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# *Recent Consumer Law Developments at the California Supreme Court: What Ever Happened to Prop. 64 and What Will Consumer Class Actions Look Like in the Future?*

In the first half of 2009, the California Supreme Court has issued two highly anticipated decisions that will have a dramatic effect on future and pending consumer class actions in California. In particular, class claims asserted on false-advertising or marketing theories are likely to be impacted. In *Meyer v. Sprint*[1] and *Tobacco II*,[2] the Court interpreted two of the primary California statutes regulating consumer claims: the Unfair Competition Laws of California Business and Professions Code sections 17200, *et seq.* ("UCL")[3] and the California Consumer Legal Remedies Act of California Civil Code section 1750, *et seq.* ("CLRA").[4] The decisions confirm that the named plaintiff in either a UCL or a CLRA class action must have actually lost money or property as a result of the practice alleged. But, in *Tobacco II*, decided on May 18, 2009, the Court held that for UCL class actions the lost money or property requirement *only* applies to the named plaintiff. In a 4-3 decision, the Court rejected the view that each class member must have standing under the UCL in order to certify a class. The Court also rejected the view that each class member must prove actual reliance on the allegedly deceptive or misleading statement that typically forms the basis of many class actions throughout the State. Instead, the lead plaintiff need only show that he or she would not have purchased the defendant's product absent its deceptive practices. This Alert summarizes these two important decisions and analyzes the practical and strategic implications in consumer class action litigation that are sure to arise.

### *Meyer v. Sprint Spectrum, L.P.*

The plaintiffs in *Meyer* were Sprint customers who alleged that certain provisions of Sprint's customer service agreement, including an arbitration clause, were unconscionable and illegal under the UCL and CLRA. The plaintiffs failed to allege that they had been damaged in any way by any of these clauses, nor were they involved in any disputes with Sprint that required arbitration. Instead, the plaintiffs argued that the mere presence of the provisions in their Sprint contracts allowed them to seek relief under the CLRA.

The trial court sustained Sprint's demurrer to the complaint, concluding that the plaintiffs failed to show that they were personally damaged by Sprint's allegedly unlawful behavior. The Court of Appeal affirmed, holding that, without any showing of damage, plaintiffs had no standing to sue under the CLRA. The plaintiffs appealed to the California Supreme Court.

The Court rejected the plaintiffs' argument that the very presence of unconscionable terms within a consumer contract constitutes a form of "damage" within the meaning of the statute. The Court concluded that plaintiffs' interpretation would run counter to the plain language of the

statute, which includes a causal link between damage and the unlawful practice. Had the legislature intended to omit this causal link, it could have written the statute to provide that "any consumer who is subject to a . . . practice declared to be unlawful . . . may bring an action" under the CLRA. The Legislature did not use such open-ended language, the Court reasoned, and by including the "any damage" requirement, it clearly intended to restrict the scope of CLRA standing.

The *Meyer* Court thus accepted Sprint's argument that a consumer must experience some type of "damage" in order to have standing under the CLRA. These damages, or costs, might include "the expenditure of [] transaction costs to avoid the consequences of a deceptive practice" or even "incur[ring] opportunity costs," but must be real and realized. *Meyer*, 45 Cal. 4th at 643. The Court did not provide any additional examples and the meaning of "opportunity" or "transaction" costs and these terms will certainly be litigated and addressed in future decisions.

Significantly, the Court did not limit its holding to damages actions. It held that the "damage" requirement for CLRA standing applies even where plaintiffs seek only injunctive relief. The plaintiffs had argued that requiring even a low damage threshold would chill the efforts of consumers to prevent deceptive and unlawful business practices through injunctive relief. The Court noted that "[t]hose concerns, while not unfounded, are overstated." *Meyer*, 45 Cal. 4th at 645.

### *In re Tobacco II Cases*, Opinion Filed May 18, 2009

With the stage set by *Meyer* in January, the California Supreme Court tackled another highly debated issue in California consumer class action litigation – the effect of California's Proposition 64 on unnamed class members. Prior to the enactment of Proposition 64 in November 2004, plaintiffs who never lost money could bring a representative action on behalf of the general public. Proposition 64, however, amended the UCL to provide: "Actions for any relief pursuant to this chapter shall be prosecuted . . . by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Section 17204, as amended by Prop. 64, § 3, approved Nov. 2, 2004, eff. Nov. 3, 2004 (emphasis added). Thus, Proposition 64, in conjunction with case law, eliminated the "representative action" where a party who has not lost a vested property right may sue on behalf of a representative class for injunctive relief. Each plaintiff must have suffered injury and lost money or property as a result of such violations. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) Prop. 64 Analysis by Legislative Analyst, p. 38); *see also Californians for Disability Rights v. Mervyn's, LLC,* 39 Cal. 4th 223, 228-29, 46 Cal. Rptr. 3d 57, 60-62 (2006). The issue remained, however, whether this "lost money or property" requirement applied to unnamed class members. In a 4-3[5] decision, the California Supreme Court ruled that it did not.

The plaintiffs in *Tobacco II* had successfully certified a UCL class action before the passage of Prop. 64 based on alleged fraudulent business practices.[6] The class was defined as: "All people who at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 to April 23, 2001, and who were exposed to Defendants' marketing and advertising activities in California." Following the passage of Prop. 64, the defendants successfully moved for decertification of the class by arguing that (1) Prop. 64 required the unnamed class members to establish actual reliance on the allegedly deceptive or misleading statements; and (2) in accordance with the common law fraud standards, plaintiffs were required to specifically identify the deceptive or misleading statements upon which they relied. The Court of Appeal affirmed, agreeing that individual issues of both exposure to the deceptive statements and reliance on the deceptive statements predominated and that class treatment was inappropriate. The Supreme Court granted review and reversed.

The Court held that Prop. 64 does not require unnamed class members to satisfy its standing requirement; i.e., only the class representatives need to establish that they have "lost money or property."

To bolster its opinion, the Court stressed the importance of consumer class actions in California and relied on select language contained in Prop. 64, as well as its view of federal class action law, in holding that only the named representative is required to have standing. The Court noted that nothing in Prop. 64 purports to alter class action procedures that generally require only the named plaintiff to be properly before the court, not the unnamed class members. Slip Op. at 20; 2009 WL 1362556, at *12. The Court further concluded that imposing such a requirement would not remedy the abuses that Prop. 64 sought to correct and would instead undermine the efficacy of the UCL. Slip Op. at 23-24; 2009 WL 1362556, at *14. This analysis was driven in part by the Court's view that "the UCL's focus [is] on the defendant's conduct, rather than the plaintiff's damages," which serves the statute's larger purpose of protecting the general public against unscrupulous business practices. As a significant part of its analysis, the Court also distinguished on its facts the holding in *Collins v. Safeway Stores*, 187 Cal. App. 3d 62 ("[e]ach class member must have standing to bring the suit in his own right") and several other similar cases cited frequently by defendants in early pleading challenges brought in consumer class actions.[7]

The Court explicitly left open the question of whether a named plaintiff who had suffered injury can effectively bring an action for injunctive relief on behalf of unnamed class members who may suffer a similar injury in the future. Slip. Op. at 22, n.13; 2009 WL 1362556, at *12, n. 13. The failure to resolve this question may encourage additional litigation on behalf of unnamed plaintiffs who have not even allegedly been subjected to an unfair or deceptive business practice.

The Court also held that, while a class representative alleging misrepresentation must establish actual reliance on the deceptive or misleading statements, the class representative is not required to "necessarily plead and prove individualized reliance on specific misrepresentations or false statements where . . . those misrepresentations and false statements were part of an extensive and long-term advertising campaign." Slip Op. at 34; 2009 WL 1362556, at *17.

After summarizing the relevant cases and statutes, the Court went on to explain what showing of injury the named representative must make in order to establish UCL standing. *See* Cal. Bus. & Prof. Code § 17204 ("a person who has suffered injury in fact and has lost money or property **as a result of** the unfair competition") (emphasis added). Concluding that in the false-advertising context the named representative must prove reliance in order to show injury, the Court found that the misrepresentations need not be the "sole, or even predominant or decisive" cause of the injury. The Court further held that reliance will be presumed if the false and misleading statements are "material." Slip Op. at 31; 2009 WL 1362556, at *16. A false or misleading statement is material "if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Id.*

In sum, as long as the advertisement was an immediate cause of Plaintiff's purchase (which will be presumed if a reasonable person would have relied on the false or misleading statement), and as long as plaintiff can demonstrate exposure "to a long-term advertising campaign[,]" the Court held that a plaintiff can prove causation even without recalling a specific advertisement. Slip Op. at 33; 2009 WL 1362556, at *17.

### How Does This Alter the State of Consumer Litigation in California?

*Tobacco II*, set against the backdrop of *Meyer*, creates an interesting dynamic in California class action law. *Meyer* rejected the idea that a CLRA plaintiff could state a claim based on mere exposure to unlawful practices; *Tobacco II* allows unnamed class representatives in UCL actions to do just that. In the rush to litigate the gap between *Meyer* and *Tobacco II*, two key issues are likely to move to the front of the pack: (1) If a class is certified, what remedies are the unnamed, unharmed plaintiffs entitled to?; and (2) How will *Tobacco II* interact with Article III standing requirements under federal law and removal under the Class Action Fairness Act (CAFA)?

### If Plaintiffs Are Not Harmed, Are They Entitled to Restitution?

The Court's discussion of what effect *Tobacco II* will have on remedies available to class plaintiffs was relegated to a footnote in the opinion. In that footnote, the Court did not provide a full analysis of what remedies are available to unnamed class members who have not suffered an injury. Generally, however, remedies under the UCL are limited to injunctive relief and restitution. Restitution is available "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code § 17203. On the one hand, the Court left intact its prior holding that section 17203 "does not allow a court to order disgorgement into a fluid recovery fund, e.g. to 'compel a defendant to surrender all money obtained through an unfair practice even though not all is to be restored to the persons from whom it was obtained . . . .'" Slip Op. at n.14; 2009 WL 1362556, at *12 (citing *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116 (2000)). On the other hand, the Court specifically pointed out that *Kraus*'s prohibition against nonrestitutionary disgorgement did not overrule *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442 (1979) under which restitution may be ordered "without individualized proof of deception, reliance and injury if necessary to prevent the use or employment of an unfair practice." Slip Op. at n. 14; 2009 WL 1362556, at *12, n.14 (citing *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442 (1979)).

Whatever harmony exists between the holdings of *Kraus* and *Fletcher* awaits further development by the courts. Restitution paid to a post-*Tobacco II* class member who lacks restitutionary standing (i.e., who did not lose money or property) would seem to constitute "nonrestitutionary disgorgement" and thus be barred by *Kraus*. The same payment, however, might also constitute "restitution without individualized proof of . . . injury . . . to prevent the use of the unfair practice" endorsed by *Fletcher*. The Court provided no clear guidance on how to fashion these remedies in practice, creating uncertainty that is likely to result in hotly contested litigation and increased appeals.

### *Tobacco II* and Article III Standing

The application of *Tobacco II* may be limited in cases where UCL claims find their way into a federal court. Article III standing is jurisdictional and cannot be altered by state law. *Fiedler v. Clark*, 714 F.2d 77, 79-80 (9th Cir. 1983) (a state statute cannot confer standing where none exists under federal law). In *Lee v. Am. Nat'l Ins. Co.*, a case decided prior to the passage of Prop. 64, the Ninth Circuit held that, despite the fact that the plaintiff had standing under the UCL, since he had not suffered any injury he did not meet the Article III standing requirement. 260 F.3d 997. *Lee* had become largely irrelevant since the passage of Prop. 64 but is likely to return to prominence in the near future.

The relevant and undecided question now will be whether the *Lee* standing requirements bar claims including unnamed class members who lack standing but are now nevertheless proper class members in the wake of *Tobacco II*. As noted in the *Tobacco II* dissent, numerous

federal courts have held that unnamed class members must have standing in their own right. *See Tobacco II* Slip Op., Baxter, J. dissenting at p. 4-5; 2009 WL 1362556, at *19; *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 206) ("no class may be certified that contains members lacking . . . [Article III] standing."); *In re Copper Antitrust Litigation*, 196 F.R.D. 348, 353 (W.D. Wis. 2000) ("[i]mplicit in Rule 23 is the requirement that the plaintiffs and the class they seek to represent have standing."). While this issue has yet to be resolved definitively in the Ninth Circuit, in light of *Tobacco II* it should be addressed soon. This open issue is likely to result in a marked increase in removals under the Class Action Fairness Act (CAFA). Under CAFA, minimally diverse class actions in which the aggregate damages exceed $5 million can be removed to federal court. The District Court receiving the CAFA removal case continues to apply the substantive law of the state in which it sits, and would therefore apply California's UCL law. However, Article III standing is jurisdictional and would, therefore, be likely to trump the standing analysis of *Tobacco II*. As a result, until the issue of whether *Lee*'s standing requirements apply to unnamed class members, many defendants may choose to utilize CAFA removal to test this issue in the District Courts of the Ninth Circuit.

**Conclusion**

*Meyer* and *Tobacco II* create a new litigation landscape in California and raise important strategic issues that will heavily influence how class actions are challenged at the pleadings stage and litigated during the class certification phase. As these issues and others emerge, Paul Hastings will continue to monitor the development of the law in this important area and keep you advised.

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[1] 45 Cal. 4th 634 (2009).

[2] -- Cal. 4th --; 2009 WL 1362556.

[3] As California's primary statutory scheme regulating unfair competition, the UCL prohibits unlawful, unfair or fraudulent business practices and provides a cause of action whereby parties who suffer losses as a result of such conduct can seek restitution or injunctive relief to prevent further unlawful, unfair or fraudulent business practices.

[4] The CLRA likewise gives rise to a cause of action for parties harmed by sharp business practices enumerated in the statute; however, unlike the UCL, it applies only to consumers. Additionally, the CLRA allows consumers to recover actual and punitive damages in addition to restitution and injunctive relief.

[5] Chief Justice George did not participate in the decision and was replaced by Justice Moore, sitting by designation pursuant to article V, section 6 of the California Constitution, who joined the 4-3 majority. It is not known how Chief Justice George's recusal might have impacted the decision. The Court's further handling of several other cases where review was granted and deferred pending *Tobacco II*, and where presumably Chief Justice George will not be recused, will be resolved shortly. For example, the Court granted review and held *Pfizer v. Superior Court* pending the decision in *Tobacco II*, in that case, the Court of Appeal held that a class including all persons who purchased Listerine in California during a certain period could not be certified because the class members could not establish actual reliance on misleading statements. *Pfizer v. Superior Court (Galfano)*, 141 Cal. App. 4th 290 (2006) (ordered de-published upon grant of review pursuant to California Rules of Court). The resolution of cases like *Pfizer* within the framework of *Tobacco II* merits close monitoring, and we will keep you informed of any significant developments.

[6] The UCL has "three prongs" in that it prohibits unfair, unlawful *or* fraudulent business practices. Plaintiffs can allege a violation of any or all of the three prohibitions. The Court in *Tobacco II* made clear that its analysis was driven primarily by the third prong (fraudulent practices). Slip. Op. at 10; 2009 WL 1362556, at *5. This raises significant questions regarding the application of *Tobacco II*. Savvy plaintiffs' lawyers are likely to rely heavily on the third prong in an effort to fall within the *Tobacco II* standard. This may provide grounds for pleading challenges if reliance on the third prong is inappropriate. Additionally, the Court's reliance on the third prong may provide a starting point from which the Court could begin to limit the application of *Tobacco II*.

[7] Another example includes language from *Clay v. American Tobacco Company*, 188 F.R.D. 483 (1999) ("the definition of a class should not be so broad as to include individuals who are without standing to maintain the action on their own behalf"), which the court noted does "not support the proposition that all class members must individually show they have the same standing as the class representative in order to be part of the class." Slip Op. at 20; 2009 WL 1362556, at *11.