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Limiting *Tobacco II*? The Ninth Circuit Holds That Plaintiffs Must Identify Specific Advertisements to Allege False Advertising Claims in Federal Court

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In light of the California Supreme Court's recent decision in *In re Tobacco II Cases*,[1] the opinion of the Ninth Circuit Court of Appeals in *Kearns v. Ford Motor Company*, __ F.3d __ (9th Cir. June 8, 2009),[2] raises important strategic questions for companies facing consumer class actions in California courts based on advertising campaigns. In *Kearns*, the Ninth Circuit reaffirmed that – at least in federal court – plaintiffs asserting false advertising claims under California's UCL[3] and CLRA[4] must specify which sales material they relied upon, the particular circumstances surrounding such representations, and identify what they were specifically told.[5]

In *Tobacco II*, by contrast, the California Supreme Court held that a plaintiff who alleges false advertising under the UCL – a claim alleged in *Kearns* – "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."[6] Coming so soon after the California Supreme Court issued its decision, the *Kearns* decision is notable for its possible recognition of the limited reach of *Tobacco II* and for the strategic considerations it raises for defendants. Should California state courts interpret *Tobacco II* broadly and extend its holdings beyond the limitations expressed by the court, the Ninth Circuit's decision in *Kearns* counsels in favor of careful consideration of removal options.

Kearns v. Ford Motor Company

William Kearns originally filed a putative class action lawsuit in California state court, alleging that Ford Motor Company and others made false and misleading statements about the safety and reliability of its Certified Pre-Owned ("CPO") vehicles. Kearns asserted that Ford's national televised marketing campaign, sales materials, and dealership personnel misled him to believe that the CPO program guaranteed a safer and more reliable vehicle, which he alleged was not true. Kearns asserted both UCL and CLRA claims. Defendants removed the action to federal court on the basis of diversity and then moved to dismiss for failure to plead fraud with particularity. The District Court agreed and, after affording Kearns the opportunity to amend (three times), dismissed Kearns's complaint.

Kearns appealed, arguing that his statutory claims were not subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), and were not grounded in fraud.[7] The Court rejected his arguments. Without citing the *Tobacco II* opinion, the Ninth Circuit noted that the Federal Rules apply in federal court irrespective of whether the substantive law at issue is state or federal.[8] The Court reiterated its prior holding in *Vess v. Ciba-*

Geigy Corp. USA[9] that Rule 9(b)'s pleading standards apply to claims that are "grounded in fraud," like Kearns's UCL and CLRA claims. The Court also rejected Kearns's arguments that his nondisclosure claims were not grounded in fraud and thus not subject to 9(b) and that his complaint should have been evaluated under the unfairness prong of the UCL. Reasoning that Kearns alleged "a unified fraudulent course of conduct," the Court held that "[h]is entire complaint must therefore be pleaded with particularity."[10]

Turning to Kearns's substantive allegations, Kearns alleged that "Ford's marketing materials and representations led him to believe that CPO vehicles were inspected by specially trained technicians and that the CPO inspections were more rigorous and therefore more safe."[11] The Ninth Circuit acknowledged that Kearns claimed that he was exposed to Ford's allegedly false representations "through (1) Ford's televised national marketing campaign; (2) sales materials found at the dealership where he bought the vehicle; and (3) sales personnel working at the dealership where he bought his vehicle."[12] Nonetheless, the Court concluded that Kearns failed "to allege in any of his complaints the particular circumstances surrounding such representations."[13] The Court noted that "[n]owhere [did] Kearns specify what the television advertisements or other sales materials specifically stated."[14] Kearns failed "to specify when he was exposed to them or which ones he found material," and failed "to specify which sales material he relied upon in making his decision to buy a CPO vehicle."[15] The Ninth Circuit, in other words, rejected Kearns's argument that he relied on the advertising campaign as a whole and held that a plaintiff asserting a false advertising claim must "articulate the who, what, when, where, and how of the alleged misconduct" and with specificity.[16]

Impact of *Kearns* on Litigation Strategy in Light of *Tobacco II*

Coming less than a month after the *Tobacco II* decision, the Ninth Circuit's decision in *Kearns* raises important questions for defendants facing false advertising class actions in California. In *Tobacco II*, the California Supreme Court held that plaintiffs in state court who allege false advertising under the UCL must prove actual reliance but "[are] not required to necessarily plead and prove individualized reliance on specific misrepresentations and false statements where [] those misrepresentations and false statements were part of an extensive and long-term advertising campaign."[17] The plaintiffs alleged that various tobacco industry defendants violated the UCL by waging a decades-long campaign of false advertising about the addictive nature of nicotine and the health effects of smoking. The court rejected the defendants' argument that, to plead actual reliance, each plaintiff must allege that he or she purchased cigarettes because of a particular, specified advertisement. Instead, the court held that "individualized reliance on specific misrepresentations or false statements" is not required where the plaintiff pleads exposure to an extensive and long-term advertising campaign.[18]

When read together, *Kearns* reflects the possible limits of the holding in *Tobacco II*, and it reflects an emerging division between California and federal courts regarding the pleading requirements for false advertising claims. In pending and future litigation in California courts, defendants will undoubtedly make a strong case that the California Supreme Court deliberately limited its holding to "extensive and long-term" "saturation" advertising campaigns akin to the nearly 40-year campaign at issue in *Tobacco II*. Defendants will emphasize that the precedents on which the *Tobacco II* court relied were also tobacco cases involving "decades-long" advertising campaigns. Plaintiffs, by contrast, will contend that, despite the court's language, the *Tobacco II* court's intent was to prevent consumers from having to plead the "particular advertisements or statements" upon which they relied. Only time will tell whether defendants have the better view, but no matter how that debate plays out in state court, *Kearns* suggests that *Tobacco II* will have limited effect in federal court – a lesson that defendants should consider in weighing their removal options.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers who handle class actions throughout the United States:

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[1] *In re Tobacco II Cases*, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559 (May 18, 2009).

[2] *Kearns v. Ford Motor Co.*, 2009 WL 1578535, __ F.3d __ (9th Cir. June 8, 2009).

[3] California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210.

[4] California's Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750-1784.

[5] 2009 WL 1578535, at *4.

[6] 93 Cal. Rptr. 3d at 583.

[7] *See Kearns*, 2009 WL 1578535, at *2.

[8] Although the *Kearns* court did not cite *Tobacco II*, it did cite and rely on *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951 (1997). *See Kearns*, 2009 WL 1578535, at *5. The California Supreme Court in *Tobacco II*, in turn, relied extensively on *Engalla*. 93 Cal. Rptr. 3d at 581. Kearns has already sought an extension of time to file a motion for reconsideration and will likely seek to make arguments under *Tobacco II*.

[9] *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-05 (9th Cir. 2003).

[10] *See Kearns*, 2009 WL 1578535, at *6.

[11] *See id.* at *4.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Tobacco II*, 93 Cal. Rptr. 3d at 582.

[18] *Id.* at 583.