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Standing Requirements in California UCL Cases Brought in Federal Court in the Wake of Tobacco II and Kwikset

BY THE COMPLEX LITIGATION AND TRIAL PRACTICE

Much has been written about the California Supreme Court's developing jurisprudence regarding the standing requirements of California's Unfair Competition Law ("UCL") Cal. Bus. & Prof. Code § 17200, *et seq.* and California's False Advertising Law ("FAL") Cal. Bus. & Prof. Code § 17500, *et seq.*, specifically in the wake of the Court's opinions in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009) and *Kwikset Corp. v. Super. Ct. (Benson)*, 51 Cal. 4th 310 (2011). While these cases purport to settle, or at least further define, the UCL's standing requirement, the parallel body of law in federal cases continues to develop in response to these California opinions.

Following *Tobacco II* and *Kwikset*, many defendants argued that notwithstanding the California Supreme Court's decisions, Article III stood as independent grounds for dismissal in federal court; and, further, that each and every putative class member must have Article III standing to proceed. The Ninth Circuit has offered varying answers on these questions. For example, the Ninth Circuit appears to have taken a soft view of the Article III requirements in *Degelmann v. Advanced Med. Optics Inc.*, 659 F.3d 835 (9th Cir. 2011) and *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011). More recently, however, in *Mazza v. American Honda Motor Company*, No. 09-55376, 2012 U.S. App. LEXIS 626 (9th Cir. Jan. 12, 2012), the Ninth Circuit ordered a class de-certified based on a lack of uniform standing amongst the class. A review of these three recent opinions suggests that the state of the law of standing, as it relates to UCL claims brought in federal court, remains in flux.

The court in *Degelmann* explained that a plaintiff who could allege facts sufficient to meet the *Kwikset* standing has alleged sufficient injury in fact to satisfy Article III. Similarly, the court in *Stearns* adopted the *Tobacco II* standard in holding that only a named plaintiff needs to have standing in order to pursue a class action under the UCL. While *Stearns* and *Degelmann* may to some degree limit the standing arguments defendants previously brought as pleading challenges, *Mazza* may do the opposite, confirming that as a matter of law all class members in a proposed class must meet Article III standing requirements. It is, therefore, important to begin laying the groundwork early. In fact, in some cases it may be beneficial to continue to assert good faith standing arguments at the pleading stage in an effort to "educate" the court with respect to these issues, as they will likely be an issue throughout the duration of the case even if the pleading challenge is defeated. Indeed, at the certification stage, Article III standing can be raised again with respect to a Rule 23 analysis, most notably in conjunction with an analysis of whether common questions predominate under Rule

23(b)(3). Provided the defendant sufficiently establishes the lack of an injury-in-fact to confer standing to sue, the courts should be more likely to dispose of class allegations and/or claims at the certification stage. Significantly, the court in *Mazza* de-certified the class because it included putative members that had not been exposed to or had not relied upon the alleged false advertising. *Mazza* thus provides new hope to practitioners making an Article III challenge in the face of the decisions in *Degelmann* and *Stearns*.[1]

UCL Standing Requirements

On November 2, 2004, the California electorate passed Proposition 64 ("Prop. 64") which enacted certain changes to the standing requirements of the UCL.[2] Prior to Prop. 64, any party could bring a representative action regardless of whether or not they had suffered an injury. The UCL, as amended by Prop. 64, now provides that a person has standing to bring a UCL claim only if that person "has suffered injury in fact and has lost money or property as a result of the unfair competition."[3] Further, the UCL provides that "[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure . . . ."[4]

Following the passage of Prop. 64, the California courts have continued to develop the law of UCL standing. In 2009, the California Supreme Court's decision in *Tobacco II* resolved the issue of whether Section 17204's standing requirement applied to putative class members. The court found that it did not, noting that "Proposition 64 was not intended to, and does not, impose section 17204's standing requirements on absent class members in a UCL class action where class requirements have otherwise been found to exist."[5] Thus, under *Tobacco II*, only the named plaintiffs must satisfy the UCL's standing requirement in state court.[6] The *Tobacco II* Court also addressed the reliance requirement of Section 17204, noting that the "as a result of" language requires a named plaintiff to show "actual reliance" to establish standing under the fraud prong of the UCL.[7] However, the court went on to note that while a plaintiff must show that the misrepresentation was an "immediate" cause of the injury-producing conduct, the plaintiff need not show that the misrepresentation was the sole or even predominant cause.[8] While *Tobacco II* addressed the reliance portion of the standing analysis, it failed to offer any insight regarding the nature of the "injury" required.

The California Supreme Court took up the injury issue in *Kwikset*, a case in which the plaintiff alleged that Kwikset falsely marketed certain locks as being "Made in the U.S.A." when, in fact, the majority of the components were manufactured abroad. The court held that "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64, and have standing to sue."[9] The court acknowledged that Proposition 64 had "materially curtailed" the universe of people who may bring a UCL suit.[10] Nonetheless, interpreting the revised statute's plain language, the court adopted a two-part test for interpreting the "lost money or property" standing requirement which set a relatively low bar. Under *Kwikset*, a party "must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, *i.e.*, economic injury, and (2) show that the economic injury was the result of, *i.e.*, caused by, the unfair business practice or false advertising that is the gravamen of the claim."[11]

Applying this test, the court held that the plaintiff had standing because he had spent money to purchase the lock and would not have purchased the lock "but for" Kwikset's misrepresentations.[12] In reaching this conclusion, the court discussed the standing requirements of Article III and offered the

opinion that the UCL's standing requirements were consistent with those of Article III, which were "not insurmountable."[13]

Article III Standing and the UCL

By way of background, courts in the Ninth Circuit have not always deferred to their state counterparts on issues of standing. Prior to Prop. 64, a plaintiff that had not suffered any injury was free to bring a UCL action in state court but could not bring such an action in federal court for lack of standing. In *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997 (9th Cir. 2001), the Ninth Circuit held that the UCL cannot confer standing upon plaintiffs who do not satisfy the Article III standing requirement. The opinion in *Lee*, decided before the passage of Prop. 64, dealt with a plaintiff who had not suffered an economic injury, and explained that the UCL cannot convey standing where none exists under Article III.[14] Thus, the Ninth Circuit was not obligated to conclude that the statutory standing standards set forth in *Kwikset* or *Tobacco II* were sufficient to meet Article III requirements.

Now, the Ninth Circuit's decisions in *Degelmann* and *Stearns* appear to reflect a departure from decisions such as *Lee*, where the court resisted adopting the standing analysis of its state counterparts.[15] The plaintiffs in *Degelmann* alleged that they had been misled by defendant's advertising for contact lens solution, which claimed that the product cleaned and disinfected contact lenses.[16] Certain users of the solution purportedly suffered from infections because their lenses had not been adequately cleaned.[17] The plaintiffs alleged that, while they suffered no physical injury, they paid more for the product than they otherwise would have, had they been aware of the danger of infection.[18] The District Court[19] invited an early motion for summary judgment on standing grounds and disposed of the action accordingly.[20] The Ninth Circuit reversed. Applying the *Kwikset* analysis, the court held that plaintiffs had standing under both the UCL and Article III if they properly alleged that, in reliance on false advertising, they paid more for a product than they otherwise would have paid.[21]

In *Stearns*, the plaintiffs alleged that they were inappropriately induced into purchasing membership in a coupon service that was deceptively advertised on Ticketmaster's website.[22] The plaintiffs sought to certify a class of all persons who purchased tickets from Ticketmaster, were enrolled in the coupon service as a result of Ticketmaster's sharing of their credit card information, were charged for that enrollment, and did not use any of the coupons.[23] The District Court[24] denied class certification on the grounds that individual issues were likely to predominate. The Ninth Circuit reversed. First, the court found that under *Tobacco II*, individualized proof of reliance and causation is not necessary to establish standing under the UCL. As a result, the court found that it was enough to show that the advertising was misleading, that there was a "likelihood of deception," and that each class member was "relieved of their money."[25] Second, the court noted that only the named plaintiff needs to show Article III standing in order to confer jurisdiction.[26]

Read together, *Degelmann* and *Stearns* appear to have subtly limited a defendant's ability to argue for a heightened standing requirement under Article III in UCL cases removed to or brought in federal court. These cases, at least in theory, frustrate the strategy many defendants had adopted in the wake of *Tobacco II* and *Kwikset*. Assuming that Article III presented a higher bar than the UCL, it seemed appropriate to remove cases under the Class Action Fairness Act ("CAFA"), which allows defendants to invoke federal jurisdiction based on minimal diversity and an aggregate claims total in excess of $5 million.[27] Defendants were then able, in some instances, to take advantage of what were perceived as more stringent standing requirements to defeat claims.[28] Defendants are now faced with a more difficult choice in determining whether federal court is preferable to state court in UCL cases.

Ultimately, the developing case law suggests that Article III continues to loom large at the class certification stage. While courts have been reluctant to take a strong position at the pleading stage, Article III informs the Rule 23 analysis and, while delayed, the appropriate result is often reached on class certification.

Webb v. Carter's Inc., 272 F.R.D. 489 (C.D. Cal. 2011), is instructive. In *Webb*, plaintiffs purchased tagless infant wear and contended that the graphics printed on the inside of the clothing contained chemicals that caused severe skin reactions in certain infants.[29] The court in *Webb* denied class certification on the grounds that the class as defined included every purchaser of the product and, therefore, included purchasers whose infants had not suffered any negative skin reaction.[30] In *Webb*, the court evaluated the Article III issue at the class certification stage. In so doing, it was able to consider additional evidence, and evaluate the issue in terms of Rule 23 concerns rather than pleading standards.

Recent Ninth Circuit authority is in accord. In *Mazza*, plaintiffs brought a nationwide class composed of all consumers who had purchased or leased vehicles with collision avoidance equipment during a three-year period.[31] Plaintiffs alleged that the advertising misrepresented the characteristics of the collision avoidance system and omitted material facts regarding its limitations.[32] The District Court certified the class. The Ninth Circuit vacated the certification order, finding that the District Court erred in determining that each member of the class was presumed to have relied on the misleading advertising.[33] The defendant argued that the class necessarily contained members that lacked Article III standing. While noting that "no class may be certified that contains members that lack Article III standing[,]"[34] the court adopted the reasoning of *Tobacco II* and held that the putative class had suffered sufficient "injury in fact." However, the court found that there was insufficient evidence to presume reliance on the part of each putative plaintiff. In so holding, the court drew a distinction between the long-term, widespread advertising campaign at issue in *Tobacco II* and the more narrow advertising conducted by Honda for the collision avoidance system.[35] The court held that "[i]n the absence of the kind of massive advertising campaign at issue in *Tobacco II*, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading."[36] The court also noted that the class must exclude members that learned of the alleged defects prior to purchasing the product.[37] *Mazza*, which represents the most recent opinion on the issue, exhibits what appears to be the preference of federal courts in dealing with UCL issues, that is, a review of standing through the lens of Rule 23.

The court in *Mazza*, like many others, declined to adopt the defendants' Article III argument, but ultimately vacated certification because common questions did not predominate as a result of lack of uniform reliance. While the reasoning was not explicitly standing-related, it was ultimately a question of standing that doomed plaintiffs' claims. That is, putative plaintiffs who could not have relied on the misleading advertising could not pursue claims. Given *Stearns*, *Degelmann*, and *Mazza*, courts will be far more likely to evaluate issues of standing in terms of commonality and the predominance of individual issues rather than as a threshold requirement to bring an action. Nevertheless, whether under the guise of Article III or Rule 23, the state of the law appears to be that all putative plaintiffs must have a viable claim for a class to proceed.

Practitioners are well advised to consider, and develop a strategy to deal with, standing issues from the inception of any case. A case should be positioned to highlight the standing issue early on, either by way of motion to dismiss or motion to strike, so that the court has an understanding of the inherent difficulties of certifying a class which contains members that have not suffered an injury. While the court may decline to grant such motions in light of recent Ninth Circuit authority, they

advance the discussion in anticipation of class certification. Once the class certification motion is briefed, the court will be in a better position to recognize the Article III standing issue and dispose of the action appropriately.

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[1] See *Mazza*, 2012 U.S. App. LEXIS 626; *Degelmann*, 659 F.3d 835; and *Stearns*, 655 F.3d 1013.

[2] *Tobacco II*, 46 Cal. 4th at 313-14; *see also Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006).

[3] Cal. Bus. & Prof. Code § 17204.

[4] Cal. Bus. & Prof. Code § 17203.

[5] *Tobacco II*, 46 Cal. 4th at 324.

[6] *Id*.

[7] *Tobacco II*, 46 Cal. 4th at 325.

[8] *Id*.

[9] *Kwikset*, 51 Cal. 4th at 317.

[10] *Id*. at 320.

[11] *Id*. at 322.

[12] *Id.*

[13] *Id.* at 324. The court went on to note that "[a] consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of section 17204 [and presumably Article III] by alleging . . . that he or she would not have bought the product but for the misrepresentation." *Id.* at 330. This language has created some confusion as many plaintiffs contend that the presence of any alleged misrepresentation on a product label is sufficient to survive a pleading challenge, and, further, should be enough to certify a class. As the dissent in *Kwikset* notes, this reliance on the subjective motivation of the plaintiff makes it difficult to imagine a case where the plaintiff would not have standing as "under the majority's holding, it is enough for a private plaintiff to simply allege, 'I would not have bought the product but for the misrepresentation,' to establish not only causation but an injury cognizable under section 17204[,]" or, for that matter, Article III. *Id.* at 341 (Chin, J., dissenting).

[14] *See also Fiedler v. Clark*, 714 F.2d 77, 79-80 (9th Cir. 1983) (holding that a state statute cannot confer standing where none exists under federal law).

[15] *See also In re Google Adwords Litig.*, No. 5:08 CV 3369 EJD, 2012 U.S. Dist. LEXIS 1216 (N.D. Cal. Jan. 5, 2012) (applying both *Tobacco II* and *Kwikset* to determine that putative class members need not show standing and that named class members have sufficient standing if they paid more for a product than they otherwise would have).

[16] *Degelmann*, 659 F.3d at 838-39.

[17] *Id.*

[18] *Id.*

[19] Judge Phyllis J. Hamilton of the Northern District of California.

[20] *Id.*

[21] *Id.* at 840. Other federal courts have also applied the *Kwikset* standard. *See Whelan v. BDR Thermea*, No. C-11-02146 CDL, 2011 U.S. Dist. LEXIS 143129 (N.D. Cal. Dec. 13, 2011).

[22] *Stearns*, 655 F.3d at 1017.

[23] *Id.* at 1018.

[24] Judge Dale Fischer of the Central District of California.

[25] *Stearns*, 655 F.3d at 1020.

[26] *Id.* As the dissent in *Tobacco II* notes, a number of federal courts have held that each and every plaintiff, putative or otherwise, must have standing in order to certify a class. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514–15 (7th Cir. 2006) (in statutory consumer-fraud action claiming defendant misrepresented ingredients in its fountain diet soda, requirements of ascertainability and typicality were not met where proposed class included persons who did not rely on misrepresentations when buying defendant's fountain soda); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (stating that, while class members need not make individual showings of standing at the certification stage, "no class may be certified that contains members lacking … standing [under U.S. Const., Art. III]"); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (stating, in action on behalf of all learning-disabled Indiana public school students who allegedly had not been identified and thus were not receiving their special-education entitlement, that under Article III's "case or controversy" requirement, it must "be reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief"; denial of class certification affirmed); *In re Copper Antitrust Litigation*, 196 F.R.D. 348, 353 (W.D.Wis. 2000) (stating that "[i]mplicit in Rule 23 is the requirement that the plaintiffs and the class they seek to represent have standing"); *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 490 (S.D.Ill. 1999) (stating, in suit against tobacco companies for wrongful youth-oriented marketing, seeking disgorgement of all profits from cigarette sales to minors, and proposing class of all United States persons who, as children, bought and smoked defendants' cigarettes, that "[t]he 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"; class certification denied); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982) (in suit claiming precancerous condition caused by in utero exposure to diethylstilbestrol (DES), proposed class could not include persons who lacked standing to sue in their own right because they were not exposed to DES and sustained no injury in fact); *see 7AA Wright et al.*, Federal Practice and Procedure § 1785.1, pp. 387–388, fn. 10 (3d ed. 2005).

[27] *See 28* U.S.C. § 1332(d).

[28] This would result in dismissal or denial of certification rather than remand, thus terminating the action. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Service Workers Int'l Union, v. Shell Oil Co.*, 602 F.3d 1087, 1092 (9th Cir. 2010) (holding that once a court invokes jurisdiction under CAFA it retains jurisdiction regardless of whether a class is ultimately certified or not).

[29] *Webb*, 272 F.R.D. at 493.

[30] *Id.* at 500.

[31] *Mazza*, 2012 U.S. App. LEXIS 626 at *1-2.

[32] *Id.*

[33] *Id.* at *2.

[34] Id. at * 29-30 (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)).

[35] *Id.*

[36] *Id.* at *34.

[37] *Id.*