

News from our Commercial Class Action Litigation Group

California Supreme Court Relaxes Standards for Class Actions Under California's Unfair Competition Law

On May 18, 2009, the California Supreme Court issued its long-awaited decision in *In re Tobacco II*. The Supreme Court's decision resolves important questions about California's Unfair Competition Law (UCL) and ultimately relaxes the standards for class actions brought under the UCL based on a defendant's alleged misleading statements or advertising.

Background

In 2004, California voters passed Proposition 64, a voter initiative designed to deter frivolous lawsuits brought under the UCL. Before Proposition 64, the UCL allowed any plaintiff to bring an action on behalf of the general public, even if the plaintiff had suffered no injury as a result of the challenged conduct. As reflected in materials supporting the ballot measure, Proposition 64 was prompted by a concern that plaintiffs' lawyers were exploiting the UCL to extort settlements from businesses in cases where no plaintiff had suffered any actual harm. Proposition 64 added a new standing requirement to the UCL, requiring plaintiffs to show that they "suffered injury in fact" by having "lost money or property as a result of the unfair competition."

Following its passage, courts had to address several issues in implementing Proposition 64, including: (i) how to apply the new standing requirement in cases involving alleged misstatements, and (ii) whether the standing requirement applies only to the named plaintiff or to all putative class members. Before *In re Tobacco II*, several courts had resolved these questions in favor

of defendants, requiring all class members to establish standing by proving actual reliance on the alleged misstatements at issue. The California Supreme Court has now rejected this line of precedent in favor of more plaintiff-friendly rules.

The Court's decision

In re Tobacco II involves a UCL claim against the tobacco industry, alleging that defendants had misled the public for decades through a false advertising campaign that hid the addictive nature of nicotine and the diseases caused by cigarettes. The trial court initially certified a class consisting of California citizens who smoked a cigarette during the class period and had been exposed to defendants' misleading advertising. After Proposition 64 was enacted, the trial court decertified the class, finding that "a showing of causation is [now] required as to each class member's injury in fact" and individual issues of reliance would therefore predominate and preclude class certification. The Court of Appeal affirmed the decision but the California Supreme Court disagreed in a 4-3 decision.

The decision holds that Proposition 64's standing requirements apply *only* to the named plaintiff and not to the other members of the class. The Court looked to the plain language of the proposition and the relevant ballot materials and concluded that Proposition 64 was intended to address only a specific type of abusive litigation and was not intended to change the UCL's basic purpose of deterring unfair business practices. The Court thus held that

Proposition 64 did not alter then-existing rules for establishing claims by absent class members, which did not require proof of individualized reliance.

With respect to named plaintiffs, the majority went on to confirm that standing in a fraud-based UCL claim must be shown by proving actual reliance. Named plaintiffs must now demonstrate that the alleged misstatements were an "immediate cause" of their alleged harm. The Court tempered this requirement by noting that the named plaintiff need not show the misstatements were the "sole" or "decisive" cause of harm. Moreover, in the case of a long-term advertising campaign, a plaintiff does not have to prove with an "unrealistic degree of specificity that plaintiff relied on particular advertisements or statements."

Three justices dissented. The dissent stressed that Proposition 64 required UCL

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class actions to proceed under established class action rules, which generally dictate that class members must have individual standing to bring a claim on their own. In the dissenters' view, these established standards require all class members to prove actual reliance on a defendants' alleged misstatements. The dissent further warns that the majority's holding will potentially allow the UCL to be abused in ways that Proposition 64 was intended to prevent.

The decision's impact

As noted above, before *In re Tobacco II*, several courts had interpreted Proposition 64 to require all class members to prove reliance. This rule in effect precluded class certification where reliance could not be shown through class-wide proof and would have to be established separately for each individual class member. A recent example is the *Mazur v. eBay* case (Cooley Godward Kronish was counsel for eBay), in which Judge Patel of the Northern District of California denied class certification in a consumer class action brought under the UCL, ruling that “[c]ommon questions of law or fact fail to predominate over individual questions in this action...[because] any liability based on alleged misrepresentations hinges on individual determinations of reliance.” No. C 07-03967 MHP (N.D. Cal. May 5, 2009) (order denying motion for class certification).

The *In re Tobacco II* decision now appears to foreclose such arguments. Defendants will likely no longer be able to challenge class certification by relying on individualized

issues of reliance applicable to class members at large. As noted in the dissent, *In re Tobacco II* now opens the door for plaintiffs' counsel to assert claims on behalf of a broad class of consumers who were never affected at all by an alleged misstatement, so long as there is a single named plaintiff who can assert reliance.

It remains to be seen what defenses to class certification are still available in the wake of *In re Tobacco II*. For example, courts will have to resolve whether defendants can still challenge certification on the basis that individual proof is needed to show if class members were exposed at all to the alleged misstatements. Courts will also have to grapple with how to apply *In re Tobacco II* to claims based on the “unlawful” and “unfair” conduct prongs of the UCL (if at all).

For companies doing businesses in California, *In re Tobacco II* underscores the need to evaluate steps to mitigate the risks of class action claims. These potential measures include implementing arbitration clauses and class-action waivers designed to deter frivolous class action claims. The current state of the law regarding such provisions was discussed in a prior *Cooley Alert*: www.cooley.com/news/alerts.aspx?ID=000041590820.

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