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Weil Briefing: Antitrust/Competition

May 21, 2009

California Supreme Court Rules that Class Actions Under the Unfair Competition Law Can Go Forward Without a Showing of Class-Wide Injury

Introduction

On May 18, 2009, the Supreme Court of California issued its long-awaited decision in *In re Tobacco II*.[1] In a landmark 4-3 decision, with a vigorous dissent, the court ruled that in class actions brought under the state Unfair Competition Law, California Business and Professions Code Section 17200 *et seq*. ("UCL"), California standing requirements require that only the named class plaintiff(s) need to allege and prove injury in fact resulting from the alleged wrongdoing, and injury then may be presumed for all identifiable absent class members. The California Supreme Court also held that a private plaintiff asserting a deception claim under the UCL must plead and prove actual reliance on the allegedly deceptive conduct, but it imposed several limitations on the scope of this requirement.

Background

Proposition 64, a ballot initiative enacted on November 2, 2004, amended the UCL and the California False Advertising Law ("FAL") to impose a requirement that in order for a private plaintiff to assert a claim for the violation of either statute, that person must have suffered injury to her business or property "as a result of" the challenged conduct. In addition, Proposition 64 authorized representative claims for relief on behalf of others only if the claimant complied with California class action requirements.[2] Prior to the passage of Proposition 64, actions under the UCL and/or FAL could be brought by, *inter alia*, "any person acting for the interests of itself, its members or the general public." Courts interpreted this provision to authorize private actions on a representative basis brought by plaintiffs who were unaffected by the challenged conduct, and allowed such actions to proceed without satisfying California's class action procedures.[3]

The Impact of the *In re Tobacco II* Decision

In re Tobacco II addressed two questions regarding the impact of Proposition 64 on the standing requirements of the UCL: first, whether, in a UCL class action, the standing requirements imposed by Proposition 64 apply only to the class representative or to all unnamed class members; and second, what level of causation is required under the language adopted by Proposition 64 providing that UCL claims may be brought by a "person who has suffered injury in fact and has lost money or property *as a result of* [such] unfair competition."[4]

In short, the court held that only the named class representative, and not absent class members, must establish "injury in fact" to satisfy the standing requirement established by Proposition 64. If the named class representative satisfies the standing requirement of Proposition 64, and the

class is ascertainable, injury to all class members can be presumed. With respect to causation, a plaintiff asserting a claim under the fraud prong of the UCL must demonstrate actual reliance on the allegedly deceptive or misleading statements. But, this standard does not require the plaintiff to demonstrate that the alleged conduct is the *only* cause of the injury-producing conduct; an inference of reliance can be shown whenever there is a showing that a misrepresentation is material; and a showing of actual reliance in the context of a long-term advertising campaign need not include individualized reliance on a specific misrepresentation.

Facts of the Case

The case concerns allegations that the tobacco industry, *inter alia*, violated the UCL by conducting a decades-long campaign of deceptive advertising and misleading statements allegedly concealing the addictive nature of nicotine, manipulating the availability of nicotine in cigarette products to sustain addiction to their products and misrepresenting the relationship between tobacco use and disease. The trial court certified the case as a class action before the California voters passed Proposition 64 in November of 2004, and the class was defined as, "those people who are residents of California and who, while residents of California, smoked one or more cigarettes during the applicable class period [June 10, 1993 to April 23, 2001]."[5] After Proposition 64 was enacted, the trial court granted defendants' motion to decertify the class on the grounds that Proposition 64 required that each class member was now required to show exposure to the alleged false statements and injury in fact, consisting of lost money or property, as a result of the alleged unfair competition. Because individual issues of exposure and injury predominated, class treatment was rendered inappropriate. The Court of Appeal affirmed.

The Supreme Court's Analysis

Standing

The California Supreme Court declared that there was nothing in the express language of Proposition 64 to support the trial court's conclusion that all unnamed class members in a UCL must satisfy the injury in fact requirement. The court explained that while Proposition 64 requires actions for relief under the UCL to be brought by a person suffering "injury in fact and [who] has lost money or property as a result of the unfair competition,"[6] the section of the UCL which authorizes representative actions is written in the "singular" to provide that a "person" and the "claimant" who pursues a UCL claim must meet the standing requirements.[7] Thus, the court concluded that "only this individual – the representative plaintiff – is required to meet the standing requirements," and not unnamed class members.[8]

The court also found support in the language of section 17203 with respect to those entitled to restitution,[9] noting that the remedy was available "to any person in interest any money or property, real or personal, which may have been acquired" by means of the unfair practice.[10] The court noted that this language established a right to the restitution remedy that was "patently less stringent than the standing requirement for the class representative" *i.e.*, that such person suffer injury in fact and lose money or property as a result of the unfair competition.[11] Looking to past (pre-Proposition 64) precedent, the court explained that this language had led courts repeatedly and consistently to hold that relief under the UCL is available without proof of

deception, reliance and injury.[12] The court expressed concern that requiring absent class members to show, on an individualized basis, that they have lost money or property acquired by means of an unfair practice conflicted with the language in section 17203 authorizing relief to those whose loss of money or property "may have been acquired" by a deceptive practice, and implicitly overruled precedent established by pre-Proposition 64 cases such as *Fletcher*, *Bank of the West*, and *Committee on Children's Television*.[13] The lack of any revision to the language of section 17203 to limit the protection of the UCL only to class members who satisfied the standing requirements of Proposition 64 gave further support to the court's rejection of the motion. The court noted that to impose the standing requirement added by Proposition 64 on all class members "would effectively eliminate the class action lawsuit as a vehicle for vindication of ... rights [under the UCL]."[14]

Thus, the court concluded that Proposition 64 was not intended to, and does not, impose standing requirements on absent class members in a UCL class action when the named plaintiff(s) have otherwise established standing.

Causation

In addressing the issue of the level of causation needed to establish standing under the UCL, the California Supreme Court specifically analyzed the meaning of the phrase "as a result of" contained in the Proposition 64 amended language of section 17204: "[a] person who has suffered injury in fact and has lost money or property *as a result of* [such] unfair competition." The court noted that the pertinent phrase is not defined by Proposition 64 or other provisions of the statute, and that, "[m]oreover, examination of the ballot materials does not shed any light on whether it was the intent of the electorate in enacting Proposition 64 to impose actual reliance where a UCL claim is based on fraud."[15]

The court then explained that while California courts had repeatedly held relief under the UCL is available without individualized proof of deception, reliance, and injury,[16] the case law also makes clear that "reliance is the causal mechanism of fraud."[17] Because the purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, the court found that the phrase "as a result of" must be interpreted in light of an intention to limit such actions. On these grounds, the court concluded that the "as a result of" language imposes an actual reliance requirement on private plaintiffs bringing a claim under the UCL's fraud prong.[18] The court then explained that this determination was "the beginning, not the end, of the analysis," and proceeded to impose several limitations on this requirement.

> "[W]hile a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct. Furthermore, where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements. Finally, an allegation of reliance is not defeated merely because there was alternative information available to the consumer-plaintiff, even regarding an issue as prominent as whether cigarette smoking causes concern. Accordingly, we conclude that a plaintiff must plead and prove actual reliance to satisfy the standing

> requirement of section 17204 but, consistent with the principles set forth above, is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements where, as here, those misrepresentations and false statements were part of an extensive and long-term advertising campaign."[19]

It is unclear whether the pleading standard established by the court for actual reliance required in *Tobacco II* was limited to the nature of the advertising campaign before the court, *i.e.*, a long-term advertising campaign. And, if so, little guidance was provided by the court to assist litigants in inapposite circumstances.

The Dissent

The dissent disagreed with the majority's conclusion that unnamed class members need *not* meet the injury in fact and causation requirements of Proposition 64, and explained that the holding of the majority invites the very kinds of mischief Proposition 64 was intended to curtail. The dissent pointed out that well-established class actions rules mandate that the putative class the named plaintiffs seek to represent may include only persons who could themselves bring similar UCL claims on their own behalf, and thus such putative class members could only themselves bring a claim if they met the Proposition 64 standing requirements.

Conclusion

This 4-3 California Supreme Court decision reduces the effect of Proposition 64. Requiring that only the class representative must plead and prove injury in fact may significantly undermine procedural defenses to class certification motions. In addition, defining "actual reliance" according to the analysis and findings set forth in prior (pre-Proposition 64) California appellate decisions, indicates that the vitality of those cases may continue – to the extent not otherwise distinguishable – to control the interpretation of UCL deception claims in California.

The decision can be viewed at www.courtinfo.ca.gov/opinions/documents/S147345.PDF.

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ENDNOTES

[1] ___ Cal. Rptr. 3d ___; 2009 WL 1362556 (May 18, 2009).
[2] Cal. C.C.P. § 382.
[3] *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* 17 Cal.4th 553, 561 (1998).
[4] Cal. Bus. & Prof. Code § 17204 (emphasis added).
[5] 2009 WL 1362556 at *3. The defendants were: American Tobacco Company, Philip Morris USA Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, British American Tobacco Co., Ltd., Liggett & Myers, Inc., Hill & Knowlton, Inc., the Council For Tobacco Research – U.S.A., Inc., the Tobacco Institute, Inc., United States Tobacco Company and Lorillard Tobacco Company.
[6] Cal. Bus. & Prof. Code § 17204.
[7] 2009 WL 1362556 at *8.
[8] *Id*.
[9] The statute provides for equitable relief – including restitution – but not monetary damages. *See* Cal. Bus. & Prof. Code § 17203.
[10] 2009 WL 1362556 at *11-12.
[11] *Id.* at *12.
[12] *Id.* (*citing, e.g. Bank of the West v. Superior Ct.* (2 Cal.4th 1254, 1267) (1992)).
[13] *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal.3d 442, 452 (1979); *Bank of the West v. Superior Court*, 2 Cal.4th at 1267; *Committee On Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983).
[14] 2009 WL 1367556 at *12.
[15] *Id.* at *15.
[16] *Id.* at *16 (citing *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1288 (Cal. Ct. App. 2002)).
[17] *Id.* at *16.
[18] *Id.*
[19] *Id.* at *17 (citations omitted). The court also explained that "a presumption, or at least an inference" of reliance arises whenever there is a showing that a misrepresentation was material. *Id.* at *16. According to the court, a misrepresentation 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.* (internal quotations omitted).