CADS report

class action and derivative suit committee newsletter

SECTION OF LITIGATION | AMERICAN BAR ASSOCIATION

WINTER 2010 VOL. 20 NO. 2

In re Tobacco II Reins in Unfair Competition Class Actions in California

By Philip A. Leider

As the smoke clears from the battle over the meaning of California's Proposition 64, which imposed new standing requirements for claimants under the state's Unfair Competition Law (UCL), Business & Professions Code Section 17200 et seq., the defense bar appears to have prevailed in several key respects. So-called representative actions under the UCL are now a thing of the past. Before Proposition 64, "representative" plaintiffs could bring UCL claims without the need to show that they had been subjected to the alleged practice or harmed as a result of it. Moreover, they could bring such actions on behalf of the general public without having to make any of the showings required for certification of class actions. No longer.

This summer the California Supreme Court confirmed that Proposition 64 all but extinguished "representative" actions under the UCL. In *In re Tobacco II*,[1] the court held that the named representatives in UCL false-advertising actions must show that they actually relied on the accused advertising and suffered injury in fact to have standing to pursue a UCL claim on their own behalf or on behalf of others. For subsequent cases, the court held that all "representative" actions under the UCL must now satisfy class-action requirements and further clarified that UCL claims cannot be assigned to a representative plaintiff that lacks standing in its own right.[2]

Despite these considerable victories for defendants, other aspects of the court's recent Proposition 64 decisions are sure to spark further litigation. For example, *Tobacco II* held that Proposition 64 requires

continued on page 14

Unfair Competition Protections Are Alive and Well in California

By Cynthia L. Rice

For decades, California consumers benefited from the effects of a true private attorney-general statute that allowed any person to invoke the equitable powers of the court to stop fraudulent, unfair, or unlawful business practices. Cal. Bus. & Prof. Code § 17200, et seq., the state's Unfair Competition Law (UCL) Section 17204 extended the reach of underfunded state, local, and federal agencies by allowing Joe and Jane Consumer to hold businesses accountable for violations of civil and criminal laws that simply could not be effectively enforced by public agencies. While much has been made of the relatively limited examples of abuse and manipulation of this statutory scheme,[1] the truth is that the UCL provided a mechanism to stop businesses from engaging in practices that were just wrong.

Successful consumer litigation challenging tobacco ad campaigns targeting children,[2] enforcing worker-protection laws,[3] restoring money deducted from

continued on page 17

Inside This Issue

CADS report

CADS Report (ISSN 1937-3465) is published quarterly by the Class Action & Derivative Suits Committee, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60654-7598. The views contained within do not necessarily reflect the views of the American Bar Association, the Section of Litigation, or the Committee. Issue: Volume 20, No. 2, Winter 2010.

Address corrections should be sent to the American Bar Association, c/o ABA Service Center, 321 N. Clark Street, Chicago, IL 60654-7598.

www.abanet.org/litigation/committees/classactions

ABA Section of Litigation
AMERICAN BAR ASSOCIATION

Message from the Chairs


Lynda J. Grant


Greg Cook

This is the second of our two-part special issue covering state-law class actions. All of the articles are informative and thought-provoking—worthy of your research file. In part one, the *CADS Report* included three useful articles on the melding of merits and class discovery (and the use of experts at the certification stage); the long-running fight over the enforceability of class-action waivers; and equitable tolling and the resurrection of seemingly time-barred "zombie" claims.

In part two we include five more articles focused on state-law class actions. First, Philip Leider explores the meaning of California Proposition 64, which imposed new standing requirements on the well-known "representative" actions under California Business & Professional Code section 17200 et seq., California's Unfair Competition Law (UCL). Mr. Leider concludes that the recent California Supreme Court decision on Proposition 64—*In re Tobacco II*—leaves much unsettled and is sure to spark further heated litigation. As he explains, the court appeared to require the named plaintiff to show actual reliance in 17200 claims, and require that "representative" actions must meet class action requirements—but also appeared to allow class members to recover without actual reliance, and applied the reliance requirement loosely.

Second, Cynthia Rice provides a plaintiff's lawyer's perspective on the current state of UCL litigation in light of Proposition 64 and the California Supreme Court's decisions in *In re Tobacco II, Arias,* and *Amalgamated Transit Union.* Ms. Rice concludes that, while UCL representative actions will now have to satisfy class-action requirements, and individuals bringing 17200 claims must now demonstrate injury, the UCL is alive and well, and whether Proposition 64 will actually serve to decrease the number of UCL actions filed remains to be seen.

Third, in a piece excerpted from the course materials for the 13th Annual National Institute on Class Actions, sponsored by the ABA Section of Litigation and the Center for Continuing Legal Education, Jocelyn Larkin describes 10 key differences between California and federal class action law. Practitioners unfamiliar with California class-action law, or those California practitioners who would like a quick review, will undoubtedly find this list useful.

Fourth, Kevin Synder and Jeffrey Miller explore the pleading standards in federal court for the major California consumer-protection claims (17200, as well as the False Advertising Law and the Consumer Legal Remedies Act). They trace the precedent and then discuss the implications of the Ninth Circuit's recent decision in *Kearns*. They opine that, after *Kearns*, a plaintiff must meet the Rule 9(b) pleading standard for any such claims where the claim alleges a unified fraudulent course of conduct or sounds in fraud. The authors then compare the exacting requirement from *Kearns* with considerably softer language on pleading requirements announced by the California Supreme Court in *In re Tobacco II* for 17200 claims, and discuss the possible strategic implications of these differences. Finally, they compare the pleading standards set by *Kearns* with the pleading standards set by other circuits with respect to similar consumer-protection statutes.

Fifth, we include an article on new developments in New Jersey class-action law. In this piece, Michael McDonald and Anthony Gruppuso analyze the effect of recent decisions by the New Jersey Supreme Court, the Third Circuit, and the U.S. District Court for the District of New Jersey on class-certification requirements. In particular, the authors discuss issues involved in certifying a nationwide class of plaintiffs asserting tort claims in light of the New Jersey Supreme Court's recent decision on choice of law in *Camp Jaycee*, and the Third Circuit's decision in *Hydrogen Peroxide*.

Last, there is a fantastic article in our Class Action 101 column by Kathryn Honecker on ascertainability in class actions—a topic often neglected in the literature. We recommend this article to even the seasoned class-action litigator.

Beyond this newsletter, your committee has been hard at work on many fronts. We sponsored the 13th Annual Class Action Institute, held in San Francisco and in Washington, D.C. As commentators have frequently acknowledged, it is the gold standard for CLE on class-action law. We have many talented and dedicated ABA staff and members to thank for this wonderful program—people who have spent months preparing for this year's institute. However, first and foremost, we want to thank John Isbister. John has worked tirelessly for 13 years on the institute and has been its director for each year. John and his group put on perhaps the very best institute ever this year—including Professor Coffee with his annual class-action summary, an insightful program on class-action waivers and arbitration clauses, and detailed programs on settling class actions and recent changes in class-certification standards.

We look forward to seeing our fellow committee members at the ABA Section of Litigation Annual Conference in New York City, April 21–23. Our committee is sponsoring three programs—including one on international class actions, one on experts and class certification, and one on the impact of *Twombly*. For more information on our committee, please visit our website at www.abanet.org/litigation/committees/classactions.

CADS Cochairs
Greg Cook and Lynda Grant

Litigating on the Fault Line: Class-Action Law in California

By Jocelyn D. Larkin

Jocelyn D. Larkin

As with so many other issues, California is on the cutting edge of the class-action boom. Class-action filings in the Golden State have significantly increased in the past decade, particularly in the areas of employment and business torts. In recent years, the California Supreme Court has issued a number of important rulings that have altered the state's class-action landscape. This court, like its predecessors, has shown no hesitation in developing its own class-action jurisprudence, incorporating principles of federal class-action law in some cases and departing markedly from federal practice in other respects.[1]

The Not-So-Simple Basics of California Class-Action Law

The primary statutory authority for class actions is California Code of Civil Procedure § 382. It provides that:

> when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

While that's not quite the entire text of section 382, it is all that actually matters. And, no, the words "class action" do not appear anywhere in the statute.[2]

Practitioners accustomed to the detailed procedural structure of Federal Rule of Civil Procedure 23 may understandably be searching for a bit of scaffolding. Fortunately, some elements of that procedural blueprint are found in California Rules of Court, Rules 3.760–3.771, which govern motion practice, class notice, the settlement-approval process, and discovery against class members, among other topics. Notably, these rules do *not* address one critical piece—the prerequisites for class certification.

Jocelyn D. Larkin (jlarkin@impactfund.org) is the director of Litigation and Training with the Impact Fund in Berkeley, California.

Practitioners need to be aware that there are several areas where California law differs from federal law, in some instances based upon a deliberate choice by California courts to reject the federal approach.

In California, class-certification requirements are found in the case law.[3] The plaintiff must establish the existence of "an ascertainable class" and a "well-defined community of interest among class members." The "community of interest" criteria comprise three factors, mirroring some Rule 23 requirements: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

California law has not expressly adopted the federal-law requirement that a class action satisfy one of three types of class actions defined in Fed. R. Civ. P. 23(b). However, plaintiffs are required to show that class treatment would "provide substantial benefits" to both the courts and the litigants, a showing that California courts have recognized is akin to the 'superiority' prong of Rule 23(b)(3).[4] In addition, trial courts are permitted to look to federal class-action law in the absence of relevant state law precedent; Rule 23(b) has often been used as that guide.[5]

Not done yet. Consumer class actions in California are governed by their own statute, the Consumer Legal Remedies Act (CLRA), California Civil Code § 1781. The CLRA includes specific certification requirements (similar but not identical to Fed. R. Civ. P. 23(a)) as well as detailed provisions about the method and content of class notice. Like federal class-action law, Civil Code section 1781 serves as guidance to trial courts in addressing open class-action questions.[6]

10 Key Differences Between California and Federal Law

California class-action law, despite its idiosyncratic statutory framework, has many similarities with its federal counterpart. Before exhaling, however, practitioners need to be aware that there are several areas where California law differs from federal law, in some instances based upon a deliberate choice by California courts to reject the federal approach. While an exhaustive analysis of these differences is beyond the scope of this article, I highlight some of the most significant. These differences suggest that California is a somewhat more hospitable forum for class actions than federal court.

1. Public policy favoring class actions. California has "a public policy which encourages the use of the class action device."[7] To effectuate that public policy, trial courts have "an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class" and are urged to be "procedurally innovative."[8] Federal law carries no similar imprimatur for the class action.

2. No dispositive motions prior to class certification. California courts have long held that trial courts should not consider dispositive motions prior to certification, absent a compelling justification for doing so.[9] Pre-certification merit determinations present the risk of one-way intervention (e.g., class members taking

Published in CADS Report, Volume 20, Number 2, Winter 2010.

advantage of a favorable ruling but avoiding an adverse judgment).[10] In contrast, federal courts are far more tolerant of dispositive motions pre-certification.[11]

3. No merits review as part of certification. California courts "view the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious."[12] While the federal courts long held a similar view, several circuits have recently endorsed a review of merit issues where necessary to determine Rule 23 compliance.[13]

4. Opt-in procedure prohibited. Several federal statutes, such as the Fair Labor Standards Act (FLSA), mandate that class members join a lawsuit by affirmatively "opting in"; such cases are known as collective actions. In *Hypertouch v. Superior Court*,[14] the California Court of Appeal held that an "opt-in" procedure is not authorized by—and is impermissible under—California law. "The overwhelming weight of authority teaches that the 'opt-in' approach does not enhance but undermines the salutary effect of proper class actions."[15] Recently, a California Court of Appeal dismissed an FLSA action filed in state court because its opt-in procedure is incompatible with California law, citing *Hypertouch*.[16]

5. Interlocutory appeals from class certification orders. Under Fed. R. Civ. P. 23(f), either party may seek an interlocutory appeal of a class certification order but the decision to hear the appeal is at the *discretion* of the appellate court.[17] In contrast, California allows an immediate appeal of an order *denying* class certification under the "death-knell" doctrine.

> [An order denying class certification] is appealable if it effectively terminates the entire action as to the class, in legal effect being tantamount to a dismissal of the action as to all members of the class other than plaintiff. . . . The appeal is allowed, as a matter of state law policy, because the order has the 'death knell' effect of making further proceedings in the action impractical. . . .[18]

The right of appeal applies only to orders denying certification in its entirety, and the appeal must be taken immediately, or lost.[19] On the other hand, an order *granting* class certification may only be challenged after judgment or on an interlocutory basis by means of a writ of mandate, a highly discretionary appeal sparingly granted by the courts of appeal.[20]

6. Depositions of unnamed class members. Under California law, a defendant may subpoena the deposition of an unnamed class member without a court order.[21] In contrast, federal courts require the defendant to justify discovery against unnamed class members and impose a particularly heavy burden for depositions.[22]

7. Injunctive relief prior to certification. California Code of Civil Procedure § 527(b) permits a trial court to issue a temporary restraining order or a preliminary injunction in a class action before the class has been certified. The Ninth Circuit does not permit broad injunctive relief prior to certification.[23]

8. Tolling of individual claims. This is one area where federal law is somewhat more protective of the rights of class members. Federal law holds that the filing of a class action tolls statutes of limitation for all members of the purported class until certification is denied or the case is resolved.[24] Under California law, tolling is not guaranteed. In *Jolly v. Eli Lilly & Co.*,[25] the California Supreme Court read *American Pipe* narrowly, holding that tolling depends on the quality of notice to the defendants and whether it furthers the economy and efficiency of the litigation.[26]

9. Costs of class notice. Under federal law, the plaintiff pays for class notice.[27] Under California law, the court may direct either party to pay for the costs of notice.[28] While a plaintiff ordinarily bears the cost and burden of providing notice, the court may shift the costs if the defendant's conduct has complicated the identification and notice process.[29]

10. Availability of attorney fees. While not strictly an issue of class-action law, the issue of attorney fees often has significant ramifications in class-action cases. In at least two respects, the California Supreme Court has explicitly rejected federal precedent in favor of a more plaintiff-friendly interpretation of attorney-fees law. In *Graham v. Daimler/Chrysler Corp.*,[30] the California high court reaffirmed that a party may be entitled to attorney fees where the lawsuit has been a "catalyst motivating the defendants to provide the . . . relief sought," even if the prevailing party has not yet obtained any affirmative relief in the litigation. The court expressly rejected the U.S. Supreme Court's holding in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[31] which precluded attorney fees for parties who have not, through the litigation, obtained a material change in the legal relationship with the defendant.[32] The availability of fees based upon a 'catalyst' theory is particularly important in injunctive-relief class actions, such as environmental or government-reform cases. California has also taken a different approach to the calculation of statutory attorney fees based upon the lodestar method, permitting enhancements for risk, while the federal law prohibits the use of risk multipliers.[33]

Endnotes

1. This piece is excerpted from an article written by Jocelyn D. Larkin, Mark Chavez, and Fred W. Alvarez that is published in the course materials for the 13th Annual National Institute on Class Actions sponsored by the American Bar Association Section of Litigation and the Center for Continuing Legal Education. A complete copy of the article can be found in the course materials, which can be purchased on the ABA's website, www.abanet.org.
2. For the intrepid, see Justice Werdegar's concurring opinion in Arias v. Superior Court, 46 Cal. 4th 969, 988 (2009), in which she explains that C.C.P. § 382 pre-dates modern class actions and "codifies not class action procedure but the common law doctrine of virtual representation."
3. Sav-On Drug Stores v. Superior Ct., 34 Cal. 4th 319, 326 (2004).
4. Bell v. Farmers Ins. Exch., 15 Cal. App. 4th 715, 741 (2004).
5. *See, e.g.*, Capitol People First v. Dept. of Developmental Servs., 155 Cal. App. 4th 676, 692 n.12 (2007); Bell v. Am. Title Ins. Co., 226 Cal. App. 3d 1589, 1603 (1991).
6. Reyes v. Bd. of Supervisors, 196 Cal. App. 3d 1263, 1271 (1987).
7. *Sav-On Drug Stores*, 34 Cal. 4th at 340.
8. *Id.* at 339.
9. Fireside Bank v. Superior Ct., 40 Cal. 4th 1069, 1083 (2007); Home Sav. & Loan Assn. v. Superior Ct., 42 Cal. App. 3d 1006, 1010 (1974).
10. *Fireside Bank*, 40 Cal. 4th at 1078. *See also* Tarkington v. Cal. Unemployment Ins. Appeals Bd., 172 Cal. App. 4th 1494 (2009) (suitability of class allegations in wage and hour litigation not properly reviewed at the demurrer stage).
11. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.11 (West 2009) (initial case management order should include schedule for threshold dispositive motions if the judge chooses to hear them).
12. Linder v. Thrifty Oil Co., 23 Cal. 4th 429 (2000).
13. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3rd Cir. 2008); *In re* IPO Sec. Litig., 471 F.3d 24, 41–42 (2d Cir. 2006).
14. 128 Cal. App. 4th 1527 (2005).

continued on page 12

Kearns v. Ford Motor Company: The Ninth Circuit's Expansion of Rule 9(b) to Claims That "Sound in Fraud"

By J. Kevin Snyder Esq. & Jeffrey R. Miller Esq.

J. Kevin Snyder Esq.

Jeffrey R. Miller Esq.

Any litigator knowledgeable in even the most basic rules of federal procedure knows that claims of "fraud or mistake" must meet the heightened pleading standard of Rule 9(b). Despite the simplicity of this rule, some courts have grappled with its application to claims that do not require proof of the elements of common-law fraud, but nonetheless may be grounded in fraudulent activity. This issue has been particularly apparent in federal court cases where plaintiffs assert California consumer-protection claims under the Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, et seq., the False Advertising Law, Cal. Bus. & Prof. Code § 17500, and the Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1770, et seq. A consumer asserting claims under these statutes to remedy alleged consumer fraud or false advertising, either individually or on behalf of a putative class, traditionally has been able to pursue claims without even alleging that he or she saw, heard, or actually relied on the alleged fraud or false advertising.

As a result of recent decisions by the Ninth Circuit, however, plaintiffs asserting UCL or CLRA claims in federal court, by choice or removal, face additional pleading burdens than those they would face while asserting the same claims in California state court. Building upon its 2003 decision in *Vess v. Ciba-Geigy Corp. USA*, on June 8, 2009, the Ninth Circuit issued its opinion in *Kearns v. Ford Motor Company* and purported to resolve any doubt in the circuit as to the applicability of Rule 9(b) to UCL and CLRA claims that are premised upon allegations of a "unified course of fraudulent conduct" or that "sound in fraud."[1] After *Kearns*, it is likely that UCL and CLRA plaintiffs may face different pleading obligations depending on whether they prosecute their claims in federal or state court. Class-action plaintiffs in particular will be affected because, given federal procedural rules under the Class Action Fairness Act (CAFA), most putative class actions must be prosecuted in federal court.

J. Kevin Snyder Esq. and Jeffrey R. Miller Esq. are attorneys for the national law firm of Dykema Gossett, PLLC.

Vess v. Ciba-Geigy Corp. USA

The Ninth Circuit's recent decision in *Kearns* built upon its earlier decision in *Vess*.[2] Vess brought a putative class action against Novartis Pharmaceuticals, the American Psychiatric Association (APA), and the nonprofit advocacy group Children and Adults with Attention Deficit/Hyperactivity Disorder. Vess asserted claims under the CLRA, UCL, and Cal. Bus. & Prof Code § 17500, alleging that the defendants acted illegally to increase the market for the prescription drug Ritalin, which Vess was prescribed as a child. Vess alleged that the defendants failed to disclose information regarding the side effects of Ritalin and the drug's limited effectiveness, and that the defendants made fraudulent and false representations regarding the diagnostic criteria in connection with the drug's testing. All three defendants moved to dismiss Vess's complaint pursuant to Rule 9(b). The district court granted those motions and dismissed the complaint with prejudice. The Ninth Circuit affirmed.

On appeal, the Ninth Circuit considered the previously unresolved application of Rule 9(b) to UCL and CLRA claims. Vess made two arguments against the application of Rule 9(b). First, he argued that, under *Erie*, Rule 9(b) did not apply to state-law causes of action. The court quickly disposed of this argument, holding that "[w]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule."

Next, Vess argued that Rule 9(b) did not apply to his state-law claims because those claims did not require a showing of fraud. While the Ninth Circuit agreed that fraud was not an essential element of the claims, it disagreed that "averments of fraud therefore escape the requirements of the rule." The court noted that, "[i]n cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct." The court continued to hold that, where the plaintiff alleges "a unified course of fraudulent conduct" that provides the factual basis for the claim, the claim is "grounded in fraud" or "sounds in fraud" and the claim as a whole must satisfy the particularity requirement of Rule 9(b).[3]

Under *Vess*, where claims are not premised upon a unified course of conduct and instead rely on allegations of both fraudulent and non-fraudulent activity, only the allegations of fraud are subject to Rule 9(b). Allegations of non-fraudulent conduct need only meet the less stringent pleading requirements of Rule 8(a). Where both

Published in CADS Report, Volume 20, Number 2, Winter 2010.

fraudulent and non-fraudulent conduct is alleged, district courts should "disregard" or "strip" averments of fraud that are insufficiently pled under Rule 9(b) and examine the remaining allegations to determine whether they collectively state a claim sufficient to withstand a motion to dismiss.[4]

Kearns v. Ford Motor Company

The district courts in the Ninth Circuit struggled to apply the Ninth Circuit's decision in *Vess* with any consistency. For example, in *In re Mattel, Inc.*, the Central District of California rejected the application of Rule 9(b) to claims brought under the UCL and CLRA against manufacturers and distributors of children's toys, seeking to remedy alleged toy defects and misrepresentations regarding their qualities.[5] Despite allegations that defendants "engaged in 'fraudulent' business acts or practices," the court distinguished *Vess*, holding that "'fraudulent' under section 17200 is not the same as common law fraud" and that Rule 9(b) should apply only where plaintiffs make an effort to allege common-law fraud elements.[6] Notwithstanding its efforts to distinguish *Vess*, the district court's decision in *In re Mattel* was seemingly in conflict with *Vess*, as were other decisions from the district courts within the Ninth Circuit. To resolve any doubts regarding the reach of *Vess*, the Ninth Circuit recently issued its opinion in *Kearns v. Ford Motor Co*.

Kearns brought a putative class action against Ford, alleging that Ford and its independent dealerships conspired to mislead customers into paying more for "Certified Pre-owned [CPO] Vehicles." Kearns alleged that defendants violated the UCL and CLRA when they allegedly made various misrepresentations and omissions concerning the qualities of Ford CPO vehicles, purportedly to induce purchasers to purchase the CPO vehicles. The Central District of California dismissed Kearns's UCL and CLRA claims for failure to satisfy Rule 9(b). Kearns appealed to the Ninth Circuit, which affirmed.

Citing *Vess*, the Ninth Circuit first rejected Kearns's argument that Rule 9(b) does not apply to California's consumer-protection statutes because California state courts have not applied the particularity standard. The court held that for UCL or CLRA claims asserted in federal diversity actions, "we have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL."[7] On its face, this statement appears to create a "one size fits all" rule that *all* CLRA and UCL claims must meet Rule 9(b), a reading that finds no support in *Vess*. The Ninth Circuit further held that Rule 9(b) governs all allegations when included as a part of a "unified course of fraudulent conduct," or at least to those specific allegations that sound in fraud:

> While fraud is not a necessary element of a claim under the CLRA and UCL, a plaintiff may nonetheless allege that the defendant engaged in fraudulent conduct. A plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of that claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading . . . as a whole must satisfy the particularity requirement of Rule 9(b).[8]

To determine whether claims sound in fraud, the court held that district courts should consider the state-law elements for fraud.[9] Applying this rule, the Ninth Circuit held that while Kearns alleged that Ford engaged in a course of fraudulent conduct, he failed to specify what television advertisements or other sales materials he was basing his claims upon, what those materials actually stated, when he was exposed to them, and which materials he relied upon in making his decision to purchase a Ford CPO vehicle. The court affirmed dismissal under Rule 9(b).

In this regard, the Ninth Circuit merely reaffirmed *Vess*. However, the court elaborated on what arguably was left implicit in *Vess*. Whereas the *Vess* court's general holding was that all allegations premised in fraud were subject to Rule 9(b), it did not specify whether its holding reached claims brought under any UCL prong or any subsection of the CLRA. Recognizing this ambiguity, Kearns argued that the district court erred by failing specifically to evaluate his UCL claim under the unfairness prong to determine whether Kearns's allegations of unfair business practices must also satisfy Rule 9(b). The Ninth Circuit resolved the ambiguity, holding:

> Kearns's TAC alleges a unified course of fraudulent conduct, namely that Ford Motor Company and its "co-conspirator" dealerships knowingly misrepresent to the public that CPO vehicles are safer and more reliable, with an intent to induce reliance and defraud consumers. Because Kearns's TAC alleges a unified fraudulent course of conduct, his claims against Ford are grounded in fraud. His entire complaint must therefore be pleaded with particularity. Thus, the TAC was properly dismissed and no error was committed by not separately analyzing his claims under the unfairness prong of the UCL.[10]

Accordingly, after *Kearns*, the rule in the Ninth Circuit is that a plaintiff alleging a UCL claim under any prong (unlawful, unfair, fraudulent, or false advertising) or a CLRA claim under any statutory subsection must satisfy Rule 9(b) where the claim alleges a unified fraudulent course of conduct or sounds in fraud. Where a plaintiff does not allege a unified course of conduct, but nonetheless asserts allegations sounding in fraud, those allegations of fraud must satisfy Rule 9(b). If they do not, they will be stripped from the complaint for purposes of determining whether the UCL or CLRA claim asserts sufficient allegations to withstand dismissal under Rule 12(b)(6).

The California Supreme Court's Recent Decision

The ruling in *Kearns* has implications for class actions that are removed to or brought in federal court. Decided less than a month after the California Supreme Court issued its long-awaited decision in *In re Tobacco II Cases*, *Kearns* likely will limit the ability of plaintiffs to bring representative claims under the UCL based on allegedly fraudulent activities.[11] In *In re Tobacco II Cases*, the court addressed and purported to resolve two issues. First, it held that, while Proposition 64 modified the standing requirements under the UCL in the class-action context, it did so only with regard to named class representatives, not to all absent class members.[12] Second, it held that plaintiffs proceeding on a claim of misrepresentation under the UCL fraud prong "must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with the well-settled principles regarding the element of reliance in ordinary fraud actions."

The court held that to demonstrate actual reliance, however, a plaintiff need not allege that the misrepresentation was

the "immediate cause of the injury-causing conduct" or that it was "the sole or even the decisive cause of the injury-producing conduct."[13] The court further held that in cases involving false advertising based on an extensive and long-term advertising campaign, the plaintiff "is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements" or "plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements."

At least in the context of claims based on false advertising, *Kearns* and *Tobacco II* apply different pleading requirements. Where claims contain averments of fraud, sound in fraud, or involve a unified course of fraudulent conduct, Rule 9(b) will apply in federal court notwithstanding *In re Tobacco II*. A federal plaintiff will face a heightened pleading standard requiring specific rather than generalized allegations of fraud and causation. This may have implications for defendants who are sued in state court, where the case can be removed to federal court under CAFA or other grounds. The implications are less clear in cases involving both fraudulent and non-fraudulent conduct and cases brought under the unlawful or unfair prongs of section 17200 of the UCL not based on a unified course of conduct. Presumably, a class-action claim brought under section 17200 based on an "unlawful" violation of a law or regulation not involving fraud or deception would not be subject to Rule 9(b) if removed to federal court. The same may or may not be true of claims based on "unfairness" allegations, which *Kearns* explains may be subject to Rule 9(b) depending on whether the underlying claims of unfairness sound in fraud.

Other Circuits Are Split

The Ninth Circuit's application of Rule 9(b) to California consumer-protection claims that merely are grounded in fraud is somewhat unique, although not entirely without support in other circuits. A majority of state consumer-protection statutes require proof of actual deception and, therefore, require compliance with Rule 9(b) when pled in federal court. A minority of states, however, allow consumer-protection claims without proof of actual fraud. Federal courts faced with the applicability of Rule 9(b) to claims pled under those state statutes have taken a variety of approaches.

For example, applying the rationale of *Vess* and *Kearns*, the U.S. District Court for the District of New Jersey recently held that a claim under the New Jersey Consumer Fraud Act may need to satisfy Rule 9(b)'s particularity requirement when it is based on allegations of fraudulent conduct, despite actual deception not being a required element of proof.[14] In *Gray v. Bayer Corp.*, the court held that "a plaintiff cannot escape Rule 9(b) by alleging claims that do not traditionally involve fraud; rather the test is whether the particular claim alleged in this matter sounds in fraud . . . [i]f so, the pleading is subject to 9(b)."[15] Applying that rule, the court held that despite the plaintiff purporting to allege claims of "unconscionable commercial practices" under the New Jersey Consumer Fraud Act, her claim was premised upon alleged misrepresentations and omissions regarding the qualities of One-A-Day WeightSmart vitamin products, and "because the underpinning of Plaintiff's CFA claim is fraud, the Court applies 9(b) scrutiny."[16]

The application of Rule 9(b) to claims that merely "sound in fraud" or that are part of a "unified course of fraudulent conduct" puts a significant new burden on plaintiffs asserting UCL, false advertising, and CLRA claims.

Other courts have rejected the "sounds in fraud" approach. Those courts generally rely on a strict construction of the elements of a cause of action rather than having the factual allegations upon which the cause of action is based dictate the pleading burden. For example, the Second Circuit has held that a plaintiff need not plead a consumer-protection claim brought pursuant to section 349 of the New York General Business Law with particularity despite the claim being based on allegations of omissions and misrepresentations to consumers.[17] In *Pelman ex rel. Pelman v. McDonald's Corp.*, the plaintiff alleged that McDonald's committed deceptive trade practices under the New York statute by misrepresenting that its food products were nutritionally beneficial and part of a healthy lifestyle. The Second Circuit held that, notwithstanding that the claims alleged clearly sounded in fraud, because a plaintiff need not prove the elements of fraud to state a claim under the New York statute, he or she need not plead her claims with the specificity required by Rule 9(b). Specifically, the Second Circuit held that "an action under § 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), Fed. R. Civ. P., but need only meet the bare-bones notice-pleading requirements of Rule 8(a)."[18]

Other courts have taken a middle approach, focusing on the specific category of claim alleged under a state's consumer-protection statute to determine whether Rule 9(b) applies. For example, the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS § 505/1, et seq., expressly authorizes consumer-protection claims based upon both "deceptive" and "unfair" trade practices. The Seventh Circuit recently held that, unlike "deceptive" trade practices, claims pled as "unfair" practices need not satisfy Rule 9(b) because actual fraud is not a requirement of such a claim.[19] The court rejected the applicability of Rule 9(b), despite the fact that the claims alleged as "unfair" practices were premised on allegedly false advertisements that also formed the basis of a separate common-law fraud claim.

In most circuits, the "sounds in fraud" doctrine has been applied more often outside of the consumer-protection context. The most significant body of law addressing the doctrine stems from securities fraud cases under the Securities Act of 1933. It is well recognized that a claim pled under section 11 of the Securities Act does not require proof of actual fraud. Nonetheless, because misrepresentation is an underlying basis for such a claim, many section-11 claims include allegations that "sound in fraud." Citing *Vess*, the Ninth Circuit has held that "[a]lthough section 11 [of the 1933 Securities Act] does not contain an element of fraud, a plaintiff may nonetheless be subject to Rule 9(b)'s particularity mandate if his complaint 'sounds in fraud.'"[20] While a split exists among other circuits, the majority of those circuits have affirmed the rationale of the

Ninth Circuit, requiring compliance with Rule 9(b) for section-11 claims sounding in fraud.[21] The "sounds in fraud" doctrine has also been applied to require that other statutory claims that may involve allegations of fraud, particularly Lanham Act and RICO claims, be pled with particularity.[22]

Conclusion

The Ninth Circuit's application of Rule 9(b) to claims that merely "sound in fraud" or that are part of a "unified course of fraudulent conduct" places a significant new burden on plaintiffs asserting UCL, false advertising, and CLRA claims. That burden particularly impacts class-action plaintiffs, who often have no choice but to prosecute their claims in federal court as a result of CAFA. For any UCL or CLRA plaintiff in federal court within the Ninth Circuit, the rule following *Kearns* and *Vess* is that a plaintiff alleging a UCL claim under any prong (unlawful, unfair, fraudulent, or false advertising), or a CLRA claim under any statutory subsection, must satisfy Rule 9(b) where the district court determines that the claims allege a "unified fraudulent course of conduct" or "sound in fraud."

Endnotes

1. Kearns v. Ford Motor Co., 567 F.3d 1120 (9th Cir. 2009).
2. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097 (9th Cir. 2003).
3. *Id.* at 1103–04.
4. *Id.* at 1105.
5. *In re* Mattel, Inc., 588 F. Supp. 2d 1111 (C.D. Cal. 2008).
6. *Id.* at 1118.
7. Kearns, 567 F.3d at 1125.
8. *Id.* (citations omitted).
9. *Id.* at 1126.
10. *Id.* at 1127.
11. In re Tobacco II, 46 Cal. 4th 298, 207 P.3d 20 (2009) (currently pending petition for rehearing).
12. *Id.* at 306.
13. *Id.* at 328.
14. *See* Gray v. Bayer Corp., 2009 WL 1617930 (D.N.J. June 9, 2009).
15. *Id.* at *2–3.
16. Other courts have similarly applied the "sounds in fraud doctrine" to require that consumer-protection claims sounding in fraud be pled in compliance with Rule 9(b) despite actual fraud not being a required element. *See, e.g.*, McKinney v. State, 693 N.E.2d 65, 72–73 (Ind. 1998) (holding that claims under the Indiana Deceptive Consumer Sales Act do not require proof of fraud but must nonetheless be pled with particularity when sounding in fraud); George v. Morton, 2007 WL 680787, at *11 (D. Nev. Mar. 1, 2007) (applying Rule 9(b) to Nevada Unfair & Deceptive Trade Practices Act and holding that "[u]nder Ninth Circuit law, 'where fraud is not an essential element of a claim, only allegations ('averments') of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b)." (quoting *Vess*)).
17. *See* Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005).
18. 396 F.3d at 511.
19. *See* Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc., 536 F.3d 663, 670 (7th Cir. 2008) ("Because neither fraud nor mistake is an element of unfair conduct under Illinois' Consumer Fraud Act, a cause of action for unfair practices under the Consumer Fraud Act need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b).").
20. *In re* Daou Sys., Inc., 411 F.3d 1006, 1027 (9th Cir. 2005) ("In a case where fraud is not an essential element of a claim, only allegations of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b).").
21. The First, Second, Third, Fifth, Seventh, and Tenth Circuits have applied the "sounds in fraud" doctrine to hold that securities-fraud claims under section 11 of the Securities Act of 1933 that sound in fraud must satisfy Rule 9(b), whereas the Eighth Circuit has specifically rejected 9(b)'s application. *See, e.g.*, Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1223 (1st Cir. 1996), superseded on other grounds, (holding in dictum that "if a plaintiff were to attempt to establish violations of Sections 11 and 12[a](2) as well as the anti-fraud provisions of the Exchange Act though allegations in a single complaint or a unified course of fraudulent conduct . . . the particularity requirements of Rule 9(b) would probably apply to the Sections 11, 12[a](2), and Rule 10b-5 claims alike."); Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004) ("We hold that the heightened pleading standard of Rule 9(b) applies to Section 11 and Section 12(a)(2) claims insofar as the claims are premised on allegations of fraud."); *In re* Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 270 (3d Cir. 2006) ("[T]he plaintiff grounds [his claims] in allegations of fraud—and the claims thus 'sound in fraud'—the heightened pleading requirements of Rule 9(b) apply."); Lone Star Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 368 (5th Cir. 2001) (applying "sounds in fraud" doctrine); Sears v. Kikens, 912 F.2d 889, 893 (7th Cir. 1990) (approving of "sounds in fraud" doctrine in dicta, although many district courts have refused to apply *Sears* to securities-fraud claims on the ground that the circuit's reference to Rule 9(b) was dictum); Schwartz v. Celestial Seasonings, Inc., 124 F.3d 1246, 1252 (10th Cir. 1997) ("[A]ssuming without deciding" that the approach set out by the Third Circuit in *Shapiro* applies, and holding that "the § 11 claim in the case at bar . . . does not trigger Rule 9(b) scrutiny" because "it is not premised on fraud."); *but see* Carlon v. Thaman (*In re* NationsMart Corp. Sec. Litig.), 130 F.3d 309, 314–15 (8th Cir. 1997) (rejecting the "sounds in fraud" doctrine and holding that "the particularity requirement of Rule 9(b) does not apply to claims under § 11 of the Securities Act, because proof of fraud or mistake is not a prerequisite to establishing liability under § 11").
22. *See, e.g.*, Pestube Sys., Inc. v. Hometeam Pest Def., LLC, 2006 WL 1441014, at *5 (D. Ariz. May 24, 2006) (citing the Ninth Circuit's decision in *Vess* and holding that "where a plaintiff's Lanham Act claim is akin to fraud, the heightened pleading standard is appropriate"); Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984) (RICO claims based on fraud are subject to Rule 9(b)).

Published in CADS Report, Volume 20, Number 2, Winter 2010.

Obtaining Class Certification in New Jersey Just Became an Even More Daunting Task

By Michael R. McDonald & Anthony M. Gruppuso

Michael R. McDonald

Anthony M. Gruppuso

Recent decisions from New Jersey's high court and the U.S. Court of Appeals for the Third Circuit should make it more difficult for a plaintiff to obtain nationwide class certification for state-law tort claims and, most likely, certification of statewide classes for such claims. Proving that common questions of *law* predominate in multi-state classes has always been difficult. The New Jersey Supreme Court significantly raised that bar when it adopted a new choice-of-law standard in *P.V. v. Camp Jaycee*.[1] *Camp Jaycee* throws a wrench into the typical plaintiff strategy of urging the court to apply the law of a single jurisdiction nationwide to avoid the insurmountable obstacles imposed by application of the laws of many states. Similarly, the Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation*,[2] (H_2O_2) has made it substantially more difficult to demonstrate that common questions of *fact* predominate by articulating standards of proof that district courts must follow in conducting a "rigorous analysis" of the requirements of Rule 23. Under H_2O_2, a district court must resolve *all* factual and legal disputes relevant to class certification, even when the disputes go to the merits and even when conflicting expert testimony is presented. Class certification will be a daunting task under these decisions, which may prove fatal to the aspirations of plaintiff class-action lawyers seeking to use New Jersey's plaintiff-friendly consumer protection laws to certify nationwide classes.

Michael R. McDonald and Anthony M. Gruppuso are directors in the Business & Commercial Litigation Department of Gibbons P.C. in Newark, New Jersey. Department Director Damian V. Santomauro, along with department associates Melissa C. Fulton, George B. Forbes, and Jed Goldstein, also contributed to this article.

International Union v. Merck

The New Jersey high court portended the current reality in *International Union of Operating Engineers Local No. 68 Welfare v. Merck & Co., Inc.*[3] In *International Union*, the plaintiff sued on behalf of a nationwide class of third-party, non-governmental payors, alleging that Merck's marketing of the prescription drug Vioxx violated the New Jersey Consumer Fraud Act (CFA). The plaintiff argued that the CFA should apply to the entire class because New Jersey's interest in regulating the conduct of its corporate citizens outweighed any other state's interest. The Supreme Court ultimately reversed the order granting nationwide class certification because (among other reasons) it concluded that proving the essential elements of the plaintiff's CFA claim, and the defenses to those claims, would fundamentally involve individualized issues of fact, and thus, common questions of fact did not predominate.[4] Importantly, as guidance to courts facing motions to certify nationwide classes under New Jersey's then-existing choice-of-law rules, the *International Union* court declared that "certification of a nationwide class is 'rare,' and application of the law of a single state to all members of such a class is even more rare."[5]

Choice of Law and *P.V. v. Camp Jaycee*

With its decision in *Camp Jaycee*, the New Jersey Supreme Court ushered in a new era in New Jersey conflict-of-law analysis in tort actions by abandoning the flexible "governmental-interest" test in favor of the approach embodied by the *Restatement (Second) of Conflict of Laws* (1971).[6]

In *Camp Jaycee*, the plaintiff alleged that she had been sexually assaulted by another camper during her stay at a campsite in Pennsylvania, where the defendant, a New Jersey not-for-profit corporation, operated its charitable summer program. Unlike New Jersey, Pennsylvania had abrogated charitable immunity, and therefore application of Pennsylvania law would permit the plaintiff to prosecute her claims. Reviewing the history of New Jersey's choice-of-law jurisprudence, the *Camp Jaycee* court announced that "we now apply the Second Restatement's most significant relationship standard in tort cases," requiring application of the "law of the state of the injury . . . unless another state has a more significant relationship to the parties and issues." Based upon its analysis, the court concluded that "Pennsylvania, the state in which the charity chose to operate and which is the locus of the tortious conduct and injury, has at least as significant a relationship to the issues as New Jersey, and that the presumptive choice of Pennsylvania law therefore has not been overcome."

The *Camp Jaycee* decision represents a sea change in the law regarding conflicts of law in tort cases by adopting the *Second Restatement*'s mandatory presumption that the law of the place of the injury applies. Now, the *lex loci* presumption is the starting point of the analysis and "recognizes the intuitively correct principle that the state in which the injury occurs is likely to have the predominant, if not exclusive, relationship to the parties and issues in the litigation."[7] The competing governmental

public policies at issue—which previously were the touchstone of the analysis—are now simply one of many factors that a court must consider under *Camp Jaycee* to determine whether a state other than the one in which the injury occurred has such a significant relationship to the tortious conduct that the *lex loci* presumption must give way.

H_2O_2

As if *International Union* and *Camp Jaycee* were not disheartening enough for aspiring nationwide class representatives, the Third Circuit's recent decision in H_2O_2 created another high hurdle to class certification. In H_2O_2, purchasers of hydrogen peroxide and other related chemical compounds alleged that chemical manufacturers conspired to fix prices and restrain trade, and the district court certified a class of purchasers of the chemical compounds in the United States.[8] On appeal, the Third Circuit explained that Rule 23 is not a "mere pleading rule[],"and that much more than just a "threshold showing" is necessary to meet the certification requirements of Rule 23. Instead, the H_2O_2 court explained the standard of proof that a plaintiff must satisfy to obtain class certification, in three significant respects. First, a plaintiff must *prove* and a district court must *find*—by a preponderance of all relevant fact and expert evidence—that each of the requirements of Rule 23 has been met. Second, the "rigorous" evidentiary and legal analysis that a district court must conduct under Rule 23 includes the resolution of factual and legal issues that go to the merits of the plaintiff's substantive claims. And third, when experts clash, the district court must resolve the conflict through factual findings. The Third Circuit found that the H_2O_2 plaintiffs did not satisfy their burden of proof on class certification and therefore vacated the order certifying the class.

Predominance of Questions of Fact

In evaluating the predominance requirement in cases seeking class certification of CFA claims, district courts will now have to consider the impact of both *International Union* and H_2O_2. For example, in *McNair v. Synapse Group, Inc.*,[9] the plaintiffs claimed that the defendant, a marketer of magazine subscriptions, violated the CFA in automatically renewing a customer's magazine subscriptions by charging the credit or debit card used at signup unless the customer calls to cancel. In rejecting class certification and a presumption of causation advanced by the plaintiffs, the *McNair* court observed that to establish causation in a CFA case, *International Union* instructs courts to look "not only to defendant's conduct but also to the class members' conduct and then evaluate[] whether both were sufficiently uniform or common for class certification to be inappropriate." More importantly, the *McNair* court noted that *International Union* and H_2O_2 both reflect the principle that injury cannot be presumed.

Predominance of Questions of Law

The holdings of *Camp Jaycee* and H_2O_2 recently converged in *Agostino v. Quest Diagnostics, Inc.*[10] In *Agostino*, the plaintiffs, on behalf of putative nationwide classes and sub-classes, asserted claims, under federal law, common law, and the CFA and similar consumer-protection laws of the various states, challenging the billing and collection practices of Quest and its outside debt-collection agencies. According to the plaintiffs, the CFA could be applied to the statutory-fraud claims of all members of the class. After conducting the "rigorous analysis" required by H_2O_2, the district court denied the plaintiffs' motion for class certification in its entirety.

Applying *Camp Jaycee* and section 148(1) of the *Second Restatement*, the *Agostino* court rejected the plaintiffs' argument that the CFA and New Jersey's common law of fraud applied to the claims of all class members because Quest's principal place of business is located in New Jersey and the allegedly unlawful billing practices occurred there. Judge Chesler found that each class member's home state represented the place where the class members received and relied upon the allegedly unlawful bills and letters. Those circumstances required application of the "strong presumption" that the law of each class member's home state applied to his or her statutory and common-law fraud claims. Seeing no evidence to rebut the presumption, the court found that "each state has an overwhelming interest in seeing its own consumer protection statute govern in cases where residents were victims of fraud perpetrated within the state's borders." The court concluded that the marked differences among the applicable consumer protection statutes and common-law fraud claims militated against certification of a nationwide class. The *Agostino* court also found class certification inappropriate because individualized (rather than class-wide) evidence was needed for the plaintiffs to prove their claims.

Judge Chesler's opinion in *Agostino* was, however, recently criticized by District Judge Debevoise in *In re Mercedes-Benz Tele-Aid Contract Litigation*,[11] where the plaintiffs sought to certify a class of individuals who purchased automobiles from Mercedes-Benz U.S.A., LLC. The plaintiffs alleged that Mercedes misled its customers by promoting automobiles equipped with "Tele-Aid," an emergency-response system that links subscribers to roadside assistance through an analog signal provided by AT&T Wireless Services, Inc. The plaintiffs' CFA claim sought relief for Mercedes's alleged failure to disclose, prior to sale, the future obsolescence of the Tele-Aid analog system. As part of its choice-of-law analysis, the *Mercedes-Benz* court applied the "most significant relationship" test but did not apply the presumption of section 148(1). Judge Debevoise found that *Agostino* "relie[d] on an interpretation of the Restatement that is at odds with the plain meaning of section 148, which calls for such a presumption only in cases where 'the plaintiff's action in reliance took place in the state where the false representations were made and received.'" According to Judge Debevoise, because the alleged omissions were not both "made and received" in the same state, section 148(2), which does not contain a mandatory presumption, was the appropriate provision to be applied.

The reasoning of *Mercedes-Benz*—which rests initially and primarily on the conclusion that section 148(1) did not apply—may well be flawed. Critical to that conclusion is Judge Debevoise's finding that the alleged omissions were "made" in New Jersey, where *Mercedes-Benz* allegedly "planned and implemented" its actions, rather than in each plaintiff's home state, where plaintiffs received and relied upon such misrepresentations. Yet it appears that Judge Debevoise did not conduct the proper analysis in determining that section 148(1)'s presumption was inapplicable.

Underlying an omissions case like *Mercedes-Benz* must be some interaction between the plaintiff and the defendant during which the defendant had an opportunity to disclose to the plaintiff a

material fact but did not. The *Mercedes-Benz* court should have made findings of fact, on a plaintiff-by-plaintiff basis, concerning the circumstances surrounding Mercedes's alleged failure to disclose Tele-Aid's future obsolescence. Mercedes may have allegedly made the *decision*, in New Jersey, not to disclose Tele-Aid's future obsolescence, but making that decision itself did not injure any consumers, cannot serve as the basis for a cause of action under the CFA, and is not a factor to be considered under section 148(1). It is the place where *the omission was actually made* that must be considered.

Instead, *Mercedes-Benz* effectively ignored *Camp Jaycee*'s instruction that "in tort cases," without limitation, "the law of the state of the injury is applicable unless another state has a more significant relationship to the parties and issues."[12] Improperly subjugating the place of injury to the place of the defendant's domicile renders *Mercedes-Benz*, at best, questionable precedential value.

The Third Circuit Weighs In

The Third Circuit's August 5, 2009, decision in *Nafar v. Hollywood Tanning Systems, Inc.*,[13] approving of both *Agostino* and *Fink v. Ricoh Corp.*,[14] should provide significant guidance with respect to the proper choice-of-law analysis in consumer-product class actions. Notably, the court chose to approve of the *Agostino*'s choice-of-law analysis, and its application of the presumption of section 148(1), not the analysis advocated in *Mercedes-Benz*.[15]

Conclusion

The decisions in *International Union*, H_2O_2, and *Camp Jaycee*, and now *Nafar*, should have a tremendous impact on the disposition of nationwide tort class actions brought in New Jersey state and federal courts, which are bound to apply *Camp Jaycee* to state-law tort claims. In the past, the governmental-interest test allowed a court great flexibility (i.e., discretion) in identifying the applicable law. In non-class-action cases, the conclusion that the law of the home state of the defendant should apply could often easily be justified by reasoning that the policies of the home state in policing conduct occurring within its borders outweighed the policies of any other state involved.

Whether driven by parochialism or a desire for certainty in the law for corporate citizens doing business within its state's borders, a class representative stood an even better chance of persuading a court to adopt that reasoning when the court sat in the state in which the defendant resided. Now, when *Camp Jaycee* is applied to a nationwide class action alleging state-law tort claims, the court *must* start with the mandatory presumption that the law to be applied is the law of each state in which an absent class member was injured. The extraordinary circumstances that would rebut that presumption are rare indeed, perhaps even rarer than the *International Union* court could envision. And the Third Circuit's new guidance on the "rigorous analysis" required when determining whether a class representative has established the Rule 23 elements will likewise make class certification an even more difficult challenge.

Endnotes

1. 197 N.J. 132 (2008).
2. 552 F.3d 305 (3d Cir. 2008).
3. 192 N.J. 372 (2007).
4. 192 N.J. at 388–94.
5. *Id.* at 388 n.3.
6. 197 N.J. 132.
7. 197 N.J. at 144.
8. *Id.* at 308–09.
9. 2009 U.S. Dist. LEXIS 54908 (D.N.J. June 29, 2009).
10. Civ. No. 04-4362 (D.N.J. Feb. 11, 2009).
11. 257 F.R.D. 46 (D.N.J. 2009).
12. *See, e.g., id.* at 56, 59–60 (showing that *Camp Jaycee*'s presumption of the place of injury is absent from the court's choice-of-law analysis).
13. 2009 U.S. App. LEXIS 17561 (3d Cir. 2009).
14. 365 N.J. Super. 520 (Law Div. 2003) (nationwide consumer fraud false advertising class action).
15. *Nafar*, 2009 U.S. App. LEXIS 17561 at * 12–14.

Litigating on the Fault Line

continued from page 5

15. *Id.* at 1550.
16. Haro v. City of Rosemead, 174 Cal. App. 4th 1067, 1075–76 (2009).
17. Chamberlain v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005).
18. Stephen v. Enter. Rent-A-Car, 235 Cal. App. 3d 806, 811 (1991) (internal quotations omitted); Richmond v. Dart Indus., 29 Cal. 3d 462, 470 (1967).
19. *Stephen*, 235 Cal. App. 3d at 811.
20. *See, e.g., Sav-On Drugs*, 34 Cal. 4th 319 (2004).
21. Cal. R. of Ct. 3.768.
22. Baldwin & Flynn v. Nat'l Safety Assocs., 149 F.R.D. 598, 600 (N.D. Cal. 1993).
23. Zepeda v. I.N.S., 753 F.2d 719, 727–28 (9th Cir. 1984).
24. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).
25. 44 Cal. 3d 1103, 1118–119 (1988).
26. *But see* Hatfield v. Halifax PLC, 564 F.3d 1177 (9th Cir. 2009) (applying California law, court finds that equitable tolling doctrine preserved the claims of California residents even where *American Pipe* tolling did not).
27. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 176 (1974).
28. Cal. R. of Court 3.766(c).
29. Hypertouch, Inc. v. Superior Ct., 128 Cal. App. 4th 1527, 1553 (2005).
30. 34 Cal. 4th 553, 567 (2004).
31. 532 U.S. 598, 610 (2001).
32. *Graham*, 34 Cal. 4th at 568.
33. Compare Ketchum v. Moses, 24 Cal. 4th 1122 (2001) with City of Burlington v. Dague, 505 U.S. 557, 567 (1992).

Defining an Ascertainable Class

By Kathryn Honecker

Kathryn Honecker

In this edition, we answer some common questions about defining a class in federal cases. All references are from the text of Federal Rule of Civil Procedure 23, unless otherwise noted.

Why Is Defining the Class Important?

The class definition is important for several reasons. First, if the class is entitled to relief pursuant to a settlement or judgment, the class definition identifies who may recover money or is entitled to other forms of relief. Second, the class definition identifies who is bound by the settlement or judgment. Class members will be precluded from bringing suit in the future under the terms of the settlement or principles of res judicata, so a court must be able to determine who is precluded. Third, the class definition identifies who is entitled to receive the "best notice practicable" under Rule 23(b)(3) and due process considerations. Finally, the class definition demonstrates whether the named plaintiff has standing to sue on behalf of the proposed class, as at least one named plaintiff must be a member of each class or subclass.

Kathryn Honecker is an associate with Bonnett, Fairbourn, Friedman & Balint in Phoenix, Arizona.

What Makes a Class Ascertainable?

A class definition should specify a particular group of persons who were harmed by the defendant in a particular way during a particular time frame. To ensure that the defined class is ascertainable, focus on making the class definition clear, precise, and objective, so that it is administratively possible to determine exactly who is included in the class. The class should not be defined in a way that only parties intimately involved with the litigation know who is in the class. Instead, draft the definition in a way that anybody reading it will know whether he or she or someone else is included within the class.

Can the Class Definition Be Revised During the Course of the Litigation?

Yes. While it is always good practice to include the best class definition possible in your complaint, plaintiffs often request certification of a revised, more precise class when they seek certification. The court can also modify the class definition to make it certifiable. And, the court may modify the definition, create subclasses, or withdraw certification at any time before, during, or after trial, if the class definition certified appears inappropriate.

Is a Definition That Requires Resolution Ascertainable?

No. The class must be presently ascertainable. While a small amount of individualized inquiry may be permitted, plaintiffs want to avoid defining a class in a way that requires extensive factual inquiries to know if individuals are members of the class. Instead, focus on the defendant's conduct to keep the parameters of the class objective. Definitions therefore should not include factors such as the individual's state of mind or be defined to require subjective mini-trials on the merits of the claim, which would defeat the economies sought from class litigation. In a discrimination case, for example, a class should not be defined as "All Hispanic persons who applied for employment with X Corp. at any time between January 1, 2007 to the present, and who *believe they were discriminated against on the basis of national origin*." Instead, the class can simply be defined as "All Hispanic persons who applied for employment with X Corp. at any time between January 1, 2007 to the present." *See, e.g., Chiang v. Veneman*, 385 F.3d 256 (3d Cir. 2004).

Can a Complaint Seek Relief on Behalf of More Than One Class?

Yes. A class action can be brought on behalf of more than one class and/or subclasses. However, each class and subclass must be properly defined and satisfy the other requirements of Rule 23.

Are the Standards the Same?

Because a Rule 23(b)(2) class seeks predominantly equitable relief against a defendant, the precision of the class definition is less important than in class actions seeking monetary relief under Rule 23(b)(3). Nevertheless, because of res judicata concerns, it is best to always define your class as precisely as possible.

How Is the Class Period for the Definition Determined?

A class definition that does not contain some reference to a time period will be objectionable as overly broad, because it includes individuals with time-barred claims. Accordingly, an important part of the class definition is the period at issue, which is established by the statute of limitations period governing the claims. However, keep in mind that a limitations period may be extended because of equitable tolling or the continuing-violation doctrine. Because the limitations period can be unknown in the early stages of litigation, class definitions sometimes leave out a specific date range and instead include the phrase "during the applicable limitations period."

Published in CADS Report, Volume 20, Number 2, Winter 2010.

Unfair Competition

continued from front cover

only the named class representative, and not each member of a putative UCL class, to demonstrate standing, including actual reliance on the allegedly false or deceptive advertising and injury in fact. The court did not explain why absent class members who neither saw nor relied on the accused advertising to their detriment should be entitled to take part in a class recovery when they would not be able to obtain such relief in an individual action in light of Proposition 64. Moreover, the court interpreted the actual reliance requirement applicable to the named class representative quite loosely. These and other issues will be hotly litigated for years to come.

The History of the UCL and Proposition 64

The UCL was promulgated in 1933 along with a number of other "little FTC Acts" in several states. It defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice[.]"[3] Throughout the UCL's history, this language has been given an extraordinarily broad interpretation. The California Supreme Court famously explained that the UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'"[4]

The UCL authorized anyone to sue for an alleged unfair business practice, whether or not they had been personally exposed to or harmed by the accused practice. In fact, a UCL claimant did not need to show that anyone was actually deceived for liability to attach; rather, the mere likelihood that the public was deceived sufficed.[5] Moreover, "private attorneys general" could seek relief on behalf of the general public in "representative actions" that were not subject to the requirements for class actions. Justice Breyer noted this unique aspect of the UCL in a case involving the regulation of commercial speech, but the same held true beyond the false-advertising context.[6]

Given the extraordinary breadth of the statute and the relative ease with which liability could be imposed, the "fertility of man's invention" eventually contrived schemes to abuse the UCL itself. Because the cost of defending a UCL action, no matter how baseless, often far exceeded the amount a target would be willing to pay in settlement, the UCL increasingly became a tool for legalized shakedowns.

Proposition 64, passed by California voters in November 2004, focused on these abuses of the UCL. The voter pamphlet included findings and declarations of purpose that the unfair competition laws were "being misused by some private attorneys" who: (1) file frivolous lawsuits as a means of generating attorney fees without creating a corresponding public benefit; (2) file lawsuits where no client has been injured in fact; (3) file lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant; and (4) file lawsuits on behalf or the general public without any accountability to the public and without adequate court supervision.[7] In an ironic twist, the voter materials also stated that the UCL was being used to undermine California's competitiveness:

> Frivolous unfair competition lawsuits clog our courts and cost taxpayers. Such lawsuits cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits.[8]

Proposition 64 amended the UCL in two primary respects. First, the initiative imposed a new standing requirement: A private UCL claim can now only be prosecuted by a person who "has suffered injury in fact and has lost money or property as a result of the unfair competition."[9] Second, UCL claimants can only seek relief in a representative capacity if they satisfy both the new standing requirement of section 17204 and comply with the requirements of section 382 of the Code of Civil Procedure, California's analogue of Rule 23 of the Federal Rules of Civil Procedure.

Proposition 64 soon proved to be an effective weapon for defendants opposing class certification. Defendants won an early victory when the California Supreme Court held that Proposition 64 applied to cases pending at the time of its passage.[10] After that, defendants in putative UCL class actions based on allegedly false or misleading advertising successfully argued that variations in the advertisements and other marketing representations disseminated to the public, in addition to the varying circumstances of the unnamed members of the putative class, raised individualized issues of reliance, causation, and harm that predominated over any issues common to the class.[11]

The California Supreme Court granted review in *Tobacco II* to decide: (1) whether every member of a proposed UCL class must have suffered "injury in fact" after Proposition 64 or is it sufficient that the class representative comply with that requirement?; and (2) in a class action based on a manufacturer's alleged misrepresentation of a product, must every member of the class have actually relied on the manufacturer's representations? The court also granted review and held in several cases, including *Pfizer*, pending its decision in *Tobacco II*.

The California Supreme Court's Opinion in *Tobacco II*

On May 18, 2009, the California Supreme Court issued its much-anticipated opinion in *Tobacco II*. Chief Justice George was recused from consideration of the case, and appellate Justice Eileen Moore, sitting by designation, cast the deciding vote in a 4–3 decision. The opinion clears away some of the smoke surrounding Proposition 64, but it leaves plenty of issues that are sure to ignite further litigation for years to come.

First, the court held that only the class representative, and not each member of the putative class, must demonstrate standing under Proposition 64.[12] The court looked to the statutory language as amended by Proposition 64 and the ballot

Philip A Leider

Philip A. Leider is of counsel at Perkins Coie LLP in San Francisco, California.

materials supporting the initiative in concluding that the voters did not intend to impose on all class members the requirements they imposed on the class representative. In so holding, however, the court underscored the fact that this was a case where the trial court had already found the requirements for a class action satisfied—the trial court decertified the class after Proposition 64 had been passed by voters, erroneously concluding that each member of a putative class had to demonstrate standing to sue after Proposition 64.[13]

Notably, the court rejected the defense argument that absent class members lacking standing should not be permitted to obtain relief when they could not have done so in their own right in an individual suit. The court emphasized that the UCL's primary focus is protecting the public from deception, and the equitable remedies authorized by the UCL were not altered by Proposition 64: "The purpose of such relief, in the context of a UCL action, is to protect California's consumers against unfair business practices by stopping such practices in their tracks."[14] The dissenting opinion, penned by Justice Baxter, took the majority to task on this conclusion.[15]

In its second holding, the court concluded that a plaintiff suing for false advertising under the UCL must prove "actual reliance" on the defendant's alleged misrepresentation such that the misrepresentation was an "immediate cause" of the injury-producing conduct (e.g., the decision to start smoking).[16] Although this "actual reliance" language sounds helpful for defendants in the abstract, the court hedged its holding substantially. It clarified that a false-advertising plaintiff need not plead or prove that the alleged misrepresentation was the sole or even the decisive cause of the injury-producing conduct, and a plaintiff's showing of reliance may be adequate even if the plaintiff had access to truthful information contradicting the false advertising.[17] Citing previous smoking cases, the court observed that "despite awareness of the controversy surrounding smoking, [the plaintiffs] believed the tobacco industry's assurances that there was no definitive connection between cigarette smoking and various diseases."[18] Finally, the court explained that where a plaintiff has been exposed to "a long-term advertising campaign," like the multi-decade marketing campaign for cigarettes, the plaintiff need not plead reliance on any particular marketing statement or statements "with an unrealistic degree of specificity."[19] Given the particularly unsympathetic facts in *Tobacco II*, it remains to be seen how these latter observations will play out in other cases.

"The Ring of Fire": Defense Perspectives

After *Tobacco II*, defense counsel will need to lawyer particularly creatively in opposing class certification under the UCL. Most importantly, counsel should be aware that the sitting justices divided 3–3, and Chief Justice George will therefore have the decisive vote in a future case when he is not required to recuse himself. The result may well have been different had Chief Justice George participated in the decision of *Tobacco II*. This is especially significant because the trial court in *Tobacco II* had already found that the class-action requirements of section 382 of the Code of Civil Procedure were satisfied before Proposition 64 passed.[20] Thus, the questions presented in *Tobacco II* turned solely on Proposition 64 and not on the requirements generally governing class actions. Put another way, the issue in *Tobacco II* was not whether a class should have been certified, but instead whether decertification of an existing class that satisfied the requirements of section 382 was mandated by Proposition 64. The ordinary tools of the class-action trade—numerosity, commonality, typicality, manageability, etc.—will continue to be useful after Proposition 64.

The ordinary tools of the class-action trade—numerosity, commonality, typicality, manageability, etc.—will continue to be useful after Proposition 64.

Defense counsel can also take advantage of other aspects of the *Tobacco II* opinion. The court emphasized that its second holding was limited to false advertising cases under the "fraudulent" prong of the UCL. The court did not address how the causation requirement imposed by Proposition 64 would be satisfied in cases under the "unlawful" and "unfair" prongs of the UCL. Presumably the court's loose language regarding "actual reliance" and "immediate cause" will not apply in such cases, and defendants will have an opportunity to argue for a more stringent causation standard. Moreover, defense counsel now has every incentive to find a way to remove "fraudulent" prong cases to federal court as the Ninth Circuit has decided that Rule 9(b) of the Federal Rules of Civil Procedure requires that UCL cases sounding in fraud be pled with particularity.[21] A well-crafted motion to dismiss may well carry the day in the era of *Twombly* and *Iqbal*.

Tobacco II may also be limited based on some of its unique facts. For example, the court placed special emphasis on the "long-term advertising campaign" at issue. Defendants who are accused of deceiving the public in a single advertisement or in a brief marketing campaign can persuasively argue that unnamed class members should not be permitted to participate in a class recovery unless they actually saw and relied on the particular representation at issue, particularly if the representation was disseminated to a limited geographical area or segment of the population.[22] Moreover, the egregious suppression of scientific studies regarding the addictiveness of nicotine at issue in *Tobacco II* can be contrasted effectively with fewer eye-catching omissions in other cases, where it may be less clear that a reasonable member of the consuming public would find the decision not to publicize certain information material to his or her purchasing decision.

Importantly, several cases following *Tobacco II* remain to be decided by the California Supreme Court in the coming months that may substantially determine Proposition 64's reach. For example, the Supreme Court has granted review in *Kwikset Corp. v. Superior Court*,[23] which addresses whether a plaintiff who purchased a lock based in part on the representation that it was "made in the U.S.A." suffers the requisite "loss of money or property" to have standing under Proposition 64 when it turns out the lock functions comparably with other locks but contains some parts that were made abroad. In *O'Brien v. Camisasca Automotive Manufacturing, Inc.*,[24] the Supreme Court will similarly decide whether a purchaser of a license

plate holder falsely advertised as "made in the U.S.A." by Volkswagen has standing to sue under the UCL. In *Clayworth v. Pfizer, Inc.*,[25] the court has agreed to decide whether antitrust plaintiffs who recover from third-persons overcharges they paid to the defendants have suffered actual injury and lost money or property for purposes of establishing standing under Proposition 64. Finally, two cases where the Supreme Court granted review at the time of *Tobacco II* have been transferred back to their respective courts of appeal for decision in light of *Tobacco II*. Defense counsel should keep a close eye on these cases as they climb their way back up the appellate ladder.[26]

Endnotes

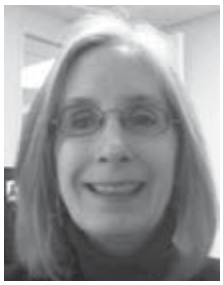
1. 93 Cal. Rptr. 3d 559 (2009).
2. *See* Arias v. Superior Ct., 95 Cal. Rptr. 3d 588 (2009); Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct., 95 Cal. Rptr. 3d 605 (2009).
3. Cal. Bus. & Prof. Code § 17200.
4. Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 181 (1999) (quoting Am. Philatelic Soc'y v. Claiborne, 3 Cal. 2d 689, 698 (1935)).
5. *See* Kasky v. Nike, Inc., 27 Cal. 4th 939, 951 (2002).
6. *See* Nike v. Kasky, 539 U.S. 654, 678 (2003) (Breyer, J., dissenting from dismissal of writ of certiorari as improvidently granted) ("[T]he regulatory regime at issue here differs from traditional speech regulation in its use of private attorneys general authorized to impose 'false advertising' liability even though they themselves have suffered no harm.").
7. Prop. 64, §1, subd. (b)(1)-(4).
8. *Id.* § 1, subd. (c).
9. Bus. & Prof. Code § 17204.
10. *See* Californians for Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223 (2006).
11. *See, e.g.*, Pfizer v. Superior Ct., 45 Cal. Rptr. 3d 840 (2006) (reversing certification of UCL class where plaintiffs alleged Pfizer marketed Listerine in a misleading manner by indicating the use of Listerine can replace the use of dental floss in reducing plaque and gingivitis) review granted Nov. 1, 2006; *In re Tobacco II*, 47 Cal. Rptr. 3d 917 (2006) (affirming order decertifying UCL class in light of Proposition 64 where plaintiffs alleged that cigarette manufacturers misrepresented the health risks and addictiveness of smoking in a marketing campaign involving thousands of varying representations over multiple decades) review granted Nov. 1, 2006.
12. *See Tobacco II*, 93 Cal. Rptr. 3d at 571–79.
13. *Id.* at 579–80 ("We therefore conclude 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*.") (emphasis added).
14. *Id.* at 576.
15. *See id.* at 586 (Baxter, J., dissenting) ("Under well-established class action rules, the putative class the named plaintiffs seek to represent may include only persons who could themselves bring similar UCL claims in their own behalves.").
16. *See id.* at 581.
17. *Id.* at 582–83.
18. *Id.* at 582.
19. *Id.*
20. Two recent appellate decisions have distinguished *Tobacco II* on precisely this ground in affirming orders denying class certification. *See* Cohen v. DIRECTV, Inc., ___ Cal. App. 4th ___, 2009 WL 3069116, at *9-10 (Dist. 2, Div. 8, Sept. 28, 2009); Kaldenbach v. Mutual of Omaha Life Ins. Co., ___ Cal. App. 4th ___, 2009 WL 3151813, at *11 (Dist. 4, Div. 3, Sept. 30, 2009).
21. *See* Kearns v. Ford Motor Co., 567 F.3d 1120 (9th Cir. Jun. 8, 2009).
22. The Second Appellate District, Division 4, recently found a more limited ad campaign to be sufficiently broad to relieve the plaintiffs of the burden to identify the particular ad or ads they allegedly relied upon. *See* Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1258 (2009) ("Although the advertising campaign alleged in this case was not as long-term a campaign as the tobacco companies' campaign discussed in *Tobacco II*, it is alleged to have taken place over many months, in several different media, in which AT&T consistently promoted its GMS/GPRS network as reliable, improving, and expanding.").
23. 90 Cal. Rptr. 3d 123 (2009), review granted June 10, 2009.
24. 73 Cal Rptr. 3d 911 (2008), review granted July 9, 2008.
25. 83 Cal. Rptr. 3d 45 (2008), review granted Nov. 19, 2008.
26. *See* Pfizer, 45 Cal. Rptr. 3d at 840, review granted Nov. 1, 2006 (presenting the question whether a class of Listerine purchasers can be certified when the claim is that Pfizer deceptively advertised Listerine as a replacement for dental floss); McAdams v. Monier, Inc., 60 Cal. Rptr. 3d 111 (2007), review granted Sept. 19, 2007 (addressing whether a class-wide presumption of reliance is warranted where the named plaintiff alleges the defendant omitted to inform consumers that their roofing tiles were substantially certain to discolor over time).

Unfair Competition Protections

continued from front cover

renters' security deposits for bogus cleaning charges,[4] and stopping hidden fees from being imposed on consumers in a myriad of situations has been obscured by the sensationalistic recitations of some private attorneys' abuse of the legal process.[5] This effective statutory scheme was the bane of every business enterprise that engaged in unlawful practices and reaped profits that outweighed the calculated business risk of being caught and held accountable. While touted as an effort to protect small business from "frivolous lawsuits" brought by "shakedown lawyers," Proposition 64 was promoted by and benefits business interests that "suffered" from the effects of this unique statutory scheme by being forced to pay back money they never should have had in the first place.

While the amendments imposed by Proposition 64 have limited who can bring an action under this powerful statute, the good news is, to paraphrase the great Mark Twain, the rumors of its demise are greatly exaggerated. As this article will demonstrate, while honoring the initiative process, the California Supreme Court, in construing this statute, chose not to throw the baby out with the bathwater, and narrowly tailored its decision to limit the impact on pending UCL class actions and other non-class representative actions.



Cynthia L. Rice

Cynthia L. Rice is the director of Litigation, Advocacy & Training at California Rural Legal Assistance, Inc. in San Francisco, California.

Post-Proposition-64 UCL Litigation

The California Supreme Court has now had the opportunity to construe the impact of Proposition 64 and provide explicit direction to the lower courts, regarding its impact on pending and future litigation. The Proposition 64 amendments to the UCL have been determined to be procedural in nature and, therefore, applicable to all pending cases.[6] While recognizing that the measure imposes new procedural and standing requirements on party plaintiffs, the court expressly noted, and indeed based its holding on the fact that the amendments "left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover."[7]

The UCL still encompasses "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[8] The available remedies, likewise, remain the same. "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction" and the court may impose such orders "as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition" or "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."[9] It is this language that provided the basis for recovering unpaid wages, restoring money deducted from security deposits, and reimbursing the fees paid by bank customers.[10] These remedies remain available post-Proposition 64.[11]

So what does Proposition 64 do? In essence, it imposes injury in fact requirements on any private plaintiff seeking to bring an action, and allows private parties to bring representative claims on behalf of others only if the named plaintiff/class representative meets the standing requirements of section 17204 and complies with section 382 of the Code of Civil Procedure.[12]

All UCL Representative Actions Must Be Class Actions

California, both at common law and through statute, recognized that representative actions were an efficient and appropriate method for resolving legal issues long before the enactment of Federal Rule 23.[13] Prior to Proposition 64, UCL actions often proceeded as non-class representative actions. This approach was approved by the U.S. Supreme Court, which recognized the important role that representative actions (in addition to and distinct from class actions) play in the enforcement of statutory rights.[14]

That all changed with Proposition 64. Ostensibly, out of concern that UCL actions were not subjected to the same scrutiny and oversight as class actions, Proposition 64 proponents included the requirement that a party seeking relief on behalf of the others comply with the provisions of Code of Civil Procedure § 382. Neither section 382 nor the express language of Proposition 64 itself mentions "class action" or requires compliance with Rules of Court provisions regarding class actions. Nonetheless, in *Arias v. Superior Court*,[15] and *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*,[16] the Supreme Court held that all "representative" actions under the UCL must now satisfy class-action requirements.

The *Arias* decision turned, not on case law interpreting rules pertaining to class or representative actions, but on the language of the Voter's Information Guide, which the majority decided not to thwart, irrespective of the plain language of the amendment.[17] Justice Moreno, writing for the majority, held that:

> In light of this strong evidence of voter intent, we construe the statement in section 17203, as amended by Proposition 64, that a private party may pursue a representative action under the unfair competition law only if the party 'complies with Section 382 of the Code of Civil Procedure' to mean that such an action must meet the requirements for a class action."[18]

In *Amalgamated*, the court further held that UCL claims cannot be assigned to a representative plaintiff that lacks standing in its own right. The court reasoned that:

> To allow a noninjured assignee of an unfair competition claim to stand in the shoes of the original, injured claimant would confer standing on the assignee in direct violation of the express statutory requirement in the unfair competition law, as amended by the voters' enactment of Proposition 64, that a private action under that law be brought exclusively by a "person who has suffered injury in fact and has lost

money or property as a result of the unfair competition."[19]

In rendering these decisions, the court was mindful of the specific voter intent and legislative intent evidenced by the statutory language and did not disrupt or otherwise cast doubt on other kinds of non-class representative actions. [20] In fact, in *Arias*, the court once again rejected due process and other arguments that all representative actions need be class actions, holding that representative actions under California's Labor Code Private Attorneys General Act, Cal. Labor Code §§ 2698, et seq., (PAGA), may proceed without class certification.[21]

All UCL Plaintiffs Must Have Suffered an Injury in Fact

Proposition 64 also added standing requirements applicable to litigants bringing actions under the UCL. Specifically, an action may only be brought by a "person who has suffered injury in fact and has lost money or property as a result of the unfair competition."[22] This standard is fairly straightforward, particularly in cases where the action challenges a failure to comply with express state or federal mandates to pay minimum wages, or not assess certain charges.

These standing requirements become an issue, however, in certain UCL actions involving advertising and product characterization. California appellate courts have rendered a number of decisions construing the impact of the "as a result of" language in UCL on cases that involve allegations of unfair or unlawful competition based on representations made about a particular product or action. The California Supreme Court resolved many of the questions raised by these cases in its decision in *In re Tobacco II*, concluding that the named plaintiff in such actions must show actual reliance on the misrepresentation, and not just an injury and loss of money.[23] However, the court also held that once that plaintiff has established standing, the individual members of the class need not make such a showing as a precondition to certifying a class or recovering restitution.[24]

In making this distinction, the court acknowledged the continued goal of the UCL: to "'focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices."[25] The court further reaffirmed prior holdings and harmonized the new standing requirements imposed on named plaintiffs by Proposition 64 with the legislative intent that private litigants supplement the efforts of law enforcement and regulatory agencies by bringing actions under the UCL that benefit the public generally.[26] Finally, the court looked to the plain language of the UCL and concluded that because the standing requirements contained in Bus. & Prof. Code § 17203 applicable to individual claimants are not repeated in Bus. & Prof. Code § 17204 and made applicable to the "others" for whom relief is being sought, "the plain language of the statute lends no support to the trial court's conclusion that all unnamed class members in a UCL class action must demonstrate Section 17204 standing."[27] In short, once a named plaintiff can show he or she was injured and lost money as a result of fraud or misrepresentation, recovery can be sought for others who suffered similar monetary losses without showing individualized reliance on their part.[28]

The court resolved many questions in its decision in *Tobacco II*, concluding that the named plaintiff in such actions must show actual reliance on the misrepresentation, and not just an injury and loss of money.

The court in *Tobacco II* reversed the trial court's decertification order and remanded the case. Anticipating that there might be an issue with the named plaintiff's standing, the court emphasized that leave to amend should be liberally granted.[29]

Conclusion

UCL actions seeking restitution for nonparties will have to proceed as class actions. Individuals bringing such actions will have to demonstrate actual injury and loss of money as a result of the challenged practice. If fraud or misrepresentation is an element of the underlying unfair competition, then the named plaintiff will also have to demonstrate reliance. The traditional class-action elements will be applicable, including commonality and typicality. But these requirements do not mean that class members must show actual injury, loss of money, or reliance.

Whether these changes to the UCL have or will impact the number of UCL actions, much less the burden of such actions on local courts, is an open question. Admittedly, there are now disincentives to bringing the get-rich-quick sue-'em-and-settle UCL actions that became the rallying cry for Proposition 64 proponents. However, the courts, the legislature, and the state bar had intervened and taken action to publicize and reign in these abuses before Proposition 64 was placed on the ballot. UCL advocates have adjusted to the *Arias* and *Amalgamated* rulings. Actions that were still pending as non-class representative actions have been amended to add new named plaintiffs, and trial courts have recognized that these amendments should relate back under the doctrine of equitable tolling principles set forth in cases like *American Pipe & Construction Co. v. Utah*,[30] *Tarkington v. Cal. Unemployment Insurance Appeals Bd.*,[31] and *In re Tobacco II*.

It is clear that workers, tenants, consumers, and even businesses will continue to bring UCL actions as class actions or individually. Business interests that rallied around Proposition 64 may find that the greatest tangible result of the ballot measure is the increase in their legal fees as they pay for the discovery, notice, and motion work required for class certification. But, do these cases constitute a signal that the courts will turn a blind eye to unfair practices? I don't think so.

Endnotes

1. *In re* Tobacco II Cases, 46 Cal. 4th 298, 316–17 (2009).
2. Mangini v. R. J. Reynolds Tobacco Co., 7 Cal. 4th 1057 (1994).
3. Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163 (2000).
4. Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116 (2006).
5. *In re Tobacco II Cases*, 46 Cal. 4th at 316–317.
6. Californians for Disability Rights v. Mervyn's, *LLC*, 39 Cal. 4th 223 (2006).
7. *Id.* at 232.
8. Cal. Bus. & Prof. Code § 17200.
9. *Id.* § 17203.
10. *See Kraus*, 23 Cal. 4th 116.
11. *In re Tobacco II*, 46 Cal. 4th at 119.
12. Cal. Bus. & Prof. Code § 17203.

13. Cal. Code of Civ. Proc. § 382 was enacted in 1872 and codified the doctrine of virtual representation. *See* Fallon v. Superior Ct., 33 Cal. App. 2d 48, 50–51 (1939). The notion of "virtual representation" predates codified class action procedures and "rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice." Bernhard v. Wall, 184 Cal. 612, 629 (1921) (quoting 15 Ency. of Pl. & Pr. 629).
14. *See* Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 126, 137–38 (2000); *see also* Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 173 (2000)).
15. 46 Cal. 4th 969 (2009).
16. 46 Cal. 4th 993 (2009).
17. Justice Werdegar in her concurrence, however, acknowledged the important role of non-class representative actions brought by homeowner's associations, opining that:

> The majority, by simplistically construing Proposition 64's reference to "Section 382" (Bus. & Prof. Code, § 17203, as amended by Prop. 64) as requiring class certification in every instance, forecloses these other possibilities. I acknowledge that the practical difference between the majority's construction of Proposition 64 and my literal one is small. As I have explained, the vast majority of representative plaintiffs in UCL actions cannot hope to comply with section 382 except through class certification. Thus, my disagreement with the majority affects very few cases.

Arias, 46 Cal. 4th at 989 (Werdegar, J., concurring).
18. *Id.* at 980 (citations omitted).
19. *Amalgamated*, 46 Cal. 4th at 1002. The court's decision does not dismiss the associational standing doctrine, which recognizes that, under certain circumstances, unions may proceed on behalf of their membership. However, the union conceded in *Amalgamated* that it did not meet the injury-in-fact requirement under the UCL in its own stead, and the court dismissed the action on that basis after concluding that the UCL action could not be assigned. Similarly, the court refused to allow the union to proceed with an assigned claim under PAGA based on its holding that the action must be brought by an "aggrieved employee" as that term is defined in the PAGA. *Amalgamated,* 46 Cal. 4th at 1002.
20. Justice Werdegar's concurring opinion makes clear that neither Proposition 64, nor the court's decision in *Arias*, alter the fact that Cal. Code Civ. Proc. § 382 is not a class-action statute, and she differs with the majority's opinion that an action under the UCL could *never* proceed without class certification. *Arias*, 46 Cal. 4th at 989 (Werdegar, J., concurring).
21. *Arias*, 46 Cal. 4th at 985.
22. Cal. Bus. & Prof. Code § 17203.
23. The court carefully limited its holding, however:

> We emphasize that our discussion of causation in this case is limited to such cases where, as here, a UCL action is based on a fraud theory involving false advertising and misrepresentations to consumers. The UCL defines "unfair competition" as "includ[ing] any unlawful, unfair or fraudulent business act or practice. . . ." (§ 17200.). There are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application.

In re Tobacco II, 46 Cal. 4th at 325 n.17.
24. *Id.* at 313. The court also offered some tantalizing observations regarding injunctive relief, commenting that:

> It is conceivable that a named class representative who met the standing requirements under Proposition 64 could pursue a broad-based UCL class action in which only injunctive relief was sought on behalf of a class that was likely to, but had not yet, suffered injury arising from the unfair business practice. We need not decide here whether such an action would be proper.

Id. at 320 n.13.
25. *Id.* at 312 (citations omitted).
26. *Id.* at 313.
27. *Id.* at 316.
28. This article does not attempt to address the tension between this standard and demonstrating the existence of common questions of law and fact when certifying the class.
29. *In re Tobacco II,* 46 Cal. 4th at 328–29 (citing First Am. Title Ins. Co. v. Superior Ct., 146 Cal. App. 4th 1564, 1574 (2007); Branick v. Downey Savs. & Loan Assn., 39 Cal. 4th 235, 243 (2006)).
30. 414 U.S. 538, 553-54, (1974),
31. 172 Cal. App. 4th 1494, 1503 (2009).

ABA Section of Litigation
AMERICAN BAR ASSOCIATION

LITIGATION PRACTICE SOLUTIONS
Sponsor of the ABA Section of Litigation
LexisNexis®

Nonprofit Organization
U.S. Postage
PAID
American Bar Association

Section of Litigation
American Bar Association
321 N. Clark Street
Chicago, Illinois 60654

CADS report