BY MICHAEL MALLOW, AMY LALLY, AND SHAWN COLLINS

The Determinants of Class Certification After *In re Tobacco II*

CLASS ACTIONS ARE A POWERFUL TOOL for consumer plaintiffs who believe they were harmed by a defendant's false advertising, since they enable the aggregation of large numbers of claims that, if prosecuted separately, might be too small to justify the costs of litigating.[1] Indeed, a court's denial of class certification is commonly viewed as the death knell of the litigation.[2] In California as elsewhere, there are various prerequisites to obtain certification of a class action. These include that there be "a well-defined community of interest" among the class members, which, in turn, "'embodies three factors: (1) predominant common questions and law or fact [i.e., commonality]; (2) class representatives with claims or defenses typical of the class [i.e., typicality]; and (3) class representatives who can adequately represent the class [i.e., adequacy].'"[3]

When proscuted as a class action, a claim under the "fraudulent business practice" prong of California's Unfair Competition Law (UCL) is a powerful tool for consumers to attack false advertising.[4] To state such a claim, "it is necessary only to show that members of the public are likely to be deceived," and the claim traditionally "has been understood to be distinct from common law fraud," which requires a showing of deception.[5] While a false advertising class action under the UCL is potentially a very powerful tool, the UCL was far more threatening to business than it is today. Prior to the 2004 passage by California voters of Proposition 64, "the UCL authorized any person acting for the general public to sue for relief from unfair competition" without regard to the requirements governing class actions, and "[s]tanding to bring such an action did not depend on a showing of injury or damage."[6] In other words, just about anyone could bring a claim against any business about almost anything without ever interacting in any way with the business. After Proposition 64 passed, "a private person has standing to sue only if he or she has suffered injury in fact," and representative UCL actions must comply with the requirements governing all class actions.[7]

In re Tobacco II

In 2009, in *In re Tobacco II*,[8] a UCL case that had been pending in the trial court when Proposition 64 passed, the California Supreme Court held that the trial court improperly decertified a class of California smokers based on the change in the law and that the trial court should presume that absent class members relied on some type of misrepresentation by the tobacco company defendants concerning the risks of cigarettes. Since then, plaintiffs' counsel have relied on *Tobacco II* to argue that their clients may proceed on a on class-wide basis founded upon only the named plaintiffs' individual experiences with the advertising at issue, without regard to whether absent class members suffered actual injury caused by a defendant's allegedly fraudulent business practice. The decision has been hailed by plaintiffs' lawyers and derided by defense counsel as opening the door to unfettered California false advertising class actions. However, the California Supreme Court's ruling was not so broad as many thought, and opinions issued in the wake of *Tobacco II* show that state and federal courts in California have been careful to limit the case's application.

RICK EWING

Much of the confusion that has occurred in the wake of *Tobacco II* can be attributed to "standing" and "commonality" being conflated, even though they remain separate and distinct requirements for the maintenance of a class action. While *Tobacco II* may have tilted the playing field in favor of plaintiffs with regard to the issue of standing, defendants can still defeat class certification on the issue of commonality if the plaintiff cannot prove that class members were necessarily exposed to the advertisement that forms the basis of the UCL fraud claim.

In *Tobacco II*, a group of plaintiffs comprised of smokers in California filed a class action against several tobacco companies.[9] The complaint alleged a cause of action under the UCL based on a claim that the plaintiffs had become smokers after being exposed to the companies' false advertising and deceptive marketing activities within the state of California.[10] After Proposition 64 passed in November 2004, the tobacco companies filed a motion to decertify the class action claims under the UCL, arguing that "each class member was now required to show an injury in fact…as a result of the alleged unfair competition."[11] The trial court granted the motion, and the California Supreme Court subsequently granted review.

On review, the California Supreme Court addressed two specific questions: 1) Who in a UCL class action must comply with Proposition 64's standing requirements, the class representatives

Michael Mallow and Amy Lally are partners in the Los Angeles and Century City offices, respectively, of Sidley Austin LLP. Shawn Collins is an associate in the firm's Orange County office.

or all unnamed class members, in order for the class to proceed? and 2) What is the causation requirement for purposes of establishing standing under the UCL?[12] The court answered these two questions by ruling that 1) only the class representatives, and not absent class members, must meet standing requirements of actual injury and causation, 2) only the class representatives must establish actual reliance in accordance with fraudulent inducement principles in order for the class action to proceed, and 3) the class representatives do not independently have to show reliance on particular advertisements or marketing materials with unrealistic specificity.[13] In short, *Tobacco II* held that class certification cannot be defeated solely for lack of standing by absent class members.

While the California Supreme Court expressly limited its ruling in *Tobacco II* to the issue of standing, plaintiffs cite to language in the opinion for the notion that courts may presume reliance on some type of false or misleading representations when there is evidence of "an extensive and long-term advertising campaign."[14] In *Tobacco II*, the court presumed all class members relied on some type of misrepresentation based on the decades-long campaign of the tobacco industry to conceal the health risks of its product while minimizing the growing consensus regarding the link between cigarette smoking and lung cancer.[15]

The court in *Keegan v. American Honda Motor Company, Inc.*[16] made a similar presumption, on different facts. There, the plaintiffs moved for class certification on claims that the automobiles they purchased had defective rear suspensions, and they cited to *Tobacco II* as support for their argument that plaintiffs are permitted to prove a UCL violation with "general evidence that Defendants' conduct was 'likely to deceive' members of the public."[17] The court in *Keegan* held that plaintiffs satisfied the commonality requirement for class certification because "all class members received the same information from defendants regarding the purported defect—which is to say, no information concerning the possibility of premature and excessive tire wear."[18]

While many might have predicted that *Tobacco II* and *Keegan* were the beginning of a new trend, they remain the only two cases in which all class members were presumed to have been exposed to some type of false representation (or in *Keegan*, the absence of representations about the defect), and there is no language in either of these cases that suggests they apply beyond their unique facts. Of course, that has not prevented plaintiffs from relying on them to seek class certification, but courts have consistently denied such motions if they seek to expand *Tobacco II* and *Keegan* beyond their unique facts.[19]

For a defendant seeking to limit the impact of *Tobacco II* and *Keegan* on a court's decision on class certification, properly framing the inquiry as a question of commonality (exposure) and not a question of standing (reliance) will be key. A number of courts now have held that class certification in a UCL case is inappropriate when plaintiffs cannot show that members of the class were exposed to the same misrepresentations or any omissions.[20]

In *Cohen v. DIRECTV Inc.*,[21] the plaintiff alleged that DIRECTV advertised its high-definition satellite service "without the intent to provide the customers" with the advertised levels of resolution, and also that the defendant "switched its HDTV channels to a lower resolution, reducing the quality of the television images it transmits to subscribers."[22] The *Cohen* court affirmed the denial of class certification because the class would include subscribers: 1) who never saw DIRECTV advertisements of any kind before purchasing HD services, 2) who only saw or relied upon DIRECTV advertisements that contained no mention whatsoever of technical terms regarding resolution, or 3) who purchased DIRECTV HD primarily based on word-of-mouth or because they saw DIRECTV's HD in a store or at a friend or family member's home.[23] The court explained: "[W]e do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice."[24]

Similarly, in *McAdams v. Monier, Inc.*,[25] the court reversed a denial of class certification and remanded the matter to the trial court to determine whether the class representative could demonstrate standing under the *Tobacco II* standard but offered the following proviso: "The members of these classes, prior to purchasing…had to have been exposed to a statement along the lines that the roof tile would last 50 years, or would have permanent color, or would be maintenance free."[26] The day after the *McAdams* decision, another court of appeal issued its decision in *Pfizer Inc. v. Superior Court*, reversing the trial court's certification of a class consisting of "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005."[27] The court in *Pfizer* found that 19 of the 34 Listerine mouthwash bottles did not include a label with the alleged misrepresentation, and that, although Pfizer ran four different television commercials with the alleged misrepresentations, "the commercials did not run continuously and there is no evidence that a majority of Listerine consumers viewed any of those commercials."[28]

In *Mazza v. American Honda Motor Co., Inc.*, the Ninth Circuit reversed the certification of a nationwide class of consumers who purchased or leased cars equipped with a Collision Mitigation Braking System (CMBS) during a three-year period, holding that "[i]n the absence of the kind of massive advertising campaign at issue in *Tobacco II*, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading."[29] The plaintiffs had alleged that certain advertisements misrepresented the characteristics of the CMBS and omitted material information on its limitations.[30] In reversing class certification, the court in *Mazza* noted that "Honda's product brochures and TV commercials that were alleged to have been misleading and deceptive fell short of the 'extensive and long-term [fraudulent] advertising campaign' at issue in *Tobacco II* [], and [that the] difference is meaningful."[31] "For everyone in the class to have been exposed to the [alleged] omissions…it is necessary for everyone in the class to have viewed the allegedly misleading advertising."[32] The court ultimately held that "the limited scope of [Honda's] advertising [made] it unreasonable to assume that all class members viewed it."[33]

Theory of Common Exposure

For a defendant opposing certification of a UCL false advertising class action, presenting evidence that disrupts the theory of common exposure is critical. While the plaintiff certainly has the burden of establishing uniform exposure, defense counsel should, if at all possible, not merely rely on arguing that representative plaintiffs cannot establish uniform exposure. Affirmative evidence should be developed to drive the point home. Evidence of nonuniform exposure might include: various product labels for an offending product that do not contain alleged misrepresentations, advertising circulation data showing limited publication of advertisements, Internet data establishing that website views are far less than product sales, deposition testimony and declarations to the effect that purchasing customers were not exposed to offending representations, and expert witness testimony on the limited reach of an advertising campaign. This type of evidence creates significant roadblocks to named representatives establishing that a putative class was uniformly exposed to false or misleading representations.

Following *Tobacco II*, to establish stand-

ing on behalf of a class, named plaintiffs in a UCL representative action need only establish their own reliance on an alleged false advertisement. However, as one court observed, "*Tobacco II* does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution."[34] Accordingly, when a UCL complaint involves a fraud claim, courts have consistently held since *Tobacco II* that class representatives must show, at a minimum, that absent class members were actually exposed to the alleged misrepresentations. That courts have done so has presented defendants with a roadmap to opposing class certification, and plaintiffs' counsel with a bit of a Hobson's choice: define a class narrowly to encompass only those purchasers who in fact were exposed to a specific alleged false advertisement (and sacrifice the more lucrative possibilities of a larger class), or define it to more broadly cover purchasers of a product (and risk having class certification denied). ■

[1] In re Tobacco II Cases, 46 Cal. 4th 298, 313 (2009).
[2] *See, e.g.*, Shelley v. City of Los Angeles, 36 Cal. App. 4th 692, 695 (1995).
[3] Tobacco II, 46 Cal. 4th at 313 (citing Fireside Bank v. Superior Ct. 40 Cal. 4th 1069, 1089 (2007)). *See also* CODE CIV. PROC. §382.
[4] "The UCL defines unfair competition as 'any unlawful, unfair or fraudulent business act or practice....' ([BUS. & PROF. CODE] §17200.) Therefore, under the statute there are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent." Tobacco II, 46 Cal. 4th at 311. "A violation of the UCL's fraud prong is also a violation of the false advertising law ([BUS. & PROF. CODE] §§17500 *et seq*.)." Tobacco II, 46 Cal. 4th at 312.
[5] Tobacco II, 46 Cal. 4th at 312.
[6] *Id.* at 314.
[7] *Id.*
[8] *Id.* at 298.
[9] *Id.*
[10] *Id.*
[11] *Id* at 306
[12] *Id.*
[13] *Id.* at 321-29.
[14] *Id.* at 328 ("[W]here…a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements.").
[15] *Id.*
[16] Keegan v. Am. Honda Motor Co., Inc., 284 F.R.D. 504 (C.D. Cal. 2012).
[17] *Id.* at 533-34 (quoting Plascencia v. Lending 1st Mortgage, LLC, 259 F.R.D. 437, 448 (N.D. Cal. 2009)).
[18] *Id.*
[19] Cohen v. DIRECTV Inc., 178 Cal. App. 4th 966, 981 (2009) (finding *Tobacco II* to be irrelevant to the court's analysis of whether or not class certification was properly denied because the issue of standing is simply not the same thing as the issue of commonality); Pfizer Inc. v. Superior Ct., 182 Cal. App. 4th 622, 625 (2010) ("[t]he circumstances herein stand in stark contrast to those in *Tobacco II*, where the tobacco industry defendants allegedly violated the UCL 'by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease.'"); McVicar v. Goodman Global, Inc., No. 13-1223, 2015 WL 4945730 at *11 (C.D. Cal. Aug. 20, 2015) ("This case is different from cases like *Tobacco II* and *Keegan* where all class members may be presumed to have been exposed to some type of representations…[and] more like *Cohen*, where many members of the proposed class 'who never saw [] advertisements or representations of any kind before deciding to purchase the company's' product would have been swept into the class definition.").
[20] Cohen, 178 Cal. App. 4th at 981 (common issues did not predominate when the class would include subscribers who never saw [allegedly misleading] advertisements and representations of any kind before deciding to purchase the company's services); *see also* Stearns v. Ticketmaster Corp., 655 F. 3d 1013, 1020 (9th Cir. 2011) ("A presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant.").
[21] Cohen, 178 Cal. App. 4th at 966.
[22] *Id.* at 969-70.
[23] *Id.* at 979.
[24] *Id.* at 980.
[25] McAdams v. Monier, Inc., 182 Cal. App. 4th 174 (2010).
[26] *Id* at 192-93.
[27] Pfizer Inc. v. Superior Ct., 182 Cal. App. 4th 622, 625 (2010).
[28] *Id.* at 632-33.
[29] Mazza v. American Honda Motor Co., Inc., 666 F. 3d 581, 596 (9th Cir. 2012).
[30] *Id.* at 585.
[31] *Id.* at 596.
[32] *Id.*
[33] *Id.*
[34] Pfizer Inc. v. Superior Ct., 182 Cal. App. 4th 622, 632 (2010).