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ADVISORY

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CALIFORNIA SUPREME COURT ISSUES WATERSHED DECISION RELAXING STANDING AND LIABILITY REQUIREMENTS UNDER CALIFORNIA'S UNFAIR COMPETITION LAW

In a highly-anticipated ruling that may have significant negative consequences for companies doing business in California, the California Supreme Court issued its decision on May 18, 2009 in *In re Tobacco II Cases*. The opinion (1) will make it easier for plaintiffs to maintain class actions under California's Unfair Competition Law (UCL, Cal. Bus. & Prof. Code § 17200 et seq.); (2) may make it easier to obtain monetary judgments in UCL class actions; and (3) may make it easier to establish liability in both individual and class actions under the UCL based on alleged misrepresentations.

The decision arose out of a putative class action brought against the major US tobacco companies alleging what the plaintiff describes as a "decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease." Op. at 2. It examined the impact on the UCL of Proposition 64, the voter initiative passed by the California electorate in 2004 that was intended to sharply limit who was entitled to sue under the UCL, and thereby rein in what had been a notoriously anti-business statute. Before Prop 64, any individual, even if he had suffered no injury whatsoever, had been entitled to bring a lawsuit under the UCL on behalf of the general public, without satisfying any of the traditional class action requirements. Prop 64 appeared to have ended these "private attorney general" lawsuits by amending the language of the UCL to require UCL plaintiffs to have suffered an injury in fact and a loss of money or property as a result of the claimed UCL violation.

The first question before the Court was "who in a UCL action must comply with Proposition 64's standing requirements [injury in fact and loss of money or property], the class representatives or all unnamed class members?" The Court held that only the named plaintiffs must satisfy the standing requirements. This now allows plaintiffs to bring a type of lawsuit that may be unique to California—a class action where none of the absent class members has suffered any injury. In dissent, Justice Marvin Baxter (who was joined by two of his colleagues on the seven-justice court) described the ruling as creating "no-injury class actions." Dissent at 10. As Justice Baxter also noted, the ruling allows an individual to "be a party to a UCL…action as a class member even though he or she could not sue in his or her own name."

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Id. at 10-11. This contravenes the fundamental principle of law establishing that the class action is a purely procedural device designed to aggregate claims that could have been brought individually, and was never intended to enlarge any individual's substantive rights.

In dicta that will undoubtedly be seized on by the plaintiffs' bar, the Court also opined on the remedies available to absent class members. The Court stated that because these class members did not have to show any injury in fact or lost money or property, such class members could recover restitution (which is the only monetary relief available to private plaintiffs under the UCL) "without individualized proof of deception, reliance and injury if necessary to prevent the use or employment of an unfair practice." Op. at 23 n.14 (quoting *Fletcher* v. *Security Pacific National Bank*, 23 Cal. 3d 442 (1979)). The Court justified its view by stressing that the statutory language allows the restoration to plaintiffs of money or property that "***may*** have been acquired" by means of the asserted UCL violation. *Id*. at 22 (quoting Cal. Bus. & Prof. Code § 17203) (emphasis in original).

The Court's emphasis on this language and its re-affirmation of its 1979 *Fletcher* decision is out of step with its more recent UCL decisions, including, most notably, its decision in *Korea Supply* v. *Lockheed Martin Corp.*, which established that a UCL plaintiff may not recover money that was not taken directly from him by means of the asserted violation of the UCL. 29 Cal. 4th 1134 (2003). In his *Tobacco II Cases* dissent, Justice Baxter noted this disconnect by stating that "to the extent *Fletcher* and its progeny broadly suggested, under the UCL's 'may have acquired' language, that a private UCL action, individual or representative, could force disgorgement of unfair profits without strict regard to the persons from whom those profits were actually wrongfully obtained, we had, even before Prop 64, rejected any such notion." Dissent at 12 n.5 (citing *Korea Supply* and *Kraus* v. *Trinity Management Services, Inc.*, 23 Cal. 4th 116 (2000)). *Korea Supply* and *Kraus* were not overruled by *In re Tobacco II cases*, and these decisions will provide an important bulwark for the defense bar against the efforts that will surely be made to obtain monetary relief on behalf of people who suffered no injury.

The second question before the Court was "what is the causation requirement for purposes of establishing standing under the UCL [after Prop 64]" in a claim based on alleged misrepresentations? Op. at 2. This required the Court to construe the phrase "as a result of" in the statutory requirement restricting standing to those who have "suffered injury in fact and lost money or property as a result of" the alleged UCL violation. Cal Bus. & Prof. Code § 17204. The Court held that this language "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." Op. at 31. Of course, given the Court's answer to the first question, any reliance or causation requirement for standing now applies only to the named plaintiff(s).

The Court then went on to describe what a showing of "actual reliance" would require. It held that "a plaintiff does not need to demonstrate individualized reliance on specific misrepresentations to satisfy the reliance requirement." Op. at 32. Instead, where the plaintiff alleges exposure to a long-term advertising campaign (as the plaintiffs had in *In re Tobacco II Cases*), he or she will not be "required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." *Id*. at 34. The Court endorsed two Court of Appeal decisions brought against tobacco companies by individual plaintiffs, in which the jury's finding of reliance was upheld based on the plaintiffs' testimony that "their decision to begin smoking was influenced and reinforced by cigarette advertising, though neither could point to specific advertisements." *Id*. at 32-33. The Court also held that "a presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation was material." *Id*. at 31.

Plaintiffs will undoubtedly argue that the Court has significantly watered down the actual reliance requirement for claims under the fraud prong of the UCL (and possibly in common law misrepresentation cases) to the point where a plaintiff can establish reliance even if he has never seen or heard the alleged misrepresentations. However, this loose

view of the reliance requirement is inconsistent with the Court's own decision in *Mirkin* v. *Wasserman*, which, in the context of a common-law fraud claim, definitively rejected the notion that a plaintiff who has never heard or read the alleged misrepresentations can establish reliance. 5 Cal. 4th 1082 (1993). It accordingly remains to be seen how the Court's discussion of reliance will be applied by the lower courts. Moreover, the Court expressed no opinion at all on the causation requirements for the other two prongs of the UCL—the "unlawful" prong and the "unfair" prong.

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Companies doing business in California cannot be happy with the May 18, 2009 decision, which effectively has neutered Prop 64's effort to curtail frivolous UCL actions and will likely engender more UCL litigation. But, appellate opinions, including *Korea Supply* and *Kraus* and their progeny, should still provide defense lawyers with enough arrows in their quiver to prevent plaintiffs in UCL cases from recovering dollars on behalf of uninjured claimants.

If you would like more information about any of the matters discussed in this advisory, please contact your Arnold & Porter attorney or:

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