ARNOLD & PORTER LLP

Legal Developments In The Obama Era: Consumer Protection and Consumer Class Actions

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Minority Attorney Summit

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What Can We Expect in the Obama Era?

- More Federal Regulation
- Fewer Federal Preemption Defenses Against State Actions
  - The Obama Preemption Memo
- More Consumer Class Actions
- Pro-Plaintiff Trends
- Pro-Defendant Trends
- Recent Major Class Actions Handled by Arnold & Porter
- What Does the Future Hold?

More Federal Regulation: FTC Enforcement

- FTC's Bureau of Consumer Protection staff has become more aggressive in enforcement.
  - Current Bureau director, David Vladeck, has public interest background – spent almost thirty years litigating cases for Public Citizen, a national nonprofit consumer advocacy organization.
  - BCP intends to implement higher standards for advertising claims, specifically, the types of scientific evidence necessary to substantiate claims.
    - Use of preemptive Consent Orders to enforce standards.
  - BCP collaboration with plaintiffs' lawyers during investigation
    - In recent significant case, Ps' lawyer met w/FTC; we had no insight into those meetings.
    - However, the Bureau does have a history of trying to keep attorneys' fees reasonable.

FTC Collaboration with Other Agencies and States

- Current BCP director intends to increase FTC collaboration with other agencies, particularly the FCC in efforts to protect phone and internet consumers.
- BCP also intends to increase collaboration with State Attorneys General in bringing consumer protection cases.
  - One important effect will be to facilitate settlements with companies facing the possibility of multiple enforcement actions.
- State AGs frequently associate with private firms to bring civil litigation on behalf of governmental entities, such as counties.
  - A&P challenging this in lead paint case (Cal. Supreme Court).

More Federal Regulation: Additional Examples

- FDA Regulation of Product Labeling
  - New FDA Commissioner Margaret Hamburg, M.D. announced that reliable nutrition labeling is a top priority of the FDA.
    - Encouraged all companies to review their labeling, Oct, 2009.
  - New FDA Front-of-Package Labeling Initiative.
    - FDA to issue new guidance and to work with industry.
    - Warning letters sent to 17 manufacturers for regulation violations.
- Nationwide Menu Labeling Law
  - Signed by President Obama March 23, 2010.
  - Amendment to Nutrition Labeling and Education Act of 1990.
  - Requires restaurants and others to list calorie information and provide additional nutritional information on request.
- Obama's Financial Reform Bill
  - Creation of Consumer Financial Protection Agency

Fewer Federal Preemption Defenses Against State Actions

- Under Bush Administration, preemption was used by federal agencies to attempt to preempt state tort law actions.
  - *E.g.*, the preamble to a 2006 United States Food and Drug Administration (FDA) labeling regulation stated that the FDA's approval of a prescription drug's label "preempts conflicting or contrary State law," including lawsuits seeking to hold drug manufacturers liable for failing adequately to warn of a drug's dangers.
- Since 2005, seven federal agencies had issued over 60 proposed or final rules that were accompanied by similar introductory statements.

The Obama Preemption Memo - May 20, 2009

- The Preemption Memo rebuked these preemption policies and had three directives:

(1) Agencies should not include preemption statements in regulatory preambles statements except where preemption provisions are also included in the actual regulation.

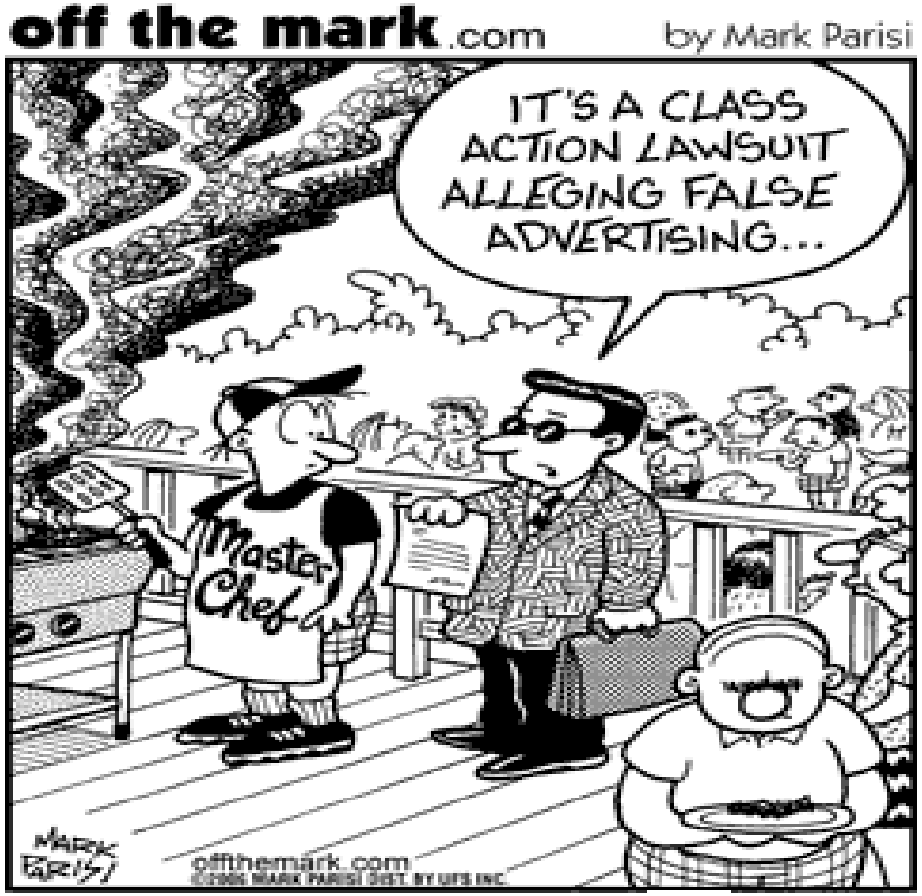
(2) No preemption provisions in regulations except where justified under legal principles governing preemption.

(3) Regulations issued within the past 10 years that contain such preemption statements should be reviewed to decide whether they are justified. If not justified, that agency should initiate appropriate action, which may include amending the regulation.

What Are The Possible Impacts Of The Obama Preemption Memo?

- Preemption Memo ended Bush administration's effort to expand scope of federal preemption of state tort law via federal regulation.
- Memo signals that companies will be far less likely to be able to invoke federal preemption to defend against state consumer class actions.
- Still too early to understand the full impact of the Memo, but a logical result will be more state tort law actions and consumer class actions against corporations.

More Consumer Class Action Suits



More Private Litigation Under State Consumer Protection Acts

- **Northwestern Law – Searle Civil Justice Institute Study** (December 2009)
  - Litigation under CPAs has increased dramatically since 2000.
  - Between 2000 and 2007, 119% increase in the number of CPA decisions reported in federal district courts and state appellate courts.
  - Between 1995 and 2007, the expected value of recovery increased dramatically.

Why Has There Been A Growth In Consumer Litigation Under CPAs?

- **According to the Searle Study:**
  - Vague statutory definitions of prohibited conduct are a major driver .
  - CPAs are becoming more favorable and generous to consumer litigants.
  - Most CPA claims would not constitute illegal conduct under FTC standards.
  - Almost 40% of CPA claims where the consumer plaintiff prevailed would not constitute illegal conduct under FTC standards.
    - However, that may change under the new BCP.

State CPAs Compared To FTCA

- Federal Trade Commission
  - broad statute
  - specific regulations supplemented by guidelines
  - enforced administratively and in federal court by government
  - **no private right of action**
- State Consumer Protection Acts
  - broad statutes (vary state by state)
  - usually no regulations or guidelines – just case law
  - enforced in federal or state court by government
  - **also enforced by private parties**

State Consumer Protection Acts

- Little FTC Acts
  - bar "false and misleading" advertising
  - some bar "unfair competition" (e.g., California § 17200)
- Specific Practices Acts
  - outlaw specific practices such as
    - "bait and switch"
    - misrepresenting the "nature, quality, and condition" of goods
- Common Law Claims (Contract and Tort)
  - breach of express/implied warranty
  - negligent/intentional misrepresentation

Pro-Plaintiff Trends

- 9th Circuit *Gerber* Ruling and Subsequent Cases
- California Supreme Court's *Tobacco II* Ruling
- Upcoming *Kwikset* Ruling

Williams v. Gerber (9th Cir. 2008)

- Ninth Circuit reversed dismissal of putative class action alleging Gerber's marketing of its "Fruit Juice Snacks" violated California CPAs.
  - Plaintiffs alleged that the depiction of fruit on the front of the product's box was misleading because the fruit was not included in the product.
  - District Court dismissed the case, stating that "no reasonable consumer" could conclude the depicted fruit was actually in the product upon review of the packaging as a whole, including the ingredient list.

Williams v. Gerber (9th Cir. 2008) (cont.)

- Ninth Circuit disagreed, finding that
  - "reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."
- This ruling opened the flood-gates for class actions in California against food companies.
- Now easier for a case to survive a motion to dismiss where a product's packaging inadvertently creates misleading impressions about a product.
  - However, compare to products with fanciful fruit-like words: "froot" or "crunchberries" which could not deceive a reasonable consumer.

California Cases: *In re Tobacco II*

- After Prop. 64, private plaintiffs only have standing to bring UCL claims if they can allege "lost money or property," in addition to injury-in-fact. Cal. Bus. & Prof. Code § 17204.
- *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009)
  - Cal. Supreme Court ruled that only the named plaintiff in a class action must meet Prop. 64's standing requirements.
    - Absent class members need not satisfy those requirements – *i.e.*, not have suffered any harm!
  - Dissent: this holding "turns class action law upside down and contravenes [Prop. 64's] plain intent."

California Cases: *In re Tobacco II*

- Implications remain unsettled – recent California appellate court decisions have limited *Tobacco II* to standing issues, and not to whether the court should actually certify the class.

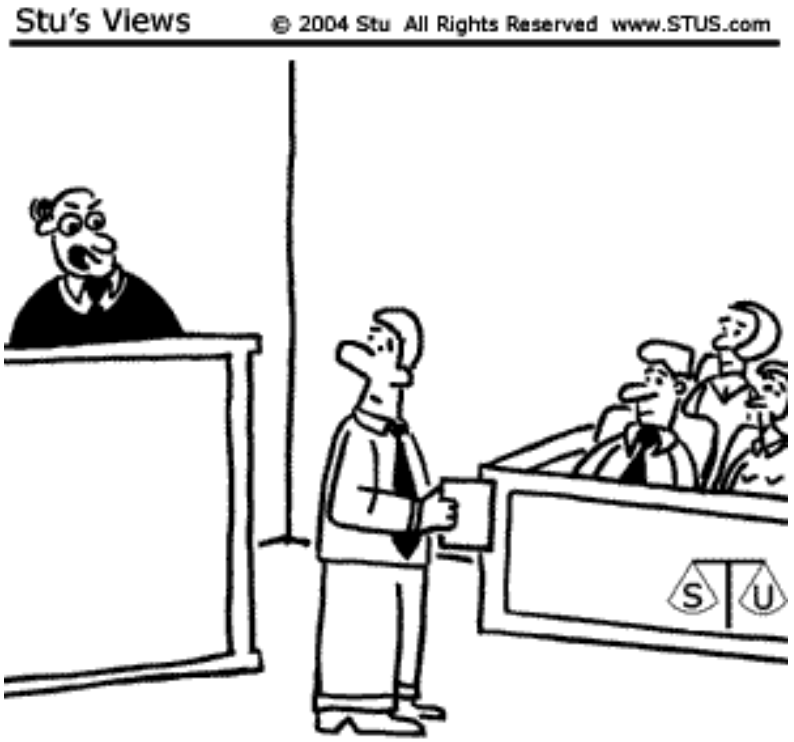
  - *But see McAdams v. Monier*, 182 Cal. App. 4th 174 (Feb. 24, 2010) – relying on *Tobacco II* in upholding certification of a class brought under the CLRA and UCL, even though individual questions of reliance and damages existed, because "individualized proof of reliance and injury is not required for non-representative class members."

California Cases: *Kwikset*

- *Kwikset Corp. v. Sup. Ct.*, 171 Cal. App. 4th 645 (2009)
  - California Court of Appeal held plaintiffs who purchased locksets under the false impression they were "made in the USA" had suffered "injury-in-fact," but had not "lost money or property" where product was perfectly functional.
  - No allegations that locksets were defective, not worth purchase price, or cost more than similar products without false country of origin labels.
  - Accordingly, plaintiffs did not have standing under Prop. 64.
  - Pending Cal. Supreme Court review.

Pro-Defendant Trends

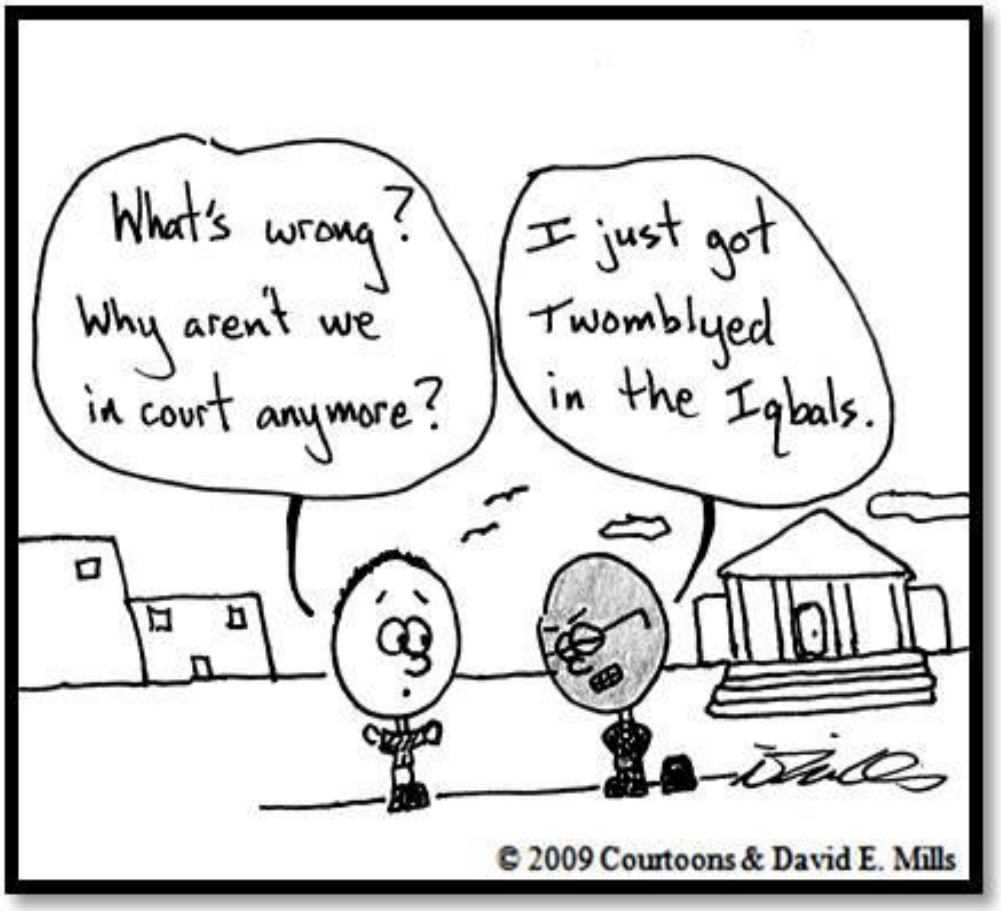
- Class Action Fairness Act Trend Toward Federal Court
- *Iqbal/Twombly* Heightened Pleading Standard
- Considering Merits at Class Certification Stage



2005 Federal Class Action Fairness Act

- CAFA has diverted large class actions from state court to federal court.
  - In addition to requiring only minimal diversity, CAFA loosened procedural requirements for removal by allowing any defendant to remove without obtaining the consent of any of the others.
- Enacted to remedy what Congress saw as "class action abuses taking place in state courts."
- According to a 2008 Study by the Federal Judicial Center, the average number of consumer protection/fraud class actions filed in or removed to federal court has more than tripled.
- Obama voted in favor of CAFA.
  - In 2008, during presidential debates, he reiterated that he had supported "tort reform" by voting for CAFA.

Twombly/Iqbal – Stricter Rule 8 Pleading Standards?



Bell Atlantic v. Twombly, 550 U.S. 544 (2007)

- In *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d. Cir. 2005), Second Circuit applied generally accepted pleading standard that there was "no set of facts" under which plaintiffs could prevail in reversing dismissal of an alleged violation of Section 1 of the Sherman Act.
- The Supreme Court reversed, rejecting the old standard, and holding that plaintiffs must plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556.
  - The Court held that "because the plaintiffs have not nudged their claims across the line from conceivable to *plausible*, their complaint must be dismissed." *Id.* at 570 (emphasis added).

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)

- *Ashcroft v. Iqbal* (2009)
  - Reinforced *Twombly's* pleading requirements.
  - Confirmed that the *Twombly* standard applies to *all* civil cases, not just antitrust or complex cases.
  - Established rigorous two-part test for a complaint to survive a motion to dismiss

    (1) courts should identify and disregard allegations that merely state a legal conclusions;

    (2) courts should consider whether the ***facts*** alleged, taken as true, "plausibly give rise to an entitlement to relief." 129 S. Ct. at 1950.

Impact Of *Twombly/Iqbal*

- Post-*Iqbal*, federal courts have applied the new pleading standard to dismiss claims in many contexts, including civil rights, fraud, bankruptcy, products liability, and securities.
- It is still too early to draw generalized conclusions about how courts are interpreting these pleading requirements.
  - Some courts continue to rely on pre-*Twombly* case law to support idea that legal conclusions need not be accepted as true.
  - Many rulings suggest that *Twombly* and *Iqbal* are providing a new framework for familiar pleading principles, rather than an entirely new pleading standard.

No Relief For Hypothetical Injuries

- Recent trend by plaintiffs' lawyers to try to convert potential "personal injury" claims into "consumer protection" class actions by bringing them as false advertising or other types of claims.

- *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009)
  - Plaintiffs alleged the iPod is defective because it poses an unreasonable risk of noise-induced hearing.
  - Plaintiffs brought several breach of warranty claims and an unfair competition claim under California's UCL.
  - District Court determined plaintiffs failed to sufficiently plead an implied warranty claim and lacked standing under the UCL.

Birdsong v. Apple, Inc.

- Ninth Circuit affirmed.
  - No breach of warranty claim – although iPod *capable* of playing loud music for long duration, that only means users can choose to take risks with their hearing, not that the iPod was defective.
  - Plaintiffs had no standing under the UCL because:
    - No alleged injury-in-fact – merely alleged potential risk of hearing loss, not to themselves, but to unidentified users who choose to use the product unsafely.
    - No alleged "loss of money or property" - any supposed "reduced value" based on a hypothetical risk of hearing loss.

Tightening of Federal Class Certification Standards

- Trend in federal appellate courts towards more rigorous class certification standards that mirrors the change in pleading requirements.
  - *E.g., In re IPO* (2nd Cir. 2006) and *In re Hydrogen Peroxide* (3rd Cir. 2008)
- Trend is away from lenient standard rooted in the Supreme Court case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), where Court found that nothing in Rule 23 allowed a court "to conduct a preliminary inquiry into the merits of a suit" in deciding whether a class could be maintained.

Tightening Of Federal Class Certification Standards (cont.)

- In 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 9th Circuits, a court must determine that plaintiff has satisfied all of the requirements for a class action under Rule 23, and can no longer presume that the allegations in the complaint are true.
- Courts must examine all of the evidence bearing on certification, including expert testimony and other evidence submitted by defendants.
  - Court must resolve factual disputes before deciding whether to certify a class.

Another Roadblock To Class Certification: Differences In State Consumer Protection Laws

- Proposed nationwide classes can be unmanageable due to differences in state consumer protection statutes
  - The many differences among states include statutes of limitations, scienter requirements, and calculation of damages.
- Courts are reluctant to certify a nationwide class due to this variability.
  - *See, e.g.*, *In re Bridgestone/Firestone*, 288 F.3d 1012, 1017-18 (7th Cir. 2002) ("State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's laws to sales in other states with different rules.")

The Plaintiffs' Bar Strikes Back

- CAFA
  - Plaintiffs avoid "minimal diversity" rule of CAFA by choosing not to sue potential defendants that are diverse.
- *Twombly/Iqbal*
  - Plaintiffs' bar has sought help from Congress – Sen. Arlen Specter has introduced a bill that would overrule *Twombly* and *Iqbal* and reinstate the old pleading standard. The bill remains in committee.
- Class Certification
  - Many plaintiffs' lawyers believe that the *In re IPO/In re Hydrogen Peroxide* line of decisions impermissibly requires district court judges to act as factfinders.
  - These lawyers fight this trend in circuits that have not yet taken a firm position on the issue.

Recent Major Consumer Class Actions Handled By Arnold & Porter

- **Trans Fat Litigation**
  - We represent The Quaker Oats Co. and The Kroger Co. in two of the first consumer class actions involving labeling of trans fats on packaged foods. These cases are pending in the Northern and Central Districts of California.
- **Applebee's Menu Litigation**
  - We represent Applebee's International, its parent company, DineEquity, and its licensor, Weight Watchers International, in six consumer class actions filed around the country challenging the accuracy of the nutritional information on the Weight Watchers portion of the Applebee's menu.

Recent Major Consumer Class Actions Handled By Arnold & Porter

- **Dietary Supplements**
  - We represented the manufacturer of two dietary supplements, one advertised for appetite suppression and the other for joint flexibility, in a consumer class action filed in federal court in Los Angeles.
- **Convenience Stores**
  - The firm has represented a major convenience store franchisor in a number of UCL and FAL consumer class actions involving, among other things, the sale of California State Lottery tickets and pre-paid phone cards.

Recent Major Consumer Class Actions Handled By Arnold & Porter

- **Gasoline**
  - We serve as lead defense counsel in the series of nationwide class actions alleging that consumers have been harmed by purchasing gasoline on a volumetric gallon basis because fuel expands when the temperature rises.
- **Tobacco**
  - We are currently defending a tobacco company in multiple class action cases involving allegations that use of the word “lights” deceived consumers into believing that the cigarettes were safer than other cigarettes.

Recent Major Consumer Class Actions Handled By Arnold & Porter

- **Vitamins**
  - In a case that generated significant national publicity, the firm represented a health supplement retailer in suits filed in multiple jurisdictions alleging excessive lead in a multivitamin as well as less calcium than indicated by the label. A state court settlement followed a multiparty mediation.
- **Yogurt**
  - Arnold & Porter represented a yogurt manufacturer in multiple class actions by plaintiffs alleging that the company's claims related to digestive comfort and immune system health are false and misleading.

Recent Major Consumer Class Actions Handled By Arnold & Porter

- Others
  - **Banking Products and Services:** The firm regularly represents financial institutions in class action cases asserting UCL, FAL, CLRA, and similar deceptive trade practices claims.
  - **Credit Cards**: The firm represents a major credit card company in California consumer putative class actions brought under the UCL and California's Cartwright Act.
  - **Deposit Account Posting Order:** The firm defended a putative consumer class action challenging the order in which a national bank posts debit card and other transactions to consumer deposit accounts and the number and amount of the resulting overdraft fees assessed on such accounts.

Others (cont.)

- **Extended Service Plans:** The firm represents the financial services arm of a major motorcycle manufacturer in a nationwide consumer class action, wherein plaintiffs alleged that the company's practice of advertising its deductible policy (including certain exemptions) was deceptive.
- **Payment Dates:** The firm successfully defended a UCL action brought by a group of bank customers, challenging the assessment of interest and late fees on credit card accounts, when payments on the account were made on the first business day following a weekend or holiday due date.
- **Bluetooth:** Arnold & Porter represented a major Bluetooth headset manufacturer in a series of class actions alleging failure to warn of risks of noise-induced hearing loss.

Others (cont.)

- **Internet Domains:** The firm represented a large Internet domain name registrar in multiple class actions alleging violations of the UCL in connection with the marketing of its domain name registration services.
- **Mobile Content:** We represented a provider of mobile content regarding the evolving practice of selling and delivering products directly to customers using advanced messaging technology.
- **Text Messaging Promotions**: We represent a technology company in two cases pending in California federal court in which the plaintiff class alleges that our client engaged in unfair competition.

What Does The Future Hold?

- Uncertainty.
- The law will continue to develop and unfold as new theories are tested out and older ones evolve.
- More federal regulations and more class actions.