

COURT OF APPEAL ISSUE TWO FAVORABLE POST-TOBACCO II OPINIONS AFFIRMING DENIAL OF CLASS CERTIFICATION MOTIONS OF FRAUD-BASED UCL CLAIMS

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Kaldenbach v. Mutual of Omaha Life Ins. Co.

In *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, ___ Cal. App. 4th ___ (4th Cal. App. Div. 3, Sep. 30, 2009) (order modified for publication on October 26, 2009), the Fourth Appellate District (Div. 3, Orange County) affirmed the trial court's denial of a motion for class certification of a UCL class action based upon the plaintiff's failure to submit evidence demonstrating predominating common questions.

The plaintiff sued under California's Unfair Competition Law ("UCL") on the ground that the defendant misled people into purchasing "vanishing-premium" life policies based on the "assertion [that the defendant] utilized uniform sales materials, training, and illustrations in marketing" these life policies. Despite the submission of multiple declarations in support of the motion by those who purchased these policies, the trial court found that "there was no evidence linking those common tools to what was actually said or demonstrated in any individual sales transaction."

The Fourth Appellate District affirmed denial of certification under the UCL and distinguished the individualized nature of statements made in a face-to-face sales setting from those made in cases, such as *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), where there is no dispute over what was and was not presented to the class. [Exh. A, pp. 20-23.] Further, the *Kaldenbach* court noted that:

"[S]eparate from whether any individual purchaser relied on alleged misrepresentations, or suffered injury as a result, here the determination of what business practices were allegedly unfair turns on individual issues. The trial court could properly conclude there was no showing of uniform conduct likely to mislead the entire class, and the viability of a UCL claim would turn on inquiry into the practices employed by any given independent agent – such as whether the agent involved in any given transaction took Mutual's training and read Mutual's manuals, used the training and materials in sales presentations, and what materials, disclosures, representations and explanations were given to any given purchaser. The trial court did not abuse its discretion in concluding those issues predominated and could not be proven on a class-wide basis." [Opinion, p. 23.]

A copy of the opinion can be found [here](#).

Cohen v. DirecTV Inc.

The Second Appellate District (Div. 8, Los Angeles) also recently affirmed the denial of another motion for class certification. In the *Cohen* case, a DirecTV subscriber sued the company for allegedly disseminating false advertisement to induce him and the putative class to purchase more expensive "high definition" or "HD" services, which were not allegedly provided.

In affirming the trial court's order, the Second Appellate District stated:

"The record supports the trial court's finding that common issue of fact do not predominate over the proposed class because the class would include subscribers who never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services, and subscribers who only saw and/or relied upon advertisements that contained no mention of technical terms regarding bandwidth or pixels, and subscribers who purchased DIRECTV HD primarily based on word of mouth or because they saw DIRECTV's HD in a store or at a friend's or family member's home. In short, common issues of fact do not predominate over Cohen's proposed class because the members of the class stand in a myriad of different positions insofar as the essential allegation in the complaint is concerned, namely, that DIRECTV violated the CLRA and the UCL by inducing subscribers to purchase HD services with false advertising. [Opinion, pp. 13-14.]

In distinguishing its holding from *In re Tobacco II Cases* (which has been relied upon by the plaintiff's bar to contend that issues of "reliance" and "damages" are not relevant considerations for determining whether a UCL class should be certified), the *Cohen* court stated:

"The trial court correctly ruled that actual reliance must be established for an award of damages under the CLRA. [] Although the rules under the UCL may or may not be different following our Supreme Court's recent decision in *In re Tobacco II Cases* (2009) 46 Cal.4th 298 (*Tobacco II*), an issue which we address below, we 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. In other words, we find the trial court expressed a 'valid reason' for denying class certification when it examined the nature of the claims in Cohen's case, and juxtaposed those claims against the respective positions of the class members." [Opinion, p. 14.]

The Supreme Court's recent decision in *Tobacco II*, supra, 46 Cal.4th 298 does

Further, the *Cohen* court noted that:

"In the contextual setting presented by Cohen's present case, we find *Tobacco II* to be irrelevant because the issue of 'standing' simply is not the same thing as the issue of 'commonality.' Standing, generally speaking, is a matter addressed to the trial court's jurisdiction because a plaintiff who lacks standing cannot state a valid cause of action. [] Commonality, on the other hand, and in the context of the class certification issue, is a matter addressed to the practicalities and utilities of litigating a class action in the trial court. We see no language in *Tobacco II* which suggests to us that the Supreme Court intended our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification. On the contrary, the Supreme Court reiterated the requirements for maintenance of a class action, including (1) an ascertainable class and (2) a 'community of interests' shared by the class members. (*Tobacco II*, supra, 46 Cal.4th at pp. 312-313.) In short, the trial court's concerns that the UCL and the CLRA claims alleged by Cohen and the other class members would involve factual questions associated with their reliance on DIRECTV's alleged false representations was a proper criterion for the court's consideration when examining 'commonality' in the context of the subscribers' motion for class certification, even after *Tobacco II*." [Opinion, pp. 15-16.]

A copy of the *Cohen* decision can be found [here](#).