

Class Action Defense Strategy Blog

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Fourth District Court of Appeal Upholds Two Denials of Class Certification: Addresses *In Re Tobacco* Cases and Acknowledges Differences in Damages Can Defeat Certification

By [*Ruben Escalante*](#)

Two recent Fourth District Court of Appeal cases affirmed the denial of class certification. *Kaldenbach v. Mutual of Omaha Life Insurance Co.*, 178 Cal.App.4th 830 (2009), was one of the first cases to address the California Supreme Court's decision in the *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009). *Evans v. Lasco Bathware, Inc.*, 178 Cal.App.4th 1417 (2009), held that differences in damages could be a reason for denying class certification.

In *Kaldenbach*, the Fourth District Court of Appeal affirmed the trial court's denial of class certification. In this case, the plaintiff attempted to certify a class of consumers who purchased so-called "vanishing premium" life insurance policies, claiming that the defendant violated the UCL by misleading them into believing they would eventually not have to pay any premiums for their coverage. The court held that there were individualized inquiries as to whether there was an actual unfair business practice by the defendant. The defendant sold its policies through independent agents who were not required to attend training, utilize any given sales materials, or adhere to a scripted sales presentation. The plaintiff attempted to use the California Supreme Court's recent decision in *In re Tobacco II Cases*. The Court of Appeal held that the *In re Tobacco II Cases* could not be used to overcome such individual inquiries because the *In re Tobacco II Cases* involved "identical misrepresentations and/or nondisclosures by defendants made to the entire class." Id. at 849.

In *Evans*, the Fourth District Court of Appeal affirmed the trial court's denial of class certification in a consumer class action. In this case, the plaintiffs owned homes in which shower pans manufactured by the defendant were installed. The plaintiffs claimed the pans were defective and caused damage to their property. The plaintiffs sought recovery on behalf of the class only for the costs of removing and replacing the shower pans and "expressly excluded" any consequential damages caused by the water leakage.

The court held that the class representative was inadequate because the complaint attempted to limit the potential damages sought so as to avoid individualized inquiries. The court also held that there was substantial evidence to support the finding that the common issue of whether the shower pan was defectively or negligently designed did not predominate “over individualized questions of damages” *Id.* at 363. The court specifically stated, “although a trial court has *discretion* to permit a class action to proceed where the damages recoverable by the class must necessarily be based on estimations, the trial court equally has discretion to deny certification when it concludes the fact and extent of each member's injury requires individualized inquiries that defeat predominance.” *Id.* at 366 (emphasis in original).