

California Appellate Court Affirms Trial Court's Order Holding Putative UCL Class Should Not Be Certified

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In a decision published October 26, 2009, a unanimous panel of the Fourth Appellate District, Division Three, affirmed the trial court's order denying class certification in a case handled by Barger & Wolen, *Kaldenbach v. Mutual of Omaha et. al.* Among other things, the court of appeal held that the California Supreme Court's recent decision in *In re Tobacco II Cases*, 46 Cal.4th 298 (2009) ("*Tobacco II*") did not mandate reversal of the trial court's decision.

Kaldenbach's case arose from his purchase of an alleged "vanishing premium" life insurance policy. He claimed that, when he purchased an "Advantage Life" universal life insurance policy from Defendant Mutual of Omaha Life Insurance Company ("Mutual"), his agent represented that he would have to pay only four annual premiums, after which he would never have to pay another premium. Kaldenbach alleged those oral representations were false, as he later was required to pay more than four premiums to keep his policy in force. Seeking to transform his individual dispute into a class action, Kaldenbach also alleged that Mutual committed "class-wide" misrepresentations and omissions in scripted presentations and standardized marketing and training materials which, among other things, supposedly violated California's Unfair Competition Law, *Business and Professions Code* section 17200 *et seq.* ("UCL").

In opposing class certification, Mutual showed that the class allegations involved thousands of individualized point-of-sale transactions between a policy owner and an agent — a scenario that courts consistently hold is not subject to class treatment. Mutual's evidence demonstrated that Kaldenbach's case, like those of the other putative class members, was based upon the unique dialogue between an agent and a policy owner, and that marketing materials, agent training and sales illustrations were not uniform. The trial court denied class certification, holding that Kaldenbach failed to meet any of the criteria required for class certification. Kaldenbach thereafter filed an appeal.

Prior to the hearing on Kaldenbach's motion for class certification, Californians passed Proposition 64 ("Prop 64"), which limited standing under the UCL to a "person who has suffered injury in fact and has lost money or property as a result of [such] unfair competition." See *Business and Professions Code* § 17204. Additionally, Prop 64 mandated that UCL representative actions satisfy class action requirements under California Code of Civil Procedure section 382. At the time the trial court decided Kaldenbach's class certification motion, *Tobacco II* — which raised the issue of whether, after Prop 64, *each class member* was now required to show an injury in fact, consisting of lost money or property, as a result of the alleged unfair competition — was pending before the California Supreme Court.

After Kaldenbach and Mutual completed their briefing and oral argument on appeal, the Supreme Court issued its opinion in *Tobacco II*, holding that, to demonstrate standing to pursue a UCL claim as a class action, *only the named plaintiff must show an injury in fact*, consisting of lost money or property, as a result of the alleged unfair competition. *Tobacco II, supra* at 305-306, 324. The Supreme Court explained that the "standing requirements are applicable only to the class representatives, and not all absent class members." *Id.* at 306. Significantly, the Supreme Court also concluded that "Proposition 64 was not intended to, and does not, impose

section 17204's standing requirements on absent class members in a UCL class action where class requirements have otherwise been found to exist." *Id.* at 324.

In light of *Tobacco II*, the court of appeal in *Kaldenbach* requested further briefing on UCL class action issues. In one of the first appellate decisions to interpret *Tobacco II*, the court of appeal affirmed the trial court's decision, rejecting Kaldenbach's argument that class certification was appropriate because reliance need not be proven on a class-wide basis under the UCL. The court of appeal reasoned that reliance was only one of the individualized issues noted by the trial court. Moreover, unlike *Tobacco II*, which involved identical misrepresentations and/or nondisclosures made to the entire class, in Kaldenbach's case, no evidence linked alleged sales materials, training or illustrations to what was actually said or demonstrated in any sales presentation. Accordingly, the appellate court held that individualized issues predominated as to whether Mutual in fact committed an unfair business practice that was "likely to mislead" the putative class.

Ed Oster, Sandra Weishart and Misty Murray of Barger & Wolen are counsel for Mutual.