

Class Action Defense Strategy Blog

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Pfizer: The Court of Appeal Rinses Away the *Tobacco II* Aftertaste

By [Paul Seeley](#) and [Fred Puglisi](#)

In Pfizer, Inc. v. Superior Court, ___ Cal. App. 4th ___ (March 2, 2010), the Court of Appeal, Second District, applied In re Tobacco II Cases, 46 Cal. 4th 298 (2009) ("Tobacco II") to overturn an order granting class certification. The Pfizer opinion resuscitates traditional class certification opposition strategies based on the unfair competition law (the "UCL") even in the wake of Tobacco II's holding.

Pfizer revolves around a six-month advertising campaign Pfizer used to promote Listerine mouthwash. During the six months between June 2004 and January 2005, some Listerine bottles bore a label that claimed Listerine was "as effective as floss" in reducing plaque and gingivitis. The plaintiff filed a class action lawsuit alleging violations of the UCL on the basis of the alleged fraudulent advertising and sought restitutionary disgorgement of the amounts the class members paid for Listerine.

The significance of the Pfizer opinion comes, in no small part, from its procedural history. The trial court certified a class of "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." Pfizer sought writ relief, which the Court of Appeal granted on the basis that Proposition 64 required that the representative plaintiff show that the putative class members must have "suffered injury in fact and lost money or property as a result of [the] violation." The case then went to the California Supreme Court, which ordered the Court of Appeal to vacate and reconsider the decision in light of Tobacco II, which held that class representatives did not need to show each class member had standing under the UCL. This Pfizer opinion represents the Court of Appeal's "reconsideration" of its previously vacated decision with a full analysis of Tobacco II's impact on the trial court's class certification order.

In reversing the certification order, the Court of Appeal focused on language from Tobacco II regarding the UCL's available remedies. As the court noted, even while individualized proof of

lost money or property is not necessary for class certification, Tobacco II states that the restitutionary remedies will only return "money or property that 'may have been acquired' by means of the unfair practice." Tobacco II, 46 Cal. 4th at 320. Thus, the Pfizer court concluded that a person who was not exposed to the "alleged misrepresentations... could not possibly have lost money or property as a result of the unfair competition" and cannot, therefore, collect restitution. Pfizer, at *10.

As persons who were not exposed to the alleged violations cannot collect restitution, the Pfizer court held that the certified class of all Listerine consumers was "grossly overbroad." The court pointed to evidence that showed that there were 34 different Listerine bottles in existence during the relevant time period and 19 of those bottles never included the alleged false advertising. Furthermore, there were four different television commercials that contained the "effective as floss" statements but there was no evidence suggesting the majority of the class members saw those commercials. Thus, there was no evidence that even a majority of the putative class saw the alleged misrepresentation and even less evidence that they made their decision to purchase Listerine based on that misrepresentation.

The Pfizer court differentiated these facts from the Tobacco II scenario. In Tobacco II, the alleged misrepresentations were made during a decades-long, pervasive campaign to misrepresent the dangers of smoking. The class in Tobacco II, therefore, was composed of people who "may have lost money by means of the unfair practice" due to the pervasive campaign that all of the class members were exposed to. In Pfizer, however, the advertising campaign was limited to six-months and there was no evidence that the majority of class members saw the campaign before they purchased Listerine. As the Pfizer court writes: "Tobacco II does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution." Pfizer at *11. As the certified class included class members who were never exposed to the "as effective as floss" campaign, the Court of Appeal reversed the certification order (again).

As a separate holding, the Pfizer court also applied Tobacco II to rule that the representative plaintiff was not "adequate" to represent the class. The plaintiff testified that he did not base his Listerine purchase on any of the four television advertisements. Instead, he claimed that he purchased Listerine because of the "as effective as floss" label on one (of a possible 34) bottles. He further testified he could not remember what else the label said, which was significant because *some* of the labels stated that the consumer should continue flossing in any event. Since the plaintiff did not have similar claims to those who saw the television commercials or saw any of the other labels, he could not adequately represent those class members in the litigation. Pfizer at *13.

Again, the Court of Appeal differentiated this case from Tobacco II. While the tobacco industry used a "decades-long campaign" that was pervasive, here the "effective as floss" campaign lasted only six-months. While the plaintiff in Tobacco II could represent a class because campaign likely influenced all of the class members in some fashion, the Pfizer plaintiff could not adequately represent all of the other consumers because his limited experience, with a limited campaign, was not "representative" of the other members of the class who may have been

exposed to the television commercials or the other 33 different bottles of Listerine that the plaintiff did not rely upon when he purchased Listerine.

The Pfizer opinion serves as a reaffirmation of the class action principles that many commentators believed Tobacco II abandoned. As interpreted by the Pfizer opinion, Tobacco II does not allow the certification of a broad class absent proof that the class members actually were exposed to the alleged unfair practice. Instead, the plaintiff must still present actual evidence that class had a common set of experiences and then must prove that the plaintiff's own experience is similar to the class's. By showcasing the differences between and amongst the class members, a defendant may be able to defeat class certification on the basis that the class members were not all exposed to the same alleged misrepresentation and, therefore, should not be thrown together into an overbroad class definition which attempts to gloss over the varied experiences of the consumer class members.