

## California Appellate Court Clarifies Issues Raised in Tobacco II

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A California Court of Appeal decision published on October 28, 2009, analyzes whether UCL “standing” rules announced by the California Supreme Court in [In re Tobacco II Cases](#), 46 Cal. 4th 298 (2009), carry over when a trial court considers the requisite elements to certify a class action. The answer, at least from the Eighth Appellate District, is that they do not.

In [Cohen v. DIRECTV, Inc.](#), the plaintiff sued the satellite television company under both the Unfair Competition Law or “UCL” ([Business & Professions Code sections 17200 et seq.](#)) and the Consumers Legal Remedies Act or “CLRA” ([Civil Code sections 1750 et seq.](#)), claiming that the company falsely advertised the quality of the High Definition (“HD”) resolution that it was transmitting to its customers. Cohen sought to certify a nationwide class. In opposition to a motion for class certification, DIRECTV presented a number of declarations from its customers that explained that their individual decisions to purchase the HD upgraded system were not based on seeing any advertising or promotional materials from the company, but rather on word of mouth, lower prices, or just because they bought an HDTV. On those facts, the trial court denied certification, finding that common legal and factual issues did not predominate.

On appeal, the court first found that no common legal issues predominated, agreeing with the trial court that the subscribers’ legal rights would vary from state to state and that subscribers outside of California may not be protected by the UCL or the CLRA. It also rejected the plaintiff’s attempt to redefine the class to include only California residents, reasoning that, even with a California-only class, plaintiff still could not show that common factual issues would predominate over individual factual issues.

As for whether common issues predominated, the court concluded that there were myriad reasons why subscribers had purchased the HD upgrade that were far removed from the alleged misleading advertisements as to resolution of the HD transmission. More particularly, the court found commonality lacking since actual reliance would need to be shown for an award of damages under the CLRA and for restitution/injunctive relief under the UCL. As for the decision in *Tobacco II*, the court explained that the Supreme Court in that case had been concerned with the issue of **standing** under the UCL and that, in the context of **standing**, only the class representative needed to satisfy the requirement and that there was no need for the class members to show actual reliance.

However, at the time of considering class certification, the *Cohen* court found “*Tobacco II* to be irrelevant because the issue of ‘standing’ simply is not the same thing as the issue of ‘commonality.’” Rather, at the time of considering class certification, the trial court was concerned that the UCL and CLRA claims alleged by plaintiff and the other class members “would involve factual questions associated with their reliance on DIRECTV’s alleged false representation,” which was a proper criterion to consider for commonality – “even after *Tobacco II*.”

*Cohen* is the second case published last week that affirmed the denial of class certification of a UCL claim and addressed the impact, or, more correctly, the lack of impact, of the decision in *Tobacco II*. The other decision is [Kaldenbach v. Mutual of Omaha et al.](#), published October 26,

2009, a decision in which Barger & Wolen represented the defendant, and is discussed in the [Life, Health and Disability Insurance Law blog](#).