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CALIFORNIA CLASS ACTIONS

2018 UPDATE

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I. TWO SCOTUS DECISIONS THAT MATTERED

A. Litigation Tourism, Type 1: *Bristol-Myers Squibb*.

If you are sued by a "litigation tourist" in a class or mass action and suit is not brought in your home state, you now have a no-jurisdiction defense.

In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017), the U.S. Supreme Court held that California lacked personal jurisdiction in a case brought by out-of-state consumers against an out-of-state defendant. The California Supreme Court thought that California could exercise "specific" jurisdiction based on the company's significant marketing activities and personnel based in California and because defendant had contracted with a California distributor to distribute the drug nationally, especially where the resident and non-residents all alleged the same injury. The Supreme Court said no:

> "The mere fact that other plaintiffs were prescribed, obtained, and ingested [the drug at issue] in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. . . . This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents." [*Id*.]

How do you know if you are being sued by a "litigation tourist"? Both the named plaintiff and the defendant are non-residents and the class representative's claim is simply that she bought the product in her home state. For a more detailed discussion, see our Client Alert, https://classdismissed.mofo.com/consumer-products/supreme-court-says-no-to-litigation-tourism/.

B. Litigation Tourism, Type 2: Exporting Consumer-Friendly Law Out-of-State.

There is another form of litigation tourism: Exporting consumer-friendly law from a form state to other states with less-accommodating laws. In other words, if you can't bring out-of-state plaintiffs to the forum with favorable law, you bring the favorable law to the plaintiffs.

This past year has seen curtailments on this form of litigation tourism as well.

- *Williams v. Yamaha Motor Co., Ltd.*, 851 F.3d 1015, 1025 (9th Cir. 2017): No general or specific jurisdiction over Japanese parent corporation in California, notwithstanding its ownership of a U.S. subsidiary, given the absence of allegations that the parent had the right to control the subsidiary's actions, even if the subsidiary's conduct could be attributed to the parent on an agency theory.

- *In re Arizona Theranos, Inc. Litigation*, 256 F.Supp.3d 1009, 1041 (D. Ariz. 2017): Arizona plaintiffs lack standing to sue a California defendant for UCL violations arising from blood tests performed in Arizona because California law does not apply to their transactions.

C. Article III and Injury-in-Fact: *Spokeo v. Robins.*

1. What *Spokeo* Holds.

Can the federal courts exercise jurisdiction where the plaintiff's only alleged injury is the violation of a federal or state statute? *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) says no, an allegation of a federal statutory violation, without some additional showing of concrete harm, is not enough.

In *Spokeo*, plaintiff alleged that defendant sold an online report about him that contained false information about his age, wealth, employment, marital status, and education in violation of the Fair Credit Reporting Act (FCRA). Robins did not allege any actual injury caused by this alleged violation, aside from potential harm to future employment prospects. Instead, he brought suit seeking statutory damages. The Supreme Court held that an allegation of a federal statutory violation, without some showing of concrete harm, is not enough.

The *Spokeo* court declined to evaluate that risk and, instead, remanded to the Ninth Circuit, whose decision is discussed in the next section.

2. Post-*Spokeo* Cases.

On remand from the U.S. Supreme Court, the Ninth Circuit found that plaintiff had, indeed, alleged standing. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017).

Likewise, the Ninth Circuit held that, in an unsolicited telephone marketing calls that alleged violations of the Telephone Consumer Protection Act, 47 USC § 227 *et seq.* ("TCPA"), the claim was that defendant had "invade[d] the privacy and disturb[ed] the solitude of their recipients" and, hence, that constitutes "concrete injury in fact" sufficient for purposes of Article III. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1049 (9th Cir. 2017).

- However, even though it satisfies Article III, this is *not* sufficient to allege "injury in fact" under the UCL. *Id.*; Accord: *Holt v. Facebook, Inc.*, 240 F.Supp.2d 1021, 1035-36 (N.D. Cal. 2017) (citing *Van Patten* and holding that an alleged violation of the TCPA may create Article III standing, but it is not a sufficient economic injury to state a UCL claim under *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310 (2011).

3. Can a *State Legislature* Confer Article III "Injury in Fact"?

All of those cases involve allegations of a federal statute being violated. What about cases alleging violations of *state* statutes? Do those qualify under Article III, or, to put it differently, can a *state* legislature confer federal constitutional standing by creating a state statutory violation?

The circuits are split. In *Compare Cottrell v. Alcon Laboratories*, 874 F.3d 154, 167, 169-70 (3d Cir. 2017), the Third Circuit said yes, finding Article III standing based on an alleged state law violation concerning slack-fill packaging. However, in *Eike v. Allergan, Inc.*, 850 F.3d 315, 318 (7th Cir. 2017), the Seventh Circuit said no, finding no Article III standing in a slackfill case involving materially identical claims as *Cottrell*.

4. Article III and the Requirement of "Tracing."

What we used to call "ascertainability" might now be recast as a failure to establish Article III standing. Here's why.

In *Perez v. Nidek Co., Ltd.*, 711 F.3d 1109, 1113 (9th Cir. 2013), the Ninth Circuit held that Article III precludes the bringing of claims against physicians who did not perform LASIK eye surgery on the class representatives, even though they may have performed it upon other putative class members. In other words, Article III says you can't sue someone who you didn't do business with or, by extension, whose products you did not purchase.

In *Sud v. Costco Wholesale Corp.*, 229 F.Supp.3d 1075 (N.D. Cal. 2017), the district court, citing *Perez*, dismissed a class action claim alleging that a retailer sold prawns farmed in Thailand in which the supply chain (the food to feed the prawns) was tainted by slavery, human trafficking, and other illegal labor practices. However, plaintiffs were unable to allege that the prawns they purchased were sourced by the suppliers with the questionable labor practices. The court noted that "[a] key component of Article III standing is 'traceability, i.e., a causal connection between the injury and the actions' about which a plaintiff complains," and "where there are multiple defendants and multiple claims, there must exist at least one named plaintiff with Article III standing as to each defendant and each claim. . . ." *Id.* at 1081.

II. UNFAIR, DECEPTIVE, AND NEW "OMISSIONS" CASES

A. What Is "Unfair"?

These are some newly minted cases discussing "unfair":

- Not an unfair business practice for a retailer to sell branded clothing at a factory outlet even if the merchandise had never been previously on sale at a traditional Gap or Banana Republic store. *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 880 (2017).

- Not unfair for retailer to sell prawns that may have been tainted by slave labor and human trafficking violations earlier in the supply chain. *Sud v. Costco Wholesale Corp.*, 229 F.Supp.3d 1075, 1087 (N.D. Cal. 2017).

B. What Is "Fraudulent"?

1. Omissions, and a Duty to Disclose.

One of the ways a pure omission can be actionable is where the defendant has exclusive knowledge of material facts.

In *Williams v. Yamaha Motor Co., Ltd.*, 851 F.3d 1015, 1028 (9th Cir. 2017), the Ninth Circuit held that where a defendant has an internal customer response system dedicated to handling customer complaints, then "an unusually high volume of complaints specific to" the alleged defect at issue could suffice to establish this element, at least as a pleading matter.

2. Exposure as a Predicate Even in Omission Cases.

Another way a pure omission can be actionable is where the defendant utters a half-truth, i.e., a partial statement. But in that case, the plaintiff had to have been exposed to the affirmative "half-truth."

In re Vizio, Inc. Consumer Privacy Lit., 238 F.Supp.3d 1204, 1231 (C.D. Cal. 2017) the district court held that the reliance requirement established by *Tobacco II Cases* requires that, in omission cases, plaintiff must allege exposure to the "half-truth," i.e., the partial affirmative statement. *See also Schellenbach v. GoDaddy.com, LLC*, 321 F.R.D. 613, 620-21 (D. Ariz. 2017) (denying class certification in a case alleging that company's characterization of its service as employing a "dedicated server" was a misrepresentation where the allegedly correct characterization was described on other website pages and not all class members would have been exposed to the same information).

3. What Constitutes "Dafety" as Would Give Rise to a Duty to Disclose?

A third way to give rise to a duty to disclose in a pure omission case is where the undisclosed fact concerns "safety." But what is "safety"? We saw two decisions in 2017 curtailing the expansion of this concept.

In *Williams v. Yamaha Motor Co., Ltd.*, 851 F.3d 1015, 1028-29 (9th Cir. 2017), the Ninth Circuit held that the risk of accelerated corrosion *on*

outboard boat motors was not a "safety" risk that gives rise to duty to disclose, especially where the named plaintiff did not experience the symptom.

And in *Sud v. Costco Wholesale Corp.*, 229 F.Supp.3d 1075, 1087 (N.D. Cal. 2017), a retailer owes no duty to disclose that an upstream supplier in the supply chain may have utilized slave labor and human trafficking in prawns sold at retail to California consumers where plaintiffs did not allege that the labor practices, "while horrific, constitute a safety risk to consumers or constitute a product defect."

4. Materiality as a Predicate in Omission Cases.

In *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 880 (2017), the appellate court held that a retailer had no duty to disclose that branded clothing it sold at a factory outlet had never been previously on sale at a Gap or Banana Republic store absent a showing that the nondisclosed fact was material to consumers.

5. "Perpetual" or "Continuous" Sale Cases.

A common, recurring "bait and switch" variation is where a retailer offers an item on "sale." "Sale" is a relative term; compared to *what*? In California, we have a three-month rule: "No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement." Bus. & Prof. Code § 17501.

In 2017, there were a lot of reported cases discussing perpetual sales.

- In *People v. Overstock.com, Inc.*, 12 Cal. App. 5th 1064 (2017), the appellate court intimated that substantiation may be required when a retailer puts an item on sale. *Ovestock.com* was a law enforcement action brought by the California Attorney General and several District Attorneys, who sued an online retailer for false advertising. Initially, the retailer's advertising showed a "list price" that was shown stricken through, the retailer's lower price, and the difference shown as "saved." Later, it changed "list price" to "compare at," and, finally, to "compare." However, it had no procedure in place to verify the comparison prices. The trial court entered judgment against the retailer and, on appeal, the court affirmed. It found that the term "list price" was a factual representation that there *was* a list price when, in fact, there was not. 12 Cal. App. 5th at 1079-80. It also found that the term "compare at" or "compare" imply that the price being compared is

for the same or similar item when, in fact, often they were not. 12 Cal. App. 5th at 1081.

- A plaintiff who brings a "perpetual sale" claim in federal court must allege the fraud with specificity under FRCP 9(b). *Haley v. Macy's Inc.*, 263 F.Supp.3d 819, 823 (N.D. Cal. 2017). Thus, it is not sufficient to allege on information and belief that Defendants did not sell their products at the original or regular price, while at the same time asserting that they 'have no realistic way to know' whether that is true." *Id.* at 824. Plaintiff must allege how a defendant's "original or regular prices were false or otherwise misleading." *Id*.; accord, *Nunez v. Best Buy Co., Inc*., 315 F.R.D. 245, 249 (D. Minn. 2016) (holding that a violation of Bus. & Prof. Code § 17501 must be pled with particularity and it is insufficient to merely allege "on information and belief" that the "prevailing price" of an item was not the "regular price."

- However, in *Veera v Banana Republic, LLC*, 6 Cal. App. 5th 907 (2017), the appellate court allowed a much looser claim to survive. There, a retailer's store window advertised a sale of 40% off when, in fact, the discount applied only to certain items. The fact that the in-store signage revealed which were the sale items and arguably cured the confusion was not something that could be decided on demurrer where plaintiff alleged she bought the items anyway, at full price, and even though she was told at the register that the discount did not apply, because there "were at least 15 people in line" and "plaintiff was annoyed and very embarrassed" and "we had invested all that time and effort."

C. Ninth Circuit Deals Blow to Private "Prior Substantiation" Cases.

In *Kwan v. SanMedica Int'l.*, 854 F.3d 1088 (9th Cir. 2017), a consumer brought a UCL and CLRA claim against an over-the-counter supplement manufacturer, alleging that it made false claims about its human growth hormone supplements. The district court dismissed, and the Ninth Circuit affirmed: "The district court did not err in concluding that neither the UCL nor the CLRA provides Kwan with a private cause of action to enforce the substantiation provisions of California's unfair competition or consumer protection laws." *Id.* at 1096.

The *Kwan* court also rejected plaintiff's argument that she could state a UCL claim by alleging that the defendant's statements amounted to an "establishment" claim within the meaning of the Lanham Act, but the *Kwan* court rejected that too: "Kwan has not cited any authority for applying the 'establishment claim' standard outside of the Lanham Act context and, more specifically, has not cited any authority for applying Lanham Act analysis to private causes of action under the UCL of CLRA." *Id.* at 1097.

Finally, it declined to allow plaintiff's claim to proceed under a theory of deception, i.e., under the fraudulent prong of the UCL. *Id.* at 1098; *see also Sonner v. Schwabe North Am. Inc.*, 231 F.Supp.3d 502, 512-13 (C.D. Cal. 2017) (holding that, on summary judgment, a battle of experts who disagree as to whether advertising claims are substantiated is not enough to prove plaintiff's case for lack of substantiation).

III. UCL DEFENSES

A. Adequate Remedy at Law—New Life for Old Defense?

The UCL and FAL are equitable claims. So, shouldn't they be subject to the rule, as with all other equitable claims, that they are available only as a last resort, i.e., only if the remedies at law are inadequate? This defense had some success, at least in the California trial courts, a few decades ago. But it has fallen into disuse. Several recent cases may suggest it still has vitality left.

In *Munning v. The Gap, Inc.*, 238 F.Supp.3d 1195 (N.D. Cal. 2017), the district court dismissed a UCL claim with prejudice on the ground that the claim was equitable and, as such, "[a] plaintiff seeking equitable relief in California must establish that there is no adequate remedy at law available." *Id.* at 1203. The fact the plaintiff was able to state other claims at law, as affirmed earlier in the opinion, precluded the UCL claim. *Id.*; accord, *Moss v. Infinity Ins. Co.*, 197 F.Supp.3d 1191, 1203 (N.D. Cal. 2016) (dismissing UCL claim where plaintiff had an adequate remedy at law in her other claims, including a breach of contract claim).

B. Defense to Injunction: We Won't Get Fooled Again?

The Who's "Won't Get Fooled Again" climbed to Number 15 on the Billboard charts in 1971. It may have crashed in 2017.

The issue is whether a class representative has Article III standing to seek injunctive relief if he or she is suing over a deceptive advertisement or product label and, given that he or she now knows the true facts, would never buy the product again or, if he or she did, he or she wouldn't be fooled. In *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir. 2017), the class representative sued in a product mislabeling case over "flushable wipes," claiming that the disposable wipes weren't really disposable. "[E]ven though the consumer now knows or suspects that the advertising was false at the time of the original purchase," that did not deprive her of Article III standing to seek injunctive relief. In that case, plaintiff alleged she could not rely on the truthfulness of the product's labeling. 873 F.3d at 1115.

IV. CLASS CERTIFICATION

A. *Comcast* and What Sort of Damages Model Is Required.

In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) the United States Supreme Court held that, at class certification, plaintiffs must provide a model for calculating remedies that comports with substantive law and is "susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Comcast*, 133 S. Ct. at 1433. Plaintiffs must also be able to show that their damages stemmed from the defendant's actions that created the legal liability; in other words, a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory. 133 S. Ct. at 1433.

Since then, the Ninth Circuit has proceeded to dismantle *Comcast*. The latest attempt at demolition came in *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (9th Cir. 2017). In that case, customers brought a class action against the manufacturer of a dietary supplement called "Cobra Sexual Energy" whose labels promoted the product as providing users with "animal magnetism" that would enhance sexual performance. The district court decertified the class on the ground that plaintiff offered no expert, and no damages theory, that could satisfy *Comcast.* The Ninth Circuit reversed, holding that, where plaintiff alleged that the product was worthless, a "full refund" model coupled with a reasonable method for calculating average retail price "presented a workable method" of calculating damages sufficient to allow the class to be certified. *Id.* at 1183.

B. What Happened to Ascertainability in 2017? A Federal/State Split.

A fissure erupted in 2017 between the federal and state courts regarding ascertainability. The result is that the California courts are now denying class certification in cases in which the federal courts would grant certification. The fault line occurs over what must be shown to define the class.

Objective definition. One line of cases holds that an objective definition is enough, i.e., all that is required is that the class can be defined by objective criteria, and, once that happens, class members can be notified and be asked to step forward and self-identify themselves.

Ascertainable means. The other line of cases applies a stricter standard, that an objective definition is not enough; that there must be an "ascertainable means" to sort eligible from ineligible candidates, such as records or other objective means capable of identifying class members; and that it is plaintiff's burden on class certification to devise a means of notifying unknown class members of the pendency of the action.

1. The Federal Approach.

Under Federal Rule of Civil Procedure 23, there is no express "ascertainability" requirement. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d

1121, 1126 (9th Cir. 2017). Consequently, the Ninth Circuit found that there was no ascertainability requirement at all, under either standard. In doing so, it noted that the Third Circuit disagrees and requires that putative class representatives demonstrate "administrative feasibility" as a prerequisite to class certification. *Id.* at 1126-27 (citing *Byrd v. Aaron's Inc*., 784 F.3d 154, 162–63 (3d Cir. 2015); *Carrera v. Bayer Corp*., 727 F.3d 300, 306–08 (3d Cir. 2013); *but cf. Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) (embracing the "objective definition" approach); *see also Rikos v. Procter & Gamble Co*., 799 F.3d 497, 525 (6th Cir. 2015) (same).

Thus, there is already a Circuit split in the federal courts over whether an "ascertainability" requirement even exists and, if it does, what it means.

2. The California Approach.

California reflects the same split. The difference is that in the California courts, unlike the federal courts, California's class action jurisprudence stems in part from statute, Code Civil Proc. § 382, but mostly from common law. Under California common law, ascertainability is a necessary element of class certification. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004) (class certification requires, among other things, "an ascertainable class"). The reason is due process: "The ascertainability requirement is a due process safeguard, ensuring that notice can be provided 'to putative class members as to whom the judgment in the action will be res judicata." *Sotelo v. Media News Group, Inc*., 207 Cal. App. 4th 639, 647 (2012).

That still begs the question: What does ascertainability require? As with the federal courts, the California courts are split between the "objective definition" and the "ascertainable means" approaches.

"Objective definition" approach. One line of cases holds that all that is required is that the class can be defined by objective criteria, and, once that happens, class members can be notified and be asked to step forward and self-identify themselves. *See Estrada v. FedEx Ground Package System, Inc*., 154 Cal. App. 4th 1, 14 (2007); *see also Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290, 1301 (2015).

"Ascertainable means" approach. The other line of cases holds that an objective definition is not enough, that there must be records or other objective means capable of identifying class members, and that it is plaintiff's burden on class certification to devise a means of notifying unknown class members of the pendency of the action. *Sotelo v. Media News Group, Inc.*, 207 Cal. App. 4th at 649-50; *see also Hale v. Sharp Healthcare*, 232 Cal. App. 4th 50, 58-59 (2014).

Three cases decided in 2017 apply the "ascertainable means" standard:

- *Kendall v. Scripps Health*, 16 Cal. App. 5th 553 (2017). In *Kendall*, a self-pay emergency care patient brought a UCL class action against a hospital arising from its billing practices vis-à-vis self-pay patients who have no private or government emergency insurance plan. The appellate court affirmed the trial court's denial of class certification on ascertainability grounds where there were no existing hospital records from which to determine who was part of the class definition, or damages, short of developing special computer programs to identify such individuals, which is not appropriate.

- *Hefczyc v. Rady Children's Hospital-San Diego*, 17 Cal. App. 5th 518, 538-40 (2017). *Hefczyc* holds, on similar facts as *Kendall*, that the guarantor of self-pay patient's financial obligation to hospital cannot certify a class of guarantors of patients who received emergency room care because there was no ascertainable class. In *Hefczyc*, the appellate court expressly declined to follow the Ninth Circuit's decision in *Briseno v. ConAgra.* 17 Cal. App. 5th at 537.

- *Noel v. Thrifty Payless, Inc.*, 17 Cal. App. 5th 1315 (2017). In *Noel*, the Court of Appeal followed Sotelo and, in doing so, attempted to reconcile the two lines of cases. In that case, plaintiff brought a class action against a retailer after buying an inflatable swimming pool that turned out to be much smaller than the pool pictured on the cover of the box. The trial court denied class certification, finding that plaintiff presented no evidence to establish how purchasers of inflatable pools from defendant's stores could be identified. Plaintiff presented evidence about the number of pools sold and the gross revenue from those sales, "but submitted nothing offering a glimmering of insight into who purchased the pools or how one might find that out." Although plaintiff did not have to affirmatively identify all purchasers who bought pools, "his failure to come up with any means of identifying them was a legitimate basis for denying class certification."

V. RESTITUTION

In *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244, 1256-57 (2012), the California Supreme Court held that a legal violation underlying a violation of Labor Code § 226.7 (the non-provision of meal and rest periods) is not the nonpayment of wages but the corresponding failure to ensure the health and welfare of employees.

Consequently, the district court held in *Guerrero v. Halliburton Energy Services, Inc*. (ED Cal. 2017) 231 F.Supp.3d 797 that a violation of section 226.7 is not recoverable as "restitution" under the UCL. [231 F.Supp.3d at 807-8] The *Guerrero* court also held that claims for civil penalties (for inaccurate wage statements) under Labor Code §§ 203 and 226.7 are also not recoverable as "restitution" under the UCL.