Attacking Class Certification Motions

When the California Supreme Court decided *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), you could hear the sound of champagne corks popping in plaintiff firms all across California hoping to obtain certification of large classes containing plaintiffs who did not even have to show they were exposed to or relied upon the allegedly unfair or fraudulent representations in order recover under the Unfair Competition Law (UCL), California Business & Professions Code Section 17200, et. seq. At the same time, there was gnashing of teeth among the in-house counsels of companies throughout the world doing business in the Golden State. However, two recently issued Court of Appeal decision should temper the joy of the plaintiffs' bar because they provide promising approaches for UCL defendants to utilize when attacking broad class certification motions.

In *Tobacco II*, the California Supreme Court addressed the standing requirements for class representatives in UCL cases filed after Proposition 64. The Supreme Court held that in order to have standing to bring a representative action under the UCL, a representative plaintiff in a UCL action must have suffered injury in fact and must demonstrate causation between the business conduct and the injury. At the same time, the Supreme Court held that the absent class members - the proposed members of the class other than the named plaintiff - do not have to meet the same standing requirements if the other elements of class certification are met. One of the questions created by the Court's ruling was whether a court could essentially presume that the class relied on the allegedly misleading representations as long as the class representative could show actual reliance.

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Two recent post-*Tobacco II* Court of Appeal cases suggest that such reliance cannot necessarily be presumed. Two Court of Appeal panels in Southern California affirmed trial court orders denying class certification, drawing a distinction between the standing requirements and the other requirements for class certification.

The Court of Appeal for the 2nd Appellate District issued a decision in *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966 (2009), in which the court examined whether the trial court properly denied certification of a proposed class of subscribers of DIRECTV's HD Package for high definition television. Cohen alleged that DIRECTV fraudulently induced him and others to buy the HD Package by advertising a higher broadcast quality than it actually delivered. Cohen sought to certify a national class of all of DIRECTV's HD Package subscribers. DIRECTV conceded that the subscribers to its HD Package were an ascertainable class of people, but the trial court denied class certification because the plaintiff could not show that common issues of law or fact would predominate. The appellate court affirmed.

The *Cohen* court cited the customer declarations DIRECTV submitted, which the trial court relied upon in denying class certification, concluding that there were multiple issues that precluded class certification. First, the court held that the contract language specifying that the law of the state in which the subscriber resides would govern meant that common issues of law did not predominate in a national class. Second, the court held that common issues of fact did not predominate because the class "would include subscribers who never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services, and subscribers who only saw and/or relied upon advertisements that contained no mention of technical terms regarding bandwidth or pixels, and subscribers who purchased DIRECTV HD primarily based on word of mouth or because they saw DIRECTV's HD in a store or at a friend's or family member's home." The court found that the members of the proposed class "stand in a myriad of different positions insofar as the essential allegation in the complaint is concerned, namely, that DIRECTV violated the California Consumers Legal Remedies Act, California Civil Code Section 1750, et seq. and the UCL by inducing subscribers to purchase HD services with false advertising." The court distinguished *Tobacco II* on the grounds that *Tobacco II* dealt specifically with the standing requirements for the class representatives and the class members, not whether common issues of fact or law predominated, which necessarily must be established in order to certify a class.

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Similarly, in *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830 (2009), the Court of Appeal for the 4th Circuit handed down a decision affirming the trial court's denial of class certification in a case alleging fraud in the inducement in purchasing vanishing premium life insurance policies through misleading marketing materials and illustrations created by Mutual of Omaha and used by its agents. Kaldenbach sought to certify a class of Californians who bought a vanishing premium policy from Mutual of Omaha between Jan. 1, 1988, and Dec. 31, 1995.

In deciding that the trial court properly denied class certification, the *Kaldenbach* court held that the named plaintiff failed to prove that any of the agents who sold the life insurance policies underwent training by Mutual of Omaha, ever read any of its manuals, or followed the training and materials with regard to selling vanishing premium policies. Nor did plaintiff Kaldenbach demonstrate what "materials, disclosures, representations and explanations were given to any given purchaser." The court held that the evidence showed a lack of uniformity in the potential misrepresentations to the class members, which distinguished the case from *Tobacco II* and other previous cases. This lack of uniformity meant that the potential class could not meet the commonality requirements because "the determination of what business practices were allegedly unfair turns on individual issues."

The Court of Appeal for the 4th District also recently affirmed the denial of class certification in a product design defect case involving shower pans on the grounds that individual issues of the absent class members predominated on the amount of damages, and on the grounds that the class representative was inadequate to represent the class on the range of damages the absent class members may have suffered. *Evans v. Lasco Bathware, Inc.*, No. D053731, 2009 WL 3261922 (2009). While not a UCL case, *Evans* shows that plaintiffs must demonstrate that the claims of the absent class members meet the standards for class certification even after *Tobacco II*.

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Kaldenbach is a final decision. The plaintiff in *Cohen* has asked for review by the California Supreme Court. If *Cohen* is not modified by the Supreme Court, then these two cases will provide some post-*Tobacco II* guideposts for certifying classes and potential lines of attack on over-broad proposed class definitions. Some things to keep in mind:

The plaintiff must satisfy the elements of class certification in addition to establishing that the class representative has met the standing requirements under *Tobacco II*. This means that even if the plaintiff alleges that he or she has been injured by an unfair business practice, obtaining class certification requires the named plaintiff to show that a class action is the best way to adjudicate claims related to that allegedly unfair business practice.

If the scope of the class includes people who may have purchased a product for reasons unrelated to the allegedly deceptive advertising, the class may be too broad. Put another way, are the elements of ascertainability and commonality at odds with each other in the proposed class? A class that can be ascertained with relative ease may be a class that includes people who have no relation to the essential allegations of the complaint. On the flip side, limiting the class to individuals who were exposed to the allegedly unfair business practice may create difficulties with ascertainability, making individual suits rather than a class action the preferable mechanism for resolving the issue.

Does the evidence show uniformity of business practices that are allegedly unfair or fraudulent? If the evidence shows that the defendant did not make uniform representations to the purported class, the question of whether the business has engaged in unfair business practices relative to the class members becomes an individualized inquiry.

These new cases provide ideas and opportunities for defendants to defeat class certification and corresponding challenges for plaintiffs' counsel. Future litigation in this area will continue to be dynamic, to say the least.

Bribery in Media and Entertainment: No Second Acts

Continued from page 1

ing on the heels of Watergate. It has subsequently been amended and expanded in scope several times since its introduction. The Act has now grown to allow for greater sources of allegations, aligned itself with the OECD Anti-Bribery Convention (as well as national legislation), dove-tailed with Sarbanes-Oxley around certifications, internal controls and the expectation that companies will take the lead in training their employees against engaging or allowing corruption to occur in the company's business dealings; added an anti-terrorism financing component, thus encouraging greater scrutiny by both federal investigators and regulatory agencies; extended cross-border governmental cooperation; raised the expectations for Boards of Directors and Audit Committees; increased the requirements of performing FCPA due diligence in mergers & acquisitions; and in the post-Enron environment, made provisions for companies to voluntarily disclose when they discover evidence of bribe giving/taking related to their business. What has not changed about the Act is the pervasiveness of corruption in certain countries and within certain industries; the difficulty of detecting bribery; the challenges to multi-national corporations to meet compliance standards around FCPA both currently and as they expand into new markets; the complexity of knowing not only who one is directly doing business with but who your business partner's partner is doing business with and the one constant through it all: the human factor. Greed and a willingness to grease palms to get things done will persist.

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The FCPA strictly forbids the bribery of foreign government officials in order to obtain a business advantage. Unfortunately for many companies transacting business, it isn't always readily apparent in their business partners who constitutes a government official - it would be so much more convenient if they would all wear uniforms! The Thai forestry officials that allowed the filming of *The Beach* on Thai national parkland or the customs officers that allowed props into Romania for the filming of *Cold Mountain* are as much foreign officials under the U.S. Dept. of Justice's definition as Silvio Berlusconi, current President of Italy, who also happens to own 350 Italian television stations and Fininvest, the 12th largest media company in the world. By the Department of Justice's and Securities and Exchange Commission's standards, any quid pro quo, whether it be to reduce customs fees, obtain a special tax break or incentive, secure a business advantage or obtain special consideration in a film festival can constitute a violation of the FCPA.

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While many business executives have thought of anti-bribery provisions as only applying to publicly traded companies, such as some of the large media conglomerates that own some of Hollywood's most renowned studios, in fact, those who must comply with FCPA due diligence requirements, take steps to avoid bribes and bribe-giving and build FCPA awareness programs include private companies and executives of companies, as well. Most worrying for many media and entertainment companies is that the provisions of the FCPA apply to not only direct employees of the company but their agents, production investors, vendors, and other third-parties, including those local non-union day-laborers, cast extras, temps, drivers, caterers, and suppliers of all manner of materials and services. Ignorance of their actions is not always an adequate defense - constructive knowledge may be inferred if it is felt that one "should have known" based on the facts. The risk of exposure grows for the media and entertainment industry as more film and television productions move overseas, more exotic locations for big budget films are sought, more small investors or independent production companies participate in major studio productions, more foreign-based companies and individuals become involved in joint-Hollywood ventures, markets expand for singers, stars appear in advertising campaigns in multiple countries, cross-selling of entertainment packages that tie in everything from sports to soap-operas continues its momentum globally. There is a perception by many that the industry has deep pockets and a history of "creative" accounting. This can result in the public disclosure of transactions, including details of "grease payments" or bribes through the litigation discovery process and press reportage. Until 1999, foreign bribes were tax-deductible in both Germany and France, but this is certainly no longer the case.

Domestically, the Department of Justice and the SEC have made FCPA enforcement a high priority. The Department of Justice's dozen-plus FCPA-exclusive prosecutors filed 18 FCPA enforcement actions in 2007 and 20 were filed by the SEC, compared to a total of just five in 2004. As of early 2008, the FBI had an estimated 77 pending FCPA investigations. This number does not include the multitude of internal company probes that have not been reported to the government. The law firm Gibson, Dunn & Crutcher claimed in mid-2007 to have identified approximately 100 other companies that had open FCPA investigations. Criminal penalties for violating the anti-bribery provisions for corporations and other business entities include a fine of up to $2 million; directors, officers, employees, stockholders and agents are subject to a fine of up to $100,000 plus up to five years imprisonment and there exists no rule for corporate indemnification of fines against individuals.

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