Case No. _____

In The Supreme Court

Of The State Of California

PHILIP KENT COHEN
Plaintiff and Appellant,

v.

DIRECTV, INC., a California Corporation
Defendant and Respondent.

After A Decision By The Court Of Appeal
Second Appellate District, Division 8
Case No. B 204 986

PETITION FOR REVIEW

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I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Must a plaintiff in a proposed consumer class action brought under the false advertising prong of California's Business & Professions Code section 17200 (hereinafter "UCL") show individualized proof of deception, reliance and injury by all class members to establish the "commonality" requirement for class certification?

II. WHY REVIEW SHOULD BE GRANTED

The most common ground for Supreme Court review reflects the Court's "institutional" function: Supreme court review of a court of appeal decision will be ordered "[w]hen necessary to secure *uniformity of decision* or to *settle an important question of law*." [California Rules of Court, Rule 8.500(b)(1) (emphasis added)]

This case presents an important question of law for both businesses and consumers throughout California — whether a plaintiff in a proposed consumer class action brought under the false advertising prong of the UCL must show individualized proof of deception, reliance and injury by all class members to establish the "commonality" requirement for class certification.

This Court in its recent decision in *In Re Tobacco II* (2009) 46 Cal.4th 298 (hereinafter "*Tobacco II*") held that the standing requirements of Proposition 64 did not change the fundamental rights provided to the State's citizens by the UCL. Thus, the standing requirement of Proposition 64 did not require a showing of individualized proof of deception, reliance and injury by all class members to certify a class of consumers in an action for false advertising brought under section 17200. *Tobacco II*, 46 Cal.4th at 321. However, as the Court of Appeal decision in this case, *Cohen v. DIRECTV* (Sept. 28, 2009) B204986 (hereinafter "*Cohen*") (a copy of the opinion is attached hereto), shows, courts throughout the State are going to continue to apply the exact same erroneous standard to deny class certification motions, just under the guise of "commonality", rather than "standing".

In *Cohen*, the Court of Appeal circumvented the import of this Court's decision in *Tobacco II* by rationalizing that this Court's decision only concerned "standing" and did not apply to the "commonality" question

of class certification. Cohen, slip op. at pp.15-16. Consequently, according to the Court of Appeal, all courts across this State are free to ignore the clear statement of this Court in *Tobacco II* and hold that without an individualized showing of deception, reliance and injury by each proposed class member, there is no commonality and certification can properly be denied.

The opinion of the Court of Appeal in *Cohen* was initially an unpublished decision. However, this unpublished decision sparked the imagination of the defense bar. Requests to have this decision published were filed by the Chamber of Commerce of The United States of America, the Association of Southern California Defense Counsel, Honda North America, Inc., as well as the defense firms of O'Melveny & Myers, LLP. Skadden, Arps, Slate, Meagher & Flom, LLP, Horvitz & Levy, LLP and Shook, Hardy & Bacon. At their request, *Cohen* was ordered published on October 28, 2009.

Review of the *Cohen* decision is also appropriate to promote uniformity of decision and to settle a dispute between differing courts of appeal. In another recent opinion, the Court of Appeal in another district was presented with the same issue and came to the opposite conclusion. In *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, ___ Cal.App.4th ___ (Fourth Appellate District, Division Three, Case No. G038539, filed Sept. 30, 2009; pub. & mod. ord. Oct. 26, 2009), the Court affirmed an order denying class certification but in the process confirmed that *Tobacco II* preserved the pre-Proposition 64 "likely to deceive" standard for the UCL's "fraudulent" prong, and that *Tobacco II* confirms that "UCL relief is available on a class basis 'without individualized proof of deception, reliance and injury.'" *See, e.g.*, slip op. at 19-20, 22 (quoting *Tobacco II*). In fact, a sentence added to the opinion in the "Order Modifying Opinion and Directing Publication" reads: "The Supreme Court ... conclud[ed]

individualized proof of injury to absent class members in a UCL action was not required." *Kaldenbach,* slip op. at 26 (citing *Tobacco II*, 46 Cal.4th at 320, 324). The findings of the Second District in *Cohen* are clearly at odds with the Fourth District in *Kaldenbach*, and this Court should review *Cohen* to resolve the dispute.

For the reasons set forth above and herein, Plaintiff / Appellant respectfully requests the court to grant this petition for review.

III. BACKGROUND

Cohen is a proposed consumer class action wherein Appellant alleges that a satellite television provider, Respondent DIRECTV, secretly removed one-third of the resolution from its high definition ("HD") signal before transmitting this lower quality signal to its customers. Appellant alleges that DIRECTV misrepresented the nature of its HD service. Appellant claims that DIRECTV violated the Consumer Legal Remedies Act, Civil Code section 1750, et seq. ("CLRA") and the Unfair Competition Law, Business and Professions Code section 17200 ("UCL") in the marketing and advertising of its HD package.

As set forth in the record below, DIRECTV never provides accurate information concerning the pixel resolution of its HD signal -- actively concealing the truth. Rather the evidence shows a broad based marketing and promotional campaign designed to mislead the consumer at large. False or misleading information concerning the pixel resolution of DIRECTV's HD signal was found on DIRECTV's promotional website "Why HD." False or misleading information was found in DIRECTV's on-line "HD Glossary." False or misleading information was found in the manuals for DIRECTV's equipment. False or misleading information information was found in a training video for DIRECTV's installers who

were instructed to educate the consumer. This misinformation was even broadcast to all DIRECTV subscribers on an endless loop on one of DIRECTV's informational channels, and was available on the website of DIRECTV's trade association. Thus, whenever information concerning the actual resolution of DIRECTV's high definition signal was provided, DIRECTV only provided the false information. DIRECTV has never informed anyone that it removes one third of the resolution of its HD signal.

Under these circumstances, whether or not the absent class members actually saw or relied upon the specific false representations does not diminish the California consumer's interest in seeing DIRECTV's unlawful conduct enjoined and in preventing DIRECTV from retaining the benefits of its wrongful conduct. A class under the UCL should have been certified.

IV. LEGAL DISCUSSION

A. ACCORDING TO *TOBACCO II*, AN INDIVIDUALIZED SHOWING OF DECEPTION, RELIANCE AND INJURY FOR EACH CLASS MEMBER IS NOT REQUIRED TO CERTIFY A CLASS UNDER THE UCL

1. *Tobacco II* Encompassed More Than Just "Standing" – It Also Concerned The Elements of a UCL Claim And The "Commonality" Question For Class Certification

In *Cohen*, Appellant alleged that DIRECTV advertised its HD satellite television service "without the intent to provide the customers" with the advertised levels of resolution, and "that DIRECTV switched its HDTV channels to a lower 'resolution,' reducing the quality of the television images it transmits to its subscribers." *Cohen*, slip op. at 3. The trial court denied certification of both the CLRA and the UCL claims

because (among other reasons) it determined that actual reliance was an element of both claims. *Id.* at 7.

As for the UCL claim, the trial court held (in November 2007):

> Prior to Prop 64 the standard for fraud was "likely to be deceived." However since Prop 64, amendments require the plaintiff to have suffered injury in fact and lost money or property. ***A conclusion may be drawn that class members must have actu[a]lly been deceived.*** *Id.* (alteration in original; emphasis added).

This is the opposite of the Supreme Court's holding in *Tobacco II*. Yet, in *Cohen*, the Court of Appeal held that the trial court "did not apply an improper criterion in addressing the class certification issue." *Cohen*, slip op. at 16. This holding is contrary to the holding in *Tobacco II*.

In *Cohen* the Court of Appeal limited the holding of *Tobacco II* to the following: "class certification may not be defeated *on the ground of lack of standing* upon a showing that class members did not rely on false advertising." *Cohen*, slip op. at 15 (italics in original). That is not what this Court held in *Tobacco II*. The holding was far broader.

The lower court in *Tobacco II* had held that, "post Proposition 64, individual issues of exposure to the allegedly deceptive statements and reliance upon them, predominated over class issues." *Tobacco II*, 46 Cal.4th at 311 (describing lower courts' holding). In *Tobacco II*, class certification had not been denied "on the ground of lack of standing," but rather because common questions would not predominate on the issue of reliance – there was no commonality. *That* is the ruling *Tobacco II* expressly reversed. *Tobacco II* goes far beyond just standing. It also encompasses the elements of a UCL claim and commonality as well.

Tobacco II held that the Proposition 64 standing requirement ("suffered injury in fact and lost money or property as a result of") *could*

not be imposed on unnamed class members because doing so would serve to *change* the long-established elements of a UCL claim -- something the Court had previously held, in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, that Proposition 64 did not do:

> [T]o hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have "lost money or property as a result of the unfair competition" (§ 17204) would conflict with the language in section 17203 authorizing broader relief -- the "may have been acquired" language -- and implicitly overrule a fundamental holding in our previous decisions, including *Fletcher*, *Bank of the West* and *Committee on Children's Television*.
>
> Had this been the intention of the drafters of Proposition 64 -- to limit the availability of class actions under the UCL only to those absent class members who met Proposition 64's standing requirements -- presumably they would have amended section 17203 to reflect this intention. Plainly, they did not....
>
> [It] would undermine the guarantee made by Proposition 64's proponents that the initiative would not undermine the efficacy of the UCL as a means of protecting consumer rights, because requiring all unnamed members of a class action to individually establish standing would effectively eliminate the class action lawsuit as a vehicle for the vindication of such rights.

Tobacco II, 46 Cal.4th at 320, 321.

The *Cohen* Court expresses the view that UCL claims are incompatible with class certification principles unless each class member proves reliance and injury:

> [W]e find *Tobacco II* to be irrelevant because the issue of "standing" simply is not the same thing as the issue of "commonality." .... We see no language in *Tobacco II* which suggests to us that the Supreme Court intended our state's trial court's to dispatch with an examination of commonality when addressing a motion for class certification.
>
> *Cohen*, slip op. at 15-16.

Cohen overlooks the fact that *Tobacco II* necessarily addressed not only standing, but also commonality, because in *Tobacco II*, the Supreme Court reinstated an order granting class certification of a UCL "fraudulent" prong claim. The Supreme Court did not direct lower courts to dispense with commonality when analyzing class certification; but what it did do is direct lower courts to assess commonality in light of the actual elements of the claim ("likely to deceive" consumers) rather than non-existent ones (such as reliance and injury).

2. Tobacco II Did Not Require All Class Members To Have Been Injured To Certify A Class Seeking Restitution And Injunctive Relief Under The UCL

In *Cohen*, the Court of Appeal concluded that the trial court correctly denied class certification of a class that included persons who had not viewed allegedly deceptive promotions by DIRECTV. The Court reasoned that "we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice" *Cohen*, slip

op. at pp. 14. "In short, ... factual questions associated with [unnamed class members'] ***reliance*** on DIRECTV's alleged false representations ***was a proper criterion for the court's consideration when examining 'commonality'*** in the context of the subscribers' motion for class certification, even after *Tobacco II*." *Cohen*, slip op. at 16 (emphasis added)

The Supreme Court held the exact opposite in *Tobacco II*:

> [Business and Professions Code section 17204], construed in light of the "concern that wrongdoers not retain the benefits of their misconduct" (*Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d 442, 452, 153 Cal.Rptr. 28, 591 P.2d 51) has led courts repeatedly and consistently to hold that ***relief under the UCL is available without individualized proof of deception, reliance and injury***. (E.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545; *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211, 197 Cal.Rptr. 783, 673 P.2d 660.)
>
> *Tobacco II*, 46 Cal.4th at 321 (emphasis added).

Tobacco II stated it clearly -- under the UCL, "***relief***" may be ordered "***without*** individualized proof of deception, reliance and injury." *Id.* (emphasis added). That is a statement of the basic elements of a UCL claim, and Proposition 64 did not change the substance of the law, which focuses on defendant's wrongful conduct, as opposed plaintiff's injury:

> Defendants also argue that Proposition 64's standing requirement must be applied to all class members because otherwise the class representative would be permitted "to assert 'claims' that the absent class

> members do not have." According to defendants this would violate the principle that the aggregation of individual claims into a class action "does not serve to enlarge substantive rights or remedies." [] We disagree. The substantive right extended to the public by the UCL is the "'right to protection from fraud, deceit, and unlawful conduct'" [], and the focus of the statute is on the defendant's conduct. As we have already observed, the proponents of Proposition 64 told the electorate that the initiative would not alter the statute's fundamental purpose of protecting consumers from unfair businesses practices. Rather, the purpose of the initiative was to address a specific abuse of the UCL's generous standing provision by eliminating that provision in favor of a more stringent standing requirement. That change, as we observed in *Mervyn's*, did not change the substantive law.
>
> *See Tobacco II*, 46 Cal. 4th at 324 (emphasis added).

Actual deception, reliance and injury are not elements of a UCL claim. *Id.*; *see also id.* at 312 (UCL "fraudulent" prong claim requires proof only that "members of the public are likely to be deceived"); *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal.App.4th 1235, 1253 (2009) ("[P]re-Proposition 64 caselaw that describes the kinds of conduct outlawed under the UCL is applicable to post-Proposition 64 cases such as the present case. The only difference is that, after Proposition 64, plaintiffs (but not absent class members in a class action) must establish that they meet the Proposition 64 standing requirements." (citing *Tobacco II*)). The Supreme Court rejected the approach of the *Cohen* Court in *Tobacco II*, concluding that "to hold that the absent class members on whose behalf a

private UCL action is prosecuted must show on an individualized basis that they have 'lost money or property as a result of the unfair competition' (§ 17204) would conflict with the language in section 17203 authorizing broader relief – the 'may have been acquired' language...." See *Tobacco II* 46 Cal.4th at 320.

Moreover, the Court expressly rejected the argument that standing requirements could be "back-doored" on absent class members through the class elements:

> At argument, defendants acknowledged that the text of Proposition 64 does not apply the standing requirements to unnamed class members. Defendants maintained, rather, that application of these requirements to absent class members is mandated by class action principles, specifically, that a class member must have standing to bring the action individually and that the aggregation of individual claims into a class action cannot be used to transform the underlying claim. We reject these arguments.
>
> *See Tobacco II*, 46 Cal. 4th at 321 (emphasis added).

The *Cohen* decision concluded that an analysis of common questions of "reliance" was a proper criterion for denying class certification (*Cohen*, slip op. at p. 16) even though "reliance" is not even an element of a UCL claim. This holding takes us back to pre-*Mervyn's* and pre-*Tobacco II* days, when lower courts had (erroneously) held that Proposition 64 changed the UCL's substantive elements by importing a "reliance' requirement. The Supreme Court held in no uncertain terms that Proposition 64 "was not intended to have *any effect* on absent class members." *Tobacco II*, 46 Cal. 4th at 319 (emphasis added). If *Cohen* is not

reviewed and remains published, it will have a major substantive impact on UCL jurisprudence.

V. CONCLUSION

Tobacco II made it clear that Proposition 64 did not change the substantive rights under the UCL and that individualized proof of deception, reliance and injury is not necessary. The *Cohen* decision turns *Tobacco II* on its head. The substantive rights under the UCL are changed, and individualized proof of deception, reliance and injury are required. *Cohen* should be reviewed buy this Court.

DATED: November 5, 2009

KING & FERLAUTO, LLP

By: _____
Thomas M. Ferlauto
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STATEMENT REGARDING PETITION FOR REHEARING IN COURT OF APPEAL

A petition for rehearing was not filed in the Court of Appeal in this action. This petition is based upon a mistake of law, not an omission or misstatement of an issue or material fact. [California Rules of Court, Rule 8.500(c)(2); *Marriage of Goddard* (2004) 33 Cal.4th 49, 53, 14 Cal.Rptr.3d 50, 53, fn. 2; *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000, 111 Cal.Rptr.2d 564, 566, fn. 2

DATED: November 5, 2009

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CERTIFICATE RE LENGTH OF BRIEF

I, Thomas M. Ferlauto,

Hereby by certify that the foregoing brief contains 3439 words, according to the word processor word count feature. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Los Angeles, California this 5th day of November, 2009.

Thomas M. Ferlauto