CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

August 16, 2007



Hon. Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Letter Brief in Support of Grant of Review in *McAdams v. Monier Inc.*, S154088 (CRC 8.500(g) & 8.512(d)(2)); or request for order that it not be published (CRC 8.1125).

Dear Chief Justice George and Associate Justices:

The Civil Justice Association of California (CJAC) and the California Bankers Association (CBA) urge the Court to review this case – at least on a "grant-and-hold" basis – because it raises an identical issue for which review has been granted in *In re Tobacco II Cases*[1] and *Pfizer v. Superior Court*,[2] to wit:

> In a class action premised on the Unfair Competition Law (UCL)[3] and Consumer Legal Remedies Act (CLRA)[4] alleging misrepresentation by a product manufacturer about its product, must every member of the class

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[1] S147345, review granted November 1, 2006. Petitioners made three arguments in favor of review, including that the "appellate court erroneously concluded that the doctrine of presumed reliance does not apply in UCL class actions where the defendant makes misrepresentations through a variety of ways and over a long period of time." (Petition, p. 39.)

[2] S145775, review on "grant-and-hold" basis by order of November 1, 2006. *Cf.*, *Meyer v. Sprint Spectrum*, S153846, review granted August 15, 2007 of opinion holding that Proposition 64 created a "two-part, statutory standing test," and that plaintiffs lacked standing under the UCL and CLRA to challenge unconscionable provisions in their cellular telephone contracts because the defendant had neither enforced nor threatened to enforce the provisions against them. *Meyer v. Sprint Spectrum L.P.* (2007) 150 Cal.App.4th 1136.

[3] B & P C. § 17200 et. seq.

[4] Civ. C. § 1750 et. seq. Though the CLRA is not a statutory claim in *Tobacco II*, the identical "as a result of" language also found in the UCL makes judicial construction of that phrase's meaning in the context of the "causation/reliance" element for misrepresentation binding for both statutory claims, which is what the appellate opinion in *Monier* found.

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have actually relied upon the misrepresentation in purchasing the product?

CJAC and CBA joined as amici with the California Chamber of Commerce and the California Manufacturers and Technology Association in the *Tobacco II Cases* and in the intermediate appellate court in *Pfizer* to successfully argue that, under the amendments to the UCL made by Proposition 64, each absent class member must prove *all* the elements of a UCL claim, including *causation*. When it comes to the element of "causation" in a UCL action based on that law's "misrepresentation" prong, this now means that every putative class member must have actually *relied* upon the same "misrepresentation" that is the gravamen of the complaint. No longer may a plaintiff prosecute a UCL misrepresentation claim by showing "reliance" solely as to the individual plaintiff and "presume" or "infer" reliance on the part of others for whom, under the pre-Proposition 64 era of the UCL, the phrase "general public" was construed expansively to include persons regardless of whether they suffered any injury in fact "as a result of" the complained about practice.

Now along comes this case, which parts company with the *Tobacco II* and *Pfizer* opinions, finding instead that the doctrine of "presumed reliance" obviates the necessity of each class member to show reliance on the *same material misrepresentation* despite plain language to the contrary in Proposition 64 and this Court's holding in *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082. Significantly, in reaching this anomalous conclusion the appellate opinion does not even reference *Mirkin*, which expressly declined to dispense with the requirement of actual reliance that each absent class member in a fraud action must prove with respect to the same material misrepresentations. *Mirkin* makes clear why actual reliance on the *same misrepresentation* in a class action for fraud is essential for each member of the class, and why "presumed reliance" does not work to end-run this requirement and obtain class certification:

> Actual reliance is more than a pleading requirement; it is an element of the tort of deceit. As we have previously observed, class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the end – to sacrifice the goal for the going.[5]

Despite the holding of *Mirkin* and Proposition 64's added "as a result of language" as an essential element for UCL "standing," the appellate opinion finds it unnecessary

[5] *Mirkin, id.* at 1103.

for each member of the class of homeowners with slurry-coated roof tiles made by the defendant to show reliance upon defendant's failure to affirmatively disclose that the color coating on its roofing tiles would not last for 50 years. In other words, failure to disclose a particular fact about a product now gives rise to an inference of reliance for each member of the class notwithstanding that different representations about it were made to different class members at different times and in different ways. The trial court rightly refused to certify this proposed class of homeowners, explaining that it swept too broadly and violated common-sense rules and decisions concerning essential characteristics of a class. A class should not logically or fairly encompass purchasers of used homes to whom, as the record shows, no representations whatsoever were made about the roofing tiles; nor should it include purchasers of homes after 1990 who were given a limited warranty representing that the tile color coating deteriorates with exposure to the elements and disclaiming coverage for physical deterioration of the color-coat.[6] Yet the ambit of the class approved by the appellate opinion includes persons to whom no single or same "misrepresentation" in the form of a "failure to disclose" occurred. Absent reliance upon the *same misrepresentation* for each member of the class, *Mirkin* bars use of the"presumed" or "inferred" reliance doctrine to obtain its certification.

In misapplying the doctrine of "presumed reliance" to justify its erroneous conclusion that the trial court's order should be reversed and the class certified, the appellate opinion relies upon *Vasquez v. Superior Court*[7] and *Occidental Land v. Superior Court*.[8] But *Mirkin* makes clear these authorities do *not* allow use of the presumed reliance doctrine where all that is alleged are "material misrepresentations [or failure to disclose material information] to the class, plus action consistent with reliance thereon."[9] "In fact, *Mirkin* stated, "we held no such thing. What we did hold [in *Vasquez* and *Occidental Land*] was that, *when the same material misrepresentations have actually been communicated to each member of the class, an inference of reliance arises as to the entire class.*"[10]

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[6] JA 916, 919, 1056-1060, 1081-1084,1282-1283, 1272, 1277.

[7] (1971) 4 Cal.3d 800, 811-12, cited 13 times in the appellate opinion.

[8] (1976) 18 Cal.3d 355, 358, cited 10 times in the appellate opinion.

[9] *Mirkin*, *supra*, 5 Cal. 4th at 1095.

[10] *Id.* (emphasis original).

As the trial court found, "the same material misrepresentations" that *Mirkin* holds necessary to give rise to the doctrine of presumed reliance in a fraud claim did not occur here. Quite the opposite, the trial court found that affirmative representations made about the tiles and any color-fastness were not identical but varied significantly over time and differed as to audience, media, scope of subject and product.[11] These findings should not be disturbed absent abuse of discretion.[12] Nonetheless, the appellate opinion ignores these findings, *Mirkin* and the plain language of Proposition 64 and the CLRA to certify an uncertifiable class, one that includes homeowners to whom different representations were made at different times about the tiles and their color-fast propensities, and homeowners whose roofing tiles have not faded and, indeed, may never fade.[13]

The appellate opinion, if allowed to stand, eviscerates *Mirkin* and key provisions of Proposition 64. Review is necessary to settle an important question of law and secure uniformity of decision concerning proper application of the doctrine of presumed reliance in seeking class certification in UCL, CLRA and common law actions for failure to disclose. For all these reasons, we urge the court grant review or direct that the opinion not be published in the official reports.

Respectfully submitted,

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[11] 1 A.A. 227-230.

[12] *Massachusetts Mutual Life Ins. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287.

[13] The opinion in this case also conflicts with *Caro v. Procter & Gamble* (1993) 18 Cal.App.4th 644, 667-669, which cites and follows *Mirkin* in holding that an inference of common reliance for an entire class arises only when the same material misrepresentation has been communicated to each class member.

## PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On August 16, 2007, I served the foregoing document(s) described as: Letter Brief in Support of Grant of Review in *McAdams v. Monier Inc.*, S154088 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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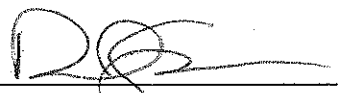
[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 16th day of August 2007 at Sacramento, California.



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