No. B188106

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

PFIZER, INC.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
LOS ANGELES COUNTY,
Respondent.

STEVE GALFANO,
Real Party in Interest.

After a Transfer Order from the Supreme Court of the State of California, Case No. S145775

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTY IN INTEREST

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Service on Attorney General and District Attorney Required by Bus. & Prof. Code §17209

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

Pursuant to rule 8.200(c) of the California Rules of Court and this Court's order dated September 25, 2009, Consumer Attorneys of California ("CAOC") respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of Real Party in Interest Steve Galfano.

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. This has often occurred through class and other representative actions under this state's Unfair Competition Law (Bus. & Prof. Code §§17200 *et seq.*) (UCL).[1] Most recently, CAOC participated as amicus in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 ("*Mervyn's*") (2006) and *In re Tobacco II Cases*, 46 Cal.4th 298 ("*Tobacco II*") (2009), the two leading cases in which the Supreme Court construed Proposition 64, which amended the UCL. CAOC has also participated as an amicus in cases pending at the intermediate appellate level.

CAOC has a substantive and abiding interest in ensuring that the amendments made to the UCL by means of Proposition 64 are correctly

[1] Statutory references are to the Business & Professions Code unless otherwise specified.

interpreted according to their plain terms, and in a manner consistent both with the Supreme Court's precedents and with the strong public policies underlying the UCL, which that Court has consistently affirmed.

In this case, the Supreme Court directed this Court to vacate its original opinion, *Pfizer Inc. v. Superior Court (Galfano)*, 141 Cal.App.4th 290, 45 Cal.Rptr.3d 840 (2006) ("*Pfizer I*") (review granted), and reconsider the cause in light of *Tobacco II*. The parties have filed supplemental briefs pursuant to Rule of Court 8.200(b) to address the impact of *Tobacco II*. This Court has indicated its intent to hear further oral argument in November and is expected to issue a new opinion in light of *Tobacco II*.[2] CAOC has a strong interest in participating as an amicus in cases, like this one, raising critical questions of interpretation of Proposition 64 and *Tobacco*.

Additionally, after the parties filed their supplemental briefs, the Court of Appeal handed down a new opinion, *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal.App.4th 1235, 99 Cal.Rptr.3d 768 (2009), which construes *Tobacco II* and which the parties' briefs do not address. CAOC's amicus brief addresses this decision, among other points.

No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. *See* Cal. Rules of Court, rule 8.200(c)(3).

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[2] Another option would be for the Court to discharge its order to show cause and deny the writ petition, sending the case back to the trial court for further proceedings consistent with *Tobacco II*.

For these reasons, CAOC respectfully requests permission to file the accompanying brief as amicus curiae in this matter.

Dated: October 22, 2009

Respectfully submitted,

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AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF APPELLANT

I. INTRODUCTION

Tobacco II is wholly consistent with, and fully supports, the trial court's order granting class certification in this case. The Court should remand the case to the trial court for further proceedings, either by discharging the order to show cause and denying the writ petition, or by issuing a new opinion consistent with *Tobacco II*.

As the Court is well aware, its original opinion in *Pfizer I* contained three substantive rulings:

(1) Unnamed class members, in addition to named class representatives, must meet Proposition 64's new standing requirement (*Pfizer I*, 45 Cal.Rptr.3d at 844, 849 (Discussion, Part 2.c));

(2) Proposition 64 eliminated the "likely to deceive" liability standard in "fraudulent"[3] prong cases (*id.* at 484, 850-51 (Discussion, Parts 2.d and 2.e)); and

(3) Proposition 64's standing language ("injury in fact … as a result of") requires proof of actual reliance in "fraudulent" prong cases (*id.* at 484, 851-53 (Discussion, Part 2.f)).

The Supreme Court addressed all three of these issues in *Tobacco II*. The Supreme Court disagreed with holdings (1) and (2), ruling instead that unnamed class members need not satisfy the standing

[3] The UCL prohibits "unfair competition," which is defined as "unlawful, unfair or *fraudulent*" conduct. Bus. & Prof. Code §17200 (emphasis added). This case, like *Tobacco II*, alleges violation of the "fraudulent" prong.

requirement and that the "likely to deceive" liability standard was unchanged by Proposition 64. As for holding (3), the Supreme Court agreed that representative plaintiffs (but not unnamed class members) must prove actual reliance in "fraudulent" prong cases, but went on to provide important guidance on how reliance may be established.

If the Court issues a new opinion, that new opinion should revisit each of the three holdings of *Pfizer I*.

II. THIS COURT'S THREE PRIOR HOLDINGS SHOULD BE MODIFIED TO COMPORT WITH *TOBACCO II*

A. Under *Tobacco II*, Unnamed Class Members Are Not Required to Satisfy the New Standing Requirement of Proposition 64

First, any new opinion should reflect *Tobacco II*'s holding that only the named class representative must meet the new standing requirement imposed by Prop. 64. *See Tobacco II*, 46 Cal.4th at 306 ("We conclude that standing requirements are applicable only to the class representatives, and not all absent class members.").

As the Supreme Court explained, this holding was text-based, and derives directly from the UCL's wording as amended by Proposition 64: "[T]he references in [Business & Professions Code] section 17203 to one who wishes to pursue UCL claims on behalf of others are in the singular; that is, the 'person' and the 'claimant' who pursues such claims must meet the standing requirements of section 17204 and comply with Code of Civil Procedure section 382. The conclusion that must be drawn from these words is that only this individual—the representative plaintiff—is required to meet the standing requirements." *Tobacco II*, 46 Cal.4th at 35-16.

In particular, the following language from *Pfizer I* is now inconsistent with California law, as declared in *Tobacco II*:

> It is a basic principle of standing that "[*e*]*ach class member must have standing to bring the suit in his own right*." (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73, 231 Cal.Rptr. 638.) …. The class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising.

Pfizer I, 45 Cal.Rptr.3d at 849 (emphasis added). The Supreme Court expressly disagreed with that reading of *Collins*, noting that "*Collins* does not address the question before us of whether absent class members in a UCL action are required to establish standing, and is therefore inapposite." *Tobacco II*, 46 Cal.4th at 323. The language is inconsistent with *Tobacco II* and should be deleted from the opinion, along with any other suggestion that unnamed class members must meet the standing requirements in a UCL case.

B. Under *Tobacco II*, Proposition 64 Did Not Change the "Likely to Deceive" Liability Standard for "Fraudulent" Prong Cases

Second, any new opinion should omit the holding of *Pfizer I* that plaintiffs "cannot state a cause of action based merely on the 'likelihood'" of deception. *Pfizer I*, 45 Cal.Rptr.3d at 850. That is because, as *Tobacco II* makes clear, "reliance" is not an element of a UCL "fraudulent" prong claim and the "likely to deceive" liability standard remains in full force today.

Under *Tobacco II*, reliance is merely something that the class representative must establish in order to have *standing* to bring a UCL "fraudulent" prong claim. It is *not* something the unnamed class members must prove—either at the outset for standing purposes, or at trial for liability purposes. Nor, for that matter, must the class representative must prove reliance at trial for liability purposes. In other

words, reliance is irrelevant to whether common questions predominate on liability in a UCL "fraudulent" prong case like this one.

As the Supreme Court explained, "[Proposition 64] was not intended to have *any effect* on absent class members." *Tobacco II*, 46 Cal.4th at 319 (emphasis added). Hence, now, as before Proposition 64, all that must be proven at trial to establish a violation of the UCL's "fraudulent" prong is that "members of the public are likely to be deceived" by the defendant's conduct. *Id.* at 312 (citing *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951). *Accord*: *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1267 (1992); *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211 (1983); *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442, 451 (1976). Recovery is "available without individualized proof of deception, reliance, and injury." *Tobacco II*, 46 Cal.4th at 320 (citing *Bank of the West*, 2 Cal.4th at 1267; *Committee on Children's Television*, 35 Cal.3d at 211).

The Supreme Court was very careful to preserve the "likely to deceive" liability standard for "fraudulent" prong cases, observing that imposing the new standing requirement on unnamed class members would "implicitly overrule [this] fundamental holding in our previous decisions, including *Fletcher*, *Bank of the West*, and *Committee on Children's Television*." *Id.*

The Court was also very careful to qualify its discussion of reliance as applicable *only* to the named class representatives and *only* for standing purposes—not to the unnamed class members and not for purposes of liability at trial. *See, e.g., id.* at 306 ("for purposes of establishing *standing* under the UCL … *a class representative* proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance"); 328 ("we conclude that

a plaintiff must plead and prove actual reliance to satisfy the *standing* requirement of section 17204 …"); 329 ("we … remand for further proceedings to determine whether *these* [*named*] *plaintiffs* can establish *standing* …") (emphasis added).

Finally, the Court was careful to preserve the pre-Proposition 64 distinction between a UCL "fraudulent" prong claim and common-law fraud:

> The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. "A [common law] fraudulent deception must be actually false, known to be false by the perpetrator *and reasonably relied upon* by a victim who incurs damages. *None of these elements are required to state a claim* for … relief" *under the UCL*.

Id. at 312 (quoting *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 332 (1998)) (emphasis added).

In a very recent case, Division Four of this District confirmed *Tobacco II*'s holding that Proposition 64 did not alter the UCL's substantive liability standards, and that *pre*-Proposition 64 precedents (including those establishing the "likely to deceive" standard for "fraudulent" prong claims) continue to govern:

> Thus, *pre-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.
>
> …. As noted above, a fraudulent business practice is one that is *likely to deceive* consumers.

Morgan v. AT&T Wireless Services, Inc., 177 Cal.App.4th 1235, 99 Cal.Rptr.3d 768, 783, 785 (2009) (citing *Tobacco II*, 46 Cal.4th at 312,

320). Division Four then discussed the facts necessary to establish a UCL "fraudulent" prong violation in a section entirely separate from its discussion of the facts necessary to prove the class representative's standing. *See id.* at 784-88 (Part B.1 (discussing liability), Part B.2 (discussing standing)).

In another recent case, the court construed *Tobacco II* and granted class certification of a UCL "fraudulent" prong claim without finding common reliance—inferred or otherwise: "Plaintiffs may prove with generalized evidence that Defendants' conduct was 'likely to deceive' members of the public. The individual circumstances of each class member's loan need not be examined because the class members are not required to prove reliance and damage. Common issues will thus predominate on the UCL claim." *Plascencia v. Lending 1st Mortgage*, ___ F.R.D. ___, 2009 WL 2569732, *10 (N. D. Cal. Aug. 21, 2009). Notably, the court certified the common-law fraud claim based on inferred classwide reliance, but found it unnecessary to discuss inferred reliance in certifying the UCL claim. *See id.* at *10-*11. The same reasoning applies here. *See also Morgan*, 99 Cal.Rptr.3d at 786 (noting "the distinction between common law fraud, which requires allegations of actual falsity and reasonable reliance pleaded with specificity, and the fraudulent prong of the UCL, which does not" (citing *Tobacco II*, 46 Cal.4th at 312, 320; *Committee on Children's Television*, 35 Cal.3d at 212 n.11)).

Under *Tobacco II*, all that the class members (and the class representatives) will have to prove for liability purposes at trial is conduct "likely to deceive" consumers. *Tobacco II*, 46 Cal.4th at 312; *Morgan*, 99 Cal.Rptr.3d at 783, 785. As in *Plascensia*, common questions predominate on that issue.

Thus, in light of *Tobacco II*, any new opinion should omit Parts 2.d and 2.e of the Discussion section of *Pfizer I* (45 Cal.Rptr.3d at 850-51) and instead, as in *Morgan*, confirm *Tobacco II*'s holding that "likely to deceive" remains the liability standard for UCL "fraudulent" prong cases after Proposition 64. Also, as in *Plascensia*, any new opinion should confirm that common questions predominate on that issue.[4]

C. Under *Tobacco II*, Actual Reliance is Required Only for the Named Class Representatives

Third, any new opinion should be careful to comport with *Tobacco II*'s detailed discussion of what "actual reliance" means in "fraudulent" prong cases.

In *Pfizer I*, this Court held:

> Inherent in Proposition 64's requirement that a plaintiff suffered "injury in fact … as a result of" the fraudulent business practice or false advertising is that a plaintiff actually *relied* on the misrepresentation and as a result, was injured thereby.

Pfizer I, 45 Cal.Rptr.3d 851-52 (citations omitted) (emphasis in original). As applied to the named class representatives, that holding is essentially consistent with *Tobacco II*, which held that "the phrase 'as a result of' … imposes an actual reliance requirement on [named] plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *Tobacco II*, 46 Cal.4th at 326.

Tobacco II went on to explain in detail what "actual reliance" means "under the UCL's fraud prong." Contrary to *Pfizer I*, "actual reliance" does not necessarily require that "a plaintiff would have had to

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[4] Alternatively, the case should be remanded for the trial court to determine in the first instance whether common questions predominate applying the "likely to deceive" liability standard.

read Pfizer's label" or mean that the named plaintiff must be "aware of" and "relied on" specific labels or advertisements. *Pfizer I*, 45 Cal.Rptr.3d at 852. That language should not be repeated in any new opinion.

Tobacco II confirms that UCL "fraudulent" prong claims may be predicated on material "'nondisclosures,'" and that "'a presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation was material.'" *Tobacco II*, 46 Cal.4th at 326-37 (quoting *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1110-11 (1993) (conc. & dis. opn. of Kennard, J.); *Engalla v. Permanente Medical Group*, 15 Cal.4th 951, 976-77 (1997)). Accordingly, it is not necessary in every case that the class representative have "read" a misrepresentation and can testify that he or she actually relied on it. In some circumstances, an inference of reliance may arise based on material nondisclosures. The Court is respectfully asked not to issue an opinion with wording that might be construed as undercutting this part of the *Tobacco II* holding.

Additionally, *Tobacco II* holds: "Nor does a plaintiff need to demonstrate individualized reliance on specific misrepresentations." *Id.* at 327. Rather, "a defendant's misrepresentation may be an 'immediate cause' of a plaintiff's injury-producing conduct even though the defendant did not make the misrepresentation directly to the plaintiff, and *even though the plaintiff never heard or read the precise words of the misrepresentation*." *Mirkin*, 5 Cal.4th at 1111 (conc. & dis. opn. of Kennard, J.) (citing Rest. (2d) Torts, §533) (cited in *Tobacco*) (emphasis added). Accordingly, it may not be necessary in every case that the named plaintiff "read [the defendant's] label."

This Court need not resolve these questions in its new opinion. As discussed above, neither the unnamed class members nor the named

class representatives must prove "actual reliance" for liability purposes at trial. "Actual reliance" is relevant only for purposes of standing. Hence, it is irrelevant to class certification. For class certification purposes, the relevant question is whether common questions predominate on the "likely to deceive" question. As in *Plascencia*, they do in this case.

According to the *Pfizer I* opinion, Petitioner did not challenge the named class representative's individual standing in opposing class certification (as it attempts to do now in its supplemental brief (at 23-24)). The opinion mentions only Petitioner's distinct argument that common questions did not predominate because each unnamed class member would have to prove actual reliance, which would vary from person to person. 45 Cal.Rptr.3d at 845 (discussing Pfizer's opposition to class certification). As discussed above, under *Tobacco II*, that argument fails.

If Petitioner wishes to challenge to the named class representative's standing under the principles announced in *Tobacco II*, it should do so on remand. As the Supreme Court held in *Tobacco II*, that is for the trial court to address in the first instance. In fact, the named class representative's lack of standing does not bar class certification if a substitute representative may be joined—another question best addressed by the trial court in the first instance. *See Tobacco II*, 46 Cal.4th at 329 ("we reverse the order granting the decertification motion and remand the case for further proceedings to determine whether these [named] plaintiffs can establish standing as we have now defined it and, if not, whether amendment should be permitted [to substitute a new class representative]").

D. Petitioner Incorrectly Argues, in Direct Contravention of *Tobacco II*, that Unnamed Class Members Must Prove Actual Reliance or Recover No Remedy

In its supplemental brief, Petitioner contends that absent class members "cannot recover, and cannot be within the class, if they were never exposed to the advertising in question *and were not misled* by it." Petitioner's Supp. Br. at 4 (emphasis added); *id.* at 11-18. That is directly contrary to *Tobacco II*, which holds that absent class members (and indeed, the named class representatives) *need not prove* actual deception, reliance *or* injury for purposes of liability at trial—*and* for purposes of awarding restitutionary relief. Petitioner's argument flouts the Supreme Court's unambiguous holdings in *Tobacco II*.

As *Tobacco II* holds, nothing in the UCL's text suggests that Proposition 64 changed the rules governing entitlement to restitution. On the contrary, those rules were unchanged and are "patently less stringent" than the new rules governing standing:

> [T]he language of section 17203 with respect to those entitled to restitution—"to restore to any person in interest any money or property, real or personal, which *may have been acquired*" (italics added) by means of the unfair practice—is **patently less stringent** than the standing requirement for the class representative—"any person who has suffered injury in fact and has lost money or property *as a result of* the unfair competition." (§ 17204, italics added.)

Tobacco II, 46 Cal. 4th at 320 (italics original; bold added). As a result, and out of "'concern that wrongdoers not retain the benefits of their misconduct,'" "courts repeatedly and consistently … hold that *relief* under the UCL is available without individualized proof of deception, reliance and *injury*." *Id.* (quoting *Fletcher*, 23 Cal. 3d at 452) (emphasis added).

To reiterate, "relief" is available *without* proof of "injury." *Id.*

Accordingly, *Tobacco II* held that to require absent class members to show that "they have 'lost money or property as a result of'" the defendant's conduct "would conflict with the language in section 17203 authorizing broader relief—the 'may have been acquired' language …." *Tobacco II*, 46 Cal. 4th at 320.

Section 17203 ("may have been acquired") authorizes "broader" restitutionary relief than section 17204's language ("as a result of") might suggest. As *Tobacco II* points out, if the electorate had intended to change the remedies, it would have amended section 17203 as well as section 17204. *Id.* at 320 & n.14.

"[T]he UCL's focus [is] on the defendant's conduct, rather than the plaintiff's damages," *id.* at 312 (citing *Fletcher*, 23 Cal.3d at 453), and its purpose is to restore the status quo ante, *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 121 (2000) (citing *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 286 (1973)). The UCL does not require plaintiffs to prove what they lost; rather, it requires plaintiffs to prove what the defendant "acquired," which must then be "restored" to the persons from whom it came. Bus. & Prof. Code §17203; *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144-45 (2003).

In *Tobacco II*, the Supreme Court confirmed all this. It reaffirmed that, notwithstanding Proposition 64, "*restitution may be ordered* 'without individualized proof of *deception, reliance, and injury* if necessary to prevent the use or employment of an unfair practice.'" *Tobacco II*, 46 Cal. 4th at 320 n. 14 (citing *Fletcher*, 23 Cal. 3d 442; *Bank of the West*, 2 Cal. 4th at 1267) (emphasis added).

Petitioner cites an intermediate appellate opinion saying that "the focus is on the *plaintiff's loss*." Petitioner's Supp. Br. at 13 (quoting *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.app.4th 997, 1020 (2005)). That contradicts *Tobacco II* and *Fletcher*, which confirm that "the focus [is] on the defendant's conduct," and therefore on what the *defendant gained*, "in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *Tobacco II*, 46 Cal.4th at 298 (citing *Fletcher*, 23 Cal.3d at 453).

Petitioner's argument boils down to the suggestion that class members must prove actual deception and injury as a prerequisite to an order requiring the defendant to "restore" what it "acquired," even though *Tobacco II* expressly holds otherwise. The suggestion should not be adopted.

III. CONCLUSION

For all of these reasons, the Court is respectfully asked to issue a new opinion that comports with *Tobacco II* in the manner discussed above, or to discharge its order to show cause, deny the writ petition, and remand the case for further proceedings consistent with *Tobacco II*.

Dated: October 22, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH WORD COUNT REQUIREMENT

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it does not exceed 3,786 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: October 22, 2009

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David A. Arbogast

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

California Rules of Court