June 2011: Class Action Litigation Update

Federal Courts Rein In California Supreme Court's Tobacco II Decision: The California Supreme Court's decision in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), appeared to be grim news for companies defending consumer class actions under California's Unfair Competition Law ("UCL"). The Court held that only the named plaintiffs, and not all absent class members, are required to show an "injury in fact" that resulted from the defendants' conduct. The ruling appeared to gut a primary defense to certification in such cases: that individual issues of reliance, causation, and injury predominate over any common issues.

Many consumer class actions are now litigated in federal court under the Class Action Fairness Act, and an open question from *Tobacco II* was whether its relaxed standing approach conflicted with Article III's requirement that federal court plaintiffs have suffered an injury in fact. The Eighth Circuit recently addressed the interplay of Article III and *Tobacco II* in *Avritt v. Reliastar Life Ins.*, 615 F.3d 1023, 1034 (8th Cir. 2010). The *Avritt* plaintiffs were California residents who allegedly bought fixed deferred annuities based on a misleading rate-setting practice. They filed a class action that asserted, among other claims, violation of the UCL. The district court denied certification, finding that plaintiffs had failed to establish that common questions predominated over individual issues.

On appeal, the Eighth Circuit discussed the applicability of *Tobacco II* in federal courts, reasoning that "to the extent that *Tobacco II* holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts." Although each class member is not required to submit evidence of personal standing, a class cannot be certified if it contains members who lack standing. As the *Avritt* court further stated, "[a] class must therefore be defined in such a way that anyone within it would have standing. Or, to put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring the suit themselves." According to the Court of Appeals, the determination in *Tobacco II* that only the named plaintiffs asserting a representative UCL claim, and not all absent class members, are required to meet standing requirements "diverged from federal jurisdictional principles, which we are bound to follow." The Eighth Circuit affirmed the district court's denial of the plaintiffs' class certification motion.

At least one California district court has followed *Avritt's* analysis. *See Webb v. Carter's, Inc.*,—F.R.D. —, 2011 WL 343961, at *6-9 (C.D. Cal. Feb. 3, 2011) (Feess, J.) (declaring that "*Tobacco II* does not persuade the Court that a class action can proceed even where class members lack Article III standing," and denying certification of UCL, FAL, CLRA and fraud claims). Time will show whether other courts, including the Ninth Circuit, will ultimately agree with *Avritt*. Until this issue is definitively resolved, the ability of defendants to invoke Article III to countervail *Tobacco II* will provide a powerful incentive to remove consumer class actions to federal court when possible.