Tumult in California UCL Class Action Cases: Will the Supreme Court Step in?

Late last year the Fourth Appellate District of the California Court of Appeal issued its decision in Zhang v. Superior Court, 178 Cal. App. 4th 1081 (2009). In that case, the court identified the issue presented "as whether fraudulent conduct by an insurer, which is connected with conduct that would violate Insurance Code § 790.03 et seq., sometimes referred to as the 'Unfair Insurance Practices Act'—can also give rise to a private civil cause of action under the Unfair Competition Law (UCL), Business and Professions Code § 17200 et seq." The court held that it did. This case will thus address whether insurance companies enjoy any special exemption from UCL liability. The statement of issues on review reads:

> *(1) Can an insured bring a cause of action against its insurer under the unfair competition law (Bus. & Prof. Code, § 17200) based on allegations that the insurer misrepresents and falsely advertises that it will promptly and properly pay covered claims when it has no intention of doing so? (2) Does Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287 bar such an action?*

This was a departure from Textron Financial Corp. v. National Union Fire Ins. Co., 118 Cal. App. 4th 1061 (2004), which was previously interpreted to bar UCL "unlawful" prong claims against insurers based on conduct prohibited by § 790.03. The court held that "if a plaintiff relies on conduct that violates the Unfair Insurance Practices Act but is not otherwise prohibited, Moradi-Shalal requires that a civil action under the UCL be considered barred." The court explained that that where, however, a plaintiff alleges unlawful, misleading and untrue conduct that is expressly within the parameters of the UCL, the suit may proceed on that claim.

On February 10, 2010, the California Supreme Court granted the Petition for Review of this case. It is therefore no longer citable.

On the same day the California Supreme Court denied a Petition for Review and Depublication in Cohen v. DIRECTV, Inc. (October 28, 2009). Cohen v. DIRECTV, Inc., 178 Cal. App. 4th 966 (2009).

In *Cohen*, the plaintiff alleged that DIRECTV violated the UCL and the Consumer Legal Remedies Act ("CLRA") by inducing subscribers to purchase high definition television services through misrepresentations in DIRECTV's advertising that DIRECTV's broadcast of those channels would meet certain technical specifications. *Id*. at pp. 969-970. In opposing class certification, DIRECTV submitted evidence that many subscribers had never seen, or did not remember seeing, advertisements with the alleged misrepresentations about the technical specifications, and purchased the services at issue due to other factors. The trial court found that common issues of fact did not predominate because the allegedly fraudulent representations were not uniformly made to or considered by the class members.

The appellate court affirmed. In discussing the UCL claim, the appellate court noted that *Tobacco II*, 46 Cal. 4th 298 (2009) was irrelevant to class certification because it addressed only the issue of standing, and did not instruct the "state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification." *Id*. at p. 981. The court then concluded that the trial court's concern that the plaintiff's UCL and CLRA claims would involve individual factual issues regarding class members' reliance on the alleged

misrepresentations "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*." *Id*.

The Court may very well have viewed the issues as premature, given that Cohen has been heavily criticized by other decisions recently. Most recently, the modified opinion in *Steroid Hormone Product Cases*, __ Cal. App. 4th __ (February 8, 2010) rejected the Cohen analysis. The court stated:

> *"But to the extent the appellate court's opinion might be understood to hold that plaintiffs must show class members' reliance on the alleged misrepresentations under the UCL, we disagree. As Tobacco II made clear, Proposition 64 did not change the substantive law governing UCL claims, other than the standing requirements for the named plaintiffs, and "before Proposition 64, 'California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury.' [Citation.]" (Tobacco II, supra, 46s Cal.4th at p. 326.) But in any event, the Cohen court's discussion regarding the appropriateness of considering class members' reliance when examining commonality is irrelevant here, where the UCL claim is based upon the unlawful prong of the UCL and thus presents no issue regarding reliance."*

Yokoyama v. Midland National Life Insurance Co., __ F.3d __ (9th Cir. February 8, 2010), also amounts to a rebuke of Cohen, although the court did not cite to Cohen and even though the court interpreted Hawaii law. It ruled that class members, relative to Hawaii's version of California's UCL, did not need to show reliance on misrepresentations because the Hawaii statute required an "objective" standard. Like California's UCL, under Hawaii law, a deceptive act or practice is: (1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances [where] (3) the representation, omission, or practice is material. Likewise, claims under California unfair business practices statutes are governed by the "reasonable consumer" test. *Freeman v. Time, Inc.,* 68 F.3d 285, 289 (9th Cir.1995) ("[T]he false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer." (citation omitted)); Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 506-07 (2003) ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer.").

It will be interesting to when the California Supreme Court will resolve these conflicts

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