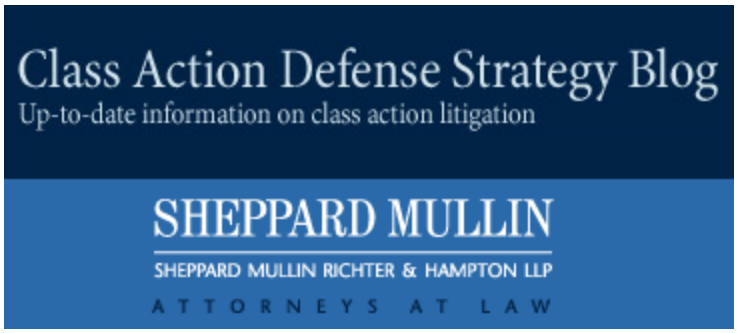

Class Action Defense Strategy Blog

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Fourth District Court of Appeal Confirms that the No "Pick Off" Rule Applies to a Potential UCL Class Action

By Jennifer Hoffman

In Wallace v. GEICO General Insurance Company (April 19, 2010) __ Cal.App.4th __, the Fourth District Court of Appeal confirmed that a defendant cannot "pick off" a potential class representative by tendering payment of their claim in a class action alleging violations of California's Unfair Competition Law, Business and Professions Code section 17200 et seq. ("UCL"). The no "pick off" rule stems from the California Supreme Court's holding in La Sala v. American Savings & Loan Ass'n, 5 Cal.3d 864 (1971), that an involuntary settlement of the named plaintiff's claim does not necessarily divest him or her of standing to continue the action on behalf of the class. Under Wallace, as long as the class representative "suffered injury in fact" and "lost money or property" as of the filing of the lawsuit, he or she may still serve as the representative plaintiff in a UCL class action.

The dispute in Wallace began when Wallace submitted a first-party property damage claim to her auto insurer, GEICO. GEICO paid a portion of the repair bill, but refused to pay costs it deemed to be above the prevailing rate, causing Wallace to pay the balance. Wallace alleged that GEICO's partial denial of her claim violated the UCL, and filed a class action complaint seeking relief on behalf of herself and all other similarly-situated Californians. After Wallace filed suit, GEICO sent her a check covering her out-of-pocket repair costs. The trial court held that GEICO's payment deprived Wallace of standing to represent the potential class under the UCL which, as amended by Proposition 64, states that "actions for relief pursuant to this chapter shall be prosecuted … by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Particularly, the court reasoned that because Wallace's claim had been paid in full, she had no longer "lost money or property" as a result of GEICO's conduct.

The Fourth District Court of Appeal reversed, finding no indication that Proposition 64 was intended to exempt UCL class actions from the no "pick off" rule. Instead, Proposition 64

focused on the *filing* of lawsuits by plaintiffs who had not suffered injury in fact or lost money or property. Because Wallace was a proper plaintiff under the UCL at the time she filed her suit, involuntary settlement of her claim did not automatically disqualify her as class representative under La Sala and its progeny. Instead, the proper procedure in such a "pick off" situation is for the trial court to consider at the class certification hearing whether the compensated plaintiff will fairly represent the class notwithstanding settlement of their claim.

The Wallace court also rejected GEICO's claim that the policy behind the "pick off" prohibition, preventing a defendant from avoiding class action liability through a strategic voluntary payment, would not be served in this case. GEICO argued that it had not strategically paid the defendant to avoid the class action liability because it paid Wallace's claim pursuant to a consent order issued by the California Department of Insurance. Although a consent order was in place at the time of the payment, the court determined that Wallace was not among the class of persons subject to the consent order. Thus, the court left open the issue of whether a payment *required* under a consent order would destroy a class representative's standing under the UCL or fall under an exception to the no "pick off" rule.