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Standing Under Calif.'s Unfair Competition Law

Law360, New York (June 8, 2011) -- While standing is a threshold question in every action, it is not necessarily a bar to absent class-member claims under California's Unfair Competition Law (UCL).

In a 2009 landmark decision, the California Supreme Court ruled that absent class members need not establish that they suffered injury as a result of unfair competition in order to assert viable UCL claims. In re Tobacco II Cases, 46 Cal. 4th 298, 321, 326 (2009) ("Tobacco II"). The court concluded that Proposition 64 (approved by California voters in the November 2004 general election) substantively amended the UCL by imposing a standing requirement on only the named plaintiff, not the class at large.[1]

While some courts have followed Tobacco II in certifying UCL class actions in the absence of class-member standing, others have distinguished it in denying certification. These opinions illustrate the intersection between the standing doctrine and the class certification elements of commonality and typicality, and provide abundant ammunition for those bringing and opposing class action claims under the UCL.

To start, two recent California Courts of Appeal decisions offer conflicting interpretations of Tobacco II. One court construed Tobacco II as limited to the question of standing and concluded that individual questions of reliance on alleged misrepresentations precluded class certification. Cohen v. DirectTV Inc., 178 Cal. App. 4th 966 (2009).

In Cohen, plaintiffs brought a class action alleging that the defendant induced the proposed class to purchase high-definition services through false advertising. In finding the absence of commonality, the Cohen court explained that "[w]e see no language in Tobacco II which suggests to us that the [California] Supreme Court intended our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification." Id. at 981.

Conversely, in In re Steroid Hormone Prod. Cases, 181 Cal. App. 4th 145 (2010), the court relied on Tobacco II in reversing the trial court's order denying certification. In re Steroid was a putative class action involving the sales of over-the-counter products containing anabolic steroids.

The In re Steroid court agreed with Cohen's reasoning that Tobacco II did not dispense with the commonality requirement for certification. But it disagreed with Cohen's implicit conclusion that a UCL class plaintiff must show actual reliance by individual absent class members and noted that "relief under the UCL is available without individualized proof of deception, reliance and injury." Id. at 158.

Three recent opinions from the Central District of California add a further layer of complexity to the standing question. In Webb v. Carter's Inc., 2011 U.S. Dist. LEXIS 12597 (C.D. Cal. Feb. 3, 2011), Judge Gary Feess held that, in UCL actions brought in federal court, class representatives and absent class members must meet Article III standing requirements. See also Burdick v. Union Sec. Ins. Co., 2009 U.S. Dist. LEXIS 121768 (C.D. Cal. Dec. 9, 2009) (same).

Webb v. Carter's involved a class action against a clothing manufacturer for its alleged failure to disclose and provide adequate warnings to consumers that the ink used in its tagless labels contained toxic chemicals that could cause adverse skin reactions.

The Webb court acknowledged Tobacco II's holding that absent class members need not show standing but concluded that a different rule applied under Article III in federal court litigation. It noted that Tobacco II "did not address federal courts' standing requirements," and further that "before the enactment of Proposition 64, uninjured Plaintiffs could bring UCL claims in state courts, but not federal courts." Id., at * 21.[2]

The court also recognized that the treatise Newberg On Class Actions suggests that a showing of standing is not required of absent class members, but noted that Newberg implicitly suggests that members of a proper class will necessarily have standing if they are to meet the typicality element of Rule 23.

Conversely, in Johnson v. General Mills Inc., 2011 U.S. Dist. LEXIS 45120 (C.D.Cal., Apr. 20, 2011), Judge Cormac Carney certified a UCL class action, reasoning that absent class members need not establish injury in fact under the UCL. In that case, the plaintiffs alleged that the defendant promoted its yogurt by falsely representing that it improved digestive health.

In addressing commonality, the court noted the reliance requirement for named plaintiffs did not apply to absent class members under the UCL. Relying on Tobacco II and In re Steroid, supra, the court explained that "Relief under the UCL is available without individualized proof of deception, reliance and injury." Id. at 320.

These decisions exemplify the overlap between standing, reliance and commonality, and demonstrate that, Tobacco II notwithstanding, the scope of the standing requirement under the UCL — whether analyzed under Proposition 64 or Article III, or in the context of commonality and typicality — is far from settled. Apparent conflicts abound both within the California Courts of Appeal and California federal district courts, and between them.

Though it denied review of both Cohen and In re Steroid, the California Supreme Court may yet resolve the apparent conflict between them.[3] The Ninth Circuit may also soon shed light on these questions in federal court actions, as there currently is "no controlling authority requiring absent class members, as opposed to the named plaintiffs, to satisfy Article III's standing requirements." Webb v. Carter's Inc., at * 19. In the interim, the conflicts raised by these cases may lead to both forum shopping and uncertainty for UCL litigants.

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[1] Prior to Proposition 64, the UCL did not require named plaintiffs to establish actual injury. See Tobacco II, at 571.

[2] The Eighth Circuit recently reached a similar result in Avritt v. Reliastar Life Insurance Company, 615 F.3d 1023 (8th Cir. 2010) (noting that Tobacco II is "inconsistent with the doctrine of standing as applied by federal courts.").

[3] See Cohen v. DIRECTV, Inc., 2010 Cal. LEXIS 954 (Cal., Feb. 10, 2010); In re Steroid Hormone Prod. Cases, 2010 Cal. LEXIS 3415 (Cal., Apr. 14, 2010)