

## Eighth Circuit Limits the Application in Federal Court of California Supreme Court's *Tobacco II* Decision

Last year, the California Supreme Court handed down its decision in *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, a highly anticipated decision addressing the impact of Proposition 64, a 2004 ballot initiative, on the standing requirements of California's Unfair Competition Law ("UCL"), California Business & Profession Code section 17200, *et seq.* Prop. 64 amended the UCL to provide that a person may pursue representative claims or relief on behalf of others only if the claimant both complies with Section 382 of the California Code of Civil Procedure (the authorizing statute for class suits in California) and "has suffered injury in fact and has lost money or property as a result of the unfair competition." In *Tobacco II*, the California Supreme Court held that only the named plaintiffs asserting a representative UCL claim, and not all absent class members, are required to meet Prop. 64's heightened standing requirements. A recent decision by the United States Court of Appeals for the Eighth Circuit has significantly limited the holding of *Tobacco II* with respect to class action lawsuits asserting UCL claims in federal court.

In *Avritt v. Reliastar Life Insurance Co.*, 2010 WL 3168453 (8th Cir. Aug. 12, 2010), plaintiffs, who were residents of California, alleged that they had purchased fixed deferred annuities from Northern Life Insurance Company (a predecessor of defendant, Reliastar). Plaintiffs alleged that Northern engaged in a misleading rate-setting practice, wherein the interest it credited on recent annuity deposits was consistently higher than that which it credited on older deposits. According to plaintiffs, Northern essentially engaged in a bait-and-switch scheme, which encouraged individuals to purchase Northern's annuities based on the false assumption that the initial, favorable interest rate would be maintained over time. Plaintiffs filed a class action lawsuit against Reliastar alleging, among others, violation of the UCL. The district court denied plaintiffs' motion for class certification, finding that plaintiffs had failed to establish that common questions predominated over individual issues, as required under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The Court of Appeals for the Eighth Circuit affirmed.

On appeal, plaintiffs argued that their motion for class certification should have been granted with respect to their UCL claim because, in light of *Tobacco II*, they are not required to produce evidence of individual class members' reliance or injury. The Court of Appeal disagreed. The court first pointed out that at least one California Appellate Court had interpreted *Tobacco II* as narrowly limited to the question of standing, and not touching upon the examination of commonality that is performed when deciding a motion for class certification. Noting that another California Appellate Court had interpreted *Tobacco II* more broadly, the Court of Appeals stated, "Although the state of California's UCL jurisprudence is currently uncertain, there is reason to doubt that the holding in *Tobacco II* goes as far as the [plaintiffs] suggest, eliminating any need to show that unnamed class members relied on any misrepresentations or were actually injured."

The Court of Appeals next discussed the application of *Tobacco II* in federal courts, stating 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." The court found that although each class member

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is not required to submit evidence of personal standing, a class cannot be certified if it contains members who lack standing. As stated by the court, “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 Prop. 64’s heightened standing requirements “diverged from federal jurisdictional principles, which we are bound to follow.” The Court of Appeal affirmed the district court’s denial of plaintiffs’ class certification motion.

The key lesson from *Avritt* is that the each class member in a federal UCL class action must have standing in his or her own right. A proposed class that includes putative class members who do not have individual standing should not be certified under federal standing principles. Therefore, if the class definition proposed by plaintiffs seeking certification includes individuals who have not “suffered injury in fact and . . . lost money or property as a result of the unfair competition,” class certification should be denied in federal court. California courts are not bound by federal standing jurisprudence. Consequently, if faced with a class action lawsuit in which plaintiffs assert a UCL claim, defendants should strongly consider removing the case to federal court.

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