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Posted at 5:38 AM on November 15, 2010 by Sheppard Mullin

California Court of Appeal Continues the Trend of Limiting Tobacco II

By Anna McLean and Rachel Tarko Hudson

The California Court of Appeal for the Fourth Appellate District recently added to the growing jurisprudence interpreting the scope and effect of *In re Tobacco II Cases* (2009) 46 Cal.4th 298 in its decision last month in *Sevidal v. Target Corp*. (Case No. D056206, Oct. 29, 2010) __ Cal.App.4th __. Following a trend of other California appellate courts, including the Second Appellate District in *Pfizer v. Superior Court* (2010) 182 Cal.App.4th 622, *Target* stands for the proposition that *Tobacco II* applies only to standing, and does not change the requirements for class certification under California's Unfair Competition Law ("UCL"). The *Target* court upheld the lower court's decision denying class certification, holding that *Tobacco II*'s limitation of traditional reliance and causation standing requirements to the named plaintiff in certain cases brought under the UCL does not eliminate the need for absent class members to establish that they were affected by the allegedly unfair practice in order to meet class certification requirements.

Raymundo Sevidal was a customer who purchased items of clothing through Target's website. Sevidal claimed he purchased these goods based on Target's representation on its website that the items were made in the United States when in fact they were not. He brought a class action suit against Target alleging fraud and violations of the UCL and false advertising laws.

Sevidal moved to certify a new class composed of "any California consumer who purchased any product from Target.com on or after November 21, 2003 which was identified on Target.com as 'Made in USA,' when such product was actually not manufactured or assembled in the United States." In support of his motion, Sevidal produced evidence obtained from Target that a "computer bug" caused some products at times to be incorrectly identified on the website as being produced in the United States when in fact they were not.

Target opposed certification of the class arguing that it was not ascertainable, that it was overbroad, and that common factual questions did not predominate. Target presented evidence that consumers had to click on an "additional info" link to find the country of manufacture and thus that not all potential class members were exposed to the incorrect information. Furthermore, Target produced evidence to show that it did not track which customers clicked on the "additional info" link for a particular product. When Target did track the percentage of customers who clicked the "additional info" link for a period of time in 2009, it found that the link was selected in only 20% of online shopping sessions; not all of those customers then went on to make a purchase.

Sevidal argued that "under *Tobacco II* . . . , the putative class members need not have reviewed or relied on Target's misrepresentations." The trial court ruled in favor of Target, holding that the class was not ascertainable, that common issues did not predominate, and that the class was overbroad.

The Court of Appeal affirmed the lower court's decision. As to ascertainability, it upheld the trial court's finding that Target did not have adequate records to be able to identify customers who purchased items while they were incorrectly labeled. The court rejected Sevidal's arguments that customer purchase records and self

identification could be used to determine which customers were part of the class. The "computer bug" that caused the incorrect "Made in USA" designation had operated inconsistently, so it was not possible even to identify which items has been inappropriately labeled at which times. In addition, because on average, 80% of customers did not view the additional product information, those customers would not know if the information was incorrect when they made their purchase and thus would not know if they were members of the class or not. As a result, the class would be significantly overbroad—by as much as 80%—which, the court held, was more than was acceptable.

The Court of Appeal also rejected Sevidal's argument that the trial court's ruling was contrary to the holding in *Tobacco II*. In doing so, the court noted that the trial court did not base its decision on reliance, which was addressed in *Tobacco II*, but rather on how Sevidal chose to define the class, which was not. The Court of Appeal agreed with the trial court that under *Tobacco II*, class actions brought under the UCL must still comply with the statutory class certification rules, including those that require that the class be ascertainable.

Tobacco II, the Court of Appeal held, does not stand for the proposition that "there are no substantive limits on absent class members seeking restitution . . . ." Under the language of the UCL, "a person is entitled to restitution for money or property 'which may have been acquired' *by means of* the unfair or unlawful practice." The Court of Appeal reasoned that, so as not to render this statutory language meaningless in practice, some connection between the defendant's conduct and the unnamed class members must exist.

The Court of Appeal drew further support for its decision from *Pfizer*,182 Cal.App.4th 622, also decided after *Tobacco II*. *Pfizer* involved an advertising campaign for Listerine in which only a small percentage of absent class members were exposed to the allegedly misleading label claiming that Listerine was "as effective as floss." The court in *Pfizer* held that, where large numbers of class members were never exposed to the advertising in question, there was no likelihood that that money or property was taken from them by means of unfair competition. The *Target* court held the same was true in the case of Target's "Made in USA" designations and came to the same conclusion. In *Tobacco II*, by contrast, all members of the class were likely exposed to the long-term advertising campaign at issue.

On the one hand, the implications of *Target* are clear: *Target* reiterates the limits of *Tobacco II* as applied in *Pfizer*. *Tobacco II* applies only to standing and does not change the requirements for class certification under the UCL. On the other hand, *Tobacco II*, *Pfizer*, and *Target* all involved claims of misleading advertising or promotional information. It remains to be seen how *Tobacco II* will be applied when addressing other types of activities allegedly prohibited by the UCL.

Target also suggests that in defending against UCL class actions involving claims of false advertising or other allegedly misleading disclosures which not all putative class members may have seen, defendants should consider challenging certification of the class on overbreadth, ascertainability, and other standard class certification grounds. Taken together, *Target* and *Pfizer* suggest a new tack for defendants seeking to navigate the post-*Tobacco II* UCL waters.