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CREATING CONFUSION WHERE NONE EXISTED

PERSPECTIVE
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According to William Stern, the co-author of California's Proposition 64, the decision rendered in *In re Tobacco II Cases* could make California "the class-action capital of the country," 46 Cal.4th 298 (2009).

This statement evinces a common misconception about the *Tobacco II* decision that has led many to conclude that the case created more questions than it answered. While there was quite a bit of controversy over Proposition 64's passage, the California Supreme Court's ruling in *Tobacco II* was monumental not because it signaled a fundamental change in the state's Unfair Competition Law, but because it clarified the limited scope of the changes resulting from the passage of the proposition.

After passage of Proposition 64, the trial court in *Tobacco II* decertified a previously certified class on the ground that the new standing requirements imposed by the proposition applied to each class member and not just the class representatives. In decertifying the class, the trial court reasoned that because each class member was now required to show that he or she lost money or property as a result of the alleged unfair competition, individual issues - rather than common issues - would predominate at trial. The California Supreme Court reversed the decertification order, concluding that class representatives were the only individuals subject to the new standing requirements.

What *Tobacco II* did not do is change the requirements for class certification of Unfair Competition Law claims or the requirements for ultimately proving those claims on a class-wide basis. With *Tobacco II*, the court held that all of the jurisprudence that predated Proposition 64 regarding the certification and trial of Unfair Competition Law claims remains undisturbed. In short, while Proposition 64 limited *who* may act as a class representative in an Unfair Competition Law action, it did nothing to limit *what* is required in order to certify or prove such claims.

It has been almost a year since *Tobacco II* was decided. In that time, California's courts have issued a handful of appellate decisions addressing the certification of Unfair Competition Law claims. Asking whether these class certification decisions conform with *Tobacco II* is not helpful since - as the decision makes clear - the real question is whether the following decisions conform with all of the prior jurisprudence that Proposition 64 left untouched. Two post-*Tobacco II* decisions illustrate this point -*Cohen v. DIRECTV, Inc.*, 178 Cal.App.4th 966 (2009) and *Pfizer Inc. v. Superior Court*, 2010 WL 660359.

Cohen involved a class action lawsuit against DIRECTV, Inc., for violation of the unfair competition law. Cohen alleged that DIRECTV deceptively advertised and marketed its HD Package broadcasting channels at a specific resolution and bandwidth. The plaintiffs in the case contended that subscribers relied on DIRECTV's representations when choosing to purchase the company's HD services. The trial court denied Cohen's motion for class

certification based on the principles of ascertainability and commonality. The Court of Appeal disagreed on the basis of ascertainability but sided with the trial court on the issue of commonality, stating:

"[W]e do not understand the [Unfair Competition Law] to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an alleged wrongful business practice...we find the trial court expressed a 'valid reason' for denying class certification when it examined the nature of the claims in Cohen's case, and juxtaposed those claims against the respective positions of the class members." 178 Cal.App.4th at 980.

According to *Cohen*, ascertainability is achieved by "defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of the class members possible..." 178 Cal.App.4th at 976. In other words, ascertainability deals with whether or not the court can determine who should be a part of the lawsuit. Commonality, on the other hand, asks whether there are common issues of fact that arise among this defined and ascertainable class so that their claims can be aggregated into a single lawsuit. *Tobacco II* provides no guidance regarding these issues, other than to point out that requirements for class certification have not been altered by Proposition 64.

In fact, *Cohen* can be analogized to the case cited in *Tobacco II* as being inapposite or irrelevant - *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62 (1986). Like *Cohen*, the question in *Collins* was whether a class could exist at all, not whether unnamed members of a certified class must demonstrate standing. Both *Cohen* and *Collins* stood for the proposition that class certification simply requires cohesion of the class members' claims - an issue that was wholly irrelevant to the court's decision in *Tobacco II*. While *Tobacco II* discussed the requirements for a class representative's standing, it did not discuss the requirements at the certification stage for ascertainability, typicality or commonality. Indeed, the court in *Cohen* fully recognized this fact, stating: "[i]n the contextual setting presented by Cohen's present case, we find *Tobacco II* to be irrelevant because the issue of 'standing' simply is not the same thing as the issue of 'commonality.' Standing, generally speaking, is a matter addressed to the trial court's jurisdiction."

In *Pfizer*, consumers brought a class action against the manufacturer of mouthwash for misleading consumers to believe that the mouthwash could replace the use of dental floss. Based on grounds of ascertainability and commonality, the Court of Appeal concluded, "the certified class, consisting of all purchasers of Listerine in California over a six-month period, is overbroad because it presumes there was a class-wide injury. However, large numbers of class members were *never exposed* to the 'as effective as floss' labels or television commercials." The court in *Pfizer* based their decision to vacate class certification on the second sentence of Business & Professions Code Section 17203. Although the *Pfizer* court points to *Tobacco II* in support of its conclusion, the court in *Tobacco II* specifically noted that the relevant portion of Section 17203 had not been changed by Proposition 64 and that the its prior jurisprudence holding that restitution is available without individualized proof of deception, reliance, or injury remained unchanged.

Concerns that California would become the class action capital of the country because of the *Tobacco II* decision are fundamentally flawed, since *Tobacco II* did nothing more than confirm that the requirements for class certification remain fundamentally unchanged. The same procedural elements that were required of class actions prior to Proposition 64 are still in

place, with the addition of a new standing requirement for class representatives in unfair competition claims.

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