Kralowec Law
The Kralowec Law Group

November 30, 2015

Hon. Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication of Opinion: *In re Tobacco Cases II*, 240 Cal.App.4th 779 (2015), Nos. D065165, S230426

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, I write on behalf of Consumer Attorneys of California ("CAOC") to respectfully request depublication of the Court of Appeal's opinion in *In re Tobacco Cases II*, 240 Cal.App.4th 779 (2015). The *Tobacco II* opinion was handed down on September 28, 2015, and became final on October 28, 2015. The due date for this depublication request fell on November 27, 2015, which was a judicial holiday. *See* Rules of Court 8.264(b)(1), 8.1125(a)(4); Code Civ. Proc. §135. This depublication request is timely filed on the first court day thereafter. *See* Rule of Court 1.10(b).

Statement of Interest

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC's members have taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and in the legislature. This has often occurred through litigation brought under California's Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200 et seq.).

CAOC has a substantive interest in upholding the public policies underlying the UCL for the benefit of the consumers whom its members represent. CAOC has participated as amicus curiae in significant cases involving interpretation of the UCL, including the earlier proceeding in this case, *In re Tobacco II Cases*, 46 Cal.4th 298 (2009). *See also Kwikset Corp. v. Superior Court (Benson)*, 51 Cal.4th 310 (2011); *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758 (2010); *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006).

The Court of Appeal's *Tobacco II* Opinion Should Be Depublished Because it Does Not Adhere to this Court's 2009 *Tobacco II* Opinion

This Court, when it last considered this case, handed down a landmark opinion holding that the "injury in fact" standing requirement added to the UCL by Proposition 64 in 2004[1] applied only to the named class representatives, not to the unnamed class members. *In re Tobacco II Cases*, 46 Cal.4th 298, 306, 315-24 (2009).[2] The opinion has provided critical guidance to litigants in UCL matters ever since.

The Court of Appeal's newly-issued opinion does not adhere to this Court's 2009 *Tobacco II* opinion. In its new opinion, Court of Appeal engrafted what amounts to an "injury in fact" requirement into the restitution provision (§17203), thereby imposing that requirement on the named and unnamed class members alike, contrary to this Court's *Tobacco II* holding. As a result, the new opinion should be depublished.

In its 2009 opinion in this case, this Court noted the stark contrast in wording between the UCL's standing language (§17204) and its restitution language (§17203), and explained that the two are not coextensive. To the contrary, the remedies language is "patently less stringent" than the standing language:

> [T]he language of section 17203 with respect to those entitled to restitution—"to restore to any person in interest any money or property, real or personal, which *may have been acquired*" (italics added) by means of the unfair practice—is **patently less stringent** than the standing requirement for the class representative—"any person who has suffered injury in fact and has lost money or property *as a result of* the unfair competition." (§ 17204, italics added.) This language, construed in light of the "concern that wrongdoers not retain the benefits of their misconduct" (*Fletcher v. Security Pacific National Bank, supra,*

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1 *See* Bus. & Prof. Code §17204 (UCL action may be brought by "any person who has suffered injury in fact and has lost money or property as a result of the unfair competition").

2 The Court may recall that it chose to take up this case as the most appropriate vehicle to address the standing issue. *See Tobacco II Cases*, No. S147345 (docket entry dated Oct. 26, 2006; denying extension request and advancing briefing schedule because "the Court is considering the possibility of acting upon the petition for review on an expedited basis"). The Court granted review just 19 days after the review petition was filed.

> 23 Cal.3d 442, 452) has led courts repeatedly and consistently to hold that **relief under the UCL is available without individualized proof of deception, reliance and injury**. (E.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267; *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211.)

Tobacco II, 46 Cal.4th at 320 (italics in original; bold added).

This Court then went on to hold that the neither the new standing provision, let alone the "less stringent" restitution provision, required proof by class members of their specific injuries or monetary losses:

> Accordingly, to hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have "lost money or property as a result of the unfair competition" (§ 17204) **would conflict with the language in section 17203 authorizing broader relief—the "may have been acquired" language—and implicitly overrule a fundamental holding in our previous decisions**, including *Fletcher*, *Bank of the West* and *Committee on Children's Television*.

Id. (bold added).

After this Court handed down its opinion in 2009, the case was remanded and significant post-remand activity occurred. Unfortunately, the trial court and the Court of Appeal both failed to adhere to this Court's directives in *Tobacco II*.

Following a 2013 bench trial, the trial court held that defendant Philip Morris had, for decades, falsely represented that Marlboro Lights cigarettes "delivered less tar and nicotine to smokers, and were thus less harmful than full-flavored cigarettes such as Marlboro Reds." 240 Cal.App.4th at 786. Philip Morris executives admitted that "they *knew* Marlboro Lights 'were just as harmful as Marlboro Reds and other full-flavored cigarettes but failed to disclose this information to consumers.'" *Id.* at 787 (emphasis added). Nevertheless, applying section 17203, the trial court declined to order Philip Morris to pay any monetary compensation to the class members whatsoever, because they had not proven the "actual value" they had "received" when they bought the intentionally mislabeled cigarettes. *Id.*

The Court of Appeal agreed with this reasoning and affirmed. However, its new, published opinion ignores this Court's 2009 holdings that the UCL's restitution provision (§17204) is "patently less stringent" than the standing provision; that "relief under the UCL is available without individualized proof of deception, reliance and injury"; and that the restitution provision "authoriz[es] broader relief" than would be available if proof of "injury in fact" were required. *Compare Tobacco II*, 46 Cal.4th at 320 *with Tobacco II*, 240 Cal.App.4th at 791-92, 794-95.

As a prerequisite to recovering restitution, and as the *only* appropriate measure of restitution, the Court of Appeal's new opinion requires proof of the difference between the price the class members paid for the product and the "actual value" they received in return. *See Tobacco II*, 240 Cal.App.4th at 791-92, 794-95. After making a classwide assumption that all of the class members must have "obtained value" when they bought the mislabeled cigarettes, the Court of Appeal then concluded that monetary relief could not be ordered under §17203 unless the class members quantified that value. *See id.* at 791, 794. According to the Court of Appeal, whenever the class members received any kind of benefit when they bought the mislabeled product, the amount of that benefit must be measured at trial and reduced to a specific dollar figure. *See id.* at 794-96.

That reasoning is inconsistent with this Court's holding in *Tobacco II* that the unnamed class members need not quantify their losses, either to establish standing or to recover monetary relief. The Court of Appeal improperly engrafted a standard of proof for section 17203 that is more rigorous, not less rigorous, than the proof required for "injury in fact" for standing purposes under section 17204. As this Court explained in *Kwikset*, section 17203 requires proof (for the named plaintiffs) of an "economic injury," which can be established (among other ways) by proving that the named plaintiff has "surrender[ed] in a transaction more, or acquire[d] in a transaction less, than he or she otherwise would have." *Kwikset*, 51 Cal.4th at 323. But the injury need not be quantified; for standing purposes, a plaintiff need prove only an "identifiable trifle of injury" in "any nontrivial amount." *Id.* at 324-25 (citations omitted).

The Court of Appeal's new opinion not only applies this requirement to the unnamed class members, contrary to *Tobacco II*, but also makes it even harder to recover restitution under §17203 than it would be to establish standing under §17204.

In *Tobacco II*, this Court held that the UCL's standing and restitution provisions are *not* coextensive. 46 Cal.4th at 320. The plain text of the restitution provision—"may have been

acquired by means of"— is "patently less stringent" than the standing provision's "injury in fact" language. *Id.* The Court of Appeal's new opinion fails to maintain the critical difference between the two provisions, which was essential to this Court's *Tobacco II* holding. The opinion should be depublished.

By conflating the restitution and standing provisions, the Court of Appeal fell into the very trap that this Court warned against in 2009. The Court of Appeal adopted a construction of the restitution provision that "conflict[s] with the language in section 17203 authorizing broader relief—the 'may have been acquired' language—and [conflicts with] a fundamental holding in our previous decisions, including *Fletcher*, *Bank of the West* and *Committee on Children's Television*." *Tobacco II*, 46 Cal.4th at 320.

As the Court is well aware, under the doctrine of stare decisis, "[t]he decisions of this court are binding upon and must be followed by all" lower courts, which "must accept the law declared by courts of superior jurisdiction." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962) (citing *People v. McGuire*, 45 Cal. 56, 57-58 (1872); *Latham v. Santa Clara County Hospital*, 104 Cal.App.2d 336, 340 (1951); *Globe Indemnity Co. v. Larkin*, 62 Cal.App.2d 891, 894 (1944)).

This means lower courts are not only bound by the result in a Supreme Court case, but also "must follow the reasoning found therein." *Loshonkohl v. Kinder*, 109 Cal.App.4th 510, 517 (2003) (citing *Auto Equity Sales*, 57 Cal.2d at 455) (emphasis added).[3] This is so whatever the lower court "may think of the reasoning" when considering similar issues in future cases. *Vielehr v. State Personnel Bd.*, 32 Cal.App.3d 187, 193 (1973). The Supreme Court's analysis and reasoning in its opinions is not to be set aside and ignored by lower courts, particularly where the analysis was "responsive to an argument raised by counsel and probably intended for guidance of the court and attorneys upon a new hearing." *United Steelworkers of America v. Board of Education*, 162 Cal.App.3d 823, 834-35 (1984) (citing *Auto Equity Sales*, 57 Cal.2d at 455; *Wall v. Sonora Union High Sch. Dist.*, 240 Cal.App.2d 870, 872 (1966)).

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[3] *See also People v. Perez*, 182 Cal.App.4th 231, 245 (2010) ("we are bound by [the Supreme Court's] reasoning"); *Priceline.com Inc. v. City of Anaheim*, 180 Cal.App.4th 1130, 1149 (2010) ("we are constrained to analyze this case under the rationale stated [by the Supreme Court]"); *WSS Indus. Const., Inc. v. Great West Contractors, Inc.*, 162 Cal.App.4th 581, 596 (2008) ("We are bound by this reasoning."); *Atkinson v. Golden Gate Tile Co.*, 21 Cal.App. 168, 174 (1913) (lower courts have "no option but to follow and apply the reasoning [of Supreme Court opinions] in disposing of the points made [in later cases]").

Here, as explained above, the Court of Appeal's new *Tobacco II* opinion does not follow this Court's reasoning or holdings in the original *Tobacco II* opinion. The new opinion is likely to lead to significant confusion among litigants and lower appellate courts if it remains a citable precedent. It should be depublished.

Conclusion

For the reasons stated above, the Court is respectfully asked to enter an order depublishing the Court of Appeal's opinion in *Tobacco II*.

Sincerely,

Kimberly A. Kralowec
State Bar No. 163158

cc: See attached proof of service

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 44 Montgomery Street, Suite 1210, San Francisco, California 94104, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. REQUEST FOR DEPUBLICATION OF OPINION; and

2. PROOF OF SERVICE.

By Mail: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business.

I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

California Court of Appeal
Fourth Appellate District, Division One

California Court of Appeal
Fourth Appellate District, Division One
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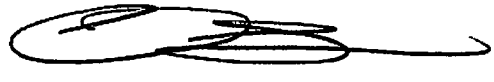
Date: November 30, 2015	 Chad A. Saunders