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Defects Of Damages Calculations In Calif. Tobacco II Case

Law360, New York (October 20, 2015, 3:10 PM ET) --

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The 18-year In re Tobacco II litigation may have just had its last gasp. On Sept. 28, 2015, the Fourth Appellate District affirmed the Honorable Ronald Prager's decision after a 10-week bench trial, which found no damages, awarded no injunctive relief and taxed over $750,000 in costs against the plaintiffs. The Court of Appeal's ruling likely put an end to this epic fight, which included a landmark 2009 trip to the California Supreme Court.

In re Tobacco II was a false advertising case against tobacco companies for allegedly misleading consumers about the health effects of light cigarettes. Its impact on California law reaches far beyond tobacco because the plaintiffs were not suing for personal injuries. They were claiming they had been deceived about the qualities of the products they purchased and sought restitution under California's Unfair Competition Law.[1] In that sense, the case was no analytically different than the food labeling and "Made in the USA" labeling cases that began inundating California courts after the California Supreme Court issued its 2009 decision in In re Tobacco II, which held that under California's Unfair Competition Law, a single injured plaintiff has standing to sue on behalf of millions of potentially uninjured individuals.[2]

In contrast to the California Supreme Court's groundbreaking 2009 ruling, the Court of Appeal's recent holding in Tobacco II was a rather unremarkable application of longstanding California precedent: it found that the trial court had no discretion to simply make up an amount of "restitution" in the absence of competent proof by the plaintiffs as to the amount the defendants supposedly wrongfully took from them. This has been the law since at least 2000, when the California Supreme Court decided Cortez v. Purolator Air Filtration Products Co., 23 Cal. 4th 163 (2000) and subsequently Korea Supply v. Lockheed Martin Corp., 29 Cal. 4th 1134 (2003), both of which held that nonrestitutionary disgorgement is not a remedy for UCL claims. In applying these cases, the Court of Appeal affirmed the trial court's holding

that the plaintiffs were not entitled to a full refund for their cigarettes because they had obtained some benefit from them (whatever benefit one obtains from smoking) and that the plaintiffs were not entitled to any restitution because they had not proven what their losses were at trial.

As noted above, the Tobacco II litigation is probably best known for establishing that a plaintiff need not show group reliance to establish a false advertising claim under the California Unfair Competition Law. This rule, which is somewhat unique to California, has made the state a popular venue for filing false advertising litigation.[3] But the final takeaway from the Tobacco II saga may be that certifying such a class leads to impossibilities in proving classwide damages.

As the Court of Appeal explained, the plaintiffs' damages survey failed to accurately establish the amount lost by the plaintiffs for numerous reasons, many of which had to do with the heterogeneity of the class:

The survey did not measure the difference between the price paid for Marlboro Lights and the actual value received, but rather measured "benefit of the bargain" damages not available in a UCL action; conjoint surveys have not been accepted in the relevant scientific community for litigation purposes; the method of selecting participants was flawed and many participants were not class members; the fictional cigarettes excluded attributes that many class members testified were more important than the includes attributes; and certain class members testified that in purchasing Marlboro Lights they did not even consider the health risks; the survey instructions were difficult to understand, the questions were repetitive and complex and sometimes participants gave different responses to the same questions ...

The court further noted that the survey produced "nonsensical results," which are most likely attributable to wide variances in preferences among the class members. For instance, 28 percent of the participants preferred the most dangerous smoking options and more than 81 percent preferred higher over lower priced products.

The plaintiffs employed top-shelf damages experts, including the head of New York University's Stern School of Business. If those experts were unable to establish a valid methodology for proving mislabeling damages against tobacco companies — who were alleged to have knowingly and falsely marketed cancer-causing products as safe for several decades — what realistic chance does a plaintiff have of proving damages in other false advertising cases where the consumer retains some benefit from a product, e.g., a snack food labeled as "natural," when it supposedly is not?

In federal court, such damages models should not reach trial in light of the United States Supreme Court's decision in Comcast v. Behrend, 133 S.Ct. 1426 (2013), which held before a class can be certified, the plaintiff must proffer a scientifically valid methodology for proving classwide damages. In the wake of Comcast, a growing number of courts have been denying class certification in food labeling and other false advertising lawsuits because the plaintiff has not provided any legitimate way to establish classwide damages or restitution.[4] Ultimately, Judge Prager's and the Court of Appeal's highlighting of this fundamental defect in Tobacco II may be the legacy of the case. The decision should at least serve as a cautionary tale.

—By J. Noah Hagey and Matt Borden, BraunHagey & Borden LLP

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[1] California Business & Professional Code §§ 17200, et seq.

[2] In re Tobacco II Cases, 46 Cal. 4th 298 (2009). In fact, the lesser-known companion case for which the California Supreme Court granted review along with In re Tobacco II involved a plaintiff who claimed that Listerine's advertising had deceived him into believing he no longer needed to brush his teeth.

[3] The United States District Court for the Northern District of California has been dubbed the "Food Court" in light of the deluge of food labeling suits that have been filed there. See, e.g., Anthony J. Anscombe & Mary Beth Buckley, Jury Still Out on the "Food Court": An Explanation of Food Law Class Actions and the Popularity of the Northern District of California, Bloomberg Law.

[4] See, e.g., Jones v. ConAgra Foods Inc., No. C 12-1633 CRB, (N.D. Cal. June 23, 2014), which is currently on appeal in the Ninth Circuit, Case No. 14-16327.

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