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Product Liability

EXECUTIVE SUMMARY

Attorneys involved in product liability litigation are still feeling the effects of May's California Supreme Court's ruling, *In re Tobacco II Cases* (46 Cal. 4th 298 (2009)). The ruling has set off a host of controversies over class certification, California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200-17210), and Proposition 64 (Cal. Bus. & Prof. Code § 17203).

Our panel of experts discussed this and other cases, along with the Class Action Fairness Act (CAFA, 28 U.S.C. §§ 1332 (d), 1453, 1711-1715), the operative standard for admissibility of evidence in California (*People v. Kelly,* 17 Cal. 3d 24 (1976))/*Frye v. United States,* 293 F. 1013 (1923)), the federal standard (the *Daubert* test, so called because of *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993)), and the delay in getting mass-tort cases to the courthouse. The panelists are Mark V. Berry and Pamela J. Roberts of Bowman and Brooke; Christopher Chorba of Gibson, Dunn & Crutcher; Robert J. Nelson of Lieff Cabraser Heimann & Bernstein; and Frank C. Rothrock and Randall Haimovici of Shook, Hardy & Bacon. *California Lawyer* moderated the roundtable, which was reported by Krishanna DeRita of Barkley Court Reporters.

MODERATOR: The state Supreme Court's May ruling *In Re Tobacco II Cases* seemed to be a victory for California class actions, but since that time, lower court rulings have chipped away at the ruling, limiting the practical effect of *Tobacco II.* What exactly is going on?

ROTHROCK: From the defense perspective, it was a surprising decision. What's astounding about it was that the court held that members of the class—at least for purposes of standing, do not have to have a cause of action—although the rep still has to meet that element of reliance for standing purposes. The Court of Appeal decisions have essentially echoed it. But *Cohen v. DIRECTV, Inc.* (178 Cal. App. 4th 966 (2009)) held that even though the individual class members may not have to establish reliance for standing, it is still a factor a court may consider for purposes of commonality in deciding whether to certify a class.

BERRY: I've looked at the reported and unreported appellate decisions since *Tobacco II*—and other than a couple of cases, the Courts of Appeal seem to be going along and embracing what *Tobacco II* said. From the defense point of view, *Tobacco II* is a very bad decision. There's a part in *Tobacco II* where the state Supreme Court basically says in case you don't understand what you need to do, here is what your plaintiff needs to say in deposition to have standing.

CHORBA: As has been its pattern in Unfair Competition Law (UCL) cases, the state Supreme Court limited its analysis to the two narrow issues upon which it granted review: first, the question of absent class-member standing, and second, the meaning of the causation/reliance requirement in Proposition 64. One of the more surprising aspects of the decision was that the majority treated as a well-established rule that absent class members did not have to demonstrate their standing in their own right to bring class actions. That rule actually is not so well established in the federal courts or in California, but now we have a majority of our state Supreme Court declaring that it is a settled rule. So far the federal courts are divided on this question as they apply their own Article III standards. Also, I would not say that the post-*Tobacco II* appellate decisions are "chipping" away at *Tobacco II*. Rather, they are wrestling with the very complex issues that are left open and un-addressed by that decision, including the difficult and often case-specific question of whether certification is appropriate.

"We talk among the parties about what you can do to speed up litigation and keep costs down. But the courts are overwhelmed." ***—Randall Haimovici***

NELSON: Essentially Justice Moreno in *Tobacco II* took the supporters of Prop. 64 at their word. These folks made crystal clear that the amendment was about nothing more than the standing of the named plaintiff. So the Supreme Court rightly concluded that Prop. 64 was about standing, nothing more and nothing less, and it is a mistake to suggest that Prop. 64 and *Tobacco II* somehow changed the UCL in other ways, as well. Post-*Tobacco II,* courts continue to deal with the notion of reliance, and have pretty consistently held that where the representation is material, you can infer reliance. A good recent example is the *Steroid Hormone Product Cases,* 2010 WL 196559 (Cal. App. 2 Dist.), where the court held that one could infer reliance on a class-wide basis because the omitted fact about the product, i.e., that the product contained an illegal steroid, was material.

MODERATOR: What impact are these post-*Tobacco II* issues are having on the UCL?

CHORBA: *Tobacco II* has certainly emboldened a lot of plaintiffs lawyers who were sort of licking their wounds post-Prop. 64. After *Tobacco II,* we are seeing a resurgence of what I would call frivolous UCL actions being brought in state and federal courts. After CAFA, defendants are removing many of these cases to federal courts, and these courts have taken a hard look at these cases in applying the Supreme

Court's directive in *Iqbal* (*Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009)) and *Twombly* (*Bell Atlantic Corp. v. Twombly* (550 U.S. 544 (2007)) to scrutinize those allegations and see if there really is a plausible allegation of unfair competition.

BERRY: In Los Angeles, one of the issues that we face is that not all class action cases are going to the complex departments where the judges are schooled in class actions, but they are being distributed all through the courthouse. So you have these regular courtroom judges who are trying to deal with these class actions and they've got 900 or 1,000 cases on their dockets and they are just overwhelmed.

ROTHROCK: We'd much prefer to be in federal court if we are going to challenge the pleadings. I don't know whether *Iqbal* and *Twombly* will survive. I understand there's legislation being introduced that may take them away, but while they live, we are probably better off with a 12 (b) 6 motion than a demurrer in state court.

HAIMOVICI: It's ironic that you can have a class representative who has an injury representing a class, but no evidence of injury for the class. It doesn't make any sense. You are going to have to deal with class injury when analyzing commonality anyway.

MODERATOR: What about the attempt to include CLRA (Cal. Civ. Code §§ 1750-1784) claims in many post-Prop. 64 UCL cases?

ROTHROCK: I have seen more CLRA claims since Prop. 64. Unlike the UCL, the CLRA is not limited to restitution and injunctive relief. But I'm not sure the CLRA is a panacea for plaintiffs–you have to fit within specified violations to get damages. And you have to give 30-day advance notice to obtain damages and perhaps restitution. We often see plaintiffs fail to comply with this requirement.

NELSON: When I file a UCL claim, I typically will also file a CLRA claim, primarily because the CLRA provides for a damages remedy. The fact that the UCL doesn't provide for damages is an important limitation from the plaintiff's perspective. When a consumer's been injured, and there is economic damage associated with the injury, the CLRA claim may well be the statute of choice. That said, the CLRA has its own statutory jurisprudence and its own class mechanism that is largely separate and apart from that of the UCL.

CHORBA: I agree that it's almost a no-brainer for plaintiffs to add a tag-along CLRA claim in many UCL actions. After Prop. 64, I did see some plaintiffs adding the CLRA claim to try and avoid some of the problems that they perceived with Prop. 64, but often these claims were like trying to squeeze a round peg into a square hole. The CLRA has many different and unique requirements, and often will not work as a companion to the UCL claim.

BERRY: Ironically under CLRA, it's a jury trial; under the UCL, it's not. I was in a class action trial last year where the plaintiffs lawyers dismissed the CLRA claim at the eleventh hour so they could get a bench trial. That was not unprecedented. The same thing happened in the *Ford Explorer Cases* (J.C.C.P. 4266 and 4270 (Sacramento Super. Ct.)), the one that ended with the coupon settlement, where the plaintiffs counsel thought they had a favorable judge, so they didn't want a jury. They dismissed the CLRA claim and went only with a bench trial.

ROBERTS: Pondering the value of dismissing one of these claims and electing not to have a jury trial is a tactic that we don't see as often, especially in the early stages of a case. Many cases are redesigned and reshaped at the early pleading stages and you will see both claims plead. You can then winnow them down before getting to trial. You see more plaintiffs counsel trying to craft the complaint to leave their options open, at least at the early pleading stage.

MODERATOR: Where do we stand in California after the Supreme Court rulings in *BMW of North America Inc. v. Gore* (517 U.S. 559 (1996)), *Cooper Industries Inc. v. Leatherman Tool Group Inc.* (532 US 424 (2001)), and *State Farm Mut. Auto Ins. Co. v. Campbell* (538 U.S. 408 (2003))? Has anything really changed?

BERRY: On paper, there should be dramatic change. But then you look at *Williams v. Philip Morris, Inc.* (344 Or. 45 (2008), writ of cert dismissed as improvidently granted, 129 S.Ct. 1436 (2009)), where the Supreme Court suggested a 97:1 ratio is ridiculous. Then the Oregon Court of Appeals says, "We really meant it." The Oregon Supreme Court says, "We are not going to fix this," and then the U.S. Supreme Court says, "Relief denied." So a punitive verdict 97 times compensatories stands up after *Gore* and *Cooper* and *State Farm.* In theory, there should be a sea change on punitive damages, but how do you reconcile *Williams v. Philip Morris*?

NELSON: *Philip Morris* was a death case about a company that, according to the evidence, had engaged in extraordinarily malevolent conduct over a long period of time, which also resulted in the deaths of many others. In many respects *Philip Morris* was the exception. The reality is that the Supreme Court's jurisprudence has had a substantial impact on the way plaintiffs approach punitive damages and what they actually ask for at trial. Very rarely will a plaintiff now seek a multiple on compensatory damages in excess of single digits, except in death cases. Trial and appellate judges are very sensitive to punitive damage awards that are perceived as outliers. So there really has been a sea change in my judgment.

ROTHROCK: *Dyna-Med, Inc. v. Fair Emp. Housing Comm'n* (43 Cal. 3d 1379 (1987)), *Adams v. Murakami* (54 Cal. 3d 105 (1991)), and *College Hospital, Inc. v. Superior Court* (8 Cal. 4th 704 (1994)), which held that punitive damages are disfavored, are still good law in California. The state Supreme Court has not disavowed them. *Philip Morris* is problematic. It says punitive damages should not be based on injury to nonparties. But it then says injury to nonparties–if it's the same course of conduct–can be considered by the jury in assessing the defendant's reprehensibility, which is one of the factors that goes into the amount of the punishment. This seems circular.

NELSON: What you are saying is exactly what Justice Ginsberg argued in her dissent in *Phillip Morris.* She thought the Court was being unrealistic and it is hard not to agree with her. As a plaintiffs lawyer who has argued for punitive damages in front of a jury, I'm essentially tasked with arguing that this company did this terrible thing not only to my client, but to other individuals as well. That demonstrates that the company is particularly reprehensible, and is a basis to award punitive damages. But at the same time I have to argue that when it comes to the appropriate punishment of the company and how much it should pay in punitive damages, I can only talk about the harm that this company caused my client. It's a very difficult act.

HAIMOVICI: There is a new case called *Holdgrafer v. Unocal Corp.* (160 Cal. App. 4th 907 (2008)) that takes it a step further, and says that the pattern of conduct at least has to be similar to the conduct that harmed the plaintiff.

ROTHROCK: We usually ask for a special instruc-

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tion that clear and convincing evidence requires the unhesitating assent of every reasonable mind, and we usually don't get it.

HAIMOVICI: I just asked for it and wasn't successful in convincing the judge that the unhesitating-assent standard should apply because that is how the California Supreme Court defined clear-and-convincing evidence. For whatever reason, the courts are very hesitant to make any changes to the CACI standard instructions even though the rules of court allow them to do it, and the courts have to be allowed because the law is constantly changing.

CHORBA: Turning back to punitive damages, several of the Supreme Court decisions discuss actual or potential harm as the denominator in calculating the "ratio" of punitive damages under *State Farm* and *BMW.* But under California law, actual compensatory damages are required for an award of punitive damages, as the Ninth Circuit reaffirmed last year in *California v. Altus Finance, SA* (540 F.3d 992 (2008)). In that case the jury rejected the plaintiff's very large claim to compensatory damages, but nevertheless attempted to award punitive damages. Applying California law, the Ninth Circuit affirmed the district court's decision vacating the entire punitive damages award.

MODERATOR: How does the *Wyeth* decision (*Wyeth v. Levine,* 129 S.Ct. 1187 (2009) impact the generic-drug manufacturers' liability for failure to warn?

ROBERTS: There is a different regulatory framework applicable to generic drugs. You have to be careful not to ignore the different approaches that apply to a branded drug versus a generic drug. While the Court does not address generic drugs directly, its opinion has invited discussion of a generic drug manufacturer's burden to explore additional changes to their labeling and warnings. There are clear policy reasons for why generics and branded drugs should be treated differently, and we have seen that borne out in the Waxman Act and in the FDA's own guidelines and regulations. I don't think the Supreme Court wanted to blur those, but following *Levine,* we are left with the scenario that a manufacturer of a generic arguably could now be in the position where it could or should explore its own additional labeling.

NELSON: The anti-preemption language in *Levine*

is very strong, and I don't think the generics are going to have much success trying to get around it. Certainly that is where the courts are going, as evidenced by *Mensing v. Wyeth,* 588 F.3d 603 (8th Cir. 2009). The courts are saying that if you manufacture and sell a product, and you profit from that conduct, you can and should be liable. The lone case holding differently is *Gaeta v. Perrigo Pharmaceuticals Co.,* 2009 WL 4250690 (N.D. Cal. 2009). I would suggest that Judge Ware's decision will remain the exception to the clear direction of where the law is heading.

CHORBA: Another area of litigation under the Federal Food, Drug, and Cosmetic Act (FDCA) is the food industry. There were several cases this year that litigated the preemption issue in the context of claims challenging "all natural" food and beverage labels. The defendants in these cases claimed that the FDCA both expressly and impliedly preempted private suits, but the courts rejected these arguments. Some courts even held that early 1990s amendments to the FDCA foreclosed implied preemption altogether, although this analysis rests on a misreading of the statute.

MODERATOR: Is there a need to get to trial more quickly and more cost effectively in mass tort cases?

ROBERTS: A need and a possibility are two entirely separate things. I was talking with in-house counsel in charge of litigation about the expense of trying a case in a mass-tort setting, from experts to jury research, and he said, "The most expensive component for me is time. The longer a case extends, the more expensive it is to me," and that is true for both sides. So if you are looking at a cost-benefit analysis, efficiency, and expediency—without compromising your client's case—you are going to cut down on some costs. Can you do that in a fair and effective manner? It's difficult. I would advocate that everyone on both sides remain diligent and try to work through pretrial discovery and Rule 16 agreements to orchestrate exactly what is necessary to assess the merits of the case to go forward.

NELSON: I am becoming increasingly frustrated by how long it takes to get cases to trial and how expensive trials have become, particularly in mass tort cases. It's to the point where it can cost literally millions of dollars to try a case that may only be worth a fraction of that amount. One approach to deal with this problem is an effort to re-vitalize Federal Rule of Civil Procedure 1, whose purpose is "to secure the just, speedy and inexpensive determination of every action and proceeding." The reality is that I think we lawyers have lost sight of our mission in some fundamental ways. Both sides are spending a fortune to prosecute and defend cases and it simply takes too long to get cases to trial.

ROTHROCK: The problem is that high-stakes litigation is complex and it's very hard to put a case together either from the plaintiff or defense side in that context in less than a couple of years. Much depends on your forum and the skills of the judge and the ability of defense and plaintiffs counsel to get along. The complex panel in Los Angeles has generally been successful in moving cases along reasonably quickly.

HAIMOVICI: That's part of the problem—we talk among the parties about what you can do to speed up litigation and keep costs down. But the courts are overwhelmed, and that creates a lot of problems when you are trying to set trial dates and even when you are in trial presenting evidence.

BERRY: The California courts right now are just slammed. The judges are overwhelmed. At every courthouse I've been to, there are empty courtrooms, lights out, and not enough judges.

ROTHROCK: We need some perspective. When I started practicing in Los Angeles in '72 and moved to Orange County in '74, we had what were called five-year cases. So we have made progress since then. Maybe we will slide back a little bit because of the state budget problems, but we are getting to trial a heck of a lot quicker than we did four decades ago.

ROBERTS: We are past the time where we had to use the five-year rule. There has been some progress, but much of it is in the hands of the judges. Lawyers can, do, and should maintain civil and cooperative relationships. The more you work with the other side developing case-management plans and being forthcoming about your scheduling, especially when you have to make changes, you can move a case more efficiently and you are more likely to reach your trial date on time.

HAIMOVICI: The bottom line is that the stakes are a lot higher than they have ever been and they are going to continue to get higher. From a defense perspective, we need to do everything we can to prepare a defense. That's going to take more time and effort.

NELSON: I guess my question really is whether it's

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gone too far, whether or not we are all doing our job the way that we are supposed to be doing it when, for example, it costs literally millions of dollars to try a single mass tort case. Obviously this is a very big question, but it's one that I struggle with as a plaintiffs lawyer. And I would presume that if you ask your clients the same question, they would say they struggle with it too.

HAIMOVICI: They do. From a defense perspective, plaintiffs drive the claims and we do rely on you to tell us what the claims are and then we defend against those claims. The sooner we get the information from plaintiffs about the basis for their claim, including expert opinions, the easier it is for us to analyze the case and figure out our defenses and whether it can be resolved.

MODERATOR: What's the status today of the CACI jury instructions versus BAJI, the old book of approved jury instructions, particularly when the jury instructions relate to product-design defect?

BERRY: The CACIs on product defect and causation–I just think they are wrong. They don't accurately reflect California law. We had perfectly good jury instructions that came right out of the cases and they've been junked in favor of something that has no judicial approval and I don't understand why we have come to a situation like that.

HAIMOVICI: By way of example on causation, the CACI instruction says it has to be something more than remote or trivial, which suggests that if you are just above that, you've met the burden of causation. But that's not what the case law says. It has to be substantial, and saying it's just remote or trivial doesn't seem to capture what the case law says. That's the best example.

NELSON: My sense is that CACI on the whole has done a good job taking the legalese out of the instructions so that they are more meaningful and more easily understood by jurors. That was the very worthy goal in creating CACI and in many respects they have succeeded. So I applaud their effort and the result of that effort, while still conceding that there is room for improvement.

HAIMOVICI: The goal of CACI is great. The issue with CACI is judges are very hesitant to give special instructions even in many situations where the CACI instructions do not meet the circumstances of the case.

MODERATOR: It seems that some federal courts have not hesitated recently to certify multi-state or nationwide class actions and apply the forum state's laws to all class members. Is that appropriate, and if so, what substantive rules should apply?

ROBERTS: Rule 23 was drafted to promote efficiency, provide equity, and basically to achieve a kind of economy of time, effort, economics, and expenses. It can and often does achieve that. The problem is that with CAFA, we see a flood of cases being taken to federal court. The unanswered question is what law should the court apply? Of course, we know that the federal court ends up having to evaluate whether the differences in state law interferes with the prerequisite of predominance. It has been of some concern to see federal courts discount the notion that various state laws apply to a certified class, and thus ignore the genuine question of whether or not this defeats the predominance requirement. We have seen more courts back away from this issue and go ahead and certify the class, but is it appropriate?

"The anti-preemption language in *Levine* is very strong, and I don't think the generics are going to have much success trying to get around it." ***—Robert J. Nelson***

CHORBA: The Ninth Circuit has addressed this issue before in *Zinser v. Accufix Research Inst., Inc.* (253 F.3d 1180 (9th Cir. 2001)). In *Mazza v. Am. Honda Motor Co.* (254 FRD 610 (C.D. Cal. 2008)), which the Ninth Circuit is considering on a Rule 23(f) petition, the defendant submitted a detailed discussion to the district court illustrating the significant differences between California's UCL and the laws of several other states. The district court nevertheless found that the differences in state law were not material enough, and it held that California law could apply on a nationwide basis even though the plaintiffs were from Florida and Maryland.

NELSON: It's always difficult when you are applying multi-state laws in class actions and it often requires very careful analysis by the judge to determine how, for example, negligence or consumer fraud do or don't differ between states. But the fact that it's difficult doesn't mean that it can't be done and there are certainly instances where we have had multi-state and even nationwide class actions that required the application of multi-state laws and that afforded the parties due process. It does require careful analysis by judges to ensure that the rights of the parties are respected. But there are success stories and of course there are great efficiencies.

MODERATOR: Does the *Kelly/Frye* rule in California preclude consideration of the *Daubert* factors in ruling on the admissibility of expert testimony?

ROTHROCK: There are some plaintiffs counsel who will argue, "Look, once the *Kelly/Frye* rule is satisfied as to the expert's technique or method, it's up to the defendant to challenge the reliability of the expert's opinions through cross-examination. In other words, once you lay the foundation that the expert has used an accepted technique, his opinions go to the jury. And there's the *Roberti* case (*Roberti v. Andy's Termite & Pest Control, Inc.,* 113 Cal. App. 4th 893 (2003)), which essentially supports the view that the trial judge should not act as a gatekeeper. But there are a series of cases that say that California really does apply, in effect, the *Daubert* standard and the trial judge should act as a gatekeeper. For example, was the expert's opinion just developed for litigation? Has it been peer reviewed? Is it reproducible? Is it reliable?

BERRY: The problem is that you start talking about *Daubert* with state court judges and they look at you like, "What planet are you on?" And the standards for experts in California are fairly clear. It's really up to the judges to decide to what extent they'd want to be a gatekeeper. Some feel strongly about it and some won't. *Daubert* has been great, but it doesn't stop a federal judge from lowering the bar if he or she wants to.

HAIMOVICI: In California, Evidence Code section 801 actually requires the court to be a gatekeeper. Even if you are outside the realm of *Kelly/Frye,* the court still needs to assess the expert's opinion and figure out whether it's something the jury should hear.

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