



ANTITRUST E-BRIEF

Current News and Events from the State Bar of California Antitrust and Unfair Competition Law Section

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February 2009

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This issue of the E-brief includes:

- **Letter from Chair Elaine F. Foreman**
 - Brown Bag Luncheon Program, **February 11, 2009** on **"Resale Price Agreements after Leegin: Has Anything Changed?"**
 - Apply for the Executive Committee!
 - Authorship opportunities
- **Summary of Recent Cases**
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Letter from the Chair

Dear Section Member,

I hope you will find this issue of the eBrief, which is packed with information, useful.

First, I would like to review a couple of accomplishments. **The Golden State Antitrust Institute**, held in Los Angeles last October was a great success. Thank you to the panelists who made it such an engaging event. We were delighted to honor **Mary Cranston** as our Antitrust Lawyer of the Year. We were also able to showcase the latest edition of *Competition*, which was a special issue dedicated to the 100th anniversary of the Cartwright Act. As a Section member, you can view the content online [HERE](#) in our **Members Only Area**. **Tom Hixson, Kathleen Tuttle** and countless others are to be congratulated and thanked for preparing such a landmark edition.

Second, I sent a message to as many in-house counsel as I could identify at the beginning of my term as chair. I would like to do whatever I can to increase your involvement in the Section and make the Section's offering as useful as possible. If you would like to be more involved or have comments, please contact me at elforema@cisco.com.

Third, I would like to highlight several upcoming Section opportunities:

- Please join us for a Brown Bag program on **February 11, 2009** from 12 noon until 1 p.m. The program is entitled **"Resale Price Agreements after Leegin: Has Anything Changed?"** In *Leegin*, the Supreme Court overturned the nearly 100-year old *per se* rule against resale price maintenance. Hear in-house counsel, government, and outside counsel perspectives on Leegin's real-world impact on resale price agreements and price-related policies, such as MAP and Colgate policies. Panelists are **Kathleen Foote**, Senior Assistant Attorney General (Antitrust Chief), California Department of Justice; **Gene Link**, Assistant General Counsel, Target Corp.; and **Sean Gates**, Partner, Morrison & Foerster LLP. Registration information may be found at Register [HERE](#); Or go to www.calbar.org/online-cle and

select *Tele-Seminars and Webinars*.

- **Executive Committee Applications:** Each of the State Bar's 16 Sections is comprised of a membership base and a leadership committee (the Executive Committee). The deadline for submitting applications for service on a Section Executive Committee has been extended to **February 17, 2009**. Applications are now available on the State Bar's Web site at www.calbar.org/appointments. Service on Section committees will provide you with an ideal opportunity to network and generally contribute to the furtherance of your profession. If you would like more information on serving on the Executive Committee, please contact me.
- **Authorship opportunities:** Plans for the next issues of *Competition* are underway. If you are interested in writing an article, please contact John Landry at jlandry@sheppardmullin.com.
- Finally, **Craig Corbitt** and **Kim Kralowec** put together the summaries of recent cases which follow. Thank you, Craig and Kim!

Elaine Foreman

2008-09 Chair, Antitrust and Unfair Competition Law Executive Committee

Summary of Recent Cases

Federal Cases

Twombly

Direct purchaser plaintiffs satisfy Twombly standard in rail freight price-fixing litigation:

In re Rail Freight Fuel Surcharge Antitrust Litig., No. 07-489(PLF), 2008 WL 4831214 (D.D.C. Nov. 7, 2008). Direct purchasers of rail freight filed class actions against four major railroads alleging a conspiracy to fix prices on rail fuel surcharges. On defendants' motion to dismiss, the court found that plaintiffs' allegations satisfied the pleading standard set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("Twombly"). The court held that plaintiffs' factual allegations were sufficient to create a plausible inference that railroads agreed to fix uniform fuel surcharges, as plaintiffs identified specific occasions where defendants met and allegedly promulgated their coordinated fuel surcharge program. Further, plaintiffs alleged that uniform pricing among defendants began to occur shortly after those meetings, whereas fuel surcharges had previously varied among them. The court found that such parallel conduct created a strong inference of an illegal conspiracy, and denied defendants' motion to dismiss.

Preemption

Indirect purchaser plaintiffs' state law antitrust claims preempted by Interstate Commerce Commission Termination Act in rail freight price-fixing litigation: *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489(PLF), 2008 WL 5421787 (D.D.C. Dec. 31, 2008). Indirect purchasers brought federal and state antitrust claims against the four major United States railroads. Plaintiffs alleged the defendant railroads violated Section 1 of the Sherman Act by

conspiring to fix prices through their use of fuel surcharges. Indirect purchaser plaintiffs also alleged various claims arising from state antitrust, consumer protection and unjust enrichment law. As to the state law claims, the district court granted defendants' motion to dismiss for failure to state a claim. Following federal antitrust law, the court held that the state law claims were preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101 *et seq.*, as a matter of law. However, the court ruled that indirect purchaser plaintiffs' federal claim for injunctive relief survived, having satisfied the pleading standard set forth in *Twombly*.

Sherman Act claims not preempted by federal securities laws:

Dahl v. Bain Capital Partners, LLC, No. 07-12388-EFH, 2008 WL 5206990 (D. Mass. Dec. 15, 2008). Shareholder plaintiffs brought an antitrust class action under Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act against several private equity firms, among others. Plaintiffs claimed the defendants illegally colluded in their purchase of companies as part of leveraged buyouts, and alleged with specificity nine transactions in their complaint to illustrate the overarching conspiracy. Defendants gave two grounds on which the complaint should be dismissed: first, since the conduct at issue was regulated by the Securities and Exchange Commission, the plaintiffs' claims were preempted from consideration under the antitrust laws. Second, plaintiffs failed to properly plead a Sherman Act Section 1 claim. The district court held that both of these arguments were without merit and denied the motion to dismiss on both grounds. In support of their first argument, defendants argued that the shareholders had no legal remedy to pursue an antitrust claim under *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 127 S. Ct. 2383 (2007) ("*Billing* stands for SEC pre-emption of the antitrust laws when the questioned behavior is regulated by the SEC." 2008 WL 5206990, at *2). The court distinguished the case before it from *Billing*: "[I]n finding pre-emption, the Supreme Court in *Billing* said that pre-emption was appropriate given that the SEC had authority to regulate IPOs extensively. In contrast, pre-emption does not apply here as the private nature of the [leveraged buyouts] at issue prevents the SEC from regulating these transactions. The securities and antitrust laws therefore are not 'incompatible,' and this case can proceed under the antitrust laws." (Internal citations omitted.) 2008 WL 5206990, at *4. With respect to defendants' second argument, the court found that the shareholders "provided enough facts to 'plausibly suggest' an illegal agreement" as required in *Twombly*. 2008 WL 5206990, at *6.

Foreign Trade Antitrust Improvements Act ("FTAIA")

Dismissal of U.S. consumer class claim for lack of subject matter jurisdiction under FTAIA:

Animal Science Prods., Inc. v. China Nat'l Metals & Minerals Import & Export Corp., No. 2:05-cv-04376 (GEB), (D.N.J. Dec. 30, 2008). Putative class of plaintiffs comprising certain U.S. consumers of magnesite products brought antitrust class action alleging defendants conspired to keep prices of certain magnesite products artificially inflated worldwide, in violation of Section 1 of the Sherman Act. Plaintiffs filed a motion for default judgment; one defendant moved to dismiss plaintiffs' complaint. The district court found that although the plaintiffs' complaint "necessarily... invite[ed] the FTAIA scrutiny," the complaint was barred by the FTAIA since it was "void of any information as to whether any of these seventeen Defendants was *actually bringing* Processed Magnesite into the *United States*." No. 05-4376, at 38. The court thus dismissed plaintiffs' complaint for lack of subject matter jurisdiction pursuant to the FTAIA – plaintiffs failed to show a clear link between the aim of defendants' alleged illegal activities and the U.S. market, thereby failing to avoid the FTAIA bar. The court also dismissed the complaint for failure to state a claim under the Sherman Act – plaintiffs, having averred a claim in fraud, were required to satisfy the heightened pleading standard of Fed. R. Civ. P. 9(b), but could not even meet the more lenient pleading requirement of Fed. R. Civ. P. 8. The court denied

plaintiffs' motion for default judgment with prejudice but granted leave to amend in the interests of justice.

Dismissal of foreign purchaser claim for lack of subject matter jurisdiction under FTAIA: *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. Oct. 9, 2008). Plaintiff, a British computer manufacturer, brought an antitrust class action under Sections 4(a), 12 and 16 of the Clayton Act premised on defendants' alleged violations of federal antitrust laws, including Section 1 of the Sherman Act. Plaintiff alleged that the defendants engaged in a global conspiracy to fix DRAM prices. The district court dismissed the complaint with prejudice for lack of subject matter jurisdiction under the FTAIA, holding that plaintiffs had not sufficiently alleged that their foreign injury was directly linked to the domestic effect of higher U.S. prices for DRAM. The district court also denied plaintiffs' leave to amend the complaint as futile. Following the D.C. Circuit's treatment of the FTAIA "domestic injury exception" in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005), the Ninth Circuit similarly concluded that "but for" causation could not suffice for the exception to apply, and that the "gives rise to" language of the exception requires a direct or proximate causal relationship. 546 F.3d at 987. The court concluded that the domestic effect of the defendants' alleged price-fixing conspiracy did not give rise to plaintiffs' alleged foreign injury so as to satisfy the second prong of the domestic injury exception. The Ninth Circuit thus affirmed the district court's dismissal of the complaint and its denial of leave to amend.

Foreign Sovereign Compulsion Doctrine

Foreign sovereign compulsion and other defenses could not be resolved at motion to dismiss stage: *In re Vitamin C Antitrust Litig.*, No. 06-mdl-1738 (DGT), 2008 WL 4817003 (E.D.N.Y. Nov. 6, 2008). In consolidated class actions, direct and indirect purchasers of vitamin C from Chinese manufacturers brought an antitrust class action under the Sherman Act and Clayton Act against the manufacturers and two California sellers. Plaintiffs alleged that defendants formed an illegal cartel to fix prices and limit supply for exports of vitamin C, including those to the United States. Defendants filed motions to dismiss on the grounds that their price fixing activities were compelled by the Chinese government. Specifically, defendants moved to dismiss on the grounds of act of state, foreign sovereign compulsion and international comity. The district court found that it was not clear at that stage of the case whether defendants' actions qualified as the type of governmental act or compulsion contemplated by said defenses; the record was "simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions." 2008 WL 4817003, at *12. The court thus denied defendants' motion to dismiss. The court also granted defendants' motion to dismiss plaintiffs' second amended complaint with leave to replead it. Plaintiffs had filed a second amended complaint adding a direct purchaser class representative and two California corporations as defendants, both of whom were former and current subsidiaries or affiliates of one of the named defendants. The second amended complaint failed to provide notice as to what the new defendants were alleged to have done wrong and changed the nature of the originally charged conspiracy from a horizontal to a hybrid horizontal/vertical one.

Rule of Reason

Rule of Reason analysis applied to exclusive licensing arrangement: *Major League Baseball Props., Inc. v. Salvino, Inc.*, F.3d 290 (2d Cir. Sept. 12, 2008). Defendant, a California corporation, obtained licenses from plaintiff Major League Baseball Properties, Inc. (MLBP) to use Club marks and other MLB marks on figures of baseball players in uniform. In the license agreements, the defendant promised not to use the marks in any manner other than as licensed. Defendant

later violated the agreement and in response to plaintiffs' cease-and-desist letter, commenced an action in a California federal court alleging that MLBP's activities violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton, and various state laws. MLBP subsequently commenced the present action asserting claims under federal and state law for, *inter alia*, trademark and trade dress infringement. The actions were consolidated, with the defendant's California action claims becoming counterclaims in the present action. The district court granted MLBP's motion for summary judgment dismissing defendant's Section 1 counterclaim, rejecting defendant's contentions that the operations of MLBP as centralized licensor should be ruled illegal *per se* or on a quick-look analysis. Instead, the court concluded that MLBP should be evaluated "under a rule of reason analysis, which is applied 'where the economic impact of certain practices is not immediately obvious.'" (Internal citations omitted.) 542 F.3d at 307. Under this analysis, the defendant had not met its initial burden; it could neither point to any evidence indicating that MLBP's licensing authority had an adverse effect on competition, nor establish that MLBP possessed the requisite market power to inhibit competition market-wide. The Second Circuit affirmed the district court's grant of summary judgment for plaintiff, holding that the court properly applied the rule of reason standard and that under it, defendant failed to show any genuine issues to be tried.

Settlement agreements in patent litigation subject to rule of reason analysis: *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. Oct 15, 2008). Advocacy groups and direct and indirect purchasers of brand-name drug containing a patented compound ("Cipro") sued brand-name drug manufacturer and generic drug manufacturers, alleging, *inter alia*, that settlement agreements in patent litigation that involved reverse payments from brand-name manufacturer to generic manufacturers resulted in illegal market allocation in violation of Sherman Act and state antitrust and consumer protection laws. After the cases were consolidated, the district court granted defendants' motion for summary judgment of plaintiffs' federal antitrust claims, holding that any anti-competitive effects caused by the settlement agreements between Bayer and the generic defendants were within the exclusionary zone of the patent, and thus could not be redressed by federal antitrust law. The court also dismissed plaintiffs' state antitrust claims. The Federal Circuit affirmed the district court's grant of summary judgment. The court rejected plaintiffs' argument that the district court should have concluded that the agreements were *per se* unlawful or should have applied a proper rule of reason analysis, noting that "[t]he application of a rule of reason analysis to a settlement agreement involving an exclusion payment in the Hatch-Waxman context has been embraced by the Second Circuit" and advocated by others. 544 F.3d at 1335. The Federal Circuit thus affirmed the grant of summary judgment that the agreements did not violate Section 1 of the Sherman Act as well as the dismissal of the state antitrust claims.

Exclusive Dealing

iPhone plaintiffs sufficiently state Sherman Act section 2 claims; fail to state UCL and CLRA claims: *In re Apple & AT&T Antitrust Litig.*, No. C 07-05152, 2008 WL 4810067 (N.D. Cal Oct. 1, 2008). Plaintiffs - residents of California, Washington and New York - brought a class action challenging the exclusivity agreement between defendants Apple and AT&T Mobility ("ATTM") concerning Apple's iPhone. The district court first addressed ATTM's motion to compel arbitration, denying the motion on the grounds that the arbitration agreement was unconscionable and thus unenforceable under the laws of California, New York, and Washington. ATTM also moved to dismiss on the ground that the Federal Arbitration Act ("FAA") preempted application of state unconscionability law as to the arbitration agreement. Finding no preemption by the FAA, the court denied defendants' motion. 2008 WL 4810067, at *7. Defendant Apple moved to dismiss all of plaintiffs' causes of action on the grounds that

plaintiffs did not state a claim under Section 2 of the Sherman Act because they alleged neither legally cognizable markets under the Act, nor legally sufficient monopolization of those markets. The court held that under *Newcal Ind., Inc. v. IKON Office Solution*, 513 F.3d 1038 (9th Cir. 2008), plaintiffs did allege both aftermarket and market power sufficiently enough to state a claim under Section 2 of the Sherman Act. The court granted Apple's motion to dismiss plaintiffs' consumer protection claims in the forty states where no named plaintiff resided, holding that plaintiffs only had standing in California, New York and Washington. For these remaining claims, plaintiffs had to meet the heightened pleading requirement of Fed. R. Civ. P. 9(b), having pled fraud; however, the court found that plaintiffs pled the allegations with sufficient particularity to survive Rule 9(b) scrutiny. Finally, Apple contended that plaintiffs failed to state a cause of action under the California UCL and the California CLRA. With respect to the CLRA, the district court found that plaintiffs failed to sufficiently state claims under the CLRA and UCL pursuant to a "failure to disclose" theory.

Class Certification

Third Circuit holds that Rule 23 requires a rigorous assessment of factual and legal disputes, and consideration of all relevant evidence: *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689, 2008 WL 5411562 (3d Cir. 2008). Purchasers of hydrogen peroxide and related chemical products brought an antitrust conspiracy class action against chemical manufacturers. Plaintiffs filed complaints under Section 4 of the Clayton Act, alleging a conspiracy in restraint of trade violating Section 1 of the Sherman Act. After the federal actions were consolidated, the consolidated amended complaint alleged that defendants had engaged in illegal price-fixing. The district court denied defendants' motion to dismiss the complaint for failure to state a claim. Following extensive discovery, plaintiffs moved to certify a class of direct purchasers, and both parties offered the opinion of their economists. Concluding plaintiffs' expert's opinion was admissible and supported plaintiffs' motion for class certification, the district court certified the class under Fed. R. Civ. P. 23(b)(3). The Third Circuit granted defendants' petition for an interlocutory appeal under Fed. R. Civ. P. 23(f). The court clarified "three key aspects of class certification procedure." 2008 WL 5411562, at *1. First, the decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of Rule 23 is met; factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits – including disputes touching on elements of the cause of action. Third, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it. The Third Circuit vacated the class certification order and remanded for further proceedings.

District Court certifies nationwide class asserting UCL, FAL, and CLRA claims: *Mazza v. American Honda Motor Co.*, No. C 07-7857-VBF, 2008 WL 5256432 (C.D. Cal. Dec. 16, 2008). Plaintiffs brought a nationwide class action alleging that defendant automaker violated the UCL, FAL, and CLRA by misrepresenting the characteristics of its braking system and failing to disclose known defects. The district court granted plaintiffs' motion for class certification and found that a nationwide class based on California law was appropriate. California, as the forum state, had sufficient contacts to the claims asserted such as to satisfy due process. Specifically, defendant's allegedly deceptive practices all originated in and emanated from California and defendant was a California corporation with its principal place of business in California. In addition, under California's choice of law analysis, defendant failed to demonstrate that any other state had an interest in applying its laws to this litigation. Plaintiffs also satisfied all the requirements under rule 23 for their UCL, FAL, and CLRA claims, as they were entitled to a common inference of reliance, and could prove

materiality on a class-wide basis.

California State Cases

Cartwright Act

Supreme Court considers whether pass-on defense is available under the Cartwright Act: *Clayworth v. Pfizer, Inc.*, 73 Cal. Rptr.3d 911 (Ct. App. July 25, 2008), review granted by No. S166435, 85 Cal. Rptr.3d 694 (Cal. Nov 19, 2008). The California Supreme Court has granted review to determine whether defendants may assert a pass-on defense to Cartwright Act claims. In the underlying action, retail pharmacies brought price-fixing action against pharmaceutical companies, asserting claims for violation of the Cartwright Act and for restitution and injunctive relief under the UCL. Both parties moved for summary judgment on the pass-on defense, with plaintiffs contending that it could not be asserted based on the Supreme Court opinion in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), and defendants contending that California had never adopted the *Hanover Shoe* holding. The trial court decided the cross-motions in favor of defendants, concluding that the pass-on defense was available in California, and that plaintiffs did not suffer any compensable injury within the meaning of section 16750 and thus could not recover on the Cartwright Act claim. The court also concluded that plaintiffs lacked standing to bring a UCL claim because they had not "lost money or property" as required for standing under section 17204 and, alternatively, were not eligible for restitution. Plaintiffs appealed. Before the California Court of Appeal was the issue of first impression in California antitrust law of whether the pass-on defense is available to defendants accused of price-fixing. The court held that it was. The court found that the defense defeated plaintiffs who had passed on all claimed overcharges, and thus had no "damages sustained" under section 16750. Regarding plaintiffs' UCL claim, the court found that plaintiffs lacked standing because they had not "lost money or property" or, alternatively, because they did not have an ownership interest in whatever funds they paid as a result of any overcharge and were therefore not eligible for restitution.

Cartwright Act tying claims not precluded by exclusive provider agreements: *UAS Mgmt., Inc. v. Mater Misericordiae Hospital*, No. F053553, 2008 WL 5246096 (Ct. App. Dec. 17, 2008). Outpatient surgery center brought antitrust and tort action against hospital operator, alleging that provisions in contracts between hospital operator and local health insurers were designed to drive outpatient surgery center out of business. The contracts included "exclusivity" provisions requiring that the insurer would not add to its network or contract with any other outpatient surgery center. Plaintiff alleged violations of the Cartwright Act and California UCL, in addition to a tort claim for interference with prospective economic advantage. Plaintiff alleged two separate theories for the Cartwright Act violation: first, that defendant conspired with the insurer to create an unlawful exclusive dealing arrangement constituting an unreasonable restraint of trade; and second, that the arrangement constituted one of unlawful tying. The hospital operator moved for summary judgment or adjudication; the trial court granted summary adjudication of plaintiff's tying claim, but denied it for the other causes of action. Plaintiff appealed. The court of appeal held that the trial court erred in summarily adjudicating plaintiff's tying claim: the exclusive service provider agreements, while not necessarily unlawful, did not foreclose liability on the plaintiff's tying claims under the Cartwright Act. Moreover, the degree to which the agreements impaired purchase of services from plaintiff was sufficiently burdensome to constitute a restraint on trade. The court thus reversed the trial court's grant of summary adjudication except as to two other causes of action and remanded for further proceedings.

**Unfair Competition Law (UCL); False Advertising Law (FAL);
Consumer Legal Remedies ACT (CLRA)**

**UCL "reliance" and "causation" issues under review before
California Supreme Court:**

In *re Tobacco II Cases*, 46 Cal. Rptr. 3d 235 (Ct. App. 2006), review granted Nov. 1, 2006, S147345, 51 Cal. Rptr. 3d 707; *Pfizer, Inc. v. Superior Court*, 45 Cal. Rptr. 3d 840 (Ct. App. 2006), review granted Nov. 1, 2006, S145775, 45 Cal. Rptr. 3d 840; *O'Brien v. Camisaca Auto. Mfg. Inc.*, 73 Cal. Rptr. 3d 911 (Ct. App. 2008), review granted July 9, 2008, S163207, 73 Cal. Rptr. 3d 911. Currently under review by the Supreme Court are important issues regarding the necessary elements of proof for private plaintiffs under the UCL following the passage of Proposition 64. The issues being considered include whether or not UCL plaintiffs alleging misrepresentation or deceptive conduct must prove reliance, as well as causation connected to the allegedly unfair or deceptive conduct. Also under the review is the extent of plaintiffs' obligations under the "injury in fact" and "lost money or property" requirements imposed by Proposition 64.

Administrative regulation addressing conduct at issue provides "safe harbor" defense against UCL actions : *Yabsley v. Cingular Wireless, LLC*, 165 Cal. App. 4th 1526 (Aug. 18, 2008) rehearing granted, opinion not citable Sept. 17, 2008. Plaintiff alleged that defendant wireless phone company violated the UCL and FAL by failing to inform consumers that sales tax for the full price of a new phone would be imposed where the consumer purchases the phone at a discounted or bundled price for also enrolling in a service plan. The California Code of Regulations permits, but does not require, that the tax for such bundled purchases of a wireless phones be passed onto the consumer. The trial court sustained defendants demurrer without leave to amend, and the Court of Appeal for the Second District affirmed. The trial court did not err in finding that the administrative regulation has the force and effect of a statute, and can thus provide a safe harbor from the UCL and FAL. Further, the sales invoice given to plaintiff stated the amount of the sales tax that would be imposed. Because defendant complied with all applicable regulations, plaintiff's claims failed.

Vehicle Code addressing conduct at issue provides a "safe harbor" defense against CLRA actions: *Bourgi v. West Covina Motors, Inc.*, 166 Cal. App. 4th 1649 (Sept. 24, 2004). Car buyer brought an action against dealer alleging concealment and violations of the CLRA and FAL after learning that the automobile he purchased as new had previously been vandalized and repaired. The trial court refused to allow defendant to assert a "safe harbor" defense to the CLRA claim based on the Vehicle Code's statutory guidelines prescribing what prior repaired damage to new vehicles is sufficiently "material" to require disclosure to a purchaser. The jury found for plaintiff and defendant appealed. The Court of Appeal for the Second District reversed the judgment for plaintiffs and remanded the case. The court held that the CLRA must be read in harmony with the Vehicle Code, and thus, an automobile dealer does not violate the CLRA by representing a vehicle as "new" and failing to disclose prior damage and repair if the repaired damage does not meet the "material" damage threshold for new cars set forth the Vehicle Code. Whether the prior damage and repair met the materiality threshold was a question of fact for the jury.

UCL plaintiffs fail to allege sufficient injury and causation : *Erickson v. Fry's Electronics, Inc.*, No. D051814, 2008 WL 4988983 (Cal. Ct. App. Nov. 25, 2008) (unpublished opinion). Plaintiffs brought a class action alleging defendants violated the UCL and FAL by selling products only in multi-unit sets after advertising prices for a single unit of sale. The trial court sustained defendants' demurrer without leave to amend and the Court of Appeal for the Fourth District affirmed. The

court held that plaintiffs failed to adequately allege injury in fact as well as causation. Plaintiffs failed to identify injury or loss suffered as a result of defendant's advertising. It was insufficient to allege that plaintiffs purchased products in "an effort to avoid further inconvenience" after incurring costs of travel to defendant's store and seeing the actual prices. 2008 WL 4988983 at *5. Moreover, such injuries are not compensable as restitution under the UCL because the recovery would not be restorative in nature. Plaintiffs also lacked standing because, at the time they purchased the goods in the store, they knew the price charged and still made the transaction. Thus, the alleged misleading advertising did not cause any damages to plaintiffs.

Class Certification

Trial court properly de-certified class asserting UCL, FAL, CLRA claims. *Safaie v. Jacuzzi Whirlpool Bath, Inc.*, No. D051511, 2008 WL 4868653 (Cal. Ct. App. November 12, 2008) (unpublished opinion). Purchasers of whirlpool bathtubs brought a class action against defendant alleging breach of warranty and violations of the UCL, CLRA, and FAL for representations concerning the strength of its water jets. The trial court granted plaintiffs' motion for class certification in October 2005, certifying a nationwide class for the UCL and express warranty causes of action, and a California class as to all causes of action. Upon defendant's motion to de-certify the class and the Supreme Court holding in *Californians for Disability Rights v. Mervyns, LLC*, 39 Cal. 4th 233 288 (2006) that Proposition 64 applies to all pending cases, the court de-certified the class, finding that individual issues of fact and law predominated over common issues. The Court of Appeal for the Fourth District affirmed the trial court's ability to re-consider its prior class certification ruling without "changed circumstances" since no trial on the merits had taken place and the trial court stated that its original certification ruling was interim. Additionally, the trial court reasonably concluded that "the misrepresentation was not shown to be *material* to many purchasers, and thus the case did not support an inference of reliance that was applicable on a class-wide basis." 2008 WL 4868653 at *8. Similarly, under the UCL and Proposition 64, it was insufficient that some of the members of the public such as the plaintiff may have been misled; "rather, class treatment requires a showing that a significant portion of tub purchasers were like to be misled." *Id.* at *12.