ANTITRUST E-BRIEF

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June 2009

Dear Section Members,

I am pleased to send out another excellent summary of recent developments in antitrust and unfair competition law. Of particular not is the summary of In re Tobacco II Cases. We will have a panel dedicated to this topic at the Golden State Antitrust and Unfair Competition Law Institute in October as well. Thank you to Kim Kralowec of Schubert Jonckheer and Jane Yi of Zelle Hofmann for this timely, authoritative summary.

Next on the Section's agenda is a brown bag seminar, co-sponsored by the American Bar Association, entitled "Getting to Know the State Enforcers -- California" on June 29 from 9:00 until 10:30 a.m. Moderators are Emilio Varanini, Deputy Attorney General, California Office of the Attorney General, and Craig Corbitt of Zelle Hofmann. Kathleen Foote, Senior Assistant Attorney General, will join other speakers to discuss the work of the Antitrust Section of the California Attorney General's Office. If you are interested in attending, please contact Emilio Varanini (Emilio.Varanini@doj.ca.gov) or Craig Corbitt (ccorbitt@zelle.com).

John Landry is working on another issue of Competition and is looking for editors. If you would like to help, please contact John (jlandry@sheppardmullin.com).

Finally, a note from the State Bar's Justice Gap: The Justice Gap continues to grow between available legal services and the needs of over 4 million Californians who have no access to critical legal help. You can make a difference in the lives of people like them by contributing to the State Bar's Justice Gap Fund, which provides support to almost 100 nonprofit legal aid organizations in California. We need your support more than ever. Legal aid offices are seeing as many as six times as many clients as usual, and have to turn many of them away. 11% of all total State Bar Section members contributed in 2008, with 15.8% of the Antitrust & Unfair Competition Section contributing. Only 5% of California's lawyers contributed so far this year, and the Fund is down 20% from last year's $1 million in contributions. It's not too late to donate this year. Tax-deductible contributions can be made online http://calbar.org/justicegapfund; checks made out to "State Bar of California" can be mailed to:

Justice Gap Fund
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180 Howard Street
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As always, if you have any suggestions for how the Antitrust and Unfair Competition Law Section can serve you better, please contact me at eforeman@cisco.com.

Elaine Foreman
2008-09 Chair,
Executive Committee of the Antitrust and Unfair Competition Law Section

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Recent Developments

California

California Unfair Competition Law (UCL), Cal Bus. & Prof. Code § 17200 *et seq*.

UCL claims examined post-Prop 64: *In re Tobacco II Cases* , 93 Cal. Rptr. 3d 559 (Cal. May 18, 2009). Plaintiffs, smokers exposed to defendants' marketing and advertising activities in California, brought a class action alleging that defendants

violated the California UCL by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease. Prior to the passage of Proposition ("Prop") 64, the trial court certified the class. After Prop 64 was enacted, defendants moved to decertify the class on the ground that each class member was now required to show an injury in fact pursuant to the new standing requirement imposed by Prop 64; the trial court granted the motion and the California Court of Appeal affirmed. The California Supreme Court considered the following questions: (1) who in a UCL class action must comply with Prop 64's standing requirements in order for the class action to proceed; and (2) whether proof of actual reliance is necessary for standing to bring a UCL "fraudulent" prong claim. Regarding the first issue, the court concluded that only class representatives are required to meet the standing requirements of Prop 64. The court found that "nothing in the express language of Proposition 64 [] purports to alter accepted principles of class action procedure that treat the issue of standing as referring only to the class representative and not the absent class members"; moreover, imposing such a requirement "would effectively eliminate the class action lawsuit as a vehicle for the vindication of [consumer] rights." 93 Cal. Rptr. 3d at 577. The court next concluded that plaintiffs must prove actual reliance in order to establish standing under the UCL's fraud prong. However, a plaintiff need not demonstrate that the misrepresentation was the only cause of the injury-producing conduct, nor must the plaintiff demonstrate individualized reliance on specific misrepresentations or false statements where the misrepresentations or false statements were part of an extensive and long-term advertising campaign. The court reversed the trial court's order decertifying the class and remanded the case.

Enhanced remedy applies in UCL cases: *Clark v. Superior Court (Nat'l Western Life Ins. Co.)*, 94 Cal. Rptr. 3d 135 (Ct. App. May 21, 2009). Plaintiff filed a class action on behalf of a class of senior citizens who purchased deferred annuities from defendant, alleging defendant utilized deceptive business practices to induce the purchase of the annuities in violation of the California UCL, among other claims. The trial court certified the class on the UCL claim. Defendant filed a motion for judgment on the pleadings, asserting that the enhanced treble damages remedy in Cal. Code Civ. Proc. § 3345 was inapplicable to a private action seeking restitution under the UCL. Plaintiffs petitioned the California Court of Appeal for a writ of mandate compelling the trial court to vacate its order. The court agreed with defendant and granted the motion. The Court of Appeal described the two prerequisites required for applying an enhanced remedy under § 3345: "(1) The action must be brought by or on behalf of senior citizens or disabled persons seeking redress for 'unfair or deceptive acts or practices or unfair methods of competition'... and (2) the action must be one in which the trier of fact is authorized by a statute to impose a fine, civil penalty or any other penalty the purpose or effect of which is to punish or deter." 94 Cal. Rptr. 3d at 145. The court found defendant's interpretation of the restitution remedy – being intended to restore money or property acquired by the defendant, not to deter unlawful conduct – "unduly cramped." *Id*. at 144. Based on its analysis of the legislative history and plain language of the statute, the court held that that the remedy in § 3345 is available in a private action by senior citizens seeking restitution under the UCL.

UCL "fraudulent" prong claims must be plead with particularity: *Kearns v. Ford Motor Co.*, ___ F.3d ___, 2009 WL 1578535 (9th Cir. June 8, 2009). Plaintiff, a purchaser of a Certified Pre-Owned (CPO) vehicle from defendant, brought a class action alleging defendant and its dealerships acted illegally to increase sales of their CPO vehicles in violation of the CLRA, Cal. Civ. Code §§ 1750-1784, and the UCL, Cal. Bus. & Prof. Code § 17200. Plaintiff alleged that defendant made false and misleading statements concerning the safety and reliability of its CPO vehicles and conspired to mislead purchasers into believing the CPO program guaranteed a safer, more reliable vehicle. Defendant moved to dismiss the complaint. The district court dismissed the complaint for failure to plead fraud with particularity as required by Rule 9(b). The Ninth Circuit affirmed the lower court's ruling. The court rejected plaintiff's argument that Rule 9(b) did not apply to California's consumer protection statutes including the CLRA and UCL because California courts have not applied the rule thus; rather, the court observed that "we have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL." 2009 WL 1578535, at *3. The court also rejected plaintiff's argument that because some of his claims were not grounded in fraud, they were not subject to the rule. Finding that plaintiff did allege a "fraudulent course of conduct" – but failed to allege the particular circumstances constituting fraud – the court held that the complaint failed to satisfy the pleading standard of Rule 9(b). Finally, the Ninth Circuit rejected plaintiff's argument that the district court erred by not separating analyzing his claims under the unfairness prong of the UCL. Because the complaint alleged a "unified fraudulent course of conduct," plaintiff's claims were grounded in fraud, thus requiring that the entire complaint be pleaded with particularity.

Supreme Court

***Twombly* pleading standard applies to all civil actions:** *Ashcroft v. Iqbal* , 129 S. Ct. 1937 (U.S. May 18, 2009). Respondent, Javaid Iqbal, a Muslim Pakistani, was arrested on criminal charges and detained by federal officials under restrictive conditions following the September 11, 2001 terrorist attacks. After being released, Iqbal filed a *Bivens* action against numerous federal officials including former Attorney General John Ashcroft and FBI Director Robert Mueller ("petitioners"), alleging that petitioners adopted an unconstitutional policy that subjected Iqbal to harsh conditions of confinement on account of his race, religion, or national origin. The issue before the Supreme Court was whether Iqbal, "as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights." 129 S. Ct. at 1943. While petitioners' appeal was pending, the Supreme Court decided *Bell Atlantic Corp. v. Twombly* , 550 U.S. 544 (2007) (" *Twombly* "). Citing *Twombly* , the Court stated in *Iqbal* that the pleading standard announced by Rule 8 "does not require 'detailed factual allegations,' but [] demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id* . at 1949. The Court outlined the following "two-pronged approach" for courts considering a motion to dismiss: (1) the court should first identify "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and (2) for well-pleaded factual allegations, the court should "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id* . at 1950. When it utilized this approach in *Twombly* , the Court "first noted that the plaintiffs' assertion of an unlawful agreement was a 'legal conclusion' and, as such, was not entitled to the assumption of truth"; and next concluded that the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement. *Id* . The Court thus held that the plaintiffs' complaint must be dismissed. Applying the same approach in *Iqbal* , the Court held that the complaint failed to state a plausible claim. The court rejected Iqbal's argument that the pleading standard set forth in *Twombly* should be limited to antitrust pleadings. Rather, "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." *Id* . at 1953. The Court reversed and remanded the case to the Second Circuit to determine whether to remand to the district court.

Certiorari Granted

State legislatures' ability to dictate procedure in federal court: *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.* , 549 F.3d 137 (2nd Cir. 2008), *cert. granted* , 129 S. Ct. 2160 (U.S. May 4, 2009) (No. 08-1008). Plaintiffs brought a class action for statutory interest penalties under N.Y. Ins. Law § 5106(a) on behalf of all individuals to whom defendant, Allstate Insurance Co., owed interest under the statute. Plaintiffs alleged that Allstate failed to pay penalties on overdue payments of insurance benefits owed to plaintiffs under no-fault automobile insurance policies issued by Allstate. Allstate moved to dismiss based on N.Y. C.P.L.R. 901(b), which eliminates statutory penalties as a remedy for class action plaintiffs. Plaintiffs argued that the statute was inapplicable to class actions brought in federal court because it is a procedural rule in conflict with Rule 23 of the Federal Rules of Civil Procedure. The district court granted Allstate's motion to dismiss. The Second Circuit held that N.Y. C.P.L.R. 901(b) – which the court analogized to a statute of limitations and considered substantive for *Erie* purposes – does not conflict with Rule 23; instead, "Rule 23's procedural requirements for class actions can be applied along with the substantive requirement of CPLR 901 (b)." 549 F.3d at 144. The court also held that the application of the statute in federal courts was consistent with the aims of *Erie* , and did not threaten any "essential characteristic" of the federal court system. Finally, the court found that plaintiffs' cause of action under N.Y. Ins. Law § 5106(a) did not fall within the exception clause of the statute. Plaintiffs raised the following questions in their petition for writ of certiorari to the Supreme Court, 2009 WL 344618 (U.S. Feb. 6, 2009): (1) Can a state legislature properly prohibit the federal courts from using the class action device for state law claims? (2) Can state legislatures dictate procedure in the federal courts? (3) Could state-law class actions eventually disappear altogether, as more state legislatures declare then off limits to the federal courts?

Federal / *Twombly*

Motions to dismiss denied in part, granted in part: *In re Flash Memory Antitrust Litig.* , 2009 WL 1096602 (N.D. Cal. Mar. 31, 2009). Plaintiffs, direct and indirect purchasers of flash memory and flash memory products, filed an action alleging a horizontal price fixing conspiracy between defendants – manufacturers, sellers and distributors of flash memory – in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs alleged that defendants conspired to fix, raise, maintain and stabilize the price of NAND flash memory sold in the U.S. Indirect purchaser

plaintiffs also alleged violations of various state antitrust and consumer protection laws as well as equitable claims. Defendants moved to dismiss both complaints. With respect to direct purchaser plaintiffs' complaint, the court held that the complaint stated a plausible claim for relief, having alleged facts to sufficient satisfy the *Twombly* pleading standard. Direct plaintiffs' allegations of conspiracy; exchange of market information between competitors; concentration of the flash memory market and supply shortages thereto; price stability; defendants' joint ventures, cross-licensing agreements, and participation in trade shows and trade association meetings; and the relationship between the DRAM, SRAM, and flash memory conspiracies sufficed to state a claim to relief. With respect to indirect purchaser plaintiffs' complaint, the court denied defendants' motion to dismiss based on *Twombly* for the same reasons stated above. As to the additional indirect claims, the court denied the motion as to plaintiffs' state antitrust claims; granted in part and denied in part plaintiffs' claims under the consumer protection laws of various states; denied the motion as to plaintiffs' claim for unjust enrichment; and granted in part and denied in part the motion to the extent plaintiffs' claims were based on the laws of states for which plaintiffs' failed to name a representative plaintiff. On the issue of indirect purchaser plaintiffs' standing, the court found that the "standard for determining standing under federal antitrust claims" set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* , 459 U.S. 519 (1983) only applied to plaintiffs' antitrust claims in three states including California, and that plaintiffs adequately alleged facts sufficient to establish standing to pursue the antitrust claims.

Dismissal affirmed: *CBC Companies, Inc. v. Equifax, Inc.* , 561 F. 3d 569 (6th Cir. April 2, 2009). Plaintiffs, purchasers of consumer credit information from credit reporting agencies who consolidate and resell the data in the form of "tri-merged" reports, filed an action against defendant, a credit reporting agency, after it implemented a contractual fee that allegedly restricted the ability of resellers to offer "reissues" of the reports. Plaintiffs alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, contending that by requiring resellers to pay a fee upon selling each reissue, defendant monopolized and attempted to monopolize the service of providing consumer credit information to mortgage lenders. Defendant moved to dismiss; the district court granted the motion on the ground that plaintiffs' complaint amounted to a mere contract dispute over price terms, and because plaintiff failed to allege any antitrust injury and thus lacked antitrust standing. Plaintiffs appealed. The Sixth Circuit noted that in proving antitrust injury, "the key inquiry is whether *competition* – not necessarily a competitor – suffered as a result of the challenged business practice" (original emphasis). 561 F. 3d at 572. Plaintiffs' allegation that defendant leveraged its "monopoly power" in the mortgage reseller market to restrain competition in that market did not satisfy the inquiry. The court held that plaintiffs' complaint contained only conclusory allegations, and failed to allege key facts to substantiate that competition in the mortgage lender market decreased due to defendant's reseller agreement; failed to allege defendant's specific anticompetitive behavior; and failed to allege any impact resulting from defendant's anticompetitive conduct. Because the district court properly concluded that plaintiffs' complaint failed to allege facts sufficient to support an antitrust injury, the Sixth Circuit affirmed the dismissal.

Dismissal reversed: *William O. Gilley Enterprises, Inc.* 561 F.3d 1004 (9th Cir. April 3, 2009). Plaintiff filed a class action on behalf of wholesale purchasers of California Air Resources Board (CARB) gasoline against defendants, major oil producers, alleging that they conspired to limit the supply of CARB gasoline and to raise prices in violation of section 1 of the Sherman Act. Because plaintiffs' allegations were similar to those alleged in *Aguilar v. Atlantic Richfield Co.* , 25 Cal.4th 826 (2001), the district court stayed the suit pending the outcome of that case. The California Supreme Court affirmed the trial court's grant of summary judgment to the *Aguilar* defendants; the *Gilley* defendants then moved for summary judgment on the ground of collateral estoppel. The district court granted the motion with leave to amend. In the amended complaint, plaintiff alleged that numerous bilateral exchange agreements between defendants had the effect of unreasonably restraining trade in violation of section 1 of the Sherman Act and of California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200. The district court granted defendants' motion to dismiss with prejudice; the Ninth Circuit reversed and remanded. Plaintiff filed a second amended complaint which the district court again dismissed. The Ninth Circuit concluded that plaintiff's claim was not precluded by *Aguilar* ; that case precluded a *per se* claim of horizontal price fixing, but did not preclude a rule of reason claim that the bilateral exchange agreements had an anticompetitive effect on competition. With respect to the sufficiency of plaintiff's section 1 claim, the court held that the alleged bilateral exchange agreements, even absent intent to control prices, satisfied the first element of the existence of an agreement. In addition, plaintiff's aggregation of the agreements to demonstrate their anticompetitive effects satisfied the second element of an agreement that unreasonably restrains trade: "[s]ection 1 liability [] is directed not only at inherent anticompetitive conduct, but also at conduct that has

anticompetitive effects." 561 F.3d at 1012. The court reversed the dismissal of the Sherman Act and UCL claims and remanded the case.

Motion to dismiss granted: *Hinds County, Mississippi v. Wachovia Bank N.A. et al.* , ___ F. Supp. 2d ___, 2009 WL 1204345 (S.D.N.Y. April 29, 2009). Plaintiffs, municipalities and other purchasers of municipal derivatives, alleged that defendants participated in an unlawful conspiracy to rig bids, limit competition, and fix prices in the municipal derivatives market in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs alleged that defendants conspired to allocate customers and markets of municipal derivatives sold in the U.S., causing plaintiffs to receive lower interest rates on their municipal derivative contracts than they would have received in a competitive market. Defendants moved to dismiss the complaint. In assessing the motion, the court noted that the Second Circuit has determined that *Twombly* "does not require a universal standard of heightened pleading, but rather 'a flexible "plausibility standard," which obligates a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.'" 2009 WL 1204345, at *7. The court found that plaintiffs' complaint made "broad allegations" of a conspiracy, but contained specific factual allegations only with respect to a few of the defendants. Because the complaint made no specific allegations regarding various joint defendants' involvement in the alleged conspiracy, plaintiffs failed to a state a section 1 claim against said defendants. The complaint's reference to a history of fraud in the relevant market did not support plaintiffs' claims: "the mere fact that defendants are involved in an industry that is purportedly rife with antitrust violations is not, without more, enough to state a § 1 claim." *Id* . at *11. In addition, plaintiffs' allegations that several employees engaged in *per se* illegal horizontal communications – without specifying the approximate time period or frequency of the communications – did not make their allegations of conspiracy more plausible. The court granted defendants' motion to dismiss with leave to replead plaintiffs' claims.

Dismissal affirmed: *Nitro Distributing, Inc. v. Alticor, Inc.* , 565 F.3d 417 (8th Cir. May 4, 2009). Plaintiffs, distributors of Amway marketing materials, filed a suit alleging that defendants conspired to allocate customers and fix prices within the tools business in violation section 1 of the Sherman Act, 15 U.S.C. § 1, in addition to claims of injurious falsehood, tortious interference, and violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1962. The district court granted summary judgment to defendants. The Eighth Circuit found that plaintiffs' claims of price fixing and customer allocation agreements were "among the 'most elementary' violations" and were subject to a *per se* analysis. Because plaintiffs "attempted to characterize vertical constraints as a horizontal restraint conspiracy, and have set forth factual allegations that do not demonstrate the existence of any unlawful restraint of trade," the court concluded that plaintiffs' section 1 claims were appropriately dismissed. 565 F.3d at 423. As a *per se* case, plaintiffs were required to present evidence that tended to exclude the possibility of independent action by the alleged co-conspirators. The court rejected plaintiffs' argument that this requirement was limited to cases in which the plaintiff relies solely on circumstantial evidence, stating that "we require a showing of independent action, whether it be by circumstantial or direct evidence." *Id* . Moreover, the record suggested that Amway acted independently rather than with other defendants; that Amway played the role of vertical quasi-parent company rather than a horizontal competitor; and that plaintiffs' evidence did not link Amway with any unlawful restraint of trade. The court thus affirmed the district court's dismissal of plaintiffs' claims.

Motion to dismiss granted: *In re California Title Insurance Antitrust Litig.* , 2009 WL 1458025 (N.D. Cal. May 21, 2009). Plaintiffs, individuals who purchased title insurance for residential property in California, filed a class action against defendants, California title insurers, alleging that defendants collectively set and charged supra competitive rates for title insurance in violation of section 1 of the Sherman Act, 15 U.S.C. § 1; the California Cartwright Act, Cal. Bus. & Prof. Code § 16720 ; and California UCL, Cal. Bus. & Prof. Code § 17200. Defendants moved to dismiss. The court considered the propriety of dismissal of plaintiffs' claims in light of the pleading standards enunciated by the U.S. Supreme Court in *Twombly* . The court found that plaintiffs failed to state a claim under section 1 of the Sherman Act. Although plaintiffs asserted that their allegations regarding rate setting organizations amounted to a direct agreement to fix prices, plaintiffs failed to allege factual allegations to support their conclusion, thus requiring the court to determine if sufficient facts were pled to infer conspiracy. The court rejected plaintiffs' argument that defendants' participation in rate setting organizations was a plausible basis for suggesting that defendants acted collectively to fix prices in California. Moreover, plaintiffs failed to allege factual allegations that the organizations held formal meetings, where or when such meetings took place, or even which defendants may have attended the meetings. Plaintiffs also failed to allege facts setting forth a temporal link between the release of rates in rate setting

organizations in other states and the release of rates in California. In sum, plaintiffs' allegations and "plus factors" did not "nudge their claims across the line from conceivable to plausible." 2009 WL 1458025, at *7. Plaintiffs' UCL claim also failed because it was based in part on the alleged price fixing conspiracy, and because plaintiffs lacked standing. The court granted defendants' motions to dismiss with leave to amend.

Motion to dismiss denied in part and granted in part: *McNulty v. Reddy Ice Holdings, Inc.* , 2009 WL 1508381 (E.D. Mich. May 29, 2009). Plaintiff, a packaged ice salesman, alleged defendants, manufacturers and distributors of packaged ice, conspired to terminate plaintiff from a defendant employer for refusing to participate in an unlawful market allocation scheme and conspired to boycott plaintiff from employment in the packaged ice industry. Plaintiff alleged violations of the RICO Act, 18 U.S.C. § 1961 *et seq.* ; section 1 of the Sherman Act, 15 U.S.C. § 1; the Michigan Antitrust Reform Act (MARA), M.C. L. § 445.772; and various common law actions. Defendants moved to dismiss the complaint. With respect to the section 1 claim, the court found that plaintiff failed to allege any anti-competitive effect on the alleged relevant market – the market for packaged ice sales representatives – resulting from defendants' alleged termination and boycott; rather, plaintiff merely alleged that the group boycott injured him personally. The court thus held that plaintiff's antitrust claim failed. In addition, because Michigan courts apply Sherman Act analysis to the MARA, the court held that plaintiff's state antitrust claims failed as well.

Motion to dismiss affirmed in part, reversed in part: *Coalition for ICANN Transparency, Inc. v. Verisign, Inc.* , ___ F.3d ___, 2009 WL 1564230 (9th Cir. June 5, 2009). Plaintiff, a coalition including website owners, filed a complaint against defendant, the sole operator of the ".com" and ".net" domain name registries, alleging violations of sections 1 and 2 of the Sherman Act and the California Cartwright Act. Plaintiff alleged defendants conspired to restrain trade in connection with the terms of the pricing and renewal provisions of .com and .net contracts, resulting in artificially high prices and renewal provisions that wrongfully restrained competition for successor contracts. Plaintiff's section 2 claim alleged that defendant's predatory conduct in obtaining anti-competitive provisions constituted monopolization of the .com and .net registration markets, and that expiring domain names composed a separate market for antitrust purposes. The district court dismissed the action with prejudice for failure to state claims under federal or state law, finding that plaintiff failed to sufficiently allege the terms of the contracts, defendant's conduct in obtaining the contracts, or that a separate market for expiring domain names existed. The Ninth Circuit held that plaintiff adequately stated section 1 and 2 claims with regard to defendant's activities in the .com registration market, but did not with respect to the .net market. Specifically, plaintiff adequately alleged a section 1 violation with respect to the .com agreement, having alleged that competition itself was eliminated as a result of defendants' conspiratorial conduct; however, plaintiff failed to make out a violation for the .net agreement, which was reached as a result of competitive bidding rather than conspiratorial action. With respect to the section 2 claim, the court held that plaintiff's allegations of defendants' predatory litigation activity stated a claim, but remanded on the issue of the existence of a separate market for expiring domain names.

Motion to dismiss granted in part, denied in part: *Pecover v. Elec. Arts Inc.* , 2009 WL 1604696 (N.D. Cal. June 5, 2009). Plaintiffs brought suit on behalf of purchasers of Madden NFL interactive video game software, alleging that defendant ("EA"), the developer, publisher and distributor of Madden NFL, acquired exclusive rights to publish video games using football association trademarks, effectively foreclosing competition in the market for interactive football software. Plaintiffs alleged causes of action including violations of section 2 of the Sherman Act, 15 U.S.C. § 2; the California Cartwright Act, Cal. Bus. & Prof. Code § 16700; California's UCL, Cal. Bus. & Prof. Code § 17200; unjust enrichment; and various other state antitrust, consumer protection, and unfair competition laws. Defendant moved to dismiss. The court held that plaintiffs' section 2 claim was adequately pleaded, and rejected defendant's argument that plaintiffs did not adequately allege a recognizable product market for interactive video football software, finding that plaintiffs' allegations that defendant's exclusive agreement with the NFL "killed off" the only other competitive interactive software and allowed EA to "dramatically" raise its prices sufficed to allege a product market. With respect to plaintiffs' Cartwright Act claim, defendant's assertion that signing multiple exclusive agreements could not constitute a restraint of trade as a matter of law also failed. While exclusive agreements are not *per se* illegal under the Cartwright Act, "they [may] plausibly be found to restrain trade after applying the rule of reason analysis"; here, the exclusive licenses themselves constituted the conduct giving rise to plaintiffs' Cartwright Act claim. 2009 WL 1604696, at *6. Because the Cartwright Act claim survived, the court also upheld plaintiffs' other California law claims and claim under the District of Columbia Consumer

Protection Procedures Act, but granted defendant's motion to dismiss with respect to claims for violations of the remaining state laws because no named plaintiffs purchased in these states.

Class Action Tolling

Equitable tolling applied to California residents: *Hatfield v. Halifax PLC* , 564 F.3d 1177 (9th Cir. May 8, 2009). Plaintiff, an investor, brought a class action against defendant, a building society, alleging that defendant wrongful deprived investors of the right to share in proceeds of the sale of the society. Plaintiff filed a complaint in New Jersey Superior Court, 8.5 years after the cause of action arose; the court dismissed the entire action, which the New Jersey Appellate Division upheld as to the named plaintiff. Plaintiff thereafter filed substantially the same class action against defendants in federal court in California. Defendants moved to dismiss the complaint, arguing the federal action was barred by the California statute of limitations. The district court agreed with defendants and granted the motion. On appeal, plaintiff argued, *inter alia* , that the previous New Jersey class action tolled the 6-year English limitations period, making the federal action timely. Having determined that California law governed tolling of plaintiff's individual claims, the Ninth Circuit agreed with plaintiff, observing that "California courts have permitted a plaintiff to take advantage of tolling based on the filing of a prior class action." 564 F.3d at 1185. Moreover, California's equitable tolling doctrine applied to the claims of the unnamed putative class members who were California residents, in light of the California Supreme Court's "general agreement with tolling in the class action context." *Id* . at 1186-1187. However, the Ninth Circuit pointed out that the doctrines of equitable tolling and *American Pipe* tolling are "not congruent." *Id* . at 1188. While there is "every indication [] that California would at least apply equitable tolling to claims made by its own residents," non-California resident class members are not similarly entitled. *Id* . at 1189. The court thus upheld California's "strong interest" in providing a remedy for wrongs committed against its citizens, while declining to put cross-jurisdictional tolling into effect. The court reversed the district court's dismissal with respect to California residents and remanded the case.

Class Action Waiver

Class action waiver substantively unconscionable under Oregon law: *Chalk v. T-Mobile USA, Inc.* , 560 F.3d 1087 (9th Cir. March 27, 2009). Plaintiffs, purchasers of a wireless LAN PC card, filed a class action against defendants, T-Mobile and Sony, alleging violations of various federal and state laws, including Oregon's Unlawful Trade Practices Act (UTPA), and several common law theories. Plaintiffs alleged that defendants knew or should have known that the card was not compatible with or did not fit into a specific laptop, and that defendants allowed customers to purchase the cards and enter into long-term service contracts from which consumers would receive no benefit. Defendants filed a motion to dismiss the case or stay proceedings and compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* The district court granted the motion and dismissed the case; plaintiffs appealed. The Ninth Circuit considered "whether the district court properly dismissed a consumer class action pursuant to an arbitration agreement between T-Mobile and its customers." 560 F.3d at 1090. The court answered the question in the negative, concluding that the agreement's class action waiver was substantively unconscionable and therefore unenforceable under Oregon law. Because unconscionability is governed by state law, the court assessed the claim in light of Oregon law, which considers both procedural and substantive unconscionability but only finds the latter "absolutely necessary" to find an agreement unenforceable. The court agreed with the district court's conclusion that T-Mobile's arbitration agreement was not procedurally unconscionable, finding insufficient evidence of oppression or surprise. However, the Ninth Circuit concluded that the agreement's arbitration clause – effectively banning class actions – was rendered unconscionable by the "disparity in bargaining power" combined with terms that were "unreasonably favorable to the party with the greater power." *Id* . at 1094. Moreover, the court relied on the Oregon Court of Appeals' decision in *Vasquez-Lopez v. Beneficial Oregon, Inc.* , 210 Or. App. 553 (2007), wherein the court held a similar class action waiver substantively unconscionable. Such a waiver is "inherently one-sided when contained in a consumer contract," and "frequently prevents individuals from vindicating their rights." *Id* . at 1095. The court held that T-Mobile's class action waiver was "identical in effect" to the class action waiver in *Vasquez-Lopez* , and thus substantively unconscionable as a matter of Oregon law. *Id* . at 1096.

Class action waiver unconscionable under Washington law: *Coneff v. AT&T Corp.* , ___ F. Supp. 2d ___, 2009 WL 1459111 (W.D. Wash. May 22, 2009). Plaintiffs, former and current AT&T wireless customers, brought an action against defendants Cingular Wireless and AT&T Wireless, alleging that after Cingular merged with AT&T in 2004, Cingular deliberately degraded AT&T Wireless'

network in order to induce AT&T Wireless customers to transfer their service plans to Cingular plans. Plaintiffs asserted claims under the consumer protection acts of 14 different states; the Federal Communications Act, 47 U.S.C. §§ 201 *et seq.* ; and several common law doctrines. Defendants moved to compel arbitration on an individual basis, and to dismiss plaintiffs' claims pursuant to the arbitration provision included in plaintiff's AT&T Wireless service agreements (WSAs), which expressly required customers to pursue their dispute in individual arbitration or small claims court, and precluded the bringing of or participation in any class action. Defendants also argued that section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* , preempted plaintiffs' state-law unconscionability arguments. Because plaintiffs' claims indisputably fell within the scope of the arbitration agreements in the WSAs, the first issue before the court was the enforceability of the arbitration agreements. Plaintiffs argued that applying the WSA choice-of-law clauses would violate the state of Washington's "fundamental public policy against class-action waivers in arbitration agreements," since some of the states at issue upheld class action waivers. 2009 WL 1459111, at *6. Finding that Washington law governed absent an enforceable choice-of-law clause, the court next turned to the specific terms of the class action waivers, and ultimately found them to be unconscionable: "Defendants are effectively exculpated from any liability as a result of the provisions contained in their WSAs. This conduct contravenes Washington's fundamental public policy favoring the availability of class actions as a mechanism for enforcing a consumer's rights." *Id* . at *11. The court also rejected defendants' argument that the FAA preempted the substantive unconscionability laws of Washington. Defendants' motions to compel arbitration and to dismiss the action were denied.