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CALIFORNIA HIGH COURT IMPOSES REALITY CHECK ON CONSUMER CLASS ACTIONS

by
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The expression "Only in California" can mean a lot of different things. To businesses having to defend against consumer litigation, it is usually not good. Among other things, it has come to refer to the "only in California" phenomenon of consumers bringing class actions over imagined wrongs that have caused no injury. Those days may be drawing to a close.

"As a Result of" Requires Actual Damages. On January 29, the California Supreme Court held in a 7-to-0 ruling that a consumer who entered into a contract that contains an allegedly unconscionable provision may not bring an action for damages under the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq*. ("CLRA") if that provision was never actually invoked against her. *Meyer v. Sprint Spectrum LP*, No. S153846 (Jan. 29, 2009). *Meyer* is an important case because the CLRA is a much-utilized consumer protection statute in California and the claim in that case was prototypical of the sort of claim that, until now, many thought the CLRA could accommodate.

According to the California Supreme Court, a no-injury claim cannot even get past the plain meaning of the statute. Section 1780(a), the damages provision of the CLRA, provides that "[a]ny consumer who suffers any damage *as a result of* the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action" under the CLRA. The Supreme Court held that the "as a result of" language of Section 1780(a) requires a showing of actual and not just threatened damage:

> We conclude based on the language of the statute that Sprint has the better position. Section 1780(a) provides that: "Any consumer who suffers any damage *as a result of* the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action" under the CLRA. The statute speaks plainly about the use of an unlawful practice causing or resulting in some sort of damage. Thus, the statute provides that in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result. If the Legislature had intended to equate "any damage" with being subject to an unlawful practice by itself, it presumably would have omitted the causal link between "any damage" and the unlawful practice, and instead would have provided something like "any consumer who is subject to a method, act, or practice declared to be unlawful by Section 1770 may bring an action" under the CLRA.

The *Meyer* court went on to hold that "transaction costs" – costs expended in fees associated with bringing the litigation – do not qualify as "damages" for purposes of Section 1780(a).

No Injury/No Injunction. Although the court was construing the "damages" provision of the CLRA, it also held that a no-injury claim cannot be brought as an injunction-only claim either.

Effect on Tobacco II Cases? In consumer class action litigation in California, all eyes have been turned towards the Supreme Court's decision in *In re Tobacco II Cases*, which will be heard March 3, 2009 and a decision is expected by June. There, the Court will decide whether Proposition 64, a voter initiative that amended California's unfair competition law (Cal. Bus. & Prof. Code § 17200), requires proof of reliance. *Meyer* makes it increasingly likely the court will say yes, because Proposition 64 uses the identical "as a result of" language used in the CLRA.

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