

March 18, 2010

Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Shook,
Hardy &
Bacon L.L.P.®
www.shb.com

Kevin Underhill

333 Bush Street, Suite 600
San Francisco
California 94104-2828
415.544.1923
415.391.0281 Fax
kunderhill@shb.com

**RE: *Weinstat v. Dentsply International, Inc.*, No. S180179
Letter of Amici Curiae in Support of Petition for Review**

Dear Chief Justice George and Associate Justices:

The Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the NFIB Small Business Legal Center write to urge the Court to grant the Petition for Review filed in this above-referenced matter. As discussed below, the appeal presents three important questions that merit review now.

First, guidance is needed as to what class certification standards apply in UCL cases. The lower courts are sharply divided as to the effect of Proposition 64 and *In re Tobacco II Cases* (2009) 46 Cal.4th 298, on class certification standards in Unfair Competition Law cases. Some courts have interpreted this Court's holding in *Tobacco II* (i.e., that standing need not be shown for absent class members) to mean that issues like reliance and causation are never obstacles to certification. These courts ignore the statutory requirement that a UCL class representative must not only have standing but also must comply with Code of Civil Procedure (CCP) Section 382. No representative could do that without showing that elements like typicality and predominance were met, and so the often individualized nature of issues like reliance and causation remain relevant. The error by these courts, including the court below, imposes a heavy burden on businesses, which frequently face purported class actions brought by representatives who cannot comply with Section 382.

Second, the decision below deprives trial judges of the flexibility to revisit class determinations where it has become apparent that a prior ruling was incorrect. A mistaken certification not only harms the defendant but also unnecessarily adds to a court's burden because merits discovery and a class trial may follow. The court below cited no policy reason for insisting that such mistakes not be corrected.

Third, the lower court's decision to dispense with reliance as an element of express warranty claims creates another split of authority and would continue the unsound erosion of this element of California law. The lack of such an element in the UCL encouraged the abuses that led to Proposition 64. It makes little sense to encourage those same abuses in the warranty context. The increased litigation that would likely result would burden business, the courts and California citizens alike.

The Court of Appeal erred in its rulings on all three of these issues. Allowing the court's decision to stand would have a significant and prejudicial impact on the many companies that do business in the state. Even if this Court does not agree that the Court of Appeal erred as to one or more of the above, this Court should nevertheless grant review to provide needed clarity on the important issues presented in this appeal.

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation, representing more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The NFIB Small Business Legal Center, a nonprofit, public-interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

WHY REVIEW SHOULD BE GRANTED

I. Guidance is Desperately Needed as to What Class Certification Standards Apply in California UCL Cases

For years, California courts have seen a rise in consumer class actions. It is more important than ever to bring greater clarity to certification standards in such cases. Significant efficiency will be gained and the caseload potentially reduced.

As the Court is aware, class action filings in California increased steadily from 2000 through 2004, with a moderate decline in state filings in 2005 that can be attributed to some filings being shifted to California federal courts as a result of the federal Class Action Fairness Act of 2005. See Administrative Office of the Courts, *Findings of the Study of Cal. Class Action Litig., 2000-2006*, at 3 (1st Interim Report Mar. 2009) (AOC Class Action Study). More recent data also shows a dramatic rise in decisions by California federal courts in cases involving state law consumer protection claims (typically brought as class actions).¹ This Court's guidance on the underlying state law issues remains crucial even if some of the affected cases are pending in federal court.

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

¹ See Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation*, at 22 (Dec. 2009), available at <http://www.law.northwestern.edu/searlecenter/issues/index.cfm?ID=86>. One might expect the absolute number of consumer protection claims to be greater in California simply because

The confusion over class certification standards under the UCL long predates Proposition 64. Just as is the situation now, two lines of authority existed. Some courts held, essentially, that the lack of a standing requirement made ordinary class certification standards like typicality and predominance irrelevant, so that certification should be routine. Other courts held that those standards remained relevant, which would sometimes preclude certification. Because of that dispute, it is no surprise that Proposition 64 specifically addressed this issue by including a reference to CCP Section 382, a reference that is now part of the UCL. Cal. Bus. & Prof. Code § 17203. As a result, a person “may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure” *Id.* (emphasis added). Section 382 has long been understood to incorporate requirements similar to those in Rule 23 of the Federal Rules of Civil Procedure, including typicality and predominance of common issues. See, e.g., *Lindner v. Thrifty Oil* (2000) 23 Cal.4th 429, 435; *Caro v. Procter and Gamble Co.* (1993) 18 Cal.App.4th 644, 654. No plaintiff has yet explained, to our knowledge, how a named representative could “comply with Section 382” without showing, for example, that common issues predominate over individual ones.

The Court’s decision to resolve *Tobacco II* on the limited basis of “standing” only postponed the need to address this question. The recent case law does not reflect a new split; it highlights the fact that the old one has not yet been put to rest. Since *Tobacco II*, some courts have held that the lack of a standing requirement for absent class members means that certification should be routine. See *In re Steroid Hormone Prod. Cases* (2010) 181 Cal.App.4th 145; *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116. And some courts hold that ordinary class certification standards remain relevant, meaning that applying them will sometimes preclude certification. See *Pfizer Inc. v. Superior Court (Galfano)* (Feb. 25, 2010) ___ Cal.App.4th ___, 2010 WL 660359; *Cohen v. DirecTV, Inc.* (2009) 178 Cal.App.4th 966, *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830.

We believe that Proposition 64 was intended in part to resolve this issue, and that the reemergence of the split of authority demonstrates that it is time for this Court to step in and make clear that that is the case. Otherwise, the confusion will persist, California state and federal courts alike will undoubtedly see the number of purported consumer class actions continue to rise, and companies that do business in California will continue to bear unjustified burdens arising from a statute that the voters sought to limit when they approved Proposition 64.

A grant of review is therefore warranted to secure uniformity of decision and settle an important question of law that substantially affects litigation in California. See Cal. R. Ct. 8.500(b)(1).

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

of the state’s size, but the disparity between the number of cases in California and elsewhere has become so great that (along with Texas) the California data in the Searle study had to be removed so that trends in other states could even be discerned. See *id.* at 22-24.

II. Trial Courts Must Have Flexibility to Reconsider Certification Decisions

Especially given the continuing uncertainty over class-action standards that is illustrated by the split of authority, it makes little sense to force trial courts to abide by prior certification decisions that they have become convinced were not correct, or to subject a defendant to a class-action trial or settlement that may be unjustified. The Court should therefore also grant review to address the circumstances under which reconsideration of such decisions may be granted.

March 18, 2010
Page 4

As the AOC's study showed, and as other *amici* have mentioned, class actions consume more judicial resources than their numbers alone may reflect.² The filing (let alone the grant) of a motion for certification increases the duration and complexity of a case, and an order granting such a motion increases the pressure on a defendant to settle even a relatively weak case. A mistake will almost inevitably impose large and unjustified costs on the defendant, who (unlike in the federal system) cannot seek interlocutory review of certification orders except by extraordinary writ - a remedy that is almost never granted.³ Nor is it clear why a defendant should be forced to risk trial in a certified class action in order to appeal from a final judgment, or why a court should be forced to conduct such a trial, if the court decides that its certification order was wrong. The Court of Appeal cited no reason why its result was good public policy, and instead decided the case on technical grounds based on *dicta* in a single previous case. This Court should not let that decision stand.

To the contrary, this Court has repeatedly recognized that trial courts should retain flexibility to revisit certification decisions, not just because mistakes are sometimes made but also because unforeseen individual issues or manageability problems may arise. *See, e.g., Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 335 (trial court "retains the option of decertification"); *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360 (trial court "should retain flexibility" after certification because it may later discover that the order was inappropriate). And that is entirely consistent with this Court's recognition that the judiciary must have the inherent discretion to revisit any of its own rulings, regardless of any limitation the Legislature may attempt to impose. *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104-05. Whatever the wisdom may be of precluding a party from filing a motion for reconsideration in some circumstances (given that a trial judge has ample inherent authority to deal with such motions if they are frivolous), this Court was clear in *Le Francois* that a judge may not be precluded from rethinking decisions regardless of how a possible error came to his or her attention. That is the federal practice. *See, e.g., Slaven v. BP America, Inc.* (C.D. Cal. 2000) 190 F.R.D. 649, 652 (holding district court may amend certification order whenever desirable, regardless of whether new facts or law have emerged). This Court should grant review and clarify that state trial courts have this discretion as well.

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

² See AOC Class-Action Study at 3, 21.

³ *Id.* at 13.

III. This Court Should Also Grant Review to Clarify the Law and Reverse the Lower Court's Novel Express-Warranty Holding

March 18, 2010
Page 5

Finally, this Court should grant review to address a split of authority created by the Court of Appeal's decision. There is no question that the law of express warranty is a common issue in California courts. Companies that do business in the state have a strong interest in clear rules as to what does and does not become part of an express warranty promise.

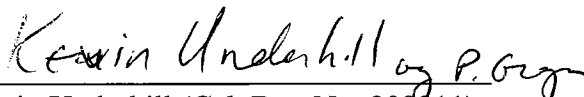
Plaintiffs are incorrect that the Court of Appeal's decision can be reconciled with existing law. For example, California law has been clear that a seller may try to show that an alleged promise did not become part of the basis of the bargain. *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 23-24. The defendant in *Keith* did not successfully do so, but it is simply not true to say that under existing state law, in California or a majority of other states, the issue of reliance "plays no role" in a warranty case. Indeed, the Court of Appeal has previously held that it is a "vital ingredient" of an express warranty claim. *Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 760. Subsequent case law has been consistent with that, until now. The decision by the court below is unique in dismissing reliance altogether, and creates a clear conflict in the case law that will be litigated in a host of future cases unless this Court provides guidance.

If the lower court's decision is permitted to stand, and other courts do follow its lead, the result could expand litigation similar to that which has accompanied the broad construction previously given to the UCL (a construction that persists in at least some courts). Proposition 64 was intended to address that problem, and the Court should not allow it to arise again in the arena of warranty litigation. The element of reliance is crucial in weeding out weak or frivolous cases, which is one of the reasons why a majority of the nation's courts hold that reliance remains a part of warranty law. This Court should clarify that the same is true in California.

CONCLUSION

For these reasons, this Court should grant review of the decision below.

Respectfully submitted,



Kevin Underhill (Cal. Bar. No. 208211) 206121
SHOOK, HARDY & BACON L.L.P.
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

Mark A. Behrens
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400

Attorney for Amici Curiae

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 637-3000

Karen R. Harned
Elizabeth Milito
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 314-2061

Of Counsel

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.