STATE COURT
DocketWatch®

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SPECIAL EDITION
California 17200: Its Nature, Function, and Limits

Prop 64, also known as California 17200, was adopted by initiative in 2004 and was supposed to limit the state's law on unfair competition, restricting private lawsuits against a company only to those where an individual is actually injured by and suffers a financial loss due to an unfair, unlawful, or fraudulent business practice. Otherwise, only public prosecutors may file lawsuits charging unfair business practices. How has the measure functioned in practice? Has it been a hurdle for private litigation, or a catalyst? What has been the frequency and extent of criminal sanctions? Has the provision spurred a greater amount of business-on-business litigation, and what is the real-world impact of such a development?

In May 2010, the Federalist Society State Courts Project and the San Diego Lawyers Chapter hosted a panel of experts to discuss these issues. H. Scott Leviant of Spiro Moss, Professor Shaun Martin from the University of San Diego School of Law, Jeremy Rosen of Horvitz & Levy, and William Stern of Morrison & Foerster all participated. Former San Diego Superior Court Judge Hon. Michael Orfield moderated. This special edition of *State Court Docket Watch* includes each experts' thoughts on California 17200 and a transcript of the discussion.

Remarks by William L. Stern

The forces that in 2004 gave rise to Prop 64 are, in microcosm, the same forces that are driving a larger debate about class actions that is being played out on the national stage. That debate is worthy of Socrates. But instead of debating the nature of Truth or Beauty, this contest might be better entitled, "What is the Nature and Purpose of Class Actions?"

The two positions in the debate lie on a spectrum. On the plaintiff's and consumer's end of the spectrum we find the "Deterrence" approach. The deterrence school teaches that deterring bad business conduct is so important to society, particularly in false advertising and defective product cases, that if in certifying a class we wind up over-compensating certain groups—say, by giving money to people who weren't harmed—that is part of the collateral damage. The benefit of deterrence overrides any downside, they argue, and besides, the money that is getting redistributed is being taken from a wrongdoer anyway, so we should not shed any tears.

On the defense and the business end of the spectrum, we have the "Tort" approach. The tort approach says that a class action is really just an aggregation of individual claims. So that if one individual cannot sue BP or Enron individually, either because he hasn't been harmed or he didn't read or rely upon the advertising, or because the product *he* purchased didn't fail, then he doesn't get to recover money

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INSIDE

FROM THE

EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

Remarks by Scott Leviant

The debate surrounding use of the Unfair Competition Law, or UCL, has been framed by commentators favoring its curtailment as a choice between a deterrence model, where theoretical over-compensation is possible, and a tort model, where all class actions are viewed as a collection of individual actions. While this is an interesting framework in which to discuss the divergent positions of the defense and the plaintiff bar (as proxies, generally for consumer and corporate interests respectively), the dichotomy leaves important concepts out of that dialogue. Moreover, there are a broader set of interests that are at play in the ongoing struggle over the UCL: interests that extend well beyond the unfair competition law.

California's UCL is being used as a proxy for a number of other arguments. When you examine cases where the UCL is alleged, the total number of cases is a relatively small number when compared to the total number of cases that are litigated within the state. Most of those UCL cases are class actions, and, while there are a few other types of litigation where the unfair competition law is a cause of action, when you say "class action," you immediately get people very excited. But before everyone gets too excited, it makes sense to review the numbers.

There are probably somewhere between 1,500 and 2,000 class actions filed in California state courts each year. That compares to roughly 1.5 million general jurisdictions civil litigations filed in the state each year. Class actions are a very small sliver of the litigation that is going on, and yet, if you look at the decisions that are coming out of the Court of Appeals getting the attention, class actions receive a disproportionate share of the press. One reason for this disproportionate attention is that businesses, consumers, and employees have chosen this area as one of the battlegrounds to argue about other issues broader than the UCL's intended purpose, including arguments that are either political or economic, rather than primarily legal.

The arguments are all cast in legal terms, but they are serving as a proxy for a debate about government intervention and economics. On one side are those that believe that business should essentially be unregulated entirely or almost unregulated and that pure economic market forces should drive whether a business succeeds or fails. Proponents of the market approach believe that businesses should be allowed to conduct themselves as they see fit and that the markets will weed out the bad actors. On the other side are individuals advocating various degrees of government intervention through laws and regulations. The more restrained advocates of this approach counsel that market correction forces only function as advertised if you have perfectly fluid economic markets. But because all market participants do not possess symmetrical information, some regulation is required to steer behaviors of corporate actors. Consumers will not have the same information available to them that is available to businesses. Businesses possess more resources that they can use to collect information about the marketplace.

The UCL has become a whipping boy for people having political and economic arguments. Critics of the UCL are overstating the theoretical harm that can be caused by a UCL class action where, for example, we might presume that class members have relied on a

potentially false advertisement. The critics of the UCL will suggest that you are allowing class members with no injury to recover, but they don't acknowledge that they are also presuming something. What we do for efficiency's sake in UCL litigation and in other contexts like securities litigation is allow, in certain circumstances, for a presumption that people exposed to false or incomplete information relied on it. The argument in response is that a plaintiff should be required to show that each person in a proposed class actually heard and actually relied on false representations. Plaintiffs argue that, along with deterrence, the presumption of reliance is a principle of equity. If a corporate actor made grossly misleading statements, that corporate actor ought to be held accountable for the fact that it shouldn't have made the false statement in the first place. If the corporate actor conducted itself appropriately, it wouldn't have to engage in the debate about whether some people did or did not hear its false statements. The corporation should have conducted itself in a lawful manner.

A business chooses whether to cross the line when it advertises or discusses information about its stock value in the marketplace. If the corporate actor chooses wrongly, it has denied the market the opportunity to have full and fair information; the marketplace was manipulated. The consequence is that the corporate actor ought not to have any profit that was obtained through affected transactions. There is a political and moral equity that underlies application of the UCL. There is more going on here than simply a debate about how the UCL ought to shake out as a tort or a deterrence device.

Remarks by Jeremy Rosen

In the last couple of years I have had many clients who have told me that they have either moved significant parts of their operations out of California or have made conscious decisions not to have any further expansion in California, but instead expand in other states. These decisions are made for a number of reasons, but primarily because of (1) California's very pro-employee employment laws, (2) because the impact of section 17200, and (3) California's fiscal crisis. Obviously the fiscal crisis and employment laws of California could be the subject of weeks of depressing discussion, but today we are focusing on Section 17200.

Notwithstanding the fact that Section 17200 class actions are potentially a relatively small percentage of the total litigation in California, I would posit it makes up for its small numbers in its impact. A regular garden-variety tort or contract claim is not going to be a make or break for most companies or for most businesses. But, when you can have a potentially nation-wide class action, or at least an all-California-citizen class action against a company on behalf of people who haven't really been injured or affected and the plaintiffs can seek injunctive relief and restitution, plaintiffs can do a lot of damage to the businesses. This is why California businesses have taken notice and why they are concerned, and why I posit why we should all be concerned. As Will Stern pointed out, prior to Prop 64's passage, any person could sue on behalf of the public as a self-appointed Attorney General. They didn't need to show that they were harmed by the act they were challenging and, needless to say, I think this was fraught with peril. Generally our system is set up so that someone who is injured seeks redress while people who have not been injured cannot become gadflies and go out to sue just for the heck of it. Allowing uninjured people to sue distorts our system and doesn't lead to the proper outcome.

In 2004, there was an attempt with Prop 64 to reign in the UCL by requiring people who file a UCL action to show that they have personally lost money or property as a result of that unfair business practice. Many thought that this would reign in the UCL significantly and limit UCL actions to those who had actually been injured. Unfortunately, the California Supreme Court in the *Tobacco II* decision in a 4-3 opinion held that Prop 64's standing requirements only apply to the class representative and not to class members. Thus, only the named plaintiff has to show that they were actually injured by the act they are challenging, and they can get a class certified of thousands or millions of potential class members who have not at all been injured. I think the dissent made a valiant effort to point out that this distorted the whole purpose of passing Prop 64.

But the question has now been presented in the lower appellate courts about what does the *Tobacco II* decision mean in terms of traditional class certification requirements, such as the predominance of common issues of causation and injury among individual class members. Whether or not those traditional class certification factors are relevant or irrelevant in UCL

actions so far have split the intermediate appellate courts. There have been quite a number of appellate opinions coming out on different sides of this question, and I am going to highlight two of them as sort of representative examples. To this point, the Supreme Court has ducked or allowed the issue to percolate, depending on how you want to look at it. I think at some point the Supreme Court is going to have to weigh in on this again because the intermediate appellate courts on this are sending conflicting signals. The first of the two cases I wanted to mention is *Weinstadt v. Dentsply*, which I should give a caveat, was handled by two of my partners. It was a class action of dentists suing over a dental device called a cavitron, which is a device that expels water at a very high pressure that is used when you go to the dentist to get your teeth cleaned. California has a regulation that says for dental surgery only sterile water can be used but since teeth-cleaning is not surgery, you do not need to use sterile water. The class action that was filed against this manufacturer was based on an allegation that there was some intimation in the marketing materials for this device that it could be used in surgery, which it could be in 49 other states that do not have the sterile water requirement that California does. There was no indication or evidence that any dentist didn't realize that this device did not use sterile water because the dentist had to hook it up to their own water system. There was no indication that any dentist in California did not realize that they were required under state regulation to use sterile water for surgery. Yet, the Court of Appeals said you could have a class certified of dentists who had not shown any reliance, or any injury, or any improper use of the device, saying that the *Tobacco II* opinion found that those type of requirements did not exist other

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Remarks by Shaun Martin

The change in 2004 with Proposition 64 was a microcosm of what was going on in the nation. Prop 64 codified that you cannot sue unless you lost money and property. Absent this, there was no standing. How we approach standing has changed in the last twenty years and Prop 64 illustrates this.

In the 1960's and 1970's, the Supreme Court was expanding standing, letting more people sue, whereas the current Supreme Court is cutting back on standing. I think Prop 64 is a part of that. A lot of Prop 64 falls on whether or not it is the right way to approach a problem to deprive people of standing and say: "Look, there might be a legal problem here, but you cannot sue, and no one can sue." Prop 64 says that you cannot sue if you have not individually lost money or property or at least cannot find a class representative. That makes sense from our traditional tort understanding, but there are lots of doctrines where we do not have that same principle at work. This is not the universal rule. We have entire bodies of remedies law, like unjust enrichment and disgorgement, where we give people standing to sue even if they have not been injured. If you ever want to sue for an Establishment Clause violation, just try to find someone who lost money or property and has standing on that basis. If you imposed the same standing requirement in this area as Prop 64 does, it would be very hard, and the government might be able to establish the Episcopal Church of America and it would be very hard to find someone with standing. We could impeach the official who created such a state-sponsored church, but you would have no judicial relief. There are lots of areas where we do not have these or similar standing requirements.

The real debate is: Is the right way to attack a problem, if there is a problem, to take away standing? There are examples of social problems that been largely remediated, albeit not entirely, because we do not have a strict standing requirement, such as in residential racial discrimination. What makes a landlord not discriminate against a minority applicant? One may say, "Oh, the fact that no one in America is racist." Perhaps, though I doubt it. The other reason might be the laws against residential discrimination, which is undoubtedly the case, but those laws are very difficult to enforce. If you are a minority applicant and you get turned down, very rarely will you know it is because of your race. Usually, the landlord can very easily come up with some other reason, which makes it very hard to sue. What has been a huge stake in the heart of the residential racial discrimination? Private testers. Law firms that go out and get two identically-situated people to apply for an apartment—one a minority applicant and one a white applicant—and then the minority applicant is told, "Sorry, we are all filled up," and the white applicant is told, "How soon can you sign?" Now, the applicants were not real applicants. They did not actually want to rent that property. They were testers. They did not lose money and property. If those people could not sue, this way of enforcing the law would be pitched out the window. But,

the Supreme Court said, "You've got standing," and that is a legitimate way to attack the problem. This has a major beneficial impact.

The same is true for Prop 64, at least in certain cases. Imagine there is a particular ARCO that sells tons of cigarettes to 14- and 15-year-olds. Well, who's got standing to sue for that? The 14- and 15-year-olds got exactly what they wanted. As a result of Prop 64, you would have a strong argument that no one could sue for that. I think that is disadvantageous. I think it is advantageous to have a 14-year-old tester go up there and buy cigarettes and then sue for disgorgement for all the cigarettes ARCO sold to 14-year-olds. That would be a socially beneficial practice, and it is potentially stopped by Prop 64.

Moreover, not only does Prop 64 prevent some beneficial ways of enforcing laws, but it also changes the method of enforcement in a way that might be socially deleterious. Prop 64 does not apply to governments. We do not require that the government have standing. Governments can sue even if they have not lost money or property. Prop 64 basically shifts enforcement from private individuals to the government. When you restrict standing to the government, your belief has to be the government is in a better position to do this than private enterprise. But there are some downsides to the government enforcing these laws rather than private individuals. For one, you may get discriminatory enforcement. You also get occasional over-enforcement, especially since in these cases the government can still criminally prosecute individuals for violating these laws, and arguably that over-deters. What 17200 did in the old days was to essentially turn over enforcement of a wide variety of statutes to private litigators, to lawyers. The good thing about lawyers is they are not discriminatory. If you have done something wrong and they can get money, they will get it from you. Private lawyers may occasionally have too much of an incentive to enforce, so we may want to reign them in a little bit, but depriving them entirely of standing seems to me not necessarily the right way to do it. Shifting enforcement to the government is not really a cure-all for these things.

Moreover, it may result in a race to the bottom. Imagine that you run a liquor store somewhere and you can sell beer and cigarettes sell to 14-year-olds or not. Now if there is vigorous enforcement by private anti-beer and cigarette lawyers, which was allowed pre-Prop 64, you are likely to comply with the law. That will put you on the same footing as the other store owners who comply with the law voluntarily, who also don't sell beer and cigarettes to 14-year-olds. I think that's a good idea. But after Prop 64 deprives private individuals of standing, you may have a race to the bottom; the sleazy liquor store that illegally sells cigarettes and liquor to minors may make more money than the other stores and dominate the marketplace. The advantage of having broad citizen enforcement of laws is that it puts everyone on the same footing, as there is

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Question & Answer Session

JUDGE ORFIELD: Scott, where will UCL end up in five years—Do you think it will be thought of as the deterrence mechanism or whether it will be regulated as tort or damages only?

SCOTT LEVIANT: I think that is just a given. It's one of the things that is not really in dispute. As to the deterrence effect, I think what we are going to see in five years is just a little bit more development of what actually shook out immediately following the *Tobacco II* case, which were a number of appellate courts that seemingly took different positions in the debate about how far-reaching the *Tobacco II* decision goes. When you try to line them all up and go through the lawyerly exercise of reconciling them, rather than throwing in the towel and assuming that some of them are just antithetical to each other, you will be left with a case by case, factual situation by factual situation analysis where, if you are talking about advertising type of cases—which are the most relevant to this debate—advertising campaigns that go on longer and are communicated through a broader set of media are more likely to get the *Tobacco II* treatment. Ad campaigns that are more short-lived and that are disseminated through a narrower branch of media where it's less comfortable for someone to presume that most people were exposed to them, they are going to be the recipients of the denial of class certification because of an inability to ascertain what the class is.

JUDGE ORFIELD: Jeremy, if the Appellate Courts and the California Supreme Court seem to be deciding that only the class representative needs to show damages, then haven't we already then gone to a deterrent system and thrown the tort issues and damages out the window?

JEREMY ROSEN: I would be, at the moment, slightly hopeful if the *Direct TV* line of cases takes hold that, while the standing requirement for bringing a 17200

claim may not require showing actual injury, you might in some traditional class action requirements be able to limit the collateral damage somewhat. I think that the best thing would be for the California Supreme Court to revisit *Tobacco II*. And I would posit that that is not something implausible. California has a somewhat weird system compared to the U.S. Supreme Court and other state supreme courts. If we have a Justice on the California Supreme Court who is recused, instead of just having the remaining member of the California Supreme Court decide the case, they actually appoint at random a sitting Court of Appeals Justice to replace a Supreme Court Justice for that case. *Tobacco II* was a 4-3 opinion where the fourth and deciding vote was cast not by a sitting member of the California Supreme Court, but by a Court of Appeals Justice sitting by designation because Chief Justice George was recused. Whether Chief Justice George would have signed the majority or the dissent I can't speculate, but it is certainly not implausible that the California Supreme Court could revisit this and potentially not give it the same stare decisis benefit that you might give to another holding of the Supreme Court because it was such a closely decided case that was actually decided by a nonmember of the court. So maybe I am being over-optimistic—I probably am—but I still view *Tobacco II* as not necessarily the final word on the standing requirements under Prop 64.

JUDGE ORFIELD: Shaun, it seems to me that in your discussion of standing, it makes sense when you say that we do actually need standing to sue in these various cases. It seems as though the examples you're giving had to do with these white, bright constitutional protection issues. We are talking about race, creed, sex, sexual orientation. You take those kinds of cases and you say, "We should have a mechanism in place where we relax standing to a certain extent because we want to go after the owner of property that will not rent to somebody of a certain race." But for the defendants this is a continuum. Down the line, you may have, for example, a window manufacturer who claims that the light coming through the window is a hundred percent UV and it turns out it isn't. People may say, "You're wrong, you've misrepresented. You sold a lot of windows with false advertising." And now there is not a greater reason to relax the standing issue. If you gather 10,000 people against this window manufacturer in Compton on the issue of whether his advertising is direct or not, the standing issue does not seem to be more in play and the issue of damages seems to go in play than it is when you are talking about the racist landlord.

SHAUN MARTIN: Yes, I think that is true. You make a good point, that I have no doubt that if more was at stake we are more willing to relax the standing requirements. I guess I have two instantaneous reactions, one of which is that it is not clear to me that we do that in all cases. For example, I was thinking of some low-level case where we relaxed a requirement that you have lost something. Think of something like a guy who has built a shed unbeknownst to him on the wrong side of the property line. And we would have common law remedies that would relax standing as well. So if you accidently improve someone else's property, we might let you go back and trespass on their property and get back the materials or we may require them to disgorge the benefits. So, you are exactly right, we do that in high-impact cases, but I think we also do that in low-impact cases as well in particular ways. And I think that we do it in cases where we think, that to enforce a standing requirement, leaves the law without a very good remedy. And so—I was thinking just as I was speaking, that I am pretty sure candy cigarettes are illegal in California—and you know that's not a constitutional issue, but I'm not sure that if 7-11 started selling candy cigarettes and someone wants to sue and say, "You know what, give back all the money from your candy cigarettes." I just don't think that that relaxes the standing requirement too much, but maybe I don't like candy cigarettes so I don't know, but you make a good point.

JEREMY ROSEN: I think Shaun has an interesting point on whether at another level, whether relaxing standing or strengthening requirements is the better way to go. The only observation I would make here with respect to Prop 64 is that the voters passed an initiative that made a pretty clear statement that standing was going to be changed in section 17200, giving standing only to those who had been injured, and in the *Tobacco II* case the majority in the Supreme Court seemed to give the voter initiative a very short drift and pretty much read the limitation that the voter should pass essentially out of the statute and rendered it pretty meaningless because, if you are going to say, "Well you can still have a class action where millions of people had not been injured," then the whole task of amending section 17200 to require only those who had been injured to sue seems pretty meaningless. I guess we could have another discussion about the validity of voter initiatives and the Supreme Court's deference to them, but here, if you read the majority opinion, they had to go through a lot of hoops and gymnastics to get around the pretty clear language of the statute to get to the result of what they seem to want to get to.

SCOTT LEVIANT: The ambiguity that followed from the language of Prop 64, I think, is an object lesson of why the initiative process in general in California is not necessarily the greatest idea—cobbling together a law will result in unintended consequences. And if it was done in a more deliberate way, perhaps you avoid some of that. Now, with respect to the discussion about the failure of Prop 64 to be applied in the way that the voters intended, I think you need to look at this as a glass-half-full situation because clearly now individuals that have suffered no harm or injury are precluded from bringing suits. So, you do not have the situation that actually caused Prop 64 to gain momentum. I don't know if everyone is aware of this, but the notorious Trevor Law Group did more to get Prop 64 passed than any other advertising campaign or effort by anybody. What they were doing, if you do not know about it, was using the pre-Prop 64 version of the UCL, which allowed any person, irrespective of whether they had suffered injury or been engaged in an transaction, to bring suit for violation of the UCL. They were using a—if I remember right—sort of a proxy corporation that they had established themselves and then represented very small businesses, like nail salons, and identify violations of various health and safety type regulations and statutes. They would then file an action and send a demand letter immediately saying you're not changing out your nail files at the appropriate interval or whatever it was this business would have done. They would offer a settlement amount to say $10,000. We will settle it and drop the lawsuit, otherwise get ready to litigate. So, the tiny business owner makes a cost-benefit analysis where they contacted the defense attorney, who says, "Yeah, my retainer is going to be about ten grand just to talk to you." So, they write the check, and the Trevor Law Group would go on to the next business. Eventually some of those businesses started complaining because they felt that this was essentially quasi-legalized extortion and the scrutiny that they got built the groundswell support for Proposition 64. Then, I might add, the CEOC blew it as far as getting up to speed and opposing that initiative or maybe we would have been spared that change in law. But it did accomplish what it was written to address at the time, which was the ability of a person who had no stake in a transaction to bring litigation. That issue, that ability, was eliminated from the law, and I think it is not an amazing stretch of the language to come to the conclusion that it only affected the person bringing the suit. It does not say that the person bringing the suit and every other represented individual in any capacity must show standing; if that was what it intended to do, and if that could be included in the law, it could have been written into it. It was not. So, take it as a glass half-full. There was an entire area of litigation that was eliminated by the state and something that I think was abusive, which was wandering around with a shammed plaintiff suing the businesses for the sake of squeezing out a little quick-hit settlement was eliminated. And the Trevor Law Group disbanded and I think the individuals gave up their license to practice law in the state as a result of it. So, good was accomplished, but then this just brings us right back around to why is the UCL still such an area of contention. I heard a couple of things mentioned by the panelists that I think all feed into it. I would second Professor Martin's suggestion that private enforcement is better. I think frankly the local state and federal governments are colossal train wrecks at this point. And I wish there were criminal sanctions for how horribly they've driven the resources of the country and the state off a cliff. I don't understand how we could be in this situation we're in right now, given that the last thing I want to see is a government agency out enforcing some sort of consumer protection scheme. If you agree that it should be there, and that is a separate debate, I would rather have a bunch of attorneys that have a profit incentive out there enforcing it. And before everyone got extra nervous about that, I have to tell you the most difficult decision that I make in practice is not turning away the bad cases—that is easy. It's the ones that I get where I hear a description of something and I'm not clear if at the end of the day if that is going to be a winner or the loser of a case. I don't want to spend two years and 1,500 to 2,000 hours of time finding out that there is a very interesting legal theory there, but a judge decides it's not a winner. There are no private lawyers out there intentionally taking cases they think they are going to lose. I think the profit incentive will put the focus in the right place and the incentives in the right direction, and the government ought to stay out of pretending to be enforcing various regulations in laws because it's incompetent.

WILLIAM STERN: Here's where I think Professor Martin and the plaintiff's criticism breaks down. The biggest growth areas right now in consumer class actions are no injury class actions. The *Tobacco II* cases that Jeremy described were a no-injury class action. These were smokers—the class was defined as smokers—who weren't injured. Let me give you a data point we can all relate to because it relates to San Diego. Two weeks after Toyota recalled its sudden acceleration cars, more than 80 class action lawsuits were filed around the country. The plaintiff's lawyers brought these, and they are the biggest plaintiff lawyers in the country. Many of them

are familiar names from the tobacco litigation who met and took over a hotel in Chicago about a month ago. It was recorded in the *Wall Street Journal* and the *New York Times* to decide where they should bring these cases and who is going to lead them. Every one of them was a class action brought in by people whose cars didn't suddenly accelerate. These are no-injury class actions. Where did they collectively decide to bring these lawsuits? San Diego. They brought them here in San Diego. Think about this: *Tobacco II* cases were one of several state-only class actions brought by healthy smokers. They were brought in twenty-five or so other states. Two states allowed those class actions: California and New Jersey. So why is it that we in California permit these no-injury class actions? Had *Tobacco II* gone the other way, the Toyota lawsuits would have been filed elsewhere—I am absolutely convinced of that. And so when I hear that Prop 64 ended the abuses, I don't see that. The abuses are continuing and they are continuing because we now permit no-injury class actions to be brought by entire classes of people, none of whom was harmed.

SCOTT LEVIANT: See, some of that is sophistry and also some of that is incorrect. There were Toyota class actions filed in states all over this country—Florida, Texas, Illinois, New York, New Jersey, California, and I can say with absolute certainty that the reported meeting in Chicago was not to decide where to bring the class actions against Toyota. They had already been filed all over the country and the multi-district litigation panel of the United States District Court decided where those cases would ultimately be directed to, which was the central district of California in Los Angeles.

WILLIAM STERN: But that's also where, collectively, the majority of the class lawyers and plaintiffs asked that they be held.

SCOTT LEVIANT: And Toyota, which has its headquarters in the United States in Torrance, California.

WILLIAM STERN: Which allows you to go nation-wide and export 17200 to all 50 states.

SCOTT LEVIANT: And that brings me to a little bit of news that people who are practicing may not be aware of, and that is the Ninth Circuit, in June, will be hearing oral argument in a case in which a nation-wide class was certified of drivers of a certain model of Acura. And I believe the issue was whether the correct choice-of-law analysis was applied to conclude that California's interests in enforcing its laws against a defendant situated in California were such that it could extend its UCL law nation-wide and include consumers that purchase the vehicles in other states. So, that is going to be heard I think June 9th, and so probably sometime this year the Ninth Circuit will weigh in on the propriety of at least that particular set of facts.

AUDIENCE: Scott, on behalf of my colleagues from the AG's office here, specifically in the licensing section, I would offer the following in regards to your comment. I am not going to take up the issue with it completely, but I think what your comments should point out is that perhaps the complementary approach is best. I would submit that in certain types of licensing regulation cases, we have a core of expertise and knowledge and in people, within the regulatory agencies themselves and within the office that is particularly well-equipped to deal with, for the lack of a better term, garden-variety cases. On the other hand, as a former plaintiff's lawyer, I know that relish and that good feeling, "Yeah, I am going to go with this one and the six figure settlement in the court of appeals will be the least of it." What I am hearing from you is that perhaps the larger, unique cases should be reserved for the private park, whereas the "run-of-the-mill" cases should be reserved for the government. Do I understand you correctly in that respect?

SCOTT LEVIANT: Well I think if you wanted to look at it from a pure economic standpoint, and let's say there is a certain number of violations going on in a particular business sector and we have agreed collectively as a society that a certain type of activity or the use of a certain chemical or something is going to be prohibited because we decided that is what we are going to do, you can presumably rank the violations in order from greatest economic impact and damage to smallest. One measure of efficiency would be to turn the private sector loose and say, you know, "go get 'em" and they're going to start from the top and work their way down. Presumably they are going to seek out the biggest case first and then the next one and the next one until you reach a level where there is such a diminishing return that there is actually no incentive because the profit to be had from enforcing ends up being below the damage that is caused by the violation. There, you are using economics to serve as a proxy for what might be called prosecutorial discretion, where an administrative body decides that's a small fish, we have bigger fish to fry and we are going to skip them. Maybe, after listening to your comments, I would say perhaps the law enforcement agency or the administrative body with law enforcement powers might be best served focusing on violations that are quasi or truly criminal in nature and they are beyond the reach of a civil court and that the regulatory bodies might also to a certain

extent contribute their expertise to fashioning the terms of regulations after a legislative body says, "I want you to regulate this area," but they don't specify the terms. The FCC does quite a bit of regulation after a bunch of general mandates being issued by the Congress. Then you get into a side conversation about regulatory capture and do the industry people end up all working in the regulatory body and essentially dominating how it gets regulated. Now, you are back in the political debate again.

JUDGE ORFIELD: Quick question, is there some requirement that when an individual takes on a 17200 lawsuit that they already run it by the AG's office? What happens if the AG's office is going after the same group and some attorney says, "I am going to file this lawsuit," and they are the same target of the AG's office.

WILLIAM STERN: There is no requirement.

JEREMY ROSEN: You have to serve them.

AUDIENCE: Courtesy comment for Mr. Stern that there is no requirement. But, it's like, hey, a silver platter minus a little bit.

JEREMY ROSEN: I would like to interject a little bit on the question, going to Scott's point about whether private enforcement or government enforcement is best, and I guess I am troubled by the notion that we leave so much of this to the private profit motive because the profit motive is not necessarily correlating with serious violations of the law. It has more to do with how deep is the pocket of the particular defendants and how large is the class of uninjured people you can put together. I think the *Tobacco II* case that we have been talking about is an example of a very large class of people who haven't been injured against a very, very wealthy deep pocket and, frankly, unpopular defendants. Now the Supreme Court is saying, well, the fact that these advertisements that may or may not have been misleading were not even necessarily read or relied upon by any of these people in the class is irrelevant, yet, they can share a potential recovery for them. You certainly have lots of lawyers engaged who have a profit incentive in pushing these cases for violations that seem very flimsy for a group of people who haven't been hurt. And there may be more serious violations either that are made by companies that don't have that deep of a pocket or that may have greater difficulties of proof or other things that may cause private lawyers to not want to take them on. So I don't think leaving this in the hands of, frankly, unaccountable private actors who get so much power vested by the statutes to act on behalf of the public it is not necessarily the best outcome. I think that's why businesses are troubled by the explosion or however many number of these 17200 class actions because there's the potential for huge pressure to settle. You are almost never going to go to trial on a class action where you have millions of dollars of potential liability. The scope of liability if you lose is so prohibitive that it's almost always going to force the defendants to settle for very large amounts of money whether or not they did anything wrong. I think that the government is not perfect, and it certainly has its own faults. But, having some removal from a pure profit motive for lawyers where I think there is some requirement to look to the public good as opposed to the economic incentive of the lawyers bringing the case I think would be a much better system.

WILLIAM STERN: Let's ratchet up the debate a notch because to Jeremy's point, litigation is about leverage. If you can leverage claims of unharmed people, you can wield the hammer that many defendants are going to find irresistible. Judge Orfield, if I may introduce the *Arco* case.

JUDGE ORFIELD: Sure.

WILLIAM STERN: There is a case that may not be on your radar screen but should be: the *Arco* case. It was argued to the California Supreme Court last week, and it is going to address whether, and under what circumstances, public law enforcement agencies, like the Attorney General, district attorneys, and the county counsel, can outsource 17200 actions to private contingency fee lawyers. It's a debate, again, in microcosm being played out in the national stage because some other states, like Rhode Island, do permit this. But this could be a game changer, because if it is permitted, then you are going to see private contracts with private contingency plaintiff's lawyers bringing 17200 suits that will have the leverage of civil penalties brought in the name of the people. They won't have any effect on Prop 64 because the law enforcement isn't bound by Prop 64; they don't have these standing requirements. Keep an eye out on that case. One thing to worry about is that two of the justices who might have voted no to this—Justice Baxter and Justice Oregon—recused themselves. So, we are going to have a split decision, and my prediction from the oral argument questioning is that they aren't going to permit this.

JUDGE ORFIELD: Let me throw out a proposition that segways into an idea of class actions in general, as far as 17200 claims are concerned: How can there be anything such as a class action where the class members themselves have not been damaged? Why? What's the necessity of a class action with 10,000 people, none of whom who have to show any damages whatsoever? Let's go back and have

an open discussion about why 17200 came into effect in the first place. In reading it, it seemed to suggest anyway that the AG's office has so much they can do. Then, at some point, there is just a lot more to be done. So the concept of the legislature was, "Well, let's create this section that allows privatization of what the AG would otherwise be doing, what the district attorney would otherwise be doing." They don't file a class action. If you go out after a company, Farmers, and say, "Farmers, I think you have violated the over-time statutes, and probably about 2,000 times a month for the past ten years." And you go about proving that they did. So, for every violation there is going to be a penalty. On the plaintiff's bar, why aren't there just lawsuits where your individual, who is any person acting for the interest itself or its members of the general public, doesn't have to have a class action at all? They just go after Farmers on their own. Maybe the person has to have been a Farmer's employee who has to show that they themselves had been damaged. If they can do that, then why not go over the violations and skip this issue about class actions? It seems to me that class actions—the whole idea behind class actions—was giving it a voice to people who have been damaged who otherwise might not have a voice because maybe the damages are ten dollars per person, so they aren't going to do anything about it. The company and the defendant should not be able to keep millions of dollars because it messed over with a hundred thousand people of ten dollars a person. But they all have their damages, they all have to have some damages to be a part of the class. It seems to me that class actions as a concept simply allowed of people to have damages where they might be able to move forward on their own. So, I'm just a little bit disturbed, or I don't quite understand. And the attorneys in front of me would not be surprised that I don't understand. I don't understand the concept of class actions with individuals who are not damaged.

SCOTT LEVIANT: Well, I would just say that the specific example you gave highlights a fork in the road in class actions that are most commonly seen. When you are talking about employment law class actions, especially wage-per-hour, there are a whole separate set of debates. Typically, in those cases, the only utility served by the UCL is adding an extra year of statute-of-limitation recovery on to three-year statutes of limitations for unpaid wages. By definition, every person that isn't paid minimum wage or overtime wage or a meal time premium has lost money sufficient for standing. Often in those cases you have a situation where if you are talking about liability you are adding accounting employer records. Perhaps you are demonstrating that there were 173,000 instances over a four-year period where an employer did not pay a meal period premium for a person that did not receive their lunch break. So, you have, by definition, applied a remedy to a statute, including a type of harm. You don't get into the issue of presumed reliance. That is not an issue there. When you go into the advertising and consumer law class actions, you have to, I think, be clear about what is being said. A lot of the class action jurisprudence says we are going to tolerate slight over-inclusiveness or participation and recovery and we're going to tolerate a distribution of funds that is not exactly matched one to one to the harms suffered if we can get to a point where we approximate what the total liability of the actor should be. The corporation shouldn't really care if it has committed a ten million dollar harm how that money is distributed to class members and if one gets 25% more than he should and one gets 25% less, that shouldn't really matter to the company. You achieve the social good of not letting them profit from a wrong, and you have served from what Will describes as the deterrent effect.

JUDGE ORFIELD: Is the assumption there though that for the most part there has been some damage to each class member?

SCOTT LEVIANT: I suppose there is that presumption, but I think it also depends upon the case. The thing that I think is not being correctly construed in *Tobacco II* is that there is some slippage between what they said and what people debating the issue say. All the court in *Tobacco II* said is the main plaintiff has to show standing, so they have to meet the Prop 64 standing requirement, which is lost money or property and suffered harm. If the representations that were being litigated about were material, you can presume that the class heard them and relied upon them. I think maybe too much is getting argued about in *Tobacco II* as far as damage. It seems to me that the debate is should you have to prove up before you get to liability when everyone was damaged. That seems to be what really is being debated. You have to do an upfront prima facie proof that you are going to win before you are entitled to bring a class action and try to win.

JEREMY ROSEN: Just a couple of observations. The first is something we haven't really talked about before, but Scott brings up an interesting point about the statute of limitations for unfair competition claims, which is four years. This is much longer than most statutes of limitations in California, which is generally one, two, or three years. And, the legislature has set specific statutes of limitations for various torts or statutory violations of one, two, or three years, but if you can throw in a UCL claim and just say, oh well, because they've violated this other statute

it's also an unfair competition that automatically extends your statute of limitations to four years and that is the law. But clearly that does not make a lot of sense, since it sort of defeats the whole purpose of having the statute of limitations for the specific violations that have already been set if you could just call up the UCL and jump it up to four years. In terms of the fraud on the market type claims, I think the *Winestack* case that I talked about in my earlier remarks highlights why it really is somewhat, I think, unfair to not have this inquiry at the beginning. This is because if you have a situation there where every dentist who uses this device hooks it up to their own water supply, so they know whether it is sterile water or tap water. They presumably know what California regulations are regarding their business in terms of what type of water they have to use for different procedures, and there is no allegation that any of them believed that this particular device had sterile water in it, which they couldn't believe since they hook it up themselves to non-sterile water. To say that *Tobacco II* means it doesn't matter if they have been injured because someone theoretically could read their manual that goes with their device throughout the country, and that manual somehow trumps California regulation about the water that they are supposed to use for surgery, seems that it makes it fraught with abuse. Even in *Tobacco II* itself, there was a presumption of reliance where you have thousands or hundreds of thousands or millions of people who are smokers, who may or may not have seen hundreds of thousands of ads over a period time. To say, "Oh, we are just going to presume that they saw the ad that we are challenging here and relied on it," when there is no reasonable basis to assume that any of them had done that, you just allow a suit to proceed that basically is just leverage to try and force a settlement. That doesn't seem to me to best utilize the deterrents that the statute is supposed to affect.

SCOTT LEVIANT: I think the *Cohen* and *Winestack* cases you mentioned also highlight why you get inconsistent results in cases that have very different factual situations. The *Winestack* issue is easy to describe. However you come out on it, it is easy to describe the situation about the product and what the literature said. You can summarize it in a couple of pages, and everyone would understand the difference between tap water and sterile water. And they can understand what a page in a pamphlet says. The *Cohen* case and *Direct TV* case, I suspect that no judge involved in the case had any idea what it was that the plaintiffs were complaining about in that case and had zero sympathy for them because what they were discussing was the degree of compression of MPEG-4 transmissions coming from a satellite, and whether they were or were not true HD transmissions. I don't think anyone reading the papers and deciding the cases have any idea exactly what an HD TV actually is, let alone whether 18 megabits per second versus 9 megabits per second is good or not good HD transmission. So, to a certain extent, some of this fractionization in these post-*Tobacco II* cases, I think stems from whether they are conceptually easy and sympathetic when you describe the facts in a simple way or whether they are so frustratingly ambiguous that the court just says: "I don't know; you sound like a cry baby." "Did your TV work, and there was something on the screen?" "Did it stretch to 1920 x 1080 on your big flat screen picture?" And you say, "Well, yes, but I know that data was compressed more than I think it should have been." And you know at that point I think you get eye-rolling and you get aberrant results. A little bit of this apparent discord I think comes from the maxim that bad facts make bad law. Unsympathetic facts make decisions go against the person bringing the unsympathetic facts.

JUDGE ORFIELD: All right, let me ask you about the plaintiff representative who has been damaged or who has seen damages go to certify his class in a 17200 case. The defense brings a motion to require arbitration because the plaintiff signed an arbitration agreement saying "I will agree to arbitrate these issues," so the defendant says this is out of your court, Judge Orfield. This should be sent to AAA arbitration, where it will be resolved. Does Judge Orfield agree that he did sign a valid binding arbitration agreement? Is that going to affect the entire class of individuals? Are they all going to be subject to binding arbitration where this class representative is going or can it be—will it end the class for awhile?

SCOTT LEVIANT: I guess I'll pipe up because I have been writing about this. It certainly raises the questions that are triggered by the Supreme Court's recent decision in *Stolt-Nielsen*, which on its face seems to suggest that an arbitration agreement silent as to the issue of class treatment of the claim cannot be used to compel a class-wide arbitration. I think it's a little bit more complicated than that, but that's the very simple spin that the case was initially getting. The question in California is whether California's two major decisions that test arbitration agreements would require the court to consider whether it should, one, declare the arbitration agreement unconscionable because California has said the denial of class-wide arbitration in certain types of cases is tantamount to eliminating the claim entirely. Or, in the alternative, if it is sent to the arbitrator, must the arbitrator determine that class-wide arbitration must

be permitted because if an unwaivable statutory right is involved that would be compromised by denying the ability to bring a class claim? Does that mandate a class arbitration irrespective of what *Stolt-Neilsen* has said and also has left unsaid as far as the consumer and employment law of arbitration? I think it is a very complicated issue that you are asking about, and there is going to be a lot of collateral litigation for a good number of years about this issue.

JEREMY ROSEN: It also comes down to whether the Federal Arbitration Act or the California Arbitration Act applies because I think there is now a stronger argument under the Federal Arbitration Act that you could send these cases into arbitration. But, if the Federal Arbitration Act does not preempt in a particular California class action, then you are left with the California Supreme Court cases that provide more limitations on whether you can go to arbitration. But I agree that, I think that this is one of those opinions that came out where you do "high-fives" around the appellate law firm because there are going to be a lot more appeals.

SCOTT LEVIANT: I'll tell you what. That's a safe bet. The first trial court that I know of to rule on this was Claudia Wilken in the Northern District. She denied AT&T's request to revisit their motion to compel arbitration and apply the Ninth Circuit decision *Destroyer & Lasher* and said, "No, in California under California law, your tacit preclusion of class actions is unenforceable." Irrespective of what *Stolt-Nielsen* said, and she said specifically that there was no mention of preemption in *Stolt-Nielsen* and it's not a preemption case, so she was very dismissive of the preemption argument.

JUDGE ORFIELD: It seems to me that as we are continuing to take a look at the issues surrounding 17200, we have spent a lot of time talking about the damages issue, whether you have to have damages or not. As I have observed it from my particular position, it seems to me that we have, in some major decisions, gotten away from the pure damages issue as far as the class is concerned. I'm just wondering if we are ever going to get to a point where clearly the law is going to be that either you don't have to show damages in the class at all—just the class representative—or if what we're really going to is a system where we say damages are assumed. We could agree that in class actions you still have to show damages like in some defamation cases, but we are just going to assume that there are damages so we can move right into liability. Does anybody have any thoughts on if we are going to a pure no-damages-required situation or if we are simply going to be loosening up the definition of what damages are?

AUDIENCE: Well, I was thinking about the same analogy to defamation law all afternoon too, and looking at the sorts of defamation laws, rather than species of liability that do presume damages. Though, we have four classic categories I believe. What those collectively say is there are some sorts of defamations, just that there may be some sort of bad consumer practices that are so heinous that they deserve this heightened treatment. So perhaps that's what it would come out to. Defining those would be the question.

JEREMY ROSEN: I guess the analogy of defamation I don't think works because at least in the defamation contexts, where you have the presumed statements—I guess one of the categories was a woman was unchaste, whether that is still a category I am not sure. At least there you have someone saying that statement about a particular person and then that person brings the lawsuit. That to me is very different from these class action situations where they are being brought up by a half of class of people who've never even heard the statement that was alleged to be wrong or didn't see the advertisement or didn't read the brochure or never relied on it. So I think even though there may not be monetary damages from the statement in the presumed defamation context, you at least have a statement made about a particular person that is hurtful and wrongful, and maybe not quantifiably monetary. But, to go to Professor Martin's comment, at least there is a reason for that person to sue on that question, whereas I think they've been injured at least in a metaphysical way at least, whereas I think in these classes I think we have a different situation.

JUDGE ORFIELD: Then from the appellate level do you think that is where we are heading? Are we are going into a pure no-damages-required class action lawsuit other than the representative?

SHAUN MARTIN: What I would say is this. If the path goes that way—if the path goes to the left—I have no doubt that it will not be because we have presumed damages. I think the presumption-damages cases either come from this long historical analogue and defamation law—they come from history—or they come on the broad of the market theory from an entirely different era from which they come of the judiciary, which we are not in. We are not in an era where we are on the left where there are a lot of creative legal theories. I think this is an incremental regime. If the court decides that we don't require damages you are going to do it by parsing through Prop 64 and saying, "They didn't specifically require it for this person, etc." I think it is a much more technical process now than it was historically.

JEREMY ROSEN: And I think Scott hit the nail on the head when he talked about having to look at the specific facts and that bad facts make bad law, although I suppose there would be some disagreement on this panel as to what is a good fact and what is a bad fact, but I think the eight or nine post-*Tobacco II* opinions that I alluded to in my opening remarks, where instead of boring you with talking about nine cases I just picked two. But I think if you look at these nine cases and the facts, I think they are very fact-intensive and I suspect that you are going to continue to have, especially if the Supreme Court continues to not take the cases, you are going to have appellate courts going through and doing a very, very detailed factual analysis here—well, one case involved a Listerine ad, one case involved a dental brochure, one involves a Direct TV claim. They are going to be looking very closely at all of these and coming up with a very fact-based analysis of how whether there is sufficient commonality to allow the class to be certified, and you will probably have a lot of ad hoc and potentially seemingly inconsistent results. At some point I suspect the Supreme Court will take another case, but I guess that doesn't necessarily mean it will end the fact-based analysis. It just may push it to another direction, but I suspect that we are sort of going on an incremental fact-based approach where each case is going to be different and with lots of appellate briefs to write.

SCOTT LEVIANT: I think in the larger cases where enough is at stake that people are going to devote the resources to do this, what you'll see are things like a plaintiff may obtain class certification and then you'll see things like a defended company doing extensive surveys and providing expert analysis about how fractured the consumer bases understanding is of the representations and who saw what and then motions to decertify class. So you may get a first-pass presumption of reliance for the class members after the class representative meets his standing requirement, and then when you get into the merits, you may see creative ways to double around and take a second look at that. I don't think *Tobacco II* said that you presumed this reliance and then it is a lock forever. I think they talked about in the certification analysis what presumptions the trial courts should be setting, but I think we are starting to see a little bit more resistance to class actions. It's like an arms race, where each time one side of the bar comes up with a new approach and a new set of arguments, within a year or two the other side has reacted and has its counterpunch. And I think the counterpunch to the presumption reliance is going to be sort of fall back, regroup, and then revisit the issue a second time around. There are some examples of cases where there have been certifications followed by decertifications after there was a presentation of more elaborate evidence, so that may be the direction that the bigger consumer cases go.

JEREMY ROSEN: There could also be a difference in federal courts and state courts. We haven't really talked about that, but you can bring 17200 claims in federal courts as well. I think it is an open question whether a federal court would apply the same analysis on class certification that some of the California cases are doing, or whether they would apply the regular federal class certification guidelines. This may lead to disparate results depending on the claim of the federal court. That is something that people may want to keep on the lookout for.

AUDIENCE: Aren't we talking about apples and oranges? My simplest analogy here is that standing is "did your dog get in a fight?" If it did, you have reason come up to the court and decide whether or not another dog started it, whether there was injury suffered, or what have you. So standing is you have a key to the courtroom, but I don't see that that necessarily relieves plaintiffs from the obligation of establishing that by reason of the wrongful conduct they have suffered legally-cognizable injury. Now, presumptions? We have it all the time. We have rebuttal assumptions; we have preclusive assumptions. What jumps to mind is paternity, and I don't think that a cause of action can be established with the absence of a duty, a breach of the duty, and most importantly, the suffering of legally-cognizable injury. The securities cases that we talk about are an example. If indeed someone who is asserting a claim for a product market claim is deposed and testifies that he never read the allegedly fraudulent material in the annual report because he always throws the annual reports away, his claim is dismissed. So, getting in the door and proving recovery are two entirely different things. The real issue here is how much does it cost and that is a problem that litigation is generally facing and not really dealing with very effectively.

WILLIAM STERN: See, to your question, Judge Orfield, I think the damages issue is already at the point where it's off the table for two reasons. The first is the "when question." The when question is if the defense, such as lack of damage, can't be asserted at the class certification stage, then it is a useless defense in the world of class actions. Why? Because Scott is going to say, look, there may be differences in individual damages, but we can sort that out in the prove-up stage after we have gone to trial and shown liability. We can get a bunch of accountants to prove-up damages. I, of course, on the business side I

am going to say, "No, this should happen earlier on, so once he gets his class certified he's got the hammer." He's got now a class of unharmed people. That is item number one. Item number two is that the courts have permitted the cheapening of the damaged element. For example, in the Toyota case the argument is going to be that I, who did not have an issue with sudden acceleration, have seen the secondary market drop in the value of my car. Now, think about it: when did Toyota in the warranty guarantee that there will be a certain market value that I'll be able to resell that? Nobody thought that. And yet, the courts have accepted that. One of the lawyers who was just allowed to become one of the lead class council in the Toyota case brought a theory in the Ford Explorer Rollover case, in which a class of people whose Ford Explorers didn't roll over, nevertheless suffered injury because by looking at Kelley Blue Book we can see that now someone can pay less for that Ford Explorer than they would have before and that was sufficient damage. I would call that a no-injury case. And yet, that was recognized.

AUDIENCE: Recognized in what sense? Awarded damages?

WILLIAM STERN: The class was certified and once it certified Ford settled for—I forget how much, but it was an enormous amount of money.

AUDIENCE: But I would argue that even with the Blue Book you have described, no economic injury has been suffered. What you are talking about is a business decision predicated on this hellacious risk of loss and it happens every day, unfortunately because of the nature and the structure of our litigation process.

JUDGE ORFIELD: And there we have to let the debate lie. Isn't it great to have a topic where you could go a whole couple more hours? Isn't it great? I am retired! I have all the time, but I am assuming that those of you do not, but I did want to make sure that we had a few moments left personally to thank this esteemed group of individuals and Professor Martin, and Jeremy Rosen, and Scott Leviant, William Stern, thank you very much for your insight, your comments, and for all the information you shared with me and everybody else in this room, and I certainly think they deserve a good round of applause.

Remarks by Jeremy Rosen

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than the main plaintiff. So this joined a number of other cases holding that a recovery in an unfair competition law action is available in the absence of any individual proof of deception, reliance, or injury. Other cases, including the recent *Cohen v. Direct TV* case, have held that traditional class action rule still apply in UCL cases and that the *Tobacco II* case only discuss the standing to bring a class action. It didn't discuss the other class action requirements. And the *Cohen* court held that the unfair competition law does not authorize an award of injunctive relief and/or restitution on behalf of a consumer who is never exposed to a wrongful business practice. *Cohen* is a class action of satellite TV subscribers claiming alleged misrepresentations about the quality of Direct TV's high definition transmissions. The Court of Appeals reasoned that the individual class members may not have seen or relied on any of these specific representations challenged in the complaint, so that there was no factual commonality among the class members.

So, what we can take after these cases? There have been about eight or nine cases since *Tobacco II*, and there is now real confusion. What does T*obacco II* mean? Does it really allow "no holds bars"—anyone can sue even if they have not been injured—or is there still some limitation based on at least traditional notions of class action limitations? That answer is still unknown. At some point I think the California Supreme Court will have to step in.

And just a final point I would like to make before closing and we can talk about more during the discussion is that I want to say a little bit about business-to-business uses of Section 17200. I have noticed, in my practice, that there has been an increased number of these cases filed where generally one competitor will sue another competitor basically in an effort to get a competitive advantage or to try to get their competitor to not be able to do something that is helping them compete. And these types of claims I think are disturbing on another level: now companies have a research and development budget, a marketing budget, and a litigation budget. I want to give two examples. One is a case I am handling now that's on appeal involving a plaintiff who is one of the largest LSAT test preparation companies and my client who is a much smaller LSAT test company. The plaintiff sued my client for a number of claims, including Section 17200, and this is part of a trend that they have done nationwide where they have tried to go after their smaller competitors and try to basically litigate them to death. Now in our

case we actually prevailed in the trial court after a lengthy, lengthy and expensive litigation, and it is now on the other side's appeal. But 17200 allows this type of abuse, which promotes anti-competition. Another example is a single beverage company Hansen. Just since 2008 Hansen has filed eleven 17200 actions against competitors in other companies in federal courts in California. One example is a lawsuit involving a competitor who makes another energy drink. I guess Hansen makes its own Monster energy drink and this Vital Pharmaceuticals makes another energy beverage, and Hansen is suing claiming that their competitor's advertisements about the benefits of their energy drink are not supported by the scientific evidence based upon the ingredients. Now this may or may not be true, and maybe Hansen is just unlucky that so many of its competitors are doing so many bad things to it, but it seems to me that this is something we should be concerned about where we have companies instead of trying to compete on the merits looking to take their competition into the courts that I think is another issue that may be worth discussion.

I would be slightly hopeful if the *Direct TV* line of cases takes hold that while the standing requirement for bringing a 17200 claim may not require showing actual injury that you might be able to have standing under some traditional class action requirements. This might limit the collateral damage somewhat. I think that the best thing to do would be the California Supreme Court to revisit *Tobacco II*. And I would posit that that is not something implausible. California has sort of a weird system compared to the U.S. Supreme Court and other state supreme courts in which when a justice on the California Supreme Court is recused, instead of having the remaining members of the California Supreme Court decide the case, they will actually appoint at random a sitting Court of Appeals Justice to replace a Supreme Court Justice for that case. Now *Tobacco II* was a 4-3 opinion where the fourth and deciding vote was cast not by a sitting member of the California Supreme Court, but by a Court of Appeals Justice sitting by designation because Chief Justice George was recused. Now, whether Chief Justice George would have signed the majority or the dissent I can't speculate, but it is certainly not implausible that the California Supreme Court could revisit this and potentially not give it the same stare decisis benefit that you might give to another holding of the Supreme Court because it was such a closely decided case that was actually decided by a nonmember of the court. So maybe I am being over optimistic—I probably am—but I still view *Tobacco II* as not necessarily the final word on the standing requirements under Prop 64.

I think Shaun has an interesting point on whether at another level, relaxing standing or strengthening requirements is the better way to go. The only observation I would make here with respect to Prop 64 is that the voters passed an initiative that made a pretty clear statement that standing was going to be changed in section 17200, giving standing only to those who had been injured and in the *Tobacco II* case. The majority in the Supreme Court seemed to give the voter initiative a very short drift and pretty much read the limitation that the voter should pass essentially out of the statute and rendered it pretty meaningless because, if you are going to say, "Well you can still have a class action where millions of people had not been injured," then the whole task of amending Section 17200 to require only those who had been injured to sue seems pretty meaningless. I guess we could have another discussion about the validity of voter initiatives and the Supreme Court's deference to them, but here, if you read the majority opinion, they had to go through a lot of hoops and gymnastics to get around the pretty clear language of the statute to get to the result that they seem to want to get to.

Remarks by Shaun Martin

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a greater incentive to comply with the law. So I think that there is some advantage both systematically as well as individual cases to allow individuals to have standing, even if they have not lost money or property. This may occasionally create over-enforcement, but the best way to solve this problem is not to enact a wholesale deprivation of standing, but rather to enact targeted procedural remedies. For example, I think Jeremy is right. It shouldn't be that if someone does one tiny thing, they get faced with ten billion dollars of liability. One thing that we could have done in Prop 64 is to have limited restitution, or could have gone to a loser pays system, or could have enacted a variety of procedural mechanisms that would have actually not only made 17200 cases more just, but that would have made non-17200 cases more just as well. But we did not do that. Instead, we pulled away standing. I think that when you are trying to solve a problem, the better way to solve a problem, rather than make it procedurally more difficult, is to directly target the problem. If you do not like various substantive laws because you think they're driving businesses out of California, then repeal those laws. I think in some ways the worst possible of all worlds is having governmental enforcement on a sporadic

basis and leaving to the marketplace the consequences of that sporadic law enforcement. So, I would have liked to have seen Proposition 64 do something other than tinker with standing. I think that is the worst way to deal with those problems and it overlooks the real problems. So, I think you are right that Prop 64 reflects a microcosm of a larger debate, but I think that debate is whether you solve things through the procedure, in particular standing, or solve them on the merits of the substance.

I have no doubt that if more was at stake we are more willing to relax the standing requirements. Think of something like a guy who has built a shed unbeknownst to him on the wrong side of the property line. In that case we created common law remedies that relax standing. So if you accidently improve someone else's property, we might let you go back and trespass on their property and get back the materials or we may require them to disgorge the benefits. We do that in high-impact cases, but I think we also do that in low-impact cases as well. And I think that we do it in cases where we think that to enforce a standing requirement leaves the law without a very good remedy. If 7-11 started illegally selling candy cigarettes and someone wants to sue and say, "You know what, give back all the money from your candy cigarettes," I just do not think that that would relax the standing requirement too much.

Remarks by William L. Stern

Continued from front cover...

and cannot be part of the class. Further, just because there can be found a named plaintiff who *was* harmed and can prove the defendant's liability, doesn't give an absent class member who can't prove these things a right to recover greater than if he had sued the defendant individually.

This is the debate that underlies every consumer class action, and is one that plays out again and again, every time, in every class action case.

How does it play out? On the defense side, we ask the courts to apply filters to limit eligible class members to just those people who would have had a claim had they sued individually. We use concepts like commonality, typicality, individual issues predominating, superiority, and all of the other "Rule 23" factors. But make no mistake about it. All of these are simply tools in the tool chest that plaintiffs and defendants deploy to move the dial on the spectrum—to the left or right—between the Deterrence and the Tort theories. That debate is what gets reenacted in every class action. Should recovery be limited to just those who were harmed by the conduct?

How then does this figure into Proposition 64 and California's Section 17200 (California's "Little FTC Act")? Here's how.

Prior to Prop 64, up until November 2004 that is, California had moved the "dial" farther to the left than any other state had with its analogous version of the Little FTC Act. Every state and the District of Columbia has enacted a version of a Little FTC Act—sometimes called Unfair and Deceptive Trade Practices Acts—but no state had done with theirs what California had done with Section 17200. What did California do? Two things.

First, California allowed a claimant to sue a defendant even if he had absolutely no dealings with the defendant. Lawyers would lure their mothers, relatives, and secretaries to become "class" representatives. Second, California allowed such a person to bring a claim on behalf of a "class" of *harmed* people, and recover money on their behalves, without having to plead or prove a class action. Those two features were ended by Prop 64. Thus, Proposition 64 was an attempt by business interests and adherents of the Tort Theory of class actions to move the "dial" a couple of notches to the right or, at least, closer to the middle.

The California Supreme Court's 2009 decision in *Tobacco II Cases* was an instance of the California Supreme Court moving the dial back toward the "left" again, closer to—some might say exactly—where it was before Prop 64.

This debate in California over Section 17200 is really a microcosm of what is going on in the larger national stage, and indeed it is. At a national level, we have seen cases like the Second Circuit's *McLaughlin* case, the Third Circuit's *Hydrogen Peroxide* case, and a number of other class certification rulings that are using the Rule 23 elements of class actions to try to move the dial to the right, or to try to limit claims to people who have actually been harmed. In the Ninth Circuit, by contrast, we have cases like the recent *Dukes v. Wal-Mart* decision that moves the dial once again back to the left.

All of these cases are just a few illustrations of the push and tug of the Deterrence versus the Tort approach, and how from a policy standpoint class actions should be viewed. Prop 64 is part of that debate. Socrates would be proud.

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