

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEROID HORMONE  
PRODUCT CASES

B211968

(Los Angeles County  
Super. Ct. No. JCCP4363, Contra  
Costa Super. Ct. No. MCO400283)

ORDER MODIFYING OPINION  
AND DENYING REHEARING

THE COURT:\*

It is ordered that the opinion filed herein on January 21, 2010, be modified as follows:

1. On page 15, add the following paragraphs before DISPOSITION:

D. *Recent Appellate Cases on Class Certification*

After we issued our opinion, GNC petitioned for rehearing, arguing that two recent cases from the Second Appellate District -- *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966 (*Cohen*) and *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116 (*Vioxx*) -- support the trial court's denial of class certification in this case. Both cases are distinguishable.

In *Cohen*, the plaintiff alleged that DIRECTV violated the UCL and the CLRA by inducing subscribers to purchase high definition television services

through misrepresentations in DIRECTV's advertising that DIRECTV's broadcast of those channels would meet certain technical specifications. (*Cohen, supra*, 178 Cal.App.4th at pp. 969-970.) In opposing class certification, DIRECTV submitted evidence that many subscribers had never seen, or did not remember seeing, advertisements with the alleged misrepresentations about the technical specifications, and purchased the services at issue due to other factors. (*Id.* at p. 970.) The trial court found that common issues of fact did not predominate because the allegedly fraudulent representations were not uniformly made to or considered by the class members. (*Id.* at p. 973.)

The appellate court affirmed. In discussing the UCL claim, the appellate court noted that *Tobacco II, supra*, 46 Cal.4th 298, was irrelevant to class certification because it addressed only the issue of standing, and did not instruct "our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification." (*Cohen, supra*, 178 Cal.App.4th at p. 981.) The court then concluded that the trial court's concern that the plaintiff's UCL and CLRA claims would involve individual factual issues regarding class members' reliance on the alleged misrepresentations "was a proper criterion for the court's consideration when examining 'commonality' in the context of the subscribers' motion for class certification, even after *Tobacco II*." (*Ibid.*)

We agree that *Tobacco II* did not dispense with the commonality requirement for class certification. But to the extent the appellate court's opinion might be understood to hold that plaintiffs must show class members' reliance on the alleged misrepresentations under the UCL, we disagree. As *Tobacco II* made clear, Proposition 64 did not change the substantive law governing UCL claims, other than the standing requirements for the named plaintiffs, and "before Proposition 64, 'California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury.'"

[Citation.]” (*Tobacco II*, *supra*, 46 Cal.4th at p. 326.) But in any event, the *Cohen* court’s discussion regarding the appropriateness of considering class members’ reliance when examining commonality is irrelevant here, where the UCL claim is based upon the unlawful prong of the UCL and thus presents no issue regarding reliance.

*Vioxx* is similarly distinguishable. In that case, the plaintiffs asserted causes of action under the UCL and CLRA based upon allegations that the manufacturer of the medication *Vioxx* knew about cardiovascular risks associated with the medication but engaged in a campaign to hide or explain away those risks. (*Vioxx*, *supra*, 180 Cal.App.4th at p. 120.) The plaintiffs asserted that *Vioxx* was no more effective, and less safe, than a generic medication and that it was more expensive than that generic medication. They alleged that the manufacturer misled consumers into buying the more expensive *Vioxx*, and therefore consumers were entitled to recover the difference between the cost of *Vioxx* and the cost of the generic medication. (*Id.* at p. 122.)

The trial court denied class certification largely on the ground that common issues did not predominate because two key aspects of the plaintiffs’ case required individual inquiry. The court found -- based upon extensive medical and other evidence -- that the determination of whether *Vioxx* was no more effective and less safe than the generic medication “is dependent on each individual patient’s specific medical needs and history,” as is the determination of whether the more expensive *Vioxx* was better than the generic medication. (*Vioxx*, *supra*, 180 Cal.App.4th at p. 126.) In other words, the court found that the basic premise of the plaintiffs’ claims -- that the manufacturer misrepresented the effectiveness and safety of *Vioxx*, which deceived patients into paying more for a medication than it was worth -- could not be proved on a classwide basis. Thus, the trial court denied class certification. (*Id.* at pp. 126-127.)

The appellate court affirmed. As to the CLRA claim, the appellate court concluded that, in light of the individualized issues regarding Vioxx's effectiveness and safety, the trial court was correct that the plaintiffs could not establish materiality and reliance on a classwide basis. (*Vioxx, supra*, 180 Cal.App.4th at pp. 133-134.) As to the UCL claim, the appellate court noted that the plaintiffs needed to be able to show the existence of a "measurable amount" of restitution supported by the evidence, and the plaintiffs' assertion that that amount is the difference between the cost of Vioxx and the cost of the generic medication failed because the generic medication was not a valid comparator due to the differences among patients who take those kinds of medications. (*Id.* at p. 136.)

Neither issue is relevant to this case. As we explained, there is no impediment to establishing reliance on a classwide basis for the CLRA claim in this case because it can be established by showing that the alleged misrepresentation -- that the androstenediol products were legal -- was material. And with regard to the UCL claim, unlike the allegations in *Vioxx*, where the plaintiffs put valuation at issue by alleging that due to the alleged misrepresentations they paid more for a medication than it was worth, in this case Martinez does not put valuation at issue when he alleges that he bought a product that was illegal to sell or possess.

In short, neither *Cohen* nor *Vioxx* has any impact on our analysis of this case.

There is no change in the judgment.

Respondent's petition for rehearing is denied.