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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KERRY WHITE, Plaintiff and Appellant, v. HOLLISTER CO., Defendant and Respondent.	B239119 (Los Angeles County Super. Ct. No. BC444368)

APPEAL from an order of the Superior Court of Los Angeles County, David L. Minning, Judge. Reversed with directions.

Law Offices of Melvin Neal and Melvin Neal for Plaintiff and Appellant.

Jones Day, Christopher Lovrien, and Peter Davids for Defendant and Respondent.

Plaintiff Kerry White appeals the trial court's denial of his motion to certify a class made up of all consumers who received $25 gift cards from defendant Hollister Company as part of a 2009 holiday promotion, but did not redeem the gift cards before the cards expired on January 30, 2010. Plaintiff contends that because the gift cards did not say that they expired, defendant's failure to honor them after January 30, 2010, violated Civil Code section 1749.5 and the Consumers Legal Remedies Act (Civ. Code, § 1770 et seq.; CLRA).[1] Plaintiff further contends that the case is appropriate for class treatment and, therefore, the trial court abused its discretion by denying his motion for class certification. We agree with plaintiff in part, and thus we reverse with directions to the trial court to certify a subset of the proposed plaintiff class.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Present Action

Plaintiff Kerry White filed the present action on August 25, 2010, and filed the operative first amended class action complaint (complaint) on March 24, 2011. The complaint alleges that plaintiff is a California consumer and defendant is an Ohio corporation that conducts business in California.[2] In December 2009, defendant ran a promotion pursuant to which it issued a $25 gift card to any customer who made a purchase of $75 or more. On about December 14, 2009, plaintiff received a $25 gift card as a promotion for purchasing $84.82 worth of defendant's merchandise. The gift card did not indicate an expiration date. Plaintiff gave the gift card to his daughter, who attempted to use it on February 7, 2010. The cashier refused to honor the gift card, saying it had expired on February 1, 2010.

The complaint alleges that defendant's failure to indicate an expiration date on the gift card's face violated section 1749.5, which provides that a gift certificate may not

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[1] All further undesignated statutory references are to the Civil Code.

[2] Hollister is a subsidiary of Abercrombie & Fitch Co.

expire unless it is distributed pursuant to a promotional program *and* states the expiration date on the front of the gift certificate in capital letters in at least 10-point type. The complaint also alleges that defendant's issuance of the gift cards violated the CLRA, section 1770, subdivision (a)(5) (declaring unlawful "[r]epresenting that goods or services have . . . uses, benefits, or quantities which they do not have . . .") and (a)(14) (declaring unlawful "[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law"). The complaint seeks a declaration of the rights and obligations of the parties—"(a) that the unspecified expiration date imposed on the consumers who have purchased or received DEFENDANT'S gift cards is unlawful and void; and (b) that Plaintiff and the class have the right to redeem all such gift cards"—an injunction, and compensatory and punitive damages.

II. Motion for Class Certification

Plaintiff filed a motion for class certification on August 25, 2011, seeking to certify a class defined as: "[Any] person[] who received or is a holder of a promotional gift card with an unspecified expiration date, in violation of California Civil Code Section 1749.5, which was issued by the DEFENDANT pursuant to a transaction occurring in the State of California on or after August 25, 2007, and which expired without use, in whole or in part, due to having reached the unexpressed expiration date. Excluded from the class is DEFENDANT, [its] agents, any entity in which any DEFENDANT has or had a controlling interest, its predecessors in interest or assigns."

The motion asserted that common questions of law or fact predominated over questions affecting individual class members because none of the gift cards contained an expiration date, each card entitled the bearer to $25 off his or her next purchase, and defendant denied each class member use of the card. Further, "[t]he central and dispositive issues in this case related to the conduct and liability of Defendant; specifically, whether the law was violated with regards to Defendant's distribution of promotional gift cards subject to an expiration date, but without indicating the expiration

date on the face of the card as required by statute. [¶] In this case, the questions of law appl[y] commonly and equally to all class members. Each class member received a gift card according to the terms of the promotion. All members were treated uniformly in that they were denied use of the promotional gift card because of an expiration date of which they were unaware because it was not indicated on the face of the card. Class treatment is proper and efficient because the court would be able to determine in a single litigation Defendant's liability to the numerous class members regarding the same conduct." Plaintiff also alleged that the number of class members was in the thousands, plaintiff's claims were typical of the claims of the class, plaintiff would fairly and adequately protect the interests of the class, and a class action was a superior procedure for the fair and efficient litigation of the claims.

In support of his motion, plaintiff submitted defendant's responses to interrogatories, which represented that during its December 2009 promotional event, defendant issued 72,062 gift cards through its California stores, and 957 gift cards to California residents through its website. Of the 72,062 gift cards issued by defendant's California stores, 9,469 were rejected because the promotion had expired, 6,732 cards were partially unredeemed, and 23,896 cards were fully unredeemed. Of the 957 gift cards issued to California residents through defendant's website, 79 cards were partially unredeemed, and 440 cards were fully unredeemed.

Defendant opposed the motion. Among other things, it contended that individual issues of "reliance, causation, and damages, all of which require a consumer-by-consumer analysis, are insurmountable obstacles to certification of Plaintiff's proposed class." Defendant asserted that "the individual factual issues that predominate over common issues include the manner in which each putative class member learned of the promotion, including through in-store signs, Card sleeves, e-mails, or conversations with in-store personnel, whether each putative class member learned of the expiration date, whether and how each putative class member was induced to spend additional money because of the promotion, whether and how the existence of an expiration date for the Promotion Card influenced each putative class member's decision to spend additional

money, and why putative class members failed to redeem Promotion Cards before they expired (i.e., were they unaware of the expiration date *or* did they choose not to use the Card, misplace it, or forget about it?). These individual factual issues bear directly on reliance, causation, and injury-in-fact and preclude class certification."

In support of its opposition, defendant submitted the declaration of its marketing production manager, which stated that during the 2009 holiday promotion, each of defendant's stores received signs indicating that the 2009 holiday promotional gift cards expired January 30, 2010, and the declaration of defendant's regional manager for central California, which stated that during the 2009 holiday promotion, signs indicating the gift cards' expiration date "were prominently located throughout the stores." Defendant also submitted the declaration of its sales audit department manager, which attached (1) an email sent to recipients of electronic gift cards, which stated that the gift cards were redeemable "through 1/30/2010"; (2) an informational packet sent to defendant's store managers, which stated that all employees should be told that each gift card must be placed in a promotional sleeve that indicated the expiration date; (3) a copy of the gift card sleeve, which stated that "$25 gift card expires 1/30/10"; (4) an email to store managers, indicating that they were to notify the company if they were running out of sleeves; (5) an informational sheet provided to store managers, indicating that if they had fewer than 50 sleeves, they were required to contact their district manager, take down all promotional marketing, and contact headquarters to disable the promotion at the register; (6) copies of in-store signage advertising the holiday 2009 promotion, which stated "$25 gift card expires 1/30/2010"; (7) marketing emails indicating the gift cards' expiration date; and (8) reminder email sent to customers who had subscribed to defendant's email distribution list.

The trial court issued an order denying plaintiff's motion for class certification on December 15, 2011. The court found that the proposed class was ascertainable and numerous, plaintiff White was typical of the class, and proposed class counsel would adequately represent the interests of the class. However, the court found that common questions did not predominate. It noted that under section 1749.5, subdivision (d), if a

gift card expires, it must indicate the expiration date in 10-point font on the face of the card. There was no dispute in the present case that the gift cards did not state an expiration date. However, to prevail under the CLRA, "a consumer must have suffered damage as a result of an unfair or deceptive practice. Cal. Civil Code § 1780(a). In other words, the consumer had to have relied on the unfair or deceptive act or representation to their detriment." Thus, to certify a class, the plaintiff would have to demonstrate that the representations made to each class member were material and uniform. Here, the court said plaintiff could not do so:

"In order to certify a class under CLRA, the plaintiff must demonstrate that the representations made to each class member were material and uniform in order to allow the court to infer class wide reliance. [*Mass Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293.] Here, the evidence is that the representation (or lack thereof) of the expiration date was not uniform to the class members given that it was indicated through a variety of promotional materials that the class members may or may not have seen.

"Plaintiff argues that the representations through other promotional materials are irrelevant because this case is brought solely on the failure to indicate the expiration date on the gift card itself. However, the issue of liability must be answered by the question of whether the failure to indicate the expiration date on the gift card amounts to a violation of the CLRA. Since the CLRA demands a showing of causation for liability to attach, this element cannot be ignored. Nor can it be considered in a vacuum. Plaintiff would have the Court determine causation solely by looking at a single, specific failure to disclose and by deliberately ignoring other representations made by Defendant, which are highly relevant to causation. This would require the Court to ignore the reality of the circumstances under which the gift cards were disseminated, in order to allow Plaintiff to make his case. Plaintiff wants to bring the class claims through the CLRA without having to meet one of its basic requirements. There is no support for this in the law.

"Defendant has demonstrated that the representations made to the class members were not uniform, and were made through a variety of mediums that may or may not

have reached every consumer. For example, while all the in-store signs stated the January 30, 2010 expiration date, a consumer may not have noticed that language on the signs. Similarly, some of the gift card sleeves may have indicated the expiration date, which Defendant argues it expressly instructed its sales associates to use, but other sleeves did not if the sales associates ignored this instruction. [Internal record reference omitted.] Given this lack of uniformity, it cannot be inferred on a classwide basis that the class member relied on the lack of an expiration date on the gift cards themselves. Without an inference of reliance, Plaintiff cannot show that all the class members failed to use the gift cards by the expiration date as a result of the lack of an expiration date on the face of the gift cards. Each class member would have to be questioned regarding the information they saw about the expiration date and the degree to which the lack of an expiration date on the card face influenced their decision not to use the gift card by January 30, 2010."

Plaintiff timely appealed from the order denying class certification.

DISCUSSION

It is undisputed that none of the gift cards distributed to potential class members stated an expiration date, as section 1749.5 requires. There was, however, substantial evidence that the January 30, 2010 expiration date "was indicated through a variety of promotional materials" that class members may or may not have seen. The relevant question on appeal, therefore, is whether under these circumstances the trial court was correct that individual questions of reliance and damages predominate over common ones—or whether, as plaintiff urges, the common questions of law and fact are sufficiently significant to make class treatment appropriate.

Plaintiff contends that the trial court erred in concluding that common issues of fact do not predominate. He urges that the question relevant to determining commonality under the CLRA is whether a common, material misrepresentation was made to class members; if so, an inference of reliance arises as to the entire class. In this case, by

omitting the expiration date from the gift cards, defendant implicitly misrepresented to each member of the proposed class that the cards did not expire. Because this misrepresentation was material, class members are presumed to have relied on it, and the trial court should have found that common questions predominate.

Defendant disagrees. It contends that even if a material omission is made to a class representative, a court cannot infer classwide reliance unless all members of the class were similarly deprived of material information. Here, "most class members were informed of the expiration date through a myriad of disclosures, including disclosures found on the card sleeve in which consumers received their Promotion Cards, in-store signs, conversations with store clerks, and emails." Thus, reliance "is an individual issue in this case."

We consider these issues below.

I. Statutory Framework

A. Section 1749.5

Section 1749.5 states that it is unlawful to sell a gift certificate that contains an expiration date. (Subd. (a)(1).) Expressly omitted from this prohibition are gift certificates distributed "pursuant to [a] . . . promotional program without any money or other thing of value being given in exchange for the gift certificate by the consumer," so long as the expiration date "appears in capital letters in at least 10-point font on the front of the gift certificate." (§ 1749.5, subd. (d)(1).)

B. CLRA

Section 1770, subdivision (a) of the CLRA declares unlawful "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Such unlawful practices include the following:

(a)(5): "Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have."

(a)(14): "Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

Courts have held that the CLRA does not require an affirmative misrepresentation; rather, among the practices proscribed by the CLRA are "the *concealment or suppression* of material facts." (*McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, 185 (*McAdams*), italics added; see also *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255 ["deceptive practices proscribed in the CLRA include the concealment or suppression of material facts"].) Thus, "a CLRA claim may be predicated on 'an alleged failure to disclose a material fact that is misleading in light of other facts . . . that [the defendant] did disclose.' (*McAdams, supra,* 182 Cal.App.4th at p. 185; see also *Daugherty* [*v. American Honda Motor Co., Inc.* (2006)] 144 Cal.App.4th [824,] 835 ['to be actionable the omission must be contrary to a representation actually made by the defendant'].)" (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1382.)

C. CLRA Class Action Requirements

A CLRA claim brought as a class action is governed by section 1781, which sets out four conditions that, if met, mandate certification of a class: "(1) It is impracticable to bring all members of the class before the court. [¶] (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members. [¶] (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. [¶] (4) The representative plaintiffs will fairly and adequately protect the interests of the class." (§ 1781, subd. (b); see *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 153 (*Steroid Cases*).)

"'The predominance factor requires a showing "that questions of law or fact common to the class predominate over the questions affecting the individual members."' (*In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 410.) To determine whether the questions of fact and law at issue in the litigation are common or individual, it is

necessary to consider the individual causes of action pleaded, and the issues raised thereby." (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 128.) "Common issues are predominant when they would be 'the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance . . . .' (*Vasquez v. Superior Court* [(1971)] 4 Cal.3d [800,] 810.)" (*Caro v. Procter & Gamble Co*. (1993) 18 Cal.App.4th 644, 667-668 (*Caro*).)

D. Standard of Review

We review a ruling on certification for abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. The denial of certification to an entire class is an appealable order [citations], but in the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation]. Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal '"even though there may be substantial evidence to support the court's order."' [Citations.]" (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435-436.)

Thus, "[t]he appeal of an order denying class certification presents an exception to the general rule that a reviewing court will look to the trial court's result, not its rationale. If the trial court failed to follow the correct legal analysis when deciding whether to certify a class action, 'an appellate court is required to reverse an order denying class certification . . . , "even though there may be substantial evidence to support the court's order."' [Citations.] In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial." (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828-829, superseded by statute on another point, as stated in *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1224.)

II. Reliance and Damages Under the CLRA

Pursuant to the CRLA, a consumer "who suffers any damage *as a result of* the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770" may bring an action to recover actual or punitive damages, an injunction, attorney fees, and any other relief that the court deems proper. (§ 1780, subd. (a), italics added.) Courts have interpreted the italicized language to require that plaintiffs in a CLRA action must show not only that a defendant's conduct was deceptive, but also that the deception caused them harm. (See *Massachusetts Mutual Life Ins. Co. v. Superior Court*, *supra*, 97 Cal.App.4th 1282, 1292 (*Massachusetts Mutual*), superseded by statute on another point as stated in *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 154.)

The causation required by section 1780 does not necessarily make a plaintiff's claims unsuitable for class treatment. "Causation, on a classwide basis, may be established by *materiality*. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class. [*Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1292.] This is so because a representation is considered material if it induced the consumer to alter his position to his detriment. ([*Caro*], *supra*, 18 Cal.App.4th at p. 668.) That the defendant can establish a lack of causation as to a handful of class members does not necessarily render the issue of causation an individual, rather than a common, one. '"[P]laintiffs [may] satisfy their burden of showing causation as to each by showing materiality as to all."' ([*Massachusetts Mutual*], *supra*, 97 Cal.App.4th at p. 1292.) In contrast, however, if the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action. ([*Caro*], *supra*, 18 Cal.App.4th at p. 668.)" (*In re Vioxx Class Cases*, *supra*, 180 Cal.App.4th at p. 129.)

The issues of common reliance and damages have been discussed extensively in CLRA cases in which class certification was sought. We discuss several of those cases below.

A. Cases Holding Inference of Common Reliance Supported Class Certification

In *Massachusetts Mutual, supra*, 97 Cal.App.4th 1282, the plaintiffs purchased from defendant Massachusetts Mutual Life Insurance Company (Mass Mutual) a form of life insurance (the "N-Pay premium payment plan") that not only provided coverage and a guaranteed return on accumulated premiums, but also permitted policyholders to share in discretionary dividends. Plaintiffs alleged that although Mass Mutual intended to reduce its discretionary dividend rate, its agents represented during sales presentations that over time the accumulated premiums and discretionary dividends would be large enough to pay the annual premiums. Plaintiffs further alleged that the company's failure to disclose its plans to lower its discretionary dividends gave rise to liability for violations of the CLRA, and that Mass Mutual's representations were sufficiently uniform to make class treatment appropriate. The trial court agreed and certified a plaintiff class of 33,000 people who had purchased "N Pay" insurance from Mass Mutual. Mass Mutual appealed. (*Id*. at p. 1286.)

The Court of Appeal affirmed, holding that the record permitted an inference of common reliance. It noted that the operative complaint alleged that Mass Mutual "failed to disclose its own concerns about the premiums it was paying" and that "those concerns would have been material to any reasonable person contemplating the purchase of an N-Pay premium payment plan." (*Massachusetts Mutual, supra*, 97 Cal.App.4th at p. 1293.) Thus, "[i]f plaintiffs are successful in proving these facts, the purchases common to each class member would in turn be sufficient to give rise to the inference of common reliance on representations which were materially deficient." (*Ibid.*)

The court noted that in determining whether an inference of reliance arose, the trial court would have to consider whether other information that Mass Mutual disclosed

provided buyers with all the material information they needed, and "should it develop that class members were provided such a variety of information that a single determination as to materiality is not possible, the trial court has the flexibility to order creation of subclasses or to decertify the class altogether." (*Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1294 & fn. 5.) Based on the information before it, however, it appeared that "the information Mass Mutual provided to prospective purchasers appears to have been broadly disseminated" and "there is no evidence any significant part of the class had access to all the information plaintiffs believe they needed before purchasing N-Pay premium payment plans." (*Id.* at pp. 1294-1295.) Thus, the trial court "could have reasonably concluded that the ultimate question of whether the undisclosed information was material was a common question of fact suitable for treatment in a class action." (*Id.* at p. 1294.)

The court reached a similar result in *McAdams*, *supra*, 182 Cal.App.4th 174. There, the plaintiff alleged that Monier, a manufacturer and marketer of roof tiles, represented to class members that its tiles would remain structurally sound for 50 years and had a permanent color glaze that would require no resurfacing. This was false; Monier knew but failed to disclose that the color composition of its tiles would erode well before the end of the tiles' warranted 50-year life. (*Id*. at pp. 179-180.) Plaintiff moved to certify a CLRA class comprised of all California residents who owned homes with coated roof tiles sold by Monier or who paid to replace or repair such tiles. (*Id*. at p. 180.) The trial court denied the class certification motion, reasoning that each class member individually would have to prove the particular misrepresentation on which he or she relied and the resulting damage, and that the named plaintiff, who bought his roof tiles from an independent distributor, was not typical of those who bought roof tiles from the manufacturer, a home builder, or a prior homeowner. (*Id*. at p. 180.) Plaintiff appealed.

The Court of Appeal reversed. It noted that the class action "is based on a single, specific, alleged material misrepresentation: Monier knew but failed to disclose that its color roof tiles would erode to bare concrete long before the lifespan of the tiles was up."

(*McAdams, supra,* 182 Cal.App.4th at p. 182.) The court redefined the class—to include only those persons who "prior to purchasing or obtaining their Monier roof tile product, [were] exposed to a statement along the lines that the roof tile would last 50 years, or would have a permanent color, or would be maintenance-free" (*id*. at p. 179)—and held that, with the class thus defined, class treatment was appropriate. It explained: "Plaintiff alleges that Monier made a single material misrepresentation to class members that consisted of a failure to disclose a particular fact regarding its roof tiles. Plaintiff has tendered evidence that Monier knew but failed to disclose to class members that the color composition of its roof tiles would erode to bare concrete well before the end of the tiles' represented 50-year life; and that this failure to disclose would have been material to any reasonable person who purchased tiles in light of the 50-year/lifetime representation, or the permanent color representation, or the maintenance-free representation. If plaintiff is successful in proving these facts, the purchases common to each class member—that is, purchases pursuant to this alleged failure to disclose in light of the 50-year life, permanent color, or maintenance-free representations—would be sufficient to permit an inference of common reliance among the class on the material misrepresentation comprising the alleged failure to disclose." (*Id*. at p. 184.) Further, the court said, its analysis "dispenses with the trial court's concern that plaintiff McAdams's claim is typical of only one of the four kinds of roof tile purchasers in the proposed class—those who bought from an independent distributor and relied on Monier literature (the other three kinds of purchasers involved purchases from Monier, from home builders, or from individuals selling their homes). As we have seen, the alleged material misrepresentation in this case, properly viewed, does not encompass an array of varying transactions and misrepresentations, but a single failure to disclose a particular known fact. In this milieu, plaintiff McAdams presents a typical claim based on that single, specific failure to disclose." (*Id*. at p. 186, fn. omitted.)

The court then addressed the issue of individual damages. "'A class action can be maintained even if each class member must at some point individually show his or her eligibility for recovery or the amount of his or her damages, so long as each class

member would not be required to litigate substantial and numerous factually unique questions to determine his or her individual right to recover.' (*Acree v. General Motors Acceptance Corp*. (2001) 92 Cal.App.4th 385, 397.) Here, the claims of all class members '"stem from the same source"'—Monier's failure to disclose that the color composition of its roof tiles may erode to bare concrete prematurely. (See *Chamberlan v. Ford Motor Co*. (N.D.Cal. 2004) 223 F.R.D. 524, 526.) To obtain damages, each class member will have to show the representation made to him or her that accompanied this failure to disclose (e.g., 50-year/lifetime, permanent color, maintenance-free, or the like), and will have to show the amount of his or her damages. But these two showings do not invoke 'substantial and numerous factually unique questions to determine [the] individual right to recover' damages, and therefore are not a proper basis on which to deny class certification. (*Acree, supra*, at p. 397; accord, *Wilens* [*v. TD Waterhouse Group, Inc.* (2003)] 120 Cal.App.4th [746,] 756.)" (*McAdams, supra*, 182 Cal.App.4th at pp. 186-187.)

B. Cases Affirming Denial of Class Certification

The court addressed a different set of facts and reached a contrary result in *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932 (*Knapp*). There, the plaintiff was an AT&T Wireless (AWS) customer who claimed that defendant did not fully disclose how it computed airtime usage—i.e., that it "'billed in full minute increments with partial minutes rounded up to the next full minute'"—until after she had signed a wireless service agreement. (*Id*. at p. 937.) She sought to represent a class composed of "'[a]ll persons who have ever been subscribers under a term contract to [defendant's] wireless telephone service in California of [AWS] from and after January 1, 1999 until October 1, 2004.'" (*Id*. at p. 936.) The trial court denied the certification motion, and the Court of Appeal affirmed, explaining that there had been no showing that all members of the proposed plaintiff class had been exposed to the alleged misrepresentation. It said:

"The evidence produced in connection with the motion for class certification confirmed the lack of commonality in representations (or omissions) by AWS to members of the proposed class regarding its service plans. Substantial evidence showed AWS used several different channels to market its service plans. AWS used print advertisements in newspapers and magazines. Online promotions were advertised on AWS's Web site. AWS advertised on television and the radio, sent out direct mailings, and maintained kiosks in malls and other locations. Prospective customers could begin their service at an AWS store, a third party's store, a national retail chain store, online, or over the telephone. Retailers had their own sales processes and the documents that they provided to the customers were specific to the retailer. [¶] Consequently, the proposed class here would include subscribers who solely spoke with a representative on the telephone, those who only considered certain advertisements, and those who only viewed AWS's Web site and began their service online; an individual inquiry would be required to determine whether the representations received by each proposed class member constituted misrepresentations, omissions, or nondisclosures. Thus, what business practices were allegedly unfair, unlawful, or fraudulent necessarily turns on an individualized assessment of which representations were made to each proposed class member.

"To further complicate matters, the record contains several versions of AWS's rate plan guides and six welcome guides provided to new subscribers. All but one of those materials contain the express disclosure to the effect that airtime for each call 'is billed in full minute increments with partial minutes rounded up to the next full minute.' Knapp stated in her deposition that she did not read the welcome guide that accompanied her handset upon delivery and took the position she was unaware of AWS's multiple disclosures regarding the rounding up policy. But other members of the proposed class may very well have seen this express disclosure or discussed the rounding up policy with a sales representative in person or on the telephone, which constitutes facts that would affect the determination whether a misrepresentation or omission had occurred. [¶] . . . [¶] Thus, the trial court did not abuse its discretion by finding a lack of commonality of

issues and accordingly denying the motion for class certification." (*Knapp, supra*, 195 Cal.App.4th at pp. 943-944.)

The court also affirmed a denial of class certification in *Caro, supra*, 18 Cal.App.4th 644. There, defendant manufactured and sold orange juice that was reconstituted from frozen concentrate and contained additives, including water and flavor enhancers. (*Id*. at pp. 651, 668.) The orange juice carton accurately listed the product's ingredients and stated "'from concentrate'" on three sides of the package, but also falsely represented that the orange juice was "'fresh'" and contained "'no additives.'" (*Id*. at p. 668.) Plaintiff filed a class action complaint, asserting that defendant's misrepresentations violated the CLRA. (*Id*. at p. 651.) The trial court denied plaintiff's motion for class certification. (*Ibid*.)

The Court of Appeal affirmed. Noting that the orange juice carton contained both accurate and misleading information, the court concluded that consumers would have been misled by the packaging only if they, like plaintiff, read only a portion of the carton—i.e., that portion stating that the orange juice was "fresh." Plaintiff "did not show other consumers failed to read the entire label" and "did not show actual damages for consumers who bought and received the juice knowing it was 'from concentrate.'" (*Id*. at p. 666.) Further, although plaintiff's deposition testimony "might be construed as suggesting he personally was misled into believing the juice contained 'no additives,' it would be a matter of individualized proof whether the claim of 'no additives' constituted a material misrepresentation to class members who—unlike Caro—read the portions of the label stating 'from concentrate.'" (*Id*. at p. 668.) Thus, the court concluded, "the record indicated that consumers—who thought they were buying different products such as 'premium,' 'fresh,' or 'from concentrate' orange juice based upon their personal assumptions about the nature of the products they wanted to buy and upon reading various portions of the labels—would be required individually to prove liability and damages. Since class members would have to prove individually the existence of liability and damages, the community of interest requirement was not satisfied . . . ." (*Id*. at pp. 668-669.)

III. The Trial Court Erred in Denying the Motion for Class Certification as to a Subset of the Proposed Class

As indicated above, pursuant to section 1749.5, a promotional gift certificate "is valid until redeemed or replaced" if an expiration date does not appear on the front of the gift certificate. (Subd. (c).) Accordingly, a gift certificate that does not state an expiration date implicitly represents that it does *not* expire and can be used at any time. In the present case, it is undisputed that none of defendant's promotional gift cards stated an expiration date, although each expired on January 30, 2010. Thus, as in *Massachusetts Mutual* and *McAdams*—and unlike *Knapp*, where "[t]he face of the complaint itself reveals that AWS's alleged misrepresentations were not uniformly made to proposed class members" (195 Cal.App.4th at p. 943)[3]—each member of the proposed plaintiff class was exposed to the identical misrepresentation.

Moreover, as in *Massachusetts Mutual* and *McAdams*, the misrepresentation was material. As we have said, the materiality of an alleged misrepresentation "generally is judged by a 'reasonable man' standard. In other words, a misrepresentation is deemed material 'if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question" [citations], and as such materiality is generally a question of fact unless the "fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it."' (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 977; accord, [*In re Tobacco II Cases* (2009)] 46 Cal.4th [298,] 327.)" (*Steroid*

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[3] The present case also is unlike *In re Vioxx Class Cases*, *supra*, 180 Cal.App.4th 116, where the Court of Appeal affirmed the denial of class certification because, among other things, plaintiffs could not proceed on a class basis on the theory that Vioxx was less safe than other pain relievers because such a determination depended on each patient's specific medical needs, and plaintiffs could not establish damages by using another generic nonsteroidal anti-inflammatory drug (NSAID) as a comparator, because whether Vioxx was no better than the generic NSAID was an issue subject to individual proof for each patient. (*Id*. at pp. 126-127.)

Cases, *supra*, 181 Cal.App.4th at p. 157.) Thus, the question that must be answered in this case is whether a reasonable person would find it important when determining when to redeem a $25 gift card that the gift card would become valueless after a particular date. It "requires no stretch to conclude that the proper answer is 'yes'" (*ibid.*)—we assume that a reasonable person would prefer to redeem a gift card *before* it expires, rather than to allow the gift card to expire and lose all value.

What complicates the analysis in the present case is that although all potential plaintiffs received gift cards that on their face appeared to have no expiration date, some potential plaintiffs also were exposed to other information that told them that the gift cards *would* expire. In other words, while all members of the proposed class were exposed to the same implicit misrepresentation, some presumably were also exposed to other information that corrected the misrepresentation. The present case therefore is unlike *Massachusetts Mutual*, where there was no evidence that any significant part of the class had access to all relevant information. Under those circumstances, the court was willing to assume that representations to class members were uniform, and thus concluded that class treatment was appropriate.[4] A similar assumption would not be appropriate in the present case because there was evidence before the trial court that signage in defendant's southern California stores, as well as the "sleeves" into which some gift cards were placed, stated that the "$25 gift card expires 1/30/10." Some of defendant's customers undoubtedly saw this information and thus were aware that their gift cards would expire.

The present case also is unlike *Caro*, however, where the plaintiff had not demonstrated the existence of *any other consumers* who had read only part of the orange juice label, as he claimed to have done. In view of that lack of evidence, the *Caro* court was unwilling to assume that consumer beliefs about defendant's orange juice were

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[4] The court noted, however, that should it become evident during the course of litigation that the information provided to class members varied significantly, the trial court would have "the flexibility to order creation of subclasses or to decertify the class altogether." (*Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1294 & fn. 5.)

sufficiently uniform to justify class treatment. In the present case, in contrast, the undisputed evidence before the trial court is that as of the date defendant served discovery responses, consumers had attempted to redeem 9,469 gift cards—more than 13 percent of the 72,062 gift cards issued by defendant's California stores—*after* the cards had expired. As to these consumers, we do not believe it reasonable to infer knowledge that defendant's gift cards would expire. Stated differently, at least as to the subset of the proposed class made up of people who attempted to redeem their gift cards after January 30, 2010, we believe the trial court abused its discretion in concluding that it could not infer a common misrepresentation and, thus, common reliance on the lack of an expiration date on the gift cards themselves.

Having said that, a question still remains as to the approximately 21,000 holders of defendant's gift cards who neither fully redeemed the gift cards before they expired nor attempted to redeem them after they expired. Although plaintiff is correct that an inference of reliance arises as to an entire class if the trial court finds that uniform misrepresentations were made to the entire class (*Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1292), here the trial court found that the representations made to the class members were *not* uniform. That finding is supported by substantial evidence, and thus we do not disturb it.[5] However, the trial court did not find that individual issues predominated solely because representations to class members varied. Rather, the trial court concluded that individual issues predominated because "[e]ach class member would have to be questioned regarding the information they saw about the expiration date and the degree to which the lack of an expiration date on the card face influenced their decision not to use the gift card by January 30, 2010." In so stating, the trial court appears to have assumed that certifying the proposed class would require examining each potential plaintiff about *both* "the information they saw about the expiration date" *and*

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[5] As we have said, although each gift card implicitly misrepresented that it would not expire, some members of the proposed class undoubtedly were exposed to information from other sources that accurately informed them that the gift cards would expire.

"the degree to which the lack of an expiration date on the card face influenced their decision not to use the gift card by January 30, 2010." That was error. Because an inference of classwide reliance arises if material misrepresentations have been made to an entire class, the *only* question relevant for present purposes is whether potential plaintiffs were aware, through any source, that the gift cards would expire on January 30, 2010. As to any potential plaintiff who was not aware of the expiration date, reliance should be inferred pursuant to the cases cited above.

The *McAdams* court addressed facts similar to ours by redefining the class as limited to those persons who were exposed to the relevant misrepresentation. Although we have the option to follow that path in this case, we are mindful that "'trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action'" and thus should be afforded "'great discretion'" in granting or denying certification. (*Hernandez v. Chipotle Mexican Grill, Inc*., *supra*, 208 Cal.App.4th at p. 1495.) We thus decline to order the trial court to certify a class made up of all holders of defendant's promotional gift cards who were unaware that the cards would expire. Instead, we remand this matter for the trial court to determine whether, as in *McAdams*, the class of such persons can be identified without individual questions predominating over common questions—or whether, instead, the class should be limited to the 9,500 or so persons who attempted to redeem defendant's gift cards after they expired on January 30, 2010.

DISPOSITION

The order denying class certification is reversed. The matter is remanded with directions to the trial court to reconsider the motion for class certification in light of this opinion. Plaintiff is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.