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September 11, 2009

Honorable Chief Justice George and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Yabsley v. Cingular Wireless, LLC*, ___ Cal.App.4th ___,
2009 WL 2517246 (Aug. 19, 2009), Case Nos. B198827, S176146
Request for Depublication of Court of Appeal Opinion

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, I write on behalf of Consumer Attorneys of California ("CAOC") to request depublication of the Court of Appeal's opinion in *Yabsley v. Cingular Wireless, LLC*, ___ Cal.App.4th ___, 2009 WL 2517246 (Aug. 19, 2009) (Case Nos. B198827, S176146). A copy of the opinion is enclosed.

Statement of Interest

CAOC, founded in 1962, is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to unlawful and harmful business practices, including consumer fraud. CAOC has regularly participated as an amicus curiae in cases before this Court relating to the Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) ("UCL"), including *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006), *In re Tobacco II Cases*, 46 Cal.4th 298 (2009), and, most recently, *Clayworth v. Pfizer, Inc.*, no. S166435.

The *Yabsley* Opinion Should be Depublished Because its Discussion of UCL Standing is Misleading and Could be Misused as a Precedent

In *Yabsley*, the Court of Appeal affirmed a judgment following an order sustaining the defendants' demurrer without leave to amend. *Yabsley*, slip op. at 1-2. The Court of Appeal determined that the defendant's conduct was protected by a *Cel-Tech* "safe harbor" because the conduct was affirmatively authorized in a statute or regulation. *Id.* at 9-12 (citing *Cel-Tech Communications, Inc. v. Los Angeles Cell. Tel. Co.*, 20 Cal.4th 163 (1999)).

This purpose of this depublication request is to highlight the problems in the

opinion's discussion of UCL standing. Slip op. at 7-9. That discussion is wholly unnecessary to the opinion because the Court of Appeal had already determined that the judgment should be affirmed based on a *Cel-Tech* "safe harbor."

Unfortunately, the (unneeded) discussion of standing contains two plain errors that could create confusion and may be subject to misuse as a precedent. *See* Eisenberg, Horvitz & Weiner, *California Practice Guide: Civil Appeals & Writs* §11:180.1 (The Rutter Group 2008) (depublication indicated where opinion "is wrong on a significant point" and/or "could lead to unanticipated misuse as precedent"); *California Civil Appellate Practice*, §21.17 (CEB 3d ed. 1996) (depublication indicated where opinion "contains misleading or incorrect language that might cause confusion").

First, the opinion incorrectly states that the "legally protected interest" in a UCL case derives *only* from statutes or regulations *other than* the UCL itself:

> The "legally protected interest" for standing purposes ***must be an interest that is protected by a source other than the remedial provisions of the UCL or FAL.*** (See, e.g., *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 180 ["'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable"].) The only independent statute Yabsley cites is Revenue and Taxation Code section 6051. ....

Slip op. at 8 (emphasis added).

In that passage, the Court of Appeal cites *Cel-Tech*'s reference to the "unlawful" prong (which does "borrow" violations of other statutes), but then wholly ignores the UCL's "unfair" and "fraudulent" prongs. Those two prongs independently create a "legally protected interest" separate and apart from the UCL's "unlawful" prong. *See* Bus. & Prof. Code §17200. Likewise, the False Advertising Law (Bus. & Prof. Code §§17500 et seq.) ("FAL") contains a specific list of enumerated wrongful conduct, each of which independently creates a legally protected interest with an independent right to pursue relief. *See*, *e.g.*, Bus. & Prof. Code §17533.7 (prohibiting misrepresentations about geographic origin of goods).

As this Court observed in *Cel-Tech*:

> The [UCL] does more than just borrow. The statutory language referring to "any unlawful, unfair or fraudulent" practice (italics added) makes clear that ***a practice may be deemed unfair even if not specifically proscribed by some other law.*** "Because Business and Professions Code section 17200 is ***written in the disjunctive, it***

> ***establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.*** 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.' "

Cel-Tech, 40 Cal.4th at 180 (quoting *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 647 (1996)) (emphasis added).

The quoted passage from the Court of Appeal's opinion is plainly wrong and misleading because it could lead other courts to hold that the "unfair" and "fraudulent" prongs essentially do not exist, and that the only UCL cases that may proceed are those that derive from violations of some other statute or regulation. The opinion should be depublished to prevent its misuse as a precedent on this point.

Second, in a footnote in the UCL standing discussion, the opinion incorrectly states that "[t]he CLRA requires that before an action is filed, the consumer make demand on the retailer to rectify the alleged deceptive practice." Slip op. at 7-8 n.4 (citing Civ. Code §1782). On the contrary, the CLRA requires a pre-filing demand *only* in actions in which damages are sought. *See* Civ. Code §1782(a) ("Thirty days or more prior to the commencement of an action *for damages* pursuant to this title, the consumer shall do the following: ...." (emphasis added)). Additionally, the CLRA permits an action for injunctive relief to be filed without any pre-filing notice as all, followed by a post-notice amendment of the complaint to seek damages (if the plaintiff wishes to seek monetary relief). *Id.* §1782(d) ("An action for injunctive relief ... may be commenced without compliance with subdivision (a).").

This Court faced a similar situation last year, when it modified its original opinion in *Vasquez v. State of California*, 45 Cal.4th 243, 252 (2008) (No. S143710). The opinion had inadvertently failed to make clear that the CLRA pre-filing notice requirement applies only in actions "for damages."[1] To correct the error here, the *Yabsley* opinion should be depublished. If it is not depublished, the incorrect language may mislead litigants and lower courts alike.

Yabsley Should be Taken Up as a "Grant and Hold" Case Pending Resolution of _Kwikset Corp. v. Superior Court (Benson)_

In *Kwikset Corp. v. Superior Court (Benson)*, no. S171845 (review granted Jun. 10, 2009), this Court will be addressing the standing questions addressed in the *Yabsley* opinion. *Kwikset* raises the issue of what "lost money or property" means in the UCL (as amended by Proposition 64) and the types of losses that are sufficient to confer standing. *Yabsley* addresses

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[1] The modification was made in response to a request filed by a non-party shortly after the original opinion was issued. *See Vasquez*, no. S143710 (docket entries dated 12/01/08 and 12/17/08).

this issue as follows:

> Yabsley also fails to meet the "lost money or property" requirement. "[T]he UCL and FAL's 'lost money or property requirement 'limits standing to individuals who suffer losses ... that are eligible for restitution.'" (*Buckland v. Threshold Enterprises, Ltd.*, *supra*, 155 Cal.App.4th at p. 817.) There has been no determination by the Board that he is eligible for restitution of the alleged excess sales tax he paid at the time he purchased the phone. (*Loeffler v. Target Corporation*, *supra*, 173 Cal.App.4th at p. 1248.)
>
> Lastly, Yabsley cannot meet the causation requirement. "'[T]here must be a causal connection between the harm suffered and the unlawful business activity. The causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law.'" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1348-1349.) Cingular's alleged nondisclosure of the amount of sales tax to be collected on the purchase did not affect the amount of sales tax due on the sale of the phone because Regulation 1585 permits Cingular to collect sales tax from the consumer based on the non-sale price of the phone.

Slip op. at 8-9.

Regardless of whether this is a correct statement of the law (CAOC believes it is not), this Court will be addressing the issue in *Kwikset*. It is therefore appropriate for *Yabsley* to be taken up as a "grant and hold" case and rendered uncitable while *Kwikset* proceeds.

Yabsley Should be Taken Up as a "Grant and Hold" Case Pending Resolution of _Loeffler v. Target Corporation_

The underlying substantive issue addressed in *Yabsley*—whether consumers may recover sales tax reimbursement unlawfully collected from them by retailers—is identical to an issue decided in another case, *Loeffler v. Target Corporation*, 173 Cal.App.4th 1229 (2009), in which this Court granted review on September 9, 2009. *See Loeffler v. Target Corp.*, No. S173972. Because *Yabsley* raises the same issue (*see*, *e.g.*, Slip op. at 4-7 (quoting *Loeffler* extensively)), it should be taken up as a "grant and hold" case pending resolution of *Loeffler*.

Conclusion

For the reasons discussed above, this Court is respectfully asked to depublish the Court of Appeal's opinion in *Yabsley*. Alternatively, the Court is asked to issue a "grant and hold" order pending resolution of *Kwikset* and/or *Loeffler*.

Respectfully submitted,

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Enclosure

cc: See attached proof of service

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PROOF OF SERVICE

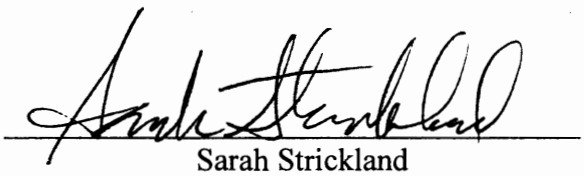
Yabsley v. Cingular Wireless
Court of Appeals Case No. B198827

I am employed by Schubert Jonckheer Kolbe & Kralowec LLP, in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. By business address is Three Embarcadero Center, Suite 1650, San Francisco, California 94111.

On September 11, 2009, I served the foregoing document described as **LETTER REQUESTING DEPUBLICATION** on the person(s) listed below by placing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mailbox at San Francisco, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of September, 2009 in San Francisco, California.



Sarah Strickland

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