

Memorandum

To: Honorable Judy Chu, Ph.D., Chair
Honorable Betty T. Yee, Vice Chairwoman
Honorable Bill Leonard
Honorable Michelle Steel
Honorable John Chiang

Date: October 29, 2008

From: Kristine Cazadd
Chief Counsel 

Subject: **Other Chief Counsel Matters- November 13, 2008**
Item Number M1 –
Request for Authorization to File *Amicus Curiae* Brief

Yabsley v. Cingular Wireless LLC

Santa Barbara County Superior Court Case No. 01221332
Second Dist. Ct. of Appeal No. B198827

In this memorandum, we are requesting that the Legal Department be authorized to file an *amicus curiae* (friend of the court) brief in *Yabsley v. Cingular Wireless LLC* in order to protect the Board's interest in the outcome of the case. In *Yabsley*, a class action law firm sued Cingular Wireless alleging that they were illegally charging sales tax – that is, collecting sales tax reimbursement – on sales of cell phones pursuant to Regulation 1585. While the Board was originally the sole party in the suit, it was dropped after the plaintiff filed his First Amended Complaint.

In *Yabsley*, Cingular Wireless cited *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, which held that compliance with state law provided a “safe harbor” to a taxpayer's collection of sales tax reimbursement. Cingular argued that its application of the sales tax to its sale of the cell phone was specifically authorized under the Board's regulation and, therefore, it could not be held liable for engaging in unfair business practices or violating the Unfair Competition Law (UCL). The trial court agreed.

Initially, the Appeals Court also agreed, ruling that Board regulations had the force and effect of law, therefore business activities permitted by the Board's regulation could not be unlawful or unfair under the UCL. Because Cingular had paid tax as the Board had instructed in its regulation, and Cingular had the right under the Civil Code to collect sales tax reimbursement, it should be able to treat compliance with the regulation as a safe harbor, thus precluding consumers from asserting or alleging violations of the UCL statutes.

The opinion was published on August 18, 2008, as 165 Cal. App. 4th 1526. On September 17, 2008, however, the court vacated its opinion. (2008 Cal. App. LEXIS 1633.) According to the court's web site, it did so at the request of the Attorney General.

The AG's reasoning is not given. According to reliable sources within the AG's office, however, the AG's Consumer Protection Section made the request because it disagreed with the court's ruling that the *Cel-Tech* "safe harbor" from UCL liability should be extended to Board (or state agency) regulations. Accordingly, we assume that the AG's office wants a rehearing in *Yablsey* so that it can argue against such extension of the *Cel-Tech* "safe harbor" to Board regulations. If this information is accurate, then the Legal Department views the AG Consumer Protection Section's position as a serious concern and possible threat to the Board's ability to manage the tax and fee programs entrusted to it by the Legislature and implemented by Board regulations. If taxpayers (primarily retailers) cannot rely upon the Board's regulations, not only ensure compliance with the tax and fee laws, but also to protect them from suits by consumers who might be unhappy with such laws, then the Board will be seriously hampered in effectively administering these programs.

Consequently, the Legal Department is seeking authorization from the Board to file a request to file an *amicus* brief with the court in *Yablsey*. The deadline for the AG to file its brief is November 14, 2008. As the court has not provided a specific time period for the parties to respond, the Board should also file it by that date, if such a brief is approved.

Assistant Chief Counsel Robert Lambert and Tax Counsel IV John Waid will be prepared to answer any questions you have. Mr. Lambert may be reached at (916) 324-6593, and Mr. Waid can be reached at (916) 324-3828.

Approved:



Ramon J. Hirsig
Executive Director

KC/JLW/gm

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October 29, 2008

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Re: *Yabsley v. Cingular Wireless LLC*
Santa Barbara County Superior Court Case No. 01221332
Second Dist. Ct. of Appeal No. B198827

Dear Mr. Chaney:

I am writing on the Board's behalf to request permission to file an amicus curiae brief in the above matter independent of the Office of the Attorney General (AG). The AG intends to file an amicus brief in this case by November 14, 2008. As explained below, we have been advised that the AG is taking positions in such brief that are contrary and in possible opposition to the Board of Equalization's (Board's) established substantive legal positions on the *tax* issues in question.

By way of background, Yabsley and others sued Cingular in superior court under the Unfair Competition Law (UCL - Bus. & Prof. Code, §§ 17200 et seq.), alleging that Cingular had illegally collected sales tax reimbursement on a sale of a cell phone. The trial court granted Target's Demurrer to the First Amended Complaint without leave to amend on the grounds that Cingular's collection of tax reimbursement was protected under the "safe harbor" for compliance with state law, announced in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163. The Appeals Court also agreed. *Cel-Tech* had involved business practices authorized by statute.

The Appeals court ruled that, because Cingular had paid tax as the Board had instructed in its regulation, and Cingular therefore had the right under the Civil Code to collect sales tax reimbursement, it should be able to treat compliance with the regulation as a safe harbor, thus precluding consumers from asserting that Cingular had engaged in unfair business practices, or alleging violations of the UCL statutes. The court held that Board regulations had the force and effect of law, therefore business activities permitted by the Board's regulation could not be unlawful or unfair under the UCL.

The opinion was published on August 18, 2008, as 165 Cal. App. 4th 1526. On September 17, 2008, however, the court vacated its opinion. (2008 Cal. App. LEXIS 1633.) According to the court's web site, it did so at the request of the Attorney General.

The AG's reasoning is not given. The Board's Legal Department has received information that the AG's Consumer Protection Section made the request, since it disagreed with the court's ruling that the *Cel-Tech* "safe harbor" could be extended to regulations, and that it intended to argue that position before the court. If this intelligence is true, the Legal Department views the AG Consumer Protection Section's position as a serious concern and possible threat to the Board's ability to manage the tax and fee programs entrusted to it by the Legislature and implemented by Board regulations.

As a result of the foregoing, the Board requests written permission to represent itself in this matter. Due to the conflicts between the goals of consumer protection law and the sales tax law, the Board is of the opinion that it best serves the interest of the State of California for the Board to file an amicus brief in its own name and place before the court the details of its interests under sales tax law. The Board cannot support any position holding that taxpayers cannot rely on duly-adopted Board regulations, which not only guide them in complying with the tax laws, but also to protect them from suits by consumers who are unhappy with those laws. The court's web site requires the AG to file its brief by November 14, 2008. The Board will file its own amicus brief, and petition to file the same, by that date.

Thank you so much for your immediate attention to this request. Please expedite your consideration of our request as time is of the essence. If you or your staff have any questions, please contact Assistant Chief Counsel Robert Lambert at (916) 324-6593 or Tax Counsel IV John Waid at (916) 324-3828.

Sincerely,



Kristine Cazadd
Chief Counsel

cc: Mr. Robert Lambert (MIC:82)
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Litigation File