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IN THE SUPREME COURT OF CALIFORNIA  
CASE NO. \_\_\_\_\_

IN RE COORDINATED PROCEEDING  
SPECIAL TITLE (RULE 3.550(B))

In re BAYCOL CASES I and II

DOUGLAS SHAW, on behalf of himself and all others similarly situated,

*Plaintiff and Appellant,*

SUPREME COURT  
FILED

v.

DEC - 1 2009

BAYER CORPORATION,

Frederick K. Ohlrich Clerk

*Defendant and Respondent.*

Deputy

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After Order by the Court of Appeal, Second Appellate District, Case No.  
B204943 on Appeal from Judgment of the Superior Court of the State of  
California for the County of Los Angeles  
The Honorable Wendell R. Mortimer, Judge Presiding,  
Department 307, Case No. JCCP 4217

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**PETITION FOR REVIEW**

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## **ISSUE PRESENTED FOR REVIEW**

Did the Court of Appeal erroneously hold that the grant of a demurrer without leave to amend to a complaint that contains individual as well as putative class allegations creates two separate deadlines to file a notice of appeal, notwithstanding the one final judgment rule?

## **REASONS FOR GRANTING REVIEW**

The question presented is one of critical importance: What is the deadline for filing a notice of appeal when a complaint contains putative (uncertified) class allegations and the trial court grants a demurrer to this complaint without leave to amend? This Court has repeatedly held that a grant of such a demurrer does not commence the period for filing a notice of appeal, and that the relevant date is instead that of any subsequent entry of final judgment, pursuant to the longstanding “one final judgment” rule. *See, e.g., Lavine v. Jessup* (1957) 48 Cal.2d 611, 614 (“An order sustaining a demurrer without leave to amend is nonappealable, and the appeal must be taken from the ensuing judgment. . . . [T]he time for appeal d[oes] not commence to run until the entry of judgment.”) (citations omitted).

The Court of Appeal below, however, held that this longstanding rule is inapplicable to a complaint that contains putative class allegations, and on that basis dismissed as untimely the core of Plaintiff’s appeal. The Court of Appeal held that where, as here, a trial court sustains a demurrer to a complaint that contains individual as well as class allegations, this single order creates two different deadlines for filing an appeal: one deadline to appeal the dismissal of the class claims (which commences upon entry of the order), and a different deadline to appeal the dismissal of the individual

claims (which runs upon entry of judgment). In short, the Court of Appeal held that a single order that grants a demurrer to a single complaint requires a party, under pain of dismissal, to file two appeals on two different dates: an immediate appeal of the demurrer to the class allegations and, thereafter, a subsequent appeal (after entry of judgment) of the demurrer to the rest of the complaint. For this reason, because Plaintiff—pursuant to the one final judgment rule, and consistent with this Court’s repeated admonition that no appeal lies from the grant of a demurrer without leave to amend<sup>1</sup>—filed its notice of appeal after the entry of judgment, the Court of Appeal dismissed the appeal of the class allegations as untimely, notwithstanding its reversal of the dismissal of the individual allegations on the merits.

The Court of Appeal’s dismissal of the appeal, and its rejection of this Court’s longstanding precedent, is not only erroneous, but profoundly pernicious. The Court of Appeal’s holding requires the filing of multiple, duplicative appeals from a single order granting a demurrer. Moreover, it does so by creating two different deadlines to appeal a single order: parties must appeal the part of the order that effectively dismisses allegations that relate to a putative class starting from the date of the order, but may appeal the part of the order that dismisses the individual allegations only after the entry of a final judgment.

The requirement of several appeals and the creation of differential dates on which those appeals must be filed not only encourages wasteful

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<sup>1</sup> See, e.g., *Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 651 (“No appeal lies from an order sustaining a demurrer without leave to amend.”); *Berri v. Superior Court* (1955) 43 Cal.2d 856, 860 (“An order sustaining a demurrer without leave to amend is not appealable as it is not the final judgment in the case. . . . It is only by the entry of judgment that plaintiff is in a position to test the correctness of the court’s ruling since there is no appeal from a ruling on a demurrer but only from the ensuing judgment.”).

(and duplicative) appellate litigation, as well as provides a trap for unwary litigants (and those who rely on the longstanding final judgment rule), but precludes beneficial and efficacious resolution of litigation in the trial courts as well. The present case is a prime example. The demurrer was granted on April 27, 2009, and approximately two weeks later, Plaintiff filed a motion for reconsideration, the merits of which the trial court did not hear until more than 60 days later. Under the rule adopted by the Court of Appeal, because the deadline to appeal the grant of a demurrer to a complaint that contains putative class allegation commences from the date of the order, the required filing of this appeal within 60 days would divest the trial court of jurisdiction to entertain even a wholly meritorious motion for reconsideration, at least with respect to the class claims.

A trial court in such a setting could either consider itself divested of jurisdiction and unable to correct its error or, if it did hear the motion, could recognize that it had erroneously dismissed the lawsuit, and thereby reinstate the individual claims (for which no appeal, pursuant to the final judgment rule, was yet permitted), and yet—given the pending appeal—would be powerless to reinstate the class claims that were dismissed on identically erroneous grounds. This would not only result in an unnecessary appeal, but would also preclude the trial court's consideration of a motion that this Court has *expressly protected* with the one final judgment rule. *See, Berri*, 43 Cal.2d at 860 (noting that the final judgment rule permits parties to file motions for reconsideration to the grant of a demurrer with no leave to amend, without divesting the trial court of jurisdiction to consider such motions, by refusing to start the deadline for filing an appeal until after the motion is considered by the trial court and, if the motion is denied, final judgment thereafter entered).

Moreover, the Court of Appeal's holding is pernicious not only in class action litigation---a bad enough result given the significance of such lawsuits---but has equally deleterious consequences in every litigation in which a portion of the complaint contains interlocutory requests for relief, and virtually *every* complaint does so. The Court of Appeal held that an immediate appeal was required in the present case because the demurrer effectively dismissed class allegations, the appeal of which (pursuant to the "death knell" doctrine) often need not await a final judgment. But there are a plethora of other allegations in even routine complaints that are equally subject to permissible interlocutory appeal; *e.g.*, allegations that request an injunction, an attachment, appointment of a receiver, etc. *Cal. Code Civ. P.* sect. 904.1(a) (listing appealable judgments and orders).

Under the Court of Appeal's rule, the grant of a demurrer to an entire complaint would create differential appellate deadlines whenever *any* such allegations are contained in the complaint. For example, were a complaint to request both damages and an injunction (as many do), and the trial court were to grant a demurrer to the entire complaint, this order would effectively constitute a denial of the request for an injunction and thereby compel the plaintiff to *immediately* appeal the portion of the demurrer that affected the injunction, under penalty of waiver, even before entry of final judgment (just as the Court of Appeal held that the grant of the demurrer here effectively constituted a denial of the request for class relief). This is not, and should not, be the law, either in the present putative class litigation or in any other.

Finally, the Court of Appeal's holding not only causes substantial practical as well as doctrinal harm, but does so needlessly. The Court of Appeal contended that it was vital to commence the appeal deadline from

the date of the minute order because doing so would create “a bright-line rule.” (See, attached hereto as Exhibit A, App. Opinion at 9.) But a bright-line rule already exists: the final judgment rule. When a trial court grants a demurrer to a complaint, the time to appeal runs from the date of entry of judgment, not the order. This is not only a bright-line (indeed, luminous) rule, but is a far superior one to the one established and applied by the Court of Appeal here.

This Court created the “death knell” doctrine to permit plaintiffs to appeal the denial of a class certification motion, rightly recognizing that the fact that individual claims remained did not alter the reality that the lawsuit was effectively over even though judgment on the individual claims might be years away. *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699. By contrast, when a demurrer has been granted without leave to amend to an entire complaint, this principle does not apply; the individual claims do not remain to be litigated, and the *whole* complaint will be dismissed upon entry of final judgment. When a single minute order dismisses the *entirety* of a complaint pursuant to a demurrer, the fact that some of the allegations in that complaint assert putative class claims does not commence a distinct appellate deadline. A single appeal is required. And that appeal lies from the final judgment, and the deadline for that appeal is calculated therefrom. The Court of Appeal’s opinion not only radically departs from this central principle, and thereby does severe injustice to the class in the present case, but also (while unpublished) reflects a pervasive misreading of this Court’s “death knell” doctrine that compels plaintiffs who fear a similar dismissal in the Court of Appeal to file duplicative, unnecessary and disadvantageous prejudgment appeals. It is for these reasons that intervention by this Court is warranted.

The Court of Appeal's holding substantially harms not only class action litigation, as well as the named and unnamed parties thereto, but also fairness, efficiency, and the conscientious administration of justice in non-class action litigation as well. The fact that this Court *permits* plaintiffs an appeal in class actions when class claims are dismissed but individual claims remain does not mean an appeal upon final judgment is *precluded* when individual claims *do not* remain and the *entire* action has been dismissed in a single order granting a demurrer to the *entire* complaint without leave to amend.

This Court should accordingly grant review and remand to the Court of Appeal to review the dismissal of the class claims on the merits.

### **FACTUAL BACKGROUND**

Baycol was introduced to the U.S. market in 1998 and is Defendant's brand name for a drug generically known as cerivastatin sodium, a type of cholesterol lowering drug commonly referred to as "statins." (Appellant's Appendix ("AA") at 53 (FAC ¶¶ 2, 7).) Statins accounted for \$9.5 billion in revenue in the pharmaceutical industry in 2000, and sales for 2001 were estimated to exceed \$14 billion based on 70 million prescriptions. (AA at 53-54 (FAC ¶ 7).)

Defendant promoted Baycol as a safe and effective alternative to other statins on the market. (AA at 54 (FAC ¶ 8).) Early clinical trials, however, demonstrated that Baycol did not offer superior efficacy and safety relative to other statins, and indeed presented greater risks. (AA at 54, 55-56 (FAC ¶¶ 9, 15-19).) Specifically, Defendant knew as early as 1994 that Baycol lowered the liver's ability to produce coenzyme Q10

("CoQ10"), an essential requirement for the body to produce energy, the absence of which caused serious side effects, including rhabdomyolysis and congestive heart failure. (AA at 55 (FAC ¶¶ 15-16).)

During the development of Baycol, Defendant's marketing partner, SmithKline Beecham Corporation, expressed "[s]erious concerns regarding the emerging profile of [Baycol]," stating that "[s]imple and safe no longer appears to be a viable promotional platform." (AA at 55-56 (FAC ¶ 17) (emphasis in original).) Regardless, Defendant did not alter its planned marketing platform.

Once on the market, the FDA also cautioned Defendant from making efficacy claims for Baycol relative to other statins because its evaluation showed Baycol was only minimally effective in lowering serum cholesterol levels compared to other statins already on the market. (AA at 56 (FAC ¶ 18).) Nonetheless, Defendant marketed the purported safety and efficacy of Baycol through an aggressive promotional strategy including samples, detail visits to doctor offices (425,000 in 1998 alone), journal advertising and direct to consumer advertising. (AA at 54 (FAC ¶ 10).) Promotional spending for Baycol was \$75 million in 2000, resulting in sales of \$586 million in 2000 and projected sales of \$875 million in 2001 had Baycol not been withdrawn from the market as a dangerous product. (AA at 54 (FAC ¶ 10).)

Defendant's marketing materials deliberately created the impression of extensive successful testing of Baycol while concealing vital information obtained in appropriate and reasonable testing procedures. (AA at 56 (FAC ¶ 21).) For example, in 1998, in addition to what Defendant already knew from clinical trials, Defendant became aware of reported deaths associated with Baycol, but refused to adjust its advertising and marketing materials

accordingly. (AA at 56 (FAC ¶ 20).) During that same year, Defendant promoted Baycol by stating in the Physician's Desk Reference that “[r]are cases of rhabdomyolysis with acute renal failure . . . have been reported with other [similar drugs],” (AA at 56 (FAC ¶ 21) (emphasis added)), a warning that was misleading because Defendant's own study showed that the occurrence of rhabdomyolysis resulting from Baycol use was less ‘rare’ than Defendant suggested, occurring in more than 7% of those patients taking Baycol. (AA at 56 (FAC ¶ 21).)

Throughout 1999, Defendant continued to learn material adverse information about Baycol that it deliberately did not disclose. (AA at 58 (FAC, ¶ 26).) In April 1999, Defendant learned that there were 4 to nearly 40 times as many reported incidents of rhabdomyolysis among Baycol users as compared to each of the six major statins on the market. (AA at 57 (FAC ¶ 24).) Undeterred, and despite the FDA's express warning about comparative efficacy and safety claims, Defendant continued to take out multi-page advertisements touting these qualities as compared to Baycol's competition. (AA at 58 (FAC ¶ 27).) The FDA again cautioned Defendant that “promotional material for Baycol (cerivastatin sodium) [was] false, lacking in fair balance, and otherwise misleading” and directed Defendant to “immediately cease” its deceptive advertising, but Defendant continued to promote Baycol and downplay the risks associated with the drug. (AA at 58-59 (FAC ¶¶ 29-32).

A few months later, Defendant withdrew Baycol from the market for safety reasons. Defendant's misrepresentations about Baycol deceived both doctors and consumers about the serious potential adverse reactions linked to the use of Baycol. (*See e.g.*, AA at 54, 55, 59 (FAC ¶¶ 9, 13, 32).) By representing Baycol to be a safe and effective replacement for other statins,

Defendant continuously and deliberately marketed Baycol in a manner that concealed and misrepresented material facts concerning its safety and efficacy.

### **PROCEDURAL HISTORY**

On September 5, 2001, Plaintiff, on behalf of himself and all others similarly situated, filed the present action against Defendant in the Superior Court in San Francisco, and asserted causes of action under California's Unfair Competition Law ("UCL") as well as unjust enrichment. (AA at 140-159.) Defendants subsequently removed the case to federal court, and in 2002 this action was transferred as a tag-along to multidistrict litigation proceedings then pending in Minnesota.

Plaintiff moved for a remand to state court in 2001, a motion that was stayed pending the transfer, and again in 2004, at which point the motion was granted and the case remanded for lack of federal subject matter jurisdiction. (AA at 44-51 and 161-80.) In 2005, this action was coordinated with *In re Baycol Cases I and II*, JCCP Nos. 4217 and 4223, pending in the Superior Court of California, County of Los Angeles ("Trial Court"), where the class claims were stayed pending resolution of the many individual personal injury claims then pending in that forum.

On January 29, 2007, Plaintiff filed a First Amended Complaint ("FAC"), which added a claim for violations of California's Consumer Legal Remedies Act ("CLRA"). (AA at 52-67 (FAC).) Following the amendment, on March 19, 2007, Defendant demurred to the entire FAC. (AA at 68-97.) On April 27, 2007 the Trial Court issued an unsigned minute order that sustained Defendant's demurrer in its entirety, without

leave to amend, holding that the class allegations were barred by collateral estoppel (due to the MDL court's refusal to grant a nationwide class for claims arising under different state laws, as well as because individual issues allegedly predominated) and that the individual claims were barred for various allegedly fatal deficiencies. (AA at 353-55.)

The Trial Court's grant of the demurrer without leave to amend on April 27, 2009, did not, for various reasons, promptly result in the entry of a final judgment.<sup>2</sup> Final judgment was instead entered only on October 24, 2007 (AA at 533), and its notice of entry was served on October 29, 2007. (AA at 534-37.) Within 60 days of this final judgment, on December 20, 2007, Plaintiff filed his notice of appeal.

On October 20, 2009, the Court of Appeal (1) affirmed the dismissal of the class claims on the sole ground that the appeal as to those claims was untimely; and (2) reversed the district court's dismissal of the individual UCL claims. (App. Opinion at 8-11.) Rather than consider the merits of the class claims, the Court of Appeal found that the time to appeal those allegations began to run from the Trial Court's entry of its April 27, 2007 Order sustaining Defendant's demurrer as to *both* the class and individual claims. (*Id.* at 9.) At the same time, the Court of Appeal found that the time to appeal Plaintiff's individual claims did not begin to run until the

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<sup>2</sup> Plaintiff filed a motion for reconsideration from the minute order sustaining Defendant's demurrer on May 14, 2007, but the Trial Court was unaware of this motion, and on May 25, 2007, entered judgment. (AA at 383.) On June 5, 2007, the Trial Court issued a minute order stating that it was unaware of the motion for reconsideration when it erroneously entered judgment, but that due to this entry of judgment, it had no jurisdiction to rule on the motion. (AA at 384-85.) On June 7, 2007, Plaintiff moved to set aside and vacate the judgment, and the Trial Court did so on August 3, 2007. (AA at 386-400 & 466.) On September 21, 2007, the Trial Court denied Plaintiff's motion for reconsideration on the merits. (AA at 52.)

District Court entered final judgment on October 24, 2007. (*Id.* at 8-11.) The Court of Appeal accordingly reviewed only the merits of Plaintiff's individual claims, and reversed the dismissal of the individual UCL claims—claims that largely mirrored the class claims that the trial court dismissed and the Court of Appeal refused to review.<sup>3</sup> (*Id.* at 10-11.)

### LEGAL DISCUSSION

The Court of Appeal's creation of two independent, concurrently running appellate deadlines from a single order sustaining a demurrer as to both individual and class allegations not only conflicts with the important policy considerations embodied in the "one final judgment rule," but also furthers no legitimate interest. Rather, the Court of Appeal's holding only encourages precisely those ills this Court identified in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, n.9 ("Interlocutory appeals burden the courts and impede the judicial process in a number of ways: (1) They tend to clog the appellate courts with a multiplicity of appeals . . . .") and *Lavine v. Jessup* (1957) 48 Cal.2d 611, 615 ("[A]n absurd situation would result if we were to hold that the portion of the ruling sustaining the demurrers is non-appealable . . . but that the portion of the ruling granting the motions [to strike] is final and immediately appealable.").

There was a single order entered here, on a single motion: the grant of a demurrer, without leave to amend, to the entire complaint. As this Court has recognized, the deadline to appeal such an order commences not

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<sup>3</sup> The Court of Appeal held that Plaintiff waived any claim of error with respect to the demurrer as to his individual CLRA claim. (App. Opinion at 11-12). Plaintiff does not request review on this issue, but requests review solely upon the Court of Appeal's dismissal of the appeal with respect to the class allegations.

on the date of the minute order, but on the date of the final judgment. The fact that a complaint contains putative (uncertified) class allegations in addition to individual allegations does not alter this longstanding principle, nor does it give rise—contrary to the decision of the Court of Appeal—to multiple appeals and two different appeal deadlines. There was one order. There was one judgment. There should be one appeal, and the deadline for its filing should run from the date of final judgment. The Court of Appeal’s holding to the contrary is both erroneous and warrants review by this Court.

**A. The Final Judgment Rule and Death Knell Doctrine**

As this Court has repeatedly recognized, the one final judgment rule obtains a plethora of individual and institutional benefits, including but not limited to efficiency, certainty, and the avoidance of unnecessary appeals. In order to ensure these benefits, this Court has consistently enforced this principle, refusing to permit (or require) prejudgment appeals even to those orders (such as the granting of a demurrer without leave to amend) that may practically terminate the litigation short of a judgment.

This Court, in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, established a narrow exception to this principle in order to grant plaintiffs the right to immediately to appeal when class claims are dismissed but the individual claims remain to be litigated. *Id.* at 699. This Court permitted plaintiffs to appeal in such a scenario because the class claims are “virtually demolished” by such an order—thereby preventing further proceedings for the class—and yet there is no right of appeal because an order sustaining a demurrer is not appealable as a “final judgment,” a final judgment that in this scenario may well be years away. *See* Code of Civ. Proc. § 904.1

(demurrer order not listed as appealable order); *Lavine*, 48 Cal.2d at 614 (“An order sustaining a demurrer without leave to amend is nonappealable, and the appeal must be taken from the ensuing judgment.”) These two factors combined—dismissal of class claims and simultaneous *retention* of individual claims—create the “legal effect” of an immediately appealable dismissal. *Daar*, 67 Cal.2d at 699.

For this reason, this Court has noted that the death knell exception applies when a demurrer is sustained as “to all members of the class *other than plaintiff*.” *Id.* (emphasis added). Because, unlike the present case, a plaintiff is allowed in such a scenario to proceed as an individual after a demurrer order, “the death knell doctrine fits comfortably into the exception to the ‘one final judgment’ rule that arises when parties have separate and distinct interests; when this is true, there can be a final and appealable judgment for each such party.” *Farwell v. Sunset Mesa Property Owners Ass’n, Inc.* (2008) 163 Cal.App.4th 1545, 1547. Thus, an immediate appeal may be made from a *partial* demurrer dismissing class claims but retaining individual claims since, in effect, it “prevents any further proceedings as a class action.” *Daar*, 67 Cal.2d at 699. In such a scenario, the death knell doctrine acts as a necessary exception to the one final judgment rule to fill the procedural gap and allow the plaintiff a right to immediate appeal from the demurrer order on behalf of the class.

**B. The Court of Appeal’s Opinion Defeats the Principles Underlying both the One Final Judgment Rule and the Death Knell Exception**

The one final judgment rule furthers a number of salutary policy considerations. The death knell exception “is a tightly defined and narrow concept” designed to bend those policies only when there is no reasonable

alternative. *See Farwell*, 163 Cal.App.4th at 1547. Any attempt to expand the exception must be carefully considered to ensure that the fundamental policies that underlie the rule and that gave birth to its exception are not defeated. The Court of Appeal's new formulation of the death knell exception, however, ignores these policies and its unnecessary expansion of the exception undermines the certainty and efficiencies gained by the one final judgment rule as well as the primary purpose for the exception.

In formulating the exception, this Court noted that "the question, as affecting the right of appeal, is not what the form of the order or judgment may be, but what is *its legal effect*." *Daar*, 67 Cal.2d at 699 (citations and quotations omitted) (emphasis added). To that end, the *Daar* Court, "assay[ed] the total substance of the order" and determined "its legal effect" to be "tantamount to a dismissal of the action as to all members of the class other than plaintiff . . . virtually demolishing the action as a class action." *Id.* Such analysis was necessary because the underlying order exposed a gap in relation to the rights of the individual versus the rights of the class described concisely in *Farwell* as that gap created when an individual plaintiff and class members "have separate and distinct interests[.]" *See id.*; *Farwell*, 163 Cal.App.4th at 1547. Those separate and distinct interests arise uniquely from a demurrer order sustained as to class members but denied as to the named plaintiff. *Daar*, 67 Cal.2d at 699. Under such an order, at best the class would be forced to accommodate undue delay awaiting the resolution of the individual claims. Realistically, however, the potential for the propriety of the dismissed class claims to evade review altogether is high—a plaintiff with only individual claims remaining often has little incentive to continue with the litigation to such a point where final judgment is entered on the individual claims. *See, e.g., Farwell*,

163 Cal.App.4th at 1552 (“[T]he gist of the death knell doctrine is that the denial of class action certification is the death knell of the action itself, i.e., that without a class, there will not be an action or actions, as is true of cases when the individual plaintiff’s recovery is too small to justify pursuing the action.”). Thus, the purpose of the death knell exception is to ensure appellate review of important legal issues and to prevent unnecessary delay or surrender of the resolution of class claims solely because inefficient individual claims remain to be resolved.

The Court of Appeal’s new formulation of the death knell exception is devoid of any such analysis or requirement that the plaintiff and class members have separate and distinct interests. This alteration is significant because the same procedural gap and conflicts that gave birth to the exception do not exist when a court sustains a demurrer as to both individual and class claims as the Trial Court did in this matter. Instead, because all parties are subject to the same forthcoming final judgment, their interests regarding appeal are aligned obviating the purpose behind the death knell exception. The net effect of eliminating the “separate and distinct interest” analysis is that the death knell doctrine is no longer “a tightly defined and narrow” exception to the one final judgment rule, but instead it becomes the new general rule for any demurrer sustained as to class claims, regardless of the treatment of the individual claims.

This unnecessary expansion of the exception undermines several fundamental policies that would be maintained by adhering to the one final judgment rule. For example, one policy underlying the one final judgment rule is avoiding piecemeal disposition and a multiplicity of appeals. The Court of Appeal’s inclusion of demurrers to an entire class complaint in the death knell exception breaks a class action plaintiff’s action into pieces and

promises a multiplicity of appeals filed for every class action in which both individual and class claims are subject to a demurrer in a single order.

However, absent an underlying policy concern equivalent to those discussed above or statutory authority, there can be no doubt that piecemeal disposition and multiple appeals are to be avoided as oppressive and costly. *See, e.g., id; Kinoshita v. Horio* (1987) 186 Cal.App.3d 959, 966-67.

Following the one final judgment rule without invoking its exception in such an instance avoids both “clog[ging] the appellate courts with a multiplicity of appeals. . . .” (*see Morehart*, 7 Cal.4th at 741, n.9) and the type of “absurd situation” described in *Lavine* where a single order gives rise to multiple appellate deadlines. *See Lavine*, 48 Cal.2d at 615.

Following the Court of Appeal’s rule encourages both.

In addition, “[e]arly resort to the appellate courts tends to produce uncertainty and delay in the trial court.” *Morehart*, 7 Cal.4th at 741, n.9. Here, if Plaintiff had prosecuted his appeal of class claims before entry of judgment on his individual claims, uncertainty and delay would have been the result because the trial court would have been without jurisdiction to enter judgment in the individual claim until the Appellate Court resolved his appeal, notwithstanding the fact that the trial court had sustained a complete demurrer as to those claims. Following the one final judgment rule in cases such as the present one will not result in a multiplicity of protective appeals nor is it dilatory since a judgment invariably follows a grant of demurrer as to all claims. Moreover, “[u]ntil a final judgment is rendered the trial court may completely obviate an appeal by altering the rulings from which an appeal would otherwise have been taken.” *Id; see also, Berri*, 43 Cal.2d at 860. Here, however, the trial court would have been divested of jurisdiction to revisit its rulings on Defendant’s demurrer

by Plaintiff's filing of his notice of appeal, precluding consideration of any potential motion for reconsideration, even though Plaintiff asserted new law he believed required revisiting the matter prior to an appeal. What is more, creating two different time periods for a timely appeal of a single order disposing of an entire case would deprive the appellate court of a complete record. *See Morehart*, 7 Cal.4th at 741, n.9. ("Later actions by the trial court may provide a more complete record which dispels the appearance of error or establishes that it was harmless."). Finally, "[h]aving the benefit of a complete adjudication . . . will assist the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings." *Id.* Here, not starting the appellate clock until the entry of the impending final judgment—in accordance with the one final judgment rule—would permit the Court of Appeal to remedy an error, if any, based upon a complete record, enabling it to give specific directions rather than remanding for another round of open-ended proceedings, a result consonant with the purpose of the rule.

Neither the Court of Appeal nor Defendant cites to legal authority to support such an unnecessary and fundamental alteration of the death knell exception. Quite the opposite, the Court of Appeal quotes and bases its ruling on the holding from *Daar* (via *Alch v. Super. Ct.* (2004) 122 Cal.App.4th 339) stating the exception will apply when a demurrer order is sustained as "to all members of the class *other than plaintiff*." (App. Opinion at 9.) For Defendant's part, the cases on which it relied in the briefing below involve an appeal from either (1) a partial demurrer order dismissing solely the class claims while preserving the plaintiff's individual claims, or (2) an order denying class certification (which, by definition, allows the individual claims to proceed). *See Kennedy v. Baxter*

*Healthcare Corp.* (1996) 43 Cal.App.4th 799, 806-07 (citing *Daar* and rejecting, pursuant to the death knell exception, appellees' argument that the appeal was premature because the lawsuit was still viable as to the individual plaintiffs); *Alvarez v. May Dept. Stores Co., Inc.* (2006) 143 Cal.App.4th 1223, 1230 (appeal appropriate where lower court decided the issue of class certification on demurrer but did not dismiss plaintiff's individual claims); *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 (immediate appeal appropriate from order denying class certification); *Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 811 (determining that orders denying class certification must be immediately appealed); and *Guenter v. Lomas & Nettleton Co.* (1983) 140 Cal.App.3d 460, 465 (same). Accordingly, each of these cases fit squarely within the narrow "death knell" exception to the final judgment rule but provide no basis to expand the exception as per the Court of Appeal's holding here, ultimately altering the fundamental principals underpinning the doctrine.

Not only is there no basis for the Court of Appeal's reformulation of the exception, but it is directly contradictory to existing case law and will likely to lead to unnecessary and conflicting rulings. California courts consistently admonish plaintiffs for filing premature, protective appeals, including instances such the present case where a demurrer was entered as to both individual and class claims. For example, in *Los Altos Golf and Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, the appellants' complaint contained class action allegations. *Id.* at 202. The appellants filed their notice of appeal from the order sustaining a demurrer as to all causes of action, and the respondents urged the appellate court to dismiss the appeal as from a non-appealable order. *Id.* The appellate court agreed that the notice of appeal was premature and that the appeal should

entered it “liberally construe[d] the appeal to have been taken from the judgment of dismissal.” *Id*; see also *Hannon v. Western Title Ins. Co.* (1989) 211 Cal.App.3d 1122, 1126 (appellate court explained that it was “at a loss to explain why the bar continues to ignore the requirement of a judgment of dismissal” but construed the notice of appeal from an order sustaining a demurrer to all causes of action in a putative class action to be from the subsequently entered judgment of dismissal); *Bardin v. Daimlerchrysler Corp.* (2006) 136 Cal.App.4th 1255, 1263 n.3 (same), and *Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1157 (same). Accordingly, California courts, other than the Court of Appeal in this case, follow the general rule and take appeals from *judgments* in class actions in which a single demurrer order is entered as to all claims, rather than invoking the death knell exception and forcing two differential appellate deadlines for class members versus the individual plaintiff. See, e.g., *Cohen v. NuVasive, Inc.* (2008) 164 Cal.App.4th 868, 871; *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 214-15; *Olsen v. Cohen* (2003) 106 Cal.App.4th 1209, 1211; *Balikov v. Southern California Gas Co.* (2001) 94 Cal.App.4th 816, 818. The Court of Appeal’s new formulation of the death knell exception in this case reaches the opposite conclusion and would subsume the one final judgment rule in every instance where a demurrer is granted in a class case as to all class and individual claims, despite the fact that a final judgment on all claims will be issued. Indeed, it is the fear in the trial bar that a misguided Court of Appeal will create a new “exception” to the one final judgment rule, as occurred here, that is driving the multiplicity of appeals and premature filings discussed in the cases above that confuse the record in such class cases.

Moreover, the Court of Appeal's ruling reaches beyond class action litigation and has equally harmful effects in any litigation where a portion of the complaint contains an interlocutory request for relief. Under this new rule, a number of routine allegations—such as request for an injunction, an attachment, or appointment of a receiver (*see*, Cal. Code Civ. P. § 904.1(a) (listing appealable judgments and orders))—will result in differential appellate deadlines if a demurrer order is entered as to the entirety of the complaint. For example, if a complaint contained both a request for damages and an injunction, as is common, and the trial court sustained a demurrer as to the entire complaint, the order would effectively constitute a denial of the request for an injunction and compel the plaintiff, under penalty of waiver, to appeal immediately that portion of the order, but wait until after the final judgment to appeal the claim as it relates to damages. This is not, and should not, be the law, either in the present putative class litigation or any other.

### CONCLUSION

It would be absurd to hold that an order completely resolving an action, and followed by a judgment of dismissal of the entire action, creates multiple appellate deadlines, some of which may expire before entry of the judgment. *See Lavine*, 48 Cal.2d at 615. That is, however, precisely the ruling of the Court of Appeal in this case. The ruling of the Court of Appeal undermines the policy considerations embodied by the one final judgment rule, and also undermines the reason this Court created the death knell exception to that rule in the first place. *See, Daar*, 67 Cal.2d at 699. The one final judgment rule precipitates efficiency, certainty, and the

avoidance of unnecessary appeals. The death knell doctrine is a narrow exception to the rule ensuring that, in the event the interests of the class members and named plaintiffs become “separate and distinct,” the class members retain a meaningful right to appeal an order that amounts to the dismissal of their claims. *Farwell*, 163 Cal.App.4th at 1547. The Court of Appeal’s ruling, on the other hand, trades the narrow scope of the exception for a new, broad based rule that will result in a multiplicity of appeals and inefficiency each time a class complaint is dismissed in its entirety. In addition, the rule’s reach will impact not only class cases, but any case in which a complaint containing interlocutory requests for relief is subject to demurrer in its entirety.

In the case at bar, the Trial Court's order granting Defendant’s demurrer completely resolved the action and was followed by a judgment of dismissal of the entire action. The Plaintiff’s individual claims were not allowed to proceed, unlike the plaintiff in *Daar*. *See Daar*, 67 Cal.2d at 699. Under the Court of Appeal’s formulation of the death knell exception, the single demurrer order in this case created multiple appellate deadlines, and the deadline for appealing the dismissal of class claims expired before the entry of the judgment. As stated in *Lavine*, such a result is absurd. It harms not only the putative class in this matter, but class action litigation, the named and unnamed parties thereto, as well as fairness, efficiency, and the conscientious administration of justice in non-class

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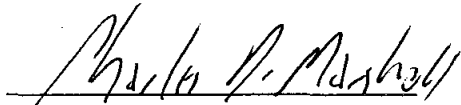
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action litigation. For these reasons, and those stated in the petition above, this Court should grant review and remand to the Court of Appeal to review the dismissal of the class claims on the merits.

DATED: November 30, 2009

Respectfully submitted,

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**CERTIFICATION OF WORD COUNT**

Pursuant to Rules 8.204(c)(1) and 8.504(d)(1) of the California Rules of Court, I certify that the attached Petition for Review was produced on a computer. According to the computer program's word count function, the Petition for Review has 6,259 words.

DATED: November 30, 2009

Respectfully submitted,

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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

COURT OF APPEAL - SECOND DIS-

**FILED**

OCT 20 2009

In re BAYCOL CASES I and II.

B204943

JOSEPH A. LANE

Clerk

(Los Angeles County  
Super. Ct. No. JCCP4217)

Deputy Clerk

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Wendell R. Mortimer, Judge. Judgment affirmed in part and reversed in part with directions; appeal dismissed in part.

Green Welling, Jenelle Welling, Charles Marshall and Brian S. Umpierre for Plaintiff and Appellant.

Sidley Austin, Catherine Valerio Barrad, Steven A. Ellis and Brendan P. Sheehey for Defendant and Respondent.

## INTRODUCTION

Plaintiff Douglas Shaw (Shaw) appeals from a judgment of dismissal entered after the trial court sustained the demurrer of defendant Bayer Corporation (Bayer) without leave to amend. Shaw also appeals from a subsequent order denying his motion for reconsideration. We dismiss the appeal as to the postjudgment order and as to the class action claims. We reverse the judgment as to Shaw's individual claims.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

On June 26, 1997, the Food and Drug Administration (FDA) approved Bayer's application to market the drug Baycol in doses up to .3 milligrams in the United States. Bayer later obtained approval to market Baycol in dosages of .4 and .8 milligrams. Baycol, generically known as cerivastatin sodium, belongs to a class of cholesterol lowering drugs commonly referred to as statins. Statins work by blocking an enzyme involved in the synthesis of cholesterol. They are generally prescribed to people with high blood pressure and heart disease.

Bayer began marketing Baycol on February 18, 1998. At that time, cholesterol lowering drugs were among the fastest growing products in the pharmaceutical industry. Revenue from the sale of statins increased from \$2.9 billion in 1996 to \$9.5 billion in 2000. Estimated revenue from sales of statins for 2001 was in excess of \$14 billion, based on 70 million prescriptions.

Bayer marketed Baycol as an effective, "simple and safe" alternative to the other statins on the market. It claimed that Baycol had fewer and less severe side effects than

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<sup>1</sup> On demurrer, the facts are those pleaded in the complaint and those of which judicial notice may be taken. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 719.)

other statins. It aggressively marketed Baycol to doctors as well as advertising Baycol directly to consumers.

Bayer obtained approval to market Baycol after clinical trials involving only 3,000 people. This was far fewer than the people involved in clinical trials of other statins. Additionally, early clinical trials indicated that Baycol was not more effective, and presented greater risks than other statins.

On August 8, 2001, Baycol lost its FDA approval and Bayer withdrew it from the market. Baycol users were advised to switch to another medication for lowering cholesterol.

The reason for the loss of FDA approval and the withdrawal of Baycol from the market was reports linking Baycol with rhabdomyolysis, an acute and sometimes fatal disease causing the destruction of skeletal muscle tissue. The disease causes a breach of the cellular membranes of the muscle tissue, releasing myoglobin and potassium into the bloodstream. This can lead to kidney failure and death, or to heart failure. The FDA received reports of 31 deaths in three years from rhabdomyolysis caused by the use of Baycol. FDA records showed 772 cases of rhabdomyolysis in people taking statins during the time Baycol was on the market; more than half of these cases were linked to Baycol.

Baycol also was linked to myositis and myopathy, diseases of the muscle tissue. Additionally, Baycol was less effective at lowering cholesterol than other statins.

Bayer knew as early as 1994 that Baycol lowered the ability of the liver to produce coenzyme Q10 (CoQ10). Risks of decreased CoQ10 levels include rhabdomyolysis, myositis, myopathy, congestive heart failure and other diseases.

Before Bayer began to market Baycol, SmithKline Beecham Corporation (SmithKline), Bayer's marketing partner, expressed concern over the risks associated with Baycol. SmithKline did not believe that Baycol was more effective than other statins, and was concerned over its dangerous side effects. The FDA also advised Bayer that Baycol was only minimally effective at lowering cholesterol as compared to other statins already on the market.

In 1998, Bayer placed a warning in the Physician's Desk Reference (PDR) that "[r]are cases of rhabdomyolysis with acute renal failure secondary to myoglobinuria have been reported with other [similar drugs]." Bayer later revised its PDR entry to state that rhabdomyolysis and other conditions had been reported since the introduction of Baycol, but "a causal relationship to the use of *Baycol* cannot be readily determined due to the spontaneous nature of reporting of medical events, and the lack of controls."

Bayer conducted additional studies to demonstrate the safety and efficacy of Baycol in conjunction with its attempt to obtain approval of higher doses of Baycol. These studies showed, however, that a higher dosage increased the risks of Baycol. Bayer did not disclose these increased risks.

In April 1999, the FDA reported that among the six statins on the market, incidents of rhabdomyolysis were highest for Baycol users. Other reports showed problems with Baycol as well. Bayer continued to characterize rhabdomyolysis as a rare side effect of Baycol, however. Bayer also advertised that Baycol provided "[t]he same proven safety and tolerability you've come to expect. Side effects are usually mild and transient and similar to a placebo."

On October 25, 1999, the FDA wrote to Bayer that it had "become aware of promotional material for *Baycol* . . . that is false, lacking in fair balance, and otherwise misleading." There was no substantial evidence that Baycol was "superior to competing products" or provided "a clinical advantage versus 'other statins.'" Additionally, the FDA stated, Bayer's "presentation of risk information . . . lack[ed] fair balance." The FDA directed Bayer to "immediately cease" its deceptive advertising.

Bayer continued to promote Baycol until August 8, 2001, when Bayer announced that it was withdrawing Baycol from the market for public safety reasons. It acknowledged that "rhabdomyolysis is a serious, potentially fatal effect of all statin drugs, including *Baycol*." At the same time, the FDA issued a notice linking Baycol to 31 deaths in the United States.

Following Bayer's withdrawal of Baycol from the market, thousands of plaintiffs filed suit against Bayer. (See *In re Baycol Products Litigation* (D. Minn. 2003) 218

F.R.D. 197, 201.) Shaw filed his action on September 5, 2001 in superior court in San Francisco County. He filed it as a class action alleging causes of action for unlawful, unfair or fraudulent business practices under Business and Professions Code section 17200 et seq. and for unjust enrichment. Shaw identified the class as “California residents who purchased or ingested the drug Baycol.” The basis of his action was Bayer’s false and misleading advertising regarding Baycol.

On Bayer’s motion, the action was removed to United States District Court of the Northern District of California. On October 26, 2001, Shaw moved to remand the action to state court.

Over a hundred federal cases against Bayer were coordinated in a multidistrict case in the District of Minnesota (*In re Baycol Products Liability Litigation* (MDL No. 1431)). Shaw’s case was one of those transferred, as of March 18, 2002.

A Plaintiffs’ Steering Committee was appointed by the court to represent all of the plaintiffs. (*In re Baycol Products Litigation, supra*, 218 F.R.D. at p. 201.) The committee filed a master class action complaint. It contained class action allegations on behalf of three separate classes: (1) the medical monitoring class, consisting of persons who took Baycol but had not yet manifested physical injury; (2) the personal injury class, consisting of persons who were physically injured as a result of taking Baycol; and (3) the refund class, consisting of persons who purchased Baycol for personal or family use. (*Id.* at p. 202.)

In the MDL, plaintiffs sought as to the refund class, which included Shaw, “restitution, disgorgement of profits and punitive damages based on claims of unjust enrichment and breach of implied warranty of merchantability . . . .” (*In re Baycol Products Litigation, supra*, 218 F.R.D. at p. 213.) The court concluded that the plaintiffs “failed to demonstrate that common issues of law predominate[d]” and therefore denied class certification. (*Id.* at pp. 214, 216.)

The decision in the federal action was filed on September 17, 2003. On February 11, 2004, Shaw moved for an order remanding his case to superior court in San Francisco. After initially denying the motion, on November 29, 2004, the federal court

granted Shaw's motion for remand. The court found it did not have subject matter jurisdiction over the case, in that Bayer had failed to establish that the amount in controversy for each class member exceeded the federal minimum.

Several hundred cases involving Baycol, including a number of class actions, which had been filed in California were consolidated in a Judicial Council Coordinated Proceeding (JCCP) in Los Angeles Superior Court. As in the MDL, a master complaint was filed in the JCCP. Shaw's case was added on to the JCCP on February 4, 2005.

During the next approximately two years, many of the cases in the JCCP were dismissed or resolved in Bayer's favor on summary judgment. On January 29, 2007, Shaw filed his first amended complaint, alleging causes of action for violation of the unfair competition law (UCL, Bus. & Prof. Code, § 17200 et seq.) and Consumers Legal Remedies Act (CLRA, Civ. Code, § 1750 et seq.), and for unjust enrichment.

Shaw sought to certify a class of "[a]ll persons who purchased or paid for the drug *Baycol* between February 18, 1998 and August 8, 2001 . . . , to be used by California Consumers, and not for resale." Excluded from the class were those who had been paid for personal injury related to Baycol use.

Shaw alleged that Bayer violated the UCL by engaging in unfair, unlawful and deceptive acts in marketing Baycol, and specifically that its acts violated the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.), the Federal Trade Commission Act, section 5 (15 U.S.C. § 41 et seq.) and the CLRA. As a result of these acts, Bayer sold more Baycol at inflated prices than would otherwise have been the case. Shaw sought restitution and disgorgement of excess profits.

Shaw similarly alleged that Bayer violated the CLRA by falsely representing that Baycol was safe and effective. For this violation, he sought restitution and disgorgement of excess profits.

Shaw finally alleged that Bayer was unjustly enriched by revenues obtained due to its deceptive advertising. He sought imposition of a constructive trust for disgorgement and restitution of excess Baycol revenue.

On March 16, 2007, Bayer filed a demurrer to Shaw's first amended complaint. Bayer demurred to the class allegations "on the grounds that plaintiff is estopped from certifying a class, and there is no reasonable possibility of establishing a community of interest here." In particular, Bayer claimed that Shaw was estopped from relitigating the class certification issue that had been decided in the MDL. Bayer also claimed that class certification was inappropriate, in that individual issues predominated and plaintiff was not an adequate representative. Bayer additionally demurred to each cause of action on the ground it failed to state a claim. Shaw opposed the demurrer as to all causes of action except unjust enrichment, which he elected not to pursue.

The trial court sustained Bayer's demurrer without leave to amend on April 27, 2007. It explained: "This Class Action arises out of a federal MDL case in which the judge has already denied class certification. The Class Action is, therefore, barred by collateral estoppel and/or res judicata principals [*sic*]. That federal case involved this plaintiff and involved nationwide class allegations which necessarily included California. Even though the case now before this court involves a slightly different class definition and specifically pleads California statute (UCL & CLRA), the claims involve the same primary rights. . . ."

The trial court also sustained the demurrer without leave to amend "on a separate and distinct basis. Individual issues predominate. Each class member would need to show that Baycol provided no health benefits or that Baycol injured them. This would include each user's cholesterol levels before, during and after Baycol use. Individual issues would make a class action impracticable."

In addition, the trial court sustained the demurrer to Shaw's individual claims without leave to amend, stating: "Plaintiff did not plead that he did not receive health benefits, that he did not get what he paid for, or that he has any basis for injunctive relief. Plaintiff did not provide a prefiling notice as required by CC 1782."

On May 14, 2007, Shaw moved for reconsideration based on a change of law, citing the recent decision in *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42. The trial court denied the motion on the grounds there were no new

facts or law justifying reconsideration. On October 24, 2007, the trial court entered a judgment of dismissal.

Bayer served notice of entry of judgment on October 29, 2007. Shaw filed his notice of appeal on December 20, 2007.

## DISCUSSION

### A. *Motion to Dismiss the Appeal*

#### 1. Timeliness

Bayer contends the April 27, 2007 order sustaining its demurrer to Shaw's class claims was immediately appealable. Therefore, it further contends, Shaw's December 20, 2007 notice of appeal was untimely as to these claims, and the appeal must be dismissed as to them.

An order denying class certification is appealable. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) However, an order sustaining a demurrer without leave to amend "is ordinarily not appealable, since the order is not a final judgment." (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 359.)

An exception to the latter rule arises "in a class action if the legal effect of the order is 'tantamount to a dismissal of the action as to all members of the class other than plaintiff,' and if the order 'has virtually demolished the action as a class action.' [Citation.] California allows direct appeal of such a 'death-knell' order as a matter of state law policy." (*Alch v. Superior Court, supra*, 122 Cal.App.4th at pp. 359-360.) "Since, in theory, the individual plaintiff's action can go forward, the death knell doctrine fits comfortably into the exception to the 'one final judgment' rule that arises when parties have separate and distinct interests; when this is true, there can be a final and appealable judgment for each such party. [Citation.]" (*Farwell v. Sunset Mesa Property Owners Assn., Inc.* (2008) 163 Cal.App.4th 1545, 1547.)

An exception to the rule regarding the appealability of an order sustaining a demurrer without leave to amend has been applied where, as here, the trial court sustains

a demurrer without leave to amend as to both the class action allegations and the individual causes of action. (See, e.g., *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202.) We are reluctant to carve out exceptions to the rule and thus introduce an element of uncertainty into what has otherwise been the established rule. Would the exception apply only where, as here, a single order sustains the demurrer without leave to amend as to both the class and individual claims? Would it apply where separate orders address the class and individual claims? A bright-line rule would eliminate any uncertainty. Accordingly, we adhere to the rule that “in a class action if the legal effect of the order is ‘tantamount to a dismissal of the action as to all members of the class other than plaintiff,’ and if the order ‘has virtually demolished the action as a class action,’” the order is immediately appealable. (*Alch v. Superior Court, supra*, 122 Cal.App.4th at pp. 359-360.)

Since the April 27, 2007 order sustaining Bayer’s demurrer to Shaw’s class claims was immediately appealable, Shaw’s December 20, 2007 notice of appeal was untimely as to these claims. We therefore affirm the judgment dismissing the class claims.

## 2. Mootness

Bayer additionally contends that the appeal as to Shaw’s individual claims must be dismissed as moot. Bayer asserts that Shaw failed to raise any contentions regarding his individual claims in his opening brief, waiving any claim of error as to them. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Since Shaw has no individual claims, Bayer continues, he is not a member of the putative class (*Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 859) and therefore has no standing to prosecute this appeal. We reject Bayer’s contention.

As Shaw points out, his argument in his opening brief addresses both his individual and his class claims. For example, Shaw refers to “the harm that Plaintiff alleges he suffered,” which “stems from being deprived of material information impacting his purchase decision.” Shaw argues that this harm differed from the harm at

issue in the federal MDL case. Thus, his argument addresses both individual and class claims.

### **B. Standard of Review**

The court should not sustain a demurrer without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Plaintiff bears the burden of establishing that the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.)

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, we assume the truth of the complaint's properly pleaded or implied factual allegations. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.) We also consider matters which have been or may be judicially noticed. (*Ibid.*; *Sacramento Brewing Co. v. Desmond, Miller & Desmond* (1999) 75 Cal.App.4th 1082, 1085, fn. 3.) We review the trial court's ruling de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law and applying the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.)

### **C. Shaw's Individual Claims**

The UCL was enacted "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. [Citation.]" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) It "defines 'unfair competition' to mean and include 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law ([Bus. & Prof. Code,] § 17500 et seq.).' ([*Id.*], § 17200.)" (*Kasky, supra*, at p. 949.)

A UCL action does not result in an award of damages to compensate a party for injury suffered. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1268.) Rather, Business and Professions Code section 17203 provides that any person who has engaged in unfair competition may be enjoined and may be required “to restore to any person in interest any money or property,” i.e., to make restitution. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126.) The focus of the UCL is “on the defendant’s conduct, rather than the plaintiff’s damages, in service of the statute’s larger purpose of protecting the general public against unscrupulous business practices.” (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312.)

The trial court sustained the demurrer as to Shaw’s individual claims on the ground that he “did not plead that he did not receive health benefits, that he did not get what he paid for, or that he has any basis for injunctive relief.” However, Shaw alleged that due to Bayer’s unfair, unlawful and deceptive acts in marketing Baycol, it sold more Baycol at inflated prices than would otherwise have been the case. At a minimum, it is reasonably probable that Shaw could amend his complaint to allege that due to Bayer’s unfair, unlawful and deceptive acts in marketing Baycol, *he* purchased Baycol and *he* purchased it at a higher price, than would have been the case had Bayer not engaged in unfair, unlawful and deceptive acts. Accordingly, he should have been given the opportunity to amend the complaint to provide more specificity as to his individual claims. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 68 Cal.App.4th at p. 459.)

#### ***D. Other Issues***

The other basis for sustaining the demurrer without leave to amend was Shaw’s failure to provide a prefiling notice as required by Civil Code section 1782. This section applies only to a CLRA claim. Shaw raises no contention, cites no authority and makes no argument as to the CLRA cause of action. Accordingly, he has waived any claim of error regarding the sustaining of the demurrer without leave to amend as to that cause of

action. (*Title G. & T. Co. v. Fraternal Finance Co.* (1934) 220 Cal. 362, 363; *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

Shaw also raises no contention with respect to the order denying his motion for reconsideration. Again, this waives any claim of error as to the order. We therefore dismiss the appeal as to this order

### DISPOSITION

The appeal is dismissed as to the class claims and as to the order denying reconsideration. The judgment of dismissal is reversed as to Shaw's individual claims only. The trial court is directed to vacate its order sustaining Bayer's demurrer without leave to amend as to Shaw's individual claims and to enter a new and different order sustaining the demurrer with leave to amend as to Shaw's UCL claim and without leave to amend as to his CLRA claim. The parties are to bear their own costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

**CERTIFICATE OF SERVICE**

I, Leslie R. Cuesta, hereby declare as follows:

I am employed by Green Welling, A Professional Corporation, 595 Market Street, Suite 2750, San Francisco, California 94105. I am over the age of eighteen years and am not a party to this action. On November 30, 2009, I served the within document(s):

**PETITION FOR REVIEW**

\_\_\_\_\_ by placing the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

\_\_\_\_\_ by personally delivering the document(s) listed above the person(s) at the address(es) set forth below.

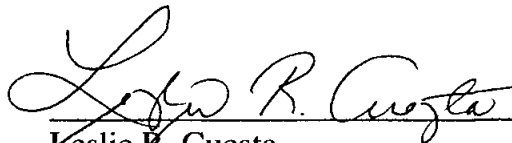
\_\_\_\_\_ by causing personal delivery by \_\_\_\_\_ of the document(s) listed above to the person(s) at the address(es) set forth below.

XX by depositing the document(s) listed above in a sealed envelope with delivery fees provided for a FedEx pick up box or office designated for overnight delivery, and addressed as set forth below.

\_\_\_\_\_ by transmitting via facsimile the above listed document(s) to the fax number(s) set forth below on this date.

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed November 30, 2009, at San Francisco, California.

  
\_\_\_\_\_  
Leslie R. Cuesta

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