Legal Opinion Letter

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
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Vol. 18 No. 16 August 14, 2009

CALIFORNIA HIGH COURT OFFERS MIXED RESULTS ON PROPOSITION 64

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California's consumer protection laws have long been criticized for fostering litigation brought by plaintiffs' attorneys and not actual consumers. In recent years, the breadth of these laws notoriously empowered less than scrupulous lawyers to leverage settlements from small businesses. *The Wall Street Journal* called the laws "[s]o bizarrely pro-plaintiff as to be a major disincentive for many companies to do business in the state."

Under California's Unfair Competition Law (UCL) and False Advertising Law (FAL) *any* individual has the right to sue on behalf of the general public over *any* business practice deemed to be "unlawful, unfair or fraudulent" – even if the individual had never suffered an injury. This delegation of governmental enforcement authority to private individuals was unique to California and created a litigation bonanza for plaintiffs' lawyers.

Proposition 64. In 2004, California voters decided to rein in the laws through the initiative process. Passed with almost 60% of the vote, Proposition 64 made two major changes to these laws. First, only a person who "has suffered injury in fact and has lost money or property as a result of" the challenged practice has standing to sue. Second, to pursue "relief on behalf of others" a private claimant must comply with California's requirements for class actions.

These simple amendments were intended to bring California law into line with the approach of most other states. But as is often the case with California ballot initiatives, the courts would have a say on how Proposition 64 would impact the state's civil justice system. As several recent California Supreme Court rulings reflect, Proposition 64 has achieved some success, but because the law remains under attack by the plaintiffs' bar, California's civil justice system is still out of step with the nation.

The Plaintiffs' Bar Fights Back. The plaintiffs' bar challenged Proposition 64 in several ways. First, they argued the law did not apply to pending cases. It did. *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223 (2006). Second, plaintiffs' lawyers argued it did not bar an otherwise unharmed plaintiff from setting up test cases. It did. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App.4th 798 (2007). Third, they argued Proposition 64 did not bar a named plaintiff from suing on behalf of others who had not lost money or property as a result of the challenged practice. Thanks to the California Supreme Court's ruling in *In re Tobacco II Cases*, for the plaintiffs' bar, the third time was the charm.

In re Tobacco II Cases*: The "No-Injury" Class Action*. Recently, in a 4-3 decision, the California Supreme Court ruled that only the named plaintiff must satisfy Proposition 64's standing requirement, and that every other class member need not. *In re Tobacco II Cases*, No. S147345 (May 18, 2009).

The decision arose from a putative class action brought against the major tobacco companies alleging a "decades-long campaign of deceptive advertising and misleading statements." The trial court initially certified a class of California smokers, but, after Proposition 64 passed, it decertified the class because every

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member would now be required to prove an injury resulting from the claimed UCL violation. This would raise so many individualized issues, the court reasoned, that class treatment would be inappropriate. The Court of Appeal affirmed, but the California Supreme Court reversed, ruling in a majority opinion by Justice Carlos Moreno that the standing requirement applies only to the named plaintiffs.

In his dissent, Justice Marvin Baxter wrote that the Court creates a "no-injury class action" in which an individual can be a member of a class even if they could not bring a claim in their own right. Such a ruling is unprecedented. As the dissenting justices noted, it "turns class action law upside down and contravenes the initiative measure's plain intent." It violates the fundamental nature of the class action, which is a purely procedural device designed to efficiently aggregate claims that could have been brought individually.

The Court went on to hold that in lawsuits under the "fraudulent" prong of the UCL challenging a long-term advertising campaign, the condition that the suffered loss be "*as a result of*" the claimed violation does not require the named plaintiff to prove reliance on any *specific* misrepresentation. The challenged representation also need not be "the only cause" of the claimed injury or loss or "even the decisive cause."

Finally, in *dicta* that the plaintiffs' bar will likely seize on, the majority also suggested that UCL plaintiffs could be entitled to monetary relief "without individualized proof of deception, reliance and injury if necessary to prevent the use or employment of an unfair practice." This is not only inconsistent with recent California Supreme Court opinions; it raises the specter of courts awarding money to people who have not lost any.

Overall, the *In re Tobacco II Cases* ruling undermines the voters' efforts, embodied in Proposition 64, to curtail frivolous litigation. It ensures that the UCL will remain a favorite tool of plaintiffs' lawyers seeking settlement money or alterations to business practices that have little real-world impact on consumers.

Amalgamated Transit Union *Rejects Associational Standing*. Despite the impact of the *Tobacco II* ruling, key aspects of Proposition 64 still stand. In cases whose decisions were issued shortly after *Tobacco II*, the plaintiffs' bar argued that Proposition 64 did not prohibit an association from representing its members in a UCL lawsuit, a common practice in the past. But in *Amalgamated Transit Union, Local 1756, AFL-CIO v. First Transit, Inc.*, No. S151615 (June 29, 2009), and its companion case, *Arias v. Angelo Dairy*, No. S155965 (June 29, 2009), the California Supreme Court upheld the intent of Proposition 64 and rejected this argument. Indeed, in *Arias* the Court went a small step further in holding, 6-1, that any UCL claim seeking relief on behalf of others must be brought as a class action and therefore meet the formal requirements for class certification.

Kwikset *and the Meaning of Monetary Loss*. One major challenge to Proposition 64 remains under review. In *Kwikset Corp. v. Benson*, No. S171845, the issue is whether the requirement that the named plaintiff have "lost money or property as a result of" the practice means merely that a purchase was made in reliance on a misrepresentation, or instead that the consumer *paid more* for the product because of the misrepresentation.

The Court of Appeal ruled that consumers who bought locksets advertised as "Made in the U.S.A." were not entitled to sue simply because the claim was inaccurate. Instead, the plaintiffs had to allege that they paid more for those products than they would have paid for products not bearing the claim. In other words, if the misrepresentation was so immaterial as to not merit a higher price, the decision of whether to challenge it was up to public officials rather than private plaintiffs in a UCL lawsuit. The California Supreme Court recently agreed to hear the case, which could determine whether Proposition 64 truly narrowed the courtroom door.

A Mixed Record. Proposition 64 corrected some of the plaintiffs' bar's more pernicious practices under the UCL. Plaintiffs' lawyers can no longer challenge a business practice without finding one person who claims a monetary loss as a result. They cannot claim to represent unnamed consumers without such a named plaintiff, and they cannot sue on behalf of activist groups who have not been harmed themselves. But this hurdle remains lower than in any other state. And it may be lowered still. For the foreseeable future, California will remain out of step with the other 49 states – and a favored destination for plaintiffs' lawyers.

ISBN 1056 3059