

California Supreme Court Ruling on UCL Standing Requirement May Open the Floodgates to Frivolous Suits

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By a 4-3 vote, the California Supreme Court recently handed a significant victory to the plaintiffs' bar – and a major loss to businesses – in *In re Tobacco II Cases*, 93 Cal. Rptr. 3d 559 (Cal. 2009). The decision, which revived a massive false-advertising class-action lawsuit against the tobacco industry, curtailed the effect of Proposition 64, a 2004 ballot initiative which imposed new standing requirements in order to curb abusive lawsuits brought under California's Unfair Competition Law and False Advertising Law (collectively, UCL). Cal. Bus. & Prof. Code §§ 17200 et seq.; 17500 et seq. The Court accepted the defendants' position that the named plaintiffs in a class action brought under the fraud prong of the UCL must prove that they relied on the defendants' alleged misrepresentations. However, the Court narrowly read Proposition 64's amendments to the UCL, holding that only the named plaintiffs must prove reliance, and that no other member of the putative class needs to do so for a class to be certified. This holding threatens to permit the abusive lawsuits that gave rise to Proposition 64 in the first place.

Voters Adopt Proposition 64 to Amend the UCL

Before Proposition 64, the UCL had been interpreted by the California courts to authorize any person to bring fraud claims on behalf of the general public. Such plaintiffs were not constrained by traditional standing requirements; indeed, any person could bring a lawsuit under the UCL regardless of whether he or she had been harmed by the challenged practice. Moreover, a plaintiff could style his or her claim as a “representative” action on behalf of the general public without the need to comply with well-established class action requirements, such as that the named plaintiff's claims must be typical of the class and that he or she would be an adequate class representative.

In short, the pre-Proposition 64 UCL authorized California citizens to act as “private attorneys general” on par with government regulators. But private plaintiffs – or more precisely, the lawyers who filed lawsuits with “figurehead” plaintiffs – have very different incentives from those of government lawyers and lack comparable accountability to the public. Unlike government regulators, who are charged with a duty to do justice, the chief incentives driving the plaintiffs' bar are economic: to maximize their fees. Given this environment, lawyers used the UCL as a ready vehicle for “shakedown” lawsuits against California businesses.

In November 2004, California voters enacted Proposition 64 to amend the UCL. First, Proposition 64 specified that, to have standing to pursue a lawsuit under the UCL, a private plaintiff must have “suffered injury in fact and . . . lost money or property as a result of” the alleged wrongdoing. Prop. 64 §§ 3, 5 (amending Cal. Bus. & Prof. Code §§ 17204, 17535). Second, Proposition 64 specified that a private party “may pursue representative claims or relief on behalf of others only if the claimant” both “meets the standing requirements” added by Proposition 64 “and complies with Section 382 of the Code of Civil Procedure,” which sets forth California's requirements for maintaining a class action. *Id.* § 2 (amending Cal. Bus. & Prof. Code §§ 17203, 17535). Third, underscoring the voters' intent to abolish actions that skirt traditional standing and class-certification requirements, Proposition 64 specifically deleted language that formerly authorized the prosecution of actions by private parties purportedly “acting for the interests of . . . the general public.” *Id.* § 3 (amending Cal. Bus. & Prof. Code § 17204).

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The Tobacco II Decision

In 2006, the California Supreme Court held that Proposition 64 applied to all cases that were pending at the time of its enactment. See *Californians for Disability Rights v. Mervyn's*, 39 Cal.4th 223 (2006). One such action was a previously certified class action against the tobacco industry, alleging a decades-long conspiracy to conceal the addictiveness of nicotine and the health consequences of smoking. The named plaintiff, William Brown, asserted claims under the UCL on behalf of a class of “[a]ll people who at the time they were residents of California, smoked in California one or more cigarettes” during the almost eight-year class period “and who were exposed to Defendants’ marketing and advertising activities in California.” *In re Tobacco II Cases*, 93 Cal. Rptr. 3d at 565. The plaintiff demanded restitution of the amounts the class members had paid for cigarettes.

Following the California Supreme Court’s decision in *Mervyn’s*, the defendants moved to decertify the class, arguing that under the UCL (as amended by Proposition 64), individualized issues predominated over common ones. Specifically, the defendants contended, each class member was required to show that he or she: (1) “was actually exposed to the allegedly false and misleading statements”; (2) “actually . . . believe[d] some or all of the statement[s] to be true”; and (3) “actually . . . purchase[d] cigarettes as a result of his or her exposure to, and belief in the veracity of, the allegedly false and misleading statement, which the class member would not have” purchased “in the absence of the alleged statement[s].” *Id.* at 568 (emphases in original). The trial court granted the defendants’ motion to decertify the class and the court of appeal affirmed, holding that (1) under the UCL, all class members were required to demonstrate injury in fact and causation (i.e., that the class member relied on a misrepresentation in deciding to purchase cigarettes); and (2) given the large number of alleged misrepresentations and long time span involved, it was “clear that proof as to the representative plaintiffs will not supply proof as to all class members.” *In re Tobacco II Cases*, 47 Cal. Rptr. 3d 917, 923 (Ct. App. 2006).

The California Supreme Court granted review to answer two questions: (1) whether the injury-in-fact and causation requirements under the amended UCL must be satisfied by all of the class members or merely by the named plaintiff; and (2) what kind of showing of reliance does the amended UCL require. By a sharply divided 4-3 vote, the California Supreme Court reversed the lower courts’ rulings and remanded for further proceedings.¹

The justices were in agreement on the second question – that the “as a result of” language in Proposition 64 imposes a reliance requirement. *In re Tobacco II Cases*, 93 Cal. Rptr. 3d at 581. Writing for the majority, Justice Moreno explained that a plaintiff may establish reliance by proving that the alleged misrepresentation “was an ‘immediate cause’ of the plaintiff’s injury-producing conduct.” Justice Moreno added that the alleged misrepresentation need not “be the sole or even the predominant or decisive factor influencing [the plaintiff’s] conduct It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision.” *Id.* Justice Moreno noted that when “a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements.” *Id.* at 582.

Although the Court unanimously agreed that the UCL’s standing requirements include the need to prove reliance, the Court split sharply on whether the standing requirement applied to absent class members. Justice Moreno concluded that Proposition 64’s “standing requirements are applicable only to the class representative, and not [to] absent class members” because “nothing in the express language of Proposition 64 purports to alter . . . accepted principles of class action procedure that treat the issue of standing as referring only to the class representatives and not the absent class members.” *Id.* at 577. In support of this conclusion, Justice Moreno cited two treatises and a vacated 1979 federal district court decision. *Id.* at 576 (citing 1 Newberg & Conte, *Newberg on Class Actions* § 2.07, at 2-41 (3d ed. 1992); 7AA Wright *et al.*, *Federal Practice and*

Procedure § 1785.1, at 388–89 (3d ed. 2005); *Vuyanich v. Republic Nat'l Bank of Dallas*, 82 F.R.D. 420, 428 (N.D. Tex. 1979), *vacated*, 723 F.2d 1195 (5th Cir. 1984)).

Justice Baxter, writing for the dissenters, rejected the majority's narrow reading of Proposition 64, arguing that "Proposition 64 requires all UCL suits brought by private persons on behalf of others to comply with" California's class-action principles, and those principles mandate that all "members of [the] class [must] themselves have causes of action against the defendant." *Id.* at 585. Justice Baxter also warned that "the majority's holding encourages the very sort of abusive shakedown suits that Proposition 64 was designed to curb." *Id.* at 588. Justice Baxter explained that if, for example, a supermarket chain unintentionally labeled ground round as an inferior and cheaper grade of ground beef and a customer who had wanted the inferior grade bought the mislabeled meat at the lower price, the supermarket chain must pay restitution not only to that customer, but also to the "many" others who either never saw the incorrect label, were "not influenced by it," prefer the mislabeled superior grade of meat, or "do not care about the grade of ground beef they eat." *Id.*

Analysis

The California Supreme Court's ruling that only named plaintiffs must satisfy Proposition 64's injury-in-fact and reliance requirements is a sharp departure from the class-action principle that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997); see also, e.g., *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). Moreover, the support for the *Tobacco II* Court's conclusion was weak: the Court relied not only upon a federal district court decision that had been vacated but also on snippets from the Newberg and Wright & Miller treatises that it quoted out of context. In fact, both treatises confirm that, under Federal Rule of Civil Procedure 23, "the class representative must share standing with class members." 1 Newberg & Conte, *supra*, § 2.07, at 97; see also 7AA Wright, *supra*, § 1785.1, at 390 ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention."). The *Tobacco II* Court's holding also is inconsistent with basic norms of due process. Because a UCL plaintiff must prove that he or she "lost money or property as a result of" the challenged conduct in an individual action (Cal. Bus. & Prof. Code § 17204), he or she should be required to make the same showing in order to participate as a member of a class action. But under the *Tobacco II* Court's holding, aggregating individual claims into a class action permits consumers who could not sue in their own right to participate as members of the class.

Regardless of the soundness of the California Supreme Court's legal reasoning, its decision will encourage class-action lawsuits with respect to any trivial infraction or misstatement by a business, even if the odds that any consumer was harmed are slight, so long as a single named plaintiff will sign an affidavit stating that an alleged misrepresentation was a substantial factor in his or her decision to buy the product or service. Depending on the circumstances, businesses may be forced into settling such lawsuits to avoid the potential substantial burdens and expenses of litigation.

Nonetheless, the Court's decision is not a total loss. The Court squarely held that Proposition 64 imposes a reliance requirement in UCL class actions and rejected the plaintiffs' far looser theory of causation. Under the Court's decision, in typical consumer class actions, which unlike the tobacco cases do not involve allegations of "decades-long" campaigns of misleading "saturation advertising," the named plaintiffs must demonstrate actual reliance on specific allegedly false statements or advertisements, rather than merely asserting that misrepresentations had occurred.

In addition, the *Tobacco II* decision addresses only whether a named plaintiff has standing to sue, not whether independent class-certification requirements have been met. Indeed, it remains open for the courts to decide whether to certify a class in which none of the putative class members

(other than the named plaintiffs) can show that they have suffered an injury or that a claimed injury was caused by the defendant's conduct. Specifically, in such circumstances, a court could deny class certification on the ground that a named plaintiff who suffered an actual injury would not be "typical" or that common questions did not predominate over individual questions. An injured named plaintiff also may not be an adequate representative for uninjured class members, given the conflict of interest that may arise between the two groups. In addition, the *Tobacco II* decision did not resolve any due process challenges to certification of a class of consumers who, because they have not been injured, could not bring individual actions. Moreover, it is as yet unclear what sway the California Court's opinion will have on federal courts facing post-Proposition 64 lawsuits, as those courts must also apply the standing criteria required by Article III of the U.S. Constitution.

In the wake of the *Tobacco II* decision, it is critical that businesses defending against class-action lawsuits seek to establish – before the class-certification stage – that the named plaintiffs cannot meet their burden of satisfying the UCL's "lost money or property" and reliance requirements. Discovery into the scope and nature of the named plaintiffs' purported injury and theory of reliance should be thorough and include depositions of the named plaintiffs and other important witnesses. Armed with this discovery, a quick motion for summary judgment may dispose of the lawsuit. Although plaintiff's counsel may have an alternative named plaintiff with a better claim to standing waiting in the wings, the business should be prepared to oppose a request for discovery directed at identifying such a new named plaintiff.

The *Tobacco II* decision will not be the California Supreme Court's last word on the meaning of the standing requirements under the UCL. On June 10, the California Supreme Court granted review of *Kwikset Corp. v. Superior Court*, 90 Cal. Rptr. 3d 123 (Ct. App. 2009), to analyze the meaning of the "injury in fact" and "lost money or property" requirements under the UCL as amended by Proposition 64. Businesses that face the risk of class actions in California should keep an eye on *Kwikset* and should remain alert for additional UCL class action decisions from the courts of appeal.

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¹Because of a minor conflict of interest, Chief Justice Ronald M. George recused himself from the case. The law firm that handles his estate planning, Loeb & Loeb, also represents one of appealing defendants. Under California law, the most senior associate justice becomes the acting chief justice and may assign another judge to fill the vacancy. CAL. CONST. art. 6, § 6(e). In Chief Justice George's absence, Acting Chief Justice Joyce L. Kennard assigned Associate Justice Eileen C. Moore of Division 3 of the Fourth District Court of Appeal to participate in the appeal, and she ultimately cast the deciding vote. Following the court's decision, the defendant that had been represented by Loeb & Loeb switched law firms. Because the technical basis for Chief Justice George's recusal no longer exists, it is possible that he may participate in the decision on the petition for rehearing.