

Authors

Karen R. Palmersheim
213-687-6742
kpalmersheim@lockelord.com

Peter Roan
213-687-6788
proan@lockelord.com

Did the Latest California Supreme Court UCL Decision Create More Uncertainty?

On May 18, 2009, the California Supreme Court (the “Court”) issued a significant ruling regarding Proposition 64’s¹ (“Prop 64”) standing and causation requirements for Unfair Competition Law (“UCL”) class actions based on deceptive advertising. In *In Re Tobacco II Cases*, S147345, Ct. App. 4/1 D046435, the Court addressed two questions: (1) Who in a UCL class action must comply with Prop 64’s standing requirements, the class representatives or all unnamed class members, in order for the class action to proceed? and (2) What is the causation requirement for purposes of establishing standing under the UCL, and in particular, what is the meaning of the phrase “as a result of” in Business and Professions Code section 17204?

The Court concluded in a 7-3 decision authored by Justice Moreno, that standing requirements are applicable *only* to the class representatives and not all absent class members. The majority also concluded that a class representative proceeding on a claim of misrepresentation as the basis of a UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, but the representative need not prove reliance on specific misrepresentations or false statements, where they “were part of an extensive and long-term advertising campaign.”²

The Allegations and Case History

The Plaintiff, acting individually and on behalf of the general public, sued a variety of tobacco companies for misrepresentations and unfair advertising, claiming that over the span of decades, the defendants sold tobacco products to the public knowing but concealing that tobacco products contain the highly addictive drug, nicotine. The Plaintiff sought to certify the class as “those people who are residents of California and who, while residents of California, smoked one or more cigarettes during the applicable class period.”³ After class certification was granted and after a series of summary judgment motions, the complaint was amended to allege only two causes of action – for violation of the UCL and for false advertising.

Following passage of Prop 64 in November 2004, the defendants moved for class decertification. Defendants argued that the new standing requirements imposed by Prop 64 applied to *every* unnamed class member, and not just the named class representative. The defendants argued that class certification was not appropriate because numerous individualized issues predominated, such as whether each member was actually exposed to the false statements, whether each member was actually affected by the false statements, and whether each member actually spent money to purchase cigarettes manufactured by defendants as a result of his or her exposure to the false statements.⁴ The trial court granted the defendants’ motion to decertify the class, which was affirmed by the Court of Appeal.

UCL Standing Requirements

The Court first considered the question of whether both the representative plaintiff and the unnamed class members must meet the standing requirements in a UCL class action, and concluded the trial court’s interpretation of Prop 64 was erroneous. The Court noted that there is no language in Prop 64 that imposes the standing requirements on absent class members. Instead, the Prop 64 amendments provide that a person may pursue representative claims on behalf of others if the representative meets the standing requirements of Section 17204 and complies with class action procedural requirements.⁵ The Court noted that the references in Section 17203 to one who wishes to pursue UCL claims are in the singular, further indicating that the standing requirements are only on the representative and not the unnamed class members. The Court determined there was nothing in the initiative’s ballot materials that suggested the intent was to require Section 17204 standing requirements be met for the unnamed class members.⁶ In so doing, the Court determined that the ballot materials accompanying Prop 64 show there was no intent to curb the broad remedial purpose of the UCL or the use of class

www.lockelord.com

This *Client Alert* is provided solely for educational and informational purposes. It is not intended to constitute legal advice or to create an attorney-client relationship. Readers should obtain legal advice specific to their enterprise and circumstances in connection with each of the topics addressed.

If you would like to be removed from our mailing list, please contact us at either unsubscribe@lockelord.com or Locke Lord Bissell & Liddell LLP, 111 South Wacker Drive, Chicago, Illinois 60606, Attention: Marketing. If we are not so advised, you will continue to receive *Client Alerts*.

Attorney Advertising

© 2009 Locke Lord Bissell & Liddell LLP

actions for that purpose, noting the abuses to which Prop 64 was directed was its “use by unscrupulous lawyers who exploited the generous standing requirement of the UCL to file ‘shake-down’ suits to extort money from small businesses.”⁷ The Court also found that the ballot materials did not contain “any indication that the purpose of the initiative was to alter the way in which class actions operate in the context of the UCL.”⁸ The Court added that under existing law, the question of standing in class actions involves the standing of the class representatives and not the class members.

The Court also noted that the remedies available under the UCL – which were not changed by Prop 64 – support a finding that unnamed class members were not required to show standing. The Court stated that an injunction would serve no purpose of prevention of future harm if only those who had been injured were entitled to that relief.⁹ The Court also believed requiring absent class members to show they lost money or property as a result of the unfair competition as required by Section 17204 would conflict with the language in Section 17203 allowing the broader relief of restoration of money or property which “may have been acquired” by means of the unfair practice.¹⁰ The Court concluded that “Proposition 64 was not intended to, and does not, impose section 17204’s standing requirements on absent class members in a UCL class action where class requirements have otherwise been found to exist.”¹¹

Causation Requirements

The second question addressed by the Court was the causation requirements for a false advertising claim under section 17204. By so doing, the Court addressed the meaning of the phrase “as a result of” in section 17204 which states that a UCL private action may

only be brought by “a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.”¹²

The UCL defines “unfair competition” as “any unlawful, unfair or fraudulent business act or practice ...”¹³ With respect to the “fraudulent” prong, unlike common law fraud, a plaintiff need not show actual deception; the test is whether “members of the public are likely to be deceived.”¹⁴ Prior to Prop 64, the law was clear that relief under the UCL was available without individualized proof of deception, reliance and injury.¹⁵ Although Prop 64 imposed a new causation requirement (a showing of injury in fact and loss of money or property “as a result of” the unfair competition), the Court noted that the Prop 64 ballot materials do not show whether it was the intent of the electorate to impose an actual reliance requirement where the UCL claim was based on fraud.

The Court decided to construe the phrase “as a result of” in light of Prop 64’s intent to impose limits on private enforcement actions under the UCL, and held actual reliance on the misrepresentation must be shown.¹⁶ But the Court proceeded to temper its holding requiring actual reliance, stating that it is not necessary that the plaintiff’s reliance be the sole or predominant factor in influencing the conduct; it is sufficient if the misrepresentation is “substantial” which is presumed if the misrepresentation is “material.”¹⁷ The Court also held that where 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 a particular misrepresentation. Although a plaintiff must plead and prove actual reliance to satisfy the standing requirements of section 17204, where the misrepresentations were made as part of an extensive and long-term advertising campaign, the plaintiff is not required to plead and prove individual reliance.¹⁸

The opinion leaves open the question of what constitutes an “extensive and long-term advertising campaign.” The opinion also leaves open the question of what constitutes “substantial” or “material” misrepresentations. As noted by Justice Baxter in his concurring and dissenting opinion, under the rule announced by the majority, “so long as the named plaintiffs actually relied on the allegedly deceptive advertising claims when buying and smoking cigarettes, they may seek injunctive and restitutionary relief on behalf of *all California smokers who simply saw or heard such ads* regardless of whether false claims contained in those ads had anything to do with any class members’ decision to buy and smoke cigarettes.”¹⁹ Justice Baxter concluded that by not requiring absent class members to meet the Prop 64 standing requirements, “the rule the majority announces will apply equally to less egregious cases, where it invites the very kind of mischief Proposition 64 was intended to curtail.”²⁰

It remains to be seen whether such “mischief” will come to pass, but the likely outer reaches of what constitutes an “extensive and long-term advertising campaign” or a “substantial” and “material” misrepresentation in that context will likely be litigated for years to come.

Endnotes

- 1 Proposition 64 was passed by the California electorate on November 2, 2004, to eliminate frivolous lawsuits under the Business and Professions Code Section 17200 et seq. (“UCL”) by attorneys where they have no client who has been injured in fact under Constitutional standing requirements. Proposition 64 amended California Business & Professions Code Sections 17203 and 17204. The amendment to Section 17204 adds the standing requirement that a person bringing a UCL claim show he or she suffered injury in fact and lost money or property “as a result of” the unfair competition. The amendment to

Offices

Atlanta
 Austin
 Boston
 Chicago
 Dallas
 Houston
 London
 Los Angeles
 New Orleans
 New York
 Sacramento
 San Francisco
 Washington DC

Did the Latest California Supreme Court UCL Decision Create More Uncertainty? (cont'd.)

Section 17203 narrows UCL representative actions only to persons who meet the standing requirements of Section 17204 and comply with the class action provisions of Code of Civil Procedure section 382.

- 2 Opinion, at p. 34.
- 3 *Id.* at p. 6.
- 4 *Id.* at p. 8.
- 5 *Id.* at p. 15.
- 6 *Id.* at pp. 15-16.
- 7 *Id.* at p. 16.
- 8 *Id.* at p. 18.
- 9 *Id.* at p. 21.
- 10 *Id.* at p. 22.
- 11 *Id.* at p. 28.
- 12 *Id.* at p. 28; Bus. & Prof. Code § 17204.
- 13 Bus. & Prof. Code § 17200.
- 14 Opinion at p. 10 (citing *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951).
- 15 *Id.* at p. 30 (citing *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1288).
- 16 *Id.* at 30.
- 17 *Id.* at p. 31.
- 18 The Court reversed the order of decertification “to the extent it was based upon the conclusion that all class members were required to demonstrate Proposition 64 standing” and remanded the case for further proceedings to determine whether the class representatives can demonstrate standing.
- 19 Concurring and dissenting opinion by Baxter, J., at p. 3.
- 20 *Id.*

About the Authors

Karen Palmersheim and Peter Roan are litigation partners in the Los Angeles office and represents health care entities, insurers and other companies in complex business and reimbursement litigation, class actions and related regulatory matters.