

Antitrust Law Blog

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Voter-Approved Standing Requirements For California's UCL Apply Only To Class Representatives, Not Class Members, State Supreme Court Rules

In 2004, California voters imposed limits on the state's famously broad Unfair Competition Law. More than four years later, the California Supreme Court has announced exactly where those limits lie.

The court's long-awaited decision in In re Tobacco II Cases, S147345, interprets two fundamental, voter-approved amendments to the UCL. First, a unanimous court held that a named plaintiff suing under the revised statute for injury caused by a defendant's misrepresentation must have actually relied on the allegedly misleading statement. Second, a 4-3 majority held that absent class members are not subject to the voters' new, more rigorous standing test; unlike the plaintiffs seeking to represent them, class members need not show that they "lost money or property as a result of" the alleged unfair business practice.

The opinion elicited strong, and predictably polarized, reactions from California litigators. Plaintiffs lawyers rejoiced, saying that the high court had preserved consumers' most effective tool for challenging widespread deceptive practices – the class action lawsuit.

Defense lawyers, meanwhile, decried Tobacco II as a betrayal of the electorate. Voters clearly intended to halt the abuses that were increasingly common under the previous statute, the argument goes, but under Tobacco II "bounty hunter" plaintiffs may still file lawsuits on behalf of giant consumer classes, including many who were never even harmed by the business practice at issue.

Commentators on both sides of the bar, however, agree that the decision is a landmark in California's UCL jurisprudence. Some have even suggested that the court's willingness to apply a more lenient standing test to class members may have implications for class-action practice beyond the UCL.

California's UCL prohibits any unfair, unlawful or fraudulent business practice. Cal. Bus. & Prof. Code § 17200. The statute expressly allows public officials, such as the attorney general or district attorneys, to file representative actions. Before its amendment, the UCL also authorized representative suits by "any board, officer, person, corporation or association or ... any person

acting for the interests of itself, its members or the general public." Bus. & Prof. Code, former § 17204.

Thus anyone was a potential plaintiff under the UCL, even if they had no connection whatsoever to the defendant. Moreover, anyone could file "representative" actions on behalf of other consumers without the procedural protections afforded by traditional class action rules. Although damages are not available under the UCL, plaintiffs can recover in equity, including injunctions and restitution.

These generous standing requirements were eventually abused by "unscrupulous lawyers" who filed "'shakedown' suits to extort money from small businesses." Tobacco II, slip. op. at 18. Some lawyers formed front organizations to serve as plaintiffs, sued small businesses for minor regulatory violations, and offered to settle suits for economic nuisance value. Id.

California voters responded by placing on the ballot, and approving, Proposition 64. The ballot measure amended the UCL, requiring that private plaintiffs suing under the statute have "suffered injury in fact and ha[ve] lost money or property as a result of unfair competition." Cal. Bus. & Prof. Code § 17204. Prop. 64 also added language to the UCL requiring any private plaintiff pursuing a representative claim under the UCL to comply with the California statute governing class actions. Id. § 17203.

Plaintiff in Tobacco II claimed that defendant tobacco companies conducted a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease, violating the UCL's "fraudulent" prong. Tobacco II, slip. op. at p. 2. The trial court, acting before Prop. 64 passed, certified a class of California residents who "smoked in California one or more cigarettes" during the relevant time period and who "were exposed to Defendants' marketing and advertising activities in California." Id.

After voters amended the UCL, however, defendants moved to decertify the class. The trial court granted the motion, finding that the amended statute requires each class member to show injury in fact. As a result, the court found that individual inquiries regarding each class member – whether they saw the advertisements, whether they relied upon the ads when buying cigarettes – predominate over any common issues, making class treatment inappropriate. Id. at p. 9. The court of appeal affirmed. 142 Cal.App.4th 891 (2006).

The California Supreme Court granted a petition for review, and addressed two distinct questions: "[W]hat is the causation requirement for purposes of standing under the UCL, and in particular what is the meaning of the phrase 'as a result of' in section 17204?" And, "who in a UCL class action must comply with Proposition 64's standing requirements, the class representatives or all unnamed class members[?]" Tobacco II, slip. op. at p. 2.

The Court answered the first question unanimously: "a class representative proceeding on a claim of misrepresentation must demonstrate actual reliance on the allegedly deceptive or misleading statements" in accordance with principles of reliance established in common-law fraud cases. Id. Such an interpretation comports with the overriding purpose of Proposition 64,

the court said, which is to impose limits on private enforcement actions under the UCL. *Id.* at 30.

But the court also limited this holding. It emphasized that the holding applies only to actions under the "fraudulent" prong of the UCL (and not the "unfair" or "unlawful" prongs). *Id.* at p. 30 n.17. Further, a plaintiff need only show that the misrepresentation was a "substantial factor" influencing his conduct; he need not show that it was the sole or even predominant factor. *Id.* at 31. And a plaintiff need not point to a specific misrepresentation that caused his injury. Where, as in *Tobacco II*, plaintiff alleges a long-term advertising campaign, a plaintiff "is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." *Id.* at 33.

The Court split on the second question. Writing for the majority, Justice Carlos Moreno held that the stricter standing requirements apply only to named class representatives, not absent class members. The plain meaning of the statute mandates such a result, the majority held, because the new standing requirements apply to the "person" bringing the representative claim, and the "claimant." Bus. & Prof. Code § 17203. The use of these singular terms, the majority said, clearly indicates an intent to exclude absent class members from the more rigorous standing test. *Tobacco II*, slip. op. at 15.

The majority also found support in the ballot materials distributed in support of Prop. 64, which say that the proposition aims to stop the abuses of attorneys who file "frivolous" lawsuits on behalf of uninjured clients. *Id.* at 17. Thus, the majority found, the ballot literature focuses on specific abuses related to class representatives, not class members.

The majority rejected defendants' argument that application of the more lenient standing test to class members would violate the principle that aggregation of class claims unto a class action should not "serve to enlarge substantive rights or remedies." *Id.* at 27. The UCL extends to the public a substantive "right to protection from fraud, deceit and unlawful conduct." *Id.* at 27. "Applying Proposition 64's standing requirements to the class representative but not the absent class members enlarges neither the substantive rights nor the remedies of the class." *Id.* at 28.

In a separate opinion, Justice Marvin R. Baxter disagreed with the majority's holding that unnamed class members need not meet Proposition 64's injury-in-fact and causation requirements. Citing a litany of state and federal class-action decisions, Justice Baxter wrote that the requirements of ascertainability and typicality mandate that a class definition "cannot be so broad as to include persons who would lack standing to bring suit in their own names." Voters incorporated these requirements into the UCL, Justice Baxter wrote, by specifying that a private person seeking to bring a representative action under the UCL must comply with California's class action statute.

The majority's holding, Justice Baxter wrote, contravenes Prop. 64's plain intent, and "invites the very kinds of mischief" that the proposition was meant to curtail. Justice Baxter details a hypothetical case showing how, under the majority's holding, a consumer who relied on a defendant's false advertising could bring a lawsuit on behalf of a class of other consumers who bought the same product without any regard for the allegedly false statement. Threatened with the prospect of paying restitution to all customers who bought the product – whether those

customers cared about the advertising or not – the defendant would be pressured to settle. Such a result, Justice Baxter writes, "cannot be what voters intended when they adopted the substantial reforms set forth in Proposition 64."

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