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## New Limitations on Lawsuits Likely Will Trigger Litigation

### Focus Column

#### Litigation

By Steven A. Ellis, Robert A. Holland and David R. Carpenter

On Nov. 2, 2004, California voters approved Proposition 64, which adds a significant standing requirement for claims brought under the state's Unfair Competition Law and false-advertising law (Business and Professions Code Sections 17200 and 17500).

The proposition provides that a person can seek relief under Section 17200 or Section 17500 only if the person "has suffered injury in fact and has lost money or property as a result of" the alleged wrongdoing. The proposition also eliminates the "private attorney general" provisions in those statutes and requires that any collective or group action brought under the statutes satisfy the state's class-action requirements.

Do these changes apply to pending cases, including those on appeal? A strong argument can be made that they do.

Under state law, courts generally presume that a statute is not retrospective absent a clearly expressed contrary intent. See *Tapia v. Superior Court*, 53 Cal.3d 282 (1991); see also state Civil Code Section 3 ("No part of [the Code] is retroactive, unless expressly so declared.").

A retrospective law is one that "affects rights, obligations, acts, transactions and conditions which are performed prior to the adoption of the statute." *Physicians Commission for Responsible Medicine v. Tyson Foods Inc.*, 119 Cal.App.4th 120 (2004). "A statute has retrospective effect when it substantially changes the legal consequences of past events."

Because Proposition 64 does not expressly state that it applies to pending cases, uninjured plaintiffs likely will argue that applying the proposition to cases filed before it became effective would violate the presumption that statutes are not retrospective.

There are, however, at least two substantial grounds for arguing that Proposition 64 applies to all pending cases.

First, Proposition 64 repeals a right created by statute. Courts have held that the repeal of a right created by statute presents "entirely distinct issues from that of the prospective or retroactive application of a statute." *Tyson Foods*; see also *Beckman v. Thompson*, 4 Cal.App.4th 481 (1992) (enforcing repeal of statute in pending action is "not a 'retroactive' application of a new statute").

Specifically, where "a right or remedy did not exist at common law but is dependent on a statute, the repeal of the statute without a savings clause destroys such a right unless it has been reduced to a final judgment." *Beckman*; see also *Governing Board v. Mann*, 18 Cal.3d 819 (1977); Bernard Witkin, Summary of California Law: Constitutional Law Section 497 (9th ed. 1988) ("The repeal [of a cause of action created by statute] will operate retroactively to terminate a pending action based on the statute.")

This rule applies even where judgment has been entered by the trial court and the case is pending on appeal. See *Mann*.

The reason for this rule is that a right created by statute does not vest until it is incorporated into a final judgment; thus, applying the repeal of a statutory right to a pending case does not deprive a person of a vested right. See *Beckman*; see also *People v. Acosta*, 48 Cal.App.4th 411 (1996) ("all statutory remedies are pursued with full realization that the [L]egislature may abolish the right to recover at any time"); state Government Code Section 9609 ("Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal.")

The right to bring "private attorney general" suits under Section 17200 or Section 17500 did not exist at common law but was created by those statutes. Thus, there is a strong argument that Proposition 64's repeal of that statutory right applies to pending cases and that pending actions brought by uninjured plaintiffs are therefore subject to dismissal.

Second, as stated in a publicly released memorandum by the drafter of Proposition 64 (available at <http://www.cjac.org/hotissues/prop64/whenandhow.pdf>) - statutes affecting only procedural rules, not substantive rights, generally do apply to pending cases. See *Tapia*.

The rationale is that, because changes to procedural rules affect only the secondary conduct of litigation that will occur, not the primary past conduct that gave rise to the litigation, applying procedural changes to pending cases does not constitute "retrospective" application. See *Tapia*. The memorandum argues that Proposition 64's standing requirement likewise is "procedural" and thus also should apply to pending cases. See *Residents of Beverly Glen Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973) (characterizing "standing to sue" as a "procedural requirement").

Although the state Supreme Court has cautioned that even changes in procedural requirements may be deemed retrospective if they substantially affect existing rights and obligations (see *Aetna Casualty & Surety Co. v. Industrial Accident Commission*, 30 Cal.2d 388 (1947)), there is a strong argument that Proposition 64's standing requirement does not fall into this category.

The requirement does not change injured parties' rights to obtain injunctive or monetary relief. Rather, it affects only who can sue for those remedies. While uninjured plaintiffs may have invested time and money to bring a Section 17200 or Section 17500 suit, Proposition 64 does not deprive them of any personal rights or change whether a company's prior primary conduct is actionable.

Thus, it can be characterized persuasively as having no substantive effect on the legal consequences of past actions. See *Tyson*.

Proposition 64's class-certification requirement also likely will be viewed as only a "procedural" change. See *Linder v. Thrift Oil Co.*, 23 Cal.4th 429 (2000). In addition, when applied to cases brought by arguably uninjured plaintiffs, the class-certification requirement may have the effect of reinforcing the new-injury requirement.

This is because a plaintiff seeking class certification must establish, among other things, a "well-defined community of interest"; to make such a showing, a plaintiff must have claims typical of the class and must be an adequate representative of the absent class members. See *Linder*.

An uninjured plaintiff seeking relief for a class of injured individuals likely could not meet these requirements.

In sum, Proposition 64 significantly limits the scope of Section 17200 and Section 17500, permitting suits only by injured plaintiffs and requiring that representative suits meet the requirements for class certification.

Because there is a strong argument that these significant changes apply to pending cases, numerous pending claims may be subject to dismissal. The application of Proposition 64 to pending cases undoubtedly will be litigated soon and may need to be resolved by the state Supreme Court.

**Steven A. Ellis** and **Robert A. Holland** are partners and **David R. Carpenter** is an associate in the litigation group of the Los Angeles office of Sidley, Austin, Brown & Wood.

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