
Client Alert on In re Tobacco II Cases

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On May 18, 2009, in *In re Tobacco II Cases* (2009), the California Supreme Court revived a major consumer class action against the tobacco industry. The majority opinion, in which four of the seven Justices joined, clarified the standing and causation requirements imposed on an Unfair Competition Law class action plaintiff after Proposition 64's narrowing of the scope of the Law. The long-awaited decision, however, will provide little comfort to companies doing business in California, who are likely to face more—and more protracted—class action litigation as a result.

California's Unfair Competition Law and Proposition 64

California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq. ("UCL" or "Section 17200"), is a famously broad remedial statute that has been used to challenge a wide variety of business conduct. The statute defines unfair competition to include any "unfair, unlawful, or fraudulent business act or practice." A plaintiff need satisfy only one of the three "prongs" of the UCL to state a claim. Thus, Section 17200 prohibits an "unfair" business act even where the acts complained of were neither "unlawful" nor "fraudulent."

While the range of conduct that has been challenged under the UCL is very broad, UCL cases are tried to judges, not juries. The relief available to UCL plaintiffs is limited to injunctions and restitution—damages are not available. Nevertheless, the willingness of California courts to fashion broad and creative injunctions in UCL cases, the possibility of significant restitution payments, and the fact that UCL remedies can be cumulative to remedies available under common-law theories and other California (and sometimes federal) statutes has made the UCL a powerful tool in the hands of California plaintiffs and their attorneys. Finally, and of direct relevance to the California Supreme Court's decision in the *Tobacco II Cases*, the UCL may be enforced through class actions, as well as by individuals and the California Attorney General.

Before 2004, the UCL was enforceable by "any person" in a "representative" action in which the plaintiff acted as a private attorney general for the interests of himself or the general public. Following concerns about abusive lawsuits directed at small businesses, in 2004 California voters passed Proposition 64. Proposition 64 amended the UCL so that a person may pursue a representative claim only where he or she meets the standing requirements of Section 17204, which the Proposition revised to require that a UCL plaintiff show that he or she "suffered injury in

fact and has lost money or property as a result of such unfair competition."

The Tobacco II Cases

In 1997, plaintiff Willard Brown brought a class action on behalf of a class of smokers in California, alleging that cigarette makers and others had engaged in a long campaign of fraudulent advertising in violation of the UCL. Several other named plaintiffs later joined Mr. Brown. The trial court certified a class in 2001. Following the passage of Proposition 64, however, the trial court de-certified the class, agreeing with defendants that the "simple language" of the UCL, as amended, imposed an individualized causation requirement that *each member* of the plaintiff class must satisfy. The trial court determined that the amendment required an individualized determination as to whether each class member was exposed to the allegedly fraudulent advertising, whether each class member purchased cigarettes "as a result of" such advertising, and that such individual issues predominated and defeated the commonality required for class certification. The Court of Appeal affirmed.

The Supreme Court's opinion addressed two questions that had been left open in the wake of Proposition 64: (1) does the UCL's standing requirement, as amended by Proposition 64, apply to all class members or only to the class representatives; and (2) what is the causation requirement for purposes of establishing standing under the "fraudulent" prong of the UCL, *i.e.*, how does a plaintiff satisfy the new "as a result of" test?

Impact of Proposition 64 on Standing in UCL Class Actions

The court first held that the UCL's standing requirements apply only to the *named* class representatives, and not to all unnamed class members. It therefore reversed the trial court's de-certification order, determining that it was based on an erroneous determination that Proposition 64 had required *all* class members to satisfy the UCL's heightened standing requirements.

The court first reasoned that neither the language of Proposition 64 nor the accompanying ballot materials provided to voters supported the Superior court's determination that absent class members must satisfy the Proposition's standing requirements. Neither did the Proposition's language or supporting materials indicate an intent to substantively change the UCL. Proposition 64 acted to "prevent uninjured persons from suing for restitution on behalf of others"¹—it did not alter the broad, remedial purpose of the statute, or the availability of class actions as procedural tools to effect that purpose.

The court found additional support for its holding by reference to federal class action principles, which, as the court understood them, impose standing requirements only on class representatives, and not on all absent class members.

Finally, the court reasoned that the UCL's remedies provisions, which were unaltered by Proposition 64, lent support to its holding. First, the primary form of relief under the UCL, an injunction, would not serve its intended purpose of preventing future harm if it benefitted only those who could show injury. Further, the language of Section 17203 regarding restitution is "patently less stringent" than the standing requirement articulated by Proposition 64, and thus does not suggest an intent to

require individualized entitlement to restitution.

Justice Baxter, joined by Justices Chin and Corrigan, dissented from this portion of the court's opinion, writing that both Proposition 64 and federal class action principles support the trial court's view that all class members must satisfy Proposition 64's standing requirements. Justice Baxter viewed the majority's opinion as undermining Proposition 64's primary goal of limiting UCL class actions to plaintiffs who were actually injured. Indeed, Justice Baxter noted that the court's decision would permit a single named plaintiff who could satisfy the UCL's standing requirements to maintain a UCL class action even if it was the only member of the plaintiff class that could.² In his view, the Court was reopening the door to the sort of abusive suits that Proposition 64 had been enacted to curb.

Establishing Causation and Injury under the UCL

In the second part of its opinion, the court determined that Proposition 64's requirement that a UCL private plaintiff establish that he was injured "as a result of" the unfair competition required a showing of actual reliance. This holding is, however, limited. First, the Court explicitly restricted its holding to the "fraudulent" prong of the UCL, leaving for another day the issue of how Proposition 64's causation requirement impacts the "unfair" and "unlawful" prongs.

Second, the court stated that although a plaintiff must establish that the allegedly fraudulent act was an immediate cause of the injury, he need not establish that it was the only—or even a decisive—cause. In so holding, the court parted from past cases in which California courts have distinguished the UCL "fraudulent" prong from common-law fraud and instead equated it with deception (see e.g., *Kasky v. Nike, Inc.* 27 Cal. 4th 939, 951 (2002); *Schnall v. Hertz Corp.* 78 Cal. App. 4th 1144, 1167 (2000)); the court instead looked to the law of fraud to analyze the reliance element. Accordingly, the Court articulated a "framework" for what a plaintiff must plead and prove in fraudulent-prong actions under the UCL, including that: actual reliance may be presumed where the misrepresentation is material; a plaintiff complaining of exposure to a long-term advertising campaign need not plead with an unrealistic degree of specificity reliance on a particular advertisement or statement; and an allegation of reliance is not defeated by the availability of alternative information.³

Implications for Companies Doing Business in California

The Supreme Court's decision presents a mixed bag for companies doing business in California. On one hand, the court limits Proposition 64's standing requirement to named plaintiffs only, thus resuscitating the possibility of abusive UCL class actions that many hoped Proposition 64 had eliminated. As the dissent notes, so long as the named class representative can satisfy the UCL's standing requirements, the fact that other members of a purported class cannot will not defeat class certification. On the other hand, the court's second holding gives content to Proposition 64's "as a result of" causation standard by requiring plaintiffs to plead actual reliance, at least in the context of claims based on the "fraudulent" prong of the UCL.

Even the second holding, however, may provide little comfort to businesses due to its restricted reach. While the first part of the Court's ruling applies universally to all UCL class actions, the "actual reliance" requirement is limited to individual and class actions brought under the UCL's "fraudulent"

prong. Thus, the decision leaves open the question of what standard of causation applies to "unlawful" and "unfair" UCL actions—a question that is likely to be vigorously disputed in the many UCL individual and class actions businesses active in California may experience in years to come.

¹*Majority Opinion* at 14, quoting *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 at 232 (2006).

²*Dissent* at 11.

³*Majority Opinion* at 33.

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