California: Unfair Competition Law

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The consumer protection statutory scheme known as the Unfair Competition Law (UCL) has been in effect in various forms in California since the 1930s.[2] By its terms, it affords consumers remedies against unfair competition, which is broadly defined in the statute as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[3] Particularly in the last twenty to thirty years, courts have read this vague statutory language in ever broader terms, so that many business practices can be prosecuted in court as "unlawful, unfair or fraudulent" acts in violation of the UCL.[4] The court's broad reading of the UCL has been restricted by the fact that remedies are somewhat limited. A consumer can get injunctive relief or restitutionary disgorgement to restore money or property taken by means of a UCL violation, but he cannot get compensatory or punitive damages.[5]

Despite the limited remedies that the statute allows, prior to the enactment of Proposition 64, plaintiffs frequently brought UCL actions in part because recovery was enhanced by a standing provision that allowed "any person" to sue on behalf of the general public as a self-appointed

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[2] Cal. Bus. & Prof. Code § 17200 *et seq.* (West 2004).
[3] *Id.*
[4] *See, e.g., Californians For Disability Rights v. Mervyn's, LLC*, 138 P.3d 207 (Cal. 2006) (Californians for Disability Rights sought an injunction barring practices that allegedly violated the UCL, including "that pathways between fixtures and shelves in Mervyn's stores were too close to permit access by persons who use mobility aids such as wheelchairs, scooters, crutches and walkers.").
[5] *See, e.g., Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1143-1152 (Cal. 2003); *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116, 126-137 (Cal. 2000).

attorney general.[6] This provision made it possible for attorneys to file UCL suits even if they did not represent specific consumers who had been subjected to a company's unfair business practices.

California voters restricted the scope of the UCL by passing Proposition 64 in 2004. The proposition limited the UCL by eliminating the "any person" standing rule.[7] Thus, Proposition 64 brought UCL cases more closely in line with generally applicable standing requirements by providing that only a person who has suffered an injury in fact, having lost money or property, as a result of an unfair business practice has standing to sue under the UCL.[8] It further limited the scope of the UCL by requiring plaintiffs wishing to sue as representatives of a class of consumers to bring a class action suit rather than allowing them to pursue the "non-class" collective action alternatives that had been previously allowed.[9]

In May, the California Supreme Court addressed the question of whether all the unnamed plaintiffs in a class action suit are required to have standing according to Proposition 64 in *In re Tobacco II Cases*.[10] The plaintiffs alleged that the defendants had violated the UCL "by conducting a decades-long campaign of deceptive advertising and misleading statements about

[6] *Compare* Cal. Bus. & Prof. Code § 17203 (West 2004) (The court may make orders and judgments "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."), *with* Cal. Civ. Proc. Code § 367 (West 1992) ("Every action must be prosecuted in the name of a real party in interest, except as otherwise provided by statute.").
[7] *See, e.g.*, *Californians For Disability Rights*, 138 P.3d at 228 (holding that Proposition 64 applied to pending actions).
[8] *See In re Tobacco II Cases*, 207 P.3d 20, 41-42 (Cal. 2009) (Baxter, J., concurring and dissenting).
[9] *See id.*at 42.
[10] 207 P.3d 20 (Cal. 2009).

the addictive nature of nicotine and the relationship between tobacco use and disease."[11] They sought certification of a class of "[a]ll people who at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 to April 23, 2001, and who were exposed to Defendants' marketing and advertising activities in California."[12] The Superior Court of San Diego County held that this class should be decertified because the plaintiffs could not prove that all members of the class had standing pursuant to Proposition 64.[13] The Court of Appeal affirmed.[14] The California Supreme Court then granted review.

In an opinion issued on May 18, 2009, four members of the California Supreme Court construed Proposition 64 to mean that consumers who could not themselves establish standing to bring a UCL action in their own name under the new rule could nonetheless be included in a class of plaintiffs represented by a single named individual who can establish standing. In holding that Proposition 64's "standing requirements are applicable only to the class representatives, and not all absent class members,"[15] the court effectively read into Proposition 64 an intent to carve out UCL claims from the rule that class actions are procedural devices for case management, and are not intended to alter the substantive rights that the parties would have if the same claims were pursued individually.[16] Further, because Proposition 64 left the remedies provision of the UCL

[11] *Id.* at 25.
[12] *Id.*
[13] *In re Tobacco II Cases v. Philip Morris, Inc.*, No. JCCP 4042, 2005 WL 579720, at *1 (Cal. Super. Ct. March 7, 2005).
[14] *In re Tobacco II Cases*, 47 Cal.Rptr.3d 917, 926,(Cal. Ct. App. 4th Dist. 2006).
[15] *In re Tobacco II Cases*, 207 P.3d at 25.
[16] *See, e.g.*, *City of San Jose v. Super. Ct. of Santa Clara County*, 12 Cal.3d 447, 462 & n.9 (Cal. 1974) (stating the principle that "[c]lass actions are provided only as a means to enforce substantive law"); *Feitelberg v. Credit Suisse First Boston, LLC,* 36 Cal. Rptr.3d 592, 603-04 & 606 (Cal. Ct. App. 6th Dist. 2005) (holding that "[c]lass certification does not serve to enlarge substantive rights or remedies" and that "[i]f a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class").

unchanged, the court held that unnamed plaintiffs may obtain a monetary award "'to restore to any person in interest any money or property, real or personal, which *may have been acquired*' by means of the unfair practice"[17] even if there is no evidence that they suffered an actual injury caused by the claimed acts of unfair competition.[18]

Finally, the court held that, in an action based on allegedly deceptive business practices, the named plaintiff (either in an individual action or as the named representative in a class action) must nominally show actual reliance on the claimed deception, but such reliance by the individual may be inferred from evidence that the defendant's misrepresentation was "material."[19] The court did not explain how this approach can be squared with the court's earlier flat rejection of such a "fraud on the market" theory of liability.[20] It will be interesting to see how lower courts interpret this part of the court's opinion in future cases.

Three justices disagreed with the majority's approach. Justice Baxter, in a concurring and dissenting opinion, called the court's holding that unnamed plaintiffs need not satisfy the injury-in-fact and causation requirements of Proposition 64 "mistaken" and noted the potentially perverse effect that the court's reasoning could have on cigarette companies' liability in UCL suits:

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[17] *In re Tobacco II Cases*, 207 P.3d at 35 (quoting Cal. Bus. & Prof. Code § 17203 (West 2004)) (emphasis in the opinion).

[18] *See id.* at 34-36 (arguing that "to hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have 'lost money or property as a result of the unfair competition' (§ 17204) would conflict with the language in section 17203 authorizing broader relief").

[19] *See id.* at 39-40 (explaining that "[a] misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question'" (quoting *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 919 (Cal. 1997)).

[20] *See Mirkin v. Wasserman*, 5 Cal.4th 1082, 1090-1098 (Cal. 1993).

> [S]o 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 during the period at issue, regardless of whether false claims contained in those ads had anything to do with any class member's decision to buy and smoke cigarettes.[21]

According to critics, the California Supreme Court's decision in *In re Tobacco II*, nullified the effect of Proposition 64 on class actions.[22] With California and the nation's economy struggling, businesses should perhaps be concerned that the court's recent holding will increase consumers' ability to bring class action suits under the UCL without meeting traditional standing requirements despite California voters' endorsement of Proposition 64, resulting in expensive litigation.

[21] *In re Tobacco II Cases*, 207 P.3d at 42 (Baxter, J., concurring and dissenting).
[22] *Id.* at 44-45 ("[T]he majority's holding encourages the very sort of abusive shakedown that Proposition 64 was designed to curb.").