FENWICK & WEST LLP

Litigation Alert

New Prop 64 Decision Affects Class Actions Under California's Unfair Competition Law: *Pfizer Inc. v. Superior Court*

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Under the California Court of Appeal's July 11, 2006 decision in *Pfizer Inc. v. Superior Court*, class action plaintiffs seeking to bring unfair business practices or false advertising claims against California businesses now face a greater preemptive challenge. Both class representatives and proposed class members must have sustained actual injury from the alleged unfair practices – not just the "mere likelihood" of such – and must have actually relied on the allegedly unfair practices or false advertisements. *Pfizer* thus imposes a much higher standing requirement for plaintiffs seeking to file class actions under California's unfair competition laws. This presents a potentially significant benefit to businesses seeking early dismissal of frivolous claims.

I. Proposition 64 Changed California's Unfair Competition Laws

Before its amendment in November 2004, California Business & Professions Code sections 17200 (California's Unfair Competition Law, or "UCL") and 17500 (California's False Advertising Law, or "FAL") entitled private parties to bring representative actions on behalf of the general public (the so-called "private attorney general suits"). Under the then-existing statutes, any person could file suit on behalf of the public without having personally sustained loss as a result of the actions alleged. This set the stage for abuse of the statutes by plaintiffs and their lawyers suing only to generate and recoup windfall attorneys' fee awards. In response to the growing number of frivolous suits and the threat of large attorneys' fee awards, California voters passed Proposition 64 in November 2004. Proposition 64 amended the UCL and FAL to, among other things, eliminate the right of private plaintiffs to sue on behalf of others unless (1) they complied with the procedural requirements applicable to class action lawsuits, and (2) suffered "injury in fact." Cal. Bus. & Prof. Code §§ 17203, 17204, 17535.

II. Interpreting the Effects of Proposition 64

Since Proposition 64's modification of the UCL and FAL, California courts have been faced with construing how its changes affect plaintiffs' standing requirements. In *Pfizer Inc. v. Superior Court*, No. B188106, ___ Cal.App.4th ___ (Jul. 11, 2006), the 2nd District Court of Appeal interpreted Proposition 64's "injury in fact" and "actual reliance" standards. *Pfizer* plaintiff Steve Galfano had obtained class certification to bring false advertising claims against Pfizer (the manufacturer of Listerine) in response to an advertisement claiming that Listerine could replace dental floss in reducing plaque and gingivitis. The certified class included "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." Slip. Op. at 2. Defendant Pfizer sought a writ of mandate to overturn the superior court's order on the ground that the class was overbroad. *Id*. The Second District Court of Appeal agreed, finding that because the class included plaintiffs who had not been actually injured or had not actually relied on the false advertising, "the class definition is plainly overbroad and must be set aside." *Id*.

In so holding, the Court determined that in order to have standing to sue under Proposition 64, both representative plaintiffs *and* all other proposed class members must have suffered "injury in fact" and lost money or property as a result of the fraudulent business practice or advertisement. *Id*. at 5. That insures compliance with California Code of Civil Procedure Section 382, which requires class representatives to have claims typical of the class. As the Court explained, "If Galfano alone, but not the class members, suffered injury in fact and lost money or property as a result of Pfizer's alleged unfair competition or false advertising, then by definition his claim would not be typical of the class. Rather, Galfano's claim would be demonstrably atypical." *Id*. at 14. **This "injury in fact" requirement has the effect of preventing plaintiffs from lodging false advertising claims based on the "likelihood of deception."** *Id*. The Court expressly declined to follow any decisions holding that a "likelihood of deception" would have sufficed. *Id*. at 14-15.

In addition, the Court held that Proposition 64 requires proposed class members to have **actually relied** on the false advertisement at issue. *Id*. at 17. The Court found the "actual reliance" element was inherent in Proposition 64's requirement that the injury in fact be "a result of" the fraudulent business practices or false advertising. *Id*. To that end, the Court followed *Laster v. T-Mobile USA, Inc.*, 407 F.Supp.2d 1181 (S.D. Cal. 2005) in setting forth the proper statutory interpretation, and declined to follow *Anunziato v. eMachines, Inc.*, 402 F.Supp.2d 1133 (C.D. Cal. 2005). *Id*. at 18. Under this "actual reliance" standard, Galfano and the other class members "must have purchased the Listerine in reliance on the allegedly false or misleading representations or advertisements and as a result suffered injury." *Id*. at 19. Because there was no showing that all class members had such actual reliance, the certified class was overbroad.

III. Implications of *Pfizer*

As the *Pfizer* panel itself noted in its opinion, Proposition 64 "has had the effect of dramatically restricting these consumer protection measures," making it far more challenging for a private attorney general to sustain a UCL or FAL cause of action, and placing the onus on state attorney generals and/or local public prosecutors to police business practices. *Id*. at 20. Such an outcome is in keeping with the purposes of Proposition 64, itself, which aimed to halt UCL abuses by deterring frivolous claims brought by plaintiffs who had not suffered actual injury. *Id*. at 10.

The fate of the Court of Appeals' decision in *Pfizer*, however, may soon be determined by two pending California Supreme Court decisions on Proposition 64's retroactivity. In *Californians for Disability Rights v. Mervyn's LLC ("Mervyn's")*, S131798, and *Branick v. Downey Savings and Loan Ass'n*. *("Branick")*, S132433, the California Supreme Court is considering whether Proposition 64 applies retroactively to UCL and FAL cases pending at the time of the measure's enaction. The Court may base its decision on the determination of whether Proposition 64 affected substantive or procedural rights: If Proposition 64 affected mere procedural rights, it could be deemed to apply retroactively, whereas if it affected a plaintiff's substantive right to bring suit, then it would apply only prospectively.

Pfizer may be read to suggest that Proposition 64 affected a plaintiff's substantive rights to bring UCL claims, since it holds that plaintiffs must show "injury in fact" and actual reliance. Under such an interpretation, the California Supreme Court may be less inclined to find Proposition 64 retroactive. Opinions in *Mervyn's* and *Branick* are expected before the end of August 2006.

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