FENWICK & WEST LLP

Litigation Alert

Supreme Court of California Holds Proposition 64 Applicable to Pending Unfair Competition Law Cases

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In two unanimous decisions – *Californians for Disability Rights v. Mervyn's LLC*, S131798, ___Cal. 4th ___ (July 24, 2006) and *Branick v. Downey Savings and Loan Ass'n.*, S132433, ___Cal. 4th ___ (July 24, 2006) – the California Supreme Court ruled today that ***Proposition 64 applies to cases pending at the time of its enactment***. Proposition 64 is the November 2004 measure that amended Business and Professions Code Sections 17200 and 17500 by requiring plaintiffs suing as public "representatives" to have suffered actual injury and meet class representative certification requirements in order to have standing to sue. The Court also held that trial judges have discretion to grant plaintiffs leave to amend so that they may substitute a plaintiff who meets these heightened standing requirements. The *CDR* and *Branick* decisions resolve a split of authority on the issue, and stand to significantly impact pending unfair competition litigation filed before November 2004.

I. Deciding Whether Proposition 64 Applies to Cases Pending at the Time of Proposition 64's Enactment

In November 2004, California voters passed Proposition 64 to purge the abusive use of private "representative" actions under California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL") (respectively, California Business & Professions Code Sections 17200 and 17500, *et seq.*). Previously, private parties were able to act as "private attorney generals" and bring representative UCL and FAL actions on behalf of the general public without having suffered any personal or monetary loss as a result of the actions alleged. Many attorneys and organizations began to file frivolous UCL and FAL suits – often by soliciting willing representative plaintiffs – in an attempt to recoup windfall attorneys' fees available in certain representative actions. Under Proposition 64's amendments, private plaintiffs can no longer sue on behalf of others unless they comply with the statutory requirements for class actions, and have suffered actual personal or monetary injury, themselves. Cal. Bus. & Prof. Code §§ 17203, 17204, 17535.

After Proposition 64's amendment of the UCL and FAL, California courts grappled with determining whether its amendments applied to cases pending at the time the measure went into force, and the related question of whether representative plaintiffs could have leave to amend to comply with the new standing requirements. The courts of appeal came down on both sides of the issue. Until today, the controlling and only citable authority on the question held that Proposition 64 does apply to cases pending on November 3, 2004. See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1260-62 (2005). However, the California Supreme Court was granting review over nearly every other appellate decision. On May 31, 2006, the California Supreme Court heard oral argument on both *CDR* and *Branick* to resolve the split of authority, and today, the conflict was resolved.

II. The *CDR* Case

In *Californians for Disability Rights v. Mervyn's LLC*, the Supreme Court held that the amended standing provisions of the UCL and FAL apply to cases already pending when Proposition 64 took effect. In *CDR*, the public interest group Californians for Disability Rights ("CDR") brought UCL claims against department store chain Mervyn's for alleged unlawful business practices in their failure to provide sufficient access space for disabled persons. In early 2004, the trial court held in favor of Mervyn's in a bench trial, and CDR appealed. While the case was pending on appeal, Proposition 64 passed and Mervyn's filed a motion to dismiss due to the plaintiff's lack of personal injury, and thus lack of standing under the new requirements. The court of appeals denied Mervyn's motion, finding that Proposition 64 did not apply to pending cases, and Mervyn's appealed to the California Supreme Court.

The Supreme Court reversed, and held Proposition 64's amendments applicable to cases pending as of November 3, 2004. However, the Court was careful to explain that applying Proposition 64 to pending cases was not a "retroactive" application of the law – the term that CDR and lower courts had used to describe it – because Proposition 64 does not "change the legal consequences of past conduct by imposing new or different liabilities." Slip. Op. at 8. Proposition 64 did not affect substantive rules governing the types of business or competitive conduct subject to UCL/FAL claims, or eliminate any

right of damages recovery. *Id*. It simply prevented uninjured private parties from suing for restitution on behalf of others. Therefore, its application – even to cases pending at the time of its enactment – is not "retroactive" as California precedent has defined it.

III. The *Branick* Case

In the companion case to *CDR*, the Supreme Court held in *Branick v. Downey Savings and Loan Ass'n.*, 126 Cal. App. 4th 828 (2005) that, subject to the trial court's discretion in granting it, plaintiffs may be given the right to amend their complaints to attempt to comply with the heightened standing requirements.

Branick involved two private attorney general plaintiffs, Thomas Branick and Ardra Campbell, who filed UCL and FAL claims against Downey Savings and Loan Association for various practices involving document recording fees charged in the course of real estate financing transactions. As in *CDR*, the named plaintiffs did not suffer any personal injury because they had not personally taken loans out. The trial court found that plaintiffs' claims were preempted under federal law, granted defendant's motion for judgment on the pleadings, and plaintiffs appealed. Proposition 64 was passed during the pendency of the plaintiffs' appeal, and the Court of Appeal determined that plaintiffs lacked standing because Proposition 64 applied to pending cases.

In *Branick*, California's Supreme Court was tasked with determining whether representative plaintiffs could have leave to amend to comply with Proposition 64's new standing requirements. That question, like the issue of Proposition 64's applicability to pending cases, is not addressed explicitly in the statute itself. The Court found that imposing a flat ban on allowing plaintiffs an opportunity to attempt to comply would not further any articulated goal of Proposition 64. Slip Op. at 5. On the other side of the coin, allowing plaintiffs an attempt to comply with Proposition 64 would not interfere with or violate any policy goals. *Id*. at 6. Therefore, the Court saw no reason to universally bar plaintiffs from having the opportunity to attempt to comply with Proposition 64's heightened standing requirements, and affirmed the decision below.

However, the Court did find that the determination of whether plaintiffs should actually be granted leave to amend should be decided by the trial court in each individual case. Slip. Op. at 6-7. Because the plaintiffs in Branick had never sought leave to amend to comply with Proposition 64, there was no existing trial court determination to review on appeal, and the Supreme Court declined to render an advisory opinion. *Id*. at 7. The Court cautioned that plaintiffs seeking leave to amend "may not 'state facts which give rise to a wholly distinct and different legal obligation against the defendant.'" Id. at 8 (citing *Klopstock v. Superior Court*, 17 Cal. 2d 13, 20 (1941)).

IV. Implications of the Court's Decisions

The *Branick* and *CDR* decisions stand to significantly impact pending litigation. Now, defendants can move to dismiss cases pending as of November 3, 2004, for which plaintiffs do not (and potentially cannot) meet the new UCL and FAL standing requirements. These rulings should reduce the threat of exorbitant attorneys' fees being levied against California's businesses and corporations when unaffected plaintiffs have filed frivolous suits. With some evenhandedness, however, the California Supreme Court's decisions also provide a compromise for plaintiffs. At the trial court's discretion, plaintiffs may be afforded an opportunity to amend their complaints to attempt to comply with the new standing protocol.

These holdings are likely to have a great effect on the 2nd District Court of Appeal's recent decision in *Pfizer Inc. v. Superior Court*, No. B188106, ___ Cal.App.4th ___ (Jul. 11, 2006). In *Pfizer*, the court held that Proposition 64 must be interpreted to require both class representatives and proposed class members to (1) have sustained *actual injury* from the alleged unfair practices, and (2) demonstrate *actual reliance* on the allegedly unfair practices or false advertisements. After today's Supreme Court rulings, the Plaintiffs' bar will likely argue that *Pfizer's* holdings are inconsistent with the Supreme Court's determination that substantive rights are not affected by Proposition 64. *See CDR*, Slip. Op. at 8. In contrast, defense lawyers will argue that *Pfizer* carries an independent analysis of Proposition 64 that does not depend on whether substantive or procedural rights were at stake. This debate is likely to become the next 17200 hot topic surrounding California Business & Professions Code Section 17200.

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