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## **California Supreme Court Rules that Proposition 64 Applies to Pending Unfair Competition Cases**

By Robert R. Pohls

California's Unfair Competition Law ("UCL") (Bus. & Prof. Code §17200 et seq.) was enacted to protect consumers as well as competitors from unlawful, unfair or fraudulent business acts of practices by promoting fair competition in commercial markets for goods and services. *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949. As originally enacted, the UCL permitted *any person* to sue on behalf of the general public for UCL violations. Indeed, (former) section 17204 of the Business & Professions Code provided that "[a]ctions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel ... or any city attorney ... or by any person acting for the interests of itself, its members or the general public." (Stats. 1993, ch. 926, §2, italics added). To state a cause of action under the former UCL, then, a private plaintiff who had not suffered any injury could sue to obtain relief for others. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561.

It soon became evident, though, that the UCL was prone to certain abuses. In a general election on November 2, 2004, California voters therefore passed Proposition 64, an initiative measure that imposed stricter standing requirements under the UCL which were designed to prevent lawyers from bringing "frivolous lawsuits against small businesses even though they had no client or evidence that anyone was damaged or misled." (Ballot Pamphlet, General Election (Nov. 2, 2004), Argument in Favor of Prop. 64, p.40). In the words of the initiative's proponents, the former law had been "misused by some private attorneys who '[f]ile frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit,' '[f]ile lawsuits where no client has been injured in fact,' '[f]ile lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant,' and '[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision'." (Prop. 64, §1, subd. b)(1)-(4)).

To remedy those abuses, Proposition 64 made two significant changes to the UCL. First, it amended section 17203 of the Business & Professions Code to provide that a private party may pursue a representative action only if that person has complied with the class action certification requirements set forth in section 382 of the California Code of Civil Procedure. See, Bus. & Prof. Code §17203 (as amended). Second, the measure amended section 17204 of the Business & Professions Code to provide that only plaintiffs who have suffered an injury in fact and have losts money or property as a result of unfair competition may prosecute actions under the UCL. See, Bus. & Prof. Code §17204 (as amended).

Taken together, those portions of Proposition 64 prohibit the filing of new UCL actions which involve "representative" claims unless the plaintiff(s) can meet the standing requirements traditionally required for class actions. The changes enacted by Proposition 64 therefore are likely to generate new battles over whether a UCL plaintiff actually was harmed by the alleged conduct which forms the basis of his or her claims or, instead, is proceeding in a representative



capacity. See, e.g., *Pfizer, Inc. v. Superior Court* (B188106) [each member of putative class asserting UCL claims must have suffered an injury in fact or lost money or property as a result of the alleged violation; mere likelihood of harm to members of the public no longer is sufficient]. However, because the initiative did nothing to clarify whether and how the new standing requirements might be applied to UCL actions that already had been filed, Proposition 64 also raised important questions about a plaintiff's ability to proceed with representative claims under the UCL that were the subject of a pending lawsuit.

The California Supreme Court first considered that question in *Californians for Disability Rights v. Mervyn's LLC* (July 24, 2006, S31798), a case in which it ruled that Proposition 64 is retroactive and therefore governs pending cases. In other words, plaintiffs who had filed lawsuits prior to Proposition 64's enactment and who had not suffered an injury in fact or themselves lost money or property as a result of the alleged unfair competition lost their standing to prosecute claims under the UCL.

In the companion case of *Branick v. Downey Savings & Loan Association* (July 24, 2006, S132433), however, the California Supreme Court acknowledged that plaintiffs whose standing was revoked by Proposition 64 could possibly amend their complaints to substitute new plaintiffs who meet the new standing requirements. Stated differently, the *Branick* court held that Proposition 64 does not affect the ordinary rules governing the amendment of pleadings or the relation back of such amendments. The decision in *Branick* therefore signals that plaintiffs in pending UCL cases who have lost their standing under Proposition 64 can use Code of Civil Procedure Section 473 to substitute a new plaintiff who does meet the new standing requirements "in the furtherance of justice, and on any terms as" the court, in its discretion, considers to be proper.

Proposition 64 therefore provides defendants with a means of dismissing representative claims under the UCL. However, it also will require that the parties in UCL lawsuits be prepared to litigate the question of whether the plaintiff was (or was not) harmed by the alleged conduct upon which the unfair competition claims are based.

### **About the Author**

*Rob Pohls* has been shaping California insurance law for more than 20 years. He is the principal of *Pohls & Associates*, a firm in the San Francisco Bay Area that he established in 1999 to represent life, health, disability and long term care insurance companies in bad faith, ERISA and other forms of complex litigation. As a member of the Association of Life Insurance Counsel and a former Chair of the American Bar Association's Health & Disability Insurance Law Committee, he is a prolific author and frequent speaker on issues of interest to the insurance and financial services industries. More information about Rob, his firm and his practice is available online at: [www.califehealth.com](http://www.califehealth.com). Contact him by e-mail at: [rpohls@califehealth.com](mailto:rpohls@califehealth.com).