Class Action Satisfaction?

The 'In re Tobacco II Cases' decision will invite litigants to seek 'remedies' for injuries that don't even exist.

By Jeffrey LeVee, Christopher Lovrien and Michael Tunick

The California Supreme Court's decision in *In re Tobacco II Cases* destroys Proposition 64 even as it purports to implement it. The 4-3 decision potentially permits plaintiffs who have not suffered injury to band together with thousands of uninjured class members to seek monetary restitution and injunctive relief provided they can find just one plaintiff who actually was injured to serve as the named class plaintiff. The plaintiffs' bar is ecstatic. But for the rest of us in this state, the decision will drive companies and jobs out of California to "remedy" injuries that do not even exist.

The court's decision suggests an unwelcome return to the pre-Prop. 64 days, when California's Unfair Competition Law permitted plaintiffs who had no injury to file suit and recover on behalf of the general public. The law did not require plaintiffs to show that they, or anyone else, had been injured. Instead, plaintiffs needed only to show that the defendant's conduct was likely to cause harm. The representative action did not even require the named plaintiffs to show that their claims were typical of the class (it was a class action without class certification protections). Some argued that the lax liability elements of the law were balanced by limited remedy provisions, but for companies threatened with huge monetary restitution and attorney fees to prevailing (uninjured) plaintiffs, it was of little consequence how the courts characterized the money going out the door.

In November 2004, voters passed Prop. 64 to eliminate frivolous lawsuits by individuals who had not been injured (including the well-publicized efforts of the Trevor Law Group). Prop. 64 limited standing to individuals who suffered "injury in fact and … lost money or property as a result of" the challenged conduct. Additionally, the measure amended the Unfair Competition Law to require that representative actions comply with Code of Civil Procedure Section 382, the statute governing class actions.

The Supreme Court in *In re Tobacco II* addressed two questions: First, it unanimously held that under the plain meaning of the language of Prop. 64, a plaintiff has to show not just injury in fact but also causation. More specifically, under the Unfair Competition Law's fraud prong, a plaintiff must demonstrate actual reliance upon the allegedly fraudulent statements. Then, the court held that in an Unfair Competition Law class action, the injury and causation requirements apply to the named class representative but not any of the potentially thousands or tens of thousands of absent class members. This latter holding rejects the clear purpose of Prop. 64 while purporting to pay heed to its precise language. The court's analysis rests on a tortured reading of the plural versus the singular and a reworking of the limits of class actions that potentially has impact beyond the Unfair Competition Law setting.

Writing for the majority, Justice Carlos Moreno parsed post-Prop. 64 Section 17203, noting that "the references in section 17203 to one who wishes to pursue UCL claims on behalf of others are in the singular; that is, the 'person' and the 'claimant' who pursues such claims must meet the standing requirements of section 17204 and comply with Code of Civil Procedure section 382." Consequently, Moreno concluded "only this individual — the representative plaintiff — is required to meet the standing requirements."

The majority also analyzed Prop.64's declarations of purpose, which sought to prohibit "private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact." Moreno found that a lawsuit in which the class representative has standing is not one in which plaintiffs' lawyers have "no client" who has been injured. From this myopic reading of the proposition's purpose, the majority concluded that it did not alter the way in which class actions operate in the context of the Unfair Competition Law.

This strained reading of the text ignores that Prop. 64 expressly required that any representative claim (other than by the attorney general), comply "with Section 382 of the Code of Civil Procedure." Well-settled principles of class action law under Section 382 require that *all members* of the putative class have standing to bring the claim in their own right. See, e.g., *Collins v. Safeway Stores Inc.*, 187 Cal.App.3d 62 (1986). As the dissent pointed out, in holding otherwise, "the majority thus determines, contrary to the electorate's clear directive, that normal class action rules do not apply to UCL private representative actions governed by Proposition 64."

Likewise, California law is clear that class action procedures cannot be used to alter substantive rights. See, e.g., *City of San Jose v. Superior Court*, 12 Cal.3d 447 (1974). But altering substantive rights is exactly what the majority's opinion does. It allows large groups of potential plaintiffs who have no injury, and thus no standing under Prop. 64, to band together and sue simply by finding one plaintiff with actual injury to serve as class representative. That result is completely contrary to traditional California class action law and the very purpose of Prop. 64. It also completely ignores the traditional class requirement that a named plaintiff be typical of the absent class members. A named representative who is the only member of the class who suffered actual injury could hardly be more atypical.

According to the majority, "other than the requirement that the representative plaintiff comply with Code of Civil Procedure section 382, the ballot materials contain no reference whatsoever to class actions." As an initial matter, the Voter Information Guide made clear the electorate intended "that unfair competition lawsuits initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits." More importantly, the requirement that the representative plaintiff comply with Code of Civil Procedure Section 382 clearly should be read to require Unfair Competition Law plaintiffs comply with traditional class action requirements.

Ultimately, the court's decision "turns class action law upside down and contravenes the initiative's plain intent." Plaintiffs' counsel now need one, and only one, allegedly injured person to serve as the named plaintiff in an Unfair Competition Law class action. As a result, the Supreme Court's decision no doubt will reinvigorate the use of Section 17200 as a tool by which plaintiffs attempt to extract money from businesses. There had been a strong trend since the passage of Prop. 64 to reject putative class actions that involved no real injury to consumers; this new opinion will reverse that trend and leave California businesses exposed to more costly litigation, at a time when California least needs this result

Perhaps the majority was swayed by the defendants' businesses (tobacco) and the nature of their allegedly wrongful conduct. But as the saying goes, bad facts make bad law. The voters made a policy choice when they enacted Prop. 64. This decision substitutes the court's own opinion of what the law should be.

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There is no basis for charges that the Supreme Court's ruling will open the floodgate of frivolous lawsuits.

By Erwin Chemerinsky

The California Supreme Court's recent decision in *In re Tobacco II Cases* is a major victory for consumers in California. The California Supreme Court followed the literal language of Proposition 64 and the intent of the voters and preserved the class action as a crucial device for remedying harms suffered by large numbers of people.

The decision involves a lawsuit initially filed in 1997on behalf of residents of California who had smoked cigarettes against 11 tobacco defendants, including the major tobacco companies.

The lawsuit alleged that the defendants engaged in a "fraudulent course of conduct" that spanned decades in the marketing of cigarettes.

The issue before the California Supreme Court was whether Prop. 64, adopted by the voters in 2004, prevented the class action suit against the tobacco company from going forward. Prop. 64 amended the Unfair Competition Law in California to prevent abusive lawsuits. It authorizes unfair competition suits by the attorney general or a district attorney or a county counsel "or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."

In construing this language, the California Supreme Court faced two questions. First, in a class action for unfair competition, is it sufficient that the named plaintiff meet the requirement for "injury in fact" or must all unnamed class members fulfill this requirement?

Second, what must be demonstrated in order to show that the loss "resulted" from the unfair competition?

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The court answered both questions in favor of protecting injured Californians. As to the former, the court held that the "standing requirements are applicable only to the class representative, and not all absent class members." Although the court came to this conclusion by a 4-3 margin, the majority is clearly right under every principle of statutory construction.

Prior to Prop. 64, lawyers could bring unfair competition suits on behalf of the public without needing to have a plaintiff who was actually injured. This led to abusive lawsuits.

Prop. 64 changed this by requiring that there be a "person who has suffered injury in fact and has lost money or property as a result of the unfair competition." "Injury in fact" is language borrowed from the federal law of standing. The U.S. Supreme Court has held that a plaintiff may sue in federal court only by demonstrating that he or she has been, or imminently will be, injured.

The language of Prop. 64 and its legislative history make clear that it requires only that the named plaintiff, and not every member of a class action, meet this requirement. As Justice Carlos Moreno noted in his majority opinion, Prop. 64 is written in the singular: It says that a "person" may bring a claim by alleging injury in fact.

Nothing in the language of Prop. 64 says, or even remotely implies, that a class action requires a showing that each member of the class meet its requirements.

Nor do the ballot materials support such an initiative. The court carefully reviewed the ballot materials and reaffirmed its earlier conclusion in *California for Disability Rights v. Mervyn's LLC*, 39 Cal.4th 223 (2006): "The intent of the voters of California in enacting Proposition 64 was to limit such abuses by 'private attorneys from filing lawsuits where they have no client who has been injured in fact.'" In fact, the supporters of Prop. 64 were explicit that it "[p]rotects your right to file a lawsuit if you've been damaged."

> **Those who speak in apocalyptic terms about the flood of frivolous suits are ignoring all of the procedural safeguard in California law, like federal law, that limit class action suits.**

Nothing in Prop. 64 or its accompanying ballot materials even remotely suggests that it was meant to change the traditional practice of class action suits that the focus in certification is on the named plaintiff. This is the law in federal court in class action suits and it has long been the law in California. A contrary interpretation, requiring that each member of the class show actual injury, would have created an insurmountable obstacle to many class action suits. Such suits are often the only way of challenging widespread deceptive practices.

As to the second issue, the California Supreme Court held that requirement that the harm be "as a result of" the unfair competition necessitates a showing of "actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions."

But the court stressed that this does not require "the class representative to plead or prove an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements when the unfair practice is a fraudulent advertising campaign."

In other words, a plaintiff does not need to "demonstrate individualized reliance on specific misrepresentations to satisfy the reliance requirement." Nor need it be shown that the false advertising was the sole cause of the purchases.

The court was unanimous as to this aspect of its holding; the dissent expressly agreed with the majority as to the requirement for causation under Prop. 64. This interpretation follows the traditional requirement for causation in fraud cases. Any other interpretation would have created an unprecedented, insurmountable obstacle to relief in many cases.

Critics of the California Supreme Court's decision say that it will open a floodgate of frivolous lawsuits. There is no basis for this fear. The California Supreme Court rightly interpreted Prop. 64 as imposing a standing requirement for injury in fact like that which exists in federal court. There has not been a problem with a flood of frivolous federal court suits.

Most importantly, those who speak in apocalyptic terms about the flood of frivolous suits are ignoring all of the procedural safeguard in California law, like federal law, that limit class action suits. For a class action to be certified, a judge must determine that the class is so numerous that joinder of all members is impractical, that there are questions of law or fact common to the class and that the individual parties will fairly and adequately represent the class. These requirements and judicial oversight of them inherently limit the number of class action suits.

The critics of the California Supreme Court decision really seek to eliminate class action suits to enforce the state's Unfair Competition Law. They wanted the California Supreme Court to interpret Prop. 64 to create procedural hurdles that essentially would have ended such litigation.

But that is not what Prop. 64 did. The initiative simply tightened such lawsuits by requiring that there be a plaintiff who alleged an injury in fact. In this way, it prevented abusive suits brought by lawyers who did not have an injured client, but it protected the ability to sue, including through class actions, for unfair competition. The California Supreme Court's decision carefully followed the law and protected all in the state from unfair and unscrupulous business practices.

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