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Did The California Supreme Court Put Out A "Welcome Mat" For Consumer Class Actions?

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We wish the expression "only in California" hadn't become so clichéd, but there are times when nothing less will do. This is such a time.

On May 18, the California Supreme Court got its chance in In re Tobacco II Cases, No. S147345 to decide what the voters of California meant when they enacted Proposition 64, the November 2004 initiative that sought to curtail the abuses in California's unfair competition law, Bus. & Prof. Code § 17200 ("UCL"). But a 4-to-3 decision in this case, with a vigorous dissent, suggests that California's efforts to shape a sensible class action law—or, at least, one that resembles other states' and the federal courts' class action laws—remains elusive.

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California's Section 17200 and Proposition 64. Under the old regime, anyone could sue whether harmed or not and, once in court, a plaintiff could recover classwide restitution without even certifying a class. These "nonclass class" or "private Attorney General" actions became *de rigueur*, resulting in waves of shakedown suits that swept though California industries and businesses large and small alike. Eventually, 59% of the voters said "enough is enough." Or so they thought.

Proposition 64 did two things. First, it ended "private Attorney General" actions by requiring that any relief brought on behalf of others had to comply with class action procedure. Second, it imposed a standing requirement on a private litigant, who now must show he "suffered injury in fact and has lost money or property as a result of such unfair competition." If this requirement sounds familiar, it is language that was taken verbatim from other states' "Little FTC Acts."

In re Tobacco II Cases—Background. This was a UCL class action filed in 2001 alleging that defendant tobacco manufacturers engaged in false advertising by concealing that their tobacco products contain a highly addictive drug called nicotine. This was not a personal injury case; these plaintiffs just wanted their money back for themselves and a class of smokers. All three testified in deposition, however, that the tobacco companies' public statements that allegedly downplayed the adverse health effects of nicotine had nothing to do with their decision to smoke.

The trial court certified a class of Californians who smoked one or more cigarettes during the class period, reasoning that all that was needed was proof that class members bought the product while *exposed* to the allegedly deceptive statements. But after the passage of Proposition 64, the trial court decertified the class finding that "exposure" is not enough, that actual reliance is required, and that this means individual issues predominated. The Court of Appeal affirmed.

In re Tobacco II Cases—Holding. The California Supreme Court took review as to two issues. First, does the new standing requirement apply only to the class representative, or does it apply to all absent class members. Second, what does "as a result of" mean? It reversed, and sent the case back for further proceedings.

On the first issue, the Court held that Proposition 64's "standing requirements are applicable only to the class representatives, and not all absent class members." (Slip opn., at 2.) And not content to declare just California law, the Court went on to suggest that the same rule applies under federal law. It ruled: "We therefore conclude that Proposition 64 was not intended to and does not, impose 17204's standing requirements on absent class members in a UCL class action where class requirements have otherwise been found to exist." (Id., at 28.) In a vigorous dissent, Justice Baxter wrote that this "turns class action law upside down and contravenes the initiative measure's plain intent."

On the second issue, the court held that the "as a result of" requirement "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." (Id,. p. 31.) But the majority went on to impose several limitations on this requirement:

> "[W]hile a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct. Furthermore, where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements. Finally, an allegation of reliance is not defeated merely because there was alternative information available to the consumer-plaintiff, even regarding an issue as prominent as whether cigarette smoking causes cancer. [Citations omitted]. Accordingly, we conclude that a plaintiff must plead and prove actual reliance to satisfy the standing requirement of section 17204 but, consistent with the principles set forth above, is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements where, as here, those misrepresentations and false statements were part of an extensive and long-term advertising campaign."

(Id., at 33-34.) The majority opinion could not have intended, as Justice Baxter points out in his dissent, that a person barred by Proposition 64 from filing a class action because he cannot show any personal injury or loss, may still join in an identical class action brought by another named plaintiff who does show a loss. (*See* dissent, at p. 11.)

One California plaintiff's lawyer has already noted that "the showing required now is exactly the same as what it was pre-Prop. 64," that "[i]ndividualized proof of deception, reliance and injury are not required, and that "[a]fter *Tobacco*, class certification of a UCL claim now should be as easy (or difficult, as the case may be) as it was before Prop. 64."
