

## FIVE YEARS LATER, PROPOSITION 64 STILL UNCLEAR

### BUSINESS

By Richard Kellner and Alfredo Torrijos

Today marks the five-year anniversary of Proposition 64, which amended California's Unfair Competition Law. Among other things, the Unfair Competition Law allows consumers to pursue companies that misrepresent their products and services.

The amendments brought by Proposition 64 were designed to severely restrict or even do away with the private enforcement provision of the Unfair Competition Law - a provision that was firmly established prior to 2004. During the campaign for its passage, Proposition 64 supporters successfully portrayed the Unfair Competition Law as a statute that facilitated the "legalized extortion" of small businesses and others for conduct that seemed to harm no one. Supporters added that the only perceived purpose of these lawsuits was to line the pockets of unscrupulous lawyers. And that argument helped propel Proposition 64 to victory.

Yet, following the California Supreme Court's recent ruling in *In re Tobacco II Cases*, (2009) 46 Cal.4th 298, many questions remain to be answered before the complete effect of Proposition 64 can be understood.

On its face, the changes brought by Proposition 64 seem relatively straightforward. For one, the proposition prohibits plaintiffs from filing unfair competition lawsuits unless they have actually suffered injury and have "lost money or property" as a result of unfair competition. Second, the proposition prohibits the filing of "representative" actions as a substitute for a class action. To do so, Proposition 64 revised Business & Profession Code Section 17204's standing requirements so that plaintiffs representing a class would have to show that they - as individuals - had suffered injury and had lost money or property as a result of unfair competition.

For almost five years following the passage of Proposition 64, trial and appellate courts across California were split on whether the proposition required each member of a class in an unfair competition lawsuit to prove actual damages. If it required proof, then Proposition 64 would essentially eviscerate the private right of action under the Unfair Competition Law.

Opponents of the Unfair Competition Law argued that Proposition 64 would require class members to prove that they had been actually damaged, based upon the following rationale. Since class representatives must be actually damaged and class representatives must be typical of the class member, then the class members must also be damaged. While this argument failed to account for the fact that the unfair competition law is not a "damages" action and that the "actually damaged" requirement imposed by Proposition 64 relates to standing only, some appellate courts still accepted this analysis (see *Pfizer v. Superior Court* (2006) 141 Cal.App.4th 290, *petition for review granted*), while others did not (see *McAdams v. Monier, Inc.* (2007) 151 Cal.App.4th 667, *petition for review granted*).

*Tobacco II* put to rest this aspect of the Proposition 64 debate. The case, which was initially certified, involved an unfair competition law action brought on behalf of a class of California smokers who alleged that cigarette makers engaged in a long campaign of fraudulent advertising. After Proposition 64 passed in 2004, the trial court de-certified the class, based upon the cigarette manufacturer's contention that the simple language of the Unfair Competition Law, as amended, required each class member to prove individual exposure and that damages were caused as a result of the manufacturer's deceptive advertising campaign. After the Court

of Appeal affirmed the trial court's order, the California Supreme Court granted review in order to address two questions: First, whether the law's standing requirement, as amended by Proposition 64, applied to all class members or only to class representatives; and second, what was required to establish standing under the fraudulent prong of the Unfair Competition Law in light of the new language found in Section 17204?

The court first held that the Unfair Competition Law's standing requirements apply only to the named class representatives and not to all unnamed class members. To support its decision, the majority reasoned that nothing in the proposition's language or supporting materials indicated an intent to substantively change the Unfair Competition Law. In fact, the Supreme Court refused to adopt an interpretation that would alter the broad, remedial purpose of the statute, or the availability of class actions as procedural tools to pursue the law's purpose. The court further ruled that the interpretation advanced by defendants in the case would result in an impermissible conflict within Section 17203, because the language regarding restitution is less stringent than the standing requirement found in Section 17204 as modified by Proposition 64.

Second, the court ruled that even though the class representative must establish that the allegedly fraudulent act was an immediate cause of the injury, that requirement did not mean that the fraudulent act must be the only, or even a decisive, cause. The court ruled that actual reliance on a misrepresentation may be presumed if the misrepresentation was material, and that the availability of alternative information to make a purchasing decision did not defeat the allegation of reliance. Significantly, the court specifically limited its holding on this issue to actions predicated on the fraudulent prong of the Unfair Competition Law, leaving unanswered how the "as a result" language of Proposition 64 would apply to the unlawful and unfair prongs - the other two predicates of the Unfair Competition Law. Despite this, the court did seem to imply that the causation requirements for the unlawful and unfair prongs of the law would be easier to satisfy than the fraud prong.

In *Tobacco II*, the California Supreme Court reiterated that Proposition 64 did nothing to substantively change the Unfair Competition Law. Proposition 64, however, did fundamentally change who has standing to assert those class claims on behalf of a class. Today, potential class representatives must not only be members of the class that they seek to represent, but they must also have lost money or property as a result of the unfair competition. The court, with *Tobacco II*, settled the question of who must satisfy the standing requirements of Section 17204 as amended by Proposition 64. Questions still linger over how that language should be applied. On June 10, 2009 - only three weeks after issuing its decision in *Tobacco II* - the California Supreme Court granted review in *Kwikset Corp. v. Superior Court (Benson)* to address one of those remaining questions.

In *Kwikset*, the court will consider whether a plaintiff satisfies the "lost money or property" requirement of Section 17204 simply by alleging that "he purchased a product in reliance on the product label's misrepresentation about a characteristic of the product" even if "he obtained the benefit of his bargain by receiving the product in exchange for the payment." The plaintiffs in *Kwikset* alleged that they paid money for the defendant's products by relying on representations that the products were "Made in U.S.A.," when in fact the products were not made here. Furthermore, the plaintiffs alleged that they would not have bought the products but for that misrepresentation.

Nonetheless, in an opinion issued before *Tobacco II*, the Court of Appeal dismissed their claims and found that the plaintiffs failed to show that they lost money or property. In reaching this conclusion, the Court of Appeal analyzed whether the plaintiffs had received the benefit of their bargain - a framework previously foreign to the Unfair Competition Law - and held that, "Absent a showing of some complaint about the cost, quality, or operation of the mislabeled [products] they purchased [the plaintiffs] received the benefit of their bargain and are not entitled to any restitution."

The Court of Appeal decision in *Kwikset* appears to directly contradict the California Supreme Court's admonition that Proposition 64 did not substantively change the Unfair Competition Law. On the contrary, anything that violated the law before Proposition 64 remains a violation today, according to the court. But, if *Kwikset* is upheld, the unfair competition law would be fundamentally transformed into a damages statute, which is something the California Supreme Court has steadfastly maintained is not the purpose or intent of the law. Keeping *Kwikset* would also fail to account for the underlying intent of the Unfair Competition Law to deter unfair business practices.

Five years following its passage and despite substantial clarification provided by *Tobacco II*, key questions remain whether the state's unfair competition law will continue to be an effective tool that private citizens can use to combat unfair business practices in this state. Understandably, litigants throughout California anxiously await this final clarification of Proposition 64.

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