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WHITE PAPER ALERT

Proposition 64
Class Action Standing

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Pfizer, Inc v. Superior Court
Court of Appeal, Second District - July 11, 2006

Significant new Prop. 64 decision

Yesterday, in [*Pfizer, Inc. v. Superior Court*](#), ___ Cal.App.4th ___ (Jul. 11, 2006), the Court of Appeal (Second Appellate District, Division Three) addressed a trio of significant and currently unresolved questions about how the UCL (B&P 17200 et. Seq.) works in the post-Prop. 64 world. The court decided all three questions in the defendant's favor:

(1) In a UCL class action, all class members, not just the representative plaintiff, must have suffered "injury in fact." "We conclude that in order to meet the 'community of interest' requirement of Code of Civil Procedure section 382, which requires, inter alia, the class representative to have claims typical of the class, it is insufficient if the class representative alone suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. The class members being represented by the named plaintiff *likewise must have suffered injury in fact and lost money or property as a result of such violation.*" (Slip op. at 5 (emphasis added).) The court rejected the argument that the amendment's plain language—"Actions ... under this section may be prosecuted ... by any person who has suffered injury in fact and has lost money or property as a result of a violation of this chapter"—meant that only the representative plaintiff had to prove "injury in fact." (Slip op. at 13-14.)

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(2) The "likely to deceive" standard, which governed UCL "fraudulent" prong cases before Prop. 64, has been abolished. "[T]he mere likelihood of harm to members of the public is no longer sufficient for standing to sue. Persons who have not suffered any injury in fact and who have not lost money or property as a result of an alleged fraudulent business practice *cannot state a cause of action merely based on the 'likelihood' that members of the public will be deceived.*" (Slip op at 5 (emphasis added).) The Court declined to follow any of the post-Prop. 64 decisions that applied the "likely to deceive" formulation (Slip op. at 15-17.)

(3) Prop. 64 imports a reliance element into the UCL. "[I]nherent in Proposition 64's requirement that a plaintiff suffered 'injury in fact ... *as a result of* the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) is that a plaintiff actually *relied* on the false or misleading misrepresentation or advertisement in entering into the transaction in issue." (Slip op. at 5 (emphasis in original).) The court expressly declined to follow *Anunziato v. eMachines, Inc.*, 402 F.Supp.2d 1133 (C.D. Cal. 2005), and held instead that "the district court's decision in *Laster v. T-Mobile USA, Inc.* (S.D. Cal. 2005) 407 F.Supp.2d 1181, sets forth the correct interpretation." (Slip op. at 18.)

The Court concluded by saying:

We recognize this initiative measure, which was promoted as adding a standing requirement to the UCL and FAL, has had the effect of dramatically restricting these consumer protection measures. However, this court must take the statutory language as it finds it. Given the new restrictions on private enforcement under the UCL and the FAL, enforcement of these statutes in legitimate cases is increasingly the responsibility of a vigilant state Attorney General and/or local public prosecutors. (Slip op. at 20.)

COMMENT

If the *Pfizer* holdings stand up, the effect of Prop. 64 will indeed be quite different from what the electorate was told. The silver lining for plaintiffs is that such amendments cannot possibly be construed as merely "procedural." According to *Pfizer*, Prop. 64 **altered** the "fraudulent" prong's "likely to deceive" standard and **added** a reliance element to the UCL." (Slip op. at 16-17 (emphasis added).) Those changes are substantive. They cannot be applied to cases filed before the amendments' effective date absent a very clear statement of retroactive intent, which Proposition 64 does not contain.

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On the other hand, if the Supreme Court holds that Prop. 64's amendments *do* apply to previously-filed actions, that would impliedly overrule *Pfizer* (unless the holding is based exclusively on the so-called "statutory repeal rule). This whole thing is becoming a Gordian knot. As a result this case may join the list before the California Supreme Court in rapid fashion.

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