

Proposition 64: A Major Change in the Unfair Competition Law

The Bad Old Days

On November 2, 2004, California voters approved major revisions to California Business and Professions Code § 17200, the state's notorious Unfair Competition Law ("UCL"). Prior to these changes, the UCL was an "only in California" statute that allowed any state resident to sue a company on behalf of the general public without being actually injured by the challenged business practice and without meeting the procedural burdens of normal class action cases.

Over the years, the permissive standards of the UCL gave rise to legions of lawsuits that were perceived to be frivolous and motivated by considerations other than consumer protection. Among other actions, Section 17200 has been used to:

- ▶ Sue health clubs for allegedly failing to tell customers that Sundays and holidays were not included in calculating a three-day time period for canceling new memberships
- ▶ Sue breakfast cereal makers for allegedly representing to children that sugared cereals are "fun to eat" and "make children happy"
- ▶ Sue auto repair shops for minor administrative violations reported on the state Bureau of Automotive Repair's website
- ▶ Expand the scope of employment lawsuits to include employees with no interest in the suits and every conceivable business practice of the companies at issue

In addition to not suffering any actual harm, the plaintiff in UCL cases—sometimes an employee, friend or even relative of the attorney filing the lawsuit—often did not know anything about the facts allegedly supporting the claim.

The UCL's loose standards encouraged a few law firms to specialize in "shakedown" lawsuits filed to extract settlements from companies in amounts below the fees and costs needed to fight the allegations in court. While the state bar prosecuted some of these firms, the practice of frivolous lawsuits was far from over.

The Proposition 64 Revolution

With the passage of Proposition 64, California voters eliminated the most permissive elements of the UCL. Now, a UCL plaintiff must plead and prove actual injury from the challenged business practice, just like plaintiffs are required to do in virtually every other lawsuit. Uninjured plaintiffs can no longer get to court under the UCL.

Proposition 64 also eliminated private lawsuits brought on behalf of the general public. Before the passage of the proposition, a plaintiff could bring a "representative" action on behalf of all the residents of California—without ever having to satisfy the procedural burdens typically imposed in class actions – where large numbers of individuals are represented by the named plaintiff. Now, a UCL plaintiff who seeks to represent individuals other than himself must abide by the rules and procedures governing class actions.

The New UCL World

While the full impact of Proposition 64 will not be sorted out in the courts for some time, the effects on consumer and employment litigation could be significant. The actual injury requirement will force the plaintiffs' bar to be far more selective in the matters they bring suit on and the plaintiffs they choose to name. The actual injury requirement could have a particularly substantial impact on false advertising claims.

Key Attorney Contacts

UCL Litigation and Issues

Jim Donato	415/693-2047 jdonato@cooley.com
Johanna Calabria	415/722-2992 jcalabria@cooley.com

Employment & Labor

Steve Friedlander	415/693-2138 friedlanders@cooley.com
Dennis Childs	858/550-6082 dchilds@cooley.com
Rich Frank	415/693-2043 rfrank@cooley.com
Greg Tenhoff	650/843-5054 tenhoffgc@cooley.com

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Under the old version of the UCL, a plaintiff could sue for false advertising without proving that anyone was hurt by the ad, relied on the ad or even saw the ad. All the old UCL plaintiff needed to prove was that the advertisement was likely to mislead a potential consumer, a low threshold indeed. Now, a plaintiff in a UCL false advertising or other case will be required to prove real harm, which should substantially reduce the volume of frivolous lawsuits under the UCL.

The new class action requirement is also likely to have a beneficial effect for companies facing UCL claims. By imposing class action procedures and requirements on plaintiffs seeking to represent individuals other than just themselves, the revised UCL will again force plaintiffs' attorneys to be more selective and careful in the cases they file. The class action requirements will also lead to more court involvement in settlements. Class action cases must go through a rigorous process of court review and approval before a settlement will be deemed final. The reason for this is that class action cases bind the rights of individuals in the class who are usually not actively involved in the litigation, and the courts seek to ensure that class action settlements are just and fair to class members before their legal rights are affected. The benefit for defendants arises directly out of that court review: court-approved class action settlements usually bar any more lawsuits on the same matter by covered class members. One class-wide settlement resolves all covered claims. Under the old UCL, no such protection existed because a plaintiff could sue on behalf of the general public without the procedures that made it fair to bind the legal rights of the public to the outcome of the case.

While the changes imposed by Proposition 64 are likely to improve the posture of defendants in UCL cases, they could lead to an increase in litigation under other consumer statutes. For example the Consumer Legal Remedies Act (Civil Code § 1750 et seq.) ("CLRA") protects "personal, family or household" transactions (i.e., consumer,

not business transactions) and allows substantially broader remedies than the UCL, and class certification is much easier to achieve under CLRA than under the UCL. Now that the draw of easy lawsuits under the UCL has been significantly curtailed, litigants might turn to the CLRA and other statutes for claims against companies.

The Plaintiffs' Employment Bar Takes A Hit

These changes should also have a significant effect on employment cases. The UCL has in the past several years been a favorite, though often misdirected, weapon of the plaintiffs' employment bar. With the passage of Proposition 64 we expect to see fewer, or narrower, UCL claims in employment cases, which should reduce the number of expensive, unwarranted excursions into the entire range of a company's business practices.

Are the Changes in the Law Retroactive?

Proposition 64 took effect on November 3, 2004. The question of whether the new law has retroactive application will almost certainly be heavily litigated for some time. There is little debate that the changes in the law are applicable to claims that arose on or after November 3rd. However, whether the changes apply to litigation that was pending prior to Proposition 64's enactment will engender substantial debate between the plaintiffs' and defense bars until there is a clear pronouncement on the issue by the California Supreme Court. Nonetheless, there appears to be grounds for arguing that Proposition 64 should apply to pending cases, and defendants in pending UCL cases will likely spare no effort in arguing that Proposition 64 changes are immediate and should result in dismissal of a number of cases.

Cooley attorneys have a broad range of expertise in litigating and advising on UCL issues. For further information or questions, please contact one of the attorneys at the beginning of this Alert, or your regular Cooley contact. [n](#)