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Bailout For Calif. Class Action Plaintiffs Bar

Law360, New York (June 10, 2009) -- The list of government bailouts grows with each passing day. The plaintiffs' bar — specifically, those who file Unfair Competition Law class actions — cheerfully joins the ranks of the bailout recipients having received a stimulus package for their law practices, courtesy of the California Supreme Court.

The court's holding in *In Re Tobacco Cases II* seriously undermines the impact of the California voters' initiative to curb lawsuit abuse and opens once again the floodgates for class action lawyers to bring costly lawsuits for unfair competition even where the class has suffered no harm.

Unfortunately, like most government intervention, this bailout comes at a steep price which will ultimately be paid by consumers to whom the cost of litigation will be passed.

In Re Tobacco Cases II has a long and tortured path since it was filed 1997. The plaintiffs are pursuing claims against large tobacco interests for deceptive advertising and misleading statements concerning the addictive nature of nicotine and the nexus between tobacco use and disease.

The principal means by which the plaintiffs seek to address this conduct is through California's well-known UCL statute ("Section 17200"). The UCL allows a plaintiff to bring an action in the public interest for "any unlawful, unfair or fraudulent business act or practice."

The plaintiffs in this action focus on the third prong of the statute, a fraudulent business practice, here, in the form of allegedly deceptive advertising practices.

In 2006, while the lawsuit was pending, California voters became fed up with litigation abuse by professional plaintiffs filing frivolous lawsuits and passed Proposition 64.

The intent of the electorate, as recognized by the court, was "prot[ecting] small businesses from frivolous lawsuits' generated by '[s]hakedown lawyers [who] 'appoint'

themselves to act like the attorney general and file lawsuits on behalf of the State of California, demanding thousands of dollars from small businesses that can't afford to fight in court.”[1]

Offering a refreshingly simple and common sense approach to the problem, Proposition 64 was premised on the notion that the best way to curb such abuses and separate frivolous lawsuits from meritorious claims is to require a plaintiff to prove actual injury.

Proposition 64 thus amended the statute which previously provided that a UCL lawsuit could be brought by any person “acting for the interests of itself, its member or the general public” and replaced that language with the phrase, “who has suffered injury in fact and has lost money or property as a result of such unfair competition.”[2]

Notwithstanding this mandate, the Supreme Court has now concluded that, in the context of class action lawsuits, only the class representative must prove actual injury.

None of the class members must prove any injury in order to participate in the class. That means that the class in that case may be composed of those who were never exposed to or relied on the tobacco companies' advertising.

But the implications are far broader than tobacco litigation. The court's ruling puts class action lawyers in essentially the same position they were before Proposition 64 by allowing UCL class action lawsuits to proceed as long as a singular representative of the class may plead injury.

The court reasoned that the ballot materials did not indicate that the voters intended to alter the class action lawsuits and does specifically require that a person bringing a representative claim comply with Section 382.

Thus, concluded the court, since the class action statute (Code of Civ. Proc. § 382) does not separately require unnamed class members to establish standing through proof of injury, and because the voters did not specify that the standing requirement extends to unnamed class members, only the class representative must demonstrate standing.

Based on this rationale, the court held that, in the absence of ballot materials informing voters that class members, and not just a representative would have to meet the standing requirement, “imposing such a novel requirement is not necessary to remedy the specific abuse of the UCL which Proposition 64 was directed” and “would have undermined the guarantee made by Proposition 64's proponents that the initiative would not undermine the efficacy of the UCL as a means of protecting consumer rights.”

Although the court's reasoning is results-oriented and seriously flawed (Justice Baxter wrote a well-reasoned dissent that persuasively makes the case that Proposition 64's requirements should be applied to all class members) in several respects, there are three premises that are stunningly deficient:

1) Voters' Intent (or Lack Thereof)

The first error relates to the manner in which the court attempts to divine electorate intent (the equivalent of legislative intent that is applicable when the law to be interpreted was passed by voters).

It is admittedly a difficult task to discern a voter's intent when the electorate is called upon to amend a law by modifying the statute to add a requirement based in a legal doctrine (here, standing).

While legislatures in general and judiciary committees in particular are typically comprised of a significant number of lawyers and are frequently advised by staff lawyers and others who testify about proposed changes in the law, and those statements preserved for future reference by the courts, such is not the case when interpreting a ballot initiative.

The typical layperson enters the voting booth with little more than a rudimentary understanding of the issue at hand.

It is for this reason that the court's reasoning is flawed to the extent it was compelled to reach the result by the voters' intent to amend the UCL statute while leaving the class action statute unchanged.

The typical California voter choosing "yes" on Proposition 64 could not be expected to contemplate the impact that an amendment to a substantive statute (UCL) has on a procedural rule (the class action statute).

It follows that it is the role of courts to discern and advance the voter's intent in a more generalized fashion. Courts fulfill this role by reconciling the electorates' general objective with other statutes and rules rather than achieving a result that undermines that intent.

In the case of Proposition 64, the voters' intent was to stop abuses of the UCL by requiring injury in order for a plaintiff to have standing. There is no evidence that the voters intended to carve out class members or make any other qualification. Most of these abuses took the form of class action lawsuits which aggregate claims and compound costs and fees.

By surmising that the average voter standing in line at his or her local polling place did not pause to contemplate how the initiative would impact the Code of Civil Procedure, the court has lost sight of the electorate's more generalized yet compelling objective and its own mandate to harmonize its holding with that objective.

2) A Plaintiff With Actual Injury — A "Novel" and "Unprecedented" Concept

The second error in the court's analysis is its conclusion that the injury in fact requirement that was created by Proposition 64 would be "novel" and "unprecedented" if it were extended to apply to class members.

While the court cited federal decisions applying the federal rule on class action actions, those cases discuss what must be shown at the pleading or certification stage at which point the focus is on the class representative, not the class itself.

Those cases do not hold that a person who has suffered no injury from the conduct alleged may nonetheless proceed to state a claim for damages.

The requirement that class members show injury in fact is advanced under "ascertainability" and "typicality" requirements, as the dissent points out.

These elements require that the class be made up of members who have ascertainable claims that are typical of the class. As the dissent points out, these elements "both require that the members of a certified class themselves have causes of action against the defendant."

Indeed, what was "novel" and "unprecedented" was a statute prior to Proposition 64 that permitted plaintiff standing without injury. This anomaly defied all norms in the legal system, capsulated best in legal maxim *damnum absque injuria*—injury without damage or loss will not bear an action.

While the California voter may not have understood these intricacies and legal doctrines or the implications of Proposition 64 on the California Code of Civil Procedure, their common sense dictated that, if a plaintiff wasn't injured by the defendants' conduct, they should not be in court. Extending the injury and standing requirement to class members is neither "novel" nor "unprecedented."

3) The "Parade of Horribles" if Proposition 64 is Applied to the Class

The work of an activist jurist is not complete without invocation of a parade of horrors that would result absent judicial intervention. And so it stands to reason that the court assures us that applying the standing requirement to the class members would "effectively eliminate the class action lawsuit as a vehicle for the vindication of rights under the UCL."

The answer to this is that the class action mechanism would continue unabated for those lawsuits that have a representative and members who have suffered injury in fact but, consistent with the purpose and intent of Proposition 64, absent such standing, the lawsuit would terminate. There is every reason to believe that that is the result the voters intended.

As a result of this decision, entities that do business in the state of California can expect to see a resurgence in the types of lawsuits that existed prior to Proposition 64. As long

as a plaintiff can find a solitary representative who alleges injury, the entire class can proceed absent proof of standing.

At a time when small business are facing potential tax increases to shore up our state's fiscal crisis, they can expect to be hit with more consumer lawsuits. Consumers of goods and services will be hit with another hidden tax in the form of higher costs intended to cover the risk of doing business in the Golden State.

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[1] In *Re Tobacco II*, supra at p. 17, quoting Voter Information Guide, Gen. Elec. (Nov. 2004).

[2] Cal. Bus. & Prof. Code § 17200.

[3] *Id.*

[4] In *Re Tobacco II*, supra at p. 17, quoting Voter Information Guide, Gen. Elec. (Nov. 2004).

[5] Bus. & Prof. Code, formerly § 17204, as amended by Stats. 1993, ch. 926, § 2, p. 5198. See also *Californians for Disability Rights v. Mervyn's*, 39 Cal. 4th 223, 228-229 (2006).

[6] In *Re Tobacco II*, supra at 14, citing § 17203 and *Mervyn's*, supra, 39 Cal. 4th at 228-229.

[7] In *Re Tobacco II*, supra at 18-19.

[8] *Id.* at 23-24.

[9] Justice Baxter wrote a well-reasoned dissent that persuasively makes the case that Proposition 64's requirements should be applied to all class members.

[10] Code of Civ. Proc. § 382.

[11] In *Re Tobacco II*, supra at 19-21.

[12] In *Re Tobacco II*, (Baxter, J. dissenting) at 4.

[13] In *Re Tobacco II*, supra at 24.