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# CLASS ACTION WATCH

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## EARLY DECISIONS INTERPRETING CLASS ACTION FAIRNESS ACT

Several months after its enactment on February 18, 2005, the Class Action Fairness Act ("CAFA") is beginning to generate a sufficient body of judicial interpretation to identify a number of key issues. Among others, litigants and courts are grappling with questions about which actions were "commenced" before the effective date of CAFA; how to calculate the amount in controversy for purposes of the statute; and what to make of the statute's provisions regarding calculation of attorneys' fees.

While CAFA provides that its jurisdictional and other provisions apply to all actions "commenced" on or after February 18, 2005, the meaning of the word "commence" has already generated significant debate. Some defendants have argued that an action is "commenced" for purposes of the statute on the date it is removed to federal court, regardless of how long the action may have been pending in state court. That position is not without support; several cases decided in connection with statutory amendments increasing the amount-in-controversy require-

ment of 28 U.S.C. § 1332 have held that the increased jurisdictional amount applied to cases that were removed after the increase took effect—regardless of when they were filed in state court—because the removal date was the date on which the action was "commenced."<sup>1</sup> The first appellate decision under CAFA, however, has declined to adopt that approach. In *Pritchett v. Office Depot, Inc.*,<sup>2</sup> the Tenth Circuit rejected a defendant's removal to federal court of a case that had

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## REFORMS TO CALIFORNIA'S UNFAIR COMPETITION LAW ALTER LITIGATION LANDSCAPE

While all 50 states have some form of unfair and deceptive trade practices statute, California's Unfair Competition Law, Business and Professions Code Section 17200 *et seq.* (the "UCL"), was unique in that it permitted anyone to bring a claim as a "private attorney general" on behalf of the "general public"—regardless of whether the plaintiff himself had actually been affected by the challenged conduct. Thus, a plaintiff who had never done any business with the defendant, seen the defendant's advertising or used the defendant's products or services could pursue a UCL claim on a quasi-class-action basis without having traditional standing or satisfying any of the due process requirements

for class action cases. Not surprisingly, California became the preferred forum for consumer class action litigation in large part because of the UCL; in some cases, plaintiffs' law firms went so far as to file UCL claims naming themselves as the plaintiffs.

On November 2, 2004, California voters approved Proposition 64, which reformed the UCL. Most importantly, Proposition 64 established two new requirements for UCL claims. First, it established a standing requirement for UCL claims, prohibiting private plaintiffs from prosecuting UCL claims unless they suffered "actual injury" and lost money or property. Thus, plaintiffs' lawyers must find a client who actually was

harmed by the business practice at issue before they can bring a claim. Second, it requires plaintiffs to meet the class certification requirements of California Code of Civil Procedure Section 382 before they can obtain classwide relief. While there had been some progress by litigants seeking to impose class certification-like requirements on UCL claims, Proposition 64 resolved the question through statutory fiat. Proposition 64 took effect on November 3, 2004.

### California Supreme Court To Review Proposition 64's Application To Pending Cases

Although Proposition 64

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been filed in state court before February 18, 2005. The court held that the term “commenced,” as used in CAFA, refers to the filing of a complaint (or similar initiating pleading), and not to the act of removal itself.

Given the large number of purported class actions filed on February 17, 2005 (apparently based on anticipation that the President would sign CAFA the next day), a number of defendants have argued that CAFA’s “date of enactment” was February 17, 2005, the day on which the bill was passed by Congress, rather than February 18, 2005, the day on which the president signed the bill into law. The one court to release an opinion on the subject thus far has rejected that argument, invoking the lyrics of a song from a popular 1970s children’s television program: “I’m just a bill/Yes, I’m only a bill/And if they vote for me on Capitol Hill/Well, then I’m off to the White House/Where I’ll wait in a line/With a lot of other bills/For the president to sign/And if he signs me, then I’ll be a law/How I hope and pray that he will/But today I am still just a bill.”<sup>3</sup> (Neither of these two decisions addresses other contested issues concerning the applicability of CAFA; among other things, litigants continue

to debate whether CAFA applies to pre-February 18th cases that are amended to add parties after February 18th, to pre-February 18th cases that are amended after February 18th to include class allegations, etc.)

The first publicly available decision to interpret CAFA’s modified amount-in-controversy provision suggests that removing defendants (and initiating plaintiffs) will continue to face challenges in establishing that removed cases involve sufficiently large amounts of potential damages or other relief. While CAFA eliminates any doubt that the amount in controversy in putative class actions is to be calculated in the aggregate (thus abolishing previous precedents that had relied on *Snyder v. Harris* and *Zahn v. International Paper* to require each individual class member to satisfy the jurisdictional amount requirement), it still appears that defendants will need to do more than simply assert that a large amount is at issue. In *Holland v. Cole Nat’l Corp.*,<sup>4</sup> the plaintiff in an action originally filed in federal court argued that CAFA’s jurisdictional requirements were met because the case involved “many thousands of class members,” and because the defendant generated revenues of more than \$50 million from the sale of the challenged products and services.<sup>5</sup> The district court rejected this argument, thus suggesting the possibility that federal courts will continue to scrutinize the amount-in-controversy requirement

with some rigor.

Finally, the first publicly available decision interpreting the class-settlement provisions of CAFA suggests that courts will not be reluctant to reduce attorneys’ fee awards where they are out of proportion to the actual benefit received by settlement class members. In *Fears v. Wilhelmina Model Agency, Inc.*,<sup>6</sup> the district court relied in part on CAFA (which was not technically applicable, since the action predated the effective date of the statute) to hold that plaintiffs’ counsel was entitled to a fee award based only on a percentage of class claims actually submitted and approved for payment, and not based on a percentage of the total settlement fund made available to class members.

### Footnotes

<sup>1</sup> See, e.g., *Lorraine Motors, Inc. v. Aetna Case. & Sur. Co.*, 166 F. Supp. 319, 323-24 (E.D.N.Y. 1958); *Hunt v. Transp. Indem. Ins. Co.*, 1990 U.S. Dist. LEXIS 16555 (D. Haw. July 30, 1990).

<sup>2</sup> 404 F.3d 1232 (10th Cir. 2005).

<sup>3</sup> *Berkowitz v. Transfirst Health Servs., Inc.*, 2005 U.S. Dist. LEXIS 9604, at \*2 n.1 (E.D. Missouri May 19, 2005) (emphasis in opinion).

<sup>4</sup> 2005 U.S. Dist. LEXIS 9862 (W.D. Va. May 24, 2005).

<sup>5</sup> *Id.* at \*46.

<sup>6</sup> 2005 U.S. Dist. LEXIS 7961 (S.D.N.Y. May 5, 2005).

## PROPOSITION 64 (CONT. FROM PG. 1)

clearly applies to actions filed on or after November 3, 2004, it does not expressly state whether it applies to actions filed prior to its enactment. Not surprisingly, trial courts have been inundated by motions seeking the dismissal of pending UCL actions, primarily on three grounds. First, the language of Proposition 64 and its prefatory section describing its

intent and purpose arguably suggest that it should be applied to all UCL actions, including pending cases.<sup>1</sup> Second, the repeal of a statutory right of action immediately terminates pending actions based on that right.<sup>2</sup> Third, Proposition 64’s new standing and class action requirements are procedural in nature and apply to pending actions because they do not impair vested rights or impose new, additional or different

liabilities based on past conduct.<sup>3</sup> In response, plaintiffs are contending, among other things, that Proposition 64 does not expressly provide that it applies to pending actions and that the right to prosecute a UCL action vests when it is filed and cannot be impaired.

Because numerous UCL cases were on appeal when Proposition 64 was enacted, the Courts

of Appeal have been quick to provide guidance on this issue. As of the date this article was completed, six published cases have held that Proposition 64 applies to pending actions<sup>4</sup> and one has held that it does not.<sup>5</sup> The first published case, *Californians for Disability Rights v. Mervyn's, LLC*,<sup>6</sup> decided by the First District, held that Proposition 64 did not apply to a case pending on appeal because it would “deny parties fair notice and defeat their reasonable reliance and settled expectations,” particularly given the commitment of substantial resources in pursuing the claim. Since *Californians for Disability Rights*, however, there have been five published decisions reaching the opposite conclusion, all of which focused on the “statutory right repeal doctrine.” These cases all held that, because the right to assert a UCL claim is wholly statutory—and not based on the common law—such right can be repealed at any time. Under the rationale of these cases, Proposition 64 must be applied to pending cases, including those on appeal.

Not surprisingly, given the split of authorities, the California Supreme Court has granted review of a number of Proposition 64 cases to decide the applicability of Proposition 64 to pending cases.<sup>7</sup> A decision is expected later this year.

#### **The Fallout: Other Issues to be Litigated**

Proposition 64 raises other questions that are being and will be litigated in California. First, when a UCL claim is dismissed based on the plaintiff’s lack of standing, can the plaintiff’s counsel amend the complaint to substitute an injured plaintiff? The published decisions discussed above and trial courts have reached different conclusions on this issue,<sup>8</sup> most allowing leave to amend based on traditional notions of liberality, while some have denied leave. Importantly,

however, no court appears to have addressed the obvious policy question, which is why the plaintiff’s counsel should be permitted to continue litigating a case as if he or she owned the claim.<sup>9</sup> Proposition 64 was intended to preserve the right of injured parties to retain counsel to prosecute their UCL claims, not the right of attorneys to find clients to represent in such actions.<sup>10</sup> A countervailing argument is that, because a claim was being prosecuted on behalf of the “general public,” possibly causing members of the general public to rely on the pendency of a UCL action, it is equitable to permit the case to continue after substitution of a proper plaintiff. While these arguments have been raised principally at the trial court level at this point, they should be determined at the appellate level shortly.

Second, if a plaintiff without standing is allowed to amend his complaint to substitute an injured plaintiff, do the claims of absent class members relate back to the filing of the claim by the unaffected plaintiff? Similarly, if a plaintiff can amend a complaint to add class allegations, do the claims of absent class members relate back to the filing of the claim by the individual on his or her own behalf or on the behalf of the general public?

Third, what will be the impact of Proposition 64’s new injury and causation requirements on the previously used definitions of “unlawful,” “unfair” and “fraudulent” conduct? California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury.<sup>11</sup> Indeed, this has been the mantra of plaintiffs bringing suit under the UCL. Given the new injury and causation requirements, however, California courts will have to revisit the previous case law discussing whether certain conduct is “unlawful,” “unfair” and/or “fraudulent,” particu-

larly where no resulting injury can be attributed to such conduct.

Fourth, can a plaintiff seek discovery, file motions or otherwise prosecute a UCL action while a dismissal motion based on Proposition 64 is pending?

Fifth, what will be the impact of Proposition 64’s new injury and causation requirements on class certification proceedings? The UCL’s new injury and causation requirements may assist defendants in defeating class certification of UCL representative actions that otherwise might have been certified with little hesitation. Prior to Proposition 64, California courts had determined that, because a UCL claim premised on “fraudulent” or deceptive conduct does not require proof of actual reliance or damages, problematic issues regarding commonality and typicality in these respects had no bearing on class certification. For example, in *Massachusetts Mutual Life Insurance Co. v. Superior Court*,<sup>12</sup> the Court of Appeal affirmed class certification of a UCL claim based on alleged non-disclosure of certain terms relating to the sale of “vanishing premium” life insurance policies. Although defendant argued that class treatment was not suitable because each plaintiff would be required to make an individual showing of the representation that he or she received,<sup>13</sup> the Court rejected this argument, reasoning that under the “unique scope” of UCL, plaintiffs were not required to prove individualized deception, reliance and/or injury.<sup>14</sup> Based on Proposition 64, however, *Massachusetts Mutual*, and other cases following its rationale, may no longer be applicable.

While there is no shortage of issues to be litigated in the aftermath of Proposition 64, there can be no question that significant reforms have taken place. Not only has California reduced the allure of legal bounty-hunting in its courts, but it also has elimi-

nated the ability of plaintiffs' lawyers to gain settlement leverage by pleading UCL claims in routine cases. Going forward, plaintiffs' lawyers will need to find injured clients before they can sue, and they must meet the requirements of due process before obtaining classwide relief. Stay tuned; further reforms are in the planning process.

#### Footnotes

<sup>1</sup> See, e.g., *Day v. City of Fontana*, 25 Cal. 4th 268, 274 (2001) (holding that initiative's Findings and Declaration of Purpose may be considered by court in order to "test" its construction of initiative's unambiguous statutory language).

<sup>2</sup> See, e.g., *Younger v. Superior Court*, 21 Cal. 3d 102, 109 (1978); *Governing Board of Rialto Unified School District v. Mann*, 18 Cal. 3d 819, 829 (1977); Cal. Gov. Code § 9606.

<sup>3</sup> See, e.g., *Tapia v. Superior Court*, 53 Cal. 3d 282, 288 (1991); *Brenton v. Metabolife Int'l, Inc.*, 116 Cal. App. 4th 679, 688 (2004).

<sup>4</sup> *Thorton v. Career Training Center, Inc.*, 128 Cal. App. 4th 116 (Cal. App. 4th Dist., April 4, 2005) (holding that Proposition 64 applies to pending actions); *Frey v. Trans Union Corp.*, 127 Cal. App. 4th 986 (Cal. App. 4th Dist., March 24, 2005) (same); *Lytwyn v. Fry's Electronics, Inc.*, 25 Cal. Rptr. 3d 791 (Cal. App. 4th Dist., Feb. 22, 2005) (same); *Bivens v. Corel Corp.*, 126 Cal. App. 4th 1392, 24 Cal. Rptr. 3d 847 (2005), petition for rev. filed (Mar. 29,

2005); *Thomas Branick v. Downey Savings and Loan Assn.*, 126 Cal. App. 4th 828, 24 Cal. Rptr. 3d 406 (2005) (same), petition for rev. filed (Mar. 22, 2005); *James Benson v. Kwikset Corp.*, 126 Cal. App. 4th 887, 24 Cal. Rptr. 3d 683 (2005) (same), petition for rev. filed (Mar. 21, 2005).

<sup>5</sup> *Californians for Disability Rights v. Mervyn's, LLC*, 126 Cal. App. 4th 386, 24 Cal. Rptr. 3d 301 (2005), petition for rev. filed (Mar. 14, 2005).

<sup>6</sup> 126 Cal. App. 4th at 397 (reasoning that the application of Proposition 64 to cases filed before the initiative's effective date "would deny parties fair notice and defeat their reasonable reliance and settled expectations.").

<sup>7</sup> See *Californians for Disability Rights v. Mervyn's, LLC*, 2005 Cal. LEXIS 4586 (Cal. Apr. 27, 2005); *Benson v. Kwikset Corp.*, 2005 Cal. LEXIS 4587 (Cal. Apr. 27, 2005); *Bivens v. Corel Corp.*, 2005 Cal. LEXIS 4601 (Cal. Apr. 27, 2005).

<sup>8</sup> Compare *Branick*, 126 Cal. App. 4th 828 (remanding case to trial court for determination as to whether the plaintiffs should be granted leave to amend the complaint to substitute an affected plaintiff to preserve the claims of the represented group) with *Benson*, 126 Cal. App. 4th 887 (remanding case only to permit plaintiff to demonstrate standing, and unlike the *Branick* Court, likely would not permit a new plaintiff with standing to intervene.).

<sup>9</sup> *Keru Investments, Inc. v. Cube Co.*, 63 Cal. App. 4th 1412, 1425 (1998) ("Choses in action belong to the party who suffered the injury.").

<sup>10</sup> The effort to curtail persons without

a valid cause of action from filing suit is not a new phenomenon. "At common law, barratry was 'the offense of frequently exciting and stirring up suits and quarrels' (4 Blackstone, Commentaries 134) and was punishable as a misdemeanor." *Rubin v. Green*, 4 Cal. 4th 1187, 1190 (1993). A statutory version of the crime survives today. Cal. Pen. Code §§ 158-159. "The modern successor of common law barratry, solicitation, is not only a misdemeanor when accomplished through the use of agents, but is also subject to discipline by the State Bar." *Rubin*, 4 Cal. 4th at 1190; see also Cal. Bus. & Prof. Code §§ 6152-6153; rule 1-400, Rules of Prof. Conduct of State Bar.

<sup>11</sup> *Massachusetts Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1288 (2002) (citing numerous cases).

<sup>12</sup> 97 Cal. App. 4th at 1282.

<sup>13</sup> Defendant had presented to the Court numerous out-of-state authorities holding that vanishing premium claims were not suitable for class treatment, which the Court distinguished based on the broad scope of California's UCL jurisprudence. *Id.* at 1291.

<sup>14</sup> *Id.* at 1288-92; see also *Corbett v. Superior Court*, 101 Cal. App. 4th 649, 672 (2002) (noting that "[t]he refusal to certify a class on other claims is not dispositive on whether the UCL claim should be certified, because the UCL claim is materially different from the other causes of action. Relief under the UCL is available without individualized proof of deception, reliance and injury.").

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