S147345

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.
Plaintiffs and Appellants,

vs.

PHILIP MORRIS USA, INC., ET AL.
Defendants and Respondents.

Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One Affirming an Order Decertifying a Class Action, San Diego County Superior Court, Case No. 711400 *Judicial Council Coordination Proceeding 4042 The Hon. Ronald Prager, Judge Presiding*

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 14.5, plaintiffs and their counsel certify that apart from the attorneys representing the plaintiffs in this action, as disclosed on the cover of the brief and the attachment thereto, the plaintiffs and their counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the plaintiffs or their counsel reasonably believe the justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: February 20, 2007

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NEITHER CCP SECTION 382 NOR GENERAL CLASS ACTION PRINCIPLES REQUIRES ABSENT CLASS MEMBERS TO SHOW STANDING AS A PREREQUISITE TO CLASS CERTIFICATION

Defendants attempt to redefine the case that has been presented by the plaintiffs to suit their arguments against certification. Plaintiffs acknowledged in their Opening Brief that the basic class action principles of standing apply to this case. Plaintiffs Opening Brief deferred to the language in *Collins* stating that the "definition of a class cannot be so broad as to include individuals who are without standing to maintain an action on their own behalf. Each class member must have standing to bring a suit in his own right." *Collins v. Safeway Stores, Inc.*, (1986) 187 Cal.App.3d 62, 73. (Plaintiffs' Opening Brief, p. 47-48) The last sentence of which the defendants rely upon in their Answer Brief. (Defendants' Answer Brief, p. 1).

Plaintiffs do not assert that they can or do "represent a class of *uninjured* persons". (Defendants' Brief, p. 2). Plaintiffs do stand by the analysis in their Opening Brief that none of the cases cited by defendants in any way stand for the proposition that they and the lower courts espouse, which is that as a prerequisite to class certification each class member

would be required to establish standing. As the court in *Collins* recognized, in California courts in is "the principle that if the existence of an ascertainable class has been shown, there is no need to identify its individual members as a prerequisite to maintaining a class suit." *Collins, supra.*, 187 Cal.App.3d at p. 71.

Clearly, that language is directly contrary to the proposition, put forward by the lower courts and the defendants, that each and every class member is required to come forward and prove that they have standing in order to qualify the matter as a class action. If that were the case then it would never be practical or possible to have a certified class.

Such a holding would significantly and substantively change the application of the UCL indeed it would negate the ability to bring consumer class actions in California. This would undo the recognition that "[i]t is without question that a consumer class action in many circumstances will result in substantial benefit to the parties and the court." *Collins, supra.*, 187 Cal.App.3d at p. 68.

In *Collins* the plaintiff's failing was that she did not even allege that any member of the class, other than herself sustained injury or damage of course such a failure to even establish the existence of a class is enough to deny class certification. *Collins, supra.*, 187 Cal.App.3d 73.

However, that is not the case here as evidenced by the analysis of the trial court contained in the ruling which originally certified this class, a ruling which was upheld on appeal.

Plaintiffs position is contained in other cases cited by the Defendants Answer Brief, which is that the existence of such "an ascertainable class depends in turn upon a demonstrated community of interest among the purported class members in common questions of law and fact. (*Daar v. Yellow Cab Co., supra.*, at p. 706.) Thus, the crucial inquiry centers upon whether the plaintiffs are truly representative of the absent, unnamed class members." *Bartlett v. Hawaiian Village, Inc.*, (1978) 87 Cal.App.3d 435, 438.

Further, in *the Denney* case also cited by Defendants it was determined that, "[w]e do not require that each member of a class submit evidence of personal standing. 'Those represented in a class action are passive members and need not make individual showings of standing.' 'Once it is ascertained that there is a named plaintiff with the requisite standing, however there is no requirement that the members of the class also proffer such evidence.' '[P]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented

parties or absent class members are properly before the court.'" *Denney v. Deutsche Bank AG,* 443 F.3d 253, 263-264 (2nd Cir. (N.Y.) 2006)(citations omitted).

The trial court in this matter, prior to the passage of Prop 64, found that there was in fact an ascertainable class and certified a class on that basis:

> In addition to the demonstration of the requisite commonality of issues in fact and law, the court finds that the named Plaintiff has demonstrated that his claims are typical of the putative class. The named Plaintiff herein asserts identical claims on behalf of the class, are brought pursuant to the same statutory provisions and are premised upon the same alleged conduct of the Defendants which was directed to the members of the putative class on a class-wide basis. [AA 1, p. 226]

Clearly it is as true today as it was when this class was certified, that the named Plaintiffs assert the same identical claims on behalf of the class, which are still brought pursuant to the same statutory provisions and are still premised upon the same alleged conduct of the Defendants which was directed to the members of the putative class on a class-wide basis. The plain language of Proposition 64, the "legislative" intent behind it and the case law regarding class certification, compels the conclusion that the standing clause only applies to the representative plaintiff and it is

unnecessary to establish a standing requirement for every class member as a prerequisite to class certification. Moreover in the context of the UCL, doing so would undermine the articulated public policy goals of the statute.

The examination of the lower courts should have been whether the **named plaintiffs** satisfied the standing requirements added by Prop 64. The issue of whether there is an ascertainable class could have in no way been affected by the passage of Prop 64 unless that initiative rendered substantive changes to the law. The law remains, if plaintiffs' allegations that the defendants engaged in false and deceptive advertising are true, then the interest of each class member is identical. Each member still has an interest in determining whether the defendants' conduct constituted unfair and/or deceptive acts or practices in violation of the UCL.

The members of the putative class of course must fit within the bounds of the class definition and the issues as restricted by the rulings of the trial court. Thus the plaintiffs and members of the putative class are all persons who: purchased cigarettes in California during the class period; were subjected to the same allegedly deceptive conduct; seek recovery of the amounts expended for defendants products; and seek relief on the basis of the same legal claims and theories.

Defendants contend that Proposition 64 imposes a standing

requirement not only on the representative plaintiff, but on every class member as well. But that theory is not supported by the express language of Proposition 64 and, in fact, imposing such a requirement would unduly undermine the consumer protections embodied in the UCL.

Proposition 64 was not intended to nor did it do anything to change the broad scope of the UCL. Proposition 64 was intended, proposed, drafted and enacted to address a singular issue that its proponents had with the expansive standing to bring representative suits previously allowed under the UCL where it was being abused. "The abuse is a kind of legal shakedown scheme: Attorneys form a front 'watchdog' or 'consumer' organization. They scour public records on the internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of a front organization." *People ex. rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1316-1317. Thus all that was intended or accomplished was simply to prevent the use of so called "professional plaintiffs" who had no connection or interest in the case to be brought and require that the representative plaintiffs be persons that actually had an interest in the case. That is that the person actually filing the complaint must have been a victim of the unfair business practice complained of in order to be able to bring suit under the UCL. To do this it

effected only three changes based upon the Analysis by the Legislative Analyst prepared by the Attorney General: Restricts Who Can Bring Unfair Competition Lawsuits; Requires Lawsuits Brought on Behalf of Others to Be Class Actions; and Restricts the Use of Civil Penalty Resources.

Even the proponents of Proposition 64 took pains to explain to the electorate that they were not trying to change the substantive sweep of the UCL or the FAL. As Proposition 64 explained in subdivision (a) of section 1, the UCL and FAL "are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." In subdivision (d) of section 1, the voters further confirmed that their intent in enacting Proposition 64 was not to limit or impair the use of the statute in cases with merit. Rather, their intent was "to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to" the UCL and FAL.

THE "AS A RESULT OF" LANGUAGE IN PROPOSITION 64 DOES NOT IMPOSE A CAUSATION OR RELIANCE REQUIREMENT

Nothing in Proposition 64 imposes any requirement that ***reliance*** be proven - either by the representative plaintiff or the class members. By improperly implying the existence of a reliance requirement in Proposition 64 and then, on that basis, asserting that individual issues predominate, the lower courts applied the wrong legal standards and thereby improperly decertified the class.

By requiring the representative plaintiff to have suffered an injury in fact, Proposition 64 stopped the inappropriate use of the UCL. And by limiting the standing requirement to the representative plaintiff, Proposition 64 did not significantly impair the use of the UCL in legitimate cases. To extend the standing language of Proposition 64 beyond its express terms, i.e., to other consumers, would destroy that balance and would, as a result, undermine the public policy protections that are an essential part of the UCL.

Even assuming that Proposition 64 were read to require not only the representative plaintiff but every class member to demonstrate injury in fact, the lower courts' rulings were still in error. That is because the lower courts went far beyond imposing an injury in fact requirement. In fact,

what the trial court did was to read into Proposition 64 a ***reliance*** requirement that nowhere appears in the language of the statute or the findings. Again, such an improper addition of language that does not appear in the statute or the "legislative" intent underlying it erroneously undermines the statute's protective goals.

As the Findings and Conclusions of Proposition 64 explain, the injury in fact requirement of the statute is intended to be equivalent to the requirement of injury in fact under Article III of the United States Constitution. (Proposition 64, section 1, subdivision e ["It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client *who has been injured in fact under the standing requirements of the United States Constitution*." (Emphasis added).]

And, indeed, Article III injury in fact functions well in the context of the UCL without impairing the public policy goals of the statute. Article III injury in fact "requires a showing that plaintiff has suffered actual loss, damage or inury, or is threatened with impairment of his or her own interests. This tends to assure that plaintiff has a sufficient stake in the outcome of the suit to make it a real 'case or controversy.' [*Gladstone Realtors v. Village of Bellwood* (1979) 441 US 91, 100, 99 S.Ct. 1601,

1608; *Bullfrog Films, Inc. v. Wick* (9th Cir. 1988) 847 F2d 502, 506].

Even if Proposition 64 had intended to impose a causation element – which is nowhere set forth in its Findings or Declarations of Purpose – the jurisprudence under Article III does not support the appellate court's conclusion that reliance or actual causation is mandated. This is because Article III "causation" only requires a showing that the actual loss is 'traceable' to defendant's acts or omissions. [*Lujan v. Defenders of Wildlife* (1992) 504 US 555, 559–560, 112 S.Ct. 2130, 2136; "*Allen v. Wright* (1984) 468 US 737, 757, 104 S.Ct. 3315, 3327] That, in fact, is precisely what a UCL or FAL claim has always done – it "traces" the loss of money or property to the defendant's prohibited conduct and, as a deterrent, requires that the actual loss be repaid, i.e., that restitution be made. The proponents of Proposition 64 expressly invoked the injury in fact concept under the United States Constitution and defendants cannot now claim that they really meant something more stringent. Where an action is brought by someone who gave money or property to a defendant who engaged in prohibited acts, the injury in fact (and, indeed, the causation) requirements of Article III standing under the United States Constitution have been met. There is no requirement that a showing of reliance or

causation – as those terms are understood in the strict common law sense – be made.

Long before Proposition 64, this Court frequently spoke of the UCL's restitutionary remedy in general causation terms. In *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-127 for example, this Court defined an order for restitution as one "compelling a UCL defendant to return money ***obtained through*** an unfair business practice to those persons in interest from whom the property was taken . . . ." "Obtained through" is merely the other side of the coin from "as a result of." This Court even used the "as a result of" language in *Kraus*, noting that restitution also refers to "all profits earned ***as a result of*** an unfair business practice." (*Id.*) But despite the use of that concept, this Court has consistently held that the ***substantive*** requirements under the UCL do ***not*** include causation. (See, e.g., *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442; *Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.App.3d 197.)

This Court, in *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, determined that the language of the statute "is unquestionably broad enough to authorize a trial court to order restitution *without requiring*

the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction." (*Fletcher*, at 451; emphasis added.) The Court then embarked on a compelling discussion of the public policy reasons for that conclusion. First, the Court noted, "inasmuch as '[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society' [citation omitted], we must effectuate the full deterrent force of the unfair trade statute." (*Id.*, at 451.) Further, the Court stated, adequate enforcement of the statutes cannot be achieved if a defendant engaged in such conduct is permitted to retain even "a portion of the illicit profits" and that "those who have engaged in proscribed conduct" must "surrender all profits flowing therefrom." (*Ibid.*) "*Thus, a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement.*" (*Ibid.*; emphasis added.)

This Court then took that same principle a step further in *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197. There, the plaintiff charged a food manufacturer, a supermarket chain and two advertising agencies with making fraudulent, misleading and deceptive advertisements in the marketing of sugared breakfast cereals and

asserted causes of action under the UCL, the FAL and common law fraud principles. In overturning the trial court's sustaining of demurrers against the UCL and FAL causes of action, this Court held that "[t]o state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.' [Citations omitted.] Allegations of actual deception, reasonable reliance, and damage are unnecessary. *The court may also order restitution without individualized proof of deception, reliance and injury if it 'determines that such a remedy is necessary "to prevent the use or employment" of the unfair practice . . .'"* (*Committee on Children's Television,* at 211; emphasis added.)

Thus, *Fletcher* and *Committee on Children's Television* make clear that there is no substantive requirement for showing "deception, reliance or damage" in a UCL or FAL action, even when brought as a class action seeking restitution. Tellingly the defendants do not even discuss the issue of the status of the "likely to deceive" standard. Defendants recognize that to argue it does not apply, would be to concede that they are arguing that Prop 64 has in fact wrought substantive changes upon the UCL landscape. On the other hand if they concede it still exists then clearly its application to plaintiffs' case dictates that the class should not have been decertified.

Essentially, under this Court's jurisprudence before Proposition 64, the statute was a "strict liability" one: You engage in wrongful conduct and you must give back the money. The defendant's conduct is thus the focus of the inquiry, not the plaintiff's injury. Indeed, as *Fletcher* explains, a defendant that violates the UCL is not forced to provide restitution because the customers were, in fact, individually "victimized" by the conduct, but, rather, because the goal of the statute is to keep the marketplace trustworthy by using resititution as a deterrent. (*Fletcher*, at 453.)

Defendants engaged in a decades-long campaign of lies and deceit about the health effects and addictive nature of cigarettes. They, in fact, sold a product that was dangerous, harmful and addictive. And the representative plaintiffs - and every class member - suffered an "injury in fact" ***because they bought cigarettes***. The actually spent their money and purchased the dangerous, harmful and addictive product peddled by defendants through their unfair business practices. As the *Anunziato* court explained so well, it is not necessary to establish any closer link than that and it would wholly undermine the protective goals and public policies underlying the UCL to impose any reliance requirements at all.

The class in this case has always been defined on the basis of people who purchased cigarettes – and thereby lost money. As such, the class in

this case has always complied with Proposition 64's mandates – even before they passed into law.

Accordingly, the only possible result - given all these circumstances and the need to preserve the meaningful protections inherent in the UCL or FAL - is that a representative bringing a class action under the UCL or FAL need only show that he or she lost money or property to a defendant who engaged in prohibited conduct. This conclusion fulfils the primary goal of Proposition 64 – that is, to stop unaffected plaintiffs - i.e., plaintiffs to whom a defendant does not owe restitution – from bringing either individual or class actions under the UCL. And it does so without impairing the public policy goals of the UCL or the class action statute.

THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING THAT INDIVIDUAL ISSUES PREDOMINATED IN THE UCL CLAIMS.

In its most recent decisions regarding the class action device, the California Supreme Court has made clear that class actions are a favored form of litigation. As the California Supreme Court noted in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, "[c]ourts long have acknowledged the importance of class actions as a means to prevent a failure of justice in

our judicial system. [Citations omitted.] "'By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress. . . .'"" (*Linder*, at 434-435.)

The appellate courts and this Court have been in no way reluctant to reverse trial courts who have erroneously exercised their discretion in denying class certification. *See e.g. Sav-On Drug Stores, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800; *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070; *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908; *Prata v. Superior Court* (2001) 91 Cal.App4th 1128. Indeed, given the importance of the class action device as a way to assure that the UCL can be most effective in protecting consumers, denial of class certification should be most carefully scrutinized. That scrutiny is particularly appropriate in this case because of the vast amount of money the tobacco industry has - and continues - to glean from California citizens who are addicted to their products.

Defendants' suggestion that the lower courts properly assessed the individual issues is simply wrong. They mistakenly focus on individual

advertisements to argue that the individual issues predominate. The individual advertisements are not the issue here, rather it is the decades long, deliberate and integrated marketing campaign that demonstrates the commonality of the issues. Plaintiffs' experts opine that the tobacco industry never expected any smoker to see and rely on a single advertisement in choosing to smoke, or even in choosing the brand of cigarettes to smoke. [AA 14, 3491:8-3494:15; 3496:2-3498:11; 3499:2-3537:1; 3512:13-3517:1; 3521:25-3535:4; AA 39; 9652-9659; 9660-9668.] And the marketing campaign was not even limited to advertisements, but included broader media information, including news stories and free media about the "controversy" regarding tobacco's dangers, to convince the public to begin and continue smoking. The entire marketing campaign was a long-term, coordinated and integrated campaign [*Id.*] that was never intended to function based upon a particular representation but rather was always intended to function based upon cumulative impact.

And it worked. As plaintiffs' experts testified, defendants' integrated, long-term marketing campaign was fantastically successful for decades. [*Id.* And that is proven by the very evidence defendants rely on in an effort to demonstrate that individual issue predominate.

In this case ***uncontradicted*** evidence and prior case law

unequivocally established that, with respect to the purchase of cigarettes, causation could be established on the basis of the tobacco industry's decades-long marketing campaign. Indeed, two appellate cases had already established that fact (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635; *Boeken v. Philip Morris* (2004) 127 Cal.App.4th 1640) and defendants provided the trial court with not one single California tobacco case that disputed those two appellate decisions.

As this Court previously determined in *Committee on Children's Television, Inc.*, at 219 a "long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date. . . . [A]dults buying a product in a store will not often remember the date and exact message of the advertisements which induced them to make that purchase.[1] Plaintiffs should be able to base their cause of action upon an allegation that they acted in response to an advertising campaign ***even if they cannot recall the specific advertisements.***" (Emphasis added.)

The tobacco defendants argued that the common law fraud cause of action could not survive given that each plaintiff had admitted that they

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[1] Indeed, as discussed by plaintiffs' experts, they may not even been consciously aware that the advertising is affecting their decision to purchase the product. [AA 14, 3491:8-3494:15; 3496:2-3498:11; 3499:2-3537:1; 3512:13-3517:1; 3521:25-3535:4; AA 39; 9652-9659; 9660-9668.]

could not recall specific advertisements that they relied on in beginning to smoke or in continuing to smoke - the very complaints defendants make here about the class representatives. Both the *Whiteley* and *Boeken* courts rejected defendants' arguments and made clear that ***such individual causation and reliance evidence was unnecessary to establish the fraud claim***. If individual causation and reliance is not necessary to establish an ***individual*** fraud claim, how, then, can individual issues of causation and reliance be predominating in a UCL fraud prong class action? The simple answer is - they can't. And that is where the lower courts abused discretion in decertifying the class - by refusing to apply the proper standard (i.e., the appropriateness of class-wide causation and reliance evidence) in assessing whether common issues predominate.

The class-wide reliance and causation concept has been utilized in numerous cases in California, with the express approval of this Court. (*Vasquez, supra; Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355; *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282.) Because of the way defendants marketed their products, it is particularly appropriate here.

Further, "[w]here advertising is aimed at a particularly susceptible audience..., its truthfulness must be measured by the impact it will likely

have on members of that group. We also recognize that an advertisement may be designed to appeal to specific groups of consumers, although it is ostensibly directed to the public at large. Where the plaintiff contends that a more vulnerable subgroup is the true target of such an advertisement, a question of fact is presented which the court must resolve." *Lavie v. Proctor & Gamble Co.* (2003) 105 Cal.App.4th 496, 506-507. Plaintiffs have alleged that defendants advertising was directed at just such particularly susceptible consumers.

As demonstrated by this Court's jurisprudence, and in individual tobacco injury cases, reliance and causation can, and should, be determinable on a class basis, thus the appellate courts decision must be reversed.

Respectfully submitted,

Dated: February 20, 2007

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CERTIFICATION OF LENGTH

I hereby certify that this brief contains 4,194 words, including footnotes, but not including the cover, tables, this certification or the proof of service, as established by the word count of the computer program utilized for the preparation of this brief.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certification was executed on February 20, 2007 at San Diego, California.

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