

Andrews Tobacco Industry Litigation Reporter

May 28, 2009

CALIFORNIA SUPREME COURT REVIVES CLASS SUIT AGAINST BIG TOBACCO

In re Tobacco II Cases

Copyright © 2009 Thomson Reuters.

In a closely watched case California's highest court has breathed new life into a defunct class-action lawsuit that seeks to hold the tobacco industry accountable for alleged deceptive advertising. [*In re Tobacco II Cases*, No. S147345, 2009 WL 1362556 \(Cal. May 18, 2009\)](#).

The 4-3 ruling bolsters a state consumer protection law that voters had limited in 2004 when they passed Proposition 64.

The decision was written by Justice Carlos Moreno and joined by Justices Joyce Kennard, Kathryn Mickle Werdegar and Eileen C. Moore.

The case concerns whether the plaintiffs had standing under Proposition 64 to pursue the case as a class action.

The lower courts said they did not because some of them could not demonstrate personal injury or loss.

Proposition 64 bars an uninjured person from suing on behalf of others.

However, the Supreme Court disagreed, finding nothing in the express language of the voter initiative or ballot pamphlet materials to alter the established principles of class-action procedure.

To hold otherwise would undermine the state's unfair-competition law, which protects consumer rights and "effectively eliminate the class-action lawsuit as a vehicle for the vindication of such rights," the majority said.

The dissenting justices said the majority's ruling "turns class-action law upside-down and contravenes the initiative measure's plain intent."

Proposition 64 was aimed at eliminating "shakedown" lawsuits in which attorneys sued or threatened to sue small businesses for minor infractions and pocketed the settlement money paid to make the lawsuits disappear.

Some experts see the decision as a victory for consumers, while others predict a deluge of frivolous lawsuits.

David L. Wallace of Chadbourne & Parke in New York called the ruling "an abomination" that will mean trouble for consumer product manufacturers, including tobacco companies.

Cases previously won by tobacco companies can now be revived on appeal, he said.

Wallace also pointed out that the ruling allows an individual plaintiff who loses a false-advertising lawsuit against a tobacco company for failure to demonstrate a reliance on any company marketing or advertising claim to join a parallel class action.

The ruling "gives new life and new incentive" to class-action plaintiffs battling big tobacco, he added.

Beth Hummer of Rutter Hobbs & Davidoff in Los Angeles predicted that the ruling will result in fewer individuals bringing UCL claims on their own. Instead, there will be more class actions because plaintiffs generally do not have to pay attorney fees in such cases, she said.

Hummer stressed that the ruling only deals with the fraud prong of the UCL in the specific context of advertising. She said numerous questions remain regarding the application of Proposition 64 for the lower courts to resolve.

In a statement Philip Morris USA maintained that substantial defenses remain in the current case and vowed to vigorously defend its position.

“We continue to have many significant defenses to both class certification and on the merits and we believe this case should ultimately be dismissed,” said Murray Garnick, senior vice president and associate general counsel of Altria Client Services.

Altria is Phillip Morris' parent company.

Background

The false-advertising case began over a decade ago in the San Diego County Superior Court, where the plaintiffs, a group of California smokers, accused six tobacco companies and two trade groups of violating the state's unfair-competition law, Cal. Civ. Code § 17200, and false-advertising law, Cal. Civ. Code § 17500.

The plaintiffs said the defendants marketed cigarettes to children, falsely touted the health benefits of “light” cigarettes, and used false “natural” and “no additives” labels.

The named defendants are R.J. Reynolds, Philip Morris USA Inc., Lorillard Tobacco Co., Brown & Williamson Tobacco Corp., Liggett Group Inc., Liggett & Myers Inc., the Council for Tobacco Research and the Tobacco Institute.

By January 2000 Willard Brown was the only remaining plaintiff. After he filed several amended complaints, the court eventually certified a class of smokers who were California residents between June 1993 and April 2001 and were exposed to the defendants' marketing and advertising activities in the state.

In 2004 California voters passed Proposition 64, which requires plaintiffs alleging unfair competition to show “injury in fact” consisting of lost money or property caused by allegedly unfair competition.

False-advertising plaintiffs have to show “detrimental reliance,” or that they would not have bought the product but for the defendants' false advertising.

After Proposition 64 was enacted, the trial court granted the defendants' motion to decertify the class.

The state's 4th District Court of Appeal affirmed, and the state Supreme Court agreed to review the case.

The high court specifically addressed two questions:

- For a class action to proceed, who in a UCL class action must comply with the standing requirements of Proposition 64? The class representatives or all unnamed class members?
- What is the causation requirement for establishing standing under the UCL?

Only Class Representatives Need Standing

The Supreme Court held that the standing requirements apply only to the class representatives, not all absent class members.

The court also held that when a class representative bases a UCL action on a misrepresentation claim, the representative must prove actual reliance on the allegedly deceptive statements using well-established principles of reliance in fraud cases.

“Those same principles, however, do not require the class representative to plead or prove an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements when the unfair practice is a fraudulent advertising campaign,” the high court explained.

It added that a plaintiff can proceed with an allegation of reliance even if alternative information was available.

Therefore, the high court reversed the decertification order and remanded the case for further proceedings regarding whether the class representatives have Proposition 64 standing.

Dissent: UCL Suits Should Follow Class-Action Rules

In his dissent, Justice Marvin R. Baxter said the ballot materials for Proposition 64 clarify that all UCL suits must proceed pursuant to the rules and principles of class-action lawsuits.

Those rules and principles require that the named plaintiff have a claim typical of the class and that each class member have the ability to bring suit on his or her own behalf, he said.

He also rejected the majority's conclusion that unnamed class members need not meet Proposition 64's injury-in-fact and causation requirements.

That ruling improperly allows the named plaintiffs to seek relief on behalf of all California smokers who saw or heard the allegedly deceptive ads, regardless of whether the ads influenced their decision to buy and smoke the cigarettes.

The dissent was joined by Justices Ming W. Chin and Carol A. Corrigan.