

DEC 10 2004

LOS ANGELES
SUPERIOR COURT

*Superior Court of California
County of Los Angeles*

GINA KIM

Plaintiff,

vs.

BAYER CORPORATION,

Defendant

Case No.: BC309926

**RULING ON MOTION OF DEFENDANT
FOR JUDGMENT ON THE PLEADINGS**

The above-entitled action came on regularly for hearing on December 10, 2004, in Department 40 of the Superior Court, the Honorable David A. Workman, Judge presiding. Paul, Hastings, Janofsky & Walker, by Eve M. Coddon and Stan Karas, appeared on behalf of defendant and moving party. Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, by Bonny E. Sweeney, appeared on behalf of plaintiff and responding party.

Having read and considered the moving, opposing and reply papers, and having heard and considered the argument of counsel, and the matter having been submitted for decision, the Court now rules as follows:

The Court grants plaintiff's and defendant's requests for judicial notice.

The motion for judgment on the pleadings is granted, without leave to amend.

Within 10 days, moving party shall serve and lodge a proposed judgment.

I. ALLEGATIONS AND PROCEDURE

2
3 In this action, plaintiff sues on behalf of the general public. The complaint includes
4 theories of injunctive and declaratory relief, and restitution for violations of Business and
5 Professions Code Sections 17200 et seq. and 17500 et seq. Essentially, plaintiff claims that as to
6 four of defendant's "One A Day" products ("Joint Health," "Bedtime & Rest," "Cholesterol
7 Health," and "Prostate Health Formula") the trademark is misleading in that consumers actually
8 are instructed to take more than one tablet a day. The trademark is used on packaging and other
9 advertisements and statements disseminated in newspapers and other publications.
10

11 12 II. NATURE OF PROPOSITION 64

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14 Proposition 64 was written to change the standing requirements of the unfair competition
15 laws, by amending sections 17203, 17204 and 17535 of the Business and Professions Code.
16

17 III. EFFECTIVE DATE

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19 California Constitution Article II, section 10 provides that an initiative or referendum
20 approved by a majority of votes takes effect the day after the election unless the measure
21 provides otherwise. Thus, Proposition 64 became effective November 3, 2004.
22

23 24 IV. RETROACTIVITY

25 A. Ascertaining Intent

1
2 “In interpreting a voter initiative ... we apply the same principles that govern the
3 construction of a statute.” *People v. Canty* (2004) 32 Cal. 4th 1266, 1276. Courts construe
4 propositions by looking at the text and history, including ballot materials, to ascertain voter
5 intent. *John L. v. Superior Court* (2004) 33 Cal. 4th 158, 169-171 (nothing in the text or history
6 of the proposition at issue there showed an intent to postpone the effective date, or to limit the
7 proposition based upon the time of underlying conduct).
8

9
10 In the absence of a clear legislative intent to the contrary, statutory enactments apply
11 prospectively. *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188; *Brenton v. Metabolife*
12 *Int., Inc.* (2004) 116 Cal.App.4th 679, 688; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287;
13 *7 Witkin Sum. Cal. Law* (9th ed. 1988) *Const. Law* § 495.
14

15 Applying the above rules, the Court readily observes that Proposition 64 contains no
16 express declaration of substantive retroactive application. Furthermore, the proposition
17 expresses no intent to postpone its effect in requiring the procedural change of standing. On the
18 contrary, Proposition 64 reveals voters’ intent to reach back and affect all pending litigation and
19 regardless of dates of underlying occurrences. Specifically, the preamble states that the purpose
20 is to "eliminate frivolous lawsuits," and the initiative forbids prosecution by persons who have
21 not suffered harm. Such statements make no provision for delaying application as to preexisting
22 causes of action. Cf., *John L.*, supra, at 169-71.
23
24
25

2 Alternatively, where the change is procedural, “[t]here is then no problem as to whether
3 the Legislature intended the changes to operate retroactively.” *Aetna Casualty & Surety Co. v.*
4 *Industrial Acci. Com.* (1947) 30 Cal. 2d 388, 394.

6 B. Prospective Procedure Versus Retrospective Substance

8 1 Generally

9
10
11 Procedural changes are not “retrospective” when applied to preexisting litigation, but
12 instead they operate as procedure to be followed in the future, regardless of when events
13 occurred giving rise to claims. *Brenton*, supra, at 689; *Tapia*, supra at 288; *Kuykendall v. State*
14 *Board of Equalization* (1994) 22 Cal.App.4th 1194, 1211, n. 20.

15
16 “A statute has retrospective effect when it substantially changes the legal consequences
17 of past events.” *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472
18 (quoting, *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243). To give an
19 example, “law governing the conduct of trials is being applied prospectively when it is applied
20 to a trial occurring after the law's effective date, regardless of when the underlying ... cause of
21 action arose.” *Tapia*, supra, at 289.

22
23
24 However, procedural changes may be unconstitutional where they have a *substantive*
25 effect. “[T]he legislature may not, under pretense of regulating procedure or rules of evidence,

deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore.” *Morris v. Pacific E. R. Co.* (1935) 2 Cal. 2d 764, 768. “It is the effect of the law, not its form or label, that is important for purposes of this analysis”. *Brenton*, supra, at 689.

2. Standing as Procedure

Proposition 64 changed the standing requirement. For example, it states: “Actions for any relief...shall be prosecuted...by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.” The Unfair Business Practices Act contains the substantive law, left fully in tact by Proposition 64. See, *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, 670 (“The UCL is a substantive statute . . .”). The proposition has changed the mechanisms for invoking such rights.

Standing is a procedural issue and not a cause of action. *Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605 (“The question of standing to sue is one of the right to relief...”). The purpose of the standing requirement is to prevent multiple lawsuits by different parties for the same harm. *Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG 2004) ¶2:4 [hereinafter “*Weil & Brown*”]. Procedural requirements of standing are based upon policies apart from substantive law. *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 122 (“In recent years there has been a marked accommodation of formerly strict procedural requirements of standing to sue”).

C. Estoppel Analysis

2
3 Another policy-based test courts apply is whether the parties reasonably relied on the
4 former law and formed expectations based on existing legal consequences, such that imposition
5 of the new proposition would be manifestly unfair. *Buttram v. Owens-Corning Fiberglas Corp.*
6 (1997) 16 Cal. 4th 520, 536.
7

8
9 Courts measure substantive effects on litigants by evaluating theoretical possibilities,
10 without inquiring into factual proof. For example, the Supreme Court concluded that plaintiffs
11 may have refrained from adding joint tortfeasors as parties in reliance upon law preexisting
12 Proposition 51. *Evangeletos*, supra, at 1215. In the context of Proposition 64, the Court
13 concludes that parties have not relied on the ability to sue in the absence of personal injury in
14 prosecuting or defending an action, such that implementing the proposition would be unfair.
15 Specifically, the injured plaintiffs and defendants still have available alternative avenues for
16 prosecuting and defending pending claims related to them, including procedures for party
17 substitution along with direct and class actions. While factually prosecutors or private parties
18 may in some future instances decide they cannot, or should not, pursue some claims, in theory
19 the procedural channels will remain open for prosecuting the causes of action.
20

V. CONSTITUTIONALITY

A. Deprivation of Rights

2 Since Proposition 64 is not substantively retroactive, there is no associated constitutional
3 impediment. As *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 981-982, 983, opines:
4 "Retrospective application of a statute is constitutional as long as it does not deprive a person of
5 a substantive right without due process of law.... Therefore, a state and its people may alter such
6 rights. Such alteration is only forbidden when at the very least the party is deprived of every
7 reasonable method of securing just compensation."

8
9 Assuming, arguendo, that the effect of Proposition 64 is retroactive, there is no
10 deprivation of any substantive right as to all of the theoretical classes of plaintiffs, as examined
11 below.

12
13 First, Proposition 64 expressly does not change the ability to sue as to those who have
14 suffered injury in fact.

15
16 Second, plaintiffs suing only as representatives would lose nothing individually, since by
17 definition, they are excluded precisely because they were not personally damaged, but instead
18 have sued on behalf of others.

19
20 Third, representative and injured plaintiffs have available to them the alternative
21 procedures of substituting into a representative case, whether individually or in a class action,
22 because the statute of limitations generally will not have expired where prior representative cases
23 are disallowed. See, generally, *Weil & Brown*, supra, at ¶¶6:734.5, 6:788 (relation back to time
24 of filing original action in circumstances where there is permitted substitution of plaintiffs
25

having standing based on same facts, incidents and damages). Also, parties seeking to bring cases on behalf of many injured persons retain the option to follow the procedural route of a class action. See, *William L. Stern, Bus. & Prof.C. §17200* (The Rutter Group 2004) ¶ 1:3 [hereinafter “*Bus. & Prof. C.*”].

Fourth, Proposition 64 excludes the California Attorney General's office from the injury requirement, which effectively retains mechanisms for representing the interests of the general public.

Moreover, private parties are not losing a right to secure just compensation, in that under section 17200 et seq., monetary damages are not allowed, but only restitution and injunctive relief. See, generally, *Bus. & Prof. C.*, supra, at ¶¶7:276, 8:2.

In sum, all of the above possible scenarios demonstrate that plaintiffs have not been “deprived of every reasonable method of securing just compensation.” See, *Yoshioka*, supra, at 983. While the representative parties themselves may be barred, the substantive claims that they initiated may survive or be renewed via alternative procedures. Hence, to the extent that Proposition 64 impacted the standing requirement, it is prospective, or at least, constitutionally retroactive.

B. Repeal of Statutorily Created Rights

1 Without triggering retrospectivity problems, statutes creating rights of action may be
2 repealed. See, *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 67 (“the repeal of a statute
3 without reservation takes away all remedies given by the repealed statute and defeats all actions
4 pending under it at the time of its repeal.”); *Lemon v. Los Angeles T. Ry. Co.* (1940) 38 Cal.
5 App. 2d 659, 670-671; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 (“[as] a general rule, ... a cause
6 of action or remedy dependent on a statute falls with a repeal of the statute, even after the action
7 thereon is pending, in the absence of a saving clause in the repealing statute. [Citations.] The
8 justification for this rule is that all statutory remedies are pursued with full realization that the
9 legislature may abolish the right ... at any time.”); *Governing Board v. Mann*, (1977) 18 Cal.3d
10 819, 830-831. “Where ... the Legislature has conferred a remedy and withdraws it by
11 amendment or repeal of the remedial statute, the new statutory scheme may be applied to
12 pending actions without triggering retrospectivity concerns.” *Brenton*, supra, at 689-690.
13 Parties do not have a vested right in claims created by statute, as distinguished from common
14 law. *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal. App. 3d 997, 1007.
15
16

17 VI. CONCLUSION

18
19 Under all of the applicable tests that have been defined by case law, Proposition 64
20 lawfully may detract from statutory rights created under The Unfair Practices Act by requiring
21 standing as to all pending cases and preexisting causes of action, including the one at hand.
22

23 Dated: December 10, 2004

DAVID A. WORKMAN

24
25 David A. Workman
Judge