Superior Court

San Diego County, State of California

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The following is a TENTATIVE ruling for 12/17/2004,
Department 61, the Honorable John S. Meyer presiding.

Case Number GIC833705

Re: United Policyholders, etc., v. Willis Group Holdings Limited, et al.

Case #: GIC 833705

Tentative Ruling:

This is a representative action brought on behalf of the general public. Plaintiff concedes that it has not suffered injury in fact and has not lost money or property as a result of the alleged unfair business practices. Proposition 64 eliminates the standing of such plaintiffs under the Unfair Business Practices Act [B&P §§17200, et seq.]. The issue presented is whether Proposition 64 should be applied to these existing causes of action.

Discussion

"It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." [*Aetna Casualty & Surety Co. v. Industrial Acci. Com.* (1947) 30 Cal. 2d 388, 393]

There is no language in Proposition 64 which expressly indicates that the statute is to apply retroactively.

In addition, the courts have found it appropriate to apply a statute retroactively when "the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively," even though the statute did not contain an express provision mandating retroactive application. [*Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1210]

The *Evangelatos* court described a "sufficiently clear indication" of the Legislature's intent as follows:

> In *Marriage of Bouquet*, the court, in concluding that the statute at issue in that case should be applied retroactively, relied, in part, on the Legislature's adoption of a resolution, shortly after the enactment of the measure, indicating that the retroactivity question was specifically discussed during the legislative debate on the measure and declaring that the provision was intended to apply retroactively (see *Marriage of Bouquet, supra*, 16 Cal.3d at pp. 588-591); in *Mannheim*, the statute in question incorporated by reference a separate statutory scheme which had expressly been made retroactive, and the *Mannheim* court reasoned that the Legislature must have intended the later statute to have a parallel application to the provision on which it was expressly fashioned. (See *Mannheim, supra*, 3 Cal.3d at pp. 686-687.)

In the Preamble in support of Proposition 64, there is language which could imply that the voters intended Proposition 64 to apply retroactively: The purpose of the proposition is to "eliminate frivolous lawsuits," and to forbid persons who have not suffered harm from "pursuing" or "prosecuting" civil actions. There is not, however, sufficiently clear language of an actual intent on the part of the drafters or voters to apply Proposition 64 retroactively.

That is not, however, the end of the analysis. The Court must also address the issue of whether the statute is procedural as opposed to substantive, and its effect if applied retrospectively. As discussed in *Brenton v. Metabolife Int., Inc.* (2004) 116 Cal.App.4th 679:

> "[T]here remains the question of what the terms 'prospective' and 'retrospective' mean." (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 288.) The courts have broadly distinguished between substantive and procedural statutes to assess whether applying a new statute would have improper retrospective application, and have declined to interpret a statute as having retrospective application when doing so would "change the legal consequences of the parties' past conduct." (*Id.* at p. 289.) Accordingly, if a statutory change is substantive because it would impose new, additional or different liabilities based on past conduct, courts are loath to interpret it as having retrospective application. (*Id.* at pp. 290-291; [see also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269 [128 L. Ed. 2d 229,

114 S. Ct. 1483] ["'every [statute that] takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective' "].)

In contrast to changed substantive statutes, applying changed procedural statutes to the conduct of existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute addresses conduct in the future. "Such a statute ' "is not made retroactive merely because it draws upon facts existing prior to its enactment ....["] [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' [Citation.] For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.' [Citation.]" (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 288.) As one court explained:

" '[T]he presumption against retrospective construction does not apply to statutes relating merely to remedies and modes of procedure. [Citation.] ... [P]rocedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." [Citations.] In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. [Citation.] In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective. There is then no problem as to whether the Legislature intended the changes to operate retroactively.' " (*ARA Living Centers-Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1561 [23 Cal. Rptr. 2d 224].)

It is the effect of the law, not its form or label, that is important for purposes of this analysis. [*Brenton,* at 688-689]

In *Robertson v. Rodriguez* (1995) 36 Cal. App. 4th 347, the appellate court addressed the issue of whether Code of Civil Procedure section 425.16 (the anti-SLAPP statute) applies to causes of action which accrued before the effective date of section 425.16. The court noted that section 425.16 was a procedural statute. It did not "change the legal effect of past conduct. It merely is a procedural screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact." [*Id.*, at 356] Hence, as a procedural statute, it is "being applied *prospectively* to an existing cause of action." [*Ibid.*, italics in original]

Standing is a procedural issue. The issue of standing does not reflect on the merits of the action, but rather goes to whether the cause of action can be maintained. [See, e.g., *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 348 ("[T]he Court of Appeal in the underlying action in this case did not rely on a technical or procedural defense like lack of standing. Instead, the court applied a substantive rule of contract law ..."); *Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605 ("The question of standing to sue is one of the right to relief ..."); *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 ...")]

Similar to Code of Civil Procedure section 425.16, Proposition 64 provides a screening mechanism to determine if a plaintiff has suffered an actual loss in order to maintain a claim under Business & Professions Code section 17200, et seq. Application of Proposition 64 to an existing cause of action would not change the legal effect of past conduct. Persons who suffered "injury in fact" and who have "lost money or property as a result of such unfair competition" can still bring a claim to remedy an alleged unfair business practice. The Attorney General and other governmental prosecuting authorities may continue to seek a remedy on behalf of the general public. Hence, the persons actually harmed and the general public are still protected under the Unfair Business Practices Act.

"[T]he right to recover specific types of damages is not a vested right because such rights are created by state and common law independent from the Constitution. (Citations) Therefore, a state and its people may alter such rights. Such alteration is only forbidden when at the very least the party is deprived of every reasonable method of securing just compensation." [*Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 982]

The purely representative plaintiff, who has suffered no injury or loss, is not losing a vested right to secure just compensation; damages are not allowed under §17200 and such a plaintiff would have no individual claim for restitution.

The Court is also cognizant of the fact that the subject causes of action are statutory claims only. As discussed by the *Brenton* court:

> Where, as here, the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns (citation); "[as] a general rule, ... a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. (Citations.) The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right ... at any time." (Citation.) MII acknowledges the numerous cases holding that when a remedial statute is amended or repealed before a final

> judgment is entered in the pending action, the court will apply the law in force at the time of the decision. (Citations.) MII attempts to distinguish these cases because the statute on which it relied--section 425.16--was neither amended nor repealed; instead, new statute section 425.17 was added. However, the court in *Governing Board v. Mann* (1977) 18 Cal.3d 819 recognized that a new statute (even one containing no reference to the existing statute) can effect a partial repeal of an existing statute. (*Id.* at p. 828 and fn. 7.) Section 425.17 directly refers to the statute it was designed to amend, and therefore MII's argument that the new legislation did not effect an amendment or partial repeal of section 425.16 is unconvincing. [*Brenton, supra*, at 690, citations omitted.]

The argument can be made that application of Proposition 64 to a pending lawsuit would affect the rights of the general public. For example, if the case is dismissed for lack of standing, those who would have benefited from this lawsuit would lose the benefit of the claim. This can be easily remedied by substituting in a new plaintiff, one who has standing under Proposition 64; that is, who has suffered an injury in fact or actual loss.

Conclusion

The motion for judgment on the pleadings is GRANTED, WITHOUT LEAVE TO AMEND.

This ruling is a tentative ruling pursuant to California Rule of Court 324(a)(2). All law and motion matters are set for hearing on Fridays at 11:00 a.m. in Department 61.

Unless modified or vacated by oral argument, the tentative ruling will become the final Order of the Court. [See California Rule of Court 324] The prevailing party is to prepare and serve notice of this ruling pursuant to CCP §1019.5.

Oral Argument Policy

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