



PROPOSITION 64: ALIVE OR DEAD?

by Mona Hanna & Todd Stitt

I. Introduction

A class action suit can act as a proverbial double edged sword to the American legal system. In its purest form, class actions allow a group of plaintiffs, who individually may not be able to pursue a lawsuit against a large corporation or private entity, to collectively address the harm done by these entities and protect themselves, as well as the public, from real abuses. While the virtues of class actions have been extolled in popular culture with films like “Erin Brokovich,” the other side of the spectrum is the misuse of class actions as a vehicle to obtain large Attorney fee awards, without obtaining any real public benefit.

Due to its potential for very large Attorney fee awards under the Private Attorney General Statute (California Civil Code § 1021.5), California courts were faced with an onslaught of these class action lawsuits in the 1990s and early 2000s due to the broad language used in Unfair Competition Law (“UCL”), Business & Professions Code § 17200, the vehicle which allows plaintiffs to bring suit.

In response, in 2004, California voters overwhelmingly passed Proposition 64, a measure that dramatically reformed the state’s notorious UCL, by limiting the individual’s right to sue under Business & Professions Code § 17200 to those plaintiffs who were personally injured by the alleged wrongful business practice, and who also suffered financial/property loss. The purpose of Proposition 64 was to combat the multitude of unsubstantiated claims that mired the state’s courts by uninjured plaintiffs (other attorneys themselves) who filed lawsuits against businesses for minor errors. It



also brought California law in line with Federal law because federal courts have consistently limited uninjured plaintiffs rights to sue on behalf of the general public under its unfair-competition law.

In the years following its passage, California Courts have been faced with the challenge of construing how Proposition 64 affects plaintiff's standing requirements. Addressing certain nuances within the proposition, the state's courts have systematically whittled away at the original stringency of the law. Specifically, in a series of cases beginning shortly before California's citizens affirmatively voted for Proposition 64, courts have allowed substitutions of pre-certification class member in certain situations during the discovery phase of litigation, leaving many in the legal community to wonder if Proposition 64 is in fact, dead.

II. Pre-Prop 64 issues with Representative Class Actions

Before Proposition 64, the UCL's sweeping prohibitory language created two troubling issues that encouraged litigious plaintiffs, and attorneys, seeking to increase their coffers. Those issues were: (1) Attorneys could file a lawsuit against a business even if a consumer had never complained about the alleged practice or sought the attorney's representation. Lacking formal class action requirements, the UCL also led to repeat liability for the same conduct. (2) Plaintiffs bringing lawsuits under the UCL were not required to meet traditional standing requirements allowing unaffected or uninjured plaintiffs to raise claims against a business. These same plaintiffs did not have to satisfy traditional class requirements if they brought the suit on behalf of the general public.

As a result of the UCL's leniency, abuses of class action proceedings using "straw man" plaintiffs became the norm rather than the exception. These "straw man" plaintiffs had no interest in the litigation. In fact, unaffected or uninjured plaintiffs could sue on behalf of the "general public" without satisfying class action requirements.

In many instances, “straw man” plaintiffs rarely sought to file a class action themselves, but instead were pursued by law firms who identified their client’s problem as a potential class action or more disturbing, identified potential actions without even being approached by any particular client. The use of these plaintiffs in class actions threatened to flood the California legal system with a host of merit-less cases. Ultimately, a solution became necessary.

III. Prop 64 requires Plaintiff to be a member of the Class

In the wake of the “straw man” waive of litigation, Proposition 64 aimed to deftly reform these oversights in the UCL by including stricter parameters to bring suit. The initiative amended the provisions of § 17200 et. seq. to limit standing to causes of action for unfair competition to persons ***personally injured, in fact***, by the conduct. Specifically, Prop 64 added the language that a private party may only sue if he or she “has suffered injury in fact ***and*** has lost money or property as a result of such unfair competition.” Prop. 64, §§ 3, 5. [Emphasis added].

Similarly, C.C.P. § 367 provides that “[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.” It is well settled, however, that only the real party in interest, *i.e.*, the person who owns or holds title to the claim or property involved, can invoke the judicial process to recover damages. *Gantman v. United Pac. Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566. In *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1001, the court held that only the person who suffered the injury may invoke the judicial process and only that person has a real interest in the ultimate adjudication. Only the “real party in interest” may prosecute an action. C.C.P. § 367.

For a private plaintiff to bring suit on behalf of a representative class, *i.e.*, in this case the acts must have caused an injury in fact to the Plaintiff and loss of money or property. [CAL. BUS. & PROF. CODE §§ 17204, 17535]. Plaintiff can’t simply bring a

representative class action on behalf of the putative class when he is not an affected member of that class. Rather, Plaintiff must allege that he is a member of the affected class in that he has lost money or property or been denied money to which Plaintiff has a cognizable claim as a result of the alleged unfair competition affecting the representative class. *Meyer v. Sprint Spectrum L.P.* (2007) 150 CA4th 1136.

IV. Post Prop 64

The passage of Proposition 64 placed standards on class certification where previously few existed. As a result, this led to a wave of motions seeking discovery to identify substitute class representatives in lawsuits where the plaintiff was not a member of the putative class. In a series of decisions, California courts allowed the substitution of plaintiffs in certain scenarios, which began to raise doubts as to the over-arching impact of Proposition 64 to curb legal actions brought by uninjured or unaffected plaintiffs.

In *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 135 Cal. Rptr.2d 90, plaintiffs brought a class action alleging employer's violation of California's wage and hour laws regarding overtime compensation and unfair competition. Although the trial court denied the plaintiffs motion to communicate with potential class members before class certification and to compel discovery of names and addresses of potential class members, the Court of Appeals reversed this holding and ruled that the requirement of court approval for pre-certification communications with potential class members was a prior restraint on speech in violation of the California Constitution.

The Court further held that if the original plaintiff had standing but loses it during pendency of action but pre-certification, the court may use a balancing test to allow pre-certification discovery of class members to obtain and substitute in a Plaintiff with standing. As part of this balancing test, the Court expressly identified any potential abuses of the class action procedure that may be created if the discovery is permitted,

and weigh the danger of such abuses against the rights of the parties under the circumstances.

In 2005, the Court expanded the parameters surrounding class substitution in its decision, *Shapell Industries, Inc. v. Superior Court*, 132 Cal.App.4th 1101 (2005). The Court found that if the original plaintiff loses standing, even due to a voluntary dismissal, a new plaintiff can be substituted in as a class representative. The trial court also continues to have subject matter jurisdiction to substitute in a new class representative plaintiff even if the named plaintiff voluntarily dismisses his claims. In this suit, the plaintiff brought an uncertified class action against a developer and escrow company for escrow violations, unfair competition, and restitution. The Court held that the new plaintiff had standing to seek an amended complaint to add himself as the representative plaintiff.

Following the decisions in *Shappell*, the Court found that the plaintiffs' discovery interests in a class action outweighed certain privacy concerns of potential class members. In *Best Buy Stores, L.P. v. Superior Court*, 137 Cal.App.4th 772 (2006) and *Pioneer Electronics v. Superior Court*, 40 Cal.4th 360 (2007), the California Supreme Court unanimously held that the plaintiffs' discovery interests outweighed the privacy concerns such that a discovery request for victim contact information in a consumer class action did not require the affirmative written consent of those consumers.

The plaintiffs in *Pioneer Electronics* filed a class action against the electronics company, alleging defects in the DVD players that it sold. The class, which sought to represent persons who purchased the same model of allegedly defective DVD player, were able to learn the names of other individuals who might "assist" them in prosecuting their case because the Court found that contact information regarding the identity of potential class members is generally discoverable so long as such disclosure does not involve a revelation of personal or business secrets, intimate activities, or similar private

information. In short, the Court held that the plaintiff's lawyer who originally filed the class action lawsuit as both class representative and as counsel for the class, could compel Best Buy (through a third party) to send a letter to a sampling a members of the putative class so that he could find a new class representative.

In *Cash Call v. Superior Court*, 159 Cal. App.4th 2793 (2008), the California Court of Appelas extended the right to the 2003 "Parris" pre-certification discovery to substitute in new plaintiff, pre-certification, even when a plaintiff never had standing to act as a class representative at the pleadings stage. Specifically, in *Cash Call*, the plaintiffs alleged that Cash Call secretly and illegally monitored its collection calls in violation of the borrower's privacy rights. After discovering that the plaintiffs named in the class action had not had their calls monitored, the class action complaint was further amended to substitute new named plaintiffs, and then further amended after those plaintiffs had not had their calls monitored either. The Court allowed precertification discovery for the identities of the apparently 551 members of the putative class action whose calls had been surreptitiously recorded.

The decisions in this line of cases exploited a weakness in Proposition 64 in which uninjured plaintiffs could still bring their lawsuits to Court. Although after Proposition 64, these uninjured plaintiffs were no longer able to fully adjudicate their suits in the guise of class certified plaintiffs, they could nonetheless pursue their cases up to a point. Beginning with the Court's decision in *Parris*, these uninjured plaintiffs, who clearly had no standing, could find class members to certify through discovery. In some ways, this resembled the uninjured plaintiff bringing suit on behalf of the public, one of the primary reasons that Proposition 64 was initially enacted.

V. Reemergence of Prop 64 in *Starbucks v. Superior Court*

In December 2008, the Court of Appeals reviewed *Starbucks Corporation v. The Superior Court of Orange County*, No. 05CC00130, a case in which approximately

135,000 unsuccessful job applicants alleged that the Starbucks job application contained an illegal question regarding prior marijuana convictions that are more than two years old. The trial court had denied Starbucks's motion for summary judgment in the class action that was filed against the coffee giant. However, the plaintiffs who brought the class action suit against Starbucks did not have any marijuana convictions and were not covered by the applicable labor statute that the application violated. Only an individual with a marijuana-related conviction fell within the class of people the Legislature sought to protect.

Since the plaintiffs were not actually injured, nor part of the underlying statute's legally protected class, the Court of Appeals issued a writ of mandate ordering the Superior Court to vacate its order denying Starbucks's motion for summary judgment and to issue an order granting summary judgment.

Has Proposition 64 reemerged after California's Court of Appeal's recent decision in *Starbucks*? In some ways, the answer to that question is yes. The Court strictly enforced Proposition 64's provisions that a plaintiff must have suffered an injury in fact and lost money or property. Here, the plaintiffs were neither injured by Starbucks job application nor lost money or property because of this injury. The Court found that the plaintiffs, who had no marijuana convictions to disclose, had failed to establish that they fell within the class of persons the legislature had intended to protect.

However, interestingly, mention of Proposition 64 is not only absent from the Court's opinion, with the Court instead focusing the majority of its decision making process around the harsh burden that Starbucks would suffer should the plaintiffs succeed on their claim. The plaintiffs, who did not lose money or property as a result of Starbucks allegedly unlawful conduct, argued that they were automatically entitled to a minimum of \$200 simply because they filled out the Starbucks job application and it was a statutory penalty for completing an application that violates the applicable labor code.

Disagreeing with the latter, the Court found that the Legislature enacted the statute to minimize the social stigma attached to a relatively minor form of criminal activity and did not intend to protect the privacy interests of job applicants who had no prior marijuana convictions in their background.

Should the plaintiffs had succeeded on their claim Starbucks could have been liable for a class total of \$26 million. The Court reviewed the labor code's language in such a way that it would avoid harsh results or unconstitutionally excessive penalty, and found that the potential penalty for Starbucks was disproportionate to its alleged culpability. Although the Court had issues with the placement of the disclaimer instructing California residents to omit any convictions for possession of marijuana that were more than two years old on the reverse side of the Starbucks application, it nonetheless found the penalty excessive.

With 135,000 members of the class, there was no need for the Starbucks Court to concern themselves with issues of privacy and discovery for pre-class certification reasons. Ultimately, the Court simply found that the potential outcome of the class action to be overly harsh in relation to the alleged misconduct.

VI. Conclusion

So, the question remains; is Prop 64 alive or dead. Based on the Court's more recent rulings in this area, it appears that Prop 64 is being given new life to protect against potential misuse of the Class Action.

About Mona Hanna & Todd Stitt

Mona Hanna is the Managing Partner at Michelman & Robinson's Orange County office and the head of the Firm's Litigation Practice Group.

Mrs. Hanna is a versatile litigator who represents her clients in all aspects of employment law and class action matters. She has obtained several precedent setting victories, including her successful defense in a "lemon law" case for the national motorcycle manufacturer, Yamaha Motor Corporation, U.S.A.

Her achievements have often been recognized in the Daily Journal and she was named

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Todd Stitt is the Administrative Partner at Michelman & Robinson's Orange County office.

Mr. Stitt specializes in the areas of insurance defense, insurance coverage litigation and business litigation. He is widely recognized for his extensive civil litigation experience, having successfully represented clients on a broad range of insurance matters in both state and federal court.

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