

**SUPREME COURT
COPY**

Alleged Unfair Competition
Bus. & Prof. Code § 17200 et seq.
Cal. Rules of Court, Rule 15(e)(2)

No. S117156

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

KIDS AGAINST POLLUTION, et al.,

Plaintiffs and Respondents,

v.

CALIFORNIA DENTAL ASSOCIATION,

Defendant and Appellant.

SUPREME COURT
FILED

DEC 10 2004

Frederick K. Ohlrich Clerk

DEPUTY

On Petition for Review
After a Decision of the Court of Appeal
First Appellate District, Division Three

**CALIFORNIA DENTAL ASSOCIATION'S
SUPPLEMENTAL BRIEF REGARDING PASSAGE OF
PROPOSITION 64**

(Cal. Rules of Court, Rule 29.1(d))

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INTRODUCTION

On November 2, 2004, an overwhelming majority of California voters passed Proposition 64 and amended Business & Professions Code section 17200 et seq. (the “UCL”) to eliminate frivolous lawsuits like this one. According to Proposition 64, which became effective on November 3, 2004, a private plaintiff may bring a UCL claim only if he has (i) “suffered injury in fact and (ii) lost money or property as a result of such unfair competition.” (Prop. 64, §§ 3, 5, Exhibit A hereto.)

Kids Against Pollution et al.’s (“KAP”) two virtually identical complaints were premised solely on alleged UCL claims arising out of California Dental Association’s (“CDA”) protected speech on a public health controversy.¹ KAP does not allege “injury in fact” or monetary loss to sustain a UCL claim. If, *arguendo*, KAP ever had any likelihood of success on the merits (prong two of the anti-SLAPP statute’s two-part test), Proposition 64 destroyed KAP’s possibility of prevailing. (See Code Civ. Proc., § 425.16; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733 [prong two requires that plaintiff establish “a probability of prevailing on the claim”].)

¹ KAP’s lawsuit sought a prior restraint on statements by CDA that dentists who advocate the removal of functional amalgam fillings by citing “health concerns” (and to reap financial windfalls) are acting unethically.

Although this litigation was pending before passage of Proposition 64, because UCL remedies are purely statutory in nature (*i.e.*, not founded in the common law), those remedies can be repealed at any time. Proposition 64 repealed the “private attorney general” provisions of the UCL. The recent amendments to the UCL are applied prospectively to all cases in which final judgment has not yet been rendered, and KAP’s failure to state a claim under the new statute is fatal.

Proposition 64 provides an independent basis for affirming the Court of Appeal’s decision, or alternatively, vacating the grant of review.

I. **KAP, A SELF-DESCRIBED “PRIVATE ATTORNEY GENERAL,” LACKS STANDING TO BRING A UCL CLAIM**

A. **KAP Does Not Allege Actual Injury and Pecuniary Loss to Satisfy the UCL’s Standing Requirements**

The recent amendments to the UCL are fatal to KAP’s purported UCL claims and negate any likelihood of success on the merits.

Proposition 64 amended section 17204 of the UCL as follows:

Actions for any relief pursuant to this chapter shall be prosecuted exclusively by . . . [one of the specified government attorneys or prosecutors] or **by any person acting for the interests of itself, its members or the general public who has suffered injury in fact and has lost money or property as a result of such unfair competition.**

(Prop. 64, § 3, Ex. A [emphasis added].) A non-governmental prosecutor now may seek representative relief only if he can satisfy both requirements

and the additional, stringent requirements of Code of Civil Procedure section 382. (See Prop. 64, §§ 1, 2, 5.)

KAP's lawsuit is exactly the type of suit Proposition 64 was intended to eliminate.² No named plaintiff alleges injury in fact or monetary loss. (See CT 1, 162.) Rather, each purports to act as a "private attorney general" asserting claims on behalf of unnamed members of the public who, according to KAP, are "prevented" from receiving KAP's views on the safety of dental amalgam. (CT 28, 192.) During argument before the Court of Appeal, KAP's counsel conceded that this lawsuit challenged nothing other than CDA's right to disseminate ethical principals to its member dentists. No injury in fact or monetary loss is alleged.

B. The Recent Amendments to the UCL Apply Here

Pursuant to Article 2, section 10 of the California Constitution, Proposition 64's amendments to the UCL became effective on November 3, 2004, the day after the election. (Cal. Const., art. II, § 10, subd. (a) ["An initiative statute . . . approved by a majority of votes thereon takes effect

² In approving Proposition 64, California voters found that, as here, "unfair competition laws are being misused by some attorneys who: (1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit. (2) File lawsuits where no client has been injured in fact. . . . [and] (4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." (Prop. 64, § 1, subd. (b).)

the day after the election unless the measure provides otherwise”].)

Proposition 64 contained no exception or savings clause for pending litigation. (See Ex. A hereto.)

Because UCL remedies are purely statutory in nature (see *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264), the recent amendments of the UCL apply here, and all claims that do not satisfy the new requirements fail to state a claim. (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 [quoting *Callet v. Alioto* (1930) 210 Cal.65, 67 (“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”)].)

Proposition 64 repealed the authority of uninjured private parties to seek relief on their own behalf or on behalf of the general public. (Prop. 64, § 3; accord, *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 [a statutory remedy is repealed where earlier procedures are eliminated, regardless of whether “cast in terms of an ‘amendment’”].)

“Any statute may be repealed at any time, except when vested rights would be impaired.” (Gov. Code § 9606; see also *International etc. Workers v. Landowitz* (1942) 20 Cal.2d 418, 423 [where statute authorizing claim for injunctive relief was repealed during pendency of appeal, “the right to maintain an action based thereon [was] terminated”].)

KAP has no “vested right” to bring purported UCL claims seeking to

ensor CDA's constitutionally protected speech on a public health controversy. Absent the former UCL's statutory grant of authority to uninjured private plaintiffs, *no* private party other than a real-party-in-interest has a right to sue. (Compare, e.g., *Baxter v. Salutory Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941, 948 [prior UCL provided "relaxed standing requirements"] with *Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297, 315 [persons with standing to sue have "some particular right to be preserved or protected over and above the interest held in common with the public"].)

Applying Proposition 64 to KAP's pending lawsuit is a prospective, not retroactive, application of the UCL. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288 explained,

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."

Proposition 64 does not declare conduct that was lawful prior to November 3, 2004 to be unlawful, or visa-versa. It amended a *procedural* prerequisite to the enforcement of substantive rights under the UCL – claims on the public's behalf now must be prosecuted by law enforcement officials or injured parties only. (Accord, *Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194, 1211 & fn. 20 ["[P]arties do not have vested

rights in existing remedies and rules of procedure.”]; cf., *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1389 [discussing the “procedural requirements of standing to sue”].)

CONCLUSION

KAP’s lawsuit was meritless at its inception. Proposition 64 provides new and conclusive grounds for so deciding. CDA respectfully urges the Court to affirm the Court of Appeal’s decision striking KAP’s complaints, or alternatively, to vacate the order granting review.

Dated: December 9, 2004

Respectfully submitted,

MORRISON & FOERSTER LLP

By: _____



Seth M. Hufstedler
Attorneys for Defendant/Appellant
California Dental Association

CERTIFICATE OF WORD COUNT

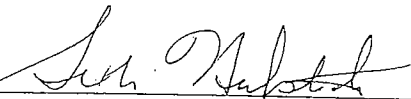
Pursuant to Rule 14(c)(1) of the California Rules of Court, counsel of record hereby certifies that the foregoing Supplemental Brief Regarding Passage of Proposition 64 of defendant/appellant California Dental Association is produced using 13 point Roman type and contains approximately 1,259 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 9, 2004

Respectfully submitted,

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By: _____



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California Dental Association

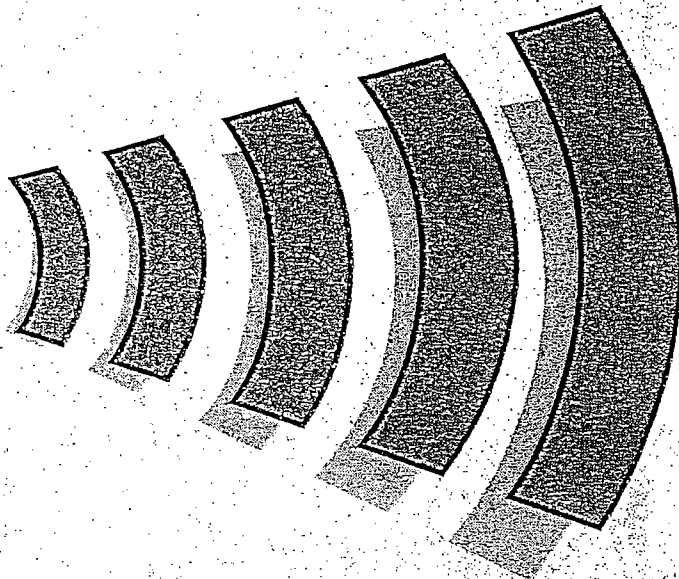


OFFICIAL VOTER INFORMATION GUIDE

CALIFORNIA GENERAL ELECTION

NOVEMBER 2, 2004

MAKE YOUR VOICE HEARD



REGISTER LEARN VOTE

▶ MAKE YOUR VOTE COUNT

Register as a Permanent Absentee Voter.
To receive your ballot in the mail each election,
sign up at www.MyVoteCounts.org.

▶ MAKE AN INFORMED CHOICE

Read inside about the statewide issues
on the ballot.

▶ MAKE YOUR VOICE HEARD

Vote on Tuesday, November 2, 2004.
The polls are open from 7 a.m. to 8 p.m.
on Election Day.

CERTIFICATE OF CORRECTNESS

I, Kevin Shelley, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the General Election to be held throughout the State on November 2, 2004, and that this guide has been correctly prepared in accordance with the law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 9th day of August, 2004.

Kevin Shelley

Kevin Shelley
Secretary of State



PROPOSITION

64

LIMITS ON PRIVATE ENFORCEMENT OF
UNFAIR BUSINESS COMPETITION LAWS.
INITIATIVE STATUTE.

OFFICIAL TITLE AND SUMMARY

Prepared by the Attorney General

Limits on Private Enforcement of Unfair Business
Competition Laws. Initiative Statute.

- Limits individual's right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss because of, an unfair business practice.
- Requires private representative claims to comply with procedural requirements applicable to class action lawsuits.
- Authorizes only the California Attorney General or local government prosecutors to sue on behalf of general public to enforce unfair business competition laws.
- Limits use of monetary penalties recovered by Attorney General or local government prosecutors to enforcement of consumer protection laws.

Summary of Legislative Analyst's Estimate of Net State and Local Government
Fiscal Impact:

- Unknown state costs or savings depending on whether the measure significantly increases or decreases court workload related to unfair competition lawsuits and the extent to which funds diverted by this measure are replaced.
- Unknown potential costs to local governments depending on the extent to which funds diverted by this measure are replaced.

ANALYSIS BY THE LEGISLATIVE ANALYST

BACKGROUND

California's unfair competition law prohibits any person from engaging in any unlawful or fraudulent business act. This law may be enforced in court by the Attorney General, local public prosecutors, or a person acting in the interest of itself, its members, or the public. Examples of this type of lawsuit include cases involving deceptive or misleading advertising or violations of state law intended to protect the public well-being, such as health and safety requirements.

Currently, a person initiating a lawsuit under the unfair competition law is not required to show that he/she suffered injury or lost money or property. Also, the Attorney General and local public prosecutors can bring an unfair competition lawsuit without demonstrating an injury or the loss of money or property of a claimant.

Currently, persons initiating unfair competition lawsuits do not have to meet the requirements for class action lawsuits. Requirements for a class action lawsuit include (1) certification by the court

of a group of individuals as a class of persons with a common interest, (2) demonstration that there is a benefit to the parties of the lawsuit and the court from having a single case, and (3) notification of all potential members of the class.

In cases brought by the Attorney General or local public prosecutors, violators of the unfair competition law may be required to pay civil penalties up to \$2,500 per violation. Currently, state and local governments may use the revenue from such civil penalties for general purposes.

PROPOSAL

This measure makes the following changes to the current unfair competition law:

- *Restricts Who Can Bring Unfair Competition Lawsuits.* This measure prohibits any person, other than the Attorney General and local public prosecutors, from bringing a lawsuit for unfair competition unless the person has suffered injury and lost money or property.

LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS
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ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

- *Requires Lawsuits Brought on Behalf of Others to Be Class Actions.* This measure requires that unfair competition lawsuits initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits.
- *Restricts the Use of Civil Penalty Revenues.* This measure requires that civil penalty revenues received by state and local governments from the violation of unfair competition law be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws.

FISCAL EFFECTS

State Government

Trial Courts. This measure would have an unknown fiscal impact on state support for local trial courts. This effect would depend primarily on whether the measure increases or decreases the overall level of court workload dedicated to unfair competition cases. If the level of court workload significantly decreases because of the proposed restrictions on unfair competition lawsuits, there could be state savings. Alternatively, this measure could increase court workload, and therefore state costs, to the extent there is an increase in class action lawsuits and their related requirements. The number of cases that would be affected by this measure and the corresponding state costs or savings for support of local trial courts is unknown.

Revenues. This measure requires that certain state civil penalty revenue be diverted from general state purposes to the Attorney General for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by the General Fund, there would be a state cost. However, there is no provision in the measure requiring such replacement.

Local Government

The measure requires that local government civil penalty revenue be diverted from general local purposes to local public prosecutors for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by local general fund monies, there would be a cost to local government. However, there is no provision in the measure requiring the replacement of diverted revenues.

Other Effects on State and Local Government Costs

The measure could result in other less direct, unknown fiscal effects on the state and localities. For example, this measure could result in increased workload and costs to the Attorney General and local public prosecutors to the extent that they pursue certain unfair competition cases that other persons are precluded from bringing under this measure. These costs would be offset to some unknown extent by civil penalty revenue earmarked by the measure for the enforcement of consumer protection laws.

Also, to the extent the measure reduces business costs associated with unfair competition lawsuits, it may improve firms' profitability and eventually encourage additional economic activity, thereby increasing state and local revenues. Alternatively, there could be increased state and local government costs. This could occur to the extent that future lawsuits that would have been brought under current law by a person on behalf of others involving, for example, violations of health and safety requirements, are not brought by the Attorney General or a public prosecutor. In this instance, to the extent that violations of health and safety requirements are not corrected, government could potentially incur increased costs in health-related programs.

Proposition 64

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Business and Professions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declarations of Purpose

The people of the State of California find and declare that:

(a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices.

(b) These unfair competition laws are being misused by some private attorneys who:

(1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.

(2) File lawsuits where no client has been injured in fact.

(3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

(4) File lawsuits on behalf of the general public without any accountability to the public and, without adequate court supervision.

(c) Frivolous unfair competition lawsuits clog our courts and cost taxpayers. Such lawsuits cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits.

(d) It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code.

(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.

(f) It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public.

(g) It is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.

(h) It is the intent of California voters in enacting this act to require that civil penalty payments be used by the Attorney General, district attorneys, county counsels, and city attorneys to strengthen the enforcement of California's unfair competition and consumer protection laws.

SEC. 2. Section 17203 of the Business and Professions Code is amended to read:

17203. *Injunctive Relief—Court Orders*

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

SEC. 3. Section 17204 of the Business and Professions Code is amended to read:

17204. *Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys*

Actions for any relief pursuant to this chapter shall be prosecuted exclu-

sively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public who has suffered injury in fact and has lost money or property as a result of such unfair competition.

SEC. 4. Section 17206 of the Business and Professions Code is amended to read:

17206. *Civil Penalty for Violation of Chapter*

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. *The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered *for the exclusive use by the city attorney for the enforcement of consumer protection laws.* However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

SEC. 5. Section 17535 of the Business and Professions Code is amended to read:

17535. *Obtaining Injunctive Relief*

