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Judicial Council  
Coordination Proceedings  
No. JCCP 4042

Coordination Proceeding  
Title [Rule 1550(b)]  
TOBACCO CASES II

Motion for Class Decertification

The Court issues this final ruling on defendants Philip Morris USA Inc., R.J. Reynolds Tobacco Company, Lorrillard Tobacco Company and Brown & Williamson Tobacco Corporation's (collectively, "Defendants") motion to decertify plaintiffs Willard R. Brown, et al.'s (collectively, "Plaintiffs") remaining Business & Profession Code sections 17200 and 17500 *et seq.* class-action claims.

I. Summary of Ruling

Defendants' motion for decertification of the class is granted. After a thorough review of the pertinent case law and the arguments presented, the Court determines that the standing requirements of Proposition 64 ("Prop 64") apply to this pending case. As a result, individual issues predominate, making class treatment inappropriate.

II. ***Introduction and Procedural Background***

The critical issue raised by Defendants' motion for decertification is whether Prop 64 applies to this pending case. Proposition 64 was approved by California voters in the most recent election of November 3, 2004. It amends the enforcement provisions of Business & Profession Code sections 17200 and 17500 *et seq.* (the "Unfair Competition Law" or "UCL"), which allowed anyone to bring an action on behalf of the general public. The amendment imposes two new standing requirements on plaintiffs. To have standing, UCL plaintiffs must now allege (and ultimately prove) that the purported wrongful conduct or practices of the named defendants actually injured them in some tangible way, *i.e.*, caused loss of money or property.

The second requirement applies to UCL plaintiffs who wish to represent the general public. These plaintiffs must not only allege and show actual injury to themselves, but must also demonstrate that a certifiable class of California residents suffered comparable injury. This change in the law is significant in that plaintiffs are now prohibited from filing any representative UCL action unless the action meets the requirements for certification as a class action. See Defendants' Exhibit A, sections 3 and 5, striking, respectively, the phrase "acting for the interests of itself, its members or the general public" from section 17204 and 17535.

Defendants here vigorously argue that these changes in the law apply to the instant case. If Defendants are correct, then the certification issues presented by Plaintiffs' UCL case would be no different than the certification issues presented earlier by Plaintiffs' claims under the Consumer Legal Remedies Act. (CLRA). Respecting the CLRA claims, the Court ruled that Plaintiffs' case could not be certified as a class action because "causation" and "injury" were distinctive to each member of the proposed class. In light of Prop 64, the issue now is whether the same reasoning applies to Plaintiffs' UCL case such that the UCL class should be decertified.

### III. Discussion

#### I. *Prop 64's Standing Requirements Apply to this Pending Case*

Plaintiffs assert several arguments that the change in the standing requirement brought by Prop 64 does not apply retroactively. Plaintiffs argue that the cases cited by Defendants, namely *Younger v. Superior Court*, 21 Cal.3d 102 (1978), and *Governing Board of Rialto Unified School District v. Mann*, 18 Cal.3d 819 (1978), in support of retroactivity are inapposite because in those cases the statutes at issue were completely repealed, whereas Prop 64 effected no repeal of any statutory right, but merely implemented several substantive changes respecting a person's standing to bring UCL actions. Additionally, Plaintiffs argue that reliance on the *Younger* line of cases is no longer proper in light of a certain decision by the California Supreme Court, namely *Myers v. Philip Morris Cos.*, 28 Cal.4<sup>th</sup> 828 (2002). Lastly, Plaintiffs contend that the Repeal Rule (codified at Government Code section 9606) does not apply in cases where the statute that is repealed codified common law rights.

A review of the case law, however, reveals that none of Plaintiffs' arguments is persuasive. While the question of retroactive application is often analyzed from various perspectives (such as whether the amendments or changes are substantive or procedural, whether the statute contains a saving clause or an express directive requiring retroactive application, or whether the right in question is derived from a statute or existed at common law), a thorough review of the case law reveals that these analytical perspectives are not at all inconsistent or irreconcilable. Rather, they are all guided by an overriding Constitutional principle: the protections afforded by the Due Process clause of the U.S. and California Constitutions.

Courts are wary to apply a law retrospectively unless there is a clear directive from the Legislature to do so. In this regard, Plaintiffs are correct that the decision to apply a new law or any amendment retrospectively is a policy decision which is first made by the Legislature. It is only when the Legislature has not addressed the issue, or when there is some ambiguity, that the courts will consider the matter. See *Myers v. Philip Morris Co.*, 28 Cal.4<sup>th</sup> 828, 841 (2002). Courts will also review newly enacted statutes or amendments when their application would subject a party to liability for past conduct that was not actionable at the time it occurred. In this circumstance, the court must evaluate the new law or amendment from a Constitutional perspective, focusing on whether the amendment is fair in light of the protections afforded by the Due Process clause of the California and U.S. Constitutions. In sum, it appears that legitimate Constitutional concerns about the application of new legislation to newly filed or pending cases has led to the well-settled rule that, in the absence of an express legislative mandate, statutes and amendments are to be given prospective application.

This does not mean, however, that the application of all new statutes or amendments trigger Constitutional concerns, or that, there is only one rule, the presumption of prospective application, as Plaintiffs impliedly suggest when they argue that the Repeal Rule was abandoned by the California Supreme Court in *Myers, supra*. While *Myers* speaks volumes about the canons of statutory interpretation, and the presumption of prospective application, it does so with respect to the repeal of a certain kind of statute (former Civil Code (“CC”) section 1714.45), one which provided Defendants and similarly situated manufacturers with *immunity* from prosecution for their unsafe products. The question of retroactive application was therefore patent and paramount, for if the Court applied the new law retroactively, Defendants would have likely been found liable for their *past* conduct—conduct that could not have formed the predicate of any legal action at the time it occurred. And a quagmire of Due Process and Ex Post Facto issues would have arisen in the case. Hence, it is not surprising that *Myers* emphasizes time and again that “Constitutional considerations reinforce our reading of the repeal statute (referring to the newly amended CC section 1714.45) as not having retroactive application.” *Myers*, 28 Cal.4<sup>th</sup> at 845.

The repeal legislation at bar, however, is very different, and the significance of this difference cannot be overemphasized. Here, we have the opposite side of this legal coin. Unlike the amendment to CC section 1714.45, Prop 64 did not repeal the right to be immune from suit, but rather limited the right to file a suit. Consequently, unlike the repeal of any immunity provision, the repeal of a statutory right of action does not raise any of the myriads of Constitutional concerns that underlie *Myers*.

Moreover, on this point, *Myers* provides direct guidance. Indeed, in *Myers*, the Court makes clear that the phrase “retroactive application” does not simply refer to the application of new law to past conduct. Rather, the phrase “retroactive application” is a legal term of art that takes into account various contingencies. A “retrospective” or

“retroactive” statute is one 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.” *Id.* at 839-40 (emphasis added). Thus, only those statutes which affect the legal consequences of past conduct are considered “retroactive.” And with regard to a person’s legal rights, only those statutes which impair or take away a *vested* right can be deemed “retroactive.” *Myers* therefore shows that the application of Prop 64’s standing requirement in this case cannot, *by definition*, be deemed “retroactive.” Thus, ironically, the Court agrees with Plaintiffs that there can be no “retroactive” application of Prop 64 in this case. But this does not lead to the conclusion that Prop 64 should not be applied here.

In light of the Repeal Rule, the pivotal questions are whether the Rule applies, and, if so, whether Plaintiffs’ right of action has vested. Regarding the former, the Court can only conclude that the Repeal Rule applies here, as the Repeal Rule comes into play precisely in situations such as these. See Government Code section 9606 (providing that “[a]ny statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal.”) When the right to file an action is derived from statute, and the statute is repealed, plaintiffs’ case must be dismissed where there is no saving clause and no final judgment has been entered. *Younger v. Superior Court*, 21 Cal.3d 102, 109 (1978). The rationale for the Repeal Rule is that “all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.” *Id.* (quoting *Governing Board v. Mann*, 18 Cal.3d 819, 829 (1977)). And while the voters, rather than the Legislature, repealed the liberal standing requirements of the UCL, the result is unavoidably the same.

Plaintiffs argue that Prop 64’s standing requirements should not be applied to this case because Prop 64 did not completely repeal the UCL. This argument presupposes that in order to apply the Repeal Rule, the entire statute affording the cause of action must be repealed. There is no authority, however, for this proposition. Plaintiffs also argue that the repeal rule does not apply where, as here, the statute that was repealed has its origins at common law. Plaintiffs’ arguments are, however, unavailing.

First, Plaintiffs are correct that the Repeal Rule does not apply when the right at issue existed at common law, but is thereafter codified and then later repealed. This is probably because unless the repealing statute also extinguished the common law right, the common law right would survive the repeal of its codification. Application of the Repeal Rule would therefore serve no purpose. Plaintiffs are also correct that the UCL is in part based on an expanded view of the tort of unfair competition, which allows businesses to recover against competitors for unfair competition practices. But this is a far cry from showing that the cause of action *as codified* existed at common law.

Plaintiffs cite *The People ex re., Stanley Mosk v. National Research Company of California*, 201 Cal. App.2d 765 (1962), as supporting authority. But in *National Research Company*, the court merely interpreted the UCL’s predecessor statute, Civil

Code section 3369, specifically the phrase “unfair competition, to mean unfair competition in its broadest sense, that is, unfair practices that injure not just competitors, but also the public’s right to be protected from fraud and deceit. *Id.* at 771. Thus, *National Research* only shows that Civil Code section 3369 was given a broad interpretation by the courts in accordance with the intent of the Legislature.

Neither does *Bank of the West v. Superior Court*, 2 Cal.4<sup>th</sup> 1254 (1992), also cited by Plaintiffs, help their case. Indeed, in *Bank of the West*, the California Supreme Court reviewed the historical development of the UCL, noting that the expansion of legal remedies against deceptive business practices can be traced to a 1938 amendment to the Federal Trade Commission Act (“FTC”), which gave the FTC jurisdiction over unfair business practices that harmed the public. Later, the States followed suit, enacting a host of “little FTC Acts,” including Civil Code section 3369. *Id.* at 1264. Even more on point, *Bank of the West* notes that the common law tort of unfair competition did not provide an effective remedy for the consumer precisely because a showing of competitive injury was required.

From this it follows that contrary to Plaintiffs’ argument, the common law did not recognize any right of action by which uninjured consumers could sue on behalf of the general public to enjoin unfair business practices. This expansive development was fashioned by the Legislature when it enacted section 3369. And, it is this very statutory right which the voters changed by means of Prop 64 in making injury in fact a standing requirement for UCL actions. It therefore appears that, through Prop 64, the voters have, in effect, brought the UCL more in line with the common law.

Plaintiffs further argue that Prop 64 enacted “substantive changes” in the law and that, if applied to the instant case, Prop 64 would “take[] away” or “impair” Plaintiffs’ right to maintain this action. At first blush, these arguments seem to have merit, as this action has been pending for several years at a significant cost to Plaintiffs. But unfortunately for Plaintiffs, their arguments ignore the critical issue of vesting. As discussed above, only a right that has vested can remain unimpaired by new legislation. And, with respect to this action, Plaintiffs’ right has not vested, as a right of action vests only when final judgment is entered in the case. (Logically, one should say that it is plaintiff’s right to collect that vests since the action is concluded.) The Court therefore finds that the Repeal Rules applies here.

Lastly, Plaintiffs also argue that the new standing requirement imposed by Prop 64 is substantive, instead of procedural, and that for this reason, Prop 64 is not applicable. The right is substantive, Plaintiffs’ argue, because given that the statute of limitations has elapsed with respect to the claims asserted here, not even the Attorney General could prosecute Defendants for their alleged unfair business practices were the Court to dismiss Plaintiffs’ case. In other words, because application of Prop 64 would relieve Defendants of all liability for their past conduct (a retroactive application according to Plaintiffs), it should not be applied here. Plaintiffs’ argument is artful, but it misses the mark.

As discussed above, whether a particular amendment is deemed “retroactive” depends on whether the *defendants’* Due Process rights are infringed. Here, Defendants have made no claim that the Court’s application of Prop 64 to the instant action would in any way infringe upon their Constitutional rights. On the contrary, Defendants vigorously argue for Prop 64’s application. Moreover, simply because a party’s litigation rights have changed does not necessarily mean that the modification is substantive, even when the change ultimately works to deprive the party of the right to sue. For instance, in many jurisdictions, changes made to statutes of limitations are considered to be procedural in nature, even though the change substantively impacts a party’s rights to file an otherwise legitimate action. And, in California, changes in standing requirements are certainly deemed to be procedural. *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App.3d 117 (1973). As such, they can be and are routinely applied to pending cases.

To conclude, the standing changes instituted by Prop 64 are procedural and therefore apply to this pending case. In so doing, the Court is not applying Prop 64 “retroactively” because the changes do not affect the legal consequence of Defendants’ past conduct. Instead, the Court is applying Prop 64 prospectively. Further, because Plaintiffs have no vested rights in this case, as no final judgment has been entered, the Repeal Rules applies. As a result, Plaintiffs have no right to continue prosecuting this lawsuit unless they meet Prop 64’s standing requirement.

2. *The Court’s Instant Ruling Follows Branick v. Downey Savings and Loan Association*

In the first appellate opinion on the issue of the applicability of Prop 64 to pending cases, *Californians for Disabilities Rights v. Mervyn’s LLC*, 2005 WL 2300019 (Feb. 1, 2005), the First Appellate District held that Prop 64 was not retroactive, meaning that Prop 64 did not apply to pending cases. Noting that Prop 64 did not contain an express retroactivity provision, the court determined that the presumption of prospective application controlled. *Id.* *Californians for Disabilities Rights*, however, is not the only decision addressing the issue. Shortly after it was handed down, the Second Appellate District issued *Branick v. Downey Savings and Loan Association*, 2005 WL 299926 (Feb. 9, 2005), a contrary decision. In *Branick*, the court expressly cited Government Code section 9606 as authority for its decision that the Repeal Rule (codified therein) was entirely applicable to the case before it. The court further noted that *Californians for Disabilities Rights* had not addressed the applicability of Section 9606. The court also explained that in *Callet v. Alioto*, 210 Cal. 65 (1930), the California Supreme Court held that when a right of action or remedy is created entirely by statute, it is not a vested

property right. Thus, plaintiffs who pursue statutory actions are on notice that their right to maintain the action may be impaired at any time by legislation.

*Branick* also addressed the issue of whether the UCL (pre- Prop 64) constituted a codification of the common law right to sue for unfair competition. In so doing, it stressed that in several California Supreme Court decisions, the Court has held that “section 17200 et seq., and its predecessor statute, cannot be equated with the common law definition of ‘unfair competition.’” *E.g., Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 109 (1972). The right to bring representative actions on behalf of the general public did not exist at common law, and certainly not when the plaintiff suffered no injury in fact. *See also* Code of Civil Procedure § 367 (defining “real party in interest”).

*Branick* therefore constitutes authority for the Court’s instant decision. As this Court tentatively ruled before *Branick* was decided, the Repeal Rule cannot be avoided in this case, and the standing right to file representative actions without having suffered injury in fact that was afforded by the UCL (pre-Prop 64) did not exist at common law. As a result, the UCL cannot be said to constitute a codification of this right.

Furthermore, the Fourth Appellate District has issued decisions that are consistent with *Branick*, including *Bivens v. Corel Cop.*, 2005 WL 388245 (Feb. 18, 2005), and *Lytwyn v. Fry’s Electronics, Inc.*, 2005 WL 407363 (Feb. 22, 2005). In both these cases, the Fourth Appellate District held that the Repeal Rule applied, citing Government Code section 9606, and noting that the UCL (pre-Prop 64) was not a codification of any prior common law rights.

In sum, in light of the comprehensive analysis contained in *Branick*, *Bivens*, and *Lytwyn*, the Court’s decision here is to follow these precedents, rather than *Californians for Disabilities Rights*, the sole contrary opinion.

### 3. *The Court Decertifies the Class*

First, the simple language of Prop 64 makes clear that, for standing purposes, a showing of causation is required as to each class member’s injury in fact (specifically, the phrase “as a result of” the UCL violations). *Collins v. Safeway Stores, Inc.*, 187 Cal. App.3d 62, 73 (1986) (“Each class member must have standing to bring a suit in his own right”). Further, because this is not a personal injury action, but a UCL action seeking restitution for unfair business practice based on alleged false statements, the injury in fact that each class member must show for standing purposes in this case would presumably consist of the cost of their cigarette purchases. But significant questions then arise undermining the purported commonality among the class members, such as whether each class member was exposed to Defendants’ alleged false statements and whether each member purchased cigarettes “as a result” of the false statements. Clearly, here, as in Plaintiffs’ CLRA case, individual issues predominate, making class treatment

unmanageable and inefficient. Further, it appears from the record that not even Plaintiffs' named class representatives satisfy Prop 64's standing requirement.

IV. Conclusion

In sum, given that Plaintiffs' unvested right in this action is subject to the vagaries of statutory law, and given that there is no savings clause in Prop 64, the Repeal Rule (Government Code section 9606) applies and requires this Court to impose the new standing requirements of Prop 64. Accordingly, and for the additional reasons set forth above, the Court grants Defendants' motion for class decertification.

**IT IS SO ORDERED.**