

F I L E D  
Clerk of the Superior Court

JAN 06 2005

By: N. SANDALL

Deputy

1 SAMUEL A. KEESAL, JR. CASB NO. 38014  
2 BEN SUTER, CASB NO. 107680  
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9 Attorneys for Specially-Appearing Defendant  
10 WILLIS GROUP HOLDINGS LIMITED and Defendants  
11 WILLIS NORTH AMERICA INC. and WILLIS INSURANCE  
12 SERVICES OF CALIFORNIA, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 FOR THE COUNTY OF SAN DIEGO

15 UNITED POLICYHOLDERS, on behalf of the  
16 General Public,

17 Plaintiff,

18 vs.

19 WILLIS GROUP HOLDINGS LIMITED,  
20 WILLIS NORTH AMERICA INC., WILLIS  
21 INSURANCE SERVICES OF CALIFORNIA,  
22 INC. and DOES 1-50, inclusive,

23 Defendants.

Case No. GIC833705

Action Filed: August 3, 2004

Assigned For All Purposes To:

Judge John S. Meyer, Dept. 61

**ORDER GRANTING DEFENDANTS  
WILLIS NORTH AMERICA INC. AND  
WILLIS INSURANCE SERVICES OF  
CALIFORNIA, INC.'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

Date: December 17, 2004

Time: 11:00 a.m.

Dept: 61

Discovery Cutoff: None Set

Motion Cutoff: None Set

Trial Date: None Set

1 Defendants WILLIS NORTH AMERICA INC. and WILLIS INSURANCE SERVICES OF  
2 CALIFORNIA, INC.'s (collectively, "Willis") Motion for Judgment on the Pleadings came on  
3 regularly for hearing on December 17, 2004 at 11:00 a.m. in Department 61 of the above-entitled  
4 Court before the Honorable John S. Meyer. John J. Stoia, Jr., Esq. and Theodore J. Pintar, Esq. of  
5 LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP appeared on behalf of  
6 Plaintiff UNITED POLICYHOLDERS, and Ben Suter, Esq. of KEESAL, YOUNG & LOGAN  
7 appeared on behalf of Willis.

8 This matter, having been fully briefed and argued, and good cause appearing, the Court makes  
9 the following Order:

10 **ORDER**

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

16 **Discussion**

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

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

22 In addition, the courts have found it appropriate to apply a statute retroactively when "the  
23 legislative history or the context of the enactment provided a sufficiently clear indication that the  
24 Legislature intended the statute to operate retrospectively," even though the statute did not contain an  
25 express provision mandating retroactive application. [*Evangelatos v. Superior Court* (1988) 44 Cal. 3d  
26 1188, 1210]

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

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

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

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

19 "[T]here remains the question of what the terms 'prospective' and 'retrospective' mean."  
20 (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 288.) The courts have broadly  
21 distinguished between substantive and procedural statutes to assess whether applying a  
22 new statute would have improper retrospective application, and have declined to  
23 interpret a statute as having retrospective application when doing so would "change the  
24 legal consequences of the parties' past conduct." (*Id.* at p. 289.) Accordingly, if a  
25 statutory change is substantive because it would impose new, additional or different  
26 liabilities based on past conduct, courts are loath to interpret it as having retrospective  
27 application. (*Id.* at pp. 290-291; [see also *Landgraf v. USI Film Products* (1994) 511  
28 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' ".])

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

1 "[T]he presumption against retrospective construction does not apply to statutes  
2 relating merely to remedies and modes of procedure. [Citation.] ... [P]rocedural  
3 changes "operate on existing causes of action and defenses, and it is a misnomer to  
4 designate them as having retrospective effect." [Citations.] In other words, procedural  
5 statutes may become operative only when and if the procedure or remedy is invoked,  
6 and if the trial postdates the enactment, the statute operates in the future regardless of  
7 the time of occurrence of the events giving rise to the cause of action. [Citation.] In  
8 such cases the statutory changes are said to apply not because they constitute an  
9 exception to the general rule of statutory construction, but because they are not in fact  
10 retrospective. There is then no problem as to whether the Legislature intended the  
11 changes to operate retroactively.' " (*ARA Living Centers-Pacific, Inc. v. Superior Court*  
12 (1993) 18 Cal.App.4th 1556, 1561 [23 Cal. Rptr. 2d 224].)

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

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

22 Standing is a procedural issue. The issue of standing does not reflect on the merits of the  
23 action, but rather goes to whether the cause of action can be maintained. [See, e.g., *Casa Herrera, Inc.*  
24 *v. Beydoun* (2004) 32 Cal.4<sup>th</sup> 336, 348 ("[T]he Court of Appeal in the underlying action in this case  
25 did not rely on a technical or procedural defense like lack of standing. Instead, the court applied a  
26 substantive rule of contract law ..."); *Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605 ("The  
27 question of standing to sue is one of the right to relief ..."); *Residents of Beverly Glen, Inc. v. City of*  
28 *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

1 who have "lost money or property as a result of such unfair competition" can still bring a claim to  
2 remedy an alleged unfair business practice. The Attorney General and other governmental prosecuting  
3 authorities may continue to seek a remedy on behalf of the general public. Hence, the persons actually  
4 harmed and the general public are still protected under the Unfair Business Practices Act.

5 "[T]he right to recover specific types of damages is not a vested right because such rights are  
6 created by state and common law independent from the Constitution. (Citations) Therefore, a state and  
7 its people may alter such rights. Such alteration is only forbidden when at the very least the party is  
8 deprived of every reasonable method of securing just compensation." [*Yoshioka v. Superior Court*  
9 (1997) 58 Cal.App.4<sup>th</sup> 972, 982]

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

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

15 Where, as here, the Legislature has conferred a remedy and withdraws it by amendment  
16 or repeal of the remedial statute, the new statutory scheme may be applied to pending  
17 actions without triggering retrospectivity concerns (citation); "[as] a general rule, ... a  
18 cause of action or remedy dependent on a statute falls with a repeal of the statute, even  
19 after the action thereon is pending, in the absence of a saving clause in the repealing  
20 statute. (Citations.) The justification for this rule is that all statutory remedies are  
21 pursued with full realization that the legislature may abolish the right ... at any time."  
22 (Citation.) MII acknowledges the numerous cases holding that when a remedial statute  
23 is amended or repealed before a final judgment is entered in the pending action, the  
24 court will apply the law in force at the time of the decision. (Citations.) MII attempts to  
25 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.]

26 The argument can be made that application of Proposition 64 to a pending lawsuit would affect  
27 the rights of the general public. For example, if the case is dismissed for lack of standing, those who  
28 would have benefited from this lawsuit would lose the benefit of the claim. This can be easily

1 remedied by substituting in a new plaintiff, one who has standing under Proposition 64; that is, who  
2 has suffered an injury in fact or actual loss.

3 **Conclusion**

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

5  
6  
7 DATED: JAN 06 2005, 2005

JOHN S. MEYER  
\_\_\_\_\_  
~~JAMES S. MEYER~~ JOHN S. MEYER  
JUDGE OF THE SUPERIOR COURT