ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

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California Supreme Court holds that, even in a case filed before Proposition 64 took effect, the plaintiff can only sue under California's Unfair Competition Law (the "UCL") if he or she suffered some actual harm from the defendant's actions.

California Edition

A Littler Mendelson California-specific Newsletter

California Supreme Court Clarifies Who Has Standing to Sue Under California's Unfair Competition Law

By Rod M. Fliegel and Marlene S. Muraco

On July 24, 2006, the California Supreme Court issued its eagerly awaited opinions in two cases involving the "standing" (i.e., the right to file and pursue a lawsuit) of private litigants to pursue claims under California's Unfair Competition Law (the "UCL"): *Californians for Disability Rights v. Mervyn's*, No. S131798 and *Branick v. Downey Savings and Loan Association*, No. S132433 (July 24, 2006). In the companion cases, the California Supreme Court ruled that Proposition 64 amendments to the UCL affecting "standing" applied retroactively, but that plaintiffs in cases filed before the passage of Proposition 64 can amend their lawsuits to cure any standing issues.

In November 2004, California voters approved Proposition 64, legislation that was intended to curb rampant abuse of the UCL by restricting standing under the Act. Before Proposition 64, a private litigant could file suit under the UCL on behalf of "the general public" whether or not he or she had suffered any damage or injury from the defendant's alleged wrongdoing. After Proposition 64, a private litigant can only file suit under the UCL when he or she has suffered some actual harm. The question before the California Supreme Court was whether the actual harm requirement of Proposition 64 would be applicable to UCL cases that were filed before Proposition 64 was passed. The California Supreme Court ruled in *Californians for Disability Rights v. Mervyn's* that Proposition 64 applies to cases that were pending when the legislation took effect, but that a plaintiff who lacks standing under the amended UCL (i.e., who cannot establish an injury-in-fact) can attempt to amend his or her lawsuit to add a plaintiff who has standing.

Background of *Californians for Disability Rights v. Mervyn's*

The plaintiff in the *Mervyn's* case was a nonprofit corporation that alleged the aisles in Mervyn's stores were too narrow to allow access by certain disabled patrons. The nonprofit sued on behalf of the general public and did not claim to have suffered any harm as a result of Mervyn's conduct. After a bench trial, the trial court entered judgment in favor of Mervyn's. While the nonprofit's appeal was pending, Proposition 64 took effect. Mervyn's sought to dismiss the appeal on the ground that Proposition 64 eliminated standing under the UCL for plaintiffs who, like the nonprofit corporation, had not actually been harmed by a defendant's allegedly unlawful conduct. The court of appeal denied the motion, holding that Proposition 64's standing provisions did not apply to cases that were filed before the measure took effect.

Although the California Supreme Court acknowledged that statutes operate prospectively absent a clear indication that the voters intended otherwise, and concluded that the California voters had not indicated that Proposition 64 was to operate retroactively, the court nonetheless concluded that Proposition 64 did apply to cases pending at the time it took effect. More specifically, the court reasoned that a statute is only being applied retroactively when the application of the statute would change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct. Proposition 64, however, "left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a

business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." Thus, applying Proposition 64 to cases pending at the time it was passed would not constitute the retroactive application of a statute. On that basis, the court reversed the ruling of the court of appeal.

Background of *Branick v. Downey Savings and Loan Association*

The holding that the nonprofit plaintiff in *Mervyn's* no longer had standing to pursue the UCL claims against Mervyn's left open the question of whether the nonprofit had the right to substitute in a new plaintiff who had suffered harm as a result of the store's alleged conduct. That question was answered in *Branick v. Downey Savings and Loan Association*. The plaintiffs in that case had filed a lawsuit before Proposition 64 was passed that alleged that Downey Savings had misrepresented and overcharged customers for fees charged by governmental entities to record official documents used in real estate transactions (e.g., deeds, powers of attorney, etc.). As in *Mervyn's*, the two plaintiffs in *Downey* sued on behalf of the general public and did not claim to have personally lost money or property as a result of Downey's alleged conduct.

Consistent with *Mervyn's*, the California Supreme Court in *Downey* held that the plaintiffs lacked standing to pursue their UCL claim. However, the court then considered whether, and under what circumstances, the plaintiffs could amend their complaint to substitute in someone who had actually suffered actual injury. In that regard, the court held that the trial courts have broad discretion to allow a plaintiff who was deprived of the ability to pursue his or her UCL claim by the passage of Proposition 64 to substitute in a new plaintiff who satisfies the UCL's standing requirements. Such substitution is to be liberally allowed, the court indicated, provided that the new plaintiff does not "state facts which give rise to a wholly distinct and different legal obligation against the defendant." Furthermore, provided that the new plaintiff's claim rests on the same general set of facts and involves the same injury as the original plaintiff's claim, the new plaintiff's claim will typically "relate back" to the filing of the original complaint. In other words, under those circumstances the new plaintiff would be able to seek a remedy for the four-year period preceding the filing of the original complaint – not just four years from the date s/he was substituted into the case.

Implications of the Decisions

Because the UCL has a generous four-year limitations period, it has become common for plaintiff's attorneys to include a UCL claim when asserting the violation of a statute with a shorter limitations period (such as the overtime provisions of the California Labor Code). It remains to be seen whether the California Supreme Court's decisions will put an end to a substantial or even considerable number of such claims that were pending before Proposition 64 took effect. Businesses that can challenge the plaintiff's standing under the UCL almost certainly will explore the opportunity to do so. Success may depend in large measure on how far discovery has progressed in the action. It will be easier to identify "substitute plaintiffs" in cases where the plaintiff already was able to discover, or otherwise has access to, contact information for persons allegedly harmed by the defendant's conduct. It also remains to be seen whether cases where the plaintiff successfully amends his or her lawsuit will proceed in state or federal court. In cases involving diverse parties, the amended lawsuit may give rise to removal jurisdiction under the federal Class Action Fairness Act of 2004.

Action Items for Employers with Current UCL Claims Pending

Employers who are presently defending UCL claims should consider the following:

1. Was the lawsuit filed before Proposition 64 took effect on November 3, 2004?
2. If so, does the plaintiff who filed the lawsuit have standing to continue to prosecute individual or class UCL claims? (As noted, Proposition 64 restricts standing to plaintiffs who suffered some injury-in-fact.)
3. If a standing challenge appears viable, is the investment in a motion to dismiss the lawsuit warranted? (As noted, a plaintiff who lacks standing can attempt to amend the lawsuit to add a substitute plaintiff who suffered an injury-in-fact.)
4. Is there some possibility that an amended complaint will open the door to removal of the action to federal court under the Class Action Fairness Act of 2004? (The developing body of federal case law holds that, even in cases filed before the Class Action Fairness Act took effect in February 2005, amendments to the pleadings may trigger a new window for removal to federal court.)
5. If so, is removal warranted based on the particular facts and circumstances of the action?

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