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Toss Suits Affected by Proposition 64

By Jim Burgess

California voters approved Proposition 64 by a significant margin on Tuesday. The initiative, which limits lawsuits brought under the state's Business and Professions Code Section 17200, also limits lawsuits brought for false advertising under Section 17500. We can now reflect on the effect that Proposition 64 will have on existing lawsuits.

Before Proposition 64, any private person could file a lawsuit alleging unlawful, unfair or fraudulent business practices or false or misleading advertising under Section 17200, the Unfair Competition Law. Under the Unfair Competition Law and 17500, the False Advertising Law, lawsuits could be filed by "any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public."

Under these statutory schemes, some private plaintiffs were allowed to seek injunctive and monetary relief on behalf of the "general public" without satisfying class-action requirements and without having suffered any injury as a result of the challenged conduct.

These plaintiffs were allowed to sue even if they never dealt with the defendant.

Furthermore, some plaintiffs were allowed to allege false advertising even if no consumer was deceived and even if they never relied on the challenged advertising to buy any products.

Some lawsuits were brought over mere typographical errors that did not cause any consumer any harm. In these cases, the plaintiffs argued, they only had to show that the advertising was "likely to deceive" the public.

All of this changes with Proposition 64. Proposition 64 provides that only those who have suffered "injury in fact" and lost "money or property" as a result of the challenged conduct will be allowed to sue.

Plaintiffs' attorneys will not be allowed to sue in the name of friends, secretaries and spouses who suffered no injury and did not deal with the defendant.

Further, the requirement of showing "injury in fact" and loss of "money or property" will limit questionable false-advertising claims brought by private parties.

With Proposition 64, private plaintiffs will have to show more than that the challenged advertising was "likely to deceive."

Private plaintiffs now will have to show that they suffered "injury in fact" and "lost money or property" as a result of the false advertising.

Proposition 64 also clearly eliminates representative actions on behalf of the "general public." Plaintiffs will need to satisfy existing class-action requirements in order to obtain any relief on behalf of any other person.

Proposition 64 does not affect lawsuits brought by public prosecutors such as the attorney general or district attorneys.

In fact, the new law could enhance the ability of public prosecutors to bring actions for unfair competition and false advertising because it provides that all civil penalties collected by public prosecutors can be used only to enforce consumer protection laws.

Technically, Proposition 64 went into effect Wednesday in accordance with the state constitution, which says an initiative or referendum approved by "a majority of votes

thereon takes effect the day after the election unless the measure provides otherwise." Article II, Section 10a. Proposition 64 is silent regarding its effective date; therefore, it became law Nov. 3.

Proposition 64 will affect all pending lawsuits as well as all future lawsuits. See *Younger v. Superior Court*, 21 Cal.3d 102 (1978); see also *People v. Bank of San Luis Obispo*, 159 Cal. 65 (1910) ("the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal."). The limits imposed by Proposition 64 apply to all pending actions.

This means that Proposition 64's repeal of "private attorney general" standing to bring a representative action on behalf of the general public is effective immediately.

Existing cases brought under the Unfair Competition Law or false-advertising statute on behalf of the general public as a private attorney general now lack standing and should be dismissed to that extent.

Plaintiffs no longer can attempt to seek relief for the "general public" or any other absent parties without satisfying the existing class-action requirements.

Further, the requirement that a plaintiff prove "injury in fact" also is effective immediately.

Any actions brought by people who did not suffer any injury or did not lose money or property as a result of the challenged conduct should be dismissed for failure to state a cause of action.

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