

Commentary

Prospective Application Of Proposition 64 To Pending UCL Representative Actions

By
Donald M. Falk
and
Jay C. Johnson

[Editor's Note: Donald M. Falk is a partner in the Supreme Court and appellate practice group of Mayer, Brown, Rowe & Maw LLP and practices in the firm's Palo Alto, California office. He has extensive experience litigating Section 17200 actions in the California appellate courts. Jay C. Johnson is an associate in the firm's Washington, D.C. office. Copyright 2004 by the authors.]

On November 2, California voters overwhelmingly approved Proposition 64, a ballot initiative that places two significant limits on the ability of private individuals to seek collective relief under California's Unfair Competition Law ("UCL").¹ First, Proposition 64 restricts standing to those who have suffered injury from an actual loss of money or property. Second, it requires private individuals seeking collective relief to meet the requirements for class certification, rather than relying on the less distinct UCL "representative" action.

Proposition 64's amendments took effect the day after the election.² Thus, there is no question that plaintiffs who file UCL claims on or after November 3 will have to meet the Proposition's new standing and class certification requirements. More likely to be litigated in the near future is the question whether these amendments also necessitate dismissal of *pending* lawsuits in which the plaintiff does not comply with the new requirements.

The California cases reflect a range of different analytical approaches to the application of new statutes

to ongoing lawsuits, but we conclude that under any approach, statutory changes to the rules governing the conduct of litigation, like those in Proposition 64, govern both pending actions and future actions. Application of such changes to pending cases is prospective rather than retrospective, because the changes apply to proceedings that take place after enactment, rather than to primary conduct that took place beforehand. As a result, plaintiffs in pending actions who do not meet the new standing and class certification requirements face dismissal of their claims in light of Proposition 64.

A. Proposition 64's Language Indicates That Its New Requirements Apply Throughout An Action

Proposition 64 amends five sections of the California Business and Professions Code.³ Relevant here are amendments to two sections of the UCL that govern private actions. Amended Section 17203 provides that "[a]ny 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 * * *."⁴ Amended Section 17204 sets out those "standing requirements," mandating that UCL actions "shall be prosecuted exclusively" by public prosecutors "or by any person * * * who has suffered injury in fact and has lost money or property as a result of such unfair competition."⁵ Amended Section 17535 extends identically worded standing and class certification requirements to private actions brought

under California's false advertising law.⁶ Although the analysis here is couched in terms of the UCL provisions, it applies equally to false advertising actions.

As an initial matter, the plain language of amended Sections 17203 and 17204 indicates that the conditions imposed by Proposition 64 apply throughout the course of a lawsuit, not just at the time of filing. The use of the terms "prosecute" and "pursue" — rather than "file," "commence," or "bring" — to delineate the scope of the new "standing requirements" indicates that these requirements must be satisfied beyond the initial stage of an action. "To 'prosecute' an action is not merely to commence it, but includes following it to its ultimate conclusion."⁷ The California Rules of Court and Code of Civil Procedure, which authorize dismissal for "delay in prosecution" of a lawsuit, reflect this understanding.⁸ "[D]elay in prosecution" does not mean delay in filing, but delay in bringing an action to trial because of a lack of diligence in service of the complaint, discovery, and other pretrial matters.⁹ Moreover, Proposition 64 itself distinguishes between filing and prosecuting actions, expressing in its text the voters' intention that only public prosecutors "be authorized to *file* and *prosecute* actions on behalf of the general public."¹⁰ Similarly, the term "pursue" means "[t]o follow, prosecute, or enforce a matter judicially, as a complaining party."¹¹ By limiting the prosecution and pursuit of UCL actions to those who meet standing requirements and comply with class action procedures, Proposition 64 on its face requires plaintiffs to comply with its terms from the initiation of a suit through its conclusion.

In addition, by characterizing the amendment to Section 17204 as implementing "standing requirements" for private plaintiffs, Proposition 64 clarifies that those new restrictions operate throughout a lawsuit. "Standing is a jurisdictional issue that may be raised at any time in the proceedings," not a technical requirement that need exist only at the initiation of an action.¹² Consequently, it is the plaintiff's burden to "plead and prove facts showing standing."¹³ In other words, a plaintiff must demonstrate Proposition 64's standing requirements at every stage of a suit.¹⁴ California class certification requirements also involve an element of standing.¹⁵ Indeed, courts can and should enforce compliance with those requirements throughout an action, decertifying those classes that fall short as circumstances change.¹⁶

B. Application Of Proposition 64 To Pending Actions Is Not Retroactive Because It Does Not Impair Vested Rights

Despite the plain language of the amended sections, uninjured plaintiffs with pending UCL suits are likely to argue that Proposition 64 does not apply to the continued pursuit and prosecution of actions filed before it became effective. These plaintiffs will contend that applying Proposition 64 to pending actions would give retroactive effect to the amendments to Sections 17203 and 17204 without sufficient authority for doing so.

Plaintiffs can be expected to point out the general rule that a new statute operates prospectively unless it contains a clear statement of retroactive effect.¹⁷ Proposition 64 contains no such statement. But that is not the end of the matter. To the contrary, the California Supreme Court has recognized, applicability of this rule turns on the logically prior "question of what the terms 'prospective' and 'retrospective' mean."¹⁸ A careful examination of California case law demonstrates that applying Proposition 64's amendments to pending cases is prospective rather than retrospective under any of the leading analyses.

The day after Proposition 64 took effect, the California Supreme Court, in an unrelated case, reaffirmed its understanding that a "statute has retrospective effect when it substantially changes the legal consequences of past events."¹⁹ In reaching that understanding, the Court quoted the U.S. Supreme Court's conclusion in *Landgraf v. USI Film Products* that a law is retroactive if it "attaches new legal consequences to events *completed* before its enactment."²⁰ In an earlier decision, the California Court quoted a longer definition from *Landgraf*, one first articulated by Justice Joseph Story in 1814: "[E]very statute, which 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."²¹ Many California cases appear to have adopted this vested rights approach to determining retrospective effect.²²

Most relevant here, the California Supreme Court has consistently held that "when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of the

statute without a saving clause *will terminate all pending actions* based thereon.”²³ Indeed, a number of decisions confirm that new legislative enactments can eliminate pending causes of action. In *Governing Board of Rialto Unified School District v. Mann*, the plaintiff school district had commenced a statutory action in 1971 seeking the dismissal of Thomas Mann, a tenured teacher who had pleaded guilty to possession of marijuana.²⁴ In 1977, while Mann was appealing his dismissal, the California Legislature passed a law “prohibit[ing] any public entity, including a school district, from revoking any right of an individual on the basis of a pre-1976 possession of marijuana conviction * * *.”²⁵ Reasoning that the school district’s statutory right to sue Mann was not a vested right, the California Supreme Court “dispose[d] of the case under the law in force when its decision [was] rendered,” reversing Mann’s dismissal in light of the 1977 law.²⁶ The Court further explained that the Legislature’s elimination of the school district’s cause of action was prospective, because any suit based on a statute is filed “with full realization that the Legislature may abolish the right to recover at any time.”²⁷

Under this analysis, Proposition 64 terminates pending UCL actions in which the plaintiff cannot meet the statute’s new standing and class certification requirements. In addition, “numerous cases hold[] that when a remedial statute is amended or repealed before a final judgment is entered in the pending action, the court will apply the law in force at the time of the decision.”²⁸ For example, in *Los Angeles Unified School District v. California*, the plaintiff school district had filed a claim under a statute that provided for state reimbursement of costs incurred as a result of statutes enacted after January 1, 1973.²⁹ Before the school district could obtain a final judgment, the California Legislature enacted a new statute that required the state to reimburse local school districts only for costs incurred “as a result of any statute enacted on or after January 1, 1975.”³⁰ The California Court of Appeal held that the new statute abolished the school district’s right to reimbursement for costs caused by statutes enacted between 1973 and 1975, even though the district had filed its case four years before the new statute’s enactment.³¹ As in *Mann*, the court explained that “when a right of action does not exist at common law, but depends solely

upon a statute, the repeal of the statute destroys the right unless the right has been reduced to a final judgment.”³²

Even more recently, the Court of Appeal in *Metcalf v. U-Haul Int’l, Inc.*, applied *Mann*’s approach to an amendment that prohibited the filing of statutorily created anti-SLAPP motions in connection with “advertising statements concerning commercial products.”³³ Before the amendment passed, the appellant in *Metcalf* had filed an anti-SLAPP motion of the sort subsequently prohibited by the amendment.³⁴ The Court of Appeal held that, because the revised statute did not change the legal consequences of any past conduct, the amendment barred the appellant’s previously filed anti-SLAPP motion.³⁵ Like the courts in *Mann* and *Los Angeles Unified*, the court in *Metcalf* also relied on the rule that, when “the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns.”³⁶

The effect of Proposition 64’s amendments to the UCL is indistinguishable from the effects of the statutory changes at issue in *Mann*, *Los Angeles Unified*, and *Metcalf*. By amending Sections 17203 and 17204, the people of California have withdrawn the ability of uninjured plaintiffs to pursue a cause of action that depended entirely on those statutory sections.³⁷ That change did not attach new or different legal consequences to past conduct, because the same past conduct violates the UCL’s substantive provisions (and may still be enforced by a public prosecutor or an injured plaintiff).³⁸ Violators of the substantive provisions of the UCL remain liable for restitution to all injured parties, who may recover for themselves, as part of a properly certified class, or as beneficiaries of a representative action brought by a public prosecutor. Proposition 64’s changes do not deprive any plaintiff of vested rights, because plaintiffs cannot have a vested right to pursue a statutory cause of action at all, much less to use statutory means to avoid class certification requirements.³⁹ Accordingly, under *Mann*’s definition of retroactivity, the Proposition 64 amendments apply prospectively to pending cases, and should terminate those cases in which the plaintiff fails to meet the new requirements imposed by Proposition 64.

C. Application Of Proposition 64 To Pending Actions Is Prospective, Not Retroactive, Because The Amendments Affect Only Procedures Followed after Enactment

1. The Amendments Are Procedural Rather Than Substantive

Many California courts have distinguished between substantive and procedural amendments in determining whether application of a new law to pending litigation (or litigation concerning pre-enactment conduct) is permissibly prospective or impermissibly retroactive.⁴⁰ As the U.S. Supreme Court observed in *Landgraf*, “[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.”⁴¹

Under California law, a statute is procedural — and thus may be applied immediately to pending litigation — if it “neither creates a new cause of action nor deprives defendant of any defense on the merits.”⁴² That definition dovetails with the definition of vested rights discussed above. Under the substantive/procedural analysis, the amendments added by Proposition 64 are procedural. Standing requirements like the one that Proposition 64 adds to the UCL are “procedural.”⁴³ Likewise, “the class action statute” — which Proposition 64 makes applicable to UCL representative actions brought by private parties — “is a procedural device.”⁴⁴ The amendments neither create a new cause of action nor abolish a defense. Rather, they provide “procedural screening mechanism[s] for determining” whether and in what form particular lawsuits can go forward, and therefore can be applied to lawsuits filed before Proposition 64’s effective date.⁴⁵

Under this analysis as well, the application of Proposition 64’s UCL amendments to pending cases has no retroactive effect.

2. Only Post-Enactment Proceedings Are Affected By The Amendments

Rather than engaging in a vested rights analysis or parsing substantive-procedural labels, the California Supreme Court in *Tapia v. Superior Court* took a more modern approach, simply focusing on what conduct was affected by the newly enacted law.⁴⁶ Under *Tapia*’s analysis, “it is evident that a law governing the conduct of trials is being applied ‘prospectively’

when it is applied to a trial occurring after the law’s effective date, regardless of when * * * the underlying cause of action arose.”⁴⁷ “[S]uch statutes,” the Court observed, “relate to the procedure to be followed in the future.”⁴⁸

As with the law at issue in *Tapia*, standing requirements and class action procedures “address the conduct of trials which have yet to take place,” not behavior that took place in the past.⁴⁹ The analysis applies equally to “pretrial and/or trial proceedings” that occur after an amendment becomes effective, even in litigation that commenced before the amendment’s effective date.⁵⁰ As the Court of Appeal recently put it, “[i]f a newly enacted statute merely changes the procedures to be used in the conduct of existing litigation * * * its application is not considered retrospective.”⁵¹ Thus, after Proposition 64, if a UCL plaintiff cannot prove on a going-forward basis that he meets the requirements of C.C.P. § 382, his suit should be dismissed insofar as it seeks to recover for other people — just as a class would be decertified if it demonstrably no longer qualified for class treatment.

The examples given in *Tapia* confirm the point. The *Tapia* court approved at least two earlier decisions that had applied statutory amendments to pending actions.⁵² In one such case, the Court of Appeal had held that a statute abolishing the right to appeal from certain orders applied to appeals pending on the date of enactment.⁵³ In another case, the Court of Appeal had held that a statute altering the standard for dismissing a case for failure to prosecute applied to actions filed long before enactment.⁵⁴ Significantly, the *Tapia* court quoted with approval a passage in *Andrus* deeming it “‘absurd’ to ‘subscribe to the notion that the Legislature desired to postpone the demise of a procedural loophole.’”⁵⁵ The findings enacted as Section 1 of Proposition 64 expressed the voters’ intent to “‘eliminate’ frivolous unfair competition lawsuits.”⁵⁶ In that light, it would be absurd to prolong the loopholes closed by the Proposition.

The view that, under a *Tapia* analysis, the conduct affected by Proposition 64 is the prospective pursuit of litigation rather than the retroactive elimination of a right draws reinforcement from the established principle that statutes withdrawing a court’s jurisdiction are not retrospective when applied to pending litigation.⁵⁷ As the concurring opinion in *Landgraf*

explained, “the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power — so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.”⁵⁸ Thus, even a pending appeal can be dismissed based on a new statute withdrawing jurisdiction.⁵⁹ As we have explained above, under California law, standing is “a jurisdictional issue.”⁶⁰ Accordingly, application of Proposition 64’s new “standing requirements” to pending actions is not retroactive.

In addition, California class certification standards include a standing requirement. In particular, a class action “may only be maintained against defendants as to whom the class representative has a cause of action.”⁶¹ Failure to satisfy this requirement may alternately be “characterized as a ‘standing’ defect or a failure to satisfy the class action ‘typicality’ requirement.”⁶² Because Proposition 64’s class certification requirement implicates this standing concern, it too falls under the jurisdictional rubric, and applies in pending actions.

Proposition 64’s amendments to the UCL eliminate courts’ power to hear cases prosecuted either by an uninjured plaintiff or a plaintiff pursuing a collective action who cannot meet California’s class action requirements. As explained above, those requirements apply throughout the course of an action. Therefore, the application of Proposition 64 to prohibit any future exercise of judicial power in pending cases where the new requirements are not met is prospective, not retrospective.

Conclusion

Whether California courts apply the vested rights approach employed in *Mann*, a substantive-procedural dichotomy, or the relevant activity analysis in *Tapia*, the result should be the same. The requirements imposed by Proposition 64 govern pending as well as future litigation. Because this application of Proposition 64’s amendments is prospective, it does not violate the presumption against retroactive application of legislation.

Endnotes

1. BUS. & PROF. CODE § 17200 *et seq.*
2. CAL. CONST., art. ii, § 10(a).

3. *See* Prop. 64, §§ 2 (amending BUS. & PROF. CODE § 17203), 3 (amending BUS. & PROF. CODE § 17204), 4 (amending BUS. & PROF. CODE § 17206), 5 (amending BUS. & PROF. CODE § 17535), 6 (amending BUS. & PROF. CODE § 17536).
4. BUS. & PROF. CODE § 17203 (emphasis added). “Section” refers to the Business and Professions Code unless otherwise indicated.
5. BUS. & PROF. CODE § 17204 (emphasis added).
6. BUS. & PROF. CODE § 17500 *et seq.* Amended Section 17206 requires that civil penalties recovered in UCL actions brought by public prosecutors be used for the enforcement of consumer protection laws. Amended Section 17536 does the same for actions under the false advertising law.
7. BLACK’S LAW DICTIONARY 1221 (6th ed. 1990).
8. *See* Cal. R. Ct. 373; CAL. CODE CIV. PROC. §§ 583.110 *et seq.*
9. *See* Cal. R. Ct. 373(e); CAL. CODE CIV. PROC. § 583.420.
10. Prop. 64, § 1(f) (emphasis added).
11. *Id.* at 1237. The Code of Civil Procedure distinguishes between “commenc[ing]” and “pursu[ing]” an action. CAL. CODE CIV. PROC. § 1161.1(b).
12. *Waste Mgmt. of Alameda County, Inc. v. County of Alameda*, 79 Cal.App.4th 1223, 1232 (2000).
13. *Tahoe Vista Concerned Citizens v. County of Placer*, 81 Cal.App.4th 577, 590-91 (2000).
14. *See id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation”).
15. *See Hart v. Alameda County*, 76 Cal.App.4th 766, 775 (1999) (quoting *Baltimore Football Club, Inc. v. Superior Ct.*, 171 Cal.App.3d 352, 359 (1985)).

16. *See, e.g., American Suzuki Motor Corp. v. Superior Court*, 37 Cal.App.4th 1291 (1995); *Vasquez v. Superior Court*, 4 Cal.3d 800, 821 (1971).
17. *See Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207 (1988).
18. *Tapia v. Superior Ct.*, 53 Cal.3d 282, 288 (1991). For present purposes, the terms “retrospective” and “retroactive” are interchangeable.
19. *McClung v. Employment Dev. Dep’t*, ___ Cal.4th ___, slip op. at 4 (Nov. 4, 2004) (quoting *Western Security Bank v. Superior Ct.*, 15 Cal.4th 232, 243 (1997)).
20. *See McClung*, slip op. at 4 (emphasis added) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994)).
21. *Myers v. Phillip Morris Cos.*, 28 Cal.4th 828, 839 (2002) (quoting *Landgraf*, 511 U.S. at 269 (in turn quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (Cir. Ct. N.H. 1814) (Story, J.))).
22. *See, e.g., Governing Bd. of Rialto Unified Sch. Dist. v. Mann*, 18 Cal.3d 819, 829 (1977); *Aetna Cas. & Surety Co. v. Indus. Acc. Comm.*, 30 Cal.2d 388, 391 (1947).
23. *Mann*, 18 Cal.3d at 829 (emphasis added) (quoting *Southern Serv. Co. v. Los Angeles*, 15 Cal.2d 1, 11-12 (1940) (brackets omitted)); *see also Callet v. Alioto*, 210 Cal. 65, 67-68 (1930).
24. 18 Cal.3d at 821-22.
25. *Id.* at 822.
26. *Id.* at 822-23 (quoting *Southern Serv. Co.*, 15 Cal.2d at 11-12).
27. *Id.* (quoting *Callet*, 210 Cal. at 67-68).
28. *Brenton v. Metabolife Int’l, Inc.*, 116 Cal.App.4th 679, 690 (2004).
29. 229 Cal.App.3d 552, 553 (1991).
30. *See id.* at 556.
31. *See id.* at 556-57.
32. *Id.* at 557.
33. 118 Cal.App.4th 1261, 1265 (2004). “SLAPP” stands for “strategic lawsuits against public participation.” Anti-SLAPP motions are special motions to strike that are designed to bring an early end to actions that seek to impose liability for the exercise of constitutional rights of petition or free speech. *See* CAL. CODE CIV. PROC. § 425.16.
34. *See id.* at 1264.
35. *See id.* at 1266.
36. *Id.* at 1266 (quoting *Brenton*, 116 Cal.App.4th at 689-90).
37. Ballot initiatives like Proposition 64 are treated just like legislative enactments for purposes of retrospectivity analysis. *See Evangelatos*, 44 Cal.3d at 1212.
38. *See Metcalf*, 118 Cal.App.4th at 1266.
39. *See Mann*, 18 Cal.3d at 829.
40. Despite the prevalence of this substantive/procedural analysis, the California Supreme Court has recognized that “it is the law’s effect, not its form or label, which is important.” *Tapia*, 53 Cal.3d at 289 (citing *Aetna Cas. & Sur. Co. v. Industrial Accident Comm’n*, 30 Cal.2d 388, 394(1947); *Evangelatos*, 44 Cal.3d at 1225-26 n. 26).
41. 511 U.S. at 1502.
42. *Owens v. Superior Court*, 52 Cal.2d 822, 833 (1959) (applying extension of long-arm jurisdiction enacted after action filed).
43. *See, e.g., Tenants Ass’n of Park Santa Anita v. Southers*, 222 Cal.App.3d 1293, 1299 (1990). Plaintiffs may re-characterize the standing requirement as the addition of a new “actual injury” element to a UCL cause of action in order to argue that the amendment is substantive in nature. We believe, however, that the references to “standing” in the amendment doom that effort.
44. *Corbett v. Superior Ct.*, 101 Cal.App.4th 649, 670 (2002).

45. *Brenton v. Metabolife Int'l. Inc.*, 116 Cal.App.4th 679, 689 (2004) (citing *Robertson v. Rodriguez*, 36 Cal.App.4th 347, 356 (1995)).
46. *Tapia*, 53 Cal.3d at 289.
47. *Id.*; see *Metcalf*, 118 Cal.App.4th at 1265-66.
48. *Id.* at 288 (internal quotation marks omitted). This approach resembles that taken by the three concurring Justices in *Landgraf*, who described the "critical issue" in a retroactivity analysis as "the relevant activity that the rule regulates." 511 U.S. at 291.
49. 53 Cal.3d at 288.
50. *Albertson v. Superior Ct.*, 25 Cal.4th 796, 804 (2001).
51. *Metcalf*, 118 Cal.App.4th at 1265-66.
52. *Id.* at 289.
53. *Id.* (citing *Andrus v. Municipal Ct.*, 143 Cal.App.3d 1041 (1983), disapproved on other grounds, *Evan gelatos, supra*, 44 Cal.3d at p. 1207, fn. 11).
54. *Id.* (citing *Republic Corp. v. Superior Ct.*, 160 Cal. App.3d 1253 (1984)).
55. *Id.* (quoting *Andrus*, 143 Cal.App.3d at 1047).
56. Prop. 64, § 1(f) (2004) (emphasis added).
57. See, e.g., *Landau v. Superior Ct.*, 81 Cal.App.4th 191, 214-16 (1998) (holding that a statute eliminating jurisdiction over certain direct appeals was not retrospective when applied to a pending appeal). See also, e.g., *Landgraf*, 511 U.S. at 1501.
58. *Id.* at 293.
59. See *Landau*, 81 Cal.App.4th at 214-16.
60. *Waste Mgmt. of Alameda*, 75 Cal.App.4th at 1232.
61. *Hart v. Alameda County*, 76 Cal.App.4th 766, 775 (1999) (quoting *Baltimore Football Club, Inc. v. Superior Ct.*, 171 Cal.App.3d 352, 359 (1985)).
62. *Hart*, 76 Cal.App.4th at 775. ■