

American Bar Association  
Section of Antitrust Law

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Proposition 64:

Abuse and Consequences  
for Representative Actions  
Under California's Unfair  
Competition Law

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# UNFAIR COMPETITION ACTIONS BEFORE PROP. 64

- Cal. Bus. & Prof. Code §17200 prohibited five types of conduct: any (i) unlawful, (ii) unfair or (iii) fraudulent business act or practice; (iv) unfair, deceptive, untrue or misleading advertising; and (v) any act prohibited by Bus. & Prof. Code §17500, et seq.
- Actions for relief could be pursued by the Attorney General, local law enforcement agencies, and any person, including an uninjured plaintiff.
- Representative and class actions were permitted.
- Injunctive relief was available to prevent unfair competition and restitution of money or property “which may have been acquired by means of such unfair competition.” (§17203)
- There was no recovery of damages or attorneys’ fees.
- Government enforcers could obtain a civil penalty of \$2,500 per violation. (§17206)



# UNFAIR COMPETITION REPRESENTATIVE AND CLASS ACTIONS BEFORE PROP. 64

- Authorized under Code of Civil Procedure section 382.
- Required existence of ascertainable class and well-defined community of interest.
- "Community of interest" elements: (i) predominant questions of law or fact, (ii) class representatives with claims or defenses typical of class, and (iii) class representatives who can adequately represent the class.
- Representative actions for fraudulent business practices and false advertising could proceed without proof that anyone was actually deceived, relied upon a fraudulent practice or sustained any damage. State Farm Fire & Casualty Co. v. Superior Court, 45 Cal.App.4th 1093, 1105 (1996).
- Representative action alternative considered in class certification motions.
- Fluid recovery available in class actions. Cal. Civ. Proc. Code § 384.
- Class action resolution had res judicata effect.



# SHAKEDOWN ACTIONS ABUSING SECTION 17200

- 2002: Trevor Law Group files 22 unfair competition mass actions against 2,207 auto repairs shops, more than a 1,000 restaurants and markets, and 210,000 "Does."
- Form demand letters sent to obtain quick settlements of \$5,000 to \$26,000.
- Letters misrepresent that settlement protects defendant from similar lawsuits.
- Letters demand secret settlement.
- 2003: California Attorney General sues Trevor Law Group under § 17200.
- Attorney General alleges illegal fee-splitting agreement between Trevor Law Group and plaintiff.
- Attorney General alleges actions were unmeritorious with no adequate investigation of facts before suit-filing.
- Trevor Law Group's lawyers obtain civil penalties which can only be recovered by government prosecutors.



# PROP. 64 ELIMINATES REPRESENTATIVE ACTIONS

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. . . . Any 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, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney or city prosecutor in this state.

(Cal. Bus. & Prof. Code §17203)



# PROP. 64 ELIMINATES “UNINJURED PLAINTIFF” STANDING

Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney . . . in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public~~ who has suffered injury in fact and has lost money or property as a result of such unfair competition.

(Cal. Bus. & Prof. Code §17204)



# REPRESENTATIVE AND CLASS ACTIONS AFTER PROP. 64

- Private Attorney General representative actions are abolished. See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553 (1998); Mangini v. R.J. Reynolds Tobacco Co., 7 Cal.4th 1057 (1994).
- Government prosecutors have greater role in cases where no person satisfies the dual standing requirement.
- “Fraudulent business practice” and “false advertising” probably redefined by Prop. 64’s class action and standing requirements.
- Unfair competition class actions will be affected by Class Action Fairness Act of 2005.
- Representative actions no longer considered an alternative in class certification motions.



# PROP. 64'S EFFECT ON UNFAIR BUSINESS PRACTICE AND FALSE ADVERTISING CLASS ACTIONS

- Example: Brown v. The American Tobacco Company, Inc. (JCCP 4042)
- Class of California smokers allegedly misled through concealment, misrepresentations and false advertising about the health risks of smoking.
- Despite myriad individual issues on exposure to alleged deceptive marketing, reliance, smoking causation and injury, class certified in 2001.
- After Prop. 64, showing of causation required as to each class member's injury in fact.
- Questions (i) of whether each class member was exposed to the same statements and (ii) whether each class member purchased cigarettes as a result of the alleged false statements predominate and make class treatment unmanageable and inefficient.
- The named class representatives fail to satisfy Prop. 64's standing requirement.
- Decertification motion granted.

