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## The Passage of Proposition 64, Amending California's Unfair Competition Law (Business & Professions Code, §§ 17200, et seq.)

On November 2, 2004, California voters passed Proposition 64 which amends certain provisions of California's Unfair Competition Law ("UCL"). The amendments apply to both unfair competition claims (Sec. 17200) and false advertising claims (Sec. 17500). Proposition 64 restricts who may bring UCL claims in two significant respects: (1) private persons may assert UCL claims only if they actually suffered injury in fact and lost money or property; and (2) lawsuits brought by private persons on behalf of others must satisfy all the standard requirements for certifying a class.

The UCL broadly defines "unfair competition" to include anything that can properly be called a business practice and that at the same time is forbidden by law. It also prohibits false and misleading advertising. These broad definitions are unchanged by Proposition 64.

Before the passage of Proposition 64, individuals could sue without showing they suffered any injury as a result of the alleged "unfair competition," and were not required to demonstrate standing to sue in the traditional sense. Often, such plaintiffs had no connection at all with the alleged "unfair competition." Moreover, such a plaintiff could bring a representative action on behalf of the "general public" without meeting the requirements for certifying a class action.

Proposition 64 effects two broad changes to UCL claims. First, it prohibits any private person from bringing a UCL claim unless the person has suffered injury **and** lost money or property. Second, it requires any private person who initiates a UCL claim on behalf of others to meet all the traditional requirements for certification of a class action, including: (1) a community of interest among the class members, (2) common questions of law or fact which predominate over individualized issues, and (3) the plaintiff must have a claim that is typical of the class and be able to adequately represent the interests of the class.

These amendments are effective "the day after the election," which really means that day after the election results are officially certified by the Secretary of State. An immediate point of contention is whether Proposition 64's restrictions apply to pending lawsuits. As a general rule, new statutes that trigger new or different liabilities or substantive consequences for past conduct are presumed to apply prospectively only, unless the language of the statute clearly indicates otherwise. No such clear intent appears in Proposition 64. Where a statutory change merely alters legal procedures and

remedies without impacting individuals' substantive rights, however, such changes are generally presumed to apply to actions pending when the new law passes. Because Proposition 64 merely alters the UCL's standing and class certification requirements, both of which are traditionally considered procedural issues, there exists a strong argument that it should apply to pending actions.

Plaintiffs are likely to argue that the new standing requirement alters their substantive rights and limits a defendant's liability for past conduct, and, therefore, should not apply to pending actions. The problem with this argument is that the only people who have lost the right to sue under Proposition 64 are people who were not injured by the alleged unfair competition. If they were not injured, it should be difficult for plaintiffs to argue that stripping them of their right to bring a lawsuit has deprived them of any substantive rights.

Proposition 64 also raises various other issues:

- The standing requirement may also mean that a plaintiffs' class will be limited to recovery of its actual damages and will no longer be able to force disgorgement of all moneys derived from defendant's unfair competition.
- Individual proof of injury and lost money or property may render class actions infeasible.
- Proposition 64 is likely to increase litigation over class certification, and some plaintiff attorneys hope that an unintended consequence is an easing of the class certification process.

The most likely effect of Proposition 64 should be to curtail the number of private UCL suits. It is unlikely, however, to affect suits where the UCL claims simply augment complaints filed under other theories. Proposition 64 also will put increased pressure on the plaintiffs' bar and advocacy groups to find plaintiffs who have actually suffered an injury. The full ramifications of Proposition 64 will take some time to surface, but it is certainly a big step in the right direction for businesses concerned about abusive UCL litigation in California.

