

Superior Court of the State of California

IN RE TOBACCO CASES II

Brown, et al. v. The American Tobacco Co., Inc., et al.

Judicial Council Coordinated Proceeding (JCCP) No. 4042

San Diego Superior Case No. 711400

The Honorable Ronald S. Prager, presiding

January 21, 2005

Motion for Decertification of Class

The Court issues the following tentative ruling on defendants Philip Morris USA Inc., on behalf of R.J. Reynolds Tobacco Company, Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation's () motion against plaintiffs Willard R. Brown, et al.'s (collectively,) to Decertify the Class as to Plaintiffs Remaining Claims (the).

I. Summary of Ruling

Defendants' motion is granted. After a thorough review of the pertinent case law and the arguments presented, the Court determines that the standing requirements of Prop 64 apply to this pending case. As a result, individual issues predominate, making class treatment inappropriate. Accordingly, Plaintiffs motion for decertification is granted.

II. Introduction and Background

The critical issue raised by Defendants' motion for decertification is whether Proposition 64 () applies in this pending case. Proposition 64 was approved by California's voters in the most recent election of November 3, 2004. It amends the enforcement provisions of Business & Profession Code sections 17200, et seq. and 17500 *et seq.*, (the or), which allowed anyone to bring a UCL action on behalf of the general public. The amendment imposes two new standing requirements on plaintiffs. To have standing, UCL plaintiffs must now allege (and ultimately prove) that the purported wrongful conduct or practices of the named defendants actually injured them in some tangible way, *i.e.*, caused them lost of money or property.

The second requirement applies to UCL plaintiffs who wish to represent the general public. These plaintiffs must not only allege and show actual injury to themselves, but they must also demonstrate that a certifiable class of California residents also suffered comparable injury or loss. This change in the law is significant in that plaintiffs are now prohibited from filing any representative UCL action unless the certification requirements for a class action are met. See Defendants' Exhibit A, sections 3, and 5, striking, respectively, the phrases from section 17204, and 17535.

Defendants vigorously argue that these changes in the law apply to the instant case. If Defendants are correct, then the certification issues presented Plaintiffs' UCL case are now no different than the certification issues presented by Plaintiffs' claims under the Consumer Legal Remedies Act. (CLRA). Earlier in the case, the Court ruled that Plaintiffs' CLRA case could not be certified as a class action because and were distinctive to each member of the proposed class. Now, in light of Prop 64, Defendants argue that the same reasoning applies to Plaintiffs' UCL case, and that, accordingly, the Court should decertify the class.

III. Discussion

1. Prop 64's Standing Requirements Apply to this Pending Case

Plaintiffs assert several arguments that Prop 64's changes do not apply retroactively. Plaintiffs argue that the cases cited by Defendants, namely *Younger v. Superior Court*, 21 Cal.3d 102 (1978), and *Governing Board of Rialto Unified School District v. Mann*, 18 Cal.3d 819 (1978), in support of retroactivity are inapposite because in those cases the statutes at issue were completely repealed, whereas, here, Prop 64 effected no repeal of any statutory right, but merely implemented several substantive changes respecting a person's standing to bring UCL actions, individually and in a representative capacity. Additionally, Plaintiffs argue that reliance on the *Younger* line of cases is no longer proper in light of the California Supreme Court's decision in *Myers v. Philip Morris Cos.*, 28 Cal.4th 828 (2002). And, lastly, Plaintiffs contend that the repeal rule does not apply in cases where the statute that is repealed codified common law rights.

A review of the case law, however, reveals that none of Plaintiffs' arguments is persuasive. While the question of retroactivity is often analyzed from various perspectives, such as whether the amendments or changes are substantive or procedural in nature, whether the statute contains a saving clause or an express directive requiring retroactive application, or whether the right in question is derived from a statute or existed at common law, these varying analytical perspectives are not inconsistent or irreconcilable. Rather, they are all guided by an overriding Constitutional principle: the protections afforded by the Due Process clause of the U.S. and California Constitutions.

Courts are wary to apply a law retrospectively unless there is a clear directive from the Legislature to do so. In this regard, Plaintiffs are correct. The decision to apply a new law or any amendment retrospectively is a policy decision which is first made by the Legislature. It is only when the Legislature has not addressed the issue, or when there is some ambiguity, that the courts will consider the matter. See *Myers v. Philip Morris Co.*, 28 Cal.4th 828, 841 (2002). Courts will also review newly enacted statutes or amendments when their application would subject a party to liability for past conduct that was not actionable at the time it occurred. In this circumstance, the court must consider the new law or amendment from a Constitutional perspective, particularly whether the new changes are fair in light of the protections afforded by Due Process clause of the California and U.S. Constitution. In sum, it appears that legitimate Constitutional concerns about the application of new legislation to new and pending cases has led to the well settled rule that, in the absence of an express legislative mandate, statutes and amendments are to be given prospective application.

This does not mean, however, that the application of all new statutes or amendments trigger Constitutional concerns, or that, there is only one rule, the presumption of prospective application, as Plaintiffs impliedly suggest when they argue that the so-called Repeal Rule (see below) was abandoned by the California Supreme Court in *Myers, supra*. While *Myers* spoke volumes about the canons of statutory interpretation, and the presumption of prospective application, it did so with respect to the repeal of a certain kind of statute (former Civil Code section 1714.45), one which provided Defendants and similarly situated manufacturers with **immunity** from prosecution for their unsafe products. The question of retroactive application was therefore patent and paramount, for if the Court applied the new law retroactively, Defendants would have likely been found liable for their *past* conduct-conduct that could not have formed the predicate of any legal action at the time it occurred. Consequently, a quagmire of Due Process and Ex Post Facto issues would have arisen in the case. Not surprisingly, *Myers* emphasizes time and again that *Myers*, 28 Cal.4th at 845.

The repeal legislation at bar, however, is very different, and the significance of this difference cannot be overemphasized. Here, we have the opposite side of this legal coin. Prop 64 did not repeal the right to be immune from suit, but rather the right to file a suit unless certain conditions are met. And unlike the repeal of an immunity provision, the repeal of a right of action does not

raise any of the myriads of Constitutional concerns that underlie *Myers* and most decisions against retroactive application.

On this point, *Myers* is clear. Retroactive application does not simply refer to the application of new law to the past conduct of the parties. Rather, it is a legal term of art that takes into account various legal contingencies. A statute is one that *Id.* at 839-40 (emphasis added). Thus, only those statutes which affect the legal consequence of past conduct are considered retrospective, and with regard to a person's legal rights, only those statutes which impair or take away a **vested** right can be deemed retrospective. *Myers* therefore shows that the application of Prop 64's standing requirement in this case cannot, by definition, be deemed to be retroactive.

The pivotal question then becomes whether Plaintiffs' right of action has vested. Plaintiffs argue that Prop 64 enacted in the law and that, if applied to the instant case, Prop 64 would deprive Plaintiffs' right to maintain this action. At first blush, these arguments seem to have merit, as this action has been pending for several years at a significant cost to Plaintiffs. Unfortunately for Plaintiffs, however, their arguments ignore the critical issue of vesting.

As discussed above only those rights that have vested can remain unimpaired by new legislation. And, with respect to this action, Plaintiffs' right has ostensibly not vested, as a right of action vests only when final judgment is entered in the case. (Logically, one should say that it is plaintiff's right to collect that vests since the action has concluded.) Thus, ironically, the Court agrees with Plaintiffs that there can be no retroactive application of Prop 64 in this case. But, again, this is not to say that Prop 64 cannot be applied at all.

It is in situations such as these that the so-called Repeal Rule comes into play. When the right to file an action is derived from statute, and the statute is repealed, plaintiffs' case must be dismissed where there is no saving clause and no final judgment has been entered. *Younger v. Superior Court*, 21 Cal.3d 102, 109 (1978). The rationale for the Repeal Rule is that *Id.* (quoting *Governing Board v. Mann*, 18 Cal.3d 819, 829 (1977)). While the voters, rather than the Legislature, repealed the liberal standing requirements of the old UCL, the result is unavoidably the same. Given that Plaintiffs' unvested right in this action is subject to the vagaries of statutory law, and given that there is no savings clause in Prop 64, case law requires that this Court apply the new standing requirements of Prop 64 to this pending case.

In opposing Defendants' motion to decertify this action pursuant to Prop 64, Plaintiffs also argue that because Prop 64 did not completely repeal the UCL, Prop 64's standing requirements should not be applied here. This argument presupposes that in order to apply the Repeal Rule, the entire statute affording the cause of action must be repealed. Plaintiffs further argue that the repeal rule does not apply where, as here, the statute that was repealed has its origins at common law. Plaintiffs' arguments, however, are unavailing.

Plaintiffs are correct that the Repeal Rule does not apply when the right at issue existed at common law, but is codified and then later repealed. It is likely that this is because unless the repealing statute also extinguished the common law right, the common law right would survive the repeal of its codification. Application of the repeal rule would therefore serve no obvious purpose. Plaintiffs are also correct that the UCL is in part based on an expanded view of the tort of unfair competition, which allows businesses to recover against competitors for unfair competition practices. But this is a far cry from showing that the cause of action **as codified** existed at common law.

Plaintiffs cite *The People ex re., Stanley Mosk v. National Research Company of California*, 201 Cal. App.2d 765 (1962), as supporting authority. But in *National Research Company*, the court merely interpreted the UCL's predecessor statute, Civil Code section 3369, specifically the phrase , to mean unfair competition in its broadest sense, that is, unfair practices that injure not

just competitors, but the public's right to be protected from fraud and deceit. *Id.* at 771. Thus, *National Research* only shows that Civil Code section 3369 was given a broad interpretation by the courts in accordance with the intent of the Legislature.

Neither does *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (1992) help Plaintiffs' case. Indeed, in *Bank of the West*, the California Supreme Court reviewed the historical development of the UCL, noting that the expansion of legal remedies against deceptive business practices can be traced to a 1938 amendment to the Federal Trade Commission Act, which gave the FTC jurisdiction over unfair business practices that harmed the public. Later, the States followed suit, enacting a host of including Civil Code section 3369. *Id.* at 1264. Interestingly, *Bank of the West* makes another critical point: that the common law tort of unfair competition did not provide an effective remedy for the consumer precisely because a showing of competitive injury was required.

From this it follows that contrary to Plaintiffs' argument, the common law did not recognize any right of action by which uninjured consumers could file an action on behalf of the general public to enjoin unfair business practices. This expansive development was actually instituted by the Legislature when it enacted section 3369. And, it is this very statutory right which the voters changed by means of Prop 64 in making injury in fact a standing requirement for filing a UCL action. It therefore appears that through Prop 64, the voters have, in effect, brought the UCL more in line with the common law. The Repeal Rule is therefore applicable in this case.

Lastly, Plaintiffs argue that the changes imposed by Prop 64 are substantive, not procedural, and that for this reason, Prop 64 cannot be applied to this case. The rights are substantive because, given that the statute of limitations has elapsed with respect to the claims asserted here, not even the Attorney General could prosecute Defendants for their unfair business practices were the Court to dismiss Plaintiffs' case. Thus, because application of Prop 64 would relieve Defendants of all liability for their past conduct--a retroactive application--it should not be applied here. Although artful, Plaintiffs' arguments again miss the mark.

As discussed above, whether a particular amendment to a statute is deemed retrospective depends on whether the **defendants'** Due Process rights are infringed. The Court doubts that the Defendants in this case are likely to claim any infringement of their Constitutional rights by the Court's application of Prop 64 to the instant action. Moreover, it does not necessarily follow that a change to a party's litigation rights is substantive even when the change ultimately works to deprive the party of a right. For instance, in many jurisdictions, changes to statutes of limitations are considered procedural, even though a change may preclude the filing of an otherwise legitimate action, thereby substantively impacting a party's legal rights. And, in California, changes in standing requirements are considered to be procedural in nature. *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App.3d 117 (1973). As such, they can be and are routinely applied to pending cases. But, again, this does not mean that the application is retroactive. As explained above, application of amendments or changes in the law are retroactive only when a party's **liability** for past conduct is affected. The simple fact that defendant's past conduct forms the basis of the action does not automatically render the new law's application in the case retroactive.

To conclude, the standing changes instituted by Prop 64 are procedural, and therefore apply to this pending case. In so doing, the Court is not applying Prop 64 retroactively because the changes do not affect the legal consequence of Defendants' past conduct. Instead, the Court is applying Prop 64 prospectively. It is therefore Plaintiffs, who obtained the right to bring this action from the Legislature, who are affected. But because Plaintiffs' right in a case do not vest until final judgment is entered, the upshot of is that Plaintiffs have no right to continue prosecuting this lawsuit unless they meet Prop 64's standing requirement.

2. The Court Decertifies the Class

First, the Court finds that for standing purposes, the simple language of Prop 64 makes clear that a showing of causation is required as to each class members' injury in fact (specifically the phrase the UCL violations). *Collins v. Safeway Stores, Inc.*, 187 Cal. App.3d 62, 73 (1986) (.). Further, because this is not a personal injury action, but a UCL action seeking restitution for unfair business practice based on alleged false statements, the injury in fact that each class member must show in this case is the costs of their cigarette purchases. But the question then arises as to whether each member of the class was exposed to Defendants' alleged false statements and whether each member of the class purchased cigarettes of the false statements. Clearly, here, as in Plaintiffs' CLRA case, individual issues predominate, making class treatment unmanageable and inefficient. Further, it appears from the record that not even Plaintiffs' named class representatives satisfy Prop 64's standing requirement.

Therefore, the Court grants Defendants' motion for class decertification.