

CALIFORNIA SUPREME COURT CONFIRMS CLASS-ACTIONS CAN BE FILED UNDER PROPOSITION 64

Nearly five years of legal wrangling was brought to a close on May 18 when the California Supreme Court confirmed 4-3 that consumers can file class-action lawsuits against the tobacco industry and other businesses under the 2004 law passed by voters known as Proposition 64.

Proposition 64 sought to change standing requirements for suits brought under *Business and Professions Code* section 17200 ("The UCL") to people who claimed they had lost money or property as a result of a company's wrongdoing. In the case, known as *Tobacco II*, the Supreme Court rejected business arguments that Proposition 64 required a showing of proof that every plaintiff, regardless of how many thousands or millions of them there might be, had seen an allegedly deceptive ad and relied on it to make a purchase. The court majority said that evidence is required only for the single plaintiff or small group that represents the entire class.

The case was originally filed under California's unfair-competition law, a far-reaching statute that lets private citizens sue on behalf of the general public over illegal business practices, including deceptive advertising. The law was narrowed by the business-sponsored Proposition 64, which requires a plaintiff to show that he or she had actually been harmed by the business practice.

Proposition 64 did not say, however, how the new requirement would affect class actions, in which an individual or a small group sues on behalf of consumers in the same circumstances. The crucial question in *Tobacco II* was whether every member of the class must show harm from the challenged business practice, a virtual impossibility in most cases.

It is sufficient, the Court wrote, for individual plaintiffs who represent the class, to show they suffered some harm from the companies' conduct. Justice Moreno, writing for the Majority, said extending the same requirement to every class member "would effectively eliminate the class-action lawsuit as a vehicle for the vindication of (consumer) rights. . . It is clear that the proponents did not intend to eliminate . . . actions to protect Californians from unfair business practices."

Some highlights of the opinion:

The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. "A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief" under the UCL. (*Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332; see *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1105.) This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices. (*Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 453.) [Slip op. at 11 (bold added).]

[I]n granting defendants' motion for decertification, the trial court

concluded that "the simple language of Prop[osition] 64" required each class member to show injury in fact and causation. Thus, the trial court construed the text of Proposition 64 as requiring absent members to affirmatively demonstrate that they met Proposition 64's standing requirements — injury in fact and the loss of money or property as a result of the unfair practice.

We conclude that the trial court's construction of Proposition 64 was erroneous. [Slip op. at 14 (bold added).]

Notably, the references in section 17203 to one who wishes to pursue UCL claims on behalf of others are in the singular; that is, the "person" and the "claimant" who pursues such claims must meet the standing requirements of section 17204 and comply with Code of Civil Procedure section 382. The conclusion that must be drawn from these words is that only this individual — the representative plaintiff — is required to meet the standing requirements. [Slip op. at 15 (bold added).]

Similarly, the language of section 17203 with respect to those entitled to restitution — "to restore to any person in interest any money or property, real or personal, *which may have been acquired*" (italics added) by means of the unfair practice — is patently less stringent than the standing requirement for the class representative — "any person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (§ 17204, italics added.)

Accordingly, to hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have "lost money or property as a result of the unfair competition" (§ 17204) would conflict with the language in section 17203 authorizing broader relief — the "may have been acquired" language — and implicitly overrule a fundamental holding in our previous decisions, including *Fletcher, Bank of the West and Committee on Children's Television*. Had this been the intention of the drafters of Proposition 64 — to limit the availability of class actions under the UCL only to those absent class members who met Proposition 64's standing requirements — presumably they would have amended section 17203 to reflect this intention. Plainly, they did not. [Slip op. at 22-23 (footnote omitted) (bold added).]

The substantive right extended to the public by the UCL is the "right to protection from fraud, deceit and unlawful conduct" (Prata v. Superior Court (2001) 91 Cal.App.4th 1128, 1137), and the focus of the statute is on the defendant's conduct. As we have already observed, the proponents of Proposition 64 told the electorate that the initiative would not alter the statute's fundamental purpose of protecting consumers from unfair businesses practices. Rather, the purpose of the initiative was to address a specific abuse of the UCL's generous standing provision by eliminating that provision in favor of a more stringent standing requirement. That change, as we observed in *Mervyn's*, did not change the substantive law. (*Mervyn's*, supra, 39 Cal.4th at p. 232.) [Slip op. at 27-28 (bold added).]



ATTORNEY SPOTLIGHT

MAK LAWYER DAVID GROVE TAKES THE LONG ROAD TO PLAINTIFF'S WORK



DAVID GROVE

David Grove's transition from defense attorney to a top-notch plaintiff's lawyer took a major detour – and it wasn't a traffic jam on the 5 Freeway from San Diego to Los Angeles that sent him off the road. After ten years of defending home builders, he tired of standing up for what he considered poor construction and cutting corners, and made the logical move – to South America. Thus began a two-year odyssey which took

David from Central to South America and throughout most of Europe. It wasn't exactly new territory for David, who although he was born in Kansas, lived in Saudi Arabia and went to school in Switzerland.

As a defense lawyer at a general civil defense firm in San Diego, David represented a wide range of parties involved in personal injury, wrongful death and breach of contract actions including numerous subcontractors in construction defect actions. This progressed into representing a number of different developers and general contractors throughout Southern California. In fact, David was the supervising attorney for the developer in the famous Aas v. William Lyon case, a landmark decision which at the time had far-reaching impact in construction defect litigation, to the detriment of homeowners.

"I came to regret that one," David says, "as I have now seen the way it impacted real people with real problems," (the case no longer has much relevance with the passing of SB 800).

When David returned from abroad he was without a job but not devoid of conviction. "I wanted to represent homeowners, consumers, people who were taking on the big corporations," he said. So he looked up an old friend – Mark Milstein, who also took the 5 North to the world of plaintiff's litigation, albeit without the need for a passport. "Mark took me in, after making sure I wasn't going out on walkabout again."

At MAK, David reverse-engineered his knowledge and experience representing builders into the representation of homeowners that have been taken advantage of by the system. "It is much more satisfying and professionally rewarding to be part of the solution rather than to try and minimize the exposure of my client." David currently represents about 1,500 homeowners throughout the state in their battles with developers.

Recently, David settled a large single-family home construction defect case in Northern California on the eve of trial for over for \$42,000 per home, a terrific result for his clients. He also says that while he has seen improvements in products and materials over the years, primarily due to the watchful eye of construction defect litigation there is still a long way to go; hopefully not as far as David had to go to find himself in Santa Monica as a plaintiff's lawyer.



RECENT RESULTS

MAK IS PLEASED TO REPORT THE FOLLOWING FAVORABLE RULINGS AND CASE RESOLUTIONS:

Trial Court

Class Certification GRANTED in a California case venued in San Joaquin County against a publicly held nationwide manufacturer and distributor of vinyl and aluminum windows for residential homes. Class notice will now be sent to the over One Million homeowners with the subject windows, and a trial date will be scheduled.

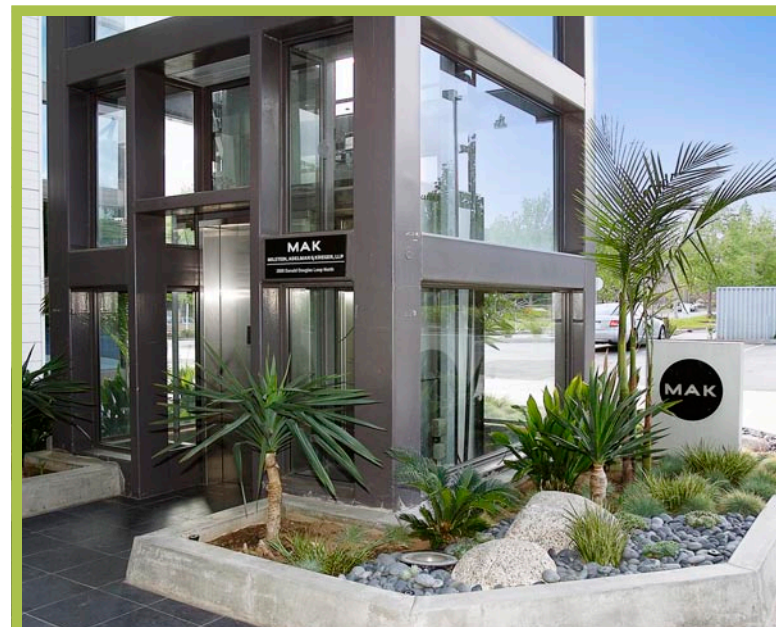
Preliminary Approval GRANTED in a case venued in Los Angeles County in which MAK represents a nationwide class of consumers against a soft drink manufacturer for false advertising in the labeling and selling of products. After the dissemination of class notice, the firm will seek Final Approval of the settlement.

Preliminary Approval GRANTED in a case in which MAK represents a nationwide class of consumers against an over-the-counter cold and flu supplement distributor for false advertising in the labeling and selling of products. After the dissemination of class notice, the firm will seek Final Approval of the settlement.

Verdicts And Settlements

- Bench verdict in a four-plaintiff judicial reference trial venued in Riverside County before a Referee under the judicial reference rules.
- Class action settlement in a California case venued in Los Angeles County against a manufacturer and distributor of vinyl and aluminum windows for residential homes.
- \$750,000 (new money) settlement in a homeowners under-insurance bad faith case against State Farm Insurance Company arising out of the total destruction of our clients' home in the 2007 Malibu fires.
- Class action settlement on behalf of a nationwide class of consumers venued in Los Angeles County against a large grocery chain for false advertising and labeling of the chain's generic products.
- Class action settlement on behalf of a nationwide class of consumers venued in Los Angeles County against a food products company for false advertising and labeling of the Company frozen food products.

- Class action settlement on behalf of a nationwide class of consumers venued in Los Angeles County against a diet supplement company for false advertising in the labeling and selling of its weight loss products.
- \$2,782,000 Complex multi-party construction defect litigation on behalf of residential homeowners in Menifee.
- \$1,234,000 Complex multi-party construction defect litigation on behalf of residential homeowners in Camarillo.
- \$851,697 Complex multi-party construction defect litigation on behalf of residential homeowners in Corona.
- \$844,625 Complex multi-party construction defect litigation on behalf of residential homeowners in Pittsburg.
- \$784,000 Complex multi-party construction defect litigation on behalf of residential homeowners in Salida.
- \$755,000 Complex multi-party construction defect litigation on behalf of residential homeowners in San Marcos.
- \$603,000 Complex multi-party construction defect litigation on behalf of residential homeowners in Lake Elsinore.
- \$585,000 Complex multi-party construction defect litigation on behalf of residential homeowners in Sacramento.

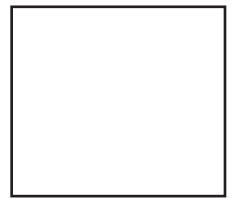


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MAK NEWS

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WE KEEP GROWING



MAK is pleased to announce that Michigan alum Ryan Clarkson has joined the firm as an Associate. Formerly with Dykema Gossett in Century City, Ryan joins the complex consumer litigation group and will immediately begin handling some of the firm's largest and most interesting cases...



Suzanne N. Patron, formerly with Kasdan, Simonds, Riley & Vaughan, has joined MAK as an Associate. Suzanne will continue to aggressively represent homeowners throughout the state in their battles over construction defects in their homes with her typical terrific results...



Newly admitted lawyer Sara Avila has joined the firm as an Associate. Sara, who began working at MAK after college as a legal assistant and then clerked with the firm while attending Pepperdine Law School, will focus primarily on unfair competition claims for the firm's complex consumer litigation group.

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MAK IN THE NEWS

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U.S. Senator Bill Nelson (FL) tours one of MAK's client's homes in Cape Coral, Florida with MAK Partner Wayne Kreger.

MAK's basketball team returned to prominence with a championship in this season's L.A. County Lawyer's League Tournament. This was MAK's 4th County-wide championship in the past 6 seasons.

