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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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YOUNG AMERICA CORPORATION,

Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO  
COUNTY,

Respondent;

ROBERT LYNCH,

Real Party in Interest.

C049337

(Super. Ct. No. 02AS01561)

This case raises the issue of the retroactivity of Proposition 64's amendments to Business and Professions Code sections 17203 and 17204. We conclude the statutory repeal rule, in accordance with the plain language of the amended statutes after the enactment of Proposition 64, requires the application of Proposition 64's amendments to all pending cases.

Real party in interest Robert Lynch (Lynch) brought suit against petitioner Young America Corporation (Young America) as "an individual, on behalf of the general public" for unfair business practices under California's Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17200 et seq.)<sup>1</sup> Lynch alleged Young America, a promotion fulfillment company,<sup>2</sup> violated California's Unclaimed Property Law (Code Civ. Proc., § 1500 et seq.) by keeping funds from uncashed rebate checks sent to consumers in California rather than reporting and surrendering the funds to the State of California. Lynch alleged he is a California resident, bringing the action pursuant to the UCL.

Young America demurred to the complaint, contending Lynch lacked standing to bring the action because Lynch was not truly suing on behalf of the public, but on behalf of the California State Controller's office and the State of California was already investigating and pursuing the same remedies by making

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<sup>1</sup> Undesignated statutory references are to the Business and Professions Code.

<sup>2</sup> Young America describes a promotion fulfillment company as a company providing services to manufacturers who sponsor contests, games and rebate programs as part of the advertising of their products. With respect to rebate programs, the fulfillment company receives claims submitted by the customer or consumer, processes those claims and sends out checks to the customer or consumer. A percentage of the rebate checks that are mailed out never get cashed. The amount of money represented by uncashed checks is known in the industry as "slippage." Slippage is either returned to the manufacturer or booked as revenue by the fulfillment company, depending on the contractual arrangement between the manufacturer and the fulfillment company.

an audit demand of the records of Young America. Young America contended Lynch lacked standing as a private attorney general because the lawsuit was unnecessary. In the alternative, Young America asked for a stay of the action pending resolution of a federal lawsuit and the actions of the State of California. The trial court overruled the demurrer and denied the request for stay.

On November 2, 2004, the California electorate approved Proposition 64, which amended sections 17203 and 17204 to limit standing to bring a cause of action under the UCL to government prosecutors or individuals who have suffered actual injury, and, if acting on behalf of others, have satisfied the class certification requirements set forth in Code of Civil Procedure section 382. Proposition 64 became effective on November 3, 2004. (Cal. Const., art. II, § 10, subd. (a).)

Following the passage of Proposition 64, Young America moved for judgment on the pleadings, arguing Proposition 64 retroactively applied to eliminate any standing Lynch had under the UCL. The trial court denied Young America's motion, ruling the amendments approved in Proposition 64 did not apply to pending actions. Pursuant to Code of Civil Procedure section 166.1, the trial court expressed its belief "that the key question presented on Young America's Motion - whether or not Proposition 64 should be applied prospectively only or retroactively - is a controlling question of law as to which there are substantial grounds for differences of opinion,

appellate resolution of which may materially advance the conclusion of this litigation.”

The denial of a motion for judgment on the pleadings may be reviewed by means of a petition for writ of mandate. (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 451-452.) An order overruling a demurrer, while not routinely reviewable by writ proceedings, may be considered on a petition for a writ of mandate where the issue is one of substantial legal importance. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 851; *City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 898.)

Young America filed a petition for writ of mandate or other appropriate relief seeking review of the trial court’s rulings on its demurrer and motion for judgment on the pleadings. We issued the alternative writ and stayed further proceedings in the superior court.

Young America argues Proposition 64 applies to this pending case because: (1) it repealed the right of an uninjured person to sue under the UCL; (2) the plain language of the amended UCL, along with the findings, declarations, and ballot arguments for Proposition 64, establishes the voters’ intent that Proposition 64 be applied to pending cases; and (3) the amendments were procedural changes applicable to pending UCL actions. Young America claims Lynch’s complaint cannot be amended to meet the new standing requirements and asks that leave to amend be denied. Even if Proposition 64 does not apply to pending

actions, Young America claims Lynch lacks standing based on the arguments set forth in its demurrer. Lynch contends Proposition 64 should not be given retroactive effect and the demurrer was properly overruled. If Proposition 64 is determined to apply to pending cases, Lynch claims he still has standing and asks to be given leave to amend.

As the parties note, the issue of the retroactivity of Proposition 64 is currently before the California Supreme Court.<sup>3</sup> We agree with a majority of the related decisions that have been granted review by the Supreme Court. These decisions hold the statutory repeal rule is applicable to Proposition 64, requiring the amended standing requirements of the UCL to be used in all pending cases. The plain language enacted by Proposition 64 supports the application of the statutory repeal rule. As the complaint filed by Lynch alleged only he was bringing this action as an individual on behalf of the public, Lynch failed to

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<sup>3</sup> (See *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2005) 129 Cal.App.4th 540 [Second Dist., Div. Eight], petition for review granted September 28, 2005, S135587; *Thornton v. Career Training Center* (2005) 128 Cal.App.4th 116 [Fourth Dist., Div. One], review granted July 20, 2005, S133938; *Lytwyn v. Fry's Electronics* (2005) 126 Cal.App.4th 1455 [Fourth Dist., Div. One], review granted April 27, 2005, S133075; *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392 [Fourth Dist., Div. One], review granted April 27, 2005, S132695; *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887 [Fourth Dist., Div. Three], review granted April 27, 2005, S132443; *Branick v. Downey Savings & Loan Assn.* (2005) 126 Cal.App.4th 828 [Second Dist., Div. Five], review granted April 27, 2005, S132433; *Californians for Disability Rights v. Mervyn's LLC* (2005) 126 Cal.App.4th 386 [First Dist., Div. Four], review granted April 27, 2005, S131798.)

satisfy the new standing requirements. Therefore, the trial court erred in denying Young America's motion for judgment on the pleadings. We also conclude the complaint shows on its face it is incapable of amendment to assert standing in an individual under the amended UCL. In light of these conclusions, we need not address the other issues presented by Young America's petition for writ of mandate.

## DISCUSSION

### I

#### **Standard of Review for a Motion for Judgment on the Pleadings**

"In deciding or reviewing a judgment on the pleadings, all properly pleaded material facts are deemed to be true, as well as all facts that may be implied or inferred from those expressly alleged. [Citation.] A ruling on a motion for judgment on the pleadings 'resolves a mixed question of law and fact that is predominantly one of law, viz., whether or not the factual allegations that the plaintiff makes are sufficient to constitute a cause of action. [Citation.] The resolution of a question of this sort calls for examination de novo. [Citation.]' [Citation.]" (*Fire Ins. Exchange v. Superior Court, supra*, 116 Cal.App.4th at pp. 452-453.)

### II

#### **The Statutory Repeal Rule**

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (§ 17200.) "The Legislature intended

this 'sweeping language' to include "anything that can properly be called a business practice and that at the same time is forbidden by law." [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) Standing to sue was expansive as well. Under former section 17204, a UCL action could be brought by a public prosecutor or "by any person acting for the interests of itself, its members or the general public." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.)

Proposition 64 amended section 17204 to limit standing to public prosecutors and "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." In addition, Proposition 64 amended section 17203 to require that a private party may bring a representative action only if he or she meets the standing requirements of section 17204 and complies with class certification requirements set forth in Code of Civil Procedure section 382.<sup>4</sup> (§ 17203.) The amendments do not include a savings clause.

Courts ordinarily presume that a newly enacted statute operates prospectively, but also hold "that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of such a statute

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<sup>4</sup> Code of Civil Procedure section 382 reads in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

without a saving clause will terminate all pending actions based thereon.'" (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829-831 (*Mann*), quoting *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12.) What has come to be known as the statutory repeal rule applies regardless of whether the repeal takes the form of an express repeal of the entire statute or an amendment of a specific section that effectively results in a repeal of the statutory provision under which the cause of action arose. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 109; *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184-185.)

"The repeal of a statutory right or remedy . . . presents entirely distinct issues from that of the prospective or retroactive application of a statute. A well-established line of authority holds: "'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal.'"" (*Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125-126.) "'The justification for [the statutory repeal] rule is that all statutory remedies are pursued with full realization that the [L]egislature may abolish the right . . . at any time.'" (*Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 690, quoting *Callet v. Alioto* (1930) 210



Cal. 65, 67-68; see Gov. Code, § 9606 ["Persons acting under any statute act in contemplation of this power of repeal"].)

The statutory repeal rule applies only "when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action. [Citations.]" (*Callet v. Alioto, supra*, 210 Cal. at p. 68.)

The Supreme Court has repeatedly held that the UCL set forth in section 17200 et seq., and its predecessor statute, "cannot be equated with the common law definition of 'unfair competition.'" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109; see also *Bank of the West v. Superior Court, supra*, 2 Cal.4th at pp. 1263-1264.) Lynch's UCL claim rests entirely on statutory grounds and does not derive from a common law cause of action. We conclude the statutory repeal rule applies to Proposition 64's amendments to sections 17203 and 17204, leaving Lynch without standing to sue on behalf of the public under the UCL.

### III

#### The Plain Language of Amended Section 17204

Our conclusion regarding the application of the statutory repeal rule to Proposition 64 is supported by the plain meaning of the language enacted by Proposition 64.

Section 17204, as amended by Proposition 64, provides, in part: "Actions for any relief pursuant to this chapter shall be *prosecuted* exclusively . . . by [a government prosecutor] or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." (Italics added.) By using the term "prosecuted" rather than "filed" or "brought," the Legislature in previous versions of the statute, and the electorate, pursuant to Proposition 64, meant for this statute to provide the continuing standing to litigate the action, not just to file the action. "Prosecute" means to "commence *and carry out* a legal action." (Black's Law Dict. (8th ed. 2004) p. 1258, italics added; see *Marler v. Municipal Court* (1980) 110 Cal.App.3d 155, 160-161 ["prosecution" includes every step from commencement to final determination of action].) The text of Proposition 64 makes it clear that "prosecute" means more than just filing: "It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to *file and prosecute* actions on behalf of the general public." (Prop. 64, § 1(f), italics added; see *California Mfrs. Assn. v. Public Utilities*

Com. (1979) 24 Cal.3d 836, 844 [construction of statute rendering some words surplusage or redundant to be avoided].)

#### IV

#### Leave to Amend

Young America contends there is no "need to allow Lynch an opportunity either to attempt to amend his complaint to allege injury in fact or to attempt to substitute a new party with injury in fact" because neither Lynch nor any other individual plaintiff can establish injury in fact from Young America's retention of any money from uncashed rebate checks. Lynch responds he has been harmed by Young America's practices within the meaning of Proposition 64 and requests leave to amend to allege additional facts regarding his standing. Lynch reasons that if Young America had complied with the escheat law of California, the State of California would have use of such monies for the benefit of Lynch and other residents. Therefore, Young America's alleged failure to report and surrender the funds from uncashed rebate checks issued to California residents deprived Lynch and other residents of California of benefits that could have been funded with such monies. According to Lynch, he and the other California residents "have been injured in the same manner as if Young America had taken money directly from their pockets." Young America has the better argument.

We do not consider and need not decide the precise meaning of "injury in fact" for purposes of amended sections 17203 and 17204. It is clear after the enactment of Proposition 64 the

sections require some wrong or harm to an interest or right over and above the interests and rights held in common with the public at large in order for an individual to have standing to sue. Otherwise, the amendments to sections 17203 and 17204 enacted by Proposition 64 will have changed nothing, contrary to the expressed intent of the California voters "that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." (Prop. 64, § 1(f).) If an individual asserting an injury coextensive in scope and kind with the general public could still claim an "injury in fact" and bring an action under the UCL, the amendments would be meaningless. Such a construction must be rejected. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 723; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 ["Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative"].)

Given the nature of the unfair business practice alleged by this complaint, that is, Young America's business practice of retaining monies that should escheat to the State of California, we can conceive of no individual or class of individuals who could allege an injury in fact on this cause of action different from the injury general to the public at large. Since the complaint shows on its face it is incapable of amendment to assert standing in a specific individual or class of individuals

under the amended UCL, leave to amend must be denied. (See *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.)

**DISPOSITION**

Let a writ of mandate issue directing respondent superior court to vacate its order denying Young America's motion for judgment on the pleadings and enter a new and different order granting that motion and denying leave to amend. The stay of proceedings in Sacramento County Superior Court No. 02AS01561 is vacated upon finality of this opinion. Young America is awarded costs. (Cal. Rules of Court, rule 56(1)(1).)

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.