

Assembly Bill Represents Legislative Bid to Skirt Proposition 64

By Michael A. S. Newman

According to the ancient historian Herodotus, King Croesus so delighted in his riches that he exhorted the Athenian lawmaker Solon to agree that he, Croesus, was without doubt the happiest of men. Solon disappointed the king by disagreeing, explaining that no man was to be deemed happy until he had died; until the moment of his death, misfortune could always overtake him.

A living person was therefore to be regarded as temporarily "fortunate" at best, not happy. Predictably, Croesus ended his days as a conquered and deeply unhappy man, vindicating Solon's lugubrious philosophy.

In the world of politics, Solon's philosophy has an even more disheartening corollary: No political struggle can ever be deemed resolved or disposed of. A political victory, like human good fortune, can always be undermined at a later time. But political issues, unlike people, do not die — though they do evolve with time.

Like the monster in the horror movie that arises just when everyone thinks it is finally dead, political issues seemingly disposed of in the ballot box invariably come back to life — in the courts and in the Legislature.

It should therefore come as no surprise that the victory of Proposition 64, which profoundly modified California's Unfair Competition Law, is already under attack from those with an interest in keeping alive the litigious atmosphere that has made California such an unattractive place to run a business.

The Unfair Competition Law purports to penalize "unfair" competition. Prior to the passage of Proposition 64, California statute permitted anyone to sue a business for unfair competition as a "private attorney general," even if the plaintiff had never been damaged by the alleged wrongdoing of the defendant.

What constitutes an "unfair" business practice is not clearly defined. Consequently, plaintiffs attorneys have often tried to use the Unfair Competition Law as a means of bringing actions based on laws that do not provide for a private right of action (that is, laws that are not ordinarily enforceable by private citizens). As a result of the broad reach of the Unfair Competition Law and its even broader standing requirements prior to the passage of Proposition 64, unethical attorneys were given the opportunity to file frivolous lawsuits, forcing settlements from unsophisticated business owners or those without the means to hire defense counsel.

On Nov. 2, 2004, Californians changed the law, with a vote of 59 percent in favor of Proposition 64. Proposition 64 provides that unless the plaintiff is an appropriate government agent or entity, only those "who have] suffered injury in fact and have lost money or property as a result of such unfair competition" may assert a cause of action under the Unfair Competition Law. By creating strict standing requirements based on actual injury and actual loss of money and property, Proposition 64 served to curb shakedown lawsuits initiated by attorneys who had not even troubled to find a true client before suing.

Of course, the advocates for changing

the law could not take on the whole world in one day, and thus Proposition 64 did not address the continuing problem that what constitutes "unfair competition" is inadequately defined in the Unfair Competition Law. For the time being, plaintiffs attorneys continue to try to use the statute as a means of enforcing laws that do not otherwise provide a private right of action. But it is now much more difficult to use the Unfair Competition Law as a tool for extorting settlements based on frivolous claims.

The proponents of Proposition 64 were not given long to rest on their laurels. Within a month, attorneys attempted to erode Proposition 64 through the judicial process by arguing that the statute applied only to suits filed after Nov. 2, 2004, leaving all pre-Election Day suits in the courts. That question is now before the California Supreme Court.

But the opponents of Proposition 64 are not limiting themselves to the courts. Members of the California Legislature are now attempting to roll back Proposition 64 through legislation that dilutes its effectiveness. Thus, on Feb. 16, Assemblyman Dario Frommer introduced AB528, a bill that would effectively undermine the strict standing requirements of Proposition 64 in a broad range of actions. If passed, the bill will operate as yet another law appointing individual plaintiffs attorneys as "private attorneys general," precisely what Proposition 64 attempts to limit.

AB528 "authorize[s] any person with a beneficial interest in the outcome of a civil action to enforce specified laws, including regulations, permits, and orders issued pursuant to those laws, that provide for the protection or enhancement of public health or the environment." The legislative findings of AB528 state that "[t]he severe fiscal crises that have faced California governments at all levels have severely reduced the enforcement of environmental laws by public agencies." For this reason, the statute proposes to allow "personal enforcement" to "allow those who are affected by pollution and other environmental injuries to protect themselves, their families, their property and resources that they utilize from the violation of laws intended to protect the public health and the environment."

In particular, the statute permits a person with a "beneficial interest" to bring an action to enforce "specified laws." In fact, the laws implicated are quite extensive, going well beyond the limited realm of "environmental laws," and include the following:

- The entirety of Article X of the California Constitution (which, among other things, relates to eminent domain to acquire frontages to navigable water, water rights, the sale of tidelands, and other water-related issues).

- Broad portions of the Fish and Game Code; provisions of the Food and Agricultural Code regulating pesticides.

- Some provisions of the Government Code regulating land uses; some provisions of the Health and Safety Code.

- Provisions of the Public Resource Code that regulate mining, oil and gas activity, forest practices, solid waste disposal and the release of waste into water.

- Provisions of the Water Code that regulate the discharge of waste into, or the degradation of, the waters of the state.



In this way, a long list of statutes that do not include any private right of action can be used as the bases of lawsuits under AB528.

The first problem with AB528 is that it involves so many possible bases for lawsuits that it necessarily overlaps with the Unfair Competition Law. Doubtless, many allegedly "unfair business practices" under the law will also trigger liability under AB528. But whereas the Unfair Competition Law, under the strict

Proposition 64 framework, now requires a plaintiff to show that he or she "has suffered injury in fact and ha[s] lost money or property as a result of such unfair competition," a plaintiff under AB528 need only show a "beneficial interest."

What is a "beneficial interest?" The statute does not define the term. And California law has varying interpretations of what the term means, depending on the context. Based on this varying

authority, plaintiffs will probably argue that a "beneficial interest" is broader than the specific injury requirements under Proposition 64.

In addition, AB528 permits a cause of action to be asserted even where a violation is merely "threatened." Thus, a person who cannot show that he or she has suffered "injury in fact" and has "lost money or property" as a result of unfair competition may be able to assert a claim under AB528.

Worse still, AB528 imposes penalties beyond those found in the Unfair Competition Law. In particular, AB528 provides for the award of civil penalties against defendants, although it provides that all such civil penalties are to be paid to the state. The Unfair Competition Law, by contrast, does not allow for any civil penalties at all, restricting itself to injunctions and other equitable remedies. This means that AB528 is potentially more punitive than the Unfair Competition Law.

Supporters of the assembly bill may argue that the civil penalties provision is harmless because the penalties are to be paid to the state, and therefore will not create an incentive for plaintiffs attorneys to bring frivolous or extortive suits. But such an argument misses the point. As many years' experience with the Unfair Competition Law shows, plaintiffs attorneys do not need the prospect of damages to motivate them to proceed with an action. The possibility of attorney fees is more than enough.

However, from the defendants' point of view, the potential for civil penalties may raise the settlement value of the case. In this way, the civil penalties provision of AB528 provides more leverage to the plaintiffs attorney — not by increasing the incentive to bring suit, but by altering the settlement value on the defense side to encourage settlements that are more lucrative for plaintiffs attorneys.

Advocates for AB528 may argue that abuses, and particularly extortive settlements, will not occur under AB528 because the bill provides that no action can be settled "prior to 45 days following the receipt of a copy of the settlement by the [a]ttorney [g]eneral, except by approval of the court." At first glance, this appears to mean that all settlements must be approved by the attorney general, but closer scrutiny shows that this is not so.

We are asked to believe that the attorney general's office — the same body that allegedly has no time to handle environmental cases, and that requires the

deputizing of countless private attorneys to enforce the law — is somehow going to have time to review the facts of each case and the positions of the parties, and make a determination that settlements are adequate and fair.

It is very significant that the statute does not require the approval of the attorney general. It merely provides that a settlement cannot be finalized until 45 days after the attorney general has received a copy of it, whether or not the attorney general has even reviewed the settlement. Moreover, it appears that the court has discretion to release the parties from the requirement to submit the settlement to the attorney general. AB528 thus provides no substantive protection against extortive settlements.

In sum, AB528 flouts the will of the California electorate as manifested in November 2004, while providing no additional protections. It introduces excess exactly where Proposition 64 imposed restraint.

Why is the mandate of the California electorate so important? Because the voters of California, if not their legislators, understand that the state's litigation-friendly laws are a reason why businesses have few incentives to come to or stay in California. In 2005, the U.S. Chamber Institute For Legal Reform conducted a survey of corporate attorneys, who ranked California near the bottom of the bunch — number 45 out of 50 states — in terms of how reasonable and fair the state tort liability system is. That is how California is viewed — as one of the six worst states in which to run a business in terms of its tort liability system.

Businesses are the creators of jobs and wealth in California, and we are driving them away. That is why Californians passed Proposition 64, and why it is so important that the Legislature not be permitted to roll back the gains achieved by the electorate. The enforcement of environmental statutes is a very worthy cause, but the method chosen for enforcement should be narrowly focused, and it should not negate the clearly stated will of the voters.

Soion may have been right about the transient nature of good fortune, but let us try to keep the victory of Proposition 64 alive long enough to enjoy some of its benefits.

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