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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MANUELA ZERMENO et al., Plaintiffs and Appellants, v. PRECIS, INC., et al., Defendants and Respondents.	B207674 (Los Angeles County Super. Ct. No. BC300788)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edward A. Ferns, Judge. Reversed and remanded.

Neighborhood Legal Services of Los Angeles County, David Pallack, Joshua Stehlik, Jose O. Tello and Christina Ku; Los Angeles Center for Law & Justice and Hellen Hong, for Plaintiffs and Appellants.

Mayer Brown, Philip R. Recht, Christopher P. Murphy and Francisco Ochoa, for Defendants and Respondents.

Western Center on Law and Poverty, Richard A. Rothschild and Jennifer A. Flory; National Health Law Program and Randolph T. Boyle; National Immigration Law Center, Linton Joaquin and Sonal Ambegaokar, for Amici Curiae.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of DISCUSSION parts 2 and 3.

Plaintiffs Manuela and Juan Zermeno appeal from the judgment entered for defendants in their unfair competition action after the trial court found that the pre-trial settlement of their damage claims meant they no longer had standing to sue under the new standing requirements of Proposition 64. We hold that the changed standing rule was not intended to apply to cases pending when it took effect where a plaintiff had suffered actual injury as required by the new law, but settled that portion of its action before Proposition 64 took effect.

FACTS AND PROCEDURAL HISTORY

Manuela and Juan Zermeno joined a healthcare discount program offered by Care Entrée in December 2001.[1] For a monthly fee of $54.95, deducted automatically from the Zermenos' bank account, Care Entrée offered access to groups of healthcare providers who would charge discount rates. When three dentists identified on Care Entrée's list of providers said they did not participate in the program and would not offer discounts, the Zermenos tried to cancel their membership in the program. Care Entrée did not terminate their membership for another year, however, and continued to withdraw the monthly fee from the Zermenos' account. When Care Entrée finally ended the Zermenos' contract, it refunded less than $200 of the $714.35 it had taken from them.

In August 2003, the Zermenos sued Care Entrée in the Los Angeles Superior Court, alleging that Care Entrée had violated the law governing discount buying services. (Civ. Code, § 1812.100 et seq.) They also alleged that Care Entrée's violation of that law amounted to unfair competition, in violation of Business and Professions Code section 17200. Care Entrée removed the action to federal court, where the Zermenos filed a first amended complaint that added a claim for violation of Health and Safety Code section

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[1] Care Entrée is operated by defendants Precis, Inc., and The Capella Group, Inc., who do business under that name. When we refer to Care Entrée, we include Precis and Capella.

445, which bars the operation of for-profit healthcare referral services.[2] The unfair competition claim was amended to include a violation of that provision, along with the discount buying service claim.

On October 4, 2004, Care Entrée and the Zermenos reached a partial settlement. The parties stipulated to remand the action to state court solely to litigate the Zermenos' injunctive relief claims under Health and Safety Code section 445 and the unfair competition laws. Care Entrée would pay the Zermenos $25,000 as full compensation for damages of any kind, including their restitution claims for unfair competition and their damage claims under the discount buying service laws. The Zermenos also agreed to forego any unfair competition restitution claims on behalf of the general public. The settlement was subject to approval by the federal district court, and on October 7, 2004, that court approved the agreement and remanded the action to the Los Angeles Superior Court.

After remand, the state court denied the Zermenos' motion for summary adjudication of their Health and Safety Code section 445 claim because that statute allowed only the Attorney General to sue, and did not confer a private right of action.[3]

On November 2, 2004, the voters approved Proposition 64, which amended the unfair competition law to state that a person has standing to sue for unfair competition only if he "has suffered injury in fact and has lost money or property as a result of [such] unfair competition." (See Bus. & Prof. Code, §§ 17203, 17204, as amended by Prop. 64, §§ 2, 3.) Before then, anyone acting for the general public had standing to sue for relief

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[2] Health and Safety Code section 445 states that no person or entity "shall for profit refer or recommend a person to a physician . . . or [] any form of medical care or treatment of any ailment or physical condition. . . . [¶] . . . [¶] Any violation of this section may be enjoined in a civil action brought in the name of the people of the State of California by the Attorney General, except that the plaintiff shall not be required to allege facts necessary to show or tending to show lack of adequate remedy at law or to show or tending to show irreparable damage or loss."

[3] We do not discuss the other portions of the motion, or the trial court's ruling, because they are not relevant to the present appeal.

from unfair competition even if he had not suffered any injury. (Former Bus. & Prof. Code, §§ 17203, 17204; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561.)[4] The initiative's findings and declarations of purpose stated that it was designed in part to stop lawyers from filing unfair competition actions if they have "no client who has been injured in fact under the standing requirements of the United States Constitution." (See Historical and Statutory Notes, 4D West's Ann. Bus. & Prof. Code (2008 ed.) foll. § 17203, p. 409.) The new law took effect the day after its passage. In July 2006, our Supreme Court decided *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 (*Mervyn's*), which held that Proposition 64's new standing requirement applied to all pending unfair competition actions, including those filed before the changed law took effect.

The Zermenos' case went to trial in June 2007 on the theory that they could seek to enjoin Care Entrée's alleged violation of Health and Safety Code section 445 under the unfair competition law. (See *Stop Youth Addiction, Inc., v. Lucky Stores, Inc., supra,* 17 Cal.4th at pp. 562-563 [plaintiffs can bring unfair competition action for violation of any statute, even if that statute does not confer a private right of action].) The trial court found that they lacked standing to pursue their unfair competition claim because, under *Mervyn's, supra,* 39 Cal.4th 223, the new standing requirements applied to their action, and because their 2004 settlement and release of all damage claims meant they no longer had any injury in fact.

The Zermenos contend the trial court erred when it ruled on their earlier summary adjudication motion that they lacked standing to sue under Health and Safety Code section 445, and when it found at trial that the settlement of their damage claims eliminated their standing to sue for unfair competition.[5]

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[4] All further undesignated section references are to the Business and Professions Code.

[5] The ruling that the Zermenos lacked standing under Health and Safety Code section 445 came as part of the order denying their summary judgment motion. Because

DISCUSSION

1. *The New Standing Requirement Does Not Apply to This Unique Factual Situation*

It is undisputed that up to the time of the settlement, the Zermenos had a claim for actual injury that would have conferred standing under Proposition 64. They contend those injuries continued to give them standing even after the settlement and the decision in *Mervyn's*. Care Entrée contends that *Mervyn's* "foreclosed" the standing issue against the Zermenos. We conclude that Proposition 64, as construed by *Mervyn's,* does not impose the new standing requirement on these peculiar facts.[6]

The plaintiff in *Mervyn's* was a disability rights organization that sued for unfair competition because it alleged the layout of defendant's department stores interfered with access by persons who used wheelchairs, scooters, crutches, and other mobility assistance devices. At no time had the plaintiff itself suffered any actual injury, but because the plaintiff sued before Proposition 64 was passed, it had standing at the time it brought the action. Mervyn's won at trial and the plaintiff appealed. After Proposition 64 took effect, Mervyn's moved to dismiss the appeal because the plaintiff had suffered no injury and therefore lacked standing under the new law. The Court of Appeal denied the motion to dismiss, and the Supreme Court reversed.

The parties framed the issue as whether the new law was intended to apply retroactively or prospectively. The Supreme Court noted the general rule that statutes are presumed to operate prospectively in the absence of a clearly expressed contrary intent. (*Mervyn's supra,* 39 Cal.4th at pp. 230-231.) The newly-enacted statutory language was

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that order is not appealable until there is a final judgment, the issue is premature. (*F.D.I.C. v Dintino* (2008) 167 Cal.App.4th 333, 342-343.)

6 The purpose of Proposition 64 was to weed out unmeritorious claims by uninjured plaintiffs. Therefore, it seems to us that allowing unfair competition plaintiffs with actual injuries to settle their damage claims and proceed to trial on the merits of injunctive relief would not thwart that purpose, and would streamline the trial of such actions. For purposes of our discussion, however, we assume, but do not hold, that an unfair competition plaintiff with actual injury who settles his injury claims is no longer suffering an injury in fact as required by section 17204.

silent on the topic, but there was language in the preamble that could be so construed. Rather than rely on that ambiguous language, the court relied on the traditional rules of statutory construction and determined that applying the new standing requirement to pending unfair competition cases resulted in a prospective application of Proposition 64. (*Ibid.*)

The *Mervyn's* court reached that conclusion by focusing on the effects of new legislation, not its substantive or procedural labels. If a new law changes the legal consequences of past conduct by imposing new or different liabilities for that conduct, or if it substantially affects existing rights and obligations, then its " 'application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application.' " (*Mervyn's, supra,* 39 Cal.4th at pp. 230-231.) A statute that establishes rules for the conduct of pending litigation without changing the legal consequences of past conduct is not retroactive, even if it draws upon facts that existed before the new law took effect. (*Ibid.*)

Applying the new standing requirement in that case did not make the provision retroactive because it did not change the legal consequences of past conduct by imposing new or different liabilities based on that conduct. It also did not change the substantive rules governing improper business conduct and it still permitted restitution of profits obtained in violation of the unfair competition law. (*Mervyn's supra,* 39 Cal.4th at pp. 232-233.) Instead, all Proposition 64 did was withdraw standing from uninjured persons to sue on behalf of others who were injured. Standing must exist throughout the life of an action. Because challenges to standing are jurisdictional in nature and may be raised at any time, the new requirement was not retroactive. (*Id.* at p. 233.)

The *Mervyn's* court held that Proposition 64 does not "significantly impair the settled rights and expectations of the parties to continue prosecution of their actions." The only rights and expectations at issue were those of non-injured plaintiffs to volunteer as private attorneys general and recover their attorney's fees for obtaining restitution for others. (*Mervyn's supra,* 39 Cal.4th at p. 233.) The presumption of prospective operation should not be applied to protect so abstract an interest. (*Ibid.*)

In short, the *Mervyn's* court held that applying the new standing requirement to a plaintiff who was never injured did not upset any meaningful, settled rights. Where such rights were impaired, however, application of the new standing requirement was forbidden unless the statute expressly provided for it. (*Mervyn's supra,* 39 Cal.4th at pp. 230-231.) The Zermenos did suffer actual injury, but settled that portion of their claim before Proposition 64 was passed, partly in exchange for the right to pursue their injunctive relief claim in state court. Unlike the *Mervyn's* plaintiff, applying Proposition 64 to the Zermenos would " 'significantly impair [their] settled rights and expectations . . . .' " (*Id.* at p. 233.)[7] Nothing in the statute or in the *Mervyn's* holding allows for application of Proposition 64's new standing requirement in such a case.[8]

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[7] It would also grant Care Entrée a windfall by effectively settling the entire action even though it too bargained for continuation of the Zermenos' injunctive relief claim. We presume a complete settlement would have come at a higher price.

[8] Although not raised as an issue by the parties, application of Proposition 64, which was enacted after the Zermenos' settlement, might also be an unconstitutional impairment of the Zermenos' contract rights under that settlement. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *In re Marriage of Guthrie* (1987) 191 Cal.App.3d 654, 660-663 [applying newly-enacted statute to permit retroactive modification of marital settlement agreement that awarded former wife custody of the community property house as a form of child support would be unconstitutional].) We merely note this potential issue however, and it does not factor into our analysis.

We also want to make clear that our holding is limited to the unique facts of this case. In reaching this result, we have found an example in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal. 4th 235, which was the companion case to *Mervyn's*. In that case, the court held that the uninjured plaintiffs who lost standing after Proposition 64 took effect could seek leave to amend their complaint to substitute in their stead a plaintiff who sustained actual injury. (*Branick*, at pp. 243-244.) Therefore, our Supreme Court has at least suggested its willingness to adopt a flexible approach when warranted in cases where standing was lost due to the passage of Proposition 64.

Finally, we express no opinion on the merits of the Zermenos' claim for injunctive relief.

2. Care Entrée's Regulation By The Department Of Managed Health Care Is Not A Basis for Denying Injunctive Relief

Sometime before trial, the state's Department of Managed Health Care (the Department) began regulating Care Entrée as a healthcare service plan under the Knox-Keene Health Care Service Plan Act of 1975. (Health & Saf. Code, § 1340 et seq.) In what might be considered an alternative ruling, the trial court apparently found that injunctive relief was no longer necessary because the Department found that Care Entrée misled consumers and issued a cease and desist order as part of its efforts to regulate Care Entrée. Based on this, Care Entrée contends that even if the Zermenos had standing to sue for unfair competition, the court made a factual finding supported by substantial evidence that the need for injunctive relief – which was the only remaining claim – was no longer present.

Although the Department of Managed Health Care has the exclusive statutory authority to regulate healthcare plans, Health and Safety Code section 445 gives the Attorney General authority to enjoin businesses that make healthcare referrals for profit. As part of the consent decree that brought Care Entrée under its regulatory oversight, the Department adopted the order and findings of an administrative law judge, which stated that the only issue to be determined was whether Care Entrée was a health care service plan under the Knox-Keene Act. The potential joint applicability of Health and Safety Code section 445 is not mentioned, and there is no evidence that the Department found Care Entrée was not also in violation of section 445 or that it had authority to enforce that section to the exclusion of the Attorney General. In fact, among the factual findings in the administrative law judge's order are statements that Care Entrée "steers" its members to certain healthcare providers, and provides its members with "referral lists." At a minimum, this raises the specter of a Health and Safety Code section 445 violation. If the Department of Managed Health Care is regulating a business that should be enjoined from operating under that section, then the public may still be threatened with harm. The trial court did not address the merits of the section 445 claim because of its ruling on

standing, which we have rejected. The applicability of section 445 to this case should, we believe, be considered first in the trial court.[9]

3. *Health and Safety Code Section 445 Is Constitutional*

Care Entrée contends Health and Code section 445 is an unconstitutional infringement on its free speech right to distribute its referral lists. As Care Entrée acknowledges, unlawful or misleading commercial speech is not protected by the First Amendment. (*Thompson v. Western States Medical Center* (2002) 535 U.S. 357, 367.) The trial court noted the Department's finding that Care Entrée was misleading consumers. This at least raises an inference that Care Entrée's commercial speech was misleading and therefore not protected by the First Amendment. We need not decide the issue because, we believe, it must first be more fully developed in the trial court.

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9 Care Entrée argued below that the trial court should stay the action and defer to the Department's regulatory expertise under the doctrine of primary jurisdiction. (*Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 931-932.) The trial court's statement of decision does not mention that doctrine, and Care Entrée has not raised it as an issue on appeal. We therefore deem it waived. (*Bode v. Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224, 1239.)

Similarly, although Care Entrée's appellate brief cites decisions holding that the Knox-Keene Act is a comprehensive scheme intended to occupy the field of healthcare plan regulation, thus barring judicial intervention (*see, e.g., Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301-1302), it does not fully develop a preemption argument. Instead, its argument is confined to the notion that the Department's efforts to regulate it as a healthcare plan shows that there was sufficient evidence to support the trial court's finding that injunctive relief is no longer necessary to remedy any supposed violation of Health and Safety Code section 445. Because Care Entrée has not fully developed its cursory preemption argument, we hold that the issue has been waived. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court for further proceedings.[10] Appellants shall recover their appellate costs.[11]

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

MOHR, J.*

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[10] The Zermenos point out that recent Supreme Court decisions have construed other portions of Proposition 64 to require unfair competition plaintiffs to proceed under the certification requirements for class actions. (*Amalgamated Transit Union, Local 756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993; *Arias v. Superior Court* (2009) 46 Cal.4th 969.) The Zermenos ask us to certify this as a class action, but that is an issue for the trial court in the first instance.

[11] We allowed three groups – Maternal and Child Health Access, California Pan-Ethnic Health Network, and Koreatown Immigrant Workers Alliance – to appear as amicus curiae and file an amicus brief. That brief was limited to two issues: whether plans such as those offered by Care Entrée are truly necessary because consumers can negotiate for their own discounts; and whether the Department is allowed to, or capable of, effectively regulating businesses that violate Health and Safety Code section 445. The trial court did not reach those issues, and they too are best resolved there. Accordingly, we disregard the arguments raised in the amicus brief, along with the supporting exhibits. We therefore deny as moot Care Entrée's motion to strike four exhibits from the amicus brief, consisting mostly of news accounts, on the grounds they are hearsay and were not part of the trial record.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.