

No. S249895

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

ABBOTT LABORATORIES; ABBVIE INC.; TEVA PHARMACEUTICAL
INDUSTRIES, LTD.; TEVA PHARMACEUTICALS USA, INC.; BARR
PHARMACEUTICALS, INC.; DURAMED PHARMACEUTICALS, INC.;
DURAMED PHARMACEUTICALS SALES CORP

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF ORANGE,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Real Parties in Interest.

Petition for Review of a Decision of the Court of Appeal,
Fourth Appellate District, Division 1, No. D072577

Superior Court, County of Orange
Civil Case No. 30-2016-00879117-CU-BT-CXC
Honorable Kim G. Dunning

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In support of their Petition for Writ of Mandate or Prohibition in the Fourth District (hereinafter, the “Writ Petition”) that led to the challenged Opinion here, Defendants argued that the legal questions presented should be reviewed because the questions – involving “the authority of local officials to bring and settle UCL claims beyond their local area – [have] proven perplexing and resulted in inconsistent decisions from superior courts.”¹ (Writ Petition at p.11.) Defendants claimed extraordinary review is “necessary” and “crucial” because the issues are “of widespread importance,” arising in the early stages of “‘thousands’ of cases.” (Writ Petition at pp.13-16.) Defendants argued that there is a need for “certainty” in the law not only in this case, but in all related cases, since the issues are “of significant statewide importance and [have] heretofore evaded appellate review.” (Writ Petition at p.12.) All of these reasons support granting the People’s Petition for Review.

Yet, in this Court, Defendants argue just the opposite. In their Answer to the Petition for Review, Defendants now contend review is “unnecessary” because the Fourth District’s Opinion on the merits is “grounded in settled principles” and the “prior conflict[s]” in the lower courts are now “irrelevant.” (Answer at pp.15-20.) Defendants ignore

¹ Unless otherwise defined, all capitalized terms used herein shall be as defined in the People’s Petition for Review.

the statewide problems that the broad-reaching policy pronouncement in the Opinion creates for the “thousands” of similarly situated cases in their Answer entirely, arguing that the Fourth District’s two justice Majority Opinion should simply be left to bind *all* trial courts and parties as the final decision on the contested legal questions -- regardless of the procedural or factual circumstances of any of these other cases. The UCL’s broader aim to fully protect California consumers from unlawful and unfair competition that was raised in support of the Petition is of no concern to the Defendants here.

Perhaps if the two justice Majority Opinion were limited to addressing a question linked to the facts and circumstances of the present case, then Defendants objection to further review in this Court would have some merit. But, it is not. The holding in the Opinion sets forth a new procedural process and constitutional policy in the state that shields defendants from liability, not only in UCL cases, but potentially also in other civil law enforcement cases brought by district attorneys. Such a decision should be made for the entire state, if at all, only by the highest Court. Defendants offer no good reason to suggest otherwise.

For each of these reasons, and those described in more detail below and in the Petition, the Petition for Review should be granted.

II. DEFENDANTS' ANSWER FAILS TO REFUTE ANY OF THE REASONS REVIEW SHOULD BE GRANTED

Defendants oppose the Petition because, in their view, the Fourth District Opinion is correct on the merits, and it is fully consistent with all other laws and authorities. (Answer at pp.15-35.) In so doing, the Defendants spend the vast majority of their Answer arguing the merits of the Petition, not whether there is good reason for this Court to grant review.² Not only does the Answer fail to refute the many reasons the People presented supporting their request for review, but the arguments raised highlight precisely why review should be granted.

A. There Is No Dispute That The Petition Presents Important Legal Questions Of First Impression

Defendants do not dispute that the issues presented are heavily contested issues of first impression. (*See* Petition at pp.22-24.) In their Answer, Defendants admit that there is no other published decision that addresses the precise legal question presented. (Answer at p.19 [arguing the “only other published decision on the issue is *Hy-Lond*” and claiming the Fourth District properly relied on the principles of that heavily disputed case when answering the legal questions presented].) The uncontested

² Of course, the People disagree that the Majority Opinion is correct on the merits. (Petition at 34-40.) The People will respond in full to the entirety of the arguments on the merits in their opening brief on the merits if the Petition for review is granted.

statewide importance of the legal issues of first impression decided in the Fourth District Opinion, alone, is a sufficient basis warranting review. (Cal. R. Ct. 8.500, subd. (b), subd. (1).)

B. Defendants’ Attempt To Minimize The Inconsistencies And Conflicts In The Law Does Not Mean They Do Not Exist

In the Petition, the People argued that the holding in the Opinion is inconsistent, and in conflict, with other well settled law and authority for numerous reasons. (Petition at pp.24-32.) In response to these arguments, Defendants argue that the admitted conflicts in the lower courts are no longer relevant because all trial courts are now bound to follow the Fourth District’s Majority Opinion which is, in their view, right on the merits. (Answer at pp.20-29.) These arguments do not refute the People’s showing in support for this Petition for Review.

1. The Conflicts In Lower Court Opinions Are Relevant And Important Reasons Review Should Be Granted

The People argued that review is necessary to ensure uniformity of decisions because there is a risk of conflicting decisions on the legal question addressed in the Opinion, particularly in other appellate districts that are not bound to follow the Fourth District’s Majority Opinion. (*See* Petition at p.24 [contending a “likelihood of inconsistent rulings is evidenced by the different holdings of the trial courts and a divided 2-1 appellate court already with respect to the issue” presented].)

In response, Defendants do not deny that conflicting rulings exist or that there is a real potential for conflicts in other appellate districts if this Court does not settle these important questions. Instead, Defendants contend the conflicts are “irrelevant” because the Fourth District Opinion correctly resolved the issue for all trial courts and parties throughout the state. (Answer at p.20.) However, the fact that the Fourth District’s Majority Opinion may be presently binding on all trial courts in the state does not remove the real and potential conflicts that still exist at the appellate level and justify review. Moreover, if anything, the argument further supports the Petition for Review because, if the Opinion stands, the UCL’s aim to fully protect California consumers will be thwarted not only in this case, but in numerous other cases that raise this question throughout the state. (See Petition at p.40 [arguing the Majority’s holding “will hurt California consumers if it stands” by limiting the power of the trial courts to grant the full scope of remedies authorized in the UCL].)

**2. Defendants’ Answer Highlights The Need For Guidance
From This Court Regarding The Proper Standard For
Interpretation Of Civil Law Enforcement Statutes**

In the Petition, the People argued that review should be granted because there is a clear conflict between the Second and Fourth District’s standard for interpretation of civil law enforcement statutes

and their application of this Court’s ruling in *Safer v. Superior Court* (1975) 15 Cal.3d 230, 236 and related decisions. (See Petition at pp.26-29 [noting in “the Second District, broad prosecutorial standing under the UCL *presumptively exists* unless otherwise specified, but in the Fourth District, civil prosecutorial power *presumptively does not exist*, unless express specified”].) Defendants do not dispute that different standards were applied in these cases, but argue they do not present conflicting interpretations of the *Safer* rule because the Second District decision “concerned a wholly different statute” as the predicate for the UCL action in that case. (Answer at p.22.) Even if the cases are factually distinguishable, however, that does not change the fact that two districts applying conflicting standards to the interpretation of civil law enforcement statutes merits review.

In addition to distinguishing the Second District’s decision, Defendants argue review should be denied because the Fourth District properly applied the *Safer* rule on the merits in support of its holding here. Other than a lengthy argument in favor of extending the *Safer* holding to all civil prosecutions, the Defendants do not explain how or why the *Safer* rule was properly applied to restrict only a portion of the statutorily authorized remedies in the UCL in this case. Indeed, Defendants acknowledge that “section 17204,” which is the statute at issue here, already provides express authorization for the district

attorneys' action to proceed, which is all the *Safer* rule requires. (Answer at p.23.)³

In the broader context, Defendants attempt to offer support for the Fourth District's restrictive view of the district attorney's prosecutorial powers, arguing that the authorization of prosecutorial power to district attorneys under Government Code Section 26500 (amended after the *Safer* decision was rendered) applies only to criminal actions. In support, Defendants ask the Court to take judicial notice of the legislative history of the amendment, claiming Government Code Section 26500 was not intended to have "broad reaching significance" in civil actions. (Answer at p.24.) Yet, all of the legislative history presented and the plain meaning of the language in the statute points to an intent to "allow greater discretion on the part of the public prosecutor in initiations of prosecutions." (*See, e.g.,* Request for Judicial Notice, Ex. A at pp.6-7, 10, 16.)

Moreover, contrary to Defendants' suggestion that a district attorney is intended to be the public prosecutor only in criminal cases

³ There is no dispute that the District Attorney has standing to pursue the UCL claims here, and that the case was properly brought in the competent jurisdiction and venue of Orange County. (Petition at pp.10-11.) Hence, case law permitting courts to refuse to grant relief to plaintiffs that lack standing are not dispositive of the issues here. (*See* Answer at pp.29-32 [arguing courts can dismiss UCL claims when the Plaintiff lacks standing to pursue them and citing authorities for that proposition].)

under section 26500, section 26501 expressly notes the district attorney's concurrent role in prosecuting "civil cases on behalf of the People." (Gov. Code §§ 26500 & 26501.) The Defendants' arguments concerning the limitations in civil prosecutions confirm the various conflicts and confusion in the law that support granting review in order to clarify the proper standard to be applied by the lower courts when interpreting civil prosecution statutes. (*See Answer at pp.23-27* [noting the *Safer* rule has been "applied broadly"].)

3. Defendants' Distinguish Other Case Law, But The Fourth District's Holding Does Not, Thereby Creating Conflicts

In the Petition, the People argued that review should be granted because the holding in the Opinion cannot be reconciled with well settled law governing UCL law enforcement actions. (*See Petition at pp.25-26* [noting inconsistencies between the holding here and the limited evidentiary burdens and punitive focus of remedies on the Defendant's conduct under the UCL to protect California consumers recognized in the *Tobacco II Cases*].) In response, Defendants distinguish the *Tobacco II Cases*, arguing that case involved "a fraud based UCL claim" and "deceptive advertising" and thus, these concepts are irrelevant to the legal questions presented in this Petition. (*Answer at p.27.*) If the Fourth District Opinion was limited to the unique facts and circumstances of this case, the distinction might have merit, but, once again, it is not. As

it stands, the Majority's far reaching ruling restricts monetary remedies and fundamentally alters the policy considerations and burden of proof in *all* UCL actions brought by local prosecutors, including those based on fraud and deceptive advertising. As such, the apparent inconsistencies left unaddressed in the Fourth District Opinion support review by this Court to ensure uniformity of decisions and the protection of California consumers in all UCL cases.

C. The People Did Not Waive Any Arguments That Support Review

In their Answer, Defendants claim review should be denied because the People waived any arguments concerning the conflicting interpretations of this Court's *Safer* decision and the powers of the court to enter appropriate remedies in UCL cases because these arguments were not timely raised in the Fourth District. (Answer at pp.21 & 29.) Neither of these arguments were waived.

First, it is not the job of the district courts to provide uniformity in California law and address conflicts between districts. Only the highest Court has the power to grant review and consider such matters, particularly here when guidance is sought to address conflicting interpretations of decisions of this Court. (Cal. R. Ct. 8.500; *People v. Davis* (1905) 147 Cal. 346, 348.) The People's arguments regarding the conflicts between districts that relate to the *Safer* decision and other

decisions of this Court and districts were thus properly and timely raised in this Court in support of this Petition for review.

Second, it is not correct that the People failed to argue on the record below that the UCL grants the courts the power to award the statutorily authorized remedies in a properly filed UCL case by any authorized public prosecutor. (*See Answer at p.29.*) Indeed, the People made this argument many times in the Fourth District below, including in the pre-hearing briefing, at oral argument, and as a basis for its Petition for Rehearing. (*See Return at pp.37-38; People’s Consolidated Answer to Amicus Briefing at pp.8-10; People’s Petition for Rehearing at pp.19-20.*) The argument was also raised by amicus parties as well. (*See, e.g., City Attorneys’ Amicus Brief at pp.28-31.*) Not only was the argument timely raised numerous times, but it was also a basis for the dissenting opinion by Justice Dato in the Fourth District Opinion. (Dis. Opn. at p.11.)

Accordingly, there is no basis to deny review of these important legal questions on the grounds of waiver.

D. Jurisdictional Overreach By The District Courts May Indeed Support A Basis For Review By This Court

Finally, Defendants argue that the People’s jurisdictional challenges to the Fourth District’s ruling cannot be reviewed by this court under Rule 8.500(b)(2), claiming the reason for the rule “has

ceased to exist.” (Answer at p.35.) This argument ignores the vast body of law permitting this Court to review the lower court’s decisions for error of all types, including jurisdictional errors. (*See, e.g., People v. DeLouize* (2004) 32 Cal.4th 1223, 1228; Petition at pp.32-34.) Even if there was a jurisdictional error, Defendants argue it was merely “procedural error, which does not merit this Court’s review.” (Answer at p.36.) However, as discussed above, the “procedural” errors here stand to affect far more than the parties in this case given the Fourth District’s holding on the merits. Under these circumstances, review by this Court is proper. (Petition at pp.32-34.)

III. CONCLUSION

For all the foregoing reasons, and those set forth in the Petition, the People respectfully request that the Petition for Review be granted. The issues presented should be briefed and heard on the merits, and the Opinion should be reversed.

Dated this 9th day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 8.504(d)(1)]

The text of this Petition for Review (excluding tables and caption pages) consists of 2447 words as counted by the word-processing program used to generate this brief.

Dated this 9th day of August, 2018.

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