Public Investors Arbitration Bar Association

May 5, 2004

Honorable Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: ***Bowen v. Ziasun Technologies, Inc.*, 116 Cal.App.4th 777 (2004)**
Fourth Appellate District Case No. D041142
Request for Depublication (Cal. Rules of Court, rule 979(a))

To the Chief Justice and the Associate Justices of the California Supreme Court:

On behalf of the Public Investors Bar Association ("PIABA"), we request depublication of *Bowen v. Ziasun Technologies, Inc.*, 116 Cal.App.4th 777 (2004), filed March 8, 2004 [2004 Daily Journal D.A.R. 2974], and modified April 7, 2004 [2004 Daily Journal D.A.R. 4358].

The Nature Of PIABA's Interest

PIABA has more than seven hundred attorney members from more than forty states who devote a significant portion of their practice to the arbitration of securities disputes and represent public investors in arbitration. Collectively, PIABA members have represented tens of thousands of public investors in securities arbitrations around the country, including California. PIABA seeks to advance the rights of public investors through a variety of activities, including the submission of briefs as *amicus curiae*. PIABA appears as amicus in court cases because broker-dealers today commonly require investors to sign pre-dispute arbitration agreements and most individual retail securities disputes, as a consequence, are resolved in arbitration. Cases litigated in court and brought to an appeal are important to PIABA members and public investors because litigated retail securities cases are now rare, and arbitrators look to those cases for guidance.

Introduction

This Court recently wrote that "California . . . has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices." *Small v. Fritz Companies, Inc.*, 30 Cal.4th 167, 182 (2003). The decision in *Bowen v. Ziasun Technologies, Inc.*, 116 Cal.App.4th 777 (2004), subverts that interest to the detriment of Californians generally and law enforcement agencies and investors in particular.

Public Investors Arbitration Bar Association
2415 A Wilcox Drive Norman, OK 73069 Phone: (405) 360-8776 Fax: (405) 360-2063
Toll Free: (888) 621-7484 Website: *www.PIABA.org* Email: *piaba@piaba.org*

Bowen exempts securities transactions from the Unfair Competition Law ("UCL"). To arrive at that result, the decision ignores the UCL's cumulative remedies provision. *Bowen* does not discuss or even acknowledge *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998), in which this Court held that the cumulative remedies provision of the UCL means exactly what it says. The effect of *Bowen* will be to overrule *Stop Youth Addiction* in part and thus begin a new line of authority allowing lower courts to determine what statutes and areas of the law will not be subject to the UCL. This potentially denies rights to citizens and remedies to law enforcement agencies. Allowing *Bowen* to remain published will undermine the current clarity of the UCL and its application while frustrating California's interest in maintaining business integrity. *Bowen* should be depublished.

Why *Bowen* Should Be Depublished – A Summary

Under existing law, the Unfair Competition Law literally applies to securities transactions. The Fourth District Court of Appeal's holding to the contrary is erroneous and disregards this Court's precedent and applicable statutes:

1. The UCL is cumulative; no implicit repealer of or exemption from the UCL is available. As set forth in *Stop Youth Addiction* and the UCL itself, section 17205 of the Business and Professions Code requires that exceptions to coverage by the UCL be "express." No express exception for securities transactions exists in the UCL or elsewhere.

2. Section 25510 of the Corporations Code makes the remedies under the California Corporate Securities Law of 1968 ("Corporate Securities Law") cumulative as well. Thus, no express exception from the UCL for securities transactions exists in the Corporate Securities Law.

Bowen ignores both Supreme Court precedent and the clear language of governing statutes. It conflicts with decisions of other appellate districts which have allowed UCL claims arising out of securities transactions. Therefore, it should not remain as precedent.

The *Bowen* Decision

The court of appeal initially filed the *Bowen* decision on March 8, 2004. In reaching its decision that the UCL does not apply to securities transactions, the court observed that the Law was California's "little FTC Act." *Bowen v. Ziasun Technologies, Inc., supra*, 116 Cal.App.4th at 787. The court then counted up the states that have determined whether their "little FTC Acts" apply to securities transactions. *Id.* at 787-88. The court next examined a Ninth Circuit decision

interpreting Hawaii's law. *Id.* at 788-89.[1] This analysis led to the conclusion that "based upon the fact that the FTC Act has never been applied to securities transactions, and federal and state authority from 15 other jurisdictions have held that their little FTC Acts do not apply to securities transactions, section 17200 does not apply to securities transactions . . . ." *Id.* at 790.[2]

To bolster its conclusion, on April 7, 2004, the court modified the decision to add two footnotes. Footnote 9 in effect declares that securities transactions are "exempt" from section 17200 because the UCL was "never intended to apply to securities transactions *at all* because of the comprehensive regulatory umbrella of the Securities and Exchange Commission over such transactions."[3]

No Implied Exemption Or Repeal Is Allowed Under The UCL

The authority relied upon by the court of appeal and the conclusion reached in *Bowen* are contrary to clear and unequivocal statutory language and the decisions of this Court. Implied exemption or repeal simply does not exist under the UCL.

1. Both The UCL And The Corporate Securities Law Provide For Cumulative Remedies; No Express Exemption Or Repeal Exists

The remedies under the UCL are cumulative. Business and Professions Code section 17205 provides as follows:

> Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or

[1] As set forth in footnote 5 below, the Hawaii law apparently did ***not*** have a cumulative provision similar to section 17205 of the California Business and Professions Code.

[2] The authority is not unanimous. *See, e.g., Myers v. Merrill Lynch & Co., Inc.*, 1999 WL 6906082 (N.D. Cal. 1999), *affirmed*, 249 F.3d 1087 (9th Cir. 2001) (California UCL does not exclude securities transactions; court would need "to rewrite the statute . . . to reach" contrary conclusion); *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983) (Arizona law applies to securities transactions); *Cieri v. Leticia Query Realty*, 80 Haw. 54, 68, 905 P.2d 29, 43 (Haw. 1995) (Hawaii law applies to securities transactions).

[3] The court's reference to the Securities and Exchange Commission is not for the purpose of grounding its decision on preemption. In the decision, the court specifically rejects any notion of preemption. *Bowen v. Ziasun Technologies, Inc., supra*, 116 Cal.App.4th at 789. Certainly, federal securities legislation and regulation do not preempt the field. Rather, the federal courts, as well as this Court, have long recognized that state law remedies exist side-by-side and concurrently with federal securities regulation. *See, e.g., Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977); *Small v. Fritz Companies, Inc.*, 30 Cal.4th 167, 176-78 (2003); *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal.4th 1036, 1056-57 (1999). Additionally, the federal securities laws expressly are cumulative and generally non-preemptive. 15 U.S.C. §§ 77p(a), 78bb(a).

> penalties available under all other laws of this state.

Despite the UCL's clarity, the court of appeal in *Bowen* did not cite, mention, or refer to section 17205. It did not find or point to anything suggesting that the California legislature "expressly provided" for securities transactions to escape coverage by the UCL.

Indeed, the Corporate Securities Law contains its own cumulative remedies provision and thus is exactly contrary to *Bowen*:

> . . . . Nothing in this chapter shall limit any liability which may exist by virtue of any other statute or under common law if this law were not in effect.

Cal. Corp. Code § 25510; *see Bowden v. Robinson*, 67 Cal.App.3d 705, 716 (1977) ("Sections 25510 and 25006 express a clear legislative intent for the Corporate Securities Law of 1968 to supplement common law causes of action, not to repudiate them").

The court of appeal in *Bowen* did not cite, mention, or refer to section 25510. It did not suggest or point to anything overruling or negating the clear language and effect of the statute.

Thus, nothing in either the UCL or the Corporate Securities Law supports the conclusion in *Bowen*. Rather, the language of the statutes leads to exactly the opposite result – *i.e.*, the UCL applies to securities transactions just as it applies to other business acts and practices.

2. This Court Interprets The UCL As Requiring That Any Exemption Or Repeal Be Express; No Implied Exemption Or Repeal Is Available

In 1998, this Court rejected the notion that anything less than an express legislative provision can avoid application of the UCL and held that implied preemption, exemption, and repealer were not available. *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998).

In *Stop Youth Addiction*, this Court specifically addressed the meaning of section 17205. There, plaintiff sought equitable relief based upon Lucky's violation of a Penal Code provision proscribing the sale of cigarettes to minors. Lucky argued that the Penal Code provision together with the Stop Tobacco Access to Kids Enforcement Act (the "STAKE Act") embodied the Legislature's intent to create a comprehensive and exclusive scheme for combating the sale of tobacco to minors.

This Court, however, rejected Lucky's argument of a legislative bar. *Id.* at 567-74. First, the Court noted that the concept of "preemption" was not applicable to the case. Instead, Lucky's argument was "more akin to one of implied repeal." *Id.* at 568. The Court then observed that the

law "shuns repeals by implication," *id.* at 569, and that every time the Legislature amended the UCL, it expanded the law's scope. *Id.* at 570.

With respect to section 17205, this Court wrote:

> The term "'expressly' means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'" [Citations omitted.] We agree with amicus curiae CDAA that, in order to conclude an enforcement "scheme" comprising Penal Code section 308 and the STAKE Act *impliedly* repeals the UCL's broad express standing provision, we would have to read the word "implicitly" into section 17205 or read the word "expressly" out of it. . . .
>
> As neither Penal Code section 308 nor the STAKE Act expressly provides otherwise, we conclude the remedies or penalties provided by the UCL are cumulative to the remedies or penalties available under those statutes.

Id. at 573.

In *Stop Youth Addiction*, the absence of an express statutory provision limiting the application of the UCL, combined with section 17205, dictated the outcome:

> . . . . Simply no basis exists for concluding that, by identifying and penalizing in section 308 and the STAKE Act certain tobacco sales practices, the Legislature intended to bar unfair competition causes of action based on such practices. Section 308 and the STAKE Act nowhere reflect legislative intent to repeal other state statutes insofar as they may apply to tobacco retailers; in section 17205, on the other hand, the Legislature has clearly stated its intent that the remedies and penalties under the UCL be cumulative to other remedies and penalties.

Id. at 565-66.[4] Securities transactions present an easier case than *Stop Youth Addiction* in that the Corporate Securities Law's own cumulative remedies provision expressly rejects repeal of other laws.

[4] In *Stop Youth Addiction*, this Court wrote that its conclusion that the remedies or penalties provided by the UCL are cumulative to the remedies or penalties available under Penal Code section 308 or the STAKE Act was "reinforced" by the observation that, when the Legislature desired to limit UCL remedies, it "has 'expressly provided' (§ 17205) for such limitation." *Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at 573-74. As set forth above, the Corporate Securities Law is expressly cumulative.

Clearly, in light of this Court's holding in *Stop Youth Addiction*, the *Bowen* decision is erroneous. A statutory provision preserves the UCL's remedies; section 25510 expressly provides that the Corporate Securities Law does not limit any liability which may exist by virtue of any other statute. The *Bowen* decision, however, does not cite, mention, or refer to *Stop Youth Addiction*.

In sum, the provisions of the UCL are cumulative. The provisions of the Corporate Securities Law are cumulative. This Court has held that exceptions from the application of the UCL must be express and that no implied preemption, exemption, or repeal of the UCL is available. For some reason, however, in writing the *Bowen* decision, the court of appeal disregarded this clear, compelling, and overwhelming authority which leads to the conclusion that the UCL applies to securities transactions.[5]

The *Bowen* Decision Creates A Conflict Between Districts

Not only is *Bowen* erroneously decided, it creates a conflict between appellate districts. In *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal.App.4th 345 (2000), *cert. denied*, 531 U.S. 1119 (2001), the First District Court of Appeal reversed an order sustaining Morgan Stanley's demurrer. Morgan Stanley asserted that the plaintiff's UCL and breach of fiduciary duty claims were preempted by the federal securities laws. Plaintiff's claims were based upon Morgan Stanley's "trading ahead" of and delay in executing plaintiff's and class members' securities transactions. The predicates for plaintiff's UCL claim were violations of federal law involving securities transactions.

In reversing the order sustaining Morgan Stanley's demurrer, the First District Court of Appeal, unlike the *Bowen* court, observed that remedies available under the UCL were cumulative citing to section 17205. *Id.* at 350. The court wrote "it is clear that the UCL could potentially provide a remedy for the conduct in issue, if the UCL is not preempted by federal law . . . ." *Id.* at 351. The court then concluded that the federal securities law and regulation supplemented, rather

[5] The importance of the cumulative remedies provision is demonstrated by two cases in Arizona and the Ninth Circuit case relied upon heavily in the *Bowen* decision. In *People ex rel. Babbitt v. Green Acres Trust*, 127 Ariz. 160, 618 P.2d 1086 (App. 1980), an Arizona court of appeals held that the Arizona Consumer Fraud Act did not apply to securities transactions. In 1981, the legislature amended the Act to provide cumulative remedies. Thereafter, the Arizona Supreme Court held that the Act provided a remedy in addition to remedies allowed under the securities laws. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983). The language added was substantially similar to that of section 17205 of the California Business and Professions Code. The *Bowen* decision relied upon *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388 (9th Cir. 1988), in which the Ninth Circuit (incorrectly) predicted that Hawaii's law did not apply to securities transactions. In reaching that conclusion, the Ninth Circuit rejected *Pickrell* reciting that Arizona law had a cumulative remedies provision while the Hawaii law did not. *Id.* at 393 n. 6. Thus, given section 17205, *Bowen*'s reliance on *Spinner* was misplaced.

than preempted, California law. *Id.* at 352. The court rejected Morgan Stanley's reliance on the Ninth Circuit cases given weight by the *Bowen* court. *Id.* at 354-55 and n. 8.

In holding that UCL claims based upon securities transactions were not preempted by the federal securities laws, the *Roskind* court recognized that they were predicates for a section 17200 action. *Id.* at 352. Moreover, *Roskind* wrote: "The UCL contains no language supporting an exclusion for securities, and under the plain language of the UCL, we cannot create such an exclusion." *Id.* at 355 n. 8. Thus, *Roskind* means that the UCL applies to securities transactions. *See also Fenning v. Glenfed, Inc.*, 40 Cal.App.4th 1285, 1298-99 (1995) (allowing UCL claim based upon engaging in misleading and deceptive acts in soliciting the sale of securities). *Bowen* conflicts with the application of the UCL to securities transactions allowed in *Roskind.*

Thus, two conflicting appellate decisions exist with respect to whether the UCL reaches securities transactions. *Roskind* is consistent with the clear language of the UCL and this Court's precedent while *Bowen* is not.

Conclusion: The *Bowen* Decision Should Be Depublished

Bowen is wrongly decided. It does not consider the cumulative remedies provisions of the UCL or the Corporate Securities Law. It does not discuss or even acknowledge this Court's decision in *Stop Youth Addiction*, which interprets the cumulative remedies of the UCL to preclude any implied preemption, exemption, or repealer. No California law supports the *Bowen* decision. In fact, it conflicts with other district court of appeal decisions which have allowed UCL actions focused on securities transactions to proceed. Depublication is necessary to prevent confusion, reliance on an erroneous decision, and the erosion of the clear edicts of section 17205, section 25510, and *Stop Youth Addiction*. The *Bowen* decision should not remain as precedent.

Respectfully submitted,

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

By: _____

Scot D. Bernstein
Cal. Bar. No. 94915
10510 Superfortress Avenue
Mather Field, CA 95655
(916) 933-2255
(916) 933-5533 (Fax)

By: _____

William P. Torngren
Cal. Bar No. 58493
117 J Street, Suite 300
Sacramento, CA 95814
(916) 554-6447
(916) 554-6445 (Fax)

PROOF OF SERVICE

CASE NAME:	***Bowen v. Ziasun Technologies, Inc.***
CASE NO.:	116 Cal.App.4th 777 (2004)
FORUM:	California Supreme Court

The undersigned declares:

I am over the age of 18 years and not a party to this action. My business address is 117 J Street, Suite 300, Sacramento, California 95814.

On the date set forth below, I served all parties in the above matter with **Request for Depublication (Cal. Rules of Court, rule 979(a)) of the Public Investors Arbitration Bar Association** by causing a true copies thereof to be placed in a sealed envelope, with postage thereon fully prepaid for deposit with the U.S. Postal Service, addressed as indicated below, and at my place of business, placed for collection, processing, and mailing on that date following ordinary business practices. Correspondence so collected and processed is deposited with the U.S. Postal Service that same day in the ordinary course of business.

ADDRESSEES:

James A. Shalvoy
1201 Morningside Drive, Suite 215
Manhattan Beach, CA 90266

John S. Clifford
Stephanie P. Alexander
Smith, Chapman & Campbell
1800 North Broadway, Suite 200
Santa Ana, CA 92706

Fourth Appellate District, Division One
California Court of Appeal
750 B Street, No. 300
San Diego, CA 92101-8189

Herschel Elkins
Senior Assistant Attorney General
Consumer Law Section
California Department of Justice
300 South Spring Street
Los Angeles, CA 90013-1230

District Attorney
San Diego County
330 West Broadway
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed May 5, 2004.

William P. Torngren