S147345

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.
Plaintiffs and Appellants,

vs.

PHILIP MORRIS USA, INC., ET AL.
Defendants and Respondents.

Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One Affirming an Order Decertifying a Class Action, San Diego County Superior Court, Case No. 711400 *Judicial Council Coordination Proceeding 4042, The Hon. Ronald Prager, Judge Presiding*

BRIEF OF *AMICUS CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF AND APPELLANTS

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INTRODUCTION

"After Proposition 64, which the voters approved at the November 2, 2004, General Election, a private person has standing to sue only if he or she 'has suffered injury in fact and has lost money or property as a result of such unfair competition.' ([Business & Professions Code] § 17204, as amended by Prop. 64, § 3; see also § 17203, as amended by Prop. 64, § 2.)" (*Californians for Disability Rights v. Mervyn's LLC* (2006) 39 Cal.4th 223, 227.) In this case, this Court must determine whether that standing provision requires that the class representative must prove actual reliance and/or causation and, if so, whether each putative class member must also meet those standing requirements, and how.

BACKGROUND

This is an action brought by three smokers or former smokers against several tobacco companies, the tobacco industry's research arm and its trade association for unfair competition and false advertising in representing to the public that their products were not addictive and/or that safety questions about their products were at the very least unresolved, despite, plaintiffs allege, the industry's specific knowledge that cigarettes were addictive and had serious health effects on smokers, including the risk of lung cancer and

death.

This action does not seek to compensate smokers for physical injuries caused by smoking. Nor does it seek reimbursement for governmental or insurance company expenditures for treatment of tobacco-related illnesses. What it does seek is to require defendants to provide restitution (primarily in the form of a cy pres or fluid recovery fund) for their violation of California law under Business & Professions Code section 17200, et seq. ("the UCL") and Business & Professions Code section 17500, et seq. ("the FAL").

This case addresses questions arising from this Court's decision in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, given the finding in that case that Proposition 64, enacted by the voters on November 2, 2004, did not make any substantive change in the UCL or the FAL. The issues here are (1) whether, in a representative action under the UCL or FAL, either the class representative or each member of the class must establish reliance and/or causation in order to establish "injury in fact," and (2) if injury in fact on the part of the putative class members is required, whether actual reliance of each class member is required.

THE UCL AND PROPOSITION 64

As this Court discussed in *Mervyn's* the UCL "previously authorized 'any person acting for the interests of itself, its members or the general public' (former § 17204) to file a civil action for relief. Standing to bring such an action did not depend on a showing of injury or damage. (See *Committee on Children's Television, Inc. v. General Foods Corp., supra*, 35 Cal.3d 197, 211, 197 Cal.Rptr. 783, 673 P.2d 660; cf. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra*, 17 Cal.4th 553, 561, 71 Cal.Rptr.2d 731, 950 P.2d 1086.)" (*Mervyns*, at 227.) Further, "[i]n Proposition 64, as stated in the measure's preamble, the voters found and declared that the UCL's broad grant of standing had encouraged '[f]rivolous unfair competition lawsuits [that] clog our courts[,] cost taxpayers' and 'threaten[ ] the survival of small businesses····' (Prop. 64, § 1, subd. (c) ['Findings and Declarations of Purpose'].) The former law, the voters determined, had been 'misused by some private attorneys who' '[f]ile frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit,' '[f]ile lawsuits where no client has been injured in fact,' '[f]ile lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant,' and '[f]ile lawsuits on behalf of the general public without any

accountability to the public and without adequate court supervision.' (Prop. 64, § 1, subd. (b)(1)-(4).) '[T]he intent of California voters in enacting' Proposition 64 was to limit such abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact' (*id.*, § 1, subd. (e)) and by providing 'that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public' (*id.*, § 1, subd. (f))." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.)

This Court further went on to discuss Proposition 64's changes, noting that "Proposition 64 accomplishes its goals in relatively few words. The measure amends section 17204, which prescribes who may sue to enforce the UCL, by deleting the language that had formerly authorized suits by any person 'acting for the interests of itself, its members or the general public,' and by replacing it with the phrase, 'who has suffered injury in fact and has lost money or property as a result of unfair competition.' The measure also amends section 17203, which authorizes courts to enjoin unfair competition, by adding the following words: 'Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and

complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.' (§ 17203.)" (*Ibid.*)

In *Mervyn's*, this Court determined that because Proposition 64 only made changes in the standing requirements for representative actions, and did not have a substantive effect on the UCL cause of action itself, it applied to pending cases. As this Court discussed in *Mervyn's*, "[t]o apply Proposition 64's standing provisions to the case before us is not to apply them 'retroactively,' as we have defined that term, because the measure does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct. [FN omitted] (See *Elsner, supra*, 34 Cal.4th 915, 937, 22 Cal.Rptr.3d 530, 102 P.3d 915.) ***The measure left entirely unchanged the substantive rules governing business and competitive conduct***. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover. Now, as before, no one may recover damages under the UCL (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266, 10 Cal.Rptr.2d 538, 833 P.2d 545), ***and now, as before, a private person may recover restitution only of***

those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144-1150, 131 Cal.Rptr.2d 29, 63 P.3d 937)." (*Mervyn's*, at 232; emphasis added.)

DISCUSSION

Given that background, the threshold question, therefore, is whether the standing provision added by Proposition 64 requires a claimant under the UCL to allege and prove reliance and/or causation and, if it does, whether Proposition 64 then imposes that same standing requirement on the putative class members or only the class representative. If both the class representative and the putative class members are required to establish causation and/or reliance in order to meet the standing provisions, it then must be determined whether the doctrine of presumed reliance can be applied to satisfy that requirement.

Substantive requirements of the UCL prior to Proposition 64.

The analysis of the substantive requirements of the UCL/FAL properly starts with this Court's decision in *Fletcher v. Security Pacific*

National Bank (1979) 23 Cal.3d 442. In that case, the plaintiff sought class certification of a breach of contract claim and a claim under the UCL for the unfair practice of charging "per annum" interest rates on the basis of a 360-day year. (*Id.*, at 445-446.) The trial court in that case denied class certification of all the claims because "'the knowledge of each borrower . . . must be determined separately for each loan,'" thus rendering the individual issues predominant. (*Id*., at 448.)

Previously, in *Chern v. Bank of* America (1976) 15 Cal.3d 866, the Court had concluded that a customer who had knowledge of the bank's practice could not allege a common law breach of contract claim. As such, the Court held in *Fletcher* that the trial court had correctly determined that an individual inquiry about each putative class member's knowledge would be necessary and individual issues would, therefore, predominate over common issues with respect to the breach of contract claim. (*Fletcher*, at 449.)

But this Court reversed with regard to the FAL claims. (*Id.*, at 453.) The Court held that the language of the FAL "is unquestionably broad enough to authorize a trial court to order restitution *without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction*." (*Fletcher*, at 451; emphasis

added.) In fact, the defendant in *Fletcher* specifically argued that restitution, as opposed to injunctive relief, could not be ordered in a class proceeding under the FAL absent "proof of actual defrauding" and that, as such, "the issue of individual knowledge determines the right to restitutionary recovery." (*Fletcher*, fn. 5.) This Court rejected that argument, holding that the equitable powers bestowed under the UCL and FAL provided the courts with the equitable power to do just that.

The Court then embarked on a compelling discussion of the public policy reasons for that conclusion. First, the Court noted, "inasmuch as '[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society' [citation], we must effectuate the full deterrent force of the unfair trade statute." (*Id.*, at 451.) Further, the Court stated, adequate enforcement of the statutes cannot be achieved if a defendant engaged in such conduct is permitted to retain even "a portion of the illicit profits" and that "those who have engaged in proscribed conduct" must "surrender all profits flowing therefrom." (*Ibid.*) "*Thus, a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement.*" (*Ibid.*; emphasis added.)

This Court then took that same principle a step further in

Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197. There, the plaintiff charged a food manufacturer, a supermarket chain and two advertising agencies with making fraudulent, misleading and deceptive advertisements in the marketing of sugared breakfast cereals and asserted causes of action under the UCL, the FAL and common law fraud principles. In overturning the trial court's sustaining of demurrers against the UCL and FAL causes of action, this Court held that "[t]o state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.' [Citations.] Allegations of actual deception, reasonable reliance, and damage are unnecessary. *The court may also order restitution without individualized proof of deception, reliance and injury if it 'determines that such a remedy is necessary "to prevent the use or employment" of the unfair practice . . .'*" (*Committee on Children's Television*, at 209; emphasis added.)

Thus, *Fletcher* and *Committee on Children's Television* make clear that there is no substantive requirement for showing "deception, reliance or damage" in a UCL or FAL action, even when brought as a class action seeking restitution.

Imposition of an actual reliance requirement and/or a causation requirement would add substantive requirements to the UCL.

The appellate court here determined that the standing provisions imposed by Proposition 64 require that both the class representative and each putative class member in a proposed UCL class action must demonstrate actual reliance, causation and loss of money and property. That holding, however, directly conflicts with this Court's conclusion in *Mervyn's* that Proposition 64 did not change the substantive requirements of the UCL. That is because, as noted, prior to Proposition 64, it was unnecessary – even in a class action seeking restitution – for a class member to prove actual deception, reliance or damages. (*Fletcher, Committee on Children's Television*.) If such a showing is now required, the substantive elements of the cause of action have changed and – as the *Fletcher* court noted, it is highly unlikely that a class action could ever be brought under the statute. That, in turn would substantially limit, if not completely undermine, the public policy goals of the statute. Contrary to defendants' arguments, and the Court of Appeal's conclusion, nothing in either the language or legislative history of Proposition 64 warrants such a drastic alteration of the UCL or FAL.

Proposition 64 does not require actual reliance or causation, either as to the proposed class representative or the individual class members.

Proposition 64 amended Business & Professions Code section 17204 to provide that "[a]ctions for any relief pursuant to this chapter shall be prosecuted . . . upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition."

Defendants argue, and the Court of Appeal concluded, that the "as a result of" language requires a showing of causation, in other words, that the person bringing an action under the UCL must prove that he or she relied on the misleading statements of the defendant and, based on that reliance, lost money or property.

But this Court has previously held that such statutory "causation" language does not, in fact, impose common-law causation in UCL-type actions. The defendants in *Fletcher* argued, as do defendants here, that the express language of the FAL imposed a causation requirement on the plaintiff bringing the action. The FAL language relied on by the *Fletcher* defendant states that the court may order restitution "to any person in interest any money or property, real or personal, which ***may have been acquired by means of any practice in this chapter declared to be***

unlawful." (Business & Professions Code section 17535; emphasis added.) The *Fletcher* defendants argued that the "acquired ***by means of***" phrase required proof of causation - just as the appellate court here construed Proposition 64's "as a result of" language as requiring proof of reliance and causation.

This Court rejected that analysis in *Fletcher*. As this Court said in *Fletcher*, the "[d]efendants' reading of the statute overlooks the true breadth of the section. Contrary to defendant's assertion, section 17535 authorizes restitution not only of any money which has been acquired by means of an illegal practice, but further, permits an order of restitution of any money which a trial court finds '*may have been* acquired by means of any . . . [illegal] practice. (Italics added.) This language, we believe, is unquestionably broad enough to authorize a trial court to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction. Hence defendant's argument clearly fails to defeat the class action." (*Fletcher*, at 451.)

Essentially, under this Court's jurisprudence before Proposition 64, the statute was a "strict liability" one: You engage in wrongful conduct and you must give back the money. The defendant's conduct is thus the focus

of the inquiry, not the plaintiff's injury. Indeed, as *Fletcher* explains, a defendant that violates the UCL is not forced to provide restitution because the customers were, in fact, individually "victimized" by the conduct, but, rather, because the goal of the statute is to keep the marketplace trustworthy by using resititution as a deterrent. (*Fletcher*, at 453.) As this Court explained in *Fletcher*, "[w]e do not deter indulgence in fraudulent practices if we permit wrongdoers to retain the considerable benefits of their unlawful conduct. . . . To permit (the retention of even) a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement (of the law) is to be achieved. Once requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom. Thus a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement." (*Id.*, at 451.)

Proposition 64 did nothing to change that standard. Both before and after passage of Proposition 64, Business & Professions Code section 17203 contains the same broad, sweeping equitable powers that authorize the court to "make such orders or judgments, including the appointment of a receiver, *as may be necessary to prevent the use or employment by any person of any*

practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (Emphasis added.)

Proposition 64 could have changed the substantive requirements of the UCL or FAL by requiring that restitutionary claims be proven only upon a showing of actual reliance or causation – but it did not. Proposition 64 could have altered the broad sweep of the court's equitable powers under section 17203, including the power to award restitution in the absence of reliance or causation – but it did not.

Defendants' arguments and authorities in this case rely on standard common-law fraud claims and causation issues to assert that Proposition 64's amendments now require that same common-law standard of reliance and causation. But defendants' arguments overlook the public policy differences between common-law fraud claims – whether brought individually or on a class basis - and UCL fraud-prong claims. As this Court noted in *Fletcher*, imposing a common law causation or reliance requirement would strip the trial courts of the power to fulfill the public policy goals of the UCL or the FAL and it is imperative that "we must effectuate the full deterrent force of the unfair trade statute." (*Fletcher*, at

451.)

This is particularly important in light of the limited restitutionary remedy provided under the UCL. As this Court held in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, the only monetary remedy available is restoring money or property to the people from whom it was taken by a defendant who engaged in prohibited conduct. Damages are not available. (*Bank of the West v. Superior Court* (1992) 4 Cal.4th 1254, 1266.) Certainly, consequential damages are not available. (*Id.*) Other than injunctive relief, all that can be obtained by any plaintiff – or any putative class member – under the UCL is restoration of the money paid to the defendant who engaged in the prohibited conduct.

Even the proponents of Proposition 64 took pains to explain to the electorate that they were not trying to change the substantive sweep of the UCL or the FAL. As Proposition 64 explained in subdivision (a) of section 1, the UCL and FAL "are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." In subdivision (d) of section 1, the voters further confirmed that their intent in enacting Proposition 64 was not to limit or impair the use of the statute in cases with merit. Rather, their intent was "to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an

attorney and file an action for relief pursuant to" the UCL and FAL.

Essentially, the goal of Proposition 64 was to stop *frivolous* cases brought by attorneys representing plaintiffs who were unaffected by the defendant's alleged misconduct, i.e., actions plaintiffs from whom no money or property had been taken by the defendant. Thus, where the plaintiff bringing the action is among the people from whom money or property was taken by a defendant whose conduct violates the UCL, all of the purposes of Proposition 64 have been met, without in any way impairing the underlying public policy goals of the statute itself.

In contrast, if appellate court's approach were taken – i.e., that both the representative plaintiff and each class member are required to demonstrate actual reliance or causation – the public policy protections intended by the statute would be effectively destroyed. Indeed, as this Court noted in *Fletcher*, such a showing would be "often impossible," (*Fletcher*, at 451), thus making it "often impossible" to bring a class action under the UCL or FAL. That, in turn, would substantially hinder the ability of anyone – even a direct victim of a defendant's violation of the statute – to invoke the full panoply of remedies, including restitution, provided under the statute.

Indeed, if the appellate court's analysis were accepted, a court could

only exercise its full restituionary power when a government entity brings the action. (Business & Professions Code section 17203.) But given the limited resources of governmental entities and the unlikelihood that they would be able to address more than a fraction of the violations, that approach would mean that the statutes' effect would be substantially undermined – a result expressly disavowed by the proponents of Proposition 64. (Proposition 64, section 1, subdivisions (a), (d).) Because the voters specifically intended to maintain the public protection goals of the UCL and the FAL and because, as this Court has repeatedly reiterated in its jurisprudence, that can only be done where courts have the ability to certify class actions in the absence of proof of actual fraud, reliance or damages, Proposition 64 – by its own terms - cannot be interpreted as imposing those additional substantive requirements.

Nor is such a radical shift necessary, either under the express language of Proposition 64 or in order to fulfill its goals. As the Findings and Conclusions of Proposition 64 explain, the injury in fact requirement of the statute is intended to be equivalent to the requirement of injury in fact under Article III of the United States Constitution. (Proposition 64, section 1, subdivision e ["It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition

where they have no client *who has been injured in fact under the standing requirements of the United States Constitution*." (Emphasis added).]

Under federal law, standing is measured by the specific claims that a party presents; i.e., 'whether the *particular plaintiff* is entitled to an adjudication of the *particular claims asserted*. ' [*Allen v. Wright* (1984) 468 US 737, 752, 104 S.Ct. 3315, 3325 (emphasis added)] Additionally, there are three ***different*** components to standing under the United States Constitution, only one of which is injury in fact. The three components are injury in fact, causation and redressibility. (*Lujan v. Defenders of Wildlife* (1992) 504 US 555, 560–561, 112 S.Ct. 2130, 2136; *United Food & Comm'l Workers Union, Local 751 v. Brown Group, Inc.* (1996) 517 US 544, 550, 116 S.Ct. 1529, 1533.) The appellate court's approach conflates the first two elements, i.e., injury in fact and causation, despite the express representation to the voters that only injury in fact was intended to be added as a statutory standing requirement.

And, indeed, Article III injury in fact functions well in the context of the UCL without impairing the public policy goals of the statute. Article III injury in fact "requires a showing that plaintiff has suffered actual loss, damage or injury, or is threatened with impairment of his or her own interests. This tends to assure that plaintiff has a sufficient stake in the

outcome of the suit to make it a real 'case or controversy.' [*Gladstone Realtors v. Village of Bellwood* (1979) 441 US 91, 100, 99 S.Ct. 1601, 1608; *Bullfrog Films, Inc. v. Wick* (9th Cir. 1988) 847 F2d 502, 506]" (Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* (Rutter 2006) paragraph 2:1220.)

As this Court established in *Korea Supply*, restitution under the UCL or the FAL involves recovery of money or property by a party from a defendant who engaged in prohibited conduct. Thus, there is, as required for Article III injury in fact, an actual loss – the amount of money or property conveyed to the defendant by the plaintiff. That actual loss or injury in fact is wholly consistent with Proposition 64's stated purposes, i.e., to stop frivolous lawsuits brought by attorneys whose clients were not entitled to recover restitution under these statutes.

Even if Proposition 64 had intended to impose a causation element – which is nowhere set forth in its Findings or Declarations of Purpose – the jurisprudence under Article III does not support the appellate court's conclusion that reliance or actual causation is mandated. This is because Article III "causation" only requires a showing that the actual loss is 'traceable' to defendant's acts or omissions. [*Lujan v. Defenders of Wildlife* (1992) 504 US 555, 559–560, 112 S.Ct. 2130, 2136; *Allen v. Wright* (1984)

468 US 737, 757, 104 S.Ct. 3315, 3327] That, in fact, is precisely what a UCL or FAL claim has always done – it "traces" the loss of money or property to the defendant's prohibited conduct and, as a deterrent, requires that the actual loss be repaid, i.e., that restitution be made.

The proponents of Proposition 64 expressly invoked the injury in fact concept under the United States Constitution and defendants cannot now claim that they really meant something more stringent. Where an action is brought by someone who gave money or property to a defendant who engaged in prohibited acts, the injury in fact (and, indeed, the causation) requirements of Article III standing under the United States Constitution have been met. There is no requirement that a showing of reliance or causation – as those terms are understood in the strict common law sense – be made.

This conclusion is confirmed by the federal district court's analysis in *Annunziato v. eMachines, Inc.* (C.D. Cal. 2005) 402 F.Supp. 1133. In that case, the court expressly addressed the question of whether Proposition 64's "as a result of" language imposed a stringent causation requirement and concluded that it did not. Distinguishing the language of the UCL and FAL after the passage of Proposition 64, the *Annunziato* court noted that "there is a legitimate basis for requiring reliance and causation where the

plaintiff seeks monetary benefit [such as available under the CLRA.] The same need does not exist when the principal benefit of statutory enforcement, even when undertaken by a single individual non-class representative plaintiff, is protection of the public." (*Annunziato*, at 1137.) As that court concluded, "construction of these statutes that reduced them to common law fraud would not only be redundant, but would eviscerate any purpose that the UCL and the FAL have independent of common law fraud." Indeed, the *Annunziato* court expressed the issue in precisely the proper terms: as "harm in fact." That is precisely what the restitutionary remedy under the UCL and the FAL is and, as the *Annunziato* court explained, we "need not torture the language of the UCL and the FAL statutes to conclude that harm in fact will meet the 'as a result of' requirement." Confirming the preceding analysis, the *Annunziato* court expressly found that "the remedial purposes of Proposition 64 are fully met without imposing requirements which go beyond actual injury. Significantly, none of the ballot materials which accompanied Proposition 64-the California Attorney General's summary, the commentary prepared by the California Legislative Analyst's Office, or the arguments for and against the Proposition-mention reliance. They do stress injury in fact." Further, the court confirmed that this actual harm as fulfillment of the injury in fact

standing provision comports with Proposition 64's language and intent:

> The intent of Proposition 64 was to eliminate the filing of frivolous lawsuits brought to recover attorney's fees without a corresponding public benefit and the filing of lawsuits on behalf of the public welfare without any accountability to the public. (Prop.64, § 1(b).) The California voters identified the gateway for these abuses as the "unaffected plaintiff," which was often the sham creation of attorneys, and expressed their intent "to prohibit private attorneys from filing lawsuits for unfair***1139*** competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Prop.64, § 1(e).) *See Molski v. Mandarin Touch Restaurant,* 347 F.Supp.2d 860, 867 (C.D.Cal.2004); *People ex rel. Lockyer v. Brar,* 115 Cal.App.4th 1315, 1316-17, 9 Cal.Rptr.3d 844 (2004) (observing that the Trevor Law Group has achieved infamy in California for carrying out shakedown schemes under Section 17200 *et seq.*). An injury in fact requirement achieves these goals

The class in this case has always been defined on the basis of people who purchased cigarettes – and thereby lost money. As such, the class in

this case has always complied with Proposition 64's mandates – even before they passed into law.

Accordingly, the only possible result - given all these circumstances and the need to preserve the meaningful protections inherent in the UCL or FAL - is that a representative bringing a class action under the UCL or FAL need only show that he or she lost money or property to a defendant who engaged in prohibited conduct. This conclusion fulfils the primary goal of Proposition 64 – that is, to stop unaffected plaintiffs - i.e., plaintiffs to whom a defendant does not owe restitution – from bringing either individual or class actions under the UCL. And it does so without impairing the public policy goals of the UCL or the class action statute.

Even if the appellate court was correct that the class representative had to prove reliance or causation in order to have standing, it erred in imputing that same requirement to the putative class members themselves.

Even if Proposition 64 could be interpreted as imposing a reliance or causation requirement on the class representative, there is no basis for defendants' argument that such a requirement must similarly be imposed on the putative class members. Indeed, to do so would, again, conflict with the

express language of Proposition 64, as well as the public policy goals of both Proposition 64 and the UCL.

As amended by Proposition 64, Business & Professions Code section 17203 now provides, in pertinent part, that "[a]ny person may pursue representative claims or relief on behalf of others only if *the claimant* meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure. (Emphasis added.)[1]

The drafters of Proposition 64 had the power and ability to expressly provide that a showing of causation or reliance be made by putative class members as well as the class representative. For example, section 17203 *could* have been amended to read:

> Any person may pursue representative claims or relief on behalf of others only if ***all class members*** meet the standing requirements of Section 17204 . . . .

Although the authors of Proposition 64 could have drafted the provision to unambiguously require that each class member demonstrate individual causation or reliance, they did not do so. Rather, they expressly

[1] The standing requirement of section 17204, as noted above, requires that the action must be brought "by any person who has suffered injury in fact and has lost money or property as a result of a violation of this

limited the statute such that the showing required – whatever it is - need be made only by "*the claimant*," i.e., the named plaintiff bringing the action - the class representative, if it needed to be made at all.

Nor do the usual class action requirements of commonality or typicality mandate that the representative's claim be identical to the claim of each putative class member. Basically, the putative class members' claims are all the same: The defendant engaged in an unfair business practice and the class member gave the defendant money. ***And that is the very same claim that the representative plaintiff has, i.e., the defendant engaged in an unfair business practice and gave the defendant money***. The fact that the representative plaintiff can show ***more*** does not make the representative' claim ***less*** typical or common. The assessment must be made from the perspective of what the class claim is, not what the representative can show in addition to that class claim.

As such, the commonality and typicality requirements of the class action device do not require that the class representative's claim be identical to the class members' claims. Thus, it is not inconsistent with the express language of Proposition 64 to require the representative to demonstrate reliance and causation while permitting the class members to recover

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chapter."

restitution in the absence of such a showing.

CONCLUSION

Because this Court held that Proposition 64 made no substantive changes to the UCL, the provisions of the proposition cannot be construed to impose causation or reliance requirements on either the class representative or the putative class members.

Dated: March 21, 2007

LAW OFFICES OF MARK J. PEACOCK

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CERTIFICATION AS TO LENGTH OF BRIEF

The word count for this Brief, excluding Table of Contents, Table of Authorities, Proof of Service, and this Certification is approximately 5,481 words. This count was calculated utilizing the word count feature of Microsoft Word.

Dated: March 21, 2007

Respectfully submitted,

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