

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

Hoffman v. American Express	2001-022881
Turner v. Allstate	2002-046665
Ryan Hanan v. Ford	HG03-086629
Cellphone Termination Fee Cases	JCCP 004332
Cross Country Bank Cases	JCCP 004380
Turner v. State Farm	RG03-078358
Turner v. Farmers Ins. Co.	RG03-078362
Goldman v. Furniture Traditions	RG03-083217
FATE v. Covenant Care	RG03-087211
FATE v. Ember Care	RG03-087224
FATE v. GranCare	RG03-103363
The Utility Consumers Action Network v. Pacific Bell	RG04-174050
Center For Biological Diversity, Inc. v. FPL	RG04-183113

[SECOND TENTATIVE] ORDER (1)  
DENYING MOTIONS TO STRIKE  
UCL CLAIMS ASSERTED BY  
PRIVATE PARTIES IN THE  
INTEREST OF THE GENERAL  
PUBLIC; and (2) DENYING MOTIONS  
TO STRIKE UCL CLAIMS  
ASSERTED BY PRIVATE PARTIES  
IN THEIR OWN INTERESTS.

Date: February 10, 2004  
Time: 9:00 am

1 PROCEDURE

2 All of the motions in the above cases concern how to apply the statutory amendments  
3 made in Proposition 64 to pending cases that were filed on or before November 2, 2004. The  
4 Court was inclined to frame the issues in ways that were not addressed directly by the parties in  
5 their initial briefs so it issued a tentative decision on January 28, 2005, and permitted Plaintiffs,  
6 Defendants, the Attorney General, and the Alameda County District Attorney to file briefs to  
7 address the tentative basis for the Court's decision. See *Bacon v. Southern Cal. Edison Co.*  
8 (1997) 53 Cal.App.4th 854, 860.

9  
10 After the Court's tentative decision of January 28, 2005, and before the hearing on  
11 February 10, 2005, the Court of Appeal, First Appellate District, issued an opinion in  
12 *Californians for Disability Rights v. Mervyn's ("Mervyn's")* (February 1, 2005) 2005 Cal. App.  
13 LEXIS 160, that addresses the Proposition 64 issues.

14  
15 The Court of Appeal certified *Mervyn's* for publication. C.R.C. 977(d) states "A  
16 published California opinion may be cited or relied on as soon as it is certified for publication or  
17 ordered published." The Court notes that under C.R.C. 24(b)(1), *Mervyn's* is not a final decision  
18 until 30 days after filing. As the Court understands the law, the ability to cite a case concerns  
19 whether it can be relied upon by lower courts as authority and is distinct from the finality of a  
20 decision for purposes of entering judgment and calendaring appeal dates.

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1 DECISION.

2 All of the motions to strike, demurrers, and other motions by Defendants based on  
3 Proposition 64 are DENIED. The *Mervyn*'s decision is directly on point concerning how to  
4 apply the statutory amendments in Proposition 64 to claims under California's Unfair  
5 Competition Law, Business and Professions Code 17200 et seq ("UCL") that were filed on or  
6 before November 2, 2004. *Mervyn*'s compels the Court to deny the various defense motions to  
7 strike the UCL claims. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.  
8

9 The result is that the Plaintiffs in the above cases may continue to pursue UCL claims in  
10 their own interests and in the interest of the general public. UCL claims filed on or before  
11 November 2, 2004, will be governed by the text of sections 17203 and 17204 as they existed  
12 before the adoption of Proposition 64.

13 The Court takes judicial notice of the Official Voter Guide for the November 2, 2004,  
14 election. The Court also takes judicial notice of the decisions of other trial courts, although  
15 other trial court decisions are not binding on this court.  
16

17 The Court will issue separate orders in the individual cases that are set for hearing on  
18 February 10, 2005. If Counsel have issues that are not addressed by this order, they should be  
19 prepared to discuss them at the hearing.

20 The Court understands that the Third and Fourth Districts of the Court of Appeal may  
21 consider issues related to Proposition 64 in the near future. These issues may eventually reach  
22 the California Supreme Court. If there is a change in the law, then the parties to the above  
23 actions may renew their motions. C.C.P. 1008; *Int'l Ins. Co. v. Superior Court* (1998) 62 Cal.  
24 App. 4th 784, 788.  
25

26 What follows is dicta.

1 WHY THE DICTA?

2 The Court will state, by way of dicta, how it would have applied Proposition 64 to cases  
3 that were filed on or before November 2, 2004, in the absence of the *Mervyn*'s decision. The  
4 Court takes this exceptional step for two reasons.

5 First, a lower court may define issues and explore alternatives to the current state of the  
6 law in an effort to assist the Court of Appeal in determining whether to change the law. *People*  
7 *v. Willis* (2002) 27 Cal. 4th 811, 817-821 (considering the concerns of the lower courts and then  
8 changing the law to address those concerns). If the trial court does not recognize and discuss an  
9 issue, the issue might be deemed waived and the Court of Appeal might not to consider it.  
10 Therefore, the Court will state its thoughts publicly.  
11

12 Second, Plaintiffs and Defendants are presenting arguments that appear to be result  
13 oriented and that do not address all the legal issues and potential judicial options. Sometimes it  
14 is the Court's responsibility to consider and explore independently what should be the proper  
15 result in a case. *Abbott Laboratories v. Mead Johnson & Co.* (7th Cir. 1992) 971 F.2d 6, 22-23  
16 ("Each party, it appears, tried to hit a home run ... Neither offered alternative conclusions that  
17 steered a reasonable middle ground.")  
18

19 The Court is acutely aware that the parties in these cases have no incentive to raise the  
20 full range of options. The Defendants want the claims against them dismissed – they have no  
21 interest in suggesting that public entities continue prosecution of the UCL claims in the interest  
22 of the public. The Plaintiffs want to continue to control the litigation of UCL claims in the  
23 interest of the public – they have no interest in letting the UCL claims proceed under the  
24 direction and control of public entities.  
25  
26

1 The Court's reading of Proposition 64 and the ballot materials leads it to the conclusion  
2 that the electorate wanted UCL claims in the interest of the general public to be prosecuted by  
3 public entities. Under this Court's suggested approach, the Plaintiffs would lose control of UCL  
4 claims asserted on behalf of the public, public entities would immediately assume prosecution of  
5 claims on behalf of the general public, and the Defendants would be required to defend pending  
6 UCL claims brought on behalf of the public. This appears to be the result intended by the  
7 electorate, but it is a result that will not please any of the named parties to these cases. The Court  
8 states its thoughts in an effort to broaden the discussion and to provide the appellate courts the  
9 opportunity to consider a fuller range of alternatives.  
10

#### 11 12 PROSECUTION OF UCL CLAIMS BEFORE PROPOSITION 64.

13 Before Proposition 64, three different types of plaintiffs could prosecute UCL claims: (1)  
14 the Attorney General or any other public entity in the interest of the People of the State of  
15 California; (2) private parties in the interest of the general public; and (3) private parties in their  
16 own interest. These three categories of cases were expressly identified in Business and  
17 Professions Code 17204, which stated, "Actions for any relief pursuant to this chapter shall be  
18 prosecuted exclusively in a court of competent jurisdiction by [1] the Attorney General or any  
19 district attorney ... in the name of the people of the State of California upon their own complaint  
20 or upon the complaint of any board, officer, person, corporation or association or by any person  
21 acting for the interests of [2] itself, its members or [3] the general public."  
22  
23

24 Before Proposition 64, the UCL permitted all types of plaintiffs to obtain injunctive and  
25 monetary relief from a defendant that had engaged in any unlawful, unfair, or fraudulent business  
26 act. Where the UCL claim was asserted in the interest of the general public, the Court could

1 order injunctive and monetary relief for the benefit of the general public even though the affected  
2 members of the general public were not parties to the case either as named plaintiffs or absent  
3 class members.

4  
5 PROPOSITION 64.

6  
7 Proposition 64 was approved by the general public in an election on November 2, 2004,  
8 and became effective the next day. Cal. Const. Art. II, § 10 (a) (“An initiative statute or  
9 referendum approved by a majority of votes thereon takes effect the day after the election unless  
10 the measure provides otherwise.”)

11 Proposition 64 contains nine separate sections: section 1 is the “Findings and Declaration  
12 of Purpose,” sections 2-6 are statutory amendments; and sections 7-9 concern the application of  
13 the statutory amendments. The statutory amendments concern Business and Professions Code  
14 sections 17203, 17204, 17206, 17535, and 17536. The amendments to a single statutory section  
15 can concern more than one issue. Specifically, the amendment to section 17204 both eliminates  
16 the right of a private person to represent the general public and requires a person bringing a UCL  
17 claim in his or her own interest to meet heightened standing requirements. This Court would  
18 have considered each issue separately.

19  
20 It is also worth noting that the UCL is a complex statute with both procedural and  
21 substantive provisions. Procedurally, the UCL previously authorized claims by government  
22 entities, private persons in the interest of the general public, and private persons in their own  
23 interests. Substantively, the UCL permits claims for unlawful, unfair, and fraudulent business  
24 practices. Paraphrasing *Gatto v. County of Sonoma* (2002) 98 Cal.App.4<sup>th</sup> 744, 757-758,  
25 although the UCL has been treated as an omnibus consumer protection statute, the Court should  
26

1 be careful not to assume that all UCL claims are procedurally and substantively similar. Such an  
2 assumption would “fail[] to attend to the complexity of the [UCL] and the variety of claims that  
3 may be adjudicated under its rubric.” *Id.*, 98 Cal.App.4<sup>th</sup> at 757.

4 *Mervyn’s* does not consider separately the different sections of Proposition 64.

#### 5 6 INTERPRETIVE TOOLS AND OVERALL PURPOSE OF PROPOSITION 64.

7  
8 As directed by *People v. Canty* (2004), 32 Cal. 4th 1266, 1276-1277, the Court would  
9 interpret Proposition 64 using the same principles that govern the construction of a statute. The  
10 Court’s role is to ascertain the electorate’s intent so as to effectuate the purpose of the law. The  
11 Court first examines the language of the proposition and gives the words their usual, ordinary  
12 meaning. If the language is clear and unambiguous, the Court follows the plain meaning of the  
13 measure. This “plain meaning” rule does not, however, prohibit a court from examining whether  
14 the literal meaning of a measure comports with its purpose. The language is construed in the  
15 context of the measure as a whole. The intent of the law prevails over the letter of the law and  
16 the letter will, if possible, be read to conform to the spirit of the act.

17  
18 Given the importance of the intent and spirit of the law, the Court would consider the  
19 “Findings and Declaration of Purpose” in Proposition 64, Section 1, and the voter information  
20 guide. *People v. Canty* (2004) 32 Cal. 4th 1266, 1280 (“statements of the intent of the enacting  
21 body contained in a preamble, while not conclusive, are entitled to consideration”); *Hayward*  
22 *Area Planning Assn. v. Alameda County Transportation* (1999) 72 Cal. App. 4th 95, 104-105  
23 (“[I]f the meaning of the words is not clear courts can use interpretative aids; with respect to  
24 voter-approved enactments, these aids include the ballot analysis, the official summary, and the  
25 arguments presented to the voters.”).

1       The Court would have found that the central purpose of Proposition 64 was to ensure that  
2 only public entities prosecuted UCL claims in the interest of the general public. Proposition 64  
3 permits private parties to continue pursuing private UCL claims to recover compensation for  
4 actual injuries and permits those parties to pursue class actions on behalf of similarly situated  
5 injured persons. This is similar to the law in other states. What Proposition 64 was intended to  
6 do was to close the “loophole” that “no other state allows” that permitted private persons to  
7 “‘appoint’ themselves to the act like the Attorney General.” Ballot Argument in Favor of  
8 Proposition 64. The Court would have found that Proposition 64 and the voter information guide  
9 suggest that the electorate intended to immediately transfer the prosecution of claims in the  
10 interest of the general public from private parties to public entities.  
11

#### 12 13 PROPOSITION 64’S EFFECT ON SUBSTANTIVE LAW. 14

15       Proposition 64 did not affect change the UCL’s standards for permissible conduct. Under  
16 Business and Professions Code 17203, “Any person who engages, has engaged, or proposes to  
17 engage in unfair competition may be enjoined in any court of competent jurisdiction.” Business  
18 and Professions Code 17200 defines unfair competition as “any unlawful, unfair, or fraudulent  
19 business act.” Proposition 64 did not change these provisions. Any act that was unlawful,  
20 unfair, or fraudulent under the UCL before November 3, 2004, remains unlawful, unfair, or  
21 fraudulent.  
22

#### 23 24 PROPOSITION 64’S EFFECT ON WHO CAN PROSCUTE A UCL CLAIM. 25

26       The primary effect of Proposition 64 was to change who can prosecute a UCL claim. As  
it reads after the adoption of Proposition 64, section 17204 states, “Actions for any relief



1 pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction [1] by  
2 the Attorney General or any district attorney ... in the name of the people of the State of  
3 California upon their own complaint or upon the complaint of any board, officer, person,  
4 corporation or association or [2] by any person who has suffered injury in fact and has lost  
5 money or property as a result of such unfair competition.” The amendment deletes the words  
6 that permitted private persons to prosecute UCL claims in the interest of the general public and  
7 adds words that require private persons who prosecute UCL claims in their own interest to have  
8 suffered actual injury.  
9

10 *Mervyn’s* does not consider separately the effect of Proposition 64 UCL on claims  
11 brought by public entities, by private persons in the public interest, and by private persons for  
12 private interests. *Mervyn’s* appears to conflate the interests of the plaintiff organization  
13 (Californians for Disability Rights) with the interests of the general public. Applying *Mervyn’s*  
14 can be difficult because the Court of Appeal based its decision in substantial part on the facts of  
15 that case, but never states in the caption or in the text of the opinion whether the plaintiff  
16 organization brought the action on its own behalf, as an association on behalf of its members, or  
17 in the interest of the general public. This trial court thinks those distinctions are important.  
18

19 Starting with the letter of the UCL as amended, the Court would focus on the word  
20 “prosecuted” in section 17204. California courts have held consistently that “prosecution”  
21 includes every aspect of a case through final judgment. See *Ramos v. Superior Court* (1982) 32  
22 Cal. 3d 26, 36 (“The term “prosecution” is sufficiently comprehensive to include every step in an  
23 action from its commencement to its final determination.”). See also *Melancon v. Superior*  
24 *Court of Los Angeles County* (1954) 42 Cal. 2d 698, 707-708. This definition of “prosecution” is  
25 also implicit in Code of Civil Procedure 583.110 et seq (especially 583.420) and California Rule  
26

1 of Court 373 (especially subsection (e)), regarding the dismissal of cases for delay in prosecution.  
2 The Code of Civil Procedure and Rules of Court are not concerned with delay in filing a case  
3 (which is covered by the statute of limitations), but the delay in bringing the case to trial after it  
4 has been filed.

5 *Mervyn's* does not discuss the meaning of the word "prosecution" and how it affects the  
6 application of section 17204 (as amended) to pending cases.  
7

8  
9 CLAIMS BY PUBLIC PROSECUTORS IN THE INTEREST OF THE PEOPLE OF THE  
10 STATE OF CALIFORNIA.

11 When government entities pursue UCL claims in the name of the people of the State of  
12 California, the UCL claims are in the nature of law enforcement actions. *People v. Pacific Land*  
13 *Research Co.* (1977) 20 Cal.3d 10, 17 (UCL claim by the Attorney General "is fundamentally a  
14 law enforcement action designed to protect the public and not to benefit private parties."). The  
15 government entities act as representatives of the people as an indivisible whole. *People v.*  
16 *Eubanks* (1996) 14 Cal.4th 580, 589-590, states, "The prosecutor speaks not solely for the victim,  
17 or the police, or those who support them, but for all the People. That body of 'The People'  
18 includes the defendant and his family and those who care about him. It also includes the vast  
19 majority of citizens who know nothing about a particular case, but who give over to the  
20 prosecutor the authority to seek a just result in their name."  
21

22 Proposition 64 has not changed the ability of the Attorney General, any district attorney,  
23 or any authorized government entity to "prosecute" a UCL claim in the name of the people of the  
24 State of California. This is clear from Section 1(g) of Proposition 64, which states "It is the  
25 intent of California voters in enacting this act that Attorney General, district attorneys, county  
26

1 counsels, and city attorneys maintain their protection authority and capability under the unfair  
2 competition laws.”

3  
4 CLAIMS BY PRIVATE PERSONS IN THE INTEREST OF THE GENERAL PUBLIC.

5         This Court would have held that Proposition 64 transfers the prosecution of UCL claims  
6 in the interest of the general public from private parties to public entities. In reaching that  
7 conclusion, the Court would examine (1) who was the real party in interest when a claim was  
8 asserted “in the interest of” the general public, (2) what is “the general public,” (3) who  
9 represents “the general public,” and (4) can “the general public” choose how it is represented in  
10 legal proceedings before getting to (5) whether the general public intended to permit private  
11 parties to represent it after Proposition 64.  
12

13  
14 WHO WAS THE REAL PARTY IN INTEREST WHEN A PRIVATE PARTY ASSERTED A  
15 UCL CLAIM IN THE INTEREST OF THE GENERAL PUBLIC?  
16

17         The Court would have held that when private parties asserted UCL claims in the interest  
18 of the general public the real party in interest was the general public.

19         Before Proposition 64, Section 17203 read, “Actions for any relief pursuant to this  
20 chapter shall be prosecuted exclusively in a court of competent jurisdiction ... by any person  
21 acting for the interests of ... the general public.” The plain language of the statute suggested that  
22 when a private party pursued a UCL claim in the interest of the general public, the real party in  
23 interest was not the named plaintiff but “the general public.”  
24

25         In the first case to apply this language, *Hernandez v. Atlantic Finance Co.* (1980) 105  
26 Cal. App. 3d 65, stated, “[W]e read the statute as expressly authorizing the institution of action

1 by any person on behalf of the general public. The Legislature has provided that suit may be  
2 brought by any person acting in his own behalf *or* on behalf of the general public.” The Court  
3 then distinguished actions on behalf of the general public prosecuted by a private attorney general  
4 with a class action where the named plaintiff has suffered damages, is pursuing his or her own  
5 claim, and seeks to represent similarly situated persons. This suggests that the court considered  
6 claims in the interest of the public as distinct from claims in the interest of the named plaintiff.  
7 See also *Prata v. Superior Court* (2001) 91 Cal. App. 4th 1128, 1138-1139 (claim in interest of  
8 general public is distinct from claim in interest of named plaintiff).  
9

10 A claim by a private person in the interest of the general public is similar to a claim by a  
11 government official in the interest of a state department or agency – the former may be the named  
12 party but the latter is the real party in interest. Federal Rule of Civil Procedure 25(d)(1),  
13 regarding substitution of parties, acknowledges this and states, “when a public officer is a party  
14 to an action in an official capacity and during its pendency ... ceases to hold office, then the  
15 action does not abate and the officer's successor is automatically substituted as a party.”  
16

17 The Court observes that the role of the general public in claims “in the interest of the  
18 general public” could have been clarified by earlier attention to C.C.P. 367. This section states,  
19 “Every action must be prosecuted in the name of the real party in interest, except as otherwise  
20 provided by statute.” UCL jurisprudence might have developed differently if actions “in the  
21 interest of the general public” had been captioned “*THE GENERAL PUBLIC ex rel. Jane*  
22 *Plaintiff v. ACME CO.*” instead of “*JANE PLAINTIFF in the interest of the general public v.*  
23 *ACME CO.*”  
24  
25  
26

1 The Court would have concluded that although private parties that assert UCL claims in  
2 the interest of the general public may devote time and energy to the claims, the real party in  
3 interest is the general public.

4 *Mervyn's* suggests that the named plaintiff (a private organization) had an interest in  
5 pursuing a UCL claim in the interest of the public. *Mervyn's* did not, however, discuss whether  
6 the named plaintiff was bringing the UCL claim for its own benefit, for the benefit of its  
7 members, or in the interest of the public. Therefore, it is unclear whether *Mervyn's* holds that the  
8 named plaintiff is the real party in interest when a UCL claim is brought on behalf of the public.  
9 *People v. Ault* (2004) 33 Cal. 4th 1250, 1268 ("It is axiomatic that cases are not authority for  
10 propositions not considered.")  
11

#### 12 13 WHAT IS THE "GENERAL PUBLIC"?

14 The Court would hold that when a private plaintiff brought a UCL claim in the interest of  
15 the general public under former Business and Professions Code 17204, the plaintiff represented  
16 the public as a whole. The Court could not locate any law directly on this subject, but the  
17 "general public" presumably has the same meaning as the "People of the State of California"  
18 under Government Code 100(a).<sup>1</sup>  
19

20 The judicial treatment of claims in the interest of the general public suggests that they are  
21 in the interest of the public as a whole and not in the interest of the named plaintiff, persons  
22 similarly situated to the named plaintiff, or persons injured by the result of the unfair  
23

24  
25 <sup>1</sup> *Rosenbluth International, Inc. v. Superior Court* (2002) 101 Cal. App. 4th 1073, could be read as holding that only  
26 consumers are member of the general public. The Court understands *Rosenbluth's* rationale to be that the named  
plaintiff was not competent to represent the injured persons (large corporations), not that the injured persons were  
not members of the general public. As a general matter, corporations are members of the general public and are

1 competition. For example, a judgment on a UCL claim in favor of the general public is not  
2 binding on the individual members of the public. *Corbett v. Superior Court* (2002) 101 Cal.  
3 App. 4th 649, 662 (majority) and 684 (dissent); *Payne v. National Collection Systems, Inc.*  
4 (2001) 91 Cal. App. 4th 1037. In addition, if a private person obtains relief for the general  
5 public, the plaintiff usually seeks to recover fees under C.C.P. 1021.5 for benefits conferred on  
6 the general public.

7  
8 The definition of the “general public” is open to dispute. In *Kraus v. Trinity Management*  
9 *Services, Inc.* (2000) 23 Cal. 4th 116, the Court indicates that UCL claims not certified as class  
10 actions could nevertheless be “brought on behalf of absent persons.” *Id* at 121. See also *Kraus*  
11 at 126 fn 10, and 138 fn 18. There is no statutory basis for these statements and the Court  
12 seemed to be taking the allegations of the complaint as true. See *Kraus* at 125 fn 9.  
13 Alternatively, the Court could have simply been acknowledging the reality that claims prosecuted  
14 by the general public for public purposes can result in incidental benefits (restitution) to the  
15 injured members of the public. See, e.g. Penal Code 1204.4(f) and (j) (restitution can be awarded  
16 to victims in criminal cases).

17  
18 The Court also notes that there is some case law suggesting that UCL claims by private  
19 persons in the interest of the public are not as “public” as claims by public prosecutors on behalf  
20 of the People of the State of California. *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal. 4th  
21 1132, 1154 n12, *Net2phone, Inc. v. Superior Court* (2003) 109 Cal. App. 4th 583, 587, and  
22 *Payne v. National Collection Systems, Inc.* (2001) 91 Cal. App. 4th 1037, 1044-1047. Although  
23 these cases implicitly suggest that the “People of the State of California” has a different meaning  
24

25  
26 entitled to the protection of California law. *People v. Eubanks* (1996) 14 Cal. 4th 580 (criminal prosecution for theft  
of trade secrets from large corporation).

1 than the “general public,” they do not explain why there is a difference or what that difference  
2 might be. In the absence of clear direction, the Court would conclude that the “general public”  
3 has the same meaning as the “People of the State of California.”  
4

5 WHO REPRESENTS “THE GENERAL PUBLIC”?  
6

7 Before Proposition 64, section 17204 permitted private persons to prosecute actions on  
8 behalf of the general public.<sup>2</sup>

9 Former section 17204 was a departure from the ordinary course of things, where the  
10 Executive branch enforces laws in the interest of the public. Cal. Const., art. V, § 13 (“It shall be  
11 the duty of the Attorney General to see that the laws of the State are uniformly and adequately  
12 enforced.”); Government Code § 26500 (“The district attorney is the public prosecutor, except as  
13 otherwise provided by law. The public prosecutor shall attend the courts, and within his or her  
14 discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.”)  
15 See also *People v. Oakland Water Front Co.* (1879) 118 Cal. 234, 239 (the attorney general has  
16 the authority and power to institute or prosecute proceedings in the name or on behalf of “the  
17 people of the state”); *People v. Cortes* (1990) 71 Cal. App. 4th 62, 79 (“our state Constitution  
18 delegates the prosecutorial function to the executive branch, which is represented by the district  
19 attorney.”)  
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1 CAN THE GENERAL PUBLIC CHOOSE WHO CAN REPRESENT IT IN THE COURTS?

2 The people of the State of California can presumably (through the Legislature or in a  
3 ballot initiative) determine who can represent the people in litigation. This Court would hold  
4 that the amendment to section 17204 in Proposition 64 demonstrates that the people intended to  
5 eliminate the ability of private persons to prosecute actions on behalf of the general public and  
6 intended to transfer that authority to public officials. This is the effect of the amendment to  
7 section 17204. The “Findings and Declaration of Purpose” in Proposition 64, Section 1, and the  
8 ballot statement also suggest this intent.

10 In the “Findings and Declaration of Purpose” in Proposition 64, Section 1, the people of  
11 the State of California found and declared that some private attorneys were filing “lawsuits on  
12 behalf of the general public without any accountability to the public and without adequate court  
13 supervision.” Section 1(b)(4). The section then states, “It is the intent of California voters in  
14 enacting this act that only the California Attorney General and local public officials be authorized  
15 to file and prosecute actions on behalf of the general public.” Section 1(f). This is a strong  
16 suggestion that the people wanted to transfer the authority for prosecuting claims in the interest  
17 of the public from unaccountable and unsupervised private attorneys to government officials.

19 The arguments in the voter information guide echo this purpose. The Argument in Favor  
20 of Proposition 64 states:

21 Shakedown lawyers ‘appoint’ themselves to act like the Attorney General  
22 and file lawsuits on behalf of the people of the State of California,  
23 demanding thousands of dollars from small businesses that can’t afford to  
fight in court.

24 \* \* \*

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25 <sup>2</sup> There are other examples where the general public has, through the Legislature or by initiative, enacted laws that  
26 permit private persons to prosecute actions on behalf of the general public. See Health and Safety 1430(a)  
(regulation of long term care facilities); Health & Safety 25249.7 (Proposition 65).



1 Here's why 'YES' on Proposition 64 makes sense: ...

2 \* Allows only the Attorney General, district attorneys, and other public  
3 officials to file lawsuits on behalf of the People of the State of California  
4 to enforce California's unfair competition law.

5 The Rebuttal to Argument Against Proposition 64 states:

6 Here's what 64 really does:

7 \* Stops fee-seeking lawyers from exploiting a loophole in California law -  
8 A LOOPHOLE NO OTHER STATE HAS – that lets them 'appoint'  
9 themselves to act like the Attorney General and file lawsuits on behalf of  
10 the people of the State of California.”

11 \* Permits only real public officials like the Attorney General or District  
12 Attorneys to file lawsuits on behalf of the People of the State of California.

13 As directed by *Canty*, 32 Cal. 4th at 1276-1277, the Court's role is to ascertain the  
14 electorate's intent so as to effectuate the purpose of the law. It appears to this Court that the  
15 electorate wanted claims in the interest of the general public to be prosecuted only by “real public  
16 officials.”

17 DID THE GENERAL PUBLIC INTEND TO PERMIT PRIVATE PARTIES TO REPRESENT  
18 IT AFTER THE PASSAGE OF PROPOSITION 64?

19 The focus of these motions is on how the general public expected to be represented in  
20 cases that were filed by private parties in the interest of the public before November 3, 2004.

21 The Court would consider the text of the statutory amendments, the “Findings and Declaration of  
22 Purpose,” and the information in the voter information guide.

23 The statute itself suggests that the general public wanted to be represented only by public  
24 entities immediately after the passage of Proposition 64. Section 17204 says that actions under  
25 the UCL “shall be prosecuted exclusively” by public entities in the interest of the people of the  
26 State of California. The term “prosecution” includes every step in an action from its

1 commencement to its final determination, so after November 2, 2004, only public entities could  
2 “prosecute” public claims.

3       The “Findings and Declaration of Purpose” states at Section 1(f), “It is the intent of  
4 California voters in enacting this act that only the California Attorney General and local public  
5 officials be authorized to file and prosecute actions on behalf of the general public.” This could  
6 be read as either (1) only public entities are authorized to file and to prosecute actions on behalf  
7 of the general public or (2) only public entities are authorized to file [new actions] and prosecute  
8 actions [previously filed by public entities] on behalf of the general public, but private entities  
9 that have already filed actions on behalf of the general public may continue to prosecute those  
10 actions. The former interpretation is consistent with the statute and the latter interpretation is  
11 strained.  
12

13       The ballot arguments also suggest that the general public wanted to be represented only  
14 by public entities immediately. The Argument in Favor states:  
15

16       Here’s why a ‘YES’ on Proposition 64 makes sense: ...

- 17       · Stops these shakedown lawsuits ...
- 18       · Settlement money goes to the public, not the pockets of unscrupulous trial lawyers.

19       The Rebuttal to Argument Against Proposition 64 states:  
20

21       Here’s what 64 really does: ...

- 22       · Stops Abusive Shakedown Lawsuits ...
- 23       · Stops trial lawyers from pocketing FEE AND SETTLEMENT MONEY that belongs to the public.

24       The statements that Proposition 64 will “stop” the “shakedown lawsuits” suggest that the  
25 effect will be immediate. The statements that Proposition 64 will stop private counsel from  
26 being paid from the settlement of UCL claims so that all settlement funds can be distributed to

1 the aggrieved members of the public suggest that the new law was intended to affect settlements  
2 in pending cases. The Court notes that the ballot arguments frequently use the word “file” rather  
3 than the word “prosecute.” Although the word “file” raises legitimate questions about whether  
4 the new amendments should apply only to the “filing” of new cases, the Court does not find the  
5 use of the word “file” to be material given that the actual statute uses the word “prosecute.”  
6 *Mervyn’s* holds that the “isolated” references to “filing” in the ballot arguments are “far from  
7 decisive.” (Slip Op at 4.)

8  
9 The principle basis for the District Court’s decision in *Mervyn’s* is the Court’s finding  
10 that “the language used in the proposition and ballot materials [] fails to provide any implicit  
11 indication that the electorate intended the law to be retroactive.” (Slip Op at 3.) *Mervyn’s* does  
12 not, however, address many of the above indications in Proposition 64 and the ballot measure.

13  
14 THIS COURT WOULD HOLD THAT THE GENERAL PUBLIC MAY CONTINUE TO  
15 PROSECUTE CLAIMS UNDER THE UCL THROUGH THE ATTORNEY GENERAL  
16 AND/OR LOCAL PUBLIC OFFICIALS.

17  
18 This Court would hold that the amendment to section 17204 by Proposition 64 did not  
19 eliminate claims in the interest of the general public or direct that they be dismissed - it changed  
20 the law so that only the Attorney General and local public officials can prosecute actions on  
21 behalf of the public.

22  
23 There is no suggestion in Proposition 64 that all pending claims in the interest of the  
24 general public should be dismissed. Proposition 64 reaffirms that the state’s unfair competition  
25 laws are intended to protect California businesses and consumers from unlawful unfair and  
26 fraudulent business practices. Section 1(a). Proposition 64 also states that “some private

1 attorneys” are misusing the UCL. Section 1(b). The word “some” is important because it  
2 suggests that other private attorneys have filed and are pursuing legitimate UCL claims in the  
3 interest of the general public.

4 To ensure that legitimate claims are pursued on behalf of the general public, the Court  
5 would permit the California Attorney General and local public officials to continue the  
6 prosecution of actions on behalf of the general public. This would provide the accountability that  
7 was lacking previously, section 1(b(4), and permit government entities to assume the public  
8 protection authority and capability intended by the voters, section 1(g). The government entities  
9 could elect to continue the prosecution of all, some, or none of the affected cases. *Consumers*  
10 *Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal. App. 4th 963, 976 (in enforcing  
11 the UCL, “prosecutors have broad discretion to choose which defendants to prosecute”).  
12

13 The Court would order that private persons that have asserted UCL claims in the interest  
14 of the public must serve on the Attorney General and the Alameda County District Attorney a  
15 notice stating the nature of any claim in the interest of the general public and the status of the  
16 litigation. The Court would then permit the Attorney General and/or the Alameda County  
17 District Attorney to intervene in any case to pursue any claims in the interest of the general  
18 public. If a public entity did not appear to represent the interests of the general public within a  
19 reasonable time period (perhaps 60-90 days), the Court would dismiss the claims in the interest  
20 of the general public.  
21

22 In *Mervyn’s* the Court of Appeal expresses concern that application of the amendments to  
23 section 17204 to pending cases would deny the named plaintiff the opportunity to seek the  
24 intervention of a public prosecutor. (Slip Op at 9.) This concern can be met with relative ease.  
25 It also is not unusual - the representatives of the public change with each election cycle, trustees  
26

1 and receivers change in the middle of a probate and other litigation; and public and private  
2 entities can substitute counsel during litigation. The Court presumes that on a regular basis the  
3 Attorney General and the District Attorney evaluate potential cases in the interest of the people of  
4 the State of California and decide whether to pursue those cases. The Court would simply  
5 require public prosecutors to evaluate pending UCL claims in the interest of the public and  
6 decide whether to continue prosecution of those claims.  
7

#### 8 9 OTHER ISSUES CONCERNING CLAIMS IN THE INTEREST OF THE GENERAL PUBLIC.

10 The Court has considered the many arguments of the parties who set their Proposition 64  
11 motions for February 10, 2005.

12 Various plaintiffs argue that Proposition 64's amendment to section 17204 could not be  
13 retroactive absent express language to the contrary. These arguments rely on authority holding  
14 that a new statute is generally inapplicable to pending actions if it is determined to affect "rights,  
15 obligations, acts, transactions and conditions which are performed or exist prior to the adoption  
16 of the statute." *Aetna Cas. & Surety Co. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391. Where  
17 private claims are at issue, there is a presumption that those claims are not forfeited when a  
18 statute is amended. *Evangelatos v. The Superior Court of Los Angeles County* (1988) 44 Cal.3d  
19 1188, 1209.  
20

21 These arguments would be met with three points: (1) the claims of private plaintiffs in the  
22 interest of the general public are in the interest of the general public; (2) the general public,  
23 acting through public prosecutors, can still prosecute those claims; (3) if Proposition 64 did  
24 prohibit the prosecution of claims by the general public, the statute should be construed to apply  
25 retroactively.  
26

1 First, UCL claims in the interest of the general public were always in the interest of the  
2 public as a whole. The named plaintiff was only a representative of the public and had no  
3 personal interest in the outcome of the litigation. Although named plaintiffs may have “acted in  
4 reliance on the then-existing state of the law” when they undertook to represent the public, they  
5 have not been subjected to “unexpected and potentially unfair consequences” because they  
6 cannot pursue claims on behalf of the public. *Evangelatos*, 44 Cal.3d at 1217.  
7

8 *Mervyn’s* seems to overlook the distinction between UCL claims brought by private  
9 persons in the public interest and UCL claims brought by private persons for private interests.  
10 *Mervyn’s* states that “Dismissal of CDR’s appeal would substantially affect CDR’s rights” (Slip  
11 Op at 8) and “Plaintiffs who filed and prosecuted case for years, like CDR, could suffer dismissal  
12 of their lawsuit at all stages of litigation” (Slip Op at 9). This would be true if CDR were the real  
13 party in interest. If, however, CDR brought the UCL claim in the interest of the general public,  
14 then the general public is the real party in interest. If any rights are being affected they are those  
15 of the public.  
16

17 Second, under this Court’s analysis, public prosecutors could still prosecute UCL claims  
18 in the interest of the general public. Proposition 64 would not affect the right of the public to  
19 pursue pending UCL claims.

20 Third, if Proposition 64 did prohibit the prosecution of claims by the general public  
21 (which it does not), the statute would apply retroactively. The general public, acting through the  
22 Legislature or through a ballot initiative, may presumably limit its own ability to assert claims  
23 against private persons. If the general public elects to waive a claim that belongs to the general  
24 public, it presumably has the power to do so. Where public claims are at issue, there is a  
25 presumption that those claims are forfeited when a statute is amended.  
26

1       The claims most frequently asserted on behalf of the People of the State of California are  
2 criminal charges under the Penal Code. When there is a change in the Penal Code that limits  
3 liability or mitigates punishment and there is no saving clause, the general rule is that the  
4 amendment operates retroactively. When Legislature repeals a criminal statute, that action  
5 requires the dismissal of pending criminal proceedings under the repealed statute. This is  
6 because the Courts presume that Legislature is not motivated by a desire for vengeance and  
7 would not want the Executive branch to pursue charges or punishments that the Legislature has  
8 determined to not be in the interest of California. *People v. Figueroa* (1993) 20 Cal. App. 4th  
9 65, 69-70; *People v. Nasalga* (1976) 12 Cal. 4th 784, 792.

11       If, by approving Proposition 64, the people of the state of California decided that they did  
12 not want to pursue claims in the interest of the general public under the UCL (which they did  
13 not), then defendants should be entitled to the benefits of that change immediately. If  
14 amendments to eliminate a criminal offense take immediate effect in all pending criminal cases  
15 initiated by the people of the State of California, then amendments to eliminate civil liabilities  
16 should also take immediate effect in all pending civil cases initiated in the interest of the general  
17 public.

19       Various defendants argued that Proposition 64's amendment to section 17204 takes  
20 immediate effect and requires the dismissal of all claims brought by private persons in the  
21 interest of the general public. These arguments rely on two major themes: (1) UCL claims assert  
22 a statutory right and seek a statutory remedy so a repeal of the statute terminates all pending  
23 actions, and (2) the changes in the UCL are procedural in nature and apply immediately.  
24 *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal. App. 4th 120,  
25 125-126. The Court addresses these arguments separately.

1 The Court would find no merit to the defense argument that Proposition 64 repealed the  
2 general public's rights. Proposition 64 does not preclude the general public from prosecuting  
3 UCL claims or change the substantive law that applies to those claims, it only changes who may  
4 represent the general public.

5 The Court would find merit to the defense argument that Proposition 64's changes are  
6 procedural in nature and apply immediately, but would find that the changes do not require the  
7 dismissal of the claims in the interest of the public. In *Brenton v. Metabolife Internat., Inc.*  
8 (2004) 116 Cal. App. 4th 679, 688-689, the Court states that courts have broadly distinguished  
9 between *substantive* and *procedural* statutes and held that "if a statutory change is *substantive*  
10 because it would impose new, additional or different liabilities based on past conduct, courts are  
11 loath to interpret it as having retrospective application" but that "applying changed procedural  
12 statutes to the conduct of existing litigation, ... involves no improper retrospective application  
13 because the statute addresses conduct in the future."

14 The Court would hold that the amendment to section 17204 regarding claims by the  
15 general public is procedural in nature because it "merely regulates the conduct of ongoing  
16 litigation." The amendment would take effect immediately, but would not require dismissal of  
17 pending claims on behalf of the general public because government entities could intervene and  
18 continue the prosecution of those claims.  
19  
20  
21

## 22 CLAIMS BY PRIVATE PERSONS IN THEIR OWN INTERESTS. 23

24 Proposition 64 amended section 17204 to read, "Actions for any relief pursuant to this  
25 chapter shall be prosecuted exclusively in a court of competent jurisdiction ... by any person  
26 who has suffered injury in fact and has lost money or property as a result of such unfair



1 competition.” This amendment creates a new standing requirement for UCL claims by private  
2 persons.

3  
4 THE COURT WOULD HOLD THAT PRIVATE PERSONS PROSECUTING UCL CLAIMS  
5 IN THEIR OWN INTERESTS MUST NOW MEET THE REQUIREMENTS OF SECTION  
6 17204.  
7

8 The analysis related to UCL claims by private persons for their own interests is relatively  
9 straightforward compared to the analysis of UCL claims by private persons in the interest of the  
10 public. The issue is whether plaintiffs pursuing a statutory claim must meet standing  
11 requirements that were added to the statute after the claim arose and after the action was filed.

12 The general rule is stated in *McClung v. Employment Development Dept.* (2004) 34 Cal.  
13 4th 467, 475 as follows, “Generally, statutes operate prospectively only. ... [T]he presumption  
14 against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal  
15 doctrine centuries older than our Republic. Elementary considerations of fairness dictate that  
16 individuals should have an opportunity to know what the law is and to conform their conduct  
17 accordingly ... . For that reason, the 'principle that the legal effect of conduct should ordinarily be  
18 assessed under the law that existed when the conduct took place has timeless and universal  
19 appeal.”  
20

21 This general rule has three exceptions. First, the Legislature can expressly state that it  
22 intends a new law to govern conduct prior to the enactment of the law. *McClung*, 34 Cal.4<sup>th</sup> at  
23 475. There is no express statement in Proposition 64 regarding claims in the interest of private  
24 persons.  
25  
26

1 Second, a procedural change that affects the means of getting to trial but not the elements  
2 of the substantive cause of action can be applied immediately even if it affects cases that were  
3 filed before the change was adopted. *Tapia v. Superior Court* (1991) 53 Cal. 3d 282, 287-91.  
4 This raises the issue whether the new requirements are substantive or procedural. The Court has  
5 specifically considered two cases that concern statutory amendments affecting standing  
6 requirements. These cases would be particularly useful if they did not go in different directions.  
7

8 In *In re Daniel H.* (2002) 99 Cal. App. 4th 804, 809-812, a petitioner mother lacked  
9 standing to raise the issue of sibling visitation when the case began and was decided on its  
10 merits, but a new statute conferred standing to raise that issue while the case was on appeal. The  
11 Court of Appeal held that the standing amendment was not retroactive, that standing was  
12 determined based on the law as of the time of filing, and that the mother could not pursue her  
13 arguments related to sibling visitation. In *Parsons v. Tickner* (1995) 31 Cal. App. 4th 1513,  
14 1523, the daughter of a decedent initiated claims as the decedent's successor in interest at a time  
15 when those claims could only be brought by the decedent's personal representative. While the  
16 case was pending, the Code of Civil Procedure was changed and conferred standing to successors  
17 in interest. The Court of Appeal held that the standing amendment was procedural in nature,  
18 retroactive, and that the daughter could pursue her claims as the successor in interest.  
19

20 The Court would not resolve whether the new standing requirement is substantive or  
21 procedural.  
22

23 Third, plaintiffs pursuing statutory claims are presumed to be acting with the knowledge  
24 that the Legislature (or the voters) could repeal or amend the statute at any time. Government  
25 Code § 9606 ("Any statute may be repealed at any time, except when vested rights would be  
26 impaired. Persons acting under any statute act in contemplation of this power of repeal.");

1 *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal. App. 4th 679, 690 (As “a general rule, ... a  
2 cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the  
3 action thereon is pending, in the absence of a saving clause in the repealing statute.”).

4         The UCL provides rights and remedies that are separate from (and in addition to) those  
5 available at common law. Government Code § 9606 and *Brenton* direct that plaintiffs pursuing  
6 UCL claims in their own interests did so with the knowledge that the UCL could be repealed or  
7 amended at any time and that section 17204’s standing requirements take effect immediately.  
8 Therefore, the Court would hold that plaintiffs in all pending cases must plead and prove that  
9 they have suffered injury in fact” and have “lost money or property.”  
10

11  
12 THE COURT WOULD PROBABLY GRANT PLAINTIFFS LEAVE TO AMEND TO MAKE  
13 THE ALLEGATIONS NECESSARY TO PROSECUTE UCL CLAIMS IN THEIR OWN  
14 INTERESTS.  
15

16         The Court would probably grant plaintiffs leave to file amended complaints alleging that  
17 they have “suffered injury in fact” and have “lost money or property” as a result of the alleged  
18 unfair competition. If the named plaintiffs could not meet the new standing requirements, the  
19 Court would probably permit the addition of new plaintiffs. *Cloud v. Northrop Grumman Corp.*  
20 (1998) 67 Cal. App. 4th 995, 1005 (“[I]f the facts of the cause of action against the defendant  
21 would not be “wholly different” after amendment, a complaint filed by a party without standing  
22 may be amended to substitute in the real party in interest.”); *Tenants Assn. of Park Santa Anita v.*  
23 *Southers* (1990) 222 Cal. App. 3d 1293, 1304 (“When a court concludes that the named plaintiffs  
24 can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to  
25  
26

1 amend their complaint, to redefine the class, or to add new individual plaintiffs, or both, in order  
2 to establish a suitable representative.”)

3 *Mervyn’s* expresses concern that Proposition 64 would deny the plaintiff in that case the  
4 opportunity to obtain the participation of its organization to substitute in as a plaintiff and  
5 suggests that permitting leave to amend would raise “a host of difficult questions.” (Slip Op at  
6 9.) As the above cases suggest, permitting amendments and determining the effect of those  
7 amendments would not be unduly complicated.  
8

9  
10 OTHER ISSUES CONCERNING CLAIMS IN THE INTEREST OF INDIVIDUAL  
11 PLAINTIFFS.

12 Various plaintiffs argue that Proposition 64’s amendment adding the “injury in fact” and  
13 “lost money or property” requirements cannot be applied to pending cases because it would  
14 deprive the plaintiffs of a vested claim. As discussed above, where the claim is a creation of  
15 statute, the claim can be eliminated when the statute is amended or repealed.  
16

17 *Mervyn’s* expressed concern that it would be unfair to deprive a plaintiff who has not  
18 suffered any injury the opportunity to continue prosecution of his or her lawsuit. The Court  
19 noted, “The law, if applied retroactively, would sweep up all pending complaints by uninjured  
20 plaintiffs.” (Slip Op. at 9.) The concerns of the Court of Appeal seem to recognize a property  
21 interest in the process of bringing a lawsuit.  
22

23 This Court understands that a person can have an interest in a cause of action where he or  
24 she is the real party in interest or has acquired the cause of action by way of an assignment of  
25 claims. It is less clear that a person who voluntarily undertakes to represent the public in a  
26 lawsuit has acquired a legally recognizable interest in pursuing the lawsuit that is separate from

1 the public's interest in the lawsuit. It would seem that a person who performed work on behalf of  
2 the public and was then told that his or her services were no longer wanted might have a claim  
3 against the public for the value of their work, but would not have an independent right to  
4 continue pursuing the work. The situation is somewhat analogous to a contractor who is entitled  
5 to a completion bonus at the end of a project and is terminated mid project – the contractor may  
6 sue the developer for compensation, but has no right to complete the project after being told that  
7 the developer was retaining another person to complete the work. A more apt analogy might be  
8 to a lawyer who undertakes work on a contingent fee case and is terminated before the case is  
9 completed – the attorney may have a right to the fair value of his or her work, but has no right to  
10 pursue the lawsuit after the client has decided to retain new counsel.  
11

12 It is worth noting that Proposition 64 does not deprive any named plaintiffs of their  
13 common law claims. The ability to pursue common law claims substantially limits any prejudice  
14 to the named plaintiffs caused by the application of the “injury in fact” and “lost money or  
15 property” requirements to pending individual UCL claims. *Yoshioka v. Superior Court* (1997)  
16 58 Cal. App. 4th 972, 981-982, the Court held, “Retrospective application of a statute is  
17 constitutional as long as it does not deprive a person of a substantive right without due process of  
18 law. ... Such alteration is only forbidden when at the very least the party is deprived of *every*  
19 *reasonable method of securing just compensation.*”  
20

21 A hypothetical plaintiff who loses the ability to pursue an individual UCL claim because  
22 she cannot plead or prove “injury in fact” and “lost money or property” has (by definition) not  
23 lost any money or property, so her ability to secure just compensation is not relevant. A  
24 hypothetical plaintiff who cannot meet the new standing requirement may be theoretically  
25 deprived of the ability to pursue injunctive or declaratory relief, but this is not of constitutional  
26

1 concern because one cannot have a vested interest in the ability to obtain prospective injunctive  
2 or declaratory relief.

3 Furthermore, the hypothetical plaintiff who loses the ability to pursue her individual UCL  
4 claim is probably not deprived of the ability to obtain injunctive or declaratory relief. Any lost  
5 “unlawful” claim would have borrowed from an underlying statute and the lost “unfair” claim  
6 would have been tethered to an underlying statute. *Gregory v. Albertson's, Inc.* (2002) 104 Cal.  
7 App. 4th 845, 854. Lacking a UCL claim, the hypothetical plaintiff could still bring a common  
8 law tort claim, reference a statute in the context of Evidence Code 669, and seek injunctive or  
9 declaratory relief. The lost “fraudulent” claim could be replaced with a claim for common law  
10 fraud.  
11

### 12 13 CLASS ACTION ISSUES

14 The Court would hold that the amendment to section 17203 is effective immediately  
15 because it is a clarifying amendment. Clarifying amendments are effective immediately because  
16 they are not intended to change rights or obligations. *Southbay Creditors Trust v. General*  
17 *Motors Acceptance Corp.* (1999) 69 Cal. App. 4th 1068, 1080. See also *Edward Fineman Co. v.*  
18 *Superior Court* (1998) 66 Cal. App. 4th 1110, 1124.  
19

20 The amendment has three components: “Any person may pursue representative claims or  
21 relief on behalf of others only if the claimant (1) meets the standing requirements of Section  
22 17204 and (2) complies with Section 382 of the Code of Civil Procedure, (3) but these  
23 limitations do not apply to claims brought under this chapter by the Attorney General, or any  
24 district attorney, county counsel, city attorney, or city prosecutor in this state.”  
25  
26

1 The requirement that plaintiffs meet the standing requirements of Section 17204 is  
2 surplussage. Under Section 17204, any person who is not a government entity must meet the  
3 requirements of Section 17204.

4 The requirement that plaintiffs comply with Section 382 of the Code of Civil Procedure  
5 before they can “pursue representative claims or relief on behalf of others” is largely declarative  
6 of existing law. C.C.P. 367 states, “Except as provided by law, every action must be prosecuted  
7 by the party in interest.” This longstanding statute prohibits persons from pursuing claims or  
8 relief on behalf of absent persons except as provided by a specific statute. C.C.P. 382 permits  
9 class actions and in *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, the court held that  
10 individual UCL claims could be aggregated through the class action mechanism. The  
11 amendment to section 17203 would affect only those limited situations where statutes other than  
12 C.C.P. 382 have permitted representative lawsuits. See C.C.P. 369.5 (associations).  
13

14 The statement that public prosecutors can represent the general public without class  
15 certification is declarative of existing law. *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*  
16 (2002) 104 Cal. App. 4th 508, 530-533 (UCL claim by Attorney General resulted awards of  
17 restitution to injured members of the public). See also *General Tel. Co. v. E.E.O.C.* (1980) 446  
18 U.S. 318, 327-331 (EEOC claims in the interest of the public do not require class certification).  
19

20 The Court would anticipate that the need to obtain class certification to represent absent  
21 persons would result in requests to file amended complaints adding class allegations. The Court  
22 would probably permit Plaintiffs who had previously alleged UCL claims in the interest of the  
23 public leave to amend to add class action allegations. The Court would eventually resolve  
24 whether any new class allegations relate back to the filing of a claim in the interest of the public.  
25 As noted above, these issues are not unduly complicated.  
26

1  
2 OTHER ASPECTS OF PROPOSITION 64.

3       The parties did not discuss and the Court would not address how the amendments to  
4 Business and Professions Code Sections 17206 and 17536 made by Proposition 64 Sections 4  
5 and 6 affect currently pending cases.  
6

7  
8 CONCLUSION.

9       The motions of the Defendants based on Proposition 64 are DENIED as explained on  
10 pages 2-3 of this order. The remainder is dicta and is included by the Court to raise and publicly  
11 explore issues and approaches that were not argued by the parties or discussed in *Mervyn* 's.  
12  
13

14 Dated: February \_\_, 2005

15 \_\_\_\_\_  
16 Judge Ronald M. Sabraw  
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