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4 SUPERIOR COURT OF CALIFORNIA  
5 COUNTY OF LOS ANGELES  
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**FILED**  
LOS ANGELES SUPERIOR COURT  
MAR 15 2005  
JOHN A. CLARKE, CLERK  
*E. Sabalboro*  
BY E. SABALBURO, DEPUTY

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9 JONATHAN PERALTA,  
10  
11 Plaintiff,  
12 vs.  
13 ABBOTT LABORATORIES, INC.,  
14  
15 Defendant

CASE NO. BC 259 587  
RULING ON DEFENDANT'S MOTION  
FOR JUDGMENT ON THE PLEADINGS

16  
17 Hearing date: 3/14/05  
18 Ruling date: 3/15/05  
19

20 After considering the moving, opposing, and reply papers and the arguments of  
21 counsel at the hearing, the court now rules as follows:

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23 **Defendant's motion for judgment on the pleadings is GRANTED WITHOUT**  
24 **LEAVE TO AMEND. Defendant's request for judicial notice is DENIED.**  
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1 **A. Introduction**

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3 Plaintiff brings a representative Business & Professions Code section 17200  
4 action, alleging defendant fraudulently manipulated market prices for certain  
5 pharmaceuticals. Plaintiff does not allege he was injured by the practice. Defendant  
6 moves for judgment on the pleadings on the ground plaintiff's action is barred by the  
7 amendment to section 17200 effected in November, 2004 by Proposition 64.  
8

9 **B. Proposition 64**

10  
11 On November 2, 2004, California voters passed Proposition 64, which eliminated  
12 the ability of uninjured parties to pursue representative actions for the benefit of the  
13 general public. Proposition 64 amended, inter alia, section 17204 of the Business and  
14 Professions Code to provide that a private plaintiff can prosecute a UCL action only if  
15 that plaintiff "has suffered injury in fact and has lost money or property as a result of [the  
16 defendant's] unfair competition."

17 An initiative or referendum approved by a majority of votes takes effect the day  
18 after the election unless the measure provides otherwise. (Cal. Const., Art. II, § 10.)  
19 Therefore, Proposition 64 became effective November 3, 2004.

20 Defendant argues Proposition 64 deprives plaintiff of standing to prosecute this  
21 action.  
22

23 **C. Applicability of Proposition 64 to Pending Cases**

24  
25 This case was filed before Proposition 64 was enacted. The threshold issue is  
26 whether the proposition applies to pending cases. If it does not, the court has no occasion  
27 to reconsider plaintiff's standing.

28 "In interpreting a voter initiative . . . we apply the same principles that govern the  
construction of a statute." (*People v. Canty* (2004) 32 Cal. 4th 1266, 1276.)

1           Where a claim or remedy is entirely dependent on a statute and not common law,  
2 the repeal of that statute takes effect immediately unless the amendment contains a  
3 savings clause. (Gov. Code, §§ 9605-9606; *Younger v. Superior Court* (1978) 21 Cal. 3d  
4 at 109, 109-110; *Governing Bd. v. Mann* (1977) 18 Cal. 3d 819, 829 [reversing dismissal  
5 of a teacher because statutory authority for dismissal was repealed during the appeal; “If  
6 final relief has not been granted before the repeal goes into effect it cannot be granted  
7 afterwards, even if a judgment has been entered and the cause is pending on appeal. The  
8 reviewing court must dispose of the case under the law in force when its decision is  
9 rendered.”]; see also *Southern Service Co. v. City of Los Angeles* (1940) 15 Cal. 2d 1, 11;  
10 *Lemon v. Los Angeles T. Ry. Co.* (1940) 38 Cal.App.2d 659, 670-671 (1940); accord  
11 *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 (*Callet*) [“As a general rule, . . . a cause of  
12 action or remedy dependent on a statute falls with a repeal of the statute, even after the  
13 action thereon is pending, in the absence of a saving clause in the repealing statute.  
14 [Citations.] The justification for this rule is that all statutory remedies are pursued with  
15 full realization that the legislature may abolish the right . . . at any time.”]; *Graczyk v.*  
16 *Workers’ Comp. Appeals Bd* (1986) 184 Cal. App. 3d 997, 1007.)

17           “Where, as here, the Legislature has conferred a remedy and withdraws it by  
18 amendment or repeal of the remedial statute, the new statutory scheme may be applied to  
19 pending actions without triggering retrospectivity concerns.” (*Brenton v. Metabolife,*  
20 *Int’l Inc.* (2004) 116 Cal. App. 4th 679, 690.) This rule applies to all pending actions  
21 including those on appeal. (*Governing Bd. v. Mann, supra*, 18 Cal. 3d at p. 829.)

22           For convenience, the court will refer to this as the “statutory repeal rule.”

23           The statutory repeal rule applies only to “purely” statutory causes of action, not to  
24 causes of action which, though they may be codified, also exist or existed at common  
25 law. (*Callet, supra*, 210 Cal. at p. 68.)

26           Proposition 64 repealed the authority for uninjured persons to pursue a claim on  
27 behalf of the general public. Though there is a common law cause of action for “unfair  
28 business practices,” the unfair competition cause of action set forth in Business &  
Professions Code section 17200, et seq., is not the same as the common law tort because

1 the common law cause of action cannot be alleged by uninjured consumers. (See *Barquis*  
2 *v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109.)

3 Because representative standing under Business & Professions Code section  
4 17200, et seq., is purely a statutory right, Proposition 64's repeal of that right with no  
5 saving clause applies to pending claims.

6 And though a recent appellate decision holds Proposition 64 does *not* apply to  
7 pending claims (*Californians for Disability Rights v. Mervyns, LLC* (February 1, 2005)  
8 2005 DJDAR 1347), four subsequent appellate opinions hold that it does. (*Branick v.*  
9 *Downey Savings and Loan Association* (2005) 2005 WL 407363 (*Branick*); *Lytwyn v.*  
10 *Fry's Electronics, Inc.* (2005) 2005 WL 407 363; *Benson v. Kwikset Corp.* (2005) 2005  
11 WL 327472; and *Bivens v. Corel Corp.* (2005) 2005 WL 388245.)

12 When two superior courts disagree, an inferior court is free to follow the better  
13 rule. (See, e.g., *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 496, 497, 498.)  
14 Following *Branick*, etc., this court concludes Proposition 64 applies to pending cases and  
15 requires that plaintiff allege here an actual injury to prosecute a 17200 action.

16 Plaintiff does not allege an actual injury. Therefore, defendant's motion for  
17 judgment on the pleadings is granted.

#### 18 19 **D. Leave to Amend**

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21 It is a plaintiff's burden upon demurrer (or judgment on the pleadings) to  
22 demonstrate it is reasonably probable he can cure any defects if afforded leave to amend.  
23 (*Cooper v. Leslie Salt Co.* (1960) 70 Cal.2d 627, 636; *Goodman v. Kennedy* (1976) 18  
24 Cal.3d 335, 349.) Here, plaintiff argues he can amend to allege patients "such as" him  
25 are directly damaged by defendant's fraudulent pricing scheme. (Opp., p. 8:17.) This  
26 does not suffice. As discussed above, plaintiff cannot sue under Business & Professions  
27 Code section 17200 for damages caused to persons "such as" him unless he can first  
28 show he himself was damaged.

He gives no indication that he can do so.

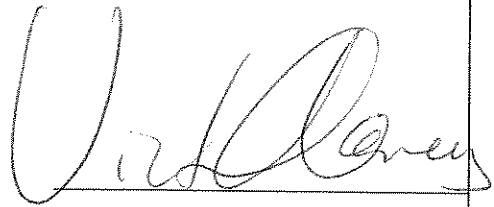
1 Therefore, leave to amend is denied.

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3 **In Sum:**

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5 Defendant's motion for judgment on the pleadings is **GRANTED WITHOUT**  
6 **LEAVE TO AMEND.** Defendant's request for judicial notice is **DENIED.**

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8 IT IS SO ORDERED.

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10 Dated: 3/15/05



11  
12 Victoria Gerrard Chaney

13 Judge  
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