No. S132433

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THOMAS BRANICK, et al.
Plaintiffs and Appellants,

v.

DOWNEY SAVINGS AND LOAN ASSOCIATION,
Defendant and Respondent.

On a Decision from the Court of Appeal,
Second Appellate District, Division Five
Case Number B172981

Unfair Competition Case
(See Bus. & Prof. Code § 17209 and Cal. Rules of Court, rule 16(d))

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF AARP IN SUPPORT OF PLAINTIFFS AND APPELLANTS

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To the Honorable Ronald M. George, Chief Justice of this Court:

AARP requests leave to file an *amicus curiae* brief in this case in support of Thomas Branick on the limited issues regarding whether a plaintiff may amend his or her complaint to add a party that satisfies the standing requirements of section 17204 of the California Business and Professions Code and whether such an amended complaint relates back to the initial complaint for statute of limitations purposes. This Court's decision on the retroactive effect of Proposition 64 will impact the rights of AARP's members in many pending cases in California.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

AARP is a non-partisan, non-profit membership organization of more than 35 million people aged 50 or older, including more than 3 million members in California. As the largest membership organization in the United States dedicated to addressing the needs and interests of older Americans, AARP is greatly concerned about ensuring strong protections against unfair and deceptive practices in the marketplace that target vulnerable populations, such as older individuals who are disproportionately victimized by many of these practices. AARP supports laws and public policies that protect the rights of older Americans, including access to courts to vindicate those rights.

ISSUES PRESENTED

In granting review, this Court specified the issues to be decided as follows:

"If the standing limitations of Proposition 64 apply to actions under the Unfair Competition Law that were pending on November 3, 2004, may a plaintiff amend his or her complaint to substitute in or add a party that satisfies standing requirements of Business and Professions Code section 17204, as amended, and does such an amended complaint relate back to the initial complaint for statute of limitations purposes?"[1]

SUMMARY OF ARGUMENT

In California, there is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceedings. Conflicts are usually resolved in favor of allowing an amendment, resting on the fundamental principle that cases should be decided on their merits. Prior to the enactment of Proposition 64, the original plaintiffs undisputedly had standing to sue on behalf of the general public. Substitution of a new plaintiff who has suffered "injury in fact" under the revised standing requirements of section 17204 of the California Business and Professions Code is only equitable for

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[1] Defendant/Respondent devotes pages 3 - 10 of their brief arguing why they believe Proposition 64 should apply to pending cases. The issue whether or not Proposition 64 applies to pending cases was not certified in this case but was certified in *Californians for Disability Rights v. Mervyn's LLC.*, California Supreme Court Case No. S131798. AARP's position, however, is that it would be unlawful to apply Proposition 64 to pending cases. AARP will submit an application to file a separate brief on that issue in *Californians for Disability Rights*. Since that issue was not certified in this case AARP will limit its argument here to the issues certified by this Court in this case.

several reasons. First, if substitution is permitted, it will not change the substantive cause of action. The fundamental question of whether the defendant engaged in unfair business practices remains the same. The underlying causes of action being identical, there is no prejudice to defendant/respondent if the plaintiffs/appellants are granted leave to amend. Second, there is also a strong policy in California to avoid the harsh results of the statute of limitations. Substitution of a new party is still allowed because the amendment relates back to the commencement of the original suit. Relation back is permitted on the theory that the statute of limitations should not bar the amendment of a complaint, if the defendant originally had enough notice to prepare a defense. As discussed below, the defendants/respondents in the present case are clearly absent of surprise, having both notice of the claim and ample time to prepare a defense on the merits. Finally, under the liberal discretion granted by section 473 of the California Code of Civil Procedure and published opinions on point, this Court should rule that the plaintiffs in the present case are entitled to amend their complaint to meet any alleged standing defect.

ARGUMENT

I. THE ORIGINAL PLAINTIFFS SHOULD BE ALLOWED TO AMEND THEIR COMPLAINT TO SUBSTITUTE DIFFERENT PLAINTIFFS BECAUSE THE AMENDMENT WOULD NOT ALTER THE SUBSTANTIVE GROUNDS OF THE SUIT OR PREJUDICE THE DEFENDANT.

In general, parties may be changed or new parties brought in by an amendment of the complaint. Cal. Civ. Proc. § 473; 5 Witkin, Cal. Proc. Plead § 1113. The Court of

Appeal in this case was correct in holding that the substitution of a new plaintiff would be appropriate.[2] Although the plaintiffs here did not allege in their amended complaint that they suffered injury in fact, or that they had lost money or property, they were not required to allege such an injury. It is likely that this case could in fact have been filed as a class action. The fact that it was filed as a representative action may simply reflect that at the time it was filed, section 17200 of the California Business and Professions Code did not require class allegations.

This Court as well as the courts of appeal have permitted amendments under circumstances similar to those in this case. California appellate courts have long held that "where it appears that a proposed amendment will not radically change the issues originally presented in the action and will neither work great delay nor prejudice rights of the adverse party to the action, as has been judicially declared, it is clear that 'it can very rarely happen that a court would be justified in refusing a party leave to amend. . . .'" *Hanna v. Hirschhorn* (1931) 112 Cal. App. 438, 440. The liberal rule regarding amendment of pleadings has been followed repeatedly by appellate courts. *See La Sala v. Am. Sav. & Loan Ass'n.* (1971) 5 Cal. 3d 864, 872; *Klopstock v. Superior Court* (1941) 17 Cal. 2d 13, 19-22; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal. App. 4th 995, 1005;

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[2] The Court, however, was incorrect in its holding that Proposition 64 applies to pending cases. The applicability of Proposition 64 to pending cases is currently pending before this Court in *Californians for Disability Rights v. Mervyn's LLC.*, California Supreme Court Case No. S131798.

Jensen v. Royal Pools (1975) 48 Cal. App. 3d 717, 720-22. The substantive issue in this case, i.e., whether Downey Savings and Loan Association engaged in unfair business practices, will remain identical following the substitution of an injured plaintiff.

This Court has previously ruled that the substitution of a new plaintiff is allowed when the original plaintiff is not the proper party. *See Klopstock,* 17 Cal. 2d at 21. Appellate courts have followed *Klopstock* in allowing a plaintiff without standing to substitute a real party in interest. *See, e.g., Cloud,* 67 Cal. App. 4th at 1005-06. In class action lawsuits, this Court has held that when the court concludes that "named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable representative." *La Sala,* 5 Cal .3d at 872.

Contrary to Downey's assertions, the "entire nature of the action" (Downey's Opening Brief, p. 13) would not change; to the contrary, the causes of action would be identical. The only thing that would change in this case would be the substitution of an injured class representative as a named plaintiff. Accordingly, the cases Downey cites on pages 12 - 13 of its brief involving new causes of action are not relevant here. *Summit Office Park, Inc. v. U.S. Steel Corp.* (5th Cir. 1981) 639 F.2d 1278, cited by Downey, likewise concerns only the Federal Rules of Civil Procedure and an entirely new cause of action. It is factually dissimilar to this case and provides no reason for this Court to reject

California authorities on point.

II. THERE IS A STRONG PUBLIC POLICY IN FAVOR OF LIBERAL AMENDMENTS SO THAT CASES CAN BE DECIDED ON THEIR MERITS.

In California there is a strong public policy in favor of liberal allowance of amendments. This policy rests on the fundamental principle that cases should be decided on their merits. *Grudt v. City of Los Angeles* (1970) 2 Cal. 3d 575, 585. Under this doctrine, the discretionary power of the court to allow such amendments should be liberally exerted in favor of deciding cases on their merits. *Olsen v. Lockheed Aircraft Corp.* (1965) 237 Cal. App. 2d 737, 741. Accordingly, an amendment should be allowed in this case, to allow the case to be decided on its merits.

III. THE AMENDED COMPLAINT SHOULD RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT FOR STATUTE OF LIMITATIONS PURPOSES.

If this Court authorizes an amendment to substitute new plaintiffs, in the interests of justice the amendment should relate back to the original complaint. "Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action." *Ruiz v. Santa Barbara Gas & Elec. Co.* (1912) 128 P. 330, 333.

The policy behind a statute of limitations is to put defendants on notice of the

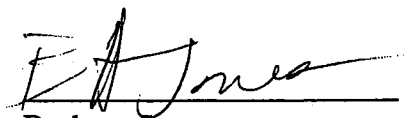
claim and give them time to prepare a fair defense of the merits. *Pasadena Hosp. Ass'n. Ltd. v. Superior Court* (1988) 204 Cal. App. 3d 1031, 1035. When recovery under an amended complaint is sought on the same basic set of facts as the original pleading, this policy is satisfied. *Id.* at 1036; *Klopstock*, 17 Cal .2d at 21-22. Relation back is permitted so long as the cause of action against the named defendants has not factually changed. *Jensen,* 48 Cal. App. 3d at 720; *Klopstock,* 17 Cal. 2d at 22.

CONCLUSION

The request to substitute a plaintiff who meets the new standing requirements of section 17204 of the California Business and Professions Code should be granted and the amended complaint should relate back to the original complaint for statute of limitations purposes.

Dated: August 5, 2005

Respectfully submitted,



Barbara Jones
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CERTIFICATE OF COUNSEL RE: WORD LENGTH

I, Barbara Jones, hereby certify as follows:

I am counsel of record for *amicus curiae*. According to the word processing program I used to prepare this brief, the brief (excluding tables and this certificate) is 1741 words long.

Dated: August 5, 2005

BARBARA A. JONES
Attorney for *Amicus Curiae*
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PROOF OF SERVICE BY MAIL

CASE NAME: *Branick, et al. v. Downey Savings and Loan Association*
SUPREME COURT CASE NUMBER: No. S132433
COURT OF APPEALS CASE NUMBER: 2nd Civ. No. B172981

I, Doris Larbi, declare as follows:

1. At the time of service, I was at least 18 years of age and not a party to this legal action. I am a resident or employed in the county where the within-mentioned service occurred.

2. My business address is: 601 E Street, NW, Washington, DC 20049

3. On August 5, 2005, I served the Application for Leave to file *Amicus Curiae* Brief; and Proposed Brief in Support of Plaintiffs and Appellants,Thomas Branick, et al., by overnight mail as follows: I enclosed a copy in separate envelopes, with postage fully prepaid, addressed to each individual addressee named below, and placed in my employer's mail room. I am readily familiar with my employer's practice of collecting and processing correspondence for business day delivery and know that in the ordinary course of that practice the document described above will be deposited with the U.S. Mail in Washington, DC on the same date that it is placed in my employer's mail room fully prepaid for collection and delivery.

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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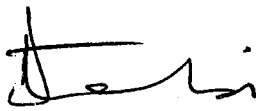

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