CASE NO. S132433

IN THE

SUPREME COURT 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

DOWNEY SAVINGS AND LOAN ASSOCIATION F.A.'S REPLY TO *AMICUS CURIAE* BRIEF OF AARP

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Service on the Attorney General of the State of California and the District Attorney of the County of Los Angeles Required by Business and Professions Code Section 17209 and California Rules of Court 44.5

Introduction

AARP filed an *amicus curaie* in support of the plaintiffs and appellants, contending that plaintiffs should be allowed leave to amend to substitute in new and unrelated parties.[1] AARP's brief, however, adds nothing to the current analysis. As with the plaintiffs, they rely predominately on *Klopstock v. Superior Court* (1941) 17 Cal.2d 13 and other cases where amendment was required due to a "mistake or misnomer" in the naming of a plaintiff, and not a new law specifically designed to prevent the current plaintiffs from pursuing the litigation. As stated in Downey Savings' opening and reply briefs, *Klopstock* and its reasoning do not apply here. Because Downey Savings addressed this argument in its opening and reply briefs on the merit, it will not do so again here.

Although it had no involvement in this matter, AARP nevertheless suggests that allowing plaintiffs' counsel to replace the old plaintiffs with new plaintiffs will not substantively change the lawsuit. AARP has no basis for making that sweeping conclusion. Assuming that plaintiffs' counsel can track down an individual who was injured by Downey Savings' allegedly unfair conduct, the lawsuit will necessarily have to be altered to fit the specific facts and circumstances the injured party. In addition, by converting this case to a class action, it may also greatly expand the available remedies, including allowing for a fluid recovery fund and revive many already stale claims. *See Kraus v. Trinity Mgmt. Services, Inc.* (2000) 23 Cal.4th 116 (recognizing the differences between class actions and UCL representative actions).

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[1] AARP states that this Court did not certify for review whether Proposition 64 applies to pending cases. That is not correct. On May 18, 2005, this Court issued an order requiring the parties to brief this very question.

AARP also fails to distinguish (or even address) *Diliberti v. Stage Call Corp.* (1992) 4 Cal.App.4th 1468, which presents a very similar situation as the instant case. There, as here, a lawsuit was filed by an uninjured plaintiff. After litigating for some time, the uninjured plaintiff sought substitute in a new, injured plaintiff. The court held that the substitution would effect a substantial change in the action because the new plaintiff was seeking to enforce an independent right (her claim to be compensated for her injuries, which was not derivative of any of the old plaintiff's rights, since she had not been injured). *Id.* at 1471 (citing *Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526).

Finally, AARP contends that if amendment is allowed, the amended complaint should relate back to the filing of the original complaint. But, for that to happen, the new complaint must, among other things, be based on the same general set of facts and involve the same injury. *See Norgart v. The Upjohn Co.* (1999) 21 Cal.4th 383, 408-09. AARP makes no effort to address these requirements of the relation-back doctrine, nor could it. As discussed in Downey Savings' opening and reply briefs on the merits, the amended complaint could not possibly be based on the same injury because the current plaintiffs were not injured. Likewise, a new plaintiff must have had a loan from Downey Savings, and therefore the new complaint would have to be based on the facts and events specific to that borrower. Accordingly, because the current plaintiff never had a loan from Downey Savings, the new complaint could not possible be based on the same set of facts as the current complaint.

Hence, for the reasons stated above and in Downey Savings' opening and reply briefs on the merits, the arguments raised by AARP in its *amicus* brief should be rejected, and this Court should reverse the court of

appeal's holding permitting plaintiffs divested of standing under Proposition 64 to move to substitute in new, unrelated plaintiffs.

Dated: August 26 2005

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Certificate of Word Count

The undersigned certify that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 599 words, exclusive of the matters that may be omitted under rule 29.1(c)(1).

Dated: August 26, 2005

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
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I am employed in the County of Orange, State of California. I am over the age of 18, and not a party to the within action. My business address is Hodel Briggs Winter LLP, 8105 Irvine Center Drive, Suite 1400, Irvine, CA 92618.

On August 29, 2005, I served the foregoing document(s) described as:

DOWNEY SAVINGS AND LOAN ASSOCIATION F.A.'S REPLY TO *AMICUS CURIAE* BRIEF OF AARP

on the interested parties by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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

Executed on August 29, 2005, at Irvine, California.

/s/

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