Case No. **B188106**

Case No. **B188106**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

PFIZER INC.,
Petitioner and Defendant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
Respondent,

STEVE GALFANO,
Real Party in Interest and Plaintiff.

LOS ANGELES SUPERIOR COURT
HON. CARL J. WEST, JUDGE

APPLICATION OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, and CALIFORNIA BANKERS ASSOCIATION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER; AND AMICI CURIAE BRIEF.

FRED J. HIESTAND
State Bar No. 44241
1121 L Street
Suite 404
Sacramento, CA 95814
Tel.: (916) 448-5100
Fax.: (916) 442-8644

WILLIAM L. STERN
State Bar No. 96105
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105
Tel.: (415) 268-7637
Fax.: (415) 268-7522

Counsel for *Amici Curiae*
California Unfair Competition Law (Bus & Prof. C. §17200 et. seq.)
Cal. Rules of Court 15(c)(3), 44.5(c)

Prometheus Press * Sacramento, CA

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

PFIZER INC.,

Petitioner and Defendant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Respondent,

STEVE GALFANO,

Real Party in Interest and Plaintiff.

APPLICATION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

TO THE HONORABLE JOAN D. KLEIN, PRESIDING JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SECOND DISTRICT, DIVISION THREE:

The principal issue raised on this appeal—whether the changes to California's Unfair Competition Law (Bus. & Prof. Code § 17200 et seq. [UCL]) made by Proposition 64 apply only to the named plaintiff or to every putative class member—is of paramount interest to applicants, whose members are too often sued in spurious UCL class actions.

Applicants believe the accompanying amici curiae brief will assist the court in assessing whether the trial court erred by holding that only the named plaintiff, and not each putative class member, is subject to the "standing" and "causation" requirements imposed by Proposition 64. Applicants are well-situated to explain the

adverse consequences to California's economy that would follow from a decision which interprets Proposition 64 to permit an absent UCL class member to assert claims he or she could *not* assert individually.

The Civil Justice Association of California (CJAC) is a non-profit corporation whose hundreds of members are businesses, professional associations and local governments committed to improving the "fairness, efficiency and economy" of laws that determine who gets how much, and from whom, when injured by the wrongful acts of others. Toward these ends, CJAC has petitioned the Legislature, the courts and the people themselves for redress with respect to "unfair" and "overreaching" laws. CJAC was an official ballot sponsor of Proposition 64, a measure animated by the inability or unwillingness of the Legislature over the past several years to curb the omnivorous growth and reach of the UCL. CJAC has an abiding interest in seeing that Proposition 64 is properly enforced to curb the excesses of the UCL, and this case presents an opportunity to do that.

The California Manufacturers & Technology Association (CMTA) is a 501(c)(6) mutual benefit trade association advocating for a strong business climate for California's 30,000 manufacturing, processing and technology based companies. Since 1918, CMTA has worked with state government to develop balanced laws, effective regulations and sound public policies to stimulate economic growth and create new jobs while safeguarding the environment. To that end, the CMTA is vitally interested in promoting a civil justice system in the state that limits frivolous lawsuits and promotes fair compensation to injured parties. The outcome of this case with regard to proper application of Proposition 64 in the class action setting will have a significant impact on California manufacturers.

The California Chamber of Commerce (CCC) is the largest, voluntary business association within the state of California, with more than 15,000 members, both individual and corporate, representing virtually every economic interest in the state.

While the Chamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. The Chamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. The Chamber only participates as *amicus curiae* on matters that have a significant impact on California businesses, of which this case is an excellent example.

The California Bankers Association (CBA) was founded in 1891 and today represents more than 300 banks in the state, including commercial banks, industrial loan companies, and savings institutions. California's banking industry provides jobs to more than 150,000 Californians and financial security and opportunity to millions more. CBA member banks hold more than $2.7 trillion in assets and loans in excess of $1.5 trillion.

Applicants have read the briefs of the parties and present in our brief authority and analysis that does not duplicate, but supplements what has been submitted to the court to date. Applicants contend in our accompanying brief that Proposition 64 requires proof of causation in UCL actions; and that this essential element applies to every member of a putative class action brought under the UCL, not just the named plaintiff.

For these reasons, CJAC, CMTA, CCC and CBA respectfully request that the Court grant them leave to file the accompanying amici curiae brief.

Dated: April 20, 2006

Respectfully submitted,

_____

Fred J. Hiestand
William L. Stern
Counsel for Applicants to File as Amici Curiae: CJAC, CMTA, CCC and CBA

Case No. **B188106**

Case No. **B188106**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

PFIZER INC.,
Petitioner and Defendant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
Respondent,

STEVE GALFANO,
Real Party in Interest and Plaintiff.

LOS ANGELES SUPERIOR COURT
HON. CARL J. WEST, JUDGE

BRIEF AMICI CURIAE OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, and CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER.

FRED J. HIESTAND
State Bar No. 44241
1121 L Street
Suite 404
Sacramento, CA 95814
Tel.: (916) 448-5100
Fax.: (916) 442-8644

WILLIAM L. STERN
State Bar No. 96105
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105
Tel.: (415) 268-7637
Fax.: (415) 268-7522

Counsel for *Amici Curiae*

California Unfair Competition Law (Bus & Prof. C. §17200 et. seq.)
Cal. Rules of Court 15(c)(3), 44.5(c)

Prometheus Press * Sacramento, CA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Codes and Statutes

Texts, Articles and Miscellaneous

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

PFIZER INC.,
Petitioner and Defendant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
Respondent,

STEVE GALFANO,
Real Party in Interest and Plaintiff.

INTRODUCTION

A. Importance of Issues Presented

The answers to the two issues raised by this case will determine whether the voters of California meant what they said and said what they meant when they enacted Proposition 64.[1] That ballot initiative was approved to end the practice of "shakedown" lawsuits based on the Unfair Competition Law.[2] As its Findings and Declaration of Purpose state, the UCL is "being misused" by private attorneys who file "frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit," "[f]ile lawsuits where no client

---

[1] On November 2, 2005, the electorate approved Proposition 64 by a 59% to 41% margin.

[2] Bus. & Prof. Code § 17200 et seq.; hereafter referred to as the "UCL."

has been injured in fact," or "[f]ile lawsuits for clients who have not used the defendant's product or service, [or] viewed the defendant's advertising, ..."[3] To correct these abuses Proposition 64 made two changes to the UCL, both of which are central to the resolution of this case.

First, Proposition 64 eliminated the standing of *phantom* or *unaffected* plaintiffs, persons who never purchased or availed themselves of the product or service at issue or acted on the basis of an advertisement about the product or service. Previously, "any person" had standing under the capacious language of the UCL to sue "on behalf of the general public" and invoke that law's substantive prohibitions against business practices felt to be "unfair, unlawful or fraudulent."[4] Proposition 64 deleted that broad "standing" provision and substituted in its place the requirement that *only* one who has "suffered injury in fact *and* has lost money or property as a result" of the practices proscribed by the UCL can sue under it.

Second, Proposition 64 eliminated the ability of private litigants (but *not* public prosecutors) to bring "representative actions" under the UCL on behalf of the general public, providing instead that named, private plaintiffs seeking monetary redress by way of restitution for others *besides themselves* must meet the new "standing" requirement *and* bring the lawsuit as a "class action."

---

[3] Prop. 64, § 1(b)(1)-(4).

[4] As the Court has stated on more than one occasion before Proposition 64's enactment, "A private plaintiff who has himself suffered *no injury at all* may sue to obtain relief for others." *Stop Youth Addiction v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561; emphasis added.

Both of these Proposition 64 requirements highlight the two issues presented:

(1) Does a "fraudulent" business practice under the UCL now require proof of *causation*, i.e., that the plaintiff saw the offending ad, was misled by it, and consequently lost "money or property"? (The label advertisement in question stated the mouthwash was "clinically proven" to be "as effective as floss against plaque and gingivitis between teeth.")

(2) If so, does this make inappropriate the trial court's certification of a "class action" for those who purchased Listerine® mouthwash within a specified time interval, when it cannot be proven that a misleading label on some bottles or some television advertisements for the product occasioned each class member's decision to buy it?

The answer to both questions is "Yes," and both answers are compelled by the plain language of Proposition 64 and its stated purpose. Yet the respondent court ruled otherwise, certifying purchasers of Listerine® as a class entitled to restitution without any showing that the fraudulent business practice complained of – i.e., the allegedly misleading advertisement on some, but not all, bottles comparing the effectiveness of its use with "flossing" – caused them to buy Listerine®. That ruling is a repudiation of what the voters approved when voting for Proposition 64; it substitutes cosmetic change for real and significant procedural reform. The class action respondent court certified is, in other words, indistinguishable from the formerly discredited "general public" action, which

even plaintiff concedes Proposition 64 abolished.[5]

If allowed to stand, the court's ruling will stimulate a new generation of "Trevor Law Groups"[6] for whom Proposition 64 will prove but a trifling inconvenience. Instead of manufacturing UCL claims by canvassing every statute book, ordinance and regulatory agency's web site to find the most minuscule violation àla The Trevor Law Group and its ilk, practitioners will be content to find just one person in California willing to say he read an ad, was misled by it, and bought the product or service in reliance thereon.[7] If that is all the courts hold necessary to maintain a class action under the UCL, then Californians will unfortunately be condemned to relive the recent history from which we obviously failed to learn.

B. Interest of Amici Curiae

The principal issue raised on this appeal—*viz.*, whether the changes to California's UCL by Proposition 64 apply only to the named plaintiff or to every putative class member—is of paramount interest to amici because our members are too often named as defendants in spurious UCL class actions. We believe this brief will assist this court in assessing whether the trial court erred by holding that

---

[5] *See* Opposition to Petition for Writ of Mandate, at p. 8 (Opp.).

[6] For a discussion of the sort of pre-Proposition 64 abuses that have come to be associated with the "infamous" Trevor Law Group, *see People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1316-17.

[7] This Petition involves only UCL class actions seeking monetary relief, i.e., restitution. Not before this court is whether the "injury-in-fact" requirement of Proposition 64 limits the ability of a UCL plaintiff to obtain an injunction based on merely a threatened injury.

only the named plaintiff, and not each putative class member, is subject to the "standing" requirements imposed by Proposition 64. Because we represent a significant portion of businesses and professional associations in California, amici are particularly well-situated to explain the adverse consequences to California's economy that would follow from a decision holding that Proposition 64 permits an absent class member to assert claims he or she could not assert individually.

The Civil Justice Association of California (CJAC) is a non-profit corporation whose hundreds of members are businesses, professional associations and local governments committed to improving the "fairness, efficiency and economy" of laws that determine who gets how much, and from whom, when injured by the wrongful acts of others. Toward these ends, CJAC has petitioned the Legislature, the courts and the people themselves for redress with respect to "unfair" and "overreaching" laws. Indeed, CJAC was an official ballot sponsor of Proposition 64, a measure made necessary by the inability of the Legislature to curb the omnivorous growth and reach of the UCL over the past several years.[8] We have an understandable interest in seeing that Proposition 64 is properly enforced to trim the excesses of the UCL.

The California Manufacturers & Technology Association (CMTA) is a

---

[8] "At least eleven reform bills were introduced in 2003 to address the problems stemming from the UCL. Proposals included . . . requiring plaintiffs to have suffered harm and demonstrate typicality of claims before filing a representative action. Nonetheless, the Legislature failed to enact section 17200 reform. The legislature's inability to reach consensus on UCL reform was not new. Numerous proposals, including procedural improvements suggested by the California Law Revision Commission in 1996, have not survived committee." Mathieu Blackston, *Comment: California's Unfair Competition Law – Making Sure the Avenger Is Not Guilty of the Greater Crime* (2004) 41 *SAN DIEGO L. REV.* 1833, 1847-48.

501(c)(6) mutual benefit trade association advocating for a strong business climate for California's 30,000 manufacturing, processing and technology based companies. Since 1918, CMTA has worked with state government to develop balanced laws, effective regulations and sound public policies to stimulate economic growth and create new jobs while safeguarding the environment. To that end, the CMTA is vitally interested in promoting a civil justice system in the state that limits frivolous lawsuits and promotes fair compensation to injured parties. The outcome of this case with regard to proper application of Proposition 64 in the class action setting will have a significant impact on California manufacturers and we appreciate this opportunity to express our views to the court.

The California Chamber of Commerce (CCC) is the largest, voluntary business association within the state of California, with more than 15,000 members, representing virtually every economic interest in the state. The Chamber was also an official ballot sponsor of Proposition 64. While we represent several of the largest corporations in California, 75 percent of our members have 100 or fewer employees. The Chamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. The Chamber only participates as *amicus curiae* on matters that have a significant impact on California businesses, of which this case is an excellent example.

The California Bankers Association (CBA) was founded in 1891 and today represents more than 300 banks in the state, including commercial banks,

industrial loan companies, and savings institutions. California's banking industry provides jobs to more than 150,000 Californians and financial security and opportunity to millions more. CBA member banks hold more than $2.7 trillion in assets and loans in excess of $1.5 trillion.

SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND[9]

Plaintiff and Real Party in Interest, Steve Galfano, bought his first bottle of mouthwash in the fall of 2004. It was Listerine®, a long-time brand name mouth rinse made by Pfizer Inc. Up until then, plaintiff had only used dental floss about "once a month," though he understood a person had to floss "a couple of times a week" to get any real benefits from doing so.

When he bought his first bottle of Listerine® at a local supermarket, plaintiff recalled it bore a red label which read "as effective as floss," but he could not recall what else it stated. In any event, he admitted that he did not make his purchase on the basis of any television or other advertisement, though he did state that he hoped the mouthwash would prove "an easy way to do what [he] should have been doing for a long time . . . flossing regularly."

Pfizer Inc. does not dispute that some bottles of Listerine® carried an "as effective as floss" label during the period in question, but these labels were changed twice over six months by adding statements such as "ask your dentist," "floss daily," and "not a replacement for floss." Indeed, out of 34 different Listerine® products, 19 never included any label that made a comparison to

---

[9] This summary is taken from the factual and procedural statements in the briefs of both parties.

flossing, and as for the remaining 15 bottles, some had two to three different versions of the "as effective as" label during the period of purchase defining the putative class of consumer plaintiffs.

Plaintiff sued Pfizer Inc. under the UCL, the Fair Advertising Law[10] and express warranty in January 2005. The gravamen of his complaint is that Pfizer Inc., through advertising via television commercials, labeling and other devices, "create[d] a false impression that Listerine® can replace the use of dental floss in reducing plaque and gingivitis."

After discovery, plaintiff moved for certification of a class restricted to those persons who purchased Listerine® bottles bearing any of three "challenged" labels. The court went beyond that requested definition, however, and certified a broader class to include "all persons who purchased Listerine® in California from June 2004 through January 7, 2005." In doing so, the court recognized that to succeed on the express warranty claim *reliance* must be shown, but stated the determination of reliance "must be preserved for subsequent proceedings." As for the UCL and FAL claims, the court ruled that Proposition 64's "injury" and "as a result" requirements applied only to plaintiff and not to absent class members. While permitting the suit to proceed as a class action, however, the court expressed "reservations" that give the lie to the appropriateness of that mechanism:

> With respect to restitutionary relief, the requirements of "injury in fact" or "lost money or property as a result" of the conduct of

[10] Bus. & Prof. Code § 17500 et. seq.; "FAL."

> defendant Pfizer, as imposed by Proposition 64, may preclude recovery on a class basis. Similarly, proof of the claim for restitutionary disgorgement appears problematic, to the extent there must be some correlation between the amount of restitutionary relief and conduct justifying recovery.

Believing that these "reservations" show that the court's class certification order wrongly "put the cart before the horse," Pfizer filed for writ review, which amici support.

SUMMARY OF ARGUMENT

Proposition 64 changed the rules of the *ancien* (pre-Proposition 64) UCL *régime*. Now, to bring a UCL lawsuit, plaintiff must have "suffered injury in fact" and "lost money or property *as a result of*" the alleged deception. "As a result" means "to arise as a consequence, effect, or conclusion." Thus, the California voters plainly intended to require proof of causation.

Many, indeed most, federal and state consumer protection laws contain the identical "as a result of" language as Proposition 64. In every instance in which that language appears, the federal and state courts have uniformly construed those laws to require *causation*. That is true not only of California's own Consumer Legal Remedies Act[11], but it is true of the federal Truth in Lending Act, and is true as well of every analogous state "Little FTC Act" in which "as a result of" language appears, which is the vast majority of such statutes. Like statutes ought to be interpreted alike. Thus, Proposition 64 now requires proof of causation.

The second issue is whether these new "standing" requirements apply only

---

[11] Civ. Code § 1750 et seq.; CLRA.

to the named plaintiff, thus permitting a court to certify a class so long as the named plaintiff can satisfy the Proposition 64 requirements. Phrased somewhat differently but to the same legal effect: Do these standing strictures apply equally to the claim of each individual absent class member, thereby precluding class certification when myriad individual issues of proof predominate over common issues?

Respondent court, citing a *pre*-Proposition 64 case[12] involving a standard sales misrepresentation, believed that a class could be certified provided just the named plaintiff met the Proposition 64 "standing" requirement; and that any differences among class members could be sorted out in some unspecified "subsequent proceedings" But *Mirkin v. Wasserman*[13], by balancing the utility of class actions against the need to prove all of the elements of each absent class members' claim, decided the precise issue presented herein opposite from the respondent court. Addressing class claims of fraud and negligent misrepresentation, *Mirkin* declined to suspend the requirement of actual reliance that *each* absent class member must otherwise prove:

> Actual reliance is more than a pleading requirement; it is an element of the tort of deceit. As we have previously observed, class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.[14]

---

[12] *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282.

[13] (1993) 5 Cal.4th 1082.

[14] *Id.* at 1103.

As the Court put it: "[T]here is little force in plaintiff's argument that we should reshape the law of deceit simply in order to remove an unnecessary pleading barrier to the effective utilization of class action procedures."[15] Substitute "UCL" for "deceit" in these quotes and the Court in *Mirkin* could have been writing about this case.

If the answer to the first question is that Proposition 64 requires individual proof of causation—and, of this, there can be no doubt—then the answer to the second question necessarily follows. To rule otherwise, as respondent court did, would mean that someone who could not himself sue directly under the UCL could nevertheless recover money by letting someone else sue on his behalf. But that is contrary to class action law, and is contrary to *Mirkin*. It is also repugnant to Proposition 64 and the intent of the voters because it would "open the door to class action lawsuits based on exceedingly speculative theories," allowing consumers to sue based on "misrepresentations they never heard."[16] It would also restore what the voters abolished, namely, UCL lawsuits "where no client has been injured in fact" or on behalf of "clients who have not used the defendant's product or service, [or]viewed the defendant's advertising, ..."[17]

---

[15] *Id.*

[16] *Id.* at 1008.

[17] Prop. 64, §1(b),(b)(1)-(4).

ARGUMENT

Proposition 64 requires proof of causation in UCL and FAL actions; and that essential element applies to every member of a putative class action brought under the UCL, not just the named plaintiff.

I. PROPOSITION 64 REQUIRES PROOF OF CAUSATION.

A. The Plain Language of Proposition 64 and its Purpose Requires Proof of Causation.

The court's "first task in construing a statute is to ascertain the intent of the [measure] so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the [statutory] purpose."[18]

Applying this standard to Proposition 64 reveals that every UCL claim now requires proof of *causation*. All actions brought under the UCL (and its companion provision, the FAL) must satisfy this new standard: In order to obtain "any relief," plaintiff must have "suffered injury in fact" and "lost money or property *as a result of*" the alleged violation of the law. The plain meaning of the words "as a result of" shows that the voters intended to engraft a hitherto absent causation requirement onto the UCL.

"As a result" means "to proceed or arise as a consequence, effect, or

---

[18] *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-1387.

conclusion."[19] Thus, the California voters plainly intended to limit the remedies available under the UCL to only those persons who can prove causation and reliance, i.e., that they "suffered injury in fact" and "lost money or property" *as a consequence of* the alleged UCL violation.

This conclusion is consistent with – indeed, compelled by – Proposition 64's findings, which underscore its purpose. "If a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense."[20] The People of California stated the purpose of Proposition 64 is to eliminate "lawsuits where no client has been injured in fact [or where] clients who have not used the defendant's product or service, [or] viewed the defendant's advertising, or had any other business dealing with the defendant ...."[21]

The district court in *Laster v. T-Mobile USA, Inc.*[22] understood the plain meaning of this statutory language when read in context with Proposition 64's express purpose. Citing the text of Proposition 64, *Laster* holds that "[t]he language of the UCL, as amended by Proposition 64, makes clear that a showing of *causation* is required."[23]

Though this case involves the "fraudulent" prong of the UCL, another

---

[19] *WEBSTER'S COLLEGIATE DICTIONARY* 999 (10th ed. 1993).

[20] Karl Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VAND. L. REV.* 395, 400 (italics added), reprinted in Singer, *STATUTES AND STATUTORY CONSTRUCTION* §48A:08, p. 639 (2000 ed.).

[21] Prop. 64, § 1(b),(b)(1)-(4).

[22] (S.D. Cal. 2005) 407 F. Supp.2d 1181.

[23] *Id.* at 1194.

appellate opinion holds that the related "unfairness" prong of the UCL requires proof of causation – *i.e.*, a "link between a defendant's business practice and the alleged harm."[24] In that opinion, titled *In re Firearm Cases*, the court confronted the question whether purely lawful conduct – the lawful manufacture and sale of firearms to authorized and licensed dealers – could violate the UCL's "unfairness" prong. The plaintiffs were municipalities who alleged that defendant gun manufacturers market, design, and promote handguns in a manner that facilitates their use in the commission of violent crimes, i.e., that the manufacturers profit from the downstream sale of guns that end up in criminals' hands. The theory was that the defendants' failure to control the practices of a small percentage of retailers was an "unfair" business practice. The appellate court in the *Firearms Cases* disagreed: "[W]e do not believe a UCL violation may be established without a link between a defendant's business and the alleged harm," and "[t]he UCL's provisions are not so elastic as to stretch the imposition of liability to conduct that is not connected to the harm by *causative* evidence."[25]

Anunziato v. eMachines, Inc.[26] disagrees with the aforementioned state case law because it believes that reading causation into the UCL (and Section 17500) "would subvert the public protection aspects of these statutes."[27] But *Anunziato* engaged in no statutory or "plain meaning" analysis and, indeed, failed to analyze even the facts before it. Instead, the court, mistaking its role for that of the

---

[24] *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 981.

[25] *Id.* at 981.

[26] (C.D. Cal. 2005) 402 F.Supp.2d 1133.

[27] *Id.* at 1137.

voters, based its decision on the perceived ill effects a "causation" requirement might have on a *hypothetical* situation involving a manufacturer's intentional "short-weighting" of cookies.[28] Straying even further afield, the court cited 2000 census data that 39% of Californians speak a second language at home and, from that, concluded that "the goal of consumer protection is not advanced" by a causation requirement.[29]

B. Proposition 64's "As a Result of" Language Should be Construed Consistently with the Interpretation California Courts Have Given Identical Words in Comparable Statutes.

"A statute that is modeled on another, and that shares the same legislative purpose is *inpari materia* with the other, and should be interpreted consistently to effectuate [legislative] intent."[30]

California's Consumer Legal Remedies Act (CLRA) contains the identical "as a result" language of Proposition 64. Only a consumer "who suffers any damage *as a result of* the use of a prohibited method, act, or practice" may sue.[31] This language has been consistently interpreted to impose a causation requirement: "Relief under the CLRA is specifically limited to those who suffer damage, making *causation* a necessary element of proof."[32]

---

[28] *Id.*

[29] *Id.* at 1138.

[30] *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1129.

[31] Civ. Code § 1780(a); italics added.

[32] *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754; *see Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 688; accord, *Chamberlan v. Ford Motor Co.* (N.D. Cal. 2005) 369 F. Supp.2d 1138, 1145.

The CLRA and the UCL both serve pro-consumer interests. It would make little sense to construe the two statutes' identical words differently.[33] "When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, . . . the use of them in a subsequent statute in a similar setting carries with it a like construction."[34]

C. Proposition 64's "As a Result of" Language Should be Construed Consistently with the Interpretation the Courts of Other States Have Given to Their Analogous "Little FTC Acts" to Require *Causation* for Misrepresentation.

Every state has enacted a form of "Little FTC Act" that, like California's UCL, is patterned on the federal FTC Act.[35] Many state "Little FTC Acts" permit private rights of action and, of those that do, most condition private recovery on a showing that plaintiff suffered a loss "as a result of" the violation. Significantly, every state whose "Little FTC Act" contains "as a result of" language has – without exception – interpreted its law to require either causation, or reliance, or both.[36]

A recent decision by the district court in New York is illustrative. In

---

[33] Plaintiff never mentions the CLRA in his Response, perhaps hoping that by ignoring it this court will follow suit.

[34] *Perry v. Jordan* (1949) 134 Cal.2d 87, 93.

[35] 15 U.S.C. § 45(a)(1).

[36] The decisions of the courts of other states interpreting their similarly-worded statutes are persuasive and serve as guides in the interpretation of California statutes of like import. (*See Erlich v. Municipal Court* (1961) 55 Cal.2d 553, 558; *see also Estate of Salisbury* (1978) 76 Cal.App.3d 635, 642.) Petitioner has listed 18 states that fit this mold. (*See* Petition, 7 n. 2.). In addition to those 18 listed states, one needs to add North Carolina. (*See Hageman v. Twin City Chrysler-Plymouth, Inc.* (M.D.N.C. 1988) 681 F.Supp. 303, 308 (interpreting N.C. Gen. Stat. § 75-16.)

construing South Dakota's Deceptive Trade Practices Act,[37] the court in a class action case held that the phrase "as a result of" means that "each Plaintiff will need to prove that Citibank *caused* his injury" and, further, that "proving causation requires that the alleged injury resulted from reliance on Citibank's omission or representation."[38] In that case, the court declined to certify a class of credit card users because "different class members used their Citibank credit cards with different understandings of their card member agreements," yet, "to prove causation, each Plaintiff must show that Citibank's disclosure of the conversion fees was inadequate, causing the cardholder to be deceived into using the Citibank card for foreign purchases when other more economical options were available."[39]

To read the UCL's "as a result of" language differently than the two dozen or more states that have interpreted their similar statutes to impart a causation requirement would have adverse consequences.[40] Listerine® is sold in all 50 states. Setting California apart would be the legal equivalent of putting a "Welcome" mat outside the doors of the California courthouses, signaling that consumer class actions over product claims that could not be certified anywhere else will find a home here. (*Cf., Osbornev. Subaru of America, Inc* (1988) 198

---

[37] The South Dakota statute provides: "Any person who claims to have been adversely affected by any act or a practice declared to be unlawful by [this chapter] shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." S.D. Codified Law § 37-24-31; emphasis added.

[38] *See In re Currency Conversion Fee Antitrust Litig.* (S.D.N.Y. 2004) 224 F.R.D. 555, 568.

[39] *Id.* at 568.

[40] Most notably, courts in both Illinois and New York, when faced with similar allegations against Pfizer, have denied class certification. *Elder v. Pfizer Inc.*, No. 05CH633 (Cir. Ct. Cook County, Ill. Feb. 17, 2006); *Whalen v. Pfizer Inc.*, No. 600125/05 (N.Y. Sup. Ct. Sept. 28, 2005).

Cal.App.3d 646, 664 ("Nor will we adopt a remedy—the gratuitous adjudication of this dispute in the courts of this state—the practical effect of which would be to bestow upon California the dubious distinction of becoming the class action capital of the country.").)

D. Proposition 64's "As a Result of" Language Should Be Construed Consistently With The Interpretation Federal Courts Have Given Misrepresentation Claims Under The Federal Truth in Lending Act.

The prevalence of consumer protection statutes with "as a result of" language is not limited to state statutes. The federal Truth in Lending Act (TILA) permits both individual and class actions for damages, but is conditioned by the same "as a result of" language as Proposition 64: "any actual damage sustained by such person *as a result of* the [defendant's] failure [to comply with TILA]."[41] The federal courts have had little difficulty reading "as a result of" to require proof by plaintiff of a causal link between the TILA violation and plaintiff's economic loss. Five federal Circuit Courts (including the Ninth) have considered the issue and all have held that the "as a result of" language in the TILA requires that plaintiffs must prove a causal link.[42]

In sum, Proposition 64 now requires that a plaintiff suing for monetary

---

[41] 15 U.S.C. §1640(a); emphasis added.

[42] *In re Geraldine Kay Smith* (9th Cir. 2002) 289 F.3d 1155, 1156-67; accord, *Turner v. Beneficial Corp.* (11th Cir.) 242 F.3d 1023, 1028 (*en banc*) ("plaintiff must present evidence to establish a causal link between the financing institution's noncompliance and his damages"), *cert den.* (2001) 534U.S. 820; *Perrone v. General Motors Acceptance Corp.* (5th Cir. 2000) 232 F.3d 433, 436; *Stout v. J.D. Byrider* (6th Cir. 2000) 228 F.3d 709, 718; *Peters v. Jim Lupient Oldsmobile Co.* (8th Cir. 2000) 220 F.3d 915, 917; *Bizier v. Globe Financial Servs., Inc.* (1st Cir. 1981) 654 F.2d 1, 4.

relief under California's UCL must prove causation.[43] This is clear from the plain language of the voter initiative, Proposition 64's "findings" as to its purpose; the interpretation the California courts have given the identical language found in the CLRA; the interpretation courts from other states have given the identical language found in their analogous "Little FTC Acts"; and the interpretation federal circuit courts have given identical language found in the federal Truth in Lending Act.

II. CAUSATION IS AN ELEMENT OF EVERY UCL CLAIM AND, AS SUCH, APPLIES TO EVERY ABSENT CLASS MEMBER.

The second issue this petition raises is whether the new causation requirement of Proposition 64 applies only to the named plaintiff, as respondent court held, or whether it applies equally to each class member. This issue caused respondent court the most difficulty, but it needn't have.

To begin with, well-settled principles of class action law require that an absent class member must have a claim in his own right before he can become a member of a class. In the second place, this issue is not new. The policy decision respondent court reached—of relaxing a substantive element (here, proof of causation) to facilitate adjudication of claims through a class action device—was

---

[43] As petitioner points out, the cases often blur causation with reliance. (*See* Petitioner's Response, pp. 8-11.) But here, it does not matter which label is used because, either way, respondent court certified this class in error. Under a "reliance" standard, each class member would have to show that he or she would not have bought Listerine® "but for" the allegedly false label or advertisement. But even under a "causation" standard, respondent court erred. After Proposition 64, a consumer whose only claim is nothing more than that he bought Listerine® during the class period would not necessarily have a UCL claim. First, he would have to show that he saw the advertisement or that the bottle carried the label that Listerine® is as effective as floss. Second, he would have to show that "as a result of" seeing the advertisement he suffered economic injury.

foreclosed by the Court in *Mirkin v. Wasserman.*

A. Respondent Court Misconstrued Class Action Law By Elevating Class Actions From Purely Procedural To Substantive Devices.

As petitioner points out, a class action is merely a procedural device for aggregating like claims and treating them together in order to avoid multiple, individual litigation.[44] But certifying a class necessarily assumes—and requires a determination—that each absent class member *has* a claim for which the named plaintiff's claim is "typical."

Mere participation in a class action cannot confer on an absent class member a substantive right or entitlement that he or she would not otherwise have. Yet, that is exactly the effect of respondent court's order. It allowed Galfano to aggregate the claims of persons who would otherwise lack the right to sue individually and thereby give them that right by authorizing recovery through a class action. That is error. "Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."[45]

No other California cause of action permits a shortcut to proof simply because the claim is asserted as a class action. Allowing that result under the UCL is directly contrary to Proposition 64, which expressly placed UCL class action on

---

[44] *See* Petition, pp. 32-35 and cased cited.

[45] *Mirkin v. Wasserman*, *supra*, 5 Cal.4th at p. 1103, citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462.

the *same* footing as other class actions.[46] It is also contrary to decades-old class action law. As the Court held in *Mirkin*, it must be proven that "*each class member* . . . read or heard the same misrepresentations ...."[47]

Plaintiff attempts to draw an analogy to federal securities cases in which "an inference or presumption of reliance arises as to the entire class."[48] There are two problems with this analogy. First, cases permitting a presumption of classwide reliance are limited to federal securities cases and, even then, the presumption arises only where plaintiff can establish that the same uniform and material misrepresentation was shown to each class member. Second, and more importantly, the Court rejected even that standard in *Mirkin*, itself a securities case. Plaintiff neglects even to mention *Mirkin*,[49] which this court must follow instead of any contrary rule by federal courts.[50]

Not only did respondent court get it wrong, it was error to defer the hard choices on this issue. A trial court must decide at the time of class certification how individual issues—here, individual questions of causation—can be resolved

---

[46] Section 17203, as amended by Proposition 64, requires that "[a]ny person may pursue representative claims for 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...." (Italics added.)

[47] *Mirkin*, *supra*, 5 Cal.4th at 1095; emphasis added.

[48] Opp. at 20.

[49] Plaintiff butchers the statute by reading the "and" out of Proposition 64. To be sure, Article III "case or controversy" requires "injury in fact." So too does Proposition 64. But Proposition 64 goes further: A UCL action can be brought only by "any person who has suffered injury in fact *and* has lost money or property as a result of such unfair competition." (Bus. & Prof. Code § 17204 [as amended by Proposition 64].)

[50] *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

manageably on a classwide basis. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 927.)[51]

B. *Mirkin v. Wasserman* Holds That a Trial Court Errs by Making The Policy Decision To Ignore Individual Questions of Causation When Certifying a Class.

Respondent court may have believed that by ignoring individual issues of causation in order to certify a class it was making a permissible policy-based decision, namely, furthering the pro-consumer features of the UCL. If so, that too is error foreclosed by *Mirkin v. Wasserman*.

In *Mirkin*, shareholders brought a class action for common law deceit and negligent misrepresentation against a corporation and others alleged to have intentionally misrepresented the corporation's financial condition in prospectuses and other public communications. Plaintiffs did not plead that they had read or heard the representations, but argued that they had purchased the securities in reliance upon the integrity of the securities market. They argued that classwide reliance should be presumed under the "fraud on the market" doctrine borrowed from the federal securities laws.[52] The Court said no, holding that a plaintiff suing for fraud or negligent misrepresentation under California law must prove each

---

[51] It would be a mistake to think that certification doesn't matter. Given the enormous amount of money at stake, certification becomes the decisive point in a class action. As Judge Posner has explained, certification of a class action, even one without merit, forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of bankruptcy to settle even if they have no legal liability...." (*In re Poulenc-Rorer, Inc.* (7th Cir. 1995) 51 F.3d 1293, 1299.)

[52] *Mirkin, supra,* 5 Cal.4th at 1088-89.

element of the claim as to *each* class member.[53] Critically, nothing about aggregating those claims into a class action suspends that substantive element. To the contrary: "Actual reliance is more than a pleading requirement; it is an element of the tort of deceit."[54] Furthermore, "there is little force in plaintiff's argument that we should reshape the law of deceit simply in order to remove an unnecessary pleading barrier to the effective utilization of class action procedures."[55]

Respondent court also ignored the *Mirkin*'s caution "that courts should be hesitant to impose new tort duties when to do so would involve complex policy decisions, especially when such decisions are more appropriately the subject of legislative deliberation and resolution."[56] In that, the Court could have been speaking of this case. The voters of this state enacted Proposition 64 for the purpose of adding causation as an element of a UCL claim. Ignoring that requirement in the case of class actions, or deciding it could be sorted out later after a class has been certified, is simply not an option.

C. Giving Meaning To Proposition 64's "Causation" Element Is Not Inconsistent With The Initiative's Express Provision Authorizing UCL Class Actions.

Plaintiff contends that to adopt petitioner's interpretation of Proposition 64 would render "mere surplusage" the provision of that initiative "that

---

[53] *Id.* at 1090-98.

[54] *Id.* at 1103.

[55] *Id.*

[56] *Id.* at 1104-05.

specifically allows class actions to be brought."[57] To the contrary, UCL class actions still can be brought—so long as they comply with Proposition 64's new requirements.

If plaintiff's "doomsday scenario" were correct, one would have predicted the end of CLRA class actions. After all, the CLRA contains the same "as a result of" language, which has been interpreted to require proof of causation.[58] Yet, that has not happened.[59]

Second, even as to the "fraudulent" prong, *Mirkin* observes that a "reliance" requirement is not necessarily inconsistent with class certification of a fraud or negligent misrepresentation claim. "[A]ctual reliance can be proved on a class-wide basis *when each class member has read or heard the same misrepresentations*...."[60] The Court drew a line between those claims that would be suitable to class action treatment, on the one hand, and those that would not, on the other. It distinguished the *Mirkin* facts by contrasting that case with the facts of two earlier Supreme Court decisions that had approved class certification because, there, plaintiffs were able to show that *identical* representations had been made "to *each* class member."[61] That same distinction ought to apply to the UCL, *post*-Proposition 64.

---

[57] *Cf.*, Opp. 22.

[58] See discussion *ante* at 22-23.

[59] *Cf. Massachusetts Mutual Life Ins. Co. v. Superior Court, supra,* 97 Cal.App.4th 1282 (affirming order certifying CLRA class action).

[60] *Mirkin, supra,* 5 Cal.4th at 1095; emphasis added.

[61] *Id.* at 1094-95; citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811-12 and *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 358.

Rather than being disfavored because it may hinder UCL class actions, the causation requirement ought to be favored because it serves the important filtering function (much as the reliance element in *Mirkin*) of ensuring consumers will not be allowed to sue based on "misrepresentations they never heard."[62]

This brings us full circle back to Proposition 64 and its principal purpose, which is to abolish UCL lawsuits in which "no client has been injured in fact" and those brought on behalf of "clients who have not used the defendant's product or service, [or]viewed the defendant's advertising, ..."[63] Respondent court's ruling effectively trashes this purpose and disenfranchises 59% of the California electorate.

If respondent court's interpretation stands, UCL class actions seeking recovery on behalf of uninjured consumers who have not used the defendant's product or service or viewed the defendant's advertising, will continue to vex honest businesses. Shakedown claims brought on behalf of persons who lost no money or failed even to see the advertisement or read the label will continue to flourish so long as counsel can find one person willing to state under oath that he or she read an ad, was misled, and bought in reliance thereon. So, instead of abolishing "general public" actions and putting UCL class actions on the same footing as all other class actions, Proposition 64 will have accomplished nothing except to force a modest change in litigation tactics.

---

[62] *Mirkin, supra*, 5 Cal.4th at 1094.

[63] Prop. 64, § 1(b),(b)(1)-(4).

The author of a recent law review article expressed it well:

> Increasingly, plaintiffs' lawyers are using consumer fraud statutes to pursue class actions based on manufacturers' alleged misrepresentations about their products. By themselves, these lawsuits are not troubling. But when consumers themselves have never relied on a manufacturer's misrepresentation, have never independently sought redress, and likely will never receive meaningful benefit from a suit (though their lawyers stand to make millions of dollars), these class actions become more akin to corporate blackmail than to consumer protection. [64]

CONCLUSION

For all the aforementioned reasons, this court should vacate respondent court's order certifying a class and reverse with directions that no UCL class may be certified under the circumstances presented.

Dated: April 20, 2006.

Law Offices of Fred J. Hiestand
A Professional Corporation
- and -
Morrison& Foerster, LLP

By_____
Fred J. Hiestand
William L. Stern
Attorneys for Amici Curiae
Civil Justice Association of California, California Chamber of Commerce, California Manufacturers and Technology Association, and California Bankers Association

---

[64] 43 *HARV. J. ON LEGIS.* 1, 2 (Winter 2006).

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 7,000 words.

Date: April 20, 2006

_____

Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On April 20, 2006, I served the foregoing document(s) described as: Application of the Civil Justice Association of California, California Chamber of Commerce, California Manufacturers and Technology Association, and California Bankers Association for Permission to File an Amici Brief in Support of Petitioner; and Amici Brief in *Pfizer Inc. v. Superior Court of Los Angeles County (Galfano)*, B188106 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

The Honorable Carl J. West
Los Angeles County Superior Court
600 S. Commonwealth Avenue
Dept. 311
Los Angeles, CA 90005

Office of the District Attorney
Los Angeles County
210 West Temple Street
18th Floor
Los Angeles, CA 90012

Ronald A. Reiter
Office of the Attorney General
Consumer Law Section
455 Golden Gate Ave.
Suite 11000
San Francisco, CA 94102

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102
Four Copies

Allan A. Sigel
Law Offices of Allan A. Sigel
1125 Gayley Avenue
Los Angeles, CA 90024
Attorney for Real Party in Interest

R. Duane Westrup
Christine C. Choi
Phillip R. Poliner
Westrup Klick LLP
444 West Ocean Blvd., Suite 1614
Long Beach, CA 90802
Attorneys for Real Party in Interest

Frederick Bennett
Superior Court of Los Angeles County
111 North Hill Street, Room 620
Los Angeles, CA 90012
Attorney for Respondent

Jeffrey S. Gordon
Kaye Scholer LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
Attorney for Petitioner

[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 20th day of April 2006 at Sacramento, California.

_____

David Cooper