IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PFIZER INC.

Petitioner,

vs.

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

Respondent,

STEVE GALFANO,

Real Party in Interest.

Court of Appeal No. B188106

Los Angeles County Superior Court
Case No. BC 327114

Trial Judge:
The Hon. Carl J. West

APPLICATION TO FILE AN AMICUS CURIAE BRIEF AND BRIEF AMICUS CURIAE OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER AND STATEMENT OF INTEREST OF AMICUS CURIAE

TO THE HONORABLE PRESIDING JUSTICE, SECOND DISTRICT COURT OF APPEAL:

Pursuant to California Court Rule 13, subdivision (c), amicus curiae Product Liability Advisory Council, Inc. ("PLAC") respectfully requests leave to file the accompanying brief in support of Petitioner Pfizer Inc. for a writ of mandate directing that the Superior Court vacate its November 22, 2005, Order certifying a class.

PLAC is a non-profit association with 134 corporate members representing a broad cross-section of American and international product manufacturers. (List of PLAC corporate members attached). These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 700 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

The lower court's order wrongly characterizes the need for class members to show injury in fact and "lost money or property as a result of" the alleged deception

as an "open issue" under the Unfair Competition Law (UCL) following Proposition 64. (Exhibits in Support of Petition page ("EXP") 010). The trial court's order also improperly accepts pre-Proposition 64 precedent that found no need for actual deception, reliance, and injury in certifying a class.

This case is of substantial interest to PLAC because the Superior Court's certification of the plaintiffs' UCL claim, if allowed to stand, threatens to undermine California's class-certification standards. Moreover, the decision thwarts voter intent in passing Proposition 64 and would mark a return to the abuses previously prevalent under the UCL. This decision has ramifications beyond consumer protection law. If actual injury and causation are not required under the UCL, then attorneys will be encouraged to recast traditional product liability claims as UCL claims when their clients cannot show the basic elements of proof of a product liability claim.

This amicus brief will assist the Court by discussing the policy basis for private rights of action under consumer protection statutes such as the UCL, and by showing the fundamental distinction between government enforcement and private actions. The brief will illustrate how failing to require basic elements of proof in private lawsuits brought under the UCL resulted in widespread abuse, leading to voter passage of Proposition 64. It will then discuss the public policy reasons why every plaintiff, including purported class representatives or members, bringing a UCL claim should be required to meet the minimal requirement of showing a loss of money or property as a result of reliance on the conduct alleged to be deceptive, or caused by conduct alleged to be unfair or unlawful. Finally, the brief will show why class

certification was not appropriate in this case, one in which it is apparent that members of the proposed class have widely varying motivations for purchasing the product at issue, and cannot show injury, causation, or damages on a classwide basis. For these reasons, the brief will respectively urge this Court to grant the petition for a writ of mandate and vacate the Respondent Court's November 22, 2005 Order certifying a class.

Dated: April 19, 2006

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Superior Court certified a class under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, of all persons who purchased Listerine in California between June 28, 2004 and January 7, 2005. The plaintiff, Steve Galfano, alleges that the manufacturer, Pfizer Inc., created a false impression through its labeling and advertisements during that period that Listerine could replace the use of dental floss in reducing plaque or gingivitis. Mr. Galfano does not claim that he suffered gingivitis, cavities, or any other dental condition, or even that he incurred increased dental-care expenses, as a result of reliance on the representations. On the contrary, he alleges only that "[d]uring the time that the Defendant made the above advertisements and representations, Plaintiff purchased Listerine." Complaint at 10. Moreover, the class includes anyone and everyone in California who purchased Listerine during a six-month period, regardless of whether they saw or heard and acted upon the allegedly deceptive advertising and labeling.

This approach conflicts with the letter and spirit of Proposition 64, is contrary to the will of the voters, and violates basic California class-certification standards. Consumers buy mouthwash, and a particular mouthwash product, for a multitude of reasons. These reasons may include freshening breath, brand loyalty, taste, comparative pricing, coupons and other promotions, as well as to provide a supplement to brushing and flossing. But, the lower court's certification of this class blends all of these people together in a class action Cuisinart™ even though it is highly probable that many never saw or even heard about the "effective-as-flossing"

representations at issue or had completely unrelated reasons for purchasing Listerine. Certification of such a class weakens class certification standards in California, and violates public policy and the will of the voters.

ARGUMENT

I. THE PUBLIC POLICY BEHIND CONSUMER PROTECTION ACTS AND THE DISTINCTION BETWEEN PUBLIC ENFORCEMENT AND PRIVATE LAWSUITS

California's UCL developed in sync with consumer protection law in much of the rest of the country, and California courts have recognized that, for example, precedent under sections of the Federal Trade Commission Act may be "more than ordinarily persuasive" in construing the UCL. *People ex rel Mosk v. Nat'l Research Co.*, 201 Cal. App. 2d 765, 772-73 (1962); *see Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 184-85 (1999) (drawing on section 5 precedent in discussing "unfairness" test). For that reason, PLAC believes that the Court may be assisted by a brief review of the development of federal consumer protection regulation, adoption of consumer protection statutes in the states, and the addition of private rights of action.

Before consumer protection statutes allowed private causes of action, consumers who were misled into purchasing a product or service relied on common law fraud and misrepresentation claims. These claims are sometimes difficult to prove because consumers bear the burden of proving that the defendant *intended* to deceive them. In addition, these types of claims did not provide an effective means to stop deceptive conduct before it resulted in harm or when the injury was small.

For these reasons, Congress established the Federal Trade Commission (FTC) in 1914 and expanded its authority to regulate consumer transactions in 1938. Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a) (2000)). When Congress first established the FTC, it considered, but ultimately rejected, an amendment that would have provided for private causes of action. There were many concerns with this amendment. First, legislators expressed a general concern that the vagueness of the terms "unfair" and "deceptive" could lead to limitless lawsuits. One Senator warned, "a certain class of lawyers, especially in large communities, will arise to ply the vocation of hunting up and working up such suits." 51 Cong. Rec. 13,113, 13,120 (1914) (statement of Sen. Stone). Members feared that "[t]he number of these suits . . . no man can estimate." *Id.* Second, members expressed unease that, given the broad wording of the statute, employers would have no way of knowing whether an advertisement or a business practice was "illegal" until they were hit with a lawsuit. *See, e.g.*, 51 Cong. Rec. 11,084-109, 11,112-16 (1914). What makes this legislative history so interesting today is that many members of Congress foretold the very problems that would arise in California and other states when they adopted and then added private causes of action to their consumer protection statutes. Eventually, as this brief will show, the voters of California addressed the problem. Unfortunately, the lower court's decision revived it.

Congress specifically declined to provide a private right of action. Congress addressed consumer concerns by providing that a five-person nonpartisan

commission, whose membership would include expertise in the business environment. They would determine whether conduct was unfair or deceptive.[1] In addition, it was decided that the FTC's authority would be primarily injunctive in nature, meaning that, after finding a deceptive practice, it would issue an order requiring the offender to cease and desist from that activity. If the offender disobeyed the order, then the Commission could impose hefty fines. In a bipartisan vote, Congress firmly rejected the inclusion of a private right of action under the FTC law. *Id.* at 13,149; *see also id.* at 13,150 (colloquy between Sens. Cummins and Clapp debating need for private remedy in addition to public enforcement).

States later adopted their own mini-FTC acts. The purpose of these laws, which were similar to the federal act, were to provide additional consumer protection enforcement, allowing use of the financial and human resources of the state attorney general or other government officials to protect the state's consumers. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 15-16 (2006). When the state laws were adopted, some included private rights of action. Many state laws, including California, initially did not permit private lawsuits, but were amended later to authorize them. *See id.* at 16 n.78.

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[1] *See* 51 Cong. Rec. at 11,108–09 (stating that the power to determine unfair practices would be placed in a nonpartisan Commission, composed of "a body of five men, intelligent men, . . . [including] lawyers, economists, publicists, and men experienced in industry, who will . . . be able to determine justly whether the practice is contrary to good morals or not") (statement of Sen. Newlands).

The flaw in such statutes and their expansive interpretation by some courts is that extending them to allow private lawsuits blurred the line between government enforcement and private litigation. Fundamental differences in purposes and incentives went unrecognized. For example, government enforcement is primarily injunctive and designed to stop deceptive conduct before it causes harm. Private lawsuits generally provide remedies for people who have suffered monetary harm. Government enforcement considers broad public interest and policy; private lawsuits are personal. Government enforcement are limited by human and financial resources, priorities, and, most importantly, public accountability. Private lawsuits have certain boundaries that are set by, among other things, the fundamental requirements of standing, and that plaintiffs show the defendant violated a duty and causation.

Some state courts have interpreted consumer-protection-based private causes of action as extending the broad authority of the state attorney general to private lawyers. This occurs most frequently when consumer protection statutes do not unambiguously require private plaintiffs to show such fundamental elements as an actual financial loss, reliance on the unfair or deceptive conduct, and that the practice actually caused the alleged injury. *See* Schwartz & Silverman, *supra*, at 18-21, 50-57. This leaves the statutes ripe for lawsuit abuse. It has led to increasing use of consumer protection statutes as a back-door to escape from the fundamentals of tort law. As one commentator has recognized, consumer protection laws are particularly susceptible to class-action abuse:

> By themselves, these lawsuits are not troubling. But when the 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.

Shiela B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 2 (2006). This was the case in California until Proposition 64. The trial court's class certification order revived the fundamental public policy error that Proposition 64 sought to correct – i.e., failing to make a rational distinction between government and private enforcement. It would be a public policy blunder to interpret the interface between Proposition 64 and the UCL, contrary to its new wording, in a manner that permits these types of abusive private lawsuits to resume.

II. CALIFORNIA'S EXPERIENCE LEADING TO PROPOSITION 64

Until voters passed Proposition 64 on November 2, 2004, the UCL had become the broadest consumer fraud statute in the nation. *See* Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, in 26 California Law Revision Commission Reports 227, 239-49 (1995) (comparing California's UCL to similar laws in sixteen other states). It was the poster child for an irony: consumer protection lawsuit abuse. A significant majority of Californians who voted on this issue made clear that UCL lawsuits, including class actions, should not go forward unless the plaintiffs could prove actual injury resulting from any alleged unfair

practice. The Superior Court's decision certifying a class in this case thwarts the voters' clear intent and purpose of Proposition 64.

A. The Gradual Expansion of Actions Under the UCL

Consumer protection regulation in California followed much the same pattern as the rest of the country, moving from a focus on business torts, to government consumer protection enforcement, to allowing private lawsuits. It then expanded well beyond the mainstream, essentially allowing lawyers to sue without a client for violations that caused no real injury to anyone. The absence of reasonable restraints placed small and large businesses alike in fear of unpredictable and uncertain liability.

Originally, the UCL provided a statutory cause of action for traditional business torts, *see* Fellmeth, *supra,* at 231, but then the statute and its interpretation were repeatedly stretched over the years. In 1933, California rewrote the UCL to provide injunctive relief for unfair competition, which was broadly defined to include fraudulent business practices and deceptive advertising. *See Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 129-30 (2000) (examining the history of the UCL). Notwithstanding this broad definition, the law was not relied on as the basis of general consumer protection actions until the late 1950's, and even then it was used principally by public prosecutors. *See id.* at 130.

In 1972, the UCL was interpreted to allow any member of the public to bring suit regardless of injury, but lawsuits remained constrained by the limitation on private relief to an injunction; a private individual could not obtain monetary damages or civil penalties. *See id.* (citing *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94

(1972)); *see also Chern v. Bank of America*, 15 Cal. 3d 866, 874 (1976) ("Private relief is limited to the filing of actions for an injunction and civil penalties are recoverable only by specified Public officers.") (internal citation omitted). In 1976, the California General Assembly amended the law to allow plaintiffs to seek restitution (and moved the law to the California Business and Professions Code). *See Kraus*, 23 Cal. 4th at 130. Representative actions by lawyers acting as "private attorney generals" could now be brought not only for injunctive relief, but also for significant monetary awards and (sometimes) substantial attorneys' fees.

The gradual and consistent loosening of the UCL allowed plaintiffs to file "Section 17200" or "private attorney general" actions without meeting the basic standing rules that California law normally required. Courts allowed any individual to bring an action on behalf of him or herself, a representative class, or the general public. The law did not require a plaintiff to show that he or she or anyone else had suffered any harm. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 570 (1998) (stating that a private individual can seek injunctive relief). Although plaintiffs were sometimes permitted to bring claims under the UCL as class actions, they could frequently avoid satisfying the procedural safeguards normally required in California class actions—adequacy, commonality, numerosity, and superiority, *see* Cal. Civ. Proc. Code §§ 382, 384, by merely bringing a claim as a "representative action" or "non-class class" action under the UCL, which arguably did not require these safeguards. "Defendants did not necessarily receive the protections that are available in class actions, including finality and protection against more than one

lawsuit arising from essentially the same allegations." Alexander S. Gareeb, *Evaluating the Retroactive Application of Proposition 64*, 28 L.A. Law., Mar. 2005, at 10.

The UCL allowed (and continues to allow) plaintiffs to bring claims for fraudulent conduct and unfair or unlawful acts. Fraudulent conduct is defined as conduct that is likely to deceive "the normally credulous consumer." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). Unlike plaintiffs who bring common-law fraud and misrepresentation claims, plaintiffs who brought UCL actions prior to Proposition 64 arguably did not need to show actual deception, reasonable reliance, or damages. *See, e.g., Comm'n on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211 (1983).

It is unclear what constitutes an "unfair" act. The California Supreme Court has rejected two different appellate court attempts to define the term because the attempts were "too amorphous and provide too little guidance to courts and business." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (1999). Ironically, it then established a third test that has only deepened the existing confusion. *See Bardin v. DaimlerChysler Corp.*, 136 Cal. App. 4th 1255, 1261 (2006) ("respectfully suggest[ing] that our Legislature and Supreme Court clarify the definition of 'unfair' in consumer actions under the UCL"). Some California appellate courts have found that unfair practices include violations of public policy as demonstrated by statutory or regulatory prohibitions. *See, e.g., Scripps Clinic v. Super. Ct.*, 108 Cal. App. 4th 917, 937-41 (2003); *Gregory v. Albertsons, Inc.*, 104

Cal. App. 4th 845, 854 (2002). Thus, under the UCL, an unfair business practice may include practices that violate another law.[2] *See Stop Youth Addiction*, 17 Cal. 4th at 562 ("[I]t is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs 'specific power' to prosecute unfair competition claims."). This type of claim therefore overlaps with the UCL's third prong, prohibiting "unlawful practices." The uncertainty as to what is prohibited conduct under the UCL underscores the importance of requiring all plaintiffs to satisfy basic principles of law, such as standing and causation, before proceeding with a claim.

The UCL provides courts with broad equitable power to make such orders and judgments as necessary to prevent future unfair acts and to restore any person in the amount acquired by the unfair act. Cal. Bus. & Prof. Code § 17203; *see also Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 180 (2000) (recognizing the trial court's "very broad" discretion in awarding equitable relief). The statute does not provide for monetary relief beyond restitution. Yet, under pre-Proposition 64 law, California courts sometimes ordered restitution even to those who were never influenced or otherwise harmed by the deceptive act. *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 454-55 (1979).

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[2] Courts in other states have found that consumer protection claims may not be alleged to effectively establish a private right of action for a violation of a statute where the legislature did not provide for such a remedy. *See, e.g., Conboy v. AT & T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001) (holding that where New York law only provided that the Attorney General or a District Attorney could commence an action for violation of the Fair Debt Collection Practices Act, "[p]laintiffs cannot circumvent this result by claiming that a violation is actionable as [a deceptive practices claim]" because it is contrary to legislative intent and at odds with the statutory scheme).

B. A History of Abuse

The loosened rules for standing and the broad scope of UCL actions led to substantial abuse involving small and large businesses alike. For example, plaintiffs' lawyers used the UCL to file thousands of suits against auto dealers and homebuilders across the state for technical violations such as using the wrong font size or an abbreviation, such as "APR," instead of "Annual Percentage Rate," and went after travel agents for not posting their license numbers on their websites. *See* John Wildermuth, *Measure Would Limit Public Interest Suits*, S.F. Chron., May 31, 2004, at B1; Walter Olson, *Stop the Shakedown*, Wall St. J., Oct. 29, 2004, at A14. They sued nail salons in Riverside and San Bernardino that used the same nail polish bottle for more than one customer. Amanda Bronstad, *Nail Salons Sued Under Unfair Competition Law*, L.A. Bus. J., Dec. 16, 2002, at 12. They sued a national lock manufacturer for labeling locks as "Made in the U.S.A.," when the locks included six screws made in Taiwan. *See* Olson, *supra*.

One UCL suit against Colorado Grill, a Fresno fast-food restaurant, claimed that the restroom mirror was an inch too high to meet disability requirements. Robert Rodriguez, *Business Coalition Seeks to Tighten Law, Lawyers Use Loophole to Sue, Group Says*, Fresno Bee, Sept. 24, 2004, at C1. In fact, a Beverly Hills law firm filed more than 2,200 claims against restaurants and auto repair shops on behalf of a front corporation located in Santa Ana. Monte Morin, *State Accuses Law Firm of Extortion*, L.A. Times, Feb. 27, 2003, at 5. The claims were based on technical violations of the state's Automotive Repair Act. The law firm sent the defendants

settlement offers that demanded payments ranging from $6,000 to $26,000. *Id.*[3]

Plaintiffs' lawyers sued AOL Time Warner, Disney, and Metro-Goldwyn-Mayer for using movie reviews from critics who received perks for their reviews. *See* John H. Sullivan, *California's All-Purpose Plaintiffs' Law Continues to Reach Out, Touch Everyone*, 10 Metro. Corp. Couns., Jan. 2002, at 52. These types of claims, so prevalent prior to Proposition 64, could return if individuals are permitted to bring class actions under the UCL for trivial violations on behalf of people who are not harmed at all.

C. Proposition 64 Was the Public's Response to this Abuse

On November 2, 2004, public outrage[4] over UCL lawsuits led California voters to overwhelmingly supported Proposition 64,[5] which limited the potential for abuse of the statute. This is at the heart of this case. In supporting Proposition 64, the voters

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[3] In early 2003, California Attorney General Bill Lockyer filed a Section 17200 lawsuit on behalf of the state *against* the law firm involved in suing restaurants and automobile repairs shops for abusing Section 17200. *Id.* Ultimately, the lawyers involved surrendered their licenses, rather than face disciplinary proceedings. *See* Traci Jai Isaacs, *Litigious Attorneys Give Up Licenses*, Daily Breeze (Torrance, Cal.), July 12, 2003, at A3.

[4] *See, e.g.*, Alexander S. Gareeb, *Evaluating the Retroactive Application of Proposition 64*, 28 L.A. Law., Mar., 2005, at 10; George Avalos, *Prop. 64 Draws Strong Arguments, State Measure Would Limit Right to Sue; Backers and Foes Both Predict Calamity If They Lose*, Contra Costa Times, Oct. 25, 2004, at 4; David Reyes, *Business Owners Rally Around Initiative to Limit Lawsuits; Proposition 64 Aimed at 'Shakedowns,' Would Weaken Unfair Competition Law*, L.A. Times, Sept. 16, 2004, at B3.

[5] *See* California Secretary of State, Statement of Vote and Supplement to the Statement of Vote, 2004 Presidential General Election, Nov. 2, 2004, at 45 (2004), http://www.ss.ca.gov/elections/sov/2004_general/ssov/formatted_ballot_measures_detail.pdf. (reporting 59% of voters voted in favor of Proposition 64).

specifically found that the UCL was being misused by some attorneys who, among other things, filed "lawsuits where no client has been injured in fact":

> (1) File frivolous suits as a means of generating attorney's fees without creating a corresponding benefit; (2) File lawsuits where no client has been injured in fact; (3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant; and (4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

Proposition 64, § 1(b) (2004). California voters realized that when left unchecked, the UCL, instead of protecting important consumer rights, resulted in unfair, uncertain, unpredictable, and substantial liability for businesses, especially small ones. That is why, through Proposition 64, voters made three changes to the law by requiring: (1) that only those who are injured can bring a claim; (2) causation, in that the alleged wrongful act must have "resulted in" injury in fact and loss of money or property to the plaintiff; and (3) application of class-action standards in UCL claims. All three issues are relevant to this appeal.

1. Plaintiffs Must Satisfy Basic Standing Requirements

The UCL now provides that "[a]ctions for relief pursuant to this chapter shall be prosecuted . . . by . . . any person who has suffered *injury in fact and has lost money or property* as a result of such unfair competition." Cal. Bus. & Prof. Code § 17204 (emphasis added). Injury is a basic requirement for standing. It is a core element that distinguishes private actions from government enforcement of consumer protection statutes. Despite the clear voter intent reflected in the statutory language, the Superior Court's November 22, 2006 order granting class certification curiously

characterizes the need for class *members* to fulfill the same "injury in fact" standing requirement as the class representative as an "open issue." (EXP 10). Thus, the lower court would permit one individual who has experienced an actual injury and "loss of money or property," as expressly required by Proposition 64, to bring a "representative" action on behalf of thousands of other people who are not injured and have not experienced a loss of money or property. Such an interpretation would roll back progress made by Proposition 64 and patently nullify the intent of California's voters.

2. *Causation is Required*

The Superior Court's November 22, 2006 Order on class certification fails to recognize the effect of Proposition 64 on causation. The court apparently considered the amendment to do no more than require standing of an individual plaintiff or the purported class representative. Citing pre-Proposition 64 precedent, the court stated that "California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury." (EXP 10).

The clear language of Propostion 64 and the history of abuse that led to it do not support this improper following of pre-Proposition 64 case law. Proposition 64 specifically requires causation. Under its plain terms, a plaintiff must show that that the allegedly wrongful act "resulted in" the claimed loss. Cal. Bus. & Prof. Code § 17204. In litigation alleging a misrepresentation, this requires that a plaintiff bringing an action under the UCL show that he or she was, in fact, deceived by the representation at issue. *See* Scheuerman, *supra*, at 45 ("As a practical matter,

damages cannot be 'caused' by a defendant's misrepresentation without reliance on the statement."). In addition, a court does not have the power to restore to anyone money or property that was not "aquired by means of [the] unfair competition." Cal. Bus. & Prof. Code § 17203. Thus, causation is required for anyone to sue or recover under the law, whether the purported class representative or purported class member.

Contrary to the plaintiff's assertions, requiring causation does not create a higher standard for UCL actions than common law fraud. Most notably, fraud, unlike the UCL, requires proof of intent to deceive. *See Leegin Creative Leather Prods. v. Diaz*, 131 Cal. App. 4th 1517, 1524 (2005) (citing *Wilkins v. National Broad. Co.*, 71 Cal. App. 4th 1066, 1081 (1999)). Nor does requiring causation eliminate the ability of plaintiffs to bring representative claims, as the plaintiffs argue.

3. Class-Action Standards Apply to UCL Claims

The third change is Proposition 64's application of ordinary class-certification standards to UCL claims. The language of Section 17203 now unambiguously states that representative claims by private individuals are permitted "only if the claimant meets the standing requirements of Section 17204 *and* complies with Code of Civil Procedure Section 382," the section governing class action lawsuits. Cal. Bus. & Prof. Code § 17203 (emphasis added); *see also id.* § 17535 (providing same standing requirements with respect to representative actions for untrue or misleading advertising). While the Attorney General's authority is not constrained by Proposition 64, a private party may no longer "act[ ] for the interests of itself, its members or the general public," as permitted by Sections 17204 and 17535 prior to

amendment. By its very terms, the UCL, as amended by Proposition 64, requires private plaintiffs, in both individual and class actions, to show standing and causation, and requires any purported class representative to be truly "representative."

III. THE IMPACT OF ALLOWING SUCH CLAIMS ON PRODUCT LIABILITY AND OTHER TORT LAW CLAIMS

Statutory actions under state consumer protection laws and other claims are distinct causes of action. But, the vague language of these laws, including the UCL, has enticed some plaintiffs' lawyers who may be unable to prove the fundamental elements of another statutory action, a common tort claim, or a contract claim to couch their lawsuit in consumer-protection terms. *See, e.g., Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150-53 (2003) (finding that plaintiff had improperly recast a tort claim as a UCL claim and "reaffirm that an action under the UCL "is not an all-purpose substitute for a tort or contract action"); *see also Avery v. State Farm Mut. Ins. Co.*, 835 N.E.2d 801, 835-38 (Ill. 2004) (finding that the plaintiffs' class action began as a claim for breach of contract, then was amended to add a statutory consumer fraud claim that simply restated the contract claim, and was amended yet again to change focus to avoid dismissal and maintain class certification). This is a particular problem with respect to product liability lawsuits in which a plaintiff who is unable to show a defective design alternatively alleges that a manufacturer is liable under a consumer protection statute because it misrepresented a product design, feature, or level of safety or effectiveness, or did not disclose certain risks or dangers associated with the product. *See generally* Philip E. Karmel & Peter

R. Paden, *Consumer Protection Law Claims in Toxic Torts Litigation*, 234 N.Y.L.J. 3 (2005) (commenting that consumer protection lawsuits are the latest in a "recurring motif in toxic torts litigation" where innovative plaintiffs' attorneys seek to assert a product liability claim without the need to prove that their client was injured by the product). While the case before this Court does not provide a clear example of such abuse, the Court should be cognizant of the impact of an expansive interpretation of the UCL on future tort law cases.

A recent example of this perilous trend is a group of class action lawsuits brought by fourteen residents and filed initially in eight states, including California, seeking $5 billion from DuPont stemming from its use of the popular nonstick coating, Teflon. The claims, filed in July 2005, allege that a chemical used in Teflon was dangerous and that DuPont failed to adequately warn consumers of the risk, despite no hard evidence that the chemical was harmful to humans when used in cookware. *See* Amy Cortese, *Will Environmental Fear Stick to DuPont's Teflon?*, N.Y. Times, July 24, 2005, at 34. While that sounds like a typical product liability lawsuit, plaintiffs' lawyers quickly pointed out that, under consumer protection laws, they "'don't have to prove that it causes cancer,'" but only that the company did not fully disclose information to the public. John Heilprin, *DuPont Hit With $5 Billion Suit Over Teflon Risks*, Assoc. Press, July 20, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1121763922530 (quoting plaintiffs' attorney Alan Kluger). Such lawsuits do not involve the everyday consumer transactions for which consumer protection claims were anticipated. Rather, they are "repackaged"

product liability claims where lawyers would have difficulty showing that the product is defective, that it caused any injury, or resulted in any loss to the plaintiff.

Despite suits of this nature, thus far, courts appear to have kept their collective finger in the dam. A Maryland case, *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 416-20 (D. Md. 2001), provides an example. In that case, Mr. Shreve and his wife brought a product liability action against the manufacturer and seller of a snow thrower, alleging that he was injured while using the machine because of an alleged defect in a safety device incorporated into the design. *Id.* at 410-16. The plaintiffs also alleged that the defendants committed an unfair and deceptive trade practice when they failed either to communicate to the plaintiff that the machine lacked an adequate guard or to depict the operation of the "impeller" blade, and when they committed other alleged misrepresentations in the owner's manual. *Id.* at 417. The court granted summary judgment for the defendants. *Id.* at 424. The court found that the mere sale of an allegedly defectively designed product was not a violation of the consumer protection law. *Id.* at 418.

Another example is a lawsuit that charged that OxyContin did not live up to its advertising claims as providing "smooth and sustained" relief. In that case, *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 175 (D.D.C. 2003), the dispute was essentially a product liability claim, yet the complaint alleged a violation of the District of Columbia's Consumer Protection Procedures Act. As the defendant observed, "[t]his is a product liability suit in which plaintiffs fail to allege any physical injury." *Id.* at 175-76. Relying on a similar Texas case in which a plaintiff

who was not injured sued a pharmaceutical manufacturer for not including warnings of the potential for liver damage and on grounds that the drug's labeling was defective, the court agreed and dismissed the claim. *See id.* at 177-78 (citing *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002)).

California courts should continue to hold this common-sense line. When a claim sounds in product liability or contract law, courts should not permit plaintiffs to assert UCL claims to eliminate well-reasoned requirements for a prima facie claim – as a back-door to escape the fundamental requirements of tort law. The legislative history of the UCL clearly shows that it was meant to address typical consumer transactions, not product design or "unfair" practices in other areas.

IV. THE FAILURE TO UPHOLD CLASS CERTIFICATION STANDARDS SUBVERTS THE FUNDAMENTAL PURPOSE OF PROPOSITION 64

As the proposition's history demonstrates, voters believed Proposition 64 would address the most egregious abuses of the UCL – frivolous lawsuits by uninjured parties and actions brought by individuals on behalf of others without class action safeguards. But, the certification of the class of Listerine consumers in this case shows that holes are already being poked through the rational shield that Proposition 64 was intended to provide.

Class actions place tremendous pressure on defendants to settle regardless of the merits or whether class certification is appropriate because an unfavorable ruling—however misguided—could result in millions (or billions) of dollars in liability. *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.

1995) (recognizing that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle"). For this reason, it is particularly important for California courts to ensure fair treatment in class actions asserting UCL claims brought by private individuals.

A. Class Certification Is Not Appropriate Where Causation and Damages Vary Significantly from Plaintiff to Plaintiff

The purpose of class actions is to provide an efficient vehicle for claim resolution where multiple plaintiffs have suffered nearly the same injury under the same law. Federal case authority is relevant in California for construing its rule. *See City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 453 (1974). The Federal Rules of Civil Procedure permit class certification only when "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The Advisory Committee's note to Rule 23 recognizes:

> [The class action rule] encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons *similarly situated*, without sacrificing procedural fairness or bringing about other undesirable results. . . . In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action. . . . On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action *if there was material variation in the representations made or in the kinds or degrees of reliance by the person to whom they were addressed.*

See Fed. R. Civ. P. 23, Adv. Comm. Note to Subdivision (b)(3) (emphasis added).

California law embraces the same principles. It requires those seeking class certification to demonstrate the existence of an ascertainable class and a well-defined

community of interest among the class members. *Bennett v. Regents*, 133 Cal. App. 4th 347, 354 (2005). The "community of interest" requirement encompasses the need to show (1) that questions of law or fact predominate over individual issues; (2) representation by plaintiffs who have claims typical of the class; and (3) class representatives who can adequately represent the class. *Id.* (finding class certification improper where showing severe emotional distress would require a case-by-case trial for each member of the class). Under well-established California law, all class members, not just the named plaintiff, must have suffered an injury to have standing "to bring the suit in his own right." *Collins v. Safeway Stores, Inc.*, 187 Cal. App. 3d 62, 73 (1986).

These requirements help ensure that class actions do not provide a mechanism to ignore the fundamentals of tort law through aggregation of claims and do not allow plaintiffs to prove liability through generic showings of elements of causes of action. For example, in *City of San Jose v. Superior Court*, a nuisance action in which plaintiffs' complained of noise from local airport, the court found that while landing and departure were "a fact common to all, liability can be established only after extensive examination of the circumstances surrounding each party" and recognized that "[c]lass 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." 12 Cal. 3d at 461-62. When individual issues such as causation and damages predominate, class certification is inappropriate because courts must decide these issues class member by class member. *See Newell*

v. State Farm Gen. Ins. Co., 118 Cal. App. 4th 1094, 1102-05 (2004) (finding class certification inappropriate in action against insurance company where each class member would have to show his or her insurance claim was wrongfully denied and individual damages).

Courts in several states have properly construed class action rules in recognizing that class actions brought under consumer protection statutes are improper when individual factual or legal issues predominate. For example, in *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 234-36 (Md. 2000), Maryland's highest court rejected a class action brought on behalf of all Maryland cigarette and smokeless tobacco users, a purported class of hundreds of thousands of people. Among the claims asserted by the class members was a claim that tobacco companies and their Maryland distributors violated several provisions of the Maryland Consumer Protection Act (MCPA). *Id.* at 206. The court reasoned that individual issues, chiefly reliance, predominated over common issues with respect to the class's MCPA claims. *Id.* at 234-36. "The unsuitability of such claims for class action treatment arises from the burden placed on [the class members] of proving individual reliance upon [Defendants'] alleged misrepresentations and material omissions . . . ." *Id.* at 234. Noting that reliance could vary significantly from plaintiff to plaintiff, the court stated, "[s]uch individual discrepancies obviously cannot be glossed over at trial on a class-wide basis but must be allowed to be delved into by [Defendants], class member by class member." *Id.* at 236.

Weinberg v. Sun Co., 777 A.2d 442, 446 (Pa. 2001), provides another example. In that case, the Pennsylvania Supreme Court rejected a class action brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (PUTP) against a producer of high-octane gasoline because individual questions of fact predominated over common ones. The court held that "[t]he [PUTP] clearly requires, in a private action, that a plaintiff suffer an ascertainable loss *as a result of* the defendant's prohibited action." *Id.* The court clarified this holding: "That means, in this case, a plaintiff must allege reliance, that he purchased [the high-octane gasoline] because he heard and believed [Defendant's] false advertising that [the high-octane gasoline] would enhance engine performance." *Id.*

These decisions illustrate that class action certification is inappropriate if individual factual issues such as causation and damages predominate, as in the case before this Court.

Here, the plaintiffs allege that the defendant's advertising and labeling of Listerine as being "as effective as flossing" was unfair and deceptive. Injury in fact and causation, however, as required by Proposition 64, cannot be shown on a class-wide basis in this case. First and foremost, common experience and knowledge tells us that consumers buy mouthwash for many different reasons. Some people buy it simply to freshen their breath. Others buy it to supplement dentist-recommended daily brushing and flossing. Some buy it because they recognize the brand, or it was on sale, or the bottle was the right size. Maybe they had a coupon, or their favorite brand was sold out, or they just wanted to try something new. There are many

reasons why people buy Listerine. It is wrong to assume that all or a majority of the alleged "class" members bought the product because of a simple representation in an advertisement or on a label. After Proposition 64, causation or harm in the abstract no longer can support a claim. Simply stated, any person who did not see or hear the alleged misrepresentation, or that did see or hear the misrepresentation but purchased the product for other reasons, fails to show the causation necessary to state a claim and cannot recover under the UCL. Cal. Bus. & Prof. Code § 17203.

Yet, the trial court's certification of this class lumps all of these people together, even though it is likely that many never saw or heard the "effective as flossing" representations at issue or had completely unrelated reasons for purchasing Listerine. Certification of such a class is contrary to class certification standards in California and would set poor precedent in both UCL and any other type of claim.

B. Typicality Is Lost When A Class Representative Seeks To Represent Individuals Who Cannot Show Injury In Fact

If the Superior Court's interpretation of the injury requirement of Proposition 64 is allowed to stand, it nullifies an additional rational restraint on class certification. The Superior Court's certification of the class implicitly found that only the class representative, and not each of the class members, needs to show injury in fact and a loss of money or property as a result of the practice to bring a claim. (EXP 10). As the court also recognized, however, the "typicality" requirement of class certification mandates that the class representative have the same interests and suffer the same injuries as members of the proposed class. *Id.* If the class representative,

Mr. Galfano, alleges that he experienced a financial loss as a result of the relying on the representation, but class members did not necessarily experience such a loss, or any injury at all, then this would preclude class certification, in addition to violating basic principles of standing applied by Proposition 64. It is fundamental that Mr. Galfano, who alleges a financial injury, can not represent a class composed of those whose injury is a matter of pure speculation, or non-existent.

CONCLUSION

For the foregoing reasons, the Product Liability Advisory Council, Inc., respectively urges this Court to grant the petition for a writ of mandate and vacate the Respondent Court's November 22, 2005 Order certifying a class.

Dated: April 19, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Paul B. La Scala, an attorney duly admitted to practice before all courts of the State of California and a member of the law firm of Shook, Hardy & Bacon L.L.P., attorneys of record for amicus curiae Product Liability Advisory Council, Inc., hereby certify that the attached brief complies with the form, size and length requirements of Cal. R. App. Pro. 14(b) and (c) in that it was prepared in proportionally spaced type in Times Roman 13-point, double spaced, and contains 7,532 words (including the headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) as measured by using the word count function of "Word 2000."

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PROOF OF SERVICE

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 5 Park Plaza, Suite 1600, Irvine, California 92614.

On April 19, 2006, I served on the interested parties in said action the within:

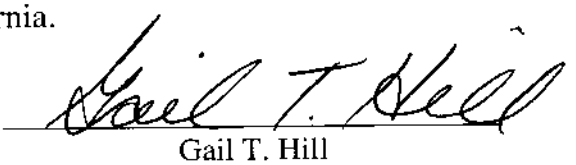
APPLICATION TO FILE AN AMICUS CURIAE BRIEF AND BRIEF AMICUS CURIAE OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

by placing a true copies thereof in sealed packaging addressed as stated on the attached mailing list.

☒ (MAIL) I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

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

Executed on April 19, 2006, at Irvine, California.



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APPENDIX A:

Corporate Members of the
Product Liability Advisory Council
as of March 2, 2006

3M
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Deere & Company
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.

Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Miller Brewing Company
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.