IN THE SUPREME COURT OF CALIFORNIA
No. S147345

IN RE TOBACCO II CASES, JCCP 4042

BROWN, et al.,
Plaintiffs-Appellants,

v.

PHILIP MORRIS USA, INC, et al.,
Defendants-Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One (No. D046435)

APPLICATION FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 22091
(703) 264-5300

Kevin Underhill (SBN 208211)*
Shook, Hardy & Bacon, L.L.P.
333 Bush Street, Suite 600
San Francisco, CA 94104-2828
(415) 544-1900

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, L.L.P.
600 14th Street, N.W., Suite 800
Washington, DC 20005-2004
(202) 783-8400

*Counsel of Record

Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.

IN THE SUPREME COURT OF CALIFORNIA
No. S147345

IN RE TOBACCO II CASES, JCCP 4042

BROWN, et al.,
Plaintiffs-Appellants,

v.

PHILIP MORRIS USA, INC, et al.,
Defendants-Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One (No. D046435)

APPLICATION FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 134 corporate members representing a broad cross-section of American and international product manufacturers. (A list of PLAC corporate members is provided in Appendix A). These companies seek to improve and reform the law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC derives its perspective from the experiences of a corporate membership that spans a diverse group of industries in various manufacturing sectors. In addition, several hundred of the country's

leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 700 briefs as *amicus curiae* in federal and state courts, including this Court, presenting a broad perspective of product manufacturers seeking fairness and balance in the law of product liability. This case is of substantial interest to PLAC, which filed a similar amicus curiae brief in the *Galfano* case.[1]

Overturning the Fourth District's order would undermine California's class-certification standards, thwart the voters' intent in passing Proposition 64, and threaten a return of the abuses previously prevalent under the UCL. It would also have 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 whenever 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, 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 UCL lawsuits resulted in widespread abuse, leading to the Prop 64 reforms, and will examine how courts in other states

---

[1] *See Pfizer Inc. v. Superior Court (Galfano)*, 45 Cal. Rptr. 3d 840 (Ct. App. 2006); *rev. granted*, No. S145775 (Cal. Nov. 1, 2006).

have addressed causation under similar consumer statutes. Finally, the brief also argues that 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 buying the product at issue, and cannot show injury, causation, or damages on a classwide basis.

PLAC urges this Court to uphold the lower court decisions denying class certification under the UCL, a common-sense result that honors the intent of the voters and the language of Prop 64.

March 26, 2007

Respectfully submitted,

Kevin Underhill (SBN 208211)*
Shook, Hardy & Bacon L.L.P.
333 Bush Street, Suite 600
San Francisco, CA 94104-2828
(415) 544-1900

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
(202) 783-8400

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091
(703) 264-5300

Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.

*Counsel of record

IN THE SUPREME COURT OF CALIFORNIA
No. S147345

IN RE TOBACCO II CASES, JCCP 4042

BROWN, et al.,
Plaintiffs-Appellants,

v.

PHILIP MORRIS USA, INC, et al.,

Defendants-Respondents.

**After a Decision by the Court of Appeal,
Fourth Appellate District, Division One (No. D046435)**

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 22091
(703) 264-5300

Kevin Underhill (SBN 208211)*
Shook, Hardy & Bacon, L.L.P.
333 Bush Street, Suite 600
San Francisco, CA 94104-2828
(415) 544-1900

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, L.L.P.
600 14th Street, N.W., Suite 800
Washington, DC 20005-2004
(202) 783-8400

*Counsel of Record

Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

Other Authorities

the plaintiffs' UCL claims inappropriate. A contrary ruling would thwart voter intent in passing Proposition 64, undermine California's class-certification standards, and threaten a return of the abuses previously prevalent under the UCL. It would also have ramifications beyond consumer protection law. If actual injury and causation are not required under the UCL, then attorneys will simply recast traditional product liability claims as UCL claims, bringing class actions based on hypothetical or nonexistent injuries. This would pose the same risks and potential for abuse that were the reason for Prop 64's passage in the first place.

STATEMENT OF THE CASE

PLAC adopts Respondents' Statement of the Case.

SUMMARY OF THE ARGUMENT

In this case, plaintiffs sought relief on behalf of millions of Californians who bought cigarettes between 1993 and 2001, though many of them began smoking decades earlier. These plaintiffs do not claim that they suffered a physical injury. Rather, they seek reimbursement for the purchase price of cigarettes based on the claim that they were misled by various representations of tobacco companies regarding the health hazards or addictiveness of smoking.

The case is not appropriate for class certification. Smokers began smoking at different times for different reasons. They chose to smoke a multitude of brands and types of cigarettes. Some smoked regularly, others

INTEREST OF AMICUS CURIAE

Amicus curiae, Product Liability Advisory Council, Inc. ("PLAC"), submits this brief in support of Respondents' request that the Court uphold the Court of Appeals' order denying class certification under the Unfair Competition Law (UCL) and False Advertising Law (FAL).

PLAC is a non-profit association with 134 corporate members representing a broad cross-section of product manufacturers. (*See* Appendix A). These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on products liability law. PLAC derives its perspective from the experiences of a corporate membership that spans a diverse group of industries in various manufacturing sectors. Hundreds of leading product liability defense attorneys 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. This case is of substantial interest to PLAC, which filed an amicus curiae brief addressing similar issues in the *Galfano* case, which this Court has also agreed to review. *Pfizer Inc. v. Superior Court (Galfano)*, 45 Cal. Rptr. 3d 840 (Ct. App. 2006), *rev. granted* No. S145775 (Cal. Nov. 1, 2006).

As in *Galfano*, in this case the Court of Appeal found certification of

Other Authorities

only socially. Over the course of many years, the purported class members would have been exposed to a wide variety of statements and messages about smoking, some promoting the activity and some discouraging it. Each person would have received different information about smoking risks and would have interpreted that information in his or her own way, meaning each may have been aware of different risks at different times.

Permitting this group of people to pursue a class action makes little sense. It would presume that they all heard or saw representations by the cigarette companies that they interpreted as downplaying health risks, that they all relied on those representations in deciding to smoke despite other widely disseminated information about the risks of smoking, and that they are all therefore entitled to a refund. Such an outcome is contrary to the letter and spirit of Prop 64 and violates basic California class-certification standards. The distinguished authority on civil procedure, Professor Charles Allen Wright, once opined that a class action purporting to include everyone who "has ever been 'addicted' to nicotine" would be a "Frankenstein's monster." *See Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.19 (5th Cir. 1996) (quoting 1994 letter from Professor Wright to N. Reid Neureiter).[2] In other words, it would be something stitched together from unrelated parts, with unpleasant results for virtually everyone

[2] Professor Wright was a member of the Advisory Committee on the 1966 amendment to the federal class action rule.

concerned. Of course, the proposed class definition in this case was much broader, and so the monster potentially much bigger, than the one Professor Wright feared.

The legal principles at issue here will affect more than just tobacco cases. For example, the *Galfano* case involves similar issues in a UCL class action purportedly brought on behalf of purchasers of Listerine mouthwash, claiming that it is not, as advertised, as "effective as flossing." In that case, it is clear that consumers buy mouthwash, and a particular mouthwash product, for a multitude of reasons including freshening breath, brand loyalty, taste, comparative pricing, coupons and other promotions, as well as to provide a supplement to brushing and flossing. But a trial court, accepting arguments similar to those asserted by Appellants here, certified a class that blended all of these people together even though it is highly probable that many of them never saw or even heard the representations at issue, let alone relied on them when purchasing the product.

This case presents the Court with an opportunity to provide guidance on crucial, related issues. First, this Court should make clear that the UCL requires every claimant to show that he or she suffered a loss of money or property that was caused by the defendant's challenged conduct. Second, the Court should reaffirm that class action principles do not permit a party to assert claims on behalf of others who do not have standing to bring a claim in their own right. A class action allowing claims by individuals who

were not harmed by the complained-of conduct confuses government enforcement with private actions, a situation that Prop 64 was designed to correct. Allowing individuals who were not harmed by a defendant's conduct to recover monetary awards is contrary to fundamental principles of justice, as well as simple common sense.

ARGUMENT

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

Like consumer protection law in many other states, California's law has been greatly influenced by practice under the Federal Trade Commission Act. California courts have recognized that FTC Act precedent 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 federal 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 evolution 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. Such claims

tend to be difficult to plead and prove; they must be pleaded with specificity, and plaintiffs bear the burden of proving, for example, 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)). The difficulty of successfully bringing a common-law fraud claim has long been considered appropriate, given the increased risk of baseless claims in the fraud context. On the other hand, some felt that the common law did not adequately protect consumers as a group, in part because it did not always provide an effective means to stop deceptive conduct before it resulted in harm or when the injury was small.

Partly for these reasons, Congress established the 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)). 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 proposed 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. William Joel Stone, D-MO). "The 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 after 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 foresaw the very problems that would later arise in California and other states.

Congress specifically declined to provide a private right of action under the FTC Act. It chose to address consumer concerns by providing that a five-person nonpartisan commission, whose membership would include expertise in the business environment, would determine whether conduct was unfair or deceptive. 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).

States later adopted similar laws, which came to be called "mini-FTC" acts. The purpose of these laws was to provide additional consumer protection enforcement, allowing use of the financial and human resources

supra, at 18-21, 50-57. And it should not be surprising that this kind of power, sooner or later, is abused. As commentators have recognized, vague consumer protection laws are particularly susceptible to class-action abuse, especially when important elements like causation or reliance are absent:

> 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.

Sheila 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 frequently the case in California until Prop 64. The Court of Appeal's order affirming decertification of the class in this case recognized the fundamental public policy error that Prop 64 sought to correct – failing to preserve the necessary distinction between government and private enforcement. It would be bad public policy to interpret the nexus between Prop 64 and the UCL in a manner that permits these types of abusive private lawsuits to resume.

II. CALIFORNIA'S EXPERIENCE LEADING TO PROPOSITION 64

A. The Gradual Expansion of Actions Under the UCL

As in the rest of the country, consumer protection law in California

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). Some of these laws created private rights of action. Many state laws, including California's, initially did not permit private lawsuits, but were amended later to authorize them. *See id.* at 16 n.78.

Extending these statutes to allow private lawsuits blurred the line between government enforcement and private litigation. But fundamental differences in purposes and incentives went unrecognized. For example, government enforcement is primarily injunctive, designed to stop deceptive conduct before it causes harm. Private lawsuits generally provide remedies for people who have already suffered monetary harm. Government enforcement considers and emphasizes broad-based public interest and policy. Private lawsuits are personal and the public interest is usually not relevant. Government enforcement is limited by human and financial resources, public priorities, and, most importantly, public accountability. Private lawsuits lack this accountability, and their boundaries have traditionally been set by, among other things, the fundamental requirements of standing and the need to prove breach of duty and causation of harm.

Where these fundamental requirements are not present, therefore, a private party has essentially been given the broad authority of the state attorney general without meaningful restraints. *See* Schwartz & Silverman,

evolved from its original focus on business torts, to government enforcement of consumer protection issues, and eventually to private causes of action. But it then expanded well beyond the mainstream, ultimately allowing lawyers to sue without a client and 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, but the statute and its interpretation were repeatedly stretched over the years. *See* Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 Cal. Law Rev. Comm. Reports 227, 231 (1995). 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 1950s, and even then it was used mainly 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 private lawsuits were still limited by the restriction on private relief to an injunction. A private individual could not obtain monetary relief or civil penalties. *See id.* (citing *Barquis v.*

Merchants Collection Ass'n, 7 Cal. 3d 94 (1972)); *Chern v. Bank of America*, 15 Cal. 3d 866, 874 (1976). In 1976, however, the Legislature amended the law to allow plaintiffs to seek restitution (and moved the law to the 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 "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 himself or herself, some larger group of people, or the "general public." The law did not require a plaintiff to show that anyone (plaintiff included) had suffered any harm. *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 570 (1998).

Although plaintiffs were sometimes permitted to bring UCL claims as class actions, they frequently avoided the procedural safeguards normally required in California class actions—adequacy, commonality, numerosity, and superiority (*see* Cal. Civ. Proc. Code § 382) by merely bringing a claim as a "representative action" or "non-class class" UCL action. In such cases, "[d]efendants 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.

Compounding these problems were the vague standards as to exactly what conduct the UCL covered. Plaintiffs who brought deceptive-business-practice UCL actions prior to Prop 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). Exactly what they *did* need to show was far from clear. Similarly, the prohibition on "unfair" acts has been and remains a source of confusion. This Court previously stated its concern that existing definitions were "too amorphous and provide too little guidance to courts and business." *Cel-Tech Communications, Inc*, 20 Cal. 4th at 185. Years later, many lower courts remain baffled. *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"). The uncertainty as to what is prohibited under the UCL underscores the importance of requiring 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 interest 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-Prop 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).

B. A History of Abuse

By the time of Prop 64, the UCL had become the broadest consumer protection statute in the nation. *See* Fellmeth, 26 California Law Revision Commission Reports at 239-49 (comparing California's UCL to similar laws in sixteen other states). And perhaps inevitably, its ever-expanding scope led to abuse.

For example, plaintiffs' lawyers exploited 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 pursued 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. Others sued nail salons in Riverside and San Bernardino that used the same nail polish bottle for more than one customer. *See* Amanda Bronstad, *Nail Salons Sued Under Unfair Competition Law*, L.A. Bus. J., Dec. 16, 2002, at

12. They sued a lock manufacturer for labeling locks "Made in the U.S.A." when the locks included six screws made in Taiwan. *See* Olson, *supra*. One UCL suit against a Fresno fast-food restaurant claimed that the restroom mirror was one inch too high to meet disability requirements. *See* Robert Rodriguez, *Business Coalition Seeks to Tighten Law, Lawyers Use Loophole to Sue, Group Says*, Fresno Bee, Sept. 24, 2004, at C1.

In another well-known case, a Beverly Hills law firm filed more than 2,200 claims against small businesses on behalf of a front corporation located in Santa Ana. *See* Monte Morin, *State Accuses Law Firm of Extortion*, L.A. Times, Feb. 27, 2003, at 5. In early 2003, Attorney General Lockyer sued the law firm on behalf of the state for abusing Section 17200. *See 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.

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

On November 2, 2004, the public responded to the UCL controversy[3] by overwhelmingly supporting Prop 64.[4] The voters evidently

[3] *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.

[4] *See* California Secretary of State, Statement of Vote, 2004 General Election, *available at* www.ss.ca.gov (59% of voters supported Prop 64).

agreed that the UCL was being misused by many attorneys who, among other things:

> (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.

Prop 64, § 1(b) (2004). 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 Prop 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.

III. THE UCL NOW REQUIRES PLAINTIFFS TO SHOW CAUSATION AND SATISFY BASIC PRINCIPLES OF CLASS CERTIFICATION

A. Causation is Required

1. The Effect of Proposition 64

Prop 64 specifically requires causation. Under its plain terms, a plaintiff must show that the loss occurred "as a result of" the unfair

competition. Cal. Bus. & Prof. Code § 17204. Similarly, a court does not have the power to restore to anyone money or property that was not "acquired by means of [the] unfair competition." Cal. Bus. & Prof. Code § 17203. Where the alleged wrongful act is a misrepresentation, therefore, these changes necessarily mean that a plaintiff must show the misrepresentation "resulted in" the loss and that the defendant acquired property from plaintiff "by means of" the deceit:

> In order to be influenced by the representation, the plaintiff must have of course relied upon it and believed it to be true. If it appears that he knew the facts, or believed the statement to be false, or that he was in fact so skeptical as to its truth that he reposed no confidence in it, it cannot be regarded as a substantial cause of his conduct.

William L. Prosser, The Law of Torts § 108, at 714 (4th ed. 1971).

The Court of Appeal properly recognized that it is inappropriate to simply presume that each and every purported class member relied upon the alleged misrepresentations – that doing so ignored the real and highly individualized facts at issue. *See In re Tobacco II Cases*, 47 Cal. Rptr. 3d 917, 920-26 (Ct. App. 2006). Causation must be proven, not presumed.

2. *Other States Have Interpreted The Language of Their Consumer Protection Laws to Require Causation*

The need to show causation under the UCL aligns with the unfair trade practices laws of many other states. All jurisdictions, with the exception of the District of Columbia, require plaintiffs acting under their

consumer protection laws to establish causation. *See* Scheuerman, *supra*, at 44 (citing all state statutes). California now is no different.

Consumer protection laws in some states, such as Arizona, Indiana, and Texas, are considered to require causation because they explicitly mention reliance. *See* Ariz. Rev. Stat. § 44-1522A; Ind. Code Ann. § 24-5-0.5-4(a); Tex. Bus. & Comm. Code Ann. § 17.50(a). But that language is not necessary, although reliance and causation are often the same thing in a misrepresentation case. Courts in other states have found that causation is required by language stating that harm must be "as a result of" the allegedly wrongful act, the same language that appears in the UCL and CLRA.

For instance, under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), "[a]ny person who . . . suffers any ascertainable loss of money or property, real or personal, *as a result of* the use or employment by any person of a method, act or practice declared unlawful . . . may bring a private action. . . ." Pa. Unconsol. Stat. § 201-9.2 (emphasis added). That language requires Pennsylvania consumers to allege and prove causation; as the state supreme court held in a case involving gasoline, plaintiff had to show he "purchased [the high-octane gasoline] because he heard and believed [Defendant's] false advertising that [the high-octane gasoline] would enhance engine performance." *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001); *see also Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 439 (Pa. 2004) (affirming dismissal of

UTPCPL claim).

Georgia law provides another example. An individual "who suffers injury or damages *as a result of* consumer acts or practices" in violation of Georgia's Fair Business Practices Act may bring a claim. Ga. Code Ann. § 106-1210 (emphasis added). Georgia courts have consistently interpreted this language to incorporate causation in the form of justifiable reliance. *See Zeeman v. Black*, 273 S.E.2d 910, 916 (Ga. 1980); *Allen v. Remax North America*, 445 S.E.2d 774, 776 (Ga. Ct. App. 1994); *Condon v. Kunse*, 432 S.E.2d 266, 269-70 (Ga. Ct. App. 1993).

Oregon's law is the same. *Feitler v. The Animation Celection, Inc.*, 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (equating "as a result of" language with causation).

Similarly, North Carolina law provides that "if any person shall be injured . . . *by reason of* any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person . . . shall have a right of action on account of such injury done. . ." N.C. Code § 75-16 (emphasis added). North Carolina courts have interpreted this language to require a showing that the plaintiff detrimentally relied on the representation at issue. *See, e.g., Pearce v. American Defender Life Ins. Co.*, 343 S.E.2d 174, 181 (N.C. 1986) (finding insured had shown sufficient evidence of detrimental reliance and could proceed with claim); *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 650-51 (N.C. App. Ct. 1990)

(holding recovery "limited to those situations when a plaintiff can show that plaintiff detrimentally relied [and] 'suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation'"); *see also Finstad v. Washburn University*, 845 P.2d 685 (Kan. 1993) (dismissing claim under state consumer protection act where students claimed to be "aggrieved" though they conceded they had not relied on statement).

While many of these decisions discuss "reliance," and reliance is often if not always the element of causation in a fraud case, whether "reliance" must be shown is not really the question on appeal. The Court of Appeals held that the issue of proximate causation, not "reliance," was the issue that could not be addressed on a class basis. Whether or not reliance is technically required, causation clearly is, and all the same individual issues therefore exist. *See, e.g., Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 155, 161 (Ill. 2002) (holding it was unnecessary to determine precise relationship between causation and reliance in consumer protection statute because plaintiffs' claim failed under causation principles in any event).

B. Class Certification is Inappropriate Where Standing is Lacking, Individual Issues Like Causation Predominate, and Typicality is Missing

Class actions place tremendous pressure on defendants to settle regardless of the merits or whether 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 class action "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.

1. All 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, and it is a core element that distinguishes private actions from government enforcement of consumer protection statutes. Both the trial court and Court of Appeal in this case properly understood the effect of applying ordinary class action principles to UCL claims. The Court of Appeal recognized that "[t]he definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his own right." *In re Tobacco II Cases*, 142 Cal. App. 4th at 921 (quoting *Collins v. Safeway Stores, Inc.*, 187 Cal. App. 3d 62, 73, 231 Cal. Rptr. 638 (1986)).

As a preliminary matter, this Court should make clear that every person who brings a claim under the UCL, individually or as a member of a class action, must meet this basic standing requirement.

2. *Prop 64 Applied Ordinary Class Action Standards to UCL Claims*

In addition to applying foundational principles of standing to UCL claims, Prop 64 applied ordinary class-certification standards to such claims. As the proposition's history demonstrates, voters believed Prop 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. The Appellants' argument seeking certification of the class of consumers in this case fails to respect voter intent and should be rejected.

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 limited 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 terms, the UCL, as amended, requires private plaintiffs, in both individual and class actions, to show standing and causation, and requires any purported class representative to be truly "representative."

3. *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. They do not alter substantive prerequisites to civil actions. Like California's class action rules, 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); *see also City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 453 (1974). The Advisory Committee's note to Federal Rule of Civil Procedure 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 Subd. (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*, 187 Cal. App. 3d at 73.

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 a 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." 12 Cal. 3d at

461-62. The Court 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." *Id.* 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 claim was wrongfully denied and prove 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 *Weinberg v. Sun Co.*, discussed above, the Pennsylvania Supreme Court rejected class certification because individual questions as whether the each plaintiff heard and believed the defendant's representations regarding high-octane gas enhancing engine performance, and purchased gas in reliance on such advertising, predominated over common ones. *Weinberg*, 777 A.2d at 446.

Likewise, the Supreme Court of Texas has rejected a consumer class action brought by 20,000 dentists alleging that the makers of office management software deceptively advertised their product. *See Henry*

Schein, Inc. v. Stromboe, 102 S.W.3d 675, 693–94 (Tex. 2002). In that case, the court found that there was no evidence that purchasers *actually* and *uniformly* relied upon the advertisements and representations made by the defendant in deciding to purchase the software, but that some had relied on recommendations from colleagues and others. *See id.* at 694. The court denied class certification, finding:

> [T]he 20,000 members in the present case are held to the same standards of proof of reliance—and for that matter all the other elements of their claims—that they would be required to meet if each sued invidually. . . . [E]vidence insufficient to prove reliance in a suit by an individual does not become sufficient in a class action simply because there are more plaintiffs. Inescapably individual differences cannot be concealed in a throng.

Id. at 693.

These principles were applied in the tobacco context in *Philip Morris Inc. v. Angeletti*, where Maryland's highest court rejected a consumer class action brought on behalf of all Maryland cigarette and smokeless tobacco users because individual issues predominated. *Angeletti*, 752 A.2d at 234-36. Noting that proof of causation and reliance could vary significantly from plaintiff to plaintiff, the court recognized that "[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.

These decisions illustrate that class certification is inappropriate if

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. But the "typicality" requirement of class certification precludes this. Indeed, Appellants are arguing for a result that would permit a plaintiff to act on behalf of a class of which, *by definition*, plaintiff would not be "typical." It is fundamental that a class representative who alleges a financial injury cannot represent a class composed of those whose injury is a matter of speculation, or non-existent.

The United States Court of Appeals for the Seventh Circuit recently addressed this issue in a case in which the class representative claimed she was tricked by Coca-Cola into believing that the sweetener used in fountain Diet Coke (aspartame and saccharin) was the same as that used in bottled Diet Coke (aspartame only). *See Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006). She brought the claim under the Illinois Consumer Fraud and Deceptive Practices Act (ICFA) seeking disgorgement of all profits from the sale of fountain Diet Coke in Illinois on behalf of all individuals in the state who purchased fountain Diet Coke for consumption from 1999 until the date of class certification. *See id.* at 510. The class representative claimed she was deceived, but recognized that Coke's marketing of the product may have been only a minor factor in the purchasing decisions of other class members and some members may have known of the presence of saccharin in fountain Diet Coke, but bought it anyway. *See id.* The

individual factual issues such as causation and damages predominate, as in the case before this Court. First and foremost, common experience and knowledge tell us that consumers begin to smoke and select a cigarette brand and type for many different reasons. It is wrong to simply presume that all or a majority of the alleged "class" members bought the product due to health representations made by the defendants. After all, individuals engage in a wide variety of behaviors despite the health or safety risks. After Prop 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 who did see or hear it but bought 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.

Appellants urge this Court to require the trial court to certify a class that would lump all smokers together, even though it is likely that they had substantially varying reasons for purchasing the product. Certification of such a class is contrary to class certification standards in California and would set poor precedent in both UCL cases and any other type of claim.

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

If this Court accepts the Appellants' interpretation of the injury requirement of Prop 64, it would nullify an additional restraint on class certification. The Appellants ask this Court to implicitly find that only the

Seventh Circuit affirmed the trial court's denial of class certification due to the absence of injury for some class members and the lack of typicality. *See id.* at 514. The court recognized that the proposed class "could include millions who were not deceived and thus have no grievance under the ICFA." *Id.* Likewise, class certification in this case would allow a class representative to sue on behalf of people whose claims are not typical of his own and on behalf of many individuals who are not injured at all.

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

The Court should be cognizant of the impact that an expansive interpretation of the UCL would have on future tort cases. 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-law 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 reaffirming 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 plaintiffs' class action began as a contract claim, then was amended to add

a statutory consumer fraud claim that simply restated the contract claim, then was amended yet again).

This is a problem especially in product liability lawsuits in which a plaintiff who is unable to show a defective design alleges instead 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).

The case before this Court provides a classic example of such abuse. For example, it is clear under federal law and state court decisions that failure-to-warn claims involving advertising and promotion after July 1, 1969, are expressly preempted under the Federal Cigarette Labeling and Advertising Act. *See* 15 U.S.C. §§ 1331 to 1341; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 (1992); *see also Whiteley v. Philip Morris, Inc.*, 117 Cal. App. 4th 635, 667-68 (2004) (interpreting *Cipollone*; noting that trial court applied Labeling Act preemption and properly instructed jury on the issue). Almost all courts have found it inappropriate to certify

personal injury claims of smokers, given the great variations in individuals' smoking behavior, exposure to other substances, health backgrounds, and injuries. *See e.g., Barnes v. American Tobacco Co.*, 161 F.3d 127, 135 (3rd Cir. 1998); *Castano v. American Tobacco Co.*, 84 F.3d 734, 739-40 (5th Cir. 1996); *see also Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1267-70 (Fla. 2006) (allowing some class findings to stand but decertifying class as to individual issues of legal causation, comparative fault and damages).

Here, of course, the plaintiffs' claims post-date July 1, 1969. Faced with dismissal as the likely outcome of a personal injury or product liability class action, plaintiffs have styled what is essentially a failure-to-warn claim with no injury and no true damages as a UCL class action. Likewise, in the *Galfano* case, the plaintiffs allege that Listerine was not as effective as flossing, yet they do not allege any harmful effect on their teeth or any increased dentistry expenses. *See Pfizer Inc.*, 45 Cal. Rptr.3d at 845. If this Court accepts appellants' arguments it would allow the mass recruiting of thousands or millions of individuals who simply purchased the product at issue, without the need to show that they experienced an injury, physical or economic, as a result of the defendant's conduct.

UCL claims are not just being used to circumvent product liability law with respect to tobacco lawsuits. Another prime example of a product liability claim masquerading as a claim under the UCL is a group of class action lawsuits filed in Sacramento and Los Angeles on behalf of all

Californians who purchased, owned, or leased Ford Explorers between 1990 and 2000. The class action, which was certified by the Superior Court, does not seek to show that the Explorer was defective. See Ruling on Submitted Matter, Motion for Class Certification, *Bridgestone/Firestone Tire Cases I & II*, JCCP Nos. 4266 & 4270 (Cal. Super. Ct., Sacramento Cty, Feb. 8, 2005). Rather, it alleges that vague representations regarding safety, such as the "Ford Tough" logo, combined with less than complete disclosure regarding the rollover risk of the vehicles, entitles each and every purchaser to restitution. *See* Ruling on Submitted Matter, Ford Motor Company's Motion for Partial Summary Adjudication on Plaintiffs' Unfair Competition Law and False Advertising Claims, *Bridgestone/Firestone Tire Cases I & II*, JCCP Nos. 4266 & 4270 (Cal. Super. Ct., Sacramento Cty, Mar. 23, 2007). In essence, the plaintiffs are essentially attempting to reinvent a product liability claim without showing a defect and without showing an injury. If these types of claims are allowed to prevail under the UCL, California may find itself as the court of last resort for the country's failed product liability claims.

Yet another example of this perilous trend is a group of class action lawsuits filed in at least twenty 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 the lack of 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; U.S. Envt'l Protection Agency, Perfluorooctanoic Acid (PFOA) and Fluorinated Telomers, *at* http://www.epa.gov/opptintr/pfoa/ (stating that the EPA "does not have any indication that the public is being exposed to PFOA through the use of Teflon®-coated or other trademarked nonstick cookware"). 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 that consumer protection claims were intended to protect. 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. Better-reasoned cases have rejected this kind of repackaging. A Maryland case provides an example. *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 416-20 (D. Md. 2001). 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. *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. *Id.* at 417. 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, 424.

Another example is a lawsuit charging that OxyContin did not live up to its advertising claims as providing "smooth and sustained" relief. *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 175 (D.D.C. 2003). Again, this dispute was essentially a product liability claim, yet the complaint alleged a violation of the District's consumer protection act. Relying on a similar Texas case, the court dismissed the claim. *See id.* at 177-78 (citing *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002)).

California courts, too, should continue to hold the line. When a claim truly 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 warnings that are better evaluated under well-settled

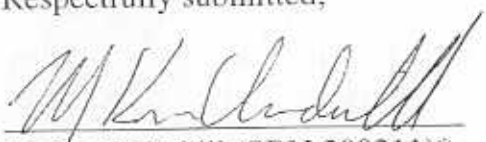
product liability law.

CONCLUSION

For the foregoing reasons, the Product Liability Advisory Council, Inc., respectfully urges this Court to affirm the decision of the Court of Appeal and make clear that each individual class member must show a loss of money or property caused by the defendant's conduct to bring a UCL action following Proposition 64.

Dated: March 26, 2007

Respectfully submitted,



Kevin Underhill (SBN 208211)*
Shook, Hardy, & Bacon L.L.P.
333 Bush Street, Suite 600
San Francisco, CA 94104-2828
(415) 544-1900
Counsel of Record

Victor E. Schwartz
Cary Silverman
Shook, Hardy, & Bacon L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
(202) 783-8400

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091
(703) 264-5300

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I, Kevin Underhill, 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 Rule 8.520 and 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point, double spaced, and contains less than 11,045 words as measured by using the word count function of "Word 2000."

Kevin Underhill (SBN 208211)
Shook, Hardy & Bacon L.L.P.
333 Bush Street, Suite 600
San Francisco, CA 94104-2828
(415) 544-1900

Attorney for Amicus Curiae Product Liability Advisory Council, Inc.

PROOF OF SERVICE

I HEREBY CERTIFY THAT ON THIS 26th day of March, 2007, I caused an original and four copies of the foregoing Application to File an Amicus Curiae Brief and Brief Amicus Curiae of Product Liability Advisory Council, Inc. in Support of Petitioner to be manually filed with the clerk of the Supreme Court. I also caused a copy to be mailed via First Class Mail to the following recipients and one copy mailed to the clerk of the Superior Court in compliance with Rule 8.212(c) of the California Rules of Court:

Administrative Office of the Courts
Attn: Carlotta Tillman
455 Golden Gate Ave., 6th Fl.
San Francisco, CA 94102

Hon. Ronald S. Prager
c/o Clerk of the Court
San Diego County Superior Court
330 West Broadway
San Diego CA, 92101

Clerk of the Court
California Court of Appeal
Fourth District, Division One
750 "B" Street, Suite 300
San Diego CA, 92101-8189

Ronald A. Reiter
Supervising Deputy Attorney General
Office of the Attorney General
Consumer Law Section
455 Golden Gate Avenue
Ste. 11000
San Francisco, CA 94102

Thomas D. Haklar
DOUGHERTY, HILDRE & HAKLAR
2550 Fifth Avenue, Suite 617
San Diego CA, 92103

William T. Plesec
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, OH 44114-1190

Bonnie Dumanis, D.A.
Office of District Attorney

H. Joseph Escher III
DECHERT LLP

Hall of Justice
330 West Broadway, Rm. 1300
San Diego CA, 92101

William S. Boggs
DLA PIPER RUDNICK
GRAY CARY
401 "B" Street, Suite 1700
San Diego CA, 92101

Gerald L. McMahon
Daniel Eaton
SELTZER CAPLAN
MCMAHON & VITEK
750 "B" Street, Suite 2100
San Diego CA, 92101-8177

Robert C. Wright
WRIGHT & L'ESTRANGE
401 West A Street, Suite 2250
San Diego CA, 92101-8103

Gregory P. Stone
Daniel P. Collins
Fred A. Rowley
MUNGER, TOLLES
& OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, C 90071-1560

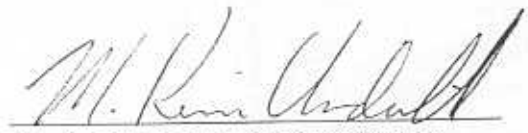
One Market, Steuart Twr. Ste. 2500
San Francisco, CA 94105

Sharon S. Mequet
LOEB & LOEB
1011 Santa Monica Blvd.
Ste. 2200
Los Angeles, CA 90067

Mary C. Oppedahl
REED SMITH LLP
1999 Harrison Street, Suite 2400
Oakland, CA 94612-3583

Joseph L. Dunn
ROBINSON CALCAGNIE, et al.
620 Newport Center Dr., Suite 700
Newport Beach, CA 92660-7147

Jeffrey P. Lendrum
LENDRUM LAW FIRM
600 West Broadway, Suite 1100
San Diego CA, 92101



Kevin Underhill (SBN 208211)
Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

APPENDIX A:

Corporate Members of the Product Liability Advisory Council

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.