Proposition 64: Abuse and Consequences for Representative Actions Under California's Unfair Competition Law

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Could some frivolous, if not abusive, lawsuits filed by a small, now defunct Beverly Hills law firm known as the Trevor Group lead to sweeping reform of California's unfair competition ("UCL")[1] and false advertising laws ("FAL")?[2] As unlikely as that seems, it actually happened: On November 2, 2004, California voters adopted Proposition 64 ("Prop. 64"), an initiative imposing new procedural requirements and limiting the type of actions that can be brought under these statutes. In doing so, they removed the most unusual and controversial feature of the UCL -- standing for an uninjured plaintiff to sue on behalf of the general public in a "representative action."[3] For the first time in over 70 years, a plaintiff must now allege that he "suffered injury in fact" and "lost money or property as a result of such unfair competition."[4] Representative actions are eliminated. Class actions may only be brought by plaintiffs who meet the new dual standing requirement and comply with section 382 of the Code

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[1]Cal. Bus. & Prof. Code §17200.

[2]Cal. Bus. & Prof. Code §17500.

[3]Kraus v. Trinity Management Services, Inc., 23 Cal.4th 116, 126-138, 96 Cal.Rptr. 2d 485, 999 P.2d 718 (2000).

[4]Cal. Bus. & Prof. Code §§17204, 17535.

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of Civil Procedure, the California statute authorizing class actions.[5] In fraudulent business practice and false advertising cases, the new standing requirement forces the plaintiff to plead and prove the elements of common law fraud, e.g., detrimental reliance causing damages, rather than merely a likelihood of public deception, the prior standard.

As reflected by the initiative's findings and declarations of purpose, Prop. 64 was a strong reaction to problems with the UCL. Although the UCL was "intended to protect California businesses and consumers from unlawful, unfair and fraudulent business practices,"[6] it has been "misused by some private attorneys who: File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit."[7] Such lawsuits include instances "where no client has been injured in fact, . . . [has] not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant."[8] These lawsuits on behalf of the general public occurred "without any accountability to the public and without adequate court supervision."[9] It was the intent of the voters to eliminate frivolous lawsuits and prevent "private attorneys from filing lawsuits for unfair competition where they have no

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[5]Cal. Bus. & Prof. Code §§17203, 17535. State and local prosecutors are exempt from these changes. Prop. 64 also provides that civil penalties shall be used exclusively by public prosecutors to enforce consumer protection laws. Cal. Bus. & Prof. Code §§17206(e), 17536.

[6]Cal. Bus. & Prof. Code §17203; Prop. 64 §1(a).

[7]Id.; Prop. 64 §1(b)(1).

[8]Id.; Prop. 64 §1(b)(2)-(3).

[9]Id.; Prop. 64 §1(b)(4).

client who has been injured in fact under the standing requirements of the United States Constitution."[10]

Prop. 64 advanced these goals and much more. A review of the UCL before Prop. 64 and its effect on some decided cases reveals a dramatic change in California unfair competition law.

CONSUMER PROTECTION UNDER THE FORMER UCL

Prior to the adoption of Prop. 64, California had one of the broadest UCL statutes in the nation. Thirty-four states, including California, have "Little FTC Acts" prohibiting unfair business practices.[11] Paralleling section 5 of the Federal Trade Commission Act,[12] the UCL prohibited unfair competition in five categories: Any (i) unlawful, (ii) unfair (iii) fraudulent business act or practice, (iv) any unfair, deceptive, untrue or misleading advertising, or (v) any act that violates California's false advertising law in section 17500, et seq., of the California Business and Professions Code.[13] "Unlawful" acts included "anything that can properly be called a business practice and that at the same time is forbidden by law."[14] The UCL "borrowed" violations of other laws and made them actionable as unfair competitive practices.[15] In the competitor

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[10]Id.; Prop. 64 §1(d), (e).

[11]William L. Stern, Bus. & Prof. C. §17200 Practice §2:55, p. 2-19 (The Rutter Group 2005).

[12]Robert C. Wright, The Trevor Case: Catalyst for Reforming California's Unfair Competition Law? 11 No. 2 A.B.A. Consumer Protection Update 5, 6 (Summer 2003).

[13]Cal. Bus. & Prof. Code §17200.

[14]Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 195, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)

[15]. Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1143, 131 Cal.Rptr. 2d 29, 63 P.3d 937 (2003).

context, an unfair practice was one which "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . . or otherwise significantly threatens or harms competition."[16] The California Supreme Court has yet to define "unfair" business practices in actions by consumers;[17] however, there is no doubt that "unfair" encompassed at least the FTC concepts of unfairness and violations of any legislatively declared policy.[18] A business practice was "fraudulent" if "members of the public are likely to be deceived."[19] Other elements of common law fraud such as intent, scienter, actual reliance, and damages were not required. Nor was proof of actual deception by any member of the public.[20] Equitable defenses would not defeat a UCL claim but were considered by a court in fashioning remedies.[21] The UCL imposed strict liability for unfair business practices without regard to whether the defendant intended to injure anyone.[22]

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[16]Cel-Tech, 20 Cal.4th at 187.

[17]Id. at 187 n.12.

[18]Id. at 184-186; see also, In re Firearm Cases, 126 Cal.App. 4th 959, 980, 24 Cal.Rptr.3d 659 (2005) (relying on the federal definition of unfairness in holding that there must be some causal connection between the defendants' unfair business practices and harm to the public).

[19]Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal.3d 197, 211, 197 Cal.Rptr. 783, 673 P.2d 660 (1983).

[20]Schnall v. Hertz Corp., 78 Cal.App.4th 1144, 1167, 93 Cal.Rptr.2d 439 (2000).

[21]Cortez v. Purolator Air Filtration Products Co., 23 Cal.4th 163, 179, 96 Cal.Rptr. 2d 518, 999 P.2d 706 (2000).

[22]Id. at 181.

Contrary to some unfair competition statutes in other states, the UCL is equitable in nature and does not provide for recovery of actual or punitive damages;[23] however, the plaintiff could obtain injunctive relief and restitution of money or property that may have been acquired by means of unfair competition.[24] Restitution involves two concepts: "The offending party must have obtained something to which it was not entitled and the victim must have given up something which he or she was entitled to keep."[25] The concept of restitution includes restoring property to which plaintiffs are entitled, such as, for example, unpaid wages.[26] Nonrestitutionary disgorgement of profits to an individual was not permitted.[27] Recovery of profits unfairly obtained could only be recovered to the extent that the profits represent "monies given to the defendant or benefits in which the plaintiff has an ownership interest."[28] In addition to injunctive relief and restitution, public prosecutors could obtain a civil penalty of up to $2,500 per violation on behalf of the general public.[29] Although the UCL did not provide

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[23]Korea Supply Co., 29 Cal.4th at 1147-1148; Cortez, 23 Cal.4th at 179-180 (holding that only restitution, not damages, is available under the UCL but noting that damages may include a restitutionary element.)

[24]Cal. Bus. & Prof. Code §17203.; Cortez at 174.

[25]Day v. AT&T Corp., 63 Cal.App.4th 325, 339-340, 74 Cal.Rptr.2d 55 (1998) (holding in a representative action on behalf of purchasers of telephone calling cards advertised without disclosing the practice of "rounding up" minutes that members of the public received "exactly what they paid for" and would not be entitled to restitution).

[26]Cortez at 168.

[27]Korea Supply Co. at 1148.

[28]Id.

[29]Cal. Bus. & Prof. Code §17206(a); People v. Thomas Shelton Powers, M.D., Inc. 2 Cal.App.4th 330, 339, 3 Cal.Rptr. 2d 34 (1992, *overruled on other grounds by* Kraus v. Trinity Management Services, Inc., 23 Cal.4th 116, 127, 96 Cal.Rptr.2d 485, 999 P.2d 718 (2000).

for recovery of attorney fees by prevailing plaintiffs, attorney fees were available to a private plaintiff if, as a result of the litigation, a significant benefit was conferred on the general public or a large class of persons.[30]

Unlike section 5 of the Federal Trade Commission Act which is enforceable exclusively by the Federal Trade Commission, the UCL was unique among states in permitting "any person acting for the interest of itself, its members or the general public" to sue. (Emphasis added.)[31] Thus, an uninjured plaintiff could sue as a private attorney general in a non-class representative action to obtain relief for others, including an injunction and restitution.[32]

Despite its expansive scope, until 1957, the UCL's application was confined to instances of trade name misappropriation.[33] After the California Attorney General opened a Consumer Fraud Unit in 1959, consumer protection cases based on the UCL began to be regularly filed and upheld by courts.[34] Indeed, the name "Unfair Competition Law" became a misnomer. As the California Supreme Court held in the 1972 landmark decision of Barquis v. Merchants Collection Ass'n, the UCL "broadened the scope of legal protection against wrongful business practices generally, and in so

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[30]Cal. Civ. Proc. Code §1021.5(a).

[31]Former Cal. Bus. & Prof. Code §17204 (West 1997).

[32]Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553, 560-561, 71 Cal.Rptr.2d 731, 950 P.2d 1086 (1998).

[33]See, e.g., Hesse v. Grossman, 152 Cal.App.2d 536, 540, 313 P.2d 625 (1957).

[34]Wesley J. Howard, Former Civil Code Section 3369: A Study in Judicial Interpretation, 30 Hastings L.J. 705, 713 (1979).

doing extended to the entire consuming public the protection once afforded only to business competitors."[35]

UCL CLASS ACTIONS

California does not have a statute comparable to Federal Rule of Civil Procedure 23. Under California Code of Civil Procedure section 382, a class action may be maintained when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court."[36] Proceeding as a class action requires that the plaintiff establish the existence of an ascertainable class and a well-defined community of interest.[37] The community of interest requirement involves three factors: predominant questions of law or fact, class representatives with claims or defenses typical of the class, and class representatives who can adequately represent the class.[38]

Prior to Prop. 64, UCL actions could be prosecuted as class actions. Applying the broad restitutionary language of the UCL and FAL, appellate courts consistently held that an unfair competition class action for fraudulent business practices or false advertising could proceed without individualized proof of lack of knowledge of fraud or reliance by class members, as an effective means to assure restitution of illicit gains by

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[35]Barquis v. Merchants Collection Ass'n, 7 Cal.3d 94, 109, 101 Cal.Rptr. 745, 496 P.2d 817 (1972).

[36]Other procedural aspects of a class action, including notice requirements, are specified in California Rule of Court 1856.

[37]Massachusetts Mutual Life Ins. Co. v. Superior Court, 97 Cal.App.4th 1282, 1287, 119 Cal.Rptr. 2d 190 (2002).

[38]Id.

the defendant.[39] The statute reaches "not only those alleged unfair practices which have in fact deceived the victims, but also those which are likely to deceive them."[40] This result was consistent with the broad remedial language of section 17535 of the California Business and Professions Code, which provides in part:

> Any person, corporation, [or] firm . . . which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders . . . as may be necessary to prevent the use or employment . . . of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful. (Emphasis added.)

In determining whether a UCL claim should proceed as a class action, the trial court was required to weigh the expense of pretrial certification and notice against the fact that adequacy of representation of all allegedly injured plaintiffs may be better assured by proceeding as a class action.[41] A class action may also provide a different vehicle for recovery. In any class or representative action, the court had the power to order restitution as a form of ancillary relief to an injunction. California law specifically authorizes fluid recovery in class actions.[42] Thus, it became arguable that in a UCL class action, the defendant may be required to disgorge all wrongfully obtained profits

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[39]Fletcher v. Security Pacific Nat'l Bank, 23 Cal.3d 442, 451, 153 Cal.Rptr. 28, 591 P.2d 51 (1979).

[40]Id.

[41]Id. at 454. See also, Massachusetts Mutual Life Ins. Co., 97 Cal.App.4th at 1291-1292.

[42]Cal. Civ. Proc. Code §384.

into a fluid fund, an important deterrent for enforcing the UCL.[43] (This issue has not been decided by the California Supreme Court.[44]) The opposite was true in representative actions, where recovery was clearly limited to restitution to direct victims of unfair competition.[45] Lastly, class certification of UCL claims may benefit the defendant by assuring that resolution of the claims is binding on all class members.[46]

Because it amounts to damages, nonrestitutionary disgorgement, i.e., the "surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice"[47] is probably not permitted in a UCL class action. [48]

To certify a class action, the trial court must determine that it is "superior to other available methods for the fair and efficient adjudication of the controversy."[49] In some cases, defendants have argued that the streamlined procedures of a representative

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[43]Cortez, 23 Cal.4th at 173-174; Corbett v. Superior Court, 101 Cal.App.4th 649, 664, 125 Cal.Rptr. 2d 46 (2002). But see, Madrid v. Perot Systems Corp., 130 Cal.App.4th 440, 460, ___ Cal.Rptr.3d ___ (2005) (holding that "nonrestitutionary disgorgement is not an available remedy in a UCL class action").

[44]Korea Supply Co., 29 Cal.4th at 1148 n.6.

[45]Id.

[46]Kraus v. Trinity Management Svc.,Inc., 23 Cal.4th 116, 126, 96 Cal.Rptr.2d 485, 999 P.2d 718 (2000).

[47]Id. at 127.

[48]Compare Corbett at 655 (holding that "where a class has been properly certified, a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund") with Alch v. Superior Court, 122 Cal.App.4th 339, 408, 19 Cal.Rptr.3d 29 (2004) (holding that in a UCL class action, nonrestitutionary back pay is similar to the disgorgement remedy and impermissible under Kraus, and Korea Supply) and Madrid, 130 Cal.App.4th at 460.

[49]Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal.App.3d 758, 773, 259 Cal.Rptr. 789 (1989).

action are superior to a class action.[50] They have also argued that when the only available remedy is injunctive relief, a representative action is sufficient.[51] When that argument prevailed, the defendant was estopped from later complaining that absent persons were not bound by the outcome of a representative action and could later bring identical claims. [52]

PROBLEMS WITH THE UCL

With its broad scope and liberal standing provisions, the UCL was a powerful legal regime to protect consumers. Unfortunately, one of its problems was vulnerability to abuse by private lawyers. In 2003, the Attorney General sued two California law firms, including the Trevor Group, under the UCL for filing "shake down" type UCL representative actions in 2002 against hundreds of misjoined automobile repair shops, restaurants, markets, and nail salons.[53] In both cases, the Attorney General alleged that the lawyers engaged in a settlement scam to benefit themselves, not the general public. Shortly after filing suit, they would send demand letters to the defendants requesting settlements of $1,000 or more to be dismissed from the case. They misrepresented that settlement would confer res judicata and collateral estoppel benefits and requested that the settlement agreement be kept secret. The plaintiffs in these cases were uninjured entities controlled by the lawyers. Although the UCL

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[50] Id.

[51] Alch v. Superior Court, 122 Cal.App.4th at 408.

[52] Id.

[53] Robert C. Wright, The Trevor Case: Catalyst for Reforming California's Unfair Competition Law? 11 No. 2 A.B.A. Consumer Protection Update 5 (Summer 2003) (citing People of the State of California v. Trevor Law Group, et al., Los Angeles Superior Court Case No. BC 290989).

prevents the recovery of attorney fees, the lawyers kept the monies obtained in these settlements, which could potentially total millions of dollars.

The Attorney General sought an injunction requiring that the "shake down" lawsuits be dismissed, prohibiting the defendants from filing other UCL or FAL actions without prior court approval, imposing a $2,500 civil fine for each violation of the UCL, and requiring full restitution of the money acquired in the scam. In the Trevor Group case, Damian Trevor stipulated to an injunction requiring the restitution of all monies taken from victims, payment of a small civil penalty, and prohibition against receipt of attorney fees in UCL actions without court permission. He also agreed to stop misjoining defendants in lawsuits. The Attorney General obtained a similar injunction against the other two lawyers in the Trevor Group and civil penalties of $7.5 million. Faced with disbarment proceedings, the Trevor Group lawyers resigned from the California State Bar. In the second case by the Attorney General against attorney Harpreet Brar, a judgment was obtained for similar injunctive relief and civil penalties of $1.7 million. The California Supreme Court is considering whether a State Bar recommendation to suspend his license for 30 days and impose two years of probation should be upheld.

Another problem with representative actions was the potential for unending litigation. No judgment or settlement protected a defendant from being sued again on the same theory by another member of the public.[54] Although the California Supreme Court has held that in a UCL representative action, the trial court can adopt procedures

[54]See, Mathieu Blackston, California's Unfair Competition Law - Making Sure The Avenger Is Not Guilty of the Greater Crime, 41 San Diego L. Rev. 1833, 1852-1853 (2004).

like a class action, i.e., provide notice to affected persons not before the court, prevent double recovery against the defendants, and review whether the action was brought by a competent plaintiff for the benefit of injured parties, there was no legal requirement to do so.[55] Without notice and adequate representation, these basic safeguards of due process prevented any settlement or judgment from binding absent parties.

Lastly, settlement in representative actions, including payment of attorney fees, could occur without court determination that the settlement was lawful, noncollusive, and adequately protected the interests of the general public. There was no requirement that the California Attorney General be notified of the existence or settlement of a UCL representative action unless there was an appeal.[56]

The abuses of the UCL by a few lawyers and the failure of the California state legislature to enact meaningful reforms to the UCL, set the stage for an initiative effort by business and taxpayer associations that resulted in Prop. 64. The initiative was approved by 59 percent of California voters in November 2004.

POST-PROP. 64 REPRESENTATIVE UCL ACTIONS

Judicial application of Prop. 64 is still in its infancy and is focused on whether the initiative applies to pending actions.[57] Nevertheless, the following conclusions can be reached:

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[55]Kraus v. Trinity Management Svc., Inc., 23 Cal.4th at 159-160.

[56]Cal. Bus. & Prof. Code §17209.

[57]Compare Californians for Disability Rights v. Mervyn's, LLC, 126 Cal.App.4th 386, 397, 24 Cal.Rptr.3d 301 (2005) (*review granted* April 27, 2005; declining to apply Prop. 64 retroactively) with Benson v. Kwikset Corp., 126 Cal.App.4th 887, 902-903, 24 Cal.Rptr.3d 683 (2005) (*review granted* April 27, 2005; applying Prop. 64 retroactively).

- Private attorney general representative actions are abolished. This was the expressed intent of the voters reflected in the provisions of Prop. 64. As a result, many prior California UCL cases could not now be pursued by private parties. For example, Stop Youth Addiction, Inc. v. Lucky Stores, Inc.[58] was an action by a private, nonprofit corporation formed by plaintiff's counsel against a supermarket chain for allegedly selling cigarettes to minor children in violation of California Penal Code section 308. The plaintiff alleged that the defendant profited from addicting children to cigarettes, who then returned to buy cigarettes as both children and adults.[59] The plaintiff sought restitution for 90 percent of the gross profits from the sale of cigarettes by the supermarket, i.e., $10 billion, an injunction forbidding sale of cigarettes to children, costs and reasonable attorney fees.[60] The action was brought on behalf of the general public,[61] and the California Supreme Court reaffirmed that a private plaintiff who has suffered no injury may bring a representative action. That decision would be contrary to Prop. 64.[62] Similarly, in Mangini v. R.J. Reynolds Tobacco Co., an uninjured plaintiff sued in the public interest alleging that "the Old Joe Camel advertising campaign targets minors for the purpose of inducing and increasing their illegal

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[58]Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553, 71 Cal.Rptr.2d 731, 950 P.2d 1086 (1998).

[59]Id. at 558.

[60]Id. at 559.

[61]Id. at 558.

[62]Id. at 565.

purchases of cigarettes" and sought injunctive relief.[63] This is another case which could not be brought by a private attorney general after Prop. 64.

- Some types of UCL violations can only be brought by government prosecutors. There are numerous examples of unlawful, unfair, or fraudulent business practices where it may be very difficult to prove that a person suffered injury in fact and lost money or property as a result. For example, during the last several years, the California Attorney General used the UCL for such diverse purposes as challenging territorial allocation agreements between newspapers,[64] failure to disclose the mercury content in fish,[65] an agreement between automobile dealers not to advertise the price of new vehicles,[66] and underground tank violations by gas stations.[67] The Attorney General and any district attorney may prosecute UCL violations in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation, or association.[68] In some circumstances, violations may also be prosecuted by a city attorney or county counsel.[69] Public prosecutors are unaffected by Prop. 64's standing requirements and will be required to assume greater

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[63]Mangini v. R.J. Reynolds Tobacco Co., 7 Cal.4th 1057, 1061, 31 Cal.Rptr.2d 358, 875 P.2d 73 (1994).

[64]See http://ag.ca.gov/newsalerts/release.php?id=769.

[65]See http://ag.ca.gov/newsalerts/release.php?id=690 (against tuna mfrs.); see also http://ag.ca.gov/newsalerts/release.php?id=764 (against grocery stores).

[66]See http://ag.ca.gov/newsalerts/release.php?id=1023.

[67]See http://ag.ca.gov/newsalerts/release.php?id=1251 (against AT&T); see also http://ag.ca.gov/newsalerts/release.php?id=865 (against Arco).

[68]Cal. Bus. & Prof. Code §17204.

[69]Cal. Bus & Prof. Code §17204.

responsibility for UCL and FAL enforcement. Although fraught with numerous problems, the anticipated mounting pressure on the Attorney General and district attorneys to bring consumer and environmental cases may cause public prosecutors to consider deputizing private attorneys.[70]

- Prop. 64 redefines the UCL and FAL in private cases. After Prop. 64, all UCL class members, including UCL class representative and each class member must have been (i) injured in fact (ii) lost money or property (iii) as a result of unfair competition. These standing requirements effectively change the definition of "fraudulent business practice" and "false advertising" in private UCL cases, including class actions. Thus, under Prop. 64 standing requirements, plaintiffs in UCL fraudulent business practice and FAL cases must now plead and prove the elements of a fraud cause of action. This is contrary to the prior UCL fraud standard, which was likelihood of public deception -- regardless of whether anyone was actually deceived, relied upon a fraudulent practice, or was damaged.[71]

Under California law, the elements of a common law fraud cause of action include: false representations, knowledge of their falsity by the defendant, intent to induce reasonable reliance by the plaintiff, and resulting damages.[72] To certify a class in such a case, "the right of each individual to recover may not be based on a separate

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[70]Barbara M. Motz, Problems in Partnering with Public Prosecutors, 14 No. 1 Competition 55 (Spring/Summer 2005).

[71]State Farm Fire & Casualty Co. v. Superior Court, 45 Cal.App.4th 1093, 1105, 53 Cal.Rptr. 2d 229 (1996).

[72]Vasquez v. Superior Court, 4 Cal.3d 800, 811, 94 Cal.Rptr. 796, 484 P.2d 964 (1971).

set of facts applicable only to him."[73] The fact that separate transactions are involved with respect to each class member, and that each must ultimately prove a different amount of loss, does not defeat the requisite community of interest "so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in plaintiffs' favor whatever questions were common to the class."[74]

In fraud class actions, these requirements can be satisfied by proving that a uniform material misrepresentation was made to each class member. In such situations, an inference of reliance can arise as to the entire class[75] from a consistent response by class members to the material misrepresentation.

Although no appellate court has applied Prop. 64 to certification of a UCL class action,[76] at least one trial court has. The California Coordinated Tobacco Cases, JCCP No. 4042, are pending before San Diego Superior Court Judge Ronald S. Prager. In one of those cases, Brown v. The American Tobacco Company, Inc., the trial court certified a class of California smokers who were allegedly misled through concealment and affirmative misrepresentations by the defendants about the constituents of tobacco and the health risks and addictive nature of smoking, and were targeted in a uniform

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[73] Id. at 809

[74] Id.

[75] Id. at 814; Massachusetts Mutual Life Ins. Co., 97 Cal.App.4th at 1292-1293; Blakemore v. Superior Court, 129 Cal.App.4th 36, 49, ___ Cal.Rptr.3d ___ (2005).

[76] But see Blakemore, at 49, 57 (employing the "likely to be deceived" standard in a UCL class action factually similar to Vasquez without discussing the impact of Prop. 64).

effort to induce the class members to smoke. While recognizing that there was a myriad of individual issues, including each class member's exposure to the alleged deceptive marketing, reliance, whether marketing was a causal factor in a person smoking, and whether a class member sustained injury, Judge Prager held they were insufficient to defeat the finding of substantial commonality because "such issues are wholly outside the purview of B&P Code §§17200, et seq., and 17500, et seq."[77]

After Prop. 64, the defendants moved to decertify the class. On March 7, 2005, the court granted the motion for the following reasons:

> First, the simple language of Prop 64 makes clear that, for standing purposes, a showing of causation is required as to each class member's injury in fact (specifically, the phrase "as a result of" the UCL violations). Collins v. Safeway Stores, Inc., 187 Cal.App.3d 62, 73 (1986) ("Each class member must have standing to bring a suit in his own right".) Further, because this is not a personal injury action, but a UCL action seeking restitution for unfair business practice based on alleged false statements, the injury in fact that each class member must show for standing purposes in this case would presumably consist of the cost of their cigarette purchases. But significant questions then arise undermining the purported commonality among the class members, such as whether each class member was exposed to Defendants' alleged false statements and whether each member purchased cigarettes "as a result" of the false statements. Clearly, here, as in Plaintiffs' CLRA [Consumer Legal Remedies Act] case, individual issues predominate, making class treatment unmanageable and inefficient. Further, it appears from the record that not even Plaintiffs'

[77]The Certification Order was rendered on April 11, 2001.

named class representatives satisfy Prop 64's standing requirement.[78]

The trial court's decision is on appeal.

- UCL class actions are affected by the Class Action Fairness Act of 2005.

On February 18, 2005, the Class Action Fairness Act of 2005 ("CAFA") became law. Under the statute, state class actions may be removed to federal court if the aggregated amount in controversy exceeds $5 million and there is diversity of citizenship between any member of the class and a defendant. Prior to Prop. 64, UCL representative actions were never removable to federal court because the plaintiff was uninjured and, therefore, lacked Article III standing,[79] and UCL class actions were subject to the same removal standards as any other case, i.e., whether there was complete diversity of citizenship among all plaintiffs and defendants, and the amount in controversy as to each class member exceeded $75,000. Absent Prop. 64, CAFA would have no impact on UCL representative actions.[80] Since California and federal procedures for class certification are different, removal could have a significant impact, particularly concerning the scope and method of sending notice to the class.[81]

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[78]Several of the Brown class representatives testified in deposition that they could not recall seeing or hearing any allegedly false and misleading public statements by the defendants.

[79]See Mangini v. R.J. Reynolds Tobacco Co., 793 F.Supp. 925, 929 (N.D. Cal. 1992).

[80]See Amy Darby & Amy Maclear, Have Unfair Competition Claims Become "Federalized" After Proposition 64 and the Class Action Fairness Act?, 14 No. 1 Competition, 63 (Spring/Summer 2005).

[81]Timothy D. Cohelan, California Class Actions §1:3 (West 2005); Hypertouch, Inc. v. Superior Court, 128 Cal.App.4th 1527, ___ Cal.Rptr.3d ___ (2005) (discussing California Rule of Court 1856 regarding notice to class members).

- Representative actions will no longer be compared with class actions for purposes of determining superiority. In a number of reported California cases, class certification has been denied because it was not found to be superior to a representative action.[82] Since nonclass representative actions were abolished by Prop. 64, this comparison is no longer part of California jurisprudence.

CONCLUSION

Did the actions of a few lawyers lead to major revisions of California's unfair competition and false advertising laws? Beyond a doubt, the answer is yes. The elimination of representative actions and the creation of a new standing requirement -- with its implications for fraudulent business practice and false advertising cases -- are the most dramatic changes since the modern version of the statute was adopted in 1933.

Will Prop. 64 suffice to prevent abuse of these laws? The answer remains to be seen. On February 10, 2006, an Orange County Superior Court Judge sentenced one of the lawyers previously sued by the Attorney General in 2003, Harpreet Brar, to 15 days in jail for contempt of an order precluding him from naming unrelated businesses as defendants in a single lawsuit. In 2005, Brar filed three lawsuits in Los Angeles and Orange County, California, including two under the UCL, against more than 150 misjoined liquor stores after being ordered not to do so. The judge described him as an "extortionist."[83]

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[82]Kavruck v. Blue Cross of California, 108 Cal.App.4th 773, 787, 134 Cal.Rptr.2d 152 (2003); Frieman v. San Rafael Rock Quarry, Inc., 116 Cal.App.4th 29, 37, 10 Cal.Rptr.3d 82 (2004).

[83]Sara Lin, O.C. Judge Jails Brea Lawyer for Filing Frivolous Suits, L.A. Times (Orange County Edition), February 11, 2006, at B1.