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ORIGINAL

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

ROBERT KRUMME, on Behalf of the General Public,
Plaintiff and Respondent,

vs.

MERCURY INSURANCE COMPANY, et al.,
Defendants and Appellants.

40(K) filing

APPEAL FROM THE SUPERIOR COURT FOR SAN FRANCISCO COUNTY (313367)
THE HONORABLE ROBERT L. DONDERO, JUDGE

UNFAIR COMPETITION CASE: SERVED ON ATTORNEY GENERAL AND DISTRICT ATTORNEY AS REQUIRED BY BUS. & PROF. CODE § 17209.

PETITION FOR REHEARING

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IN THE COURT OF APPEAL
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ROBERT KRUMME, on Behalf of the General Public,

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MERCURY INSURANCE COMPANY, et al.,

Defendants and Appellants.

PETITION FOR REHEARING

INTRODUCTION

Rehearing should be granted for any of three independent reasons:

1. Proposition 64, approved by the voters four days after this court filed its opinion, amended the Unfair Competition Law, Business and Professions (B&P) Code sections 17200 et seq. (UCL) in a way that defeats plaintiff's standing to bring this action and eliminates the statutory right of action under which he was proceeding. Proposition 64 requires that the action now be dismissed.

2. The court's analysis is flawed because it rests on the erroneous premise that only appointed agents, and not licensed insurance brokers, can sell automobile insurance policies.

3. The court's opinion fails to address Mercury's argument that the trial court abused its discretion by issuing an injunction to regulate Mercury's conduct, where that conduct is already subject to comprehensive regulation under a detailed statutory and regulatory scheme.

LEGAL ARGUMENT

I.

THE COURT SHOULD GRANT REHEARING AND DISMISS THIS ACTION BECAUSE PROPOSITION 64, JUST APPROVED BY THE VOTERS, ELIMINATES PLAINTIFF'S RIGHT TO PURSUE THIS ACTION.

A. Proposition 64 amended the UCL to provide that a private party may bring a representative action only if he personally lost money or property and only if he complies with class action procedures.

Rehearing is appropriate to consider a change in law that affects an appellate court's disposition. (See, e.g., *County of San Bernardino v. Ranger Ins. Co.* (1995) 34 Cal.App.4th 1140 [court grants "rehearing to consider the effect of the change in the law"].)

On November 2, 2004, four days after this court filed its opinion, California voters approved Proposition 64. (See ballot pamp., Gen. Elec. Nov. 2, 2204 at < http://vote2004.ss.ca.gov/Returns/prop/00.htm> [as of Nov. 12, 2004].) The proposition took effect the next day. (Cal. Const., art. II, § 10, subd. (a).) (For the court's convenience, a copy of the text of Proposition 64 is attached as an appendix to this petition.)

Proposition 64 amended the B&P Code in two main ways pertinent to this case: it eliminated the prior statutory rule granting standing to "any person" to pursue an action under the Unfair Competition Law ("UCL"), and it eliminated the prior statutory rule allowing private representative actions "on behalf of the general public" absent class certification.

First, with respect to standing, Proposition 64 amended B&P Code section 17204, which had allowed any person to bring an action under the UCL, regardless whether that person had been injured by the defendant's alleged acts or practices. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561.) As amended, section 17204 now provides that UCL actions "shall be prosecuted exclusively" by a designated public official or by a private party "*who has suffered injury in fact and has lost money or property* as a result of" the alleged UCL violations. (Prop. 64, § 3.)

Similarly, Proposition 64 amended B&P Code section 17535, governing remedies for false advertising, to impose the same standing requirements discussed above. Thus, relief is now available under section 17535 only to a person "who has suffered injury in fact and has lost money or property as a result of a violation of this chapter." (Prop. 64, § 5.)

In addition, Proposition 64 *deleted* language in B&P Code sections 17204 and 17535 that had previously granted standing to any person "acting for the interests of itself, its members *or the general public.*" (Prop. 64, §§ 3, 5.) The intent behind these changes was "to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Prop. 64, § 1, subd. (e).)

Second, with respect to the procedures for pursuing a UCL claim, Proposition 64 amended B&P Code section 17203 to provide that a private party bringing a UCL action as a representative of others must not only have

personally suffered injury, but must also comply with the procedures governing class actions: "Any person may pursue representative claims or relief on behalf of others *only if the claimant meets the standing requirements of Section 17204 [requiring injury in fact] and complies with Section 382 of the Code of Civil Procedure*,[1/] but these limitations do not apply to claims brought under this chapter by [designated public officials]." (Prop. 64, § 2.) Similarly, section 17535 now provides a person may proceed under that section as a representative of others "only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure . . . ." (Prop. 64, § 5.) These amendments were designed to combat the practice of private attorneys who "[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." (Prop. 64, § 1, subd. (b)(4).) By this amendment, the voters intended "that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." (Prop. 64, § 1, subd. (f).)

1/ Code of Civil Procedure section 382 authorizes class action suits when the party seeking class certification meets his or her burden of establishing the existence of (1) an ascertainable class and (2) a well- defined community of interest among the class members. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1103-1104.)

B. Proposition 64 applies to this case and requires dismissal.

1. Jurisdictional defects, including lack of standing, may be raised at any time. Proposition 64 eliminates plaintiff's standing to pursue this action.

"[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding," even on appeal. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 2:78, p. 2-21; ¶ 2:81.1, p. 2-22 ["Lack of standing negates existence of a cause of action and is not waived by failure to object; it can even be raised for the first time on appeal"].)

New legislation eliminating the court's jurisdiction applies to actions pending when the legislation takes effect. (See, e.g., *Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041, 1045 [statutory amendment removing party's right to appellate review by way of direct appeal applied to appeals pending when amendment took effect].)

Here, under Proposition 64, plaintiff lacks standing to pursue this private action for violation of the UCL because he did not and cannot allege that he suffered injury in fact or personally lost money or property as a result of Mercury's alleged UCL violations. On the contrary, plaintiff has never been insured by Mercury, has never attempted to purchase a Mercury insurance product through a Mercury broker, and has no personal knowledge of Mercury's sales practices. (AOB pp. 1, 26.) Plaintiff agreed to bring this action on behalf of the general public solely at the urging of his attorneys, one of whom is his brother-in-law. (AOB p. 26.) This is *precisely* the sort of UCL action Proposition 64 was designed to eliminate. (See Prop. 64, § 1, subds.

(b)(2)-(3), (e) [finding that UCL is being misused by attorneys who 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 who have not "been injured in fact"; voters intend to prohibit private UCL actions by litigants who have not been injured].)

In short, under Proposition 64, having personally suffered no injury, plaintiff lacks standing to pursue the action.[2/] Mercury is entitled to raise this jurisdictional issue, even at this late stage in the progress of the case. Because plaintiff lacks standing to maintain this action, the action fails as a matter of law and must be dismissed. (See *Rosenbluth Internat., Inc. v. Superior Court* (2002) 101 Cal.App.4th 1073 [UCL action fails as a matter of law where plaintiff lacks standing].)

2. Repeal of a statutory right of action immediately defeats pending cases asserting that right. Proposition 64 eliminated the statutory right of action plaintiff was asserting in this case.

Dismissal of plaintiff's action is required for the independent but related reason that, where the plaintiff is pursuing a statutory right of action and the statute is amended or repealed to remove that right of action while the case is pending, the action is no longer viable and must be dismissed:

> It is the general rule here that where a cause of action unknown at the common law has been created by statute and no vested or

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2/ This court's opinion states "that a personal stake is not required for standing to prosecute an unfair competition law suit on behalf of others: '"[A] private plaintiff who has himself suffered no injury at all may sue to obtain relief for others."'" (Typed opn., p. 11.) That statement, correct when written, is no longer an accurate statement of California law.

> contractual rights have arisen under it[,] the repeal of the statute without a saving clause before a judgment becomes final destroys the right of action. The same rule is applied to an amendment of a statute.

(*Department of Social Welfare v. Wingo* (1946) 77 Cal.App.2d 316, 320; see *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 ["an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final"]; *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 ["when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of such a statute without a saving clause will terminate all pending actions based thereon'"].)

This rule applies even if the action is on appeal when the authorizing statute is amended or repealed. (E.g., *Governing Board v. Mann*, *supra*, 18 Cal.3d at p. 830 ["The school district's authority to dismiss defendant rests solely on statutory grounds, and thus under the settled common law rule the repeal of the district's statutory authority necessarily defeats this action *which was pending on appeal at the time the repeal became effective*"]; accord, *Physicians Committee For Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 128 [""""The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered"""""]; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489 [where trial court ordered dismissal based on forum non conveniens statute that expired while action was on appeal, expiration of provision was equivalent to repeal and required reversal of dismissal order: "If the judgment is not yet final because it is on appeal, the

appellate court has a duty to apply the law as it exists when the appellate court renders its decision"].)

"'The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.'" (*Governing Board v. Mann*, *supra*, 18 Cal.3d 819, 829.)

Here, plaintiff is pursuing a purely statutory right of action under the UCL. (See, e.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1256, 1263-1264 [statutory UCL claims "cannot be equated" with the common law tort of unfair competition].) As explained in part I.A. above, however, Proposition 64 amended B&P Code sections 17203, 17204 and 17535 specifically to *eliminate* private rights of action under the UCL by any person who has not personally suffered a monetary or property loss by reason of the challenged act, practice or advertising. This amendment, which has no "savings clause," therefore "stops all pending actions where [it] finds them." (*Physicians Committee For Responsible Medicine v. Tyson Foods, Inc.*, *supra*, 119 Cal.App.4th at p. 128.) 3/

Because plaintiff did not personally suffer any monetary or property loss by reason of Mercury's alleged violations of the UCL, the statute no longer permits him to maintain an action for relief under the UCL. Put simply,

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3/ *Evanagelatos v. Superior Court* (1988) 44 Cal.3d 1188 is not to the contrary. That case held that applying Proposition 51 (the "deep pocket" initiative) to limit tort recovery in an action that arose prior to the initiative's effective date would constitute "a retroactive application of the statute." Proposition 51 "modified the traditional, *common law* 'joint and several liability' doctrine" and effected radical changes to pending "*common law*" claims "which accrued prior to the effective date of the initiative measure." (*Id.* at pp. 1196, 1198-99, 1205, italics added.) Unlike Proposition 51, Proposition 64 simply removes standing to pursue a *purely statutory* claim, so "the well settled rule that an action wholly dependent on statute abates if the statute abates if the statute is repealed without a saving clause before the judgment is final" applies. (*Younger v. Superior Court*, *supra*, 21 Cal.3d at p. 109.)

Proposition 64 eliminates plaintiff's right of action. This court therefore cannot grant or uphold the relief plaintiff sought under the UCL, even though "a judgment has been entered and the cause is pending on appeal." (*Physicians Committee For Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 128.)

3. Proposition 64 effects procedural changes – new standing rules and requirements for obtaining representative relief – that apply immediately to pending cases and bar this action.

Yet another line of cases demonstrates that Proposition 64 applies to and bars this action. This line of cases stems from the rule that a party "enjoy[s] no vested right in any particular procedure." (E.g., *Andrus v. Municipal Court, supra,* 143 Cal.App.3d at p. 1048, accord, *Parsons v. Tickner* (1995) 31 Cal.App. 4th 1513, 1523.) Consequently, statutes amending the *procedures* a plaintiff must follow to pursue a particular action or remedy apply with full force to all pending actions, even those filed before the statute's effective date. (See, e.g., *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App.4th 913, 917-918 [no bar to applying procedural amendments to pending case]; *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45 [statute amending rule requiring plaintiffs in malpractice suits to file a certificate of merit is properly applied to actions that accrued and were filed before amendment's effective date]; *Andrus v. Municipal Court, supra,* 143 Cal.App.3d at pp. 1045, 1048-1049 [immediately applying, to pending action, a new statute eliminating the right to appeal from certain orders of the superior court denying extraordinary relief; "where a statutory procedural right or remedy is repealed, the repealer is effective on the date it is enacted in the

absence of a savings clause"]; *Republic Corp. v. Superior Court* (1984) 160 Cal.App.3d 1253 [immediately applying, to pending action, a new statute requiring dismissal for prolonged failure to prosecute and making the plaintiff's diligence irrelevant].)

As explained in part I.A. above, Proposition 64 amended the standing rules under the UCL and B&P Code section 17535, and such rules are procedural in nature. (E.g., *Parsons v. Tickner, supra,* 31 Cal.App.4th at p. 1523 [amendment to standing rule was "procedural only" and thus applied to case pending at time of amendment].) In addition, Proposition 64 imposed new procedures that a private plaintiff must follow before he may pursue an action under the UCL as a representative of the general public. Specifically, the plaintiff must now comply with Code of Civil Procedure section 382, relating to class actions. (See *Global Minerals and Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849 [class action question is "essentially a procedural one"].)

Here, plaintiff asserts that he "brings this case under Business & Professions Code section 17200 purely as a representative of the General Public pursuant to section 17204." (RB p. 1; see typed opn., p. 6 ["This litigation commenced when plaintiff Robert Krumme filed a complaint 'on Behalf of the General Public'"].) There is no dispute plaintiff did not bring this case as a class action or comply with Code of Civil Procedure section 382, as now required by Proposition 64. For this reason – in addition to plaintiff's lack of standing and the repeal of the statutory right to pursue a UCL action without proving injury in fact – plaintiff's action must be dismissed.

It makes no difference that the new procedures were not in force at the time of trial. "The fact that a party acted in an authorized manner at the time he or she invoked the former version of a procedural or remedial statute at trial is no impediment to the appellate court applying the current version of that

procedural or remedial statute when evaluating the appeal from the trial court's ruling." (*Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 691; accord, *Physicians Committee For Responsible Medicine v. Tyson, Foods, Inc., supra,* 119 Cal.App.4th at p. 128 [following *Brenton*]; *Metcalf v. U-haul Intern., Inc.* (2004) 118 Cal.App.4th 1261, 1266 [same; rejecting party's claim that it would be "improper to apply the changes effected by [amendment to anti-SLAPP statute] here, because its [SLAPP] motion to strike under section 425.16 had already been made, the trial court had already ruled, and the appeal had already been filed before the section's effective date"].)

In sum, application of Proposition 64 to this action is not a question of "retroactivity," but rather a question of the *prospective* impact of the voters' decision (1) to repeal the anomalously broad standing clause that previously allowed "any person" to act as the spokesperson for the general public; and (2) to impose procedural protections for the benefit of the public and for target defendants facing UCL claims. Under the various legal doctrines outlined above, the new statutory terms enacted by Proposition 64 apply immediately to bar this action.

II.

THIS COURT SHOULD GRANT REHEARING BECAUSE THE COURT'S ANALYSIS AND HOLDING REST ON THE MISTAKEN BELIEF THAT ONLY PRODUCERS *APPOINTED AS AGENTS* CAN SELL AUTOMOBILE INSURANCE.

The trial court categorically enjoined Mercury from selling any automobile insurance policy through a broker-agent whom Mercury has not appointed pursuant to Insurance Code section 1704, subdivision (a), or whom

Mercury knows to be charging a broker fee. (Typed opn., p. 10.) Because many brokers charge broker fees and, by definition, are *not* appointed by insurers, the injunction effectively bars Mercury from selling any policy through a broker, even an independent broker having no ongoing relationship with Mercury.

This court's decision to affirm the injunction rested in large part on the court's understanding that *only* appointed agents may sell automobile insurance. This understanding is reflected in the opinion's very first sentence: "Insurance Code section 1704 requires that certain kinds of insurance may be sold only by what are known as 'appointed agents' – persons for whom the insurer has filed with the Insurance Commissioner a notice of appointment formally designating the person to act on the insurer's behalf." (Typed opn., p. 1, fn. omitted.)

In fact, contrary to the court's understanding, any licensed producer may lawfully sell automobile insurance. A consumer seeking insurance may purchase it through an *agent*, whose primary duty is to the insurer whose product the agent sells (see Ins. Code, § 1621), or through a *broker*, whose primary duty is to the consumer (see Ins. Code, § 1623). [4/]

4/ As this court generally explained (see typed opn., pp. 2-3), agents and brokers differ with regard to where their duties lie. An insurer's agent promotes his or her principal's insurance product, and a consumer who chooses to purchase a policy through an agent enjoys the right to hold the insurer accountable for any mishaps resulting from the agent's fault in selling that product. (See, e.g., *Jackson v. Aetna Life & Casualty Co.* (1979) 93 Cal.App.3d 838; *Lippert v. Bailey* (1966) 241 Cal.App.2d 376.)

In contrast, the broker promotes the consumer's interest in obtaining the best policy for the best price, but the trade-off for the consumer who believes the broker has not met that obligation when selling a policy is that the consumer cannot look to the insurer for redress, but rather must hold only the broker responsible. (E.g, *Carlton v. St. Paul Mercury Ins. Co.* (1994) 30 Cal.App.4th 1450 ["a broker in securing a policy for a client 'acts only as

(continued...)

Nothing in Insurance Code section 1704 suggests that only appointed agents may sell automobile insurance. Section 1704 states that certain agents "shall not act as an agent of an insurer unless the insurer has filed with the commissioner a notice of appointment," and such a notice of appointment may be filed only if the agent "being appointed has consented to that filing." (§ 1704, subd. (a).)[5/]

On its face, this language simply explains how a principal/agent relationship is formalized. When both insurer and producer agree that the producer will "act as an agent" for that insurer, i.e., will owe allegiance to the insurer rather than to purchasing consumers when selecting and procuring policies for consumers. Nothing in section 1704 or anywhere else in the Code

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4/ (...continued)
agent for the [in]sured.'"]; see also *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 816-817 [broker rather than insurer liable for loss caused by broker's failure to inform insured of possible gap in coverage].) Accordingly, brokers (but not agents) must maintain a bond so as to be financially answerable to proven claims. (Ins. Code, § 1662.)

5/ As originally enacted, the first sentence of section 1704, subdivision (a), indicated that an "insurance agent" – then a separate licensing category – was a candidate for an appointment upon agreement by the insurer and a producer desiring to be that insurer's agent. After the 1990 consolidation of the broker and agent licenses, the term was changed to "fire and casualty broker-agent" acting "as an agent." In 2002, to accommodate the new Gramm-Leach-Bliley Act, the term was changed back to "insurance agent." There is no indication in the legislative history that any of these changes intended to alter the fact that only those choosing to be dedicated as a particular insurer's agent were candidates for appointments. On the contrary, by using different language in other parts of the statute – the reference in section 1704, subdivision (a), to "fire and casualty broker-agents" becoming "solicitors," and the reference in section 1704, subdivision (a)(2), to appointees reverting back to "fire and casualty broker-agents" once their appointments were exhausted – the drafters reinforced the fact that the first sentence of section 1704, subdivision (a), is intended to encompass only dedicated agents.

indicates that a broker who is *not* an insurer's appointed agent is barred from selling the insurer's policies.

On the contrary, many provisions in the Code contemplate that brokers, in addition to agents, will sell policies. (See, e.g., Ins. Code, § 1625 [brokers may transact insurance], § 1625.5 [personal lines "licensees" – without differentiation between brokers and agents – are authorized to transact automobile insurance], § 1712 [referring to agencies and brokerages' power to transact insurance], § 1726 [referring to practice of agents *or* brokers in selling insurance via internet advertising by providing quotes, accepting applications and providing terms of coverage and of an agreement to provide coverage].)

The Code expressly provides that licensure as a broker and licensure as an agent are not mutually exclusive. (Ins. Code, § 1632 [one eligible for a license to transact insurance "may be authorized to act in one or more of the capacities specified in this chapter"]; see also § 1625 ("fire and casualty licensee is a person authorized to act as an insurance agent, broker, or solicitor . . . "].) Thus, a licensee might sometimes act as a broker, shopping among insurers for the best offer on behalf of an insured, and might sometimes act as an agent on behalf of an insurer, soliciting customers for that insurer. The licensee can transact insurance in either capacity.

Insurance Code section 1731 drives this point home. It provides that a licensee who sells a policy issued by an insurer *who has appointed that licensee as an agent* is "deemed" to be acting as a the insurer's agent during such a sale: "A person licensed as a broker-agent shall be deemed to be acting as an insurance agent in the transaction of insurance placed with those insurers for whom a notice of appointment has been filed . . . in accordance with Section 1704 . . . ." (§ 1731.) This section would be superfluous if appointed agents alone could transact insurance for an insurer. There would be no need

to "deem" a licensee to be acting in its capacity as an agent when transacting insurance unless the licensee can also act in a different capacity. Section 1731 makes sense only because – contrary to this court's ultimate holding – a licensee may, under some circumstances, sell insurance in its capacity as a broker.[6/] Section 1731 cannot be squared with any conclusion that insurers are restricted to selling policies only through appointed agents. (See typed opn., p. 22 [holding that "a fire and casualty broker agent is . . . treated as an agent and is therefore subject to the appointment requirement"].)

Once the false premise that only appointed agents can sell insurance is cast aside, the statutory scheme falls into place and the plain meaning of related provisions discussed in this court's opinion can be given full effect.

Insurance Code section 1732, for example, can be read simply as its language suggests: a licensee acting as a broker, with corresponding duties owed to the consumer, may nonetheless act as an agent – i.e., on behalf of the insurer – to the extent of collecting, transmitting or refunding premiums, and in delivering policies. As this Court has observed (typed opn., pp. 3-4), section 1732 codified the holding in *Maloney v. Rhode Island Ins. Co.* (1953) 115 Cal.App.2d 238. There, the appellate court ruled that a broker who sold an insurer's policy owed an agency duty to the insurer to deliver the policy premiums to the insurer and thus acted improperly when, faced with a dispute over entitlement to the collected premiums, it returned the premiums to the insured.

In analyzing whether Mercury could properly sell policies through licensed brokers who are not its appointed agents, this court construed section 1732 to mean that "a broker could act as an insurer's agent, but *only* to the

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6/ See, e.g., *Carlton v. St. Paul Mercury Ins. Co., supra,* 30 Cal.App.4th at p. 1457 [even though insurance broker Dukar sold St. Paul auto policy to insured, "Dukar, the producing agent, was not St. Paul's agent" and Dukar's knowledge therefore was not attributable to St. Paul].)

extent of 'collecting and transmitting premium, [etc].'" (Typed opn., p. 17, emphasis added.) But there is no basis in the legislative history of section 1732 nor in its language to insert the word "only" as a limit on brokers' rights and duties. (See Code Civ. Proc., § 1858 ["In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted*, or to omit what has been inserted" (emphasis added)].

The *Maloney* court had no reason to define the *outer limits* of a broker's authority or obligations. Instead, the court was concerned only with the question whether premiums collected by a broker were held for the benefit of the insured or the insurer. Indeed, *Maloney* made clear that a broker could execute the sale of a policy to an insured *without* becoming the insurer's agent for all purposes, even though the broker is considered the insurer's agent to the extent the broker receives premiums that are due to be paid over to the insurer. (*Maloney v. Rhode Island Ins. Co.*, *supra*, 115 Cal.App.2d at p. 244 ["Although that policy was procured from Rhode Island, in procuring that policy [broker] appellants were *not* the agent of that company" (emphasis added)].) [7/]

In sum, this court's decision to affirm the injunction rests on the erroneous premise that only appointed agents, and not brokers, can sell automobile insurance. Brokers, too, can lawfully sell Mercury policies. The

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7/ This result is consistent with the approach followed by the Department of Insurance, to which this court should defer in interpreting the Insurance Code. (See , e.g., *Spanish Speaking Citizens Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1214 [" . . . 'the construction of a statute by officials charged with its administration ... is entitled to great weight.'"].) Insurance Bulletin 80-6 (AA 2256), the Tomashoff letters (AA 2596-2605), the broker fee regulations, and the new proposed broker fiduciary duty regulations all reflect a consistent interpretation that brokers may sell insurance (and collect broker fees) without becoming appointed agents. (See AOB 17-18, 22-23, 41-44; ARB 17-18; 28-29.)

injunction, however, categorically requires Mercury to appoint as agents *any* producer who sells a Mercury policy, apparently regardless whether the producers *consents* to the appointment as required under section 1704, subdivision (a). Indeed, by requiring Mercury to appoint as an agent any producer that sells a Mercury policy, the injunction effectively compels Mercury to violate the provision of section 1704, subdivision (a), that "[n]o notice of appointment of a . . . fire and casualty broker-agent . . . shall be filed under this subdivision unless the licensee being appointed has consented to that filing." The court should grant rehearing to evaluate the injunction and the statutory scheme with the correct understanding that, in addition to appointed agents, non-appointed licensees – acting as brokers for consumers – may also lawfully sell Mercury policies.

III.

THIS COURT SHOULD GRANT REHEARING TO DECIDE AN ISSUE OMITTED FROM ITS OPINION: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY UNDERTAKING "REGULATION BY INJUNCTION" IN AN AREA OF LAW GOVERNED BY A COMPREHENSIVE STATUTORY AND REGULATORY SCHEME.

Rehearing is appropriate where the court's opinion fails to address issues presented by an appellant. Indeed a party intending to seek Supreme Court review of an omitted issue *must* file a petition for rehearing asking the Court of Appeal to address the issue. (See Cal. Rules of Court, rule 28(c)(2) [party who is concerned that appellate court omitted or misstated an issue or fact should file rehearing petition to preserve arguments for Supreme Court

review]; *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68, fn. 1 [declining to address point that was omitted from Court of Appeal opinion and not raised in a petition for rehearing].)

Mercury's briefs demonstrated that the trial court abused its discretion by granting an injunction that effectively regulated Mercury's conduct in an area of law – Mercury's relationships with the broker-agents through whom it sells policies – already governed by a detailed and comprehensive statutory and regulatory scheme. (See AOB pp. 46-48; ARB 43-44.) The court's opinion is silent on this issue. The court should grant rehearing and consider the issue.

CONCLUSION

For the reasons discussed in part I. above, rehearing should be granted and the action should be dismissed. At the very least, rehearing should be granted to afford the parties an opportunity to file supplemental briefing on the impact of Proposition 64.

Alternatively, for the reasons discussed in parts II. and III. above, rehearing should be granted and a new decision issued.

Dated: November 15, 2004

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1).)

The text of this brief consists of 5,228 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

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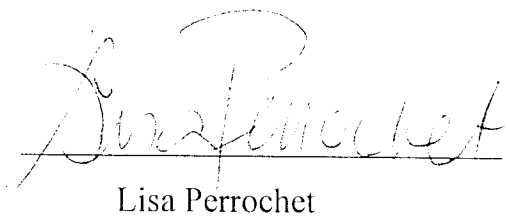

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I, **Robyn Whelan**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **November 15, 2004** I served the within document entitled:

PETITION FOR REHEARING

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Robyn Whelan

Robyn Whelan

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