CASE NO. S147345

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES

From the Decision of the Court of Appeal,
Fourth Appellate District, Division One, No. D046435
(Appeal from the San Diego County Superior Court
Honorable Ronald Prager, No. 711400)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS IN SUPPORT OF APPELLANTS; DECLARATION OF JULLY C. PAE AND EXHIBITS

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APPLICATION OF THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

The Foundation for Taxpayer and Consumer Rights ("The Foundation") respectfully applies for permission to file its amicus curiae brief, including exhibits, in support of the Appellants. The Foundation is a non-profit corporation founded in 1985 by the author and proponent of the 1988 insurance reform initiative, Proposition 103, to protect the rights of policyholders, patients, and ratepayers. A core mission of the Foundation is to defend, enforce, and monitor the implementation of that initiative and other consumer protection statutes before the Legislature, administrative agencies, and the courts. Prior to the passage of Proposition 64, the Foundation brought actions as a representative plaintiff under California's unfair competition law ("UCL") against various businesses. After the passage of Proposition 64, the Foundation continues to advocate on behalf of consumers victimized by unlawful, unfair, and fraudulent business practices.

STATEMENT OF INTEREST OF AMICUS CURIAE

This case raises extremely important issues concerning the interpretation and enforcement of Proposition 64, which amended the standing requirements of the UCL to require an injured person to serve as a representative plaintiff. The Foundation seeks permission to file the accompanying brief as *amicus curiae* because of its concern that the appellate court misinterpreted Proposition 64 and rendered a decision that impermissibly expanded the scope of the initiative as enacted by the voters. As a result, the appellate

court erroneously imposed additional obligations under the UCL, which will restrict meritorious representative consumer actions from being brought in the courts of this State. The voters did not intend such a result when they passed the Proposition.

In addition to pursuing its core mission of advocating on behalf of consumers and taxpayers, the Foundation has also played a principal role in advocating for and defending the integrity of the initiative process by educating the public about deceptive advertising and other corporate abuses of the initiative process. For example:

- The Foundation released an analysis of the ballot initiative spending in 2006, which revealed that the top 10 corporate donors to propositions were responsible for more than half of all money given to initiatives. Through the end of October 2006, the top ten corporations had given $132 million or 51 percent of the $259 million raised.
- The Foundation's volunteers debuted the VQI – Volunteer Qualified Initiative – an all-volunteer citizen model to challenge the money-dominated campaigns of most initiatives. The Foundation's volunteers gathered nearly 70,000 signatures to place all-volunteer qualified initiatives on the ballot in five local cities. Volunteers ran the campaigns for these initiatives as well, going door-to-door, speaking to voters in front of supermarkets, and debating local politicians.
- The Foundation has also tackled deception in the initiative process by sponsoring legislation to:
    - Require petitions to contain a notice to the voter indicating whether the circulator is paid or a volunteer.

- Disclose the top 3 campaign contributors on the face of petitions, in the ballot pamphlet, and in a ticker along the bottom of the screen during television ads.

Based on its years of experience in matters involving initiative measures and consumer protection, the Foundation respectfully believes that its amicus curiae brief can provide the court with a unique and valuable perspective on the statutory and regulatory issues raised in this litigation. The Foundation's brief will assist the Court in the disposition of the case by providing the historical context in which Proposition 64 was drafted and presented to the voters, while interpreting the text of the Proposition within this context, to reveal what the voters actually intended in passing the initiative.

For the foregoing reasons, the Foundation respectfully requests that the application for permission to file its amicus curiae brief be granted and the brief filed.

Respectfully submitted,

DATED: March 26, 2007 GIANELLI & MORRIS

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ISSUES ADDRESSED BY THE AMICUS CURIAE

(1) Whether the UCL (Business & Professions Code § 17200, et seq.) as amended by Proposition 64, by requiring a representative plaintiff to comply with section 382 of the Code of Civil Procedure, imposes the standing requirement of "injury in fact" on putative class members.

(2) Whether the UCL (as amended by Proposition 64), by requiring that a representative plaintiff "lost money or property as a result of such unfair competition" imposes a reliance requirement under the UCL.

INTRODUCTION

The UCL[1], codified at Business & Professions Code section 17200, et seq.,[2] has been instrumental in enabling California citizens and public interest groups representing their interests to curtail unscrupulous business practices in the marketplace, just as the Legislature had intended. Indeed, the UCL has been hailed as "a powerful tool long used by environmental, consumer and public health advocates to prevent unscrupulous businesses from putting the public at risk." (Editorial, *Prop 64 Endangers Health and Safety; Vote No It's the Wrong Fix for Lawsuits that Extort Money from Small Businesses*, San Jose Mercury News, Sept. 26, 2004, at 4P, Exh. 1.)

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[1] Proposition 64 amended both the UCL and California's false advertising law ("FAL"), codified at Business & Professions Code section 17500, et seq. Many cases, like this one (see *In re Tobacco II Cases* (2006) 142 Cal.App.4th 891, 894), bring claims under both the UCL and FAL, and this Court has historically analyzed identical language of the UCL and the FAL in a like manner. (See, e.g., cases cited and discussion in footnotes 5-7, *infra*). As such, unless otherwise specified, any discussion of the UCL herein also applies to the similarly worded standing provisions of the FAL.

[2] All further code citations are to the Business & Professions Code, unless otherwise stated.

In an effort to weaken the law and limit its liability thereunder, the corporate community banded together, politically and financially, to put Proposition 64 on the November, 2004 ballot. To deflect attention away from the true purpose of the voter initiative and garner public support, the corporate community presented the Proposition under the guise of stopping private attorneys from abusing the law by filing frivolous representative actions against small business owners. By using small business as the face of Proposition 64, large corporations succeeded in swaying voters to pass the initiative and amend the UCL.

Despite the fact Proposition 64 was passed on pretextual grounds, the voters intended the Proposition to be limited in scope. The voters only intended to modify the standing requirements under the law to require that a representative plaintiff: (1) show (a) injury in fact and (b) loss of money or property; and (2) comply with Code of Civil Procedure section 382. The corporate proponents of the measure argued that by requiring such a showing, private attorneys could no longer bring suits on behalf of plaintiffs who have never "had any [ ] business dealing with the defendant." (Prop. 64, § 1(b)(3).)

Notwithstanding the plain language of the initiative and the voters' intent, Respondents seek to broaden the purported effect of Proposition 64, asserting that the initiative requires all members of a putative class to show injury in fact as well as reliance in the context of a misrepresentation claim. Despite the obvious conflict between this interpretation and the language and stated purpose of the Proposition, two appellate courts have adopted this misinterpretation. (*In re Tobacco II Cases* (2006) 142 Cal.App.4th 891; *Pfizer, Inc. v. Superior Court* (2006) 141 Cal.App.4th 290.) As a result,

the will of the voters will be vitiated unless this Court corrects this misinterpretation.

As discussed herein, the voters' intent behind Proposition 64 is clear and unmistakable: the Proposition is targeted *only* at preventing private attorneys from using sham clients without any stake in the litigation who do not adequately represent the interests of the public as representative plaintiffs in a representative UCL action. The plain text of the amendments made by Proposition 64 and the voters' intent as expressed in the ballot materials simply do not impose additional substantive requirements that limit the scope of the prohibitions contained in the UCL. This Court, therefore, should vindicate the will of the voters and reverse the judgment of the courts below.

DISCUSSION

I. THE UCL AND PROPOSITION 64

Attaining a comprehensive understanding of Proposition 64 not only requires a review of its text, it also requires a review of the historical context in which the Proposition was brought and presented to the voters of California. (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 ["In the case of a voters' initiative statute, too, we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less"].)

A. Historical Context of Proposition 64

1. Unfair Competition Law

In 1933, the California Legislature enacted the UCL to enable public prosecutors and private citizens to file lawsuits to protect businesses from the unfair business practices of competitors.

Subsequently, the UCL was expanded to protect consumers from *any* "unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code § 17200.)[3]

> In drafting the act, the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity. As a result, to state a claim under the act ***one need not plead and prove the elements of a tort.*** Instead, one need only show that '***members of the public are likely to be deceived***' by the unfair business practice.

(*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266-67, quoting *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876, emphasis added;[4] see also *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.)

Not only does the UCL permit courts to enjoin any unfair business practice, it also authorizes courts to make such orders as "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 such unfair competition." (*Bank of the West, supra,* 2 Cal.4th at 1266, emphasis added; Bus. & Prof. Code § 17203.) The Legislature empowered courts to order restitution without "individualized proof of deception, reliance and injury ***if necessary to prevent the***

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[3] The FAL makes it unlawful for any person "with intent ... to induce the public to enter into any obligation ... to make or disseminate or cause to be made or disseminated ... any statement ... which is untrue or misleading ... or ... as part of a plan or scheme with the intent not to sell ... as so advertised." The definitions of "unfair competition" (§ 17200) and "false advertising" (Bus. & Prof. Code § 17500) remain unchanged after Proposition 64.

[4] In *Chern*, the Supreme Court pronounced the "likely to be deceived" standard within the context of a false advertising claim. In *Bank of the West*, which involved a UCL claim, the Supreme Court applied this same standard.

use or employment of an unfair practice." (*Bank of the West, supra,* 2 Cal.4th at 1267, citing *Committee on Children's Television, Inc., supra,* 35 Cal.3d at 211, emphasis added; see also *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 449-453.) The Legislature's purpose in allowing for restitution absent such proof was "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." (*Bank of the West, supra,* 2 Cal.4th at 1267, citing *Fletcher v. Security Pacific National Bank, supra,* 23 Cal.3d at 449.) By not incorporating standard tort requirements into UCL actions, the Legislature effectively imposed ***strict liability*** under the UCL. (See *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-78.)

As a result of these substantive standards and remedies, the UCL has enabled members of the public to eliminate unfair business practices that could not have been otherwise assailed. (See, e.g., *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939;[5] *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553;[6] *Committee on Children's Television, Inc., supra,* 35 Cal.3d at 211.[7])

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[5] In *Kasky,* the plaintiff brought suit against Nike under the UCL and the FAL for making false statements of fact about its labor practices and about working conditions in factories that made its product to induce customers to continue buying its products. This Court stated that, to state a claim under the UCL, "'it is necessary only to show that members of the public are likely to be deceived.' (*Committee on Children's Television, Inc. v. General Foods, Inc., supra, 35 Cal.3d at p. 211...*)." (*Kasky* at 950-51.)

[6] In *Stop Youth Addiction,* a private for-profit corporation brought suit on behalf of the public under the UCL to prevent the defendant retailer from selling cigarettes to minors. The court reversed the trial court's determination that the plaintiff lacked standing on the ground that corporations do not have to demonstrate standing, nor injury in fact.

[7] In *Committee on Children's Television,* plaintiffs (individuals and organizations) brought suit against General Foods for fraudulent, deceptive, and misleading advertising in the marketing

In addition to trading tort elements for the "likely to be deceived" standard, the Legislature allowed private citizens and public interest organizations to obtain the equitable relief afforded by the UCL on behalf of the general public. (See former Bus. & Prof. Code §§ 17204, 17535 [authorizing "any person acting for the interests of itself, its members or the general public" to bring an action for relief].) It is only these standing requirements, and not the substantive elements or remedial provisions of the UCL, that were altered by the Proposition 64 amendments. (See *Californian's for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-33.)

2. The Pretextual Underpinnings of Proposition 64

As a result of the UCL's success in curtailing unfair business practices, the corporate community sought to weaken the law and shield itself from liability. Corporations funded the campaign to place Proposition 64 on the November, 2004 ballot under the pretext that the Proposition intended to reform the UCL by preventing unscrupulous plaintiffs' attorneys from filing frivolous representative UCL actions against small businesses in order to

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of sugared breakfast cereals under the UCL and FAL. General Foods demurred on the ground that plaintiffs failed to allege the fraudulent advertising with particularity and that plaintiffs lacked standing. This Court rejected General Foods' contention that fraudulent advertising need be pleaded with specificity because "[t]he requirement that fraud be pleaded with specificity ... does not apply to causes of action under the consumer protection statutes." (*Committee on Children's Television, supra,* 35 Cal.3d at 212.) This Court further concluded that the fact that the organizational plaintiffs did not suffer legally cognizable damages was of no consequence.

generate attorneys' fees.[8] (Halper and Lifsher, *The State; Initiative Seeks Curbs on Consumer Lawsuits*, L.A. Times, Jul. 6, 2004, at A1, Exh. 2.)

By using small businesses as the face of the Proposition, corporations intended to, and did, deflect attention from themselves and the real purpose for the initiative. Corporations poured many millions of dollars into the "Yes on 64" campaign, outspending the "No on 64" campaign by five to one, to purchase more and longer-running television ads depicting small business owners allegedly victimized by frivolous representative UCL actions. (Kasler, *Businesses hail Prop. 64 victory Opponents call it a victory for polluters and scofflaws*, Sacramento Bee, Nov. 4, 2004, at A8, Exh. 3.) Due to these aggressive and expensive efforts, the corporate community succeeded in garnering public support and sympathy, and the voters passed Proposition 64 for the stated purpose of stopping the "shakedown" of small businesses through "frivolous" lawsuits.

B. Proposition 64

In pertinent part, section 1 of Proposition 64 stated the purpose of the initiative as follows:

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[8] At the time the corporate community devised Proposition 64, there were a number of stories in the media regarding abuse of the UCL's original standing requirement by plaintiffs' attorneys. One of the most notorious cases of abuse that received media attention was a group of three attorneys known as the Trevor Law Group, who sought to use the UCL to intimidate and coerce small business owners into settlement.

Even though Attorney General Bill Lockyer brought a successful suit against these attorneys, and the attorneys were involuntarily enrolled as inactive members of the State Bar of California, the backers of Proposition 64 held up such examples as reasons to pass the initiative.

SECTION 1. Findings and Declarations of Purpose

The people of the State of California find and declare that:

(a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices.

(b) These unfair competition laws are being misused by some private attorneys who:

(1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public 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.
(4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

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> (d) It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code.

(Ballot Pamphlet, Gen. Elec. (Nov. 2, 2004) text of Prop. 64, RJN, Exh. 1, p. 109 [hereinafter, "Prop. 64, § 1"].)[9]

With regard to the issues presented herein, Proposition 64 amended three sections of the Business and Professions Code. The following language was added to the end of Section 17203: "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure ... ." Section 17204 was amended so that actions for relief must be brought by a person "who has suffered injury in fact and has lost money or property as a result of such unfair competition," instead of a person "acting for the interests of itself, its members or the general public." Finally, Proposition 64 made similar amendments to section 17535 of the FAL.[10]

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[9] A copy of the complete 2004 Official Voter Information Guide for the November 2, 2004 election can be found on the Secretary of State's website at http://vote2004.ss.ca.gov/voterguide/english.pdf.

[10] Under section 17535 of the FAL as amended, actions for injunctive relief may be brought by any person "who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements this Section and complies with Section 382 of the Code of Civil Procedure ... ."

What is probably more important in the context of this case is what Proposition 64 *did not* amend. Proposition 64 made *absolutely no changes* to the substantive or remedial provisions of the UCL and the FAL, which are contained in Sections 17200,[11] 17203,[12] 17500,[13] and 17535.[14]

Despite the fact that Proposition 64's amendments to the UCL merely place requirements on the person initiating the lawsuit, Respondents contend that Proposition 64 completely alters the substantive and remedial requirements of the UCL by adding traditional tort requirements, and that the putative class members

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[11] Section 17200 defines "unfair competition" as: "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]."

[12] Section 17203 provides the following prohibition:

> Any person who engages, has engaged, or ***proposes to engage*** in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments ... necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

(Emphasis added.)

[13] Section 17500 outlines the elements of a false advertising claim by declaring it unlawful to:

> [W]ith intent ... to induce the public to enter into any obligation ... to make or disseminate or cause to be made or disseminated ... any statement ... which is untrue or misleading ... or ... as part of a plan or scheme with the intent not to sell ... as so advertised.

[14] Section 17535 provides that:

> Any person . . . [who] violates or ***proposes to violate*** this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments ... 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.)

must conform to these altered requirements. Respondents' contentions are contrary to the text of the Proposition and contrary to the will of the voters.

II. INTERPRETATION OF A PROPOSITION

"'In interpreting a voter initiative ... [the courts] apply the same principles that govern statutory construction.'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-01.) Thus, the court must "'turn first to the language of the statute, giving the words their ordinary meaning.'" (*Robert L. v. Superior Court,* supra, 30 Cal.4th at 901, quoting *People v. Birkett* (1999) 21 Cal.4th 226, 231.) "The statutory language must also be construed *in the context of the statute as a whole* and the overall statutory scheme [*in light of the electorate's intent*]." (*Robert L., supra,* 30 Cal.4th at 901, citing *Horwich, supra,* 21 Cal.4th at 276, emphasis added, bracketed text in original.)

When the language is ambiguous, the courts "refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L.*, supra, 30 Cal.4th at 901, quoting *Birkett, supra,* 21 Cal.4th at 243.) "In other words, [the court's] 'task is simply to interpret and apply the initiative's language *so as to effectuate the electorate's intent.*'" (*Robert L., supra,* 30 Cal.4th at 901, quoting *Hi-Voltage Wire Works, Inc. v. City of San Jose,* (2000) 24 Cal.4th 537, 576, emphasis added.)

Since the objective of interpreting a proposition is to effectuate the voters' intent, only those materials that were before the voters are relevant to the inquiry. (*Robert L., supra,* 30 Cal.4th at 904.) The electorate's intent is thus drawn from the ballot pamphlet arguments for and against the initiative, the ballot's legislative analysis, and the relevant historical context. (*Id.* at 906.)

III. PROPOSITION 64 PROVIDES THAT ONLY THE REPRESENTATIVE PLAINTIFF NEED DEMONSTRATE INJURY IN FACT

The text of the Proposition confirms that the voters intended that *only* the representative plaintiff need demonstrate injury in fact.[15]

A. Findings and Declaration of Purpose

Section 1 of the Proposition sets forth the "Findings and Declaration of Purpose" of the initiative. First it states the problem being addressed by the Proposition: "unfair competition laws are being misused by some private attorneys." (Prop. 64, § 1(b), *supra.*) The foregoing reflects that Proposition 64 was intended to curb abuses of the UCL by some private attorneys, not to limit meritorious suits by private citizens and public interest groups representing their interests.

Section 1 then elaborates on the types of misuse "by some private attorneys" targeted by the Proposition, including: "[f]il[ing] frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit," "[f]il[ing] lawsuits where no client has been injured," and "[f]il[ing] lawsuits on behalf of the public without any accountability to the public and without adequate court supervision." (*Id.* at § 1(b)(1), (b)(2), (b)(4).) Thus, from these "findings" it is apparent that Proposition 64 was aimed at preventing attorneys like the Trevor Law Group from abusing the UCL by filing actions using individuals who had not been injured by the unfair business practice, and who did not represent the interests of the public.

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[15] Nor does the Proposition's text reflect an intent to impose a reliance requirement, as discussed in Section IV, *infra.*

Section 1 of the Proposition also contains generalized statements of intent. Section 1(d) provides, in pertinent part, that Proposition 64 is intended to "eliminate frivolous unfair competition lawsuits" *and* "protect[] the right of individuals to retain an attorney and file an action for relief" under the UCL. (Prop. 64, § 1(d), *supra.*) If Proposition 64 required all members of a class to demonstrate injury in fact, it would be more difficult and expensive to obtain class certification. In turn, this would create a disincentive for attorneys to take on meritorious UCL cases. Accordingly, it would be more difficult for individuals to retain class counsel resulting in less opportunity for injured plaintiffs to "retain an attorney and file an action for relief."[16]

Section 1(e), further provides, in relevant part: "It is the intent of California voters in enacting this act ***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(e), *supra,* emphasis

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[16] In *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, Justice Baxter articulated the need for consumer class, and representative UCL, actions:

> Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.[]

(*Kraus* at 126, internal citations omitted.)

added.) The foregoing establishes that the intent of the Proposition was to prevent *attorneys* from abusing the UCL by making it more difficult for these *attorneys* to file frivolous UCL actions. Requiring the *representative plaintiff* to demonstrate standing effectuates this purpose, which is reflected in subsection (e)'s reference to the "client"[17] instead of "all persons whose interests are being represented."

Since Proposition 64 unambiguously states it does not intend to limit individuals' rights to file UCL actions, while seeking to prevent private attorneys from filing frivolous actions, the only reasonable interpretation that achieves this balance of interests is that Proposition 64 imposes the injury in fact requirement on only the person initiating the lawsuit.

B. The Amended Text Makes Clear that Putative Class Members Need Not Demonstrate Injury in Fact

The amendments to the statutory provisions of the UCL made by the Proposition clearly indicate that the injury in fact requirement applies only to a representative plaintiff. Of particular import is the text's reference to "the claimant."

As amended by Proposition 64, Section 17203 provides, in pertinent part: "Any person may pursue representative claims or relief on behalf of others only if ***the claimant*** meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure." "The claimant" unambiguously refers to the person initiating the section 17200 lawsuit. Thus, only the

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[17] "Client" is defined as "a person or entity that employs a professional for advice or help in that professional's line of work." Black's Law Dictionary (2d Pocket Ed. 2001). Since the representative plaintiff employs the attorney's services, the representative plaintiff is the "client" in a UCL action.

representative plaintiff need meet the requirements of section 17204 and Code of Civil Procedure section 382.

Section 17204, as amended, allows "***any person*** who has suffered injury in fact and has lost money or property as a result of such unfair competition" to bring a UCL action. (Emphasis added.) "Any person," in the singular, refers to the person prosecuting the action, that is, the representative plaintiff, not the other unnamed class members or members of the public in a representative UCL action. Since section 17204 references only the representative plaintiff, the only reasonable interpretation is that Proposition 64 intended that only the representative plaintiff demonstrate injury in fact and loss of money or property as a result of the unfair business practice.[18]

Despite the plain language of the Proposition, Respondents are of the position that the injury in fact requirement applies to all members of the putative class, not just the representative plaintiff. Given the contradiction with the text of Proposition 64, Respondents' position must fail. (See *Arredondo v. Regents of University of California* (2005) 131 Cal.App.4th 614, 619 [wherein the court found minor plaintiff's interpretation was "defeated" by the plain language of the statute].)

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[18] Obviously, the standing provisions added by Proposition 64 do not apply to the Attorney General, the district attorney, or other public officials. Adopting Respondents' interpretation would, therefore, create an unintended dichotomy whereby members of the public represented by a representative plaintiff would have to have suffered injury in fact, but members of the public represented by a public official would not.

C. Even if the Statutory Text as Amended by Proposition 64 Is Ambiguous, the Ballot Materials Establish that the Voters Intended to Impose the Injury in Fact Requirement Only on the Representative Plaintiff

Even if the text of Proposition 64 is ambiguous as to whether all plaintiffs in a representative UCL action must demonstrate injury in fact (which it is not), the ballot materials establish that the voters intended to have only the representative plaintiff comply with this requirement.

The argument for Proposition 64 claimed that it was closing a "loophole" that allowed private attorneys who used "front groups" to "shakedown" small businesses by filing frivolous lawsuits under the UCL even though these attorneys "ha[d] no *client* or evidence that anyone was damaged or misled." (Ballot Pamphlet Materials, argument in favor of Prop. 64, RJN, Exh. 2, p. 40, emphasis added; see also *id.*, rebuttal to argument against Prop. 64, p. 41.)

Since the arguments in favor of Proposition 64 were founded entirely on stopping unscrupulous plaintiffs' attorneys from using "front groups" as the "client" (i.e. the representative plaintiff), this means the voters sought to ensure that attorneys filing representative UCL actions had a representative plaintiff who met the new standing requirements of "injury in fact" and who had lost money or property as a result of the alleged unfair business practice. The requirement that only the *representative plaintiff* demonstrate injury in fact thus closes the "loophole," as it was described by the proposition's proponents to the voters. No other intent can be inferred to the voters, such as imposing additional requirements on absent class members, when that argument was never presented to them. (See *Robert L., supra,* 30 Cal.4th at 904.)

There is absolutely no indication in the ballot arguments that the voters were concerned about making sure *all* putative class

members in a representative UCL action demonstrate injury in fact. Therefore, extending that requirement to such unnamed class members would impermissibly expand the intended scope of Proposition 64 and contravene the will of the voters. (Cf., *People v. Thomas* (2005) 35 Cal.4th 635, 644.)

Finally, the analysis by the Legislative Analyst's Office of the effect of the Proposition also confirms that the standing requirement applies only to the representative plaintiff.[19] The analysis provides, in pertinent part: "Currently, a person *initiating* a lawsuit under the unfair competition law is not required to show that he/she suffered injury or lost money or property," and also, "Currently, persons *initiating* unfair competition lawsuits do not have to meet the requirements for class action lawsuits." (Ballot Pamphlet Materials, Analysis by the Legislative Analyst, Background, RJN, Exh. 3, p. 38, emphasis added.) The person who "initiates" the lawsuit is the representative plaintiff, which establishes that Proposition 64 intended only the representative plaintiff to demonstrate injury in fact and meet the requirements of Code of Civil Procedure section 382.

D. The Court-Defined Typicality Requirement for Class Actions Does Not Require All Unnamed Class Members in a Representative UCL Action to Demonstrate Injury in Fact

As stated above, section 17203 provides that a *representative plaintiff* must meet the standing requirements of section 17204 and

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[19] The evaluation by the Legislative Analyst's Office is considered along with other ballot arguments, because the Court assumes that "the voters duly considered and comprehended the materials." (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349.)

"comply with Section 382 of the Code of Civil Procedure."[20] Case law has, in turn, required parties seeking certification as a class representative to establish "the existence of an ascertainable class and a well-defined community of interest among the class members." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

The community of interest requirement consists of three factors: (1) common questions of law or fact predominate over individual questions; (2) class representatives offer claims or defenses that typify the class; and (3) class representatives can adequately represent the class. (*Ibid.*, citing Code of Civ. Proc. § 1781(b)(2)-(b)(4).)

In determining the existence of a well-defined community of interest, "[t]he crucial inquiry centers upon whether the plaintiffs are truly representative of the absent, unnamed class members." (*Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal.App.3d 435, 438.) Thus, the requirement focuses on ensuring that the *representative plaintiff*, who assumes a fiduciary obligation to unnamed plaintiffs, shares similar interests with them so that he may adequately represent their interests in court. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434.)

Code of Civil Procedure section 382 by no means requires putative class members to demonstrate that their interests are

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[20] Section 382 of the Code of Civil Procedure provides, in pertinent part:

> [W]hen 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, one or more may sue or defend for the benefit of all.

It is worth noting that Section 382 does not contain any requirement that a representative action be certified as a class action.

similar to those of the representative plaintiff.[21] Therefore, it does not provide a basis for requiring unnamed class members or members of the public to demonstrate injury in fact.

IV. PROPOSITION 64 DOES NOT IMPOSE ADDITIONAL SUBSTANTIVE REQUIREMENTS, NAMELY, RELIANCE

As set forth above, Proposition 64 amended section 17204 to require that the claimant "has suffered injury in fact and lost money or property as a result of such unfair competition." Respondents have arbitrarily interpreted the "as a result of" language to mean

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[21] Indeed, this Court has recently determined that imposing such a requirement encroaches upon the privacy rights of those putative class members. (See *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360.) In *Pioneer Electronics*, the named plaintiff sought identifying information of consumers who had submitted complaints to Pioneer to facilitate communication with potential class members. In balancing the customers' interests in their confidential information and the named plaintiff's interests in ascertaining potential class members, this Court concluded that the balance weighed in favor of disclosure because the customers had a reduced expectation of privacy in light of the fact that they had already submitted complaints to Pioneer.

Continuing upon this Court's reasoning in *Pioneer Electronics*, it follows that where unnamed class members do not submit a complaint or some other type of communication to the defendant, then those individuals have a full (not reduced) expectation of privacy. In this situation, if Proposition 64 actually required all members of the putative class to demonstrate standing, which, in turn, requires the representative plaintiff to contact unnamed class members and determine whether they suffered injury in fact, then Proposition 64 effectively authorizes a representative plaintiff to encroach upon unnamed class members' privacy rights. This is not what the voters intended in passing the Proposition.

"proximate (or "legal") causation"[22] and rely upon a number of inapposite cases for this erroneous proposition. (Respondent's Brief, p. 24.)

A. The Text of the Proposition Confirms that No Reliance Requirement Was Imposed on Anyone

There is absolutely no indication in the text of the Proposition itself that evidences an intent that "as a result of," as contained in amended section 17204, equates to proximate/legal cause or reliance.[23] The words "proximate cause," "causation," or "reliance" do not appear anywhere in the text of the Proposition. Thus, the voters *could not* have intended to add this requirement.

In fact, section 1(d) of the Proposition clearly states: "It is the intent of the California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief" under the UCL. This statement of purpose confirms that the substantive requirements under the UCL remained intact so that individuals would not be deterred from filing actions under the law as a result of a heightened burden.

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[22] "Proximate cause, in the legal sense, is that cause 'which, in natural and continuous sequence, unbroken by an efficient intervening cause, produced the injury or damage complained of and without which such injury or damage would not have occurred.'" (*Parker v. City and County of San Francisco* (1958) 158 Cal.App.2d 597, 607.)

[23] Again, if Respondents' interpretation were accepted, an unintended double-standard would result whereby actions prosecuted by public officials would retain the "likely to be deceived" standard, while actions prosecuted by private persons would have to prove reliance and, therefore, actual deception. There is absolutely no indication that the voters intended to impose a more onerous liability standard based on who brings the UCL action.

Moreover, after Proposition 64, section 17203 now reads, in pertinent part:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments ... as 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 such unfair competition.

(Emphasis added.) The "may" to which emphasis was added in the foregoing statement remained unchanged after Proposition 64, which reflects that the burden did not change. More specifically, if a consumer could still bring a UCL action even if he does not have definite proof that money or property was acquired by means of unfair competition after Proposition 64, it stands to reason that Proposition 64 did not modify the UCL to require a consumer to demonstrate a particular element of proof such as proximate causation or reliance.

B. The Ballot Materials Confirm that Proposition 64 Was Meant to Effect the Requirements for "Initiation" of a UCL Action, Not Its "Prosecution"

Even if the text of Proposition 64 is ambiguous as to whether a "proximate causation" or "reliance" standard is imposed (which it is not), the ballot materials do not establish any intent by the voters to import a reliance requirement into a UCL claim. The arguments for the Proposition focus on making it more difficult *to bring* a UCL action, not *to prosecute* one. (See Ballot Pamp., *supra*, argument in favor of Prop. 64, p. 40 ["There's a LOOPHOLE IN CALIFORNIA

LAW that allows private lawyers to *file* frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled"; "Protects your right to *file* a lawsuit if you've been damaged"; "Allows only the Attorney General, district attorneys, and other public officials to *file*..."].) Imposing a "proximate causation" or "reliance" requirement would make it more onerous to prosecute such actions.

Also noteworthy is that the Legislative Analyst's Office identified a possibility of an "increase [in] court workload, and therefore state costs, to the extent that there is an increase in class action lawsuits and their related requirements." (Ballot Pamp., *supra*, Analysis by the Legislative Analyst, Fiscal Effects, State Government, at p. 39.) The fact that the Legislative Analyst's Office even contemplated an increase in class actions reflects its failure to even consider that Proposition 64 imposed a reliance requirement. Imposing an additional substantive requirement would make it more difficult, not easier, to bring and maintain class actions. Indeed, a reliance requirement oftentimes makes class certification problematic. (See *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184-85.)

C. The Voters Did Not Intend to Make it More Difficult to Prove Liability under the UCL by Imposing a Reliance Requirement

As previously noted, the UCL imposes ***strict liability*** on defendants because the primary concern of the law is stopping unlawful, unfair, and fraudulent business practices in the marketplace and ensuring that such defendants do not profit from their practices. As a strict liability law, the Legislature intended to make it easier to establish liability thereunder:

> [U]*nder the UCL, a representative plaintiff need not prove that members of the public actually were deceived [or] relied upon the fraudulent practice...* (*Bank of the West v. Superior Court, supra, 2 Cal.4th at 1267*). The only requirement is that the defendant's practice is unlawful, unfair, deceptive, untrue, or misleading. ***The burden of proof is modest: the representative plaintiff must show that members of the public are likely to be deceived by the practice.*** (*Id. at pp. 1266-1267;* see also *State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at p. 1105*).

(*Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1144, emphasis added; see also *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 531-32.)

If the Court finds that Proposition 64 imposed a reliance requirement, it would abrogate the "likely to be deceived" standard and make it more difficult for a UCL plaintiff to establish liability. There is no indication, however, that in passing Proposition 64, the voters intended to overturn the established body of law as set forth in cases such as *Prata, supra.*

In addition, Proposition 64 added the "as a result of" language to *both* the UCL and the FAL. Thus, any intended meaning should be the same in both contexts, but imposing a reliance requirement under the UCL makes no sense when considering the applicability of such a requirement outside the context of fraudulent or misleading advertising (i.e. the fraud prong of the UCL, and the FAL). If a plaintiff was required to establish reliance in a UCL action based on the unlawful or unfair prong, what would he have to show – that he relied on the fact that the defendant would abide by the

law or that the defendant would act fairly? Such proof is nearly impossible to establish and is not the result the voters intended in passing Proposition 64.

Furthermore, imposing a reliance requirement is unreasonable since it would vitiate any distinction between fraud under the UCL and common law fraud. (See, e.g., *Anunziato v. eMachines* (C.D.Cal. 2005) 402 F.Supp.2d 1133, 1137-39 ["A construction of [the UCL and FAL] that reduced them to common law fraud would not only be redundant, *but would eviscerate any purpose that the UCL and the FAL have independent of common law fraud*"], emphasis added.) Nowhere in the Proposition is there any indication that the voters intended to do away with this distinction.

Finally, in proving common law fraud in a representative action, the element of reliance is generally established for all plaintiffs based on a *presumption* of reliance. (See, e.g., *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355.) If Proposition 64 imposed a reliance requirement for representative UCL actions, this means it would be more difficult to prove UCL fraud than common law fraud.[24] Such result cannot be what the voters intended.

D. The Voters Did Not Intend "As a Result of" to Mean "Proximate Causation" in Passing Proposition 64

In determining the plain meaning of a word, a court should use "the meaning [it] bear[s] in *ordinary* use." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [emphasis added].) By equating "as a result of" with proximate cause, Respondents have not given that language

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[24] In *Tobacco II Cases*, the court refused to accept a presumption of reliance in a UCL fraud claim notwithstanding the fact that reliance is usually presumed in representative actions involving common law fraud.

the meaning it bears in ordinary use. "Proximate cause" is a legal term of art that is not ordinarily used by the public.[25] Moreover, in equating "as a result of" with proximate cause, Respondents fail to consider the context in, and the purpose for, which the voters passed the initiative.

The statement of purpose and text of the Proposition clearly establish that the voters did not intend to change the legislative intent behind the UCL, nor the purpose of the law. More specifically, the voters did not intend to change the substantive elements or remedial provisions of the UCL. In passing Proposition 64, the voters only intended to change the standing requirement, which is a *procedural* requirement. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 122 [Second Appellate District characterized the standing requirement as a procedural requirement].)

Further, this Court has already determined that the UCL's substantive requirements remained unchanged after Proposition 64. (*Californian's for Disability Rights v. Mervyn's, LLC, supra,* 39 Cal.4th at 232.)[26] Therefore, even after Proposition 64, courts are still empowered to order restitution without "individualized proof" of

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[25] A review of the California Code reveals that use of the term "as a result of" does not equate to proximate cause in many instances. For example, Section 1659 provides, in part: "The information obtained *as a result of* the fingerprints of the applicant shall be used in accordance with Section 11105 of the Penal Code...." (Emphasis added) "As a result of" as used herein simply means "by" or "from," not legal causation. (See also, Section 4521.2(f) and Civil Code section 43.8 [the "as a result of" language in section 4521.2(f) has the same meaning as "on account of" as used in Civil Code section 43.8, which does not equate to proximate causation, but rather simply requires a showing of some relationship between the damage and the wrongful conduct at issue].)

[26] Further discussion of the *Mervyn's* decision follows in Section V.A, *infra.*

"deception" or "reliance" "if necessary to prevent the use or employment of an unfair practice." (*Bank of the West, supra,* 2 Cal.4th at 1267.) As such, this Court should specifically *avoid* a determination of the meaning of the phrase "as a result of" in the tort context.

Respondents cite cases in which the phrase "as a result of" is interpreted as proximate cause, but those cases are inapposite. Both *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, and *Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, dealt with proximate cause in the context of a negligence action. As set forth above, the Legislature never meant to impose tort liability or tort requirements under the UCL, due to the focus on stopping unlawful, unfair, and fraudulent business practices and the resultant need for "speed and administrative simplicity," (*Bank of the West, supra,* 2 Cal.4th at 1266-67 ["As a result, to state a claim under the act ***one need not plead and prove the elements of a tort.*** Instead, one need only show that '***members of the public are likely to be deceived***' by the unfair business practice"]), and the voters did not change this intent.

Respondents also argue that since Proposition 64 requires "*two* distinct requirements" – that a claimant "suffered an injury in fact *and* lost money or property as a result of [the prohibited action]" – both must be "as a result of" the prohibited action. (Respondents' Brief, p. 26.) This argument makes no sense. The "and" separates two distinct verb clauses: "*has suffered* an injury in fact" and "*has lost* money or property as a result of [the prohibited action]." Use of the phrase "injury in fact" is clearly a reference to the first element of the

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federal standing requirement.[27] (See Prop. 64, § 1(e), *supra* ["It is the intent of California voters in enacting this act 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"].)

In *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, the United States Supreme Court defined the first "injury in fact" element as "an invasion of a legally protected interest which is (a) concrete and particularized [citations] and (b) actual *or imminent,* not 'conjectural' or 'hypothetical.'" (*Id.* at 560 [emphasis added].) Given that an "imminent" injury is sufficient to confer Article III standing, it follows that a plaintiff need not demonstrate causation to have standing under the UCL after Proposition 64. Thus, the only reasonable conclusion is that the voters intended to retain the original substantive requirements, that is, the "likely to be deceived" standard.

Further, it is likely that the "as a result of" language is meant to merely have UCL standing track the second element of the federal standing requirement. As articulated in *Lujan, supra,* this second element states, "there must be a causal connection between the injury and the conduct complained of – the injury has to be ***fairly traceable*** to the challenged action of the defendant, and ***not the result of the independent action of some third party not before the court.***" (*Ibid.*, emphasis added, original alterations omitted.) All the second element requires is that the representative plaintiff show the

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[27] The federal standing requirement contains three elements: (1) the plaintiff must show injury in fact; (2) some sort of connection between the injury and the conduct complained of; and (3) it must be more likely than speculative that the injury can be redressed by a favorable opinion. (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560-61.)

defendant is the proper party to the action and not some third party; it does not require proximate causation. (See *Animal Legal Def. Fund v. Veneman* (9th Cir. 2006) 469 F.3d 826, 834 ["[A] 'chain of causation [may have] more than one link and satisfy Article III, so long as the connection between injury and cause is not 'hypothetical or tenuous' (*Nat'l Audubon Soc'y, Inc. v. Davis* 307 F.3d 835, 849 (9th Cir. 2002)"].) This is a far cry from the "proximate causation" necessary as an element of a tort action that the Respondents claimed was imported into the UCL by Proposition 64.

E. Appellate Court Interpretations of "As a Result of" in the Consumer Legal Remedies Act Do Not Support Respondents' Contention that the UCL Requires "Proximate Causation"

In support of their argument that the voters intended to import the "proximate cause" element of a tort action into the UCL, Respondents also cite to the standing provision of the Consumer Legal Remedies Act ("CLRA"), which contains the "as a result of" language, and California appellate court cases that have stated, without any discussion, that the CLRA requires that the defendant's prohibited conduct "caused" the plaintiff's harm. (See Respondents' Brief, p. 24, citing *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754, and *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292.)

However, Respondents' reliance on these Fourth District Court of Appeal CLRA cases for their argument that Proposition 64 imposed a "proximate cause" requirement in UCL actions is misplaced, and this Court should not rely on those decisions because they: (1) do not analyze the meaning of the "as a result of" language in any detail, and (2) to the extent they refer to harm "caused" by the

defendant's conduct, they do not use the phrase "proximate causation" or anything to that effect.[28]

Civil Code section 1780(a) sets forth the standing requirement for CLRA claims. It states: "Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person ...."

In referring to this standing provision in *Mass. Mutual, supra,* the Fourth District summarily concluded that:

> [T]his limitation on relief requires that plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm.

(*Mass. Mutual, supra,* 97 Cal.App.4th at 1292, citing *Caro v. Procter & Gamble* (1993) 18 Cal.App.4th 644, 667-68[29].) There is no further discussion by the *Mass. Mutual* court, however, of what it meant by the phrase "caused them harm" and the court certainly did not state that "proximate causation" was required. In fact, the court goes on to state that its "finding" regarding the "causation" required by Civil

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[28] Indeed, at least one appellate court has determined that the CLRA does not contain a proximate causation or reliance requirement. (See *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361-62 [holding that the proper determination regarding misrepresentations under the CLRA is "whether the[] representations are likely to deceive a reasonable consumer"].)

[29] It is important to note that the *Caro* court also did not discuss whether causation was required in the CLRA context. In fact, the *Caro* court was discussing whether class certification was proper given the common interest of material misrepresentation that was assumed to be an element of the CLRA by the plaintiff. (See *Caro, supra,* 18 Cal.App.4th at 667, fn. 17 ["according to Caro the issue of material misrepresentation was an element [] in his cause of action ... for violation of CLRA"].)

Code section 1780 "does not make the plaintiffs' claims unsuitable for class treatment," reasoning that:

> The fact a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all." [Citation.] Thus, "[i]t is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." [Citation.]

(*Mass. Mutual, supra,* 97 Cal.App.4th at 1292-93.)

Similarly, in *Wilens, supra,* the Fourth District, again with no analysis, cited to *Mass. Mutual* for its pronouncement that, "Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." (*Wilens, supra,* 120 Cal.App.4th at 754, citing *Mass. Mutual, supra,* 97 Cal.App.4th at 1292.) Again, there is no discussion of what level of "causation" is required, but what is clear is that the *Wilens* court based its conclusion regarding "causation," at least in part on the fact that the CLRA allows for recovery of damages. (See *ibid.* [referencing the

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damage remedy of the CLRA in Civil Code Section 1780(a)(1)].)[30] Thus, *Wilens* is also inapposite.[31]

V. THIS COURT AND AT LEAST ONE OTHER APPELLATE COURT HAVE ALREADY INDICATED THAT PROPOSITION 64 DOES NOT REQUIRE UNNAMED CLASS MEMBERS TO DEMONSTRATE INJURY IN FACT AND DOES NOT IMPOSE ADDITIONAL SUBSTANTIVE REQUIREMENTS

A. The *Mervyn's* Decision Confirms that Proposition 64 Did Not Change the UCL's Substantive Requirements

In *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, this Court explicitly stated that Proposition 64 did not change the UCL's substantive requirements; it only changed the

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[30] Relying upon these cases is also not wise because of this major distinction between the CLRA and the UCL. The CLRA allows for damages as a remedy while the UCL does not. As pointed out in *Anunziato v. eMachines, Inc., supra,* 402 F.Supp.2d at 1137, there may be:

> [A] legitimate basis for requiring reliance and causation where the plaintiff seeks monetary benefit. The same need does not exist when the principal benefit of statutory enforcement, even when undertaken by a single individual non-class representative plaintiff, is protection of the public.

[31] Moreover, analyzing the CLRA's prohibited acts reveals that imposing a proximate causation requirement may limit the scope of CLRA actions contemplated by the Legislature. Civil Code section 1770(a) sets forth the list of "unfair methods of competition and unfair or deceptive acts or practices" that are "unlawful" when "undertaken by any person in a transaction ***intended to result*** or which results in the sale or lease of goods or services to any consumer." (Civil Code § 1770(a), emphasis added.) Thus, according to Civil Code section 1770, a CLRA plaintiff can obtain relief even if the defendant does not consummate the transaction that involved the prohibited act. Requiring a plaintiff to satisfy the tort requirements of proximate causation in order to bring a CLRA action potentially nullifies certain acts contemplated by the "intended to result" language in Civil Code section 1770.

standing requirement for the person initiating the lawsuit. (*Id.* at 232.) *Mervyn's* was filed before Proposition 64 took effect. After its passage, Mervyn's moved to dismiss the appeal because the plaintiff had not suffered any lost money or property. The issue before this Court was whether Proposition 64 applied to cases pending prior to Proposition 64's effective date.

The Court held that Proposition 64 applied to pending cases, stating, among other things, that: "The measure left ***entirely unchanged*** the substantive rules governing business and competitive conduct." (*Id.* at 232-33 [emphasis added].) Since the Supreme Court established that Proposition 64 did not change the UCL's substantive requirements, then the burden under the UCL remains intact, i.e., the "likely to be deceived" standard, and any effort to add a causation or reliance requirement is in direct opposition to the holding in *Mervyn's*.

B. *Aron v. U-Haul Company of California* Confirms that, Even After Proposition 64, Only the Representative Plaintiff Need Demonstrate Injury in Fact and the "Likely to Be Deceived" Standard Still Applies Under the UCL

This Court recently denied review of *Aron v. U-Haul Company of California* (2006) 143 Cal.App.4th 796 (*Aron v.U-Haul Co.*, 2007 Cal. LEXIS 26).[32] In *Aron*, the Second Appellate District found that Proposition 64's standing requirement applies only to the representative plaintiff and not the unnamed class members. The *Aron* court determined that the increased standing requirement was

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[32] Denial of review "may be taken as approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." (*DiGenova v. Board of Education* (1962) 57 Cal.2d 167, 178.)

satisfied because Aron alleged "that *he* suffered economic loss by being required to purchase excess fuel, because there was no accurate measuring device to determine the actual amount required to return the truck at its rental fuel level." (*Aron, supra*, 143 Cal.App.4th at 802-803, emphasis added.) In addition, the *Aron* court did not require allegations that each and every class member suffered injury in fact; instead, Aron's allegation that *he* suffered injury in fact was sufficient to comply with Proposition 64's requirements.

Further, in determining whether the complaint sufficiently alleged a UCL fraud claim, the court applied the "likely to be deceived" standard from the perspective of a "reasonable consumer." (*Id.* at 806.) The court's application of the original standard clearly reflects that even after Proposition 64, reliance is not an element of UCL fraud.

CONCLUSION

For the reasons stated herein, Amicus Curiae respectfully request that this Court reverse the judgment of the courts below, and uphold the will of the voters by not expanding on the substantive requirements of the UCL that they left unchanged.

Respectfully submitted,

DATED: March 26, 2007 GIANELLI & MORRIS

By: _____

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THE FOUNDATION FOR
TAXPAYER AND CONSUMER
RIGHTS

DECLARATION OF JULLY C. PAE

I, Jully C. Pae, declare:

1. I am an attorney duly admitted to practice law before all courts in the State of California. I am an attorney in the firm of Gianelli & Morris, attorneys for Amicus Curiae, The Foundation for Taxpayer and Consumer Rights. The following facts are within my personal knowledge and if called upon to testify I could competently do so.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the San Jose Mercury News editorial article entitled, *Prop 64 Endangers Health and Safety; Vote No It's the Wrong Fix for Lawsuits that Extort Money from Small Businesses*, September 26, 2004, which I downloaded and printed from the Lexis legal research database.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the Los Angeles Times article entitled, *The State; Initiative Seeks Curbs on Consumer Lawsuits*, July 6, 2004, written by Evan Halper and Marc Lifsher, which I downloaded and printed from the Lexis legal research database.

4. Attached hereto as **Exhibit 3** is a true and correct copy of the Sacramento Bee article entitled, *Businesses hail Prop. 64 victory Opponents call it a victory for polluters and scofflaws*, November 4, 2004, written by Dale Kasler, which I downloaded and printed from the Lexis legal research database.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed this 26th day of March, 2007, at Los Angeles, California.

JULLY C. PAE

CERTIFICATE OF WORD COUNT

In accordance with California Rule of Court, Rule 8.520(c)(1), the undersigned party certifies that the word count is **8,185 words**, [or does not exceed the maximum allowable length under The California Rules of Court.] Counsel relies on the Word Count as counted by Microsoft Word, the word processing program used to generate this brief.

Dated: **March 26, 2007**

JULLY C. PAE

15 of 22 DOCUMENTS

San Jose Mercury News (California)

September 26, 2004 Sunday MORNING FINAL EDITION

SECTION: EDITORIAL; Pg. 4P

LENGTH: 544 words

HEADLINE: PROP 64 ENDANGERS HEALTH AND SAFETY;
VOTE NO
IT'S THE WRONG FIX FOR LAWSUITS THAT EXTORT MONEY FROM SMALL BUSINESSES

BYLINE: MERCURY NEWS EDITORIAL

BODY:

A California law intended to prevent unfair business practices has been hijacked by fly-by-night lawyers and shakedown artists. They use it to file frivolous claims against mom and pop businesses that often settle out of court, frequently for thousands of dollars. It's nothing short of legalized extortion.

Proposition 64 would stop the abuse. But it would do so by taking a sledgehammer to a law that ought to be fixed with a scalpel. It's the wrong solution to a real problem.

By gutting the so-called unfair business competition law, Prop. 64 would do away with a powerful tool long used by environmental, consumer and public health advocates to prevent unscrupulous businesses from putting the public at risk.

The law allows average citizens to file suit, even when they have not been directly harmed. Prop. 64 supporters want voters to believe that's wrong. It isn't. It's how environmental groups use the law to stop a polluter from illegally fouling the waters. It's how public health groups use the law to stop a supermarket from endangering the public by selling food whose expiration date has passed. It's how anti-tobacco advocates use the law to stop a store from illegally selling cigarettes to minors.

Prop. 64 would end those suits. Plaintiffs filing cases under the law would have to show not only that they've been harmed, but also that they've suffered financial losses. Only law enforcement officials, such as the attorney general and local district attorneys, would be able to use the law to prevent harm. But it's no secret that law enforcement resources are stretched thin. Saying that Prop. 64 "goes unbelievably far," a top deputy to Attorney General Bill Lockyer added that the initiative amounts to "throwing out the baby with the bathwater."

The costly battle over Prop. 64 could have been avoided. More balanced fixes to the unfair competition law have been debated over the years. Yet every time, they've been thwarted by Democrats beholden to the powerful trial lawyer lobby.

Large businesses have put a whopping $8.2 million behind the Prop. 64 sledgehammer. They'll use the money to convince voters that the initiative is simply about ending shakedown lawsuits.

Who could argue with that? It will be a lot harder to hear the pleas from the dozens of public interest groups, from AARP to American Lung Association and the Sierra Club, who are warning that Prop. 64 would weaken environmental, health and safety protections that all Californians have come to enjoy.

Californians would be best served by defeating Prop. 64 and giving lawmakers one more chance to fix the unfair competition law. If lawmakers punt, the onus will be on public interest groups to craft a more sensible fix to the law and put it before the voters in the next election.

PROP. 64 FACTS

* Plaintiffs would no longer be allowed to sue a business for unfair business practices unless they have been directly harmed and have suffered financial losses.

* It would put an end to frivolous unfair competition lawsuits aimed at shaking down small businesses.

* It would also prevent environ- mental, public health and consumer groups from using the law to stop polluters or other unscrupulous businesses from harming the public.

NOTES: ELECTION 2004

LOAD-DATE: August 31, 2005

3 of 6 DOCUMENTS

Los Angeles Times

July 6, 2004 Tuesday
Correction Appended
Home Edition

SECTION: MAIN NEWS; Metro Desk; Part A; Pg. 1

LENGTH: 2050 words

HEADLINE: The State;
Initiative Seeks Curbs on Consumer Lawsuits

BYLINE: Evan Halper and Marc Lifsher, Times Staff Writers

DATELINE: SACRAMENTO

BODY:

It was a comforting message from California's largest HMO: "When you see a Kaiser Permanente physician, no one but you and your doctor decides what's right for you."

Comforting perhaps, consumers groups said, but flat-out untrue. After a four-year legal battle, they won a court settlement last year requiring Kaiser to disclose how it pays doctors for controlling costs.

Now the health maintenance organization is joining an effort to weaken the 70-year-old consumer protection law under which it was sued. Dozens of companies have already collected $7 million to promote a measure making it more difficult to sue businesses, and political consultants say Proposition 64 could become the hottest ballot initiative of 2004.

At issue is California's tough Unfair Competition Law, which lets consumers sue businesses to stop unfair and deceptive business practices even when those consumers have not been harmed personally. The initiative would sharply limit who can sue and under which circumstances.

Businesses say they do not want to gut the law; they just want to prevent frivolous and costly litigation.

They rattle off hundreds of cases of abuse. One complaint alleges that the Super Soaker squirt gun doesn't shoot as far as promised. Another charges that the Universal Studios movie "In the Name of the Father" is not based on a "true story," as advertised. And a law firm sent letters to 140 ethnic grocery stores, accusing them of offering pirated videotapes for rent and threatening to file a complaint against every store that did not immediately pay a $2,000 settlement.

Consumer groups, on the other hand, insist that the initiative's backers really want to go beyond stopping such cases to strip valuable protections from Californians.

The state's senior consumer attorney -- who acknowledges that the law has been abused -- is alarmed by the proposal to fix it. The initiative "goes unbelievably far," said Senior Assistant Atty. Gen. Herschel Elkins. "Throwing the baby out with the bathwater is not the best thing. There are substantial problems with the proposal."

Elkins says the law has been used successfully to protect the public from polluters, unscrupulous financing schemes and religious discrimination. Other public officials note that the law helped jump-start civil litigation against tobacco companies, which ultimately resulted in a multibillion-dollar settlement for taxpayers.

With hefty contributions pouring in, the measure is shaping up to be among the most costly ballot fights in recent memory.

After two years of failed efforts to overhaul the law in the Legislature -- including 14 unsuccessful bills -- business groups are urgently collecting cash to win. They say they are prepared to spend tens of million of dollars if necessary.

"Companies are budgeting to fix the problem, regardless of the cost," said John Sullivan, a co-chairman of the campaign to pass the measure, Californians to Stop Shakedown Lawsuits.

Businesses say they get shaken down all the time under the current law.

"It's extortion. It's like Chicago in the 1920s," said Peter K. Welch, president of the California Motor Car Dealers Assn. "The window breakers out there find any unlawful act, and they get you in a hammerlock.... It winds up being cheaper to settle than to defend."

Car dealers, who often complain of being hounded by lawsuits saying that the fine print is too small in their newspaper ads or that those ads use too many abbreviations, have so far raised the most money: $4.5 million.

Large corporations such as Microsoft, Blue Cross of California, the State Farm Group, Bank of America Corp. and Southern California Edison Co. have contributed much of the rest.

Kaiser says the advertising case wasn't what it had in mind when it wrote a campaign check. What really annoys the HMO is a case claiming that it broke the law by splitting pills and giving them to patients. Kaiser says patients still got the prescribed dosages, consumer groups endorsed the practice and plaintiffs acknowledged that nobody got hurt.

"We have spent over $1 million in enrollee premiums defending this," said Michael Hawkins, a company attorney. "We do not think it is appropriate."

Although 16 other states have similar consumer protection laws, only California's allows people to sue companies that have not directly caused them damage. A California consumer group, for example, did not have to prove that anyone had been harmed when it successfully sued to stop a supermarket chain from pushing back expiration dates on meat.

Without the existing law, only government prosecutors would have been able to take legal action in that situation.

As proposed, the initiative would limit lawsuits to people who can show they have lost money or property. It also would make it more difficult for individuals to file lawsuits aimed at getting sweeping court orders to halt particular business practices statewide.

"What we are saying is, have a legitimate reason to sue," said Michael Chee, spokesman for Blue Cross of California, which has donated $250,000 to fund the measure. The company has been sued under the consumer protection law at least four times in recent years. The charges have included deceptively increasing members' premiums and underpaying doctors and hospitals.

Alan Zaremberg, president of the California Chamber of Commerce, said passage of the initiative wouldn't keep cases with merit from going forward under other laws.

"If there is a problem, you can call the district attorney," he said. "If they are selling meat that is out of date, he can go stop it."

But several current and former prosecutors scoff at Zaremberg's statement.

"The attorney general's office and the district attorney do not have enough staff -- and never will -- to solve all the problems of deceptions in business practices," Elkins said.

Public interest groups say the changes proposed by the initiative would be a disaster.

Environmentalists cite several cases in which they have used the law to stop polluters before they could cause harm. People should not have to wait until they are hurt to take action, they say.

The Environmental Law Foundation, an Oakland-based advocacy group, says there have been hundreds of pollution and natural-resource cases that could not have been filed under the initiative.

Among them is a lawsuit an environmental health activist group filed that resulted in the removal of tobacco billboard ads from within 1,000 feet of schools. Another case forced bottled-water companies to install filtration systems to remove illegal levels of arsenic.

And a case against major oil companies spurred the cleanup of leaking underground gas station tanks that were polluting groundwater.

So far, the oil giant BP has contributed $50,000 to the initiative.

Other advocacy groups have used the law to stop companies from marketing sugary children's cereals as healthful. They have sued large insurance companies for reducing earthquake coverage without providing adequate notice to policyholders. And they say the law has shed light on car dealers and finance companies that scammed minority customers into paying excessive rates and illegally repossessed cars.

"Unless you have a law like this, those nightmares continue for thousands of people unabated," said Andrew Ogilvie, a consumer attorney in San Francisco.

Los Angeles Mayor James K. Hahn, a former prosecutor, has warned that the initiative would lead to "the erosion of critical public safety and civil rights protections" and cost taxpayers more money because prosecutors would need to take on cases now being handled by private groups.

Hahn, in a recent letter to the California League of Cities, noted that if the measure had been in effect, lawsuits such as the one charging R.J. Reynolds with using its Joe Camel advertising campaign to attract children to smoking would not have been filed. Settlements from such cases resulted in a multibillion-dollar payout for cities and counties, he said.

Some legal experts say there is an easier way to end abuses of the law without keeping legitimate cases out of court. They say all it takes is a little more discipline from the courts, state officials and the bar association.

Indeed, three lawyers accused by Atty. Gen. Bill Lockyer of filing thousands of bogus cases against restaurants and auto repair shops gave up their law licenses.

Robert Fellmeth of the Center for Public Interest Law at the University of San Diego has been pushing lawmakers to pass a bill that would provide prosecutors with resources to more aggressively police use of the law and to crack down on abuses. His solution also would involve judges reviewing settlements to ensure that they are just.

"The problem is not that difficult to solve," Fellmeth said.

But a negotiated solution has yet to gain traction in the Legislature. Analysts say neither side has been willing to give. Many business groups want nothing short of the initiative, and some groups that file suits under the law won't accept any changes.

With the election season looming, both sides hope that Gov. Arnold Schwarzenegger will step in on their side.

The Republican governor, who ran in a recall election on a jobs and pro-business agenda, recently signaled sympathy for the initiative by telling a chamber of commerce audience that he opposes "shakedown lawsuits." His office, however, stresses that the governor has not yet officially declared his position on the measure.

Schwarzenegger's own Environmental Protection Agency secretary used the law in the mid-1990s to file a suit against an El Segundo oil refinery. Environmentalists hope Terry Tamminen will persuade his boss to broker a legislative agreement that will take the steam out of the initiative.

Michael Schmitz, director of CLEEN, an environmental law office in Oakland, says the issue gives the governor an opportunity to bolster his image as an effective pragmatist by negotiating a settlement.

The key is giving him a "way to be both green and pro-business," Schmitz said.

In Chula Vista, meanwhile, the mother of a disabled child is watching it all unfold closely. Kathy Olsen was the lead plaintiff in the case that forced the Kaiser Permanente HMO to disclose a system of bonuses for medical groups that keeps costs down.

The case was about a company not being truthful with the public, she says, and not about shaking down a business. "Everything isn't money or property," Olsen said.

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What Proposition 64 would do

Proposition 64 would revise the state's consumer protection laws to make it more difficult to sue businesses. Here are changes under the measure:

* Attorneys would need to have a client who had been harmed by a business before they could file a lawsuit under the California Business and Professions Code Section 17200.

* It would be more difficult for consumer and environmental groups to challenge in court what they contend are deceptive and dangerous corporate practices, including misleading advertising. Currently, lawyers do not have to prove that anyone was injured before filing a lawsuit.

Business groups say:

* The measure is needed because attorneys are filing too many frivolous suits in the hopes of quick settlements.

Consumer groups say:

* Proposition 64 would eliminate a valuable tool for keeping businesses honest and products safe.

Top contributors

More than $7 million has been raised to support Proposition 64, and proponents say they are prepared to raise millions more. (Opponents have raised $150,000, all from the Foundation for Taxpayer and Consumer Rights In Sacramento.) Here are top contributors to the coalition behind the measure:

1. California Motor Car Dealers Assn., Sacramento $500,000
2. Alliance of Automobile Manufacturers, Washington $250,000
3. Blue Cross of California, Thousand Oaks $250,000
4. California Assn. of Realtors, Los Angeles $200,000
5. Bank of America, Charlotte, N.C. $100,000
6. Citigroup, Washington $100,000
7. Countrywide Home Loans, Simi Valley $100,000
8. Kaiser Foundation Health Plan, Sacramento $100,000
9. Intel Corp., Hillsboro, Ore. $100,000
10. Oracle Corp., Redwood City $100,000
11. Microsoft, Redmond, Wash. $100,000
12. State Farm Mutual Automobile Insurance, Bloomington, Ill. $100,000
13. Southern California Edison, Rosemead $100,000

Source: California secretary of state

Graphics reporting by Evan Halper and Marc Lifsher

CORRECTION-DATE: July 07, 2004

CORRECTION:

Consumer lawsuits -- A photo caption in Tuesday's Section A accompanying an article on California's Unfair Competition Law said Kathy Olsen won a malpractice lawsuit against Kaiser Permanente. She was the lead plaintiff in a false advertising lawsuit against Kaiser that resulted in a settlement requiring the HMO to disclose a system of bonuses given to medical groups for controlling costs. Also, an accompanying chart said the Foundation for Taxpayer and Consumer Rights was in Sacramento; it is in Santa Monica.

GRAPHIC: PHOTO: CONSUMER ADVOCATE: Kathy Olsen, who won a malpractice suit against Kaiser, was a lead plaintiff in forcing the HMO to disclose a system of bonuses for medical groups that kept down costs.
PHOTOGRAPHER: Mark Boster Los Angeles Times

LOAD-DATE: July 7, 2004

1 of 26 DOCUMENTS

Sacramento Bee

November 4, 2004, Thursday METRO FINAL EDITION

SECTION: MAIN NEWS; Pg. A8; ELECTION 2004 - California

LENGTH: 561 words

HEADLINE: Businesses hail Prop. 64 victory Opponents call it a victory for polluters and scofflaws.

BYLINE: Dale Kasler Bee Staff Writer

BODY:

It was another win for California businesses and their benefactor, Gov. Arnold Schwarzenegger.

California voters overwhelmingly passed Proposition 64 on Tuesday, approving a ballot initiative that weakens the general public's ability to pursue lawsuits over unfair business practices and environmental problems.

Consumer advocates and environmentalists bemoaned the outcome, saying it was a victory for polluters and corporate scofflaws. But the proposition's backers called it a common-sense initiative that will merely curb "shakedown" suits filed by greedy lawyers.

"This opportunity for abuse has been removed," said John Sullivan, co-chair of Yes on 64 and president of the Civil Justice Association of California, a Sacramento-based business lobbying group.

"It lifted a giant threat that's been hanging over the head of small businesses and takes us one step toward being a more business-friendly state," Sullivan said. "We had been known as the 'shakedown state.' "

The proposition was supported by Schwarzenegger, who has allied himself with business interests and devoted considerable energy to improving California's business climate. He pledged in May, at a California Chamber of Commerce breakfast, to "get rid of the shakedown lawsuits."

Opponents of Proposition 64 said the initiative really benefits big businesses that were flouting the law.

"The oil and tobacco companies bought themselves a loophole," the Sierra Club's Bill Magavern said.

Jamie Court of the Foundation for Taxpayer and Consumer Rights in Santa Monica said, "Big business spent $16 million and misled the public into believing (the proposition) was only a small change." He said opponents spent a little over $3 million fighting Proposition 64.

He pledged to run a campaign to overturn the initiative.

"Over the course of time, it'll become very clear to the public what was lost," Court said. "The public will hear about a lot more abuses for which there is no remedy. ... We're going to go on the offensive."

Until now private citizens had wide latitude to file lawsuits over environmental issues and unfair business practices. Proposition 64 restricts those rights to those who can show they've been hurt or suffered losses.

Magavern said that's a major distinction. Until now, citizens could sue a polluter, say, to "prevent harm," he said. That was "the best way to ... stop illegal pollution," he said.

Now citizens will have to wait until the damages occur before they can sue, he said.

Of course, government still has the ability to go after polluters and others before damage is done, but citizen lawsuits have been an important safeguard when government dropped the ball, Proposition 64 opponents said.

Sullivan, though, said businesses were getting hit with frivolous lawsuits that did nothing to advance the public interest but generated fat attorneys' fees.

Magavern said environmentalists tried to work with Schwarzenegger this summer to forge a compromise in the Legislature that would preserve the gist of existing law while "getting rid of the bad lawyers."

But the effort fell apart when business lobbyists refused to compromise and chose instead to pursue an initiative, he said.

The initiative passed with nearly 59 percent of the vote.

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The Bee's Dale Kasler can be reached at (916) 321-1066 or dkasler@sacbee.com.

GRAPHIC: Sacramento Bee/Randy Pench Gov. Arnold Schwarzenegger, shown at the Capitol Wednesday , said in May that Proposition 64 would "get rid of the shakedown lawsuits."

LOAD-DATE: November 5, 2004

PROOF OF SERVICE

Supreme Court Case Number S147345
In Re Tobacco II CASES

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is **626 Wilshire Boulevard, Suite 800, Los Angeles, California 90017.**

On **March 26, 2007,** I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS IN SUPPORT OF APPELLANTS; DECLARATION OF JULLY C. PAE AND EXHIBITS

X___ **(BY MAIL)** by placing a true copy thereof enclosed in a sealed envelope address as stated on the attached **SERVICE LIST.** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

X____ **(State)** I declare under penalty of perjury under the laws of the State of California and The United States of America that the foregoing is true and correct.

Executed on **March 26, 2007,** at Los Angeles California.

DIANE SCHMIDT

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In Re Tobacco II CASES
Case Number S147345

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