No. S147345

SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES

WILLARD BROWN, *et al*.,

Plaintiffs and Appellants,

v.

PHILIP MORRIS USA, INC., *et al*.,

Defendants and Respondents.

On Review of a Decision of the Fourth Appellate District, Division One,
Affirming an Order of the Superior Court of San Diego County,
Case No. 711400, Judicial Council Coordination Proceeding 4042
Hon. Ronald S. Praeger, Judge

AMICUS CURIAE BRIEF OF THE NATIONAL CONSUMER LAW CENTER AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFFS AND APPELLANTS

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INTRODUCTION

This appeal presents the question whether, in the private enforcement setting, Proposition 64 abolished the standard this Court established 28 years ago in Fletcher v. Security Pacific National Bank for obtaining restitution orders under the Unfair Competition Law and the False Advertising Law.[1] The Court has consistently held since Fletcher that these statutes empower the courts, in the exercise of discretion, to order restitution to consumers based simply on proof that the business violated a statutory prohibition on false advertising. No causal connection between the transaction and any harm or compensable injury to a consumer need be shown to support a restitution award.

Replacing this traditional "transactional nexus" standard with a proximate cause requirement borrowed from tort law, or the more stringent subjective reliance requirement of common law fraud, would profoundly affect the vitality of the UCL and the FAL. Neither the language nor the intent of Proposition 64 supports this transformation of UCL and FAL jurisprudence.

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[1] Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442. The Unfair Competition Law, Business & Professions Code §§ 17200 et seq., is referred to as the "UCL;" the False Advertising Law, Business & Professions Code §§ 17500 et seq., is referred to as the "FAL."

Both public prosecutors and private parties can enforce the UCL and the FAL. Public prosecution of California's consumer protection laws would be a good idea.[2] In practice, though, as overworked public prosecutors themselves will testify, criminal justice priorities and limited resources prevent the Attorney General and other public prosecutors from taking a leading role in consumer law enforcement.

During the Proposition 64 election campaign, California's highest ranking public consumer attorney, Senior Assistant Attorney General Herschel Elkins, was candid that public prosecutors do not have the resources to enforce the state's consumer protection laws:

> 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.

("Initiative Seeks Curbs on Consumer Lawsuits," LOS ANGELES TIMES (June 6, 2004).)

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[2] Likewise, when asked what he thought about Western civilization, Ghandi is reputed to have replied: "'It would be a good idea!" (See, e.g, "Quotations Page" available at http://www.sccs.swarthmore.edu/users/01/kyla/quotations/g.html (as of April 20, 2007).)

Private individual cases are likewise no match for today's aggressive advertising and marketing practices. In Fletcher, the plaintiff was overcharged $2.56. (Fletcher, supra, 23 Cal.3d at 447.) An individual smoker's receipts for cigarettes would not add up to enough to embolden even the most idealistic among the bar to charge the advancing onslaught of tobacco industry lawyers. The same is true of individual pursuit in the vast majority of consumer transactions that are essential to the everyday lives of Californians: automobile purchases and financing, home purchases and financing, credit cards, bank accounts, and insurance, to name but a few.

In striking down class action bans in low and moderate stake consumer cases, this Court again recognized the importance of class actions to effective consumer law enforcement. In Discover Bank v. Superior Court (2005) 36 Cal.4th 148, the Court said:

> Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because "'[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit'" (Linder, supra, 23 Cal.4th at p. 446), "'the class action is often the only effective way to halt and redress such exploitation.'"

(Id. at 161; see also Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 126 ("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").)

By certifying the questions whether Proposition 64's standing requirement applies to all class members and whether the initiative created a reliance requirement, the Court has again tapped into the substrate of Fletcher, Kraus, Linder v. Thrifty Oil Co.,[3] and Discover Bank. Fletcher, itself an appeal from an order denying class certification, recognized the importance of class certifications in FAL cases to effective enforcement of the law: "Because of the relatively small individual recovery at issue here, the court may find that a denial of class status in the present suit by the requirement of proof of lack of individual knowledge would, as a practical matter, insulate defendant from any damage claim." (23 Cal.3d at 452, emphasis in original.)

In practice, tort causation requirements such as proximate cause and reliance make class certifications in deceptive advertising cases risky and challenging propositions. Tort causation would have defeated the recovery of the interest overcharges in Fletcher. Importing proximate cause or reliance would make it difficult, if not impossible, to certify classes in deceptive advertising cases involving home financing, auto insurance, and prescriptions for seniors — to name just a few examples. Class-wide proof that the deception itself, no matter how shameless, was a substantial factor in every class member's decision, or that every class member subjectively

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[3] (2000) 23 Cal.4th 429.

relied on the advertisement, would not be feasible in a broad range of these cases.[4] This would likely result in denial of class certification and sound the death knell of UCL and FAL enforcement for these transactions.

The Court of Appeal interpreted Proposition 64 as replacing Fletcher's transactional nexus with tort law causation requirements.[5] A decision of this Court affirming this result would discourage the private bar from pursuing deceptive practice cases under the UCL and the FAL and undermine the key roles these statutes play in combating false advertising. While some might welcome that result, it would embolden the worst

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[4] See, e.g., Massachusetts Mutual Life Insurance Company v. Superior Court (2002) 97 Cal.App.4th 1282,1286 (defendant argued that "plaintiffs' claims are not suitable for class treatment because Mass Mutual believes that each plaintiff will be required to make an individual showing of the representation he or she received"); Prata v. Superior Court (2001) 91 Cal.App.4th 1128, 1144 (defendant argued that individualized proof of "which advertisements, disclosures, or representations actually were relied upon by members of the public who participated in Bank One's 'Same-As-Cash' promotion in order to determine liability.").)

[5] In affirming the decertification of the class, the Court of Appeal ruled: "Individual determinations would have to be made as to when the class members began smoking, what representations they were exposed to, what other information they were exposed to, and whether their decision to smoke was a result of defendants' misrepresentations (and thus they suffered an injury due to defendants' conduct) or was for other reasons. The numerous individual determinations render this case unsuitable for a class action." (Court of Appeal Opn. at pp. 24-25, emphasis added.)

marketing practices and leave Californians even more exposed and vulnerable to them.

SUMMARY OF ARGUMENT

Almost 30 years ago, this Court laid down the transactional nexus standard in Fletcher for restitution under the UCL and the FAL. This standard is rooted in the preventative and deterrent regulatory regime these statutes establish. This regime has been held "parallel" to the regulatory jurisdiction of Federal Trade Commission under the FTC Act.

The UCL and the FAL protect consumers by preventing deceptive practices before they occur. Unlike tort law, they are not intended to compensate victims after an injury. Injunctive relief under the UCL and the FAL stops ongoing practices that violate their statutory prohibitions. Restitution deters violations by undermining the financial incentives to commit them. Administrative ease and streamlined procedures effectuate this scheme, free of the burden and complexity of tort causation and damages proof requirements.

Tort law, on the other hand, is primarily compensatory, not preventative and deterrent. Tort concepts such as proximate cause and reliance are foreign to this Court's UCL and FAL jurisprudence.

The Court has recognized the importance of class action enforcement of California's consumer protection laws. Importing proximate cause and/or reliance into the UCL or the FAL would thwart the

certification of class actions in a wide range of deceptive advertising cases and undermine the effective enforcement of these laws.

The voters' intention is paramount in interpreting Proposition 64. They did not intend Proposition 64 to eliminate the transactional nexus standard. Their single-minded intention was to stop Trevor Law-type representative actions. There is no reliable evidence that the voters intended to change the standard established by Fletcher and embraced since then by the courts.

Proposition 64 did not amend the language of sections 17203 or 17535 on which Fletcher was based. Proposition 64 did not draw any distinction between the remedial powers of the courts in cases brought by private litigants, as opposed to public prosecutors. There is no basis in the statutory language of sections 17203 and 17535 for distinguishing between the remedial powers of the courts in private as opposed to public cases. The remedial scheme for injunction and restitution remains intact and applies to all cases brought under the UCL and the FAL, public and private alike.

A plaintiff who has bought a product or service from a defendant who has violated the UCL or the FAL will easily meet the federal constitutional "standing" requirements imposed by Proposition 64. Although the standing requirements apply only to the named plaintiff, all

members of a restitution class defined as all purchasers of the product or service in question will, as a practical matter, also meet these requirements.

The importation of tort causation into the UCL or the FAL would mark a radical departure from this Court's historic jurisprudence. There is nothing in Proposition 64 to show that the voters intended the revolutionary result of overturning Fletcher and its progeny and fundamentally changing the character of these laws, to the detriment of the consumers who voted for the initiative.

ARGUMENT

1. The Traditional Nexus for Restitution Requires Only Proof of a Violation of the UCL or the FAL and Money Paid or Property Given to the Defendant in the Same Transaction.

Appellants' remedy in this case is restitution of what they paid for cigarettes. (Court of Appeal Opn. at p. 11.) Before Proposition 64, public prosecutors and private enforcers alike had only to establish a transactional nexus to make a case for restitution. "Causation" (if it can be called that) for purposes of a restitution order under the UCL and the FAL required only that the consumer buy goods or services from the defendant in a transaction that violated the acts. The acts did not require any other nexus between the violation and the payment of money, or any proof of harm.

Fletcher, the seminal case, has been consistently reaffirmed and followed by this Court. (E.g., Cortez v. Purolator Air Filtration Prods. Co.

(2000) 23 Cal. 4th 163, 177; Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211; see also cases cited at footnote 8, below.) Fletcher established that transactional causation is sufficiently established by proof of only two elements:

- The defendant's violation of section 17200 or 17500; and
- Money or property paid or property given by the consumer to the defendant.

(Fletcher v. Security Pacific National Bank, supra, 23 Cal.3d at 449.)

In Fletcher, plaintiff alleged that Security Pacific National Bank had violated the FAL by advertising "per annum" interest rates, when the bank was in fact computing interest based on a 360-day year. The Court had previously held that this practice violated the FAL because "quoting as a 'per annum' rate interest computed on the basis of a 360-day year is likely to mislead and deceive a bank's potential borrowers." (Chern v. Bank of America (1976) 15 Cal. 3d 866, 876.) Accordingly, the practice could be enjoined.

Fletcher presented the review of denial of a class certification order in a case seeking restitution under section 17535 for the same practice.[6]

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[6] Section 17535 of the FAL then provided, in pertinent part: "The court may make such orders . . . as may be necessary to prevent the use or employment . . . of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice

The trial court had denied certification because "the knowledge of each borrower … must be determined separately for each loan," and that "if a separate determination were necessary for each class member, maintenance of the action as a class action would be neither feasible nor efficient." (Fletcher v. Security Pacific National Bank, supra, 23 Cal. 3d at 446.)

In an argument of which the Court of Appeal's opinion in this case is reminiscent (see footnote 5, above), Security Pacific argued that section 17535 "refers to money 'which may have been acquired by means of any ... [illegal] practice,' … [and] that individual proof of each transaction must be established to determine if the money was obtained by such means." (Id. at 450.) This Court rejected the argument:

> Contrary to defendant's assertion, section 17535 authorizes restitution not only of any money which has been acquired by means of an illegal practice, but further, permits an order of restitution of any money which a trial court finds "*may have been* acquired by means of any . . . [illegal] practice." (Italics added.) This language, we believe, is unquestionably broad enough to authorize a trial court to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction. Hence defendant's argument clearly fails to defeat the class action.

(Id. at 451, italics in original, underscoring added.)

The Court held that the "by means of" language that still appears in section 17535 (and still also in section 17203) requires no showing of

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in this chapter declared to be unlawful." The same language appears today in section 17535 and in section 17203 of the UCL.

proximate causation or reliance. Plaintiff need only prove that the defendant violated the statutory prohibition on false advertising and received money from consumers in the transaction. In the oft-quoted formulation, the Court stated:

> The general equitable principles underlying section 17535 as well as its express language arm the trial court with the cleansing power to order restitution to effect complete justice. Accordingly the statute clearly authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.

(Id. at 449, emphasis added.)

Fletcher thus established a "transactional nexus" test for restitution: an individual plaintiff who bought a product from the defendant, but who was not at all deceived, suffered no loss, and would not be entitled to compensation under tort law, could still ask the Court for and obtain restitution under the FAL. Although the decision to award restitution is ultimately up to the trial judge's discretion, the FAL and the UCL impose no causation requirement as a matter of law.

Fletcher posited deterrence, not compensation, as the basis for dispensing with causation under the UCL and the FAL. Beginning at page 451 of the reported opinion, the Court devoted an extensive discussion to the deterrent purpose of restitution: "[I]nasmuch as '[protection] of unwary consumers from being duped by unscrupulous sellers is an exigency of the

utmost priority in contemporary society', we must effectuate the full deterrent force of the unfair trade statute." (Citations omitted.) The Court concluded that "a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement." (Id.)

Fletcher's recognition of the primacy of deterrence and prevention reflects the regulatory character of the UCL and the FAL, and their "parallelism"[7] to section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)). The UCL is among the "Little FTC Acts" which, like the FTC Act, extended the regulation of unfair competition law to protect consumers as well as competitors. (Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254, 1264.) "In view of the similarity of language and obvious identity of purpose of [the UCL and the FTC Act], decisions of the federal court on the subject are more than ordinarily persuasive." (Cel-Tech Communications v. L.A. Cellular Tel. Co. supra, 20 Cal.4th at 185-186, quoting People ex rel. Mosk v. National Research Co. (1962) 201 Cal. App. 2d 765, 773; see also Lavie v. Procter & Gamble Co. (2003) 105 Cal.App.4th 496, 507 ("no good reason" to depart from the FTC's interpretation).)

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[7] Cel-Tech Communications v. L.A. Cellular Tel. Co. (1999) 20 Cal. 4th 163, 185.

Like the FTC Act, the UCL and the FAL are regulatory, not compensatory, legislative schemes. Unlike tort law, they are not intended to make consumers whole after injury, but to protect them by preventing undesirable business conduct from occurring. The twin remedies of injunction and restitution accomplish this by prevention and deterrence.[8]

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[8] Kraus v. Trinity Management Servs., supra, 23 Cal. 4th at 145-46 ("The trial court's order is "necessary to prevent" future unfair competition because, as we have recognized, an "'injunction against future violations, while of some deterrent force, is only a partial remedy.'"); Bank of the West v. Superior Court, supra, 2 Cal. 4th at 1267 **("**If insurance coverage were available for monetary awards under the Unfair Business Practices Act, a person found to have violated the act would simply shift the loss to his insurer and, in effect, retain the proceeds of his unlawful conduct. Such a result would be inconsistent with the act's deterrent purpose."); McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1983) 33 Cal. 3d 816, 821 **("**Section 17535 of the Business and Professions Code vests the trial court with broad authority to fashion a remedy that will prevent unfair trade practices and will deter the defendant and others from engaging in such practices in the future. The provision of the section for restitution of property acquired by means of illegal practices provides such deterrence."); People ex rel. Kennedy v. Beaumont Investment, Ltd. (2003) 111 Cal.App.4th 102, 135 ("[S]tatutory restitution is not solely 'intended to benefit the [victims] by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations.'"); People ex rel. Lockyer v. Fremont Life Ins. Co. (2002) 104 Cal. App. 4th 508, 531 ("Appellant first argues that across-the-board restitution may not be ordered without proof that all consumers were deprived of money or property as a result of an unfair business practice. This position directly contradicts the holding of [Fletcher].")

Injunctive relief specifically prevents ongoing practices that violate the statutory prohibitions. Restitution deters those same practices by undermining the financial incentives to commit them.

The regulatory character of the UCL and the FAL is reflected in this limited remedial scheme. "[T]he Legislature deliberately traded the attributes of tort law for speed and administrative simplicity." (Bank of the West v. Superior Court, supra, 2 Cal. 4th at 1266-67.) "To permit individual claims for damages to be pursued as part of such a procedure would tend to thwart this objective by requiring the court to deal with damage issues of a higher order of complexity." (Dean Witter Reynolds v. Superior Court (1989) 211 Cal.App.3d 758, 774.)

Restitution holds forfeiture of ill-gotten gain out as an example to law-abiding businesses and promotes integrity in competition. As Justice Baxter observed:

> Merchants who violate the law by selling tobacco products to minors obtain an unfair competitive advantage over their law-abiding counterparts who do not share in the profits from such illegal sales. Use of the UCL to restrain such unlawful activity is therefore appropriate notwithstanding the existence of sanctions available under the criminal law. Compelled disgorgement of profits earned by unlawful sales deters future violations of the law and levels the playing field on which the business activity occurs. (*Fletcher v. Security Pacific National Bank* (1979) 23 Cal. 3d 442, 451 [153 Cal. Rptr. 28,

> 591 P.2d 51] [construing identical language in section 17535 applicable to false and misleading advertising].)

(Stop Youth Addiction v. Lucky Stores (1998) 17 Cal. 4th 553, 579-80, Baxter, J., concurring, emphasis added.)

The profits that law violators reap from deceptive advertising tempt law-abiding businesses to break the law in order to keep up. By empowering the courts to order forfeiture of the money taken from consumers in false advertising transactions, Fletcher sends the message to law-abiding businesses that they will gain nothing by committing the same fouls. Fletcher thus establishes the legal equivalent of the penalty box in ice hockey. It is not sitting in the box that counts so much as the prospect of having to do so.

In the current competitive environment, building and maintaining substantial "market share" has become central to long-term competitive viability. The market share imperative tempts reputable businesses to engage in the practices of their least ethical competitors — to join "the race to the bottom" — lest they lose share to them. The absence of vigilant public prosecution encourages violations of the false advertising laws by making law-breaking less risky and more profitable. Likewise, importing compensatory proof requirements into the UCL's historical regime of deterrence would, as the Court recognized 28 years ago in Fletcher,

encourage violations by impeding class certifications and amplifying the net expected gain from violating the law.

"Unfair competition law" may seem like a misnomer for consumer class actions under the UCL and the FAL. But a business making a rational decision whether to obey the law and lose market share, or to violate it and gain share, will take account of litigation risk. Class actions are thus a mainstay against the race to the bottom that impels even fair-minded businesses to abandon principle to keep up with their least scrupulous competitors.

Without significant discussion, the Court of Appeal turned its back on nearly 30 years of deterrence jurisprudence traceable to Fletcher. This Court prudently granted review to consider the issues at the depth their importance requires.

2. The Question: Did Proposition 64 Overturn Fletcher in Private Enforcement Actions?

There is no dispute that Fletcher continues to be controlling in public prosecutor cases. (Respondents' Brief at p. 29.) Today, a public prosecutor may ask a trial judge to exercise equitable discretion to order restitution of all amounts paid by cigarette buyers for "light" cigarettes without showing that a single purchaser saw a "light" advertisement.[9]

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[9] Compare the Court of Appeal's opinion: "Individual determinations would have to be made as to when the class members began smoking,

Today, a court finding that the advertisements were likely to deceive a reasonable consumer would be acting well within legal bounds to grant that relief.

Respondents' argument is that Proposition 64 eliminated Fletcher's traditional nexus requirement for restitution orders only in the private enforcement context. When Fletcher was decided, a private plaintiff did not have to have any "standing" to seek a restitution order; a complete stranger to the transaction could sue. Proposition 64 unquestionably changed that. But it does not follow that by eliminating transactional strangers as UCL and FAL plaintiffs, Proposition 64 also changed the transactional causation standard that Fletcher and its progeny so firmly established.

The right even to be heard by a court is a standing requirement. The remedial standard applicable to a restitution order is something else entirely. Proposition 64 changed the standing requirement under sections 17204 and 17535. It did not change the remedial standard for restitution under sections 17203 and 17535. The initiative did not change a word of the FAL that Fletcher interpreted — "to restore to any person in interest

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what representations they were exposed to, what other information they were exposed to, and whether their decision to smoke was a result of defendants' misrepresentations (and thus they suffered an injury due to defendants' conduct) or was for other reasons." (Opn. at pp. 24-25.)

any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful." Likewise, after Proposition 64, the second sentence of the UCL's section 17203 remained the same, including the parallel language "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."

Respondents argue that the addition of the new standing requirement in other parts of the law (section 17204 and the second paragraph of section 17535) overturned Fletcher in the private enforcement context, but not in the public enforcement context. This raises the questions of why the initiative did not amend the provisions of section 17203 and 17535 on which Fletcher is based, and why there is still no distinction in the statutory language between public and private prosecutor cases with respect to restitution orders.

Respondents do not answer these questions, but instead argue that by adding the phrase "and has lost money or property as a result of such unfair competition" to sections 17204 and 17535, Proposition 64 replaced the Fletcher standard with a compensatory causation standard. (Respondents' Brief at pp. 23-31.) According to respondents, "as a result of such unfair competition" has a "clear and settled legal meaning" based on tort cases, the Consumer Legal Remedies Act, and the laws of other states. (Id. at pp.

23-25.) Thus, they conclude, the Court need not consider the voter's pamphlet or any other evidence of what the voters intended. (Id. at p. 26.)

A striking feature of this contention is that it ignores the "clear and settled meaning" that Fletcher imparted to the UCL and the FAL. The natural setting for any analysis of Proposition 64 would seem to be the jurisprudential fabric of which the new law is a part. The California courts have not interpreted the UCL or the FAL with reference to tort law standards, the CLRA, or the consumer protection laws of other states. They have taken their cue from the regulatory regime of the FTC Act. Respondents do not cite or discuss the "parallel" FTC Act.

Even more fundamentally, respondents' contention that Proposition 64 imposed tort causation requirements on the UCL and the FAL ignores the legislative context of Proposition 64 — a voter initiative. The voters did not know or have any appreciation of the legal analogies respondents draw in their brief to arrive at their "clear and settled legal meaning." Because Proposition 64 was a voter initiative, the meaning of the words "as a result of" cannot be as facilely resolved as respondents suggest.

3. Voter Intent Is Paramount In Interpreting Ballot Measures.

In the initiative cases on the Court's docket, the Court has had to glean statutory intent in the peculiar legislative environment of the ballot measure. Legislators engage in a deliberative process, in which bills are

drafted, negotiated, debated, and amended before a vote is taken. This confrontational dimension is entirely absent from the initiative process. The special interest groups that typically propose initiatives have unfettered control over the text of their measures. Their measures face only a yes-or-no decision from millions of voters based largely on television advertising and the voter pamphlet.

The "legislative history" of a voter initiative is at best cursory and at worst cryptic. Initiative proponents have inordinate leeway to include artifices in their measures (such as "as a result of") to create phantoms of voter intent. After the election, the proponents can move these phantoms out of the shadows into the light of day as arguments for extending ballot measures beyond the voters' intended reach.

The Court has been confronted by this phenomenon in the context of several important initiatives. The Court has responded with a line of decisions that tailors initiative interpretation to the evil the voters clearly intended to address, as clearly shown by reliable evidence in the measures themselves and the supporting ballot arguments. The Court has guarded actual voter intent against partisan attempts to put words in the voters' mouths. It has hewed to the principle that "the intent of the enacting body is the paramount consideration." (In re Lance W. (1985) 37 Cal.3d 863, 889 (interpreting Proposition 8); see also In re Littlefield (1993) 5 Cal.4th

122, 130 ("[O]ur primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure").)

This Court established the primacy of actual voter intent in its landmark opinion in Evangelatos v. Superior Court (1986) 44 Cal.3d 1188. The Court held that Proposition 51, which abrogated the joint and several liability rule as to non-economic tort damages, did not apply retroactively to causes of action that accrued before its effective date. The principal argument advanced by the retroactivity proponents was based on the measure's findings and declaration of purpose and the ballot arguments. (Id. at 1209-10.) They pointed to the finding that the joint and several liability rule had resulted in "a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and resulted in higher prices for goods and services to the public and higher taxes to taxpayers." (Id. at 1212; Civil Code § 1431.1(a).)

While this statement of intent arguably supported application of the initiative to pending cases, the Court found it inconclusive as evidence of voter intent: "the fact that the electorate chose to adopt a new remedial rule does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law." (Id. at 1214, emphasis added.) The Court concluded that it had "no reliable basis for determining

how the electorate would have chosen to resolve ... the broad threshold issue of whether the measure should be applied prospectively or retroactively ...." (Id. at 1217, emphasis added.)

The Court's insistence on a reliable basis for determining voter intent continued in a pair of decisions decided a week apart in August 1999, interpreting Proposition 213. The voters passed this measure in 1996, adding Civil Code section 3333.4. This statute prohibited uninsured motorists and drunk drivers from collecting non-economic damages in auto accident cases.

In Hodges v. Superior Court (1999) 21 Cal.4th 109, the Court considered whether section 3333.4 applied to a product liability action by an uninsured driver against a car manufacturer. The statute applies to "any action to recover damages arising out of the operation or use of a motor vehicle," which could be read as including a product liability case as well as a lawsuit between motorists.

The Court rejected literal construction of the statute: "[t]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, in the legal and broader culture. Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken." (Id. at 114,

quoting Kopp v. Fair Political Practices Commission (1995) 11 Cal.4th 607, 673, Mosk, J., concurring, emphasis in original.)

The Court went on to emphasize the primacy of actual voter intent: "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." (Id.)

The Court then considered the summary and ballot arguments that appeared in the voter pamphlet as evidence of the voter intent. The Court concluded that voter intent was limited to "remedying an imbalance in the justice system that resulted in unfairness when an accident occurred between two motorists -- one insured and the other not. There is no suggestion that it was intended to apply in the case of a vehicle design defect." (Id. at 116, emphasis in original).)

A week after Hodges, the Court decided Horwich v. Superior Court (1999) 21 Cal.4th 272. In Horwich, the Court considered whether section 3333.4 applied to a wrongful death action by the parents of an uninsured driver against the other driver. After observing that the language of section 3333.4 was subject to differing interpretations, the Court "sought enlightenment" in the "legislative history" of Proposition 213 -- the ballot materials. (Id. at 277.)

The Court concluded that these materials evinced a "single-minded concern with the unlawful conduct of uninsured motorists who, at the

expense of law-abiding citizens, could recover for noneconomic losses while flouting the financial responsibility laws." (Id. at 277.) In light of this single-minded focus of the initiative, section 3333.4 could not be applied to survivors of an insured motorist, who were not even mentioned in the ballot materials:

> We must therefore construe it in accordance with both the letter and spirit of the enactment. Since the initiative also contains no mention of heirs or those who might sue for loss of the care, comfort, and society of their uninsured decedents, we are not at liberty to apply the prohibition against such plaintiffs. (Cf. Hodges v. Superior Court, supra, 21 Cal.4th at 116 ["no suggestion" Proposition 213 was intended to apply in case alleging vehicle design defect].)

(Id. at 280.)

The Court went on to address the defendant's argument that a purpose of the initiative was to reduce litigation costs. The ballot pamphlet stated that the measure would eliminate "big money awards that . . . uninsured motorists and their attorneys go after when these lawbreakers are in an accident with an insured driver." (Id. at 281, emphasis in original.) The Court rejected this argument, stating that the initiative did not target wrongful death plaintiffs because they "do not contribute to this perceived unfairness, nor are they in a position to rectify it." (Id. at 282.) As the Court finally put it: "They are not part of the problem. Thus, we cannot deem them part of the solution." (Id.)

Under this line of decisions, the Court must ascertain whether there is reliable evidence that the voters actually intended to replace the transactional nexus standard for restitution orders with standards taken from tort law. Neither Proposition 64 itself nor the ballot materials reveal any reliable basis for reaching a conclusion that they did.

4. The Voters Did Not Intend to Replace the Transactional Nexus Standard for Restitution with a Tort Standard.

These cases dispose of the claim that "as a result of such unfair competition" must be understood as having a "clear and settled legal meaning" of which the average voter had not the vaguest idea. "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." (Hodges v. Superior Court, supra, 21 Cal.4th at 114.)

The voters' intention with respect to amending the UCL and the FAL must be gleaned from Proposition 64 itself and from its purpose as revealed in the materials before them at the time of the election. The Findings and Statement of Purpose in Proposition 64 demonstrate that the voters intended to impose a federal constitutional "standing" requirement on plaintiffs bringing UCL and FAL cases in order to prevent "Trevor

Law"-type representative actions. (Proposition 64 § 1(e).[10]) The Findings evince a "single-minded concern" with stopping these "frivolous lawsuits."[11] (Appellants' Opening Brief at pp. 28-29; Proposition 64 § 1(b), (d).) There is no reliable evidence in the Findings or in the ballot arguments on which this Court could reliably find a wholesale intention to transform the sole monetary remedy under the UCL and the FAL — restitution — from a deterrent device into a compensatory remedy.

a. Proposition 64 Did Not Impose Tort Causation Requirements on Either the Plaintiff or Any Member of a Restitution Class Comprised of Purchasers of a Consumer Product or Service.

There is no evidence that the voters intended to change any provision of the UCL or the FAL in individual, as opposed to representative, cases. To the contrary, the voters resolved to "protect[] 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." (Proposition 64 § 1(d).)

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[10] "It is the intent of the 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." (Emphasis added.)

[11] Respondents' claim that "the overarching purpose of Proposition 64, as reflected in the ballot materials, was effectively to normalize the UCL's private cause of action by making it more analogous to consumer protection laws in California and in other jurisdictions," is nothing short of preposterous. (Respondents' Brief at pp. 26-27.)

There is also no evidence that the voters saw class action enforcement of the UCL or FAL as a problem. To the contrary, they directed that representative cases be litigated using the class action device. It would have been anomalous for the voters, in the same breath, to have hobbled it.

Proposition 64's statements of intent are clear that it left the Fletcher standard intact in both public prosecutor and in individual (as opposed to representative) cases. There is no reliable evidence on which the Court could conclude that the voters actually resolved to eliminate the transactional nexus standard.

Respondents claim that the addition of the phrase "and has lost money or property as a result of such unfair competition" worked this change. (Respondents' Brief at pp. 25-26; see also pp. 14, 23-24.) To make this claim, respondents appear to concede that they must prove that this clause is not merely part of constitutional "injury in fact," but means something more than standing — namely, tort causation.[12] (Id. at pp. 23-24.) If so, it was incumbent on the proponents of the measure to bring this

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[12] Proposition 64 imposed only one of the three federal constitutional standing elements, "injury in fact," on private UCL and FAL plaintiffs. (Proposition 64 § 1(e).) As shown at pages 30-33 below, restitution claimants and classes can easily establish "injury in fact." Respondents, apparently recognizing this, focus on the "as a result of" clause, arguing that it was intended to bear the entire load of tort causation.

distinction between standing as such and the "as a result of" clause squarely home to the voters. As already observed, the average voter could not have gleaned this fine a distinction from the materials provided.

Even granting the contention that the "as a result of" clause imported something more than just standing, the "as a result of" clause is at least as consistent with Fletcher as it is with respondents' interpretation. Respondents seem to contend that "as a result of such unfair competition" means that the consumer must have parted with the money because of the deceptiveness of the advertising. In other words, the consumer had to have been actually deceived. This is exactly the argument that Security Pacific made and Fletcher rejected. The phrase could alternatively mean, consistent with Fletcher, that the consumer parted with money because he or she engaged in a transaction in which the defendant violated the UCL or the FAL. In other words, "unfair competition" does not refer to the deceptive character of the advertising, just to the illegal character of the transaction.

In choosing between these interpretations, as already observed, there is nothing in Proposition 64 to support any voter intention to change the substantive standard applicable to UCL and FAL restitution claims. There is much more to confirm that the voters intended to maintain the long-standing attributes of individual and class action cases under the UCL and the FAL intact.

It is appropriate to ask whether the "as a result of" in Proposition 64 could mean anything other than "by means of" as used in section 17203 and the first paragraph of section 17535. Fletcher held that "by means of" as used in section 17535 (and by implication section 17203) simply meant participation in an illegal transaction, and did not import tort causation. Respondents' argument rests on a very slender reed if they are saying that the voters intended "as a result of" to mean something different from the established meaning of "by means of," and yet that appears to be their case.[13] Even in a world where such fine distinctions can be drawn, the difference, if any, was never brought home to the voters.

The Court "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." (Hodges v. Superior Court, supra, 21 Cal.4th at 114.) Proposition 64, sold to voters based on the Trevor Law Group experience,

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[13] As noted above, section 17203 and the first paragraph of section 17535 specify the restitutionary remedy for both public prosecutor and private enforcement cases. Fletcher's transactional causation standard still applies to restitution sought by public prosecutors. There is no basis in the statutory language for interpreting "by means of" in sections 17203 and 17535 any differently in private party cases, to which the phrase also applies. Respondents' proposed interpretation posits the anomaly that although a private plaintiff must show tort causation in order to sue, he or she might still obtain a restitution order without showing causation. The possibility that it would then be sufficient for the class representatives alone to show reliance and damage forces respondents to the argument that "standing" must apply to all members of the class. (Respondents' Brief at pp. 12-14.)

was intended to eliminate representative suits brought by complete strangers to the transactions. Proposition 64 does not disclose any clear intention by the voters to impose new burdens on plaintiffs bringing individual (as opposed to representative) claims, or to frustrate well-established class action enforcement of the law.

Individual and class action claims for restitution brought under the Fletcher were "not part of the problem" Proposition 64 addressed; therefore, the Court cannot "deem them part of the solution." (Horwich v. Superior Court, supra, 21 Cal.4th at 282.)

b. The Standing Requirements Apply Only to the Named Plaintiff and Will Readily Be Met by an Entire Appropriately Defined Restitution Class.

The "standing requirements"[14] of amended sections 17204 and 17535 require that an individual claimant have "suffered injury in fact and … lost money or property as a result of such unfair competition." The Findings and Statement of Purpose state that UCL and FAL standing is intended to be interpreted in accordance with the federal court standing requirement of "injury in fact" imposed by the United States Constitution. (Proposition 64 §1(e).)

Under federal constitutional law, "standing" is a threshold jurisdictional requirement that governs the named plaintiff's access to the

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[14] See sections 17203 & 17535.

courts. The reference to constitutional "standing" therefore imports that the requirement applies only to named plaintiffs and not to other class members.

"In essence the question of standing is whether a litigant is entitled to have the court decide the merits of the dispute or of particular issues." (Warth v. Seldin (1975) 422 U.S. 490, 498 [45 L. Ed. 2d 343, 95 S. Ct. 2197], emphasis added.) Article III of the United States Constitution imposes standing as a precondition for a federal court to exercise jurisdiction. (Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 560 [112 S. Ct. 2130, 119 L. Ed. 2d 351] ("One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III [of the U.S. Constitution] – 'serving to identify those disputes which are appropriately resolved through the judicial process' -- is the doctrine of standing"), emphasis added, citations omitted.)

Therefore, by imposing a constitutional "standing" requirement, Proposition 64 required that only the named plaintiff have sufficient nexus with the transaction to render the case justiciable as a threshold matter. Standing is required just to have access to the courts. Only after that access is established do the merits of the controversy come into play.

"Injury in fact" requires only "an invasion of a legally protected interest which is (a) 'concrete and particularized' and (b) 'actual or imminent, not conjectural or hypothetical.'" (Lujan v. Defenders of

Wildlife, supra, 504 U.S. at 560.) The "injury in fact" requirement of standing is easily met by any consumer seeking restitution under the UCL or the FAL of money he or she paid directly to the defendant.

The United States Supreme Court has held that the mere inability to obtain a list of donors allegedly required to be disclosed under the Federal Election Campaign Act satisfied "injury in fact," where the plaintiffs alleged that the information would help them evaluate candidates for public office. (Federal Election Commission v. Akin (1998) 524 U.S. 11, 21 [118 S. Ct. 1777, 141 L. Ed. 2d 10].) Likewise, citizen allegations that the contamination of the North Tygar River prevented them from using the river for recreational purposes were held to satisfy injury in fact. (Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC), Inc. (2000) 528 U.S. 167, 182-83 [120 S. Ct. 693, 145 L. Ed. 2d 610].)

An appropriately defined restitution class under the UCL or the FAL will consist of all consumers who purchased a product or service from a defendant. As the preceding cases imply, "injury in fact" would be easy for the class representatives to establish, as well as for the members of the class. If the "as a result of" clause is interpreted consistently with Fletcher, it will likewise pose no barrier to either to the standing of the class representatives and will also, incidentally, be satisfied by all members of the class. If the clause is interpreted contrary to Fletcher, as respondents contend, then class representatives who had actually been deceived would

have standing. Because standing requirements apply only to named parties, standing is not required for the other members of the class.

(The Court's recent decision in Fireside Bank v. Superior Court, 2007 Cal. LEXIS 3597 (April 16, 2006) is noteworthy at this point. The Court has made clear, contrary to the suggestion in the Court of Appeal's opinion and respondents' brief, that typicality does not require perfect identity between the claims of the class representative and the members of the class. (Slip Opn. at pp. 25-27.))

Standing applies only to the named plaintiff. However, all members of a well defined restitution class under the UCL or the FAL will, as a practical matter, meet the requirement.

5. Importation of Tort Standards into the UCL and the FAL Would Overturn this Court's Established UCL Jurisprudence in the Absence of Any Manifestation of Legislative Intent.

Respondents' argument that Proposition 64 imported tort causation into the UCL and the FAL rends the fabric of nearly 30 years of UCL and FAL jurisprudence. The legislative record before the Court contains no proof that the voters ever intended this radical result. "[I]t is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (Regency Outdoor Advertising, Inc. v. City of Los Angeles (2006) 39

Cal.4th 507, 526, quoting County of Los Angeles v. Frisbie (1942) 19 Cal.2d 634, 644.)

As previously observed, the Court has consistently looked to section 5 of the Federal Trade Commission Act for guidance in interpreting the UCL and the FAL. The standard for false advertising is the same under the FTC Act as under California law, likelihood to deceive a reasonable consumer. (Simeon Management Corp. v. Federal Trade Commission (9th Cir. 1978) 579 F.2d 1137, 1146 n.11.) Under the FTC Act, evidence of actual deception is unnecessary. (American Home Products Corp. v. Federal Trade Commission (3d Cir. 1982) 695 F.2d 681, at 687-88 & n.10.) A likelihood of deception may be based solely on inferences drawn from the advertising itself. (Resort Car Rental System, Inc. v. Federal Trade Commission (9th Cir. 1975) 518 F.2d 962, 964.) Consumer survey evidence of actual deception is not required. (American Home Products Corp. v. Federal Trade Commission, supra, citing Federal Trade Commission v. Colgate-Palmolive Co. (1965) 380 U.S. 374 391-92 [13 L.Ed.2d 904, 85 S.Ct. 1035].)

The "likely to deceive standard" under the FTC Act stands in marked contrast to the Lanham Act's standard for false advertising.[15] Unlike the FTC Act and its close cousins, the UCL and the FAL, the

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[15] 15 U.S.C. § 1125(a).

Lanham Act is not a consumer protection statute. It provides commercial competitors with a private remedy to recover damages for false advertising.

> The Lanham Act is primarily intended to protect commercial interests. A competitor in a Lanham Act suit does not act as a "'vicarious avenger' of the public's right to be protected against false advertising." Instead, the statute provides a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising.

(Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc. (3d. Cir. 1990) 902 F.2d 222, 230.)

In keeping with this key difference in purpose between the Lanham Act and the FTC Act, a private plaintiff under the Lanham Act must prove that consumers were actually deceived in order to establish compensatory damages:

> [C]onsumer testimony proving actual deception is not necessary when the FTC claims that an advertisement has the capacity to deceive or mislead the public. Concomitantly, in cases brought by the FTC under Section 5, "advertising capable of being interpreted in a misleading way should be construed against the advertiser." A Lanham Act plaintiff, on the other hand, is not entitled to the luxury of deference to its judgment. Consequently, where the advertisements are not literally false, plaintiff bears the burden of proving actual deception by a preponderance of the evidence. Hence, it cannot obtain relief by arguing how consumers could react; it must show how consumers actually do react.

(Id. at 228, citations omitted, emphasis added; William H. Morris Co. v. Group W, Inc. (9th Cir. 1995) 66 F.3d 255, 257 (Lanham Act plaintiff must

show that the advertisements "actually deceived a significant portion of the consuming public" and that plaintiff was injured by the conduct).)

Respondents would have Proposition 64 rewire California's "Little FTC Act" jurisprudence. They would discard the "vicariously avenging" and "parallel" FTC Act as the model for interpreting the UCL and FAL. Instead, the compensatory principles of tort law, such as underlie the Lanham Act, would henceforth guide California's UCL and FAL jurisprudence. That would mark a profound reversal of nearly 30 years of decisions of this Court.

This case bears similarity to Sherlock Holmes's "The Adventure of Silver Blaze." The most compelling evidence for Holmes was "the curious incident of the dog in the night-time" — the dog that didn't bark. If the voters had contemplated the revolution that respondents propose, they would have emphatically said so. If the proponents of the initiative intended that result, their "dog" should have barked. It didn't.

Proposition 64 speaks only of reform of the no-standing provisions of the UCL and the FAL, not of a revolution against the core of UCL jurisprudence. The Legislature or the voters might some day resolve to transform the UCL or the FAL as respondents propose. But the voters did not have respondents' radical program in mind when they simply went along with the "as a result of" clause in Proposition 64.

CONCLUSION

Thirty-five years ago, Justice Tobriner wrote: "We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices." (Barquis v. Merchants Collection Association of Oakland, Inc. (1972) 7 Cal.3d 94, 111.) For all the changes since then, these words ring equally true today. Amici request that the judgment be reversed.

Dated: April 23, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Rules 8.520(b) and 8.204(c)(1) of the California Rules of Court that according to the word count on the computer program used to prepare this brief, this brief contains 7,719 words, including footnotes and excluding the cover page, Table of Contents, and Table of Authorities, this Certificate, and the following Proof of Service.

_/s/_____
Arthur D. Levy

PROOF OF SERVICE

I, Cheryl F. Pritchard, state:

I am a citizen of the United States. My business address is 639 Front Street, Fourth Floor, San Francisco, CA 94111. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing document described as:

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