Be Careful What You Wish For: The UCL After Prop. 64

Michael Sweet
Kimberly A. Kralowec

December 1, 2005
Santa Clara County Bar Association
How did we get here?

- Trevor Law Group
  - Actions against nail salons and auto shops. Single plaintiffs with huge number of defendants. Lots of immigrant/mom & pop businesses. Extracted settlement money.

- Resignation from bar with charges pending September 17, 2003.
Attempts at legislative fix

- Several attempts to change 17200 in legislature rebuffed.
Proposition 64

- Who was behind it and why?
- Who opposed it and why?
# Campaign Finance Activity

**PROP 64 - LIMITATIONS ON ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE**

**View Information:**
- General Information
- Late Independent Expenditures Affecting This Measure

How much money is being raised and spent to pass or defeat California propositions and ballot measures, and what are the sources of the money? Check here to follow the money trail.

<table>
<thead>
<tr>
<th>COMMITTEE ID</th>
<th>COMMITTEE NAME</th>
<th>COMMITTEE POSITION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1257254</td>
<td>YES ON 64 -- CALIFORNIANS TO STOP SHAKEDOWN LAWSUITS, A COALITION OF TAXPAYERS, AUTOMOBILE DEALERS, BUSINESS GROUPS AND CIVIL JUSTICE REFORM SUPPORTERS</td>
<td>SUPPORT</td>
</tr>
<tr>
<td>1256299</td>
<td>CALIFORNIA MOTOR CAR DEALERS ASSOCIATION FUND TO STOP SHAKEDOWN LAWSUITS - YES ON 64</td>
<td>SUPPORT</td>
</tr>
<tr>
<td>1270479</td>
<td>PUBLIC HEALTH WARNING: NO ON 64; A COALITION OF ENVIRONMENTAL, PUBLIC HEALTH AND CONSUMER GROUPS, REGISTERED NURSES, AND ENVIRONMENTAL AND CONSUMER ATTORNEYS</td>
<td>OPPOSE</td>
</tr>
</tbody>
</table>

Committees formed to support or oppose the ballot measure.
Stop Shakedown Lawsuits

$14,588,045.29
# Stop Shakedown Contributions

<table>
<thead>
<tr>
<th>NAME OF CONTRIBUTOR</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA Motor Car Dealers Assn. Fund To Stop Shakedown Lawsuits-yes On 64</td>
<td>$5,000,000</td>
</tr>
<tr>
<td>Alliance Of Automobile Manufacturers, Inc.</td>
<td>$1,250,000</td>
</tr>
<tr>
<td>U.S. Chamber Of Commerce And Related Entities</td>
<td>$495,000</td>
</tr>
<tr>
<td>Intel</td>
<td>$300,000</td>
</tr>
<tr>
<td>Kaiser Foundation Health Plans</td>
<td>$300,000</td>
</tr>
<tr>
<td>Pfizer</td>
<td>$217,000</td>
</tr>
<tr>
<td>Blue Cross</td>
<td>$150,000</td>
</tr>
<tr>
<td>Johnson &amp; Johnson</td>
<td>$125,000</td>
</tr>
<tr>
<td>Microsoft</td>
<td>$100,000</td>
</tr>
<tr>
<td>Cisco</td>
<td>$100,000</td>
</tr>
<tr>
<td>Oracle</td>
<td>$100,000</td>
</tr>
</tbody>
</table>
Car Dealers - $4.8 Million

$4,891,049
# Car Dealer Contributions

<table>
<thead>
<tr>
<th>NAME OF CONTRIBUTOR</th>
<th>CITY</th>
<th>STATE</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greater Los Angeles New Car Dealers Association</td>
<td>Los Angeles</td>
<td>CA</td>
<td>$500,000</td>
</tr>
<tr>
<td>New Car Dealers Association</td>
<td>San Diego</td>
<td>CA</td>
<td>$250,000</td>
</tr>
<tr>
<td>Southern California Chevrolet Dealers Association</td>
<td>Cerritos</td>
<td>CA</td>
<td>$151,325</td>
</tr>
<tr>
<td>Toyota Of Orange, Inc.</td>
<td>Orange</td>
<td>CA</td>
<td>$104,900</td>
</tr>
<tr>
<td>Conant Automotive Resources</td>
<td>Cerritos</td>
<td>CA</td>
<td>$100,000</td>
</tr>
<tr>
<td>Orange County Automobile Dealers Assoc.</td>
<td>Costa Mesa</td>
<td>CA</td>
<td>$100,000</td>
</tr>
<tr>
<td>Longo Toyota</td>
<td>El Monte</td>
<td>CA</td>
<td>$100,000</td>
</tr>
<tr>
<td>Silicon Valley Auto Dealers Association</td>
<td>San Jose</td>
<td>CA</td>
<td>$100,000</td>
</tr>
<tr>
<td>Auto Nation</td>
<td>Ft. Lauderdale</td>
<td>FL</td>
<td>$100,000</td>
</tr>
</tbody>
</table>
Public Health Warning
“Coalition of Environmental, Public Health and Consumer Groups, Registered Nurses, and Environmental and Consumer Attorneys”

<table>
<thead>
<tr>
<th>Election Cycle</th>
<th>Election Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1. GENERAL ELECTION</td>
</tr>
<tr>
<td></td>
<td>Tuesday, November 2nd, 2004</td>
</tr>
<tr>
<td></td>
<td>2. PRIMARY ELECTION</td>
</tr>
<tr>
<td></td>
<td>Tuesday, March 3rd, 2004</td>
</tr>
<tr>
<td></td>
<td>3. SPECIAL ELECTION</td>
</tr>
<tr>
<td></td>
<td>Tuesday, October 17th, 2004</td>
</tr>
</tbody>
</table>

TOTAL CONTRIBUTIONS: $3,129,468.02
Consumer Attorneys of California
Last week, Consumer Attorneys of California and its allies officially formed a No on 64 committee to oppose the business-backed initiative. Over the summer, President James Sturdevant had maintained CAOC had no plans to formally coordinate fund raising.

So far, No on 64 contributions total just about $84,000 -- a far cry from the more than $11 million collected by the two Yes on 64 committees, including more than $1.3 million from auto dealers and other businesses in just the month of September. On Tuesday, Shell Oil Co. donated $100,000.
## No on 64 Contributions

<table>
<thead>
<tr>
<th>NAME OF CONTRIBUTOR</th>
<th>CITY</th>
<th>STATE</th>
<th>OCCUPATION</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Attorney's Issues Political Action Committee</td>
<td>Sacramento</td>
<td>CA</td>
<td>Attorney</td>
<td>$500,000</td>
</tr>
<tr>
<td>James Sturdevant</td>
<td>San Francisco</td>
<td>CA</td>
<td>Attorney</td>
<td>$400,000</td>
</tr>
<tr>
<td>Consumer Attorney's Issues Political Action Committee</td>
<td>Sacramento</td>
<td>CA</td>
<td>Attorney</td>
<td>$225,000</td>
</tr>
<tr>
<td>CAALA</td>
<td>Los Angeles</td>
<td>CA</td>
<td>CAALA PAC</td>
<td>$150,000</td>
</tr>
<tr>
<td>California State Council Of Service Employees</td>
<td>Sacramento</td>
<td>CA</td>
<td>Attorney</td>
<td>$100,000</td>
</tr>
<tr>
<td>Greene, Broillet, Panish &amp; Wheeler LLP</td>
<td>Santa Monica</td>
<td>CA</td>
<td>Attorney</td>
<td>$ 50,000</td>
</tr>
<tr>
<td>Milberg Weiss Bershad &amp; Schulman LLP</td>
<td>New York</td>
<td>CA</td>
<td>Attorney</td>
<td>$ 50,000</td>
</tr>
<tr>
<td>Lerach, Coughlin, Stoia &amp; Robbins, LLP</td>
<td>San Diego</td>
<td>CA</td>
<td>Attorney</td>
<td>$ 50,000</td>
</tr>
</tbody>
</table>
TEXT OF PROPOSED LAWS

Proposition 64

The initiative measure is submitted to the people in accordance with the provisions of the Constitution of the State of California.

prop. 64

Section 1. Findings and Declarations of Policy

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

1. Thirteen prior attempts at public vote to enact a ban on the sale, possession, and use of assault weapons have failed, with one attempt being repealed before the measure would have taken effect.

Section 2. Definitions

For the purposes of this act:

1. "Assault weapon" means any firearm designed for mass shooting.

Section 3. Prohibitions

It is hereby prohibited to:

1. Manufacture, import, sell, transfer, loan, or gift an assault weapon.

Section 4. Ban on the sale and possession of assault weapons

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift an assault weapon.

Section 5. Ban on the sale and possession of firearm accessories

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 6. Ban on the sale and possession of ammunition

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 7. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 8. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 9. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 10. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 11. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 12. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 13. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 14. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 15. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 16. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 17. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 18. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 19. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 20. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 21. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 22. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 23. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 24. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 25. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 26. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 27. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 28. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 29. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 30. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift ammunition that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.

Section 31. Ban on the sale and possession of firearm]

It is hereby prohibited:

1. For any person to sell, transfer, loan, or gift any firearm accessory, component, or magazine that is designed or intended to increase the rate of fire or to increase the capacity of a firearm.
Proposition 64

- Principal target: The unaffected private plaintiff
- Standing: Actual Injury
- Liability
- Class Certification
- Restitution
- Injunctive Relief
- Parallel changes in §17535 and §17536.
### The UCL Before Prop. 64:

- "any person" could act as a private attorney general and seek relief on behalf of the “general public” (Bus. & Prof. Code §17204)
- Associations had standing to sue on behalf of their members

### And After:

- "any person who has suffered injury in fact and lost money or property as a result of” unfair competition (Bus. & Prof. Code §17204, as amended)
- Written in the conjunctive; defendants argue this means you have to show both injury in fact and loss of money or property
- But: Prop. 64 expressly indicated that it was intended to import the standing rules of Article III, which do not require loss of “money or property” Prop. 64, § 1(e).
- Associational standing may have been eliminated or limited
- Standing limitations do not apply to claims brought by Attorney General, DA, county counsel, city attorney or city prosecutor.
The Changes Wrought By Prop. 64

Liability

The UCL Before Prop. 64:

- UCL prohibited any “unfair, unlawful or fraudulent” conduct (Bus. & Prof. Code §17200)
  - “unlawful” prong “borrows” violations of other laws (state, federal, statutory, court-made) and makes them independently actionable
  - “fraudulent” prong: plaintiffs need only prove that members of the public “likely to be deceived” (*Bank of the West v. Sup. Ct.*, 4 Cal. 4th 1254 (1992))

- Bottom line: plaintiffs did not have to prove that they, or anyone else, suffered monetary harm or any other kind of harm (*Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983))

And After:

- UCL did not change these substantive bases for liability;
  - UCL still “borrows” violations of other laws;
  - Definition of “unfair” is still dictated by *Cel-Tech*;
  - “fraudulent prong”: the “likely to deceive” standard is arguably altered by the “and lost money or property” language.
The Changes Wrought By Prop. 64

Class Certification

The UCL Before Prop. 64:
- Class certification was not required;
- The plaintiff could seek representative relief on behalf of other people without formal class certification;
- Accordingly, an unaffected plaintiff could, and often did, champion the rights of the general public;
- Some cases suggested that UCL claims could not be certified for class treatment because that was not the “superior” way to litigate the dispute, given the availability of representative, non-class relief (Kavruck v. Blue Cross of California, 108 Cal.App.4th 773, 787 (2004); Frieman v. San Rafael Rock Quarry, Inc., 116 Cal.App.4th 29, 38 (2004)).

And After:
- “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 …” (Bus. & Prof. Code §17203, as amended) (emphasis added).
- Prop. 64 resolves any dispute about whether UCL cases can be certified.
- Now, they not only can be certified, but arguably, they must be.
The Changes Wrought By Prop. 64
Restitution

**The UCL Before Prop. 64:**
- Split of authority on whether non-restitutionary disgorgement of profits is recoverable in a **certified** UCL class action:
  - Supreme Court has specifically left that issue undecided. *See, e.g., Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1148 n.6 (2004); *Kraus*, 23 Cal.4th at 137.
  - *Corbett v. Superior Court*, 101 Cal.App.4th 649, 655 (2002) (“Where a class has properly been certified, a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund.”).

**And After:**
- Prop. 64 does not change the UCL’s “restitution” remedy.
- Does Prop. 64 open the door to damages?
  - A central reason for the Supreme Court’s later holding that restitution is the only form of monetary relief recoverable under the UCL is that “the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity.” *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266-67 (1992); see also *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003).
  - Prop. 64 eliminated the “speed and administrative simplicity” by requiring class certification and imported “attributes of tort law” by requiring “injury in fact.”
The Changes Wrought By Prop. 64

**Injunctive Relief**

**The UCL Before Prop. 64:**
- Plaintiff could obtain injunctive relief on behalf of others without formal class certification

**And After:**
- Prop. 64 arguably limits the injunctive relief remedy unless formal class certification is obtained.
- But – the class certification requirement only applies to plaintiffs seeking to “pursue representative claims for relief on behalf of others.”
  - Individual plaintiff could seek broad injunctive relief - stop publishing misleading advertising; stop engaging in unlawful employment practice
  - Prop. 64 does not say that anyone other than the representative plaintiff has to have lost money or property for an injunction to issue.
Initial Question: Does Prop. 64 Apply Retroactively To Pending Cases?

- No express retroactivity language
- Ballot materials use *prospective* language

- “A YES vote on this measure means: Except for the Attorney General and local public prosecutors, no person could bring a lawsuit for unfair competition unless ….”

- “Proposition 64 closes a loophole allowing lawyers to file frivolous shakedown lawsuits against small businesses.”

- “This measure prohibits any person, other than the Attorney General and local public prosecutors, from bringing a lawsuit for unfair competition …”
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Does Prop. 64 Apply Retroactively To Pending Cases?

- The omission was intentional
  - “At one point we did decide we wanted to keep the initiative as clean as possible and that we didn't want to put in excess language on that or any other issue.”

John Sullivan, Chairman of Yes on 64 Committee, quoted in “Firms’ drive on lawsuits attacked: Critics say Prop. 64 is being used to purge pending cases,” Sacramento Bee, December 29, 2004.
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Does Prop. 64 Apply Retroactively To Pending Cases?

- The omission was intentional
- “The businesses backing Proposition 64 always intended to apply the new law to pending cases and purposely chose not to tell voters,” said Fred Hiestand, general counsel for the Civil Justice Assn. of California, a tort-reform lobbying group that helped sponsor Proposition 64.”

“Citing Prop. 64, Firms Seek to Kill Lawsuits,” Los Angeles Times, December 27, 2004.
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Prop. 64 Retroactivity – The Courts Weigh In:

- Trial courts split on the issue:
  - Judges of the same court came to differing conclusions
- Orange County:
  - Americare v. Medical Capital Corp., Orange Cty. Super Ct. – Prop. 64 does not apply to pending claims
  - California Alliance v. Ensign Group, Orange Cty. Super Ct. – Prop. 64 does apply to pending claims
- Los Angeles County:
  - Teachers for Truth in Advertising v. Spirit Sciences USA, Inc., Los Angeles Cty. Super. Ct. – Prop. 64 does not apply to pending claims
  - Dohrmann v. Tosco Refinery Co., Los Angeles County Super. Ct. – Prop. 64 does apply to pending claims
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Prop. 64 Retroactivity – The Courts Weigh In:

- Appellate courts also split:
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Prop. 64 Retroactivity – The Courts Weigh In:

- **4th District – YES:**
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Prop. 64 Retroactivity – The Supreme Court Acts:

- April 27, 2005: Supreme Court grants review in multiple cases

- Review granted outright:
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Prop. 64 Retroactivity – The Supreme Court Acts:

- “Grant and hold”:
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Prop. 64 Retroactivity – The Supreme Court Acts:

- Depublished:
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

Prop. 64 Retroactivity – In The Meantime

- Plaintiffs seek leave to amend to satisfy the new requirements
- Defendants continue to move for judgment on the pleadings
- Supreme Court probably won’t rule until next year
### How Will Plaintiffs Adapt in the Post-Prop. 64 World?

#### What Plaintiffs Will Do:

- **Injured** People Will File Suit:
  - The easiest way to deal with the amendments is to join a plaintiff who did, in fact, “lose money or property”
  - Far easier than litigating whether Prop. 64 should be interpreted to import Article III standing requirements, or whether associational standing still exists

#### Implications for Defendants:

- The UCL cases that are brought will be stronger.
- Judicial and public hostility will be less frequent and less virulent
  - No more cases like *Benson v. Kwikset* (opinion before rehearing)
### How Will Plaintiffs Adapt in the Post-Prop. 64 World?

<table>
<thead>
<tr>
<th>What Plaintiffs Will Do:</th>
<th>Implications for Defendants:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large associational plaintiffs will become involved.</td>
<td>Result could be similar to what we saw after the PSLRA</td>
</tr>
<tr>
<td>If courts rule that associational standing is unchanged by Prop. 64, we may see a lot more large associations filing UCL actions on behalf of their members.</td>
<td>There was a temporary lull in new filings, but now, securities defendants are facing large, well-capitalized plaintiffs such as pension funds</td>
</tr>
<tr>
<td></td>
<td>Are the defendants really better off?</td>
</tr>
</tbody>
</table>
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

**What Plaintiffs Will Do:**
- They will all seek formal class certification
  - Easiest way to deal with the new class action requirement is simply to add class allegations to the complaint.
  - Drawback – cost of formal class notice
  - Drawback – problem of the Class Action Fairness Act

**Implications for Defendants:**
- Broader monetary relief may be recoverable.
- Defeating class certification can be difficult and expensive.
- Class actions require class notice, which often serves only to publicize the defendant’s wrongdoing and generate public support for the case.
- Class actions cannot be settled or dismissed without court approval (Rule of Court 1859). A certified class has greater settlement leverage.
- Res judicata problem
- Possible CAFA implications
How Will Plaintiffs Adapt in the Post-Prop. 64 World?

What Plaintiffs Will Do:

- Add causes of action
  - Now that an injured plaintiff will be filing suit and seeking formal anyway, you may as well add other claims.
  - CLRA
    - A lot of UCL cases involve fact patterns that would fall within the ambit of the CLRA
      - Punitive damages
      - Mandatory attorneys’ fees (other than CCP section 1021.5)
  - What other causes of action might we see added?

Implications for Defendants:

- Damages are recoverable under the CLRA, not just restitution. Civ. Code §1780(a)(1); Broughton v. Cigna Healthplans, 21 Cal.4th 1066, 1077 (1999).
- CLRA’s attorney’s fees provision is much stronger than Code of Civil Procedure §1021.5 (the private attorney general doctrine). Civ. Code §1780(d).
- Will more cases go to trial?
  - If plaintiff’s attorneys work harder to identify plaintiffs and build cases, will they demand more to settle? Will defendants be willing to pay?
- But - Settlements may bring preclusive effect that is not available under straight § 17200 case. So defendants may be willing to pay more.
<table>
<thead>
<tr>
<th></th>
<th>UCL</th>
<th>CLRA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensatory Damages</td>
<td>No</td>
<td>Yes, minimum $1,000 per class action</td>
</tr>
<tr>
<td>Attorney Fees</td>
<td>Code Civ. Proc §1021.5</td>
<td>Civ. Code §1780(d) (mandatory to a prevailing plaintiff)</td>
</tr>
<tr>
<td></td>
<td>(if it applies)</td>
<td></td>
</tr>
<tr>
<td>Punitive Damages</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>
The Changes Wrought By Prop. 64
Bring in the Public Prosecutors

“Plaintiff Lawyers Hunt for Partners: Needing Public Faces for Private AG Suits, Lawyers Turn to DAs, City Attorneys,” The Recorder, February 25, 2005
The Changes Wrought By Prop. 64 Bring in the Public Prosecutors

The UCL Before Prop. 64:

- Prop. 64 does not impact the standing of public prosecutors.
- Provides that funds recovered shall be earmarked for consumer protection (nobody asked the public prosecutors whether they wanted this).
- Public prosecutors can intervene in pending litigation or retain private class action attorneys to prosecute actions on their behalf (e.g., Judge Sabraw’s decision in the FATE cases contemplated this).

And After:

- Public prosecutors can recover mandatory civil penalties under the UCL – up to $2,500 per violation. (Bus. & Prof. Code §17206(a).
- A public prosecutor is a more threatening opponent.
- A public prosecution is more likely to generate press attention and bad publicity.
- But – public prosecutors have expressed concerns that their funding will be reduced because of the perception that they can earn the money needed to run their offices from UCL litigation.
Prop. 64 Does Much of What it Was Intended to Do

**Fewer UCL Cases will be Filed**
- Don’t know yet if this will actually pan out

**No More “Frivolous” Cases**
- Most plaintiffs will have not only had dealings with the defendant, but will also have suffered actual harm.
- But – how many truly “frivolous” cases were there to begin with??

**No More Trevor Law Group Tactics**
- They were the ones who really abused the law and who should have been more careful about what they wished for.
- But – a simple amendment requiring court approval of all settlements in UCL cases would have accomplished the same result as Prop. 64.
Thanks for coming.
End of presentation
Judge, Superior Court of California, County of Santa Clara
Judge Kleinberg was appointed to the bench in 2002 and re-elected (unopposed) in 2004. He has been on the executive committee of the Litigation Section of the State Bar of California since 2002. Judge Kleinberg received his B.A. from the University of Pittsburgh in 1964 and his J.D. from the University of Michigan Law School in 1967. For over 19 years he was a partner at McCutchen, Doyle, Brown & Enersen LLP (now Bingham McCutchen, LLP) in their San Jose, Palo Alto and San Francisco Offices.
Michael Sweet

Michael Sweet is a senior litigation associate in Winston & Strawn’s San Francisco office who concentrates his practice in complex business litigation and political law. He represents clients in state and federal courts, including in actions brought under the UCL. Prior to practicing law, Mr. Sweet worked as a consultant on national and statewide political campaigns, including the 1992 presidential campaign of former California Governor Jerry Brown. He is a community activist and currently serves as the vice chair of the Rincon-Point/South Beach Citizens' Advisory Committee to the S.F. Redevelopment Agency.
Kimberly Kralowec

Kimberly A. Kralowec is Of Counsel to The Furth Firm LLP, a plaintiffs’ class action firm in San Francisco. Ms. Kralowec has extensive experience litigating UCL actions on behalf of both plaintiffs and defendants, and recently argued the Prop. 64 retroactivity question before the California Court of Appeal (First Appellate District, Division One). Before joining The Furth Firm, she was a partner with Severson & Werson, a class action defense firm in San Francisco. She is the author of *The UCL Practitioner*, the first and only weblog devoted to UCL law and practice (http://www.uclpractitioner.com).