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Private Plaintiff Litigation Under California's Unfair Competition and False Advertising Statutes After Proposition 64

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Despite many areas of disagreement, members of the plaintiffs' bar and the defense bar agree on one thing: Proposition 64 will lead to changes in the legal and practical frameworks governing the litigation of private party claims asserted under the UCL and FAL statutes on an individual and collective basis. But what are those changes? How does Proposition 64 alter the way in which private plaintiff UCL and FAL litigation may lawfully proceed? What must individual private plaintiffs plead and prove to have standing and make out viable claims for monetary relief under the UCL or FAL? How does Proposition 64 affect what matters are properly considered by trial and appellate courts assessing the propriety of class actions in UCL and FAL cases?

Making Sense of Private Plaintiff Litigation Under California's Unfair Competition and False Advertising Statutes After Proposition 64

One of the most hotly contested issues raging in the California courts over the past few years has involved the proper interpretation and application of Proposition 64, the changes to California's Unfair Competition Law, Business & Professions Code § 17200 *et seq.* ("UCL"), and False Advertising Law, Business & Professions Code § 17500 *et seq.* ("FAL") enacted by the voters in the November 2004 election. In the coming years, one of the challenges for California practitioners will be how best to make sense of California's UCL and FAL statutes after Proposition 64.

Despite many areas of disagreement, members of the plaintiffs' bar and the defense bar at least agree on one thing: Proposition 64 will necessarily lead to certain changes in the legal and practical frameworks governing the litigation of private party claims asserted under the UCL and FAL statutes on an individual and collective basis. But just what are those changes? How does Proposition 64 alter the way in which private plaintiff UCL and FAL litigation may lawfully proceed? What must each individual private plaintiff plead and prove to have standing and make out a viable claim for monetary relief under the UCL or FAL? How does Proposition 64 affect what matters are properly considered by trial and appellate courts assessing the propriety of class actions in UCL and FAL cases? This article assesses these questions and suggests some answers in making sense of California's consumer fraud statutes after Proposition 64.

Proposition 64's Amendment to the UCL and FAL Statutes, and the Initial Wave of Proposition 64 Litigation

When the voters enacted Proposition 64, they altered the UCL's and FAL's procedural provisions in Business & Professions Code sections 17203, 17204, and 17535, but left the substantive proscriptions of sections 17200 and 17500 intact. Specifically, the voters amended the UCL and FAL statutes in two important ways.

First, Proposition 64 changes the standing provisions of the UCL and FAL, Business & Professions Code sections 17204 and 17535. It strikes the former language that had authorized statutory claims to be prosecuted by any person "acting for the interests of itself, its members or the general public." After Proposition 64, private party claims under the UCL and FAL shall be prosecuted exclusively by a person "who has suffered injury in fact and has lost money or property as *a result of*" a defendant's statutory violation of the UCL or FAL. Prop. 64, § 3 (amending Bus. & Prof. Code § 17204), § 5 (amending Bus. & Prof. Code § 17535). Thus, Proposition 64 eliminates the former statutory authorization for any private party, uninjured or injured, to prosecute UCL or FAL statutory claims on behalf of the "general public." Despite these changes, Proposition 64 does not affect the authority or ability of designated public officials to prosecute UCL and FAL claims for the general public in governmental enforcement actions. *See* Prop. 64, §§ 1(f), 1(g), 2, 3, 5.

Second, Proposition 64 amended the UCL and FAL statutes by clarifying that private parties are authorized to pursue "representative" claims or relief on behalf of others "only" if they both satisfy the law's "standing requirements" described above and also comply with California's general class-action procedures under Code of Civil Procedure section 382. Prop. 64, § 2 (amending Bus. & Prof. Code § 17203), § 5 (amending Bus. & Prof. Code § 17535). Specifically, Proposition 64 amends sections 17203 and 17535 to provide that "[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section [17204 for the UCL, and 17535 for the FAL] and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any

district attorney, county counsel, city attorney, or city prosecutor in this state." *Id.*

The first wave of Proposition 64-related litigation focused primarily on the propriety of applying the voter-enacted changes to "pending cases"; that is, to cases filed before, but which remained pending when, Proposition 64 took effect on November 3, 2004. In two companion cases, *Californians for Disability Rights v. Mervyns LLC*, 39 Cal.4th 223 (2006), and *Branick v. Downey Savings & Loan Ass'n*, 39 Cal.4th 235 (2006), the California Supreme Court itself addressed this question in the context of pending claims asserted on behalf of others by private parties who were themselves uninjured by the defendants' alleged UCL or FAL violations.

In *Mervyns*, the Court held that Proposition 64 properly applies to pending cases, and rejected the plaintiff's arguments that such application violates general retroactivity principles. 39 Cal.4th at 228-33. The effect of Proposition 64's application to the pending case in *Mervyns* was that the admittedly uninjured plaintiff—Californians for Disability Rights—no longer had standing to prosecute any UCL claim because the plaintiff had not itself suffered any injury in fact, and had not lost any money or property, as a result of defendant Mervyns LLC's allegedly wrongful placement of its shelves and fixtures in a way that impaired access by disabled persons who use wheelchairs and other mobility aids. *Id.* at 227. The plaintiff argued that application of Proposition 64's tightened standing requirements to pending cases would impermissibly have a substantive retroactive effect by imposing potentially dispositive requirements that the plaintiff was not required to satisfy when the case was initially filed. The *Mervyns* Court disagreed.

Even though application of Proposition 64 to the pending case led to dismissal of the plaintiff's UCL claim and termination of the litigation, such application was not impermissibly "retroactive" in effect, the *Mervyns* Court held, "because the measure does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct." *Id.* at 232. "The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor

does the measure eliminate any right to recover. Now, as before, no one may recover damages under the UCL, and now, as before, a private person may recover restitution only of those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest." *Id.* (citations omitted).

To be sure, the application of Proposition 64 to pending cases requires private plaintiffs to satisfy additional hurdles that were not present before the measure's enactment. As *Mervyns* itself illustrates, if the private plaintiff cannot satisfy those additional requirements, then the party no longer has standing to seek relief for itself or others, and its action necessarily fails and must be dismissed. But this litigation-terminating effect does not mean that application of Proposition 64 to pending cases has any impermissible substantive retroactive effect. Rather, as *Mervyns* holds, the effects of applying Proposition 64's tightened standing requirements to pending cases do not constitute the sort of "retroactive" effects that the Court's retroactivity jurisprudence is designed to protect against. *See* 39 Cal.4th at 233 ("the only rights and expectations Proposition 64 impairs hardly bear comparison with the important right the presumption of prospective operation is classically intended to protect, namely, the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred").

In *Branick*, the Court confirmed its holding in *Mervyns* that Proposition 64 applies to pending cases, but held that trial courts have the discretion to permit leave to amend in order to substitute an actually injured plaintiff with standing to prosecute a UCL claim under Proposition 64 for the present uninjured plaintiff who lacked standing under Proposition 64. 39 Cal.4th at 243-44. The Court then remanded the case for determination of whether such leave to amend and substitution was appropriate. 39 Cal.4th at 243-44.

What Must Private Plaintiffs Plead and Prove After Proposition 64 to Have Standing and Any Viable UCL or FAL Claims for Monetary Relief?

Under Proposition 64, UCL and FAL claims necessarily fail unless a private plaintiff can plead and prove that he or she has personally suffered an "'injury in fact and has lost money or property as a result of'" the defendant's challenged act or practice alleged to constitute a violation of section 17200 or 17500. *Mervyns*, 39 Cal.4th at 228-29 & n.2 (citation omitted). In the absence of such allegations and proof, the private plaintiff lacks standing to prosecute any UCL or FAL claim.

While this much is plain, there has been a substantial divergence of views about what effect Proposition 64's amendments should have on the required contours of private party statutory claims under the UCL and FAL. After Proposition 64, private party claims for monetary relief under the UCL and FAL should now have the following as essential inquiries. As before Proposition 64, a private plaintiff must plead and prove a statutory violation of the UCL and FAL by the defendant. After Proposition 64, a private plaintiff also must plead and prove facts sufficient to establish his or her own standing to prosecute a UCL or FAL claim under *Mervyns*, which demands that the private plaintiff has suffered an "injury in fact" and "has lost money or property" both "as a result of" the defendant's challenged practice claimed to violate the UCL's or FAL's substantive proscriptions. And if the private plaintiff seeks monetary relief, then the plaintiff also must sufficiently plead and prove facts sufficient to establish—as under pre-Proposition 64 law—that the defendant has taken money or property from the plaintiff, the return of which the plaintiff seeks through a legally cognizable award of restitution authorized by the UCL or FAL statutes. Thus, in private party actions after Proposition 64, a UCL or FAL claim for monetary relief requires that the private plaintiff have (1) suffered injury in fact; and (2) lost money or property; (3) as a result of; (4) a statutory violation of the UCL's substantive proscriptions in section 17200, or the FAL's substantive proscriptions in section 17500, of the Business & Professions Code; (5) where the money or property sought to be recovered was taken from the plaintiff by the defendant, which, in the exercise of the Court's equitable discretion, should be ordered

returned to the plaintiff by the defendant through a legally authorized award of restitution. Each of these inquires is discussed below.

(1) "Injury in fact" suffered by plaintiff: To have standing after Proposition 64, private plaintiffs must plead and prove that they suffered a legally cognizable "injury in fact" as a result of the defendant's alleged statutory violation. Bus. & Prof. Code §§ 17204 (UCL), 17535 (FAL).

The voters made clear in enacting Proposition 64 that no private plaintiff may prosecute any UCL or FAL claims unless the person has suffered an "injury in fact" under the "standing requirements of the United States Constitution." Prop. 64, § 1(e); Bus. & Prof. Code §§ 17204, 17535; Stern, *Bus. & Prof. C. § 17200 Practice*, 7:73, at p. 7-21 (The Rutter Group 2006). As the United States Supreme Court has held, the "irreducible constitutional minimum of standing" under Article III includes the mandate that "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, and not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations, citations omitted).

Proposition 64's injury-in-fact requirement necessarily weeds out those UCL and FAL claims asserted by private parties who have not themselves suffered an actual and appreciable injury as a result of the defendant's challenged acts or practice claimed to violate section 17200 or section 17500. Any alleged injury that is theoretical, conjectural, generalized or hypothetical will no longer suffice. Indeed, any theory of injury in fact that would not support Article III standing in the federal courts will no longer suffice to support standing in the California courts in UCL or FAL cases. The private plaintiff's alleged harm suffered on account of the defendant's challenged acts or practice must be actual and concrete; it must be particularized and specific as to the individual seeking to pursue the claim.

As illustrated by *Mervyns* and *Branick*, one of the necessary effects of Proposition 64's standing requirements is to do away with the former authorization for *uninjured* persons or groups to prosecute "representative" private-attorney-general actions on behalf of the California "general public" under either the UCL or the FAL illustrated by cases such as *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal.4th

553, 560-62 (1998). After Proposition 64, only designated public prosecutors now have the requisite statutory authorization to prosecute any UCL or FAL claims on behalf of the "general public." If a private plaintiff seeks collectively to litigate any UCL or FAL claims or to obtain relief on behalf of others, then, under Proposition 64, that party must not only have standing but also must comply with the requirements of California's general class-action rule, Code of Civil Procedure section 382. *See* Bus. & Prof. Code §§ 17203, 17535.

(2) Plaintiff "lost money or property": Proposition 64's amendments also provide that no private plaintiff has standing to prosecute a UCL or FAL claim unless that person has "lost money or property" as a result of the defendant's challenged conduct. Bus. & Prof. Code §§ 17204 (UCL), 17535 (FAL). This requirement that the plaintiff have "lost money or property" as a result of the alleged statutory violation is in addition to the baseline injury-in-fact requirement imposed by Proposition 64. Those who have suggested, by reference to arguments in the ballot materials accompanying Proposition 64, that the only standing requirement imposed by the new amendments is that private plaintiffs suffer an "injury in fact" sufficient to support Article III standing in federal court are improperly disregarding the explicit and full text of the statutes' amended standing provisions. Indeed, Proposition 64's additional standing requirement that private plaintiffs must have "lost money or property as a result of" the defendant's alleged UCL or FAL violation is, in practical effect, the most important aspect of Proposition 64's standing requirements. If a private party has "lost money or property as a result of" the defendant's challenged practice, then such a person surely would have suffered a sufficient "injury in fact" to have standing under Article III. Nevertheless, any analysis of Proposition 64's standing requirements should not obscure the different doctrinal and analytical issues raised by Proposition 64's baseline injury requirement ("injury in fact") and baseline economic/proprietary loss requirement ("lost money or property") that all private plaintiffs must satisfy in order to have standing to prosecute statutory claims under the UCL and FAL statutes.

(3) Causation – "as a result of": The need for a legally sufficient showing of causation in private plaintiff litigation under the UCL and FAL should be readily apparent after Proposition 64. Indeed, the explicit terms of Proposition 64 provide that any private plaintiff's requisite

injury in fact, and loss of money or property, both must have been suffered and incurred "as a result of" the defendant's challenged acts or practices alleged to violate the UCL or FAL. The "as a result of" language employed by the voters in Proposition 64 clearly signals the demand for a causal connection—a causal nexus—between the defendant's statutory violation and the plaintiff's claimed injury in fact and economic/proprietary loss.

The "as a result of" phrase employed in Proposition 64 is a classic textbook example of the words of causation—including both factual causation and proximate or legal causation. For instance, Witkin's leading treatise on California law describes the requirement of "injury to plaintiff *as a result of"* a defendant's misconduct as demanding a showing of "proximate or legal cause." 4 Witkin, California Procedure, Pleading § 537, at p. 624 (4th ed. 1997) (emphasis added).

In addition, the "as a result of" language in the UCL and FAL's standing provisions is identical to the language that appears in Civil Code § 1780(a), which is the standing provision contained in one of California's other consumer fraud statutes, the California Legal Remedies Act ("CLRA"). This "as a result of" language in the CLRA's standing provision has been held to impose a "causation" requirement that all private plaintiffs must satisfy to have viable claims under the CLRA. *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 754 (2003). At a minimum, therefore, courts should at least construe the "as a result of" language in the standing provisions of the UCL and FAL in no less demanding a way as they have construed the identical "as a result" of language in the CLRA's standing provision—namely, to demand proof of causation.

Further still, the United States Supreme Court has interpreted the meaning and effect of similar causation language contained in the standing provisions of the federal RICO and antitrust statutes as requiring private plaintiffs to establish both "but-for" (factual) causation and "proximate" (legal) causation. *See Holmes v. S.I.P.C.*, 503 U.S. 258, 267-68 (1992); *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 529-37 (1983). The RICO statute's standing provision, 18 U.S.C. § 1964(c), provides that the right to sue is limited to "any person injured in his business or property by reason of a violation of" RICO's substantive proscriptions in 18 U.S.C. § 1962.

This provision was modeled after the standing provisions in the federal antitrust laws—*i.e.*, § 4 of the Clayton Act, and § 7 of the Sherman Act. In both contexts, the Supreme Court has interpreted the phrase "by reason of" to demand a showing that the defendant's statutory violation was both the "but-for cause and the proximate cause" of the plaintiff's claimed economic injury. *See Holmes*, 503 U.S. at 267-68; *Associated General Contractors*, 459 U.S. at 529-37; *see also Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004). Because the phrases "as a result of" and "by reason of" each equally speak in the language of causation, federal jurisprudence interpreting and applying the analogous causation language contained in the private-party standing provisions of the federal RICO and antitrust statutes should provide useful guidance with respect to Proposition 64's comparable language.

In practical effect, the causation inquiries imposed by the "as a result of" standing language of Proposition 64 should now make *actual injury* and *actual causation* a necessary part of every private plaintiff's action for monetary relief under the UCL and FAL. Indeed, as *Mervyns* and *Branick* illustrate, any private plaintiff that was not actually injured by the defendant's challenged practice, and did not actually lose money or property as a result of the alleged statutory violation, lacks standing under the UCL or FAL.

Likewise, in a case based on a defendant's allegedly deceptive acts or practices (*e.g.*, claims based on a defendant's alleged misrepresentations about its products or services), it follows that private plaintiffs after Proposition 64 must have been among those who were in fact deceived by the defendant's alleged UCL or FAL violation—thereby making *actual deception of plaintiff* an inherent component of Proposition 64's private-party standing analysis in such cases. For instance, consider a plaintiff who claims that a defendant violated the UCL or FAL by making false or misleading statements about a product, and plaintiff seeks restitution of the money he or she paid to purchase the product. Under Proposition 64, the plaintiff lacks standing unless he or she suffered injury in fact and lost money or property as a result of the alleged misrepresentation claimed to violate the UCL and FAL. Regardless of whether a public prosecutor might be authorized to bring a claim on behalf of such a person, the individual cannot prosecute a private UCL or FAL claim in his or her own right if the individual was

not actually deceived by the defendant's alleged misrepresentation in connection with the individual's own product purchase. This is because such an individual could not credibly claim that any alleged injury and economic loss in purchasing the defendant's product was caused by—*i.e.*, incurred "as a result of"—the defendant's alleged misrepresentations.

In the pre-Proposition 64 era, private plaintiffs may have had co-extensive authority with the Attorney General and other designated public prosecutors to prosecute UCL or FAL claims for the general public even if no one was actually deceived by the defendant's challenged practices. But in enacting Proposition 64, the voters have clearly expressed their intent that only the Attorney General or other designated public prosecutors are now authorized to prosecute UCL or FAL claims for the general public in such circumstances. Any former authority that may have held or suggested that private plaintiffs need not themselves actually be injured or deceived by the defendant's challenged practice to assert a claim necessarily involved interpretations of the pre-amended statutory regimes under the UCL and FAL. Thus, such authorities are no longer applicable and provide no guidance with respect to the proper interpretation and application of the UCL and FAL statutes and their standing provisions after Proposition 64.

The nature and content of the causation analysis demanded by Proposition 64's "as a result of" standing requirement will surely produce the most heated and contentious disagreements between the plaintiffs' bar and the defense bar in the next wave of California consumer fraud litigation in the wake of Proposition 64's enactment. For instance, one disputed issue is whether, in UCL and FAL cases based on alleged misrepresentations, private plaintiffs must plead and prove that they actually relied on the defendants' alleged misstatements in order to satisfy the causation ("as a result of") requirement in those statutes' standing provisions. *Compare Pfizer v. Superior Court (Galfano)*, 141 Cal.App.4th 290, 296 (2006) (reliance required to establish causation in misrepresentation cases after Proposition 64) (depublished by grant and hold); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1193-94 (S.D. Cal. 2005) (same); *with Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1136-37 (C.D. Cal.

2005) (reliance need not be pled to satisfy Proposition 64's "as a result of"/causation requirement in misrepresentation cases).

The Ninth Circuit's decision in *Poulos v. Caesars World, Inc., supra*, is particularly instructive. In interpreting and applying the RICO statute's causation requirement in the context of a mail fraud claim, the Ninth Circuit correctly observed that, in many cases, "reliance may be 'a milepost on the road to causation.'" 379 F.3d at 664 (citation omitted). Indeed, "reliance" often "provides a key causal link" between a defendant's alleged statutory violation by making misrepresentations and any alleged economic injury claimed to flow as a result of those alleged misstatements. *Id.* at 665. A defendant's alleged "misrepresentations standing alone have little legal significance" given the statute's causation requirement, the Court observed, and thus "individualized reliance issues related to the plaintiffs' knowledge, motivations, and expectations bear heavily on the causation analysis." *Id.*

But the Ninth Circuit in *Poulos* was reticent to hold that a showing of individual reliance was *always* required in every conceivable civil RICO case premised on allegedly fraudulent conduct by the defendant. It refrained from making any "sweeping pronouncement" that purported to address the numerous sorts of claims and theories that might be advanced, and cautioned that the "'infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.'" *Id.* at 666 (citation omitted). As the Ninth Circuit reasoned, "it is neither necessary or prudent to reach the issue of whether reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on wire fraud." *Id.* (emphasis in original). Instead, the Ninth Circuit was "careful to frame the controlling issue in terms of causation, not reliance." *Id.*

Similarly in this context, the controlling issue after Proposition 64 should be framed and analyzed in terms of causation. Regardless of whether or not a showing of traditional reliance is required, such as that demanded in the context of common law fraud claims (and there are substantial reasons why it should be), there can be no legitimate dispute that some legally cognizable showing of *causation* is absolutely required by virtue of the phrase "as a result of" in the UCL's and FAL's amended standing provisions. Indeed, under Proposition 64,

what private plaintiffs must plead and prove is a legally sufficient causal connection—or causal nexus—between the plaintiffs' claimed economic loss and the defendants' alleged misstatements or fraudulent business practice. As the Ninth Circuit recognized in *Poulos*, in most circumstances the requisite causal nexus cannot be shown in the absence of proof that the plaintiff was exposed to the defendant's misstatements and then in some meaningful way relied upon them to the plaintiff's detriment. To be sure, if the plaintiff would have purchased the defendant's product or services irrespective of the alleged misrepresentation or other fraudulent practice, the plaintiff would have a very difficult time convincing any court that the plaintiff suffered any economic harm "as a result of" the defendant's alleged misstatements and challenged practice. That is, without actual proof of some form of reliance, the plaintiff could not really hope to establish causation, *i.e.*, that plaintiff's alleged economic loss would not have occurred in the absence of the defendant's alleged UCL's or FAL violation. But, as *Poulos* suggests, analyzing the causation questions under the UCL and FAL solely in terms of whether any traditional form of "reliance" is or is not required after Proposition 64 might threaten to misstate, obscure, and even confuse the issues, rather than resolve them in a coherent and doctrinally satisfying way.

(4) Defendant's statutory violation of the UCL or FAL: As before Proposition 64, private plaintiffs must continue to plead and prove that the defendant's challenged acts or practices constitute a statutory violation of the substantive proscriptions imposed under the UCL by section 17200, and under the FAL by section 17500, of the Business & Professions Code.

After Proposition 64, some have questioned whether the effect of Proposition 64's changes to the UCL and FAL statutory regimes is to alter the standards used by the courts for determining whether the defendant's challenged practice constitutes a statutory violation of the UCL and FAL. However, Proposition 64 does not change the underlying "substantive rules governing business and competitive conduct"— "Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." *Mervyns*, 39 Cal.4th at 232. Indeed, Proposition 64 left unchanged the substantive proscriptions set forth in sections 17200 and 17500 of the Business & Professions Code. By its terms, Proposition 64 changed the private

enforcement mechanisms contained in the procedural provisions of the UCL and FAL statutes, *i.e.*, sections 17203, 17204, and 17535. Thus, as *Mervyns*' analysis suggests, the standards for determining whether a defendant's challenged acts or practices constitute a violation of the substantive proscriptions of the UCL or FAL remain unaffected by Proposition 64.

But it is important to recognize the narrow nature of that legal conclusion. Indeed, to properly understand and apply the UCL and FAL statutes in private party actions after Proposition 64, a distinction must be drawn between a defendant's *statutory violation* of 17200 or 17500, and whether a particular individual has *standing* to seek a monetary recovery in a private action under these statutes even assuming a statutory violation by defendant might be established. After Proposition 64, proof in a private UCL or FAL action that a defendant's challenged practice violates sections 17200 or 17500—*e.g.*, because it is "likely to deceive" or has a "tendency to deceive"—would not by itself establish that any private plaintiff can properly sue the defendant in a private UCL or FAL action. Rather, Proposition 64 demands proof that the private plaintiff has suffered an injury in fact and lost money or property as a result of that statutory violation. Consequently, the standard for determining whether a defendant's challenged conduct constitutes a fraudulent business practice may remain the former standard of "likely to deceive" or "tendency to deceive," which applies equally in both private plaintiff actions (affected by Proposition 64) and public enforcement actions brought by the Attorney General or other designated public officials (not affected by Proposition 64). Proposition 64's standing requirements—which provide that no private plaintiff can prosecute any UCL or FAL action unless he or she has suffered an "injury in fact and has lost money or property as a result of" the defendants' statutory violation—simply narrow the class of private plaintiffs authorized to enforce the statutes in civil litigation. It would thus be mistaken for members of the plaintiffs' bar to contend that a defendant's liability to private parties in a private action may still be established merely upon a showing that, in the abstract, the defendant's challenged practice is likely to deceive or has a tendency to deceive—without any concrete showing of actual injury, actual causation, and actual deception with respect to the particular plaintiff bringing the action and seeking relief. Such contentions ignore the explicit text and necessary import of Proposition 64's amendments to

the UCL and FAL's statutory standing provisions, and mistakenly cling to the former statutory regime that the voters sought to change by overwhelmingly enacting Proposition 64.

(5) Legally cognizable economic harm to plaintiff that could support an award of restitution: The final aspect of UCL or FAL liability in private plaintiff cases seeking to impose monetary liability on a defendant relates to the fact that only a narrow category of monetary relief may be awarded to private plaintiffs under these statutes. As the *Mervyns* Court emphasized, both before and after Proposition 64, "no one may recover damages" under the UCL or FAL statutes, 39 Cal. 4th at 232 (citing *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992)); and "a private person may recover restitution only of those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest." *Id.* (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144-50 (2003)). Consequently, no private plaintiff may obtain any monetary award under the UCL or FAL statutes in any private-plaintiff action without pleading and proving facts sufficient to establish the person's entitlement to restitution from the defendant of money or property that the defendant wrongfully acquired from the plaintiff on account of the defendant's proven violation of the UCL or FAL statutes. After Proposition 64, as before, private plaintiffs must sufficiently establish that by virtue of the defendant's statutory violation of the UCL or FAL, the defendant has taken money or property from plaintiff the return of which plaintiff seeks through a legally cognizable award of restitution authorized by the UCL or FAL statutes.

Proposition 64's Effect on the Certifiability of Private Party Class Actions Under the UCL and FAL: Do the Amended Standing Provisions Apply Only to the Named Plaintiffs in Class Action Cases?

While *Mervyns* and *Branick* were winding their way through the appellate process after the November 2004 general election, another set of cases in which the application and effect of Proposition 64 was simultaneously being litigated in the California courts involved those in which the plaintiffs had sought to litigate UCL and FAL claims as class actions. This most notably includes *In re Tobacco Cases II*, 142 Cal.App.4th 891 (2006) (review granted), and *Pfizer v. Superior Court (Galfano)*, 141 Cal.App.4th 290 (2006) (review granted, on a grant and hold basis, pending the outcome of *Tobacco Cases II*).

In *Tobacco Cases II*, the Fourth Appellate District, Division One, unanimously affirmed the trial court's decertification of a class it had previously certified in 2001, consisting of all California smokers who purchased cigarettes from 1993 to 2001 and were exposed to the cigarette company defendant's allegedly deceptive marketing and advertising practices. The plaintiffs purported to identify a wide array of allegedly false or misleading statements by the cigarette company defendants—on a number of different and particularized issues, in different media, and over the course of several decades—which the plaintiffs claimed to violate the UCL and FAL. The plaintiffs then broadly sought restitution of all money spent to purchase the defendants' cigarettes in California from 1993 to 2001. As both the trial and appellate courts agreed in *Tobacco Cases II*, the effect of Proposition 64's application to future proceedings was to interject predominant individual issues of injury and causation into the case, such that class-wide treatment of the UCL and FAL claims was no longer warranted and was unmanageable. In support of this conclusion, the trial court noted that it did not appear than any of the four named plaintiffs could even satisfy Proposition 64's standing requirements, because the record revealed that none of them could establish any causal link between the defendants' allegedly false statements claimed to violate the UCL or FAL and any of their cigarette-purchasing decisions.

The procedural history of class certification proceedings in the case further illustrates the rationale underlying the decertification ruling

after Proposition 64 took effect. The plaintiffs in *Tobacco Cases II* initially sought certification of claims under the CLRA, which the trial court denied on the ground that the CLRA's requirements of injury and causation implicated a host of individual issues that predominated, thereby defeating class certification. However, the trial court later certified the plaintiffs' UCL and FAL claims based on the view that, at that time, the individual inquiries of injury and causation that precluded certification of the plaintiffs' CLRA claims were "wholly absent" from the UCL and FAL statutes as they existed in 2001. With the voters' enactment of Proposition 64, however, the same inherently individualized inquiries of injury and causation were now implicated under the UCL and FAL. Consequently, the trial court granted the defendants' motion to decertify the class, and the Court of Appeal affirmed.

In *Pfizer*, the Second Appellate District, Division Three, held that application of Proposition 64's standing requirements to that pending case warranted reversal of the trial court's certification for class-wide treatment of UCL and FAL claims that were based on the theory that the defendant's advertisements for Listerine were misleading by allegedly implying that the mouthwash could effectively replace dental floss in reducing plaque and gingivitis. As in *Tobacco Cases II*, the Second Appellate District in *Pfizer* reasoned that the application of Proposition 64's standing requirements warranted the conclusion that individual issues predominated on the fundamental question of whether the plaintiff and each putative class member had standing to prosecute claims in their own right, under the UCL and FAL. However, the Second Appellate District in *Pfizer* premised its reversal of class certification on its view that an individual showing of "reliance" by the named plaintiffs and each putative class member was required in order to establish causation in misrepresentation cases under the UCL and FAL.

The plaintiffs petitioned for California Supreme Court review in both *Tobacco Cases II* and *Pfizer*. On December 1, 2006, the California Supreme Court granted review in *Tobacco Cases II*, and issued a grant and hold in *Pfizer*.

One of the central issues raised in both *Tobacco Cases II* and *Pfizer* is whether, in putative class action cases under the UCL and FAL, courts

need concern themselves only with whether the named plaintiffs who purport to be class representatives can satisfy Proposition 64's standing requirements, or whether it is proper for courts considering the propriety of class certification in any given case to consider whether all putative class members could satisfy Proposition 64's standing requirements as well. Indeed, one common aspect of the appellate decisions in *Tobacco Cases II* and *Pfizer* is the courts' agreement that, in determining whether individual issues predominate so as to preclude class-wide litigation of UCL and FAL claims, it is proper to consider whether the nature of the claims at issue implicate a predominance of individual inquiries about whether the named plaintiffs and putative class members could prosecute any UCL or FAL claims in their own right in light of Proposition 64's standing requirements.

In the lead case, *Tobacco Cases II*, the plaintiffs have argued to the California Supreme Court that, in a putative class action brought under the UCL and FAL statutes, Proposition 64's standing requirements apply only to the named plaintiffs who purport to be class representatives. But the statutory language states that 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 (emphasis added). Included in the latter requirement that the claimant comply with California's general class-action rule, C.C.P. § 382, is the principle of class-action law that the plaintiff's proposed class must be comprised of an ascertainable group of individuals *who each have standing to bring the claim in their own right*. Indeed, the appellate courts in both *Tobacco Cases II* and *Pfizer* cited *Collins v. Safeway Stores, Inc.*, 187 Cal. App.3d 62 (1986), which provides: "The definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his or her own right." *Id.* at 73. This is indeed a bedrock rule of class-action law. A proposed class must be limited to ascertainable individuals *with standing* to bring the action in their own right. *See also*, *e.g.*, *Zelman v. JDS Uniphase Corp.*, 376 F. Supp. 2d 956, 966 (N.D. Cal. 2005) ("The purpose of defining a plaintiff class . . . is to limit the class of plaintiffs to those ascertainable individuals who have standing to bring the action.") (citing *Newberg on Class Actions* §§ 2.3 & 6.14

(4th ed. 2002)); *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 490 (S.D. Ill. 1999) ("Definition of a class should not be so broad so as to include individuals who are without standing to maintain the action on their own behalf."); *accord McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D. S.D. 1982); *Lamb v. Hamblin*, 57 F.R.D. 58, 60 (D. Minn. 1972); *Thomas v. Clarke*, 54 F.R.D. 245, 249 (D. Minn. 1971). Hence, contrary to the plaintiffs' argument in *Tobacco Cases II*, it is entirely proper for courts to consider whether the very nature of the claims at issue implicate a predominance of individual inquiries on the question of whether the named plaintiffs and all putative class members have standing, and thus any viable claims at all, under the UCL or FAL statutes.

This conclusion is also supported by another fundamental tenet of class action law. A class action is merely a procedural device employed in appropriate cases collectively to litigate, on a representative basis, viable claims shared by the named plaintiff and all putative class members. The class action procedural device does not, and cannot, alter or expand the underlying law that forms the basis of the claims sought to be certified for class-wide treatment. *See*, *e.g.*, *City of San Jose v. Superior Court*, 12 Cal.3d 447, 462 (1974); *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.App.4th 997, 1018 (2005); *Madrid v. Perot Sys. Corp.*, 130 Cal.App.4th 440, 461 (2005). Thus, if a person lacks standing to assert a claim against the defendant in his or her own right, such a person cannot be permitted to recover through the backdoor of a private-party class action. Surely no properly certified class action under the UCL or FAL can include private persons who lack standing and thus could not assert any statutory claims in their own right in the absence of certification of the class. Hence, any contention that, under Proposition 64, courts determining whether to certify a class action in any given UCL or FAL case may only consider whether the named plaintiffs who purport to be class representatives can satisfy the amended standing requirements under the UCL and FAL is flatly at odds with the fundamental nature of the class-action procedural device on which the plaintiffs purport to rely to litigate claims on an aggregated basis.

In resolving this issue in *Tobacco Cases II*, the California Supreme Court will need to consider and address the fundamental nature of the class action procedural device. It will also have further occasion to pronounce how Proposition 64's amendments to sections 17203,

17204, and 17535 have altered what private plaintiffs must establish to have standing, as well as what matters trial and appellate courts may properly consider in determining the propriety of class actions under the UCL and FAL. Resolution of the appeals in *Tobacco Cases II* and *Pfizer* should at least begin to provide all of us with an indication of how the California Supreme Court views private plaintiff litigation under the UCL and FAL statutes after Proposition 64, and how the voters' enactment of Proposition 64 has changed the legal and practical frameworks governing the litigation of private party claims on an individual and collective basis.

This article first appeared in the Second Quarter 2007 issue of *The Verdict*, published by the Association of Southern California Defense Counsel.

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Steven B. Weisburd is an Austin-based partner in Dechert's litigation team. He is a member of several of the firm's practices, including mass torts and product liability and appellate. He concentrates his practice primarily in the area of complex civil litigation, focusing on trial and appellate matters for a variety of businesses and industries. He has wide-ranging experience in consumer class actions, marketing disputes, false advertising and unfair competition cases, and general business litigation.

Mr. Weisburd has successfully represented some of the nation's largest corporations in class action cases and other complex litigation in various federal and state jurisdictions. He participated in briefing for Philip Morris USA in the *Tobacco Cases II* discussed in this article, and also represented the California Chamber of Commerce and other California business associations as *amici curiae* in the *Mervyns* and *Branick* cases.

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