



## PACIFIC LEGAL FOUNDATION

July 7, 2009

Honorable Ronald M. George, Chief Justice  
and the Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-3600

Re: *Safeco Insurance Company of America, et al. v.  
Superior Court; Lisa Karnan, et al., No. S173602*

Dear Chief Justice George and Honorable Associate Justices:

Pacific Legal Foundation (PLF) respectfully requests that the Court grant Safeco Insurance Company's and First National Insurance Company's petition for review of *Safeco Insurance Company of America, et al. v. Superior Court*, No. B213044, 173 Cal. App. 4th 814 (2009). Cal. Rules of Court, Rule 8.500(g). PLF urges the Court to review the decision of the lower court because it conflicts with the plain language and purpose of Proposition 64 and thereby presents an important question of law.

### IDENTITY AND INTEREST OF AMICUS

Founded 35 years ago, Pacific Legal Foundation is widely recognized as the nation's largest, oldest and most experienced nonprofit legal organization of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, property rights, individual rights, and free enterprise. PLF has previously litigated as amicus curiae as to the purpose and effect of California's Unfair Competition Law, as well as class actions, in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009); *Amalgamated Transit Union v. Superior Court*, No. S151615, 2009 WL 1838972 (Cal. June 29, 2009); *Californians For Disability Rights v. Mervyn's*, 39 Cal. 4th 223 (2006); *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); and *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002). PLF believes that Proposition 64 fundamentally changed representative actions under the Unfair

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Competition Law (UCL) by requiring class action procedures and eliminating associational standing, and, in so doing, the reformed UCL should prohibit a noninjury plaintiff from proceeding *at all* in the litigation.

## INTRODUCTION

Lisa Karnan was never overcharged on her car insurance premiums or suffered any other injury at the hands of either the Safeco or First National insurance companies. Nonetheless, purporting to represent all policy holders in California, she sued the companies under the state's Unfair Competition Law. Proposition 64's amendment to California's UCL, however, requires that plaintiffs have an actual injury related to the unfair business practice complained of. Unable to move forward with her lawsuit, the uninjured Karnan sought to engage in discovery that was nothing more than a fishing expedition to see if she could find someone in the putative class who had been injured. The court of appeal granted Karnan permission to force the two companies to respond to this expensive, time-consuming, and possibly useless discovery.

California businesses are struggling enough without being sued by people they never injured. Proposition 64 allows private enforcement of the UCL only by plaintiffs who have suffered some identifiable loss of money or property as a result of an injury. Without this predicate, the UCL claims should have been dismissed. Instead, the lower court allowed Karnan to force the defendants to provide the names of customers who may have been injured, so the "straw" plaintiff could find a substitute who could prosecute the case. This ruling eviscerates the clear language of Proposition 64, and defeats its purpose—to protect against frivolous lawsuits which are a drain on California's already diminished economy.

California's UCL encourages both government officials and private individuals to challenge corporate misdeeds in order to protect the public from unfair, unlawful, and fraudulent conduct. But the law also encourages individuals to seek remedies for injuries personally suffered—a traditional aspect of tort law. While the legislative and judicial expansion of the UCL furthered the public law goals of the statute, publicized abuses galvanized voters into demanding restrictions of its provisions. By enacting Proposition 64, Californians rejected the expansive public law approach to the UCL, imposing new standing and causation requirements that plainly reflect a private law viewpoint. However, the decision of the court of appeal ignored Proposition 64's mandate that only injured persons have standing to sue under the UCL. Because the lower court's opinion conflicts with both the plain language and purpose of Proposition 64, this Court should grant the petition for review, and reverse.

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## ARGUMENT

This Court's review of an appellate court decision is appropriate when necessary "to settle an important question of law." Cal. Rules of Court 8.500(b)(1). The lower court's decision satisfies this criteria for review by raising the important and unsettled question of law as to the applicability of Proposition 64's standing requirements to an uninjured plaintiff who seeks to conduct discovery for the purpose of finding an appropriate individual to substitute as the named class representative.

This issue is of inestimable importance—not just to the parties, but to potential parties to future litigation across the state. If the decision below stands, future defendants will face lawsuits in which placeholder plaintiffs hold open the courthouse doors until an actual, injured plaintiff can be found. In this situation, a defendant would be forced to respond to a complaint, engage in preliminary motions, and even discovery, all without knowing whether there would ever be an actual injured party prosecuting the litigation. Such a defendant would be accountable to virtually anyone able to file a complaint, and thus unable to predict potential liability and how to offset that burden within his business. *Arden Carmichael, Inc. v. County of Sacramento*, 93 Cal. App. 4th 507, 517 (2001) (“[P]redictability in the law . . . is of particular value in laws affecting economic activity.”).

When this action first commenced before Proposition 64 was enacted, any California citizen could bring a lawsuit under the UCL for “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Bus. & Prof. Code §§ 17200, 17204.

Actions for relief [under the UCL could] be prosecuted . . . by the Attorney General or any district attorney or by any county counsel . . . [or] by a city prosecutor . . . [or] by a city attorney . . . or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

Bus. & Prof. Code, former § 17204, *amended by Stats*, 1993, ch. 926, § 2, p. 5198; *see also Californians For Disability Rights v. Mervyn's*, 39 Cal. 4th at 227. Under the UCL, California allowed any of its citizens to bring a lawsuit for “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Bus. & Prof. Code §§ 17200, 17204. The plaintiff need not have suffered a personal injury. *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 850-51 (2002). Nor was there any requirement that the public had actually relied on the company's actions. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992). In fact, the “statute's breadth [was] matched by its liberal and perhaps unique standing provisions.” Robert C. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's On First?*, 15-WTR Cal. Reg. L. Rep. 1, 1 (1995). Under this scheme, the “procedural formalisms and due process safeguards of class actions . . . disappeared.” Michael S. Greve,

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*Consumer Law, Class Actions, and the Common Law*, 7 Chap. L. Rev. 155, 166 (2004). The resulting legal landscape was a nightmarish parody of a judicial system, where thousands of small businesses became easy targets for unscrupulous litigants.

California voters concluded that the statute was too prone to abuse and needed serious reform. After the state Legislature repeatedly failed to address voters' concerns (*see* Mathieu Blackston, Comment, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime*, 41 San Diego L. Rev. 1833, 1847-48 (2004) (detailing failed legislative attempts)), they enacted Proposition 64 and transformed the UCL back into a private law statute. *See United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 125 Cal. App. 4th 1300, 1303 (2005) (After Proposition 64, “[t]he authority of a person to file suit on behalf of the general public absent injury in fact and loss of money or property has been abrogated.”). Under Proposition 64, a UCL plaintiff now must show that he “has suffered injury in fact and has lost money or property as a result of the unfair competition.” Bus. & Prof. Code § 17204, *amended by* Proposition 64, § 3.

Proposition 64 also imported class action procedures into the UCL, so that “[a]ny person may pursue representative claims or relief on behalf of others.” Bus. & Prof. Code § 17203, *amended by* Proposition 64, § 2; *see also Amalgamated Transit Union*, 2009 WL 1838972, at \*2. However, a restriction was also placed on this new avenue of pursuing relief under the UCL: the person seeking to bring a class action could do so “*only if* the claimant meets the standing requirements of Section 17204.” Bus. & Prof. Code § 17203, *amended by* Proposition 64, § 2 (emphasis added); *see also Amalgamated Transit Union*, 2009 WL 1838972, at \*2. Unless the person bringing the class action has also “suffered injury in fact and has lost money or property as a result of the unfair competition,” the individual lacks authority to bring the action at all.” Bus. & Prof. Code §§ 17203-17204, *as amended by* Proposition 64, §§ 2-3.

The court below recognized that “Karnan’s claim differed from and was not typical of the class claim alleged in the complaint, that she was never a class member, and that she therefore could not maintain the class action.” *Safeco*, 173 Cal. App. 4th at 823. Notwithstanding the plain language of the UCL, the court of appeal devised an exception to the standing requirements on the purported grounds that the interests of unidentified—and perhaps nonexistent—class members outweighed the potential abuse of the litigation process that might be wrought by a plaintiff who has not “suffered injury in fact” and “lost money or property as a result of the unfair competition.” *Id.* at 827 (quoting Bus. & Prof. Code § 17204).

And yet this Court just recently rejected the flip side of this holding, that would allow an injured plaintiff to assign the rights to prosecute his UCL claims to an uninjured representative: “[A]llow[ing] a *noninjured assignee* of an unfair competition claim to stand in the shoes of the *original, injured claimant* would confer standing on the assignee in direct violation of the express

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statutory requirement in the unfair competition law, as amended by the voters' enactment of Proposition 64 . . . ." *Amalgamated Transit Union*, 2009 WL 1838972, at \*4. The critical point is that "that a private action under that law be brought *exclusively* by a 'person who has suffered injury in fact and has lost money or property as a result of the unfair competition.'" *Id.* (quoting Bus. & Prof. Code, § 17204). If a noninjured assignee—someone expressly charged by an injured party with litigating that injured party's claims—lacks standing, so too must Karnan—who has not even been assigned an injured party's right to pursue litigation—lack proper standing.

The requirement that a litigant have standing recognizes that courts are not super-legislatures inquiring "into the 'wisdom' of underlying policy choices," but instead is the branch of government that "may be asked to decide whether a statute is arbitrary or unreasonable for constitutional purposes." *People v. Bunn*, 27 Cal. 4th 1, 17 (2002). Indeed, the "purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." *Bilafer v. Bilafer*, 161 Cal. App. 4th 363, 370 (2008) (quoting *Common Cause v. Bd. of Supervisors* 49 Cal. 3d 432, 439 (1989)). California courts recognize the importance of standing, because the requirement that "a plaintiff to have a personal interest in the litigation's outcome" ensures that "all of the relevant facts and issues will be adequately presented." *Id.* (citations omitted).

This Court's establishment of a prudential standing requirement also reflects the recognition of a basic truth: Courts are well-equipped to handle actual disputes between adverse parties, but are not the proper forum for resolution of theoretical disputes. See Robert P. Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 *Antitrust L.J.* 515, 518 (1986) (noting that "the judicial process is poorly equipped to deal . . . with highly speculative claims of injury"). In fact, "courts should not make unnecessary decisions, because unnecessary decisions are often bad decisions." Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 *Tex. L. Rev.* 215, 221 (1998). Rather, "at their best," courts may be described as "councils of wise elders meditating on real disputes." Richard A. Posner, *The Problematics of Moral and Legal Theory* 257-58 (1999). Standing requirements ensure "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). By rendering judgment based on the "actual factual setting" of the case at hand, a court ensures that its decisions "will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.*

If the lower court's decision is allowed to stand, it will permit individuals without standing to engage in discovery to identify an actual injured person to serve as the representative of a class of claimants who may have standing. By allowing the placeholder plaintiff to litigate, the doors of the judiciary

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are once again thrown open to a flood of “lawyer’s lawsuits,” clogging California’s courts with dozens of similar claims. *See Van Gemert v. Boeing Co.*, 573 F.2d 733, 735 (2d Cir. 1978) (noting Harvard Law Review article describing class actions as “lawyer’s lawsuits”). Certainly it appears that this case is being propelled forward by the lawyers alone as it was originally brought without any injured clients at all (as was permitted at the time) and the lawyers’ one attempt to find an injured client failed. “If passionate commitment plus money for litigating were all that was necessary to open the doors of the federal courts, those courts, already overburdened with litigation of every description, might be overwhelmed.” *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984). California courts would suffer the same fate if the decision below stands.

The prospect of returning to a pre-Proposition 64 landscape is particularly worrisome in the context of class action litigation, where the filing of one class action is often the herald of other similar class action suits. Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000). It is not uncommon for so-called “copycat” class actions to spread “amoeba-like across federal and state courts” mere days after the filing of the original class action. *Id.* This “spontaneous regeneration of class litigation” presents enough of a challenge to the judiciary and California’s businesses, without a no-standing-necessary invitation to litigants seeking a payout from deep-pocketed defendants. *Id.*

California voters found that some private attorneys had abused the unfair competition laws by filing “frivolous lawsuits,” “lawsuits where no client has been injured in fact,” “lawsuits for clients who have not used the defendant’s product or service, viewed the defendant’s advertising, or had any other business dealing with the defendant,” and “lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.” Proposition 64, § 1. As recognized by the lower court, the purpose of “Proposition 64 was to limit such abuses” by prohibiting the filing of lawsuits absent a plaintiff “who has been injured in fact.” *Safeco*, 173 Cal. App. 4th at 827 (citing *Californians for Disability Rights v. Mervyn’s*, 39 Cal. 4th at 228). The decision below conflicts with the voters’ rationale for enacting Proposition 64 by allowing a “class representative who is not a class member” to “move for precertification discovery for the purpose of identifying a new class representative.” *Id.* at 828.

## CONCLUSION

Proposition 64 demonstrated Californians’ dissatisfaction with the lax standing requirements formerly allowed by the UCL. By imposing standing requirements with teeth, Californians declared that the function of the UCL was to remedy wrongs actually suffered by the named plaintiffs, not

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merely to deter misbehavior. This Court should grant review to determine the appropriate scope of Proposition 64's standing requirements.

Respectfully submitted,

DEBORAH J. LA FETRA  
LAUREN A. WIGGINS

By *Lauren A. Wiggins*  
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**DECLARATION OF SERVICE BY MAIL**

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 3900 Lennane Drive, Suite 200, Sacramento, California 95834.

On July 7, 2009, true copies of LETTER BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 7th day of July, 2009, at Sacramento, California.

  
TAWNDA ELLING