No. 07-CV-1264

DISTRICT OF COLUMBIA COURT OF APPEALS

ALAN GRAYSON,

Plaintiff-Appellant,

v.

AT&T CORPORATION, et al.,

Defendants-Appellees.

On Appeal from a Decision of the Superior Court
of the District of Columbia, Civil Division (Wright, J.)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AT&T CORPORATION, ET AL., AND IN SUPPORT OF REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Local Rule 28(a)(2), Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (PLF) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Counsel for all parties consent to the filing of this brief.

PLF has extensive experience litigating the public policy aspects of California's Unfair Competition Law, which may be considered an analog to the District of Columbia's Consumer Protection Procedures Act (CPPA). *See In re Tobacco II Cases*, 46 Cal. 4th 298 (2009); *Californians for Disability Rights v. Mervyn's, LLC*, 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 attorneys are familiar with the legal issues raised by this case and the briefs filed thus far with this Court. Drawing on California's experience with its Unfair Competition Law, both prior to its amendment in 2004 to require standing, and thereafter, PLF highlights the intended and unintended public policy consequences of a no-standing rule. Moreover, PLF argues that the public law approach reflected in no-standing-required consumer protection statutes has proven to adversely affect both the judiciary and the jurisdiction's economy. The District of Columbia's

consumer protection law has traditionally been interpreted to reflect the private law model by which individual harms are compensated by those who caused the harm.

INTRODUCTION

Amicus PLF will not duplicate the parties' arguments with regard to the case law interpreting the CPPA, instead offering this first-hand look at the California experience and how the District can avoid the pitfalls of that experience by the straightforward and appropriate approach of interpreting the CPPA as this Court has traditionally done—requiring plaintiffs to allege an actual injury as a prerequisite to standing.

ARGUMENT

I

LESSONS LEARNED FROM CALIFORNIA'S UNFAIR COMPETITION LAW

Prior to its amendment in 2004, California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, *et seq.*, gained notoriety stemming from its extreme breadth, most notably the absence of any standing requirements for plaintiffs, who, without any showing of injury, could sue in an individual or representative capacity, purporting to represent the general public. *See* Cal. Bus. & Prof. Code §§ 17203-17204, 17535, *amended by* Proposition 64 (2004) (Any private party may sue a business for any "unlawful, unfair or fraudulent business act or practice" or any

"unfair, deceptive, untrue or misleading advertising," when acting "for the interests of itself, its members, or the general public."). A private party bringing a UCL action was not required to be a customer or competitor of the defendant or to show injury or damage. *Id.*; *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 209 (1983). Uninjured private parties representing the "general public" did not have to meet any of the extensive requirements of state or federal class action procedure. Cal. Bus. & Prof. Code §§ 17204, 17535, *amended by* Proposition 64. Besides private parties, the Attorney General and other government attorneys had standing to sue businesses for violations prohibited under the UCL. Cal. Bus. & Prof. Code §§ 17203, 17204, 17535, *amended by* Proposition 64.[1]

A. Adverse Consequences of Allowing Uninjured Individual Plaintiffs To Sue under the Pre-Amended UCL

Requiring actual injury for a private plaintiff to have standing to sue serves prudential and constitutional policies. Those policies include conserving judicial resources, optimizing judicial decisionmaking, and promoting fairness. *See* Erwin

[1] Proposition 64 amended the UCL to require a private plaintiff to show that he or she "has suffered injury in fact and has lost money or property." Proposition 64 §§ 3, 5. Proposition 64 further added the requirement that a private party pursuing representative claims or relief on behalf of others must meet the new standing requirements of personal injury *and* the requirements for class action certification under state law. Proposition 64 §§ 2, 5. Proposition 64 did not affect the standing requirements of government prosecutors. By introducing meaningful standing requirements, Proposition 64 remedied the UCL's most significant flaw.

Chemerinsky, *Constitutional Law: Principles and Policies* 50-51 (2d ed. 2002) (describing these policies as underlying the justiciability doctrines, including standing). The former UCL's failure to require injury or class-action certification before private litigants could sue undermined these policies, for a number of reasons.

First, the California court system was forced to adjudicate many more UCL lawsuits (often frivolous ones) than it otherwise would have if there had been meaningful standing requirements for private litigants. Robert C. Fellmeth, California Law Revision Comm'n, *California's Unfair Competition Act: Conundrums and Confusions* 248 n.92 (Jan. 1995) (reporting that no state "appears to have a comparable volume of pled unfair competition causes of action" as California, and that "the breadth of Section 17200 makes it a natural cause of action to append to many civil complaints involving business or consumer disputes"). The lawsuits of non-injured plaintiffs undoubtedly consumed the limited resources of the court system, including the time and energy of judges, judicial staff, and *injured* litigants competing for those same limited resources. *Cf., e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) ("Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake."); *Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1201 n.21 (7th Cir. 1981) ("[W]hile the denial of standing has the effect of removing a case

from the reach of judicial determination, its function is to ration scarce judicial resources.”).

These non-injured plaintiffs’ lawsuits under UCL harmed California’s business environment. A study released by the California Business Roundtable prior to Proposition 64’s enactment found that 55% of California companies had plans to move jobs out of California, and about 50% said their policy was to avoid *adding* jobs to California. *See* Bain & Co., California Bus. Roundtable, *California Competitiveness Project: An Assessment of California Competitiveness* 2-3 (Feb. 2004). The study reported that the cost of doing business in California was 30% higher than in other western states. *Id.* A full 100% of business executives told the Business Roundtable that they viewed California’s business climate less favorably than that of other states. *Id.* The UCL was a leading cause of businesses’ reluctance to engage in the California economy. *See* California Bus. Roundtable, *California Competitiveness Project* 2.

Second, a non-injured plaintiff in a UCL action lacked the incentives of an injured plaintiff—one with a monetary or emotional stake in the outcome of the litigation—to vigorously prosecute his or her claim. If a business truly is guilty of an unfair business practice under the UCL, the courts have no better litigant to rely on for an exhaustive investigation of all relevant facts and the presentation of all viable arguments than a litigant who actually has been injured by that violation,

particularly when that litigant seeks to represent a class of similarly situated victims. The California Supreme Court recognized this fundamental shortfall in non-injured plaintiff suits and specifically cited it as the main problem that a meaningful standing requirement is meant to solve: "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." *Common Cause of Cal. v. Bd. of Supervisors of L.A. County*, 49 Cal. 3d 432, 439 (1989).

Third, the UCL's lack of a standing requirement was fundamentally unfair to defendants. For example, judgments in representative actions on behalf of the "general public," which lacked the "procedural formalisms and due process safeguards of class actions," were not binding as to absent parties, so defendants failed to achieve the peace of mind that comes with finality. Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 Chap. L. Rev. 155, 166 (2004); *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 715-21 (1989). This problem was highlighted in November, 1996, by the non-partisan California Law Revision Commission (Commission),[2] which the Legislature had

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[2] The California Law Revision Commission

> was created in 1953 as the permanent successor to the Code Commission and given responsibility for the continuing substantive review of California statutory and decisional law. The Commission

(continued...)

commissioned to review the UCL and provide recommendations on fixing the problems associated with, *inter alia*, the lack of standing requirements. State of California, California Law Revision Comm'n, *Recommendation, Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191 (1996).[3]

Moreover, the Commission described as "troublesome" the "potential for a multiplicity of actions under the [UCL] and overlapping or parallel proceedings" by public and private prosecutors, reportedly characterized by some commentators as the "two-front war" on defendants. *Id.* at 209. The Commission explained that "[t]his situation can result because there is no limitation on multiple plaintiffs seeking relief for the same injury to the general public." *Id.* Indeed, unsophisticated defendants routinely were subjected to the most frivolous complaints for technical violations harming nobody—complaints that no plaintiff required to show standing could bring.

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[2] (...continued)

> studies the law in order to discover defects and anachronisms and recommends legislation to make needed reforms . . . . The Commission may study only topics that the Legislature has authorized.

California Law Revision Comm'n, History and Purpose, *available at* http://www.clrc.ca.gov/Mbg-history.html (last visited April 26, 2010). The Commission consists of a member of the Senate appointed by the Rules Committee; a member of the Assembly appointed by the Speaker; seven members appointed by the Governor with the advice and consent of the Senate; and the Legislative Counsel, who is an ex officio member. *Id.*

[3] *Available at* http://clrc.ca.gov/pub/Printed-Reports/Pub191.pdf (last visited Apr. 26, 2010).

See Eliot G. Disner & Noah E. Jussim, *So Unfair and Foul: The Scandals Involving the Unscrupulous Application of the Private Attorney General Provision of the Unfair Competition Act Cry Out for a Sensible Solution*, 26 Los Angeles Law. 42, 43-44 (Nov. 2003) (reporting on the profiteering Trevor Law Group which used the UCL to "file actions that were needless and redundant," frequently targeting restaurants and shops owned by immigrants). Professor Robert Fellmeth, the expert who consulted the Commission on its report and recommendation to the California Governor and Legislature regarding needed reforms to the UCL, summed up the problem-ridden UCL this way:

> No statute of which we are aware in this state or nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review . . . . At present, it is unclear who can sue for whom, what they have to do, whether it is final, and as to whom . . . . The current system is, notwithstanding its beneficial use by many historically, headed toward the worst of all possible legal worlds: abuse of process as unqualified person[s] disingenuously invoke the interests of the general public, extortionate nuisance lawsuits with high exposure, confusion and duplication of litigation resources, and uncertain finality.

Robert C. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15-WTR Cal. Reg. L. Rep. 1, 11 (1995).

B. Adverse Consequences of Allowing Uninjured "Representative" Plaintiffs To Sue under the Pre-Amended UCL

Prior to Proposition 64, representative actions under the UCL and class actions were viewed as two distinct methods of mass representation. *Kraus v. Trinity Mgmt.*

Servs., Inc., 23 Cal. 4th 116, 126 n.10 (2000). Under a UCL representative action, there was no obligation for a plaintiff to show any individualized proof of deception, reliance, or injury from its represented members. *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 851 (2002) ("Section 17200 [UCL] does not require that a plaintiff prove that he or she was directly injured by the unfair practice or that the predicate law provides for a private right of action."). A plaintiff could bring an action in a representative capacity on behalf of the "general public" without obtaining class certification or meeting other class action requirements such as commonality of interest or notice to class members. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998). Thus, plaintiffs' attorneys often included UCL representative claims as the "fallback position" behind class action claims, so that in the event a class could not be certified, restitution and/or disgorgement would remain available on a group-wide basis. H. Scott Leviant, *Unintended Consequences: How the Passage of Ballot Proposition 64 May Increase the Number of Successful Wage and Hour Class Actions in California*, 6 U.C. Davis Bus. L.J. 18 (2006).[4]

Several common abuses were fueled by the former UCL's extraordinarily broad representative standing provisions. Mathieu Blackston, Comment, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater*

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[4] *Available, as an online publication only, at* http://blj.ucdavis.edu/archives/vol-6-no-2/Unintended-Consequences.html (last visited Apr. 20, 2010).

Crime, 41 San Diego L. Rev. 1833, 1849 (2004). First, plaintiffs could "divide and conquer" by filing representative actions against hundreds of defendants without having to worry about a reciprocal defendant class, because the UCL contained no notice requirement. *Id.* at 1849-50. By threatening expensive litigation while offering low settlement demands from each defendant, these plaintiffs could successfully collect settlement awards from a long string of defendants to redress alleged harms that they did not suffer. *Id*. at 1850. Another common abuse mechanism by private plaintiffs acting on behalf of the "general public" was to file gratuitous actions against defendants who were already being investigated or had already been fined by public prosecutors, in an attempt to score a personal settlement or attorneys' fees wholly separate from any public interest that the statute was intended to serve. *Id.* Finally, a plaintiff could "tack on" hundreds of other unnamed plaintiffs to enhance its own private leverage by broadening discovery and litigation costs of any single defendant to extort larger settlement awards. *Id.* at 1851.

These three mechanisms were abused by litigious attorneys to glean enormous personal profits rather than to further consumer protection as the UCL had intended. The notorious practices of the Trevor Law Group, which "found financial success by abusing California's unfair competition law," are one well-known example. *See Am. Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP*, 134 Cal. App. 4th 1332, 1347 (2005). The court of appeal described the Trevor firm's abuse as a "legal

shakedown scheme" whereby "[a]ttorneys form a front 'watchdog' or 'consumer' organization," and then "scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization." *Id.* (citing *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1316-17 (2004)). The attorneys ultimately profit "[s]ince even frivolous lawsuits can have economic nuisance value," and the attorneys "then contact the business . . . , and point out that a quick settlement . . . would be in the business's long-term interest." *Id.*

II

CALIFORNIANS' REJECTION OF THE NO-STANDING RULE WAS REFLECTIVE OF THE GENERAL TREND FAVORING A PRIVATE LAW MODEL OF CONSUMER PROTECTION STATUTES

A. Prior to Proposition 64, California's UCL Tracked the "Public Law" Model of Tort Law and Consumer Protection Statutes

Beginning in the 1960s, both tort law and consumer protection statutes moved to a public law view, authorizing so-called "private attorneys general" with no self interest in the outcome of a case to police enforcement of laws and to seek remedies on behalf of the public. Forty years later, both legislatures and courts are reversing course. While some of the sources cited below refer only to tort law, and others cite only to consumer statutes modeled after the Federal Trade Commission (as the District's CPPA is so modeled), both forms of recovery tracked the same public

policy arc from narrow avenues of private recovery to much broader, public-law oriented approaches and therefore may be considered in tandem. Greve, *Consumer Law, Class Actions, and the Common Law*, at 175. The pendulum for both seems to have reached the outermost public-law extension and is in the process of swinging back to a state of the law where private individuals may seek recovery for injuries or harms suffered by themselves personally, while government takes the lead in averting or recovering for harms to the general public.

Under the public law approach, tort law and consumer protection statutes came to be viewed as far more than a method for resolving personal disputes; instead, the common law of tort and the consumer statutes were defined as an end-run around ineffective and underfunded government in order to maximize the general public welfare and deter misconduct. *See* G. Edward White, *Tort Law in America: An Intellectual History* 178 (1985) (noting trend toward "conceiv[ing] of tort law as 'public law in disguise'" instead of being "concerned primarily with deterring and punishing blameworthy civil conduct"). Typical of this approach was the Supreme Court's statement in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980), that "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory actions of government." *See also Dolgow v. Anderson*, 43 F.R.D. 472, 489 (E.D.N.Y.

1968) (a class action "as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private litigation").

Scholars promoted the idea that "[t]he traditional account—under which tort law was understood as a set of rules and concepts, grounded in ordinary morality, for resolving disputes over alleged wrongs committed by A against B—was no longer obviously in tune with modern realities," such as the industrialized economy and the distance between manufacturer and consumer. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513, 521 (2003). Thus, while the tort law tradition was limited to providing redress to injured parties, public law advocates recreated tort law as a public policy tool that leveraged private disputes to make public rules. *E.g.*, Charles Fried & David Rosenberg, *Making Tort Law: What Should Be Done and Who Should Do It* 13-32 (2003) (arguing that tort law should be used to achieve "socially optimal management of accident risk"); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs To Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 30 (2006).

The public law model of torts then segued into consumer protection statutes, resulting in uniform acts that eliminated requirements such as proving fraudulent intent or reliance. "Implicit in the decision of these courts to abandon reliance is an acceptance of the 'public-law' version of torts." *Id.*; *see also* Elizabeth A. Dalberth, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty To*

Disclose Off-Site Environmental Hazards, 97 Dick. L. Rev. 153, 158 (1992) ("[T]he elements of UDAP statutes are easier to prove than the elements of common law fraud because many do not require proof of intent to defraud, reliance, actual damage, or even actual sale."). By defining the injury suffered by the class of consumers at this level of abstraction, the consumer fraud statutes thus further the policy goals of public law. Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 Vand. L. Rev. 2177, 2208 (2004).

California's UCL originally followed this model. Prior to Proposition 64, the Legislature and the courts consistently loosened the UCL to allow plaintiffs to proceed without meeting the basic standing rules that California law normally required. *See, e.g.*, *Stop Youth Addiction, Inc.*, 17 Cal. 4th at 570 ("[W]henever the Legislature has acted to amend the UCL, it has done so only to expand its scope, never to narrow it."). The UCL allowed almost any individual, regardless of whether he or she suffered any injury, to bring an action on behalf of him or herself, a representative class, or the general public. *Id.* at 560. Although the UCL permitted class action claims, plaintiffs chose instead to avoid the procedural safeguards normally required in California class actions—adequacy, commonality, numerously, and superiority—by bringing their claim in a "representative" capacity. *Compare* Cal. Code Civ. Proc. §§ 382, 284 *with* Cal. Bus. and Prof. Code § 17204.

B. Deficiencies in the Public Law Approach

The public law approach does not require reliance by the plaintiff because it seeks to maximize the number of cases challenging alleged misrepresentations that could harm individual consumers. But there is an alternative means of addressing these harms explicitly set out in the statute: Public agencies are intended to address public harms. "Government enforcement has the comparative advantage in articulating and applying a consumer protection policy that addresses these public harms. Because the government has substantial control over the selection of cases, it can direct a coherent body of law via both regulation and litigation." Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 37.

For example, a state (or District) attorney general can take into account existing agency regulations and policy preferences when deciding whether to pursue litigation. Individual plaintiffs' lawyers, however, have a different set of incentives that often fail to consider the regulatory scheme or policy preferences beyond their own personal biases. In *Avery v. State Farm Mutual Automobile Ins. Co.*, 746 N.E.2d 1242, 1247, 1254 (Ill. Ct. App. 2001), *aff'd in part and rev'd in part*, 835 N.E.2d 801 (Ill. 2005), for example, plaintiffs' lawyers filed a 48-state class action against State Farm, alleging that the use of non-original equipment manufacturer (non-OEM) parts to repair crash damage violated the Illinois Consumer Fraud and Deceptive Practices Act. Experts testified that many states encompassed within this nearly nationwide

class action had enacted regulations or statutes expressly permitting the use of non-OEM parts as a means of reducing insurance premiums, but the appellate court held that this was still consistent with Illinois law because none of those states expressly permitted the use of "inferior" parts. *Id.* The plaintiffs' lawyers in *Avery* essentially usurped the roles of the state insurance commissioner and the state attorney general in deciding to sue State Farm for actions that were expressly in compliance with the law of most of the states whose policyholders were represented in the class.[5] *See* Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 37 n.277.

There are numerous public policy concerns with a statutory regime that encourages public law actions borne out of alleged individual wrongs, without any element of causation/reliance required. If manufacturers must pay compensation not simply to their actual victims but to all purchasers, the lawsuit subjects defendants to excessive liability and over-deters non-injurious conduct. Indeed, "[p]unishing every error in judgment regardless of whether it has caused harm might result in excessive liability and could lead not only to overbearing and discriminatory enforcement, but also to a fearful and overcautious society." David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L.

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[5] The $1.18 billion judgment against State Farm recently was reversed by the Illinois Supreme Court. *Avery*, 835 N.E.2d at 818.

Rev. 849, 882 (1984). Finally, allowing misrepresentation claims to proceed without any showing of reliance creates inefficient incentives by allowing the consumer to feign ignorance of information they actually have. *See* Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. at 550-51; *see* Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 41. Thus,

> [w]hile state attorneys general should be able to stop deceptive conduct by obtaining injunctive relief against a business before consumers are misled, individuals who never saw, heard, or relied upon the conduct that allegedly injured them should not be able to bring imaginary claims. If the allegedly deceptive conduct did not influence the plaintiff by affecting his or her decision to purchase the product, there should be no private right of action. To do otherwise would eviscerate the fundamental distinction between private rights of action, which are based on harm to an individual, and public enforcement of a law, which may not be.

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 52 (2005).

C. Californians Rejected the Older Model by Imposing Strict Standing and Causation Requirements on Private Litigants

The private pursuit of misrepresentation class actions was largely as a result of government agencies failing to enforce existing laws prohibiting certain trade practices, plus the "public law" theory that found increasing traction among judges and lawyers. Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits after Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair*

Game?, 27 Pepp. L. Rev. 685, 691 (2000) (noting wide range of "copycat" litigation after the state attorneys general announced the tobacco settlement).

Times have changed with regard to both these factors. Government agencies and government attorneys are tenacious in their pursuit of corporate wrongdoing, while the public law theory of torts has receded in light of its excesses. In keeping with the new circumstances, Californians enacted Proposition 64 to distinguish between the standards for public enforcement and the standards that should govern a private damages claim. *See* Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 33. California voters concluded that the statute was prone to serious abuse and needed serious reform. After the state Legislature repeatedly failed to address these concerns (*see* Blackston, 41 San Diego L. Rev. at 1847-48 (detailing failed legislative attempts)), the voters enacted Proposition 64, which 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 such unfair competition." Cal. Bus. & Prof. Code § 17204.

Even with the new focus on standing and causation, no one questions that tort law serves certain public functions. Through the imposition of damages via judgments and settlements, private misrepresentation cases deter manufacturer misrepresentations. But government agencies have been specifically charged with that very objective.[6] Duplicating this public function by permitting loosely constructed yet massive class actions by self appointed "private attorneys general" who have suffered no injury and therefore have no *bona fide* stake in the case is an inefficient distribution of resources that has the unintended consequence of redistributing wealth from market participants to plaintiffs' attorneys. Thus, the decision of the court below, which reflects a "public law" vision of torts/consumer protection, is an unnecessarily broad reading of the CPPA where true public law, *i.e.*, government enforcement, exists.

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[6] This is not to suggest that government agencies are themselves immune from the potential for abuse by targeting specific industries for reasons of political pressure. *See, e.g.*, Victor E. Schwartz, *et al.*, *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 258 (2000) (potential targets include "HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries").

CONCLUSION

The decision below should be reversed, and Plaintiff-Appellant Grayson's CPPA claim should be dismissed for lack of standing.

DATED: May 4, 2010.

Respectfully submitted,

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By ________________________________
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CERTIFICATE OF COMPLIANCE

In compliance with Rule 32(a)(5), this Brief Amicus Curiae is proportionally spaced, has a typeface of 12 points or greater, and contains 4,558 words.

DATED: May 4, 2010.

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THEODORE HADZI-ANTICH

DECLARATION OF SERVICE BY MAIL

I am a citizen of the United States and employed in or a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within entitled action.

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