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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THOMAS BRANICK, et al., Plaintiffs and Appellants, v. DOWNEY SAVINGS AND LOAN ASSOCIATION, Defendant and Respondent.	B172981 (Los Angeles County Super. Ct. No. BC280755)

APPEAL from a judgment of the Superior Court for Los Angeles County, Wendell Mortimer, Jr., Judge. Reversed.

Milberg Weiss Bershad & Schulman, Jeff S. Westerman, Sabrina S. Kim, Peter Sloane; Kiesel, Boucher & Larson, Raymond D. Boucher, Patrick DeBlase, Anthony M. DeMarco; Lerach Coughlin Stoia Geller Rudman & Robbins, and Pamela Parker for Plaintiffs and Appellants.

Hodel Briggs Winter, Matthew A. Hodel, and Michael S. Leboff for Defendant and Respondent.

INTRODUCTION

In this case we hold that claims against a savings and loan association brought under Business and Professions Code[1] sections 17200 and 17500 and based upon allegations that, in effect, the savings and loan association breached contractual terms and made misrepresentations in conducting its business, are not preempted by federal law. We also hold that Proposition 64, enacted by the California electorate on November 3, 2004, which amended sections 17200 et seq. and 17500 et seq. to eliminate the statutory grant of standing to bring actions to enforce those provisions to persons who did not suffer actual injury, applies to actions that were filed but not finally resolved before November 3, 2004, the effective date of the amendments. Finally, we hold that if a plaintiff filed a representative action under section 17200 or 17500 on behalf of the general public before November 3, 2004 and cannot meet the standing requirements under the statutes as amended by Proposition 64, the plaintiff may, at the trial court's discretion, be entitled to amend the complaint to substitute a plaintiff who meets the standing requirements. Accordingly, we reverse the judgment and remand the matter for further proceedings.

BACKGROUND

Plaintiffs and appellants Thomas Branick and Ardra Campbell (plaintiffs) filed a lawsuit against defendant and respondent Downey Savings and Loan Association (Downey), alleging claims under sections 17200 and 17500[2] on behalf of the general public concerning certain practices in which Downey engaged with respect to real estate

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[1] Further statutory references are to the Business and Professions Code unless otherwise indicated.

[2] Section 17200 et seq. is referred to as the unfair competition law and section 17500 et seq. is referred to as the false advertising law. Any violation of the false advertising law is a violation of the unfair competition law. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949-950.)

financing transactions. In an amended complaint filed on February 3, 2003, plaintiffs alleged that Downey engaged in unfair competition under section 17200 by (1) "misrepresenting the amount of government recording fees necessary to record documents incident to real estate transactions"; (2) "acquiescing in the title companies' systematic overcharging and double charging of governmental document recording fees"; (3) "charg[ing] . . . for recording substitutions of trustees, even though it had no legal or contractual entitlement to do so"; (4) "charg[ing] . . . fees for recording reconveyances, including document recording fees, even though no third party was engaged to accomplish the reconveyances, in violation of its trust deeds"; and (5) "collecting the recording fee to record reconveyances twice in conjunction with title companies." Under section 17500, plaintiffs alleged that Downey engaged in unfair competition by (1) "Overstating . . . the amounts of governmental recording fees necessary to record all documents needing to be recorded"; (2) "Misrepresenting . . . that it must collect governmental document recording fees for the recording of reconveyances though [Downey] knew the title company would also demand such fee from sellers and refinancers"; (3) "Misrepresenting . . . that it could collect fees for recording substitutions of trustee even though [Downey] knew it had no legal or contractual authorization to do so"; (4) "Misrepresenting . . . that it could collect fees for recording reconveyances, including document recording fees, even when no third party was engaged to accomplish the reconveyances, though this violated its trust deeds which did not authorize defendant to charge for any fees associated with a reconveyance unless the defendant engaged a third party to prepare and/or record the reconveyance." Plaintiffs do not allege that they personally engaged in any real estate financing transaction with Downey, nor do they allege that they personally suffered any injury as a result of Downey's alleged unfair competition. Instead, they allege that they bring their claims as a representative action on behalf of the general public.

Downey moved for judgment on the pleadings on the ground that plaintiffs' claims are preempted by federal law, specifically by the Home Owners' Loan Act[3] (the HOLA) and by regulations promulgated under the HOLA by the Office of Thrift Supervision (the OTS). The trial court granted Downey's motion and entered judgment against plaintiffs. Plaintiffs appeal from that judgment, arguing that the trial court erred in finding their claims preempted.

DISCUSSION

A. Standard of Review

"'Because a motion for judgment on the pleadings is similar to a general demurrer, the standard of review is the same. [Citation.] We treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972.) We review the complaint de novo, giving the complaint's factual allegations a liberal construction, to determine whether it states a cause of action under any legal theory. (*Ibid.*; see also *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065.) And "[b]ecause a motion for judgment on the pleadings, like a demurrer, raises only questions of law, we may consider new theories on appeal to challenge or justify the trial court's ruling. [Citations.] '[W]e review the trial court's disposition of the matter, not its reasons for the disposition.'" (*Burnett*, at p. 1065.)

B. Federal Preemption

Under the supremacy clause of the federal Constitution, Congress has the authority to preempt state law. (U.S. Const., art. VI, cl. 2.) However, "'"[i]t will not be presumed that a federal statute was intended to supersede the exercise the power of the state unless there is a clear manifestation of intention to do so."' [Citations.] Accordingly,

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[3] 12 U.S.C. § 1461 et seq.

'[w]hether federal law preempts state law is fundamentally a question whether Congress has intended such a result.' [Citation.] Congressional intent to preempt may be either express or implied, i.e., either '"explicitly stated in the statute's language or implicitly contained in its structure and purpose."' [Citation.] However, courts are 'generally reluctant to infer preemption. . . .' [Citation.]" (*Gibson v. World Savings and Loan Assn.* (2002) 103 Cal.App.4th 1291, 1296-1297 (*Gibson*).)

Federal regulations may preempt state law just as fully as federal statutes. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612.) "A regulation's preemptive effect 'does not depend on express congressional authorization to displace state law. [Citation.] Instead, the determinative issues are whether (1) the agency intended its regulation to have a preemptive effect and (2) the agency acted within the scope of its congressionally delegated authority by issuing the preemptive regulation." (*Gibson*, *supra*, 103 Cal.App.4th at p. 1297.) Because the interpretation of statutes and administrative regulations are questions of law, "we determine the preemptive effect of either statutes or regulations independently [citation], without deferring to the trial court's conclusion or limiting ourselves to the evidence of intent considered by the trial court. [Citation.]" (*Ibid*.)

In the present case, the trial court determined that plaintiffs' claims were preempted by federal law, finding that the HOLA "occupies the field of lending regulation for federal savings associations and pre-empts the allegations of this case." On appeal, Downey argues that the trial court's determination was correct because 12 Code of Federal Regulations section 560.2[4] (Regulation 560.2), a regulation promulgated by

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[4] Regulation 560.2 provides as follows:

"(a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To

enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For purposes of this section, 'state law' includes any state statute, regulation, ruling, order or judicial decision.

"(b) Illustrative examples. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

"(1) Licensing, registration, filings, or reports by creditors;

"(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;

"(3) Loan-to-value ratios;

"(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

"(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;

"(6) Escrow accounts, impound accounts, and similar accounts;

"(7) Security property, including leaseholds;

"(8) Access to and use of credit reports;

"(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

"(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

"(11) Disbursements and repayments;

"(12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and § 560.110 of this part; and

"(13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

the OTS under the authority of the HOLA (specifically, under section 1464 of title 12 of the United States Code), expressly preempts "all state laws affecting the lending operations of federal savings and loan associations," including California's unfair competition law to the extent it is applied to those lending operations. Plaintiffs, on the other hand, argue that their claims sound in contract and tort law, and are the kinds of claims that are not preempted by Regulation 560.2. Plaintiffs are correct.

In *Gibson*, *supra*, 103 Cal.App.4th 1291, the Fourth District Court of Appeal was presented with the same issue presented in this case, i.e., whether Regulation 560.2 preempted claims alleged under California's unfair competition law based upon allegations that the savings and loan association (1) charged borrowers for certain amounts in violation of the terms of the borrowers' deeds of trust and (2) failed to disclose that it was charging more for certain items than the association paid for those items. After a thorough analysis under United States Supreme Court precedent and under the formula suggested by the OTS, the *Gibson* court held there was no preemption.

The court in *Gibson* explained that under the relevant precedents, "[w]e '"must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of [the preemptive statute or regulation] and we must look to each of

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"(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

"(1) Contract and commercial law;

"(2) Real property law;

"(3) Homestead laws specified in 12 U.S.C. 1462a(f);

"(4) Tort law;

"(5) Criminal law; and

"(6) Any other law that OTS, upon review, finds:

"(i) Furthers a vital state interest; and

"(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section."

[the plaintiffs' state] law claims to determine whether it is in fact pre-empted."' [Citations.] As to each state law claim, the central inquiry is whether the legal duty that is the predicate of the claims constitutes a requirement or prohibition of the sort that federal law expressly preempts." (*Gibson*, *supra*, 103 Cal.App.4th at p. 1301.) Applying this framework to the claims before it, the *Gibson* court noted that those claims "are predicated on the duties of a contracting party to comply with its contractual obligations . . . , on the duty not to misrepresent material facts, and on the duty to refrain from unfair or deceptive business practices." (*Ibid*.) The court concluded that "[t]hose predicate duties are not requirements or prohibitions of the sort that [Regulation] 560.2 preempts. That [regulation] preempts (1) state laws that (2) either purport to regulate federal savings associations or otherwise materially affect their credit activities. The predicate duties underlying the plaintiffs' claims do not meet that description. . . . [¶] . . . [¶] . . . Instead, the duties on which the plaintiffs' claims are predicated govern, not simply the lending business, but anyone engaged in any business and anyone contracting with anyone else. On their face, they do not purport to regulate federal savings associations and are not specifically directed toward them. Nor is there any evidence that they were designed to regulate federal savings associations more than any other type of business, or that in practice they have a disproportionate impact on lending institutions. Any effect they have on the lending activities of a federal savings association is incidental rather than material." (*Id.* at p. 1302.) Therefore, the court determined that the plaintiffs' unfair competition claims, which were based upon alleged violations of contractual terms and misrepresentations, were not preempted under the relevant case law.

The *Gibson* court also found that the plaintiffs' claims were not preempted even under the three-step formula suggested by the OTS to determine whether a state law is preempted.[5] That formula was described by the OTS at the time it promulgated

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[5] As in *Gibson*, *supra*, 103 Cal.App.4th at page 1302, footnote 2, we do not reach the issue whether the OTS Regulations exceed the congressional authority delegated to

Regulation 560.2 as follows: "'[T]he first step will be to determine whether the type of law in question is listed in paragraph (b) [of Regulation 560.2]. If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.'" (*Gibson*, *supra*, 103 Cal.App.4th at pp. 1302-1303, quoting 61 Fed.Reg. 50951, 50966-50967 (Sept. 30, 1996).) Applying this formula to unfair competition claims based upon breach of contractual terms and misrepresentations, the *Gibson* court found that (1) the types of laws that the plaintiffs sought to enforce were not listed in paragraph (b); (2) "the laws do affect lending businesses, just as they affect any other business that enters into contracts or makes representations during the course of its operations"; and (3) the presumption of preemption is rebutted because the laws "are general contract and commercial laws that only incidentally affect lending operations." (*Id.* at p. 1303.) Thus, the court concluded that the unfair competition claims at issue in that case were not preempted under the OTS formula.

The *Gibson* court's analysis applies in the present case, with the same result. Although the unfair competition claims in this case are not pleaded with great clarity or precision, they appear to be based upon tort violations and, perhaps, contract breaches. Thus, the claims are seemingly predicated on duties that govern anyone engaged in any business and anyone contracting with anyone else, and have only an incidental effect on the lending activities of a federal savings and loan association.[6] Therefore, the claims are not preempted under case law or under the OTS three-step formula.

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the OTS, and we need not determine whether OTS pronouncements or legal opinions have any legal effect on issues of preemption.

[6] "It has long been the rule of this state that objections that a complaint is ambiguous or uncertain, or that essential facts appear only inferentially, or as conclusions

C. Applicability and Effect of Proposition 64

After the briefs were filed in this appeal, the voters of California passed Proposition 64, which amended sections 17200 and 17500 to delete language that gave any person the right to bring an action to enforce those sections for the benefit of the general public, and to add language that an action under those sections can be brought by a private plaintiff (i.e., a non-governmental prosecutor) only if that plaintiff has suffered injury in fact and has lost money or property as a result of the unfair competition. (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (Jan. 20, 2005, B176546) ___ Cal.App.4th ___ [23 Cal.Rptr.3d 387].) The amendments to those sections took effect on November 3, 2004 (*id.*), after the briefs were filed in this appeal. We asked the parties to file supplemental briefs, under Government Code section 68081, to address whether the amendments apply to the present case and, if so, whether the matter should be remanded for possible amendment of the complaint.

1. Applicability of Proposition 64

Downey argues that Proposition 64 applies to this case because the initiative repealed the statutory right of non-injured persons to sue and therefore, under Government Code section 9606, it applies to pending cases. Downey also argues that even if Government Code section 9606 did not control, Proposition 64 applies to this case because the language of the initiative and the amended statute show that the voters intended the initiative to apply to existing lawsuits, and because the changes to the statutes are merely procedural.

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of law, or by way of recitals . . . cannot be reached on general demurrer." (*Johnson v. Mead* (1987) 191 Cal.App.3d 156, 160.) Nevertheless, if there is to be an amendment of the amended complaint, such an amendment should allege more clearly any alleged breaches of contract and misrepresentations that constitute the alleged unfair competition.

Plaintiffs contend that under well-established precedent, statutory enactments do not apply retroactively unless there is clear legislative intent to the contrary and that there is no such intent with regard to Proposition 64. They also contend that because the amendments affect standing to sue, the changes impact substantive rights and that therefore they cannot be applied retrospectively without an expressed intent to do so. Finally, they contend that Government Code section 9606 does not control in this case because Proposition 64 did not repeal the unfair competition law and because the unfair competition law is derived from common law. We need not determine the voters' intent, nor whether the amendments are procedural or substantive, because we hold that under Government Code section 9606 the amendments have immediate effect in all pending cases alleging claims under sections 17200 or 17500.[7]

Generally, there is a presumption that statutory enactments do not operate retroactively unless there is clear legislative intent to the contrary. (See, e.g., *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208 ["[B]oth this court and the Courts of Appeal have generally commenced analysis of the question of whether a statute applies retroactively with a restatement of the fundamental principle that 'legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention'"].) But by virtue of Government Code section 9606, this presumption does not apply when a statutory enactment repeals a statute that provides a purely statutory cause of action. In that instance, the enactment takes immediate effect in all pending cases—including cases in which a judgment has been entered but the matter is pending on appeal—unless the enactment contains a saving

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[7] On the day of oral argument in this case, the First District Court of Appeal issued its decision in *Californians for Disability Rights v. Mervyn's, LLC* (Feb. 1, 2005, A106199) ___ Cal.App.4th ___ [2005 WL 230019] (*Californians For Disability Rights*).) In that case, the First District held that Proposition 64 does not apply in cases pending at the time of its enactment. Plaintiffs request that we take judicial notice of that decision. Although we grant plaintiffs' request, as discussed below, we disagree with the First District's reasoning regarding the applicability of Proposition 64 to pending cases.

clause. (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829; *Northern Cal. Carpenters Regional Council v. Warmington Hercules Assocs.* (2004) 124 Cal.App.4th 296, 302; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489.)

Government Code section 9606 provides, "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." The California Supreme Court explained the rule and its application despite the general presumption against retroactivity in *Callet v. Alioto* (1930) 210 Cal. 65. The Supreme Court there stated: "It is too well settled to require citation of authority, that in the absence of a clearly expressed intention to the contrary, every statute will be construed so as not to affect pending causes of action. Or, as the rule is generally stated, every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. It is also a general rule, subject to certain limitations not necessary to discuss here, that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. [Citations.] The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time. (Sec. 327, Pol. Code [now Gov. Code, § 9606].) *This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law.* In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right, should not be construed to affect existing causes of action." (*Id.* at pp. 67-68, italics added.)

In holding that Proposition 64 does not apply to cases pending at the time of its enactment, the First District in *Californians For Disability Rights*, *supra*, ___ Cal.App.4th ____ [2005 WL 230019], failed to address the Supreme Court's analysis of the repeal rule in *Callet v. Alioto*, *supra*, 210 Cal. 65 or Government Code section 9606.

Instead, the appellate court stated that the holdings of cases in which courts found that the repeal of a statute terminated pending actions were based upon legislative intent to apply the repeal statute retroactively. (*Id.* at p. *4 ["In those cases, the repeal of a statute indicated legislative intent that the repeal legislation apply retroactively, thus rebutting the presumption of prospectivity"].) But that was not the basis for the Supreme Court's holding in *Callet*. Rather, the Supreme Court reasoned that when a right of action or remedy is created entirely by statute, it is not a vested property right, and under Government Code section 9606 a person pursuing that statutory right of action or remedy is on notice that their statutory right may be impaired by legislation at any time. The Supreme Court's subsequent decision in *Evangelatos v. Superior Court*, *supra*, 44 Cal.3d 1188, upon which the court in *Californians For Disability Rights* relies, does not affect this reasoning because the statute analyzed in *Evangelatos* "modified the traditional, common law 'joint and several liability' doctrine" (*id*. at p. 1192) and thus affected *vested* rights, to which the presumption of prospectivity applies—it did not repeal a statutory right of action or remedy that had not vested.

Thus, in accordance with *Callet v. Alioto*, *supra*, 210 Cal. 65, to determine whether Proposition 64 applies to this pending action, we must address two questions. First, did the existing right of action accrue to plaintiffs under the rules of the common law or by virtue of a statute codifying the common law? If it did, the repeal rule does not apply and the amendments to the unfair competition law and false advertising law do not apply in this case. Second, if the right of action accrued to plaintiffs solely by statute, did Proposition 64 repeal that statutory right? If so, the amendments apply to plaintiffs' claims.

Plaintiffs contend that the predecessor to section 17200 et seq., former Civil Code section 3369, codified the common law tort of unfair business practices, and therefore their right of action accrued by virtue of a statute codifying the common law and the

repeal rule does not apply.[8] But the California Supreme Court repeatedly has held that the unfair competition tort set forth in section 17200 et seq., and its predecessor statute, "cannot be equated with the common law definition of 'unfair competition.'" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109 (*Barquis*); accord, *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181, fn. 9; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Most importantly for the purposes of this case, the statute granted to persons who did not suffer competitive injury the right to bring representative actions on behalf of the general public—a right that did not exist under the common law.

As the Supreme Court explained in *Barquis*, "Although in a common law context, competitive injury originally composed an essential element of the tort of 'unfair competition,' the Legislature, by adopting [Civil Code] section 3369, broadened the scope of legal protection against wrongful business practices generally, and in so doing extended to the entire consuming public the protection once afforded only to business competitors. . . . [¶] . . . [Civil Code s]ection 3369's . . . broad proscription of 'unlawful [or] unfair ... business practice[s]' illustrates . . . a concern for wronged consumers. Moreover, the section demonstrates a clear design to protect consumers as well as competitors by its final clause, permitting inter alia, any member of the public to sue on his own behalf or on behalf of the public generally. If the Legislature had been solely concerned with protection against the evil of unfair competitive advantage, it would certainly have more narrowly circumscribed the class of persons permitted to institute such actions." (*Barquis*, *supra*, 7 Cal.3d at pp. 109-110, fn. omitted; see also *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1264 [the primary purpose of the statutory unfair competition law was to extend to consumers the protection afforded only to business competitors under the common law; "[t]he common law tort of unfair

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[8] Plaintiffs do not refer to section 17500 et seq.

competition, which required a showing of competitive injury, did not provide an effective remedy for consumers"].)

These authorities demonstrate that the right to sue for unfair competition (as well as for false advertising) on behalf of the general public without injury to the plaintiff did not exist at common law. Therefore, Proposition 64 applies in this case if it repealed that right and did not include a saving clause.

Plaintiffs do not contend that Proposition 64 included a saving clause. Instead they argue that Proposition 64 does not apply because it merely added new substantive standing requirements for bringing claims under the unfair competition law, and did not repeal—as that term is used in Government Code section 9606—the unfair competition cause of action or the remedies provided thereunder. But Proposition 64 did not add *new* standing requirements—it limited the broad standing provided by statute by *eliminating* standing for persons, other than government prosecutors, who did not suffer actual injury. Moreover, the fact that unfair competition and false advertising causes of action and remedies remain available for those who meet the standing requirements is irrelevant, because the repeal rule of Government Code section 9606 applies even when a statutory enactment results in a partial, rather than a complete, repeal of an existing statute. (See *Governing Board v. Mann*, *supra*, 18 Cal.3d at p. 828 [new statute effected partial repeal of existing statute]; *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 690 [new statute effected partial repeal of existing statute].) Therefore, Proposition 64 applies to this case, and plaintiffs cannot maintain this action unless they have "suffered injury in fact and ha[ve] lost money or property as a result of [the alleged] unfair competition." (§ 17204, as amended; see also § 17535, as amended.)

2. Leave to Amend Complaint

Plaintiffs do not allege in their amended complaint that they suffered injury in fact or that they have lost money or property as a result of Downey's alleged unfair competition. Thus, the complaint, *as alleged*, fails to state a cause of action under

sections 17200 or 17500. Although plaintiffs do not assert that they can allege facts to meet the standing requirements under the amended statutes, they argue that they should be allowed to amend the complaint to substitute an affected plaintiff to preserve the claims of the represented group. Downey, on the other hand, argues that plaintiffs should not be permitted to substitute new plaintiffs because substitution should be allowed only when the original plaintiff in unable to prosecute the lawsuit due to a technical defect, and in this case plaintiffs' inability to prosecute stems from the voters' will to eliminate unfair competition lawsuits prosecuted by uninjured plaintiffs.

Code of Civil Procedure section 473 provides that a court may "in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party." California courts repeatedly have recognized that "'[t]here is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceedings.'" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; see also *Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 488-489.) California courts also have recognized the well-established policy to decide cases on their merits. (See, e.g., *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 720, and cases cited therein.) In recognition of these policies, the California Supreme Court and courts of appeal have permitted amendments to substitute new plaintiffs under certain circumstances when the named plaintiffs are not able to maintain the alleged claims, so long as the amendment does not present an entirely new set of facts and the defendant is not prejudiced.

For example, in *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, the Supreme Court affirmed the trial court's order allowing the substitution of a new plaintiff when the original plaintiff was found not to be a proper party. The court explained, "In the present case [the original] plaintiff . . . sought on behalf of the corporation to enforce against the defendants exactly the same liability which is the basis for the relief now sought on behalf of the corporation. . . . The defendants have been fully apprised since the filing of the original complaint of the facts which are relied upon to state a right to relief against

them in behalf of the corporation." (*Id.* at p. 21.) Similarly, in *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, the Supreme Court ruled that substitution of a new named plaintiff is permitted in a class action when the original named plaintiff has been rendered unqualified to represent the class. (*Id.* at p. 872.) And in *Jensen v. Royal Pools*, *supra*, 48 Cal.App.3d 717, this court approved the substitution of new plaintiffs and held that the claims related back to the filing of the original complaint when the original plaintiff was found to have no standing to prosecute the action as a result of a court decision that was issued after the original complaint had been filed.

These decisions make clear that substitution of new plaintiffs *may* be allowed under the circumstances of this case. The issue of granting leave to amend requires consideration of various factors, such as prejudice to the defendant. (See, e.g., *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-487; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 1113-1135, pp. 568-592.) Because that issue was not before the trial court at the time it granted the motion for judgment on the pleadings and dismissed the case, we remand the matter to the trial court to determine whether, if there is a request to amend the amended complaint, the circumstances of this case warrant granting leave to amend.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court to exercise its discretion regarding whether to grant leave to amend the amended complaint if there is a request for such amendment. The parties shall bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

MOSK, J.

We concur:

ARMSTRONG, Acting P.J.

KRIEGLER, J.*

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* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.