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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PFIZER INC., Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; STEVE GALFANO, Real Party in Interest.	B188106 (Los Angeles County Super. Ct. No. BC327114)

ORIGINAL PROCEEDINGS in mandate. Carl J. West, Judge. Petition granted.

Kaye Scholer, Thomas A. Smart, Richard A. De Sevo and Jeffrey S. Gordon for Petitioner.

Hugh F. Young, Jr.; Shook, Hardy & Bacon, Paul B. La Scala, Victor E. Schwartz, Cary Silverman, for Product Liability Advisory Council, Inc. as Amicus Curiae on behalf of Petitioner.

Fred J. Hiestand; Morrison & Foerster, William L. Stern, for Civil Justice Association of California, California Chamber of Commerce, California Manufacturers and Technology Association and California Bankers Association, as Amici Curiae on behalf of Petitioner.

National Chamber Litigation Center Inc., Robin S. Conrad; Wiley Rein & Fielding, John E. Barry for the Chamber of Commerce of the United States of America, the Association of National Advertisers, Inc., and the Coalition for Healthcare Communications as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Westrup Klick, R. Duane Westrup, Christine C. Choi; Allan A. Sigel for Real Party in Interest.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Albert Norman Shelden, Assistant Attorney General, Ronald A. Reiter and Kathrin Sears, Deputy Attorneys General, as Amicus Curiae.

Defendant Pfizer, Inc. (Pfizer), the manufacturer of Listerine mouthwash, seeks a writ of mandate to overturn respondent superior court's November 22, 2005 order certifying a class action filed by plaintiff and real party in interest Steve Galfano (Galfano). The complaint alleges Pfizer marketed Listerine in a misleading manner by indicating the use of Listerine can replace the use of dental floss in reducing plaque and gingivitis.

The trial court certified a class of "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." In view of the changes in the law brought about by Proposition 64, the class definition is plainly overbroad and must be set aside.

PRELIMINARY STATEMENT

The Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.)[1] was enacted to protect consumers as well as competitors from unlawful, unfair or fraudulent business acts or practices, by promoting fair competition in commercial markets for goods and services. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) The false advertising law (FAL) (§ 17500 et seq., added by Stats. 1941, ch. 63, p. 727, § 1) likewise prohibits consumer deception, and any violation of the FAL necessarily violates the UCL. (*Kasky, supra,* at pp. 949-950.)

Over the years, the UCL was an integral part of California law. As the Supreme Court observed in *Stop Youth Addiction, Inc., v. Lucky Stores, Inc., supra,* 17 Cal.4th at page 570, "whenever the Legislature has acted to amend the UCL, it has done so only to *expand* its scope, never to narrow it."

However, in recent years, the UCL became prone to the sort of abuse "which made the Trevor Law Group a household name in California in 2002 and 2003. The abuse [was] a kind of legal shakedown scheme: Attorneys form[ed] a front 'watchdog' or 'consumer' organization. They scour[ed] public records on the Internet for what [were] often ridiculously minor violations of some regulation or law by a small business, and sue[d] that business in the name of the front organization." (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317.)

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[1] The modern UCL first appeared in 1933, as an amendment to Civil Code former section 3369. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 568-569, fn. 8.) In 1977, the Legislature moved the UCL to section 17200 et seq. of the Business and Professions Code. (*Stop Youth Addiction, Inc.* at p. 570; Stats. 1977, ch. 299, p. 1202, § 1.)

All further statutory references are to the Business and Professions Code, unless otherwise indicated.

Proposition 64, an initiative measure approved at the November 2004 general election, was a response to abuse of the UCL and the FAL by certain lawyers, who were bringing "frivolous lawsuits against small businesses even though they had no client or evidence that anyone was damaged or misled." (Ballot Pamp., General Elec. (Nov. 2, 2004) Ballot Argument in Favor of Prop. 64, p. 40.) Proposition 64 imposed new restrictions on private enforcement under the UCL and the FAL.

The instant petition for writ of mandate requires this court to construe some of the key provisions of Proposition 64. In interpreting a voter initiative, " 'we apply the same principles that govern statutory construction. [Citation.] Thus, [1] "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] [2] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] [3] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.] [¶] In other words, our 'task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.' [Citation.]" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

We address, inter alia, whether each member of the putative class asserting a claim under the UCL or the FAL must, in the language of Proposition 64, have suffered injury in fact and lost money or property as a result of such violation, or whether this standing requirement is only applicable to the class representative or named plaintiff.

Proposition 64 requires private representative actions to satisfy the procedural requirements applicable to class action lawsuits. (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64, Official Title & Summary, p 38.)[2] We conclude that in order to meet the "community of interest" requirement of Code of Civil Procedure section 382, which requires, inter alia, the class representative to have claims *typical* of the class, it is insufficient if the class representative alone suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. (§§ 17204, 17535.) The class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of such violation. (*Ibid*.)

We further conclude that unless an action under the UCL or the FAL is brought by the Attorney General or local public prosecutors, the mere likelihood of harm to members of the public is no longer sufficient for standing to sue. Persons who have not suffered any injury in fact and who have not lost money or property as a result of an alleged fraudulent business practice cannot state a cause of action merely based on the "likelihood" that members of the public will be deceived. (§§ 17204, 17535.)

Further, inherent in Proposition 64's requirement that a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) is that a plaintiff actually *relied* on the false or misleading misrepresentation or advertisement in entering into the transaction in issue.

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[2] "As with ballot pamphlet arguments, a reviewing court may look to a ballot's legislative analysis to determine voter intent. [Citation.] [¶] Finally, as a reviewing court is directed to look at the arguments contained in the official ballot pamphlet to ascertain voter intent, it is well settled that such an analysis necessarily includes the arguments advanced by both the proponents and opponents of the initiative. [Citation.]" (*Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 906.)

We conclude the trial court's ruling, which certified a class consisting of all persons who purchased Listerine in California during a six-month period, is overbroad. We grant the relief requested.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The proposed class action complaint.*

On January 11, 2005, Galfano filed a consumer action against Pfizer in his individual capacity and on behalf of all others similarly situated, based upon Pfizer's alleged misrepresentations and failure to disclose material information in the marketing, labeling, advertising and sale of Listerine mouthwash.[3] Galfano pled that Pfizer advertised and promoted Listerine in a misleading manner by indicating the use of Listerine can replace the use of dental floss in reducing plaque and gingivitis. The complaint asserted causes of action for breach of express warranty, false advertising under section 17500 and unlawful, unfair and fraudulent business practices under section 17200.

With respect to the class action allegations, Galfano alleged he represented "[a]ll persons who purchased Listerine, in California, from approximately June of 2004 to the date of judgment in this action . . . ."

2. *Galfano's motion for class certification.*

On September 9, 2005, Galfano filed a motion for class certification. Galfano sought to certify the following class: "All persons who purchased Listerine with labels that state 'as effective as floss,' in California, from June 28, 2004 through January 7, 2005 ('the Class Period')."

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[3] On November 2, 2004, the electorate approved Proposition 64, which amended the standing requirements of the UCL and the FAL. (§§ 17200 et seq., 17203, 17204, 17500 et seq., 17535.) Galfano commenced this action *after* the effective date of Proposition 64. There is no contention that Proposition 64 is not fully applicable to this case.

In seeking class certification, Galfano contended the class is ascertainable, the class is so numerous as to render joinder impracticable, an overwhelming community of interests exists among the class, the class representative has claims typical of the class, and the named plaintiff and his counsel adequately represent the class.

3. *Pfizer's opposition to class certification.*

Pfizer opposed class certification, arguing the case is replete with factual issues that only can be determined upon individual inquiry of each class member, and which individual inquiries predominate over any common issues. Pfizer enumerated those issues as follows: whether each class member saw or read a label; if so, *which* of the labels was seen or read; whether the consumer was deceived or misled by, or relied on, the label; if so, whether that was part of the bargain and caused the consumer to buy Listerine; if so, whether the consumer suffered injury in fact and lost money or property as a result of the alleged deception or reliance; and if so, the amount of damages or restitution, given that prices vary and most consumers will not have records of the price(s) they paid.

Pfizer reasoned that a consumer may have purchased Listerine not because of any alleged deception "but because he was brand loyal, he wanted a breath freshener, his dentist recommended it, due to a price promotion, or because the consumer read the label's admonition to 'floss daily' or 'not a replacement for floss' and did not take away any alleged deceptive message, each of which is an individual issue that cannot be resolved on a class-wide basis."

4. *Trial court's ruling.*

After hearing the matter, the trial court issued an order on November 22, 2005, certifying a broad class, on an opt-out basis, consisting "of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005."

In its written ruling, the trial court noted "[w]hile Proposition 64 amended [section] 17204's standing requirements to prosecute UCL claims (by mandating that a private party suffer an 'injury in fact' and lose money or property as a result of the practice), *whether the standing requirements for class members also changed under the UCL is an open issue*." (Italics added.)

The trial court reserved jurisdiction to modify the class definition, decertify the class, or replace Galfano with a new class representative. In certifying the class, the trial court also severed the breach of warranty claim, pending determination of the viability of the UCL claims in subsequent phases of the proceedings.

The trial court also expressed numerous reservations concerning the remedies available to the class. Specifically, "upon proof of false or misleading advertising, or of a fraudulent or unfair practice, injunctive relief may be available. However, any restitutionary relief may be problematic. Insofar as the advertising and labeling is no longer in use, injunctive relief may not be appropriate. With respect to restitutionary relief, the requirements of 'injury in fact' or 'lost money or property as a result' of the conduct of Defendant Pfizer, as imposed by Proposition 64, may preclude recovery on a class basis. Similarly, proof of the claim for restitutionary disgorgement appears problematic, to the extent there must be some correlation between the amount of restitutionary relief and conduct justifying recovery. The Court further has reservations with respect to the remedies on Plaintiff's breach of warranty claim, as the measure of damages is defined under Commercial Code § 2714(2)."

Despite its stated reservations, the trial court certified the class in accordance with Galfano's broad definition.

5. *Pfizer's writ petition.*

On December 29, 2005, Pfizer filed the instant petition for writ of mandate, seeking vacation of the trial court's order and entry of a new order denying class certification.

This court issued an order to show cause.[4]

CONTENTIONS

Pfizer contends the trial court erred in certifying the class because under Proposition 64, one who maintains an action under the UCL must have suffered injury in fact and have lost money or property as a result of the unfair competition (§ 17204), and this standing requirement applies equally to the named plaintiff and to all class members.[5]

DISCUSSION

1. *Prior law and perceived abuses.*

Section 17200 defines "unfair competition" to include "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of . . . the Business and Professions Code."

Prior to the enactment of Proposition 64, the UCL authorized *any person* to sue on behalf of the general public. Former section 17204 provided: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel . . . or any city attorney . . . *or by any person acting for the interests of itself, its members or the general public.*" (Stats. 1993, ch. 926, § 2, italics added.)

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[4] A defendant generally has the right to have class certification issues resolved before the merits of an action are decided. (*Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 262.)

[5] By way of additional arguments, Pfizer contends the trial court abused its discretion in finding that common issues predominate over individual ones, that Galfano's claims are typical, that Galfano is an adequate class representative, that class treatment will provide substantial benefits, and in finding an ascertainable class.

Similarly, former section 17535, within the FAL (§ 17500 et seq.) permitted an action to be brought "*by any person* acting for the interests of itself, its members, or the general public." (Stats. 1972, ch. 711, p. 1300, § 3, italics added.)

To state a cause of action under the UCL (§ 17200 et seq.) or the FAL (§ 17500 et seq.) for injunctive relief, allegations of actual deception, reasonable reliance and damage were unnecessary (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 211) and a private plaintiff who had not suffered any injury could sue to obtain relief for others. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at p. 561.)

This state of the law led to perceived abuses which Proposition 64 sought to remedy. The ballot argument in favor of Proposition 64 states the initiative was intended to "PROTECT SMALL BUSINESSES FROM FRIVOLOUS LAWSUITS—CLOSE THE SHAKEDOWN LOOPHOLE. [¶] There's a LOOPHOLE IN CALIFORNIA LAW that allows private lawyers to file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled." (Ballot Pamp., General Elec. (Nov. 2, 2004) Ballot Argument in Favor of Prop. 64, p. 40.)

2. *Proposition 64 allows private enforcement only if an individual actually was injured and suffered financial or property loss as a result of the unfair competition or false advertising; it also requires private enforcement actions to meet class action requirements.*

a. *Proposition 64 restricts private enforcement to an individual who has suffered injury in fact and lost money or property as a result of unfair competition or false advertising.*

Proposition 64 amended section 17204 to provide: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel . . . or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association *or by any person who*

has suffered injury in fact and has lost money or property as a result of such unfair competition." (§ 17204, as amended by Prop. 64, § 3, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

Similarly, Proposition 64 amended section 17535, within the FAL (§ 17500 et seq.) to provide in relevant part: "Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association *or by any person who has suffered injury in fact and has lost money or property as a result of a violation of this chapter*." (§ 17535, as amended by Prop. 64, § 5, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

Thus, Proposition 64 now prohibits any person, other than the Attorney General or local public prosecutors from bringing a lawsuit under the UCL or the FAL unless the person has suffered injury and lost money or property as a result of such violations. (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64 Analysis by Legislative Analyst, p. 38.)

b. *Proposition 64 also requires private representative actions to meet the requirements of class action lawsuits.*

In addition to restricting who can sue for unfair competition or false advertising, Proposition 64 requires private representative claims to satisfy procedural requirements applicable to class action lawsuits.

Section 17203, as amended by Proposition 64, provides: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *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, [**6**] *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*. (§ 17203, as amended by Prop. 64, § 2, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

Similarly, Proposition 64 amended section 17535, within the FAL (§ 17500 et seq.) to provide in relevant part: "Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. *Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section 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*." (§ 17535, as amended by Prop. 64, § 5, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

With regard to these changes, the legislative analysis in the official ballot pamphlet explained: "Currently, persons initiating unfair competition lawsuits do not have to meet the requirements for class action lawsuits. Requirements for a class action lawsuit include (1) certification by the court of a group of individuals as a class of persons with a common interest, (2) demonstration that there is a benefit to the parties of

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6 Code of Civil Procedure section 382, pertaining to class actions, provides: "If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

the lawsuit and the court from having a single case, and (3) notification of all potential members of the class. [¶] . . . [¶] PROPOSAL [¶] This measure makes the following changes to the current unfair competition law: [¶] . . . [¶] *Requires Lawsuits Brought on Behalf of Others to Be Class Actions.* This measure requires that unfair competition lawsuits initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits." (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64 Ballot Analysis by Legislative Analyst, pp. 38-39, original italics.)

c. *Class action requirements; class representative must have claims typical of the class; therefore, all class members, not merely class representative, must have suffered injury in fact and lost money or property due to the unfair competition or false advertising.*

Section 382 of the Code of Civil Procedure authorizes class suits in California when " 'the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.' " (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913.) The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well-defined community of interest among the class members. (*Ibid.*)

The community of interest requirement "embodies three factors: (1) predominant common questions of law or fact; (2) *class representatives with claims or defenses typical of the class*; and (3) class representatives who can adequately represent the class." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470, italics added; accord *Washington Mutual Bank v. Superior Court, supra*, 24 Cal.4th at p. 913.)

Galfano and the Attorney General take the position that only the class representative must meet the new standing requirements of Proposition 64, i.e., have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising (§§ 17204, 17535); however, there is no requirement that other class members meet this standing requirement.

The argument is unpersuasive. It is a basic principle that "[e]ach class member must have standing to bring the suit in his own right." (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73.) This is because a class action is "merely a procedural device for consolidating matters properly before the court." (*Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716.)

If Galfano alone, but not class members, suffered injury in fact and lost money or property as a result of Pfizer's alleged unfair competition or false advertising, then by definition his claim would not be typical of the class. Rather, Galfano's claim would be demonstrably *atypical*.

As explained, Proposition 64 requires private representative actions to satisfy the procedural requirements applicable to class action lawsuits. (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64 Official Title & Summary, p. 38.) In order to meet the "community of interest" requirement of Code of Civil Procedure section 382, which requires, inter alia, the class representative to have claims *typical* of the class, it is insufficient if the class representative alone suffered injury in fact and lost money or property as a result of the violation. (§§ 17204, 17535.) The class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. (*Ibid*.)

d. *The effect of Proposition 64's requirement of "injury in fact" on the rule that one could state a claim under the UCL or the FAL based on the mere likelihood that members of the public would be deceived*; *private individuals who have not suffered any injury in fact and who have not lost money or property as a result of an alleged fraudulent business practice or false advertising cannot state a cause of action based merely on the likelihood that members of the public will be deceived.*

Historically, in order to state a cause of action under either the UCL or the FAL, case law only required a showing that " 'members of the public [were] *likely to be deceived*.' [Citations.]" (*Committee on Children's Television, Inc. v. General Foods Corp., supra,* 35 Cal.3d at p. 211, italics added.) Allegations of actual deception, reasonable reliance and damage were unnecessary. (*Ibid*.)

The issue is whether the "likely to be deceived" standard can be reconciled with Proposition 64's new standing requirements.

As discussed, Proposition 64 prohibits any person, other than the Attorney General or local public prosecutors, from bringing a lawsuit for unfair competition or false advertising unless the person has suffered "injury in fact" and has lost money or property as a result of such violation. (§§ 17204, 17535, as amended by Prop. 64, §§ 3, 5, approved Nov. 2, 2004, eff. Nov. 3, 2004.) Further, Proposition 64 requires that such actions initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits. (§ 17203, 17535, as amended by Prop. 64, §§ 2, 5, approved Nov. 2, 2004, eff. Nov. 3, 2004.) In order to meet the "community of interest" requirement of Code of Civil Procedure section 382, the class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. (§§ 17204, 17535.)

Therefore, unless an action under the UCL or the FAL is brought by the Attorney General or local public prosecutors, the mere likelihood of harm to members of the public is no longer sufficient for standing to sue. Persons who have not suffered any "injury in fact" and who have not lost money or property as a result of an alleged fraudulent business practice or false advertising (§§ 17204, 17535) cannot state a cause of action based merely on the "likelihood" that members of the public will be deceived.

e. *Post-Proposition 64 state cases cited by Galfano are unavailing*.

In support of his contention the "likely to be deceived" standard is unchanged, Galfano cites four post-Proposition 64 Court of Appeal decisions: *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 285, footnote 4 (*Progressive*); *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 484; *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 682; and *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 221. Galfano's reliance on these decisions is misplaced. It is established that "[l]anguage used in any opinion is of course to be understood in the light

of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

In *Progressive, supra*, 135 Cal.App.4th at page 271, Preciado alleged in his cross-complaint that Progressive's conduct violated section 17200 as an unlawful, unfair or fraudulent business practice. The cross-complaint alleged: "Progressive has a 'pattern and practice of seeking med-pay reimbursement even though it never engaged in any discussion, analysis or conclusion that the injured party has in fact been made whole' and 'continues to seek[ ] sums it is not entitled to as a matter of law to further its unlawful scheme.' Further, . . . Progressive has a 'pattern and practice of ignoring California law by seeking 100% reimbursement for the amounts paid under its med-pay provision. This systematic scheme is contrary to law, and is nothing more than a sharp, illicit business practice.' . . . Progressive fails to investigate claims, fails to properly explain policy benefits, misled Preciado and misrepresented material facts pertaining to his claim, imposes unacceptably high reimbursement amounts, and forced Preciado to retain attorneys and incur economic damages to receive proper benefits under the policy." (*Progressive, supra*, at pp. 271-272.

Progressive held Preciado stated a cause of action under section 17200 for unfair or fraudulent business practices. (*Progressive, supra*, 135 Cal.App.4th at pp. 283-285.) In its discussion, *Progressive* relied on the principle that "[a] fraudulent business practice under section 17200 'is not based upon proof of the common law tort of deceit or deception, but is instead premised on whether the public is *likely to be deceived*.' [Citation.] . . . A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are *likely to be deceived*." [Citations.]' [Citation.]" (*Id*. at p. 284, italics added.)

However, *Progressive* does not acknowledge Proposition 64, except for the following statement in a footnote: "We express no opinion as to whether Preciado's attorney fees constitute 'injury in fact' as required under section 17204. Preciado has alleged that the conduct has forced him to incur 'economic damages' in addition to attorney fees." (*Progressive, supra,* 135 Cal.App.4th at p. 285, fn. 5.)

As for *Wayne v. Staples, Inc., supra,* 135 Cal.App.4th at page 484, *Colgan v. Leatherman Tool Group, Inc., supra*, 135 Cal.App.4th at page 682, and *Bell v. Blue Cross of California, supra,* 131 Cal.App.4th at page 221, Galfano acknowledges those cases, although they apply the traditional "likely to be deceived" standard, do not address the effect of Proposition 64.

Therefore, the cited decisions are not authority with respect to the impact of Proposition 64 on the "likely to be deceived" standard.

f. *The requirement a plaintiff suffered "injury in fact . . . as a result of" the fraudulent business practice or false advertising means that a plaintiff must have actually relied on the misrepresentation in entering into the transaction.*

Galfano and Pfizer also differ as to whether Proposition 64 added a reliance element to the UCL and the FAL. Pfizer has the better argument.

Inherent in Proposition 64's requirement that a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) is that a plaintiff actually *relied* on the misrepresentation and as a result, was injured thereby.[7] Here, for example, to have suffered an injury in fact as a result of the alleged misrepresentation, a plaintiff would have had to read Pfizer's label "as effective as floss against plaque and gingivitis" or some similar statement and relied thereon in buying Listerine. A consumer who was unaware of, or who did not rely upon,

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[7] Similarly, an element of both actionable fraud and negligent misrepresentation is damage, i.e., pecuniary or property loss, resulting from *reliance* on the misrepresentation. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 816, 818.)

Pfizer's claims comparing Listerine to floss did not suffer any "injury in fact" as a result of the alleged fraudulent business practice or false advertising.

We note that in *Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133, a post-Proposition 64 case, the district court reached a contrary conclusion. *Anunziato* held "reading reliance into the UCL and the FAL would subvert the public protection aspect of those statutes." (*Id*. at p. 1137.)

Anunziato reasoned: "[T]he Court can envision numerous situations in which the addition of a reliance requirement would foreclose the opportunity of many consumers to sue under the UCL and the FAL. One common form of UCL or FAL claim is a 'short weight' or 'short count' claim. For example, a box of cookies may indicate that it weighs sixteen ounces and contains twenty-four cookies, but actually be short. Even in this day of increased consumer awareness, not every consumer reads every label. If actual reliance were required, a consumer who did not read the label and rely on the count and weight representations would be barred from proceeding under the UCL or the FAL because he or she could not claim reliance on the representation in making his or her purchase. Yet the consumer would be harmed as a result of the falsity of the representation." (*Anunziato v. eMachines, Inc., supra*, 402 F.Supp.2d at p. 1137.)

While *Anunziato* expressed an understandable concern, it would appear the court substituted its judgment for that of the voters and based its decision on the perceived ill effects a "reliance" requirement would have in hypothetical fact situations.

In view of Proposition 64's express requirement that a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added), we believe the district court's decision in *Laster v. T-Mobile USA Inc.* (S.D.Cal. 2005) 407 F.Supp.2d 1181, sets forth the correct interpretation.

Laster held "[b]ecause Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation as required by Proposition 64." (*Laster v. T-Mobile USA Inc.*, *supra*, 407 F.Supp.2d at p. 1194.) *Laster* noted the plaintiffs failed to allege they "relied on Defendants' advertisements in entering into the transactions. While Plaintiffs meticulously describe the allegedly misleading advertisements (as later described in Plaintiffs' pleadings, a 'bait-and-switch' leading to a 'fleece'), none of the named Plaintiffs allege that they saw, read, or in any way relied on the advertisements; nor do they allege that they entered into the transaction *as a result* of those advertisements." (*Ibid*.)

Accordingly, the requirement a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) means that Galfano or others must have purchased the Listerine in reliance on the allegedly false or misleading representations or advertisements and as a result suffered injury.

CONCLUSION

For the reasons stated above, we conclude the trial court erred as a matter of law in certifying a class of "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." In view of the changes in the law brought about by Proposition 64, the class definition is plainly overbroad and must be set aside.[8] [9]

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[8] We note the class definition, extending to anyone who purchased Listerine in California within a six-month period, is overbroad for other reasons as well. For example, Pfizer's opposition papers showed that of 34 different Listerine mouthwash bottles, 19 never included any label that made any statement comparing Listerine mouthwash to floss. Further, even as to those flavors and sizes of Listerine mouthwash bottles on which Pfizer did place the labels which are at issue herein, not every bottle shipped between June 2004 and January 2005 bore such a label.

[9] Our ruling herein is without prejudice to Galfano's bringing a new motion for class certification, consistent with the principles set forth in this opinion.

We recognize this initiative measure, which was promoted as adding a standing requirement to the UCL and FAL, has had the effect of dramatically restricting these consumer protection measures. For example, as the district court recognized in *Anunziato*, the addition of a reliance requirement may preclude a consumer who did not read and rely on a label from stating a UCL or FAL claim in a " 'short weight' " or " 'short count' " case. (*Anunziato v. eMachines, Inc., supra,* 402 F.Supp.2d at p. 1137.) However, this court must take the statutory language as it finds it. Given the new restrictions on private enforcement under the UCL and the FAL, enforcement of these statutes in legitimate cases is increasingly the responsibility of a vigilant state Attorney General and/or local public prosecutors.[10]

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10 This case illustrates some of the shortcomings of the initiative process. "When a statute enacted by the initiative process is involved, the Legislature may amend it only if the voters specifically gave the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (Cal. Const., art. II, § 10, subd. (c); *Amwest* [*Surety Ins. Co. v. Wilson* (1995)] 11 Cal.4th 1243, 1251.)" (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-1484.) Proposition 64 does not include a provision empowering the Legislature to amend it.

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing respondent superior court to vacate its November 22, 2005 order granting Galfano's motion for class certification and to enter a new and different order denying the motion. Pfizer shall recover its costs in this proceeding. (Cal. Rules of Court, rule 56(*l*).)

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.