PRIVATE "REPRESENTATIVE ACTIONS" UNDER CALIFORNIA'S UNFAIR COMPETITION LAW AFTER PROPOSITION 64: A COMPARATIVE ANALYSIS

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INTRODUCTION

Before Proposition 64 ("Prop. 64") took effect, private plaintiffs could prosecute three types of actions under California's Unfair Competition Law[1] ("UCL"): (1) actions on their own behalf; (2) actions representing the interest of the general public (so-called "private attorney general actions"); and (3) actions representing the interests of a defined class. In this article, we refer generally to categories (2) and (3) as "representative actions."

Part I of this article discusses the various private representative actions that could be prosecuted under the UCL before Prop. 64. Part II discusses how Prop. 64 affects the ability of private plaintiffs to prosecute representative actions. Part III concludes that Prop. 64 significantly limits the availability of private representative actions under the UCL.[2]

PART I
REPRESENTATIVE ACTIONS UNDER THE UCL BEFORE PROP. 64

A. Non-Class Representative UCL Actions

1. Statutory Non-Class Representative UCL Actions

The prior UCL expressly authorized "any person" to prosecute a UCL claim on behalf of the general public.[3] This broad grant of authority was endorsed by the Court of Appeal over a quarter century ago in *Hernandez v. Atlantic Finance Company*[4] when it confirmed that the UCL's "any person" language should be read literally:

> Defendants argue below . . . that traditional concepts of standing must be read into the [UCL]. . .. However, we read the statute as expressly authorizing the institution of action by any person on behalf of the general public.[5]

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1 CAL. BUS. & PROF. CODE §§ 17200 *et seq*.

2 The California Attorney General's and other government entities' ability to prosecute claims on behalf of the general public was not affected by Prop. 64.

3 *See* Cal. Legis. Serv. Prop. 64 (West) § 3 (striking the language from section 17204 providing that any person "acting for the interests of itself, its members *or the general public*" could prosecute a UCL claim) (emphasis added). A "person" under the UCL includes "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." CAL. BUS. & PROF. CODE § 17201.

4 (1980) 105 Cal. App. 3d 63.

5 *Id*. at 71-72.

Furthermore, the prior UCL authorized private plaintiffs to "represent" the general public without having to satisfy California's class action procedural requirements, and without the representative plaintiff having to show that it or the general public was actually harmed by the defendants' challenged business practices.[6]

The lack of standing and class action procedural requirements, combined with the wide range of equitable remedies available for UCL violations,[7] made representative actions a potent threat. For example, the California Supreme Court in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*[8] held that a public interest corporation could pursue a UCL claim on behalf of the general public against a convenience store for alleged violation of California Penal Code section 308, which prohibited tobacco sales to minors. The California Supreme Court held that the plaintiff could pursue its claim even though it had not been injured by the complained-of conduct and did not have its own private right of action under Penal Code section 308, the statute forming the basis of its UCL suit.[9]

The UCL's "no standing" rule was an exception to California law that generally required that "[e]very action must be prosecuted in the name of the real party in interest."[10] The UCL exception, however, had limitations. For example, where a UCL claim was based on the violation of another statute (pursuant to the "unlawful" prong of the UCL), any limitations on standing in the borrowed statute *could* limit the plaintiff's standing for the UCL claim.[11] A more amorphous, yet broader, limitation (which was late developing) was a requirement that the UCL representative action plaintiff be "competent" to prosecute the claim. In *Kraus v. Trinity Management Services, Inc.*,[12] the California Supreme Court observed that a "court may decline to entertain the [UCL] action as a representative suit" where the defendant can show that the suit is not brought by a "competent plaintiff."[13]

2. Common-Law Non-Class Representative UCL Actions

Environmental groups have often relied on alleged UCL violations to support suits aimed at preserving wildlife and other natural resources. These groups have brought suits based on purported violations of the UCL (because the defendants' conduct was allegedly

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6 *See Mass. Mut. Life Ins. Co. v. Super. Ct.* (2002) 97 Cal. App. 4th 1282, 1290, n.3 (citation omitted).

7 *See* CAL. BUS. & PROF. CODE § 17203 ("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 . . . 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").

8 (1998) 17 Cal. 4th 553.

9 *See id.* at 572-574.

10 CAL. CODE CIV. PROC. § 367.

11 *See Perfect 10, Inc. v. Cybernet Ventures, Inc.* (C.D. Cal. 2001) 167 F. Supp. 2d 1114, 1125.

12 (2000) 23 Cal. 4th 116.

13 *See id.* at 138. *See also Lazar v. Trans Union LLC* (C.D. Cal. 2000) 195 F.R.D. 665, 673-74 (essentially conducting a class certification "typicality" analysis and declining to permit plaintiff to pursue a representative action where "plaintiff's circumstances were quite unusual . . . the probability that any other consumer incurred damages similar to plaintiff's . . . is also very low").

"unlawful," "fraudulent," or "unfair") and have asserted standing under the "public trust" doctrine, which holds that the state's natural resources are held in "trust" for the benefit of the public.[14] Such claims did not depend on the UCL's statutory private attorney general provision because "any member of the general public has standing to raise a claim of harm to the public trust."[15] Representative lawsuits by uninjured plaintiffs have been permitted in a variety of other contexts.[16] Presumably, plaintiffs in these representative actions could have alleged UCL violations as well.

B. UCL Class Actions

Non-class representative or "private attorney general" actions were not the only way that UCL plaintiffs could obtain relief on behalf of absent parties. California courts have permitted private parties to litigate UCL claims on behalf of a class pursuant to California's class action statute, California Code of Civil Procedure section 382.[17] That provision expressly authorizes class treatment of a claim 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."[18] As interpreted by the California Supreme Court, section 382 requires that the proponent of class certification of a claim establish the existence of both "an ascertainable class" and "a well-defined community of interest among the class members."[19] The proponent of certification bears the burden of establishing that class action treatment is appropriate.[20]

An "ascertainable class" is a class defined by "objective characteristics and common transactional facts."[21] Ascertainablility ensures adequate notice to the putative members of the class who may be bound by the judgment on the class action claim.[22]

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14 *See Betchart v. Dep't of Fish & Game* (1984) 158 Cal. App. 3d 1104, 1106.

15 *Nat'l Audobon Soc'y v. Super. Ct.* (1983) 33 Cal. 3d 419, 431, n.11.

16 *See, e.g., Farm Sanctuary, Inc. v. Dep't of Food and Agriculture* (1998) 63 Cal. App. 4th 495, 503, n.6 ("Nor is the dispute here rendered nonjusticiable or less ripe by the fact that the plaintiff is an organization rather than an individual. 'The participation of incorporated and unincorporated associations . . . has become common and accepted in public interest-oriented litigation and activities.'") (citation omitted); *Cal. Dental Assoc. v. Cal. Dental Hygienists' Assoc.* (1990) 222 Cal. App. 3d 49, 61 (permitting a dental association to pursue money damage claims on behalf of its members, even though the association itself admittedly had suffered no monetary harm).

17 *See, e.g., Corbett v. Super. Ct.* (2002) 101 Cal. App. 4th 649. In 2002, the California Court of Appeal acknowledged that this practice was consistent with the case law, statutory language, legislative history, and public policy of the UCL. *See id.* at 654. While the prosecution of UCL claims as class actions imposed additional requirements under section 382 on the proponents of such actions (as opposed to "private attorney general actions"), class certification gave UCL plaintiffs the added benefit of pursuing disgorgement of profits into fluid recovery funds. *See Kraus*, 23 Cal. 4th at 137. For some plaintiffs, the benefits of the availability of disgorgement into fluid recovery funds far outweighed the costs of meeting additional requirements under section 382. *Cf. Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal. App. 4th 29, 35-37 (rejecting plaintiffs' argument that "[t]he mere desire to obtain disgorgement of profits supports class certification without an appropriate showing").

18 CAL. CODE CIV. PROC. § 382.

19 *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470.

20 *See Wash. Mut. Bank, FA v. Super. Ct.* (2001) 24 Cal. 4th 906, 913.

21 *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 915.

22 *See id.* at 914.

A "well-defined community of interest" comprises 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."[23]

In addressing the predominance requirement, California courts have further explained that the issues to be tried jointly must be sufficiently numerous and substantial, when compared to the issues to be tried individually, such that class treatment of these issues is advantageous both to the courts and the litigants.[24] If a class will "splinter into individual trials," then the predominance requirement is not met and class treatment is not appropriate.[25]

At bottom, the proponent of certification of a claim bears the burden of showing that class action treatment "will provide substantial benefits both to the courts and the litigants,"[26] and that class treatment is "superior to other available methods" for the adjudication of the claim.[27]

While section 382 states the procedural requirements for the litigation of a claim as a class action, the determination of whether a claim satisfies those requirements depends on the substantive law governing the claim.[28] The relatively lax substantive requirements to state claims under the UCL made class certification of many UCL claims easier than for non-UCL claims.

For example, one of the more challenging requirements for class treatment under section 382 is the requirement that common issues must predominate over individual ones. For many claims, establishing reliance, causation, and injury, among others, often require individualized proof, thereby decreasing the likelihood of satisfying the predominance requirement. For UCL claims prior to Prop. 64, however, "California courts ha[d] repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury."[29] In the absence of the need for individualized proof of these issues, some UCL claims tended to be easier than other claims to certify for class treatment.[30]

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23 *Richmond*, 29 Cal. 3d at 470.

24 *See Wash. Mut. Bank.*, 24 Cal. 4th at 913-14.

25 *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal. App. 4th 799, 809-10.

26 *Id.* at 914. *See also City of San Jose v. Super. Ct.* (1974) 12 Cal. 3d 447, 460.

27 *Dean Witter Reynolds, Inc. v. Super. Ct.* (1989) 211 Cal. App. 3d 758, 798-99. California courts have questioned whether a class action is "superior" where a representative action is available as an alternative and concededly the only advantage of a class action is the ability to seek the disgorgement of profits into a fluid recovery fund. *See Frieman*, 116 Cal. App. 4th at 35-38.

28 *See City of San Jose*, 12 Cal. 3d at 462 ("Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."); *Hicks*, 89 Cal. App. 4th at 916.

29 *Mass. Mut. Life. Ins.*, 97 Cal. App. 4th at 1288 (collecting cases). *See also Corbett*, 101 Cal. App. 4th at 672.

30 *See Corbett*, 101 Cal. App. 4th at 672 ("The refusal to certify a class on other claims is not dispositive on whether the UCL claim should be certified, because the UCL claim is materially different from the other causes of action. Relief under the UCL is available without individualized proof of deception, reliance, and injury."); *Mass. Mut. Life. Ins.*, 97 Cal. App. 4th at 1291-92 ("None of the cases Mass Mutual has cited involve the UCL and its unique scope."). *But see Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 657-66 (finding that class treatment was not superior, and that plaintiff's UCL claims regarding labeling on juice cartons were not typical "because he expected 'premium' juice, not 'fresh' juice, and he read only the top portion of the carton unlike those consumers who may have read the entire label").

PART II
REPRESENTATIVE ACTIONS AFTER PROP. 64

A. Non-Class Representative UCL Actions After Prop. 64

1. Statutory Non-Class Representative UCL Actions

Prop. 64 unambiguously puts an end to "private attorney general actions," *i.e.*, the private prosecution of UCL claims on behalf of the general public.[31]

2. Common-Law Non-Class Representative UCL Actions

Prop. 64's effect on the viability of non-statutory representative actions under the UCL is far from clear. A case presently before Alameda County Superior Court Judge Ronald M. Sabraw demonstrates this. In February 2005, applying post-Prop. 64 standing requirements, Judge Sabraw denied a motion to dismiss UCL claims brought under the "public trust" doctrine[32] by the Center for Biological Diversity, Inc. against wind turbine companies.

Plaintiffs' claims were based not on harm to them, but instead on alleged harm to wild birds.[33] Defendants sought dismissal of the claims based upon Prop. 64's newly-added "injury in fact" requirement. Judge Sabraw refused to dismiss the claims by the named plaintiffs in their own interest because he found that they had "sufficiently alleged an actual injury to property held in trust for themselves to satisfy the standing requirements of section 17204 [as amended by Prop. 64] at the pleading stage."[34]

But Judge Sabraw revisited plaintiffs' standing under Prop. 64 again in March 2005. In a tentative ruling, Judge Sabraw indicated that plaintiffs could not rely on the public trust doctrine to bring a UCL claim because, after Prop. 64, private plaintiffs must allege and demonstrate (in addition to "injury in fact") loss of property or money in order to prosecute a UCL claim.[35] Relying on the California Supreme Court's holding that courts can only order defendants in UCL actions to restore money or property to parties that "have an ownership interest" in it, Judge Sabraw held that plaintiffs could not pursue the UCL claim because they did not "own" the wild birds within the meaning of the UCL.[36]

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31 *See* 2004 Cal. Legis. Serv. Prop. 64 (West) § 3.

32 *See supra* notes 14-16.

33 *See Center for Biological Diversity v. FPL Group, Inc.* (Feb. 17, 2005) No. RG04-183113, Order (1) Granting Motions to Strike UCL Claims Asserted by Private Parties in the Interest of the General Public; (2) Permitting Government Entities Leave to Intervene to Represent the General Public; (3) Granting and Denying Motions to Strike UCL Claims Asserted by Private Parties in Their Own Interests; and (4) Granting Leave to Amend and to File Motions for Leave to Amend (available at http://apps.alameda.courts.ca.gov/fortecgi/fortecgi.exe?ServiceName=DomainWebService&TemplateName=html/complitaction.html&CaseNbr=RG04183113&CurrBatchNbr=1).

34 *Id.* at 35 (citation omitted).

35 *See* CAL. BUS. & PROF. CODE § 17204.

36 *See Center for Biological Diversity v. FPL Group, Inc.* (Mar. 22, 2005) No. RG04-183113, Tentative Ruling Granting in Part Motion to Strike (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1147 (2003)) (available at http://apps.alameda.courts.ca.gov/fortecgi/fortecgi.exe?ServiceName=DomainWebService&TemplateName=index.html).

Even if environmental and other public interest groups are unable to meet the revised UCL standing requirements, they do have options, such as pursuing non-UCL claims under the public trust doctrine, recruiting a private individual who can meet the new UCL standing requirements to pursue injunctive relief (the benefits of which could inure to the public), or encouraging government agencies to take action under the UCL.[37]

B. UCL Class Actions

Prop. 64 states that "[a] person may pursue representative claims or relief on behalf of others only if the claimant meets the [newly-added] standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure."[38] Section 17204, as amended by Prop. 64, permits a UCL action to be brought by "any person who has suffered injury in fact and has lost money or property as a result of . . . unfair competition."[39]

As discussed above in Part I, the determination of whether a claim is amenable to class treatment must be made in the context of the substantive law governing the claim asserted. There is no doubt that the newly-added standing requirements of the UCL will affect the class action analysis of UCL claims. We discuss below some ways that UCL class action practice will be affected.[40]

Under the newly-added standing requirements of the UCL, a private party must show, among other things, injury, causation and damages.[41] Outside of the UCL context, issues such as injury, causation, and damages often require individualized proof, thereby decreasing

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37 *See Consumers Union*, 4 Cal. App. 4th at 976.

38 CAL. BUS. & PROF. CODE § 17203.

39 CAL. BUS. & PROF. CODE § 17204.

40 The interplay between representative actions under the UCL and class actions under the Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750 *et seq.*, is beyond the scope of this article.

41 CAL. BUS. & PROF. CODE § 17204. *See also In re Tobacco Cases II* (Mar. 7, 2005) No. JCCP 4042, Final Ruling Granting Motion for Class Decertification (available at http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CIVIL/JCCP/JCCPTOBACCO/MINUTES/TAB137996/JCCP4042%20RULING%2003-07-05.PDF) ("First, the simple language of Prop. 64 makes clear that, for standing purposes, a showing of causation is required as to each class member's injury in fact (specifically, the phrase 'as a result of' the UCL violation).").

the likelihood of satisfying the predominance requirement for class certification under section 382.[42] These new standing requirements should make class certification of UCL claims more difficult.[43]

A clear example of how the new standing requirements could affect certification of UCL claims is the recent ruling in certain consolidated tobacco cases pending in San Diego Superior Court.[44] There, before Prop. 64 had taken effect, the court had certified plaintiffs' UCL claims for class treatment. After Prop. 64 took effect, however, the court decertified those very same claims based on the effect of the newly-added standing requirements of the UCL, including causation and injury in fact. The court concluded that "[a]s a result [of the applicability of Prop. 64 to the pending case], individual issues predominate, making class treatment inappropriate."[45]

In addition, the unavailability of non-class representative actions under the UCL for private litigants should change the strategic landscape for the litigation of UCL claims. First, defendants will now only need to contend with class actions and will no longer need to contend with "back-up" non-class representative claims filed contemporaneously with the request for class treatment—a practice employed by some plaintiffs to ensure that at least one of their actions was heard.[46] Second, defendants and plaintiffs will have greater finality in less time, given the *res judicata* effect of class action judgments and settlements on the defendant and all class members (as compared with the lack of such effect for judgments and settlements in non-class representative actions).[47]

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42 *See, e.g.*, *Hicks*, 89 Cal. App. 4th at 923-24 (causation and damages); *Block v. Major League Baseball* (1998) 65 Cal. App. 4th 538, 543 (affirmative defenses); *Kennedy*, 43 Cal. App. 4th at 813 (causation and damages); *Caro*, 18 Cal. App. 4th at 653-71 (materiality and reliance); *Osborne v. Subaru of Am., Inc.* (1988) 198 Cal. App. 3d 646, 658-62 (causation and damages); *Collins v. Safeway Stores, Inc.* (1986) 187 Cal. App. 3d 62, 74 (fluid recovery cannot "serve as a substitute for the elementary duty of a plaintiff to prove damage, an essential part of the cause of action"); *Brown v. Regents of Univ. of Cal.* (1984) 151 Cal. App. 3d 982, 989-90 (finding individual issues of reliance, causation, and damages, among others, were too numerous and substantial, and noting that "[e]ven if we were to ignore the problems relative to common proof of reliance as previously discussed, the complexity of the damage question alone, fully litigated by each class member, would far outweigh any small benefit derived from those issues which could be tried on a common basis"). *But see Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082, 1095 (class treatment appropriate because, among other reasons, an identical material misrepresentation was made to each class member); *Occidental Land, Inc. v. Super. Ct.* (1976) 18 Cal. 3d 355, 362-63 (class treatment appropriate because, among other reasons, an identical allegedly misleading prospectus was shown to all potential purchasers of land); *Vasquez v. Super. Ct.* (1971) 4 Cal. 3d 800, 814-15 (authorizing certification where, among other things, the same misleading sales script was used on each class member); *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal. App. 4th 952, 962 (permitting certification where, among other things, identical misrepresentations were made to all class members).

43 Although courts are cautioned to not judge the actual merits of claims asserted when determining whether class treatment is appropriate, the "issues affecting the merits" may be taken into account where those issues are "enmeshed with class action requirements" such as predominance of common issues and typicality of the representative's claims and defenses. *See Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 436. *See also Bartold v. Glendale Fed. Bank* (2000) 81 Cal. App. 4th 816, 829; *Caro*, 18 Cal. App. 4th at 656.

44 *Tobacco Cases II* (Mar. 7, 2005) No. JCCP 4042, Final Ruling Granting Motion for Class Decertification.

45 *Id.* at 1, 7 (citing *Collins*, 187 Cal. App. 3d at 73 ("Each class member must have standing to bring suit in his own right.")).

46 *See, e.g.*, *Fletcher v. Sec. Pac. Nat'l Bank* (1979) 23 Cal. 3d 442, 453 (1979); *Chern v. Bank of Am.* (1976) 15 Cal. 3d 866.

47 *See Stop Youth Addiction*, 17 Cal. 4th at 582.

As "representative actions" shift to being pure class actions, the parties will need to address the procedural requirements of section 382 in every case. For example, the parties in every UCL class action case should consider:

- the need to adequately represent and protect the interests of absent members of the class;[48]
- the need for adequate notice to the class;[49]
- the possibility that the court will impose certain conditions on the representative parties;[50]
- the availability to defendants of depositions and certain other discovery of absent members of the class;[51]
- the need for a hearing and court approval of a dismissal (and, if the class was already certified and a notice was already sent, notice of dismissal to the class);[52]
- the need for court approval of a settlement (and, if the settlement is approved, notice to the class);[53]
- the *res judicata* effect of a judgment or settlement upon absent members of the class (once certified).[54]

Given the additional requirements for class certification and the potential of the applicability of the UCL to pending cases, plaintiffs in pending cases with certified classes should expect an increase in decertification proceedings (like the proceedings in San Diego Superior Court discussed above), as defendants seek to relitigate class certification in light of the changed standards for UCL claims.[55]

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48 *See City of San Jose*, 12 Cal. 3d at 463-64 (finding that the trial court sanctioned "a clear violation of plaintiffs' fiduciary duty" and accordingly erred by certifying a class where the plaintiffs had failed to raise the claims reasonably expected to be raised by the absent members of the class).

49 *See* CAL. R. CT. 1856.

50 *See* CAL. R. CT. 1857.

51 *See* CAL. R. CT. 1858.

52 *See* CAL. R. CT. 1859.

53 *See* CAL. R. CT. 1860.

54 *See City of San Jose*, 12 Cal. 3d at 463-64; CAL. R. CT. 1861.

55 *See Danzig v. Jack Grynberg & Assocs.* (1984) 161 Cal. App. 3d 1128, 1136 ("Once the initial determination has been made, a motion to decertify the class action may be used whenever changed circumstances render class status no longer appropriate. But a request for decertification must be made before a decision on the merits.") (citation omitted); *Grogan-Beall v. Ferdinand Roten Galleries, Inc.* (1982) 133 Cal. App. 3d 969, 977 (under certain circumstances, class decertification can be considered and granted even after a verdict in plaintiff's favor). *See also* CAL. R. CT. 1854.

Furthermore, as requirements for standing to sue (rather than mere elements of a claim under the UCL), causation, injury in fact, and loss of money or property are especially critical to a determination of class certification. California courts have held that the named plaintiff's claims must be typical of those of absent class members, and that each putative class member must have standing to bring suit, as requirements for class certification.[56] To the extent that standing to bring suit cannot be ascertained without individualized proof of numerous and substantial issues, class certification is not appropriate.[57] Plainly, the addition of these standing requirements will increase the difficulty of certifying a UCL claim.

Another potential obstacle for UCL plaintiffs in this new era is the amount of recovery sought on behalf of the absent parties. There is some California class action case law that discusses so-called "negative value" claims, *i.e.*, where the amount of individual recovery for claims would not justify the expense of an individual suit, as a reason favoring class treatment.[58] However, and in contrast to non-class representative actions, the amount of potential recovery or remedy could be so small that class treatment would be inappropriate.[59] In other words, while the potential for a low amount of individual recovery may favor certification of a claim, too small an amount of individual recovery could militate against class treatment.

PART III
CONCLUSION

Prop. 64 significantly limits private plaintiffs' ability to pursue "representative actions." Prop. 64 destroys completely uninjured and undamaged private plaintiffs' right to bring actions on behalf of the general public (so-called "private attorney general" actions).

The new standing requirements of injury in fact and loss of money or property could also pose a significant threat to the viability of common law "public trust" actions under the UCL. Indeed, the new UCL standing requirements appear to be stricter than those of Article III of the United States Constitution, and it remains to be seen whether such UCL actions will survive Prop. 64.

Finally, the new standing and causation requirements will surely make class certification of UCL claims more difficult because they emphasize individualized issues where before such issues were almost non-existent.

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56 *See Caro*, 18 Cal. App. 4th at 664 (noting that "there can be no class certification unless it is determined by the trial court that similarly situated persons have sustained damage. There can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage"); *Collins*, 187 Cal. App. 3d at 73 ("Each class member must have standing to bring suit in his own right"). C*f. Hart v. Alameda County* (1999) 76 Cal. App. 4th 766, 775-76 (typicality requirement was not met where named plaintiff had placed jury deposits in just four of twenty-six counties alleged to have injured the class); *Am. Suzuki Motor Corp. v. Super. Ct.* (1995) 37 Cal. App. 4th 1291, 1294-95, 99 (class action of all buyers of SUVs was not maintainable where the asserted defect, which allegedly caused roll-overs, had not actually caused most SUVs to roll-over).

57 *See Tobacco Cases II* (Mar. 7, 2005) No. JCCP 4042, Final Ruling Granting Motion for Class Decertification.

58 *See, e.g., Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 715. Obviously, this factor is far from dispositive.

59 *See Blue Chip Stamps v. Super. Ct.* (1976) 18 Cal. 3d 381, 386 (reversing class certification order where potential recovery was minimal and the class consisted of millions of people). *See also Linder*, 23 Cal. 4th at 446 (noting that "the potential amount of each individual recovery is a significant factor in weighing the benefits of a class action").