B213044

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

SAFECO INSURANCE COMPANY OF AMERICA, et al.,
Petitioners,

v.

THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent,

LISA KARNAN,
on behalf of herself and all others similarly situated,
Real Party in Interest.

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF
FOLLOWING AN ORDER OF THE LOS ANGELES COUNTY SUPERIOR COURT
ANTHONY J. MOHR, JUDGE • CASE NO. BC266219

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS SAFECO INSURANCE COMPANY OF AMERICA, ET AL.

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REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.200(c), the Personal Insurance Federation of California (PIFC) and the Association of California Insurance Companies (ACIC) (amici), respectfully request permission to file the attached amicus curiae brief in support of petitioners Safeco Insurance Company of America, et al. PIFC is a California-based trade association that represents insurers selling approximately 40 percent of the personal lines insurance sold in California.

PIFC represents the interests of its members on issues affecting homeowners, earthquake, and automobile insurance before government bodies, including the California Legislature, the California Department of Insurance, and the California courts. PIFC's membership includes mutual and stock insurance companies.

ACIC is an affiliate of the Property Casualty Insurers Association of America (PCI) and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.5 percent of the property/casualty insurance in California, including 50.8 percent of personal auto insurance, 48.3 percent of commercial automobile insurance, 33.2 percent of homeowners insurance, 22.7 percent of commercial multi-peril insurance, and 33.4 percent of private workers compensation insurance. ACIC members include all sizes

and types of insurance companies—stocks, mutuals, reciprocals, Lloyds-plan affiliates, as well as excess and surplus lines insurers.

As counsel for PIFC and ACIC, we have reviewed the briefs filed in this case and believe this court will benefit from additional briefing concerning whether class action plaintiffs who lack standing under the Unfair Competition Law, Business and Professions Code section 17200 et seq. (UCL), should be allowed to conduct discovery for the purpose of locating new class representatives who might have standing.

March 19, 2009

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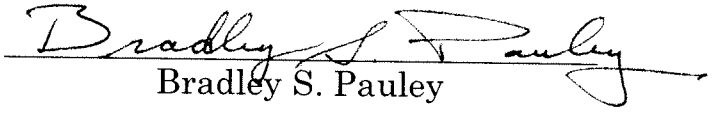
By: 
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IN THE COURT OF APPEAL
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THE SUPERIOR COURT OF CALIFORNIA,
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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS SAFECO INSURANCE COMPANY OF AMERICA, ET AL.

INTRODUCTION

Amici are concerned about the trial court's order allowing a plaintiff who lacks standing under the UCL, to prosecute a UCL action on behalf of a "placeholder" plaintiff as a means to conduct discovery and locate a proper class representative having the requisite standing.

In passing Proposition 64, and requiring that a plaintiff have personally suffered a loss of money or property as a prerequisite to *initiating* a UCL action, the voters expressed their intent that private individuals unaffected by a claimed UCL violation could no longer act in the name of the general public in filing or maintaining the equitable claims that may be asserted under the UCL. And yet under the trial court's ruling, that is *precisely* what will be allowed—attorney-driven actions will once again be filed on behalf of named plaintiffs who have no personal stake in the litigation, and settlements will be driven by the coercive effect of costly and disruptive discovery conducted by attorneys having no client who has suffered any actual loss of money or property, contrary to the clearly expressed intent of Proposition 64.

The public interest, including the need to implement the voters' will and to protect California's troubled economy from the specter of attorney-driven UCL class actions filed on behalf of plaintiffs with no standing to initiate such actions, strongly favors granting the relief sought in the petition.

LEGAL DISCUSSION

PLAINTIFFS WHO LACK STANDING SHOULD NOT BE ALLOWED TO TAKE ADVANTAGE OF THE DISCOVERY PROCEDURES ORDINARILY AVAILABLE ONLY TO THOSE WHO ARE LEGITIMATE LITIGANTS.

A. A plaintiff without UCL standing should not be allowed to initiate a UCL action to obtain discovery and locate a new UCL class representative; to do so would result in an end-run around Proposition 64.

In November 2004, California voters adopted Proposition 64 to eliminate abusive UCL lawsuits, particularly those by plaintiffs not personally harmed by the challenged business practice. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228 (*Mervyn's*) ["'[T]he intent of California voters in enacting' Proposition 64 was to limit such abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact'"].) After Proposition 64, a UCL action cannot be initiated or maintained by anyone who has not lost money or property as a result of the challenged business practice. (*Ibid.*) In addition, Proposition 64 entirely abolished representative non-class actions, in which anyone could bring a UCL action on behalf of the general public. (*Ibid.* ["The measure amends section 17204, which prescribes who may

sue to enforce the UCL, by deleting the language that had formerly authorized suits by any person 'acting for the interests of itself, its members or the general public'"].)

In keeping with the voters' intent, this court held in *First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564 (*First American*) that a purported class representative who lacks standing under the UCL cannot obtain discovery for the purpose of locating someone with standing who might be willing to act as class representative. (*Id.* at pp. 1576-1578.) To allow such discovery, the court explained, would be an "end-run" around Proposition 64. (*Id.* at p. 1577 ["We cannot permit attorneys to make an 'end-run' around Proposition 64 by filing class actions in the name of private individuals who are not members of the classes they seek to represent and then using precertification discovery to obtain more appropriate plaintiffs"].)

The Fourth District, Division Three, followed *First American* in *Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627 (*Cryoport*). There, the trial court sustained the defendant's demurrer without leave to amend because, despite being afforded an opportunity to allege UCL standing, the plaintiff failed to do so. (*Id.* at pp. 631-632.) On appeal, the plaintiff argued it should be given an opportunity to substitute a new plaintiff with UCL standing and suggested "precertification discovery" would be appropriate "to locate a substitute plaintiff." (*Id.* at p. 633.) The Court of Appeal found the request for discovery had been waived (*ibid.*), but rejected it in any case, citing *First American*: "As in *First American*, the potential for abuse of such discovery in a case

like this is great. *Cryoport clearly has no interest of its own in this litigation, having been unable to amend its complaint to allege its own standing*" (*id.* at p. 634, emphasis added).

Thus, like *First American*, *Cryoport* stands for the proposition that a titular UCL plaintiff without standing—like real party in interest Lisa Karnan here—has no legitimate interest in initiating or pursuing a UCL action and should not be permitted to take discovery for the purpose of finding a replacement class representative. This holding is consistent with the rule that a lack of standing is equated with a lack of subject matter jurisdiction. (See *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd.* (1999) 75 Cal.App.4th 327, 331 [if a party lacks standing to bring the claims it asserts, the court has no jurisdiction over the matter].)

To allow discovery initiated by a party without standing would encourage attorneys to file UCL class actions in the name of individuals who are not class members, and then to use coercive discovery procedures to locate class representatives who might have standing. On its face, the maneuver would violate the voters' intent to prohibit "'private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact.'" (*Mervyn's*, *supra*, 39 Cal.4th at p. 228.)

Below, Karnan denigrated *Cryoport*'s holding regarding the unavailability of discovery to locate a new class representative by trying to characterize that holding as dicta. But Karnan misread the opinion. *Cryoport*'s discussion of the unavailability of discovery to find a possible new plaintiff was one of *two alternative holdings*,

the other being that the plaintiff had waived its right to seek discovery by not raising the issue below. (*Cryoport, supra*, 149 Cal.App.4th at p. 633.) Such alternative holdings are not dicta. (*Bank of Italy etc. Assn. v. Bentley* (1933) 217 Cal. 644, 650 ["It is well settled that where two independent reasons are given for a decision, neither one is to be considered mere *dictum*, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and each is of equal validity"].) This court therefore should follow *First American* and *Cryoport* and reverse the trial court's order permitting discovery to locate a new UCL plaintiff.

B. Allowing plaintiffs without standing to file and pursue discovery in UCL actions is contrary to attorneys' ethical obligations not to file meritless actions.

The trial court's order allowing discovery also should be reversed because to allow such discovery would create a perverse incentive for attorneys to sign and file UCL class action complaints necessarily averring (implicitly or explicitly) that the class representative has standing when, in fact, the attorney knows or should know that no such standing exists. (Code Civ. Proc., § 128.7, subd. (b)(3) [by presenting a pleading to the court, an attorney certifies that, to the best of his or her knowledge, the allegations and factual contentions have evidentiary support or are likely to have evidentiary support].)

While amici do not speculate about whether any particular attorney would succumb to this temptation, this court should not craft rules that might encourage such conduct. Instead, it should affirm the rule articulated in *First American* and *Cryoport*: a class representative without UCL standing has no interest in pursuing its action and, given the potential for abuse, cannot obtain discovery for the purpose of locating a replacement class representative.

C. The fact that this action predates Proposition 64 does not justify the trial court's order.

Karnan attempts to distinguish *First American*, in part, by arguing that the discovery she seeks is appropriate because this action was initiated as a representative non-class UCL action before the adoption of Proposition 64. (Opp. PWM 13, 29-30.) But that fact avails Karnan nothing. As discussed above, the abuses engendered by such attorney-driven actions led the voters to adopt Proposition 64 in the first place. (*Mervyn's*, *supra*, 39 Cal.4th at p. 228.) Moreover, the Supreme Court has determined that Proposition 64 applies to actions, like this one, pending on the date of its adoption, and deprives plaintiffs of standing where they fail to meet the new UCL standing requirements. (*Id.* at p. 232 ["In effect, section 17203, as amended, withdraws the standing of persons who have not been harmed to represent those who have"].)

Therefore, the fact that the instant action began as a representative, non-class proceeding does not support the trial court's order allowing discovery to locate a new UCL plaintiff. (See

Reply PWM 19.) In fact, that was precisely the same procedural situation that the court addressed in *Cryoport*. (*Cryoport*, *supra*, 149 Cal.App.4th at pp. 631, 634 [rejecting request for discovery to locate a new class representative in action first filed before adoption of Proposition 64].)

D. The authority on which Karnan relies does not arise in the UCL context and does not implicate the public policies underlying Proposition 64.

Karnan further seeks to distinguish *First American* by citing *CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273 (*CashCall*), a non-UCL class action alleging violations of class members' privacy as a result of secret monitoring of collection calls. There, the Fourth District, Division One, applied the balancing test for determining whether to allow discovery to locate a new class representative that was first articulated in *Parris v. Superior Court* (2003) 109 Cal.App.4th 285. The *CashCall* court held that class representatives who were found to have no standing because their calls had not been monitored could nonetheless obtain discovery to locate replacement class representatives. (*CashCall*, at pp. 292-293.) For several reasons, *CashCall* does not support the trial court's order granting discovery here.

First, *CashCall* was not even a UCL class action. By adopting Proposition 64, the voters intended to bar attorneys from initiating or maintaining UCL actions when they have no client who has lost money or property as a result of the business practice alleged to

constitute a UCL violation. (*Mervyn's*, *supra*, 39 Cal.4th at p. 228 [the voters' intent in enacting Proposition 64 was to limit abuses by "'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact'"].) *First American* and *Cryoport* confirm that, *in the context of a UCL action*, the potential for abuse and the lack of any legitimate interest on the part of a titular plaintiff in prosecuting the action dictate that such discovery must be denied.[1] (*Cryoport*, *supra*, 149 Cal.App.4th at p. 634 [holding the great potential for abuse outweighed any interest potential class members might have in pursuing UCL claims when represented by a class representative without UCL standing]; *First American*, *supra*, 146 Cal.App.4th at p. 1577 ["the potential for abuse of the class action procedure is overwhelming, while the interests of the real parties in interest [i.e., plaintiffs without standing] are minimal"].) Indeed, the *CashCall* court agreed with *First American*'s essential holding in this regard. (*CashCall*, *supra*, 159 Cal.App.4th at p. 298 ["we do not disagree with *First American*'s conclusion that precertification discovery in the circumstances of that case would have been an abuse of discretion"].)

Second, *CashCall* presented an unusual situation in which the secret facts supporting the class members' claims were known only to the defendant. In other words, when the action was filed, it

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[1] *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, cited by Karnan, is not to the contrary. There, discovery was allowed to a UCL plaintiff *who had standing* but who was barred by attorney conflict of interest rules from continuing as class representative. (*Id.* at pp. 774, 779; Reply PWM 18, fn. 3.)

was both unknown and unknowable whether the named plaintiff had standing, but at least a *potential* for standing existed until discovery proved otherwise. By contrast here, as explained in the petition, potential class members would have knowledge of any claims merely by reviewing their insurance documents and/or speaking with their insurance agents. (PWM 27-28.) No discovery procedures were required to determine that fact; unlike the situation in *CashCall*, there was never any chance that the named plaintiff would later be found to have standing. Accordingly, this case is factually distinguishable from *CashCall* and that decision does not support allowing Karnan to obtain discovery.

Karnan nonetheless argues that the defendant's conduct here was so "secret" that no affected members of the public could reasonably be expected to find out about it, as in *CashCall*. That is inherently illogical. The *un*affected named plaintiff—Karnan—*did* find out about the alleged unfair practice in time to file suit, and therefore her attorneys had a reasonable opportunity to contact an *affected* individual to bring the action rather than her. More to the point, if Karnan could detect the alleged problem within the relevant statute of limitations, then presumably one of the many alleged affected consumers had that same opportunity, and there is no need for Karnan to act as a private attorney general for those consumers, contrary to the express dictates of Proposition 64. The scenario presented in *CashCall*—where the secret facts were known only to the defendant—is simply not present here, contrary to the assumption that underlies Karnan's argument in relying on *CashCall*.

Finally, in *CashCall*, the court was concerned that class members with no notice of their claims would lose their right to assert those claims due to a looming one-year statute of limitations. (See *CashCall*, *supra*, 159 Cal.App.4th at p. 293 ["there is, as the trial court noted, a potential time bar (whether under Code Civ. Proc., § 340 or otherwise)"].) Here, any concern that class members' unasserted claims will be cut off by operation of the UCL's much longer *four-year* statute of limitations is misplaced and cannot justify the filing of an action by a plaintiff without standing in order to allow discovery to locate a new class representative. (See Bus. & Prof. Code, § 17208.)

For all of these reasons, *CashCall* is an unusual decision with no application to the UCL and Proposition 64. This court should not follow it in determining the right of plaintiffs without UCL standing to obtain discovery to locate possible replacement class representatives. That would throw open the door for future generations of attorneys like the Trevor Law Group to initiate abusive lawsuits on behalf of plaintiffs who have never been personally affected by an alleged unfair business practice, in violation of the voters' intent in enacting Proposition 64.

CONCLUSION

For the foregoing reasons, and those set forth in petitioners' briefs, the requested writ relief should issue.

March 19, 2009

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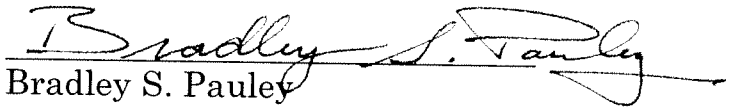
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 2,838 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: March 19, 2009



Bradley S. Pauley

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On March 19, 2009, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS SAFECO INSURANCE COMPANY OF AMERICA, ET AL.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 19, 2009, at Encino, California.

Theresa Naumann

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Safeco v. Superior Court
California Court of Appeal case no. B213044

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