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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LINDA M. HARRIS et al., Plaintiffs and Appellants, v. AMERICAN INTERNATIONAL GROUP, INC., et al., Defendants and Respondents.	B224025 (Los Angeles County Super. Ct. No. BC414205)
MARIE HAYES et al., Plaintiffs and Appellants, v. AMERICAN INTERNATIONAL GROUP, INC., et al., Defendants and Respondents.	(Los Angeles County Super. Ct. No. BC424945)

APPEAL from a judgment of the Superior Court of Los Angeles County. Yvette M. Palazuelos, Judge. Affirmed.

Aguirre, Morris & Severson, Michael J. Aguirre, Christopher S. Morris, Maria C. Severson; DeBlase Brown Eyerly, Patrick DeBlase, Michael C. Eyerly and Stephen T. Blackburn, for Plaintiffs and Appellants.

Quinn Emanuel Urquhart & Sullivan, John B. Quinn, Dominic Surprenant, Shon Morgan, Matthew S. Warren, and Daniel H. Bromberg, for Defendants and Respondents American International Group, Inc., AIG Retirement Services, Inc., AIG Financial Products, AIG Matched Funding Corporation, American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, United Guaranty Residential Insurance Company, MG Reinsurance Company, AIG Securities Lending Corporation, SunAmerica Life Insurance Company, and SunAmerica Annuity and Life Assurance Company.

Cravath, Swaine & Moore, Rowan D. Wilson, Thomas G. Rafferty, Antony L. Ryan, and Samira Shah, for Defendant and Respondent PricewaterhouseCoopers.

We are asked to decide whether Linda M. Harris (Harris), Marie Hayes (Hayes), Ron Cary (Cary), Janet Frumhoff (Frumhoff) and Danielle Hydar (Hydar) (collectively the annuitants), and also Independent Financial Planning Group, Inc. (Independent), have standing to assert unfair competition claims against American International Group, Inc. (AIG), its affiliates[1] and PricewaterhouseCoopers (Price) pursuant to California's

[1] The annuitants and Independent also sued entities with an affiliation to AIG. Those respondents are: AIG Retirement Services, Inc., AIG Financial Products, AIG Matched Funding Corporation, American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, United Guaranty Residential Insurance Company, MG Reinsurance Company, AIG Securities Lending Corporation, SunAmerica Life

statutory unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.).[2] The trial court sustained the demurrers filed by AIG, the affiliates and Price to the operative pleadings and denied leave to amend. The annuitants and Independent filed the instant appeal and contend either that their pleadings were sufficient or they should have been granted leave to amend. We find no error and affirm.

FACTS

The pleadings[3]

As alleged, Harris is the president of Independent, a corporation engaged in the financial planning business, and was a sales agent authorized to sell SALAC products such as annuities to her clients. On August 29, 1997, and February 18, 2000, she rolled her existing annuities into SALAC accounts.[4] On behalf of the annuitants, Harris purchased SALAC annuities with death benefits. All of these accounts were tax deferred.

AIG suffered a financial collapse in September 2008 due to the following business practices: (1) pooling funds from AIG annuity and insurance companies with the intent to speculate in violation of investment prudency rules; (2) selling $537 billion of sham credit default swap financial products in part to help banks circumvent regulatory capital requirements; (3) using sham and fraudulent reinsurance, guarantees, and support agreements; (4) rigging auction markets for insurance and financial products; and (5) misrepresenting AIG's financial condition. As a result of these practices, AIG's net

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Insurance Company (SALIC), and SunAmerica Annuity and Life Assurance Company (SALAC) (collectively affiliates).

[2] All further statutory references are to the Business and Professions Code unless otherwise indicated.

[3] Harris and Independent filed case No. BC414205 and the operative pleading is their second amended complaint. Cary, Frumhoff, Hayes and Hydar filed case No. BC424945 and the operative pleading is their first amended complaint. The two cases were deemed related. Because the two pleadings are substantially similar, our opinion does not distinguish them.

[4] Harris alleged that at the time of the rollovers, SALAC was known as Anchor National Life Insurance Advisor.

income losses in 2008 exceeded $99 million, which drained funds from AIG's annuity and insurance companies. Price aided AIG's unfair business practices by certifying false financial statements issued by AIG and the affiliates, and by providing consulting, advisory services and creative accounting advice that helped to structure AIG's financial transactions.

To prevent AIG from failing, the Federal Reserve Bank immediately provided AIG with an $85 billion credit facility.

Due to AIG's bleak financial outlook, SALAC annuities became less valuable and substantially more risky. As a consequence, the annuitants did not receive their annuity and death benefit insurance at the bargained for price. Hydar and Frumhoff surrendered their annuities to avoid depletion of their funds. In order to maintain death benefits, Cary, Harris and Hayes left a portion of their funds with SALAC and withdrew the rest. Harris and Hayes suffered tax penalties. The funds Cary, Harris and Hayes left in SALAC are at risk due to AIG's continuing misconduct. Each of the annuitants lost the ability to accumulate earnings on the withdrawn or surrendered funds without having to pay taxes. Independent lost time and money helping its clients transfer funds out of their SALAC accounts.

The demurrers

AIG, the affiliates and Price demurred to the pleadings. The trial court sustained the demurrers without leave to amend on the grounds that the annuitants and Independent lacked standing to sue under the UCL, and that the trial court should apply the judicial abstention doctrine because the case implicated complex economic policies that should be resolved by other entities.

This appeal followed.

DISCUSSION

I. Standard of review.

An order sustaining a demurrer is reviewed de novo. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We ask whether the operative pleading adequately states a claim. All properly pleaded facts are accepted as true, and we give the allegations a reasonable interpretation. (*Ibid.*; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) If the trial court denied leave to amend, "'". . . we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. . . . The burden of proving such reasonable possibility is squarely on the plaintiff."' [Citation.]" (*Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 775.)

II. Standing under the UCL.

An action cannot be prosecuted under the UCL by a plaintiff in his or her individual capacity unless he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." (§ 17204.) To establish standing, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 (*Kwikset*).) Injury in fact is a distinct and palpable injury suffered as a result of a defendant's actions. Stated differently, it is an invasion of a legally protected interest which is "'"(a) concrete and particularized . . . ; and (b) 'actual or imminent, not 'conjectural' or 'hypothetical."' [Citation.]" (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1590 (*Peterson*).)

"There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. [Citation.]" (*Kwikset, supra*, 51 Cal.4th at p. 323.)

III. The annuitants lack standing.

The annuitants contend that they have standing to sue under the UCL because they alleged that the business practices of AIG, the affiliates and Price caused AIG to collapse, which then caused the following injuries: (1) SALAC annuities were "rendered 'less valuable and substantially and materially more risky'"; (2) the annuitants "did not receive the annuity and death benefit insurance at the bargained-for-price"; (3) Harris and Hayes "had to pay taxes prematurely and lost the 'earnings accumulation without taxes' feature of [their] annuities"; (4) Hydar and Frumhoff lost their death benefits when they surrendered their annuities; and (5) Cary and Hayes were "injured in fact and lost money or property because they were required to keep funds in their annuity accounts or lose their death benefits." We disagree.

A. The value/risk theory.

To defend the allegation that AIG, the affiliates and Price caused their annuities to be less valuable and substantially more risky, the annuitants must point us to where they alleged the terms of their annuity contracts, what benefits they are supposed to provide, and what their value is supposed to be. Then they must advert to allegations that reveal which benefits have specifically decreased, what specific value has been lost and how AIG is responsible. In the alternative, they must advert to allegations which show that concrete losses are imminent.

The annuitants refer us to two allegations: "AIG-issued support agreements to SALIC and SALAC supposedly enhanced SALIC and SALAC's financial strength credit rating." As a direct "result of AIG's UCL [v]iolations and [ensuing] financial collapse, [the annuitants] suffered injury in fact and lost money or property because [the financial collapse] resulted in SALAC losing the support of a financially well-endowed annuity company with a high credit rating. [The SALAC] annuities were rendered less valuable and substantially and materially more risky. The annuities and related death benefits that remain are inferior quality than [the annuitants] bargained. [They] suffered actual economic injury."

Questions are immediately born. In light of the $85 billion credit facility, how were the annuitants injured? In what way did SALAC lose AIG's financial support? Did SALAC need AIG's support in order to meet contractual obligations? Did SALAC's credit rating drop? If its credit rating dropped, in what way did that adversely affect the annuitants? Was SALAC rendered insolvent or otherwise unable to pay creditors? Did it lose annuity deposits? How did the annuitants lose money or property because SALAC lost support agreements? In what way were any annuity deposits in imminent danger of being diminished? Were the benefits contractually fixed, or were they variable and dependent upon portfolio performance? If they were dependent upon portfolio performance, how was any decrease the fault of AIG rather than the fault of the general decline of the markets? The annuitants answered none of these questions. We reviewed their pleadings and did not find any answers. This legal gap between allegation and theory renders any further inquiry moot.

To be complete, we have assessed the merits of the annuitants' theory and find it lacking. In essence, they suggest that AIG's conduct was so outrageous and terrible that their losses are obvious. But, inescapably, their allegation of loss is framed as a legal conclusion, meaning it is hypothetical rather than concrete. This is not the type of pleading that triggers the UCL. Rather, the annuitants were required to allege specific, identifiable injury. (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788 (*Clayworth*) [pharmacies suffered injury in fact when they were overcharged for drugs due to a price-fixing conspiracy]; *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 803 [a truck rental company's imprecise measuring system caused a renter to pay more to refuel a truck than that required by contract].)

The annuitants claim that their attempt to assert claims under the UCL is consistent with other UCL cases. They cite *Midpeninsual Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377 [a nonprofit entity that opposed discriminatory housing practices could sue under the UCL to enjoin Unruh Act violations]; Q*uelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26 [lenders could sue under the UCL to redress a Cartwright Act violation in which insurers conspired to refuse to sell title insurance], *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 509 [a corporation could sued under the UCL for violations of the Forest Practices Act], and *Podolsky v. First Heathcare Corp.* (1996) 50 Cal.App.4th 632, 649 [deceptive nursing home practices could be enjoined under the UCL]. None of these cases aid the annuitants' cause because each of them was decided before the UCL standing requirement was amended by Proposition 64. (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1097.)

B. The bargained-for-price theory.

Though the annuitants alleged that they did not receive annuity and death benefit insurance at the bargained-for-price, they do not explain what this means. Are they suggesting that SALAC entered into annuity contracts for a particular price and were charged more than agreed upon? What were the prices? What was the dollar amount of insurance they were promised?

If they are suggesting that they did not receive the value they bargained for, that is simply a diminution theory. As we already explained, the allegations are insufficient to show concrete loss of value. And, supposing that there was a concrete loss of value, the following question arises: If they had obtained annuities from a different company, would they have been spared any loss? The annuitants never say, and it "is not our responsibility to develop [their] argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

The flaw in the annuitants' theory is highlighted by *Peterson, supra*, 164 Cal.App.4th 1583. In *Peterson*, the plaintiffs purchased cell phones and insurance from a communication equipment vendor that was not licensed to sell insurance. A percentage of each insurance premium was retained by the communication equipment vendor as a fee. In a UCL action, the plaintiffs argued that the fee was unlawful and they were injured by paying it. The court disagreed, stating that the plaintiffs "do not allege they paid more for the insurance due to [the vendor's] collecting a commission. They do not allege they could have bought the same insurance for a lower price either directly from the insurer or from a licensed agent. Absent such an allegation, plaintiffs have not shown they suffered actual economic injury. Rather, they received the benefit of their bargain, having obtained the bargained for insurance at the bargained for price." (*Id*. at p. 1591.) Like in *Peterson*, the annuitants have complained about misconduct but have not connected the dots between that alleged misconduct and their purported damage. It bears particular note that they do not allege that they could have avoided the market down swing at the end of 2008 by purchasing annuities from a company other than SALAC.

C. The early surrender theory.

The annuitants surrendered all or part of their funds in SALAC accounts at the same time or after the Federal Reserve Bank provided AIG with an $85 billion credit facility. They allegedly suffered a variety of losses, from tax penalties to the forfeiture of death benefits and future earnings. But did AIG cause those losses? The lynchpin, in our view, is whether AIG caused SALAC annuities to lose value in a concrete and particularized way. If AIG did not cause a demonstrable diminution in value, then the annuitants cannot claim that they were injured by AIG when they withdrew their funds. Absent such a specific prewithdrawal loss, they were not compelled by AIG to take protective action. As previously discussed, the annuitants failed to adequately plead that their annuities lost value.

D. The remaining funds theory.

Some of the annuitants left funds in their SALAC accounts and alleged that they lost money or property as a result. This allegation is merely an echo of the value/risk theory of loss and similarly fails.

IV. Independent lacks advisor standing.

Independent contends that it properly alleged that it incurred extra expense to help its clients surrender their SALAC annuities due to the UCL violations of AIG, the affiliates and Price. We disagree.

The trial court concluded: "[N]either Harris nor her company can claim an injury in fact based on their dedication of time and resources to advise their clients about what to do with their [SALAC] annuities. To permit [Harris and Independent] to characterize this conduct as an 'injury,' when the underlying factual predicates of this claim have been undermined—e.g., that there is no actionable 'increased future risk' associated with the annuities, and that any self-inflicted injury resulting from a surrender of the annuities is not an actionable harm—would be contrary to the spirit of the law." The trial court essentially interpreted section 17204 to preclude standing based on secondary injury in fact in the absence of an underlying direct injury caused by a defendant's statutory unfair competition.

To demonstrate error, Independent cites *Buckland v. Threshold Enterprises, Inc.* (2007) 155 Cal.App.4th 798 (*Buckland*) for the proposition that funds expended independently of litigation to investigate or combat a defendant's misconduct may establish injury in fact. (*Id*. at pp. 815–816.) According to Independent, its allegations fall within the *Buckland* rule, presumably on the theory that it incurred expenses to combat UCL violations. But *Buckland* sheds no light. It did not decide whether an entity could incur expenses to combat UCL violations on behalf of third parties if the third parties did not suffer injury in fact. Moreover, Independent simply advised and assisted its clients; it did not investigate or combat the alleged UCL violations. We easily conclude that *Buckland* does not establish standing.

In the absence of authority speaking on the topic, we are called upon to interpret section 17204, which was amended in 2004 by Proposition 64, a ballot initiative. "When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. [Citation.]" (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) Statutes must be given a reasonable and common sense construction "'that will lead to a wise policy rather than to mischief or absurdity. Thus, where a statute is susceptible of two constructions, the one that leads to the more reasonable result will be followed. A literal construction that will lead to absurd results should not be given if it can be avoided.' [Citations.]" (*Samarkand of Santa Barbara, Inc. v. County of Santa Barbara* (1963) 216 Cal.App.2d 341, 362.)

Section 17204 permits UCL actions to be filed "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." The language is ambiguous because it is too scant to provide guidance as to the breadth of the causation net. Our best source for understanding what the voters intended is part 1 of Proposition 64. It states in relevant part: "'The people of the State of California find and declare that: [¶] (a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices. [¶] (b) These unfair competition laws are being misused by some private attorneys who: [¶] . . . [¶] (2) File lawsuits where no client has been injured in fact. [¶] (3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." (*Buckland*, *supra*, 155 Cal.App.4th at p. 813, fn. 6.)

The focus on injury in fact *and* clients who have used the defendant's product or service or have had business dealings with the defendant signals the voters' intent that only those who have suffered direct injury at the hands of the defendant can sue under the UCL. Though the causation language in section 17204 is broad enough to encompass indirect injury, a construction that would allow indirectly injured people to sue would swallow the standing rule. Under a broad construction, a financial planner with clients who never used a product or service of a particular company could nonetheless sue on the theory that the company caused the market to crash and therefore caused the financial planner to incur expenses. A law firm could claim that it suffered injury in fact when it incurred expenses to help a client combat a company's UCL violations. In general, enterprising lawyers could find many creative ways to make a case for indirect injury. The result of such an interpretation would be absurd in light of the language used by the voters in Proposition 64. It would resurrect the very evils and abuses that Proposition 64 was designed to stamp out.

It is true that Independent sold SALAC's products and therefore had business dealings with SALAC. But Independent's alleged injuries did not arise from those sales.

Rather, they arose from Independent's voluntary decision to later assist its clients in surrendering their annuities. Independent might argue that it should nonetheless have standing because it had a professional obligation to assist clients who suffered direct injury. In other words, Independent might claim some sort of derivative basis for standing. The flaw in this theory is that, as we have previously explained, the annuitants themselves lack standing.

V. The trial court did not abuse its discretion in denying leave to amend.

Harris contends that the trial court erred in denying her leave to amend because it mistakenly found that she surrendered her funds a day after she filed her complaint and therefore could not sue. Presumably, Harris wishes to clarify the date she surrendered her funds. Next, the annuitants and Independent point out that the trial court decided to abstain, in part, on the theory that other agencies may be investigating AIG. The annuitants and Independent claim they can allege that any such investigations are over. These arguments are unavailing because they fail to establish that the annuitants and Independent can allege causation.

All other issues raised by the parties are moot.

DISPOSITION

The judgment is affirmed.

AIG, the affiliates and Price are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

____________________________, J.
ASHMANN-GERST

We concur:

____________________________, P. J.
BOREN

____________________________, J.
DOI TODD