G 029811

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

CONSUMER ADVOCATES, et al. Plaintiffs and Appellants, v. DAIMLERCHRYSLER CORPORATION, Defendants and Appellants,	Court of Appeal No. G 029811 (Super. Court No.785866)

On Appeal from a Judgment of the
Superior Court of California, County of Orange
The Honorable David C. Velasquez, Presiding

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CONSUMER ADVOCATES, ET AL.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS CONSUMER ADVOCATES, ET AL.

To the Honorable David G. Sills, Presiding Justice of this Court:

AARP requests leave to file an *amicus curiae* brief in this case in support of Consumer Advocates et al., plaintiffs and appellants in this action, on the limited issue regarding whether or not Proposition 64 applies retroactively.

This Court's decision on the retroactive effect of Proposition 64 will impact the rights of AARP's members and many pending cases in California.

STATEMENT OF INTEREST OF AMICUS CURIAE

AARP is a non-partisan, non-profit organization with 35 million members nationwide, including more than 3 million members in California, age 50 and older. As the largest membership organization in the United States dedicated to addressing the needs and interest of people age 50 and older, AARP is greatly concerned about ensuring strong consumer protections against unfair and deceptive practices in the marketplace that target vulnerable consumers. Because older Americans are disproportionately victimized by many of these practices, AARP supports laws and public policies to protect their rights, including access to courts.

ISSUES PRESENTED

On November 8, 2004, this Court on its own motion vacated its previous order submitting this case and requested additional "informal" briefing on the issue of whether

Proposition 64 should be applied to pending cases. AARP's brief addresses the limited issue regarding whether Proposition 64 should be applied to pending cases.

SUMMARY OF ARGUMENT

Proposition 64 does not apply to cases pending in California courts. The absence of any express provision in the initiative directing retroactive application strongly supports the conclusion that the electorate intended that this measure operate only prospectively. Additionally, it would be unjust and impractical to apply Proposition 64 to pending cases, since those litigants justifiably have relied on rules in effect at the time they filed their cases. It would be particularly unjust to apply Proposition 64 to pending cases because many individuals, having relied on representative litigation pursuant to laws in effect prior to November 2, 2004, to vindicate their rights may now be time barred by the Statute of Limitations from filing their own individual claims.

ARGUMENT

I. THE PRESUMPTION AGAINST RETROACTIVE OPERATION OF A STATUTE APPLIES EQUALLY TO VOTER-PASSED INITIATIVES.

As a general rule, statutes operate only prospectively, not retroactively, unless the language of the measure plainly indicates a contrary intent. *Evangelatos* v. *Superior Court* (1988) 44 Cal.3d 1188, 1207-1208; *Aetna Cas. & Surety Co.* v. *Ind. Acc. Com.* (1947) 30 Cal.2d 388. No such intent appears in the text of Proposition 64. The presumption against retroactive operation of a statute applies equally to voter-passed initiatives. *Evangelatos* v. *Superior Court* (1988) 44 Cal.3d 1188. In *Evangelatos*, the

Supreme Court held that Proposition 51 could not be applied retroactively after noting that nothing in the language of Proposition 51 indicated that the statute was to have retroactive effect. *Id.* at p. 1209 ("...the absence of any express provision directing retroactive application strongly supports the prospective operation of the measure.")

Although the drafters of Proposition 64 presumably were aware of this familiar legal rule, they did not include any language in the initiative indicating that the measure was to apply retroactively to pending cases. Further, there is nothing to suggest that the electorate who voted on the measure even considered the issue. Therefore, in accordance with California authorities, the initiative should not be construed to be retroactive. The presumption against retroactivity of voter-passed initiatives is especially important in cases such as this one where long-standing substantive rights of consumers are at stake.

II. THE PRESUMPTION AGAINST RETROACTIVITY PROTECTS SUBSTANTIVE RIGHTS.

In *Hughes Aircraft Co.* v. *United States ex rel. Schumer* (1997) 520 U.S. 939, the Supreme Court defined the limited circumstances under which a jurisdictional statute will be deemed to have retroactive effect. *Hughes Aircraft* is particularly relevant to the issue of the retroactivity of Proposition 64 because *Hughes* concerned a *qui tam* suit, which like California's Business and Professions Code section 17200, prior to November 2, 2004, established a right of action for a party that had suffered no actual injury. Specifically, *Hughes* concerned the interpretation of the *qui tam* provision of the False Claims Act (31 U.S.C. § 3730(b)) which authorized private individuals to bring claims on behalf of the

government against any person who knowingly presented false or fraudulent claims to the government in violation of 31 U.S.C. § 3729. In *Hughes*, the U.S. Supreme Court explained that when a statute affects "*whether* [a suit] may be brought at all," it "speaks not just to the power of a particular court but to the substantive rights of the parties" and hence, "is as much subject to [the] presumption against retroactivity as any other." (Original emphasis.) *Id.* at p. 951. *Hughes Aircraft* applied the presumption against retroactivity to a statute that "*create[d]* jurisdiction where none previously existed" (Original emphasis.) *Ibid.* Nevertheless, the principle is equally applicable to an amendment of a statute, such as Proposition 64, that bars a litigant from pursuing a claim under the statute and deprives a court of jurisdiction so that a claimant is left with no forum at all in which to bring his suit.

In *Scott* v. *Boos* (9th Cir. 2000) 215 F.3d 940, 945 the Ninth Circuit addressed a similar issue in interpreting an amendment of the Private Securities Litigation Reform Act (PSLRA) designed "to address a significant number of frivolous actions based on alleged securities law violations." The Court held that since "the intent [of the PSLRA amendment] was substantive - to deprive the plaintiffs of the right to bring securities fraud RICO claims," it could not be applied retroactively to preclude plaintiffs claims. *Ibid.* *See also, Mathews* v. *Kidder* (W.D. Pa. 1998) 161 F.3d 156, 166 (holding that an amendment to the RICO statute could not retroactively deprive plaintiffs of a right to make a claim); *Harod v. Glickman* (8th Cir. 2000) 206 F.3d 783, 792 ("When application

of a new limitation period would *wholly eliminate* claims for substantive rights or remedial actions considered timely under the old law, the application is impermissibly retroactive.") (Original emphasis.)

Article 1, section 7 of the California Constitution and the 14th Amendment of the United States Constitution guarantee the right of due process. Retrospective application of a statute is unconstitutional when it deprives a person of a substantive right without due process of law. The following factors have been considered by California courts in determining whether or not a retroactive initiative violates due process: "[1] the significance of the state interest served by the law, [2] the importance of the retroactive application of the law to the effectuation of that interest, [3] the extent of reliance upon the former law, [4] the legitimacy of that reliance, [5]the extent of actions taken on the basis of that reliance, and [6] the extent to which the retroactive application of the new law should disrupt those actions." *Yoshioka* v. *Superior Court* (1997) 58 Cal.App.4th 972, 981. All of these factors would weigh against retroactive application of Proposition 64 Many people in California relied on representative actions, the representatives themselves relied on the litigation and have expended time and costs in pursing litigation. Many individuals individual actions would now be time-barred if the initiative is applied retroactively which is an unjust result considering that the purpose of Business and Professions Code section 17200 is stop unlawful business practices.

The California Supreme Court has held that it is unlawful to subject companies to

liability for past conduct that was lawful when it occurred unless there is an express intent of the Legislature. *See*, *Myers* v. *Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840. It is likewise unlawful to wholly eliminate a litigant's claim retroactively. Statutes do not operate retroactively – that is to change the legal consequences of past events – unless the Legislature plainly intended them to do so. *Western Security Bank* v. *Superior Court* (1997) 15 Cal.4th 232, 243.

III. EVEN PROCEDURAL CHANGES SHOULD NOT BE GIVEN RETROACTIVE EFFECT IF THE RESULT WOULD BE UNJUST OR IMPRACTICAL.

Although some courts have held that in certain circumstances procedural changes can be applied to pending cases. *See e.g., Tapia* v. *Superior Court* (1991) 53 Cal.3d 282 (holding that a law relating to the procedural conduct of trials could apply to pending cases where the trial was conducted after enactment of the statute). The U.S. Supreme Court in *Landgraf* v. *USI Film Products* (1993) 511 U.S. 244 concluded that even procedural rules should not be applied retroactively to the extent that a retroactive application would be unjust and impractical. "A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . ." *Id.* at p. 275, fn 29. Therefore, even if this Court determines that Proposition 64 is a procedural change affecting the manner in which complaints should be drafted, i.e., complaints now must conform with the class action rules, it would be unjust and impractical to apply that rule retroactively. It is likely that

many of the representative actions alleging violations of Business and Professions Code section 17200, now pending in the state courts, could have been filed as class actions as is now required under Proposition 64. The fact that they were filed as representative actions may simply reflect that at the time they were filed, Business and Professions Code section 17200 did not require class allegations. To remand those cases now to be re-pleaded and possibly re-tried under newly imposed class action rules does not make sense. It would also be unfair to the general public who relied on representative actions to stop unlawful conduct to re-file representative cases in their own interests.

It would be particularly unfair to those Californians, including many AARP members, who are living on fixed incomes to require them essentially to re-litigate representative cases, forcing them to pay duplicate costs to have their day in court. Requiring repetitive litigation is simply not in the interests of justice.

IV. IT WOULD BE UNFAIR TO APPLY PROPOSITION 64 RETROACTIVELY.

The California Supreme Court in *Evangelatos* acknowledged the "common-sense notion that it may be unfair to change 'the rules of the game' in the middle of the contest," i.e., to apply retroactively "a measure like the initiative at issue here [Proposition 51] which substantially modifies a legal doctrine on which many persons may have reasonably relied in conducting their legal affairs prior to the new enactment." 44 Cal.3d at p. 1194. This concept, that it would be unfair to impose new restrictions on those who have instituted litigation and expended time and money in doing so based upon

the procedures they reasonably expected would apply to their claims is the primary rea:on cited by other courts in denying retroactive application of a newly enacted amendment or statute. *See e.g., Hogan* v. *Ingold* (1952) 38 Cal.2d 802, 815-816; *Hughes Aircraft Co* v. *United States ex rel. Schumer* (1997) 520 U.S. 939, 950-951; *Landgraf* v. *USI Film Products* (1994) 511 U.S. 244, 265 ("Elementary considerations of fairness dictate tha individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

Prior to voter approval of Proposition 64 on November 2, 2004, Business and Professions Code section 17200 did not require an individual to file a personal claim in support of a representative action. Retroactive application of Proposition 64 would unjustly deny any opportunity for relief to those individuals who did not file a claim in justifiable reliance on unamended Section 17200 and whose individual claims are now time-barred by the Statute of Limitations. Since the drafters of Proposition 64 did not include any language in the initiative requiring retroactive application, it is beyond dispute that they could have intended such an unjust result.

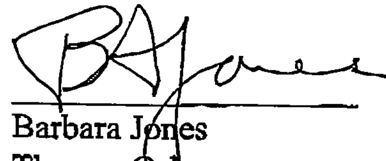
CONCLUSION

Since Proposition 64 does not include a requirement that it be given retroactive effect, it should not apply to pending cases. Both the U.S. Supreme Court and the California Supreme Court have concluded that where there is no legislative intent that a newly enacted statute or amendment apply retroactively, it would be unjust to hold tha

such a statute or amendment affects cases pending at the time of its enactment. To hold otherwise in this case would be manifestly unjust since a retroactive application would likely bar any opportunity for relief for many individuals who justifiably relied on the law as it existed at the time their representative actions were filed under Business and Professions Code section 17200.

Dated: December 2, 2004

Respectfully submitted,
AARP

By: 

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CERTIFICATE OF COUNSEL RE: WORD LENGTH

I, Barbara Jones, hereby certify as follows:

I am counsel of record for *amicus curiae*. According to the word processing program I used to prepare this brief, the brief (excluding tables and this certificate) is 1,869 words long.

Dated: December 1, 2004

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PROOF OF SERVICE BY MAIL

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COURT OF APPEALS CASE NUMBER. No. G 029811
SUPERIOR COURT CASE NUMBER: San Diego County No. 78566

I, Doris Larbi, declare as follows:

1. At the time of service, I was at least 18 years of age and not a party to this legal action. I am a resident or employed in the county where the within-mentioned service occurred.

2. My business address is: 601 E Street, NW, Washington, DC 20049

3. On December 1, 2004, I served the Application for Leave to file *Amicus Curiae* Brief; and Proposed Brief in Support of Plaintiffs and Appellants Consumer Advocates, et al. by Federal Express as follows: I enclosed a copy in separate envelopes, with postage fully prepaid, addressed to each individual addressee named below, and placed in my employer's mail room. I am readily familiar with my employer's practice of collecting and processing correspondence for priority next-day delivery by Federal Express, and know that in the ordinary course of that practice the document described above will be deposited with Federal Express in Washington, DC on the same date that it is placed in my employer's mail room fully prepaid for collection and delivery.

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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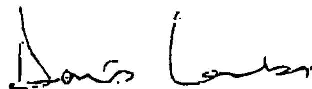

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