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VIA FEDERAL EXPRESS

Hon. David Sills, Presiding Justice
Hon. Eileen C. Moore, Associate Justice
Hon. Kathleen E. O'Leary, Associate Justice
California Court of Appeal
Fourth Appellate District, Division Three
925 N. Spurgeon Street
Santa Ana, CA 92701-3700

Re: *Consumer Advocates v. DaimlerChrysler Corporation*
No. G029811

Dear Justices Sills, Moore and O'Leary:

The Court has invited supplemental letter briefs on two issues: (1) are the causes of action asserted in the complaint, or any of them, barred by the provisions of Proposition 64; and (2) if so, should Proposition 64 be applied to pending cases? A copy of Proposition 64 and accompanying ballot materials is attached as Exhibit A.

I. SHORT ANSWERS AND INTRODUCTION

On behalf of plaintiff, respondent and cross-appellant Consumer Advocates ("Advocates") the short answers are:

(1) No, Proposition 64 does not repeal or bar unfair competition claims like Advocates' single cause of action against DaimlerChrysler Corporation ("Chrysler") alleging that Chrysler violated Business and Professions Code section 17200 et seq., the state's Unfair Competition Law ("UCL"). (AA 38-41.) To the contrary, the initiative preserves claims for "unlawful, unfair and fraudulent business practices." (Prop. 64, §1(a).) Neither did Proposition 64 repeal any remedies available for violation of §17200. (*Ibid.*) But

Proposition 64 did add two new substantive requirements: (a) a provision limiting standing to file a private suit to enforce §17200 to "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition" (Prop. 64, §3); and (b) a provision that a private suit for "representative claims or relief on behalf of others" must proceed as a class action in compliance with Code of Civil Procedure §382. (*Id.*, §2.)

(2) No, Proposition 64 does not apply retroactively to pending cases. A retroactive law ""'is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute."' [Citation.]" (*Myers v. Phillip Morris Cos.* (2002) 28 Cal.4th 828, 839.) Neither the initiative proponents nor their lawyers included an express provision in Proposition 64 alerting voters that they intended retroactive application. Without such an express provision, the initiative applies prospectively. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-94.)

On November 10, 2004, Sacramento Superior Court Judge Cecil entered a final order holding that Proposition 64 is not applicable retroactively to pending cases. A copy of that order is attached as Exhibit B. A prior amendment of §17200 in 1992 was likewise held not retroactive, in the absence of an express retroactivity provision. (*Solomon v. N. Am. Life & Cas. Ins. Co.* (9th Cir. 1998) 151 F.3d 1132, 1139, citing *Evangelatos*, 44 Cal.3d at p. 1209; *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 518-19 n.7 [court assumed that the 1992 amendment of §17200 applied prospectively].)

Chrysler may contend, however, that Proposition 64 merely created a new "procedural" rule when it added a standing requirement to "file" private suits. (Prop. 64, §§1, 3.) The label "procedural" or "substantive" does not control. It is the "law's effect, not

its form or label" that guides the analysis. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289.) California courts hold that if a statute creates a new procedure, but such a change impacts substantive rights it cannot apply retroactively absent explicit legislative intent. (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 815-17, citing *Aetna Cas. & Sur. Co. v. Indus. Accident Comm'n* (1947) 30 Cal.2d 388, 394-95.)

Moreover, as Professor Witkin explains, standing involves the right to sue and as such its effect is substantive even if procedural in form: "The person who has the right to sue under the substantive law is the real party in interest; the inquiry, therefore, while superficially concerned with procedural rules, really calls for a consideration of rights and obligations." (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §104, p. 162.) Similarly, a statute of limitations for a claim, though procedural in form, by extending (or reducing) the time period "is substantive and jurisdictional." (*Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371, 379.) The United States Supreme Court has likewise stated that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." (*Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 275 n.29.) The example given in *Landgraf* fits Proposition 64: "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 ...." (*Ibid.*)

Chrysler may also contend that Proposition 64 applies to pending cases under the Repeal Rule which states that "'a cause of action or remedy dependent on a statute falls with a repeal of the statute.' [Citation.]" (*Governing Bd. v. Mann* (1977) 18 Cal.3d 819, 829.) As noted, however, Proposition 64 does not repeal a cause of action or remedy, it adds substantive standing and class action requirements. Thus, the Repeal Rule does not apply.

Retroactive application to a case like this, which has proceeded to trial and judgment, is particularly unjustified absent explicit direction in the initiative measure. Proposition 64 is designed to prohibit the "filing" of "frivolous" suits. (Prop. 64, §1(d).) Suits that have proceeded to judgment against a defendant are hardly frivolous – even if the plaintiff is not injured. Years of costly work by the parties and the courts would be unraveled. Worse yet, where the limitations period has run, defendants like Chrysler who were found liable would gain an absolute defense despite the fact that liability had been established. The loss of a judgment of liability is a substantive consequence and anything but procedural.

II. ARGUMENT

A. Proposition 64 Does Not Repeal or Bar All Section 17200 Claims

The interpretation of legislation presents a question of law. (*Borden v. Div. of Med. Quality* (1994) 30 Cal.App.4th 874, 879.) In interpreting an initiative, courts apply the same principles that govern statutory construction. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) Those principles require resort first to the language of the statute, and second to its context, the statutory scheme and the ballot materials. (*Id.* at p. 901.) The underlying principle, however, is determining and effectuating the intent of the voters. (*Ibid.*)

The text of Proposition 64 does not "repeal" the cause of action for unfair competition provided by Business and Professions Code §17200. The content of the §17200 cause of action for "unlawful, unfair and fraudulent business practices" is unimpaired. (Prop. 64, §1(a).) By its express terms Proposition 64 "amends" the UCL, particularly §17204 of the Code, to limit standing to bring private actions to any person "who has suffered injury in fact

and has lost money or property as a result of such unfair competition." (*Id.*, §3.) It also adds a requirement that such private suits proceed as class actions. (*Id.*, §2.)

Proposition 64 further states that "It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact ...." (Prop. 64, §1(e).) Thus, Proposition 64 does not bar §17200 claims, it bars persons who did not suffer injury and damages from bringing such claims.

The question then is whether Proposition 64 applies retroactively to pending cases. There is no provision in the initiative measure calling for retroactive application to previously filed and still pending lawsuits. As discussed below, under *Evangelatos*, *supra*, 44 Cal.3d at pp. 1193-94, the absence of such express intent serves to preclude retroactive application because, as explained below, both the new standing and class action requirements add substantive consequences to §17200 actions.

B. With Clear Voter Intent Absent, a Newly Enacted Initiative Statute Like Proposition 64 Applies Prospectively, and Cannot Apply Retroactively to Pending Cases

Under well-established California law, Proposition 64 does not apply to this case. Retroactive operation of an initiative law requires clear voter intent. Such intent is entirely absent here. There is no evidence either in the plain language of the measure or in the ballot materials that voters intended Proposition 64 to apply to pending §17200 cases.

For more than 70 years, §17200 has provided for private enforcement of vital public policies by citizens who lack federal injury-in-fact standing. (*Kraus v. Trinity Mgmt. Servs.*,

Inc. (2000) 23 Cal.4th 116, 126 ["[UCL] actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.].) If the proponents wanted the voters to amend the UCL to apply retroactively to pending cases, they could easily have said so, but did not. (Compare *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979 [Proposition 213 contained an express, but limited retroactivity provision.].) That alone is a strong indication that retroactivity was not intended.

In reviewing an earlier "tort reform" initiative, the California Supreme Court in *Evangelatos* set out principles that are applicable here. Holding that Proposition 51, which eliminated joint and several liability for tort defendants, applied prospectively, the Court relied on the "widely recognized legal principle, specifically embodied in §3 of the Civil Code, that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." (*Evangelatos*, *supra*, 44 Cal.3d at pp. 1193-94; *Myers*, *supra*, 28 Cal.4th at p. 841.)

In *Evangelatos*, the Court emphasized that "[t]he drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively ...." (*Evangelatos, supra*, 44 Cal.3d at p. 1194.) The Court added that "there is nothing to suggest that the electorate considered the issue of retroactivity at all." (*Ibid.*) Accordingly, the Court refused to give the measure retroactive effect. (*Ibid.*)

Important in *Evangelatos* was the fact that all parties had acted in reliance on the existing law in making litigation choices. (*Evangelatos*, *supra*, 44 Cal.3d at pp. 1215-17.)

To the Court, it would be unfair to change "the rules of the game" in the middle of the contest by applying new law to pending cases absent explicit notice in the legislation. (*Id.* at p. 1194.) California citizens who suffered actual injury due to Chrysler's unlawful conduct, for example, may well have relied to their detriment on the representative suit filed by Consumer Advocates. Had such injured citizens known that Proposition 64 could be applied retroactively to pending cases, they might have timely intervened but may now be barred by the statute of limitations.

The fact that *Evangelatos* addressed an initiative that modified a common law rule, while Proposition 64 modified a statute, does not render *Evangelatos* any less controlling. *Evangelatos*, *supra*, 44 Cal.3d at p. 1207, relies on a United States Supreme Court case that applied the same principles to statutes, and held that amendments to the federal Bankruptcy Code could not be applied retroactively. (*United States v. Sec. Indus. Bank* (1982) 459 U.S. 70, 79-80.) Similarly, the California Supreme Court later applied *Evangelatos* to the repeal of a state immunity statute for tobacco suits. (*Myers*, *supra*, 28 Cal.4th at p. 839.)

In *Myers, supra*, 28 Cal.4th at p. 848, the Supreme Court held that repeal of a statute giving tobacco companies immunity from suit by smokers who contracted cancer could not impose liability on the companies for conduct that occurred during the 10-year period the immunity statute was in effect. A retroactive law is one which """affects rights""" that """exist prior to the adoption of the statute.""" (*Id.* at p. 839, citation omitted.) The right to sue in a representative capacity to enforce §17200 has existed for 70 years, and has been recognized as an important state interest. (*Krauss*, *supra*, 23 Cal.4th at p. 126.) In this case, the right to sue is far from inchoate. Plaintiff has filed a complaint, prosecuted it to judgment and is defending it on appeal. Prospective application is therefore presumed and

retroactive application is impermissible unless there is an express intent to do so. (*Myers*, at pp. 840-41.) The Fifth Amendment Due Process and Taking Clauses constitutionally bar retroactive application, absent unambiguous intent to do so. (*Id.* at p. 846.) Thus, retroactive application here to deprive plaintiff of a cause of action litigated to judgment would raise serious constitutional issues that prospective application avoids.

Recently, in *McClung v. Employment Development Department* (Nov. 4, 2004, S121568) 2004 Cal. LEXIS 10527), the Supreme Court refused to give retroactive effect to an amendment to the Fair Employment and Housing Act that imposed personal liability for harassment on non-supervisory workers. Citing *Evangelatos*, the Court explained: "[I]t has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" (*Id.* at p.*15, quoting *United States v. Heth* (1806) 7 U.S. 399, 413; also see *Bates v. Franchise Tax Bd* (Nov. 23, 2004, B169940) 2004 Cal.App. LEXIS 1986, at pp. *13-*14 [holding statute prospective in application].)

Evangelatos and its progeny control here. Nothing in Proposition 64 indicates any legislative intent, much less a clear one, that the measure was intended to apply to cases already under way. (*Evangelatos, supra*, 44 Cal.3d 1188, 1194.) "The failure to include an express provision for retroactivity is, in and of itself, 'highly persuasive' of a lack of intent in light of [the presumption against retroactivity]." (*Russell, supra*, 185 Cal.App.3d at p. 818.) Indeed, the text of Proposition 64's findings suggests that the measure is intended to prevent future actions from being filed, not to terminate pending cases. Section 1(e) of the measure provides: "It is the intent of the California voters ... to prohibit private attorneys from ***filing***

lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Emphasis added.)

In the absence of an express provision mandating retroactive application of a statute, courts may resort to legislative history, such as the ballot pamphlet. (*Evangelatos, supra,* 44 Cal.3d at pp. 1210-11.) Neither the Attorney General's title and summary nor the Legislative Analyst's fiscal analysis, however, advised voters that the measure would apply to pending cases. In fact, consistent with the measure's findings, the Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local public prosecutors, from ***bringing*** a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (Ex. A, emphasis added.) The proponents' ballot arguments also emphasized Proposition 64 would "[a]llow[] only the Attorney General, district attorneys, and other public officials to ***file*** lawsuits on behalf of the People of the State of California ...." (Ex. A, emphasis added.) Proposition 64 simply did not put the voters on notice that it would apply to pending cases. As the California Supreme Court said with respect to another tort reform measure adopted by the voters, "the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

Giving retroactive effect to Proposition 64 would have other substantive repercussions that the voters never intended. Until the passage of Proposition 64, state and local prosecutors depended heavily on private enforcement actions brought by groups like the Sierra Club and the Consumers Union. (See, e.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963.) Calling an abrupt halt to such cases will require prosecutors who had abstained from suit to decide between filing suit or allowing

unlawful conduct to go unchallenged. That decision in turn requires a careful evaluation of budgetary and other concerns for state and local officials whose resources are limited. As the Legislative Analyst's Analysis makes clear, "this measure could result in increased workload and costs to the Attorney General and local public prosecutors to the extent that they pursue certain unfair competition cases that other persons are precluded from bringing under this measure." (Ex. A.) The voters did not intend this result occur overnight. Instead, they intended to give prosecutors and class representatives time to transition to the new statute by making it apply prospectively only. Any other interpretation will cut off current private enforcement efforts in ways the voters did not intend and the law does not explicitly allow.

In sum, had Proposition 64's drafters wished to make their measure retroactive, they need only have inserted express retroactivity language. The fact that they did not means that the measure lacks the "clear legislative intent" required to make it apply retroactively. (*Evangelatos, supra,* 44 Cal.3d at pp. 1193-94.)

1. Chrysler Cannot Avoid the Rule Against Retroactivity by Arguing that Proposition 64 Is Merely Procedural; Standing and Class Action Requirements Carry Substantive Legal Consequences

Chrysler may argue that Proposition 64's amendments are purely procedural and therefore the Proposition is not subject to the general rule against retroactive application of statutes.

The California Supreme Court, however, has rejected any bright-line distinction between purely "procedural" and purely "substantive" legislation. (*Aetna, supra,* 30 Cal.2d at pp. 394-95.) Rather, "the distinction relates not so much to the form of the statute as to its

effects." (*Id.* at p. 394.) If substantive changes are made, "even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." (*Ibid.*)

Following *Aetna*, courts have held that substantive procedural distinctions do not prevail in California because both "procedural" and "'substantive' statutes are subject to the presumption against retroactive effect." (*Russell, supra,* (1986) 185 Cal.App.3d at pp. 815-17.) The true distinction is whether the statute affects past transactions or those impacting future events. (*Id.* at p. 816.) As the California Supreme Court later explained: "In determining whether such statutes changed 'the legal effects of past events' [citation] we sometimes used the terms 'substantive' and 'procedural.' [Citations.] However, we also made it clear that it is the law's effect, not its form or label, which is important." (*Tapia, supra*, 53 Cal.3d at p. 289.)

For example, the Supreme Court held that certain provisions of Proposition 115, which amended the Penal Code, could be applied to pending cases. Among other things, Proposition 115 provided that the court, rather than the attorneys, "shall conduct the examination of prospective jurors and that the examination shall be conducted only in aid of the exercise of challenges for cause. [Citation.]" (*Tapia, supra*, 53 Cal.3d at pp. 286-87, internal quotations omitted.) Because the new provision affected only the conduct of trial, the Court held that it could be applied to pending cases: "[A] law governing the conduct of trials is being applied 'prospectively' when it is applied to a trial occurring after the law's effective date, regardless of when the underlying crime was committed ...." (*Id.* at p. 289.)

Chrysler may nevertheless contend that the new standing and class action requirements created by Proposition 64 are "procedural" or "jurisdictional" changes applicable to pending cases even without an express retroactivity provision. Upon analysis, however, both of these new requirements carry important substantive consequences precluding retroactive application.

a. Standing Is a Substantive Requirement

The new standing provision in Proposition 64 does not simply create a procedure affecting the "conduct of trials." (Compare *Tapia, supra*, 53 Cal.3d at p. 289.) Standing is a matter of substance because it does not simply affect the conduct of trial, it affects the right of a party to sue. (4 Witkin, Cal. Proc. (4th Ed. 1997) Pleading, §104, p. 162.) Proposition 64 deprives concerned citizens and public interest groups of the right to file unfair competition complaints under §17200. As the United States Supreme Court has stated: "A new rule concerning the filing of complaints would not govern an action in which the complaint had already been filed under the old regime ...." (*Landgraf, supra*, 511 U.S. at p. 275 n.29.)

Likewise, if standing is viewed as jurisdictional, it is no less substantive. The United States Supreme Court has explained that there are two types of "jurisdictional" statutes. Statutes that "simply change[] the tribunal that is to hear the case" can be applied to pending cases, but a statute that changes "the rights and obligations of the parties" is substantive and cannot be applied retroactively absent express provision. (*Hughes Aircraft Co. v. United States ex. rel. Schumer* (1997) 520 U.S. 939, 951.) In *Hughes*, the Court recognized that a jurisdictional statute that affects "*whether*" a suit "may be brought at all" as opposed to

"*where*," is substantive and cannot be applied retroactively. (*Ibid.* [emphasis by the Court].) Standing plainly implicates the former. Accordingly, the standing provision in Proposition 64 cannot apply retroactively without explicitly so providing.

Chrysler may cite this Court's recent decision in *Metcalf v. U-Haul International, Inc.* (2004) 118 Cal.App.4th 1261, but that case is readily distinguishable. In *Metcalf*, this Court held that a newly enacted statute that "merely changes the procedures to be used in the conduct of existing litigation," may be applied to a pending action because the change is not considered retrospective. (*Id.* at pp. 1265-66; see also *Brenton v. Metabolife Int'l Inc.* (2004) 116 Cal.App.4th 679, 691.) This Court acknowledged that the determinative question "'is the effect that application of the statute would have on substantive rights and liabilities.' [Citation.]" (*Metcalf*, 118 Cal.App.4th at p. 1266.) This Court concluded that the statute in question simply withdrew a procedural screening mechanism in the form of a motion, but did not "deprive [the defendant] of any substantive defense to the action." (*Ibid.*) The Court added that because the new statute withdrew a procedural remedy, it could be applied on appeal even though the procedure had been invoked in the trial court. (*Ibid.*)

Losing the ability to file a procedural motion as occurred in *Metcalf* is very different from being deprived retroactively of the right to bring an action under Proposition 64. In the former, the defendant can still defend on the substantive merits of the case. In the latter, plaintiff loses a substantive judgment that has already been fully litigated on the merits. If the limitations period has run in such a case, vacating the judgment retroactively may provide an absolute windfall defense despite proven liability. Thus, unlike the procedural motion in *Metcalf*, the standing provision in Proposition 64 is substantive.

b. The Class Action Requirement Creates Substantive Consequences

Chrysler may also contend that Proposition 64's added requirement that all private §17200 actions proceed as class actions merely proscribes a "procedural" change that applies immediately to pending cases. (Prop. 64, §2.) As support, Chrysler may fasten on California court statements that "we view the question of [class] certification as essentially a procedural one ...." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439; see *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849.)

The language just quoted deals with the decision whether a class should be certified and simply makes clear that the ruling on certification does not "ask whether an action is legally or factually meritorious." (*Linder, supra*, 23 Cal.4th at pp. 439-40.) But once a class action is certified, there are significant substantive consequences for each of the parties that serve to preclude retroactive application.

First, filing a class action serves to toll the statute of limitations for the entire class; there is no such tolling in a non-class representative action under §17200. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103; see *Am. Pipe & Constr. Co. v. Utah* (1974) 414 U.S. 538.) Second, in a class action, the court may order disgorgement of unlawful profits into a "fluid recovery" fund (a fund to distribute money to persons other than from whom the money was obtained), but such a remedy is not available in a non-class §17200 action. (*Kraus, supra*, 23 Cal.4th at pp. 121, 124-37; accord, *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144-52.) Third, a class judgment also affords defendants res judicata effect binding all absent class members. (Fed. R. Civ. P. 23(c)(3); *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 808; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704-05.)

All of these features of class actions carry substantive consequences warranting prospective application, and preclude retroactive application in the absence of an explicit provision saying so.

2. Proposition 64 Does Not Fall Within the Line of Cases Regarding Retroactive Repeals Because It Did Not Repeal Private Actions Under Section 17200

Chrysler may also rely on a pre-*Evangelatos* line of cases involving statutory repeals. Such cases say that "where a cause of action unknown at common law has been created by statute and no vested or contractual rights have arisen under it [,] the repeal of the statute without a saving clause before a judgment becomes final destroys the right of action. The same rule is applied to an amendment of a statute." (E.g, *Dep't of Social Welfare v. Wingo* (1946) 77 Cal.App.2d 316, 320.) Similarly, the Supreme Court stated, again prior to *Evangelatos*, "'that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute.'" (*Mann, supra*, 18 Cal.3d at p. 829, citation omitted; accord, *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 [Amendment that "completely eliminates" an "action wholly dependent on statute" bars any pending proceeding under the prior statute.].)

That is not what happened here. First, Proposition 64 did not repeal the unfair competition cause of action or remedies provided by §17200. The claim of unfair business practices and its remedies remain unimpaired. (Prop. 64, §1(a).) Proposition 64 only added new substantive requirements for standing to sue to enforce §17200. As demonstrated above, there is not a hint in the ballot materials that the voters intended to halt actions that were already pending, thus allowing defendants to escape liability for conduct that occurred

prior to passage of the initiative. There is no evidence here that the voters intended to stop pending cases by enacting Proposition 64. Section 17200 was not repealed. Moreover, the voters did ***not*** amend the statute to narrow the conduct that would give rise to a cause of action on behalf of the public under §17200. If conduct that occurred prior to passage of the measure was actionable then, it remains actionable now, and the public's right to be protected from it remains unchanged. Thus Proposition 64 is not a repeal provision. It added a standing requirement for plaintiffs who in the future can institute actions on behalf of themselves and the class they represent.

Second, the unfair competition cause of action was not "unknown at common law." In 1933, former Civil Code §3369, the predecessor to §17200, codified the common law tort of unfair business competition between business competitors. (*See* Stern, *Bus. & Prof. Code §17200 Practice* (The Rutter Group 2004) ¶¶2.01-2.11.) Subsequent court decisions expanded the scope of the common law rule codified in §3369 from business competitors to consumers victimized by unfair business practices. (*People ex rel Mosk v. Nat'l Research Co.* (1962) 201 Cal.App.2d 765, 770-71.) It is true that "the statutory definition of 'unfair competition' 'cannot be equated with the common law definition ....' [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) But that does not detract from the fact that the business tort now embodied in §17200 is derived from the common law. The statute codified the common law and courts then extended the common law "protection once afforded only to business competitors" to the entire consuming public. (*Barquis v. Merchs Collection Ass'n* (1972) 7 Cal.3d 94, 109; accord, *Bank of the West, supra*, at p. 1264.) Because §17200 is based in part on common law the repeal rule does not apply here. The "repeal rule," which Chrysler asserts is applicable to "purely" statutory claims has been held

inapplicable to pre-existing common law claims or to claims like §17200 existing "by virtue of a statute codifying the common law." (*Callet v. Alioto* (1930) 210 Cal. 65, 68.) The statute-common law distinction has been modified to include a more nuanced analysis to determine whether retroactive application is intended. (*County of Los Angeles v. Superior Court* (1965) 62 Cal.2d 839, 844.) Still, the distinction persists and precludes retroactive application here. (*Cross v. Bonded Adjustment Bureau* (1996) 48 Cal.App.4th 266, 275-76.)

Third, *Mann* and *Younger* are distinguishable. In *Mann*, the court explained that the Legislature's intent to repeal the district's right to take disciplinary action based on an old conviction was clear from the statute itself. By its own terms, the statute applied to convictions "occurring prior to January 1, 1976," and there could be no doubt that the Legislature intended to prevent the district from dismissing its employee on the basis of such a conviction. (*Mann, supra*, 18 Cal.3d at p. 827.) Thus, *Mann* can be harmonized with *Evangelatos* as implementing an explicit statement of intent. In *Younger*, the statute contained unambiguous evidence of legislative intent to divest the superior courts of jurisdiction to order destruction of marijuana arrest or conviction records, and transferred that jurisdiction to the Attorney General. Such a procedural/jurisdictional change – of where not whether an action is brought – is applicable to pending cases. (*Hughes, supra*, 520 U.S. at p. 951.) But standing involves whether the suit may be brought and is substantive, and prospective.

Recent guidance on the retroactive repeal rule is found in *Myers, supra*, 28 Cal.4th 828. The Court rejected the contention that the Legislature's "Repeal Statute" that gave tobacco companies immunity from suit should operate retroactively to revive claims that accrued during the time the statute was in effect. The Court never mentioned the retroactive

repeal rule. Instead, the Court emphasized with its own italics that "'a statute will ***not*** be applied retroactively unless it is ***very clear*** from extrinsic sources that the Legislature ... must have intended a retroactive application.' [Citation.]" (*Id.* at p. 841 [emphasis by the Court].)

In sum, since the decision in *Evangelatos* the repeal rule is grounded in consideration of legislative intent. (*Myers*, *supra*, 28 Cal.4th at p. 841.) As discussed earlier, retroactive application is especially inappropriate in a case like this which has gone to trial and where judgment has been entered for the plaintiff. The trial court has found Chrysler liable for conduct that is still unlawful under Proposition 64. If a Proposition 64-suitable plaintiff had brought the case initially, all other things being the same, liability would still have been found. But, if Proposition 64 is applied retroactively in such a situation, particularly where the statute of limitations has run, Chrysler obtains a windfall – an absolute defense to liability despite the trial court judgment of liability. In this context, the retroactive application of Proposition 64 clearly has a substantive effect on antecedent rights and therefore is unwarranted in the absence of an explicit statement of voter intent, not present in Proposition 64.

III. CONCLUSION

For the foregoing reasons, this Court should hold that Proposition 64 does not apply retroactively to pending cases.

Respondents also respectfully request an opportunity to reply briefly to any contentions in Chrysler's brief not already anticipated in this letter brief, or an opportunity to address such issues at oral argument.

Respectfully submitted,

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Attachments