S129812

IN THE SUPREME COURT
OF CALIFORNIA

ROBERT KRUMME, on behalf of the General Public,

Plaintiff and Respondent,

v.

MERCURY INSURANCE COMPANY,
MERCURY CASUALTY COMPANY, and
CALIFORNIA AUTOMOBILE INSURANCE COMPANY,

Defendants and Appellants.

After a Decision By The Court of Appeal,

First Appellate District, Division Four

A103046 c/w A103742

UNFAIR COMPETITION CASE

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Review of the Court of Appeal's decision is not necessary to settle any important question of law. First, Mercury raises no significant issue of insurance law. Second, this is an inappropriate case to address the application of Proposition 64 to pending cases. This case is *sui generis*: before Proposition 64 passed, this case had already been tried to a plaintiff's judgment and affirmed in full by the Court of Appeal.

The Petition Raises No Significant Insurance Law Issues

Insurance Code sections 1621 and 1623 draw a clear distinction between an "insurance agent" and an "insurance broker." This distinction is part of the Producer Licensing Law. (Insurance Code Chapter 5, §§ 1621-1758.5.)

"Agent" versus "broker" is a *licensing* distinction. It is how the Department of Insurance distinguishes the agent and broker capacities under the licensing law. The distinction is pivotal in applying the agents' appointment statute (Insurance Code section 1704(a), amended in 2002) and the prohibition against insurance rate discrimination in Proposition 103 (section 1861.01, passed by the voters in 1988).

In 2000, the Department of Insurance informed the Legislature that "[s]ustaining our ability to enforce this clear definitional distinction between brokers and agents is key to our licensing and enforcement mission." (9 Appellants' Appendix ("A.A.") 2287.)

Mercury claims that by enacting section 1732 *in 1953* the Legislature abolished the agent/broker distinction for licensing purposes: According to Mercury, "'[d]ual agency' is now fully recognized in California statutory law as well as case law." (Petition at p. 10.)

Sections 1621, 1623, 1704(a), and 1732 refute Mercury's claim. The Insurance Commissioner completely rejected Mercury's argument in the *amicus curiae* brief he submitted in support of Krumme:

> In every insurance sales transaction, a producer must be classified as either a broker or an agent. Neither the Code, the Commissioner's regulations nor any case recognizes the concept of, or permits an insurance producer to be classified for insurance regulatory purposes as, a "dual agent."

(Amicus Curiae Brief of Insurance Commissioner at p. 1.)

Mercury's brief provides no coherent reason why this Court might disregard the plain language of these statutes and the Commissioner's interpretation. The Commissioner's interpretation was followed not only in the unanimous decision of the Court of Appeal, but also in the analysis of the respected Superior Court judge in this case[1]. The Commissioner's views on the proper interpretation and application of these statutes are entitled to deference.

No one other than Mercury and its ally, the American Agents Alliance (the "AAA"), has ever claimed that the agent/broker distinction has vanished from the Producer Licensing Law. Mercury and the AAA are driven by anxiety over the Superior Court's injunctions, which signal the end of Mercury's longstanding scheme of illegal producer compensation.

Mercury rewards the AAA's members for steering business to it by falsely dubbing these producers "brokers." The Superior Court found that Mercury's "broker" relationships are shams. (7 A.A. 1636:22-1637:3.) Stripped of analytical detail, the Superior Court and the Court of Appeal

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[1] 7 A.A. 1636:13-17; 1638:5-12.

decisions applied the principle that the law respects substance, not form. They pierced the veil of Mercury's sham agreements and called Mercury's "brokers" by their true name: *agents*.

Mercury's false "broker" designations provide cover for Mercury producers to charge consumers millions of dollars annually in illegal broker fees on Mercury business. (7 A.A. 1663:2-21.) As Mercury acknowledges, "[u]nlike a broker, an agent may not charge a fee." (Petition at p. 3.) The Superior Court's finding that the "brokers" are agents eliminated any running room that remained for Mercury's illegal practices.

Consumers are not the only ones to lose from illegal broker fees. Illegal fees also tilt the competitive playing field in favor of Mercury against its competitors. That is why Mercury's prime competitors -- State Farm, Farmers, Allstate, CSAA, Auto Club of Southern California, and 21st Century -- have not come to Mercury's aid.

The General Application of Proposition 64 Is Not Presented Here

Mercury says this is an "ideal" case to test the application of Proposition 64 to "actions pending." The most pressing Proposition 64 issue is whether the initiative applies to UCL cases pending in the trial courts. The trial courts need guidance. A poorer test case than this one would be hard to imagine.

This case was filed in June 2000 and went to trial over two years before Proposition 64 became law. The Superior Court then entered the permanent injunctions against Mercury of which it continues to complain. The Insurance Commissioner has stated that these injunctions are correct. (*Amicus Curiae* Brief of Insurance Commissioner at pp. 1, 6.) Finally, *before the November 2004 election*, the Court of Appeal issued its opinion,

affirming in full. The opinion thus crowns a four and one-half year investment of time, energy, and money to bring Mercury to justice.

The voters enacted Proposition 64 to stop "shakedown" lawsuits. The voters aimed at stopping abuses of the UCL; they did not intend to invalidate its proven and legitimate application. This case is not a "shakedown" lawsuit. It has been litigated on an above-board basis every step of the way. The Insurance Commissioner and the trial and appellate courts have given it their stamps of approval. The injunctions promise substantial benefits to consumers and a level playing field for Mercury's competitors.

This is a poor setting to take up the possible retroactive application of Proposition 64 where it really counts -- in cases that have not yet reached trial. The Court has many better opportunities; indeed, the Court already has at least one such case on its docket, fully briefed and ready for oral argument.

Mercury's petition is its next desperate step – and for the public's sake Krumme hopes the last one – to delay losing the anti-competitive "juice" of illegal broker fees. Mercury's appeal stayed the injunctions. Although the Superior Court issued the injunctions 18 months ago, Mercury has yet to file a single agency appointment, and California consumers continue to pay millions of dollars in illegal broker fees to Mercury's sham "brokers." (7 A.A. 1663:2-7.) A grant of review to consider applying the "shakedown" lawsuit initiative to this case would delay even further Mercury's day of reckoning with the agent appointment law.

Justice delayed is justice denied. This Court should act in the public interest by expeditiously denying review.

STATEMENT OF FACTS

Mercury's Marketing Practices

From Mercury's founding in 1962 until 1989, Mercury sold auto insurance exclusively through insurance producers[2] formally appointed as agents under section 1704(a).[3] (7 A.A. 1628-36, Finding of Fact ("F.F.") No. 8.) Beginning in 1989, Mercury converted approximately 700 Mercury agents to "broker" status and terminated their statutory agency appointments. (F.F. Nos. 10, 57 (mislabeled No. 56).)

The "Producer Contract" that Mercury prepared for "brokers" simply changed terms of the Mercury Agency Contract from "agency" and "agent" to either "producer" or "broker." (F.F. No. 11.) Today, Mercury has 750-800 "brokers" under these "Producer Contracts;" Mercury has not appointed these producers as agents under section 1704(a). (F.F. Nos. 6, 14.) Mercury still has 100 agents whom it has appointed with the Department of Insurance under section 1704(a). (F.F. No. 5.)

These "brokers" and the appointed Mercury agents are functionally indistinguishable. (7 A.A. 1637.) In addition to having virtually indistinguishable contracts, major similarities include:

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2 "Insurance producer" is a term that is not used in the licensing statutes themselves, but is commonly understood to refer to all kinds of sales personnel who "produce" insurance sales to customers. (*Marsh & McLennan, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796].)

3 These "independent agents" are agents for many companies simultaneously, unlike the "exclusive agents" used by State Farm, for example. (F.F. Nos. 2-3.)

(1) Both have the same binding authority and procedures. (F.F. No. 15.)

(2) Both have the same access to Mercury's underwriting and rating guidelines and must abide by the same Mercury underwriting manuals. (F.F. Nos. 16, 17, 18.)

(3) Both have the same authority to issue financial responsibility certificates, policy endorsements, and insurance identification cards to Mercury insureds. (F.F. No. 20.)

(4) Both publicly advertise that they "represent" Mercury, and Mercury knowingly permits this practice. (F.F. No. 22.)

(5) Both are subject to the same control and discipline by Mercury, including warnings, suspension, and termination. (F.F. No. 27.)

The Department's Investigation of Mercury's Practices

In January 2000, the Department of Insurance issued a draft "Notice of Noncompliance" to Mercury, charging Mercury with selling through unappointed agents. (11 A.A. 2656.) The Department charged that the "brokers" selling Mercury insurance were "de facto" insurance agents of Mercury under section 1621. The draft notice alleged:

> The [Mercury] brokers are subject to substantially the same direction and control from [Mercury] as are the [appointed Mercury] agents. Both the agents and the brokers use the same rating and underwriting manuals and follow the same application submission requirements. The agents and brokers also have similar written contracts with [Mercury]. [Mercury] will only accept applications from a broker having a contract

> with [Mercury].... [¶] The brokers use the same application forms as do the agents. They possess the same seven-day binding authority. Both brokers and agents are authorized by [Mercury] to quote premiums and issue financial responsibility certificates on [Mercury's] behalf. . . .

(11 A.A. 2658:14-25.)

The Department concluded: "These factors are inconsistent with the definition of a broker set forth in Section 1623. In fact, the brokers are operating as de facto agents under section 1621." (11 A.A. 2659:1.)

On January 27, 2000, top Mercury officials met face-to-face with the Department to discuss the draft notice and other issues. (9 A.A. 2205-10.) At the meeting, the Department asked that "Mercury write a response to the draft Notice of Noncompliance." (8 A.A. 2006.) Thirteen days later, in the midst of the investigation of these practices, Mercury made a $50,000 contribution to the Chuck Quackenbush Committee. (8 A.A. 1997-98.) The Department suspended further action against Mercury on the draft notice.

In reaction to the threat of departmental action, Mercury sponsored a legislative amendment to section 1623 in April 2000. (9 A.A. 2266-2285.) Mercury's proposed amendment provided that if a producer signs an insurance application as a "broker," there would be a "conclusive presumption" that the producer was an "insurance broker" for licensing purposes. (9 A.A. 2266-2267.) Further, the amendment would have allowed insurance brokers to bind coverage without losing "broker" licensing status. (*Id.*)

The Department opposed Mercury's bill in a letter from Tim Hart.

(9 A.A. 2286-2287.) The Hart letter stated:

> Simply put, *a licensee exercising the duties, responsibilities, and authority of an agent should not be permitted to call him/herself a broker*. Allowing him/her to do so would misinform consumers; shield the insurer from the acts of its agent; and permit circumvention of rate regulation requirements.

(9 A.A. 2286, emphasis added.)

The Department went on to defend the agent/broker distinction: "In the real world of insurance regulation, giving insurers additional flexibility to label the producers with whom they associate as 'brokers' rather than 'agents' is not a good idea for the following reasons:

. . . ." These reasons included insurer vicarious liability and broker fee abuses.

The Department's letter listed producer activities that the Department had determined to be leading indicia of an agency relationship in regulatory enforcement cases against producer licensees:

- Producer binding authority and other authorities delegated by the insurer;
- Producer access to the insurer's eligibility and underwriting guidelines;
- Insurer references to the producer as an agent in its advertising or consumer contacts;
- Producer use of official insurer applications and forms in processing applications; and
- A significant percentage of the producer's

business placed with a single insurer.

(9 A.A. 2287.)

The letter concluded with a reaffirmation of the central role of the agent/broker distinction:

> Sustaining our ability to enforce this clear definitional distinction between brokers and agents is key to our licensing and enforcement mission. The Department believes, therefore, that giving insurers the kind of discretion this bill confers would hurt, rather than help, consumers.

(*Id.*)

The Legislature declined to amend section 1623 to create the conclusive presumption or to allow brokers to have binding authority. (9 A.A. 2276.) Instead, the amendment as passed created only a rebuttable presumption of broker status based on the producer's designation in the application, and stripped broker binding authority from the bill. (Stats. 2000 Ch. 1074 §1 (A.B. 2639).)

Krumme's Lawsuit Challenging Mercury's Practices

Krumme learned of the aborted regulatory investigation and took up the Department's cause by filing this lawsuit in June 2000. (1 A.A. 14.) Judge Robert L. Dondero presided over a four-day bench trial in July 2002. In April 2003, he issued very detailed Findings of Fact and Conclusions of Law. (7 A.A. 1628.)

Judge Dondero found that Mercury's "brokers" are really agents and therefore subject to appointment under section 1704(a). (7 A.A. 1636:22-1637:13.) He entered a "Judgment/Injunction" that enjoins Mercury from selling insurance through producers that Mercury has not appointed, and

from knowingly selling insurance through producers who charge broker fees on Mercury business. (*Id.* at 1647.) These injunctions were stayed pending appeal. (*Id.* at 1699:13-18.) He denied Krumme's request for restitution of the broker fees. (*Id.* at 1650:20-1651:1.) Krumme did not appeal that decision.

On October 29, 2004, the Court of Appeal affirmed the judgment in full. The Court denied Mercury's Petition for Rehearing.

ARGUMENT

1. THE PETITION RAISES NO SIGNIFICANT INSURANCE LAW ISSUES.

Mercury seeks review of the Court of Appeal's decision that "producers cannot act in a dual capacity, i.e., in the capacities of both broker and agent, during a single transaction." (Petition at p. 3.) Mercury ventures a jumble of arguments, but fails to present any coherent basis for concluding that the Legislature eliminated the agent/broker distinction from the Producer Licensing Law.

The continued vitality of the agent/broker distinction is not a significant legal issue. The Producer Licensing Law is clear that there *is* a crucial distinction between an "insurance agent" and an "insurance broker."

The Licensing Law Plainly Distinguishes Between Agents and Brokers

As noted above, the Commissioner has repeatedly stressed the importance of the agent/broker distinction to his regulatory mandate. This appears in the Draft Notice of Non-Compliance, again in the Hart letter, and again in the Commissioner's brief. (11 A.A. 2656; 9 A.A. 2286; *Amicus Curiae* Brief of Insurance Commissioner at pp. 1-6.)

Review of the Code provisions confirms that the Commissioner is on extremely firm ground. Sections 1621 and 1623 are definitional sections in the Producer Licensing Law:

Section 1621 provides that an "insurance agent is a person authorized *by and on behalf of an insurer* to transact all classes of insurance, except life insurance."

Section 1623 provides in relevant part that an "insurance broker is a person who ... on behalf of another person, transacts insurance other than life insurance *with, but not on behalf of, an insurer* . . . ."

The distinction between an agent (who transacts "on behalf of an insurer) and a broker (who transacts "with, but *not* on behalf of, an insurer") could not be clearer. An "agent" represents the insurance company. A "broker" *cannot* represent the insurance company; if it does, it is classified as an "agent" for licensing purposes.

Mercury's claim that the distinction has vanished from the Producer Licensing Law ignores this statutory language. These statutes are clear. The courts must give significance to every part of them. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 [41 Cal.Rptr.2d 220].) The phrase "not on behalf of" in section 1623 cannot be reduced to mere surplusage. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [66 Cal.Rptr.2d 319].)

The Agent/Broker Distinction is a Key Element of the Regulation of Insurance Producers

As explained in the Hart letter and the Commissioner's brief, the agent/broker distinction is central to the regulation of insurance producers:

First, the appointment statute (section 1704(a)) depends on the

agent/broker distinction because it applies only to agents, not brokers. (*Marsh & McLennan, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796].) An action notice conclusively establishes the appointed producer's agency relationship with the appointing insurance company. (Section 1731; *Loehr v. Great Republic Insurance Co.* (1990) 226 Cal.App.3d 727, 733 [276 Cal.Rptr. 667].) The consumer need only locate the action notice in the Department's public records to establish the insurance company's vicarious liability conclusively.

Second, the agent/broker distinction lies at the heart of broker fee regulation. As Mercury concedes, agents cannot lawfully charge broker fees. (Petition at p. 3.) The Department has historically taken the position that all monies an "insurance agent" collects from the insured are part of the premium. (9 A.A. 2255-56.) Therefore, the addition of broker fees by agents would result in the *insurance company* charging an insured who paid a broker fee a higher premium than another who did not pay the fee. The difference would, in the Department's view, result in rate discrimination in violation of the provisions of Proposition 103 (Insurance Code section 1861.01) and its predecessor legislation. (*Id.*)

If a producer could perform the full array of agency functions without being classified as an "insurance agent," no producer would ever have to be appointed. Further, contrary to Mercury's own acknowledgment that "an agent may not charge a fee," any producer could add a broker fee to the premium. This is demonstrably not the law, and this Court need not waste time and resources to say so.

Section 1732 Is Limited to the Agency Functions of Premium Transmission and Policy Delivery

Mercury's argument rests on the contention that *Maloney v. Rhode Island Insurance Co.* (1953) 115 Cal.App.2d 238 [251 P.2d 1027] and section 1732 allowed producers to perform the full range of agency functions without losing "broker" status. The argument distorts the case and the statute.

Maloney held only that an insurance broker acts as the agent of the insurance company *in receiving the policy from the insurance company and the premium from the insured.* (*Id.* at 244-45)

In 1953, the Legislature added section 1732. This stated that "a person licensed as an insurance broker may act as an insurance agent *in collecting and transmitting premium or return premium funds and delivering policies and other documents evidencing insurance.*" (Section 1660.5, added by Stats. 1953 Ch. 1732 §2 p.3482, repealed, added as §1732 by Stats. 1959 Ch. 4 §2, emphasis added.) The legislative history states that the bill was intended to provide that brokers "do not have to secure agents' licenses as long as their agency activities are limited to such matters [*i.e.*, premium collection and delivery of policy documents]." (6 A.A.1530-31; 1532.)

The Court of Appeal was therefore right in holding that section 1732 provided that "a broker could act as an insurer's agent, but *only* to the extent of 'collecting and transmitting premium or return[ing] premium funds and delivering policies and other documents evidencing insurance.' Despite numerous opportunities to do so, the Legislature has never expanded this definition in Section 1732." (Typed opinion at p. 7, emphasis added.)

License Unification in 1990 Did Not Eliminate the Agent/Broker Distinction

Mercury also claims the Legislature impliedly repealed the agent/broker distinction when it amended section 1625 in 1990 to unify the formerly separate broker and agent licenses. According to Mercury, "the Legislature amended the Insurance Code to reflect the contemporary reality that brokers commonly act for the insurer in various ways while simultaneously representing their clients." (Petition at p. 13.)

Nothing in the language of section 1625 or its legislative history supports Mercury's claim. All section 1625 provided is that there is now a single license to act as an "insurance agent" or as an "insurance broker." The definitions of "insurance agent" and "insurance broker" continued.

License unification did not change the consequences that attach to acting as an agent as opposed to a broker. The Legislature simultaneously amended section 1704(a) (applying only to agents) and section 1668 (applying only to brokers). (Stats. 1990 Ch. 1420 §§ 25.5, 38 (S.B. 2642).)

The legislative history of section 1625 shows that the licenses were unified in order to "streamline" the licensing process -- that is, for administrative convenience. (9 A.A 2322-23.) The enrolled bill report expressly stated that appointment continues to be required for an "agent" and a broker's bond for a "broker." (*Id.*) The report also states that the Legislature intended binding authority to continue to be a distinguishing feature between the agent and broker capacities. (*Id.* at 2322:2.)

Section 1704(a) Does Not Contemplate Merely Voluntary Compliance by Insurance Companies

Section 1704(a) is part of a *licensing law*. To allow insurance

companies to decide whether or not to appoint lets the fox guard the chicken coop.

Appointment is the insurer's public acknowledgment of responsibility for the conduct of a producer. Significant consumer protection ramifications follow from the filing of an action notice. These include "deemed agent" liability under section 1731. Further, an agent cannot charge broker fees.

An insurer has no incentive to make an appointment that will enhance its exposure to vicarious liability. A producer has no incentive to agree to an appointment that will disable it from charging broker fees. An insurer who uses broker fees as sales incentives shares that disinclination. The Court of Appeal correctly interpreted the appointment law was as a mandatory duty. There is no need for this court to expend resources reaching the same clear statutory conclusion.

Section 1704(a) provides that "action notices" may be filed only with the "consent" of the producer. Producer consent is merely a condition on the insurer's duty to file the notice; it is not, as Mercury suggests, a loophole to allow insurers to sell insurance through unappointed agents. If a producer is acting as an agent for an insurer, he or she must either consent to the insurer's filing the action notice, or not sell insurance for the insurer.

Mercury's Parade of Horribles
Is Unsubstantiated and Misleading

Mercury warns that effect of the decision "may be to eliminate independent brokers entirely from California's automobile and homeowners insurance marketplace." (Petition at p. 5.) In support of this claim, Mercury makes a number of assertions about market practices. (*Id.* at pp. 4-

5.) *Not one of its assertions about broker practices is factually supported by the record before this Court.*[4]

The record is devoid of proof that any other insurer conducts its business like Mercury, through "brokers" that are indistinguishable from its agents. The Court of Appeal's decision will likely affect the ability of some non-Mercury producers to continue to cast themselves as "brokers" and charge broker fees. These producers can continue their business, provided they comply with the Producer Licensing Law as interpreted by the Court of Appeal. If the law as so interpreted is unacceptable, an amendment must be sought from the Legislature. Market conduct must conform to the legislation; the legislation should not be interpreted simply to conform to market conduct.

2. THE GENERAL APPLICATION OF PROPOSITION 64 IS NOT PRESENTED HERE.

This Court will eventually address the retroactive application of

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[4] None of Mercury's record citations support its allegation that "all or virtually all" of those brokers *have authority to bind coverage*: 9 A.A. 2313 ("all or virtually all brokers act as dual agents"); R.T. 163 (expert testimony that each insurance company has a process of how to bind coverage); R.T. 208-209 (expert testimony that broker/agent distinction has blurred in practice); R.T. 242-243 (testimony regarding deposition transcript; no direct evidence that Progressive Insurance Company grants binding authority to brokers); R.T. 374-375 (objection to Mercury VP's testimony of other companies' practices regarding binding authority sustained as hearsay); R.T. 455-457 (producer's testimony that Clarendon grants binding authority, but no testimony whether producer is a broker or agent).

Proposition 64 to provide guidance to the trial courts. The Superior Courts face a large number of UCL cases that have not yet gone to trial. Compared with the other opportunities coming the Court's way to guide the trial bench and bar, this case is a poor vehicle.

This case is *sui generis*. Before Proposition 64 passed, this case had been validated *not* to be a "shakedown" lawsuit – by trial, appellate affirmance, and regulatory approval. The voters intended Proposition 64 to stop "shakedown" lawsuits, not to require the reversal of cases fully validated as meritorious and beneficial to the public. It is inordinately doubtful that the voters intended Proposition 64 to apply to cases such as this one.

In contrast, this Court recently received a supplemental brief in *Kids Against Pollution v. California Dental Association,* Supreme Court Case No. S117156, requesting affirmance based on Proposition 64. The Court of Appeal reversed a trial court order denying a special motion to strike under the anti-SLAPP statute. That case has been pending in this Court since June 2003 and been fully briefed for eight months. It seems to present the question of Proposition 64 retroactivity in cases pending but never tried. At least, it is a far better candidate than this case.

Further, there are already conflicting Superior Court decisions on the application of the new law to cases that have not yet reached either trial or appeal. These trial court rulings will certainly be appealed or the subject of writ proceedings. To resolve "an issue of great public importance that the Supreme Court must promptly resolve," this Court has the power *sua sponte* to transfer an appeal to itself before the Court of Appeal acts. (Cal. Const. Art. VI, §12(a); Cal. Rules of Court, rule 29.9.)

As will be shown below, UCL cases already tried to plaintiff's judgments present issues that distinguish them from the general run of pending Superior Court cases. The Court should not test Proposition 64 retroactivity in a case like this one, which may fail to provide the guidance where it is needed most -- for the large number of cases awaiting trial.

Voter Intent Is Paramount In Interpreting Initiatives

Proposition 64 is silent whether it applies to pending cases and, if so, to which ones. The drafters of Proposition 64 did not let voters know how the initiative would affect pending cases. Thus, the application of Proposition 64 presents an issue of statutory interpretation.

Over the past 25 years, this Court has been faced with the repeated challenge of interpreting broadly-worded — and sometimes poorly drafted — ballot measures. The Court has responded with a line of decisions that takes a cautious approach to interpreting initiatives. The Court has guarded actual voter intent against partisan attempts to put words in the voters' mouths.

In *In re Lance W.* (1985) 37 Cal.3d 863 [210 Cal.Rptr. 631], the Court interpreted the provision of Proposition 8 that "relevant evidence shall not be excluded in any criminal proceeding." The Court observed that "the intent of the enacting body is the paramount consideration." (*Id.* at 889.) The Court proceeded to examine the ballot summary and arguments in the voter pamphlet. The Court concluded that the ballot materials confirmed the voters' intent to override the exclusionary rule as a remedy for violations of constitutional rights against search and seizure. (*Id.* at 888-89.)

In *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206 [246

Cal.Rptr. 629], voter intent was again the touchstone of the opinion. The statement of purpose in Proposition 51 arguably supported application of the initiative to pending cases. The Court nevertheless found it inconclusive as evidence of voter intent. (*Id.* at 1217.) Because retroactive application of a statute often entails unanticipated consequences for pending cases, "the courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears." (*Id.* at 1218.)

In *Hodges v. Superior Court* (1999) 21 Cal.4th 109 [46 Cal.Rptr.2d 884], the Court considered whether Proposition 213 applied to a product liability action by an uninsured driver against a car manufacturer. The initiative barred uninsured motorists from recovering non-economic damages in "any action to recover damages arising out of the operation or use of a motor vehicle." (Civil Code § section 3333.4.) This could be read as including a products liability case, as well as a lawsuit between motorists. The Court rejected literal interpretation of the statute, emphasizing the primacy of actual voter intent:

> In the case of a voters' initiative statute, too, we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.

(*Id.* at 114)

The Court considered the voter pamphlet as evidence of the voter intent. The Court concluded that the voters' intent was limited to "remedying an imbalance in the justice system that resulted in unfairness when an accident occurred *between two motorists* — one insured and the

other not. There is no suggestion that it was intended to apply in the case of a vehicle design defect." (*Id.* at 116, emphasis in original).)

The auto manufacturer argued that the initiative was also to punish and deter drivers who do not obey the financial responsibility laws. The Court rejected this argument, stating that "neither the statutory language nor the ballot materials reflect an intent to reform a system 'unfair' to law-abiding insured motorists by providing a windfall to manufacturers of defective vehicles." *(Id.* at 118.)

In *Horwich v. Superior Court* (1999) 21 Cal.4th 272 [87 Cal.Rptr.2d 222], the Court considered whether Proposition 213 applied to a wrongful death action by the parents of an uninsured driver against the other driver. As in *Hodges*, the starting point of the Court's analysis was that "[t]he fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*Id.* at 276.)

The Court concluded that the ballot arguments evinced a "single-minded concern with the unlawful conduct of uninsured motorists who, at the expense of law-abiding citizens, could recover for noneconomic losses while flouting the financial responsibility laws." (*Id.* at 277.) In light of this clear focus of the initiative, section 3333.4 could not be applied to survivors of an insured motorist, who were not even mentioned in the ballot materials. (*Id.* at 280.)

The Court went on to address the defendant's argument that a purpose of the initiative was to reduce litigation costs. The ballot argument had stated that the measure would eliminate "big money awards that . . . *uninsured motorists and their attorneys go after when these lawbreakers are in an accident with an insured driver.*" (*Id.* at 281, emphasis in

original.) The Court rejected the defendant's argument, stating that the initiative did not target wrongful death plaintiffs because they "do not contribute to this perceived unfairness, nor are they in a position to rectify it." (*Id.* at 282.) As the Court finally put it: "They are not part of the problem. Thus, we cannot deem them part of the solution."

The Voters Manifestly Did Not Intend Proposition 64 to Apply to Cases Previously Litigated to a Plaintiff's Judgment

Applying the principles of these cases here, Proposition 64 does not apply to a case already tried to a plaintiff's judgment before the November 2004 election. Whatever the scope of retroactive application of the initiative may be – *if any* – the voters manifestly did not intend it to apply to a case that had already been validated by the Superior Courts as meritorious and for the public benefit.

The Findings and Declarations of Purpose state that the voters intended to "eliminate *frivolous* unfair competition lawsuits," and to "prohibit private attorneys from *filing* lawsuits for unfair competition" without an injured client. (Prop. 64, § 1(d), (e), emphasis added.)

The ballot argument in favor of the measure reveals that the voters' overarching purpose was to stop "shakedown" lawsuits. (Answer to Petition for Rehearing, Exhibit A.) A "shakedown" lawsuit is purportedly brought on behalf of the general public but "demanding thousands of dollars from small businesses that can't afford to fight in court." The "shakedown" argument bluntly appealed to the voters' antipathy to abusive lawsuits and promised to "stop" them.

The voters also intended the law to preserve the legitimate enforcement of the UCL. The Findings and Declaration of Purpose

expressly reaffirm the importance of the UCL for the protection of California consumers and businesses. (Prop. 64, § 1(a).)

These provisions are compelling that the voters did not intend to apply the initiative to UCL cases that had already been filed *and* officially validated by Superior Court judgments as meritorious and benefitting the public.

On the other hand, the voters intended that only public prosecutors will be authorized to "file *and prosecute* actions on behalf of the General Public." (*Id.*, § 1(f), emphasis added.) Sections 17203 and 17204 also refer to the "prosecution" and "pursuit" of UCL actions.

Whether the voters intended "prosecution" and "pursuit" to refer to a successful UCL plaintiff's *defense* of an appeal is doubtful. "Prosecute" includes the meaning "[t]o *initiate* civil or criminal court action against" and "[t]o seek to *obtain or enforce* by legal action." (American Heritage® Dictionary of the English Language (4th Ed. 2000), emphasis added.)

That "prosecution" and "pursuit" do not include responding to an unsuccessful UCL defendant's appeal is confirmed by the context of sections 17203 and 17204. They refer to "prosecution" and "pursuit" in "a court of competent jurisdiction" – that is, in the Superior Courts. These statutes do not relate to appeals, which occur only after a plaintiff has completed "prosecution" in the "court of competent jurisdiction."

Therefore, "prosecution" and "pursuit" do not unambiguously include a prevailing plaintiff's *response* to an unsuccessful defendant's brief in an appellate court. The *defendant* initiated the appeal. The judgment of the Superior Court is presumed to be correct; the defendant/appellant has the burden of affirmatively showing error.

(*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65].) By answering Mercury's appeal points, Krumme was not prosecuting; he was defending the prosecution he completed when he won the injunctions in the Superior Court.

Krumme does not ask the Court simply to accept this interpretation of "prosecution" and "pursuit." Rather, he contends that the voters' actual intent must be assayed to determine whether they intended these terms to apply to a successful UCL plaintiff's defense of an appeal by an adjudicated UCL violator.

The evidence of voter intent proves that they did not so intend. Whatever "pursuit" and "prosecution" may mean in other procedural contexts, the voters manifestly did not intend the initiative to require dismissal of meritorious cases that had already been successfully tried to a plaintiff's judgment. The voters wanted legitimate UCL enforcement to continue, while stopping "shakedown" lawsuits. They *negated* any intent to apply the measure to cases the Superior Courts had already found to be meritorious and to yield significant benefits to the public. There is no reliable evidence of any contrary voter intent.

Applying Proposition 64 to require the reversal of the Court of Appeal decision in this case would be a startling — if not altogether absurd — consequence of a ballot measure reaffirming the integrity of the UCL. As the Court put it in *Hodges*, the courts "may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court*, *supra*, 21 Cal.4th at 114.)

In *Horwich*, the voters' "single-minded concern" was the uninsured

motorists who flouted the financial responsibility law. Likewise, here, the single-minded concern of the voters was to stop "shakedown" lawsuits. The plaintiffs and their attorneys in cases litigated to plaintiff's judgments are not responsible for the "shakedown" lawsuits. "They are not part of the problem. Thus, we cannot deem them part of the solution." (*Horwich v. Superior Court, supra,* 21 Cal.4th at 282.)

The Repeal Rule is a Rule of Construction that is Rebutted by Evidence of Contrary Voter Intent

The "repeal rule" of *Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819, 829 [135 Cal.Rptr. 526] is not to the contrary. Mercury proposes applying the repeal rule mechanically to Proposition 64 without any analysis of actual voter intent.

This is incorrect. If mechanical application of the repeal rule were all that were required, the repeal rule would run afoul of the Supreme Court's modern ballot initiative decisions discussed above. It seems unlikely that the Supreme Court's 20-year insistence on proof of actual voter intent would evaporate when confronted by a rule traced to a 1930 case, *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 [290 P. 438].

The repeal rule can be reconciled with *Lance W.* and its progeny. The repeal rule is a canon of construction, not the inflexible rule of law that the retroactivity proponents suggest. Accordingly, it provides only a *presumption* of legislative intent that can be overcome by proof of actual contrary intent in the legislative history.

The distinction between an interpretational canon and a rule of substantive law is clear. A "canon of construction" is a "rule used in construing legal instruments, esp. contracts and statutes. Although a few

states have codified the canons of construction ... most jurisdictions treat the canons as mere customs not having the force of law." (*Black's Law Dictionary* (7th Ed. 1999).) By contrast, a "rule of law" is a "substantive legal principle." (*Id.*)

In *Mann*, the Supreme Court treated the repeal rule as a canon of construction. The Court emphasized that the repeal rule is a "general common law rule" that has been applied in various contexts. (*Governing Board of Rialto Unified School District v. Mann, supra,* 18 Cal.3d at 829.) No statute compelled the application of the rule; it was (and is) a judicially fashioned rule. In that case, the school district provided no legislative history to rebut the operation of the repeal rule.

The purely presumptive character of the repeal rule is even clearer in *Younger v. Superior Court* (1978) 21 Cal.3d 102 [145 Cal.Rptr. 674]. The Supreme Court expressly considered the potential for proof of contrary legislative intent: "The only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal illustrated by such cases as *Mann*. But no such intent appears ...." (*Id.* at 110.) Thus, if contrary legislative history had been proven in *Mann* and *Younger*, the rule would not have been applied.

After deciding *Younger*, the Court cautioned against the "magical incantation" of canons of construction:

> Nevertheless, *expressio unius est exclusio alterius* is no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions, some of which are referred to in the margin. More in point here, however, is the principle that such rules shall always "be

> subordinated to the primary rule that the intent shall prevail over the letter."

(Estate of Banerjee v. Cory (1978) 21 Cal. 3d 527, 539 [147 Cal. Rptr. 157], citations omitted.)

Likewise, in *People v. Jones* (1988) 46 Cal. 3d 585 [250 Cal. Rptr. 63], the Court used emphatic language, stating that a canon of construction is not a legal "straitjacket." Rejecting mechanical application of the canon that ambiguous criminal statutes are to be construed in favor of the accused, the Court observed:

> [A] rule of construction . . . is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent.

(*Id.* at 599, quotation marks omitted; *see also In re Lance W., supra,* 37 Cal.3d at 889 ("This rule of construction is applicable, however, only in the absence of a contrary legislative or popular intent").)

Therefore, even if the repeal rule applies to create a presumption here, the measure itself and the supporting ballot argument are evidence of the voters' contrary intent that the initiative does not apply to cases previously pursued to plaintiff's judgments. This contrary evidence dispels any presumption that the *Mann-Younger* line of cases might raise.

The "Procedural Amendment" Rule Does Not Apply Retroactively to Cases that Have Already Been Tried

Likewise, the Supreme Court's voter intent cases call into serious question any proposed mechanistic application of the "procedural

amendment" doctrine. Although this rule may allow newly-enacted procedures to be applied in some pending cases, the intention of the voters remains controlling.

Moreover, the "procedural amendment" rule does not allow a procedural change to be applied retroactively to a case that has already been tried to judgment. The rule simply allows purely procedural changes to be applied *prospectively* to cases yet to be tried as of the date of the new enactment.

In *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388 [182 P.2d 159], the California Supreme Court explained the rule:

> In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and *if the trial postdates the enactment*, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. *In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective.*

(*Id.* at 394, emphasis added; seel also *Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 815-816 [230 Cal.Rptr. 810].)

In *Tapia v. Superior Court* (1991) 53 Cal.3d 282 [279 Cal.Rptr. 592], the Supreme Court considered the application of provisions of Proposition 115 to a criminal trial that postdated its enactment. The defendant argued that by applying the initiative's provision limiting the conduct of voir dire to the court, the Superior Court had applied the

provision retroactively. The Supreme Court emphasized that the new voir dire rules would only be applied prospectively to future trials:

> *Tapia's* proposed test [of retroactivity] is not appropriate for laws which address the conduct of trials *which have yet to take place*, rather than criminal behavior that has already taken place. Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future."

(*Id.* at 288, emphasis added.)

In *Elsner v. Uveges* (Dec. 20, 2004) Supreme Court Case No. S113799, the Court considered whether a Labor Code amendment, which restored the common law rule allowing Cal-OSHA provisions to establish the standard of care, could be applied to a case already tried to judgment. Following *Tapia* and *Aetna*, the Court found that the use of Cal-OSHA provisions would be an impermissible retroactive application of the amendment. (Typed Opinion at p. 2.) The rule that new statutes operate prospectively "does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. This is so because these uses typically affect only future conduct -- the future conduct of the trial." (*Id.* at 20.) Even though the amendment at issue was "superficially procedural and evidentiary," the Court found that to apply it when trial had already occurred would be "'to apply the new law of today to the conduct of yesterday.'" (*Id.* at 23, *citing Fox v. Alexis* (1985) 38 Cal.3d 621, 626 [214 Cal.Rptr. 132], *quoting Pitts*

v. Perluss (1962) 58 Cal.2d 824, 836 [27 Cal.Rptr. 19].)

Mercury points to the anti-SLAPP cases in which Code of Civil Procedure section 425.17 was applied to cases on appeal, even though the amendment had been enacted after the trial court proceedings.[5] Significantly, none of those cases has been tried. All were appeals from trial court rulings on special motions to strike brought by defendants at the outset of the case and before any trials had occurred.

The anti-SLAPP cases are distinguishable because the anti-SLAPP procedure is a threshold determination, and not a procedure that "addresses the conduct of trials." All of the cases were in their procedural infancies. If the appellate courts had applied the old law, the plaintiffs would still have been able to file new suits and argue the application of the new law. To avoid this waste of time and judicial resources, the courts applied the new law, under which the Legislature had clearly allowed the plaintiffs' cases to proceed.

Likewise, *Beckman v. Thompson* (1992) 4 Cal.App.4th 481 [6 Cal.Rptr.2d 60] involved a threshold motion to dismiss based on *forum non conveniens*, not a trial on the merits. During the appeal, the amendment to Code of Civil Procedure section 410.30(a) expired under its sunset provision. The Court held that the amendment had expired and applied the common law to the case. Like the anti-SLAPP cases, there was no purpose to be served in dismissing the case on this threshold ground, only for the

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Brenton v. Metabolife International, Inc. (2004) 116 Cal.App.4th 679 [10 Cal.Rptr.2d 702]; *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120 [13 Cal.Rptr.3d 926]; *Metcalf v. U-Haul International, Inc.* (2004) 118 Cal.App.4th 1261 [13 Cal. Rptr. 3d 686].

plaintiff to file a new one, unburdened by the expired amendment, and therefore allowed to proceed.

Therefore, assuming that Proposition 64 is purely procedural as Mercury claims, the procedural amendment doctrine cannot validate the retroactive application of the initiative to this case. The application of any new procedures to a previous trial is unwarranted and contrary to *Aetna* and *Tapia*. Unlike the anti-SLAPP cases and *Beckman*, Proposition 64 does not address a threshold procedural issue in this case. This case was fully tried to judgment long before the election.

CONCLUSION

Some attorneys abused the UCL's citizen standing provision. The voters responded to these abuses by eliminating it. Some cases, however, kept the promise of faithful citizen enforcement of the UCL. This is one of them. Few private plaintiff cases under the UCL have been so closely scrutinized, and yet so consistently found to be meritorious and valuable.

This Court should allow Krumme to make good on his promise to the General Public of California. Delivery of the benefits of the injunctions to the public should not be delayed any longer. Review should be summarily and promptly denied.

CERTIFICATE OF WORD COUNT
Cal. Rules of Court, Rule 14(c)(1)

The text of this brief consists of 7,632 words, as counted by the Wordperfect version 11.0 word-processing program used to generate this brief.

Dated: December ___, 2004 LEVY, RAM & OLSON LLP

By:_____
Heather M. Mills
Attorneys for Robert Krumme,
on Behalf of the General Public

PROOF OF SERVICE

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 21, 2004 at San Francisco, California.

_____

Cheryl F. Pritchard