CASE NO. S132433

IN THE
SUPREME COURT OF CALIFORNIA

THOMAS BRANICK, et al.,
Plaintiffs/Appellants,

vs.

DOWNEY SAVINGS AND LOAN ASSOCIATION, F.A.,
Defendant/Respondent.

On a Decision from the Court of Appeal,
Second Appellate District, Division Five, Case No. B172981
Associate Justice Richard M. Mosk
From the Superior Court of California, County of Los Angeles
Case No. BC280755
Judge Wendell J. Mortimer, Jr.

APPELLANTS' ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

"When construing any statute, [the court's] task is to determine the Legislature's intent when it enacted the statute 'so that [the court] may adopt the construction that best effectuates the purpose of the law.'" (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625.)[1] To ascertain legislative intent, courts have adopted various canons of construction. (See *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017.) "'[The] first rule of construction is that legislation must be considered as addressed to the future, not to the past.'" (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 (*Evangelatos*) (quoting *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79-80 [103 S.Ct. 407, 74 L.Ed.2d 235]).) Indeed, more than half a century ago, this Court observed that "[it] is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Aetna Casualty & Surety Co. v. Industrial Accident Com.* (1947) 30 Cal.2d 388, 393 (*Aetna*).) This fundamental precept has been "repeated and followed in innumerable decisions" of this Court. (*Evangelatos, supra*, 44 Cal.3d at p. 1207.)

A second, and subordinate, canon of construction is that in some situations, a court may apply a repeal or amendment to a statute retroactively when the change is of such a nature that the change, itself, suggests that the legislature intended retroactive operation.) See, e.g., *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) However, when the repeal or amendment does not, on its face, unmistakably suggest an intent for retroactive application, this "repeal canon" cannot defeat the presumption that legislation operates only

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[1] Emphasis is added and internal citations are omitted unless otherwise noted.

prospectively. (See *Hopkins v. Anderson* (1933) 218 Cal. 62, 66-67 (*Hopkins*).)

In ruling that Proposition 64 must be applied retrospectively to all cases pending on the date of the initiative's enactment, the Court of Appeal strayed from these principles of statutory construction by expressly declaring the voter's intent to be irrelevant to its analysis. (*Branick v. Downey Savings and Loan Association*, No. 172981, slip opinion at 11 ("slip op.").) Ignoring that the Proposition contains no express retroactivity provision, and disregarding the lack of any other language clearly indicating an intent to apply the initiative's provisions to preexisting cases, the court instead concluded that Proposition 64 repealed the prior standing rules under California's Unfair Competition Law (UCL), and declared that Proposition 64's amendments to the UCL "have immediate effect in all pending cases alleging claims under [Business & Professions Code] sections 17200 or 17500." (*Ibid.*) The Court of Appeal's mechanistic application of the repeal canon, divorced from an inquiry into the intent of the voters, is fundamentally at odds with a long line of decisions by this Court establishing the primacy of legislative (or voter) intent in determining a new law's retroactive effect.

Proposition 64 took effect on November 3, 2004, (Cal. Const., art. II, § 10, subd. (a).), and specifies new standing requirements for those filing a private UCL suit. Previously, the UCL provided that "any person" could bring an unfair competition claim on behalf of the general public. As a result of Proposition 64, private actions for UCL relief may now be brought only by a person "who has suffered injury in fact and has lost money or property as a result of such unfair competition." (*Id.*, §3, amending Bus. & Prof. Code, § 17204.) In addition, a private UCL suit for "representative claims or relief on behalf of others" must comply with Code of Civil Procedure section 382, which governs class actions. (*Id.*, §2, amending Bus. & Prof. Code, § 17203.)

As the Court of Appeal acknowledged (slip op. at 15), Proposition 64 does not alter the substantive grounds for UCL liability. Likewise, Proposition 64 does not repeal any of the remedies available for violation of section 17200. Indeed, the initiative expressly assured voters that the right of citizens to seek relief for wrongful business practices was preserved. Even the UCL's cause of action on behalf of the general public is protected under the express terms of the initiative. (See, e.g., Prop. 64, §1(d), (f), attached as Ex. A to Plaintiffs' Letter Brief regarding Proposition 64, dated January 20, 2005 (hereafter, Pltfs' Letter Br.).) Proposition 64's express preservation of UCL claims and remedies for the benefit of California consumers and businesses is fundamentally inconsistent with the notion that the voters intended the initiative to terminate all preexisting UCL "private attorney general" actions brought by unaffected plaintiffs – even those, like this one, that assert meritorious claims on behalf of California consumers, and even those that may already have resulted in a plaintiff's judgment. This unambiguous language, viewed together with the lack of any express retroactivity clause or other language indicating a retroactive intent, compels the conclusion that Proposition 64 must operate prospectively only.

In defense of the Court of Appeal's ruling, Defendant Downey Savings and Loan Association, F.A. ("Downey") contends that retroactive intent is clear from Proposition 64's stated purpose of eliminating "frivolous" UCL suits. (Pltfs' Letter Br., Ex. A, Prop. 64, §1.) Contrary to Downey's suggestion, Proposition 64 does not characterize all UCL actions brought by unaffected private plaintiffs as "frivolous." On the contrary, the initiative's preamble observed only that there had been "some" abuse of California's unfair competition statute. (*Id.*, §1(b).) More importantly, this Court emphatically has rejected the notion that the mere desire to correct perceived problems – a goal shared by almost all new laws – is enough to demonstrate a

clear intent to apply a new enactment retroactively. (*Evangelatos*, *supra*, 44 Cal.3d at pp.1213-1214.)

Downey also asserts that Proposition 64's new standing requirements are merely "procedural" and thus not subject to the presumption of prospectivity. Whether a law is "procedural" or "substantive" depends not on its effect on the rights and liabilities of the parties. (*Aetna*, *supra*, 30 Cal.2d at p. 394.) "Procedural" rules that apply to pending actions are those that concern the actual conduct of court proceedings; restrictions on standing do not fall into this category. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936 (*Elsner*).)

If this Court nevertheless concludes that Proposition 64 applies to this case, leave to amend to substitute a suitable plaintiff should be allowed. Such an amendment would not prejudice Downey because it would not introduce an entirely new set of facts or legal theories. (See, e.g., *Klopstock v. Superior Court* (1941) 17 Cal.2d 13 (*Klopstock*).) Downey incorrectly asserts that a substitute plaintiff necessarily would introduce a "new" injury because the original plaintiffs did not allege any harm to themselves. This ignores that the plaintiffs here asserted on behalf of the public the very injuries that any new plaintiff would allege. For that same reason, any amendment would relate back to the commencement of the action. On these issues, the Court of Appeals was correct.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Statement of Facts Alleged in the Complaint

Plaintiffs Thomas Branick and Ardra Campbell ("Plaintiffs") are citizens and residents of California who brought this action on behalf of the general public to remedy Downey's tortious and contractual malfeasance in violation of the UCL. (Appellant's Appendix ("AA") 2.) Downey is a

federally-chartered savings and loan association that provided lending services in real estate purchase, sale and refinancing transactions in California. (AA 3.)

Plaintiffs allege that Downey intentionally overstated the amount of governmental charges for the recording of certain real estate documents, including trust deeds, quitclaim deeds, reconveyances and powers of attorney. (*Id.* at 7-12.) This way, Downey was able to pay the government fees and pocket the difference as pure profit. (*Id.* at 8-9, 12-13.) In addition, Plaintiffs allege that Downey charged fees that it was not entitled to receive under the terms of its agreements with its customers. (*Id.* at 8, 10-13.)

B. Procedural History

This action was commenced on August 29, 2002. (AA 372.) On February 2, 2003, Plaintiffs filed their Amended Complaint for Unfair Competition and Unfair Business Practices. (AA 1.) After answering the Complaint on March 10, 2003, (AA 375), Downey moved for judgment on the pleadings on the ground that Plaintiffs' claims were preempted by federal law. (AA 21, 23.) On November 21, 2003, the trial court held a hearing and granted the motion. (AA 359.) Judgment was entered on December 3, 2003 (AA 362), and Plaintiffs timely filed their appeal. (AA 365.)

On November 2, 2004, while Plaintiffs' appeal was pending, California voters approved Proposition 64, which amended Business and Professions Code section 17204 by altering the standing requirements for bringing a private UCL action. (See Pltfs' Letter Br., Ex. A, Prop. 64.) The findings and declaration of purpose of Proposition 64 stated that California's unfair competition laws were "intended to protect California business and consumers from unlawful, unfair, and fraudulent business practices," and that the purpose of the new measure was to "eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief." (*Id.* §1(a), (d).) The findings also stated that "the intent of

California voters" was to "prohibit private attorneys from *filing* lawsuits" where they had no client who has been injured. (*Id.* §1(e).)

Proposition 64 became effective on November 3, 2004. In response, the Court of Appeal requested supplemental briefing on the issue whether Proposition 64 applies to this action.

In its decision issued on February 9, 2005, the Court of Appeal rejected Downey's assertion that this action was preempted by federal law. (Slip op. at 4-9.) However, the Court of Appeal concluded that Proposition 64 applies to actions, like this one, commenced before the effective date of the initiative. The court reasoned that Proposition 64 constituted a partial statutory repeal of a purely statutory right, immediately terminating all cases brought pursuant to the repealed statute that have not yet reached a final judgment. (Slip op. at 11.)

Nevertheless, the court also determined that Plaintiffs should have the opportunity to amend their complaint to substitute a new plaintiff who meets the standing requirements of Proposition 64. (*Id.* at 15-17.) The court reasoned that such an amendment "may be allowed" under settled California law, but noted that the issue of leave to amend had not been presented to the trial court. (*Id.* at 17.) Accordingly, the Court of Appeal remanded the case to the trial court to determine whether, under the circumstances of the case, such an amendment is warranted here. (*Ibid.*)

This Court subsequently granted Downey's Petition for Review, limiting the issues to the following questions: (i) whether Proposition 64 applies to actions filed before its effective date; and (ii) if Proposition 64 does apply, whether a plaintiff may amend to substitute in or add a party that satisfies the initiative's standing requirements, and whether any such amendment would relate back to the filing of the initial complaint. The Court of Appeal's preemption ruling is not before this Court.

III. DISCUSSION

A. Because the Voters Did Not Clearly Express a Retroactive Intent, Proposition 64 Does Not Apply to Cases Filed Before its Effective Date

1. There is a Strong Presumption that Legislation Acts Prospectively

A retroactive law is one that "'affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.'" (*Myers v. Philip Morris Cos.* (2002) 28 Cal.4th at 828, 839 (*Myers*), citing *Aetna, supra,* 30 Cal.2d at p. 391; see also *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472 (*McClung*).) In general, there is a strong presumption against retroactive application of new legislation. (See, e.g., *Evangelatos, supra,* 44 Cal.3d at p. 1207; *White v. Western Title Insurance Co.* (1985) 40 Cal.3d 870, 884.) The principle is "'deeply rooted in our jurisprudence'" and animated by "'[e]lementary considerations of fairness'" that individuals "'should have an opportunity to know what the law is and to conform their conduct accordingly.'" (*McClung, supra,* 34 Cal.4th at p. 475 (quoting *Landgraf v. USI Film Productions* (1994) 511 U.S. 244, 265 [114 S.Ct. 1483, 128 L.Ed.2d 229] (*Landgraf*).)

Consequently, it is a fundamental canon of statutory construction that "'statutes are not to be given a retrospective operation unless it is *clearly made to appear that such was the legislative intent.*'" (*Evangelatos, supra,* 44 Cal.3d at p. 1207 [holding that Proposition 51, which eliminated joint and several liability for tort defendants, applied prospectively].) Requiring a clear and unequivocal expression of retroactive intent serves to ensure that the legislative body "has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (*Landgraf, supra,* 511 U.S. at pp. 272-273.) The Supreme Court consistently has required a clear expression of retroactive

intent before applying a new law retrospectively, whether that new measure is a legislative enactment (see, e.g., *McClung*, *supra*, 34 Cal.4th at p. 476), a statutory amendment approved by the voters (*Evangelatos*, *supra*, 44 Cal.3d at p. 1194), or a statutory repeal. (See *Myers*, *supra*, 28 Cal.4th at p. 884.)

2. The Voters Did Not Intend that All UCL Actions Be Terminated upon Its Passage

When interpreting a voter initiative, the intent of the voters is "the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889; see also *In re Littlefield* (1993) 5 Cal.4th 122, 130.) The need for a clear statement of retroactive intent is particularly acute when determining the effect of a voter initiative. In the usual course, legislation is drafted, negotiated, debated, and often revised in the legislature before a vote is taken. Voter propositions, on the other hand, are subject to none of this deliberative process. The proponents of an initiative have unfettered control over its text. Millions of voters approve or disapprove of these measures based on little more than advertising and the usually scant ballot materials. As former Chief Justice Bird noted in examining these differences between voter initiatives and legislative enactments, "the initiative process renders it difficult for the individual voter to become fully informed about any particular proposal." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 266 (dis. opn. of Bird, C. J.).) Attempting to divine voter intent as to retroactive effect from cursory – or even worse, cryptic – initiative language and ballot materials risks an outcome that is contrary to what the voters intended, and thus contrary to fundamental principles of statutory interpretation.

In discerning voter intent, the Court must bear in mind "'the object to be achieved and the evil to be prevented'" by the initiative. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 (*Horwich*).) A new law must not be given a literal meaning if doing so would result in "absurd consequences" the voters did not intend. (*Ibid.*)

The process of interpreting voter intent begins with the language of the initiative itself. (*Horwich, supra,* 21 Cal.4th at p. 276.) It is undisputed that Proposition 64 contains no express declaration of retrospectivity and is, in fact, wholly silent on this matter. If anything, the text of the initiative and the accompanying ballot materials suggest an intention that the law apply to future lawsuits only. For example, Proposition 64's Findings and Declaration of Purpose states that "[i]t is the intent of California voters in enacting this act to prohibit private attorneys from *filing* lawsuits for unfair competition" where the new standing requirements are not met. (Pltfs' Letter Br., Ex. A, Prop. 64, §1(e); see also *id.* §1(d).)

Certainly, the drafters of Proposition 64 knew how to make it explicitly applicable to pending cases if that was their actual intention. For example, Proposition 213, passed eight years ago, prohibited uninsured motorists and drunk drivers from collecting non-economic damages in lawsuits arising out of car accidents. The measure explicitly provided: ""This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997."" (See *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979 [based largely on this language, court held Proposition 213 applied to a case not tried at the time of its passage].)

Indeed, other measures appearing on the ballot with Proposition 64 – including Propositions 66 and 69 – included express retroactivity language. (See Pltfs' Letter Br., Ex. D, Prop. 66, §11(d), Ex. E, Prop. 69, §4(b).) Yet Proposition 64 is devoid of any unambiguous retroactivity language. California courts properly have held that 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 v. Superior Court* (1986) 185 Cal.App.3d 810, 818 (*Russell*).)

If the measure's terms are not definitive on whether it applies retroactively, the Court may look to extrinsic sources, such as legislative history, to determine the law's effect. (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *Evangelatos*, *supra*, 44 Cal.3d at p. 1210.) 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." (Pltfs' Letter Br., Ex. A, Analysis of the Legislative Analyst.) In addition, the Analyst stated that the measure "requires that unfair competition lawsuits *initiated* by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits." (*Ibid.*)

In an effort to glean "clear" retroactive intent, Downey cites other language in the initiative and ballot materials. For example, Downey isolates the terms "prosecute" and "pursue" in the initiative as evidence of an "affirmative" intent to stop all pending private UCL actions in their tracks. (Def. Br. at 6-7.) As Downey's own authorities indicate, however, these terms are easily understood as encompassing the commencement of an action, as well as ongoing litigation thereafter. (See *Marler v. Municipal Court* (1980) 110 Cal.App.3d 155, 160-161.) Indeed, in *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2005) 129 Cal.App.4th 540 (*Kintetsu*), the Second Appellate District observed that the word "prosecute" was included in the prior version of the law, and was not amended in any way by the voters in Proposition 64. Accordingly, the court concluded that this word "is not indicative, one way or the other, of the voters' intent in repealing the statute or ensuring its retroactive application. The plain meaning of the unaltered term does not reveal the electorate intended to apply the amendment to pending litigation." (*Id.*, at p. 572.)

It is perhaps not surprising, therefore, that courts disfavor relying on isolated language in an initiative because it is rarely determinative of the voter's intent on the issue of retroactivity. Indeed, this Court in *Evangelatos* rejected efforts "to stretch the language of isolated portions of the statute" and instead viewed the proposition at issue "as a whole" to conclude, as is true with Proposition 64, that "the subject of retroactivity or prospectivity was simply not addressed." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1209.)

This Court recently affirmed that "'a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective.'" (*Myers*, *supra*, 28 Cal.4th at p. 841.) In the absence of an express retroactive provision or any clear indication of retroactive intent in the ballot materials, Proposition 64 must be applied prospectively only.

The Court of Appeal, however, ignored all of these basic principles of statutory construction. Instead, it concluded that because Proposition 64 could be categorized as a "repeal" statute – a point discussed further below – it was entirely unnecessary to conduct any inquiry at all into the intent of the voters. (See slip op. at 11 [holding that a court "need not determine the voters' intent" when "a statutory enactment repeals a statute that provides a purely statutory cause of action"].) The court did not cite any case for the proposition that the inquiry into legislative intent may be entirely abandoned when a statute classified as a "repeal."

However, such an inquiry here reveals that Proposition 64 contains unequivocal expressions of an intention to *preserve* UCL claims and remedies. Proposition 64 expressly affirms the importance of the UCL for the protection of California consumers and businesses. (Pltfs' Letter Br., Ex. A, Prop. 64, §1(a), (d), (f), (g); *id.*, Prop. 64, Arguments and Rebuttals [the initiative "[p]rotects your right to file a lawsuit if you've been damaged"].) It also preserves the content of UCL causes of action and all remedies, as the Court of Appeal acknowledged. (*Id.*, Prop. 64, §§2-4.) Yet, the court disregarded that

these provisions are compelling evidence that the electorate did not intend Proposition 64 to be applied retroactively to all preexisting UCL "private attorney general" cases – including meritorious ones – particularly considered together with the absence of any express retroactivity provision.

Downey, also ignoring this unambiguous language of the initiative, asserts that Proposition 64 was designed to "eliminate frivolous unfair competition lawsuits" that supposedly proliferated under the prior law. (Def. Br. at 6-7.) Downey insists that the measure should be applied immediately to terminate all "private attorney general[]" UCL actions pending when it became effective to give effect to the voter's intentions. (Def. Br. at 5-8.) This Court previously has rejected similar assertions.

In *Evangelatos*, *supra*, 44 Cal.3d at pp. 1213-1214, as here, the '"findings and declaration of purpose"' of the initiative at issue "indicate[d] that the measure was proposed to remedy the perceived inequities resulting" under the old law. (*Id.* at p. 1213.) This Court noted, however, that "[m]ost statutory changes are ... intended to improve a preexisting situation and to bring about a fairer state of affairs." (*Ibid.*) The court concluded that "if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively, rather than prospectively." (*Ibid.*; see also *Aetna*, *supra*, 30 Cal.2d at p. 395.)

The underlying theme of Downey's brief is that *all* "private attorney general" UCL actions constitute the "frivolous" litigation targeted by Proposition 64. The initiative, however, does not say that. Whatever the proponents of Proposition 64 may have had in mind when they drafted it, Proposition 64 no where equates "private attorney general" UCL actions with "frivolous" litigation. On the contrary, Proposition 64 asserts that only "some" private attorneys have "misused" the UCL. (Pltfs' Letter Br., Ex. A, Prop. 64, §1(b).) Filing a UCL action with an uninjured plaintiff, in itself,

could not and did not constitute "misuse" of the UCL, because until Proposition 64 this practice was expressly allowed by that law.

Moreover, Proposition 64 does not eliminate actions brought on behalf of the general public – it expressly preserves them, either in the form of actions by public prosecutors, or in the form of representative actions. (*Id.*, §§1(f); 2.) The voters did not change how the merits of UCL lawsuits are to be tested. Nothing in the initiative alters the courts' power to determine whether a UCL action has merit through, for example, demurrers, motions for judgment on the pleadings, motions for summary judgment or summary adjudication, and trial.

Put another way, the voters gave no indication in approving Proposition 64 that the perceived problem of "abuse" in the filing of UCL representative actions was so pervasive or acute as to require immediate dismissal of all pending actions that do not meet the new standing requirements. On the contrary, the absence of any express retroactivity language, combined with the initiative's preservation of UCL causes of action and reaffirmation of the UCL as a consumer protection tool, demonstrate the electorate's intention that Proposition 64 be applied prospectively only. Nor will prospective application undermine the measure's "remedial" function, for the merits of pending "private attorney general" UCL actions can still be tested according to the familiar procedures that are untouched by the initiative.

Finally, in the initiative context, it is particularly important that the Court adhere to the presumption against retroactivity in the face of statutory silence. It has been nearly twenty years since this Court examined retroactivity in the context of voter initiatives in *Evangelatos*; initiative drafters are now fully on notice that silence gives rise to a presumption that the voters intended only a prospective application. Courts should not encourage "bait and switch" tactics by permitting initiative drafters to omit language

regarding retroactivity from new statutes in hopes of achieving an end-run around the voters with satellite litigation after the statute is passed.

Thus, it would be contrary to the voters' intent to apply the statutory repeal rule reflexively to terminate this case, thereby robbing California consumers of a valuable right to prove and obtain relief for serious UCL violations, and in the process, providing Downey with absolute immunity for its alleged wrongful practices. It is no answer to say that allowing leave to amend would sufficiently protect the rights of consumers in preexisting private UCL actions. The potential for such amendment cannot be used as a substitute for the primary task of determining whether voters actually intended the initiative to be applied to terminate cases on the date of its enactment.[2]

3. The "Statutory Repeal" Rule is Just One Tool for Discerning Legislative Intent

As explained above, there are many methods a court may use to determine whether a statute was intended to apply retroactively. Courts analyze not only the language of the statute, but also "[t]he context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction" to divine the legislative purpose. (*Fox v. Alexis* (1985) 38 Cal.3d 621, 629 (*Fox*).)

In addition to these methods for determining legislative intent, California courts will also infer an intent that a statute have retroactive application where an entire cause of action or remedy has been eliminated. In the context of the criminal law, it has been said that a presumption arises that

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[2] Although this Court should allow amendment if it determines that the statute applies retroactive, as discussed *infra*, amendment is far from guaranteed. For instance, a new qualified plaintiff may not step forward.