

CASE NO. S132433

SUPREME COURT
FILED

IN THE
SUPREME COURT OF CALIFORNIA

JUL 25 2005

THOMAS BRANICK, et al.,
Plaintiffs/Appellants,

Frederick K. Ohrich Clerk

vs.

Deputy

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.

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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 *Burriss 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

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

