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

MILBERG WEISS BERSHAD
& SCHULMAN LLP
Jeff S. Westerman (94559)
Sabrina S. Kim (186242)
355 South Grand Avenue, Suite 4170
Los Angeles, CA 90071
Tel: (213) 617-1200
jwesterman@milbergweiss.com
skim@milbergweiss.com

KIESEL, BOUCHER
& LARSON, LLP
Paul R. Kiesel (119854)
Patrick DeBlase (189153)
8648 Wilshire Boulevard
Beverly Hills, CA 90211
Tel: (310) 854-4444
kiesel@kbla.com
deblase@kbla.com

MILBERG WEISS BERSHAD
& SCHULMAN LLP
Peter Sloane
Ann M. Lipton
One Pennsylvania Plaza
New York, NY 10119-0165
Tel: (212) 594-5300
psloane@milbergweiss.com
alipton@milbergweiss.com

LERACH COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP
Pamela M. Parker (159479)
Timothy G. Blood (149343)
Kevin K. Green (180919)
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: (619) 231-1058
pamp@lerachlaw.com
timb@lerachlaw.com
keving@lerachlaw.com

Attorneys for Plaintiffs/Appellants

Service on the Attorney General of the State of California and the District Attorney of the County of Los Angeles Required by Business and Professions Code Section 17209 and California Rules of Court, rule 44.5

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

MILBERG WEISS BERSHAD
& SCHULMAN LLP
Jeff S. Westerman (94559)
Sabrina S. Kim (186242)
355 South Grand Avenue, Suite 4170
Los Angeles, CA 90071
Tel: (213) 617-1200
jwesterman@milbergweiss.com
skim@milbergweiss.com

KIESEL, BOUCHER
& LARSON, LLP
Paul R. Kiesel (119854)
Patrick DeBlase (189153)
8648 Wilshire Boulevard
Beverly Hills, CA 90211
Tel: (310) 854-4444
kiesel@kbla.com
deblase@kbla.com

MILBERG WEISS BERSHAD
& SCHULMAN LLP
Peter Sloane
Ann M. Lipton
One Pennsylvania Plaza
New York, NY 10119-0165
Tel: (212) 594-5300
psloane@milbergweiss.com
alipton@milbergweiss.com

LERACH COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP
Pamela M. Parker (159479)
Timothy G. Blood (149343)
Kevin K. Green (180919)
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: (619) 231-1058
pamp@lerachlaw.com
timb@lerachlaw.com
keving@lerachlaw.com

Attorneys for Plaintiffs/Appellants

Service on the Attorney General of the State of California and the District Attorney of the County of Los Angeles Required by Business and Professions Code Section 17209 and California Rules of Court, rule 44.5

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

STATE STATUTES

MISCELLANEOUS

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

---

[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

---

[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.

"the Legislature, by removing the proscription from specified conduct, intended to condone past acts." (*People v. Collins* (1978) 21 Cal.3d 208, 212 (*Collins*), citing *Spears v. County of Modoc* (1894) 101 Cal. 303, 305 (*Spears*); *Sekt v. Justice's Court of San Rafael Township* (1945) 26 Cal.2d 297, 304, 308 (*Sekt*); *People v. Alexander* (1986) 178 Cal.App.3d 1250, 1260; *Estrada*, *supra*, 63 Cal.2d at pp. 747-748); *People v. Rossi* (1976) 18 Cal.3d 295 (*Rossi*).) So, for example, when the legislature entirely decriminalized certain conduct, *Collins*, *supra*, at p. 213, or removed all prohibitions on operating a saloon, *Spears*, *supra*, at p. 304, or lessened the penalties for escapes from prison, *Estrada*, *supra*, at p. 743, all pending prosecutions proceeded under the new statute on the assumption that the legislature "obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature *must have intended* that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

A similar rule obtains in the civil context. (See *Governing Board of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819, 829-830 (*Mann*) [observing that the canon has always applied to civil and to criminal matters]; *Moss v. Smith* (1916) 171 Cal. 777, 789 (1916) (*Moss*) [relying the same canons of construction cited in *Rossi*, *supra,* 18 Cal.3d at p. 301].) And, just as in the criminal context, statutes will be applied retroactively only for changes that alter the nature of the prohibited conduct or method of enforcement to such as degree as to allow the legislature's *intention* to be "conclusively manifest." (*Krause v. Rarity* (1930) 210 Cal. 644, 654.) The new statute must "wholly repeal[] an earlier one," (*Moss, supra*, 171 Cal. at p. 789), or "completely eliminate[]" prior procedures. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 (*Younger*).)

Here, however, rather than examine the type of change wrought by Proposition 64 to see whether it bore the unmistakable hallmarks of an intent to halt pending actions, the Court of Appeal instead held that retroactive application is automatically necessary for any statutory repeal (See slip op. at 11.) In so doing, the Court of Appeal failed to recognize that whether a statutory amendment should be categorized as a "repeal" is itself a legal *conclusion*, based on the nature of the change itself and a determination of legislative intent – it is not a *test* to decide whether a change operates retroactively. Thus, the court misread the cases on which it relied, and ignored the "transcendent canon of statutory construction that the design of the Legislature be given effect." (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587.)

For instance, the Court of Appeal found support for its automatic retroactive application of Proposition 64 in this Court's decision in *Mann*. (See slip op. at 11-12.) In that case, the effect of the new legislation was to eliminate altogether the ability of a government agency to take disciplinary action against employees based on marijuana arrests or convictions. (*Mann, supra*, 18 Cal.3d at pp. 829-830.) This Court interpreted the repeal in much the same way similar repeals are interpreted in the criminal context, namely, that the new legislation reflected a change in "prevailing societal views as to the appropriate treatment of marijuana offenders," and evinced a "public policy [to] prohibit[] public entities from imposing adverse collateral sanctions" for older convictions. (*Id.* at p. 831.) In such circumstances, there was an inference that the formerly-condemned behavior was now, if not *condoned*, at least viewed as far less serious than it had been previously, and it

was appropriate to halt pending actions.[3] This interpretation of the legislature's intent was bolstered by the fact that the statute explicitly mandated the temporal reach of the law. The law provided that no sanction could be imposed on the basis of marijuana arrests or convictions "'*on or after* the date the records of such an arrest or conviction are required to be destroyed... or *two years from the date of such conviction* or arrest without conviction *with respect to* arrests and *convictions occurring prior to January 1, 1976.*'" (*Id.* at p. 827 [emphasis by the court].) Thus, contrary to the Court of Appeal's view, the nature and context of the legislature's actions formed an integral part of the analysis.

The principle was also illustrated in *Internat. Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, a case relied upon by Downey. There, a statute authorized the creation of certain fair competition ordinances, and also permitted injured parties to sue to enjoin violations of those ordinances. After a suit was brought, the statute was repealed – thus eliminating both the authorization for the fair competition ordinances themselves, and all rights of action to enforce the ordinances. (*Id.* at p. 421.) Once again, the statute completely changed the nature of the prohibitions on the conduct, eliminated *all* private enforcement actions, and was therefore construed to halt pending cases. (*Id.* at p. 423.) And in *Moss*, a legislative alteration worked "radical changes to the pre-existing law," completely eliminating provisions that had permitted any causes of action against the

---

[3] Significantly, in support of its holding, *Mann* cited *Southern Service Co. v. County of Los Angeles* (1940) 15 Cal.2d 1 (*Southern Service*). (See *Mann*, *supra*, 18 Cal.3d at p. 829.) In *Southern Service*, however, the statutory repeal included a specific command that the new rule apply to pending actions, which was taken by the Court as an unequivocal declaration of legislative *intent*. (See *Southern Service, supra*, 15 Cal.2d at p. 13.)

defendants for monetary relief. (See *Moss, supra*, 171 Cal. at p. 787.) Once again, these changes by their nature evinced an intent that they act retrospectively. (*Id.*; see also *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184 [amendment precluding claims against property brokers under usury laws works "radical changes" to existing statute and deserves retroactive application]).[4]

Younger, another case overlooked by the Court of Appeal but relied upon by Downey, also completely replaced judicial mechanisms with a radically different administrative procedure. The legislative amendment at issue there completely stripped the courts of jurisdiction to provide the remedy sought – destruction of records relating to marijuana arrests or convictions. (*Younger, supra*, 21 Cal.3d at p. 110). The Court clearly took the amendment as evidence of a legislative intent that the change be applied to pending cases. In response to the Attorney General's assertion that the new legislation had the same intent as the old, and that the repeal was simply a matter of form over substance, the Court responded: "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." (*Ibid.*) Plainly, if there had been evidence of a different intent, the repeal rule would not have applied.

The flipside of the repeal canon, however, is that a modification to a statute will *not* be construed to operate retrospectively when the nature of the change is such that no inference of a legislative intent for retroactive application can be found.

---

[4] Additionally, the statutory amendment in *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679 (*Brenton*), relied upon by the Court of Appeal, completely eliminated the preliminary anti-SLAPP motion to strike in certain types of cases.

For instance, *Krause* addressed an amendment to California's vehicle codes (the same amendment that had received the Court's attention in the case of *Callet v. Alioto* (1930) 210 Cal. 65 (*Callet*), decided earlier that year). The amendment eliminated a previous statute that had permitted lawsuits by passengers of vehicles, or their heirs, for injuries sustained on account of the driver's negligence, and instead replaced it with a provision insulating the driver from such suits except in cases of "gross negligence" or other misconduct. (*Krause, supra*, 210 Cal. at pp. 651-652.) The Court concluded that the change from liability for ordinary negligence to gross negligence was simply not drastic enough to suggest that the legislature intended its actions to apply retroactively. As the Court put it, "The only change brought about by the new law was in the nature and character of the proof required in each case. There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery." (*Id.* at p. 654.) The Court specifically distinguished cases like *Moss*, noting that such cases, "repealed entirely the statute conferring the right, without a saving clause, or to have so amended the prior law on which the cause of action was founded as to remove from the operation of the old law, either specifically or by necessary implication, certain parties who might theretofore have been subject to the litigation which was held to have terminated by reason of the amendment." (*Id.* at p. 655.)[5] For the *Krause* Court, such large-scale repeals

---

[5] Though *Krause* noted that the legislation under consideration did not alter the parties "who might theretofore have been subject to the litigation," by its very phrasing – not to mention the cases relied upon – it is clear that *Krause* was referring to *defendants* who might be "subject" to liability. The *Krause* Court had no occasion to consider a statute that altered the standing requirements but kept liability intact, and certainly had no occasion to consider alterations to standing requirements in actions that, substantively, were intended to vindicate the rights of the *public*.

were relevant because they demonstrated the *intent* of the legislature; as the Court explained, had the legislature eliminated the right of action against drivers *entirely* – without even permitting lawsuits for "gross negligence" – then the "legislature would have been unrestrained by constitutional barriers and *its intention*, in the absence of a saving clause, would have been conclusively manifest." (*Id.* at p. 654.)[6]

The repeal rule is also inapplicable when, based on the surrounding circumstances, there are reasons to believe that it is not reflective of the legislature's intent to affected pending actions. For instance, in *Hopkins*, this Court addressed a change to California's Constitution that removed the trial court's jurisdiction to hear certain types of cases. (See *Hopkins, supra*, 218 Cal. 62 at p. 67.) In considering whether to apply the change to pending actions, this Court immediately recognized that it was dealing with two canons:

> While it is the general rule that a cause of action or remedy dependent on 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, it is equally well settled and is a fundamental rule of statutory construction that every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed.

---

[6] In *Callet*, the Court addressed the same statutory change, but in that action, the passenger survived the accident, and thus had a right of action under common law. (See *Callet, supra*, 210 Cal. at p. 68.) In *Krause*, the Court concluded that because the passenger had died and the suit brought by his heirs, the statute had no grounding in common law. (*Krause, supra*, 210 Cal. at p. 652.) The distinction was important, because, as discussed further below, the statutory repeal rule has been interpreted to include certain exceptions for common law causes of action. *Callet* thus had no occasion to decide whether, in the absence of an underlying common law right, the statute at issue would be construed to apply retroactively.

(*Id.* at pp. 66-67.) Because the Court concluded that "[t]here is nothing in the 1929 amendment of section 29 of the Municipal Court Act, *supra*, indicating that it was intended to have a retroactive operation," the Court refused to apply it to pending actions, notwithstanding the repeal canon. (*Id.* at p. 67.)

There are other examples of situations where, despite the existence of a "repeal," this Court has determined that no intent for retroactive application may be inferred. In *In re Pedro T.* (1994) 8 Cal.4th 1041, the defendant was sentenced under a provision that temporarily increased the penalty for car theft. (*Id.* at p. 1044.) Before the conviction was final, the increased penalty provision expired pursuant to a "sunset provision." The defendant asserted that he was entitled to the benefit of the lesser punishment, relying on cases like *Estrada* holding that when a harsher punishment is repealed prior to a final judgment, a defendant is entitled to the lesser penalty. (*Ibid.*)

Despite the nominal existence of a "repeal," however, the Court, refused to hold that the sunset clause operated retroactively. The Court determined that there was no evidence suggesting that the legislature's purpose in enacting higher penalties had ceased to operate as of the sunset date with respect to conduct occurring during the temporary period. (*Ibid.*) Rather, "the very nature of a sunset clause, as an experiment in enhanced penalties, establishes – in the absence of evidence of a contrary legislative purpose – a legislative intent [that] the enhanced punishment apply to offenses committed throughout its effective period." (*Id.* at p. 1049.)

In other situations, courts refuse to apply large-scale repeals retroactively because they have found legislative intent to save pending actions. (See, e.g., *Callet, supra*, 210 Cal. at p. 67 [stating the general rule that a repeal will not operate retroactively if the legislature has including a savings provision].) Significantly, the legislature need not express its intention to save pending actions purely by inclusion of an express savings provision within the statute itself. The *intent* to save may be found by *implication*, even in the

absence of an express savings clause. For instance, in *County of Alameda v. Kuchel* (1948) 32 Cal.2d 193 (*Kuchel*) (cited with approval in *Younger, supra*, 21 Cal.3d at p. 110), this Court held, "It is not necessary that there be an express saving clause in order to save rights under a statute. It is sufficient *if an intent to that effect* appear by legislative provision at the session of the Legislature effecting the repeal of the statute from which the rights are to be saved." (*Kuchel, supra*, 32 Cal.2d at p. 198.) And in *Traub v. Edwards* (1940) 38 Cal.App.2d 719 (*Traub*), also cited in *Younger*, the court also made clear that the intent of the legislature, and not the existence of a saving clause, was paramount. As the court put it, "When it is the purpose of the legislature to repeal a statute and to save the rights of litigants in pending actions based upon such statute, such purpose may be accomplished by including an express saving clause in the repealing act. But such rights may likewise be saved by any act passed at the same session of the legislature showing that the *legislature intended* that the rights of litigants in pending actions should be saved." (*Traub, supra*, 38 Cal.App.2d at p. 721.)

Finally, where legislative intent may be determined without reference to the repeal rule at all, the repeal rule is simply not employed. For instance, *Gartner v. Roth* (1945) 26 Cal.2d 184, involved a 1941 statute which forbade anyone from redeeming property ceded to the State as a result of nonpayment of taxes. In 1943, the legislature passed a second law commanding that the 1941 statute "'be postponed and suspended until June 1, 1945.'" (*Id.* at p. 186.) The plaintiffs lost their property in 1942, and immediately submitted an application to redeem it. The Court was confronted with the question whether the second statute operated retroactively so as to permit redemptions for property deeded to the state between 1941 and 1943. Although the statute completely eliminated the basis for the State's refusal to allow plaintiffs to redeem the property (at least during the suspension period), the Court made no reference to the statutory repeal rule *at all*; instead, the issue was decided

purely by reference to evidence of the legislature's intent, including the purpose behind the 1943 Act. (See *id.* at pp. 188-190.)

In a similar vein, *Fox* involved changes to the Vehicle Code regarding penalties for driving while intoxicated. The Code originally provided that the Department of Motor Vehicles was required to suspend the drivers' license of certain persons convicted of repeated offenses, but that a mandatory exemption was granted to anyone who completed a counseling program. (See *Fox, supra*, 38 Cal.3d at p. 625.) After the plaintiff's accident, but before his conviction, the law changed to entirely eliminate the exemption. (*Ibid.*)[7] Although the repeal of the exemption for participants in counseling programs left the Department subject solely to a mandatory obligation to suspend licenses after conviction, the Court analyzed the problem purely in terms of legislative purpose, without need to resort to the statutory repeal canon, ultimately concluding that no retroactive application had been intended. (See *id.* at pp. 627-630.)

Perhaps the most instructive modern case on the repeal canon is one in which this Court did not mention it at all, yet unequivocally reaffirmed that the effect of a statutory repeal depends on legislative (or voter) intent. In *Myers*, *supra*, 28 Cal.4th 828 – another case overlooked by the Court of Appeal – this Court held that repeal of a statute giving tobacco companies immunity from suits 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. *Myers* addressed the repeal of a purely statutory right – the right to be exempt from tort liability. The Court was aware of the repeal

---

[7] The provisions of the Code at issue were not considered criminal penalties, and the Court did not reach the question whether their retroactive application would violate the Constitution. (See *id.* at p. 627 fn. 4.)

canon, as evidenced by Justice Moreno's dissent, which acknowledged the repeal canon but also recognized the primacy of the legislature's intent. (*Id.* at pp. 849-52, 853 (dis. op. of Moreno, J.).) Still, the *Myers* Court rested its holding not on the repeal canon, but on the precept 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.'" (*Id.* at p. 841 [emphasis by the Court], quoting *Evangelatos*, *supra*, 44 Cal.3d at p. 1209.)

Since *Myers*, other cases have analyzed statutory repeals through the prism of legislative intent. Recently, the Second Appellate District in *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 (*Kleeman*), dealt with repeal amendments to the Labor Code in much the same manner as did the Supreme Court in *Myers*. First, the court recognized that its primary obligation was to "determine[] and give[] effect" to the legislature's intent. (*Id.* at p. 282.) Unlike the Court of Appeal here, however, the *Kleeman* court examined the statutory language pursuant to the controlling principles in *Myers*, among other cases. (*Id.* at pp. 285-286.) It concluded, based on express statutory language, that the amendments were intended to apply to the injuries suffered by the plaintiff, whether those amendments were characterized as prospective or retrospective. (*Ibid.*) The court invoked the repeal rule. (*Id.* at pp. 283, 286.) However, its analysis of that rule did not turn on whether there was a savings clause. Rather, the court's decision rested on other statutory language clearly indicating the legislature's actual intent. (*Id.* at pp. 285-286.)

4. The Court of Appeal Erred by Failing to Recognize that the "Statutory Repeal" Rule Sheds No Light on the Intent Behind Proposition 64

As explained above, the statutory repeal canon cannot be applied in a vacuum; rather, it is a rule of construction, like other rules of construction, and is only relevant to the extent that it sheds light on legislative (or, in this case,

voter) intent. But rather than recognize this principle, the Court of Appeal reflexively applied the statutory repeal rule without regard for its true function.

The Court of Appeal observed that the rule, as stated in *Callet*, provides 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. ... This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right, should not be construed to affect existing causes of action.

(Slip op. at 12, quoting *Callet, supra*, 210 Cal. at pp. 67-68.) Taking these guidelines as though they were per se rules requiring retroactive application of all legislation within their scope, the Court of Appeal dutifully examined whether Proposition 64 repealed a right grounded in the common law (no), (slip op. at 14-15), whether Proposition 64 affected a "vested" right of action or remedy (no), (slip op. at 13), and whether Proposition 64 contained a saving clause (no), (slip op. at 15.) Having found the "requirements" of the rule met, the Court of Appeal then perceived itself as bound to apply Proposition 64 retroactively, regardless of voters' intent. As explained below, the Court of Appeal failed to perceive that these "requirements" are merely *tools* to *ascertain* intent, and thus must always be subordinate to that purpose.

As described above, the repeal rule as a guide to legislative intent is rooted in both civil and criminal law. However, in the context of civil disputes, the rule was developed against a background of the common law tradition, where rights solely a creature of statute were relatively limited and

simply did not represent the primary means of governing conduct.[8] At that time, common law rights were viewed as akin to property rights that could not be abridged retroactively by the legislature, either due to the Contracts Clause or general due process concerns.[9] (See *Landgraf, supra*, 511 U.S. at p. 272; see generally Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence* (1936) 20 Minn. L.Rev. 775.) These rights were often conceived as "vested," – which in some definitions meant any right "arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it." (*Steamship Co. v. Joliffe* (1864) 69 U.S. 450, 457-458 [17 L.Ed. 805].) It became familiar to courts to avoid construing legislation in a manner that would interfere with these "vested" rights. (See, e.g., *Barber v. Galloway* (1924) 195 Cal. 1, 9.)

Statutory rights, by contrast, were viewed as somewhat more artificial, see Pound, *Common Law and Legislation* (1908) 21 Harv. L.Rev. 383, 385, and were often duplicative or layered on top of the underlying common law

---

[8] In 1872, California adopted a comprehensive code of criminal and civil statutes, see Grossman, *Codification and the California Mentality* (1994) 45 Hastings L.J. 617. The penal code completely eliminated common law crimes, Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation* (1999) 33 U.S.F. L.Rev. 313; see also *Keeler v. Superior Court* (1970) 2 Cal.3d 619 (""Constructive crimes -- crimes built up by courts with the aid of inference, implication, and strained interpretation -- are repugnant to the spirit and letter of English and American criminal law."' [citing *Ex parte McNulty* (1888) 77 Cal. 164, 168]), while the civil code was soon largely rendered secondary to the common law, see Grossman, *supra*, at pp. 619-620 (characterizing the California Civil Code as having been reduced, by 1901, to little more than a restatement of the common law.)

[9] There was also a suspicion among judges of legislative interference with the primary rights created through the common law.

rule. (See, e.g. *Callet, supra*, 210 Cal. at pp. 68-70.) Statutory rights, distinct from common law rights, could not "vest" prior to final judgment. (See, e.g., *Willcox v. Edwards* (1912) 162 Cal. 455.) Because of the constitutional limitations on a legislature's ability to retroactively eliminate rights grounded in common law and/or contracts under statutory law, courts were confronted with essentially conflicting canons – one, the canon requiring a presumption that legislatures did not intend to interfere with common law rights, and two, the statutory repeal canon, that the legislature intends to retroactively condone conduct when prohibitions on that conduct are removed.

The compromise position, which was quite natural for a time when common law causes of action governed most civil relationships, became the rule relied upon by the Court of Appeal, namely, that a "cause of action or remedy dependent on a statute falls with the repeal of the statute ... in the absence of a saving clause ... when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law" because such common law rights are "vested property right[s] which may not be impaired by legislation." (*Callet, supra*, 210 Cal. at pp. 67-68.) Because of the primacy of common law, this rule had limited application and did not threaten the general prohibition on retroactive legislation. And though these "exceptions" to the repeal rule – that the right must not be based in common law or involve vested rights – sound complex today, they were never intended to obscure the basic animating principle of the rule: Where the legislature has redefined the nature of prohibited conduct or enacted entirely new remedies, there is an inference that the legislature intended the new rules to apply to pending actions.[10]

---

[10] Though older cases phrase the repeal canon in a manner that suggests the repeal of a statute actually deprives the prosecutor (or plaintiff) of the *power* to

Today, statutory law has assumed a greater importance than the common law in ordering relationships. (See *Landgraf, supra*, 511 U.S. at p. 272.) Simultaneously, the concept of "vested" rights has assumed less primacy. Causes of action are rarely viewed as "vested" at all, whether they stem from the common law or statutory law, see *County of Los Angeles v. Superior Court* (1965) 62 Cal.2d 839, 844 ("We find no constitutional basis for distinguishing statutory from common-law rights merely because of their origin, and describing a right as 'vested' is merely conclusory."), and though actual property – assets of a marriage, pension benefits, and so forth – are still described as "vested" or "not vested," even these rights may be retroactively abridged so long as the legislature, acting with its police powers, has strong reasons for doing so, see *Bouquet, supra*, 16 Cal.3d at p. 592. In the modern approach, then, there are few per se limitations on the *ability* of a legislature to act retroactively; it is more of a question whether the legislature must have a stronger or weaker justification for its actions, see *Flournoy v. State* (1964) 230 Cal.App.2d 520.

The original repeal rule, then, phrased in terms of common law and vested rights, carried with it built-in limitations that ensured that legislative

---

proceed with the action (or the court of the power to hear it) – regardless of legislative intent – that early conception quickly gave way to the more modern view that the repeal of an entire statute may be taken as a measure of legislative intent, as the opinions in *Krause, Hopkins,* and *Estrada* make clear. The older conception may have reflected the view that statutory law was more artificial than common law, and thus more ephemeral. (See, e.g., Pound, *supra*, at page 385 [decrying the tendency of courts to see legislation as unnecessary and ill-advised].) This older view has little role to play today. After all, courts can reinterpret a statute and thus eliminate a cause of action altogether, yet still make their decisions prospective only, see, e.g., *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) 46 Cal.3d 287; thus, it hardly makes sense to hold that the repeal of a statute somehow *deprives* the court of the power to act, regardless of the legislature's intention.

intent was, in fact, being effectuated for statutes that fell within its terms. But as the distinction between "vested" and "unvested" rights has faded, as has the significance of the common law, mechanical application of these strictures can no longer ensure the effectuation of legislative intent. Indeed, it will rarely be the case today that a determination whether a statutory "right" has "vested" will serve as a useful marker of legislative intent. Nor will it shed much light on legislative intention to determine whether the repealed right was unknown at common law. As these contours on the repeal rule have faded in significance, it is incumbent upon courts to conduct a more holistic inquiry into the surrounding circumstances to determine whether the modification of a statute represents the kind of extreme change from the prior law that truly evinces an intent to halt pending actions.

This case is a perfect example of the problem. The Court of Appeal, for instance, examined the common law of unfair competition as part of its analysis of the effect of Proposition 64. (Slip op. at 13-15.) As a practical matter, it is difficult to see how this analysis would shed any light on the intent of the legislature or the voters. Indeed, one has only to imagine the results if the Court of Appeal had found a different common law history to see the arbitrariness of the court's inquiry – it can hardly effectuate any reasonable public policy to make the legitimacy of pending lawsuits (some of which may be in advanced stages of discovery, or even on appeal after a full trial) turn solely on whether the common law as it existed in the late 1800's would have permitted uninjured plaintiffs to sue to vindicate public rights. And, indeed, as statutes and new forms of actions replace the common law, a per se

application of the repeal canon threatens to turn what was once a narrow exception to the prospectivity principle into a new default rule.[11]

Had the Court of Appeal taken the correct approach, it would have determined that the change wrought by Proposition 64 was not akin to the changes involved in cases that apply new rules retroactively, and cannot, by itself, fall into the narrow category of legislative actions that by their very nature give rise to an inference of an intent for retroactive operation.

Proposition 64 did not repeal any UCL "cause of action or remedy." (*Callet, supra*, 210 Cal. at p. 67.) In fact, as the Court of Appeal acknowledged, the measure left untouched all the familiar grounds for UCL liability as well as all UCL remedies. (Slip op. at 15, [noting that "unfair competition and false advertising causes of action and remedies remain available for those who meet the standing requirements" of the initiative]; see Pltfs' Letter Br., Ex. A, Prop. 64, §1(a).) Downey is under the precise same legal obligations and duties as it was before the passage of Proposition 64; thus, if conduct that occurred prior to passage of the measure was actionable

---

[11] The Court of Appeal also incorrectly relied on Government Code section 9606, which states: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." (Gov. Code, § 9606.) The Court of Appeal interpreted section 9606 to command that repealing statutes be interpreted retroactively. But section 9606 (and its predecessor, Political Code § 327) speak to the *power* of the legislature to halt pending cases, without providing any guidance for determining *when* the legislature has done so. (See *Moss, supra*, 171 Cal. at p. 787 [due to § 327, "[t]here can be no question in this state of the power of the legislature to destroy" unvested rights].) These provisions only reflect an earlier era's concern with distinguishing legislative action that constitutes an exercise of the police power, and legislative action that creates as a "vested" contract with private parties. (See *United States v. Winstar Corp.* (1996) 518 U.S. 839, 871-887 [116 S.Ct. 2432, 135 L.Ed.2d 964] (tracing the history of such disputes); *Western Union Telephone Co. v. Hopkins* (1911) 160 Cal. 106, 121 (discussing § 327 in this context).)

then, it remains actionable now, and the public's right to be protected from it remains unchanged. And although it changed the standing requirements for private plaintiffs bringing representative claims, critically, the true parties whose rights are vindicated in such actions – members of the public who have been harmed by unlawful practices – remain precisely the same as before.

To be sure, Proposition 64 changes existing UCL law. But because Proposition 64 left intact the most critical aspects of a UCL cause of action, it is impossible to interpret the alterations as an unequivocal signal that the measure was intended to apply retroactively to halt pending actions that, indisputably, allege conduct that is still prohibited and subject to the precise same penalties as before. To the contrary, Proposition 64's own declarations of purpose include affirmations that the UCL maintains its status as a vital tool to protect Californians. (*Id.*, §1(a), (d).) All indications, then, suggest that it would be *contrary* to the voters' intent – not to mention perverse – if the change resulted in a windfall to businesses that violate the UCL.

Once again, it is useful to contrast the potential effects of a retroactive application of Proposition 64 with the retroactive application of the statutory repeals in *Mann* and *Younger*. In *Mann*, retroactive application prevented a school district from dismissing a teacher over a stale marijuana conviction – which was entirely in keeping with what this Court determined was the legislature's purpose, namely, to minimize the lingering consequences of what it had deemed to be a minor offense. (*Mann, supra,* 18 Cal.3d. at p. 831.) Similarly, in *Younger*, the legislature preserved the ultimate legal remedy available to plaintiffs, but adopted an entirely different procedure for persons to use when seeking destruction of their criminal records – presumably, a procedure that would vest any judgment or discretion in an entirely different entity. (*Younger, supra*, 21 Cal.3d at p.108.) The retroactive application of the rule in *Younger* likewise left the remedy intact, and had only the effect of

requiring the plaintiff to use the new procedures to submit a new application, which, in fact, he did. (*Ibid.*)

By contrast, Proposition 64 was intended to address the fact that *some* attorneys were perceived to be misusing the UCL, while simultaneously preserving all of the *substantive* actions to protect the public. A prospective application of Proposition 64 will certainly accomplish this result; presumably, fewer frivolous actions will be filed, and attorneys bent on obtaining nuisance settlements will now have greater difficulty doing so through the mere threat of a lawsuit, or the filing of a complaint. Retrospective application, however, will go far further – it will destroy many pending cases that have already been found *not* to be frivolous (because they have survived early procedural skirmishes), and leave serious wrongdoing unremedied where statutes of limitation prevent the filing of new complaints. By contrast, whatever frivolous actions a retroactive application may reach, these may be dealt with using the ordinary tools available to a court to eliminate baseless litigation. Unlike the practical results in *Mann* and *Younger*, a retroactive application here will almost certainly *not* achieve the voters' obvious goals.

The Court of Appeal was therefore incorrect to reject the approach taken by the only currently published California appellate decision that has examined the voters' intent in resolving the question of Proposition 64's retroactivity. In *Kintetsu*, the court recognized that this Court has applied the repeal rule in situations where, as in *Mann*, the intention to apply a new repeal measure retroactively was made clear. (*Kintetsu, supra*, 129 Cal. App. 4th at pp. 571-572.) But nothing in Proposition 64 or its accompanying ballot materials indicates that the voters intended the measure to apply to preexisting cases. (*Ibid.*) The court therefore properly concluded that Proposition 64 could not be applied to cases pending on the date of its enactment. (*Id.* at p. 574.)

By explicitly rejecting any consideration of the voters' actual intent in enacting Proposition 64, the Court of Appeal here failed in the central task of statutory interpretation – to give effect to the intent of the measure.

B. Defendants Cannot Avoid the Intent Analysis By Labeling Proposition 64 as "Procedural"

Downey contends that Proposition 64 may be applied retroactively because it merely "amends procedural rules" concerning standing. (Def. Br. at 8-9.) Unsurprisingly, the Court of Appeal did not rest its holding on this ground, or even address it.

All statutory law, whether procedural or substantive, "may affect past transactions and [is] governed by the presumption against retroactivity." (*Russell*, *supra*, 185 Cal.App.3d at p. 816; see also *Elsner*, *supra*, 34 Cal.4th at p. 936; see also *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*); *Aetna*, *supra*, 30 Cal.2d at p. 393.) However, new enactments that are purely "procedural" in the sense that they "have no effect on substantive rights and liabilities, [and] affect only modes of procedure to be followed in future proceedings," may be applied to cases that predate the enactment. (*Russell*, *supra*, 185 Cal.App.3d at p. 816.) Such procedural amendments "typically affect only future conduct – the future conduct of the trial," and thus are not considered retrospective at all. (*Elsner*, *supra*, 34 Cal.4th at p. 936; see also *Tapia*, *supra*, 53 Cal.3d at pp. 288-289.) "In deciding whether the application of a law is prospective or retroactive, we look to function, not form." (*Elsner*, *supra*, at p. 936, citing *Tapia*, *supra*, at p. 289; *Aetna*, *supra*, at p. 394.) The central inquiry is whether the new law substantially affects the existing rights and liabilities of the parties. (*Elsner*, *supra*, at p. 936.)

Cases that have found new laws to be procedural, and thus properly applied to pending cases, explicitly and obviously concern procedures for the conduct of trials. In *Tapia*, for example, the court held that a provision of

Proposition 115 regarding the conduct of voir dire could be applied to pending cases in which the trial had not yet occurred. (*Tapia, supra*, 53 Cal.3d at p. 299.) Other cases cited by Downey, such as *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App.4th 913, 917-919 [procedures for effectuating settlement between employer and employee], *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 48-49 [timing of filing of certificate of merit in medical malpractice action], and *Brenton, supra*, 116 Cal.App.4th at 679 [new procedures for motions to strike SLAPP lawsuits] equally applied purely to trial procedures.

By contrast, Proposition 64 does not address the procedures of how ongoing litigation is to be conducted. Losing the ability to seek an early strike of a complaint, for example – which is purely a form of regulation of the court's docket – is very different from being deprived retroactively of the ability to bring any action at all. "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.)

In this respect, Proposition 64 is far more akin to the amendment at issue in *Aetna*, which changed the method by which disability payments for an employee would be calculated, see *Aetna, supra*, 30 Cal.2d at p. 391, or in *Elsner*, where a nominal change in the rules of evidence actually substantively altered the definition of negligence and shifted the burden of proof, see *Elsner, supra*, 34 Cal.4th at p. 924. In each of these cases, the Court concluded that the amendments were substantive in that to apply the amendment to pending cases would affect the parties' rights and liabilities, see *Aetna, supra*, 30 Cal.2d at p. 395; *Elsner, supra*, 34 Cal.4th at p. 924.

Downey points out that in several instances, courts have classified standing requirements as "procedural," and concludes that it necessarily

follows that Proposition 64 be characterized as procedural, as well. For example, Downey cites *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, in which a change to the standing requirements was deemed "procedural" and applied retroactively. What Downey fails to note, however, is that in that instance, the new statute *explicitly* applied to all pending cases. See Code Civ. Proc., § 377.35. Thus, the "procedural" label was irrelevant to the court's decision.

Downey's other citations are equally irrelevant, because neither involved an analysis of standing *in the context of the question of retroactivity*. In *Casa Hererra, Inc. v. Beydoun* (2004) 32 Cal.4th 336, the Court held that a voluntary dismissal for lack of standing would not qualify as a determination "on the merits" that would subsequently support an action for malicious prosecution. (See *id.* at p. 348.) Similarly, in *Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, the court used the term "procedural" to characterize the basis for its reversal of the lower court's grant of a writ, but only to contrast that resolution with a resolution on the merits (i.e., substantive evaluation of the claim). (*Id.* at p. 875.) However correct the characterization of standing as "procedural" in those contexts may have been, it does not answer the question whether Proposition 64 may be applied retroactively. As the *Russell* court explained, in the context of retroactivity, "the distinction between 'substantive' and 'procedural' is a misdirection. Both types of statutes may affect past transactions and be governed by the presumption against retroactivity. The only exception which we can discern from the cases is a subcategory of procedural statutes which can have no effect on substantive rights or liabilities, but which affect only modes of procedure to be followed in future proceedings." (*Russell, supra*, 185 Cal.App.3d at p. 816; see *Aetna, supra*, 30 Cal.2d at p. 394 [no "clear-cut distinction between purely 'procedural' and purely 'substantive' legislation"].)

The Supreme Court explained the principle in *Landgraf*, *supra*, 511 U.S. 244: "the mere fact that a new rule is procedural does not mean that it applies to every pending case." (*Id.* at p. 275 fn. 29.) The example given in *Landgraf* fits the situation with 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.*)

Here, whether the label is "substance" or "procedure," persons who have been victimized by Downey's unfair business practices may have relied to their detriment on the existence of this representative suit filed on their behalf. Had such individuals known that Proposition 64 could be applied to pending cases, they might have brought their own actions or sought timely intervention, but may now be barred by the statute of limitations. (See *Evangelatos*, *supra*, 44 Cal.3d at pp. 1194, 1215-1217 [recognizing that it would be unfair to change "the rules of the game" to pending cases absent explicit notice in the legislation].) Additionally, overextended public agencies may not have the resources to take up the consumers' claims if cases, including meritorious ones, are routinely dismissed on Proposition 64-related grounds. Where, as here, the limitations period may already have run, the retroactive application of Proposition 64 gives Downey a complete defense that did not exist when this action was commenced.

C. If the Court Concludes Proposition 64 Applies to This Case, Leave to Amend to Substitute a New Plaintiff Is Appropriate

1. California Courts Liberally Grant Amendments in the Interests of Justice

The Court of Appeal concluded that, while Proposition 64 applied to this case, Plaintiffs should be given the opportunity to substitute a new plaintiff who meets the initiative's standing requirements. (Slip op. at 17.)

Amendment would be fair, would not prejudice Downey, and would serve the interests of justice.

Section 473 of the California Code of Civil Procedure provides that the Court "may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party." (Code Civ. Proc., § 473(a).) "'There is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceeding.'" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; see also *Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 488-489.) This policy rests on the fundamental principle that cases should be decided on their merits. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256; *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 585.)

Pursuant to this established precedent, courts have granted leave to amend to substitute a new plaintiff when the named plaintiff is no longer fit to serve. In such circumstances, amendment is proper so long as it does not present an entirely new set of facts and the defendant is not prejudiced. In the leading case of *Klopstock, supra*, 17 Cal.2d 13, this Court affirmed an order allowing substitution of a new plaintiff when the original plaintiff was found not to be the proper party. The Court rejected the contention that substitution would, in effect, institute an entirely different suit on a new claim. As it explained: "In determining whether a wholly different cause of action is introduced by the amendment ... nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated." (*Id.* at p. 20.) This Court concluded that amendment was proper since the original plaintiff "sought on behalf of the corporation to enforce against the defendants exactly the same liability which is the basis for the relief now sought on behalf of the corporation." (*Id.* at p. 21.) The defendants were not prejudiced as they had "been fully apprised since the

filing of the original complaint of the facts which are relied upon to state a right to relief against them in behalf of the corporation." (*Ibid.*)

Since *Klopstock*, numerous courts have permitted amendment "to substitute a plaintiff with standing for one who is not a real party in interest." (See, e.g., *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 507 [permitting amendment to substitute bankruptcy trustee for original plaintiff]; see also *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995 [allowing amendment under facts similar to *Haley*]; *Powers v. Ashton* (1975) 45 Cal.App.3d 783 [reversing denial of leave to amend where original plaintiff without standing sought to substitute real party in interest].)

Downey contends that these cases are distinguishable, because the amendment in each was necessitated by a "mistake" in naming the original plaintiff. (Def. Br. at 11.) According to Downey, amendment was proper in these cases because the original and substituted plaintiffs were "closely associated" and asserted only "derivative rights" – circumstances not present here. Downey misconstrues the basis for the holdings in these cases. What justified substitution was not that that the plaintiff was, as Downey suggests, merely a nominal figure asserting derivative rights. Rather, amendment was proper because the substitution did not substantially alter the nature of the action or the underlying facts. "California allows great liberality in the amendment of pleadings, particularly when the only change is a substitution of parties *without alteration of the substantive grounds of the suit.*" (*Olsen v. Lockheed Aircraft Corp.* (1965) 237 Cal. App.2d 737, 741.) In *Klopstock*, amendment was allowed because the new plaintiff sought to enforce against the defendants "exactly the same liability" that the original plaintiff had sought to enforce. (*Klopstock*, *supra*, 17 Cal.2d at p. 21.) Downey's assertion that substitution of a new plaintiff is allowed only when the change is purely "technical" misses the point. As the court observed in *California Air Resources Board v. Hart* (1993) 21 Cal.App.4th 289 "technical" in this

context means that the amendment "in no way affects the nature of [the] action." (*Id.* at p. 301.)

Downey disregards that numerous courts have approved the substitution of a plaintiff in cases that did not involve any "mistake" in the naming of the original party. Rather, such amendments have been allowed where, as here, the original plaintiff had standing at the outset of the suit, but lost that standing while the suit was pending. For example, in *La Sala v. American Savings & Loan Assn.* (1971) 5 Cal.3d 864 (*La Sala*), the original representative plaintiffs had standing at the commencement of the class action, but then arguably lost the ability to represent the class when they received individual benefits from the defendant. (*Id.* at p. 870.) This Court held that the plaintiffs' lack of a stake in the controversy might render them unsuitable to continue to represent the class. If that were the case, however, the trial court was required to "afford plaintiffs the opportunity to amend their complaint ... to add new individual plaintiffs ... in order to establish a suitable representative."[12] (*Id.* at p. 872.)

Substitution of a new plaintiff was also allowed in *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, on facts similar to those here. The original plaintiff in that case had standing at the outset, but as a result of an intervening legal decision, was no longer able to maintain the action. The trial court allowed amendment to substitute new plaintiffs even though the statute of

---

[12] Defendant attempts to distinguish *La Sala* by asserting that, unlike here, the original named plaintiffs in *La Sala* "indisputably had standing." (Def. Br. at 14.) There is no question, however, that plaintiffs here had standing at the time they brought this suit under the UCL's standing requirements as they then existed. Moreover, contrary to defendant's assertion, fundamental policy considerations inform the amendment question here, just as they did in *La Sala*. Those considerations include the importance of determining claims on their merits. (*Klopstock*, *supra*, 17 Cal.2d at p. 22.)

limitations had expired, because under the "modern rule" an amended pleading dates back to the filing of the original complaint provided that relief is sought on the same general set of facts.[13] (*Id.* at pp. 720-721.)

These established precedents compelled the Court of Appeal in this case to allow Plaintiffs the opportunity to seek amendment to add or substitute a new plaintiff. Downey, however, urges this Court instead to follow the holding of *Diliberti v. Stage Call Corp.* (1992) 4 Cal.App.4th 1468 (*Diliberti*). Downey's assertion that this case presents the "closest factual scenario to the facts here" is absurd. (See Def. Br. at 12.) On the contrary, *Diliberti* is sui generis and entirely distinguishable.

Diliberti was a personal injury action brought after a car accident involving two sisters, where the plaintiff's lawyer named the uninjured sister as plaintiff. (*Diliberti, supra*, 4 Cal.App.4th at pp. 1469-1470.) The error was not discovered for more than a year, by which time, of course, the statute of limitations had expired. (*Id.* at p. 1470.) The Fourth Appellate District upheld the trial court's denial of leave to substitute the injured sister as plaintiff. (*Id.* at pp. 1471-1472.)

Diliberti differs from this case in two significant ways. First, the plaintiff who originally sued in *Diliberti* was the "wrong" plaintiff. (*Id.* at p. 1470.) Mr. Branick and Ms. Campbell, of course, were the "right" plaintiffs at the time this action was commenced, under the law as it then existed. Second, the proposed new plaintiff in *Diliberti* sought recovery for her actual injuries, unlike the original plaintiff, who had not been injured at all. The defendants in that case had no notice of the new plaintiff's injuries when the case was filed.

---

[13] Defendant erroneously refers to *Jensen* as one of the cases in which a "mistake" was made in the naming of the original plaintiff. (Def. Br. at 11.) That is not correct.

(*Id.* at p. 1471.) By contrast, Downey has always been on notice of the nature of the wrongs and injuries alleged in this suit. Downey never contends otherwise.

Summit Office Park, Inc. v. U.S. Steel Corp. (5th Cir. 1981) 639 F.2d 1278 (*Summit*), is also distinguishable. There, the plaintiff was an indirect purchaser whose standing to enforce the antitrust laws was undermined when the Supreme Court redefined the nature of actionable *injuries* under the antitrust laws in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720 [97 S.Ct. 2061, 52 L.Ed.2d 707]. Plaintiff sought to substitute as plaintiffs certain direct purchasers, who also purported to represent an entirely new class of direct purchasers. (*Summit, supra*, 639 F.2d at p. 1279.) Amendment was not permitted because, unlike here, the complaint was premised on an entirely different set of substantive claims. (*Ibid.*) The Fifth Circuit expressly noted, however, that amendment would be appropriate where a proposed new plaintiff seeks to enforce substantively identical claims on behalf of the same represented group, and there is no new cause of action. (*Id.* at p. 1283 fn. 12.) This case presents that precise situation.

2. An Amendment Would Relate Back

As Downey acknowledges, the relation back doctrine applies when an amended complaint "(1) rest[s] on the *same general set of facts*, (2) involve[s] the *same injury*, and (3) refer[s] to the *same instrumentality*, as the original one." (*Norgart v. The Upjohn Co.* (1999) 21 Cal.4th 383, 409 (emphasis in original).) The relation back rule is "in furtherance of the policy that cases should be decided in their merits." (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600.)

Downey asserts that a new plaintiff would not assert the "same" injury, because Plaintiffs have not alleged any injury to themselves as a result of Downey's alleged misconduct, and thus any new plaintiff would allege a

"different" injury. This argument mischaracterizes the role of a UCL "private attorney general." Plaintiffs here based their claims on the harms suffered by the members of the public. A new private plaintiff would assert precisely those claims based on precisely the same facts, including the same wrongdoing by Downey. The only difference would be that the plaintiff will allege that he or she suffered the harm personally. That hardly constitutes a "substantial change in the action" (Def. Br. at 16), when Downey from day one has been fully apprised of the issues in the case.[14]

3. Downey's Baseless "Public Policy" Argument Cannot Trump Well-Settled Law

Lacking any legal support for its position on amendment, Downey resorts to name-calling under the guise of "public policy" to urge this Court to preclude substitution of any new plaintiff whose claims would relate back. Downey's attack is meritless.

First, there is no evidence suggesting this is the type of "frivolous" action targeted by Proposition 64. Indeed, this action already has survived Downey's first attempt to have it dismissed as a matter of law. Downey's pejorative characterizations of Mr. Branick and Ms. Campbell as "professional plaintiffs" and of this action as "attorney-driven litigation" (Def. Br. at 17) are unsupported in the record. Downey urges that plaintiffs' counsel should not be permitted to "benefit from their impermissible actions" by substituting a new plaintiff, neglecting to inform the Court precisely what counsel's

---

[14] It should be noted, too, that defendant does not address substitution of a public prosecutor for the current plaintiffs. Proposition 64's standing do not apply to public prosecutors. Such public law enforcement officials may prosecute actions brought on behalf of the general public, even though they, of course, have personally suffered no injury. (Pltf's Letter Br., Ex. A Prop. 64, §1(f).)

transgressions are, given that this action was properly filed in accord with governing law at the time of the suit. (Def. Br. at 17.)[15]

Finally, Downey contends that if amendment is allowed, Plaintiffs' counsel will "solicit" Downey's borrowers to find a new plaintiff, and thus "stir[] up" litigation. (Def. Br. at 19.) Such discussions are premature, and there is no basis for Downey's speculation that a new plaintiff could be found only through direct, unsupervised solicitation, or even that such solicitation would be improper.

---

[15] In *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572), cited by Downey, the trial court made an express finding that the plaintiff was a "professional plaintiff" and not otherwise suitable to serve as lead plaintiff and class representative. (*Id.* at p. 575.) No such finding has been made or even thought here. In any event, the court did not preclude substitution of a proper class representative in that case, but only encouraged the trial court to determine whether a proper class action exists before allowing the search for a new representative. (*Id.* at pp. 580-581.) *Saylor v. Lindsley* (2d Cir. 1972) 456 F.2d 896, is also distinguishable, in that there was no request to amend. Rather, the court disallowed a settlement entered into by counsel who had not adequately consulted with the plaintiff. Again, no such facts are present here.

IV. CONCLUSION

The Court of Appeal's determination that Proposition 64 must apply retroactively should be reversed. If, however, the Court concludes that Proposition 64 applies to this case, it should permit Plaintiffs the opportunity to substitute a new plaintiff who meets the new standing requirements, and should direct that any such amendment will relate back to the original complaint.

DATED: July 25, 2005

MILBERG WEISS BERSHAD & SCHULMAN LLP
Jeff S. Westerman
Sabrina S. Kim

JEFF S. WESTERMAN

355 South Grand Avenue, Suite 4170
Tel: (213) 617-1200
jwesterman@milbergweiss.com
skim@milbergweiss.com

and

MILBERG WEISS BERSHAD & SCHULMAN LLP
Peter Sloane
Ann M. Lipton
One Pennsylvania Plaza
New York, NY 10119-0165
Tel: (212) 594-5300
psloane@milbergweiss.com
alipton@milbergweiss.com

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
Pamela M. Parker (159479)
Timothy G. Blood (149343)
Kevin K. Green (180919)

PAMELA M. PARKER

401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: (619) 231-1058
pamp@lerachlaw.com
timb@lerachlaw.com
keving@lerachlaw.com

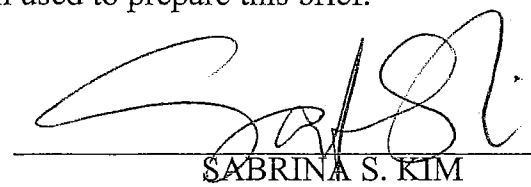
KIESEL, BOUCHER
& LARSON, LLP
Paul R. Kiesel (119854)
Patrick DeBlase (189153)
8648 Wilshire Boulevard
Beverly Hills, CA 90211
Tel: (310) 854-4444
kiesel@kbla.com
deblase@kbla.com

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COUNSEL

I, Sabrina S. Kim, hereby certify pursuant to California Rules of Court, rule 14(c)(1) that this entire Answer Brief on the Merits was produced on a computer, and that it contains 13,929 words, including footnotes, as calculated by the word count of the computer program used to prepare this brief.

DATED: July 25, 2005



SABRINA S. KIM

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 355 South Grand Avenue, Suite 4170, Los Angeles, California 90071.

2. That on July 25, 2005, declarant served the **APPELLANTS' ANSWER BRIEF ON THE MERITS** by depositing a true copy thereof in a United States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of July, 2005, at Los Angeles, California.

ANN MARIE GENOVESE

ESCROW – DOWNEY SUPREME COURT CASE
Case No. S132433
Appellate Case No. B172981

Service List – July 25, 2005
Counsel For Defendant(s)

MATTHEW A. HODEL***
MICHAEL LEBOFF
HODEL BRIGGS WINTER LLP
8105 IRVINE CENTER DRIVE, SUITE 1400
IRVINE, CA 92618
(949) 450-8040
(949) 450-8033 (FAX)

RICHARD A. DEREVAN
SNELL & WILMER LLP
600 ANTON BOULEVARD
SUITE1400
COSTA MESA, CA 92626-7689
(714)427-7000
(714)427-7799 (FAX)

COUNSEL FOR PLAINTIFF(S)

PAUL R. KIESEL
PATRICK DEBLASE
ANTHONY M. DE MARCO
KIESEL, BOUCHER & LARSON LLP
8648 WILSHIRE BOULEVARD
BEVERLY HILLS, CA 90211-2910
(310) 854-4444
(310) 854-0812 (FAX)

PETER SLOANE
ANN LIPTON
MILBERG WEISS BERSHAD & SCHULMAN LLP
ONE PENNSYLVANIA PLAZA
NEW YORK, NY 10119-0165
(212) 594-5300
(212) 868-1229 (FAX)

JEFF S. WESTERMAN
SABRINA S. KIM
MILBERG WEISS BERSHAD
& SCHULMAN LLP
355 SOUTH GRAND AVENUE, SUITE 4170
LOS ANGELES, CA 90071-3172
(213) 617-1200
(213) 617-1975 (FAX)

PAMELA M. PARKER
TIMOTHY G. BLOOD
KEVIN K. GREEN
LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
401 B STREET, SUITE 1700
SAN DIEGO, CA 92101-4297
(619) 231-1058
(619) 231-7423 (FAX)

BILL LOCKYER
ATTORNEY GENERAL OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
ATTN: CONSUMER LAW SECTION
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

STEVE COOLEY
DISTRICT ATTORNEY OF LOS ANGELES
CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
ATTN: CONSUMER PROTECTION DIVISION
210 WEST TEMPLE STREET
LOS ANGELES, CA 90012

THE HONORABLE WENDELL MORTIMER, JR.
LOS ANGELES SUPERIOR COURT
CENTRAL CIVIL WEST COURTHOUSE
DEPARTMENT 307
600 SOUTH COMMONWEALTH AVENUE
LOS ANGELES, CA 90005

COURT OF APPEAL
SECOND APPELLATE DIVISION FIVE
CASE NO. B172981
300 S. SPRING STREET, 2ND FLOOR
NORTH TOWER
LOS ANGELES, CA 90013-1213

*** DENOTES SERVICE VIA FACSIMILE