No. S 131798
Court of Appeal
1st Civ. No. A106199

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,

v.

MERVYN'S LLC,
Defendant and Respondent.

On Petition for Review After a Denial
Of a Motion to Dismiss by the Court of Appeal,
First Appellate District, Division Four

RESPONDENT MERVYN'S
OPENING BRIEF ON THE MERITS

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California Unfair Competition Law (Bus. & Prof. Code §17209)
Cal. Rules of Court, Rules 15(c)(3), 44.5(c)

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I. STATEMENT OF ISSUES.

This brief argues that Proposition 64's repeal of the right of uninjured plaintiffs to enforce the Unfair Competition Law (the "UCL") applies to pending lawsuits. The present action is such a suit, and Mervyn's moved to dismiss it on the ground that Proposition 64 applied to pending cases. The Court of Appeal disagreed. (See *Californians for Disability Rights v. Mervyn's, LLC* (2005) 126 Cal.App.4th 386, review granted.) (*CDR.*) The issues before this Court, as stated in the petition for review, are:

1. Does the statutory repeal rule still have any meaning under California law?

2. If so, does the statutory repeal rule compel the conclusion that Proposition 64 applies to all pending cases not yet final on appeal?

3. Is application of Proposition 64 to all pending cases not yet final on appeal also appropriate because considered prospective, not retroactive application?

II. SUMMARY OF ARGUMENT.

The statutory repeal rule provides that repeals of purely statutory rights and remedies apply to pending cases unless vested rights will be impaired or the lawmakers have provided to the contrary. The rule is established by numerous decisions of this Court. (See, e.g., *Younger v. Superior Court* (1978) 21 Cal.3d 102, 110 (*Younger*); *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829, and 830 fn. 8 (*Mann*) [citing cases]; *Wolf v. Pacific Southwest etc. Corp.* (1937) 10 Cal.2d 183, 184-185; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 [dicta; extensive discussion].) The justification from the standpoint of individual litigants is that "all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." (*Mann*, 18 Cal.3d at p. 829. See also Gov. Code, § 9606 ["[p]ersons acting under any statute act in contemplation of this power of repeal"].) The public policy justification is that the statutory repeal rule permits repeals of flawed legislation to take effect immediately, except where vested rights would be impaired.

A different rule applies where a statute repeals common law rights. Such cases are governed by the general rule that statutes are presumed to operate prospectively unless a contrary intent is expressed. (See, e.g., *Callet v. Alioto*, *supra*, 210 Cal. 65, 68.) The reason for the distinction between the two rules is that, unlike purely statutory rights, an accrued

common law cause of action is generally considered "a vested property right which may not be impaired by legislation." (*Ibid.*) In contrast, "[a] statutory remedy does not vest until final judgment." (*South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 619; see also *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 70-71.)

The unambiguous terms of Proposition 64's repeal of the UCL's unlimited grant of standing for any person to enforce the UCL confirms the presumed applicability of that statutory repeal to pending cases. Thus, Proposition 64 defined the scope of that repeal by (1) striking the grant of authority for any person to enforce the UCL, and (2) substituting requirements that, except for specified government attorneys, (i) UCL actions "shall be prosecuted exclusively" by persons who have lost money or property as a result of the claimed violation, and (ii) a person could "pursue representative claims" under the UCL on behalf of others "only" if the claimant "meets" the above loss requirement and "complies" with the requirements for class actions. Both the language and structure of that repeal — in which the scope of the repeal is defined by a description of the only persons who can "pursue" and "prosecute[ ]" UCL claims — clearly apply to pending lawsuits.

The statutory repeal rule applies to Proposition 64 and to this case. This lawsuit is by an uninjured private party whose right to enforce the UCL is purely statutory, and Proposition 64 repealed that right without a savings clause for pending lawsuits. The Court of Appeal should therefore have granted Mervyn's motion to dismiss the appeal.

Instead, that court concluded, in effect, that the statutory repeal rule no longer exists. It ruled that repeals of statutory rights are presumed to operate prospectively (*CDR*, 126 Cal.App.4th 386 at p. 395), ignoring this Court's contrary holdings in *Mann*, 18 Cal.3d 819, at 829, and in *Younger*, 21 Cal.3d 102, at 110. The court placed its primary reliance on *Landgraf v.*

USI Film Products (1994) 511 U.S. 244 [114 S.Ct. 1483, 128 L.Ed.2d 229] (*Landgraf*), which applied federal rules of interpretation that did not recognize the statutory repeal rule. While the court below also cited *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (*Evangelatos*), that decision is inapplicable because it involved the repeal of common law — not statutory — rights.

The Court of Appeal should also have applied Proposition 64 to this case because the limitations on the right to enforce the UCL that it enacted do not substantially affect the parties substantive rights and obligations. The application of such changes to pending lawsuits is therefore deemed to be prospective, and not retroactive. (See, e.g., *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) The Court of Appeal rejected this conclusion, finding that application of Proposition 64 to pending lawsuits would upset settled expectations and deprive uninjured plaintiffs of their right to represent others. There is, in fact, no such right to continue to represent others despite a change in the law, nor can there be a justifiable expectation that the law will not be changed. (See Gov. Code, § 9606.)

III. STATEMENT OF THE CASE.

A. Proposition 64 Repealed the Right of Uninjured Private Parties to Pursue Any Action Under the UCL, Whether on Behalf of Themselves or Others.

California voters enacted Proposition 64 to eliminate what they regarded as serious abuses.[1] Its findings and declarations of purpose state that Business & Professions Code sections 17200 and 17500 "are being

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[1] The proposition passed overwhelmingly, by a 59% to 41% margin. (Lee declaration in support of the motion to dismiss the appeal (Lee decl.), p. 3 and ex. J. For the Court's convenience, we have attached a copy of the ballot materials and Proposition 64 as an appendix.)

misused by some private attorneys"; that frivolous unfair competition lawsuits "clog our courts" and harm our economy; that it is the voters' intent to prohibit private attorneys from filing unfair competition lawsuits "where they have no client who has been injured in fact under the standing requirements of the United States Constitution," and that only specified government officials shall be "authorized to file and prosecute actions on behalf of the general public." (Prop. 64, § 1, findings and declarations (b)-(f), Appen., p. 5.)

Proposition 64 repealed the broad standing provisions of Business & Professions Code sections 17203 ("section 17203") and 17204 ("section 17204"). Proposition 64 added a requirement to section 17203 that a person could "**pursue representative claims**" or relief on behalf of others "**only**" if the claimant met the standing requirements of section 17204 "and **complies**" with the requirements for class actions; suits by specified government attorneys were excluded from those restrictions. (Prop. 64, § 2, Appen., p. 5.)[2]

Proposition 64 also amended section 17204 to: (1) **delete** the authority of any person to prosecute actions "acting for the interests of itself, its members, or the general public"; and (2) provide that actions for

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[2] The amendment added the following sentence to section 17203:

> Any person may *pursue* representative claims or relief on behalf of others *only* if the claimant meets the standing requirements of section 17204 *and complies* with section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney or city prosecutor in this state.

(Prop. 64, § 2; emphasis added, Appen., p. 5.)

relief by private parties shall be "**prosecuted exclusively**" by persons who have suffered injury in fact and have lost money or property as a result of the wrongs of which they complain. (Prop. 64, § 3.) The amendment to section 17204 deleted the language shown in strikeout type and added the language shown in *italic type* as follows:

> Actions for any relief pursuant to this chapter **shall be prosecuted exclusively** . . . by . . . [one of the specified government attorneys or prosecutors] or by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of such unfair competition.*

(Prop. 64, § 3; original strikeout and italics; bold added. Appen., p. 5.) Proposition 64's operative language could not be clearer: the amendments eliminated the authority of uninjured private parties to seek relief both on their own behalf and on behalf of the general public.

Proposition 64 made a similar change to the False Advertising Law by amending Business & Professions Code section 17535 (section 17535) to (1) **delete** the provision that actions on behalf of the general public "may be prosecuted" by any person "acting for the interests of itself, its members or the general public," (2) provide that actions for relief "**may be prosecuted"** only by specified government attorneys or by a person "who has suffered injury in fact and lost money or property as a result of the violation," and (3) that, except for the specified government attorneys, any person "may **pursue representative claims** on behalf of others **only"** if that person meets the above standing requirements "and **complies**" with the requirements for class actions. (Prop. 64, § 5, bold added, Appen., pp. 5-6.)

Proposition 64 did not change the substantive provisions of the UCL and FAL, and did not affect the authority of public officials to prosecute UCL and FAL claims for the general public. (See Prop. 64, §§ 2, 3, 5, Appen., pp. 5-6.)

These amendments took effect on November 3, 2004, the day after the election. (See Cal. Const., art. II, § 10(a) ["An initiative statute . . . approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"].) Proposition 64 does not state a different effective date, and contains no savings clause for pending lawsuits. (See Prop. 64, Appen., pp. 5-6.)

B. The Proceedings in the Trial Court.

1. Californians for Disability Rights ("CDR"), an uninjured private plaintiff, filed this suit on behalf of the general public.

CDR is a nonprofit corporation whose stated purpose is to protect the interests of persons with disabilities. (Compl., ¶ 2 (Lee decl., ex. A).) CDR filed this lawsuit on May 21, 2002, against Mervyn's, a corporation that operates more than 120 retail department stores. (Compl., ¶4.) CDR asserted a single cause of action. It alleged that Mervyn's spaces movable racks in its stores so closely together that mobility disabled persons are denied full and equal access (compl. ¶¶ 11-12); that this alleged practice violated the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the Disabled Persons Act (Civ. Code, § 54, et seq.) (compl. ¶ 21);[3] and that CDR was entitled to relief under the UCL. (Compl., ¶¶ 20, 22-30.)

CDR sued as "a private attorney general on behalf of the general public under [section] 17204." (Compl., ¶ 8.) It sought declaratory and injunctive relief "on behalf of those members of the general public who are being harmed by defendant's conduct." (*Ibid.*)

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[3] CDR did not, however, allege a cause of action for violation of either of those acts.

CDR did not claim that it had been subjected to or harmed by the alleged unlawful business practice, and it did not allege that it had lost money or property as a result of that practice. Nor did it seek or obtain class certification.

2. Mervyn's obtained a defense judgment following a trial on the merits.

The court conducted a bench trial in August 2003. It decided for Mervyn's, explaining in a 40 page statement of decision that CDR had not proved the existence of (1) any architectural barriers at Mervyn's stores (statement of decision, p. 28 (Lee decl., ex. B)); (2) any access barriers, the removal of which would be readily achievable (*id.* at pp. 28-34); or (3) a discriminatory policy, practice or procedure, the elimination of which would not fundamentally alter Mervyn's business. (*Id.* at pp. 34-40.)

3. CDR appealed, and Mervyn's moved to dismiss for lack of standing.

CDR appealed on April 1, 2004. It filed its opening brief on November 9, 2004, contending that the trial court had misconstrued the law governing liability, defenses and remedies, and that it had erred in evaluating the evidence.

Proposition 64 took effect on November 3, 2004. (See p. 7, above.) Mervyn's filed an alternative motion for dismissal or for summary affirmance on December 6, 2004. It argued that CDR, an uninjured private plaintiff, did not possess the standing required by sections 17203 and 17204, as amended by Proposition 64, and that that amendment applied to pending actions because it had repealed the statutory right to sue on which CDR based its case. (Motion to dismiss at pp. 1, 7-13.)

Mervyn's also argued that Proposition 64's amended standing requirements constituted the type of procedural change that applied to any

case that was not yet final on appeal. (Motion to dismiss at 1, 13-16.) Alternatively, Mervyn's contended that *International etc. Workers v. Landowitz* (1942) 20 Cal.2d 418, authorized a summary affirmance. (Motion to dismiss, at 8, 16-17.)

CDR opposed the motion, arguing that the rule of prospective construction stated in such cases as *Evangelatos*, *Landgraf* and *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840, applied to Proposition 64. (Opposition to the motion to dismiss, pp. 5-10.) CDR also argued that Proposition 64's effect on pending cases was substantive because standing and the requirements for class certification are substantive (*id.* at pp. 10-17), and that there were no current, well-reasoned decisions applying the statutory repeal rule. (*Id.* at pp. 17-23.)

CDR did not contend that it satisfied Proposition 64's standing requirements, and did not seek leave to amend to attempt to do so. It also conceded that "the true 'party-in-interest' in this case is not CDR"; the parties in interest were the individuals who had experienced a lack of access. (*Id.* at pp. 22-23.)

C. The Decision of the Court of Appeal.

The Court of Appeal denied the motion to dismiss on February 1, 2005, ruling that Proposition 64 did not apply to lawsuits filed before its effective date.

1. The court held that the presumption that statutes operate prospectively prevented the statutory repeal rule from applying to Proposition 64.

After concluding that the electorate had not considered whether Proposition 64 applies to pending lawsuits, the court stated that *Evangelatos*, 44 Cal.3d 1188 involved a "similar situation," and it concluded that the presumption that statutes apply prospectively in the

absence of a contrary indication of intent should likewise govern this case. (*CDR*, 126 Cal.App.4th 386 at pp. 392-393.)

Turning to Mervyn's argument that a different rule applied when statutory rights are in issue, and that remedies that are dependent on the statute fall with its repeal in the absence of a savings clause, the court *restated* that rule as a "principle that a '"reviewing court must dispose of the case under the law in force when its decision is rendered."' [Citations.]" (*CDR*, 126 Cal.App.4th at pp. 394-395.) It then found a "seeming conflict" between the restated rule and the presumption against retroactivity, which it resolved by holding that repeals are presumed to be prospective unless the enactment "clearly indicates" that it applies retroactively. (*Id.* at p. 395.)

The court relied primarily on *Landgraf*, 511 U.S. 244, to conclude that "the presumption of prospectivity is the controlling principle," and it cited *Evangelatos*, 44 Cal.3d 1188, 1207-1208, as in "accord" with this principle. (*CDR*, 126 Cal.App.4th at p. 395.) The court failed to note, however, that neither *Evangelatos* nor the cases it discussed involved the repeal of a statutory right, and that *Landgraf* was wholly irrelevant, because the statutory repeal rule does not apply to federal legislation.

2. The court also concluded that the new standing requirements were not procedural changes that applied to pending cases.

The court stated that procedural changes cannot be applied to pending cases if they substantially affect existing rights, and that that principle precluded the application of the new standing requirements to this case, because CDR had a right to prosecute its pending UCL action. (*CDR*, 126 Cal.App.4th 386, 396.) The court relied on *Landgraf*, 511 U.S. 244, to conclude that applying Proposition 64 to pending cases would violate considerations of fair notice, reasonable reliance and settled expectations.

(*CDR*, at 397.) In addition, the court stated that the dismissal of cases that had been pending for years would raise difficult issues that ought to be avoided, such as whether those plaintiffs who might have been able to bring their cases within Proposition 64 should be permitted to do so.

Mervyn's petitioned for rehearing arguing, inter alia, that *Mann*, 18 Cal.3d 819, 828-829 had expressly rejected the contention that the presumption against retroactivity applied to the repeal of statutory rights, that *Evangelatos*, 44 Cal.3d 1188, did not involve or consider the repeal of a purely statutory right, and that *Landgraf*, 511 U.S. 244, was irrelevant because it arose under federal law.

ARGUMENT.

IV. THE COURT OF APPEAL'S IMPLICIT CONCLUSION THAT THE STATUTORY REPEAL RULE NO LONGER EXISTS IGNORES CONTROLLING DECISIONS OF THIS COURT.

The court below effectively eliminated the statutory repeal rule when it concluded that a different rule — the presumption of prospectivity — applies to the repeal of purely statutory rights and remedies. The court committed four significant errors.

First, it perceived a non-existent conflict under California law between the two well-settled principles that (1) statutes that repeal purely statutory rights or remedies without a savings clause apply to pending lawsuits, whereas (2) statutes that eliminate non-statutory substantive rights are presumed to operate prospectively in the absence of a clearly indicated contrary intent. These rules apply to different types of statutes, *Callet v. Alioto* (1930) 210 Cal. 65, 67-68, and there was therefore no conflict to be resolved.

Second, the court ignored this Court's holdings in *Mann*, 18 Cal.3d 819, 828-829, and *Younger*, 21 Cal.3d 102, 110, that the presumption

against retroactivity does not apply to the repeal of non-vested statutory rights. The court relied on *Evangelatos*, 44 Cal.3d 1188, but that case did not involve or consider the applicability of the statutory repeal rule that this Court has consistently applied in numerous cases for more than a century. (See, e.g., *Younger*, 21 Cal.3d at pp. 109-110 [applying the "well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final"]; *Mann*, 18 Cal.3d at pp. 823, 839-831; *People v. One 1953 Buick 2-Door* (1962) 57 Cal.2d 358, 365; *International etc. Workers v. Landowitz*, *supra*, 20 Cal.2d 418, 423; *Southern Service Co. Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12; *Wolf v. Pacific Southwest etc. Corp.*, *supra*, 10 Cal.2d 183, 184-185; *People v. Bank of San Luis Obispo*, *supra*, 159 Cal. 65, 67, 78-79; *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317-318.)

Third, the court overlooked the fact that the policy reasons for the statutory repeal rule, and in particular, Government Code section 9606, have not changed.

Fourth, the court overlooked the fact that federal law does not include the statutory repeal rule, so that *Landgraf's* interpretative rules did not apply to California statutes.

A. There Is No Conflict Between the Principles That Repeals of Statutory Rights Apply to Pending Cases, Whereas Changes in Common Law Rights Generally Apply Prospectively.

The court below saw a conflict between the two rules that does not exist. It began by *expanding* the statutory repeal rule into a general "principle that a '"reviewing court must dispose of the case under the law in force when its decision is rendered."'" (*CDR*, 126 Cal.App.4th 386 at p.