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)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

OTHER AUTHORITIES

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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.

395.)[4] The court then found a conflict between that principle and the rule that statutes are generally presumed to operate prospectively, which it resolved by concluding that the rule of prospective interpretation governed both the principle that cases are to be decided under the law in force at the time and the statutory repeal rule that it had erroneously equated with that principle. (*Id.* at p. 395.)

There is no such conflict. This Court has applied the statutory repeal rule for more than 100 years, and none of those decisions mention that supposed conflict.[5] Nor has any other decision that we are aware of, except for that of the court below, concluded that the statutory repeal rule conflicts

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[4] The court cited *Southern Service Co. Ltd. v. Los Angeles*, *supra*, 15 Cal.2d 1, 12, and *Mann*, 18 Cal.3d 819, 829, as supporting its contention that that principle supposedly "encapsulate[s]" the far different terms of the statutory repeal rule. (*CDR*, at p. 395.) Neither case supports the Court of Appeal. Those decisions used the statutory repeal rule to determine what law was in force, which they then applied under the principle that courts must decide appeals under the law in force at the time.

[5] *Mann*, 18 Cal.3d 819, cites some of those cases at p. 830, fn. 8. (See, e.g., *International etc. Workers v. Landowitz*, *supra*, 20 Cal.2d 418, 423 [repeal of statute establishing a "fair competition" right and remedy]; *Southern Service Co., Ltd. v. Los Angeles*, *supra*, 15 Cal.2d 1, 11-12 [repeal of a purely statutory right to a tax refund]; *Wolf v. Pacific Southwest etc. Corp.*, *supra*, 10 Cal.2d 183, 185 [repeal by constitutional amendment of statutory provision subjecting personal property brokers to the usury law]; *People v. Bank of San Luis Obispo*, *supra*, 159 Cal. 65 [repeal of statutory banking regulation]; *Napa State Hospital v. Flaherty*, *supra*, 134 Cal. 315, 317 [repeal of statutory right to surcharge patient's parent].)

See also *Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 170-171 (extensive discussion of the statutory repeal rule, but the court concluded that the usury provision in issue had not been repealed).

with the principle that statutes are normally construed to operate prospectively.[6]

As this Court explained in *Callet v. Alioto*, *supra*, 210 Cal. 65, 67-68, the two distinct legal rules apply to different types of statutes. On the one hand "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." (*Id.* at p. 67.) On the other hand,

> [i]t is also a general rule . . . 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. . . . [Citations.] The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time. (Sec. 327, Pol. Code.) 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.

(210 Cal. 65, at pp. 67-68.)

Mann, 18 Cal.3d 819, at 829, reaffirms *Callet's* conclusion that the two rules apply to different situations. Witkin makes the same point, explaining that the statutory repeal rule constitutes an "exception to the rule of prospective construction. . . ." (See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 497, pp. 690-691. See also *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc., supra,* 119

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[6] The Court of Appeal has not questioned the statutory repeal rule's continued existence, with the sole exception of the court below. (See, e.g., *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125-127; *People v. Acosta* (1996) 48 Cal.App.4th 411, 418-419; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489.

Cal.App.4th 120, 125 ["[t]he repeal of a statutory right or remedy . . . presents *entirely distinct issues* from that of the prospective or retroactive application of a statute." (Emphasis added.)].)

B. Repeals of Purely Statutory Rights Are Presumed to Operate Retroactively, Not Prospectively.

The Court of Appeal's contrary decision — that repeals of statutory rights are presumed to operate prospectively — ignored the holdings in *Mann*, 18 Cal.3d 819, 828-829, and *Younger*, 21 Cal.3d 102, 110, that statutory repeals are presumed to operate retroactively in the absence of a savings clause. The court below did not discuss or mention those holdings, while relying on decisions that are not on point.

1. *Mann* held that the presumption against retroactivity did not apply to the statutory repeal rule.

Mann is directly on point. The plaintiff in *Mann* argued the theory that the Court of Appeal here has adopted — that "the traditional rule that statutory enactments are generally presumed to have a prospective effect" applied to the repeal of a purely statutory remedy. (*Mann*, 18 Cal.3d 819, at 828-829.) This Court responded that "[a] long well-established line of California decisions *conclusively refutes*" that contention. (*Id.* at. 829; emphasis added.)

> Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of such a statute without a saving clause will terminate all pending actions based thereon.' (*Southern Service Co. Ltd. v. Los Angeles*, *supra*, 15 Cal.2d 1, 11-12.)

(*Mann*, at p. 829.)

Younger, 21 Cal.3d 102, 110, also holds that the presumption that statutes operate prospectively does not apply to repeals of statutory rights. The Legislature repealed the right on which that case was based while the case was pending before this Court, which held that the statutory repeal rule applied because there was no savings clause. (See also *Beckman v. Thompson, supra,* 4 Cal.App.4th 481, 488-499 [the general presumption that statutes operate prospectively "is not applicable here," because "we deal here with a repeal, not a 'retroactive' application of a new statute"].)

Thus, under this Court's holdings in *Mann* and *Younger*, *supra*, the presumption that applies in a case such as this, where the voters have repealed a statutory remedy, is precisely the opposite of the presumption of prospectivity that the court below applied. That court should have presumed, instead, that the repeal applies to pending lawsuits, unless there was a savings clause.

Consumer Advocacy Group, Inc. v. Kinetsu Enterprises of America (May 17, 2005, as modified, May 24, 2005, B158840) __ Cal.App.4th __ [2005 D.A.R. 5677, 5686] *Advocacy Group*), rejected the conclusion that a presumption of retroactivity applies to the repeal of statutory rights on the ground that this Court's discussion of that rule in *Callet v. Alioto*, *supra*, 210 Cal. 65, 67-68 was dicta, and that this Court was not required by the facts to base its decision in *Mann*, 18 Cal.3d 819, and in *Southern Service Co., Ltd. v. Los Angeles*, *supra*, 15 Cal.2d 1, 9, on the statutory repeal rule. The short answer to that point is that the statutory repeal rule is part of the common law, that it has been the stated basis for numerous decisions by this Court for more than 100 years, and that *Mann* not only based its decision on that rule, but discussed it at length, pointing out that it "has been applied in a multitude of contexts," from criminal and quasi-criminal matters to civil cases. (*Id.* at. 829-830, at 830, fn. 8.) (See fn. 5, above,

which lists the types of civil cases that *Mann* cited in its footnote 8.)[7] This Court concluded that the statutory repeal rule is a "settled common law rule." (*Id.* at 830.) Indeed, while this Court could have placed its decision on the ground that the new legislation could be applied prospectively to prohibit Mann's dismissal, since the school board did not have a final judgment dismissing Mann when the new legislation was enacted (18 Cal.3d at 831), this Court nevertheless chose to base its decision on the statutory repeal rule.[8]

2. *Evangelatos* does not overrule *Mann* sub silentio and does not support the Court of Appeal.

The court below stated that this Court's decision in *Evangelatos*, 43 Cal.3d 1188, 1207-1208, supported its conclusion that the presumption

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[7] Significantly, one of the cases that *Mann* cited, *International etc. Workers v. Landowitz*, *supra*, 20 Cal.2d 418, 423, as an example of the application of the statutory repeal rule, involved the repeal of the same general type of legislation that is involved in this case — a statute that protected "fair competition" and provided a remedy for the violation of that statutory right.

[8] Moreover, *Consumer Advocacy Group*'s conclusion that *Mann's* application of the statutory rule constitutes dicta misses the mark even when considered from a technical standpoint. Mann had been convicted of a minor marijuana violation in 1971, and his dismissal for that conviction was pending on appeal when on January 1, 1977, the Legislature enacted a new law that prohibited such dismissals for pre-1976 convictions that were more than two years old. *Consumer Advocacy Group*, *supra*, __ Cal.App.4th __ [2005 D.A.R. 5677, 5686] states that that shows that the Legislature intended for the new law to apply to preenactment conduct, but that does not necessarily mean that the Legislature intended for the new law to apply to pending dismissals. The plaintiff in *Mann* argued that the new law did not apply to such dismissals (18 Cal.3d 819, at 828-829), and this Court's invocation of the statutory repeal rule was directly responsive to that contention.

against retroactivity applied to the repeal of a statute. (*CDR*, 126 Cal.App.4th 386, at 395.) *Evangelatos*, however, did not mention the statutory repeal rule, and did not concern the repeal of a purely statutory right. The initiative that *Evangelatos* considered (Proposition 51) repealed common law liabilities,[9] and the statutory repeal rule does not apply to such repeals. (See, e.g., *Callet v. Alioto*, *supra*, 210 Cal. 65, 68 [the statutory repeal rule does not apply where the right in issue has accrued "under the rules of the common law. . . ."].) This Court's holding *Evangelatos* therefore does not apply to the statutory repeal rule, and as noted, the Court did not mention that rule.

The Court of Appeal overlooked this crucial distinction in concluding that this Court's discussion of an entirely different issue also applied to the statutory repeal rule. (*CDR*, 126 Cal.App.4th 386, 395, citing *Evangelatos*, 44 Cal.3d at pp. 1222-1224.) The cited discussion in *Evangelatos* focused on three cases which did not discuss, apply, or even mention the statutory repeal rule, and there is no basis for the Court of Appeal's conclusion that that discussion applied to cases that involved the repeal of purely statutory rights.[10]

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[9] *Evangelatos* held that the limitations that Proposition 51 enacted on an individual tortfeasor's joint and several liability for negligence did not apply to the liability that the common law imposed on such tortfeasors for injuries that had been inflicted before Proposition 51's enactment. (*Evangelatos*, 43 Cal.3d 1188, at pp. 1192-1194. See also p. 1225 [Proposition 51 "modif[ied] a long-standing common law doctrine. . . ."].)

[10] The three cases that *Evangelatos* distinguished had applied statutory modifications of the measure of damages for conversion to pending lawsuits. This Court concluded, inter alia, that those decisions "simply found that the language of the statutes at issue . . . demonstrate that the measures were intended to apply retroactively." (44 Cal.3d 1188, at 1224.) Those cases therefore did not involve the statutory repeal rule,

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3. Neither the Legislature nor the voters have changed the code provision that supports the statutory repeal rule.

The statutory repeal rule was initially a common law rule. (E.g., *Mann*, 18 Cal.3d 819, 830 [referring to the rule as a "settled common law rule"].) When this Court decided *Callet v. Alioto, supra,* former Political Code section 327 supported the rule by providing that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time. (See *Callet v. Alioto*, *supra*, 210 Cal. 65, at 67-68 [referring to that Code section as the justification for the rule].) By the time this Court decided *Mann*, the Government Code had replaced the Political Code, and the public policy supporting the statutory repeal rule was embodied in Government Code section 9606, which stated:

> 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.

That statutory policy remains unchanged to the present day. It establishes three significant points:

1. The rights that are protected against repeal are vested rights.
2. All other statutory rights may be repealed at any time.
3. Persons who act under a statute are conclusively presumed to act in contemplation of the power of repeal.[11]

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which does not depend on a showing that the Legislature intended the statute to apply retroactively. (See, e.g., *Younger*, 21 Cal.3d 102, 110.)

[11] *Consumer Advocacy Group, supra,* __ Cal.App.4th __ [2005 D.A.R. 5677, 5676] rejected the argument that Government Code section 9606 permitted the repeal of the right of uninjured private parties to enforce the UCL. The court stated that "section 9606 does not apply because the electorate expressed no intent to repeal the broad standing requirements." (*Ibid.*) However, section 9606 simply states the authorization for statutory

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4. *Landgraf* does not support the Court of Appeal, because it involved federal statutory law.

Landgraf has no bearing on the continuing vitality of the statutory repeal rule under California law, and the Court of Appeal erred in relying on it. (*CDR*, 126 Cal.App.4th 386, 395.) *Landgraf* considered whether to apply "a federal statute enacted after the events in suit." (511 U.S. 244, at 280.) *Landgraf* did not address California law, and its statements concerning the application of the statutory repeal rule under federal law, which does not recognize that rule, cannot be extended to states such as California, where the rule does apply.

The court below simply overlooked the fact that the statutory repeal rule does not apply to federal legislation. (See 1 U.S.C. § 109 ["repeal of any statute shall not . . . release or extinguish any . . . liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force . . . for the enforcement of such . . . liability"]. See also *Korshin v. Comr.* (4th Cir. 1996) 91 F.3d 670, 673 [1 U.S.C. § 109 abolishes the common-law statutory repeal rule]; and *Fujitsu Ltd. v. Fed. Express Corp.* (2d Cir. 2001) 247 F.3d 423, 432, cert. den. (2001) 534 U.S. 891 [122 S.Ct. 206, 151 L.Ed.2d 146] [this section preserves both civil and criminal statutory liabilities].)[12]

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repeals; it does not purport to state the terms on which the statutory repeal rule will apply.

[12] *Consumer Advocacy Group* also relied on federal decisions to support its argument that that repeals that affect the standing of private parties to enforce the UCL affect the jurisdiction of the court, and that such repeals should not be applied retroactively unless the lawmakers declare that the repeal applies to pending litigation. (*Consumer Advocacy* Group, *supra*, __ Cal.App.4th at [p. 5687].) There is no such limitation on the

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In short, the statutory repeal rule is still in force in California.

V. THE LANGUAGE AND STRUCTURE OF PROPOSITION 64 CONFIRMS THE PRESUMED APPLICATION OF ITS STATUTORY REPEALS TO PENDING CASES.

A. Proposition 64 Reinforces its Repeals by Strictly Limiting the Private Parties Who Are Permitted to Pursue and Prosecute UCL Claims.

Proposition 64 does not simply except certain private parties from its repeals. It enacts both a general repeal of the previously granted authority for private parties to enforce the UCL and a prohibition against enforcement by private parties except for those that it specifically authorizes to do so. Section 3 of Proposition 64 enacts its key repeal by amending section 17204 to strike the provision that, except for specified government attorneys, actions for relief under the UCL "shall be prosecuted exclusively . . . by any person ~~acting for the interests of itself, its members or the general public~~. . . ." (Original strikeout type.) Section 3 then prohibits private parties from prosecuting UCL actions except to the extent that section 17204 permits them to do so: such actions "shall be prosecuted exclusively . . . by any person *who has suffered injury in fact and has lost money or property as a result of such unfair competition.*" (Original italics; Appen. p. 5.)

Section 2 of Proposition 64 placed a further restriction on the right of private parties to enforce the UCL that section 3 had repealed and

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statutory repeal rule, as *Younger*, 21 Cal.3d 102, 109-110, expressly held in rejecting an argument that the repeal in that case — that transferred jurisdiction form a court to the Department of Justice — was a matter of form rather than substance. "The argument misses the mark. . . . [T]he fact remains that the Legislature had revoked the statutory grant of jurisdiction for this proceeding, and has vested it in no other court." (*Id.* at. 110.)

partially restored by its amendments to section 17204. Thus, while section 3 prohibited an uninjured private party from enforcing the UCL, section 2 expanded on that prohibition by modifying section 17203 to provide that even an injured private party "may pursue representative claims" "only" if that party "complies" with the requirements for class actions. (Appen., p. 5.)

In short, Proposition 64's repeal of the right of private parties to enforce the UCL — combined with a prohibition against private party enforcement except to the extent specifically authorized — is a far stronger expression of legislative intent to eliminate unauthorized private party lawsuits than would be provided by a mere partial repeal. The established presumption that a partial repeal would apply to pending lawsuits should therefore apply, a fortiori, to the much stronger repeal that Proposition 64 enacted. Further, the voters are presumed to be aware of existing law, so this is what they would have expected. (See, e.g., *John L. v. Superior Court* (2004) 33 Cal.4th 158, 171 ["We must assume that Proposition 21 voters knew about and followed *Tapia* [*v. Superior Court* (1991)], 53 Cal.3d 282"].) As the next section shows, the operative language of Proposition 64's repeals would have confirmed that understanding.

B. The Clear Language of Proposition 64's Repeals Applies to All Pending UCL Suits by Private Plaintiffs.

The operative language of sections 17203 and 17204 clearly applies to all stages of pending lawsuits, not simply the filing of new suits.[13] Thus,

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[13] In interpreting voter initiatives, the courts " 'apply the same principles that govern statutory construction. [Citation.] "[W]e turn first to the language of the statute, giving the words their ordinary meaning." [Citations.]'" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.) As noted, courts also "assume the electorate is aware of relevant

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section 4 of Proposition 64 retains section 17204's language that UCL actions "shall be prosecuted exclusively" by persons specified by that section, strikes the statement that such actions may be prosecuted by private parties, and adds a description of the private parties — those who have suffered injury in fact — who are exclusively authorized to prosecute such actions. The operative language — "shall be prosecuted" — does not refer to the mere filing of a complaint; those terms encompass all stages of the proceeding.

The same is true for the amendment to section 17203 that authorizes private parties to "pursue" representative claims on behalf of others. The operative language — that a private party may "pursue" such claims "only" if that party "meets" section 17204's requirements and "complies" with the requirements for class actions — includes every stage of a representative UCL lawsuit, not just that suit's starting date

C. Proposition 64's Findings and Declarations and the Ballot Pamphlet Materials Generally Confirm Proposition 64's Application to Pending Lawsuits.

Proposition 64's findings and declarations confirm that its repeals apply to both new and existing lawsuits. Thus, Proposition 64, section 1(b) states that unfair competition laws are being misused by attorneys who file frivolous lawsuits for various improper purposes that are detailed in subsections (1)-(3), and section 1(b)(4) states that such attorneys sue on behalf of the general public without accountability to the public and without adequate court supervision. (Appen., p. 5.) Since finding (b) refers to the misuse of the unfair competition laws that was occurring when

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judicial decisions when it adopts legislation by initiative. [Citations.]" (*People v. Hernandez* (2003) 30 Cal.4th 835, 867.)

Proposition 64 was proposed, the voters would have understood it to refer to harm that had been and was being inflicted by both pending and future lawsuits.

Voters would have drawn the same inference from finding (c), which referred to harm that had occurred and was continuing to occur. It stated that frivolous unfair competition lawsuits "clog our courts," "cost taxpayers[,]" and "cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices . . . lay off employees . . . or . . . relocate to states that do not permit such lawsuits." (Appen., p. 5.)

Declaration (d) stated the intent of the voters in broad terms that would apply to both pending and future lawsuits: "It is the intent of California voters . . . to *eliminate* frivolous unfair competition lawsuits while protecting the right of individuals to . . . file [a UCL] action. . . ." (Emphasis added, Appen., p. 5.)

Declaration (e) contained a slightly narrower statement of intent — "to prohibit private attorneys from filing [UCL lawsuits]" where their client has not been injured in fact, but finding (f) stated an intent that applied to both new and pending lawsuits: that *only* specified government attorneys "be authorized to file and prosecute actions on behalf of the general public." (Appen., p. 5.)

These findings and declarations, with their references to continuing harm and an intent to "eliminate frivolous unfair competition lawsuits," are fully consistent with the presumption of retroactivity and the clear meaning of Proposition 64's operative language. The fact that one of the statements of intent does not refer to everything that Proposition 64 will accomplish does not change the general tenor of the findings and declarations. There is no statement that private attorneys can continue to prosecute frivolous unfair competition lawsuits that they have already filed, and such a

statement would be utterly inconsistent with the express statement in finding (d) that the voters intend to "eliminate" such lawsuits.[14]

The ballot arguments discussed the pros and cons of Proposition 64 in broad terms that could easily apply to pending lawsuits. No one said anything that would suggest that the presumption of retroactivity did not apply. The lead argument in favor of Proposition 64 stated, inter alia, that voters should "PROTECT SMALL BUSINESSES FROM FRIVOLOUS LAWSUITS — CLOSE THE SHAKEDOWN LOOPHOLE," that "There's a LOOPHOLE IN CALIFORNIA LAW"; that "*Yes on Proposition 64 will stop thousands of frivolous shakedown lawsuits. . . .*"; and that the electorate should "*Vote Yes on Proposition 64. Close the frivolous shakedown lawsuit loophole.*" (Original capitalization and emphasis, Appen., p. 3.) The rebuttal countered that big businesses were supporting Proposition 64, that it "goes unbelievably far" and throws "the baby out with the bathwater." (Internal quotation marks omitted, Appen., p. 3.)

The lead argument against Proposition 64 stated that it "LIMITS THE RIGHTS OF CALIFORNIANS TO ENFORCE" various laws, that various large companies that support Proposition 64 want to "stop environmental organizations from enforcing" the law, "stop community organizations from suing them for polluting," "stop consumer groups from enforcing privacy laws," "block health organizations from enforcing the laws," "stop . . . people who sued [banks] for confiscating Social Security funds," "block rate payers from attacking energy company fraud," etc. (Original capitalization, Appen., p. 4.)

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[14] Such uncodified statements could not, in any event, change the scope of an initiative. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1280 [such statements may be used as an aid in construing a statute (in that case, an initiative) but cannot enlarge its scope].)

The rebuttal to that argument stated that it was a smokescreen, and that what Proposition 64 really does is "*Stops Abusive Shakedown Lawsuits.*" (Original capitalization and emphasis, Appen., p. 4.)

While some of the above arguments refer to the filing of lawsuits, many others state that Proposition 64 stops what the proponents refer to as frivolous shakedown lawsuits, and no one said that the only lawsuits that will be stopped are future suits.

The Attorney General's Official Summary told voters that Proposition 64 limits an individual's "right to sue by allowing private enforcement" "only" by individuals who have suffered actual harm. (Appen., p. 1.) This statement is broad enough to include both pending and future suits. The Legislative Analyst, on the other hand, discussed both existing law and Proposition 64 in terms of the requirements for initiating a lawsuit, stating that Proposition 64 makes the "following changes," including (1) restricting "***who can bring***" UCL lawsuits by prohibiting uninjured private parties "from bringing such suits, and (2) requiring "***lawsuits brought on behalf of others to be class actions***," which requires that except for suits by government attorneys, "lawsuits initiated by any person" on behalf of others must meet class action requirements. (Original bolding and italics, Appen., pp. 2-3.)

This analysis gives a mixed message. While the first statement speaks in present terms, referring to "who can bring" a lawsuit, the second statement encompasses both existing and future actions by referring to lawsuits "brought" and "initiated."

Thus, overall, Proposition 64's structure, language, findings and declarations clearly support the point that has already been established by the presumption that repeals of purely statutory rights apply to pending lawsuits unless there is a savings clause. The ballot arguments are consistent with that presumption, and while the Legislative Analyst's

analysis sends a mixed message, it does not come close to satisfying the requirements for rebutting the presumption of retroactivity, especially in the face of Proposition 64's clear language. As numerous cases explain, that presumption applies unless there is a savings clause. See, e.g., *Younger*, 21 Cal.3d 102, 109; *Mann*, 18 Cal.3d 819, 821, 829; *Southern Service Co., Ltd. v. Los Angeles*, *supra*, 15 Cal.2d 1, 11-12; *Callet v. Alioto*, *supra*, 210 Cal.65, 67.)

VI. THE STATUTORY REPEAL RULE APPLIES TO PROPOSITION 64 AND TO THIS CASE.

That rule applies where (1) the right or remedy in issue has been repealed, (2) the repeal affected a statutory right or remedy, and did not impair vested rights, and (3) no savings clause preserves pre-existing claims. Proposition 64's repeal of the right of uninjured private plaintiffs to enforce the UCL satisfies all of these requirements, and that repeal therefore applies to this lawsuit, notwithstanding that the case has already been tried. As *Mann* states, quoting *Southern Service Co., Ltd. v. Los Angeles*, *supra*, 15 Cal.2d 1, 12,

> If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal.

(18 Cal.3d 819, 830-831.)

A. Proposition 64 Repealed the Right of Uninjured Private Plaintiffs to Enforce the UCL.

An enactment that eliminates a right or remedy is a "repeal" for purposes of the statutory repeal rule. It is of no consequence whether such a change is labeled an "amendment" or a "repeal"; a repeal for these purposes depends on substance, not form or label. (See *Southern Service Co. Ltd. v. Los Angeles*, *supra*, 15 Cal.2d 1, 13 [whether a statutory cause

of action has been repealed does not depend upon express words of repeal but on whether "the Legislature by apt expression has withdrawn the right and remedy. . . ."], app. dism. (1940) 310 U.S. 610, 60 S.Ct. 979, 84 L.Ed. 1388; *Younger*, 21 Cal.3d 102, 109 [the elimination of a statutory remedy constitutes a repeal, even if "cast in terms of an 'amendment'"]; *Wolf v. Pacific Southwest etc. Corp.*, *supra*, 10 Cal.2d at pp. 184-185 ["A repeal of the statute, *or an amendment thereof*, resulting in a repeal of the statutory provision upon which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment." Italics added].)[15]

Consumer Advocacy Group, *supra*, __ Cal.App.4th __ [2005 D.A.R. 5677, 5686] overlooked these authorities in concluding that Proposition 64's changes to the UCL's standing requirements did not constitute a repeal because they were described in the ballot argument as an amendment.

Proposition 64's elimination of the right of uninjured private parties to enforce the UCL clearly satisfied the test for a repeal. The amendments deleted section 17204's grant of authority for any person to seek relief for itself, its members or the general public, and substituted a requirement that except for specified government attorneys, suits for relief under the UCL "shall be prosecuted exclusively" by persons who had lost money or property as a result of the claimed violation.

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[15] Nor does it matter whether a repeal eliminates all or only part of a statutory right or remedy; the partial repeal applies to pending cases. (See, e.g., *Mann*, 18 Cal.3d 819, at 828 [applying the statutory repeal rule to the partial repeal of the school board's authority to dismiss a teacher]; *Wolf v. Pacific Southwest etc. Corp.*, *supra*, 10 Cal.2d 183, 184-185 [applying the repeal rule to a constitutional amendment that reduced the coverage of the usury law].)

B. The Right That Proposition 64 Repealed — and That CDR Has Asserted — Was a Nonvested, Statutory Right.

There can be no question that the UCL claim that CDR attempted to enforce in this case was a purely statutory right. The statutory tort of unfair competition that the UCL created is far broader than the common law tort of unfair business practices. As this Court has repeatedly held, the unfair competition tort set forth in the UCL and its predecessor, former Civil Code section 3369, "cannot be equated with the common law definition of 'unfair competition.'" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109; accord, *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181, fn. 9; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) The common law tort generally consisted of "passing off" one's goods as those of another, and perhaps included the sale of confusingly similar products. (*Id.* at pp. 1263-1264.) It also required a showing of competitive injury. (*Id.* at p. 1264.)

CDR has not asserted any such claims. It does not complain of competitive injury, or of any injury to its rights. Its sole cause of action against Mervyn's is on behalf of the general public for allegedly interfering with the access of mobility disabled shoppers. That UCL claim was purely statutory.

Moreover, the authority of uninjured private parties to enforce the UCL on behalf of the general public is relatively recent; it was not added until 1933. (See *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129-130 [tracing the history of the UCL].)

There can also be no question that CDR did not have a vested right to pursue a UCL claim on behalf of others. (See, e.g., *Hogan v. Ingold* (1952) 38 Cal.2d 802, 809 [no one has a vested property right "to institute and maintain an action in the right of another on terms beyond the control

of the court or the Legislature"]; *County of San Bernardino v. Ranger Insurance Co.* (1995) 34 Cal.App.4th 1140, 1149 [a statutory remedy does not vest until the judgment becomes final on appeal]; *South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 619 [statutory right to claim attorney fees did not vest prior to final judgment, and was extinguished by repeal without a savings clause].)

C. There Is No Savings Clause That Preserves Pending Lawsuits.

As noted, under the statutory repeal rule, new enactments eliminating the authorization for purely statutory claims or remedies apply immediately to pending cases in the absence of a "saving clause." (See, e.g., *Mann*, 18 Cal.3d at p. 829 [any "'cause of action or remedy dependent on a statute falls with the repeal of the statute, even after the action thereon is pending, *in the absence of a saving clause in the repealing statute*,'" italics added, citation omitted].)

Here, there can be no question that Proposition 64 fails to contain any savings clause that could serve to exempt pending lawsuits from the "ordinary effect of repeal" under the statutory repeal rule. (*Younger*, 21 Cal.3d at p. 110.) Thus, the Court of Appeal's finding — that the electorate did not consider whether Proposition 64 should apply to pending lawsuits (*CDR*, 126 Cal.App.4th 386, at 393) — does not remotely determine the question of whether Proposition 64 applies to pending cases. Instead, the "only legislative intent relevant" where an amendment repeals a former grant of statutory authority "would be a determination to save" pending actions "from the ordinary effect of repeal illustrated by such cases as *Mann*." (Younger, *supra*, 21 Cal.3d 102, 110.) Because Proposition 64 does not contain a saving clause indicating an electorate intent to save pre-

Proposition 64 UCL actions from the ordinary effect of repeal, it applies to pending cases under the statutory repeal rule.

Consequently, CDR's right to maintain this action was therefore subject to repeal at any time before entry of a final judgment. (See, e.g., *Mann*, 18 Cal.3d 819, 830-831 [reversing non-final judgment based on intervening repeal of the statutory right on which the judgment was based]; *Southern Service Co., Ltd. v. Los Angeles*, *supra*, 15 Cal.2d at pp. 11-12 [non-final judgment for tax refund based on purely statutory right must be reversed where that right was repealed without a savings clause]; *International etc. Workers v. Landowitz* (1942) 20 Cal.2d 418, 423 [judgment for defendant affirmed without considering its merits where the statutory right and remedy on which the suit was based had been repealed during the appeal]; *Moss v. Smith* (1916) 171 Cal. 777, 786-788 [repeal of the purely statutory liability of public utility company directors for certain corporate debts requires affirmance of judgment of defendants].)

VII. PROPOSITION 64'S NEW STANDING REQUIREMENTS ALSO APPLY TO PENDING ACTIONS BECAUSE THEIR OPERATION IS PROSPECTIVE, NOT RETROACTIVE.

Standing requirements have to be satisfied throughout the time that a case is being pursued. (See, e.g., *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90 ["a plaintiff who lacks standing cannot state a valid cause of action; therefore, . . . a plaintiff's lack of standing . . . may be raised at any time in the proceeding." (Citations.)].) The application of new standing requirements to a pending lawsuit can therefore be considered to be prospective, not retroactive.

This principle supplies an independent basis for applying Proposition 64 to pending litigation, because its changes in the procedure for pursuing UCL actions do not deprive litigants of vested rights or impose

new liabilities on prior conduct. The new standing requirements can therefore be imposed on pending lawsuits.

While new statutes — as distinguished from the repeal of purely statutory rights — are construed against retroactive application unless a contrary intent is clearly apparent, "[t]here remains the question of what the terms 'prospective' and 'retrospective' mean." (*Tapia v. Superior Court, supra,* 53 Cal.3d 282, 288.) The principle that statutes are generally construed against retroactive application

> does not preclude the application of new procedural or evidentiary statutes to trials occurring after the enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before the enactment. 'Such a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future."'

(*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.)

The test that determines whether a new statute can be applied to pending legislation is not based on a statute's form, or whether it can best be labeled substantive or procedural. (*Elsner v. Uveges*, *supra*, 34 Cal.4th at pp. 936-937.) Instead, new laws can be applied to the trial of pre-enactment conduct if those laws do not "'change[] the legal consequences of past conduct by imposing new or different liabilities'" and do not "'substantially affect[] existing rights and obligations[]'" (*Id.* at p. 937.)

A. Proposition 64's Standing Requirements Apply to Pending Cases Because They Do Not Substantially Affect Existing Rights and Obligations, or Impose New or Different Liabilities on Past Conduct.

Proposition 64 does not impose new or different liabilities on past conduct. Nor does it substantially affect the existing rights and obligations

of people who have been injured by UCL violations. Business practices that the UCL prohibited before November 2, 2004, remain prohibited now. Whether committed before or after Proposition 64's passage, an unlawful, unfair, or fraudulent business act or practice remains actionable by plaintiffs that have standing, and the business that committed that act or practice is still subject to the same liability for injunctive and restitutionary relief in a suit by such a plaintiff under Section 17203.

Finally, Proposition 64's changes in the UCL's standing provisions do not substantially affect existing rights and obligations of uninjured plaintiffs. The existing rights and obligations that *Elsner* and *Tapia* referred to were substantive rights, not mere procedures for determining and/or enforcing those rights. Thus, for example, *Tapia* noted that the new limitations on non-economic damages considered in *Evangelatos,* 44 Cal.3d 1188, at pp. 1225-1226 could not be given a prospective application in pending cases because those limits had a substantive effect on the damages that a plaintiff could recover from a single defendant, and on the contribution claims that defendants could assert against each other. (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 290.) Similarly, *Elsner* held that new standards of care based on Cal-OSHA regulations could not be applied to pre-amendment conduct because they might change the legal consequences of past conduct. (*Elsner*, 34 Cal. 4th 915 at 927.)

On the other hand, the elimination of the authority of an uninjured private plaintiff to file a lawsuit on behalf of the general public does not have any effect on that plaintiff's substantive rights, and that change in the requirements governing standing should therefore be applied to pending cases.

The Court of Appeal disagreed, stating that the application of Proposition 64's standing requirements to this case would deprive CDR of the "right" that it possessed when it filed this action to prosecute the case to

final judgment. (*CDR*, 126 Cal.App.4th 386, at 396.) The court below did not cite any California decisions to support that conclusion, and as the next section shows, there is no right to pursue a pending lawsuit to a final judgment unless the plaintiff's substantive rights are at stake.

B. Statutory Amendments Governing the Right to Represent Others Can Be Applied to Pending Lawsuits.

The Court of Appeal overlooked the distinguishing feature of UCL suits by uninjured plaintiffs on behalf of others. Such plaintiffs have simply appointed themselves as representatives for the public, and no court has approved that appointment. Such a plaintiff occupies a fiduciary role and the state therefore has plenary authority to determine the conditions on which such representation will be permitted. This Court considered a similar issue in *Hogan v. Ingold* (1952) 38 Cal.2d 802, which upheld the Legislature's right to impose restrictions on shareholder derivative causes of action where the plaintiff had filed suit after the statute was passed, but based that suit on stock acquired and wrongs committed before the statute's passage. (*Id.* at 805.)

Corporations Code section 834 imposed two requirements on such suits — (1) the plaintiff must have been a shareholder at the time of the wrongs complained of unless he or she acquired his stock by operation of law from such a shareholder, and (2) must provide security for costs if the trial court determined that there was no reasonable probability that the suit would benefit the corporation. (38 Cal.2d 802, at 805-807.) The trial court dismissed for failure to furnish security for costs, and probably based that order on its finding that plaintiff was not a shareholder at the time of the transaction. (*Id.* at 808.) This Court affirmed.

Plaintiff contended that she had a vested right to maintain this action in a fiduciary capacity. This Court disagreed, stating that no one has a

vested right in acting on his own nomination as a guardian ad litem, and that such a plaintiff

> has no property right to be accepted by the court to institute and maintain an action in the right of another on terms beyond the control of the court or the Legislature.

(*Id.* at. 809.)

The Court concluded that the state has plenary power over this type of litigation, and that if the suit is filed after the statute's enactment, its operation, even with respect to wrongs assertedly perpetrated before its passage, "is prospective and procedural because it does not deprive a person of any right which he had at the time of beginning suit, but merely prescribes the conditions upon which the subsequently instituted equity suit may be brought and maintained." (38 Cal.2d 802, at p. 812.)

Hogan is, of course, distinguishable, because parties who have filed lawsuits will have paid or incurred obligations for costs and attorney fees. Those factors should not, however, give anyone a vested right to maintain a lawsuit as a fiduciary for others. The control of the right to maintain lawsuits on behalf of others is too important to be subordinated to such considerations. The state can apply the repeal of a right to attorney fees to pending lawsuits (*South Coast Regional Com. v. Gordon*, *supra*, 84 Cal.App.3d 612, 618-619), and it should likewise be entitled to withdraw the right to sue on behalf of others even if obligations for costs and attorney fees have already been incurred.

Similarly in *Kuykendall v. Board of Equalization* (1994) 22 Cal.App.4th 1194, the court concluded in that in view of the Legislature's broad discretion with respect to tax matters, a statute that changed the available tax refund remedies for people who had paid an unconstitutional tax did not deprive those taxpayers of vested rights. (*Id.* at 1211, fn. 20, 1214 fn. 27.)

The plaintiff in that case had obtained a class action judgment for a full refund of the taxes. (*Id.* at 1200-1201.) While the case was on appeal, the Legislature enacted a different refund scheme — a sales tax rollback and direct payment of claims exceeding $5,000. (*Id.* at p. 1201.) Plaintiff claimed that the new statute unconstitutionally deprived the class of vested rights, but, as noted, the court ruled that the statute merely provided a new remedy to enforce existing rights, and that the plaintiff did not have a vested right in the remedy provided by his non-final judgment. (*Id.* at. 1211.)

CDR does not have any judgment in its favor, and thus has even less basis for claiming a vested right.

C. The Court of Appeal Erred in Following the Federal Test for Prospective Operation Stated in *Landgraf*.

The court below relied on the federal test stated *Landgraf*, 511 U.S. 244, at page 270, that in deciding whether new requirements can be applied to pending cases, courts are guided by "'considerations of fair notice, reasonable reliance and settled expectations.'" (*CDR*, 126 Cal.App.4th 397.) Applying that test, the court concluded that a "'new rule concerning filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime. . . .'" (*Ibid*, quoting *Landgraf* at page 275, footnote 29.)

That quote from *Landgraf* was a casual dicta without analysis or supporting authority.[16] Although the high court reviewed numerous cases

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[16] *Landgraf*'s holding was that the liability for compensatory and punitive damages that the Civil Rights Act of 1991 (42 U.S.C. §1981a(a)) imposed on certain types of unlawful discrimination that had not previously been subject to monetary relief would not be applied to cases pending on appeal when the statute was enacted. (*Landgraf*, 511 U.S. 244, 247, 281-282.)

involving the prospective or retrospective application of many different statutes, neither the majority nor the two dissenters mentioned changes in standing requirements, or stated what rule they would apply to such a case. (*Id* at pp. 268-286 (Maj. Opn. of Stevens, J.), 290-294 (Dis. Opn. of Scalia, J), 296-297 (Dis. Opn. of Blackman, J).) Thus, the sentence from *Landgraf* that the Court of Appeal quoted does not provide any support for its decision.

The Court of Appeal also stated that applying Proposition 64 to pending cases would deny fair notice and defeat the parties' reasonable reliance and settled expectations. (*CDR*, 126 Cal.App.4th 386, at p. 397.) This argument implicitly assumes the answer, because established rules permit new statutes to be applied to pending cases unless those statutes substantially affect existing rights and obligations.

The Court of Appeal concluded by stating that the application of Proposition 64 to pending cases would raise various practical problems, and that since there was no indication that the electorate had considered those issues, Proposition 64 should not be applied to pending cases. (*CDR*, 126 Cal.App.4th 386, at. p. 397.) To the contrary, since settled rules provide for the application of Proposition 64 to pending cases, this Court should assume that that is what the electorate intended. Practical problems should be resolved, not used as an excuse to defeat the electorate's intent.

VIII. THE VOTERS PASSED PROPOSITION 64 TO CLOSE A LOOPHOLE, AND THIS COURT SHOULD THEREFORE GIVE IT THE EARLIEST POSSIBLE APPLICATION.

As noted, the theme of the lead argument in favor of Proposition 64 states that there was a loophole in California law that permitted frivolous shakedown lawsuits, and that the voters ought to close that loophole. (Appen., p. 3.)

Proposition 64's findings and declarations make the same point — that "[f]rivolous unfair competition lawsuits clog our courts and cost taxpayers," and that the voters intend to "eliminate" such suits and authorize only state or local officials "to file and prosecute actions on behalf of the general public." (Prop. 64, section 1(b)-(d), (f), appen., p. 5.)

Proposition 115 contained similar findings, stating that the voters intended "to reduce the unnecessary 'costs of criminal cases' and to 'create a system in which justice is swift and fair.'" (*Tapia v. Superior Court*, *supra*, 53 Cal.3d at p. 293.) The court stated that "[we] can best effectuate this purpose by giving the earliest possible application to reforms designed to accelerate the adjudication of criminal cases." (*Ibid.*)

That reasoning is equally applicable here. While the voters did not declare that they intended either Propositions 115 or 64 to operate retroactively, the language of sections 17203 and 17204, Proposition 64's findings and declarations, and the argument to the voters lead inescapably to the conclusion that the courts can best effectuate the voters' purposes by giving Proposition 64 the earliest possible application.

IX. CONCLUSION

By passing Proposition 64, the People of California decided to put an end to private attorney general actions like this case. Mervyn's respectfully requests that the Court reverse the decision of the Court of Appeal, with directions to grant Mervyn's motion to dismiss the appeal.

Dated: May 27, 2005

MORRISON & FOERSTER LLP
LINDA E. SHOSTAK
DAVID F. MCDOWELL
JOHN SOBIESKI

By DAVID F. MCDOWELL

CERTIFICATE OF WORD COUNT

The above Respondent Mervyn's Opening Brief On The Merits contains 11, 306 words, as counted by the computer program used to prepare it.

MORRISON & FOERSTER LLP

By 
John Sobieski

la-790745

APPENDIX

PROPOSITION

64

LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE.

OFFICIAL TITLE AND SUMMARY

Prepared by the Attorney General

Limits on Private Enforcement of Unfair Business Competition Laws. Initiative Statute.

- Limits individual's right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss because of, an unfair business practice.
- Requires private representative claims to comply with procedural requirements applicable to class action lawsuits.
- Authorizes only the California Attorney General or local government prosecutors to sue on behalf of general public to enforce unfair business competition laws.
- Limits use of monetary penalties recovered by Attorney General or local government prosecutors to enforcement of consumer protection laws.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Unknown state costs or savings depending on whether the measure significantly increases or decreases court workload related to unfair competition lawsuits and the extent to which funds diverted by this measure are replaced.
- Unknown potential costs to local governments depending on the extent to which funds diverted by this measure are replaced.

ANALYSIS BY THE LEGISLATIVE ANALYST

BACKGROUND

California's unfair competition law prohibits any person from engaging in any unlawful or fraudulent business act. This law may be enforced in court by the Attorney General, local public prosecutors, or a person acting in the interest of itself, its members, or the public. Examples of this type of lawsuit include cases involving deceptive or misleading advertising or violations of state law intended to protect the public well-being, such as health and safety requirements.

Currently, a person initiating a lawsuit under the unfair competition law is not required to show that he/she suffered injury or lost money or property. Also, the Attorney General and local public prosecutors can bring an unfair competition lawsuit without demonstrating an injury or the loss of money or property of a claimant.

Currently, persons initiating unfair competition lawsuits do not have to meet the requirements for class action lawsuits. Requirements for a class action lawsuit include (1) certification by the court of a group of individuals as a class of persons with a common interest, (2) demonstration that there is a benefit to the parties of the lawsuit and the court from having a single case, and (3) notification of all potential members of the class.

In cases brought by the Attorney General or local public prosecutors, violators of the unfair competition law may be required to pay civil penalties up to $2,500 per violation. Currently, state and local governments may use the revenue from such civil penalties for general purposes.

PROPOSAL

This measure makes the following changes to the current unfair competition law:

- ***Restricts Who Can Bring Unfair Competition Lawsuits.*** This measure 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.

ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

- ***Requires Lawsuits Brought on Behalf of Others to Be Class Actions.*** This 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.
- ***Restricts the Use of Civil Penalty Revenues.*** This measure requires that civil penalty revenues received by state and local governments from the violation of unfair competition law be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws.

FISCAL EFFECTS

State Government

Trial Courts. This measure would have an unknown fiscal impact on state support for local trial courts. This effect would depend primarily on whether the measure increases or decreases the overall level of court workload dedicated to unfair competition cases. If the level of court workload significantly decreases because of the proposed restrictions on unfair competition lawsuits, there could be state savings. Alternatively, this measure could increase court workload, and therefore state costs, to the extent there is an increase in class action lawsuits and their related requirements. The number of cases that would be affected by this measure and the corresponding state costs or savings for support of local trial courts is unknown.

Revenues. This measure requires that certain state civil penalty revenue be diverted from general state purposes to the Attorney General for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by the General Fund, there would be a state cost. However, there is no provision in the measure requiring such replacement.

Local Government

The measure requires that local government civil penalty revenue be diverted from general local purposes to local public prosecutors for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by local general fund monies, there would be a cost to local government. However, there is no provision in the measure requiring the replacement of diverted revenues.

Other Effects on State and Local Government Costs

The measure could result in other less direct, unknown fiscal effects on the state and localities. For example, this measure could result in increased workload and costs to the Attorney General and local public prosecutors to the extent that they pursue certain unfair competition cases that other persons are precluded from bringing under this measure. These costs would be offset to some unknown extent by civil penalty revenue earmarked by the measure for the enforcement of consumer protection laws.

Also, to the extent the measure reduces business costs associated with unfair competition lawsuits, it may improve firms' profitability and eventually encourage additional economic activity, thereby increasing state and local revenues. Alternatively, there could be increased state and local government costs. This could occur to the extent that future lawsuits that would have been brought under current law by a person on behalf of others involving, for example, violations of health and safety requirements, are not brought by the Attorney General or a public prosecutor. In this instance, to the extent that violations of health and safety requirements are not corrected, government could potentially incur increased costs in health-related programs.

For text of Proposition 64 see page 109.

PROP 64 LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE.

ARGUMENT in Favor of Proposition 64

PROTECT SMALL BUSINESSES FROM FRIVOLOUS LAWSUITS—CLOSE THE SHAKEDOWN LOOPHOLE

There's a LOOPHOLE IN CALIFORNIA LAW that allows private lawyers to file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled. Shakedown lawyers "appoint" themselves to act like the Attorney General and file lawsuits on behalf of the people of the State of California, demanding thousands of dollars from small businesses that can't afford to fight in court.

Here's the little secret these lawyers don't want you to know: *MOST OF THE TIME, THE LAWYERS OR THEIR FRONT GROUPS KEEP ALL THE MONEY!*

No other state allows this. It's time California voters stopped it. For years, Sacramento politicians, flush with special interest trial lawyer money, have protected the lawyers at the expense of California consumers, taxpayers, and small businesses.

Yes on Proposition 64 will stop thousands of frivolous shakedown lawsuits like these:

- Hundreds of travel agents have been shaken down for not including their license number on their website.
- Local homebuilders have been sued for using 'APR' in advertisements instead of spelling out 'Annual Percentage Rate.'

HERE'S WHAT ACTUALLY HAPPENED TO ONE SMALL BUSINESS VICTIM:

"My family came to this country to pursue the American Dream. We work hard to make sure our customers like the job we do. One day I got a letter from a law firm demanding $2,500. The letter didn't claim we broke the law, just that we might have and if we wanted to stop the lawsuit, we needed to send them $2,500. I called a lawyer who said it would cost even more to fight, so we sent money even though we'd done nothing wrong. It's just not right."

Humberto Galvez, Santa Ana

Here's why "YES" on Proposition 64 makes sense:

- *Stops these shakedown lawsuits.*
- *Protects your right to file a lawsuit if you've been damaged.*
- *Allows only the Attorney General, district attorneys, and other public officials to file lawsuits on behalf of the People of the State of California* to enforce California's unfair competition law.
- *Settlement money goes to the public, not the pockets of unscrupulous trial lawyers.*

"Public Prosecutors have a long, distinguished history of protecting consumers and honest businesses. Proposition 64 *will give those officials the resources they need to increase enforcement of consumer protection laws* by designating penalties from their lawsuits to supplement additional enforcement efforts, above their normal budgets."

Michael D. Bradbury, Former President
California District Attorneys Association

Vote Yes on Proposition 64: Help California's Economy Recover

"Frivolous shakedown lawsuits cost consumers and businesses millions of dollars each year. They make businesses want to move to other states where lawyers don't have a legal extortion loophole. When businesses leave, taxpayers who remain pick up the burden. Proposition 64 closes this loophole and helps improve California's business climate and overall economic health."

Larry McCarthy, President
California Taxpayers Association

Vote Yes on Proposition 64. Close the frivolous shakedown lawsuit loophole.

RAY DURAZO, *Chairman*
Latin Business Association
MARTYN HOPPER, *State Director*
National Federation of Independent Business
MARYANN MALONEY
Citizens Against Lawsuit Abuse

REBUTTAL to Argument in Favor of Proposition 64

Small business???

The Associated Press reported:

"Here are some of the companies that have made donations to the campaign to pass Proposition 64 and some of the lawsuits that have been filed against them under California's unfair competition law:

—Blue Cross of California. Donation: $250,000. Unfair competition suits have accused the health care company of . . . discriminating against non-company emergency room doctors and underpaying hospitals.

—Bank of America. Donation: $100,000. A jury found the bank misrepresented to customers that it had the right to take Social Security and disability funds from their accounts to pay overdraft charges and other fees.

—Microsoft. Donation: $100,000. Suit . . . accuses the computer giant of failing to alert customers to security flaws that allow hackers to break into its computer systems by gaining some personal information.

—Kaiser Foundation Health Plan. Donation: $100,000. One suit accused the health care provider of false advertising for claiming that only doctors, not administrators, made decisions about care . . .

—State Farm. Donation: $100,000. A group of victims of the 1994 Northridge earthquake accused the company of reducing their quake coverage without adequate notice. State Farm reportedly was forced to pay $100 million to policyholders."

Quoting the Attorney General's senior consumer attorney in the Department of Justice, the *Los Angeles Times* reports: "The initiative 'goes unbelievably far,' . . . 'Throwing the baby out with the bathwater is not the best thing' . . . the (current) law has been used successfully to protect the public from polluters, unscrupulous financing schemes and religious discrimination."

ELIZABETH M. IMHOLZ, *Director*
Consumers Union, West Coast Office
SUSAN SMARTT, *Executive Director*
California League of Conservation Voters
DEBORAH BURGER, RN, *President*
California Nurses Association

APPEN3

LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE.

PROP 64

ARGUMENT Against Proposition 64

Proposition 64 LIMITS THE RIGHTS OF CALIFORNIANS TO ENFORCE ENVIRONMENTAL, PUBLIC HEALTH, PRIVACY, AND CONSUMER PROTECTION LAWS.

The Attorney General's Official Title for the Proposition 64 petition read: "LIMITATIONS on Enforcement of Unfair Business Competition Laws."

Across California headlines warn the public about this special interest initiative. San Francisco Chronicle: *"Measure would limit public interest suits";* Ventura County Star: *"Consumers lose if initiative succeeds";* Orange County Register: *"Consumer lawsuits targeted";* San Francisco Examiner: *"Bank of America's shakedown: Unfair-competition law under fire from businesses."*

Look who is supporting Proposition 64. Consider why they want to limit California's 71-year-old Unfair Business Competition law.

Chemical companies support Proposition 64. They want to stop environmental organizations from enforcing laws against polluting streams, rivers, lakes, and our coast.

Oil companies support Proposition 64. They want to stop community organizations from suing them for polluting drinking water supplies with cancer-causing MTBE.

Credit card companies support Proposition 64. They want to stop consumer groups from enforcing privacy laws protecting our financial information.

IF A CORPORATION PROFITS FROM INTENTIONALLY POLLUTING OUR AIR AND WATER, OR INVADING OUR PRIVACY, WE SHOULD BE ABLE TO STOP IT.

The Los Angeles Times reports: *"The measure would weaken a state law that allows private groups and government prosecutors to sue businesses for polluting the environment and for engaging in misleading advertising and other unfair business practices . . . If voters approve the measure, the current law would be drastically curtailed."*

Tobacco companies support Proposition 64. They want to block health organizations from enforcing the laws against selling tobacco to children.

Banks support Proposition 64. They want to stop elderly and disabled people who sued them for confiscating Social Security funds.

Insurance companies and HMOs support Proposition 64. They don't want to be held accountable for fraudulent marketing or denying medically necessary treatment to patients.

Energy companies support Proposition 64. They ripped off California during the "energy crisis" and want to block ratepayers from attacking energy company fraud.

Since 1933, the Unfair Business Competition Laws have protected Californians from pollution, invasions of privacy, and consumer fraud. Here are examples of cases successfully brought under this law:

- Supermarkets had to stop changing the expiration date on old meat and reselling it.
- HMOs had to stop misrepresenting their services to patients.
- Bottled water companies had to stop selling water that hadn't been tested for dangerous levels of bacteria, arsenic, and other chemicals.

The Los Angeles Times editorialized: *"(Proposition 64) would make it very difficult for citizens, businesses, and consumer groups to file justified lawsuits."*

Proposition 64 is strongly opposed by:

- AARP
- California Nurses Association
- California League of Conservation Voters
- Consumers Union
- Sierra Club California
- Congress of California Seniors
- Center for Environmental Health
- California Advocates for Nursing Home Reform
- Foundation for Taxpayer and Consumer Rights

Please join us in voting NO on Proposition 64. Don't let them limit your right to enforce the laws that protect us all.

ELIZABETH M. IMHOLZ, *Director*
Consumers Union, West Coast Office
SUSAN SMARTT, *Executive Director*
California League of Conservation Voters
DEBORAH BURGER, RN, *President*
California Nurses Association

REBUTTAL to Argument Against Proposition 64

The argument against Proposition 64 is a trial lawyer smokescreen: Read the official title and the law yourself.

- *Nowhere is Environment, Public Health, or Privacy mentioned!*
- *California has dozens of strong laws to protect the environment, public health, and privacy, including Proposition 65, passed by voters in 1986, the California Environmental Quality Act and the California Financial Information Privacy Act.*
- *Proposition 64 doesn't change any of these laws.*
- *Proposition 64 would permit ALL the suits cited by its opponents.*

". . . the trial attorneys who benefit from the current system are going bonkers, and misrepresenting what (Prop. 64) will do. They claim that (Prop. 64) . . . will somehow undermine the state's environmental laws. That's patently untrue."
Orange County Register

Here's what 64 really does:

- *Stops Abusive Shakedown Lawsuits*
- Stops fee-seeking trial lawyers from exploiting a loophole in California law—*A LOOPHOLE NO OTHER STATE HAS*—that lets them "appoint" themselves Attorney General and file lawsuits on behalf of the People of the State of California.
- *Stops trial lawyers from pocketing FEE AND SETTLEMENT MONEY that belongs to the public.*
- *Protects your right to file suit if you've been harmed.*
- *Permits only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California.*

Join 700+ groups, small businesses, and shakedown victims, including:

California Taxpayers Association
California Black Chamber of Commerce
California Mexican American Chamber of Commerce
Vote YES on 64—www.yeson64.org

JOHN KEHOE, *Founding Director*
Senior Action Network
ALLAN ZAREMBERG, *President*
California Chamber of Commerce
CHRISTOPHER M. GEORGE, *Chairman of the Board of Governors*
Small Business Action Committee

APPEN4

Proposition 64

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Business and Professions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declarations of Purpose

The people of the State of California find and declare that:

(a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices.

(b) These unfair competition laws are being misused by some private attorneys who:

(1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.

(2) File lawsuits where no client has been injured in fact.

(3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

(4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

(c) Frivolous unfair competition lawsuits clog our courts and cost taxpayers. Such lawsuits cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits.

(d) It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code.

(e) It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.

(f) It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public.

(g) It is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.

(h) It is the intent of California voters in enacting this act to require that civil penalty payments be used by the Attorney General, district attorneys, county counsels, and city attorneys to strengthen the enforcement of California's unfair competition and consumer protection laws.

SEC. 2. Section 17203 of the Business and Professions Code is amended to read:

17203. *Injunctive Relief—Court Orders*

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *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.*

SEC. 3. Section 17204 of the Business and Professions Code is amended to read:

17204. *Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys*

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association 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.*

SEC. 4. Section 17206 of the Business and Professions Code is amended to read:

17206. *Civil Penalty for Violation of Chapter*

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. *The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered *for the exclusive use by the city attorney for the enforcement of consumer protection laws.* However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

SEC. 5. Section 17535 of the Business and Professions Code is amended to read:

17535. *Obtaining Injunctive Relief*

Proposition 64 *(cont.)*

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association 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 a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section 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.*

SEC. 6. Section 17536 of the Business and Professions Code is amended to read:

17536. *Penalty for Violations of Chapter; Proceedings; Disposition of Proceeds*

(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer.

If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city. *The aforementioned funds shall be for the exclusive use by the Attorney General, district attorney, county counsel, and city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality which funds the local agency.

(e) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive.

SEC. 7. In the event that between July 1, 2003, and the effective date of this measure, legislation is enacted that is inconsistent with this measure, said legislation is void and repealed irrespective of the code in which it appears.

SEC. 8. In the event that this measure and another measure or measures relating to unfair competition law shall appear on the same statewide election ballot, the provisions of the other measures shall be deemed to be in conflict with this measure. In the event that this measure shall receive a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure relating to unfair competition law shall be null and void.

SEC. 9. If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

Proposition 65

Pursuant to statute, Proposition 65 will appear in a Supplemental Voter Information Guide.

Proposition 66

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Penal Code and amends a section of the Welfare and Institutions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

THE THREE STRIKES AND CHILD PROTECTION ACT OF 2004

SECTION 1. Title

This initiative shall be known and may be cited as the Three Strikes and Child Protection Act of 2004.

SEC. 2. Findings and Declarations

The people of the State of California do hereby find and declare that:

(a) Proposition 184 (the "Three Strikes" law) was overwhelmingly approved in 1994 with the intent of protecting law-abiding citizens by enhancing the sentences of repeat offenders who commit serious and/or violent felonies;

(b) Proposition 184 did not set reasonable limits to determine what criminal acts to prosecute as a second and/or third strike; and

(c) Since its enactment, Proposition 184 has been used to enhance the sentences of more than 35,000 persons who did not commit a serious and/or violent crime against another person, at a cost to taxpayers of more than eight hundred million dollars ($800,000,000) per year.

SEC. 3. Purposes

The people do hereby enact this measure to:

(a) Continue to protect the people from criminals who commit serious and/or violent crimes;

(b) Ensure greater punishment and longer prison sentences for those who have been previously convicted of serious and/or violent felonies, and who commit another serious and/or violent felony;

(c) Require that no more than one strike be prosecuted for each criminal act and to conform the burglary and arson statutes; and

(d) Protect children from dangerous sex offenders and reduce the cost to taxpayers for warehousing offenders who commit crimes that do not qualify for increased punishment according to this act.

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. secs. 1013(a), 2015.5)

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

OPENING BRIEF ON THE MERITS

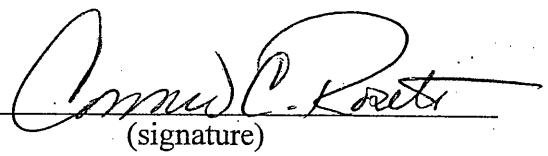
on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 555 West Fifth Street, Los Angeles, California 90013-1024 , in accordance with Morrison & Foerster's ordinary business practices:

Please see attached list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Los Angeles, California, this 27th day of May, 2005.

Connie C. Rosete
(typed)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