

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

SUPREME COURT COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS, **SUPREME COURT**
Plaintiff and Appellant, **FILED**

v.

MERVYN'S LLC,
Defendant and Respondent.

MAY 31 2005

Frederick K. Onitich Clerk

Deputy

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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**RESPONDENT MERVYN'S
OPENING BRIEF ON THE MERITS**

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.*

