No. S131798

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

Unfair Competition Case
(See Bus. & Prof. Code § 17209 and Cal. Rules of Court, rule 16(d))

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT CALIFORNIANS FOR DISABILITY RIGHTS

Barbara Jones, CA Bar No. 88448
AARP Foundation Litigation
200 South Los Robles, Ste.400
Pasadena, CA 91101
Telephone: (626) 585-2628
Facsimile: (626) 583-8538

On Brief:
Thomas Osborne, DC Bar No. 428164
AARP Foundation Litigation
Michael Schuster, DC Bar No. 934133
AARP
601 E. Street, N.W.
Washington, D.C. 20049
Telephone: (202) 434-2060

Attorneys for *Amicus Curiae* AARP

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To the Honorable Ronald M. George, Chief Justice of this Court:

AARP requests leave to file an *amicus curiae* brief in this case in support of Californians for Disability Rights, on the limited issue of what is the impact, if any, of the provisions of Proposition 64 on this case.

This Court's decision on the retroactive effect of Proposition 64 will impact the rights of AARP's members in many pending cases in California.

STATEMENT OF INTEREST OF AMICUS CURIAE

AARP is a non-partisan, non-profit membership organization of more than 35 million people age 50 or older, including more than 3 million members in California. As the largest membership organization in the United States dedicated to addressing the needs and interests of older Americans, AARP is greatly concerned about ensuring strong protections against unfair and deceptive practices in the marketplace that target vulnerable populations, such as older individuals who are disproportionately victimized by many of these practices. AARP supports laws and public policies that protect the rights of older Americans, including access to courts to vindicate those rights.

ISSUE PRESENTED

Do the provisions of Proposition 64 that limit standing to bring an action under the Unfair Competition Law (Bus. & Prof. Code § 17200 et seq.) apply to actions pending

when the proposition became effective on November 3, 2004?

SUMMARY OF ARGUMENT

Proposition 64 does not apply retroactively to cases pending in California courts on November 3, 2004. The absence of any express provision in the initiative directing retroactive application strongly supports the conclusion that the electorate intended that this measure operate only prospectively. Additionally, it would be unjust, impractical and unconstitutional to apply Proposition 64 to pending cases, since the litigants in those cases justifiably relied on rules in effect at the time they filed their cases. The absence of an express "savings clause" in the initiative is a red herring that provides no basis whatsoever to conclude that the initiative applies retroactively.

ARGUMENT

I. THE PRESUMPTION AGAINST RETROACTIVE OPERATION OF A STATUTE APPLIES EQUALLY TO VOTER-PASSED INITIATIVES.

As a general rule, California statutes operate only prospectively, not retroactively, unless the language of the measure plainly indicates a contrary intent. *See Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207-1208; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal. 2d 388, 393. No such intent appears in the text of Proposition 64. The presumption against retroactive operation of a statute applies equally to voter-passed initiatives. *Evangelatos,* 44 Cal. 3d at 1206. In *Evangelatos*, this Court held that Proposition 51 could not be applied retroactively because nothing in the language of Proposition 51 indicated that the statute was to have retroactive effect. *Id.* at 1209

("…the absence of any express provision directing retroactive application strongly supports the prospective operation of the measure.")

Although the drafters of Proposition 64 presumably were aware of this familiar rule, they did not include any language in the initiative indicating that the measure was to apply retroactively to pending cases. The inescapable conclusion is that the Proposition is intended to apply only prospectively. Further, there is nothing to suggest that the electorate who voted on the measure even considered the issue. Therefore, in accordance with California authorities, the initiative should not be construed to be retroactive. The presumption against retroactivity of voter-passed initiatives is especially important in cases such as this one where long-standing substantive rights of individuals are at stake.

II. JURISDICTIONAL STATUTES CANNOT BE RETROACTIVELY APPLIED IF THE EFFECT OF THE STATUTE IS TO WHOLLY ELIMINATE SUBSTANTIVE RIGHTS.

In *Hughes Aircraft Co. v. United States ex rel. Schumer* (1997) 520 U.S. 939, 948-51, the United States Supreme Court defined the limited circumstances under which a jurisdictional statute will be deemed to have retroactive effect. *Hughes Aircraft* is particularly relevant to the issue of the retroactivity of Proposition 64 because that case concerned a *qui tam* suit, which, like California's Business and Professions Code § 17200, prior to November 2, 2004, established a right of action for a party that had suffered no actual injury. Specifically, *Hughes Aircraft* concerned the interpretation of the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b), which authorized

private individuals to bring claims on behalf of the government against any person who knowingly presented false or fraudulent claims to the government in violation of 31 U.S.C. § 3729. In *Hughes Aircraft*, the Court explained that when a statute affects "*whether* [a suit] may be brought at all," it "speaks not just to the power of a particular court but to the substantive rights of the parties" and hence, "is as much subject to [the] presumption against retroactivity as any other." (Original emphasis.) *Id*. at 951. Although *Hughes Aircraft* applied the presumption against retroactivity to a statute that "*create[d]* jurisdiction where none previously existed," this presumption is equally applicable to an amendment of a statute, such as Proposition 64, that bars a litigant from pursuing a claim under the statute and deprives a court of jurisdiction so that a claimant is left with no forum at all in which to bring his suit.

The Defendant/Respondent has argued that *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244 and other federal cases are "wholly irrelevant" to California statutes (Respondent's Opening Brief, p. 10). This Court, however, adopted the reasoning of *Landgraf* and the specific language of *Hughes Aircraft* in holding that:

> Just as federal courts apply the time-honored legal presumption that statutes operate prospectively "unless Congress has clearly manifested its intent to the contrary" (*Hughes Aircraft co. v. United States ex re. Schumer, supra,* 520 U.S. at p. 946 [117 S.Ct. at p. 1876]), so too California courts comply with the legal principle that unless there is an "express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application."

Myers v. Philip Morris Cos. (2002) 28 Cal. 4th 828, 841.

Thus, federal and California courts apply a presumption against giving retroactive effect to legislation whose express terms do not make it retroactive. The legal presumption against retroactivity was explained by the U.S. Supreme Court in *Landgraf*, 511 U.S. at 265-66:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Federal courts have construed federal legislation designed to curb "frivolous lawsuits" in a variety of contexts and determined that the statutes could not be found retroactive. For example, in *Scott v. Boos* (9th Cir. 2000) 215 F.3d 940, 945, the Ninth Circuit interpreted an amendment of the Private Securities Litigation Reform Act (PSLRA) designed "to address a significant number of frivolous actions based on alleged securities law violations." The Court held that since "the intent [of the PSLRA amendment] was substantive - to deprive plaintiffs of the right to bring securities fraud based RICO claims," it could not be applied retroactively to preclude plaintiffs claims. *Id.* Similarly, in *Mathews v. Kidder* (W.D. Pa. 1998) 161 F.3d 156, 166, the court held that an amendment to the RICO statute could not retroactively deprive plaintiffs of a right to make a claim. The Eighth Circuit reached the identical result in *Harrod v. Glickman* (8th Cir. 2000) 206 F.3d 783, 792, construing the Disaster Assistance Act of 1989, Pub. L. No. 101-82, 103 Stat. 564: "When application of a new limitation period would *wholly*

eliminate claims for substantive rights or remedial actions considered timely under the old law, the application is impermissibly retroactive."

III. RETROACTIVE LEGISLATION DEPRIVES PARTIES OF NOTICE AS TO THE SUBSTANTIVE LAW GOVERNING THEIR TRANSACTIONS AND OF THE OPPORTUNITY TO CONFORM THEIR CONDUCT TO THE DEMANDS OF THE LAW.

Constitutional restrictions on retroactive lawmaking reflect concerns for fundamental fairness which lie at the core of due process protections. In the words of U.S. Supreme Court Justice Story, "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 3 J. Story, *Commentaries on the Constitution* § 1392 (1833).[1] *See also* Lon L. Fuller, *The Morality of Law* 53 (1964) ("[A] retroactive law is truly a monstrosity."); Herbert Broom, *A Selection of Legal Maxims* 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.").

A. Retroactive legislation that eliminates a pending claim violates the California Constitution.

Article 1, § 7 of the California Constitution guarantees the right of due process. "Retrospective application of a statute is unconstitutional when it deprives a person of a

[1]Also available at http://www.constitution.org/js/js_334.txt.

substantive right without due process of law." *Yoshioka v. Superior Court* (1997) 58 Cal. App. 4th 972, 981. The elimination of a plaintiff's right to bring a claim violates due process. *See, e.g., Aronson v. Superior Court* (1987) 191 Cal. App. 3d 294, 298. Statutes do not operate retroactively - that is, to change the legal consequences of past events - unless the Legislature plainly intended them to do so. *Western Sec. Bank v. Superior Court* (1997) 15 Cal. 4th 232, 243. Legislative intent, however, is only one prerequisite to retroactive application of a statute. Having identified such intent, this Court must determine whether retroactivity is barred by constitutional restraints. *See In re Marriage of Buol* (1985) 39 Cal. 3d 751, 756-59.

The following factors have been considered by California courts in determining whether retroactive application of an initiative violates due process: "[1] the significance of the state interest served by the law, [2] the importance of the retroactive application of the law to the effectuation of that interest, [3] the extent of reliance upon the former law, [4] the legitimacy of that reliance, [5] the extent of actions taken on the basis of that reliance, and [6] the extent to which the retroactive application of the new law should disrupt those actions." *Yoshioka v. Superior Court* (1997) 58 Cal. App. 4th 972, 983. All of these factors weigh against retroactive application of Proposition 64. Many representative plaintiffs themselves relied on the litigation and have expended time and costs in pursuing litigation designed to stop unlawful and unfair business practices.

Furthermore, this Court has held that it is unlawful to subject defendants to

liability for past conduct that was lawful when it occurred unless there is an express intent of the Legislature to do so. *See Myers*, 28 Cal. 4th at 840. It is likewise unlawful to wholly eliminate a litigant's claim retroactively. Thus, both fundamental fairness and California Constitutional due process rights mandate that Proposition 64 should not be applied to pending litigation.

B. Like California, numerous state courts have held that retroactive legislation that interferes with substantive or vested rights is unconstitutional and will not be enforced.

State courts throughout the nation follow the principle that state legislation is presumed to be prospective, not retroactive. *See, e.g., Washington Suburban Sanitary Comm'n v. Riverdale Heights Vol. Fire Co.* (1987) 308 Md. 556, 561 [520 A.2d 1319, 1322].

A Court of Appeal in Florida recently addressed the issue whether or not a public interest organization, like *Californians for Disability Rights,* could be stripped of standing retroactively in *Envtl. Confed. of Sw. Florida v. State of Florida, Dep't. of Envtl. Prot.* (2004) 29 Fla. L. Weekly D2421 [886 So.2d 1013, 1017]. The court in *Envtl. Confed. of Sw. Florida* held that an amendment to a statute limiting the standing of public interest groups to intervene in a state Department of Environmental Protection permit proceeding could not apply retroactively because the public interest groups would lose their "substantive" rights to challenge certain environmental permits. *Id.* This ruling is line with other state holdings. *See Karl v. Bryant Air Conditioning Co.* (1982) 416 Mich. 558,

573 [331 N.W.2d 456, 464] ("A new statute which abolishes an existing cause of action" is not "legally acceptable"); *Schedt v. Dewey* (1994) 246 Neb. 573, 577 [520 N.W.2d 541, 546] ("an accrued cause of action is a vested right. . . Like other vested rights, they cannot be impaired by a subsequent legislative act."); *Synalloy Corp. v. Newton* (1985) 254 Ga. 174, 176 [326 S.E.2d 470, 472] ("At such time as there shall co-exist all of the elements which, at law, combine to create a cause of action, that cause of action is deemed to be vested, and thereafter cannot be diminished by legislative act.").

Like the federal courts, state courts have held that the presumption in favor of prospective applicability of a statute may be rebutted only when the legislature "clearly and unequivocally" expresses its intent that the legislation shall apply retrospectively. *Anderson Consulting, LLP v. Gavin* (2001) 255 Conn. 498, 517 [767 A.2d 692, 704]; *Majewski v. Broadalbin-Perth Cent. Sch. Dist.* (1998) 91 N.Y.2d 577, 583-84 [696 N.E.2d 978, 979-81] (That a statute is to be applied prospectively is strongly presumed and, here, nothing is found that approaches any type of "clear" expression of legislative intent concerning retroactive application.) The Illinois Supreme Court has gone even further, holding in *First of America Trust Co. v. Armstead* (1996) 171 Ill. 2d 282, 290 [664 N.E. 2d 36, 40] that "[t]he legislature is without constitutional authority to enact a law that is truly retroactive, in that it impairs vested rights, even if that is its expressed intention."

Courts invoke the presumption because giving retroactive effect to legislation

violates principles of fundamental fairness and interferes with substantive or vested rights. *See, e.g., Metro. Dade County v. Chase Fed. Hous. Corp. (*1999) 24 Fla. L. Weekly S267 [737 So. 2d 494, 500, fn 8] (. . . " the presumption against retroactivity is an established principle of statutory construction founded on notions of fairness and separation of powers concerns, rather than simply protecting the constitutional rights of the affected parties"); *Zaragoza v. Dir. of Dept. Of Revenue* (Colo. 1985) 702 P.2d 274, 276 ("The Colorado Constitution prohibits the enactment of retrospective legislation. . . The proscription against retroactive legislation prohibits the impairment of vested rights. . . ."); *Dua v. Comcast Cable of Maryland, Inc.* (2002) 370 Md. 604, 625 [805 A.2d 1061, 1073] (Provisions in state statutes making laws retroactive were held to be unconstitutional under the Maryland Constitution because the statutes deprived people of vested rights); *City of Detroit v. Walker* (1994) 445 Mich. 682, 699-04 [520 N.W.2d 135, 143-45] (Constitutional prohibition of the passage of retroactive laws refers to retroactive laws that injuriously affect some substantial or vested right. A vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice.)

IV. EVEN PROCEDURAL CHANGES SHOULD NOT BE GIVEN RETROACTIVE EFFECT IF THE RESULT WOULD BE UNJUST OR IMPRACTICAL.

Although this Court has held that in certain circumstances procedural changes can be applied to pending cases, *see e.g., Tapia* v. *Superior Court* (1991) 53 Cal. 3d 282, 288-

92 the U.S. Supreme Court has cautioned that even procedural rules should not be applied retroactively if doing so would be unjust and impractical: "A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . ." *Landgraf,* 511 U.S. at 275, fn. 29. Therefore, even if this Court determines that Proposition 64 is a procedural change - which it is not - affecting only the manner in which complaints should be drafted, *i.e.*, complaints now must conform with the class action rules, it would nevertheless be unjust and impractical to apply that rule change retroactively. Even though it is likely that many of the representative actions alleging violations of Business and Professions Code § 17200 pending in the state courts when Proposition 64 became effective could have been filed as class actions as is now required under Proposition 64, the fact that they were filed as representative actions may simply reflect that at the time they were filed, Business and Professions Code section 17200 did not require class allegations. To require that those cases now be remanded to be re-pleaded and possibly re-tried under newly imposed class action rules would be fundamentally unfair. It would be particularly unfair to those Californians, including many AARP members, who are living on fixed incomes to require them essentially to re-litigate representative cases, forcing them to pay duplicate costs to have their day in court. Requiring repetitive litigation simply does not make sense. Neither is it in the interests of justice.

V. AN EXPRESS SAVINGS CLAUSE IN A REPEALING STATUTE IS NOT NECESSARY TO PRESERVE PENDING LITIGATION.

Although some parties have argued that Proposition 64 should have retroactive effect because there is no "express" saving clause in the initiative itself, "[a]n express saving clause in a repealing statute is not required in order to prevent the destruction of rights existing under the former statute, if the intention to preserve and continue such rights is otherwise clearly apparent." *See Bear Valley Mut. Water Co. v. County of San Bernadino* (1966) 242 Cal. App. 2d 68, 72.

Business & Professions Code § 17200 additionally is subject to the savings clause as set forth in Business & Professions Code § 4. Section 4 expressly precludes the application of a repeal statute to actions commenced *before* the statute's effective date. This proposition may be gleaned directly form Section 4's unambiguous language: "No action or proceeding commended *before* this code takes effect, and no right accrued, is affected by the provisions of this code . . ."(emphasis added).

Furthermore, in *County of Alameda v. Kuchel* (1948) 32 Cal. 2d 193, 199, this Court concluded that "statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the law makers. Such intention controls if it can be reasonably ascertained from the language used."

In approving Proposition 64, it is clear that the electorate did not intend that the measure apply to pending Business and Professions Code § 17200 claims. Specifically, the text of Proposition 64 § 1(d), provides: "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 this chapter."*** (Emphasis added.) Text of Proposed Laws.[2] The fact that the electorate specifically expressed a desire to protect the right of individuals to file § 17200 claims is also an implied savings clause regarding pending actions. *See Traub v. Edwards* (1940) 38 Cal. App. 2d 719, 723 ("...the legislature could not have intended to preserve the rights of litigants whose actions had not then been filed and to destroy the rights of those whose actions had already been filed and were pending.") The electorate's express intent to save meritorious actions makes this case distinguishable from the line of cases which concern the *unconditional* repeal of a special remedial statute. *See*, e.g.*, Physicians Com. for Responsible Med. v. Tyson Foods, Inc.* (2004) 119 Cal. App. 4th 120, 125-26.

In approving Proposition 64, the electorate also expressed concern about "clogging" the courts, which results in excessive costs to the taxpayer. Text of Proposed Laws, *Proposition 64* § 1, *supra,* subsection c ("Frivolous unfair competition lawsuits clog our courts and cost taxpayers."). Holding that Proposition 64 applies prospectively only will avoid these results and, thus implement the electorate's clearly expressed intent.

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[2]A complete copy of *Proposition 64* is available at the California Secretary of State's website: http://www.ss.ca.gov/elections/bp_nov04/prop_64_text_of_proposed_law.pdf.

CONCLUSION

Prior to voter approval of Proposition 64 on November 2, 2004, Business and Professions Code § 17200 did not require an individual to file a personal claim in support of a representative action. The drafters of Proposition 64 did not include any language in the initiative requiring retroactive application. It is, therefore, illogical to conclude that they, or the voters who approved it, could have intended such a result.

Since Proposition 64 does not include a requirement that it be given retroactive effect, it should not apply to pending cases. Moreover, it would be unjust and unlawful to hold that Proposition 64 eliminates this lawsuit filed by Californians for Disability Rights, especially in light of the fact that is case, like countless others, met the statutory pleading requirements when it was filed.

Dated: August 22, 2005

Respectfully submitted,

_____

Barbara Jones, CA Bar No. 88448
Attorney for *Amicus Curiae*
AARP

On Brief:
Thomas Osborne, DC Bar No. 428164
AARP Foundation Litigation

Michael Schuster, DC Bar No. 934133
AARP

Attorneys for AARP

CERTIFICATE OF COUNSEL RE: WORD LENGTH

I, Barbara Jones, hereby certify as follows:

I am counsel of record for *amicus curiae*. According to the word processing program I used to prepare this brief, the brief (excluding tables and this certificate) is 3534 words long.

Dated: August 22, 2005

_____

BARBARA A. JONES
Attorney for *Amicus Curiae*
AARP

PROOF OF SERVICE BY MAIL

CASE NAME: *Californians for Disability Rights v. Mervyns*
SUPREME COURT CASE NUMBER: No. S131798
COURT OF APPEALS CASE NUMBER: 1ST Civ. No. A106199

I, Doris Larbi, declare as follows:

1. At the time of service, I was at least 18 years of age and not a party to this legal action. I am a resident or employed in the county where the within-mentioned service occurred.

2. My business address is: 601 E Street, NW, Washington, DC 20049

3. On August 22, 2005, I served the Application for Leave to file *Amicus Curiae* Brief; and Proposed Brief in Support of Plaintiff and Appellant, Californians for Disability Rights by overnight mail as follows: I enclosed a copy in separate envelopes, with postage fully prepaid, addressed to each individual addressee named below, and placed in my employer's mail room. I am readily familiar with my employer's practice of collecting and processing correspondence for business day delivery and know that in the ordinary course of that practice the document described above will be deposited with the U.S. Mail in Washington, DC on the same date that it is placed in my employer's mail room fully prepaid for collection and delivery.

Counsel for Plaintiff

Andrea G. Asaro
Holly M. Baldwin
Rosen, Bien & Asaro
155 Montgomery St., 8th Floor
San Francisco, CA 94104

Sidney Wolinsky
Monica Goracke
Disability Rights Advocates
449 - 15th Street, Suite 303
Oakland, CA 94612

Daniel Mason
Zelle, Hoffman, et al.
44 Montgomery St., Suite 3400
San Francisco, CA 94104

James C. Sturdevant
Monique Olivier
The Sturdevant Law Firm
475 Sansome St., Suite 1750
San Francisco, CA 94111

Counsel for Defendant

Gloria Young Eun Lee
Morrison & Foerster LLP
425 Market St.
San Francisco, CA 94105

David Frank McDowell
Morrison & Foerster
555 West Fifth Street, Suite 3500
Los Angeles, CA 90013

Kathryn Ann Vaclavik
Howard Rice et al.
425 Market St.
San Francisco, CA 94105

Courtesy Copies Served by U.S. Mail:

Alameda County Superior Court
Honorable Henry Needham, Jr.
U.S. Post Office Building
201-13th Street
Oakland, CA 94612

Clerk of the Court
Alameda County Superior Court
1255 Fallon Street
Oakland, CA 94612

Clerk of the Court
California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Tom Orloff
District Attorney, County of Alameda
1255 Fallon Street
Oakland, CA 94612

Bill Lockyer
Office of the Attorney General of the
State of California
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244

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

Date: August 22, 2005

_____
Doris Larbi