

SUPREME COURT COPY

No. S131798

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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CALIFORNIANS FOR DISABILITY RIGHTS,  
*Plaintiff and Appellant,*

SUPREME COURT  
**FILED**

JUL 14 2005

v.

MERVYN'S CALIFORNIA, INC.,  
*Defendant and Respondent.*

Frederick K. Ohtrich Clerk  

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**Deputy**

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

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**ANSWERING BRIEF ON THE MERITS**

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Unfair Competition Case

Service on the California Attorney General and the District Attorney Required by  
Bus. & Prof. Code § 17209 and Cal. Rules of Court, rules 15(c)(3), 44.5(c)

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## I. INTRODUCTION

Because retroactive application of statutes is disfavored, a new law will not apply retroactively unless an intent to apply it to pending cases appears in an “express retroactivity provision” or is “very clear from extrinsic sources.” (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.)

*Since the drafters declined to insert such a provision in the proposition – perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision – it would appear improper for this court to read a retroactivity clause into the enactment at this juncture.*

(*Id.* at 1212.)

On November 2, 2004, the voters of California passed Proposition 64, which amends sections of the Unfair Competition Law, Business and Professions Code section 17200 et seq. (“UCL”) and sections of the False Advertising Act, Business and Professions Code section 17500 et seq. (“FAA”).<sup>1</sup> Neither the text of Proposition 64 nor the ballot materials presented to the voters suggest that the amendments to the UCL would apply retroactively to pending cases, or that the proposition constituted a “repeal” of all or any part of the UCL.

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<sup>1</sup> Throughout this brief, “UCL” is intended to mean and encompass both the UCL and the FAA.

We – the people and the courts – expect statutes and initiatives to mean what they say. This is the basic starting point of statutory construction. And when statutes are silent or ambiguous on particular matters, certain principles, woven into the jurisprudence of this Court over time, apply.

One of these time-honored principles is that newly enacted statutes are presumed to apply prospectively only, absent unambiguous language to the contrary. (*Evangelatos*, 44 Cal.3d at 1188.) Indeed, in case after case for decades, this Court has articulated this presumption as the starting point for any analysis of statutory retroactivity. If, and only if, retroactivity is clearly intended by the Legislature or electorate, *and* no constitutional impediment exists to retroactive application, will the presumption be overcome.

The instances in which this Court has applied this presumption to determine whether a new law is retroactive are varied. They include statutory amendments passed by the Legislature, initiatives amending statutes passed by the voters, and statutory repeals. In each case, this Court has posed the question: was there clear and unambiguous language that the Legislature or voters intended that the law apply retroactively?

The presumption against retroactivity applies here and compels the

conclusion that Proposition 64's amendments to the UCL cannot be applied to this case. Plaintiff Californians for Disability Rights ("CDR"), a nonprofit disability rights and resource organization, filed this action in 2002 against defendant Mervyn's, LLC ("Mervyn's") asserting a single cause of action under the UCL to redress Mervyn's systematic and unlawful failure to provide full and equal access to its merchandise to customers with mobility disabilities, in violation of California's civil rights laws. Unlike the so-called "frivolous" UCL suits to which Proposition 64 was directed, this action proceeded to a full trial on the merits and resulted in specific findings of discrimination by the trial court. Judgment was nonetheless entered for Mervyn's on an erroneous legal basis, and CDR timely filed and has been pursuing its right to appeal. Citing the so-called statutory "repeal rule," Mervyn's insists that the passage of Proposition 64 terminates this action. As the Court of Appeal recognized, this result cannot be reconciled with the expressed intent of the initiative or the jurisprudence of this Court.

The statutory repeal rule does not alter the basic and time-tested presumption against retroactivity. This Court has applied the repeal rule narrowly in select cases and limited circumstances, and then only when the Legislature or electorate clearly expressed an intent that the new law repeal the old, and that the repeal apply retroactively. The repeal rule simply does

not have the force that Mervyn's contends. Recent decisions by this Court and the United States Supreme Court emphasize that the considerations of fairness and due process underlying the presumption against retroactivity apply to all new statutes and that no exception exists where purely statutory rights are at stake. Even if the repeal rule continues to have some viability today, it does not apply to Proposition 64 which (1) does not involve a repeal of a cause of action or remedy; (2) involves the significant rights of the parties; and (3) amends a statute that contains a two-part savings clause that prohibits retroactive repeals of new terms in the statute.

Finally, Proposition 64 cannot apply to this case on the theory that it merely adopts procedural changes that properly can be applied to cases going forward. As this Court has explained, a new statute that governs the future conduct of litigation operates prospectively when applied to a pending case, because it affects *only* the "procedure to be followed in the future." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288, citations omitted.) In contrast, new laws that have a substantive effect on pending cases operate retrospectively and cannot apply to pending cases absent unambiguous legislative intent. (*Id.* at 287.) Unlike a statute that affects merely modes of procedures, Proposition 64 significantly alters the ways in which UCL claims are brought and litigated by circumscribing the parties

who can bring them. If applied to pending cases such as this one, Proposition 64 would not merely affect how many UCL cases are tried, but would eliminate them altogether. Application of Proposition 64 is a substantive change in the law and cannot be applied to pending cases.

Mervyn's arguments that Proposition 64 should apply to pending UCL cases such as this one are riddled with unresolvable inconsistencies. Mervyn's acknowledges the breadth of the presumption against retroactivity but then claims the presumption is subject to a gaping exception for the repeal of statutory rights. On the one hand, it claims that Proposition 64 effectively repeals the UCL, but on the other it claims that the changes rendered by the initiative are merely procedural and, therefore, apply prospectively to this case. This Court should not countenance Mervyn's innovative twists on stare decisis.

Careful review of the state of the law and the facts of this case leads to the inescapable conclusion that Proposition 64 does not and cannot apply retroactively.

## **II. STATEMENT OF THE CASE**

### **A. Passage of Proposition 64**

On November 2, 2004, the voters of California passed Proposition 64, which amends the UCL. Proposition 64 adds to the UCL (1) a provision

limiting standing to file a representative private suit to enforce Section 17200 or Section 17500 to “any person who has suffered injury in fact and has lost money or property as a result of such unfair competition” (Appen. at 1, Prop. 64, § 3);<sup>2</sup> and (2) a provision that a private suit for “representative claims or relief on behalf of others” comply with the requirements of the class action statute, Code of Civil Procedure section 382 (*id.*, § 2).

Two facts regarding Proposition 64 are undisputed: (1) nothing on the face of Proposition 64 or the ballot materials states that Proposition 64, if enacted by the voters, will, or was intended to, apply retroactively to all cases pending on the date of the enactment; and (2) nothing on the face of Proposition 64 or the ballot materials states that the initiative would “repeal” the UCL or any parts thereof.

In addition to the fact that Proposition 64 contains no statement of retroactivity, the text of the initiative and the ballot materials contains language indicative of prospectivity. The measure’s findings suggest it was intended to prevent certain *future* actions from being filed, not to terminate or alter the law applicable to pending cases. Section 1(e), for example,

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<sup>2</sup> For the Court’s convenience, we have attached hereto a copy of the text of Proposition 64 and the ballot materials as an appendix.

provides: “It is the intent of the California voters . . . 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.” (Appen. at 1, Prop. 64, § 1(e), emphasis added.) Where the findings speak of prospectively barring “filings,” Mervyn’s wishes the Court to pretend that the findings instead speak of barring “the filing of new cases and the continuation of old cases.” This Court should decline the invitation to rewrite the initiative.

Further, the proponents of Proposition 64 affirmatively represented to at least one voter that the initiative would *not* be retroactive. As reflected in news stories in the wake of the day at the polls, and as substantiated in a declaration, a voter specifically inquired of the proponents – before the election – whether the initiative would be retroactive. The proponents replied: “No, it will not.” (See Brief of Amicus Consumer Attorneys of California in Opposition to Respondent’s Motion to Dismiss, filed in the Court of Appeal in this case, on January 14, 2005, Exhibit 1 at 2 [Declaration of Daniel C. Sigler] (“Sigler Decl.”).)

Moreover, contrary to Mervyn’s assertions, Proposition 64 did not implicitly “repeal” any cause of action or remedy available under the UCL. The content of the UCL causes of action for “unlawful, unfair, and

fraudulent business practices” is unimpaired. (Appen. at 1, Prop. 64, § 1(a).) Likewise, Proposition 64 did not repeal any of the remedies available for violation of the UCL. In fact, voters were informed that Proposition 64 protects the right to seek redress for unlawful business practices and that actions on behalf of the general public are preserved when brought by public prosecutors. (*Id.*, §§ 1(d)-(f).) Proposition 64 does not change the scope of the liabilities or remedies under the UCL; instead, it adds substantive standing requirements for future UCL actions.

#### **B. The Proceedings in the Trial Court**

CDR, a nonprofit disability resource organization, filed this action against Mervyn’s in 2002 asserting a single cause of action under the UCL to redress Mervyn’s systematic and unlawful failure to provide full and equal access to its merchandise to customers with mobility disabilities. CDR’s action is predicated exclusively on violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the Disabled Persons Act (Civ. Code, § 54 et seq.).

The case proceeded to a bench trial on the merits in 2003. Over the course of 17 days, the parties presented the testimony of over 25 witnesses. CDR called 18 individuals with mobility disabilities who described the widespread and systematic access barriers they confronted, collectively, at

