No. S131798

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,

v.

MERVYN'S CALIFORNIA, INC.,
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

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").[1] 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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[1] 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);[2] 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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[2] 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

24 Mervyn's stores throughout California. CDR also called Mervyn's executives, who admitted that Mervyn's has no minimum spacing requirements for moveable display racks and that no one measures pathways or knows the widths of the pathways in Mervyn's stores.

In its Statement of Decision issued after trial, the court made three key findings of discrimination: (1) that Mervyn's has no minimum spacing requirements for the pathways between moveable display racks; (2) that Mervyn's does not measure the pathways or know how wide they are; and (3) that Mervyn's has a discriminatory policy or practice of maintaining narrow pathways that prevent or impede access for persons with mobility disabilities to the merchandise at its stores. (AA 543, 553, 571.) The trial court made its findings of discrimination after considering all of the evidence, some of which was conflicting, and assessing the credibility of the witnesses before it. (*Ibid.;* AA 537)

Rather than order appropriate injunctive relief, however, the trial court erroneously allowed Mervyn's to take advantage of the "readily achievable" and "fundamental alteration" affirmative defenses available under the federal Americans With Disabilities Act (42 U.S.C. § 12182 et seq. (the "ADA")) but not afforded under state law, and then misconstrued and misapplied those defenses. Based solely on its erroneous conclusions

about these federal defenses, the court entered judgment for Mervyn's.

C. The Court of Appeal Decision

CDR timely appealed the judgment against it in April 2004. After CDR filed its opening brief on the merits, Mervyn's filed a motion to dismiss the appeal on the basis of the passage of Proposition 64. After complete briefing by the parties and two amici curiae, and oral argument by the parties, the First District Court of Appeal issued a thoughtful opinion concluding that Proposition 64 does not apply to this case or to any UCL action pending on November 3, 2004, the effective date of Proposition 64. (*Californians for Disability Rights v. Mervyn's* (February 1, 2005, A 106199) (review granted April 27, 2005) ("Slip op.").)

In reaching its conclusion that Proposition 64 does not apply to lawsuits filed before its effective date, the court looked to well-established precedent from this Court. First, the court relied upon the long-settled rule that "a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (Slip op. at 3, quoting *Tapia,* 53 Cal.3d at 287.)

The Court of Appeal then looked to this Court's seminal decision in *Evangelatos*, 44 Cal.3d 1188 and its decision in *Myers v. Philip Morris*

Companies, Inc. (2002) 28 Cal.4th 828. (Slip op. at 4-5.) In those cases, this Court held that an initiative that amended a statute (*Evangelatos*) and a statute that expressly repealed a statutory immunity provision (*Myers*) were to operate prospectively, not retrospectively, absent clear expression of legislative or voter intent to the contrary. (*Evangelatos,* 44 Cal.3d at 1209, 1213-1214; *Myers,* 28 Cal.4th at 841.)

Analyzing the text of Proposition 64 and the ballot materials, the Court of Appeal noted that the language expressed an intention to prohibit the "filing" of lawsuits by private parties and found that, "[i]f anything, the statutory language and ballot materials suggest an intention that the law apply prospectively to future lawsuits." (Slip op. at 3-4.) The court then concluded that whatever the language of the initiative, it did not contain the clear language of retroactive intent necessary to apply it to pending cases. (*Ibid.*)

Second, the court considered and rejected the argument that the statutory repeal rule mandated dismissal of this case. Following the authority of both this Court and the U.S. Supreme Court, the court concluded that the repeal rule is not "an exception to the prospectivity presumption, but an application of it." (Slip op. at 7.) The court noted that in those cases in which the repeal of a statute was held to terminate a

pending action, the language of the repeal legislation indicated a legislative intent that the statute apply retroactively. (*Ibid.*)

Third, the court considered and rejected Mervyn's argument that Proposition 64 effects only procedural changes to the UCL and thus should be applied prospectively to pending cases. On this point, the court considered whether Proposition 64 "substantially affects existing rights and obligations" (Slip op. at 8, quoting *Elsner v. Uveges* (2004) 34 Cal.4th 915, 937), and concluded that application of Proposition 64 would result in dismissal of CDR's appeal, which would "substantially affect CDR's rights" (Slip op. at 8).

III. ARGUMENT

A. Amendments to a Statute, Such as Those Contained in Proposition 64, are Subject to the Firmly Established Presumption Against Retroactivity

The settled rule of law is that statutes operate prospectively only. When faced with a new statute and the question of retroactivity, this Court has repeatedly instructed that the analysis begins with "the fundamental principle that 'legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention.'" (*Evangelatos*, 44 Cal.3d at 1208, citing cases; accord *Elsner*, 34 Cal.4th at 936; *McClung v. Employment Development Dept.*

(2004) 34 Cal.4th 467, 475; *Myers*, 28 Cal.4th at 840; *Tapia*, 53 Cal.3d at 287; *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388, 393.) "[I]t has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature.'" (*McClung*, 34 Cal.4th at 475, citations omitted.)[3]

As this Court has recognized, "[e]lementary 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." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265; *McClung,* 34 Cal.4th at 475.) As Justice Mosk explained:

> The presumption of prospectivity is not narrowly cabined by constitutional concerns about ex post facto effects, but is broadly based on policy considerations involving fairness. [Citation.] "Retroactive laws are generally disfavored because the parties affected have no notice of the new law affecting past conduct. '[S]uch laws disturb feelings of security in past transactions.'" [Citations.] This proposition is firmly established. Otherwise, untenable results would follow. For example, prospectivity would be reducible to the ex post facto prohibition – and would therefore be nothing in itself. Also, prospectivity could not be "presumed" but

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[3] "Various statutes codify this rule of interpretation." (*Tapia*, 53 Cal.3d at 287 fn. 2, citing Code Civ. Proc., § 3; Pen. Code, § 3.)

would in fact be mandated as a result of constitutional compulsion. (*Tapia*, 53 Cal.3d at 305-306 (Mosk, J., dissenting); *Myers*, 28 Cal.4th at 841; *Landgraf*, 511 U.S. at 268.)

There are "dangers inherent in retroactive legislation." (*I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 316.) In particular, "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." (*Landgraf*, 511 U.S. at 266; see *Kaiser Aluminum & Chem. Corp. v. Bonjorno* (1990) 494 U.S. 827, 856 (Scalia, J., concurring), quoting 2 J. Story, Commentaries on the Constitution § 1398 (2d ed. 1851) (retroactive laws are "contrary to fundamental notions of justice, . . . [such] laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact").)

A statute's retroactivity "is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity." (*Myers*, 28 Cal.4th at 841, citations omitted.) Retroactivity, therefore, is initially and fundamentally a question of statutory interpretation. Whether it is a statute passed by the

Legislature or, as in this case, an initiative passed by the voters, the judiciary's goal is to determine and effectuate the intent of those who enacted it. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901; *Evangelatos,* 44 Cal.3d at 1193-1194.) The intent of the voters is "paramount" in interpreting a ballot initiative. (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) As with the usual principles of statutory construction, courts must first review the language of the statute and then, if needed, examine its context, statutory scheme and any legislative history or ballot materials. (*Robert L.,* 30 Cal.4th at 900-901.)

Because retroactive application of statutes is disfavored, if an "express retroactivity provision" does not appear on the face of the statute, it will not be applied to pending cases "unless it is *very clear* from extrinsic sources that the Legislature [or the voters] must have intended a retroactive application." (*Myers,* 28 Cal.4th at 841, quoting *Evangelatos,* 44 Cal.3d at 1209, emphasis in original.) Requiring a clear and unequivocal statement of retroactive intent serves to ensure that the legislative body "has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (*Landgraf,* 511 U.S. at 272-273.) The presumption also furthers another established rule of statutory construction: that courts

"construe statutes to avoid 'constitutional infirmities.'" (*Myers*, 29 Cal.4th at 846-847, citing cases.)

The need for a clear and unambiguous statement of retroactive intent is even more critical when determining the retroactivity of a voter initiative. Propositions are not subject to the rigorous debate of the legislative process. Unlike a legislative act, the language of an initiative is solely within the control of the drafters; voters do not have the opportunity to consider the import of its terms or to seek different or clarifying language. There is no opportunity for debate or even consideration – voters simply go to the polls and cast a ballot. If we cannot be assured that retroactivity, in the absence of a clear statement, was considered by the Legislature, such assurances are even more wanting in the case of the voters. (See, e.g., *People v. Davenport* (1985) 41 Cal.3d 247, 263 fn. 6 ("California initiatives are written and enacted without the benefit of the hearings, debates, negotiation and other processes by which the Legislature informs itself of the ramifications of its actions.").)

In recent years, this Court and the U.S. Supreme Court have emphasized the strength of the presumption against retroactivity. In *Evangelatos*, this Court considered whether Proposition 51, which eliminated joint and several liability for tort defendants, could apply

retrospectively. The Court began its analysis by relying on the "widely recognized legal principle . . . that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." (*Evangelatos*, 44 Cal.3d at 1193-1194.) The Court found that "[t]he drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively." (*Evangelatos*, 44 Cal.3d at 1194; see also *Aetna Casualty*, 30 Cal.2d at 396 ("it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended").) Noting that all parties had acted in reliance on the existing law, the Court found it would be unfair to change "the rules of the game" in the middle by applying new law to pending cases. (*Evangelatos*, 44 Cal.3d at 1194, 1215-1217.) Concluding that "there is nothing to suggest that the electorate considered the issue of retroactivity at all," the Court refused to give the measure retroactive effect. (*Id.* at 1194.)

In reaching its holding, the Court noted that some of its earlier decisions could have been construed as suggesting that "the presumption of prospectivity is to be 'subordinated . . . to the transcendent canon of statutory construction that the design of the Legislature be given effect" and

is to apply only if "it is impossible to ascertain the legislative intent." (*Evangelatos,* 44 Cal.3d at 1208, citations omitted.) The Court also noted that the dissent's approach called for an assessment of the overall purpose of the new legislation and whether or not the statute was "remedial" in nature. (*Id.* at 1208-1215.) The Court emphatically rejected both approaches and held that courts are to follow the "well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent." (*Id.* at 1218.)

Several years after *Evangelatos*, the U.S. Supreme Court stressed the importance of the presumption against retroactivity. In *Landgraf v. USI Film Products,* the Court disapproved two of its prior decisions to the extent they appeared to weaken the presumption, and stated that it never "intend[ed] to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." (*Landgraf,* 511 U.S. at 278.) The Court recently emphasized that the retroactive intent required must be "so clear that it could sustain only one interpretation." (*St. Cyr*, 533 U.S. at 317, citation omitted.)

After *Landgraf* and *St. Cyr* were decided, this Court in *Myers* rejected the argument that the Legislature's repeal of a statute that gave

tobacco companies immunity from suit should operate retroactively to revive claims that had accrued while the "immunity statute" was in effect. Noting the "Repeal Statute" was ambiguous on the issue of retroactivity, and reiterating the primacy of the presumption against retroactive application of a statute, this Court held that the ambiguity compelled the construction of the statute as "unambiguously prospective." (*Myers*, 28 Cal.4th at 843.) In other words, this Court held that retroactive application was impermissible because the "Repeal Statute" itself contained no "express language of retroactivity" and there was no other source "provid[ing] a clear and unavoidable implication that the Legislature intended retroactive application." (*Id.* at 884.)

More recently, in *McClung,* this Court refused to give retroactive effect to an amendment to the Fair Employment and Housing Act that imposed personal liability for harassment on non-supervisory workers. (*McClung*, 34 Cal.4th at 475-476.) The Legislature had stated that the amendments were expressly meant to clarify existing law, but this Court found that the amendments substantively changed the law. The Court stressed there was "no indication the Legislature even thought about giving, much less expressly intended to give, the amendment retroactive effect to the extent the amendment did not change the law." (*Id.* at 476.)

Most recently, in *Elsner*, this Court again determined that newly enacted Cal-OSHA provisions could not be applied to the trial in a pending case without clear evidence of legislative intent of retroactivity. (*Elsner*, 34 Cal.4th at 938-939.) Because nothing in the text or legislative history of the bill indicated such intent, the provisions could not apply retroactively. (*Ibid.*)

Accordingly, when courts consider the retroactivity of a newly enacted initiative, the roadmap is clear. The "first rule of [] construction" is that "legislation must be considered as addressed to the future, not to the past." (*Myers*, 28 Cal.4th at 840, citation omitted.) Only if the legislation "clearly intends" that the statute operate retroactively, will it be so applied and, then, only if such retroactivity is not "barred by constitutional constraints." (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756.) "[T]he voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

B. Proposition 64 Cannot Be Applied Retroactively to Pending Cases Because Neither the Text of the Initiative Nor the Ballot Materials Unambiguously Express the Intent That the Amendments to the UCL Apply Retroactively

Although the proponents of Proposition 64 had complete control over its terms, it is undisputed that the text of the initiative contains no

express retroactivity provision. Had the proponents intended that Proposition 64 apply retroactively to pending cases, nothing would have been easier for them to do than to expressly so provide – and so advise the electorate. That they did not means that the initiative lacks the "clear legislative intent" required to apply it retroactively. (*Evangelatos,* 44 Cal.3d at 1193-1194.)[4] In light of the presumption against retroactivity, the "failure to include an express provision for retroactivity is, in and of itself, 'highly persuasive' of a lack of intent." (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 818.)

Further, the fact that the proponents of Proposition 64 affirmatively represented to the public that the initiative would *not* be retroactive is strong evidence that it was not intended to apply to pending cases. (See Sigler Decl., *supra,* at 2.) (See *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 551 ("Absent some basis for determining that the intent of the electorate was in conflict with the intent of the drafters, evidence of drafters' intent is an appropriate tool in interpreting the scope of an initiative."); *City of Long Beach v. Department of Industrial*

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[4] This was not a bill negotiated in the Legislature, subject to compromise by various affected parties or groups which frequently results in the lack of an express retroactivity provisions. (Cf., *Myers*, 28 Cal.4th at 844-845; *Landgraf*, 511 U.S. at 253-257.)

Relations (2004) 34 Cal.4th 942-952 (legislator's statement prior to bill's enactment regarding prospective nature of bill was "indicative of probable legislative intent").)

The lack of explicit retroactivity language is even more conspicuous because it stands in marked contrast to previous initiatives that directly addressed retroactive application. For example, eight years ago, the voters passed Proposition 213, which prohibited uninsured motorists and drunk drivers from collecting non-economic damages in certain auto accident cases. The initiative stated: "This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997." (See *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979-980, emphasis omitted (holding, based primarily on the initiative's language, that Proposition 213 applied to a case that had been filed prior to its enactment, but in which the trial occurred after its enactment).)

Indeed, Proposition 64's proponents were fully aware that statutes are presumed to operate prospectively absent express language of intent to the contrary, since one of them submitted an amicus brief in the *Myers* case, arguing exactly that point. (See Brief of Amicus Curiae California Chamber of Commerce in Support of Respondents in *Myers v. Philip*

Morris, Inc., et al. (Nov. 7, 2001, S095213) [2001 WL 34152390] ("The presumption against retroactivity is a cornerstone of California law, which would be seriously undermined" by concluding the statute at issue in *Myers* was retroactive.); and see Office of the Attorney General, State of California, Initiative Measures 2004 (SA 03RF0051) Proponent: Allan Zaremberg and John H. Sullivan <*http://electionwatchdog.org/UCL_Text.pdf*> [as of July 12, 2005] (submission of the initiative by Mssrs. Zaremberg and Sullivan), and the official website of the Chamber of Commerce, listing Allan Zaremberg as its President and CEO <*http://www.calchamber.com/index.cfm?navID=278*> [as of July 12, 2005].)[5]

Further, the language of Proposition 64 is, in fact, forward-looking. The Findings and Declarations state that California voters intend "to

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[5] When those who drafted what would become Proposition 115 commenced their labor, they did so with notice of the presumption of prospectivity, which had recently been affirmed in *Evangelatos v. Superior Court,* 44 Cal.3d 1188 . . . . In the typical case, we would have to be content to declare that the drafters had constructive knowledge of these matters. But in this case – in which the measure was "written" by "50 prosecutors" [citation] – we can confidently infer that those who framed the language had *actual* knowledge.

(Tapia, 53 Cal.3d at 310, emphasis in original (Mosk, J., dissenting).)

prohibit private attorneys from *filing* lawsuits for unfair competition where they have no client who has been injured in fact" but permit public prosecutors "to *file and prosecute* actions on behalf of the general public." (Appen. at 1, Prop. 64, §§ 1(e)-(f), emphasis added.) Consistent with this language, the Legislative Analyst explained in the voter information materials that Proposition 64 "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." (Appen. at 3, emphasis added.) In addition, the Analyst stated that the 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." (*Id.* at 4, emphasis added.) The proponents' ballot arguments also emphasized Proposition 64 would "[a]llow[] only the Attorney General, district attorneys, and other public officials to *file* lawsuits on behalf of the People of the State of California." (*Id.* at 5, emphasis added.) The public was told that people could not "file" such lawsuits in the future, not that suits already filed would be dismissed.

Mervyn's spends several pages of its brief parsing out the text of the initiative and ballot materials but in the end concludes that the language of

Proposition 64 and its supporting materials convey, at best, "a mixed message" on retroactivity. (Mervyn's Opening Brief at 26.) Even if the Court accepts this generous conclusion, a "mixed message" falls far short of the "clear and unavoidable" language this Court requires before applying a new law retroactively. (*Myers*, 28 Cal.4th at 840.) The law of this state is that "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." (*Myers*, 28 Cal.4th at 841, quoting *St. Cyr*, 533 U.S. at 320-321 fn. 45.) Indeed, where "the subject of retroactivity or prospectivity [is] simply not addressed," statutes must be construed to be prospective only. (*Evangelatos*, 44 Cal.3d at 1209.) Without "clear and unavoidable" language indicating retroactivity, Proposition 64 must be applied prospectively only.

C. The Statutory Repeal Rule Does Not Permit Retroactive Application of Proposition 64

Proposition 64 lacks *any* language of an intent to "repeal" the UCL or an intent that its terms apply retroactively. Yet Mervyn's claims that retroactive application of Proposition 64 and dismissal of this case is *required*. Mervyn's bases this argument on its sweeping claim that, regardless of legislative or voter intent, "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." (Mervyn's Opening Brief

at 2.) Mervyn's analysis of the statutory "repeal rule" misses the mark in several key respects.[6]

1. The Repeal Rule Does Not Apply Because Proposition 64 Did Not Repeal Any Cause of Action or Remedy Under the UCL

As an initial matter, although Mervyn's clings to the fiction that Proposition 64 effects a repeal, the language and operation of the initiative is to the contrary. Even the broadest statement of the repeal rule limits it to

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[6] Moreover, the distinction between statutory and common law rights for purposes of a retroactivity analysis makes little sense. As this Court held in *Los Angeles County v. Superior Court* (1965) 62 Cal.2d 839, there is "no constitutional basis for distinguishing statutory from common-law rights merely because of their origin, . . . We must consider instead the [legislative] reasons advanced to justify retroactive application of a statute to determine if it is constitutionally permissible." (*Id.* at 844, citation omitted; see also *Landgraf*, 511 US. at 291 (Scalia, J., concurring) (the "critical issue" is not whether a new law affects "vested rights," but what the relevant activity is that the rule regulates; absent a clear statement, only activity occurring *after* the effective date of the statute is covered). Because the Legislature retains the power to change the law at any time subject to constitutional constraints, in the absence of a constitutional objection, the inquiry must be focused on what the Legislature *intended*.

In addition, even if only common law rights avoid the repeal rule, the UCL, while not the equivalent of the common law tort of unfair business competition, is derived from common law. In 1933, that tort was codified. Subsequent court decisions found that the statute also protected consumers victimized by unfair practices. (*People ex rel. Mosk v. Nat'l Research Co.* (1962) 201 Cal.App.2d 765, 771-772 (holding that equitable relief was available under section 3369 to enjoin defendants from misrepresenting themselves as government agencies to consumers).) The UCL cause of action, therefore, is based in common law.

cases in which a statute repeals a statutory cause of action or remedy. (*Callet v. Alioto* (1930) 210 Cal. 65, 67.) Proposition 64, however, did not "repeal" any of the causes of action or remedies the UCL affords.

Rather, as the voters were instructed, the initiative was an "amendment" to the UCL. (Appen. at 1-2, Prop. 64, §§ 2-6.) What Proposition 64 did was to narrow the type of plaintiffs who can institute actions in the future on behalf of themselves or others by adding substantive standing requirements to the UCL. (Appen. at 1, Prop. 64, §§ 2-3.)

More significantly, the voters did *not* narrow or eliminate liability for any of the unlawful, unfair or fraudulent conduct previously actionable under the UCL. Conduct that occurred prior to passage of the measure was actionable then and remains actionable now, and the public retains the right to be protected from it. Indeed, as Mervyn's admits, "[b]usiness practices that the UCL prohibited before November 2, 2004, remain prohibited now" and business practices are "still subject to the same liability for injunctive and restitutionary relief" under the UCL. (Mervyn's Opening Brief at 33.)

Proposition 64 plainly changes the contours of the UCL. But as its Findings and Declarations state, the UCL continues to operate to "protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." (Appen. at 1, Prop. 64, § 1(a).) If the voters were

repealing a cause of action or remedy under the UCL, the language of Proposition 64 did not inform them of that fact.

2. The Repeal Rule Does Not Apply Where, as Here, Amendments to a Statute Do Not Contain a Clear and Unambiguous Statement of Retroactive Intent

Mervyn's asks the Court to set aside the broad presumption against retroactivity in favor of the statutory repeal rule, which this Court has applied sparingly in civil cases and not at all since 1978. The jurisprudence of this Court speaks volumes as to the narrow confines of this rule, not only in the cases in which it has been discussed (all of which are based on very different circumstances), but perhaps more importantly in the cases in the last twenty-five years involving retroactivity in which the Court does not mention, let alone analyze, the repeal rule at all.

As a threshold matter, the language of Government Code section 9606 does not support application of the repeal rule to this case. That section provides that "[a]ny 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." This statute does nothing more than confirm that any statute *may* be repealed by subsequent legislation or by initiative, absent constitutional restraints. That the Legislature or the voters have the *power* to retroactively repeal a statutory right has no bearing

on whether they *intended* to do so. Indeed, if read in the broad manner that Mervyn's suggests, section 9606 would swallow the presumption against retroactivity and would directly conflict with the codification of that presumption in various codes. (See Civ. Code, § 3; Code Civ. Proc., § 3; Pen. Code, § 3.)

Read properly, Section 9606 vests the legislature with the power to retroactively apply new laws where such laws indicate a "repeal" and an intent that the repeal apply retroactively, thus rebutting the presumption against retroactivity. The critical inquiry remains whether the new legislation unambiguously expresses the intent that it be applied retroactively. Where, as here, it does not, the presumption against retroactivity controls.

The repeal rule has its origins in criminal law. The earliest iteration of the rule stated that, at common law, "when a statute proscribing certain designated acts was repealed without a saving clause, all prosecutions for such act that had not been reduced to final judgment were barred." *(People v. Rossi* (1976) 18 Cal.3d 295, 298, citing *United States v. Schooner Peggy* (1801) 5 U.S. 103, 110; see *Spears v. Modoc County* (1894) 101 Cal. 303, 305-306 (finding that "[t]he repeal of a statute puts an end to all prosecutions under the statute repealed"); *People v. McNulty* (1892) 93 Cal.

427, 437.) The general rule developed that when the Legislature repeals a criminal statute or removes or mitigates a penalty for certain conduct, such legislation applies to all prosecutions not yet final. *(People v. Collins* (1978) 21 Cal.3d 208, 212; *Rossi*, 18 Cal.3d at 304; *In re Estrada* (1965) 63 Cal.2d 740, 747.)

A new statute that lessens the punishment for a criminal defendant can apply prospectively or retroactively, *depending on legislative intent.* (*Estrada*, 63 Cal.2d at 744.)[7] If the Legislature does not expressly state whether the law should apply retroactively, however, public policy considerations rebut the ordinary presumption against retroactivity. In these circumstances, the Legislature has

> obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper . . . . It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now be deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

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[7] A new law that *increases* the punishment for a criminal defendant, on the other hand, generally cannot apply retroactively without violating the ex post facto clause, regardless of legislative intent. *(Estrada*, 63 Cal.2d at 747.)

(Estrada, 63 Cal.2d at 745; *People v. Nasalga* (1996) 12 Cal.4th 784, 791-792; *Sekt v. Justice's Court of San Rafael Tp.*, 26 Cal.2d 297, 304, *cert. denied* (1945) 326 U.S. 756 (it is "presumed that the repeal was intended as an implied legislative pardon for past acts").)

While there are sound public policy reasons to rebut the presumption against retroactivity in the criminal setting, this principle has no application in civil cases, where what is at issue is the rights of private litigants, rather than the rights of an individual against the State. In *Landgraf, supra,* the Supreme Court noted the existence of a "common-law presumption about repeals of criminal statutes, that the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one," but did not apply that presumption in the civil case before it. *(Landgraf*, 511 U.S. at 276 fn. 30.)

The repeal rule has been extended beyond the criminal context by this Court in limited circumstances and only three times since World War II. In each of those circumstances, unlike in this case, there was either an intent to repeal the statute at issue or an intent to apply the new law retroactively. The cases cited by Mervyn's, in fact, support this conclusion.

In *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, for example, this Court found that retroactive application of a new law was appropriate

where the law had "expressly repealed all acts and parts of acts in conflict with its own provisions." (*Id.* at 318.) In *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, the Court applied the repeal rule to a statute that clearly indicated the Legislature's intent that the new law apply retroactively. The text of the statute read: "No refund shall be made under section 3804 of this code, nor shall any action be hereafter commenced *nor shall any action heretofore commenced be further prosecuted for the recovery*, of any tax voluntarily paid which was levied prior to January 1, 1939." (*Id.* at 6, emphasis added, citation omitted.) The Court found that the legislature "expressly provided" that the statute "should terminate all pending actions" and that "[i]ts expression in this respect is sufficient to accomplish the declared intent and purpose." (*Id.* at 13.)[8]

In *International Ass'n. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, plaintiffs were suing under an ordinance, passed pursuant to two statutes, that called for injunctive relief as well as criminal sanctions. While the case was pending, the enabling statutes were

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[8] (See also *People v. One 1953 Buick 2-Door* (1962) 57 Cal.2d 358, 363 (change in law applied to pending case because it was a "substantial reversal of legislative policy" and "represented the adoption of an entirely new philosophy"); *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184 (constitutional amendment made "radical changes" to existing statute and wiped out pending cause of action).)

repealed. The Court concluded that, given the penal nature of the ordinance, plaintiffs' action for injunctive relief to restrain violation of the ordinance could not continue in the absence of an enabling statute that specifically authorized such relief. (*Id.* at 421.) Fundamental to the Court's holding were the facts that the ordinance criminalized conduct and that the statutes authorizing the ordinance had been repealed in their entirety. (*Id.* at 421-423.)

Similarly, *Governing Board v. Mann* (1977) 18 Cal.3d 819 arose in the peculiar context of a forfeiture of public employment based on a criminal conviction. In that case, a school board sought to dismiss a teacher who had been previously convicted of marijuana possession. (*Id.* at 821.) While the case was pending, the Legislature enacted "an entirely new comprehensive statutory scheme to govern the treatment of marijuana offenses and offenders." (*Id.* at 826.) The new law prevented school districts from terminating employment based on marijuana arrests and convictions that were more than two years old. *(Id.* at 822.) The statute at issue contained specific language as to its temporal scope; by its own terms, it applied to convictions "occurring prior to January 1, 1976." *(Id.* at 827, emphasis omitted.)

In determining whether the new law applied to the pending action, the Court repeatedly noted the "broad and sweeping" change in the law due to the Legislature's conclusion that "under prior statutes persons convicted of relatively minor marijuana offenses were subjected to disproportionately severe sanctions, both criminal and civil." (*Id.* at 827-828, emphasis omitted.) Under these circumstances, this Court applied the "common law" rule that where "the government's authority rests solely on a statutory basis, a repeal of such a statute without a saving clause will terminate all pending actions based thereon." (*Id.* at 822-23.) In doing so, the Court found that "the California Legislature has determined that at the present time public policy is best served by prohibiting public entities from imposing adverse collateral sanctions on individuals who, some years ago, may have suffered a conviction for possession of marijuana." (*Id.* at 831.) This Court applied the repeal rule only after ascertaining that the Legislature *intended* to apply a new law with lesser penalties, as in the criminal context, to pending cases.

Close on the heels of *Mann*, this Court decided the last case in which it applied the repeal rule. *Younger v. Superior Court* (1978) 21 Cal.3d 102 addressed a different aspect of the same Education Code amendments that *Mann* did. The amendment in *Younger* provided that the superior courts could order the destruction of official records of marijuana arrests and

convictions. An individual filed suit for the destruction of his conviction records. While the case was pending, the Legislature changed the law to vest the Department of Justice, not the superior courts, with authority to order destruction of conviction records. The Court found the new law revoked the jurisdiction of the superior court to order the destruction of records. The Court observed that "like all statutes," the new provision "is to be read with a view to effectuating legislative intent." (*Id.* at 113.) The Court applied the repeal rule only after concluding that the statute contained unambiguous evidence of legislative intent to divest the superior courts of jurisdiction. (*Id.* at 111.)

None of these repeal rule cases, nor the doctrine they describe, has been cited or relied upon by this Court since 1978, despite the fact that the Court has addressed the issue of statutory retroactivity in numerous cases during that same period. In its recent cases, this Court has unwaveringly adhered to a straightforward test: absent clear language or unmistakable evidence of legislative intent to the contrary, new enactments apply prospectively only. (*Elsner,* 34 Cal.4th at 544; *McClung,* 34 Cal.4th at 475; *Myers,* 28 Cal.4th at 841; *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 42-43; *Tapia*, 53 Cal.3d at 287; *People v. Hayes* (1989) 49 Cal.3d 1260, 1274; *Evangelatos,* 44 Cal.3d at 1208-1209; *Cole v. Fair Oaks*

Fire Protection District (1987) 43 Cal.3d 148, 153; *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593.)

In none of these decisions is there any statement, or even a hint, that the Court recognizes the repeal rule as an exception to the presumption against retroactivity. To the contrary, in each of these decisions, this Court flatly stated the rule that "all statutes" apply prospectively. (See *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2005) 129 Cal.App.4th 540, 571("[n]one of the authority cited by respondents support the conclusion that the repeal statute is applicable [to Proposition 64] where the voters demonstrate no intent to exercise that power.") Indeed, this presumption against retroactivity has been applied even where the Court has considered the repeal of purely statutory rights.

In *Myers*, this Court addressed whether a statute that repealed the statutory immunity granted to tobacco companies could be applied retroactively to impose liability for plaintiff's injury. Plaintiff had started smoking in 1956 and quit in 1997. During 10 of those years, defendants were protected from suit by an immunity statute that was repealed prior to plaintiff filing suit. (*Myers*, 28 Cal.4th at 840.) This Court found that defendants' conduct during the time the "Immunity Statute" was in effect was not actionable, because there was no indication that the Repeal Statute

was intended to apply retroactively. Even though the Repeal Statute concerned a purely statutory right, this Court looked exclusively to legislative intent, stating that absent 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,* 28 Cal.4th at 841, quoting *Evangelatos*, 44 Cal.3d at 1209, emphasis in original.) The Court then determined that the intent of the "Repeal Statute" was ambiguous, and that such ambiguity "requires us to construe the Repeal Statute as 'unambiguously prospective.'" (*Id.* at 843, quoting *St. Cyr,* 533 U.S. at 320-321 fn. 45.) The case here is more compelling, given that CDR commenced its suit long before Proposition 64 was passed, at a time when Mervyn's conduct was actionable by CDR.

This Court's rejection of the arguments now relied upon by Mervyn's is confirmed by Justice Moreno's dissent in *Myers.* Justice Moreno agreed with the majority that the Repeal Statute was presumed to operate prospectively absent clear legislative intent to the contrary, but concluded that the text of the Repeal Statute evidenced "a sufficiently unambiguous statement of the Legislature's intent that the Repeal Statute be given retrospective effect." (*Myers,* 28 Cal.4th at 848-849 (Moreno, J., dissenting).) Only after finding the requisite intent to apply the Repeal

Statute retroactively did the dissent then consider the repeal rule. It did so, moreover, in the context of addressing whether, *given the Legislature's intent to apply the statute retroactively,* constitutional considerations would still operate to prevent retroactive application. It then found that because the immunity eliminated by the Repeal Statute was "wholly a creation of statute" and was secured in part by deceptive representations about the lethal nature of tobacco products, any vested rights the defendants had would be outweighed by the legislative determination that the new statute repealed defendants' immunity. (*Id.* at 852-855.) The full Court in *Myers,* therefore, like the Court of Appeal in this case, found the controlling principle to be the presumption of prospectivity.

Similarly, in *McClung,* the Court refused to give retroactive effect to an amendment to the Fair Employment and Housing Act that imposed personal liability for harassment on non-supervisory workers. (*McClung,* 34 Cal.4th at 475-476.) Rather than invoke the repeal rule to apply the statute retroactively, the Court concluded that it saw "no indication the Legislature even thought about giving, much less expressly intended to give, the amendment retroactive effect." (*Id.* at 476.)

With Proposition 64, there is neither an explicit repeal nor an intent to prescribe retroactive application. The repeal rule does not apply.

Moreover, to the extent that any of this Court's cases can be read to apply the repeal rule to a statute devoid of repeal or retroactivity language, those cases – particularly in the context of a voter initiative – cannot be reconciled with modern jurisprudence. Recent cases regarding retroactivity, in both this Court and the U.S. Supreme Court, have strengthened and reaffirmed the presumption against retroactivity. It is no coincidence that the U.S. Supreme Court's two most forceful statements of the primacy of the presumption against retroactivity, in *Landgraf* and *St. Cyr*, came years after this Court last referred to the repeal rule.[9]

The current state of the law simply leaves no room for the enormous exception that Mervyn's urges – that the repeal of any statutory right or remedy applies retroactively, regardless of initiative language or voter intent. In the modern operation of our legislative system, laws are often modified, amended or repealed through either the Legislative or initiative process. Under Mervyn's suggested paradigm, the majority of newly enacted laws would be vulnerable to arguments that they are "statutory repeals" subject to the repeal rule. In effect, Mervyn's conception of the exception of the repeal rule threatens to swallow the fundamental and time-

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[10] This Court in *Myers* reaffirmed that California views the presumption against retroactivity in the same light as the U.S. Supreme Court. (*Myers*, 28 Cal.4th at 840-842.)

honored principle that statutes *operate prospectively*. Because there is no hint in the language of the initiative or in any of the ballot materials that the voters intended to halt actions that were already pending, Mervyn's attempted resurrection and expansion of the repeal rule must fail.

D. The Repeal Rule Does Not Apply Because the UCL Contains a Savings Clause

Even if the repeal rule had some application where, as here, there is no discernable legislative intent that a statute be applied retroactively, it is indisputable that the repeal rule does not support retroactivity if a "savings clause" exists. (*Mann*, 18 Cal.3d at 829.) The UCL contains a two-part savings clause, thus precluding any application of the repeal rule.

As set forth in Section 4 of the Business and Professions Code, "[n]o action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." (Bus. & Prof. Code, § 4.) In other words, Section 4 precludes application of the provisions of the UCL to an action commenced *before* the effective date of those provisions.

When Section 4 is read in context of the entire UCL, it is not limited to the original provisions of the code, but extends to subsequent enactments and amendments as well. This is confirmed by Section 12 of the Business

and Professions Code which provides that "[w]henever any reference is made to any portion of this code or any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made." (Bus. & Prof. Code, § 12.) The two sections together provide that as the UCL (or other sections of the Business and Professions Code) evolves over time, the new amendments are not meant to substantively change the law applying to pending cases.[10]

The savings clause need not be contained in the repealing statute to abrogate the repeal rule. As this Court has held, "a general savings clause in the general body of the law is as effective as a special savings clause in the particular section." (*Peterson v. Ball* (1931) 211 Cal. 461, 475.) As such, Section 4 is just as effective as any savings clause that could have been inserted within the text of Proposition 64. A new law need not include an express savings clause; to so hold would be to render null the language and import of both Section 4 and Section 12.

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[10] In *Koster v. Warren* (9th Cir. 1961) 297 F.2d 418, 420, the Court held that a materially identical statute codified at Section 9 in the Corporations Code, in conjunction with a provision identical to Section 4, collectively "casts doubt" on whether an "amendment" to Corporations Code section 834 could be applied to an action pending for one year before the amendment's effective date. (See also *Sobey v. Molony* (1940) 40 Cal.App.2d 381, 388-389, emphasis added (holding that Section 4 was "intended to cover situations, either where the codification made a substantial change in the law, or where the legislature at that *or subsequent sessions amended the law in a substantial manner*").)

Mervyn's attempted reliance on *People v. McNulty* (1892) 93 Cal. 427 does it more harm than good. In that case, the Court expressly held that "a general saving clause, if it be clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute." (*Id.* at 437.) The Court noted that general savings clauses are intended to prevent a miscarriage of justice in cases where the Legislature, in the "hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals." (*Ibid.*, citation omitted.) The language of Section 4 and Section 12 applies to actions and proceedings commenced before the statute at issue took effect; they are therefore "clothed in apt language."

Moreover, the applicability of the general savings clause is particularly important where, as here, the newly enacted law contains *no* language indicating that it is intended to be a repeal. If the voters are enacting a new law that they do not believe to be a repeal, the general savings clause operates to ensure that they have not been misled into retroactive application of a statute they intended to apply only prospectively. Sections 4 and 12 thus operate to prevent retroactive application of Proposition 64.

E. Application of Proposition 64 to Pending Cases Would be Impermissibly Retroactive Because its Amendments to the UCL are Substantive Rather than Procedural

Where a new law changes only the procedures to be used in future proceedings, the law may, in certain circumstances, be applied to pending cases without violating the presumption against retroactivity. In other words, purely procedural laws may sometimes be applied to pending cases without regard to whether the Legislature or electorate intended that the statute be applied retroactively. Mervyn's clings to this limited exception as its last remaining lifeboat to avoid appellate resolution of the merits of this case. This exception to the presumption against retroactivity, however, has no application here.

As this Court recently explained, the presumption against retroactivity "does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment." (*Elsner,* 34 Cal.4th at 936, citing *Tapia*, 53 Cal.3d at 288-289.)

> This is so because these uses typically affect only future conduct – the future conduct of the trial. . . . "[T]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." [Citations.] For this reason, we have said that "it is a misnomer to designate [such statutes] as having retrospective effect."

(*Id.* at 936, citing and quoting *Tapia*, 53 Cal.3d at 288; *Aetna Casualty*, 30 Cal.2d at 394 ("procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment," the statute is construed to operate prospectively rather than retrospectively).)[11]

Application of Proposition 64 to this case does not fall within this narrow exception. Standing is a matter of substance because it affects the right of a party to sue.[12] The amendments to the UCL do not merely affect modes of procedure to be followed in future proceedings. Rather, the amendments, if applied to pending cases such as this one, would have the effect of reaching back in time to eliminate representative UCL actions.

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[11] As the Court of Appeal in *Russell* explained:

> Both types of statutes may affect past transactions and be governed by the presumption against retroactivity. The only exception we can discern from the cases is a subcategory of procedural statutes which can have no effect on substantive rights and liabilities, but which affect only modes of procedure to be followed in future proceedings. As *Aetna* pointed out, such statutes are not governed by the retroactivity presumption, but not because they are "procedural," but simply because they are not in fact retroactive.

(*Russell,* 185 Cal.App.3d at 816, citing *Aetna Casualty*, 30 Cal.2d at 394.)

[12] (See, e.g., 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 104, p. 162 ("The person who has the right to sue under the substantive law is the real party in interest; the inquiry, therefore, while superficially concerned with procedural rules, really calls for a consideration of rights and obligations.").)

Actions properly filed and lawfully maintained until November 3, 2004 would suddenly find themselves without plaintiffs to prosecute them.

In determining whether application of a new law is procedural and therefore prospective or substantive and therefore retroactive, the Court must "look to function, not form." (*Elsner*, 34 Cal.4th at 936, citing *Tapia*, 53 Cal.3d at 289 and *Aetna Casualty*, 30 Cal.2d at 394.) As this Court has concisely stated:

> We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies. Does the law "change[] the legal consequences of past conduct by imposing new or different liabilities based up such conduct?" [Citation.] Does it "substantially affect [] existing rights and obligations?" [Citation.] If so, then application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application.

(*Elsner*, 34 Cal.4th at 937; *Aetna Casualty*, 30 Cal.2d at 391, citations omitted (a "retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute"); *Evangelatos*, 44 Cal.3d at 1206, citations omitted (same); *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79 ("retrospective operation will not be given to a statute which inteferes with antecedent rights").)

The application of Proposition 64 to this case would result in its termination. CDR has litigated this case through a trial on the merits that

resulted in several specific findings of Mervyn's discrimination against individuals with disabilities. These findings, and CDR's right to use them as a basis for relief if the Court of Appeal reverses on the merits, would evaporate. Surely this would affect the rights and obligations of the parties.

In several cases, this Court has rejected the very argument Mervyn's advances here: that the amendments at issue are merely procedural ones that can be applied to pending cases. The holdings in these cases underscore the narrow scope of purely procedural and therefore prospective laws. A statute that increased the benefits to employees under the workers' compensation laws (*Aetna Casualty,* 30 Cal.3d at 395), an initiative that modified the liability for employers based on the joint and several liability doctrine (*Evangelatos*, 44 Cal.3d at 1226 fn. 26), an initiative that changed the legal consequences of certain types of criminal behavior *(Tapia*, 53 Cal.3d at 297-301), amendments to the labor code that altered the remedies for injured workers (*Cole*, 43 Cal.3d at 153-155), and a statute that modified the procedures for admissibility of prehypnotic testimony (*Hayes*, 49 Cal.3d at 1274) were all found to be retrospective in application because they substantially affected the rights and obligations of the parties or changed the legal consequences of past events. These laws were held to be

more than mere "procedural" changes and they could not, therefore, be applied retroactively.

Review of Proposition 64's amendments to the UCL reveals them to affect the substantive rights of the parties in such a manner that their application to pending cases would be retrospective. Proposition 64 adds to the UCL (1) a provision limiting standing to bring a representative private suit to enforce Section 17200 and 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); and (2) a provision that a private suit for "representative claims or relief on behalf of others" must comply with the class action statute, Code of Civil Procedure section 382 (*id.*, § 2).

The changes rendered by Proposition 64 deprive concerned citizens and public interest groups of the right to file unfair competition complaints under the UCL and to obtain equitable relief for affected members of the public. Applying new standing rules to cases that were filed years ago in reliance on the former provisions of the UCL would significantly impair the settled rights and expectations of the parties to continue prosecution of their actions. Retroactive application of Proposition 64 to preexisting causes of action would have a substantive effect on CDR and those it represents who,

during the pending litigation, acted in reasonable reliance on the existing state of the law. (*Evangelatos*, 44 Cal.3d at 1215-1217.) As in *Evangelatos*, "the application of a tort reform statute to a cause of action which arose prior to the effective date of the statute but which is tried after the statute's effective date would constitute a retroactive application of the statute." (*Evangelatos*, 44 Cal.3d at 1206.)

Likewise, if standing is viewed as jurisdictional, it is no less substantive. The United States Supreme Court has explained that there are two types of "jurisdictional" statutes with different rules that apply to each type. Statutes that "simply change[] the tribunal that is to hear the case" can be applied to pending cases, but statutes that change "the rights or obligations of the parties" are substantive and cannot be applied retroactively absent express provision. (*Hughes Aircraft Co. v. United States ex rel. Schumer* (1997) 520 U.S. 939, 951, emphasis omitted, quoting *Landgraf*, 511 U.S. at 274.) In *Hughes*, the Court recognized that a jurisdictional statute that affects "*whether*" a suit "may be brought at all" as opposed to "*where*" it may be brought is substantive and cannot be applied retroactively. (*Id.*, emphasis in original.) The standing provisions of Proposition 64 plainly implicate the former. (See *Consumer Advocacy*, 129 Cal.App.4th at 800.)

Proposition 64 also amends the UCL to state that persons pursuing representative claims comply with Section 382 of the Code of Civil Procedure. (Appen. at 1, Prop. 64, § 2.) If this provision is read to require representative actions to proceed as class actions, a point CDR does not concede, this amendment would substantively affect the rights and obligations of the parties to pending UCL cases. As this Court very recently reaffirmed, "class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights. Affixing the 'procedural' label on such devices understates their importance[.]" (*Discover Bank v. Superior Court* (Jun. 27, 2005, S113725) ___ Cal.Rptr.3d ___ [2005 WL 1500866], at *8.)

The provisions of Section 382 – which state that one or more individuals may sue for the benefit of all "when the question is one of a common or general interest" (Code Civ. Proc., § 382) – have been interpreted by this Court to require a number of substantive requirements. A party seeking to represent a class of individuals must demonstrate (1) "an ascertainable class," and (2) "a well-defined community of interest among the class members." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The "community of interest requirement," in turn, "embodies three factors:

(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On,* 34 Cal.4th at 326, citations omitted.)

The fact that common issues must predominate over individual ones before a class may be certified under this provision necessarily means that a number of categories of cases cannot meet the requirements of Section 382. These include many personal injury cases and cases involving toxic torts, in which personal injuries are at issue. (See, e.g., *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1107-1108; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1009 (medical monitoring).) Also, in a class action, the court may order disgorgement of unlawful profits into a fluid recovery fund, but such a remedy is not available in a non-class UCL action. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 121, 124-37; accord, *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144-52.) In addition, a class action judgment affords defendants res judicata effect binding all absent class members, while a judgment in a non-class UCL action does not. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 808; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704-705.) All of these features under Section 382, therefore, carry

substantive consequences that preclude retroactive application of Proposition 64.

Against this backdrop, Mervyn's attempts to narrow the proper analysis by claiming that Proposition 64's provisions are procedural because they do not "substantially affect the existing rights and obligations of people who have been injured by UCL violations." (Mervyn's Opening Brief at 32-33.) The fact is, however, that CDR, for decades prior to November 2004, had a right to pursue a UCL claim on behalf of its members and the general public, regardless of whether it had, itself, been injured by Mervyn's conduct.

If substantive changes are made, "even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." (*Aetna Casualty*, 30 Cal.2d at 394, citations omitted.) Mervyn's cannot dismiss CDR's right to bring this lawsuit as it did in 2002, to prosecute the action through a trial on the merits, and to pursue its appeal of what it believes to be an erroneous judgment against it. Mervyn's also misstates the analysis by claiming that CDR must show that its rights are "vested," even though that language or

any discussion regarding vested rights is absent from all of the decisions from this Court regarding the prospectivity of purely procedural statutes.

Further, Mervyn's statement of the elementary legal principle that standing must be satisfied throughout the time a case is being pursued fails to support its claim that the amendments to the UCL are procedural and therefore prospective in application. Obviously, if Proposition 64 does not apply retroactively, then CDR continues to have standing to prosecute this action and pursue this pending appeal.[13]

Moreover, that the amendments to the UCL are substantive and therefore retrospective is evident from the effect Mervyn's hopes they will have: dismissal of CDR's appeal and, consequently, of its right to obtain relief for Mervyn's unlawful discrimination against individuals with mobility disabilities. Dismissal of CDR's appeal affects CDR's rights in a substantive manner. As the Court of Appeal correctly found:

> Dismissal of CDR's appeal would substantially affect CDR's rights. CDR filed this lawsuit in May 2002, over two years before passage of Proposition 64. At that time, CDR had the right to file and prosecute a UCL cause of action, and maintained that right through trial in August 2003. Dismissal of the appeal at this juncture would foreclose consideration of CDR's claims that it should have

[13] CDR has standing to pursue this appeal for an additional reason. Dismissal of an appeal is improper where the appealing party is aggrieved by the ruling below; the arguments made by Mervyn's should be raised and decided in the course of resolution of the appeal. (See *United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1304.)

> prevailed at trial, or is entitled to a new trial. Were Proposition 64 applied to pending appeals, as Mervyn's advocates, even those plaintiffs who prevailed at trial could be stripped of their judgments. It does not lessen the effect upon CDR's rights to observe, as Mervyn's does, that another plaintiff might be able to file an action against it for alleged unlawful businesses.

(Slip op. at 8.)

Applying Proposition 64 retroactively would dramatically upset the status quo by affecting the existing rights and obligations of the parties to this lawsuit and many others. While Mervyn's conduct may remain unlawful, CDR is stripped of its right to pursue the merits of its appeal and the case it has been litigating for over three years. Moreover, if the action is dismissed, the specific findings of discrimination made by the trial court will be lost, findings that, if the Court of Appeal determines Mervyn's is not entitled to the federal defenses it asserted, would establish the basis for liability and injunctive relief.

Mervyn's asserts that the state has "plenary authority" over UCL actions and, as such, can determine the conditions upon which UCL actions may be maintained. In support, Mervyn's cites two cases that have no bearing on the issues presently before this Court. This argument is nonsensical and flawed.

First, in *Hogan v. Ingold* (1952) 38 Cal.2d 802, the Court considered whether a statute that required plaintiff to post a security as a condition to

maintaining a shareholder's derivative action applied to a lawsuit filed after the statute was enacted but involving conduct occurring prior to the enactment. The Court simply found that the statute was prospective and procedural in operation because it did not deprive plaintiff of any right she had at the time she filed suit. (*Id.* at 812.) The Court explained that the statute "does not abolish stockholder's derivative suits but merely imposes regulatory conditions on their institution and maintenance." (*Ibid.*) Noting the "almost universal[]" holding that statutes involving security for the potential costs of suit are procedural and therefore prospective even when applied to actions pending at the time of enactment, the Court held it was "certainly" the case that such a statute applied to an action subsequently commenced, which the Court noted was the only question before it. (*Id.* at 814.) The Court's decision did not turn, as Mervyn's contends, on the "plenary power" of the state.

Mervyn's reliance upon *Kuykendall v. State Board of Equalization* (1994) 22 Cal.App.4th 1194, is similarly misplaced. In *Kuykendall*, plaintiff filed a class action to recover reimbursement of a tax this Court had previously held unconstitutional. After the trial court had found for plaintiff and ordered a direct refund to class members, the Legislature passed a statutory refund scheme to repay the same individuals. (*Id.* at

1201.) On appeal, plaintiff claimed that application of the new statute would violate the presumption against retroactivity. The Court of Appeal disagreed, finding that the statute's "language clearly and unambiguously 'indicates the Legislature intended a retrospective operation'" and that the statute "was intended to apply to pending cases." (*Id.*, at 1209, 1211, citation omitted.) Mervyn's claim that the court's decision hinged on plaintiff's "vested" rights is in error – the court, in fact, relied upon the legislative intent that the statute be applied retroactively. Moreover, as the analysis above demonstrates, the determination of whether a statute is retrospective or prospective turns not on "vested" rights but on the existing rights and obligations of the parties.

Finally, even if the amendments to the UCL could be construed as strictly procedural – which they cannot – such amendments may be applied *only* to trials commencing *after* the amendments take effect, not retroactively to trials that have been completed. Here, a trial on the merits has already occurred, judgment has been entered, and CDR is pursuing its appeal. Remarkably, although Mervyn's citations to the relevant language from this Court's cases in fact include this very principle, Mervyn's instead argues that the amendments to the UCL can apply to pending cases *at any stage of the proceedings*. The falsity of this argument is evident from the

holdings in *all* of this Court's cases that a rule is prospective only in those instances in which it is applied to *future proceedings.*

As this Court held in both *Tapia* and *Elsner*, procedural or evidentiary statutes are prospective in nature because *they relate to the procedure to be followed in the future.* (*Elsner*, 34 Cal.4th at 936; *Tapia*, 53 Cal.3d at 288-289.) In those instances, there is no retrospective effect of such statutes. Indeed, Mervyn's itself acknowledged this standard, but completely ignores its impact on this case. Because a trial on the merits has already concluded, applying the UCL amendments to this case affects more than "the future conduct of the trial." (*Ibid.*)

This Court has not applied a procedural amendment that became effective during an appeal retroactively to a case that has already been tried. In *Tapia*, for instance, the Court considered the application of provisions of Proposition 115 to a criminal trial that postdated its enactment. The defendant argued that by applying the initiative's provision limiting the conduct of voir dire to the court, the Superior Court had applied the provision retroactively. The Court disagreed, stating: "Tapia's proposed test [of retroactivity] is not appropriate, however, for laws which address *the conduct of trials which have yet to take place*, rather than criminal behavior which has already taken place. Even though applied to the

prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future." (*Tapia*, 53 Cal.3d at 288, emphasis added.) The Court, therefore, held that it could be applied to pending cases. (*Id.* at 289.)

In other cases, this Court has determined that even though the new statute could be applied in future proceedings, the effect of the statute was retrospective such that even in those instances, it could not be applied. For example, in *Elsner,* this Court considered whether the use of Cal-OSHA provisions enacted after the conduct at issue but prior to the trial could be used to establish the standard of care and shift the burden of proof. The Court found that such provisions were not merely procedural because, if applied to pending cases, they would change the legal consequences of defendant's conduct by making him potentially liable for conduct that may have otherwise satisfied the legal standard. The Court emphasized that "[t]o allow a jury in 2001 to decide whether [defendant] had breached his duty of care in 1998 by considering Cal-OSHA provisions not previously admissible would be 'to apply the new of law of today to the conduct of yesterday.'" (*Elsner*, 34 Cal.4th at 939, quoting *Fox v. Alexis* (1985) 38 Cal.3d 621, 626, footnote omitted.)

Mervyn's argument that Proposition 64 makes only procedural changes to the UCL is at war with its claims that Proposition 64, in fact, *repeals* representative UCL actions and that the voters intended to "eliminate" such actions. (Mervyn's Opening Brief at 11-20, 37-38.) In fact, *neither* of these extreme positions is true. Mervyn's conflicting arguments reveal the heart of the matter: Proposition 64 renders a dramatic change to the landscape of UCL actions. It does not "repeal" UCL actions altogether, but it does make significant substantive amendments to the UCL that, if applied to pending actions, would retroactively deny plaintiffs who have been pursuing UCL claims the right to continue to do so. Proposition 64 does not merely close a procedural loophole, nor does it repeal the UCL outright. Instead, it is a significant measure (passed by the voters without any reference to its application to pending cases) that limits private parties' standing to file suits. Whatever the wisdom of the initiative, it cannot reasonably be disputed that its effects are substantive – it strikes at the heart of all representative UCL actions. Without the clear intent and consent of the electorate, it cannot be applied retroactively to pending cases. (*Evangelatos*, 44 Cal.3d at 1209.)[14]

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[14] If this Court nevertheless concludes that Proposition 64 applies to this case, leave to amend to substitute a suitable plaintiff should be allowed. Such an amendment would not prejudice Mervyn's because it would not (continued...)

IV. CONCLUSION

For the foregoing reasons, Plaintiff and Appellant Californians for Disability Rights respectfully requests that the Opinion of the Court of Appeal be affirmed.

Dated: July 14, 2005

Respectfully submitted,

THE STURDEVANT LAW FIRM

DISABILITY RIGHTS ADVOCATES

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[14](...continued)
substantially change this action by introducing new facts or legal theories. (See *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 20-21.) A trial on the merits has already been completed. Several individuals who directly encountered barriers to access in Mervyn's stores testified at trial. They could substitute into the action and continue to prosecute this appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, Plaintiff and Appellant Californians for Disability Rights hereby certifies that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 14(c)(3) is 13,286.

Dated: July 14, 2005

THE STURDEVANT LAW FIRM

By: _____

Monique Olivier
Attorney for Plaintiff and Appellant

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.

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

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

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 475 Sansome Street, Suite 1750, San Francisco, California 94111.

On July 14, 2005, I caused the document entitled below to be served on the parties parties in this action listed below by placing true and correct copies thereof in sealed envelopes and causing them to be served, as stated:

ANSWERING BRIEF ON THE MERITS

By Hand Delivery:

I am readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for ***hand delivery***, being that true and correct copies of the documents are deposited with a messenger from NoBS Couriers, 301 Rhode Island, San Francisco, California 94103, for service the same day as the day of collection.

Linda E. Shostak
Gloria Y. Lee
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
Attorneys for Defendant and Respondent Mervyn's

By Overnight Delivery:

I am also readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for ***overnight delivery*** with **Federal Express**, being that the documents are deposited with Federal Express with postage thereon fully prepaid the same day as the day of collection in the ordinary course of business.

David F. McDowell
Morrison & Foerster LLP
555 West Fifth Street, Suite 3500
Los Angeles, CA 90013-1024
Attorneys for Defendant and Respondent Mervyn's

By U.S. Mail:

I am also readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for ***mailing*** with the ***United States Postal Service***, being that the documents are deposited with the United States Postal Service with postage thereon fully prepaid the same day as the day of collection in the ordinary course of business.

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Oakland, CA 94612-4293

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 14, 2005 at San Francisco, California.

Amber Rocha