Case No. **S131798**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. **S131798**

CALIFORNIANS FOR DISABILITY RIGHTS,

Plaintiff and Appellant,

vs.

MERVYN'S LLC,

Defendant and Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR, NO. A106199.

APPLICATION OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT; AND AMICUS CURIAE BRIEF

FRED J. HIESTAND
State Bar No. 44241
The Senator Office Bldg.
1121 L Street, Suite 404
Sacramento, CA 95814
FHiestand@aol.com
(916) 448-5100

Attorney for *Amicus Curiae*
The Civil Justice Association
of California (CJAC)

California Unfair Competition Law (Bus. & Prof. Code §17200 et. seq.)
Cal. Rules of Court, Rules 15(c)(3), 44.5(c)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,

Plaintiff and Appellant,

vs.

MERVYN'S LLC,

Defendant and Respondent.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court 13(c) and 29.1(f), The Civil Justice Association of California (CJAC) respectfully requests permission to file the accompanying amicus curiae brief in support of defendant and respondent.

CJAC is a not for profit organization with hundreds of members who are businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to make California's civil liability laws more fair, efficient, economical and uniform. Toward these ends, we regularly petition the government – the judiciary, legislature and, through the initiative process, the people themselves – for redress concerning who pays, how much, and to whom when wrongful conduct is charged.

CJAC was an official sponsor of Proposition 64, the scope and application of which is crucial to the issue presented – *viz.*, Does Proposition 64 apply to all pending cases for which a final judgment has not been rendered?

We have read the briefs of the parties and believe that our brief can assist the court. We present authority and analysis in our brief that Proposition 64 applies to this and all pending cases because it is a *repeal* of remedies based wholly on statute, *not* the common law, and contains no savings clause. Litigants with pending cases under the old Unfair Competition Law who can show no "actual injury" when Proposition 64 became law, have no viable case. Proposition 64 also applies to this and all cases pending at the time it became law because the changes it made to the UCL are procedural, not substantive.

Accordingly, CJAC asks that the brief be accepted for filing.

Dated: September 22, 2005

Respectfully submitted,

_____

Fred J. Hiestand
General Counsel
Civil Justice Association of California

Case No. **S131798**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S131798

CALIFORNIANS FOR DISABILITY RIGHTS,

Plaintiff and Appellant,

vs.

MERVYN'S LLC,

Defendant and Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR, NO. A106199.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

FRED J. HIESTAND
State Bar No. 44241
The Senator Office Bldg.
1121 L Street, Suite 404
Sacramento, CA 95814
FHiestand@aol.com
(916) 448-5100

Attorney for *Amicus Curiae*
The Civil Justice Association
of California (CJAC)

California Unfair Competition Law (Bus. & Prof. Code §17200 et. seq.)
Cal. Rules of Court, Rules 15(c)(3), 44.5(c)

TABLE OF CONTENTS Page

TABLE OF AUTHORITIES Page

California Cases

Federal Cases

Constitutions, Codes and Statutory Findings

Texts and Articles

Miscellaneous

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,

Plaintiff and Appellant,

vs.

MERVYN'S LLC,

Defendant and Respondent.

INTRODUCTION

The Civil Justice Association of California (CJAC or amicus) is no stranger to the issue presented – *viz.*, Does Proposition 64 apply to all pending cases for which a final judgment has not been rendered?

CJAC was an official ballot sponsor of Proposition 64, which repealed, *inter alia*, the former "non-standing" provision for prosecuting actions under the Unfair Competition Law ("UCL," B & P Code §17200 *et. seq.*), replacing it with the conventional requirement that a UCL plaintiff show "actual injury." This change was coupled with repeal of the right (except for public prosecutors) to bring a representative action under the UCL without meeting the class certification requirements of California law.[1]

CJAC was drawn inexorably to Proposition 64 by abuses we saw under the UCL, abuses invited by its capacious prohibitory language (i.e., business practices

[1] Cal. C. of Civ. Proc. §382.

deemed "unlawful, unfair or fraudulent") and the absence of any "standing" requirement (i.e., prosecution allowed by anyone acting on behalf of the "general public"). The UCL did not start out this way; overreaching laws rarely do. It grew instead from a once dormant and seemingly innocuous statute into a virtual omnibus law through accretion, aided by occasional "leaps" in the gloss placed upon it by the Legislature and Judiciary. In the course of this metamorphosis, the UCL's former universal standing provision combined with the public interest attorney fee statute[2] to often trash the public good. As a front page article from a major newspaper reported about the consequence of this marriage between the expansive UCL and ambitious lawyers:

> They blanket the business world with hundreds of lawsuits at a time, often making claims that appear fanciful, even absurd. Most of the cases never get to trial. The lawyers make their money on settlements paid by defendants who just want to make the suits go away. The amounts typically are modest – from $2,000 to $50,000 – but they add up.[3]

CJAC's hundreds of members from business, professional associations and local governments felt Proposition 64 necessary to further our goal of improving the "fairness, efficiency, economy and certainty" in our civil justice system. Courts

---

[2] Cal. C. of Civ. Proc. §1021.5.

[3] Monte Morin, *Lawyers Who Sue to Settle*, *LOS ANGELES TIMES*, Oct. 26, 2002, Pt. 1, p. 1; see also, Mathieu Blackston, *Comment: California's Unfair Competition Law - Making Sure the Avenger Is Not Guilty of the Greater Crime* (2004) 41 *SAN DIEGO L. REV.* 1833, 1871: "Prior to the passage of Proposition 64, enforcement of California's UCL was clearly chaotic. . . [¶] Lawsuits were threatened and settlements were entered into on behalf of the public, but too often the result was merely personal gain rather than vindication of the public interest. When California's UCL is abused, the avenger may, indeed, be guilty of the greater crime."

had, for the most part, proven reluctant to trim the UCL's seemingly forever unfurling sails, referring amicus and others concerned about abuses to the Legislature for redress.[4] But the Legislature – faced with opposition from the very groups who found the unfettered and omnivorous nature of the UCL to be a lucrative source of attorney fees – proved unable or unwilling to reform it.[5] Left in legal limbo by two coequal and coordinate branches of government, CJAC turned for relief to the people themselves through the initiative process; and the people responded by enacting Proposition 64.

Those benefitting from the old UCL regime understandably prefer to forestall implementation of changes wrought by Proposition 64. Hence the percolation up the judicial ladder of numerous cases, including this one, where plaintiffs contend that all UCL actions filed *before* Proposition 64's enactment are exempt from its requirements.[6] To hold otherwise, appellant tells us, is to retroactively deprive it and other plaintiffs of their rights under the old UCL regime. That position, however, is contrary to settled law and common sense. Proposition 64 applies to this case and requires its dismissal because the appellant now lacks "standing" under the UCL to prosecute it.

---

[4] See, e.g., *Stop Youth Addiction v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 557 (hereinafter *SYA*).

[5] *SYA*, *supra*, 17 Cal.4th at 598 (dissenting opn. of J. Brown.).

[6] *Compare, e.g.*, *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455; *Bivens v.Corel Corp.* (2005) 126 Cal.App.4th1392; *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887; *Branick v. Downey Savings & Loan Assoc.* (2005) 126 Cal.App.4th 828; *Frey v. Trans Union Corp.* (2005) 127 Cal.App.4th 986; and *Thornton v. Career Training Center, Inc.* (2005) 128 Cal.App.4th 116 (all holding that Proposition 64 applies immediately to all pending cases) with this case and *Consumer Advocacy Group, Inc. v. Kinetsu Enterprises of America* (2005) 129 Cal.App.4th 540 holding to the contrary.

SUMMARY STATEMENT OF SALIENT BACKGROUND FACTS

Appellant Californians for Disability Rights (CDR) is a nonprofit corporation organized to protect the interests of persons with disabilities. It sued respondent Mervyn's LLC (Mervyn's), which owns and operates a chain of retail department stores throughout California. The single cause of action for which appellant sought injunctive relief under the UCL was for allegedly denying access to persons with mobility disabilities by failing to provide sufficient pathway space between merchandise displays. This practice, appellant claims, violated the UCL because the "unlawful" prong of that law provides the "toehold" upon which to hoist and enforce the predicate provisions of California's Unruh Civil Rights Act[7] and California's Disabled Person's Act.[8]

A bench trial resulted in judgment for Mervyn's, from which CDR appealed. During the pendency of the appeal, Proposition 64 was enacted and took effect. Mervyn's moved for dismissal on the ground that CDR could show no "actual injury" as Proposition 64 now requires. After briefing on the issue, the appellate court denied Mervyn's motion and held that Proposition 64 does *not* apply to lawsuits filed before its effective date of November 3, 2004. This court then granted Mervyn's petition for review.

SUMMARY OF ARGUMENT

The changes made to the UCL by passage of Proposition 64 effectively repeal that law's formerly broad standing and representative action provisions. Now a

---

[7] Cal. Civ. C. §51 et. seq.

[8] Cal. Civ. C. §54 et. seq.

plaintiff must demonstrate "actual injury" and, if the plaintiff seeks to represent the general public, satisfy the requirements for a class action.

Proposition 64 applies to this and all pending cases because it is a *repeal* of remedies based wholly on statute, *not* the common law, and contains no savings clause. Appellant, who can show no "actual injury" as the law now requires, has no case. Proposition 64 also applies to this and all cases pending at the time it became law because the changes it made to the UCL are procedural, not substantive.

When the UCL is asserted to prevent a practice by defendant from which the plaintiff complains but cannot, as is the case here, show any "actual injury," Proposition 64 requires dismissal.

ARGUMENT

I. PROPOSITION 64 APPLIES TO THIS AND ALL PENDING CASES.

A. The Primary Purposes of Proposition 64 are to Require that (1) Plaintiffs Who Bring Suit Have Suffered "Actual Injury" and (2) Private Representative Actions on Behalf of the General Public Comply with Class Action Procedural Requirements.

Proposition 64 took effect the day *after* voters approved it, or November 3, 2004.[9] Its purposes are, *inter alia*, to (1) "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;" and (2) ensure "that *only* the California Attorney General and local public officials be

[9] "An initiative statute . . . approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. . .." (Cal. Const., art. II, § 10(a).)

authorized to file and *prosecute* actions on behalf of the general public."[10]

Proposition 64 seeks to accomplish these purposes in three ways. First, it repeals a portion of former UCL section 17204, which permitted "any person acting for the interests of itself, its members or the general public" to bring suit. In striking this quoted language and substituting in its place language specifying that "any person" now bringing suit must have "suffered injury in fact and . . . lost money or property as a result," Proposition 64 furthered the goal of putting some teeth into a "standing requirement" for UCL prosecutions.

Second, Proposition 64 repealed the portion of the injunctive remedy provision of the UCL that permitted "any person acting for interests of itself, its members or the general public" to obtain an injunction, and substituted in its place the requirement that a person who suffered "injury in fact" may "pursue representative claims or relief on behalf of others *only* if the claimant meets the [newly enacted] standing requirement . . . and complies with Section 382 of the Code of Civil Procedure,"[11] the state's statutory class action authorization. These changes accomplish the measure's second purpose of ensuring that only public prosecutors can "file and prosecute actions on behalf of the general public" when there has been no demonstrated injury-in-fact to the plaintiff.

Third, both of these objectives are reiterated and linked through the use of the conjunctive term "and" in newly amended section 17203, which states that

---

[10] Proposition 64, "Findings and Declarations of Purpose," § 1, subd. (e) & (f) (emphasis added). Courts rhythmically look to an initiative statute's "Findings and Declaration of Purpose" in ascertaining the aim of the measure "because it bears directly on the issue of legislative intent . . .." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 274.)

[11] B & P C. § 17535.

"[a]ny 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 [public prosecutors]."[12]

As a recent law review article stated about the changes to UCL litigation wrought by Proposition 64:

> The measure greatly restricts who can bring an unfair competition claim and in essence eliminates all private attorney general actions. By importing the elements of class certification into UCL claims, the proposition resolves the due process and lack of finality concerns that had besieged section 17200 actions. As with class certification requirements, imposing a harm requirement on private UCL actions also limits standing. Individuals no longer have standing to seek judicial relief under the UCL by simply crying foul. Rather, they must be harmed themselves and "establish the existence of an ascertainable class and a well-defined community of interest among the class members."[13]

---

[12] Emphasis added.

[13] Blackston, *Comment*, *supra*, 41 *SAN DIEGO L. REV.* at 1856, citing to and quoting from *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.

B. The Plain Language of Proposition 64 Makes Clear that it is Intended to Apply to Pending Cases.

The aforementioned purposes of Proposition 64 are inextricably tied to the issue of its effect on pending cases. That is because in construing a statute's scope and application, "courts first determine the . . . intent and *purpose* for the enactment." (*People v. Tindall* (2000) 24 Cal.4th 767, 772.) Toward this end, courts look to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. (*Ibid.*) If there is no ambiguity in the statutory language, its plain meaning controls; the judiciary presumes the Legislature – or in this case the People acting to represent themselves through the initiative process – meant what it (they) said. (*Ibid.*) However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including, again, "the *purpose* of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing [it]." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.) In short, "if a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense."[14]

The purposes of Proposition 64 are, according to its plain language, to restrict not only who may *file*[15] claims under the UCL, but who may "prosecute"[16] such

---

[14] Karl Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VANNED. L. REV.* 395, 400 (italics added), reprinted in Singer, *STATUTES AND STATUTORY CONSTRUCTION* § 48A:08, p. 639 (2000 ed.).

[15] Prop. 64, §§ 1, subd. (b)(1) - (4) refer to a variety of legal, social and economic ills occasioned by "filings" under the UCL, especially when they are "a means of generating attorney's fees without creating a corresponding benefit," and undertaken "where no client has

(continued...)

claims and who may "pursue"[17] relief as a "representative" of some group. Prosecution and pursuit of claims necessarily comes *before*, or are prerequisites to, their final determination. By using the term "prosecuted" rather than "filed" or "brought," the Legislature in previous versions of the statute, and the electorate, pursuant to Proposition 64, meant for this statute to provide the continuing standing to litigate the action, not just to file the action. "Prosecute" means to "commence *and carry out* a legal action." (*BLACK'S LAW DICT.* (8th ed. 2004) p. 1258, italics added; see *Marler v. Municipal Court* (1980) 110 Cal.App. 3d 155, 160-161 ["prosecution" includes every step from commencement to final determination of action].)

So Proposition 64 applies, by its plain language, to "pending" cases that are being "prosecuted" and "pursued" as well as cases "filed" but not finally determined. Proposition 64 applies, in other words, to this as yet unresolved case.

---

[15](...continued)
been injured in fact" or has "used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." The result of these lawsuits is to "clog our courts and cost taxpayers, . . . California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees . . .."

[16] Prop. 64 refers in several sections, both new and old, to the "prosecut[ion]" of actions under the UCL. (*Id.* at § 1, subd. (f), § 5 (§ 17535 of the UCL).)

[17] Prop. 64 states that any private party seeking to represent others "may *pursue* [such claims] only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure . . .," the statutory authorization for class actions. Identical language also appears in § 5 (B & P C § 17535).

II. PROPOSITION 64 APPLIES TO PENDING CASES BECAUSE IT REPEALS THE FORMER UCL PROVISIONS PERMITTING PRIVATE PERSONS WHO HAVE NOT SUFFERED ANY INJURY TO OBTAIN RELIEF FOR THE GENERAL PUBLIC.

Governing Board of Rialto Unified School District v. Mann (1977)[18] 18 Cal.3d 819, 829 states the controlling principle:

> [A] cause of action or remedy dependent on a statute falls with a repeal of the statute, *even after the action thereon is pending*, in the absence of a saving clause in the repealing statute. The justification for this rule is that the Legislature may abolish the right to recover at any time.[19]

This rule, known as the "repeal doctrine," admits two exceptions: (1) when the right or remedy repealed is based, not on statute, but the common law; and (2) when a "savings clause" is enacted accompanying the repeal. Neither exception applies to Proposition 64.

A. The UCL is Solely a Statutory Cause of Action and Not Based on Common Law.

Before Proposition 64's passage, the UCL contained a phantom or universal "standing" requirement that permitted "any person" to sue on behalf of the general public for injunctive relief regardless of whether he suffered injury from the complained of practice. This was a unique statutorily created cause of action, one that by the capacious terms of the offenses it substantively proscribes – *i.e.*, conduct that is "unlawful, unfair or fraudulent" – invited abuse. According to

---

[18] Hereinafter referred to as "*Mann*."

[19] Emphasis added. *Accord*: *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 (The rule is "well settled that an action wholly dependent on statute abates if the statute is repealed . . .").

Proposition 64, that abuse includes the "filing," "prosecution" and "pursuit" of cases "where no client has been injured in fact," including "lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision."[20]

These UCL rights and remedies were unique creatures of statute; they cannot be traced to any antecedent common law right to be free from unfair competition. As the Court stated in *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-1264:

> The common law tort of unfair competition is generally thought to be synonymous with the act of "passing off" one's goods as those of another. The tort developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection. [Citation.] [¶] In contrast, *statutory* "unfair competition" extends to all unfair and deceptive business practices. For this reason, the statutory definition of "unfair competition" "*cannot be equated with the common law definition*." (Italics added.)

The old regime version of the UCL was, in the words of the *Mann* opinion, solely "a cause of action or remedy dependent on a statute." (*Mann*, *supra*, 18 Cal.3d at 829.) Repeal of the former standing and representative action standards

---

[20] Until Proposition 64 put a stop to these abusive practices, "plaintiffs could [1] file representative actions against an extraordinary number of defendants without having to worry about a reciprocal defendant class because the UCL contains no notice requirement. . .; [2] file a case on behalf of the general public solely to pile on an additional sanction against a defendant who is in the midst of complying with a regulatory process; . . . [and 3] 'tack on' section 17200 claims in an effort to broaden a plaintiff's scope of discovery and increase settlement leverage." Blackston, *supra*, 41 *SAN DIEGO L. REV.* at 1849-1851.

in the UCL – whether a *partial* or *total* repeal of the UCL or characterized as an "amendment" – has the same legal effect. "A repeal of the statute, or an amendment thereof, resulting in a repeal of the statutory provision under which the cause of action arose, wipes out the cause of action unless the same has been merged into a final judgment." (*Wolf v. Pacific Southwest etc. Corp.* (1937) 10 Cal.2d 183, 185.) Standing to sue, of course, goes to the very existence of a cause of action. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.) Absent the standing required under the amended versions of sections 17204 and 17535, plaintiff has no cause of action.

The facts animating the opinion in *Mann* are instructive for this case. A tenured teacher pled guilty in 1971 to possession of a small quantity of marijuana in his private residence. The school district then sought a judicial determination that the teacher's conviction constituted grounds for dismissal under the Education Code, which provided that conviction of any crime involving moral turpitude constituted cause for dismissal. The trial court agreed and entered a judgment declaring that the school district had the right to dismiss the teacher from his tenured position. During the pendency of defendant's appeal, the Legislature passed an entirely new statute that prohibited any public entity, including a school district, from revoking any right of an individual on the basis of a pre-1976 possession of marijuana conviction so long as two years have elapsed from the date of conviction.

When the case reached this Court, it applied the new statute allowing the teacher to continue his employment. The School District argued, as appellant does about Proposition 64, that even if the new legislation repealed the former

remedy, the repeal should not affect a case that "was pending on appeal at the time the repealing legislation became effective."[21] This argument was soundly repudiated by a unanimous Court for reasons that ring true today for Proposition 64:

> The school district's authority to dismiss defendant rests solely on statutory grounds, and thus under the settled common law rule the repeal of the district's statutory authority necessarily defeats this action which was pending on appeal at the time the repeal became effective. As this court noted in *Southern Service Co, Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 12: "If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case *under the law in force when its decision is rendered*."[22]

Appellant relies on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 in arguing that Proposition 64 does not apply to lawsuits filed before its enactment because it does not show an unmistakable intent that it apply. This is mistaken because *Evangelatos* involved the repeal of a common law right, not a statutory right. CJAC knows this because we, as a sponsor of the initiative measure at issue in *Evangelatos* (Proposition 51, which modified the common law rule of joint and several liability to allow for several liability for noneconomic damages based on proportionate fault), were unsuccessful in persuading the Court to apply it to all

---

[21] *Mann*, *supra*, 18 Cal.3d at 829.

[22] *Id.* at 830-831; emphasis added.

pending cases. Neither amici nor *Evangelatos*, however, discuss the repeal doctrine or cite or analyze either *Mann*, *supra*, 18 Cal.3d 819 or *Younger*, *supra*, 21 Cal.3d 102. Therein lies the rub.

As with the *Mann* opinion, the "law in force" that now governs pending UCL cases is Proposition 64, which mandates dismissal of UCL cases that conflict with its provisions. "If a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered."[23] This is neither a new nor radical notion. A unanimous opinion by Chief Justice John Marshall underscored early in our nation's jurisprudence that repeal of a statute requires the court to apply the changed law to pending cases, not the repealed law that was in effect when the case arose. In *United States v. Schooner Peggy* (1801) 1 Cranch 103, the owners of a ship that had been seized and condemned by a lower court filed an appeal from the condemnation. During appeal, the United States entered into a treaty with France, in which both nations agreed to restore all property that had not been definitively condemned. The captors of the seized ship argued that the ruling of the court below was a definitive condemnation, which the Court could only reverse if the judgment of condemnation was erroneous when delivered; but if it was not, then it could not be disturbed because it was based on valid law at the time. Chief Justice Marshall rejected this contention, stating:

> It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not, but, if subsequent to the judgment and before the decision of the

[23] *First Nat'l. Bank of San Luis Obispo v. Henderson* (1894) 101 Cal. 307, 309-310.

> appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. In such a case the court must decide according to existing laws, and, if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.[24]

California follows Chief Justice Marshall's eminently sensible path to the same conclusion. "If final relief has not been granted before the repeal goes into effect, it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered." (*Southern Service Co., Ltd. v. Los Angeles County*, *supra*, 15 Cal.2d at 11-12.)

B. There is No "Savings Clause" in the UCL or Proposition 64 to Forestall its Immediate Application to Pending Cases.

Nor is there any "savings clause" in Proposition 64 or the UCL. A savings clause is a "restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted repeal." (*BLACK'S LAW DICTIONARY* 1343 (6th ed. 1990).) Whether a general savings clause contained in the statute *before* the repealing measure is enacted will, as appellant contends, suffice to save that which is repealed is doubtful. If it is to have effect, there is substantial authority that the "savings clause" must be enacted during the *same session* as the repealing measure to show the legislative intent to save pending actions from the repeal. (*County of Alameda*

---

[24] *Schooner Peggy*, *supra*, 1 Cranch at 110.

v. Kuchel (1948) 32 Cal.2d 193, 203 ("[I]ntent to [apply savings clause effect] [must] appear by legislative provision *at the session of the Legislature effecting the repeal of the statute* from which the rights are to be saved."); emphasis added.) As the Court made clear when applying the "repeal doctrine" to give immediate effect to a legislative "amendment" that changed an earlier statutory procedure for records destruction, the "amendment" "contain[ed] no express saving clause, and none [wa]s implied by *contemporaneous* legislation." (*Younger v. Superior Court*, *supra*, 21 Cal.3d at 109-110; emphasis added.) No savings clause, specific or general, was enacted by the Legislature or the People during the time Proposition 64 was passed. So repeal of the UCL's universal standing provision, and repeal of its broad conferral upon private parties (who have themselves suffered no injury) to pursue representative actions on behalf of the general public, immediately ends all pending UCL causes of action that do not comport with Proposition 64's new requirements. That includes this case.

Significantly, the argument that a general savings clause somewhere in the California Codes prevents Proposition 64 from being applied to pending cases is beside the point because California does *not* have a general savings clause for civil actions. California has a general criminal savings clause (Cal. Gov. C. §9608), but Gov. C. §9606, which deals with civil actions, codifies the principles and underlying policies of the repeal rule. (See discussion in Respondent's Reply Brief on the Merits, p. 9-11.)

III. PROPOSITION 64 IS A PROCEDURAL AND REMEDIAL MEASURE THAT SHOULD BE APPLIED TO PENDING UCL CASES.

There is a second, independent ground upon which to apply Proposition 64 to all pending cases: while changes in *substantive* legal rights normally operate only prospectively, changes made in *procedural or remedial* laws apply immediately to cases that have not been finally determined. Applying changed procedural statutes to existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring *before* the effective date of the new statute, involves no improper retrospective application because the statute addresses *conduct in the future*, not the past.

> Such a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment . . .. [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the *procedure to be followed in the future*." [Citation.] For this reason, we have said that "it is a misnomer to designate [such statutes] as having retrospective effect. [Citation.]"[25]

As *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 395 explained:

> [P]rocedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." [Citations.] In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates

[25] *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.

> in the future regardless of the time of occurrence of the events giving rise to the cause of action. [Citation.] In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective. There is then no problem as to whether the Legislature intended the changes to operate retroactively.

It is, then, the effect of the law, not its form or label, that is important for purposes of analysis as to what cases it affects.[26] If a statutory change is *substantive* because it imposes new, additional or different *liabilities* based on past conduct, courts are loath to interpret it as having retrospective application.[27] "[W]hat is determinative is the effect that application of the statute would have on substantive rights and liabilities."[28]

Appellant understands this principle, but argues that "standing is a matter of substance because it affects the right of a party to sue." (Appellant's Answering Brief on the Merits, p. 44.) That position, however, is contrary to well-settled law holding that issues of *standing* – i.e., who may bring suit to enforce a substantive right – are *procedural* in nature. "In recent years there has been a marked accommodation of formerly strict *procedural requirements of standing to sue* [citation]

---

[26] *Tapia*, *supra*, 53 Cal.3d at 289.

[27] *Id.* at pp. 290-291; see also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269["'every [statute that] takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective'"]. If a newly enacted statute merely changes the procedures to be used in the conduct of existing litigation, however, its application is not considered retrospective.

[28] *Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371, 378.

and even of capacity to sue [citation] where matters relating to the 'social and economic realities of the present-day organization of society' [citation] are concerned."[29] So are the statutory authorization and requirements for class actions, which is undoubtedly why they are found in section 382 of the Code of Civil Procedure and have been judicially recognized as "essentially . . . procedural . . .."[30] " [T]he Court . . . did not rely on a technical or *procedural defense like lack of standing*." (*Casa Herrera v. Beydoun* (2004) 32 Cal.4th 336, 348; emphasis added.)

These two reform provisions of Proposition 64 are tied together in sections 2 and 5, where the measure specifies that a private plaintiff may bring a representative action 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 . . .." The standing requirements of Section 17204 are, of course, the Proposition 64 language requiring a private plaintiff to have "suffered injury in fact and . . . lost money or property" as a condition of suing under the UCL.

Admittedly, the "substance" versus "procedure" dichotomy is not always clear-cut. As the Court recognized in *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 865:

---

[29] See also *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1164 n.2 (explaining that a creditor's claim was disallowed in another case "for the purely *procedural* reason of lack of standing") (emphasis in original); *Personnel Comm. of the Barstow Unified Sch. Dist. v. Barstow Unified Sch. Dist.* (1996) 43 Cal.App.4th 871, 875 ("[W]e dispose of the matter on *procedural* grounds. Specifically, we conclude . . . the Commission lacked *standing to sue* . . .") (emphasis added); *J & K Painting Co., Inc. v. Bradshaw* (1996) 45 Cal.App.4th 1394, 1402 n.8 (question of whether "plaintiff lacked standing to proceed with the action" was "purely procedural"); *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117; emphasis added; and *Saks v. Damon Raike and Co.* (1992) 7 Cal.App.4th 419, 430. ("Because of the nature of their claim and the particular jurisdictional and *procedural* requirements of the law pertaining thereto, [plaintiffs] lack *standing* to bring their claims in the trial court below"; emphasis added.).

[30] *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439; *Global Minerals and Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849.

> "Substance" and "procedure" . . . are not legal concepts of invariable content . . . and a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

The "nature of the problem for which a characterization must be made" turns, courts tell us, on whether the newly enacted statute changes "the legal consequences of past conduct by imposing new or different liabilities based upon such conduct."[31] Proposition 64 does *not* change the legal consequences of past conduct by imposing new or additional liability; it simply governs who may prosecute UCL actions *after* its enactment. ("Actions for any relief pursuant to this chapter shall be *prosecuted* exclusively" by the various governmental actors as well as private parties who suffered injury in fact and lost money or property as a result of unfair competition.) Application of Proposition 64 does not, in other words, affect whether plaintiffs had standing to maintain this action in the past, but bars them from continuing to maintain actions in the future due to their lack of standing. This is, of course, consistent with the venerable rule that an absence of standing "may be raised at any time in the proceeding,"[32] including after a change of law on what is required for standing. With respect to defendant Mervyn's, if its alleged conduct violated the UCL, it could still be held liable for this conduct through lawsuits brought by the California Attorney General, local public officials, or private plaintiffs who can demonstrate "injury in fact" under Proposition 64. The legal consequences of any conduct that purportedly violated the UCL are,

---

[31] *Tapia v. Superior Court*, *supra*, 53 Cal.3d at 290-291.

[32] See *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90 ("[L]ack of standing . . . may be raised at any time in the proceeding.").

therefore, unchanged by Proposition 64.

Finally, public policy favors immediate application of Proposition 64 to pending cases because that is the surest and swiftest way to stop phantom plaintiffs (i.e., ones who have not suffered any injury) – acting as self-appointed "representatives" of the *general public* – from prosecuting UCL claims that clog our courts, cost taxpayers and dampen our economy. There is simply no offsetting public benefit in allowing pending UCL cases to go forward if they do not conform to Proposition 64. An unharmed private plaintiff purporting to the represent the general public cannot continue to, as the Proposition states, "pursue" or "prosecute" these UCL claims without satisfying the new standing and class certification requirements.

The standing and class action requirements for private representative actions added to the UCL by Proposition 64 are *procedural*, not substantive. Accordingly, they may be applied to pending cases even if the event underlying the cause of action occurred before the statute took effect.[33]

[33] *Tapia v. Superior Court*, *supra*, 53 Cal.3d at 288; *Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194, 1211, fn. 20.

CONCLUSION

Proposition 64 changes the standing requirements for private parties to prosecute UCL actions. It requires that plaintiffs must show "actual injury" and, when a private party prosecutes a representative UCL action, comply with the procedural dictates for class actions. Proposition 64 accomplishes this by *repealing* key elements of formerly existing *statutory*, not common law, rights and remedies; and it does so without a savings clause to grandfather in pending UCL actions. These statutory changes to the old UCL regime are *procedural* in nature. Thus Proposition 64 applies immediately upon taking effect to all pending cases.

For these reasons, the Court should reverse the decision of the appellate court and dismiss this case because appellant does not satisfy the current legal requirements for prosecution of a UCL claim.

Dated: September 22, 2005

Fred J. Hiestand
Counsel for Amicus Curiae
The Civil Justice Association of California (CJAC)

CERTIFICATE OF WORD COUNT

The text of the foregoing amicus curiae brief consists of approximately 6200 words as counted by the Corel WordPerfect 12 word processing program used to generate this brief.

Dated: September 22, 2005

Fred J. Hiestand
Counsel for Amicus Curiae
The Civil Justice Association of California (CJAC)

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On September 22, 2005, I served the foregoing document(s) described as: Application of the Civil Justice Association of California for Permission to File an Amicus Brief in Support of Defendant and Respondent; and Amicus Brief in *Californians for Disability Rights v. Mervyn's LLC,* S131798 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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

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

Clerk of the Court
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

Tom Orloff
Alameda County District Attorney
1225 Fallon Street
Room 900
Oakland, CA 94612

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

Andrea G. Asaro
Rosen, Bien & Asaro, LLP
155 Montgomery Street
8th Floor
San Francisco, CA 94104
Attorney for Plaintiff/Appellant

James C. Sturdevant
Monique Olivier
The Sturdevant Law Firm
475 Sansome Street, Suite 1750
San Francisco, CA 94111
Attorneys for Plaintiff/Appellant

Sidney Wolinsky
Monica Goracke
Laurence W. Paradis
Disability Rights Advocates
449 15th Street, Suite 303
Oakland, CA 94612
Attorneys for Plaintiff/Appellant

Daniel S. Mason
Zelle, Hofmann, Voelbel, Mason & Gette, LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Attorney for Plaintiff/Appellant

David F. McDowell
John Sobieski
Morrison & Foerster LLP
555 West Fifth Street, Suite 3500
Los Angeles, CA 90013
Attorneys for Defendant/Respondent

Linda E. Shostak
Gloria Y. Lee
Kathryn A. Vaclavik
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
Attorneys for Defendant/Respondent

[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

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

Executed this 22nd day of September 2005 at Sacramento, California.

_____

David Cooper