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

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,

v.

MERVYN'S LLC,
Defendant and Respondent.

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

RESPONDENT MERVYN'S REPLY BRIEF ON THE MERITS

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California Unfair Competition Law (Bus. & Prof. Code §17209)
Cal. Rules of Court, Rules 15(c)(3), 44.5(c)

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I. INTRODUCTION

The heart of CDR's answering brief is a speculative argument that the statutory repeal rule has been displaced by statements by this Court concerning the presumption against retroactivity in cases that did not mention and did not involve the statutory repeal rule.

CDR's position is without merit because the two rules do not have overlapping fields of operation. (See OB 12-14.) Repeals of purely statutory rights and remedies apply to pending cases under the statutory repeal rule, unless there is a savings clause, whereas repeals of common law rights are presumed to apply prospectively. (*Ibid.*) There was no need for this Court to mention the statutory repeal rule in the cases that CDR relies on, because those cases did not involve that rule. Nor would this Court have used language that did not mention that rule to convey its supposed disapproval, since two relatively recent and unanimous decisions of this Court had referred to the statutory repeal rule as "settled."

CDR's contention that Proposition 64 did not repeal the right of uninjured private parties to enforce the UCL within the meaning the statutory repeal rule ignores the substance of Proposition 64's changes, and CDR's contention that Business & Professions Code sections 4 and 12 establish a general savings clause misconstrues both sections.

Proposition 64 also applies to pending cases on an entirely *prospective*, not retroactive basis. Proposition 64 changes the standing requirements for enforcing UCL claims, and since standing is a requirement that has to be satisfied at every stage of the proceedings, Proposition 64 applies to CDR's *continued* efforts to "prosecute" its UCL claims. Applying Proposition 64 to this case will not change the legal consequences of Mervyn's past conduct, or deprive CDR of any vested right that it actually had prior to Proposition 64's passage.

II. CDR'S ATTACK ON THE STATUTORY REPEAL RULE IS WITHOUT MERIT.

A. The Statutory Repeal Rule has Been Established by Numerous Decisions of This Court.

CDR posits that this Court's decisions in *Governing Board v. Mann* (1977) 18 Cal.3d 819 (*Mann*), and *Younger v. Superior Court* (1978) 21 Cal.3d 102 (*Younger*), were not really based on a straight-forward application of the statutory repeal rule, but rather on supposed findings that the Legislature had clearly expressed an intent that the new laws should apply retroactively. (AB 33-35.) CDR misreads the decisions.

Mann, 18 Cal.3d 819, considered the statutory repeal rule at great length, and concluded that it was based on a "long well-established line of California decisions," and that it was a "settled common law rule." (*Id.* at 829, 830.) It did not, as CDR contends, apply that rule only after determining that the Legislature intended that the repeal would apply to pending cases. (AB 34.) This Court discussed the Legislature's purpose in support of its conclusion that the Legislature had implicitly repealed the statutory right of school boards to dismiss a teacher for certain marijuana convictions (18 Cal 3d 819, at 828), not to show that the Legislature intended that that repeal would apply to dismissals that were not yet final.

CDR's attempt to distinguish *Younger*, 21 Cal.3d 102, is likewise without merit. This Court based its decision on the statutory repeal rule, repeating *Mann's* point that the rule was "well settled." (*Id.* at 109.) *Younger* refused to consider the constitutionality of the orders entered under the prior statute because the lawsuit in which those orders had been issued had abated pursuant to that rule. (See 21 Cal.3d 102 at 109.) *Younger* did not decide, as CDR suggests at AB 34, that the repeal of the trial court's jurisdiction applied to pending actions because the Legislature intended for it to do so. As this Court stated, "the only legislative intent

relevant [where the statutory authorization on which the action is based has been repealed] would be a determination to save [the] proceeding from the ordinary effect of repeal. . . . But no such intent appears. . . ." (*Id.* at 110.)[1]

CDR's attempts to distinguish this Court's older statutory repeal decisions (AB 31-33), are equally without merit. (See, e.g., *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317-318 [the Court relied on the statutory repeal rule to determine that the repeal of a purely statutory right, together with the remedy for its enforcement, applied to pending actions]; *Wolf v. Pacific Southwest etc. Corp.* (1937) 10 Cal.2d 183, 184 [the repeal of certain usury law provisions applied to pending actions *because* there was no savings clause]; *Southern Service Co. Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12 [the Court relied on the statutory repeal rule to support its decision that the Legislature had a right to apply the repeal of a purely statutory tax refund to pending actions]; and *International etc. Workers v. Landowitz* (1942) 20 Cal.2d 418, 420-423 [although equity requires specific authority to enjoin criminal conduct, the repeal of that authority applied to pending actions because of the statutory repeal rule].)

The statutory repeal rule has not disappeared from California law, notwithstanding that this Court's decisions since *Mann,* 18 Cal.3d 819, and *Younger,* 21 Cal. 3d 102, have not involved and have not cited that rule. (See section B below).

The Court of Appeal has continued to apply that rule in decisions from 2004, 1996, and 1992 (cited at OB 14, fn. 6), and Witkin's 2005 text on California law treats that rule as an established exception to the general

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[1] CDR's reference to *Younger's* statement of legislative history (AB 35, citing 21 Cal.3d at 113) dealt with a different issue — the interpretation of the administrative procedure that replaced the repealed judicial procedure.

presumption against retroactivity. (See 7 Witkin, Summary of Cal. Law (10th ed. 2005), Constitutional Law, §§634, 635, pp. 1035-1037 [contrasting the presumption against retroactivity that *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188 (*Evangelatos*), applied to an initiative with the exception to the rule of prospective construction that *Mann*, 18 Cal. 3d 819, applied to the repeal of a statutory cause of action without a savings clause].)

Moreover, the justification for the statutory repeal rule that Government Code section 9606 provides has not been changed. CDR's revisionist interpretation of that section (AB 28-29), which treats its second sentence — that "[p]ersons acting under any statute act in contemplation of this power of repeal" — as if it did not exist, is without merit. That sentence has been part of section 9606 and its predecessor for more than 70 years, and it continues to provide a statutory justification for the statutory repeal rule. As *Callet v. Alioto* (1930) 210 Cal. 65, 67-68, stated, referring to that section's predecessor, "the justification for [the statutory repeal rule] is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time."

CDR's contention that the distinction that the statutory repeal rule draws between purely statutory and common law rights makes no sense is irrelevant. (AB 26, fn. 6.) While the statutory repeal rule is derived from the common law, it is also based on the Legislature's judgment that people who act on the basis of statutes should be presumed to act in contemplation of the power of repeal. The Legislature has not, however, established any such presumption with respect to common law rights.[2]

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[2] The various federal decisions that CDR relies on are likewise irrelevant. CDR has not challenged the showing that federal law differs from California law in that Congress has abrogated the statutory repeal rule with respect to federal enactments. (See OB 36-37.)

B. This Court Has Not Disapproved the Statutory Repeal Rule Sub Silentio.

CDR implicitly contends that two factors — this Court's failure to cite the statutory repeal rule in any decision since 1978, and the broad language that it has it used to describe the presumption against retroactivity — demonstrate that it has disapproved that rule sub silentio. (AB 35-40.) The cases that CDR relies on, however, do not support its position, because those cases were governed by the presumption against retroactivity, not the statutory repeal rule.

Thus, *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936, considered statutory amendments that increased a defendant's common law liability, and held that they could not be applied to pre-amendment conduct. *McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467, 470, 476, considered an amendment that "impose[d] personal liability" for "actions not subject to liability when performed," and held that that amendment could not be applied to pre-enactment conduct. *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839-840 (*Myers*), considered the repeal of a statutory immunity from common law liability, and held that that repeal did not apply to past conduct because it would make conduct "tortious" that was "lawful" when it occurred.

None of these cases mention the statutory repeal rule, and there was no need for them to do so, because that rule would not have applied. CDR relies particularly on *Myers*, 28 Cal.4th 828, erroneously arguing that Justice Moreno's dissent confirmed the majority's supposed rejection of the statutory repeal rule. (AB 37-38.) However, his dissent did not mention the statutory repeal rule, to say nothing of suggesting that it should be extended to apply to the repeal of a statutory immunity that — as a matter of substance — imposed new liabilities on past conduct. He cited *Callet v. Alioto*, *supra*, 210 Cal. 65, 68, for a different point — that statutory rights,

unlike common law rights, are not vested for purposes of the retroactive application of a statute. (*Myers*, 28 Cal.4th 828, 853 (dis. opn. of Moreno, J.).)

CDR also places heavy reliance on the discussion of the presumption against retroactivity in *Evangelatos,* 44 Cal.3d 1188 (AB 16-18), but it does not dispute Mervyn's showing that that case did not mention the statutory repeal rule, or involve the repeal of a purely statutory right. (See OB 18.)

Justice Mosk' position in *Evangelatos* casts further doubt on CDR's contention that this Court's decisions commencing with *Evangelatos*, have implicitly disapproved the statutory repeal rule. If the four justice majority — of which Justice Mosk was a member — had intended to reject the principles that Justice Mosk had stated for the Court just 10 years earlier in *Younger*, 21 Cal.3d 102, he surely would have said something.

CDR states that the statutory repeal rule had its origins in the criminal law field, and it argues that the various policy factors that this Court has used to determine whether an amendment to the criminal law applies to pending cases — such factors, for example, as whether the amendment was analogous to a pardon, or whether the circumstances indicated that the Legislature had decided that the penalty was too severe — cannot properly be used to determine whether the repeal of a non-criminal right or remedy applies to pending cases. (See AB 29-31.) No such analogies are needed. The application of the statutory repeal rule to civil cases is not tied to the policy factors that may help to determine whether statutory changes to the criminal law apply to pending cases.

It has been settled for more than a century that the statutory repeal rule applies to the repeal of purely statutory rights or remedies in the civil law field where there is no savings clause, and that pursuant to that rule, the repeal applies to pending cases. (See *Mann*, 18 Cal.3d 819, 830, fn. 8

[citing decisions in civil cases extending back to 1901 that had applied the statutory repeal rule].)

CDR's contention that this Court should construe Proposition 64 to operate prospectively because it does not contain a statement of retroactivity is therefore without merit. No such statement was needed. Where a purely statutory right or remedy is repealed, the repeal applies to pending cases unless there is a savings clause. (OB 15-16.)[3]

III. THE STATUTORY REPEAL RULE APPLIES TO PROPOSITION 64'S RESTRICTIONS ON THE STANDING OF PRIVATE PARTIES TO ENFORCE THE UCL.

A. Proposition 64's Elimination of the Authority of Uninjured Private Parties to Enforce the UCL Constitutes a Repeal.

CDR contends that the statutory repeal rule does not apply because Proposition 64's changes did not constitute a repeal, since it characterized those changes as amendments and did not eliminate the right of injured parties and public officials to enforce the UCL. (See AB 26-28.)

Labels are not determinative. (See OB 27-28.) The change that the voters enacted was substantively identical to a repeal because they struck out the former statutory language that gave uninjured private parties a right to enforce the UCL.[4] Government Code section 9605 makes the same

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[3] CDR's interpretation of Proposition 64's language (AB 20-25) is not determinative on this issue, misstates Mervyn's position, and, in any event, is incorrect. (See OB 21-27.)

[4] See the revised text of Bus. & Prof. §17204 in the Ballot Pamphlet, OB appen. at p. 6.

point: Where part of a statute is amended, any "omitted portions are to be considered as having been repealed . . . ."

CDR's contention that the statutory repeal rule applies only to an enactment that "repeals a statutory cause of action or remedy" (AB 26-27) is not established by the case that CDR cites (*Callet v. Alioto*, *supra*, 210 Cal. 65, 67), makes no sense from a policy standpoint, and would not apply in any event to Proposition 64, which repealed the statutory cause of action that the UCL had granted to uninjured private parties by eliminating their right to seek relief under that Act.

Younger, 21 Cal.3d 102, rejected a similar argument. The Attorney General contended that the statutory repeal rule did not apply to the repeal of a judicial remedy for the destruction of criminal conviction records, since the Legislature had substituted a slightly narrower administrative remedy. This Court responded that the creation of an administrative remedy did not prevent the statutory repeal rule from terminating pending judicial remedies; "the Legislature has revoked the statutory grant of jurisdiction for *this* proceeding, and has vested it in no other court." (*Id.* at 110, original emphasis.)

Similarly, in this case, the electorate has revoked the authority of uninjured private plaintiffs to seek relief and has not transferred that authority to anyone else. Since the statutory repeal rule is based on the policy that statutory reforms that repeal purely statutory rights and remedies can and should apply to pending cases unless the lawmakers have clearly expressed a contrary intent, the electorate's preservation of the authority of injured private parties to seek relief does not preserve the authority of *uninjured* private parties to prosecute UCL actions.

B. CDR's Contention That the UCL is Derived From the Common Law Does Not Establish an Exception to the Statutory Repeal Rule.

CDR's contention that this case is governed by an exception to the statutory repeal rule — that it does not apply to the repeal of a statute that codifies common law rights — is without merit. UCL claims are "not the equivalent of the common law of unfair competition," as CDR concedes (AB 26, fn. 6), and the mere fact that the UCL "is derived from common law" is irrelevant. The statutory repeal rule applies unless the repealed "right" was a "right recognized at common law." (*Callett v. Alioto*, *supra*, 210 Cal. 65, 67, 68.) Here, however, the rights and remedies that Proposition 64 repealed, and in particular the claims that CDR asserted, were purely statutory. (See, e.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-1264.)

C. There is no Savings Clause That Protects Pending Actions from Proposition 64's Repeals.

CDR does not contend that Proposition 64 contains a savings clause. (See OB 30 [noting there is nothing in Proposition 64 that saves pending cases].) Instead, it argues that Business & Professions Code sections 4 and 12, construed together, save all actions that were pending on Proposition 64's effective date. (AB 40-42.) CDR's position is without merit. Section 4 is a limited savings clause, and section 12 does not convert it into a general savings clause.

Section 4's limited scope is established by its language; it saves only those actions, proceedings and rights that had been commenced or that had accrued before the Code took effect in 1937.

> No 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, emphasis added.)

Section 4's limited scope is confirmed by its context; it is surrounded by sections that preserve rights that existed when the Code was enacted in 1937. (See Bus. & Prof. Code §§3 [preserving the tenure of office holders at the time the Code goes into effect], 5 [preserving rights under existing licenses], 6 [preserving rights under existing certificates], and 7 [where a public offense continues to be a crime under the Code, a conviction for that crime under a prior act constitutes a conviction under the Code].)

CDR agrees that "Section 4 precludes application of the provisions of the UCL to an action commenced *before* the effective date of those provisions." (AB 40, original emphasis. See also *Sobey v. Molony* (1940) 40 Cal.App.2d 381, 388-389 [construing section 4 as saving claims arising prior to the Code's effective date notwithstanding a substantial change in the law]; *Sacramento Terminal Co. v. McDougall* (1912) 19 Cal.App. 562, 566 [construing Civ. Code § 6, identical in substance to Bus. & Prof. Code § 4, as applying only to "proceedings pending at the time of the adoption of the Code"]; *James v. Oakland Traction Co.* (1909) 10 Cal.App. 785, 797 [construing Pol. Code § 8, which is likewise substantially identical to Bus. & Prof. Code § 4, as "no doubt enacted" to prevent interference with rights that existed when the Code was adopted].)

Thus, the Legislature's intent could not have been clearer. If it had intended to enact a general savings clause, it knew how to do so. (See *In re Dapper* (1969) 71 Cal.2d 184, 188-189 [contrasting the general savings clause in Gov. Code § 9608, which saved prosecutions for crimes committed before *any* repeal except as otherwise provided, with a municipal code savings clause that applied only to ordinances repealed by that code].)

Nevertheless, CDR contends that section 4 is transformed into a general savings clause when it is construed in the light of Business & Professions Code section 12. (AB 40-42.) That could not have been the Legislature's intent, because section 12 serves a different purpose. It establishes a rule for the interpretation of reference statutes — those statutes that adopt the provisions of the crossed-referenced law.[5] Section 12 states:

> Whenever any **reference** is made to any portion of this Code or of any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made.

(Bus. & Prof. Code, §12; emphasis added.)

Section 12 is one of twenty-one statutes that change the common law rule for interpreting reference statutes by providing that they are to be construed to incorporate subsequent changes in the cross-referenced sections. (See Note, *Reference Statutes*, *supra*, 30 McGeorge L. Rev. 562, 568-569. See also *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59 [under the common law, provisions that are adopted by reference "are incorporated in the form in which they exist at the time . . . and not as subsequently modified"].)

Section 12 is inapplicable on its face to section 4, because section 12 applies to references "to any portion of this Code", whereas section 4 refers only to the entire Code. Moreover, even if, arguendo, section 12 could be construed to apply to provisions that incorporate the entire Code by reference, it would not apply here, because section 4's reference is not to the Code or to any part of the Code; it is, rather, to the *date* on which the

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[5] See Note, *Reference Statutes: Traps for the Unwary* (1999) 30 McGeorge L. Rev. at 562, 564 ("A reference statute adopts within itself the provisions of the cross-referenced law . . . .").

Code was enacted — August 27, 1937. (See Stats. 1937, Ch. 399, at p. 1230.)

Thus, neither the language nor context of section 4, nor the cases that have construed similar provisions, show that section 4 is a general savings clause.

IV. CDR'S CONTENTION THAT PROPOSITION 64'S NEW STANDING REQUIREMENTS CANNOT APPLY PROSPECTIVELY TO PENDING ACTIONS IS WITHOUT MERIT.

Mervyns's demonstrated that the application of Proposition 64's new standing requirements to pending cases will be prospective — not retrospective — within the test stated in *Elsner v. Uveges*, *supra*, 34 Cal.4th 915, 936, and other similar cases. A change in the standing of an uninjured plaintiff, who was not asserting any claims on its own behalf, neither " 'change[s] the legal consequences of past conduct by imposing new or different liabilities'" on Mervyn's, nor does it substantially affect any existing "'rights'" that CDR had prior to Proposition 64. (*Id.* at p. 937.)

While CDR argues that it had a vested "right" to continue to appeal the judgment against it on its UCL claim, *Elsner* and other decisions that state the above rules are clearly referring to the rights of parties who have been injured, and the liabilities of parties who are potentially responsible. A change in the standing of an uninjured plaintiff who is not asserting any claims on its own behalf therefore does not substantially affect existing rights and obligations, as that concept is used to define the prospective operation of a statutory amendment.

None of the cases that CDR cites (at AB 46) state or even suggest that the withdrawal of statutory standing for an uninjured plaintiff to litigate the claims of others deprives that plaintiff of a vested right, or raises any retroactivity concerns. Those cases simply hold that a statute's application to pending cases will be retrospective if it increases an injured party's

potential recovery (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 395, and *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 6), reduces a defendant's potential liability (*Evangelatos*, 44 Cal.3d 1188, 1225, fn. 26), increases the consequences of past criminal behavior (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298), or bars the use of evidence gathered in violation of a statute enacted years later. (*People v. Hayes* (1989) 49 Cal.3d 1260, 1274, discussed in *Tapia, supra,* 53 Cal.3d at 291.)

CDR argues that applying the new standing requirements to existing cases by uninjured plaintiffs would impair settled rights and reasonable expectations. (AB 47-48.) This Court answered a similar contention in *Tapia v. Superior Court, supra*, 53 Cal.3d 282, 299, noting that "it has always been understood in this state that the rules governing the conduct of trials are subject to change. . . ." The same point applies to the rules governing standing to represent others. (See, e.g., *Hogan v. Ingold* (1952) 38 Cal.2d 802, 809 [no one has a vested right to represent others that is beyond the control of a court or the Legislature].) That principle is, of course, especially applicable to a standing claim that depends on a statute rather than the common law, because persons acting under a statute cannot have a justifiable expectation that the statute will not be changed. (See Gov. Code §9606.)

CDR's contention that a statute cannot be applied prospectively where a case has already been tried (AB 55-56), ignores the principle that a statute's operation is prospective where it does not substantially affect existing rights or impose a new or different liabilities on past conduct, and its requirements apply only to proceedings that take place after its enactment. That is the case here, because standing is a requirement that has to be satisfied at every stage of the proceedings. (See OB 31.)

CDR's contention that this case has progressed too far — a contested trial, a judgment for defendant on the merits, and an appeal that has not yet been briefed (AB 52-54) — is likewise without merit. The speculative possibility that an appellate decision on the merits might arguably result in one or more rulings in CDR's favor should not prevent Proposition 64 from operating prospectively at this stage of the case, because the fact that CDR tried and lost its claims against Mervyn's does not, at this point in time, establish any rights against Mervyn's. Proposition 64 can therefore be applied prospectively to the future stages of this case without substantially affecting existing rights and obligations.

V. CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeal should be reversed, with directions to grant Mervyn's motion to dismiss.

Dated: August 17, 2005

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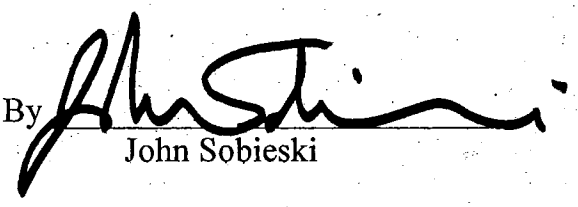
By 
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I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

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

Executed at Los Angeles, California, this 17th day of August, 2005.

Diane L. Hicks
(typed)

Diane L. Hicks
(signature)

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