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IN THE SUPREME COURT OF CALIFORNIA **CLERK SUPREME COURT**

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.,

Plaintiffs and Appellants,

vs.

PHILIP MORRIS USA, INC., ET AL.,

Defendants and Respondents.

After A Decision By The Court Of Appeal Of The State of California,
Fourth Appellate District, Division One, Case No. D046435

[Service on the Attorney General and the District Attorney
required by Bus. & Prof. Code § 17209]

**BRIEF OF *AMICI CURIAE* FARMERS INSURANCE EXCHANGE
AND GRANITE STATE INSURANCE COMPANY
IN SUPPORT OF DEFENDANTS**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. INTERESTS OF <i>AMICI CURIAE</i>	3
III. ARGUMENT	4
A. Application Of Proposition 64’s Standing Requirement To Uninjured Plaintiffs Is Consistent With This Court’s Decision In <i>Mervyn’s</i>	5
B. This Court’s Well Settled Rule Regarding The Repeal Of The Statutory Basis For An Action Also Requires Immediate Application Of Proposition 64 To Pending Cases.	11
IV. CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Aetna Cas. & Sur. Co. v. Indust. Accident Comm'n</i> (1947) 30 Cal.2d 388	6, 10
<i>Bank of the West v. Superior Court</i> (1992) 2 Cal.4th 1254	16
<i>Beckman v. Thompson</i> (1992) 4 Cal.App.4th 481	12
<i>Californians for Disability Rights v. Mervyn's</i> (2006) 39 Cal.4th 223	1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12
<i>Callet v. Alioto</i> (1930) 210 Cal. 65	12, 13
<i>Chamberlan v. Ford Motor Co.</i> (N.D. Cal. 2005) 369 F.Supp.2d 1138	16
<i>Elsner v. Uveges</i> (2004) 34 Cal.4th 915	10
<i>Envtl. Prot. Info. Ctr. v. United States Fish & Wildlife Serv.</i> (N.D.Cal., Apr. 22, 2005, No. 04-4647) 2005 U.S. Dist. LEXIS 7200	16
<i>Evangelatos v. Superior Court</i> (1988) 44 Cal.3d 1188	6
<i>Governing Bd. v. Mann</i> (1977) 18 Cal.3d 819	12, 13, 15
<i>Hogan v. Ingold</i> (1952) 38 Cal.2d 802	10
<i>Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.</i> (2005) 129 Cal.App.4th 1228	16
<i>In re Tobacco II Cases</i> (2006) 142 Cal. App. 4th 891	1, 4, 9, 11
<i>Int'l Ass'n of Cleaning & Dye House Workers v. Landowitz</i> (1942) 20 Cal.2d 418	16
<i>Krause v. Rarity</i> (1930) 210 Cal. 644	12, 13

**Table of Authorities
(Continued)**

	<u>Page(s)</u>
<i>Lee v. Interinsurance Exchange</i> (1996) 50 Cal.App.4th 694	3
<i>Myers v. Philip Morris Cos., Inc.</i> (2002) 28 Cal.4th 828	10
<i>Owens v. Superior Court</i> (1959) 52 Cal.2d 822	5
<i>People v. Bank of San Luis Obispo</i> (1910) 159 Cal. 65	12, 15
<i>Physicians Comm. for Responsible Medicine v. Tyson Foods, Inc.</i> (2004) 119 Cal.App.4th 120	12
<i>Rosasco v. Comm'n on Judicial Performance</i> (2000) 82 Cal.App.4th 315	5
<i>Southern Serv. Co. v. City of Los Angeles</i> (1940) 15 Cal.2d 1	12, 15
<i>Tapia v. Superior Court</i> (1991) 53 Cal.3d 282	6
<i>Younger v. Superior Court</i> (1978) 21 Cal.3d 102	3, 12, 13, 14, 17

Statutes

Bus. & Prof. Code, §§ 17203	9, 14, 16
Bus. & Prof. Code, §§ 17204	9, 14, 16
Gov. Code, § 9605	13
Gov. Code, § 9606	12, 17

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 64 amended the standing requirements of the Unfair Competition Law (“UCL”) and False Advertising Act (“FAA”) to require that a private plaintiff bringing a UCL claim must have “suffered injury in fact and . . . lost money or property as a result of such unfair competition.” Applying Proposition 64, the Court of Appeal in this case determined that, in a claim brought under the UCL, both putative class representatives and absent members of a purported class must satisfy the standing requirements of “injury in fact,” loss of money or property, and proximate causation. (*In re Tobacco II Cases* (2006) 142 Cal. App. 4th 891, 897-898, 904.) The Court of Appeal also determined that plaintiffs in this case could not maintain a class action on behalf of millions of California smokers premised on allegedly deceptive statements made by a group of different companies over more than five decades. (*Id.* at pp. 898-904.)

This amicus brief addresses a narrow but crucial question: Does the Court of Appeal’s holding in this case conflict with this Court’s unanimous ruling last year in *Californians for Disability Rights v. Mervyn’s* (2006) 39 Cal.4th 223? Plaintiffs argue that the decisions are in conflict. (See Petitioners’ Br. on the Merits (“P.O.B.”) at pp. 26-30.)

Amici respectfully submit that the Court of Appeal’s decision is entirely consistent with *Mervyn’s*. The underlying premise of Plaintiffs’ argument that the Court of Appeal’s decision here somehow conflicts with *Mervyn’s* is that a requirement that proposed class members satisfy Proposition 64’s standing requirements is a “substantive” change that cannot be applied “retroactively” to pending cases, and, according to plaintiffs, the decision in *Mervyn’s* is predicated on Proposition 64 making

“procedural” amendments, while leaving substantive rules governing business and competitive conduct unchanged. (See P.O.B. at p. 27.)

As the Court in *Mervyn's* recognized, however, Proposition 64's amendments to the previously broad standing provisions of the UCL and FAA caused prospective changes because they did not create a new cause of action, deprive a defendant of a defense on the merits, or otherwise change the substantive legal rules governing the conduct of an individual who directly and reasonably relied on the previously existing state of law. (*Mervyn's*, *supra*, 39 Cal.4th at pp. 232-233.) At issue in this case are the amendments in Proposition 64 that require proposed class members to satisfy requirements for private party standing – causation, injury-in-fact, and actual loss. These amendments also are prospective changes because they do not affect an “existing right” of an uninjured plaintiff. A private plaintiff does not have an existing right in a defendant's liability for representations that the private plaintiff neither relied upon nor caused him any injury or lost money or property.

Moreover, even if this Court were to conclude that Proposition 64 did add new, “substantive” requirements to private UCL claims, such a conclusion need not undermine the rationale for this Court's decision in *Mervyn's* applying Proposition 64 to cases already pending on the date of its enactment. There is an independent basis for this Court's unanimous decision in *Mervyn's*. This Court resolved the question at issue in *Mervyn's* by holding that an application of Proposition 64 was not retroactive, so it did not need to “reach *Mervyn's* additional argument that Proposition 64 applies to pending cases under the statutory repeal rule, i.e., the rule ‘that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final.’” (*Mervyn's*,

supra, 39 Cal.4th at p. 232, fn. 3, quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109.) Likewise, Proposition 64 rescinded the statutory basis for California courts to consider the claims of uninjured private plaintiffs. Accordingly, even if this Court were to conclude that Proposition 64 made “substantive” statutory amendments, those amendments would nonetheless apply to pending cases.

Plaintiffs’ argument that the decision by the Court of Appeal is in conflict with *Mervyn’s* is a red herring. *Amici* respectfully submit that the Court of Appeal’s decision is entirely consistent with *Mervyn’s*.

II.

INTERESTS OF AMICI CURIAE

The *Amici* are among the many defendants facing lawsuits or potential future lawsuits by plaintiffs alleging violations of the UCL. If this Court were to reverse the Court of Appeal’s decision in this case, the *Amici* may be forced to litigate actions brought against them even though the plaintiffs in those cases did not suffer, and cannot allege that they have suffered, any injury in fact and lost money or property “as a result of” the alleged unfair competition.

Farmers Insurance Exchange (“FIE”) is a reciprocal or interinsurance exchange headquartered in California. Interinsurance exchanges are unincorporated business organizations composed of subscribers, managed by an attorney-in-fact, and governed by Insurance Code section 1280 *et seq.* (See generally *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 702-703.) As described in greater detail in the accompanying Application for Leave, FIE is currently involved in lawsuits in California being prosecuted and pursued by uninjured private plaintiffs who allege that its business practices violate the UCL.

Granite State Insurance Company (“Granite State”) is a member company of American International Group, Inc. (“AIG”), and it transacts business in California. Like FIE, Granite State and other member companies of AIG may face litigation in California brought by uninjured private plaintiffs who allege that their business practices violate the UCL.

III.

ARGUMENT

Amici respectfully submit that the Court of Appeal correctly determined that the plain language of the newly amended standing requirements of the Unfair Competition Law (specifically, Sections 17203 and 17204 of the Business and Professions Code) and binding precedent require class representatives *and* absent members of the purported classes to have standing – *i.e.*, that they suffered “injury in fact and . . . lost money or property as a result of” the defendant’s challenged business acts or practices. (*In re Tobacco II Cases* (2006) 142 Cal.App.4th 891, 897-898, 904; Respondents’ Br. on the Merits (“R.B.”) at pp. 23-31.) In addition, for the reasons set forth by the Respondents, the Court of Appeal correctly determined that as applied to the facts of this case, plaintiffs cannot maintain a class action on behalf of millions of California smokers premised on allegedly deceptive statements made by a group of different companies over more than five decades. (*In re Tobacco II Cases, supra*, 142 Cal.App.4th at pp. 898-904; R.B. at pp. 32-46.)

The following analysis specifically addresses Plaintiffs’ argument that this reasoned decision somehow conflicts with this Court’s unanimous ruling last year in *Californians for Disability Rights v. Mervyn’s* (2006) 39 Cal.4th 223. (See P.O.B. at pp. 26-30.) *Amici* respectfully submit that the Court of Appeal’s decision is entirely consistent with *Mervyn’s*, and that

binding precedent from this Court provides an alternate ground for this conclusion.

A. Application Of Proposition 64's Standing Requirement To Uninjured Plaintiffs Is Consistent With This Court's Decision In *Mervyn's*.

Plaintiffs maintain that “[i]mposing new substantive requirements for bringing a UCL class action would conflict with this Court’s decision in *Mervyn’s*.” (P.O.B. at p. 26.) The underlying premise of this argument is that a requirement that representative plaintiffs and proposed class members share standing – *i.e.*, that they all satisfy the measure’s reliance, causation, and actual loss requirements – is a “substantive” change that cannot be applied “retroactively” to pending cases, and therefore such a requirement would call the *Mervyn’s* holding into question. This is a false choice.

Proposition 64’s amendments to the previously broad standing provisions of the UCL and FAA caused prospective changes because they do not create a new cause of action, deprive a defendant of a defense on the merits, or otherwise change the substantive legal rules governing the conduct of an individual who directly and reasonably relied on the previously existing state of the law. (*Mervyn’s, supra*, 39 Cal.4th at pp. 232-233; see also R.B. at 15-17; *Owens v. Superior Court* (1959) 52 Cal.2d 822, 833 [finding that a statute is “procedural” if it “neither creates a new cause of action nor deprives defendant of any defense on the merits”]; *Rosasco v. Comm’n on Judicial Performance* (2000) 82 Cal.App.4th 315, 322, 325 [“The critical question is whether a change in the law can be applied retrospectively to create a substantive change in the *legal circumstances* in which an individual has already placed himself in direct and reasonable *reliance* on the previously existing state of the law.”].)

At issue here are the amendments in Proposition 64 that require both representative plaintiffs and proposed class members to satisfy the measure's causation, injury-in-fact, and actual loss requirements. These amendments are "prospective" changes because they do not affect an "existing right" of an uninjured plaintiff. A private plaintiff does not have an existing right in a defendant's liability for representations that the private plaintiff did not rely upon and that did not cause him any injury or lost money or property. In this sense, the issues presented to this Court for decision in this case are two sides of the same coin – a putative private plaintiff (whether individual, class representative, or class member) must have relied on the representations at issue to meet the requirement that he suffered "injury in fact" and he could not have suffered such injury absent such reliance.

Moreover, the use of a label such as "procedural" or "substantive" would not be dispositive in any event. This Court's analysis in *Mervyn's* makes clear that the appropriate consideration in determining the application of Proposition 64 is not whether a "procedural or substantive label best applies," but rather "the effect of a law on a party's rights and liabilities." (*Mervyn's*, 39 Cal.4th at p. 231; see also *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289 ["In determining whether such statutes changed 'the legal effects of past events' . . . we sometimes used the terms 'substantive' and 'procedural.' . . . However, we also made it clear that it is the law's effect, not its form or label, which is important," quoting *Aetna Cas. & Sur. Co. v. Indust. Accident Comm'n* (1947) 30 Cal.2d 388, 394 and citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1225-1226 & fn. 26].)

In determining whether the application of the statute to pending cases was “impermissibly retroactive” in *Mervyn’s*, this Court analyzed the “function, not form” of the standing requirement imposed by Proposition 64. (*Mervyn’s, supra*, 39 Cal.4th at pp. 230-231.) In so doing, the Court asked two questions to determine whether applying the change in the law to a pending case is a “retroactive” application: (1) “Does the law change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct?” and (2) “Does it substantially affect existing rights and obligations?” (*Id.* at p. 231, internal quotations omitted.) This analysis emphasizes and renders determinative the *effect* of the law, not whether a change is labeled as “substantive” or “procedural.”

To illustrate this point, the Court contrasted examples of “retroactive” and “prospective” application in *Mervyn’s*, explaining that the Court has found to be “*retroactive* and thus impermissible”:

[T]he application of new statutes to pending cases in ways that would have: (a) expanded contractors’ tort liability for past conduct by imposing broader duties than existed under the common law (*Elsner [v. Uveges (2004)]* 34 Cal.4th 915, 937-938); (b) subjected tobacco sellers to tort liability for acts performed at a time when they enjoyed the protection of an immunity statute (*Myers [v. Philip Morris Cos., Inc. (2002)]* 28 Cal.4th 828, 840); and (c) subjected persons to increased punishment for past criminal conduct, or to punishment for past conduct not formerly defined as criminal (*Tapia, supra*, 53 Cal.3d 282, 297-299). In each of these cases, application of the new law to pending cases would improperly have changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct. (See *Elsner*, at p. 937.)

(*Mervyn’s, supra*, 39 Cal.4th at p. 231.)

