CASE NO. S132433

IN THE

SUPREME COURT OF CALIFORNIA

Thomas Branick, et al.

Plaintiffs and Appellants

v.

Downey Savings and Loan Association,

Defendant and Respondent

On a Decision from the Court of Appeal,
Second Appellate District, Division Five
Case Number B172981

DOWNEY SAVINGS AND LOAN ASSOCIATION, F.A.'S OPENING BRIEF ON THE MERITS

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Issues for Review

In granting review, this court specified the issues to be decided:

1. "Does Business and Professions Code section 17204 (as amended by Prop. 64, Gen. Elec. (Nov. 2, 2004)), which limits standing to bring an action under the Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.) to 'any person who has suffered injury in fact and has lost money or property as a result of such unfair competition' (id., § 17204), apply to actions filed before November 3, 2004, the date on which Proposition 64 took effect?"

2. "If the standing limitations of Proposition 64 apply to actions under the Unfair Competition Law that were pending on November 3, 2004, may a plaintiff amend his or her complaint to substitute in or add a party that satisfies standing requirements of Business and Professions Code section 17204, as amended, and does such an amended complaint relate back to the initial complaint for statute of limitations purposes?"

Factual and Procedural Background

As was typical in pre-Proposition 64 actions under California's Unfair Competition Law in Business and Professions Code sections 17200 and 17500 (the "UCL"), plaintiffs Thomas Branick and Ardra Campbell lent their names to this lawsuit even though they never had a loan with Downey Savings and Loan Association, F.A. ("Downey Savings"). They nevertheless alleged that Downey Savings' lending practices violated the UCL.

In their complaint, plaintiffs purport to describe a "typical real estate transaction" involving an "old lender" and a "new lender." [Appellants' Appendix ("AA") at 5, ¶¶ 16-17.] In connection with these transactions,

plaintiffs alleged that Downey, as an "old lender," engaged in a pattern and practice of unfair business practices by charging more than is necessary or fair for various loan document recording services. They also alleged, in effect, that a lender is not allowed to charge more than "actual costs" for certain services (e.g., no more than the cost charged by county at the recording window), insisting in effect, therefore, that private citizens have a right to regulate the profit margins and fees charged for services by federal savings and loans. They then allege that these practices are not allowed by law or contract, without pointing to any specific statutory or contractual prohibition. [AA 9-10, ¶¶ 31(b), (c), (f), (h) and (i).]

Downey Savings moved for judgment on the pleadings, arguing that plaintiffs' state law claims were preempted by federal law. The trial court agreed and granted Downey Savings' motion for judgment on the pleadings. Plaintiffs appealed.

On November 2, 2004, while the appeal was pending, California voters passed Proposition 64, repealing the rights of a private litigant to assert a UCL claim unless he or she "suffered injury in fact and has lost money or property as a result of such unfair competition." Bus. & Prof. Code § 17204 (as amended); *see also* Bus. & Prof. Code § 17535 (imposing the same standing requirements on claims for false advertising under Bus. & Prof. Code § 17500). In light of Proposition 64's passage, the court of appeal requested supplemental briefing on whether Proposition 64 applies to this action.

The court of appeal determined that Proposition 64 applied and held that plaintiffs "cannot maintain this action unless they have 'suffered injury in fact and ha[ve] lost money or property as a result of [the alleged] unfair

competition.'" [Typed Op'n at 15.][1] Plaintiffs acknowledged that they could not meet the standing requirements under the amended statutes, but urged the court to authorize them on remand to "amend the complaint to substitute an affected plaintiff to preserve the claims of the represented group." [Typed Op'n at 16.] Asserting a policy of great liberality in amending pleadings, the court of appeal remanded with directions to the trial court "to determine whether, if there is a request to amend the amended complaint, the circumstances of this case warrant granting leave to amend." [Typed Op'n at 17.]

This court granted Downey Savings' petition for review to decide—if Proposition 64 applies to cases filed prior to the date the new law took effect—whether plaintiffs who lack standing may amend their complaint to substitute in new plaintiffs who have standing and whether the amended complaint would relate back to the filing of the original complaint. After granting review limited to that issue, this court issued an order directing the parties also to address whether Proposition 64 should apply to cases pending at the time the new law took effect..

Legal Discussion

I

Proposition 64 Applies to Cases Pending at the Time the Initiative Became Effective

A. Proposition 64 applies to pending cases because it repealed a statutory right

"Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under common law that when a pending action rests solely on a statutory basis . . . 'a repeal of [the] statute

[1] The court of appeal rejected Downey's federal preemption argument.

without a saving clause will terminate all pending actions based thereon.'" *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 (*citing Southern Service Co. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12); *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109, ("[A]n action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final"). As this court observed in *Mann*, this "repeal rule" has been applied in a wide variety of criminal, quasi-criminal, and civil cases. *Mann, supra,* 18 Cal.3d at 829-30 and n.8 (citing cases).

"The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." *Mann, supra,* 18 Cal.3d at 829. The Government Code expressly 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."* Cal. Gov. Code § 9606 (emphasis added).

For the repeal rule to apply it is only necessary to show: (i) plaintiffs' action was pending when the repeal became effective; (ii) plaintiffs' action rests solely on statutory grounds; (iii) the repeal was of the statute on which plaintiffs' cause of action was based; and (iv) the repeal measure does not contain a saving clause. All of these elements are met here.

First, plaintiffs' action was pending on November 3, 2004, when the statute took effect. Plaintiffs had no vested rights because they were not the beneficiaries of a final, nonappealable judgment. To the contrary, the trial court dismissed their action based on federal preemption and had entered judgment against them, and in favor of Downey Savings. *See People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 79-80 (no vested rights exist

under statutory claim until a final, nonappealable judgment has been entered).

Second, plaintiffs concededly never dealt with (and therefore were not injured by any action taken by) Downey Savings. As such, plaintiffs' entitlement to bring this action against Downey Savings was entirely dependent upon statute—the pre-Proposition 64 provision in section 17204 of the Business & Professions Code authorizing an action to be brought on behalf of the general public. The right of an *uninjured* plaintiff to sue for unfair competition *never* existed at common law. *See, e.g., Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-64 (statutory claims under the UCL "cannot be equated" with the common law tort of unfair competition); *Barquis v. Merchants Collection Association of Oakland, Inc.* (1972) 7 Cal.3d 94, 109 (holding Civil Code § 3369, the predecessor to the UCL, cannot be equated with the common law definition of "unfair competition").

Third, Proposition 64 repealed the statutory basis for plaintiffs' action. It eliminated the right of private attorney generals, who have not suffered in an injury in fact, to bring an action under the UCL by striking the phrase permitting a private plaintiff "acting for the interests of itself, its members, or the public."

This court has already applied the long-standing repeal rule to a prior version of the UCL in a virtually identical situation. In *International Assn of Cleaning and Dye House Workers v. Landowitz,* (1942) 20 Cal.2d 418, plaintiff brought a claim for injunctive relief for violations of a San Francisco ordinance providing for fair competition in cleaning and pressing shops. Plaintiffs were entitled to seek injunctive relief under a then-

existing statute. *Id.* at 420.[2] While the case was pending, however, the Legislature repealed these enabling statutes. *Id.* at 421. Accordingly, reciting the repeal rule, this court concluded, "The repeal of Act 8784 in 1941, however, constituted a withdrawal of the statutory authority upon which this equitable cause of action was based. Where a statutory remedy is repealed without a saving clause and where no rights have vested under the statute, it is established that the right to maintain an action based thereon is terminated." *Id.* at 423.

Moreover, even though Proposition 64 repealed only a portion of the UCL, Government Code § 9606 makes it very clear that the repeal rule still applies. *See, e.g., Mann, supra,* 18 Cal.3d at 828 (holding that Health and Safety Code § 11361.7 partially repealed Education Code § 13403(h) and applied to case filed before the date the new statute became effective); *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 691 (noting that Civil Procedure Code § 425.17, which effected an amendment or partial repeal of Civil Procedure Code § 425.16, applied to cases pending on the effective date of the new statute).

Finally, Proposition 64 contains no saving clause. Plaintiffs, however, in arguing this issue below have attempted to find an *implied* saving clause by gleaning "implied" voter intent against retroactivity from the language of initiative. Their argument is more than a stretch, because if anything, the more reasonable construction of implied intent reveals an *affirmative* intention by California voters to stop the pending abusive lawsuits. Section 1(d) of Proposition 64 states that its intent is to "*eliminate* frivolous unfair competition lawsuits." [Proposition 64, Text of Proposed

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[2] Section 6.5 of Stats.1935, page 2212, as amended by Stats.1937, p. 1214, Deering's Gen. Laws, 1937, Act 8784.

Law.] Moreover, sections 17204 and 17535 now provide that private actions "shall be *prosecuted* exclusively" by those meeting the new standing requirements, and section 17203 now provides that a "person may *pursue* representative claims 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...."

Hence, after November 3, 2004, no party may continue to "*prosecute*" or "*pursue*" a UCL claim without meeting Proposition 64's new requirements. "Initiative measures, no less than statutes enacted by the Legislature, should, when possible, be interpreted according to the usual and ordinary meaning of their terms." *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 119. "To 'prosecute' an action is not merely to commence it, but includes following it to its ultimate conclusion." *See* Black's Law Dict. (6th ed. 1990) at 1221. "The term 'prosecution' is sufficiently comprehensive so as to include every step in an action from its commencement to its final determination." *Marler v. Municipal Court* (1980) 110 Cal.App.3d 155, 160-161. Hence, Proposition 64's intent to apply to existing cases is clear.[3]

The voters decided to change the law because they found that the harm from these abusive lawsuits is tangible and is caused while the suits are pending. The voters found these lawsuits are "without any accountability to the public and without adequate court supervision." [Prop. 64, Text of Proposed Law, at s. 1(b)(4)]. And that these lawsuits "clog our courts and cost taxpayers money . . . . [and] cost California jobs and economic prosperity . . . forcing businesses to raise their prices or lay off employees to pay lawsuit

[3] The appellate courts' "task in reviewing an initiative enacted by the voters is limited: '[I]t is not our role to second-guess the electorate's decision that the benefits to the state outweigh hardships to individual plaintiffs adversely

settlement costs or to relocate to states that do not permit such lawsuits." [*Id.* at s. 1(c)]. Beyond cavil, voters wanted to end these abuses immediately, rather than allow them go on for years, as would be case if all existing UCL cases brought by uninjured plaintiffs earned grandfathered immunity from Proposition 64. No other construction of voter intent would make sense.

Thus, at bottom, Proposition 64 is a new law that repealed an existing statutory right on which plaintiffs based their causes of action. Because Proposition 64 has no saving clause, under the long-standing repeal rule it applies to all cases pending at the time it took effect and bars plaintiffs' action. *See Callet v. Alioto* (1930) 210 Cal. 65, 67 ("It is also a general rule . . . that 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."). A search for implied voter intent changes none of this; in fact, it works against plaintiffs.

B. Proposition 64 applies to pending cases because the changes are merely procedural

A second and equally compelling reason why Proposition 64 applies to pending cases is that it amends procedural rules. "[C]ourts have broadly distinguished between *substantive* and *procedural* statutes to assess whether applying a new statute would have improper retrospective application...." *Brenton v. Metabolife Intern., Inc.* (2004) 116 Cal.App.4th 679, 687. To the extent there are limits on the power of legislatures or voters to enact laws that apply to pending cases, those limits are triggered only when they interfere with "vested rights." A party "enjoy[s] no vested right in any particular procedure...." *Andrus v. Municipal Court* (1983) 143

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affected by the measure.'" *Jenkins v. County of Los Angeles* (1999) 74 Cal.App.4th 524, 530-31.

Cal.App.3d 1041, 1048, disapproved on other grounds in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 fn. 11. Consequently, statutes amending the procedures a plaintiff must follow apply to all pending actions. *See, e.g., Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App.4th 913, 917-918 (no bar to applying procedural amendments to pending case); *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 49 (statute amending rule requiring plaintiffs in malpractice suits to file a certificate of merit is properly applied to actions that accrued and were filed before amendment's effective date).

Statutory amendments affecting standing "are procedural only and operate retroactively." *See Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1523; *See also Casa Herrera, Inc. v. Beyduon* (2004) 32 Cal.4th 336, 348 (lack of standing is procedural); *Personnel Comm v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 875 (lack of standing deemed "procedural grounds" for disposal of appeal).

The concern about applying a statute retroactively arises only where it would "change[] 'the legal effects of past events' . . . ." *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289. *See also Aetna Cas. & Sur. Co. v. Industrial Acc. Comm'n* (1947) 30 Cal.2d 388, 391, 394-95. Proposition 64 does *not* change the legal consequences of the parties' past conduct by imposing any new or different liabilities, because it leaves unchanged the UCL's substantive proscriptions. Thus, conduct that would violate the UCL before Proposition 64 passed continues to violate the UCL after November 2, 2004. All that changes is *who* may bring an action. *Injured* plaintiffs as well as appropriate state and local authorities may continue to prosecute such claims. *Uninjured* plaintiffs may not. Thus, Proposition 64, as relevant to this appeal, merely amended the standing

requirements under the UCL. Therefore, because Proposition 64 constitutes a "procedural" amendment to the UCL, it applies to pending cases.

II

Plaintiffs Should Not Be Allowed to Amend Their Complaint to Add New Plaintiffs

A. Plaintiffs should not be allowed to substitute in entirely new plaintiffs because there was no mistake in naming plaintiffs

It is well-settled that "[w]hether an amendment of a pleading will be allowed to change [the name of a party] ... depends on whether the [mistake] is merely a misnomer or defect in the description or characterization, or whether it is a substitution or entire change of parties." *Thompson v. Palmer Corp.* (1956) 138 Cal.App.2d 387, 390. *Accord, e.g., California Air Resources Bd. v. Hart* (1993) 21 Cal.App.4th 289, 300. "Amendment generally is proper where leave is sought to substitute a new plaintiff based upon a technical defect in the plaintiff's status such as an honest mistake in the naming of a party, *but may not be used to interject a new party into the litigation for the first time under the guise of a misnomer*." *Id.* at 301 (emphasis added).

Here, there was no misnomer, and there was no mistake. Rather, the law retroactively changed and, as a result, the intended plaintiffs no longer have any rights. The question becomes: can entirely new plaintiffs, who lack derivative claims or other association to the existing plaintiffs, join the litigation and avail themselves of the benefits of tolling the statute of limitations, even though there was *never any mistake* in leaving them off the pleadings? *In fact, leaving them off the pleadings was entirely intentional.*

Plaintiffs nonetheless will rely upon "mistake" cases, especially *Klopstock v. Superior Court* (1941) 17 Cal.2d 13. There, after trial, judgment and appeal in a corporate derivative action, the trial court allowed the proper plaintiff (the executrix of the estate of the shareholder/husband) to substitute in for the mistakenly named plaintiff (the executor of estate of the shareholder's wife). The error was a mere technicality because eventually the wife's estate would have succeeded to those rights once the husband's estate closed. This court upheld the trial court's decision to permit the amendment.

Klopstock and its reasoning are readily distinguishable. First, there was a mistake where closely associated parties asserting derivative rights simply chose the wrong plaintiff from among themselves. Here, there was no such mistake, association, or derivative right. Second, the identity of the named plaintiff was never particularly important in *Klopstock*, because as the court reasoned, "the corporation is the ultimate beneficiary of such a derivative suit, it is clear that the particular stockholder who brings the suit is merely a nominal party plaintiff." *Id.* at 21. Here, the identity of the plaintiff is of course crucial, and the new plaintiff will make new assertions. Among other things, under Proposition 64 the new plaintiff must now obtain class action certification and fully qualify as an appropriate class representative. *See* Cal. Bus. & Prof. Code § 17203 (as amended).

Plaintiffs will rely on other "mistake" cases, but, again, this is not a case of mistake. In addition, each case also arises from the same context as *Klopstock* where the mistakenly named plaintiff and its substitute shared an existing, direct association and the change was merely nominal because the claims remained exactly the same. *See Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 721 n.3 (condominium owners allowed to substitute in

for their homeowners' association in a construction defect lawsuit): *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 506 (allowing amendment to substitute bankruptcy trustee for the bankrupt plaintiffs); *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1002-3 (same); *California Air Resources Bd.v. Hart, supra,* 21 Cal.App.4th at 298 (authorizing substitution of the State of California as plaintiff in place of California Air Resources Board where Attorney General had delegated to board's legal counsel authority to bring suit for pollution penalties); *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 790 (allowing trustees of four trusts to substitute in as plaintiff for the administrator of those same trusts).

Proposition 64 leaves this case as one where the name change is anything but "nominal." A new plaintiff will have no existing legal relationship with the existing plaintiffs and the new plaintiff's rights are in no way derivative from those of the existing plaintiffs. To the contrary, when it comes to injury and claims they are complete strangers.

The closest factual scenario to the facts here is in *Diliberti v. Stage Call Corp.* (1992) 4 Cal.App.4th 1468, where two sisters, in the same car, were in an automobile accident. Frances, the driver, was uninjured. Mary Jo, the passenger, was hurt. Inexplicably, the complaint was filed in Frances' name, not Mary Jo's. When the parties learned of the error, plaintiff sought leave to amend to substitute Mary Jo for Frances. The trial court denied the amendment and the court of appeal affirmed.

The court of appeal first observed that the key inquiry is not whether the plaintiffs would be changed, but rather whether "the nature of the action is substantially changed." 4 Cal.App.4th at 1470 (quoting 5 B. Witkin, *California Procedure* § 1147 (3d ed. 1985)). The court held that the substitution would effect a substantial change in the action because Mary Jo

was seeking to enforce an independent right (her claim to be compensated for *her* injuries, which was not derivative of any of Frances's rights, since she had not been injured). *Id.* at 1471 (citing *Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526, 533).

The Fifth Circuit case of *Summit Office Park, Inc. v. U.S. Steel Corp.* (5th Cir. 1981) 639 F.2d 1278 is, if anything, even more closely on point than *Diliberti*. There, plaintiff filed a class action antitrust lawsuit. While that litigation was pending, the United States Supreme Court issued a ruling in another case that divested plaintiff of standing to pursue the lawsuit. The Fifth Circuit ruled that plaintiff was not entitled to amend the complaint to substitute in a new class representative or amend the class definition, holding that: "where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action." *Id.* at 1282. The Fifth Circuit further held that: "A pleading which abandons the original plaintiff and class and asserts new claims upon which the original plaintiff and class could not recover, has the characteristics of a new lawsuit rather than an amended complaint." *Id.* at 1284.

Here, as in *Diliberti* and *Summit Office Park,* there is no technical defect or misnomer in the naming of the plaintiffs. More importantly, the entire nature of the action would change if plaintiffs were now permitted to substitute new plaintiffs with standing. The current plaintiffs never dealt with Downey Savings and concededly were never injured. To have standing under Business & Professions Code section 17204 as amended by Proposition 64, however, requires that the plaintiffs have "suffered injury in fact and [have] lost money or property as a result of such unfair