NO. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MASTERCARD INTERNATIONAL INCORPORATED, and
VISA U.S.A. INC.,
Defendants and Petitioners,

vs.

SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO,
Respondent,

CALIFORNIA LAW INSTITUTE, in a representative capacity,
Plaintiff and Real Party In Interest

From An Order Denying A Writ Petition
Court of Appeal, First Appellate District, No. A108995

Writ Petition From An Order Of The San Francisco Superior Court,
The Honorable Richard A. Kramer, No. CGC-03-421180

PETITION FOR REVIEW

Service on Attorney General and District Attorney of San Francisco County required by Bus. & Prof. Code Sec. 17209 and Cal. Rules of Court, Rule 15(c)(3)

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

Defendants and petitioners MasterCard International Incorporated ("MasterCard") and Visa U.S.A. Inc. ("Visa") respectfully petition for review of the February 3, 2005 order of the Court of Appeal, First Appellate District, summarily denying defendants' petition for a writ of mandate, for a stay and for immediate relief.

Defendants' petition to the Court of Appeal sought:

(1) an alternative writ directing the Superior Court of the County of San Francisco to set aside and vacate its order, filed December 29, 2004, denying defendants' motions for judgment on the pleadings based on the repeal by Proposition 64 of the statutory asserted basis for unaffected plaintiff California Law Institute's ("CLI") suit as a purported "private attorney general on behalf of the general public" under Business and Professions Code § 17200, et seq.

(2) a writ of mandate and/or prohibition directing the trial court to enter a new order granting defendants' motion for judgment on the pleadings.

A copy of the order of the Court of Appeal is attached hereto as Exhibit A.

I. ISSUES PRESENTED

1. In light of this Court's decisions in Younger v. Superior Court (1978) 21 Cal.3d 102, 109 and Governing Bd. v. Mann (1977) 18 Cal.3d 819, 829, holding 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," may plaintiff CLI, an admittedly unaffected litigant, continue to prosecute this action as "a private attorney general on behalf of the general public" even though the purely statutory asserted basis for it to sue under the UCL was recently repealed by passage of Proposition 64 without a savings clause?

2. May plaintiff CLI—an admittedly unaffected litigant—continue to prosecute this action as "a private attorney general on behalf of the general public" even though that purported procedural vehicle for seeking relief on behalf of others is no longer available under the law, which now requires private UCL actions to be prosecuted by appropriately affected persons and, where relief is sought on behalf of others, as class actions, with all of their attendant procedural protections?

3. Does the plain language of Proposition 64 that only appropriately injured persons may "pursue" and "prosecute" private UCL actions require that the initiative govern pending cases?

II. WHY REVIEW SHOULD BE GRANTED

The issues presented here are of widespread importance and interest and affect a significant number of UCL cases currently pending throughout the state. Historically, this Court frequently has been called on to resolve the proper application of newly-enacted laws. See, e.g., Younger v. Superior Court (1978) 21 Cal.3d 102, 109 (determining applicability of legislative amendments to Health and Safety Code); Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1196-1200 (addressing Proposition 51). That experienced guidance now is required with respect to Proposition 64.

The Courts of Appeal addressing this issue have reached conflicting conclusions. Compare Branick v. Downey Savings & Loan Ass'n. (Feb. 9, 2005, Second App. Dist., Div. Five, No. B172981) __ Cal.App.4th __, 2005 Cal.App. LEXIS 201 (Proposition 64 applies to pending actions) and Benson v. Kwikset Corp. (Feb. 10, 2005, Fourth App. Dist., Div. Three, No. G030956) __ Cal.App.4th __, 2005 Cal.App. LEXIS 208 (same) with Californians for Disability Rights v. Mervyn's (Feb. 1, 2005, First App. Dist., Div. Four, No. A106199) __ Cal.App.4th __, 2005 Cal.App. LEXIS 160 (Proposition 64 does not apply to pending cases). In addition, numerous trial courts around the state—including different complex case departments and even different departments within the same

Superior Court—have reached conflicting results regarding the applicability of Proposition 64 to pending cases.[1]

Thus, it is inevitable that this Court will need to grant review to resolve this issue. See Cal. Rule of Court 28(b)(1) (review is proper "when necessary to secure uniformity of decision or to settle an important question of law"). In light of the public importance of these issues, and the large number of pending cases potentially affected, early guidance from this Court would assist litigants and the lower courts alike, and would avoid needless litigation and costs. This case presents the Proposition 64 issue on

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[1] Compare decisions in Goodwin v. Anheuser-Busch Cos., Inc. (Dec. 13, 2004, Los. Ang. Sup. No. BC 310105) (Ex. 13, PA 287-302), Kim v. Bayer Corp. (Dec. 10, 2004, Los. Ang. Sup. No. BC 309926) (Ex. 13, PA 303-311), Dohrmann v. Tosco Refinery Co., Inc. (Dec. 3, 2004, Los. Ang. Sup. No. BC 275234) (Ex. 13, PA 312-314), Coe v. Anna's Linen Co. (Dec. 16, 2004, Orange Sup. No. 04CC00660) (RJN Ex. 1), Spielholz v. Los Angeles Cell. Tel. Co. (Dec. 21, 2004, Los. Ang. Sup. No. BC 186787) (RJN Ex. 2), United Policyholders v. Willis Group Holdings Ltd. (Jan. 6, 2005, San Diego Sup. No. GIC 833705) (RJN Ex. 3) and In re Bloussant Cases (Jan. 19, 2005, San Bernardino Sup., JCCP No. 4336) (RJN Ex. 4) (finding Proposition 64 applicable to pending cases) with decisions in Twomey v. Hansen Inf. Tech. (Nov. 10, 2004, Sac. Sup. No. 03AS03632) (Ex. 11, PA 160-162), Americare v. Medical Capital Corp. (Nov. 29, 2004, Orange Sup. No. 03CC01256) (RJN Ex. 5), Munoz v. Petrini Van & Storage, Inc. (Jan. 5, 2005, Sac. Sup. No. 04AS01213) (RJN Ex. 6), and In re Insurance Broker Commission Lit. (Jan. 21, 2005, San Fran. Sup. No. 323192) (RJN Ex. 7) (reaching opposite result). Defendants cite the preceding decisions not as authority, but merely to illustrate the difference of opinions in the trial courts. References to "Ex." are to the exhibit tabs in Petitioners' Appendix. References to "PA" are to specific pages in the Appendix. References to "RJN Ex." are to the exhibit tabs in Petitioners' Request for Judicial Notice, filed herewith.

a clear record essentially with undisputed facts, and has competent counsel on both sides to assure full briefing of the important issues presented.

For years, businesses in California effectively have been forced to litigate private Unfair Competition Law ("UCL") claims against strawmen—so-called "private attorneys general"—connected to the case by name alone, who, through enterprising counsel, purported to represent the interests of the "general public." Such suits proliferated because California was virtually unique among the fifty states in purportedly creating a purely statutory right for "any person" to sue under its unfair competition laws. As a result, in recent years, California gained notoriety as fertile ground for abusive litigation filed by private attorneys purportedly on behalf of the general public as a means of generating attorneys' fees.

On November 2, 2004, the California electorate rejected the notion that unaffected nominal plaintiffs—effectively hired by their lawyers—could pursue claims as "private attorneys general" without "any accountability" to the general public they purport to represent. In passing Proposition 64, the voters required, among other things, that private UCL actions be prosecuted only by appropriately affected persons, and that claims on behalf of others proceed only as class actions, with attendant due process protections. Thus, the voters effectively revoked and "repealed" any "private attorney general" standing that purportedly existed under the

UCL, and did so without a provision to save pending actions from operation of that repeal.

Absent intervention by this Court, the lower courts likely will be burdened for years with hundreds of currently pending lawsuits, such as this one still in the early stages of discovery, that the "general public" expressly refused to allow to proceed in its name. Indeed, ignoring the voters' expressed will—plainly embodied in the amendments' language—the trial court here ruled that Proposition 64 and its attendant standing and class action requirements have no application to this pending action. In doing so, the trial court disregarded a long line of controlling precedent from this Court that purely statutory rights—such as the claimed unaffected "private attorney general" standing under the UCL—are immediately extinguished by repeal, even after judgment in the trial court. Younger v. Superior Court (1978) 21 Cal.3d 102, 109 (action "wholly dependent on statute abates if the statute is repealed"); Governing Board v. Mann (1977) 18 Cal.3d 819, 829 ("a cause of action or remedy dependent on a statute falls with a repeal of the statute"); People v. Bank of San Luis Obispo (1910) 159 Cal. 65, 67 ("A suit, the continuance of which is dependent upon the statute repealed, stops where the repeal finds it," including when case is "pending upon appeal after verdict in favor of plaintiff").

The trial court declined to apply the statutory repeal rule to Proposition 64 because the initiative assertedly lacked a "clear indication

that the electorate intended" it to apply retroactively. Order Denying Motion for Judgment on the Pleadings, December 29, 2004 ("Order"), pp. 2-3 (Ex. 4, PA 82-83). However, as this Court has explained, "[t]he only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal . . . ." Younger, 21 Cal.3d at 110 (emphasis added). Such a determination is wholly lacking in Proposition 64.

In failing to apply Proposition 64, the trial court allowed this action to proceed as a non-class "private attorney general" action "on behalf of the general public" even though that purported procedural vehicle for asserting others' claims is no longer available under the law. Thus, in the absence of appropriate action by this Court, this case—and many more like it—will continue to move forward potentially for years to come in contravention of existing law. Such a result contravenes the rule that statutes that address the conduct of on-going litigation—as with class action standards under section 382 of the Code of Civil Procedure—are prospective only and apply to pending actions, such as this one. Blanchard v. DIRECTV, Inc. (2004) 123 Cal.App.4th 903, 912 n.5 (statute that "regulates the conduct of ongoing litigation" applies to pending actions); accord City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 462 ("Class actions are provided only as a means to enforce substantive law").

Moreover, the trial court's conclusion flies in the face of the plain and unambiguous language of the amendments to the UCL, which state that only appropriately affected persons "may pursue" and "prosecute" private UCL claims, thus expressly including within the ambit of the amendments all actions already commenced but not yet litigated to final judgment.

In the absence of immediate review by this Court, defendants have no other plain, speedy or adequate remedy at law. See Code Civ. Proc. § 1086; Babb v. Superior Court (1971) 3 Cal.3d 841, 850-51. Defendants have no current right to appeal from the trial court's Order because it is not a final judgment.

III. STATEMENT OF THE CASE

A. Plaintiff's Allegations And Status As An Unaffected Plaintiff

MasterCard and Visa are defendants in this action pending in respondent court, entitled California Law Institute v. Visa U.S.A. Inc., and MasterCard International Incorporated, et al., No. CGC-03-421180. Plaintiff California Law Institute ("CLI") is named in this petition as the real party in interest. This matter is pending below in the complex case department of the Superior Court for the County of San Francisco, the Honorable Richard A. Kramer presiding.

Plaintiff CLI brings no claim on its own behalf against either of the named defendants. Rather, plaintiff is a "non-profit organization"

that purports to bring this suit as a "representative" action under Business and Professions Code section 17204 as "a private attorney general on behalf of members of the general public residing within the State of California." First Amended Complaint, Caption and ¶ 2 (Ex. 1, PA 1-2).

Plaintiff's First Amended Complaint claims that defendants' purported practices related to excessive chargebacks (which practices are designed to curb fraudulent and/or deceptive practices perpetrated against holders of defendants' branded payment cards) are unfair and unlawful business practices under Bus. & Prof. Code § 17200 et seq. (the "UCL"), id. at ¶¶ 24-29 (Ex. 1, PA 8-10). Plaintiff seeks, inter alia, injunctive relief and an order providing for "restitutionary disgorgement" to "those merchants or any other entities who have proximately paid chargebacks penalties/fines." Id. at ¶ 23, Prayer for Relief ¶¶ 1-2 (Ex. 1, PA 8, 11). Nowhere in its complaint does CLI allege that it is a merchant licensed to accept defendants' payment cards, or that it has paid or been assessed any alleged "chargeback penalties/fines." CLI seeks no relief on its own behalf other than attorneys' fees and costs. Id. at Prayer for Relief ¶ 4 (Ex. 1, PA 11).

The allegations of plaintiff's complaint and matters judicially noticed (without objection) by the trial court make clear that CLI has suffered no injury whatsoever as a result of defendants' alleged conduct challenged in the complaint. Consequently, CLI is the paradigm of the

UCL "unaffected plaintiff." At a case management conference on June 11, 2004, plaintiff's counsel candidly conceded this:

> I just wanted to say probably the obvious is that the plaintiff is an unaffected plaintiff under 17200, and so if that helps anyone, the plaintiff is relying upon the 17200 statute in order to bring this case. It doesn't have traditional standing.

June 11, 2004 Transcript at pp. 20-21 (Ex. 2, PA 26-27). See also plaintiff's responses to defendants' written discovery at Ex. 2, PA 31, 51-54; Ex. 7, PA 123-125.[2]

B. Proposition 64

On November 2, 2004, California voters passed by a wide margin State Ballot Initiative Proposition 64 ("Proposition 64"), which amended, inter alia, sections 17203 and 17204 of the UCL and, among other things, repealed the previously-claimed standing of an unaffected plaintiff to sue as a "private attorney general" on behalf of the "general public." Excerpt from Voter Information Guide (Text of Proposed Laws), p. 109 (Ex. 2, PA 19-20); Secretary of State Report of Election Returns on State Ballot Measures (Ex. 2, PA 21) (indicating that Proposition 64 passed with approximately 59 percent of the vote). The new law became effective the day after the election, Nov. 3, 2004. Cal. Const., art. II, § 10(a) ("An

[2] The trial court took judicial notice of each of the attachments to Exs. 2 and 7 of the Appendix. These documents thus are part of the record.

initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise").

Proposition 64 aimed to curb, among other things, "misuse[]" of the UCL by "private attorneys," who have filed lawsuits "where no client has been injured in fact"; who have sued on behalf of "clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing[s] with the defendant"; and who have brought actions "on behalf of the general public without any accountability to the public and without adequate court supervision." Voter Information Guide, Findings and Declarations of Purpose, at p. 109, § 1(b)(2)-(4) (Ex. 2, PA 19). The electorate stated that its intent in enacting Proposition 64 was to amend the UCL so that "only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." Id., § 1(f).

Prior to the passage of Proposition 64, section 17204 of the UCL assertedly allowed "any person"—even one with no cognizable interest in the underlying claims—to prosecute claims for relief under the UCL on behalf of the "general public." See former Bus. & Prof. Code § 17204 (2003). Proposition 64 amended the UCL to state that persons who "pursue representative claims or relief on behalf of others" must meet "the standing requirements of Section 17204 and compl[y] with Section 382 of

the Code of Civil Procedure," pertaining to class actions. Voter Information Guide (Text of Proposed Law at p. 109) (Ex. 2, PA 19) (emphasis added). Proposition 64 amended section 17204 to state that "[a]ctions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by . . . any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Id. Proposition 64 contains no savings clause precluding its application to pending actions. Id.

C. Defendants' Motion for Judgment on the Pleadings

On November 19, 2004, pursuant to a briefing schedule set by the trial court, MasterCard and Visa brought a motion for judgment on the pleadings on the grounds that Proposition 64 is applicable to actions pending as of the date it took effect, and, because plaintiff concededly does not satisfy the applicable requirements under the amended UCL, its complaint must be dismissed. Plaintiff was given the opportunity but declined to bring a motion to add a proper plaintiff. Nov. 10, 2004 Transcript, pp. 10-11 (Ex. 15, PA 327-328).

After the hearing, the trial court denied defendants' motion (see Order attached hereto as Exhibit B), but certified the matter for consideration by the Court of Appeal pursuant to Code of Civil Procedure section 166.1. Although the trial court acknowledged that "it is clear that after the effective date of Proposition 64, plaintiff could not bring this

action," the court concluded that "Proposition 64 does not apply to cases already on file as of the time of its enactment." Order, pp. 2, 8 (Ex. 4, PA 82, 88). On February 3, 2005, Division Five of the First District Court of Appeal summarily denied defendants' petition for a writ of mandate. See Exhibit A, attached hereto. This petition followed.

IV. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE COURTS OF APPEAL AND DECIDE THE IMPORTANT QUESTION OF WHETHER PROPOSITION 64 APPLIES TO PENDING CASES AND THUS HALTS THE PROSECUTION OF NON-CLASS "PRIVATE ATTORNEY GENERAL" CLAIMS BY UNAFFECTED PLAINTIFFS

The application of Proposition 64 to pending cases is a matter of statewide importance that inevitably will require guidance from this Court. Hundreds of unaffected purported "private attorney general" UCL actions are currently pending in the trial courts. In light of conflicting appellate court decisions, each superior court is free to choose which appellate decision to follow. Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 456 ("rule [of stare decisis] has no application where there is more than one appellate court decision, and such appellate decisions are in conflict").

Moreover, in the absence of guidance from this Court, businesses potentially for years to come will be forced at great cost to continue to litigate against unaffected plaintiffs purportedly representing the "general public."

A. The Unconditional Repeal Of Plaintiff's Statutory Claimed Standing Prevents Plaintiff Here—An Admittedly Unaffected Litigant—From Continuing To Prosecute This Case "On Behalf of the General Public."

The trial court erroneously concluded that the "statutory repeal" doctrine "cannot be applied to cause the dismissal of plaintiff's action here" because its application would "terminate this lawsuit altogether and in the process eliminate the claimed liabilities of the defendants herein entirely"; and that, even if a new lawsuit could be brought alleging the same claims, the "potential liabilities in such a new lawsuit would not be identical to those in this case due to the potential effects of the statute of limitations." Order, pp. 3, 5 (Ex. 4, PA 83, 85). Proposition 64, however, did not take away the rights of persons with appropriate standing who suffer cognizable injury from recovering for their alleged injuries, but instead, among other things, eliminated the ability of unaffected plaintiffs (such as CLI here) to sue on behalf of others. More importantly, even if Proposition 64 entirely abolished a right of recovery (which it did not), such a result would be entirely consistent with the statutory repeal doctrine.

Where, as here, a plaintiff seeks to pursue purely statutory as opposed to common law rights, a well-established line of authority from this Court holds: "[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." Mann, 18 Cal.3d at

829 (citation omitted); accord Younger, 21 Cal.3d at 109 (action "wholly dependent on statute abates if the statute is repealed"); Int'l. Ass'n. of Cleaning & Dye House Workers v. Landowitz (1942) 20 Cal.2d 418, 423 ("[w]here a statutory remedy is repealed without a savings clause and where no rights have vested under the statute, it is established that the right to maintain an action based thereon is terminated"); So. Serv. Co. v. Los Angeles (1940) 15 Cal.2d 1, 11-12 (holding, "A right to a credit or refund of taxes is purely statutory" and "[t]he legislature may withdraw such a statutory right or remedy, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon"); Bank of San Luis Obispo, 159 Cal. at 67 ("A suit, the continuance of which is dependent upon the statute repealed, stops where the repeal finds it").

The "statutory repeal" doctrine, therefore, affects every "right or remedy [that] did not exist at common law but is dependent on a statute." Physicians Comm. for Responsible Med. v. Tyson Foods, Inc. (2004) 119 Cal.App.4th 120, 126. Compare Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1196-1200 (addressing a new initiative (Proposition 51) that changed the "traditional, common-law" joint and several liability doctrine, rather than a purely statutory right or remedy) (emphasis added); Callet v. Alioto (1930) 210 Cal. 65, 67-69 (addressing repeal of statute that codified a common law right of action and thus was not a purely statutory right subject to immediate repeal).

As this Court has explained, purely statutory rights may be extinguished immediately because "all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." Mann, 18 Cal.3d at 829 (emphasis added, citation omitted); see Gov. Code § 9606 ("Any 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"). In pursuing its "representative" action below, plaintiff accepted the risk that its asserted statutory standing could be repealed. See June 11, 2004 Transcript at pp. 20-21 (Ex. 2, PA 26-27).

Unless the repealing legislation or initiative includes a saving clause—which Proposition 64 does not—"a party's rights and remedies under a statute may be enforced after repeal only where such rights have vested prior to repeal." Chapman v. Farr (1982) 132 Cal.App.3d 1021, 1025. In that regard, "[a] statutory remedy does not vest until final judgment . . . and an action remains pending until final determination on appeal." Id.; accord San Luis Obispo, 159 Cal. at 67 (statutory repeal rule "abate[s] proceedings pending upon appeal after verdict in favor of plaintiff").

1. Plaintiff's Claimed "Unaffected" Standing Under The UCL Is Subject To The Statutory Repeal Doctrine.

Here plaintiff's claimed standing to bring this action on behalf of the general public was a creature of statute. See Code Civ. Proc. § 367; former Bus. & Prof. Code § 17204. Plaintiff's counsel admitted this to the trial court. See June 11, 2004 Transcript pp. 20-21, (Ex. 2, PA 26-27) (plaintiff's counsel acknowledging that "the plaintiff is relying upon the 17200 statute in order to bring this case. It doesn't have traditional standing"). Because such standing did not exist under common law, the statutory repeal rule is applicable.

Since 1872, California law has required by statute that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."[3] Code Civ. Proc. § 367 (Deering's 1991 & 2005 Supp.). As noted above, prior to passage of Proposition 64, plaintiff CLI relied upon a claimed statutory authorization assertedly allowing unaffected persons, such as itself, to pursue a

[3] The final clause was added in 1992 to replace "the obsolete listing of statutes that permit prosecution of an action in the name of a person other than the real party in interest." Code Civ. Proc. § 367 (Deering's 2005 Supp.) Law Rev. Comm'n. Cmts. Moreover, "[t]he doctrine of the equity courts, that the person having the right should be entitled to the remedy, was accordingly adopted as the basis of the real party in interest statute." 4 Witkin, California Procedure, Pleading (4th ed. 1997) § 103, p. 162. (emphasis added). Under this conception of standing in equity, "the term 'real party in interest' ... refers to the beneficial owner of the right involved, who will benefit or lose by the judgment in the action." Id.

"representative" UCL action on behalf of others. See Hernandez v. Atlantic Fin. Co. (1980) 105 Cal.App.3d 65, 72 ("we read [prior section 17204] as expressly authorizing the institution of action by any person on behalf of the general public"). Compare Ventura County Ry. Co., Inc. v. Hadley Auto Transp. (1995) 38 Cal.App.4th 878, 882 ("Code of Civil Procedure section 367 requires that real party in interest assert its own substantive rights") (emphasis added).

The recent amendments to the UCL by Proposition 64 have repealed the asserted standing provision upon which plaintiff relies without a savings clause. Compare Krause v. Rarity (1930) 210 Cal. 644, 654 (the new law had a savings clause and so did not apply to plaintiff's pending action). Thus, plaintiff is prevented from claiming any statutory exception to California's fundamental standing rules.

2. This Court Has Held That The Statutory Repeal Doctrine States A General Rule That Operates Independently Of The Rule Of Presumed Nonretroactivity Of New Enactments.

Both the trial court and the Court of Appeal in Mervyn's subordinated the statutory repeal doctrine to the rule of presumed nonretroactivity of new enactments. In doing so, both courts refused to give proper effect to the statutory repeal of the claimed unaffected standing under the UCL. See Order, pp. 2-3 (Ex. 4, PA 82-83) (refusing to apply

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§ 106, p. 165.

Proposition 64's statutory repeal in the absence of a "clear indication that the electorate intended" Proposition 64 to apply retroactively); Mervyn's, 2005 Cal.App. LEXIS 160 at *11-15 (same). Compare Branick, 2005 Cal.App. LEXIS 201 at *17-18 (the prospectivity "presumption does not apply" when an enactment repeals "a purely statutory cause of action").

In Mervyn's, the court noted a "seeming conflict in canons of statutory interpretation" such that "[o]n the one hand, legislative enactments are presumed to operate prospectively[,]" but "[o]n the other hand, a court should apply the law in effect at the time it renders its decision, including recent statutory amendments." Mervyn's, 2005 Cal.App. LEXIS 160 at *12. The court then purported to resolve this "conflict," finding that the statutory repeal doctrine "is not an exception to the prospectivity presumption, but an application of it"; and that, in cases applying the doctrine, "the repeal of a statute indicated legislative intent that the repeal legislation apply retroactively, thus rebutting the presumption of prospectivity." Id. at *13. Compare Branick, 2005 Cal.App. LEXIS 201 at *19-21 (rejecting this analysis) and Benson, 2005 Cal.App. LEXIS 208 at *25-28 (same).

However, the statutory repeal doctrine—as articulated by this Court in numerous cases—is a general rule of statutory construction that applies independently of the rule of presumed non-retroactivity of new

enactments. It is neither an "exception" to nor "an application" of that rule. Thus, in Callet, this Court explained that each of the two doctrines states a "general" rule applicable to different circumstances:

> [A]s the rule is generally stated, every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. 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.

210 Cal. at 67 (emphasis added). Similarly, in Mann, the Court noted:

> Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, . . . "a repeal of such a statute without a savings clause will terminate all pending actions based thereon."

18 Cal.3d at 829 (citation omitted). Thus, contrary to the holdings of both the trial court and Division Four of the First District Court of Appeal, "[t]he repeal of a statutory right or remedy . . . presents entirely distinct issues from that of the prospective or retroactive application of a statute." Physicians Comm., 119 Cal.App.4th at 125; accord Beckman v. Thompson (1992) 4 Cal.App.4th 481, 488-489 (same).

In Mervyn's, the court noted the "analytically distinct determination" involved in a statutory repeal—namely, "that the legislature

ha[s] the *power* to retroactively affect pending litigation, because the rights being prosecuted [are] contingent statutory rights rather than vested rights, which implicate constitutional concerns." 2005 Cal.App. LEXIS 160 at *13 (emphasis in original). Nevertheless, the court failed to explain why the claimed statutory right of an unaffected litigant to prosecute actions solely on behalf of others is not such a "contingent" statutory right and thus subject to that same analysis. As previously noted, there is no substantive, vested, common law, or constitutional right to pursue exclusively others' purported rights. See, e.g., Code Civ. Proc. § 367. The court nonetheless appeared to embrace such a view. Mervyn's, 2005 Cal.App. LEXIS 160 at *15-18 (focusing on unaffected plaintiff's right to continue to prosecute action); Compare Branick, 2005 Cal.App. LEXIS 201 at *21-25 (repeal of statutory asserted unaffected standing under UCL applies immediately) and Benson, 2005 Cal.App. LEXIS 208 at *13-29 (same).

Far from being narrowly circumscribed,[4] as was urged below and in Mervyn's, the statutory repeal doctrine has a broad reach and applies "in a multitude of contexts." Mann, 18 Cal.3d at 829. Accordingly, the doctrine has been applied whether the statute is procedural or substantive.[5]

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[4] See, e.g., Order, p. 7 (Ex. 4, PA 87); id., p. 3 (Ex. 4, PA 83) (concluding that "statutory repeal" doctrine should be given "a narrow reading").

[5] See Brenton, 116 Cal.App.4th 679 and Physicians Comm., 119 Cal.App.4th 120 (applying rule to an amendment to anti-SLAPP statute,

It has been applied whether or not its application has a "retroactive" effect.[6] It has been applied where the repeal eliminated a defendant's liability and terminated entire causes of action or remedies.[7] It has been applied to civil statutes as well as criminal ones.[8] It has been applied to statutes governing private parties, as well as those regulating government conduct.[9] It has been applied to "penal" statutes as well as "remedial" statutes.[10] It has been

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which was held to be procedural statute allowing for early disposition of frivolous cases); Chapman, 132 Cal.App.3d 1021 (reversing judgment awarding damages to plaintiff under old constitutional definition of "usury" and thus eliminating plaintiff's remedy).

[6] See Chapman, 132 Cal.App.3d 1021 (reversing judgment entered under repealed Constitution provision); State, Subsequent Injuries Fund v. Indust. Accident Comm'n. (1959) 175 Cal.App.2d 674, 676-77 (reversing award already made by Industrial Commission under statute that was repealed subsequent to filing of appeal).

[7] See, e.g., Chapman, 132 Cal.App.3d at 1025 (applying new law even though it "insulated" defendants from liability and resulted in reversal of judgment of damages for plaintiff); State, Subsequent Injuries Fund, 175 Cal.App.2d at 676-77 (reversing prior award made when repealed statute was still in effect, thus eliminating plaintiff's remedy altogether).

[8] See, e.g., Mann, 18 Cal.3d at 830 ("The reach of this common law rule has never been confined solely to criminal or quasi-criminal matters").

[9] Compare Physicians Comm., 119 Cal.App.4th 120 (applying "statutory repeal" rule to anti-SLAPP statute in suit involving private parties) with Mann, 18 Cal.3d at 830 (applying rule to government entity's actions pursuant to later-repealed statute and holding, "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").

[10] See, e.g., Lemon v. Los Angeles Terminal Ry. Co. (1940) 38 Cal.App.2d 659, 670, 671 (where "right of action was a right unknown to the common law and is predicated solely upon the statutes involved,"

applied to measures enacted by the electorate, as well as the legislature.[11] This Court even has applied this rule specifically to statutory "fair competition" claims.[12]

The statutory repeal rule is so fundamental that it requires the dismissal of plaintiff's claims even where judgment has been entered in plaintiff's favor in the trial court and the matter is pending on appeal. See, e.g., Chapman, 132 Cal.App.3d at 1025 (reversing judgment for plaintiff); State, Subsequent Injuries Fund, 175 Cal.App.2d at 676-77 (same). Accord Benson, 2005 Cal.App. LEXIS 208 at *16 (applying statutory repeal rule after trial and judgment for plaintiff: "[w]hile the statutory amendments wrought by Proposition 64 only became effective during the pendency of these appeals, since plaintiff has not yet converted his causes of action to a final judgment, the amendments apply here").

The trial court and the Court of Appeal in Mervyn's both primarily relied upon Evangelatos v. Superior Court (1988) 44 Cal.3d 1188. Compare Branick, 2005 Cal.App. LEXIS 201 at *19-21 (criticizing First

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whether "the statute be construed as remedial or penal in character, it follows that the repeal of the statute before the securing of a final judgment extinguished the cause of action").

[11] See, e.g., Chapman, 132 Cal.App.3d at 1023 (applying "statutory repeal" rule to Constitutional referendum).

[12] See International Ass'n. of Cleaning & Dye House Workers, 20 Cal.2d at 422 (repeal of city code of fair competition providing right of action to "any person" to enjoin violations of ordinance terminated plaintiff's cause

District's reliance on Evangelatos as inapposite) and Benson, 2005 Cal.App. LEXIS 208 at *25 ("The First District's reasoning reflects a fundamental misunderstanding of the repeal principle"). The Court of Appeal also cited Landgraf v. USI Film Prods. (1994) 511 U.S. 244. However, neither Evangelatos nor Landgraf involved a statutory repeal.

Evangelatos concerned a modification to the "common law joint and several liability doctrine," not the repeal of an exclusively statutory right, as here. 44 Cal.3d at 1196-1200 (emphasis added) (describing and "plac[ing] Proposition 51's modification of the common law joint and several liability doctrine in brief historical perspective"). Accord Callet, 210 Cal. at 68 (statutory repeal rule "does not apply to an existing right of action which has accrued to a person under the rules of common law, or by virtue of a statute codifying the common law").

In Evangelatos, therefore, this Court had no occasion to address the applicability or scope of the "statutory repeal" doctrine. The Court neither mentioned the "statutory repeal" rule, nor hinted that it was overruling, modifying, or in any way narrowing this long established principle of statutory construction. Indeed, this Court had reaffirmed the statutory repeal doctrine only a decade earlier in both Younger and Mann. Notably, the Court's opinion in Evangelatos cited neither Younger nor

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of action).

Mann, another strong indication that this Court was not dealing with a statutory repeal in Evangelatos.

Landgraf also did not involve a statutory repeal. The provisions of the Civil Rights Act of 1991—which were at issue in that case—did not "repeal" any preexisting statutory rights or remedies. Instead, the Act added to the statutory scheme new "provisions that create[d] a right to recover compensatory and punitive damages for intentional discrimination." 511 U.S. at 244. Indeed, the High Court noted, "In cases like this one, in which prior law afforded no relief, [the new statutory provisions] can be seen as creating a new cause of action," and, "if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a 'new disability' in respect to past events." Id. at 283-84 (emphases added).

Thus, the statute at issue in Landgraf fell squarely within the general rule of presumed nonretroactivity of new enactments because it provided new liability—where none existed before—for past conduct. Id. As the Court explained, the provisions at issue in Landgraf operated similarly to an "Ex Post Facto" law in the criminal context (id. at 266) so as to "increase a party's liability for past conduct" and "impose new duties with respect to transactions already completed." Id. at 280. This result is not surprising. The Constitution always has reflected a heightened concern that a defendant have fair notice of its legal obligations before it could be

held liable for any breach.[13] Cases such as Landgraf reflect the importance of that same concern in the "civil context." 511 U.S. at 283-84. These cases have no application to Proposition 64, which did not create new liability for defendants' past conduct.

In contrast, a plaintiff has no vested interest in an unenforced, purely statutory right prior to finality of a judgment after appeal. Accordingly, this Court has recognized that a plaintiff's statutory rights may be extinguished even after entry of judgment in the trial court and while the case is pending on appeal. See, e.g., Bank of San Luis Obispo, 159 Cal. at 67 ("This rule is "carried to such extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff").

3. This Court Has Held That The Absence Of A Savings Clause In the Repealing Statute Is the Only Voter Intent That Is Relevant To Application Of The Statutory Repeal Doctrine.

The court in Mervyn's and the trial court here concluded that application of the statutory repeal doctrine was precluded by the asserted absence of a clear indication that the electorate intended Proposition 64 to apply retroactively. 2005 Cal.App. LEXIS 160 at *6-11; Order, pp. 2-3 (Ex. 4, PA 82-83) This conclusion misstates the law. Compare Branick, 2005 Cal.App. LEXIS 201 at *16 ("We need not determine the voters'

[13] See e.g., U.S. Const., art. I, § 9, cl. 3 & § 10, cl. 1 (prohibiting retroactive application of penal legislation as well as legislation singling out disfavored persons and meting out summary punishment for past conduct).

intent . . ."). Courts repeatedly have held that the repeal of a statutory right is presumed to take immediate effect, and "[a] suit, the continuance of which is dependent upon the statute repealed, stops where the repeal finds it." Bank of San Luis Obispo, 159 Cal. at 67.

This presumption of immediate effect can be rebutted only where the repealing legislation contains a savings clause. As explained by this Court in Younger, "[t]he only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal . . . ." 21 Cal.3d at 110 (emphasis added). In Younger, this Court found that no such legislative intent appeared because the repealing law "contain[ed] no express savings clause." Id.[14]

These ordinary rules of construction governing "statutory repeals" apply equally when the repeal is accomplished by an act of the voters, rather than the Legislature. See Chapman, 132 Cal.App.3d at 1025 (applying the statutory repeal doctrine to a constitutional referendum).[15]

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[14] Cf. County of Alameda v. Kuchel (1948) 32 Cal.2d 193, 198 (stating limited exception to rule that intent to save rights under a statute must be provided in express savings clause and finding intent to save in another section of same act; "[i]t is sufficient if an intent to that effect appear by legislative provision at the session of the Legislature effecting the repeal of the statute from which the rights are to be saved"). This principle has no application here because no savings clause appears anywhere in the enactment.

[15] The Constitutional referendum in Chapman, like Proposition 64, was an act of the electorate rather than the legislature. Compare Cal. Const., art. II,

Accord People v. Canty (2004) 32 Cal.4th 1266, 1276 ("In interpreting a voter initiative . . . we apply the same principles that govern the construction of a statute"). Voters who passed Proposition 64 into law are presumed to know that the "statutory repeal" doctrine operates immediately, absent an express savings clause. See Evangelatos, 44 Cal.3d at 1212-1213 (presuming that "informed members of the electorate" would have known rules of statutory construction regarding retroactivity). Thus, the absence of a savings clause in Proposition 64 ends the inquiry here. See, e.g., Beckman, 4 Cal.App.4th at 488-89 (prospectivity presumption "is not applicable here. . . . Respondent overlooks that we deal here with a repeal, not a 'retroactive' application of a new statute.").

B. Independent Of The Statutory Repeal Doctrine, Proposition 64 Modified The Procedural Rules For Maintaining A Representative Suit Under The UCL And Thus Properly Applies To Pending Cases.

The trial court also erred in ignoring the procedural requirements now embodied in the amended UCL, and ruling that this case could proceed in its current posture as a purported "representative" action by a non-affected litigant. Order, pp. 5-7 (Ex. 4, PA 85-87). In so ruling, the trial court found that the effect of Proposition 64 was substantive because its application would terminate plaintiff's case and potentially

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§ 9(a) ("The referendum is the power of the electors to approve or reject statutes or parts of statutes...") with Cal. Const., art. II., § 8(a) ("The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.").

"eliminate" defendants' alleged liabilities and, thus, have improper retrospective effect. Id. Yet, Proposition 64 requires, among other things, that the procedural requirements of Section 382 of the Code of Civil Procedure governing class actions must be followed in a private "representative" action under the UCL. The trial court's error in this regard is an independent ground for reversal.

An enactment that "constitutes a change in procedure only–i.e., [that] regulates the conduct of ongoing litigation" applies to pending actions. Blanchard v. DIRECTV, Inc. (2004) 123 Cal.App.4th 903, 20 Cal.Rptr.3d 385, 391 n.5 (applying amendment to anti-SLAPP statute on appeal). "[A]pplying changed procedural statutes to the conduct of 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" and thus "is actually prospective in nature." Brenton v. Metabolife Int'l., Inc. (2004) 116 Cal.App.4th 679, 689.

Courts regularly have applied newly-enacted procedural laws to pending cases. See, e.g., Tapia v. Superior Court (1991) 53 Cal.3d 282 (holding that new voir dire procedures applied to pending case); Brenton, 116 Cal.App.4th at 689-90 (immediately applying amendments to anti-SLAPP statute to pending case); Parsons v. Tickner (1995) 31 Cal.App.4th 1513, 1522-1523, (holding that amendments to standing rules are

"procedural only," and that "[t]here is no vested right in existing remedies and rules of procedure and evidence"). Indeed, here plaintiff is admittedly unaffected, and so Proposition 64 cannot effect plaintiff's "substantive" rights.

UCL "representative" actions, like class actions, assertedly provided a procedural mechanism for asserting the purported rights of others. See Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 126 ("Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small"). Courts repeatedly have held that the rules governing class actions do not alter substantive rights. See City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 462 ("Class actions are provided only as a means to enforce substantive law."); Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326 ("The [class] certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious") (internal quotations and citations omitted).

That the application of the procedural requirements embodied in Code of Civil Procedure section 382 would have "result[ed] in the dismissal of this case"—a concern of the trial court (Order, p. 7 (Ex. 4, PA 87))—is of no moment because plaintiff has no substantive rights of its own to lose. Neither prior to the passage of Proposition 64, nor now, did plaintiff CLI ever have any "claims" of its own against defendants, and so it

stands to lose nothing but a purported right to pursue the claims of others. Moreover, there is no fundamental or "substantive" right to pursue a private UCL action solely on behalf of others. See Code Civ. Proc. § 367; discussion, supra, at pp 17-18.

C. The Plain Language Of Proposition 64 Indicates The Voters' Intent That The Amended UCL Apply To All Pending Cases To Eliminate The "Misuse" Of The UCL, And The Attendant Social Costs Of Such Misuse.

The trial court also improperly ignored the plain language of Proposition 64 requiring application of the initiative to pending cases. Order, pp. 2-3 (Ex. 4, PA 82-83). This is a third independent ground for vacating the trial court's erroneous order.

Even assuming, arguendo, that neither the statutory repeal doctrine nor application of procedural rules to pending cases is applicable here (which they are), the trial court was required to give effect to the plain language of Proposition 64. See Plotkin v. Sajahtera, Inc. (2003) 106 Cal.App.4th 953, 960 (applying plain language); Yoshioka v. Superior Court (1997) 58 Cal.App.4th 972, 980 (same).

That Proposition 64 was intended to apply to all pending cases, including this one, is apparent from the unambiguous and plain language of the amendments to section 17203 and 17204. Section 17203 was amended to state that a private litigant "may pursue" a representative action only upon the stated conditions, and the amended section 17204 now states that private plaintiffs may "prosecute" actions only if they satisfy

traditional standing requirements. See Voter Information Guide at page 109 (Text of Proposed Law) (Ex. 2, PA 19) (emphasis added).

Ordinary understandings of the terms "prosecute" and "pursue"—i.e., "[t]o pursue or persist in so as to complete," and "[t]o carry on; continue,"[16] respectively—demonstrate that these limitations on the UCL apply to eliminate any further maintenance of pending cases. "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, 160-61 (quoting Melancon v. Superior Court (1954) 42 Cal.2d 698, 707-08; and Wong v. Earle C. Anthony, Inc. (1926) 199 Cal. 15, 18). Such interpretation is of long standing. In Cohens v. Virginia (1821) 19 U.S. 264, Chief Justice Marshall explained in dictum that the term "prosecute" within the meaning of the Eleventh Amendment to the United States Constitution indicated a congressional intent that the amendment apply to pending cases:

> To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand. . . . [T]he amendment . . . therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be

[16] The American Heritage Dictionary (2nd College ed. 1982) (Houghton Mifflin) pp. 994, 1006.

> commenced, or which, if already commenced, may be prosecuted against a State by the citizen of another state.

Id. at 408-409 (Marshall, C.J.) (emphasis added). The trial court improperly ignored the unambiguous language of Proposition 64.

D. A Stay Is Appropriate.

Although this case is in the pretrial stage, the parties next are scheduled to resolve pending discovery disputes and proceed with litigation of this action, threatening burden and expense on both the trial court and the litigants. Considerations of both efficiency and fairness warrant that the issues addressed herein should be resolved prior to further proceedings in this action. Defendants therefore respectfully request that this case be stayed in the court below pending final disposition of this petition.

CONCLUSION

For the foregoing reasons, MasterCard and Visa respectfully request that the Court grant this petition for review and address the merits of the trial court's order. Definitive guidance on the application of Proposition 64 to pending cases is needed from this Court. This is an important question of statewide application affecting hundreds of pending cases, and trial courts are faced with conflicting decisions by the Courts of Appeal. This case presents a clear and unambiguous record, with competent counsel on both sides to assure full briefing of these issues. This

action presents an ideal opportunity to resolve the proper application of Proposition 64 to pending cases.

Respectfully submitted,

DATED: February 11, 2005

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CERTIFICATE OF WORD COUNT

Cal. Rules of Court, rule 28.1(d)(1)

Pursuant to California Rules of Court, rule 28.1(d)(1), I certify as follows:

The foregoing Petition for Review by MasterCard International Incorporated and Visa U.S.A. Inc. was produced on a computer. The text and footnotes of this brief consist of 8,055 words as counted by the Word 2002 word processing program used to generate the brief.

Dated: February 11, 2005

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By _____
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EXHIBIT A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

MASTERCARD INTERNATIONAL INC., et al.,
Petitioners,

v.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,
Respondent;

CALIFORNIA LAW INSTITUTE,
Real Party in Interest.

Court of Appeal No. A108995
San Francisco Co. Super. Ct. No. CGC03421180

BY THE COURT:*

The petition for writ of mandate is denied. The petition fails to articulate compelling circumstances warranting review by extraordinary writ or demonstrate that petitioners will suffer irreparable harm absent writ review. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 851; *James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 252; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269, 1272-1274.) The court observes that the petition no longer raises issues of first impression, given that on February 1, 2005, Division Four of this court issued an opinion in *Californians for Disability Rights v. Mervyn's, LLC* (Feb. 1, 2005, A106199) __ Cal.App.4th __.

Date FEB 03 2005 JONES, P.J. P.J.

* ✓ Jones, P.J. _ Stevens, J. ✓ Simons, J. ✓ Gemello, J.

EXHIBIT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CALIFORNIA LAW INSTITUTE, in a representative capacity, Plaintiff, vs. VISA USA, INC. a foreign corporation, et al., Defendants.	Case No.: CGC-03-421180 ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION AND JUDICIAL NOTICE

Defendants Visa USA, Inc. and MasterCard International, Inc. have moved for a judgment on the pleadings in this case. The basis for this motion is that Proposition 64, recently passed by the electorate, deprives plaintiff of standing to maintain this action.

Upon the request of the defendants, this court took judicial notice of 1) the text of Proposition 64 from the Official Voter Information Guide distributed by the California Secretary of State for the November 2, 2004 General Election [Declaration of Michael W. Scarborough in Support of Motion

of Defendants MasterCard International, Incorporated and Visa USA Inc. for Judgment on the Pleadings and Request for Judicial Notice, filed November 19, 2004 ("Scarborough Decl."), Ex. A]; 2) the fact that Proposition 64 was passed by California voters in the November 2, 2004 General Election [Scarborough Decl., Ex. B]; and 3) admissions of the plaintiff's counsel and discovery responses from the plaintiff confirming that the plaintiff is not an appropriate plaintiff under Proposition 64 to bring this action [Scarborough Decl., Ex. C-G].

Under California law, Proposition 64 became effective on November 3, 2004, the day after the General Election. Cal. Const. art. II § 10(a).

Upon these matters, it is clear that after the effective date of Proposition 64, plaintiff could not bring this action. The issue presented here is whether Proposition 64 applies to cases already on file as of its effective date so as to require that plaintiff's action be dismissed.

ANALYSIS

A new ballot proposition is presumed to operate prospectively unless there is either an express declaration of retrospectivity or a clear indication that the electorate intended otherwise. *Tapia v. Superior* Court (1991) 53 Cal.3d. 282, 287. In *Evangelatos v. Superior Court* (1988) 44 Cal. 3d. 1188, the Court held Proposition 51 [Civil Code §§ 1431 to 1431.5] not retroactive. Proposition 51 did not contain any language stating it would be retroactive, and the initiative measure material provided to the electorate likewise did not say anything about retroactivity. The court observed that there was thus nothing to indicate that the electorate considered the question of whether what they were voting on would be applied retroactively. Also, the court declined to imply a retroactive intent from the general

purpose and context of the enactment because to do so would substantially modify a legal doctrine which existing litigants may have relied upon in conducting their legal affairs prior to the new law. *Id.* at 1193-94.

Defendants assert that *Evangelatos* and similar cases do not apply here because the plaintiff's original claim was created by statute as opposed to arising from the common law. Defendants postulate that statutory rights are created by the legislature and thus can be taken away by the legislature, citing a litany of cases to that effect. None of these cases, however, supports that conclusion here.

Defendants rely on *Physicians Committee for Responsible Medicine v. Tyson Foods* (2004) 119 Cal.App.4th 120 for the proposition that where a claim rests solely on statutory grounds, the repeal of the statutory authority for that claim is fatal to the continued existence of the claim, no matter what stage the progress of it may be. Defendants assert that *Physicians Committee* and the cases it relied upon hold that the unconditional repeal of a special remedial statute without a savings clause stops all pending actions where the repeal finds them. A close look at the cases, however, demonstrates that the rule is not as broad as defendants assert and that it cannot be applied to cause the dismissal of plaintiff's action here.

The "special remedial statute" involved in *Physician's Committee* was the Anti-SLAPP statute (Code of Civ. Proc. § 425.16). Defendant Tyson brought an Anti-SLAPP motion to dismiss the complaint, which was granted by the trial court. While the appeal on that result was pending, newly enacted Code of Civ. Proc. § 425.17 became effective, which limited the availability of the Anti-SLAPP motion to eliminate the ability of defendants such as Tyson to invoke it. The Court of Appeal held that the version of the Anti-SLAPP

statute in effect at the time of the appeal governed the remedy thereunder and thus reversed the trial court's dismissal upon the ground that Tyson no longer was qualified to make an Anti-SLAPP motion.

The court in *Physicians Committee* held that the Anti-SLAPP motion was a "remedial statute" which established a remedy no longer available to Tyson. In so doing, the Court followed *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679. *Brenton* was also a review of a dismissal of an action under the Anti-SLAPP statute where the dismissal was granted by the trial court while the moving party had been eligible for such relief but where the enactment of Code of Civ. Proc. § 425.17 during the pendency of the appeal from that dismissal obviated the defendant's eligibility to invoke the Anti-SLAPP statute. *Brenton* concluded that the Anti-SLAPP procedure was remedial and thus the legislative revocation of that remedy, even on appeal, rendered it unavailable to the defendant therein.

Brenton relied on *Tapia v. Superior Court, supra,* 53 Cal.3d. 282 and clearly defined what a "remedial statute" is in the context of the rule that repeal of a remedial statute stops all actions where the repeal finds them: "It is the effect of the law, not its form or label, that is important for the purposes of this analysis...[citations omitted]...The issue is whether applying section 425.17 would impose new, additional or different liabilities on MII [the defendant] based on MII's past conduct, or whether it merely regulates the conduct of the ongoing litigation." *Brenton, supra,* at 689. The court then evaluated § 425.16 as being "procedural" in that it provided a screening mechanism to allow for an early determination as to whether the plaintiff in certain types of suits can demonstrate sufficient facts to permit the matter to go to a trier of fact. Thus, the repeal of a portion of

the Anti-SLAPP statute merely took away that procedural screening device from certain categories of defendants, leaving the substance of the claims against them to proceed unaffected in the normal manner that other lawsuits progress.

This procedural effect in *Physicians Committee* and *Benton* is sharply contrasted with what would happen should Proposition 64 be determined to apply retroactively to plaintiff's case here and thus remove plaintiff's standing. Rather than leaving the parties' substantive rights intact, the effect would be to terminate this lawsuit altogether and in the process eliminate the claimed liabilities of defendants herein entirely. While it is indeed possible that these claimed liabilities could be resurrected against the defendants in a new lawsuit pursued by persons with actual injury, the potential liabilities in such a new lawsuit would not be identical to those in this case due to the potential effects of the statute of limitations. As such, Proposition 64 cannot be seen to be either "remedial" or "procedural" for the purposes of the rule stated in *Physicians Committee, Benton* and the other authorities cited by defendants.

Defendants also argue that the impact of Proposition 64 should be viewed as merely a change in the procedural rules applicable to class actions. The idea here is that the rules regarding class certification are procedural in nature, and that a change in who could bring a representative action under the UCL is therefore procedural in nature, hence subject to the rule in *Physicians Committee*. Defendants' authorities for this proposition do hold that the class certification process is "procedural" in the sense that it does not implicate the substance of the underlying claims, but they have nothing to do with whether the ability to bring a representative action as a private Attorney General is "procedural" as opposed to "substantive" for the

purposes of the rule in *Physicians Committee*. Indeed, as the above quoted language from *Brenton* instructs, it is not the label on a law that counts, but rather its effect. As is set forth above, the effect of applying Proposition 64 to plaintiff's action will not simply alter how this case would proceed, but instead would terminate it.

It is also possible to conceptualize the effect of Proposition 64 as merely altering the definition of who has standing to raise a UCL claim. From such a perspective, it could then be argued that standing is a procedural matter and thus under the rules of interpretation set forth above, Proposition 64 must be interpreted retroactively. It is true that authorities in a variety of contexts describe standing as a procedural concept. See, for example, *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 [standing is referred to in passing as a "technical or procedural defense"]; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1521-24 [statutory changes eliminating the requirements for the appointment of a personal representative in probate which created plaintiff's standing to file the subject lawsuit were procedural, hence retroactive]. Nonetheless, to borrow the "procedural" label from such authorities is precisely what *Tapia* says should not be done. Instead, the effect of a retroactive application governs the analysis.

This court notes that *Governing Board v. Mann* (1977) 18 Cal.3d. 819, cited by the defendants, might be read to support their position. In *Governing Board*, a school district filed an action to determine that the defendant teacher's conviction of possession of marijuana constituted grounds to terminate him for "moral turpitude" under Education Code § 13403. The trial court determined that the conviction did constitute grounds for termination. While the matter was on appeal, Health and Safety Code § 11361.7

was enacted which specifically prohibited a school district from terminating a teacher for a marijuana conviction. In holding that Health and Safety Code § 11361.7 was retroactive, the court stated that "where the *government's* authority rests solely upon a statutory basis, 'a repeal of such a statute without a savings clause will terminate all pending actions thereon...'[emphasis added]." *Id.* at 822. Thus, the retroactive interpretation was applied to protect the rights of a citizen against governmental intrusion. Such a narrow reading of *Governing Board* is consistent with the later case of *Tapia v. Superior Court, supra,* 53 Cal.3d. 282, where the court held that a modified criminal statute without legislative direction as to retroactivity would be applied retroactively where to do so would reduce the punishment of the criminal defendant. Id. at 300-01. No authority has been cited to render these authorities applicable to result in the dismissal of this case.

Thus, the general rule of statutory interpretation set forth in *Tapia* and *Evangelatos* applies here. As to the language of the statute, defendants point to the wording that only those qualified under Proposition 64 "may pursue" an action under the UCL appears in both the new statute and the voter materials. Scarborough Decl., Ex. A. Defendants assert that this language must be read to include both the filing of new actions and the continuation of those existing prior to the effective date of Proposition 64.

The term "may pursue" might reasonably be read to apply to new filings as readily as to the continuation of existing actions. The standard set forth in *Evangelatos,* however, is whether the proposition's language or the materials considered by the voters can be read as an explicit expression of an intent to have retroactive application so as to overcome the presumption

of prospective operation. Under this standard, the "may pursue" language cannot be seen to be an explicit expression of retroactive intent. Given the absence of any explanation in the official materials presented to the voters that Proposition 64 would apply to existing lawsuits, it would be pure speculation to conclude that the electorate read the language "may pursue" in that manner and thus made a conscious choice for retroactive application. Such is especially true given that the language of the proposition or of the voter materials could easily have been more explicit so as to eliminate any question as to what those who voted for proposition had in mind relative to its retroactive application. *See, Jenkins v. County of Los Angeles* (1999) 74 Cal.App.4th 524, 535-36.

CONCLUSION AND FURTHER PROCEEDINGS

Upon the foregoing, this court concludes that Proposition 64 does not apply to cases already on file as of the time of its enactment. Accordingly, defendants' Motion for Judgment on the Pleadings is denied.

This matter is set for a further case management conference and for the hearing on Plaintiff's Objections to Discovery Referee's Proposed Order at 9:30 a.m. on February 18, 2005.

CERTIFICATION UNDER CODE OF CIVIL PROCEDURE §166.1

This court believes that the question presented herein is a controlling question of law on this and other cases pending throughout California as to

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which there are substantial grounds for difference of opinion, the appellate resolution of which may material advance the conclusion of this and other litigation.

Dated: December 29, 2004

Judge of the Superior Court

PROOF OF SERVICE BY HAND, FEDERAL EXPRESS & U.S. MAIL

1. I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 years and not a party to the within action or proceeding. My business address is Sheppard, Mullin, Richter & Hampton LLP, Four Embarcadero Center, 17th Floor, San Francisco, CA 94111.

2. On February 14, 2005, I caused to be served by hand the following documents:

(1) PETITION FOR REVIEW; (2) REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW; DECLARATION OF MICHAEL W. SCARBOROUGH; [PROPOSED] ORDER; (3) APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

on the following parties to this action and upon their counsel of record at the following address:

Ira P. Rothken, Esq.
Rothken Law Firm
1050 Northgate Drive, Suite 520
San Rafael, CA 94903
Telephone: (415) 924-4250
Facsimile: (415) 924-2905

For Plaintiff and Real Party in Interest
California Law Institute

3. I am readily familiar with the practice at my place of business for collection and processing of correspondence for overnight delivery by Federal Express. Such correspondence will be delivered to an authorized courier or driver authorized by Federal Express to receive documents or deposited with a facility regularly maintained by Federal Express for receipt of documents on the same day in the ordinary course of business.

4. On February 14, 2005, I served by Federal Express by placing a true copy in a separate envelope for each addressee named below, with the name and address of the persons served shown on the envelope as follows, the following documents:

(1) PETITION FOR REVIEW; (2) REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW; DECLARATION OF MICHAEL W. SCARBOROUGH; [PROPOSED] ORDER; (3) APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

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For Plaintiff and Real Party in Interest California Law Institute

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For Plaintiff and Real Party in Interest California Law Institute

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1311 Marmaroneck Avenue
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Telephone: (914) 997-5656
Facsimile: (914) 997-2444

For Plaintiff and Real Party in Interest California Law Institute

5. I am readily familiar with the practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence will be deposited with the United States Postal Service on the same day in the ordinary course of business.

6. On February 14, 2005, I served by mail by placing a true copy in a separate envelope for each addressee named below, with the name and address of the persons served shown on the envelope as follows of the following documents:

(1) PETITION FOR REVIEW; (2) REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW; DECLARATION OF MICHAEL W. SCARBOROUGH; [PROPOSED] ORDER; (3) APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

Office of the District Attorney
Hall of Justice
850 Bryant Street, Room 325
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Supervising Deputy Attorney General
Office of the Attorney General
Consumer Law Section
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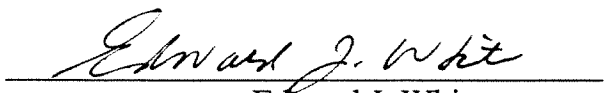
San Francisco, CA 94102

Clerk of The Superior Court
County of San Francisco
400 McAllister Street
San Francisco, CA 94102

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

Executed on February 14, 2005, at San Francisco, California.

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



Edward J. White