CASE NO. S 131798

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,

vs.

MERVYN'S, LLC,
Defendant and Respondent

Court of Appeal No. A106199
On Petition for Review After a Denial Of a Motion to Dismiss
by the Court of Appeal, First Appellate District, Div. Four

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CALIFORNIA LEAGUE FOR ENVIRONMENTAL ENFORCEMENT NOW IN SUPPORT OF PLAINTIFF AND APPELLANT CALIFORNIAN'S FOR DISABILITY RIGHTS

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Unfair Competition Case
(Bus. & Prof. Code §17209 and Cal. Rule Court, rule 15(e)(2))

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APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

TO THE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rule of Court 29(f), applicant California League for Environmental Enforcement Now ("CLEEN") requests leave to file a brief amicus curiae in support of plaintiff-respondent Californian's For Disability Rights ("CDR").

CLEEN is a statewide coalition of environmental and public health organizations, advocates and law firms committed to protecting and strengthening laws regulating toxic pollution and keeping drinking water safe. The members of CLEEN include the Environmental Law Foundation, Natural Resources Defense Council, Communities for a Better Environment, Center for Environmental Health and others.[1]

CLEEN and its members are both interested in, and will be affected by the decision in this case. Many of CLEEN's members had environmental and other public interest Unfair Competition Law ("UCL") enforcement actions pending when Proposition 64 came into effect. These entities will be directly affected by the Court's decision regarding the retroactive application of Proposition 64 to cases pending prior to

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[1] The complete list is: Altshuler, Berzon, Nussbaum, Rubin & Demain; Baykeeper; Brian Gaffney, Esq.; California Environmental Rights Alliance; Californians for Alternatives to Toxics; Center for Environmental Health; Center on Race Poverty and the Environment; Communities for a Better Environment; Environmental Law Foundation; Ecological Rights Foundation; Michael Freund, Esq.; Lexington Law Group, LLP; Mateel Environmental Justice Foundation; Natural Resources Defense Council; Andrew Packard, Esq.; Physicians for Social Responsibility- Los Angeles; Physicians for Social Responsibility - SF Bay Area; Prof. Cliff Rechtschaffen Golden Gate University School of Law; The Rose Foundation for Communities and the Environment; and Occupational Knowledge.

November 3, 2004.

For the foregoing reasons, CLEEN respectfully requests that the Court accept the following brief for filing.

Dated: September 15, 2005

Respectfully submitted,

LEXINGTON LAW GROUP, LLP

By _____

Mark N. Todzo
Attorneys for Amicus Curiae
Californians For Environmental
Enforcement Now

INTRODUCTION

The Court of Appeal's ruling upholds what both this Court and the United States Supreme Court refer to as "the first rule of statutory construction" – that new laws apply prospectively absent a clear and unambiguous statement of retroactive intent. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840; *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 264.) Finding no such statement, the Court of Appeal properly determined that Proposition 64 does not apply to pending cases. Defendant and respondent Mervyn's LLC nevertheless argues in favor of retroactive application on the grounds that: (1) Proposition 64 makes only procedural, non-substantive changes to the UCL; and (2) the first rule of statutory construction should be subordinated to its narrow exception, the statutory repeal rule. Neither of these arguments is valid.

For over 70 years, the UCL has been a powerful tool to compel businesses to comply with their legal obligations. Its controversial private attorney general provision has earned praise from this Court, which recently stated that such "actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126.) By deleting the private attorney general provision, Proposition 64 effected a sweeping change in policy that has broad impact on environmental and consumer protection throughout the State. The impairment to California's long history of private enforcement of environmental and consumer protection laws, if applied to pending cases, would disrupt the settled expectations of Californians and the environmental and consumer groups that represent them. (*See, e.g., Hewlett v. Squaw Valley Ski Corporation* (1997) 54

Cal.App.4th 499, 545 ("adequate government enforcement of the laws is not always possible, making private action imperative.").) Accordingly, Proposition 64 may not be termed merely procedural as argued by Mervyn's. (*See Landgraf, supra*, at 265.) Rather, Proposition 64 has impermissible retroactive effect and may not be applied to pending cases without an express declaration of retroactivity, which is absent here. (*See Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1226-1227 (statutory amendment that "introduced a new policy which will have broad effect" may not be applied to pending cases absent clear declaration of retroactive intent).)

The statutory repeal rule does not reverse application of the ordinary rules of statutory construction and permit courts to ignore legislative intent as Mervyn's suggests. To the extent the repeal rule retains any vitality at all, it provides a means to gauge legislative intent rather than to ignore it. (*See People v. Rossi* (1976) 18 Cal.3d 295, 300, fn. 6.) Thus, where the Legislature acts to unconditionally repeal an entire cause of action, it is presumed that the Legislature intended for such repeal to halt those causes of action in pending cases since the Legislature has removed the courts' ability to order the relief requested. Here, Proposition 64 made substantive changes to the UCL's standing requirements, but it did not repeal any of the UCL's underlying causes of action or remedies. The amended UCL provides courts with the same power to order the same relief for the same violations of law as did the UCL prior to the enaction of Proposition 64. Thus, Proposition 64 did not effect a statutory repeal within the narrow meaning of the rule.

Mervyn's attempt to broaden the repeal rule to include the repeal of any and all statutory rights (Mervyn's Opening Brief ("MOB"), p. 2) cannot be squared with this Court's recent precedents. For example,

Myers, supra, involved the repeal of a purely statutory right, the right of tobacco companies to be immune from tort liability. (*Myers, supra,* at 828.) Nevertheless, the Court did not apply the repeal rule, although it would clearly have applied under Mervyn's expansive construction.

As Proposition 64 would have retroactive effects if applied to pending cases, contains no statement of retroactive intent and is beyond the narrow scope of the repeal rule, it should not be applied to pending cases. However, even if the Court does decide that retroactive application is proper, it should nevertheless rule that CDR, a membership organization whose members are directly affected by Mervyn's unlawful acts, maintains standing to pursue its claims.

While Proposition 64 was silent on the issue of retroactivity, it included conflicting statements regarding the new standing requirement. The stated intent of the new law was to require plaintiffs to demonstrate that they had been "injured in fact under the standing requirements of the United States Constitution." (Appendix to CDR's Answering Brief ("CDR App."), p. 1 (Section 1(e) of Proposition 64).) However, the text of the law goes potentially much further, stating that an action may be brought by "any person who has suffered injury in fact *and* lost money or property as a result of the unfair competition." (CDR App., p. 1 (Section 17204) (emphasis added).) Because a loss of money or property necessarily constitutes injury in fact, yet is not a requirement for Article III standing, the two provisions of Proposition 64 are in conflict. This conflict should be resolved in favor of the stated purpose of the proposition – to require a plaintiff to satisfy the Constitutional injury in fact requirement for standing. (*See People v. Canty* (2004) 32 Cal.4th 1266, 1276 (the intent prevails over the letter of the law).)

ARGUMENT

I. PROPOSITION 64 HAS RETROACTIVE EFFECT AND IS THUS SUBJECT TO THE RULE OF PROSPECTIVITY.

In order to preserve "a rule of law that gives people confidence about the legal consequences of their actions," a newly enacted statute does not apply retroactively to cases pending prior to its enactment absent the clear and manifest intent of the legislature. (*Myers, supra*, at 843.) This rule of statutory construction is codified in Section 3 of the California Civil Code and repeatedly cited in controlling precedents of both the United States and California Supreme Courts. Mervyn's argues that this rule of statutory construction does not apply because Proposition 64 does not have any retroactive effect. (MOB, pp. 31-38.) Given Proposition 64's drastic impact on environmental enforcement in California, it is impossible to accept Mervyn's argument.

This Court has stated that the determination of whether a new law has retroactive effect should not be made on a case-by-case basis, but rather based on ***all*** of the possible effects of the new law. (*See People v. Francis* (1969) 71 Cal.2d 66, 76-77.) In *Francis*, the Court stated that "[w]hether or not the Legislature intended the amendment to be retroactive to cases not final before the effective date of the amendment obviously cannot be decided on the basis of the particular facts of this or any other individual case." (*Ibid.*) Thus the Court should consider all of the potential retroactive effects of applying Proposition 64 to pending cases when ruling on this case. While CDR has cited to a number of retroactive effects that would result from applying Proposition 64 to this case, the severe curtailment of the public's rights to enforce environmental laws that would result from applying Proposition 64 to pending cases is alone sufficient retroactive effect to preclude application of Proposition 64 to ***all*** pending

cases absent a clear statement of intent by the electorate.

Recently, this Court reaffirmed the principle that the determination of whether a statute has retroactive effect is based on function rather than form. (*See Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) The pertinent question in this analysis is whether the new law changes the legal consequences of past actions or substantially affects existing rights and obligations. (*Ibid.*; *Evangelatos, supra,* at 1226-1227; *Myers, supra,* at 839; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 290; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 395.) If so, the statute has retroactive effect and may not be applied to pending cases absent clear and manifest intent of the legislature or electorate. (*Myers, supra*, at 843.)

Prior to Proposition 64, any person, including all of CLEEN's members, had standing to enforce all environmental laws and regulations in California. Many of those laws, such as the Forest Practices Act, provisions of the Fish and Game Code, and those concerning groundwater contamination, lack any other means of private enforcement. (*See, e.g., Hewlett, supra,* at 499.) Accordingly, the UCL has been an important tool of environmental groups to obtain compliance with environmental laws. Given the inability of public enforcement agencies to fund the litigation necessary to enforce many environmental laws, the public has come to rely on its right to private enforcement of these laws. (*See, e.g., Seminole Tribe v. Florida* (1996) 517 U.S. 44, 157, fn. 2.)

Proposition 64 curtails much of this private enforcement. If, as Mervyn's contends, section 17204 now requires an individual to have lost money or property prior to bringing a UCL claim[2], the UCL may no

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[2] *See* MOB, p. 3. As discussed in Section IV, *infra*, CLEEN (continued...)

longer be used to enforce many environmental laws. For example, in *Hewlett*, although plaintiffs Sierra Club and Mr. Hewlett suffered injury in fact as a result of Squaw Valley's unlawful felling of trees, neither the environmental group or the concerned individual had a property interest in the timber that was cut. (*Hewlett, supra*, at 514-515.) Thus, neither *Hewlett* nor similar cases could be brought or maintained under Mervyn's strict construction of Proposition 64. Even if section 17204 is construed to require injury in fact alone to confer UCL standing, many environmental groups would be precluded from bringing enforcement actions. (*See, e.g., Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 563 (environmental group denied standing where members were not affected by challenged conduct).)

The rights of Californians and the environmental groups that represent them to protect their own environment have been substantially curtailed with the passage of Proposition 64. If applied to pending cases, Proposition 64 "would have a very definite substantive effect on both plaintiffs and defendants who, during the pending litigation, took irreversible actions in reasonable reliance on the then-existing state of the law." (*Evangelatos, supra,* at 1225, fn. 26.) Because its application to pending cases would drastically affect existing rights, Proposition 64 has retroactive effect and is thus subject to the rule that laws operate prospectively absent a clear and unambiguous statement of retroactive intent. (*Id.*, at 1229.)

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[2](...continued)
does not agree with this interpretation of Proposition 64's standing requirement. In order to effectuate the stated intent of Proposition 64, standing under section 17204 should be construed to require only injury in fact under the United States Constitution.

II. THE FIRST RULE OF STATUTORY CONSTRUCTION – THAT NEW LAWS ARE PRESUMED TO OPERATE PROSPECTIVELY – PRECLUDES APPLICATION OF PROPOSITION 64 TO THIS AND ALL OTHER CASES PENDING PRIOR TO ITS ENACTION.

This Court recently reaffirmed that California courts, like their federal counterparts, recognize that:

> The ***first*** rule of statutory construction is that legislation must be considered as addressed to the future, not to the past... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless it be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.

(*Myers, supra,* at 840 (emphasis added).) This Court explained that this rule pre-dates the Constitution and is embedded in both the *ex post facto* clause as well as the Fifth Amendment's due process and takings clauses. (*Id.*, at 841.)

This first rule of construction has particular vitality in the context of interpreting laws enacted by initiative, where a court's primary objective is to give effect to the intent of the voters. (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 ("the voters should get what they enacted, not more and not less.") The voting public enacts initiatives without many of the benefits afforded to the Legislature. Unlike the Legislature, voters never have the opportunity to: (1) discuss the proposed legislation with its drafters; (2) negotiate the language of the legislation; or (3) obtain reports and analyses of the proposed legislation. (*See McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 214.) Instead, the voters must rely entirely on the information provided in the ballot pamphlet and in partisan

advertising. In construing a previous initiative, Justice Baxter stated:

> When construing Proposition 65, we must keep several things in mind. First, it was adopted not by the considered processes of the Legislature, but by the all-or-nothing power of the popular vote. The people's right of initiative is precious, and measures enacted by this means are to be interpreted liberally to honor the electorate's intent. (Citation.) On the other hand, the voters have no special knowledge of technical meanings the law may attach to particular words or phrases used in such a statute. Moreover, the initiative process provides little opportunity to consider, debate, or modify the language arbitrarily chosen by the drafters of a ballot measure. Extrinsic aids to construction are typically sparse and unreliable. Hence, in ascertaining the purposes of an initiative statute, we should adhere closely to the ordinary, commonsense meaning of its language, as viewed in context and confirmed by the available outside evidence of the voters' intent. (Citation.)

(*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 315 (Baxter, J., dissenting) (citations omitted).) Thus, it is even more important in construing initiatives than ordinary legislation to interpret the law based on express, rather than implied intent.

Application of the first rule of statutory construction to Proposition 64 leads to the unmistakable conclusion that Proposition 64 may not be applied retroactively. Mervyn's essentially concedes that there is no statement of retroactive intent in the initiative, let alone a clear and unmistakable one. In fact, the statements in the initiative and ballot materials indicate that Proposition 64 was intended to prevent future actions from being ***filed*** by unaffected plaintiffs, not to terminate pending cases.

Section 1(e) of the measure provides:

> It is the ***intent of the California voters*** . . . to prohibit private attorneys from ***filing*** lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.

(CDR App., p. 1 (emphases added).) Likewise, Section 1(f) of the measure provides:

> It is ***the intent of the California voters*** in enacting this act that only the California Attorney General and local public officials be authorized to ***file and prosecute*** actions on behalf of the general public.

(*Ibid.* (emphases added).)

In the absence of an express provision mandating retroactive application of a statute, courts may resort to legislative history, such as the ballot pamphlet. (*Evangelatos, supra,* at 1210-1211.) However, neither the Attorney General's title and summary nor the Legislative Analyst's fiscal analysis advised voters that the measure would apply to pending cases. Instead, such materials express the drafters' intent and the Legislative Analyst's concurrence that Proposition 64 will apply to newly filed cases. The Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local pubic prosecutors, from ***bringing*** a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (CDR App., p. 2.) The proponents' ballot argument in favor of the measure also emphasized that Proposition 64 would "[a]llow[] only the Attorney General, district attorneys, and other public officials to ***file*** lawsuits on behalf of the People of the State of California . . ." (*Id.*, p. 4 (emphasis added).) Finally, the proponents' rebuttal to the argument against Proposition 64 stated that the initiative "[p]ermits only real public officials like the Attorney General or District Attorneys to ***file*** lawsuits on behalf of the People of the State of California."

(*Id.*, p. 5 (emphasis added).)

It is not surprising that Proposition 64's proponents chose not to include a retroactivity provision. Telling the voters that enacting Proposition 64 would provide businesses with immunity in pending environmental, consumer, and health and safety enforcement actions may have made the measure less popular. Application of Proposition 64 in a manner that may be contrary to the measure supported by the voters must be avoided.[3]

Subsequent to the November election, the drafters of Proposition 64 have expressed their view that a retroactivity clause was unnecessary in the proposition because the statutory repeal rule would apply, thereby compelling retroactive application of Proposition 64 even absent an express statement of intent. If condoned, this reasoning highlights egregious flaws with the initiative process. Proponents of initiatives should not be permitted to conceal relevant intent underlying a proposition from the public based on their view that clever lawyering will allow such intent to prevail despite never having been reviewed or approved by the voters. (*See Hodges, supra,* at 114.)

The drafters of Proposition 64 could have easily included an express retroactivity provision into the initiative. They chose not to and the voters thus had no way of knowing that the new law might operate retroactively to terminate pending cases.[4] Because Proposition 64 failed to

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[3] *See Evangelatos, supra*, at 1217 ("a voter who supported the remedial changes embodied in Proposition 51 would not necessarily have supported the retroactive application of those changes to defeat the reasonable expectations of individuals who had taken irreversible actions in reliance on the preexisting state of the law").

[4] Adding to the likelihood that voters would not have known (continued...)

express any intent that it should be applied retroactively, the first rule of statutory construction precludes its application to this or any cases pending prior to November 3, 2004.

III. THE STATUTORY REPEAL RULE DOES NOT APPLY TO PROPOSITION 64 AND SHOULD NOT BE EXPANDED TO DO SO.

Despite this Court's broad and unwavering adherence to the rule of prospective application of new laws, Mervyn's spends the bulk of its briefs arguing that this first rule of construction applies only to legislation affecting common law rights. According to Mervyn's, an entirely different rule, one that reverses the presumption against retroactivity, applies to legislation affecting statutory rights. Although Mervyn's cites to a few older cases from this Court that support a narrow exception to the rule of prospective application for certain types of statutory repeals, it fails to cite any case in support of its suggested broad limitation on the rule of prospectivity. This failure makes sense, since this Court has actually rejected the broad application of the statutory repeal rule advocated by Mervyn's. Instead, to the extent it remains a viable rule of construction, the repeal rule has been strictly confined to statutes that eliminate causes of action or remedies in their entirety. Proposition 64 did neither, and thus does not fit within the existing framework of the repeal rule. The Court should reject Mervyn's request to reconsider its commitment to the first rule of statutory construction and expand the repeal rule to cover Proposition 64.

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[4](...continued)
that Proposition 64 may be applied retroactively is the express statement of retroactivity in the ballot materials for Proposition 69, which state that: "The expanded list of qualifying offenses would be retroactive regardless of when the person was convicted (adults) or adjudicated (juveniles)." (November 2004 Ballot Pamphlet, Proposition 69 Analysis by the Legislative Analyst, p. 61.)

A. Since Proposition 64 Did Not Abolish A Cause Of Action Or Remedy, It Did Not Effect A Repeal Within The Meaning Of The Statutory Repeal Rule.

Mervyn's argues that the statutory repeal rule provides that the repeal or amendment of any purely statutory right or remedy applies to pending cases subject to a few exceptions. (MOB, p. 2.) The statutory repeal rule is not, however, nearly as broad as Mervyn's contends. Rather, to the limited extent this Court has applied it, the statutory repeal rule is a narrow exception to the rule that all laws are presumed to operate prospectively unless there is a clear and unambiguous statement of intent for retroactive application.

The statutory repeal rule permits courts to apply the Legislature's unconditional repeal of an entire cause of action or form of relief to pending cases. (*See Governing Board of Rialto School District v. Mann* (1977) 18 Cal.3d 819, 829.) In such circumstances, by divesting the courts of their authority to order the relief requested, the Legislature has evinced its intent that such relief should no longer be available even in pending cases. (*See Mann, supra,* at 831.) Proposition 64 did not repeal either the UCL or the causes of action or remedies available thereunder. Accordingly, the statutory repeal rule does not apply here.

The statutory repeal rule is derived from criminal law, where the elimination or reduction of punishment resulting from a statutory amendment or repeal is immediately effective. In *Rossi, supra*, which is relied on by the *Mann* Court, the Supreme Court describes the rationale for the rule as follows:

> When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the

> prohibited act. *It is an inevitable* ***inference*** *that the Legislature must have* ***intended*** *that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case* to which it constitutionally could apply.

(*Rossi, supra,* at 300, fn. 6 (citations omitted, emphasis added).)

That the statutory repeal rule is another branch of the tree of legislative intent is further evidenced by the saving clause exception to the rule. Any express intent to save a repealed cause of action with respect to pending cases prevails over the implied intent that such cause of action should immediately perish with the repeal. (*See Mann, supra,* at 829.) Thus, the Court of Appeal's conclusion that the statutory repeal rule is a technique for ascertaining the implied intent of the Legislature fully comports with the origins of the rule. (*See Californians for Disability Rights v. Mervyn's, LLC,* 2005 Cal. Daily Op. Service 1010, at *13.)

In the civil context, the rule has been applied in a similar manner to its application in criminal cases. Where the Legislature completely abolishes a particular cause of action or remedy, it may be presumed that the Legislature intended that such claim or remedy should no longer be available even in pending cases. (*See Mann, supra,* at 829.) This is because in such situations the courts have been divested of their authority to order the relief that has been requested.

For example, in *Mann, supra,* at 822, a lawsuit to terminate a teacher's employment based upon a conviction for marijuana possession was commenced based upon a statute that expressly provided for such dismissals. While the case was pending, a new law took effect stating that no public agency may dismiss an employee based upon a conviction for marijuana possession. (*Ibid.*) Thus, under the new law, the courts no longer had the authority to grant the school district's requested relief –

dismissal of the teacher. (*Id.* at 830-831.) Accordingly, this Court held that the new statute constituted a repeal of the old statute and applied it to the pending case. (*Ibid.*)

In *Younger v. Superior Court* (1978) 21 Cal.3d 102, the plaintiff brought the underlying action to compel the trial court to order his record of marijuana conviction destroyed pursuant to a statute that specifically required a court order for such destruction. (*Id.*, at 111.) While the case was on appeal, the statute was repealed and the authority to order the destruction of such records was given to the Attorney General. This Court held that because the repeal of the statute divested the trial court of any authority to order the records destroyed, the repeal must be applied to the pending action. (*Ibid.*)

Likewise, the other cases relied upon by Mervyn's arise from similar situations where either an entire cause of action or remedy is abolished, such that the courts were rendered incapable of ordering the requested relief. In these cases, the "repeal of a statute indicated legislative intent that the repeal legislation apply retroactively, thus rebutting the presumption of prospectivity." (*Slip Op.*, at *13; *see, e.g.*, *International Ass'n of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 423 (repeal of penal law underlying civil claim for unfair competition abrogated the courts' ability to restrain a violation of that penal statute and the claim of unfair competition based upon violation of such statute); *Southern Serv. Co. v. City of Los Angeles* (1940) 15 Cal.2d 1 (repeal of tax refund statute eliminated cause of action for tax refund and deprived court of ability to grant a tax refund in pending action).)

This is not what happened here. Proposition 64 did not repeal or abolish any of the three causes of action for unfair competition available under the UCL. Both before and after Proposition 64, actions for unlawful,

unfair and deceptive business practices remain viable causes of action. Nor did Proposition 64 repeal or abolish the remedies available under the UCL. Both before and after Proposition 64, injunctive relief and restitution are available remedies. Accordingly, Proposition 64's amendments do not manifest the implied intent of retroactive application required to rise to the level of a "statutory repeal" within the meaning of the rule. In fact, the ballot arguments specifically acknowledge that the UCL "is intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." (CDR App., p. 1, Section 1(a) of Proposition 64.) This hardly sounds like an indication of intent that ongoing litigation targeting a defendant's unlawful, unfair and/or fraudulent business practices should be dismissed.

B. This Court Recently Rejected Application Of The Repeal Rule To Statutory Amendments That Do Not Abolish An Entire Cause Of Action Or Remedy.

The overbroad application of the repeal rule to include the repeal or amendment of ***any*** statutory right which is advocated by Mervyn's has already been rejected by this Court. In *Myers, supra*, the Court refused to apply the statutory repeal rule to the repeal of the statutory immunity from common law liability previously afforded tobacco manufacturers under Civil Code §1714.45. Although the immunity statute created a purely statutory right for the cigarette companies, this Court refused to apply the repeal of the immunity statute retroactively.

In refusing to apply the repeal in *Myers* retroactively, the Court was clearly aware of the repeal rule, which was cited by Justice Moreno in his dissent. After determining that the statute repealing the cigarette companies' immunity contained sufficient indicia of legislative intent for retroactive application, Justice Moreno cited the statutory repeal rule, stating that:

> the immunity involved here was wholly a creation of statute, and its abolition does not affect the tobacco companies' right to assert common law defenses in product liability actions. (Cf. *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 [statutory rights, unlike common law rights, not vested for purposes of retroactive application of a statute because 'all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time"].)

(*Myers, supra,* at 853 (Moreno, J. dissenting).)

Nevertheless, the Court did not apply the repeal rule. Instead, the Court relied heavily on *Evangelatos* and its requirement, which the Court emphasized with its own italics, that "'a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature. . . must have intended a retroactive application.'" (*Myers, supra,* at 841, *citing Evangelatos, supra,* at 1209 (emphasis in original).) Thus, in *Myers*, the Court effectively determined that the repeal rule does not apply to the repeal of all purely statutory rights. Rather, the Court relied on the first rule of statutory construction – that new laws are presumed to be prospective absent a clear and unambiguous statement of retroactive intent.

Likewise, in *Elsner,* the Court refused to apply the repeal of a statutory rule of evidence to pending cases. Prior to the repealing amendment, the evidentiary rule modified the common law rule by affording defendants the right to exclude evidence of OSHA violations in negligence actions. (*Elsner, supra,* at 924.) The repeal of this rule restored the common law rules regarding negligence per se based on OSHA violations. Although the amendment impaired a purely statutory right – the right to exclude evidence of OSHA violations – the Court did not rely on, or even reference the statutory repeal rule. Instead, the *Elsner* Court relied on

Evangelatos and the first rule of statutory construction. (*Id.* at 936.)

Defendants argue that *Myers* is inapposite because the repeal of the statutorily granted immunity for tobacco companies "imposed new liabilities on past conduct." (Mervyn's Reply Brief ("MRB"), p. 5.) This argument conflates the repeal rule and the *Evangelatos* rule of prospectivity. Under Mervyn's framing of the repeal rule, a court should reflexively apply the repeal of any statutory right to pending cases unless the repealing law contains a savings clause. (MOB, p. 2.) Nevertheless, Mervyn's argues that the repeal rule did not apply in *Myers* for a wholly different reason – because applying the repeal of the immunity in the *Myers* case would have retroactive effects pursuant to the rule of prospectivity. (*See, e.g., Tapia, supra*, at 290 (a retroactive effect is one that increases liabilities for past conduct or affects existing rights).) Mervyn's attempt to distinguish *Myers* thus supports the view that the statutory repeal rule may not be inflexibly applied without reference to the rule of prospectivity.

Mervyn's dismisses the absence of any discussion of the repeal rule in *Elsner* (or any other of this Court's decisions over the past 27 years) on the ground that the rule was not implicated in those cases. (MRB, p. 5.) However, the amendment in *Elsner* repealing a purely statutory right fits squarely within Mervyn's framing of the repeal rule. It is Mervyn's overzealous attempt to expand the repeal rule to include all statutory rights, not this Court's reluctance to cite a rule unless it is actually applying it, that produces the disconnect between Mervyn's broad statement of the repeal rule and absence of case law from this Court citing the rule.[5]

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[5] The notion that the Court refrains from citing or distinguishing inapplicable rules is inconsistent with all of the repeal rule cases relied upon by Mervyn's. In those cases the Court always cites the first rule of construction – that new laws are presumed to operate only

(continued...)

C. Expanding The Statutory Repeal Rule To Include The Amendment Of Statutory Rights Such As Those At Issue Here Would Provide An Unworkable Framework For Determining Retroactivity And Should Be Rejected.

Expansion of the statutory repeal rule to include amendments and repeals of all statutory rights as urged by Mervyn's would result in an unworkable framework for retroactivity analysis that would require a case-by-case inquiry. It would also encourage litigation over initiatives that contain no language of retroactivity. The Court should thus reject Mervyn's invitation to broaden the repeal rule.

Mervyn's briefing attempts to elevate the status of the narrow repeal rule to the equal of the rule of prospectivity. Mervyn's argues that while the rule of construction that requires statutes to be presumed prospective absent a clear statement of intent to the contrary applies to amendments and repeals of common law rights, the statutory repeal rule applies to all other amendments and repeals. (MOB, p. 2.) If Mervyn's argument is accepted, the inquiry in retroactivity cases would shift from one of statutory intent to a historical analysis to determine whether the origin of the right at issue was statutory or from the common law. Given the reality that many present day statutes are a complex mixture of codified common law principles together with purely statutory elements, application of the repeal rule in this manner would be extraordinarily difficult.

The UCL provides a good example of this. While originally a codification of the common law tort of unfair competition, the Legislature expanded the scope of the UCL in 1933 adding statutory elements. (*See*

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[5](...continued)
prospectively – before applying the repeal rule relied on by Mervyn's. (*See, e.g., Mann, supra*, at 829 ("Although the courts normally construe statutes to operate prospectively...".)

Kraus, supra, at 129.) However, the injunctive remedy is and has always been a codification of the courts inherent equitable powers stemming from the common law. (*See Committee on Children's Television, Inc. v. General Foods Corporation* (1983) 35 Cal.3d 197, 225-226.) In 1976 the UCL was again amended, this time to codify the court's common law equitable power to order restitution. (*Kraus, supra*, at 131; *see also, Korea Supply Company v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1147.) Thus, if this Court were to apply Proposition 64 retroactively to pending UCL claims, it would have to carefully parse between those which include claims based on those parts of the UCL codified from the common law and those which do not. In the context of the UCL, that analysis becomes almost impossible, as all claims will likely include some elements of the codified common law.

IV. THE AMBIGUITY IN PROPOSITION 64'S STANDING PROVISION FOSTERED BY THE INCONSISTENCY BETWEEN ITS STATED INTENT AND THE TEXT OF THE INITIATIVE REQUIRE THE PROVISION TO BE CONSTRUED TO PERMIT CDR STANDING EVEN IF PROPOSITION 64 IS APPLIED RETROACTIVELY.

Proposition 64 would have retroactive effect and did not include an express (or even implied) statement of retroactive intent. Moreover, it did not abolish any of the UCL's causes of action or either of its remedies. Thus, there is no basis for its retroactive application. However, even if the Court applies Proposition 64 to this case, it should uphold CDR's standing to pursue its claims since CDR has suffered injury in fact sufficient to convey standing upon it under the United States Constitution.

Like many of CLEEN's members, CDR is an organization whose members are affected by the unlawful business practice challenged in this lawsuit. (TT 1093:19-28.) Accordingly, CDR would have standing to pursue Mervyn's under the standing provision of Article III of the United

States Constitution. (*See, e.g., Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* (2000) 528 U.S. 167, 183.) Given the express intent that Proposition 64 equate the standing requirements under the UCL with those of the United States Constitution (*See* CDR App., p. 1 (Proposition 64, Section 1(e))), CDR's ability to meet the injury in fact requirement should be sufficient to confer standing upon it even if Proposition 64 is applied in this case.[6]

Mervyn's completely ignores the injury in fact requirement, arguing that Proposition 64 altered the UCL's standing such that "UCL actions 'shall be prosecuted exclusively' by person who have lost money or property as a result of the claimed violation." (MOB, p. 3.) Based on this interpretation of the new standing requirement, Mervyn's concludes that, if applied to this case, Proposition 64 would divest CDR of standing. (*Ibid.*) It is not surprising that Mervyn's would focus on the loss of money or property language in Proposition 64, which it contends further narrows constitutional standing. However, given the conflicting provisions in Proposition 64, Mervyn's construction is mistaken.

The plain language of Proposition 64 is inconsistent. An interpretation of the act based on its plain language cannot give effect to the "lost money or property" phrase in section 3 of Proposition 64 (amending Section 17204) and the "injured in fact under the standing requirements of the United States Constitution" phrase in "Findings and Declaration of Purpose" in section 1(e) of the proposition. (CDR App., p. 1.) The express

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[6] Given that CDR is a membership organization and its members have lost money or property as a result of Mervyn's unlawful actions, CDR would likely be able to demonstrate that it has standing even under Mervyn's interpretation of section 17204. (*See, e.g., Tenants Ass'n of Park Santa Anita v. Southers, et al.* (1990) 222 Cal.App.3d 1293.) Nevertheless, Mervyn's interpretation is overly strict.

intent of Proposition 64 is to "prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (*Ibid.*)

While interpreting section 17204 as requiring no more than constitutional standing potentially nullifies the lost money or property language, this is clearly better than the alternative, which is to render the express intent that Proposition 64 equate UCL standing with that under the Constitution superfluous. Under rules of statutory construction, an initiative will ordinarily be construed according to its plain meaning. (*See, e.g., Canty, supra,* at 1276.) However, the plain meaning rule does not prohibit a court from determining whether the literal meaning comports with the purpose of the measure, or whether one provision is consistent with another. (*Ibid.*) The language of the proposition is construed in the context of the measure as a whole. (*Ibid.*) "***The intent of the law prevails over the letter of the law and the letter will, if possible, be so read as to conform to the spirit of the act.***" (*Id.*, at 1276-77 (emphasis added).) Thus, the 'injured in fact and lost money or property" provision should be interpreted as requiring no more than Constitutional standing.[7]

Moreover, to interpret the "lost money or property" language in section 17204 as an additional requirement beyond injury in fact effectively nullifies the injury in fact language in that section. Any person who has lost money or property as a result of unfair competition has by

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[7] Such a reading comports with section 17203, which states that a court can enjoin a person to "prevent" acts that constitute unfair competition, suggesting that the UCL was designed in part to prevent actual injury. If, however, money or property must be lost prior to the initiation of a lawsuit to enjoin acts of unfair competition, a court's ability to prevent such loss from occurring would be extinguished.

definition suffered injury in fact. (*See, e.g., Singleton v. Wulff* (1976) 428 U.S. 106, 112-113 (prospective monetary loss is sufficient to confer Article III standing).) Because giving effect to the literal meaning of "lost money or property" renders the "injury in fact" language superfluous ***and*** conflicts with the statement of purpose underlying the standing provision, it must be subordinated to the injury in fact requirement.

The ballot arguments further support reading section 17204 to be consistent with constitutional standing requirements. Therein, Proposition 64's proponents informed voters that enacting the initiative would have no effect on environmental enforcement. (CDR App., p. 4.) However, a strict construction of the lost money or property requirement would essentially preclude many private environmental enforcement actions under the UCL. *Hewlett* and similar cases, for example, could not be brought if the lost money or property requirement prevails over the injury in fact requirement.

While the opponents of Proposition 64 cautioned that enacting the initiative would preclude certain environmental claims, the proponents responded that it was "patently untrue" that Proposition 64 "will somehow undermine the state's environmental laws." (CDR App., p. 3 (Rebuttal to Argument Against Proposition 64).) Unless section 17204 is interpreted to require only injury in fact, the possibility would exist that voters were misled by the proponents' statements regarding Proposition 64's alleged lack of impact on environmental enforcement. (*See Hodges, supra,* at 114.)

The drafters of Proposition 64 had complete control over the language of the initiative's statements of intent, the amended statute and the ballot materials. Nevertheless, they presented conflicting statements regarding the revised standing requirement. These conflicting statements dilute the clear intent of voters. While the proponents of Proposition 64

such as Mervyn's now argue that section 17204 should be construed as requiring a strict loss of money or property (MOB, p. 3), Proposition 64 should instead be construed in accordance with the stated purpose of the proposition – to prohibit lawsuits where the plaintiff has not "been injured in fact under the standing requirements of the United States Constitution." (CDR App., p. 1, Proposition 64 Section 1(e).)

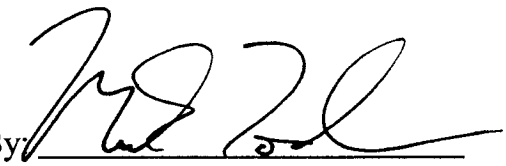
CONCLUSION

Given the proliferation of initiative measures, it is vitally important that the drafters of such measures say what they mean and mean what they say. Here, the drafters of Proposition 64 failed to do so, and the result has been a flood of litigation. If a measure is intended to have retroactive effect, the drafters of the measure must explicitly say so. Likewise, a measure must present a consistent statement of its intended reach and application. Any failure to do so should be construed in line with the more narrow interpretation so as not to expand the reach of new legislation beyond what voters intended.

Dated: September 15, 2005

Respectfully submitted,

LEXINGTON LAW GROUP, LLP

By: 

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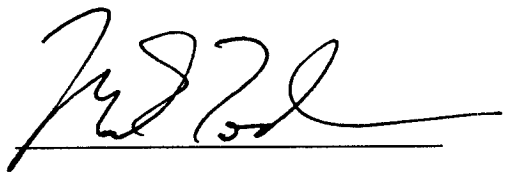

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PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 1627 Irving Street, San Francisco, California, 94122.

On September 15 2005 I caused the document entitled below to be served on the parties in this action listed below by placing true and correct copies thereof in sealed envelopes and causing them to be served, as stated:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 15, 2005.

Baine P. Kerr