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Reply to: Newport Beach Office

December 3, 2004

Presiding Justice and Associate Justices  
Court of Appeal, Fourth Appellate District, Division 3  
925 North Spurgeon Street  
Santa Ana, California 92701-3724

Re: *Consumer Advocates v. DaimlerChrysler Corp., et al*  
Case No. G029811

Dear Justices:

This *amicus* letter brief is submitted by a coalition of consumer groups, public interest groups and others, including Consumer Attorneys of California, California Nurses Association, the Gray Panthers, Congress of California Seniors, Consumers for Auto Reliability and Safety, California Advocates for Nursing Home Reform, Consumer Federation of California and the California Public Interest Research Group. An appendix at the end of this letter identifies and describes each group. These *amici* respectfully submit this *amicus* letter brief in response to this Court's order of November 9, 2004 to the parties requesting letter briefs on the issue of whether Proposition 64 can be applied to pending cases.

**STATEMENT OF INTEREST OF AMICI CURIAE**

Each of the *amici* identified in the appendix has been active in opposing certain legislative changes to Business & Professions Code sections 17200, et seq. for several years. Additionally, these organizations were part of a coalition of environmental, consumer, senior and other groups opposing Proposition 64 in the election. These organizations have an active and on-going interest in ensuring that Proposition 64 is applied appropriately so as to assure that the utility of the Unfair Competition Law ("the UCL") is not impaired. We believe that our legal perspective on the issue of whether Proposition 64 is retroactive may be of some assistance to this Court.

**WHY PROP. 64 SHOULD NOT BE APPLIED TO PENDING CASES**

The determination of whether a statute – whether passed by the Legislature or the voters – is to be given effect in pending cases is solely a determination based on statutory construction principles. Application of those principles in the interpretation and application of Proposition 64 inevitably results in the conclusion that because there is no express retroactivity provision, because there is no compelling basis for implying the

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existence of an intent to retroactively apply the law to pending cases – especially where the proponents had every opportunity to put in a retroactivity provision and did not - because Proposition 64 is a substantive change in the law and because Proposition 64 is not the repeal of a statutory remedy (indeed, the remedies remain wholly intact), Proposition 64 should not be applied to pending cases.

**A. The proponents of Prop. 64 - and thus the voters - did not intend that the initiative apply to pending cases.**

The intent of the voters in passing an initiative controls the issue of whether the provisions of an initiative apply prospectively or retroactively. (*Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 840-841.) More significantly, the intent of the drafters of the measure can properly be considered in determining the intended scope and application of an initiative.

In this case there are three extrinsic aids that demonstrate that the proponents of this initiative did not intend that it apply retroactively: The drafters' own representation to voters that the initiative is not retroactive; evidence that the drafters were perfectly aware of the retroactivity issue; and, the drafters' failure to include a retroactivity provision.

**1. The drafters did not include an express retroactivity provision - despite the fact that they were aware of what they themselves call the "cornerstone" principle that a new law is ordinarily only applied prospectively.**

In *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1192, the California Supreme Court noted that it would be *improper* for the court to read a retroactivity clause into the measure given the drafters' decision not to include a retroactivity provision. It cannot be disputed that Proposition 64 contains no express retroactivity provision. This is despite the fact that the proponents of Proposition 64 had complete control over its terms. It was not a negotiated bill in the Legislature. Indeed, such bills are commonly subject to compromise and, as such, do not normally include express retroactivity provisions. (See *Myers*, at 844-845.) But this initiative represented the proponents' wish list. Had the proponents – or the public – intended that Proposition 64 apply retroactively to pending cases, nothing would have been easier than to expressly provide that it should do so.

And there can be no surprise on the part of the proponents that the failure to include a retroactivity provisions would mean the change in the law would apply only to cases filed after its effective date. In fact, one of the two proponents of Proposition 64, the California Chamber of Commerce, knew perfectly well that "The Presumption Against Retroactivity is a Cornerstone of California Law" since that organization submitted an amicus brief in the *Myers* case arguing exactly that. (See Exh. 2, attached hereto, which is a true and correct copy of the cover page and Table of Contents for the *amicus* brief submitted by the California Chamber of Commerce to the California Supreme Court, as available from Westlaw KeyCite service.)

Since the proponents were well aware of this "cornerstone" principle of California law, since the proponents failed to include a retroactivity provision in Proposition 64 and since there is no other legal basis for its retroactive application, this Court should conclude that Proposition 64 does not apply to pending cases.

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2. **The proponents of the initiative affirmatively represented to at least one voter before the election - that the initiative would not be retroactive.**

More importantly, the proponents actually represented to at least one voter - and who knows how many others - that the initiative **would not be retroactive**. As reflected in the declaration<sup>1</sup> attached as Exhibit 1, a voter specifically inquired of the proponents - before the election - whether the initiative would be retroactive. The proponents replied that it would **not**.

"If passed, will the law be applied retroactively?"

"No, it will not."

Thus, the clear and unequivocal intent of the drafters - as expressed to the voting public - was that Proposition 64 was not intended to apply to pending cases. That this is relevant to the consideration of the issue is confirmed by the decision in *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 551. In that case, the court noted that:

Absent some basis for determining that the intent of the electorate was in conflict with the intent of the drafters, **evidence of drafters' intent is an appropriate tool in interpreting the scope of an initiative.** (Emphasis added.)

Accordingly, in addition to the usual statutory interpretation principles that apply to the analysis of this issue, the intent of the drafters - as communicated to the voters - compels the conclusion that the initiative was never intended to apply to pending cases.

B. **Repeal of a statutory right or remedy - after *Myers* - does not require an express savings clause.**

*Amici* anticipate that the defendant's primary argument in this case will be that under the *Mann* and *Younger* line of cases, the "repeal" of 17200's universal standing provision requires an express savings clause in order to avoid retroactive application. But reliance on these cases is no longer valid in light of the Supreme Court's decision in *Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828.

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<sup>1</sup> The general rule, of course, is that an appellate court will not consider additional evidence on appeal that was not submitted to the trial court. But Code of Civil Procedure section 909 permits an appellate court to consider any additional evidence of facts occurring prior to the issuance of the opinion "for any . . . purpose in the interests of justice." Obviously, this evidence did not exist at the time of the trial court proceedings, nor did the issue to be decided. In light of that, and given the extreme importance of this issue to this case and numerous others, *amici* hereby respectfully move that this Court consider this evidence in considering this issue.

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In an older line of cases exemplified by *Governing Board v. Mann* (1977) 18 Cal.3d 819 and *Younger v. Superior Court* (1978) 21 Cal.3d 102, the Supreme Court held that the repeal of a statutory right or remedy extinguished any pending claims predicated on that statutory right, absent the inclusion of an express savings clause in the repealing legislation. More recently, two appellate courts have applied this analysis in holding that the recent legislation amending the applicability of the anti-SLAPP statute (Code of Civil Procedure section 425.17) constituted a "repeal" of a portion of the anti-SLAPP statute and that, absent a savings clause, pending cases were subject to the new limitations. (*Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679; *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120.) The Supreme Court's decision in *Myers*, however, did not find that the "repeal" of a statutory right required an express savings clause in order to limit its application only to newly-filed claims.

In *Myers*, the Supreme Court addressed the effect of the repeal of the tobacco immunity statute. Effective January 1, 1988, the Legislature enacted a statute granting personal injury immunity to tobacco manufacturers (among others). (Code of Civil Procedure section 1714.45.) Thus, as of the effective date of that legislation, tobacco manufacturers had the right to assert the statute as an absolute and complete defense to personal injury product liability claims. In 1997, and effective January 1, 1998, the Legislature passed a bill expressly repealing that immunity. The question addressed by the *Myers* court was whether the repeal of the immunity statute applied retroactively, i.e., would claims arising during the immunity period still be subject to the immunity provided prior to repeal?

First, the *Myers* court stated the general rule that new legislation (or, here, a new initiative) is prospective unless there is an express or implied intent that it be retroactive. And, the court noted, a statute that is **ambiguous** about its application must be construed as prospective only. (*Myers*, at 841.)

But even more notable in *Myers* is the fact that the repeal statute the court was examining expressly provided that "[i]t is also the intention of the Legislature to clarify that such claims which **were or are brought** shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense." (*Myers*, at 842; emphasis added by *Myers* court.) Despite that language - language indicating that claims already brought during the immunity period were not to be subject to the statutory bar - the Supreme Court held that the repeal statute applied only prospectively and not to pending claims.

Despite the fact that the *Myers* court was examining the effect of the complete repeal of a statutory right (i.e., the right to assert immunity in product liability claims), the Court never held that an express savings clause was necessary under the *Mann/Younger* line of cases. If that doctrine did not apply in the context of the express repeal of a statutory right in *Myers*, there is no logical or legal basis for its application with respect to Proposition 64 - which repeals nothing.

And nothing in either *Brenton* or *Physicians Committee* changes that analysis. The anti-SLAPP statute considered in both of those cases was **purely procedural** and the new legislation had no substantive effect or impact at all. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347.) That, of course, is vastly different than the circumstance here. After Proposition 64 there are, in fact, cases that can now never be brought by a private attorney general and which will be unlikely to be brought by a law enforcement officer because of insufficient resources. For example, no individual can bring injunctive relief claims for dumping of toxic waste before injury occurs. Similarly, no private individual can bring an injunctive relief claim to stop the

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unlawful disclosure of private information before identity theft occurs. These represent the loss of substantive claims that do not fall within the procedural remedy rubric of the anti-SLAPP statute analysis.

And the fact that Proposition 64 has a substantive impact is conclusively demonstrated in this very case. Assume Proposition 64 applied retroactively and assume that the organizational plaintiff in this case cannot meet the standing requirements imposed by the statute, what would be the consequence? What would happen is that Proposition 64 would require the dismissal of the claims in this case. And since the statute of limitations has passed on the underlying UCL cause of action and the conduct upon which it is based, no one - not the Attorney General, not the District Attorney, no one - would be able to enforce the UCL against these defendants for that past conduct. That is as substantive an impact as it is possible to have because that application of the statute would relieve defendants of all liability for their wrongful conduct.

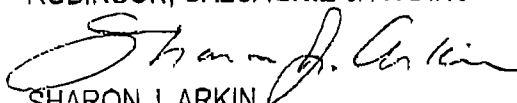
After *Myers* - a case dealing solely with the complete repeal of the tobacco industry's prior statutory immunity - there can no longer be a conceivable basis for permitting the retroactive application of Proposition 64 (which repealed nothing but, rather, added substantive conditions) to any case.

#### CONCLUSION

*Amici* urge this Court to reject the premise that Proposition 64 can be applied to pending case. Doing so will, in fact, conflict with the drafters' own intent, the voters' apparent intent and the rule of law as established in *Myers*.

Respectfully submitted,

ROBINSON, CALCAGNIE & ROBINSON

  
SHARON J. ARKIN  
Counsel for *Amici Curiae*

:sja

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### APPENDIX

The following are the descriptions of the *amici curiae*, in alphabetical order, on whose behalf this letter brief is submitted:

**California Advocates for Nursing Home Reform (CANHR)**, since 1983 has fought for the rights of long-term care residents in California. CANHR directs its resources toward a variety of issues including: developing consumer information and making it available to the public; aiding long-term care residents and their families in finding legal representation; seeking tougher sanctions against long-term care facilities that abuse or neglect residents. CANHR is a non-profit organization supported through donations and foundation grants.

**California Nurses Association (CNA)** was established in 1903 and is the largest and fastest growing professional association and union for Registered Nurses in the country. CNA is governed by a 30 member Board of Directors representing over 58,000 nurses in 165 facilities across California. CNA is a leader in ground-breaking patient advocacy legislation such as staffing ratios, whistle-blower protection and prohibitions on unsafe *mandated overtime* work.

**California Public Interest Research Group (CALPIRG)** has been in existence for over 30 years. CALPIRG is an advocate for the public interest. When consumers are cheated, or the voices of ordinary citizens are drowned out by special interest lobbyists, CALPIRG speaks up and takes action. CALPIRG seeks to uncover threats to public health using investigative research, grassroots organization, public advocacy and litigation. CALPIRG's mission is to deliver persistent, result-oriented public interest activism that encourages a fair, sustainable economy, and fosters responsive, democratic government.

**Congress of California Seniors** is a statewide organization that takes stands on important issues for middle and older persons and their families. Among the issues that the Congress of California Seniors supports are: the maintenance and strengthening of Medicare funding; a universal health care system; and the solvency of the Social Security system for seniors, disabled persons, and widowed spouses and children. Additionally the Congress of California Seniors works to keep seniors and others abreast of legislative proposals affecting our senior population.

**Consumer Attorneys of California (Consumer Attorneys)** - is a voluntary membership organization of approximately 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962 and its members predominately represent individuals subjected in a variety of ways to consumer fraud practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of consumers in both the courts and the Legislature.

**Consumer Federation of California (CFC)**, since 1962 has been committed to consumer advocacy and education. CFC is a non-profit federation of several dozen organizations, as well as, individual members. Member organizations include labor, consumer, senior citizen and community groups. CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit. Each year, CFC testifies before the California Legislature on bills that affect millions of California's consumers. CFC also appears before state agencies in support of consumer regulations.

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**Consumers for Auto Reliability and Safety (CARS)** is a national, award winning non-profit auto safety and consumer advocacy organization working to save lives, prevent injuries and protect consumers from auto-related fraud and abuse at car dealerships. On June 1, 2004, Ms. Rosemary Shahan, President of CARS, received the nationally recognized *Consumer Service Award* from the Consumer Federation of America for outstanding service in support of consumers' interests. Ms. Shahan initiated the California auto lemon law, now copied in over 30 states.

**Gray Panthers** is a local and national organization of persons dedicated to social change. The Gray Panthers welcome individuals of all ages who wish to work together on a wide variety of tough social problems. Gray Panthers brings about changes through testifying at hearings, conducting petition drives, and participation in local task forces.

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DECLARATION OF DANIEL C. SIGLER

I, Daniel C. Sigler, contacted the Committee to Stop Shakedown Lawsuits, the official campaign committee of the proponents of Proposition 64, by e-mail on September 24, 2004 to inquire about whether Proposition 64 would apply retroactively.

On September 24, 2004, the Committee responded by e-mail, replying that Proposition 64 would not apply retroactively. A true and correct copy of this e-mail correspondence is attached to this declaration.

This declaration is made based on first hand knowledge, under penalty of perjury and I would testify to the above stated facts if called upon to do so.

Executed on this 2<sup>nd</sup> day of December, 2004, at Orange, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
\_\_\_\_\_  
Daniel C. Sigler



T-629 P.004/004 F-169

DEC-02-04 12:56PM FROM-

**Dan Sigler**

From: info@stopshakedownlawsuits.com  
Sent: Friday, September 24, 2004 2:08 PM  
To: Dan Sigler  
Subject: Re: question

No, it will not. But it will keep small businesses from being victims of shakedown lawsuits in the future. Thank you for your question.

> From: "Dan Sigler" <dsigler@fbm.com>  
> Date: 2004/09/24 Fri PM 12:08:08 EDT  
> To: <info@stopshakedownlawsuits.com>  
> Subject: question

> If passed, will the law be applied retroactively?  
> Thank you,  
> Dan Sigler

> \*\*\*\*\*  
> \*\*\*\*\*

> This message is intended only for the use of the individual or entity to which it is directed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately by reply e-mail and delete the message and any attachments.

Case No. S095213

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

BETTY JEAN MYERS, )  
)  
Plaintiff and Petitioner, )  
)  
vs. )  
)  
PHILIP MORRIS, INC., et al., )  
)  
Defendants and Respondents. )  
)  
)

**SUPREME COURT  
FILED**  
NOV 7 - 2001  
**Frederick K. Onirish Gier**  
**DEPUTY**

ON REQUEST FOR ANSWER TO CERTIFIED QUESTION FILED BY  
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.  
(U.S. CT. OF APP NO. 99-17383)

**BRIEF OF AMICUS CURIAE  
CALIFORNIA CHAMBER OF COMMERCE IN  
SUPPORT OF RESPONDENTS**

FRED MAIN (SBN 95451)  
Senior Vice President and General Counsel  
CALIFORNIA CHAMBER OF  
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1215 K Street, 14th Fl.  
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(916) 444-6670

**Case No. S095213**

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

BETTY JEAN MYERS,	)
	)
Plaintiff and Petitioner,	)
	)
vs.	)
	)
PHILIP MORRIS, INC., et al.,	)
	)
Defendants and Respondents.	)
	)
	)

ON REQUEST FOR ANSWER TO CERTIFIED QUESTION FILED BY  
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.  
(U.S. CT. OF APP. NO. 99-17363)

---

**BRIEF OF AMICUS CURIAE  
CALIFORNIA CHAMBER OF COMMERCE IN  
SUPPORT OF RESPONDENTS**

---

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1 *Consumer Advocates v. DaimlerChrysler Corp., et al*  
Case No. G029811

2 PROOF OF SERVICE  
3 1013a (3) CCP Revised 5/1/88

4 STATE OF CALIFORNIA, COUNTY OF ORANGE ) ss.

5 I am employed in the County of Orange, State of California. I am over the age of 18  
and not a party to the within action; my business address is 620 Newport Center Drive,  
6 7th Floor, Newport Beach, CA 92660; (949) 720-1288.

7 On December 3, 2004, I served the within document described as Amicus Letter of  
CAOC on the interested parties in this action by placing true copies thereof, enclosed in  
sealed envelopes to be delivered, addressed as stated below:

8  By Hand: I caused the original and 4 copies to be delivered by hand to:  
9 Court of Appeal, Fourth Appellate District, Division 3  
925 North Spurgeon Street  
10 Santa Ana, CA 92701-3724

11  By Mail: I am "readily familiar" with the firm's practice of collection and processing  
correspondence for mailing. Under practice, it would be deposited with the  
12 U.S. Postal Service on that same day with postage thereon fully prepaid at  
Newport Beach, CA in the ordinary course of business. I am aware that on  
13 motion of the party served, service is presumed invalid if postal  
cancellation date or postage meter date is more than one day after date of  
14 deposit for mailing in affidavit.

15 one copy each to:	Douglas Dawson Guy Gates O'Doherty Gonter & Guy 15635 Alton Parkway, Suite 260 Irvine, CA 95618	Attorneys for Defendant-Appellants DaimlerChrysler Corporation and Chrysler Corporation.
17	Lisa Perrochet Horvitz & Levy 15760 Ventura Blvd., 18 <sup>th</sup> Floor Encino, CA 91436	
19	Matthew M. Proudfoot Gates O'Doherty Gonter & Guy 15635 Alton Parkway, Suite 260 Irvine, CA 92618	
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	Los Angeles County Attorney General 300 S. Spring Street Los Angeles, CA 90013	Attorney General
	Office of the District Attorney Writs & Appeals Attn. Brian Gurwitz 401 Civic Center Drive West Santa Ana, CA 92701	Attorneys for The People
	Orange County Superior Court 700 Civic Center Drive West Santa Ana, CA 92702	Trial Court (Case No. 785866)

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

Executed on December 3, 2004 at Newport Beach, California.



Capazin Thornton

*Consumer Advocates v. DaimlerChrysler Corp., et al*  
Case No. G029811

Proof of Service