G029811

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

CONSUMER ADVOCATES,

Plaintiff, Respondent, and Cross-Appellant,

v.

DAIMLER CHRYSLER CORPORATION,

Defendant, Appellant, and Cross-Respondent.

Appeal from the Superior Court of the State of California
For the County of Orange
Case No. 785866

The Honorable David C. Velasquez, Judge

UNFAIR COMPETITION CASE

AMICUS CURIAE BRIEF OF JACQ WILSON IN SUPPORT OF CONSUMER ADVOCATES REGARDING THE APPLICATION OF PROPOSITION 64

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INTRODUCTION

This brief is limited to the issue whether Proposition 64 applies to a case that a private plaintiff had successfully tried to judgment before the election. The voters' antipathy to the well-publicized abuses of the UCL by private attorneys is not to be doubted. Nor is their resolve to address those abuses through Proposition 64. However, it is extremely doubtful that the electorate intended to cast out meritorious judgments already won for the benefit of the General Public with the bath water of "shakedown" lawsuits.

There are several appeals from plaintiff's UCL judgments now before the appellate courts. These cases present a narrower issue than whether Proposition 64 applies to "all pending cases." Before the initiative passed, the private plaintiffs in these cases had already tried them. They had already proven that the defendants had violated the UCL to the satisfaction of the Superior Court judges who presided at the trials. The judgments awarded significant relief for the General Public. In each case, the adjudicated UCL violator appealed. Because of these *defense* appeals, these cases remained on appeal when the voters passed Proposition 64.

Proposition 64 does not clearly provide that it applies to cases that had already been tried to a plaintiff's judgment. There is no reliable evidence that the voters really intended the initiative to apply to these cases. The voters' single-minded purpose was stop "shakedown" lawsuits. Applying Proposition 64 to this case would corrupt the voters' purpose because this case is demonstrably not a "shakedown." This case has already been validated as meritorious by a plaintiff's judgment for the benefit of the General Public. The voters manifested no intention to allow defendants, proven to have violated the UCL, the windfall of an escape from the judgments against them.

The mechanical application of formal rules – such as the "repeal rule" and the "procedural amendment" rule – without consideration of actual voter intent threatens to corrupt that intent, and to carry Proposition 64 far beyond what the voters authorized. In a 1999 decision interpreting Proposition 213, the Supreme Court stated:

> Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken.

(*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 [46 Cal.Rptr.2d 884].)

This Court should read the words of Proposition 64 mindful of the world in which they were spoken. The voters aimed at stopping abuses of the UCL. They did not intend to invalidate its proven and legitimate application.

POINTS

1. Nothing in Proposition 64 Expressly or Impliedly Provides that It Applies to Cases Previously Tried to a Plaintiff's Judgment.

DaimlerChrysler is seeking a "retroactive application" of Proposition 64 to this case. This case had been filed, tried, and adjudicated before the initiative became law. DaimlerChrysler seeks to apply the later-enacted initiative retroactively to these previous "acts, transactions, and conditions which [were] performed or exist[ed] prior to the adoption of the statute." (*Myers v. Philip Morris Companies* (2002) 28 Cal.4th 828, 839 [123 Cal.Rptr.2d 40], quoting *Aetna Casualty & Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388, 391 [182 P.2d 159].)

The retroactive application of Proposition 64 to this case is an issue of statutory interpretation. *(Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206 [246 Cal.Rptr. 629].) In particular, the *scope* of retroactive effect requires the Court to interpret the initiative. In *Evangelatos*, the Court identified the scope of retroactive effect as a distinct issue, namely "whether the new rule should apply to cases in which a complaint had not yet been filed, to cases which had not yet come to trial, to cases in which a trial court judgment had not yet been entered, or to cases which were not yet final on appeal." (44 Cal.3d at 1217.)

The language of Proposition 64 does not expressly state that the initiative applies to UCL cases previously tried to a plaintiff's judgment. As Consumer Advocates observes, there is no express retroactivity provision.

There is nothing in the law that necessarily implies that the initiative so applies. It is true that sections 17203 and 17204 refer to "pursuit" and "prosecution" of UCL actions. However, these sections do not provide that the Proposition 64 applies to a case that had been tried to a plaintiff's judgment before the election. The context of these sections is pursuit in "a court of competent jurisdiction" – that is, in the Superior Courts. These statutes do not necessarily apply where the plaintiff had already completed its "pursuit" and "prosecution" in the Superior Court before Proposition 64 was passed.

The pendency of appellate proceedings *initiated by a defendant* does not detract from this conclusion. The judgment of the Superior Court is presumed to be correct; the defendant/appellant has the burden of affirmatively showing error. (*Denham v. Superior Court* (1970) 2 Cal.32d 557, 564 [806 Cal.Rptr. 65].) "Pursuit" and "prosecution" as used in

sections 17203 and 17204 do not clearly and unambiguously relate to a prevailing plaintiff's *response* to an unsuccessful defendant's brief in an appellate court.

For these reasons, the language of Proposition 64 discloses no express or necessarily implied intent on the part of the voters to apply the amendments to cases previously tried to a plaintiff's judgment. Therefore, the courts must interpret the initiative to determine whether the voters really intended the initiative to apply to these cases.

2. The Voters Intended Proposition 64 to Stop "Shakedown" Lawsuits, Not to Require the Reversal of Cases Already Validated as Meritorious by Superior Court Judgments.

a. The Supreme Court Has Consistently Required Reliable Evidence of Voter Intent to Guide the Interpretation of Initiative Legislation.

The passage of Proposition 13 in the June 1978 election heralded a new political era in California. Also known as "Jarvis-Gann," Proposition 13 rolled back and limited increases in real property tax assessments. Although the electorate's right of statutory initiative had been of 70 years standing, the "taxpayers' revolt" was the first ballot proposition to tap the full potential of television and direct mail in a mass appeal to the average voter. The groundswell of popular resolve that carried Proposition 13 altered the political landscape in California, and direct democracy emerged as a formidable tool for modern legislative change.

In the 1980s, the voters passed sweeping initiatives, including Proposition 8 (the "Victim's Bill of Rights," a wholesale reform of the rules of evidence and procedure in criminal trials), Proposition 51 (abolishing the

joint and several liability rule as to non-economic damages), and Proposition 103 (rolling back auto insurance premiums and subjecting many insurance premiums to comprehensive regulation). Major initiatives of the 1990s included term limits (Proposition 140) and an initiative targeted at ending affirmative action programs (Proposition 209).

The ascendance of direct democracy over the past 25 years has presented the Supreme Court with the challenge of interpreting and applying broadly-worded ballot measures. While legislators engage in a deliberative process, in which bills can be drafted, negotiated, debated, and modified before a vote is taken, this confrontational dimension is entirely absent from the initiative process. The proponents of initiatives have unfettered control over the text of their measures, which face only a yes-or-no decision from millions of voters based largely on advertising and the voter pamphlet.

Thus, the Supreme Court has had to glean legislative intent from an electoral process whose "legislative history" is at best cursory and at worst cryptic. The Court has consistently taken a cautious approach to interpreting initiatives in the post Jarvis-Gann era. The Court has guarded actual voter intent against partisan attempts to put words in the voters' mouths. The Court has required *reliable* evidence of actual voter intent that the initiative means what the ballot proponents say it means.

Lance W.

In *In re Lance W.* (1985) 37 Cal.3d 863 [210 Cal.Rptr. 631], the Court interpreted the provision of Proposition 8 that "relevant evidence shall not be excluded in any criminal proceeding." The Court found this language to be plain and unambiguous, and "could find no uncertainty with

regard to its application to unlawfully seized evidence." (*Id.* at 885-87.)

Nevertheless, the Court observed that "the intent of the enacting body is the paramount consideration." (*Id.* at 889.) The Court proceeded to examine the ballot summary and arguments on Proposition 8 in the voter pamphlet. The Court concluded that these ballot materials confirmed the voters' intent to override the exclusionary rule as a remedy for violations of constitutional rights against search and seizure. (*Id.* at 888-89.)

Evangelatos

The Court eliminated any doubt about the primacy of voter intent in its landmark opinion in *Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at 1188. Reliable determination of voter intent was the touchstone of the opinion.

The Court began by observing that the retroactive application of a statute is a "policy question for the legislative body which enacts the statute," and therefore a matter of statutory interpretation. (*Id.* at 1206.)

The principal argument advanced by the retroactivity proponents was based on the measure's Findings and Declaration of Purpose and the ballot arguments. (*Id.* at 1209-10.) They pointed to the finding in the initiative that the joint and several liability rule had resulted in "a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and resulted in higher prices for goods and services to the public and higher taxes to taxpayers." (*Id.* at 1212; Civil Code § 1431.1(a).)

While this statement of intent arguably supported application of the initiative to pending cases, the Court found it inconclusive as evidence of voter intent: "the fact that the electorate chose to adopt a new remedial

rule does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law." (*Id.* at 1214, emphasis added.)

The presence of these reasonable expectations and reliance by litigants negated voter intent to apply Proposition 51 to pending cases:

> A review of these consequences does indicate, however, that 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.*

(*Id.* at 1217, emphasis added.)

Because retroactive application of a statute often entails unanticipated consequences for pending cases, "the courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears." (*Id.* at 1218.)

In sum, *entirely apart from the retroactivity standard applied by the Court,*[1] the Court closely scrutinized the proponents' evidence of voter intent and found it to be equivocal at best. The Court concluded that it had "no *reliable* basis for determining how the electorate would have chosen to resolve ... the broad threshold issue of whether the measure should be

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1 Wilson agrees with the retroactivity analysis stated in Consumer Advocates' supplemental brief, including the application of the *Evangelatos* retroactivity standard.

applied prospectively or retroactively ...." (*Id.* at 1217, emphasis added.)

Hodges

The Court's insistence on reliable evidence of actual voter intent continued in a pair of decisions decided a week apart in August 1999, interpreting Proposition 213. The voters passed this measure in 1996, adding Civil Code section 3333.4. This statute prohibited uninsured motorists and drunk drivers from collecting non-economic damages in auto accident cases.

In *Hodges v. Superior Court* (1999) 21 Cal.4th 109 [46 Cal.Rptr.2d 884], the Court considered whether section 3333.4 applied to a product liability action by an uninsured driver against a car manufacturer. The statute applies to "any action to recover damages arising out of the operation or use of a motor vehicle," which could be read as including a products liability case as well as a lawsuit between motorists.

The Court rejected literal interpretation of the statute: "[t]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, *in the legal and broader culture*. Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken." (*Id.* at 114, quoting *Kopp v. Fair Political Practices Commission* (1995) 11 Cal. 4th 607, 673 [47 Cal. Rptr. 2d 108, 905 P.2d 1248] (conc. opn. of Mosk J.), italics in original.)

The Court went on to emphasize the primacy of actual voter intent: "In the case of a voters' initiative statute, too, we may not properly interpret the measure in a way that the electorate did not contemplate: the voters

should get what they enacted, not more and not less." (*Id.*)

The Court then considered the summary and ballot arguments that appeared in the voter pamphlet as evidence of the voter intent. The Court concluded that voter intent was limited to "remedying an imbalance in the justice system that resulted in unfairness when an accident occurred *between two motorists*--one insured and the other not. There is no suggestion that it was intended to apply in the case of a vehicle design defect." (*Id.* at 116, emphasis in original).)

The car manufacturer argued that a purpose of the initiative was also punishing and deterring drivers who do not obey the financial responsibility laws. The Court rejected this argument, stating that "neither the statutory language nor the ballot materials reflect an intent to reform a system 'unfair' to law-abiding insured motorists by providing a windfall to manufacturers of defective vehicles." *(Id.* at 118.)

Horwich

A week after *Hodges*, the Court decided *Horwich v. Superior Court* (1999) 21 Cal.4th 272 [87 Cal.Rptr.2d 222]. In *Horwich*, the Court considered whether section 3333.4 applied to a wrongful death action by the parents of an uninsured driver against the other driver.

As in *Hodges*, the starting point of the Court's analysis was that "[t]he fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*Id.* at 276.) After observing that the language of section 3333.4 was subject to differing interpretations, the Court "sought enlightenment" in the "legislative history" of Proposition 213 -- the ballot materials. (*Id.* at 277.)

The Court concluded that these arguments evinced a "single-minded concern with the unlawful conduct of uninsured motorists who, at the expense of law-abiding citizens, could recover for noneconomic losses while flouting the financial responsibility laws." (*Id.* at 277.) In light of this single-minded focus of the initiative, section 3333.4 could not be applied to survivors of an insured motorist, who were not even mentioned in the ballot materials:

> We must therefore construe it in accordance with both the letter and spirit of the enactment. Since the initiative also contains no mention of heirs or those who might sue for loss of the care, comfort, and society of their uninsured decedents, we are not at liberty to apply the prohibition against such plaintiffs. (Cf. *Hodges v. Superior Court*, *supra*, 21 Cal. 4th at p. 116 ["no suggestion" Proposition 213 was intended to apply in case alleging vehicle design defect].)

(*Id.* at 280.)

The Court went on to address the defendant's argument that a purpose of the initiative was to reduce litigation costs. The ballot pamphlet stated that the measure would eliminate "big money awards that . . . *uninsured motorists and their attorneys go after when these lawbreakers are in an accident with an insured driver.*" (*Id.* at 281, emphasis in original.) The Court rejected this argument, stating that the initiative did not target wrongful death plaintiffs because they "do not contribute to this perceived unfairness, nor are they in a position to rectify it." (*Id.* at 282.) As the Court finally put it: "They are not part of the problem. Thus, we cannot deem them part of the solution."

b. There is No Reliable Evidence that the Voters Intended Proposition 64 to Require Dismissal of Cases that are Demonstrably Not "Shakedown" Lawsuits" -- Those that Had Been Validated by Superior Court Judgments for the Benefit of the General Public.

Applying the principles of these cases to this case, Proposition 64 does not apply to UCL cases that had already been tried to plaintiff's judgments before the November 2004 election.

The voters did not intend Proposition 64 to undermine legitimate enforcement of the UCL. The Findings and Declaration of Purpose expressly reaffirm the importance of the UCL for the protection of California consumers and businesses. (Proposition 64, § 1(a).)

Rather, the ballot argument in favor of the measure is clear that the voters' overarching purpose was to prevent the filing of "frivolous" or "shakedown" lawsuits. A "shakedown" lawsuit is undefined, but appears to be one purportedly brought on behalf of the general public "demanding thousands of dollars from small businesses that can't afford to fight in court." The argument appealed bluntly and forcefully to the voters' antipathy to "shakedown" lawsuits, promising to "stop" them.

The proven voter intent to continue legitimate UCL enforcement and to stop "shakedown" lawsuits *negates* any intent to apply the initiative to cases previously validated by a Superior Court judgment. There is no "reliable evidence," as *Evangelatos* requires, to support a finding of voter intent to apply the initiative to this case and require reversal of the judgment.

Application of Proposition 64 to this case would be a startling -- if not altogether absurd -- consequence of a ballot proposition that reaffirmed the integrity of the UCL. Because retroactive application of a statute often

entails unanticipated consequences for pending cases, "the courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears." (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at 1218.)

As the Court put the same point in *Hodges*, the courts "may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court*, *supra*, 21 Cal.4th at 114.) The statutory language of section 3333.4, applying to "any action to recover damages arising out of the operation or use of a motor vehicle" was straightforward in comparison with the language of Proposition 64. Nevertheless, the Court held that the voters did not intend a literal application of this language: "There is no suggestion that it was intended to apply in the case of a vehicle design defect." (*Id.* at 116.)

In *Horwich*, the voters' "single-minded concern" was the uninsured motorists who flouted the financial responsibility law. "[T]he initiative ... contains no mention of heirs or those who might sue for loss of the care, comfort, and society of their uninsured decedents, we are not at liberty to apply the prohibition against such plaintiffs." (*Horwich v. Superior Court*, *supra*, 21 Cal.4th at 280.) The heirs of the uninsured motorists were not responsible for "big money awards that . . . uninsured motorists and their attorneys go after."

Likewise, here, the single-minded intent of the voters was to stop "shakedown" lawsuits. There is no suggestion that the voters intended Proposition 64 to apply to cases previously validated by a plaintiff's judgment. And there is nothing to support an intent to provide a windfall to proven UCL violators by relieving them from the judgments against them

for the benefit of the General Public.

The plaintiffs and their attorneys in cases litigated to plaintiff's judgments are not responsible for the "shakedown" lawsuits. "They are not part of the problem. Thus, we cannot deem them part of the solution." (*Id.* at 282.)

3. The Repeal Rule, to the Extent Applicable, May Be Overcome by Proof of Contrary Voter Intent.

A question remains how the "repeal rule" of *Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819,829 [135 Cal.Rptr. 526], relates to the Supreme Court cases requiring determination of actual voter intent. Proponents of applying the repeal rule to Proposition 64 seem to contend that the rule can be mechanically applied without any analysis of actual voter intent.

This is incorrect. If mechanical application of the repeal rule were all that were required, the repeal rule would assuredly run afoul of the Supreme Court's modern ballot initiative decisions discussed above. It seems unlikely that the Supreme Court's 20-year insistence on proof of actual voter intent would evaporate when confronted by a rule traced to a 1930 case. (*Callet v. Alioto* (1930) 210 Cal. 65, 67-68 [290 P. 438].)

The repeal rule can be reconciled with *Evangelatos* and its progeny. The repeal rule is a canon of construction, not the inflexible rule of law that the retroactivity proponents suggest. Accordingly, it provides only a *presumption* of legislative intent that can be overcome by proof of actual legislative history – in this case, by the voter pamphlet.

The distinction between an interpretational canon and a rule of

substantive law is clear. A "canon of construction" is a "rule used in construing legal instruments, esp. contracts and statutes. Although a few states have codified the canons of construction ... most jurisdictions treat the canons as mere customs not having the force of law." (*Black's Law Dictionary* (7th Ed. 1999).) By contrast, a "rule of law" is a "substantive legal principle." (*Id.*)

In *Mann*, the Supreme Court treated the repeal rule as a canon of construction. The Court emphasized that the repeal rule is a "general common law rule" that has been applied in various contexts. (*Governing Board of Rialto Unified School District v. Mann, supra,* 18 Cal.3d at 829.) No statute compelled the application of the rule; it was (and is) a judicially fashioned rule. In that case, the school district provided no legislative history to rebut the operation of the repeal rule.

The purely presumptive character of the repeal rule is even clearer in *Younger v. Superior Court* (1978) 21 Cal.3d 102 [145 Cal.Rptr. 674]. The Supreme Court expressly considered the potential for proof of contrary legislative intent: "The only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal illustrated by such cases as Mann. But no such intent appears ...." (*Id.* at 110.) Thus, if contrary legislative history had been proven in *Mann* and *Younger*, the rule would not have been applied.

After deciding *Younger*, the Court cautioned against the "magical incantation" of canons of construction:

> Nevertheless, *expressio unius est exclusio alterius* is no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions, some of which are referred to in the margin. More in point here,

> however, is the principle that such rules shall always "be subordinated to the primary rule that the intent shall prevail over the letter."

(Estate of Banerjee v. Cory (1978) 21 Cal. 3d 527, 539 [147 Cal. Rptr. 157], citations omitted.)

Likewise, in *People v. Jones* (1988) 46 Cal. 3d 585 [250 Cal. Rptr. 63], the Court used emphatic language, stating that a canon of construction is not a legal "straitjacket." Rejecting mechanical application of the canon that ambiguous criminal statutes are to be construed in favor of the accused, the Court observed:

> [A] rule of construction . . . is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent.

(*Id.* at 599, quotation marks omitted; *see also In re Lance W., supra,* 37 Cal.3d at 889 ("This rule of construction is applicable, however, only in the absence of a contrary legislative or popular intent").)

Therefore, even if the repeal rule applies to create a presumption here, there is contrary evidence that the voters did not intend Proposition 64 to apply to cases previously pursued to plaintiff's judgments. This contrary evidence dispels any presumption that the *Mann-Younger* line of cases might raise.

4. The "Procedural Amendment" Rule Does Not Countenance the Retroactive Application of Procedural Amendments to Cases that Had Previously Been Tried.

Likewise, the Supreme Court's voter intent cases call into serious question any proposed mechanistic application of the "procedural amendment" doctrine. Although this rule may allow newly-enacted procedures to be applied in some pending cases, the intention of the voters remains controlling.

Moreover, the "procedural amendment" rule does not allow a procedural change to be applied retroactively to a case that has already been tried to judgment. The rule simply allows purely procedural changes to be applied *prospectively* to cases yet to be tried as of the date of the new enactment.

In *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388 [182 P.2d 159], the California Supreme Court explained the rule:

> In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and *if the trial postdates the enactment*, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. *In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective.*

(*Id.* at 394, emphasis added; seel also *Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 815-816 [230 Cal.Rptr. 810].)

In *Tapia v. Superior Court* (1991) 53 Cal.3d 282 [279 Cal.Rptr. 592], the Supreme Court considered the application of provisions of Proposition 115 to a criminal trial that postdated its enactment. The defendant argued that by applying the initiative's provision limiting the conduct of voir dire to the court, the Superior Court had applied the provision retroactively. The Supreme Court emphasized that the new voir dire rules would only be applied prospectively to future trials:

> Tapia's proposed test [of retroactivity] is not appropriate for laws which address the conduct of trials *which have yet to take place*, rather than criminal behavior that has already taken place. Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future."

(*Id.* at 288, emphasis added.)

The proponents of the procedural amendment argument point to the anti-SLAPP cases in which Code of Civil Procedure section 425.17 was applied to cases on appeal, even though the amendment had been enacted after the trial court proceedings.[2] Significantly, there had not been a trial in any of those cases. All were all appeals from trial court rulings on special

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Brenton v. Metabolife International, Inc. (2004) 116, Cal.App.4th 679 [10 Cal.Rptr.2d 702]; *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120 [13 Cal.Rptr.3d 926]; *Metcalf v. U-Haul International, Inc.* (2004) 118 Cal.App.4th 1261 [13 Cal. Rptr. 3d 686].

motions to strike brought by defendants at the outset of the case and before any trials had occurred.

The anti-SLAPP cases are distinctive because the anti-SLAPP procedure is a threshold determination, and not a procedure that "addresses the conduct of trials." All of the cases were in their procedural infancies. If the appellate courts had applied the old law, the plaintiffs would still have been able to file new suits and argue the application of the new law. To avoid this waste of time and judicial resources, the courts applied the new law, under which the Legislature had clearly allowed the plaintiffs' cases to proceed.

Likewise, *Beckman v. Thompson* (1992) 4 Cal.App.4th 481 [6 Cal.Rptr.2d 60] involved a threshold motion to dismiss based on *forum non conveniens*, not a trial on the merits. During the appeal, the amendment to Code of Civil Procedure section 410.30(a) expired under its sunset provision. The Court held that the amendment had expired and applied the common law to the case. Like the anti-SLAPP cases, there was no purpose to be served in dismissing the case on this threshold ground, only for the plaintiff to file a new one, unburdened by the expired amendment, and therefore allowed to proceed.

Therefore, assuming that Proposition 64 is purely procedural as DaimlerChrysler claims, the procedural amendment doctrine cannot validate the retroactive application of the initiative to this case. The application of any new procedures to a previous trial is unwarranted and contrary to *Aetna* and *Tapia*. Unlike the anti-SLAPP cases and *Beckman*, Proposition 64 does not address a threshold procedural issue in this case. This case was fully tried to judgment long before the election.

CONCLUSION

For these reasons, Proposition 64 does not apply to UCL cases that had been successfully pursued to a plaintiff's judgments before Proposition 64 was passed.

CERTIFICATE OF WORD COUNT

Rule of Court 14(c)(1)

The text of this brief consists of 4,769 words, as counted by the WordPerfect 9.0 word processing program used to generate this brief.

DATED: December 14, 2004

Arthur D. Levy

PROOF OF SERVICE

I, Cheryl F. Pritchard, state:

I am a citizen of the United States. My business address is 639 Front Street, Fourth Floor, San Francisco, CA 94111. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing documents described as:

***AMICUS CURIAE* BRIEF OF JACQ WILSON IN SUPPORT OF CONSUMER ADVOCATES REGARDING THE APPLICATION OF PROPOSITION 64**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 14, 2004 at San Francisco, California.

Cheryl F. Pritchard

Cheryl F. Pritchard