A103046 c/w A103742

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ROBERT KRUMME, on behalf of the General Public,

Plaintiff and Respondent,

v.

MERCURY INSURANCE COMPANY,
MERCURY CASUALTY COMPANY, and
CALIFORNIA AUTOMOBILE INSURANCE COMPANY,

Defendants and Appellants.

Appeal from the Superior Court of the County of San Francisco

Hon. Robert L. Dondero, Judge

Case No. 313367

UNFAIR COMPETITION CASE

ANSWER TO PETITION FOR REHEARING

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INTRODUCTION

The Court should exercise its discretion to deny rehearing for the following reasons:

- The Court applied the law in effect at the time of its October 29 decision, affirming the Superior Court's injunctions and attorney's fee order in full. Proposition 64 did not become effective until the day after the election, November 3, 2004. Mercury cites no case requiring the Court to grant rehearing based on legislation that was enacted and first became effective after the decision was rendered. The Court should exercise its discretion to deny rehearing in the public interest.

- Proposition 64 and the voter pamphlet contain no provision or clear statement of intention that the initiative be applied retroactively to this case. The voters' single-minded concern was to stop "shakedown" lawsuits. Their intention was never to enable a proven violator of the UCL to escape Superior Court injunctions against it, rendered 18 months and affirmed on appeal before the election. The proponents of the initiative never informed the voters of this absurd consequence, and the voters never intended it. Voter intention to address abuses of the UCL should not be highjacked as a defense to its proven legitimate application.

- Mercury's challenges to the Court's opinion are without merit.

ARGUMENT

1. The Court Should Exercise Its Discretion to Deny Rehearing in the Public Interest.

Rehearing rests in the discretion of this Court. Ordinarily, rehearing will not be granted to consider arguments made for the first time in a petition for rehearing. *(Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 12 n. 11 [115 Cal.Rptr.2d 455].) The Court has discretion whether to grant a rehearing to consider a change in the law that occurs after the Court issued its opinion. (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 121 [277 Cal.Rptr. 730].)

This Court correctly decided the appeal based on the UCL as it existed at the time the opinion was issued, on October 29, 2004. Even if Proposition 64 applied to this case – which Krumme contests for reasons discussed below -- the Court correctly applied the law in force at the time of its decision. That is all that was required. (*Southern Service Co. Ltd. v. Los Angeles* (1940) 15 Cal. 2d 1, 11-12 [97 P.2d 963] ("The reviewing court must dispose of the case under the law in force when its decision is rendered").)

Mercury cites *County of San Bernardino v. Ranger Insurance Company* (1995) 34 Cal.App.4th 1140 [41 Cal.Rptr.2d 57] as authority for the Court to grant rehearing to consider a change in the law. However, in that case the change in the law occurred before the initial decision was rendered, not, as here, after the appellate court had fully decided the case. The Court exercised discretion to grant a rehearing primarily because the county counsel had not appeared to respond to the appeal. Further, nothing in *Ranger* suggests that the Court was *required* to grant rehearing.

This Court should deny rehearing in the interests of justice and the

public interest. The Court should not vacate the submission of this case and withdraw its opinion to address Proposition 64 issues. As noted, the Court was under no compulsion to apply the initiative on October 29. Granting rehearing would enable Mercury to make a contention that it cannot now make, namely that this Court will *become* obligated to apply Proposition 64 because the Court's decision on rehearing will necessarily issue *after* Proposition 64 came into effect.

As noted, this Court has discretion to vacate the submission or not. There are compelling reasons for this Court to refrain from reopening the appeal, and Krumme strongly urges the Court not to do so.

First, the record before this Court does not present the initiative's application to the large number of UCL cases still pending in the Superior Courts. This case is *sui generis* because it was no longer "pending" in any meaningful sense of the word when the initiative was passed. It had been fully tried and affirmed on appeal before the initiative ever became effective. It stands in marked contrast to other UCL cases where the question of Proposition 64 retroactivity is more appropriately tested to provide guidance to the Superior Courts.

The application of Proposition 64 to cases pending in the Superior Courts will undoubtedly command significant attention from the Courts of Appeal and, most likely, from the Supreme Court. There is no reason to address this issue in the present unique circumstances, where the Court of Appeal had already affirmed the judgment before the election.

Additionally, there are compelling reasons to allow the opinion of October 29 to stand. The Superior Court, the Insurance Commissioner, and this Court have all validated this case as valuable public interest case. This is demonstrably not a "shakedown" lawsuit.

Eighteen months before the election, the Superior Court enjoined Mercury, the State's seventh largest automobile insurance group writing $1.3 billion in premiums in this state annually, to declare 800 unappointed producers publicly as its agents under Insurance Code section 1704(a). (J.A. 1629, 1630 (Finding of Fact Nos. 6, 14).) This will disable the practice of many producers to add on millions of dollars each year in broker fees that circumvent the Broker Fee Regulations and premium regulation under Proposition 103.

The Superior Court specifically ruled that this injunction involved enforcement of an important right affecting public interest and conferred a significant benefit on the General Public. (J.A. 1802 (¶ 1); R.T. 7:15-21 (transcript of June 20, 2003).)

The Insurance Commissioner filed an *amicus curiae* brief in support of the injunctions. In his application to file the brief, the Commissioner underscored the "significant ramifications" of the case:

> The distinction between insurance agents and brokers at the heart of the *Krumme* case reverberates through many aspects of insurance law and insurance regulation. Most notably, whether an insurance "producer" (a term of art that includes both agents and brokers) is deemed an agent or a broker substantially impacts how much a consumer pays for insurance. It also determines whether an insurer is liable for errors, omissions or malfeasance of a producer, which in turn often dictates whether coverage exists for a claim and the nature of that coverage.... [¶] Because of these significant ramifications of *Krumme*, the Department has closely monitored this case since its inception.

(Insurance Commissioner's Application for Leave to File *Amicus Curiae* Brief at pp. 1-2.)

With a single minor exception, the Insurance Commissioner "concurs with the Superior Court's conclusions of law, and believes the Superior Court correctly applied its findings of fact to that law." *(Amicus Curiae* Brief of Insurance Commissioner at p. 29.)

Finally, after searching review, this Court unanimously affirmed the injunction and the attorney's fee order.

This Court's opinion crowns a four and half year investment of time, energy, and money in bringing Mercury to justice. The sole beneficiary of the injunction is the public. Robert Krumme obtained no benefit. Proposition 64 did not repeal the UCL; indeed, it reaffirmed its critical role in the protection of California consumers and businesses against unlawful practices, such as pervasive violations of Insurance Code section 1704(a). Mercury would pervert the voters' intention to stop "shakedown" lawsuits to escape liability for its violations and deprive the public of the benefits of an action of proven substance and merit.

Further, justice delayed is justice denied. Although the Superior Court issued its tentative decision two years ago and its appointment injunction 18 months ago, Mercury has yet to file a single agency appointment for a *de facto* agent. Filing this appeal stayed the injunction. Today, California consumers continue to pay millions of dollars in illegal broker fees to Mercury *de facto* agents, despite the adjudications of the Superior Court and this Court, with the concurrence of the State's insurance regulator, that these payment are illegal under the Insurance Code and the UCL.

Primarily to stanch the flow of illegal millions out of the pockets of

consumers, Krumme opposed lengthy delays in the briefing of this case and asked the Court to expedite its decision. For the Court to grant rehearing to consider the application of a voter initiative aimed at "shakedown" lawsuits after affirming the judgment would allow Mercury yet another reprieve, and delay even further Mercury's day of reckoning with the agent appointment law. Mercury should seek its hearing from the Supreme Court as soon as possible, and Krumme is hopeful that that Court will act expeditiously in the public interest by denying review.

There is simply no legal requirement that this fully adjudicated UCL violator be granted a rehearing. The public interest manifestly requires that it be denied.

2. Proposition 64 Does Not Apply Retroactively Because It Contains No Express Retroactivity Provision, Nor Is Voter Intent for Retroactive Application "Clear and Unavoidable."

Mercury attempts to raise the issue whether Proposition 64 applies retroactively to avoid judgments that purely representative plaintiffs (like Krumme) successfully obtained against UCL violators before November 3, 2004. For the following reasons, the initiative has no retroactive application to these cases. Proposition 64 is silent as to its retroactive effect, and the voters revealed no intention that it would apply retroactively so that defendants already found to have violated the UCL could escape liability to the public.

a. The *Evangelatos* Rule: Voter Intention to Apply a Ballot Initiative Retroactively Must Be Expressly Stated, or At Least "Clear and Unavoidable" from the Measure Itself or from the Voter Pamphlet.

Proposition 64 is an initiative statute enacted by the voters under Article II, Section 8 of the California Constitution. The same rules of statutory construction apply to ballot initiatives as to enactments by the Legislature. *(Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212 [246 Cal.Rptr. 629]; *see also Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222] (applying traditional rules of statutory construction to Proposition 213).)

The retroactive application of an initiative statute presents an issue of statutory construction. (*Evangelatos v. Superior Court*, supra, 44 Cal.3d at 1206; *Rosasco v. Commission on Judicial Performance* (2000) 82 Cal.App.4th 315, 318 [98 Cal.Rptr.2d 111].)

A retroactive law "is one which affects rights, obligations, acts, transactions, and conditions which are performed or exist 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]; *McClung v. Employment Development Department* (Cal. November 4, 2004) 2004 Cal. LEXIS 10527 at *6 ("A statute has retrospective effect when it substantially changes the legal consequence of past events").)

There can be no doubt that Mercury is seeking to apply Proposition 64 retroactively to this case. This case had been filed, tried, adjudicated, and affirmed before the initiative became law. Mercury now seeks to apply the later-enacted initiative to these previous "acts, transactions, and

conditions which [were] performed or exist[ed] prior to the adoption of the statute," and to "change the legal consequence of these past events." In sum, Mercury seeks to change the rules of the game after it was over.

The striking feature of Proposition 64 is that the drafters decided to omit any terms expressly applying it to pending cases. The proponents of the initiative could easily have included a simple sentence informing the voters of the measure's effect on pending litigation. That they did not see fit to tell the voters is revealing because it stands in marked contrast to previous tort reform initiatives that directly addressed retroactive application.

Eight years ago, the voters passed Proposition 213, adding Civil Code section 3333.4. This initiative prohibited uninsured motorists and drunk drivers from collecting non-economic damages in certain auto accident cases. The initiative stated:

> This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997.

(See *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979 [68 Cal.Rptr.2d 553] (holding, based mainly on this language, that Proposition 213 did apply to a case that had not been tried as of the time of its enactment).)

The inclusion of retroactivity terms in Proposition 213 was an evident response to the 1988 holding of the Supreme Court in *Evangelatos* that Proposition 51 was not retroactive. *Evangelatos* held that the 1986 initiative, which abrogated the joint and several liability rule as to non-economic damages, did not apply retroactively to causes of action that accrued before its effective date.

In *Evangelatos*, the Supreme Court sent proponents of all future ballot initiatives a clear message:

> These numerous precedents demonstrate that California continues to adhere to the time-honored principle codified by the Legislature in Civil Code section 3 and similar provisions, that *in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.*

(*Id.* at 1209, emphasis added.)

Quoting from an opinion of Chief Justice Rehnquist of the United States Supreme Court, *Evangelatos* stated that a statute will not be given retroactive application unless that is *"the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."* (*Id.* at 1207, emphasis in original; quoting from *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79-80 [103 S.Ct. 407, 74 L.Ed.2d 235].)

The Court concluded that "it appears rather clear that the drafters of Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that the statute would not be applied retroactively." (*Id.* at 1211.) There was no basis in the Legislative Analyst's analysis of Proposition 51 or in arguments included in the voter pamphlet that spoke to the retroactivity question; "thus, there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to retroactivity at all." (*Id.* at 1212, see also *id.* at 1221.)

This presumption against retroactive application of statutes has recently been reaffirmed. Two years before the 2004 election, the Supreme Court reaffirmed the *Evangelatos* principles in *Myers v. Philip Morris*

Companies, supra, 28 Cal.4th at 840-45. The Court held that the abolition of tobacco companies' immunity from suit was not retroactive because there was "no express language of retroactivity" or sources "providing a clear and unavoidable implication that the Legislature intended retroactive application." (*Id.* at 884.)

Right after the 2004 election, the Supreme Court again applied the *Evangelatos* test in *McClung v. Employment Development Department*. The Court held that an amendment of Fair Employment and Housing Act extending liability for harassment of non-supervisory coworkers was not retroactive, finding "nothing to overcome the strong presumption against retroactivity." *(McClung, supra,* at *14-16.)

b. Under the Controlling *Evangelatos* Test, Proposition 64 Cannot Be Retroactively Applied.

Evangelatos, Myers, and *McClung* are controlling here. Applying these cases, there is no basis for retroactive application of Proposition 64 to this case. There is neither an express retroactivity provision nor any "clear and unavoidable implication" of intention to apply the measure retroactively to cases that had already been fully litigated in the trial courts before the election.

Proposition 64 contains no language expressly applying the measure to these cases. Therefore, the burden falls on Mercury to show that the voters' intention to apply Proposition 64 to these cases is a "clear and unavoidable implication" from the ballot arguments.

Mercury cites nothing from the voter pamphlet that provides "confirmation of an actual intention on the part of the drafters or the electorate to apply the statute retroactively." (*Evangelatos,* 44 Cal.3d at 1211.) Mercury provides nothing to substantiate that "the retroactivity

question was actually consciously considered during the initiative process." (*Id.*)

Krumme attaches the portion of the voter pamphlet relating to Proposition 64 to this brief. The ballot argument shows that the overarching purpose of the initiative 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," which hardly describes Mercury. The argument appealed bluntly and forcefully to the voters' antipathy to "shakedown" lawsuits, promising to "stop" them.

As previously noted, this Court need not decide whether Proposition 64 applies to all pending lawsuits. This Court need only decide if there is any "clear and unavoidable implication" that the voters intended the initiative to apply retroactively to a case, such as this one, proven in a court of law not to be a "shakedown" by an adjudication that the defendant had violated the UCL and an award of the substantial relief to the General Public.

In *Evangelatos,* the Court recognized the scope of retroactivity as a distinct issue. The Court not only perceived "no reliable basis for determining how the electorate would have chosen to resolve either the broad threshold issue of whether the measure should be applied prospectively or retroactively;" further, it could not perceive any basis for determining voter intent as to the *scope of any retroactive effect* that may have been intended, 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." (*Id.* at 1217.)

The voter pamphlet discloses no basis for any implication that the voters intended to extend the scope of Proposition 64 to judgments already obtained, much less an implication that is "clear and unavoidable." The focus of the ballot argument on "frivolous, shakedown" lawsuits *negates* any intention to apply the scope of the initiative to a case like this one, validated by a Superior Court judgment finding violations of the UCL and awarding the public significant relief. Moreover, the ballot materials negate any voter intention to allow proven UCL violators to escape judgments against them. The text of Proposition 64 and the voter pamphlet reaffirm the importance of the UCL for the protection of California consumers and businesses. (Section 1(a).)

There is no basis for this Court to conclude that the voters consciously considered retroactive application of Proposition 64 to require the reversal of judgments in proven meritorious cases. Accordingly, under *Evangelatos*, Proposition 64 cannot be applied to this case.

c. Mercury's Attempts to Distinguish *Evangelatos* Are Without Merit.

Mercury relegates *Evangelatos* to a footnote, attempting to distinguish it on the ground that Proposition 51 modified a common law rule, whereas Proposition 64 modified statutory law. This distinction is untenable.

Evangelatos affirmed the principle that "the *first rule* of [statutory] construction is that legislation must be considered as addressed to the future, not to the past." (44 Cal.3d at 1207, emphasis added, quoting from *United States v. Security Industrial Bank*, *supra*, 459 U.S. at 79-80.) In *Security Industrial Bank*, the United States Supreme Court applied this rule

to the amendment of a statute, holding that amendments to the Bankruptcy Code were not retroactive, and that the prior version of the Code applied to the case at hand. Therefore, Mercury's attempt to distinguish *Evangelatos* on the ground that it involved the modification of a common law rule fails.

Mercury's attempt to distinguish *Evangelatos* on the basis that it does not apply to repeal legislation, such as Mercury contends Proposition 64 is, also fails. The California Supreme Court applied the *Evangelatos* retroactivity analysis to the repeal of a statutory immunity against tobacco suits in *Myers*, *supra*, 28 Cal.4th at 828. At common law, there was no such immunity. In 1987, the Legislature enacted an immunity statute. Ten years later, the Legislature then repealed the immunity effective January 1, 1998.

On request certified by the Ninth Circuit Court of Appeals, the Supreme Court considered whether the repeal statute would apply to actions based on conduct that occurred prior to its effective date. (*Id.* at 839.) The Court analyzed the question as one of retroactivity, applied the *Evangelatos* test, and held that the repeal statute could not be applied retroactively. (*Id.* at 848.) Thus, *Evangelatos* clearly applies to repeals.

The tobacco companies' decade-long immunity from suit was entirely a matter of legislative grace. The Legislature repealed that statutory immunity, restoring the common law. The Court did not say that the tobacco companies could not complain because they must have realized that the Legislature could have repealed the immunity at any time. Rather, the Court held that application of the repeal to prior conduct was retroactive because it affected "transactions and conditions which are performed or exist prior to the adoption of the statute." (*Id.* at 839.) The Court underscored the constitutional significance of retroactivity analysis:

> As the United States Supreme Court has consistently stressed, the presumption that legislation operates prospectively rather than retroactively is rooted in constitutional principles: 'In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.'"

(*Id.* at 841.) The Supreme Court's expression in *Myers* of the constitutional foundations for the retroactivity analysis demonstrates that the empty formalism that Mercury seeks to apply should be rejected.

3. The Statutory Repeal Cases Do Not Apply to the Construction of Ballot Measures.

Mercury relies on a line of older Supreme Court cases applying a rule that "the repeal of a statute without a savings clause before a judgment becomes final destroys the right of action." Mercury argues that this technical rule should be woodenly and inflexibly applied to Proposition 64. To the contrary, the Supreme Court has held that the intention of the voters is "paramount" in interpreting a ballot initiative. (*In re Lance W.* (1985) 37 Cal.3d 863, 889 [210 Cal.Rptr. 631]). Mercury nevertheless conspicuously avoids any discussion actual voter intent. Ignoring this paramount principle, Mercury instead argues that the courts can simply apply the arid formalism of the statutory repealer cases.

a. The Statutory Repeal Cases Arose in the Public Entitlement Context and Are Therefore Inapposite in the Context of a Ballot Initiative.

In Mercury's leading case, *Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819 [135 Cal.Rptr. 526], a school board sued a teacher to establish its right to terminate his employment. The

teacher had been convicted of possession of marijuana several years earlier. The trial court granted declaratory judgment in the school board's favor. While the appeal was pending, the Legislature enacted a comprehensive statutory scheme to govern the treatment of marijuana offenders, including a prohibition against employment terminations by government entities based on marijuana arrests and convictions. The Supreme Court reversed the trial court decision, applying the "common law" rule that when a pending action rests solely on a statutory basis, repeal of the statute without a saving clause will terminate the action.

Mann thus arose in the peculiar context of a forfeiture of public employment. The teacher was a permanent certificated employee, whose job was saved by application of the new law. (*Id.* at 829-30.) The Court noted at the end of its opinion that the new Education Code amendments reflected changing societal views regarding marijuana use. (*Id.* at 831.) The teacher advocated application of the new law, and the school district could make no viable claim that it had relied on the continuing application of the old law. The Court also held alternatively that the judgment would have to be reversed based on the purely prospective effect of the statute because the law required the school district to obtain a final judgment against the teacher prior to termination. (*Id.*)

Younger v. Superior Court (1978) 21 Cal.3d 102 [145 Cal.Rptr. 674] was also a public entitlement case and addressed a different aspect of the same Education Code amendments that *Mann* did. The amendment in *Younger* provided that the Superior Courts could order the destruction of official records of marijuana arrests and convictions. Mack, who had been convicted of possession, filed suit for the destruction of his conviction records. After the Superior Court issued a destruction order, the *Attorney*

General -- not Mack -- filed for a writ of mandate challenging the new legislation on constitutional grounds.

While the writ proceeding was still pending, the Legislature changed the law to provide that the Department of Justice, not the Superior Courts, would order destruction of the records on application of the affected person. Mack did not contend that the old law applied; he simply filed another writ petition to compel the Attorney General to comply with the new law. The Court interpreted the new law as revoking the jurisdiction of the Superior Court to order the destruction of records.

Younger presented a peculiar set of facts because the party aggrieved by the change (Mack) did not contend that the new law should not be retroactively applied. Rather, he simply sued under the new procedure. None of the parties had relied on the old law or contended that it should be enforced.

Likewise, in *Department of Social Welfare v. Wingo* (1946) 77 Cal.App.2d 316 [75 Cal.Rptr. 262] a public social service agency invoked a double damages statute against a decedent's estate to recover public aid. While the case was on appeal, the double damages provision was repealed. The Court held that the old law was a penal statute and would not be applied after the governmental penalty had been withdrawn.

(Mercury's Court of Appeal cases, *Beckman v. Thompson* (1992) 4 Cal.App.4th 481 [6 Cal.Rptr.2d 60] and *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120 [13 Cal.Rptr.3d 926], both addressed the application of changes in procedural law, and are addressed in section 4 below.)

In sum, unlike *Evangelatos*, none of these older Supreme Court cases provides a current, well-reasoned, or compelling precedent for determining

the effect of a voter initiative of the magnitude of Proposition 64. All of these cases arose in the distinctive setting of public entitlements: *Mann* and *Wingo* involved a statutory forfeiture and penalty, and in neither case could the government claim the slightest reliance or detriment from the retroactive application of the later laws. And in *Younger*, the party aggrieved by the amendment eliminating Superior Court jurisdiction over his claim (Mack) simply followed the procedures under new law.

b. *Evangelatos* and Its Progeny Are Controlling Precedent for Determining the Scope of Proposition 64's Retroactive Application.

The statutory repeal line of cases has no modern legacy in being applied to ballot initiatives such as in *Evangelatos*, or to other complex legislation such as in *Myers* and *McClung*. To the extent that the statutory repeal cases might be thought to apply in these vastly different contexts, they are of extremely dubious vitality after *Evangelatos*. The lengthy opinion in *Evangelatos* underscored the special importance of protecting actual voter intention in the peculiar environment of the initiative process.

Legislators engage in a deliberative process in which retroactivity provisions can be drafted, negotiated, debated, and modified before a vote is taken. This confrontational dimension of the ordinary legislative process is entirely absent in measures served up to the voters. The proponents of ballot initiatives have unfettered control over the text of the measures, which face only a yes-or-no decision from millions of voters based largely on advertising and the voter pamphlet. There is no vetting process through legislative give and take.

The proponents of Proposition 51 argued that its remedial purpose to eliminate inequities and to create a fairer system demonstrated voter

intent to apply the initiative retroactively. (*Evangelatos*, *supra*, 44 Cal.3d at 1213.) They relied on a statement in the measure's findings and declaration of purpose 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 1210 n. 14.)

Evangelatos rejected this claim: "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 Court observed that there were expectations of reasonable reliance on a current state of the law as to the selection of defendants, the statute of limitations and settlement. (*Id.* at 1215-1217.)

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.)

Evangelatos's progeny are likewise consistent in protecting actual voter intention. The intention of the voters is "paramount" in interpreting a ballot initiative. (*In re Lance W., supra,* 37 Cal.3d at 889.) The courts "may not properly interpret the ballot 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* (1999) 21 Cal.4th 109, 114 [46 Cal.Rptr.2d 884] (interpreting Proposition 213).)

Here, as in *Evangelatos*, a voter would not necessarily have supported the consequence of Proposition 64 that it would apply to cases such as this one, in which litigants have made a substantial investment time, money, and energy in reliance on statutory provisions of 71 years standing. Nor would a voter likely have supported the consequence that Mercury could escape a judgment for UCL violations entered by the Superior Court and affirmed by this Court. As noted above, the focus of the measure was to stop "shakedown" lawsuits, not to provide an escape hatch for adjudicated UCL violators. There is no reliable basis for the Court to infer that the voters intended the measure to apply as Mercury would have this Court apply it.

Mercury's proposal to straightjacket voter intention with a black letter application of *Mann* and *Younger* is flatly inconsistent with the analysis mandated by the Supreme Court. Substance, not form, is controlling. It is immaterial that there may have been a statutory repeal; actual voter intention as to the scope and effect of the repeal is paramount. The Court may not simply *presume* that the electorate intended to apply Proposition 64 to this case in the absence of any evidence of intention to do so, and in the face of compelling evidence that they intended *not* to do so.

In sum, *Evangelatos* prevails over the statutory repeal cases in the ballot initiative context. This Court should not apply the statutory repeal cases to Proposition 64.

c. The Statutory Repeal Cases Do Not Apply to Invalidate a Judgment for the Benefit of the Public Where the Amending Statute Reaffirmed the Public Rights on Which the Judgment Was Based.

There is another reason why the statutory repeal cases have no application here. Public rights under the judgment in this case are at stake. Proposition 64 did not repeal those public rights; it reaffirmed them. In marked contrast, in the statutory repeal cases, the statutory repeals affected purely private rights, and the repeals completely eliminated those rights.

Unlike the statutes in question in *Mann* and *Younger,* the UCL is a designed to protect the public, not merely private citizens. Injunctions obtained under the UCL are public, not private, remedies. In *Broughton v. CIGNA HealthPlans of California, Inc.* (1999) 21 Cal.4th 1066 [90 Cal.Rptr.2d 334], the Supreme Court held that a claim for injunctive relief under the Consumer Legal Remedies Act is not arbitrable because it is a public, not a purely private, remedy: "Whatever the individual motive of the party requesting injunctive relief, the benefits of granting injunctive relief, by and large, do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices that the plaintiff suffered.... In other words, the plaintiff in a CLRA damages action is playing the role of a private attorney general." (*Id.* at 1080.)

In *Cruz v. PacifiCare* (2003) 30 Cal.4th 303, 315 [133 Cal.Rptr.2d 58], the Court reaffirmed and extended the *Broughton* inarbitrability rule to injunctions under the UCL. "In the present case, the request for injunctive

relief is clearly for the benefit of health care consumers and the general public by seeking to enjoin PacificCare's alleged deceptive advertising practices. The claim is virtually indistinguishable from the claim that was at issue in *Broughton*."

Thus, the true "party in interest" under the judgment in this case is not Krumme, but the General Public. Krumme obtained no relief at all. He acted as in *Broughton* and *Cruz* as a private attorney general. The public is the actual beneficiary and party to the injunctions in this case.

Unlike the repeals in *Mann* and *Younger*, Proposition 64 did not repeal the UCL. It reaffirmed the public protections and remedies under the UCL. The injunctions in this case therefore apply a law that Proposition 64 expressly continued in effect.

For these reasons, *Mann* and *Younger* are inapposite and cannot be applied here.

d. Even if the Statutory Repeal Cases Were Applied, Compelling Evidence of Contrary Actual Voter Intent Rebuts Any Construction that the Repeal Applies to the Judgment in this Case.

Finally, even if Mercury were correct that the statutory repeal cases apply, the rule in those cases is simply a rule of construction, not a rule of substantive law. This rule of construction does not displace other rules of statutory construction or exclude evidence of actual legislative intention through proof of legislative history. At best, it posits a presumption that may be rebutted by other rules of construction and by proof of a contrary actual legislative intent.

As explained above, the Supreme Court has rejected the inflexible application of any rule of statutory construction, with the exception of the

retroactivity rule because of its constitutional dimensions. The same rules apply to the construction of ballot initiatives as to enactments by the Legislature. *(Evangelatos v. Superior Court, supra,* 44 Cal.3d at 1212*; Howard Jarvis Taxpayers Association v. County of Orange* (2003) 110 Cal.App.4th 1375, 1381 [2 Cal.Rptr.3d 514]; *see also Horwich v. Superior Court*, *supra*, 21 Cal.4th at 276 (applying traditional rules of statutory construction to Proposition 213).)

The paramount consideration in construing a ballot measure is the intent of the voters. (*In re Lance W.*, *supra*, 37 Cal.3d at 889.) Voter intent is determined in the first instance by the language of the initiative. (*Horwich v. Superior Court*, *supra*, 21 Cal.4th at 276.) Arguments stated in the official voter pamphlet may also be considered to determine voter intent. (*Id.* at 277-280 & n. 4.)

The familiar rules of statutory construction thus apply in the initiative context. Analysis begins with the text of the initiative. The language should not be given a literal meaning if doing so would result in absurd consequences. *(Horwich v. Superior Court*, *supra*, 21 Cal.4th at 276 (construing Proposition 213).) Intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. (*Id.*) The Court must consider the object to be achieved and the evil to be prevented by the legislation. (*Id.*)

The language of Proposition 64 does not expressly or unequivocally imply that the voters intended the initiative to apply to UCL judgments that plaintiffs had already obtained for the general public under the UCL before the election. The text of the initiative is silent as to its retroactive effect on cases previously litigated to judgment. The spirit of the initiative therefore controls the sense of the terms used in the measure.

The "findings and declarations of purpose" indicate that the voters did not intend to undermine the judgment in this case. The findings state that the UCL is "intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." (Section 1(a).) Interpreting the measure not to undermine successful judgments under the UCL fully supports the voters' purpose to maintain the protections of the UCL for California consumers and businesses. Applying the initiative to vacate the judgment weakens those protections.

The object to be achieved and the evil to be prevented is reflected in voters' overarching intention to "eliminate *frivolous* unfair competition lawsuits." (Section 1(d).) As discussed above, this intention is emphatically proven by the single-minded focus in the ballot argument on "shakedown" lawsuits. Reversing the judgment in this case does not address that evil. Instead, it would throw a proven meritorious UCL case out with the bath water. "The voters should get what they enacted, not more and not less." (*Hodges v. Superior Court*, supra, 21 Cal.4th at 114.)

Nothing in the measure or the pamphlet suggest the slightest intention to enable a proven UCL violator to escape a judgment against it. The measure was not enacted to protect defendants against meritorious cases. A strong presumption exists against interpreting the measure to achieve this "absurd consequence." It is not only contrary to the focus on "shakedown" lawsuits; it is contrary to the interests of the voters themselves.

4. Proposition 64 "Procedures" Cannot Be Applied Retroactively to a Trial Occurring Before Its Enactment.

After claiming that Proposition 64 eradicated Krumme's

substantive right to sue and wipes out the injunctions in this case, Mercury next argues that the initiative's amendments are merely procedural. Mercury maintains that these procedural changes may be applied at this stage of the case without running afoul of the rule against retroactive application.

Mercury's contention that Proposition 64 worked only procedural changes, and the supporting cases it cites at pages 9-11 of its brief, directly undercut its statutory repeal arguments. Assuming that the changes are purely procedural -- as Mercury emphatically contends -- these changes cannot be retroactively applied to a trial that has already occurred.

Amendments that are "procedural" may be applied only to trials *postdating the enactment*, not retroactively to trials that have already been completed. Here, the trial predated the effective date of Proposition 64. Therefore, assuming that the amendments were procedural, they cannot be retroactively applied to a trial that has already taken place.

It is well settled that procedural, as opposed to substantive, amendments can be applied in later trials because that is not a retroactive application. In *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388 [182 P.2d 159], the California Supreme Court explained:

> 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.)

Both "procedural" and "substantive" statutes are subject to the general rule against retroactivity. (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 815 [230 Cal.Rptr. 810], citing *Aetna*, *supra*, 30 Cal.2d at 394-95.) It is the application of a procedural amendment in a later trial that renders application of the new rule not retroactive:

> Both types of statutes may affect past transactions and be governed by the presumption against retroactivity. The only exception we can discern from the cases is a subcategory of procedural statutes which can have no effect on substantive rights and liabilities, but which affect only modes of procedure to be followed *in future proceedings*. As *Aetna* pointed out, such statutes are not governed by the retroactivity presumption because they are procedural, but because they are not in fact retroactive.

(*Id.* at 816, emphasis added.)

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 noted that the change in the voir dire rules was a law addressing the conduct of trials: "Tapia's proposed test [of retroactivity] is not appropriate for laws which address the conduct of trials *which have yet to taken 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 Supreme Court has never applied a procedural amendment that became effective during an appeal retroactively to a case that had already been tried. With the exceptions discussed below, all of the cases Mercury cites in its brief on the point applied procedural amendments to cases that had not yet been tried as of the date of the amendment. Therefore, they lend no authority to the application of Proposition 64 to this case.

In four cases in which there were no trials, the Courts of Appeal retroactively applied procedural amendments that became effective during the appeal to a pending case. Three of these cases address the application of an amendment to the anti-SLAPP statute, Code of Civil Procedure section 425.17. The fourth addresses the application of the sunset provision in an amendment of Code of Civil Procedure section 410.30(a), which had amended the judicial *forum non conveniens* rule to permit the courts to stay or dismiss actions brought by California residents.

The anti-SLAPP cases were appeals from trial court rulings on special motions to strike brought by defendants at the outset of the case.[1] While the cases were pending on appeal, the Legislature enacted section 425.17, which limited the application of the anti-SLAPP statute. The courts observed that the anti-SLAPP statute is a procedural "screening device" applied at the outset of the case to prevent the chilling of First Amendment

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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].

rights. They applied the procedural amendment rule to determine the appeals before them.

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." The cases were in their procedural infancies. The anti-SLAPP motions were responses to the plaintiff's complaints; no discovery, other motions, or trials had occurred. These decisions correctly applied the spirit, if not the letter, of *Aetna* and *Tapia*. The anti-SLAPP motions were clearly procedural and did not determine the merits of the plaintiff's causes of action. 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*. 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. Further, the amendment's sunset clause made clear that it expired on January 1, 1992. Government Code section 9611 expressly provides that upon expiration of an amendment, "the original provision shall have the same force and effect *as if the temporary provision had not been enacted*." Thus, by statute, the sunset clause was given retroactive effect. (*In re*

Pedro T. (1994) 8 Cal.4th 1041, 1051 [36 Cal.Rptr.2d 74] (In *Beckman*, "The legislative intention with respect to the inconvenient forum statute, and the interplay of its sunset clause with Government Code section 9611, could scarcely have been clearer.").)

Unlike the anti-SLAPP cases and *Beckman*, Proposition 64 does not address a threshold procedural issue. This case has been fully tried, briefed, and affirmed on appeal. The application of any new procedures to a previous trial is unwarranted and contrary to *Aetna* and *Tapia*. Therefore, the procedural amendment doctrine cannot validate the retroactive application of Proposition 64 to this case.

5. Mercury's Challenges to the Opinion Simply Repeat Arguments the Court Has Already Rejected.

Mercury claims that the Court based its opinion on an understanding that only appointed agents can sell auto insurance, pointing to a single sentence that appears on the first page of the opinion and ignoring the remaining 25 pages. The Court's opinion refutes Mercury's claim.

The Court recognized the "fundamental distinction" between an agent and a broker. (Opinion at p. 2.) The Court cited the Superior Court's findings at length in the opinion, clearly distinguishing between Mercury's "appointed agents" and its unappointed "brokers." (*Id.* at pp. 7-8.) The Court expressly noted that the Superior Court had found them to be "functionally indistinguishable." *(Id.)* Based on these facts, the Court held that these broker-agents are subject to section 1704(a) and therefore must be appointed. (*Id.* at pp. 22-23.)

The Court made no assumptions that Krumme can discern about whether broker-agents in general must be appointed in order to sell car

insurance. That Mercury's arguments simply repeat the ones made in Mercury's briefs, without any analysis of the opinion, is compelling that the point is groundless.

Mercury also complains that the Court omitted to rule that the trial court abused its discretion by "regulating by injunction." The claim simply ignores the Court's analysis of the jurisdictional issues in section I of its decision.

CONCLUSION

For these reasons, the petition should be denied.

CERTIFICATE OF WORD COUNT
Cal. Rules of Court, Rule 14(c)(1)

The text of this brief, excluding Proposition 64 Exhibit "A", consists of 7,765 words, as counted by the Wordperfect version 11.0 word-processing program used to generate this brief.

Dated: November 23, 2004 LEVY, RAM & OLSON LLP

By: _____
Arthur D. Levy
Attorneys for Robert Krumme,
on Behalf of the General Public

LAW OFFICES OF NORMAN GOLDMAN

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:

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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 November 23, 2004 at San Francisco, California.

Cheryl F. Pritchard