S117156

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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KIDS AGAINST POLLUTION, et al.

Plaintiffs and Respondents,

v.

CALIFORNIA DENTAL ASSOCIATION,

Defendant and Appellant.

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After a Decision by the Court of Appeal, First Appellate District, Div. Three No.A098396
San Francisco Superior Court Case No. 322109

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BRIEF OF *AMICII CURIAE* REGARDING PASSAGE OF PROPOSITION 64, IN SUPPORT OF PLAINTIFFS and RESPONDENTS

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Cal. Rules of Court, Rules 15(c)(3), 44.5(c)

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WASHINGTON POST (Dec. 20, 20004) "Bush Renews Call for Guest Worker Plan" http://www.washingtonpost.com/wp-dyn/articles/A14199-2004Dec20.html 35

INTRODUCTION

Defendant/Appellant CALIFORNIA DENTAL ASSOCIATION alternatively moves to dismiss review or summarily affirm the decision below on the ground that Plaintiff/Respondents have no standing to prosecute this suit as a result of the adoption of Proposition 64 by California voters on November 2, 2004 – some three and one-half years after the action was filed and some five months after briefing to this Court was completed on the merits. While the applicability of Proposition 64 to preenactment cases was not addressed at any earlier stage of this litigation, that question is now being considered in literally dozens of trial and appellate courts throughout the state and, within recent weeks, four different panels have issued five conflicting decisions, all certified for publication. The Court should decline in this case to resolve the question of Proposition 64's applicability to suits pending as of its effective date, and should instead order or grant review in the several Court of Appeal decisions that have now addressed the question in a variety of factual and procedural postures.

Alternatively, should the Court determine that it may appropriately address in the instant motion the question of Proposition 64's retroactive application to pending, preenactment suits, the Court should deny the motion. Appellant's argument overlooks, as do the recent decisions in the Second and Fourth District Courts of Appeal, the teachings in a sequential series of decisions by this Court and the United States Supreme Court that for historic considerations of due process and fairness, the presumption of prospectivity should control in the absence of express or clearly-manifested voter intent.

I. THIS COURT SHOULD DENY DEFENDANT'S ALTERNATIVE MOTIONS TO DISMISS REVIEW OR SUMMARILY AFFIRM THE DECISION BELOW BECAUSE THIS APPEAL, STANDING ALONE, DOES NOT PROVIDE THE PROPER CASE FOR THE COURT TO DETERMINE WHETHER PROPOSITION 64 MAY BE APPLIED TO LAWSUITS FILED BEFORE ITS EFFECTIVE DATE

A. Retroactivity of Proposition 64 Has Not Been Addressed By the Courts Below or in Briefing on the Merits Before This Court

Plaintiff/Respondents filed their actions in the superior court in June 2001, asserting various claims under Business & Professions Code Sections 17200 *et seq.* (Unfair Competition Law or UCL). Defendant/Appellant moved to strike the allegations pursuant to Code of Civil Procedure Section 425.16. The superior court denied the motion but the Court of Appeal reversed.

Review was granted in this matter on September 17, 2003. Briefing on the merits including the parties' responses to amici briefs was completed by June 8, 2004. Nearly five months later, Proposition 64,[1] amending certain provisions of the UCL, was adopted. Thereafter, defendant CALIFORNIA DENTAL ASSOCIATION filed a supplemental brief on December 10, 2004 urging that Proposition 64 was applicable to the

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[1] Proposition 64 appeared on the November 2, 2004 ballot. Following passage, it became effective November 3, 2004. (Cal. Const., art. 2, § 10.)

pending appeal; that inasmuch as plaintiffs could not satisfy the new standing requirements as amended by the proposition, and that the actions had not been brought in compliance with Code of Civil Procedure Section 382 (as further required by Proposition 64), this Court either vacate the order granting review or alternatively affirm the Court of Appeal's decision. Plaintiffs filed an answering supplemental brief on January 19, 2005.

B. Applicability of Proposition 64 to Cases Pending As of Its Effective Date Is Now Being Considered In Numerous Trial and Appellate Courts, And Is the Subject of Conflicting Decisions

Amici urge this Court to decline to resolve the question of applicability of Proposition 64 to suits pending as of its passage until the question is brought to this Court after considered review by the numerous trial and appellate courts now considering this issue in a variety of substantive and procedural settings.[2] For example, the question is now

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[2] On February 1, 2005, the Court of Appeal, First Appellate District, Div. Four concluded that Proposition 64 does not apply to lawsuits filed before its effective date. (Californians for Disability Rights v. Mervyn's, LLC., No. A106199, *certified for publication.*) On February 9, 2005, the Court of Appeal, Second Appellate District, Div. Five concluded the opposite. (Branick v. Downey Savings and Loan Assn., No. B172981, *certified for publication*). On February 10, 2005, the Court of Appeal, Fourth Appellate District, Div. Three also concluded that Proposition 64 applies to pre-enactment pending lawsuits. (Benson v. Kwikset Corp. and Black & Decker Corp., No. G030956, *certified for publication*). On February 18, 2005, the Court of Appeal, Fourth Appellate District, Div. One joined the Branick and Benson panels. (Bivens v. Corel Corporation, No.

posed in cases that, as in the present appeal, have not proceeded past a motion to strike the complaint, and in cases in which trial resulted in judgment a year or more prior to a challenge under Proposition 64; it is posed in cases in which plaintiffs' abilities to satisfied the amended standing requirements and their further failure to plead their action(s) in compliance with Code of Civil Procedure Section 382 as now required, are at issue, and in cases where only the failure to have plead Section 382 compliance is raised; it is posed in cases in which plaintiffs' may have the ability to amend if Proposition 64 is determined to be applicable and in cases where plaintiffs do not have the ability to "cure."

D043407, *certified for publication.*) On February 22, Division One of the Fourth Appellate District issued a second decision concluding that Proposition 64 applies retroactively. (Lytwyn v. Fry's Electronics, Inc. No. D042401, *certified for publication.*) *Amici* are aware of additional cases addressing this same issue pending before the following courts of appeal: First Appellate Dist., Div. One (Wilson v. Brawn of California, Inc. dba International Male and Undergear, Nos. A105461 and A106367); Third Dist. (Fair Business America, LLC v. Amazon.com, Inc., No. C044134); McCann v. Lucky Money, Inc., et al., No. G032727).

The Second Appellate District, Division Five has in another matter, denied a motion to dismiss the appeal predicated upon passage of Proposition 64, without reaching the merits of the Proposition 64 contention. (United Investors Life Insurance Co. v. Waddell & Reed, No. B176546, January 20, 2005, *certified for publication.*) The Fourth Appellate District, Division Three has also denied a similar motion to dismiss in an unpublished decision. (Consumer Advocates, et al. v. DaimlerChrysler Corp., No. G029811, January 31, 2005.)

This Court is best served by awaiting the lower courts' prior sifting of these many variants and ultimately painting the legal landscape from a palette containing the full spectrum of hues.

C. Pursuant to Rule 28.2(c), This Court Should Order Review of Courts of Appeal Decisions to Settle This Question Orderly And With Fullest Appreciation of the Myriad Legal and Factual Questions

The Courts of Appeal for the First, Second and Fourth Districts have now issued conflicting decisions on the applicability of Proposition 64 to lawsuits filed before its effective dates. (Californians for Disability Rights, *supra*; Branick, *supra*; Benson, *supra*; Bivens, *supra*; Lytwyn, *supra*.) This question is currently at issue before other courts of appeal and a large number of superior courts including those within the respective jurisdictions of the First and Second Districts as well as numerous courts outside either District. The total number of 17200 suits subject to this question is currently unknown to *amici*, but it may be safely projected as substantial. As noted in greater detail below, as of November 3, *amicus* California Rural Legal Assistance represented plaintiffs in 47 suits pending before 19 different superior courts (including courts within the jurisdictions of the First, Second, Third, Fourth and Sixth Districts). As there is a substantial conflict among the courts as to the applicability of Proposition 64 to pending UCL cases, *amici* urge this Court to review the decisions of the

Court of Appeal and resolve the matter after full and complete briefing from parties and *amici*.

II. ALTERNATIVELY, THE COURT MAY DENY DEFENDANT'S ALTERNATIVE MOTIONS ON THEIR MERITS BY DETERMINING THAT PROPOSITION 64 DOES NOT APPLY TO LAWSUITS FILED BEFORE ITS EFFECTIVE DATE

This Court has instructed that, it "is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate . . . *intended* otherwise. (Tapia v. Superior Court (1991) 53 Cal.3d 282, 287, emphasis added, *citing*, *inter alia*, Evangelatos v. Superior Court (1988) 44 Cal.3d 1188.)[3] This Court has reconfirmed this principle no less than three times in the last two years. (Myers v. Philip Morris, Inc. (2002) 28 Cal.4th 828, 841; McClung v. Employment Development Dept. (2004) 34 Cal.4th 467, 475; Elsner v. Uveges (December 20, 2004) No. S113799, 2004 DJDAR 15035, 1540.

A. Proposition 64 Does Not Contain an Express Declaration of Retroactivity

Despite the fact that the proponents of Proposition 64 had complete

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[3] Courts interpreting initiatives apply the same principles that govern statutory construction. (Robert L. v. Superior Court (2003) 30 Cal.4th 894, 900.)

control over its terms, Proposition 64 contains no express retroactivity provision. This was not a bill negotiated in the Legislature, subject to compromise which frequently results in the lack of an express retroactivity provisions. (*Cf.*, Myers, *supra*, at 844-845; Landgraf v. USI Film Products, et al. (1994) 511 U.S. 244, 253-257) Had the proponents intended that Proposition 64 apply retroactively to pending cases, nothing would have been easier than to expressly so provide - - and so advise the electorate. Indeed, the Proposition's proponents were fully aware that "the presumption against retroactivity is a cornerstone of California law" since one of the two submitted an *amicus* brief in Myers, *supra*, arguing exactly that point. (*See*, htt~://electionwatchdog.orcr/ UCL - Text.~df, which is a pdf of the submission of the initiative by Allan Zaremberg and John Sullivan; see www.calchamber.coin/index.cfin? navID=278, the official website of the Chamber of Commerce, listing Allan Zaremberg as its President and CEO; *see*, *also*, Amicus Brief of the California Chamber of Commerce, Myers, *supra*, No. S095213, (available from Westlaw's KeyCite service).)

Moreover, Proposition 64's drafters wrote not only with knowledge of the presumption against retroactivity, but on a slate that already was inscribed with a savings clause. Business and Professions Code Section 4

provides that "[n]o action or proceedings commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." (*Id.*) A general savings clause in the general body of the law is as effective as a special saving clause in the particular section. (Peterson v. Ball (1931) 211 Cal. 461; People v. McNulty (1892) 93 Cal. 427, 437.) This general savings clause is not limited to the original or contemporaneous provisions of the code, but extends to subsequent enactments and amendments as well. (Bus. & Profs. Code § 12, "[w]henever any reference is made to any portion of this code . . . such reference shall apply to all amendments and additions thereto now or hereafter made;" Evangelatos, *supra*, 44 Cal.3d, at 1208 n. 11.) Deference to the presumption against applying an ambiguous amendment retroactively is particularly compelled in this circumstance.

"[A] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." (Myers, *supra.*) In Myers, this Court examined a repeal statute that 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." (*Id.*, at

842.) However, other language in the statute indicated that claims already brought during the immunity period were not to be subject to the statutory bar provided by the repealing provision. In light of this ambiguity, this Court held that the repeal statute applied only prospectively. (*Id.*)

In Californians for Disability Rights, *supra*, the court of appeal recently observed that, "Proposition 64 contains no express declaration of retrospectivity, as [defendant] rightly concedes." (*Id.*, Slip Opinion p. 3.) Review of the plain language of the Proposition confirms that "the subject of retroactivity or prospectivity was simply not addressed." (Evangelatos, *supra*, 44 Cal.3d, at 1209.)

Thus, no action or proceeding commenced before Proposition 64 took effect is affected by the Proposition. (*Cf.*, Hogan v. Ingold (1952) 38 Cal.2d 802, 816.)

B. Extrinsic Sources Fail to Demonstrate That the Voters Intended Proposition 64 to Apply Retroactively

Absent an express retroactivity provision, "a statute will not be applied retroactively unless it is very clear from extrinsic sources that the ... voters must have intended a retroactive application." (Myers, *supra*, 28 Cal.4th, at 841, *citing*, Evangelatos, *supra*, 44 Cal.3d, at 1209.) For this analysis, courts may resort to promulgation history such as the ballot pamphlet. (Evangelatos, *supra*, 44 Cal.3d, at 1210 - 1211.)

Neither the Attorney General's "Official Title and Summary" nor the Legislative Analyst's "Analysis" advised voters that Proposition 64 would apply to pending cases. In fact, consistent with the measure's findings, the Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local pubic prosecutors, from *bringing* a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (State of California, OFFICIAL VOTER INFORMATION GUIDE, California General Election, November 2, 2004, "Analysis By the Legislative Analyst," p. 38.[4] Emphasis added.) The proponents' ballot arguments also emphasized Proposition 64 "*[a]llows only the Attorney General, district attorneys, and other public officials to file lawsuits on behalf of the People of the State of California* to enforce California's unfair competition law" (VOTER INFORMATION GUIDE, *supra*, ARGUMENT in Favor of Proposition 64, p. 40, italics in original.) Proposition 64 simply did not put the voters on notice that it would apply to

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[4] Defendant DENTAL ASSOCIATION attached as Exhibit A to its Supplemental Brief a *partial* copy of the ballot materials concerning Proposition 64. Pursuant to Evidence Code Sections 452(c), 453(a),(b), and 459, *amici* here request that the Court take judicial notice of *all* ballot materials concerning the Proposition including the title and summary/analysis (VOTER INFORMATION GUIDE, *supra*, 38-39), arguments (*id.*, 40-41) and text (*id.*, 109-110.)

pending cases.[5]

Extrinsic sources must provide an "unavoidable" implication that retroactive application was intended. (*supra*, at 844.) Neither defendant DENTAL ASSOCIATION nor Proposition 64's proponents can point to any language in the ballot materials that unavoidably implies that retroactive application was intended. Indeed, as the Californians for Disability Rights court recently found, "[i]f anything, the [Proposition 64] statutory language and ballot materials suggest an intention that the law apply prospectively to future lawsuits." (Californians for Disability Rights, *supra*, Slip Op., at 3-4.)

As this Court said with respect to another tort reform measure adopted by the voters, "the voters should get what they enacted, not more and not less." (Hodges v. Superior Court (1999) 21 Cal.4th 109, 114.)

C. No So-called "Statutory Repeal" Rule Makes Proposition 64's Provisions Applicable to UCL Cases Filed Before Its Effective Date

Defendant DENTAL ASSOCIATION, characterizing the UCL as

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[5] Addressing statutory language providing that "the amendments made by this Act shall take effect upon enactment", the federal Supreme Court has commented that, "[a] statement that a statute will become effective on a certain date does not *even arguably* suggest that it has any application to conduct that occurred at an earlier date." (Landgraf v. USI Film Products, *supra*, 511 U.S., at 257.)

"purely statutory in nature" (*citing*, Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254, 1264 ". . . the statutory definition of 'unfair competition' 'cannot be equated with the common law definition . . .'"), asserts that rights thereunder may be repealed at any time by repeal of the statute. (*Further citing*, Governing Board v. Mann (1977) 18 Cal.3d 819, 829 [including the quotation from Callet v. Allioto (1930) 210 Cal. 65, 67]; Gov. Code § 9606; International etc. Workers v. Landowitz (1942) 20 Cal.2d 418, 423.) That rationale also underlies the Courts of Appeal decisions that have conclude Proposition 64 applies retroactively. (Branick, *supra*, Slip Opinion at 11-15; Benson, *supra*, Slip Opinion at 11-16; Bivens, *supra*, Slip Opinion at pp. 7-9.)

This argument is flawed, however, for at least four independent reasons.

1. The Statutory Repeal Cases Do Not Apply Here Because Section 17200 Does Not "Repeal" Anything.

As a threshold matter, the text of Proposition 64 does not "repeal" the cause of action for unfair competition provided by Section 17200. The content of the Section 17200 cause of action for "unlawful, unfair and fraudulent business practices" is unimpaired. Instead, Proposition 64 adds substantive standing and class action requirements to Section 17200. If

conduct that occurred prior to the passage of the measure was actionable then, it remains actionable now, and the public's right to be protected from it remains unchanged. Thus Proposition 64 is not a repeal provision at all, rendering all the cases relied on by DENTAL ASSOCIATION inapposite.

2. The Statutory Repeal Cases Do Not Apply Here Because Section 17200 is Grounded in Common Law.

Second, the statutory repeal cases do not apply to cases where the legislation at issue impacts common law rights. This exception applies here because the unfair competition cause of action set forth in Section 17200 *is* grounded in common law. In 1933, former Civil Code Section 3369, the predecessor to Section 17200, codified the common-law tort of unfair business competition between business competitors. (*See* Stern, *Bus. & Prof. Code § 17200 Practice* (The Rutter Group 2004) ¶¶ 2.01-2.11.) Subsequent court decisions expanded the scope of the common-law rule codified in Section 3369 from business competitors to consumers victimized by unfair business practices. (*People ex rel Mosk v. Nat'l Research Co.* (1962) 201 Cal. App. 2d 765, 770-71.) While "the statutory definition of 'unfair competition' 'cannot be equated with the common law definition . . ..'" (*Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1264 (citation omitted)), this does not detract from the fact that the

business tort now embodied in Section 17200 is derived from the common law. The statute codified the common law and courts then extended the common law "protection once afforded only to business competitors" to the entire consuming public. (*Barquis v. Merchants Collection Ass'n* (1972) 7 Cal. 3d 94, 109. *Accord Bank of the West, supra*, 2 Cal. 4th at 1264.) Because the cause of action set forth in Section 17200 is grounded in the common law, the statutory repeal rule has no application here. (*Callet v. Alioto* (1930) 210 Cal. 65, 68 (statutory repeal rule "only applies when the right in question is a statutory right, [not] . . . an existing right of action . . . by virtue of a statute codifying the common law.").)

3. The Statutory Repeal Rule Is Only Applicable Where – Unlike Here – There is Clear Legislative Intent of Retroactivity.

Third, contrary to the claim that the repeal of a statutory right operates retroactively regardless of legislative intent, the law is exactly the opposite. In reality, as the Californians for Disability Rights Court recognized, the U.S. Constitution demands that "the presumption of prospectivity" is *always* the "controlling principle" with respect to legislative enactments. (Californians for Disability Rights, *supra*, Slip Opinion at pp. 3-5 (*quoting*, Landgraf v. USI Film Products, *supra*, 511 U.S. at 263-80).)

This Court, in recognizing the presumption of prospective application of new laws in Evangelatos, *supra*, followed the guidance of the United States Supreme Court in United States v. Security Industrial Bank (1982) 459 U.S. 70, 79-80 [103 S.Ct. 407, 74 L.Ed.2d 235]. (Evangelatos, *supra*, 44 Cal.3d at 1206-1207.) Subsequently, the federal Supreme Court addressed the seeming conflict or "apparent tension" between the presumptively-prospective principle of statutory interpretation and the principle that "'a reviewing court must dispose of the case under the law in force when its decision is rendered." (Landgraf, *supra*, 511 U.S., at 263-280.) The federal Court reconciled this seeming conflict, ruling that the presumption of prospectivity is the controlling principal as it more closely accords with traditional legislative and public expectations about how statutes operate.

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

(Landgraf, *supra*, 511 U.S. at 265, 293.)

Thus, the Court further developed its earlier Security Industrial Bank

analysis that this Court found persuasive. This sweeping language draws no distinction between those expectations that are superceded by a subsequent enactment that augments plaintiffs' expectations of recovery and defendants' expectations of exposure and those that are superceded by a subsequent enactment that diminishes plaintiffs' and defendants' respective expectations of recovery and risk.[6] This Court, in turn, has found the Landgraf reasoning persuasive in concluding that repeal of an immunity statute did not apply retroactively to conduct that occurred during the earlier statutorily-immunized conduct. (Myers, *supra*, 28 Cal.4th, at 839-847.)

As the Californians for Disability Rights Court went on to observe, the statutory repeal line of cases is actually consistent with this principle because, in those cases (and in contrast to this case), there was evidence of legislative intent that the statute operate retroactively. In the words of the First Appellate District: "[a] case holding that the repeal of a statute terminates pending actions is not an exception to the prospectivity presumption, but an application of it. In those cases, the repeal of a statute indicated legislative intent that the repeal legislation apply retroactively, thus rebutting the presumption of prospectivity." (Californians for

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[6]The Court, of course, recognizes that certain Constitutional restrictions may intervene with respect to enactments that augment exposure to pre-enactment conduct. (Landgraf, supra, 511 U.S., at 266-267, 281.)

Disability Rights, *supra*, Slip Opinion at p. 7.)

Thus, for example, in Governing Bd. of Rialto Unified Sch. Dist. v. Mann (1977) 18 Cal. 3d 819, 829, the California Supreme Court gave retroactive effect to a statute prohibiting any public entity from revoking any right of an individual as a result of a conviction for possession of marijuana prior to the statute's passage, provided that two years had passed since the conviction. The Court explained that the Legislature's intent to repeal the school district's right to take disciplinary action based on an old conviction was clear from the statute itself, which expressly applied "to arrests and convictions occurring prior to January 1, 1976." (*Id.* at 827). By its own terms, then, the statute in Mann applied retroactively to convictions occurring prior to the statute's passage, and there could be no doubt that the Legislature intended to prevent the district from dismissing its employee on the basis of such a conviction.

Close on the heels of Mann, the Supreme Court decided its only other modern case on retroactive repeals. In Younger v. Superior Court (1978) 21 Cal. 3d 102, the Court gave retroactive effect to another part of the same legislation at issue in Mann. That statute replaced an earlier provision that had authorized the superior courts, on petition, to order the destruction of records of arrests or convictions for possession of marijuana

prior to January 1, 1976. (*Id.* at 107-08.) The new statute provided for destruction of those records by order of the Department of Justice upon application by the person affected. Citing the retroactive repeal rule, the Supreme Court ordered the superior court to vacate its destruction order because "the Legislature has revoked the statutory grant of jurisdiction for this proceeding, and has vested it in no other court." (*Id.* at 110.) The Court observed that, "like all statutes," the new provision "is to be read with a view to effectuating legislative intent," and concluded that "we are satisfied the Legislature meant the statute to apply only to persons who have completed their punishment before seeking relief from the collateral effects of their convictions." (*Id.* at 113.) Thus, as in Mann, the statute at issue in Younger revealed a clear legislative intent that the statute apply retroactively to pending cases.

If there was any question about the application of this principle, it was put to rest by this Court's decision in Myers v. Philip Morris Cos., Inc. (2002) 28 Cal. 4th 828, 840. In Myers, the Court addressed whether a 1998 statute, which repealed a previously-enacted statute creating immunity from lawsuits for tobacco manufacturers, had retroactive effect. It was not contended that tobacco manufacturers had immunity at common law – such immunity was purely the product of the earlier legislation enacted in 1988.

Nor was there any question that the 1998 statute repealed the immunity statute enacted in 1988. Indeed, the Court refers to it throughout the decision as "The Repeal Statute." Nonetheless, the Court did not apply the "repeal doctrine" as the Second and Fourth District Courts of Appeal have done in their consideration of Proposition 64. Instead, as the First District did in Californians for Disability Rights, the Supreme Court looked exclusively to legislative intent, applying the rule that, absent an "express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application." (Myers, *supra,* 28 Cal.4th at 841, *quoting* Evangelatos, *supra,* 44 Cal.3d at 1209 (italics added by Myers Court).) The Court then determined that the intent of the Repeal Statute was ambiguous, and that such ambiguity "requires us to construe the Repeal Statute as 'unambiguously prospective'." (Myers, *supra,* 28 Cal.4th at 843, *quoting* INS v. St. Cyr (2001) 533 U.S. 298, 320-321, fn. 45.)

This Court's rejection of the arguments advanced by defendant DENTAL ASSOCIATION in this case and relied upon by the Second and Fourth District Courts of Appeal is made clear by Justice Moreno's dissent in Myers. In particular, the dissent cites Callet v. Alioto (1930) 210 Cal.65, 67-68, for the proposition that retroactivity application of a statute is proper

where the retroactively applied statute abolishes rights which were "wholly a creation of statute." (Myers, *supra,* 28 Cal.4th at 853.) Justice Moreno in his dissent in Myers also argues that "all statutory remedies are pursed with full realization that the legislature may abolish the right to recover at any time." (*Id., quoting* Callet v. Alioto, *supra.*)[7] Nonetheless, the majority decision in Myers, like the First District Court of Appeal in Californians for Disability Rights, declines to apply the repeal doctrine to the question of whether the statute at issue has retroactive effect.

4. The Statutory Repeal Rule Does Not Apply Here Because the Business and Professions Code Contains a Savings Clause

Finally, defendant's argument overlooks a critical qualifier to the so-called "statutory repeal rule" that was recognized throughout the Callet, Landowitz and Mann decisions: the "repeal rule" is applicable (*i.e.*, becomes a concern) only where no savings clause exists. (Callet, *supra*, 210 Cal, at 67; Landowitz, *supra*, 20 Cal.2d, at 423; Mann, *supra*, 18

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[7]Notably, even the dissent in *Myers, supra*, looks primarily to the intent of the legislature as the appropriate measure for determining whether the "repeal statute" is to be applied retroactively. Only after finding "a clear legislative intent to apply the statute retroactively" does Justice Moreno consider the holding of *Callet v. Alioto, supra*, to rebut the argument that retroactive application would deprive the defendants of a vested right without due process of law. (*Myers, supra*, 28 Cal.4th at 848, 853).

Cal.3d, at 829.) The UCL, however, is subject to a savings clause (Bus. & Profs. Code § 4; see discussion at pp. 5-6, *ante*), thus precluding consideration of the "rule".[8]

Even if the old statutory repeal cases had some application where, as here, there is no discernable legislative intent that a statute be applied retroactively, they would have no bearing here because the Business and Professions Code itself contains a general savings clause precluding the application of substantive repeals to pending cases. As set forth in Section 4 of the Business and Professions Code, "[n]o action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." Section 4 precludes the application of newly enacted provisions of the Code to effect

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[8]In its February 9 decision, the Court of Appeal in Branick acknowledges that Government Code Section 9606 and that the cases beginning with Mann do not apply where a savings clause is contained in the "enactment". The Branick court failed to address the existence of Business & Professions Code Section 4, and relied on this Court's discussion of Section 9606 in Callet, *supra*, that occurred 58 years before this Court developed the principles and policies of prospectivity in Evangelatos, and 64 years before the U.S. Supreme Court explained the public policies favoring prospectivity over "statutory repeal". (Landgraf v. USI Film Products, *supra*, [text, at 12].) The Bensen court does consider Landgraf and concludes that its broad rationale remains subservient to Govt. Code Section 9606, but , also fails to consider Section 4.

a substantive repeal of an existing claim.

First, to abrogate the common-law "repeal of statute" rule, the savings clause need not be contained in the repealing statute. The California Supreme Court has held that "a general savings clause in the general body of the law is as effective as a special savings clause in the particular section." (Peterson v. Ball (1931) 211 Cal. 461, 475). As such, Section 4 is just as effective as any savings clause that could have been inserted within Proposition 64.

Second, Section 4 expressly precludes the application of a repeal statute to actions commenced *before* the statute's effective date. This proposition may be gleaned directly from Section 4's unambiguous language. (*See* Bus. & Prof. Code § 4 ("[n]o action or proceeding commended *before* this code takes effect, and no right accrued, is affected by the provisions of this code. . . .") (emphasis added).)

Third, Section 4 is not limited to the original provisions of the code, but extends to subsequent enactments and amendments as well. This is confirmed by Business and Professions Code Section 12, which states "[w]henever any reference is made to any portion of this code or any other law of this State, such reference shall apply to all amendments and additions

thereto now or hereafter made." [9]

In sum, the general savings clause codified at Section 4 was codified for the very purpose of preventing subsequent enactments and amendments of the Business and Professions Code from terminating actions commenced before the effective date. Because this action was filed before Proposition 64 became effective, Proposition 64 cannot be applied retroactively to this case.

D. Proposition 64 Substantially Affects Existing Rights and Obligations Thus Precluding Its Application to Cases Filed Before Its Effective Date

Defendant finally urges that Proposition 64 amended merely a "procedural" prerequisite to the enforcement of "substantive rights" and concludes that, accordingly, the parties have no "vested rights" in the former provisions.

Long ago, this Court thoroughly explored defendant's suggested

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[9]In *Koster v. Warren*, 297 F.2d 418, 420 (9th Cir.1961), the Court held that a materially identical statute codified at Section 9 in the Corporation Code, in conjunction with a provision identical to Section 4, collectively "casted doubt" on whether an "amendment" to Corp. Code § 834 could be applied to an action pending for one year before the amendment's effective date. *See also Sobey v. Molony* (1940) 40 Cal. App. 2d 381, 388-89 (holding that Section 4 was "intended to cover situations, either where the codification made a substantial change in the law, or where the legislature at that *or subsequent sessions amended the law in a substantial manner.*") (emphasis added).)

distinction between "purely 'procedural' and purely 'substantive' legislation" and concluded that the "distinction relates not so much to the form of the statute as to its effects". (Aetna Cas. & Surety Co. v. Ind. Acc. Com. (1947) 30 Cal.2d 388, 394.) "If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." (*Id.*) An amendment is "substantive in its effect, [where] . . . it imposes a new or additional liability and substantially affects existing rights and obligations." (*Id.* at 395 .)

The U.S. Supreme Court similarly analyzes the question of "procedural" enactments.

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case.

(Landgraf, *supra*, 511 U.S. at 275, fn. 29.)

As this Court recently explained, in deciding whether the application

of a law is prospective or retroactive a court "looks to function, not form . . ." and, "consider[s] the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies." (Elsner v. Uveges, *supra*, 2004 DJDAR, at 15040.) In fact, Proposition 64 fundamentally changes the rights of both party plaintiffs and of "interested persons" who are identified and provided substantive remedies in the UCL, and concurrently changes the liabilities of defendants for their conduct undertaken before the initiative's adoption.

1. Proposition 64 Purports to Amend the UCL to Require All Representative Claims to be Pursued as Class Actions

Section 2 of Proposition 64 amends Business and Professions Code Section 17203 to require persons pursuing representative claims or relief for the interests of others to, *inter alia*, comply with Section 382 of the Code of Civil Procedure. (VOTER INFORMATION GUIDE, *supra*, p. 109; Bus. & Profs. Code § 17203.) *Amicus* recognizes that Proposition 64's promoters and the opinions of the Legislative Analyst and many commentators uniformly assume that this amendment proscribes *all* future representative claims or relief unless pursued as class actions.[10] Defendant/Appellant

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[10] *Amicus* does not concede that Code Civ. Proc. Section 382 so requires (*cf.*, *e.g.*, Frieman v. San Rafael Rock Quarry, Inc. (2004) 116 Cal.App.4th 29, __ [10 Cal.Rptr.3d 82, 87-90], but that is a question for

CALIFORNIA DENTAL ASSOCIATION asserts that this proscription applies to all suits pending as of Election Day.[11]

An intent to require that former representative suits under Section 17203 be confined to class actions imposes substantive changes that are dramatically illustrated in the UCL cases pending on November 2, 2004, in which *amicus curiae* California Rural Legal Assistance, Inc. (hereafter, "CRLA") provides representation.

Amicus CRLA is a California not-for-profit corporation providing free civil legal representation to qualified, income-eligible clients across much of the state. CRLA is a legal-services provider within the provisions of the federal Legal Services Corporation Act (42 U.S.C. §§ 2996 *et seq.*) and of California's IOLTA (Interest on Lawyer Trust Account - - Bus. & Profs. Code §§ 6210 *et seq.*) program. CRLA has offices in 21 locations to serve the principal agricultural regions of the state.

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another day.

[11] Defendant DENTAL ASSOCIATION focuses upon Proposition 64's Section 3, which amended the standing requirements of Section 17204 of the UCL. (*California Dental Association's Supplemental Brief Regarding Pasage of Proposition 64*, filed Dec. 10, 2004, pp. 2-3.) However, the Association argues that all amendments effected by Proposition 64 apply to suits pending as of its passage. (*Id.*, pp. 2-4.)

The Fourth Appellate District Division One has concluded that Proposition 64's requirement that representative actions be brought as class actions is to be applied retroactively to preenactment cases. (Lytwyn, *supra*, Slip Opinion at pp. 29-33.)

Since 1966, CRLA has provided legal assistance and representation to California's poor, particularly to farm, and other, low-wage workers and low-income tenants throughout the state, before state and federal courts and administrative bodies. We have provided this representation in the context of individual actions and claims, in equitable suits seeking work-force-wide relief for employees and complex-wide relief for tenants, and – until mid-1996 – in class actions.[12]

Using the "representative" provision of California's Unfair Competition Law ("UCL" - Bus. & Profs Code §§ 17200 *et seq.*) in effect prior to passage of Proposition 64,[13] our clients in dozens of actions since 1990 have sought and recovered unpaid wages (*see*, *e.g.*, Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 173-178) for themselves and agricultural workforces often numbering in the hundreds of

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[12] Pursuant to a change in federal law that became effective August 1, 1996, CRLA is prohibited from participating in class-action litigation. (*See*, Omnibus Consolidated Recissions and Appropriations Act of 1996 (1996 Appropriations Act) Pub. L. 104-208, § 504(a)(7), 110 Stat. 3009; 42 C.F.R., Part 1617.)

[13] Proposition 64 became effective November 3, 2004. (Cal. Const., art 2, § 10.) Before November 3, Section 17204 provided that, "[a]ctions for relief . . . shall be prosecuted . . . by any person acting for the interests of . . . the general public."

employees each[14], and also sought and recovered rents and other fees illegally charged thousands of poor tenants. (*See, e.g.*, Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 126-127, 139.)[15]

As of November 3, 2004, the effective date of Proposition 64, *amicus* CRLA represented clients as plaintiffs in approximately 46 suits pending in California courts[16] in which our client-plaintiffs brought representative claims for the "interests of the public." (Bus & Prof. Code, *supra*, § 17204.) Restitution of money (*id.*, § 17203) and/or enforcement of monetary penalties (*id.*; § 17202) are sought under the UCL in 44 of

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[14] The relatively-high number of persons having interests in recovery in some suits does not necessarily reflect comparably-large work forces so much as the substantial turnover found in overwhelmingly-immigrant, low-wage, seasonal work forces.

[15] We have also successfully used these provisions in numerous cases to enjoin employer violations of occupational safety and health standards that endanger low-wage farm workers, such as employer failures to provide drinking water and field toilets or employers requiring field workers to use illegal short-handled tools. Those purely-injunctive suits are not the subject of our concern, nor addressed, in this brief.

[16] Our trial-level cases are currently pending in nineteen different superior courts (including courts within the First, Second and Fourth Appellate Districts) and before the United States District Court for the Eastern District of California. Two of our current cases are on appeal from dismissals granted on grounds other than the passage of Proposition 64: one before the Fourth Appellate District, and the other before this Court. (Martinez v. Munoz, No. S121552, *rev. granted March 3, 2004.*)

these suits.[17] The filing dates of these suits extend as far back as November, 2000.

In forty-one of these cases, CRLA is currently able to estimate that, assuming plaintiffs are fully successful, the numbers of members of the general public "in interest [in] any money or property, real or personal" (Bus. & Profs. Code, § 17203) total approximately 10,050 individuals or families. One of these cases accounts for 4,000 potential beneficiaries; the remaining forty cases account for 6,050 or an average of approximately 151 potential interested persons or beneficiaries in each case.

In thirty-six of these cases, CRLA is able to reasonably estimate that the potential monetary recoveries total over $13,300,000 for the injured members of the public deprived of money or property be defendants' unfair (unlawful) conduct, whose interests plaintiffs assert pursuant to the former Section 17204. However, three of these thirty-six cases account for $7,000,000 of this total; the remaining thirty-three cases account for slightly

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[17] As of Election Day, thirteen of these were in settlement and/or proceeds-distribution status with judgments already entered in some with the courts retaining jurisdiction to oversee proceeds distribution. In one suit, the parties executed a settlement agreement prior to Election Day which was not yet reduced to judgment on November 2; that defendant now asserts Proposition 64 as grounds for renouncing the settlement. Since November 2, 2004, at least one more suit has reached final settlement and two more are in advanced settlement discussions.

over $6,300,00 or an average potential recovery of approximately $191,000 per case.[18]

The farmworker plaintiffs in the overwhelming majority of these suits are employees or former employees of defendants who failed to pay them wages due under contractual or statutory obligations (*e.g.*, minimum wage, wages for all hours worked, overtime premium wages). In a smaller number of cases, the plaintiffs are tenants or former tenants of defendants who illegally collected rents for uninhabitable structures or in excess of legal ceilings applicable under one or more public schemes pursuant to which the housing was provided. In each of these cases, the defendants' acts or omissions resulted in injuries in fact - - including, but not limited to, monetary injuries - - to our client-plaintiffs.[19] In each of these cases, the defendants' acts or omissions caused similar injuries in fact to other similarly-interested members of the public: in wage-and-hour claims, these injuries are invariably workforce-wide; in housing settings, the injuries

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[18] Comparing the above-described averages of interested persons and recoveries suggests that the recovery in CRLA-represented cases averages approximately $1,265 per "beneficiary". This modest figure is the product of low wages and temporary, short-term employment endemic in agriculture combined with the unavailability of general damages under the UCL. (Bus. Profs. Code §§ 17203, 17205; Bank of the West, *supra*, 2 Cal.4th, at 1266-1267.)

[19] Typically, two or three plaintiffs bring these UCL suits.

generally are visited upon all the tenants in multiple-dwelling complexes.

None of CRLA's suits has been filed as a class action, and *amicus* CRLA, the only available counsel as a practical matter for the majority of these plaintiffs, is precluded from representing them - - or anyone else - - in any adversarial proceeding in any class action. (Pub. L. 104-208, 110 Stat. 3009, § 504(a)(7); 45 C.F.R., Part 1617.)

If Proposition 64 applies to these suits that were initiated and often litigated for considerable periods before passage of the initiative - - and *if* compliance with Code of Civil Procedure Section 382 mandates that these plaintiffs may proceed in representative capacities only through class certification - - then these plaintiffs must either substitute new counsel for *amicus*, or they must abandon their claims for the interests of the some-10,000 similarly injured poor and low-wage persons whose interests, as will be demonstrated below, depend upon these plaintiffs. The former is impractical. The latter is unpardonable. Neither could have been the electorate's intention.[20]

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[20] The Lytwyn court rationalizes that parties act in contemplation of Government Code Section 9606 providing that any statute may be repealed at any time. (*Id.*, Slip Opinion at p. 29.) Neither that nor any other court has addressed why parties' expectations as to the UCL would not be equally settled in contemplation of the Business & Professions Code's own savings clause expressed in Section 4.

2. Retroactive Application of Proposition 64 Will Profoundly Change Available Remedies and the Consequences of These Defendants' Conduct

Application of Proposition 64 to these cases, either eliminating *amicus* CRLA's ability to serve as plaintiffs' counsel or requiring plaintiffs' abandonment of the "representative" claims, will profoundly change: the rights and remedies which these plaintiffs possessed on November 2; the legal consequences of the respective defendants' past conduct: and the rights and remedies of thousands who are statutorily accorded interests in these suits. (Elsner, *supra*, 2004 DJDAR, at 15040; *see*, Broughton v. CIGNA Health Plans of California, Inc. (1999) 21 Cal.4th 1066, 1080.)

To appreciate this assertion, it is necessary to understand the factors which inevitably combine to produce this profoundly disheartening reality. These factors, broadly brushed, consist of the characteristics of low-wage farmworkers in California, the nature of wrongs that they suffer, and the private and public resources available to address this situation.

a. Nature of Farm Workers and the Rural Poor

An estimated one million persons are employed during some part(s) of the year on California farms.

> Farm workers [in California] are mostly young and unauthorized men born in Mexico - - two-thirds are under 34, two-thirds are unauthorized, and 95 percent were born in Mexico, increasingly in the southern Mexican states that

> contain indigenous and limit-Spanish-speaking peoples. The farm labor market resembles a revolving door, with significant entries and exits - - as many as a quarter of current workers have been in the US less than two years - - and tighter border controls seem to have "trapped" more of them in the US once they succeed in eluding the Border Patrol. Most of the newcomers, who tend to be young and unauthorized, are employed by FLCs [Farm Labor Contractors]."

(RURAL MIGRATION NEWS Vol. 11, No. 1 (Jan. 2005), p.25 http://migration. ucdavis.edu..)[21] As is readily apparent from this information, the overwhelming majority of these laborers do not speak and are not literate in English. Less-well known is that a large and rapidly-growing segment of this workforce also do not speak, and are not literate in Spanish.[22]

There are by some estimates 200,000 indigenous people from

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[21] "RURAL MIGRATION NEWS is edited by Philip Martin, J. Edward Taylor and Michael Fix. Dr. Martin, generally recognized as the nation's foremost authority on farm-labor demographics, is Professor of Agricultural and Resource Economics at the University of California, Davis. J. Edward Taylor is also Professor of Agricultural and Resource Economics at the University of California. Michael Fix is currently Principal Research Associate for the Center on Labor, Human Services and Population Center at the Urban Institute in Washington, D.C.

[22] The unauthorized workforce is not unique to agriculture or to CRLA's rural service area. Observers estimate that only eight to ten percent of all undocumented workers from Mexico are employed in the agricultural industry. (BILATERAL IMMIGRATION AND SECURITY REFORM PROPOSAL: THE PUSH FACTOR - - THE PULL FACTOR, New Coalition For Comprehensive Immigration and Security Reform (undated), pp. 2, 5.)

> southern Mexico and Central America in California, and many speak Mixteco, Zapoteco, Trique, Nahuatl and other languages rather than Spanish; most estimates are that 10 to 20 percent of California farm workers may be indigenous . . .

(RURAL MIGRATION NEWS, *supra*, p. 3.)[23]

Another important trend is that "more workers employed on farms have employers who are not farmers - - farm labor contractors and other nonfarm-based operations account for almost half of average farm employment, up sharply from the mid-1970s." (RURAL MIGRATION NEWS, *supra*, p. 25.) CRLA's own experience of many years, which is corroborated by labor and employment public-enforcement personnel is that it is profoundly more difficult to maintain contact with, and help, workers hired by farm-labor contractors. (See, also, RURAL MIGRATION NEWS, *id.*, p. 26.)

Farmworkers are incredibly reluctant to come forward to assert legal rights due to combination of: lack of familiarity with rights and protections; lack of familiarity with either private advocacy resources (*e.g.*, CRLA) or public enforcement and forae (*e.g.*, California Labor Commissioner; small-

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[23] Page citations to the on-line version of RURAL MIGRATION NEWS are approximate, and depend among other factors upon the font in which the file is printed, and the configuration of the individual printer. The pagination referenced in this brief results from printing the on-line file in Times Roman 12-point font on an HP Laserjet 5000N, configured for word processing in WordPerfect 9.0.

claims courts); lack of familiarity with, and fear of, legal procedures; language barriers; undocumented status and the accompanying fear that assertion of rights subjects the complainant to deportation;[24] and trumping all of this is the pervasive fear of retaliation and loss of employment held by all workers, regardless of status.[25]

b. Nature of the Wrongs

As *amicus* CRLA brought to this Court's attention on an earlier occasion,

> Wage-and-hour violations are virtually always "crew"-wide, if not workforce wide; i.e., all workers performing the same assignment are treated similarly. Nevertheless, there can be very substantial disparities in the restitution due individual workers since the combination of seasonal work (often of very short term), relatively low pay and onerous conditions results in substantially varying individual work histories during the claims period - - some workers returning every season to labor throughout the available work period, and others working for a single week and moving on.

(Cortez v. Purolator Products Air Filtration Co., No. S071934, *Brief of*

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[24] Notwithstanding the painful and contentious issues raised by the circumstance that these workers are present and toiling outside the law, the President of the United States recently characterized them as ". . . goodhearted people who are coming here to work." ("Bush Renews Call for Guest Worker Plan," WASHINGTON POST (Dec. 20, 2004) http://www.washingtonpost.com/wp-dyn/articles/A14199-2004Dec20.html.)

[25] The majority of prospective clients that approach us for advice, assistance and/or representation with respect to employment matters do so after the employment has terminated.

Amicus Curiae Isabel Delgado Carrillo in Support of Plaintiff, filed Mar. 12, 1999 [hereafter, "Brief of *Amicus Curiae* Delgado"], p. 17 (2000) 23 Cal.4th 163]. The *Delgado* brief was prepared by *amicus* herein, CRLA.)

Similarly, the housing violations visited upon poor workers who live in camps, converted former motels, trailer courts, and other low-income housing complexes, are also complex-wide.

Wage losses that result from employer failures to pay minimum wages, for all hours worked, or overtime premiums may be relatively low in absolute terms when compared to amounts at issue in much of today's litigation, but, due to farmworkers' comparatively low earnings, these losses assume major significance for the welfare of themselves and their families. As we noted on an earlier occasion,

> . . . . Median farm worker earnings in the Western states including California vary between $5,000 and $7,500 per year. (Mines, Gabbard and Steirman, A PROFILE OF U.S. FARM WORKERS (April, 1997) Chptr 3., p. 3 (prepared for the Commission on Immigration Reform, based on data from the National Agricultural Workers Survey).) Farm worker households also have low family incomes with median household income varying between $7,500 and $10,000. (*Id.*, Chptr. 3, p. 1.) Farm labor wages in California have been declining in both absolute and nominal terms for twenty years. (U.S. Commission on Agricultural Workers, *REPORT OF THE COMMISSION ON AGRICULTURAL WORKERS* (Nov. 1992) 93-97; General Accounting Office, *H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS* (1997) Report to

> Congressional Committees, GAO/HEHS-98-20; S. Greenhouse, "U.S. Surveys Find Farm Worker Pay Down For 20 Years", *NEW YORK TIMES*, March 31, 1997, p. A1.) Thus, it should come as little surprise that data from a recent study undertaken by a consortium of universities show that, throughout California's extensive agricultural zones, a one-person increase in farm employment is associated with a one-person increase in the number of individuals in poverty and a 0.67-person increase in welfare use. (Taylor, Martin & Fix, *POVERTY AMIDST PROSPERITY: IMMIGRATION AND THE CHANGING FACE OF RURAL CALIFORNIA* (1997) Washington D.C.: The Urban Institute Press, 30-33.)

(Brief of *Amicus Curiae* Delgado, *supra*, pp. 7-8.)

The relatively high turn-over in farm labor exacerbates the dilemma of securing remedies: the number of injured workers per work-site may be relatively high while individual injuries and claims are not large in absolute dollars.

As can be readily inferred from the above information, agricultural wage-and-hour violations are wide-spread. Moreover, this inference is supported by substantial, empirical evidence. One non-profit California advocate undertakes an annual survey of wage conditions encountered by field workers in the San Joaquin Valley. This year's report, consistent with previous surveys, is disheartening:

- 49.8% of farm workers reported that their pay stubs did not show all the hours that they had worked. In 2003, 54.9% of farm workers reported that their pay stubs did not show all the hours worked; (A

SURVEY OF 1,028 CALIFORNIA AGRICULTURAL WORKERS FOUND WIDESPREAD WAGE AND HOUR VIOLATIONS, California Rural Legal Assistance Foundation (January, 2005) pp. 3,4)

- 48 % of farm workers reported that they had been paid in cash at least once during the prior year and had received no itemized pay information at all; (*id.*, p.3)
- 49.9% of farm workers reported that their employers did not always pay them the overtime wages they were owed; (*id.*, p.3)
- the 2003 survey documented that, when being paid by piece rate, 44.2% of farmworkers reported that their piece rate earnings amount to less than the minimum wage. (*Id.*, p. 6, n. 5.)

It is no answer to state that these injured farmworkers can simply start other actions against defendants for their wrongful practices. The overwhelming majority of farm workers and their families do not have the personal resources to step forward as individual plaintiffs to prosecute individual claims. And as will be described below, those few sufficiently able to do so will find inadequate legal resources to actually enable them to prosecute either individual, personal claims or class actions that are now asserted to be the requisite procedure under Proposition 64. And new

actions will not bring relief to those whose prior statutory rights under Section 17203 have expired. Thus, application of Proposition 64 to these cases filed before the initiative's effective date will deny both parties and statutorily-authorized interested persons fair notice and will defeat their reasonable reliance and settled expectations. (Californians for Disability Rights, *supra*, Slip Opinion at p. 9.)

3. Plaintiffs in Preenactment Pending Cases Will Lose Critical Substantive Rights If Proposition 64 Is Applied to Their Cases

Farmworker plaintiffs have a crucial interest in achieving *deterrence*. Deterrence is a substantive right often more significant for them than the meager recovery of a specific employer's wrongs. A worker's ability and right to seek recovery for *all* the defendant's workers, combined with the four-year statute of limitations under the UCL, effects leverage, impact and ultimately deters not only the immediate defendant at issue but other competing employers.[26] In contrast, purely injunctive relief often provides

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[26] Recent settlement of a CRLA-represented plaintiffs' representative action for wage-and-hour violations against a San Joaquin Valley dairy farm received broad coverage in both English- and Spanish-language pring and broadcast press, and within some 10 days of the settlement's announcement resulted in inquiries from workers at 28 other dairies. CRLA is informed that this settlement has received extensive attention within the industry. Yet the settlement amount–some $360,000 for 125 current and former workers–will not produce private counsel to pursue these claims as class actions. (See discussion, *infra*, at pages ___.) Workers' "remedies"

relatively limited deterrence because of the workforce's mobility, enforced by the nature of their work.

Indeed, the UCL was intended to *deter* violations. (Bank of the West, *supra*, 2 Cal.4th, at 1267.) This Court instructed that Section 17203 authorized courts to make orders "to deter future violations of the [UCL]" (*id.*), and further concluded that "[t]he Legislature considered this purpose so important that it authorized courts to order restitution without individualized proof of deception, reliance and injury . . ." (*Id.*)

More than affording recovery to a single individual, the overarching legislative concern in establishing the UCL was to provide a streamlined procedure to *prevent unfair competition.* (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1150; Frieman v. San Rafael Rock Quarry, *supra*, 116 Cal.App.4th, at ___ [10 Cal.Rptr.3d 82].)

The UCL's prohibition against unfair business practices is, of course, not limited to conduct that is unfair to competitors (People ex rel. Renne v. Servantes (2001) 86 Cal.App.4th 1081 [103 Cal.Rptr.2d 870]; Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal.App.4th 1109 [41 Cal.Rptr.2d

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hereafter will be to pursue individual claims before the Labor Commissioner or in small-claims courts–procedures that are illusory for California's agricultural work force. (See discussion, *infra*, at pages 34-43.)

46], *rehg denied as modified, rev. denied*), but is also directed to the public's right to protection from fraud, deceipt, and unlawful conduct. (Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal.App.4th 499.)[27]

Thus, the UCL provided an equitable means through which a private individual could bring individual suit to prevent unfair business practices and restore money or property to the victims of these practices. (Korea Supply, *supra.*) The *major purpose* of the UCL was the preservation of *fair business competition.* (Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, *rev. den'd*; Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal.App.4th 1156.)

In confirming this purpose, this Court and others spoke to community-wide, industry-wide and business-wide conduct, and emphasized the individual plaintiff's right to affect and where necessary correct that conduct. The courts recognized the UCL plaintiff's right to not merely recover his personal loss, which – even when successfully asserted -

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[27] "[U]nfair competition . . . mean[s] and include[s] any unlawful, unfair or fraudulent business act or practice . . ." (Bus. & Profs. Code § 17200.) It includes wrongful business conduct in whatever context such activity may occur. (Barquis v. Merchants Collection Ass'n of Oakland, Inc. (1972) 7 Cal.3d 94, 111.) It includes the ability to enforce and obtain remedies for violations of predicate laws that do not themselves provide for private civil enforcement as well as for conduct not specifically proscribed by some other law. (Korea Supply Co., *supra*, 29 Cal.4th 1134, at 1143; Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, *rev. denied.*)

- impacted the respective defendant no more than would initial compliance with existing obligation(s), but as well a right and a claim to stopping the defendants' wrongful conduct with respect to all with whom the defendant treated, and a right to deter from that course the defendants and others whom might be in "competition" with defendants.

4. Members of the General Public Whom the UCL Provided an Interest and Right to Recover Under the Party-Plaintiffs' Suits Lose Their Rights and Claims if Proposition 64 Is Applied to Their Cases

The necessary corollary to the plaintiff's right to achieve deterrence was the UCL's statutory recognition that non-party members of the general public had interests under these suits in recovering money or property of which they had been deprived. Thus, any person was entitled to seek " . . . such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitut[ed] unfair competition . . . or as may be *necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.*" (*Id.*, § 17203, emphasis added.)

Although defendants will argue that this right remains unimpeded under Proposition 64, and is now only conditioned upon the mere "procedural" vehicle of class certification, application of the Proposition

will "change the legal consequences of . . . [defendant's] past conduct . . .," and that application would be retroactive and impermissible absent clear expression of the promulgator's intent. ((Aetna, *supra*, 30 Cal.2d, at 394; Tapia, *supra*, 43 Cal.3d, at 289.)

The reasons are apparent:

- the private bar will be unable to pick up the majority of the existing cases and converted into class actions;
- the majority of the persons with interests in money or property of which they were unlawfully deprived will not approach nor find private counsel to bring individual claims;
- the majority of the persons with interests in money or property of which they were unlawfully deprived will not approach the Labor Commissioner to pursue their rights to administrative claims under Labor Code Section 98a, nor the small claims courts;
- of those limited numbers of individual persons who approach CRLA or others seeking individual representation and relief, the running of the statute of limitations will have consumed or at least greatly reduced available relief.

Investigation of these cases and their preparation for trial or settlement is complex and resource-intensive. As CRLA previously advised

this Court concerning our prosecution of these suits:

> Identification of injured workers who are not named parties have otherwise not initiated a client relationship with plaintiff(s)'s counsel begins with the employer's payroll records. . . . In some instances, the payroll records are sufficient to identify all members of the class or the "general public" who have been injured or have been deprived as a result of the unfair practice. In other instances, additional attempts to provide notice designed to identify and make contact with former workers is required. This is undertaken according to the circumstances of the case, buy may include procedures such as: mailing to last-known address on employer's payroll; public-service announcements on Spanish-language, farmworker-oriented radio programs, announcements and articles in Spanish-language community newspapers; and interviews of all known current and former employees to obtain identifying and locating information about other, unknown former employees.

(Brief of *Amicus Curiae* Delgado, *supra*, pp. 14-15.) We supplement that earlier representation by noting that, today, the above-referenced outreach increasingly must be undertaken in indigenous languages.[28]

Even ultimate distribution of recoveries, whether from trial or settlement, is complex and resource-intensive. Claims procedures must be established for individuals who often are no longer employed by the same employer and often reside elsewhere, who have limited education, who are

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[28] The indigenous languages referenced herein do not exist in written form; information presented in these languages is limited to oral presentations. In recent years, CRLA staff has increasingly included persons of indigenous heritage, fluent in one or more of these languages.

often illiterate, and who often work and live in a twilight of unreliable records.[29] To be effective, these procedures must be undertaken by plaintiffs' counsel (rather than the defendant employer).[30]

a. The Private Bar Does Not Have Adequate Resources to Preserve These Pre-enactment Claims

Private firms in California lack the logistical resources to investigate, make contact with, interview, depose and defend in deposition, and prepare testimony for hundreds of non-English – and often non-Spanish – speaking witnesses and victims in locales not infrequently hundreds of miles from

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[29] It bears recalling that California public policy is that all workers, regardless of their status, to be compensated for their past labors. (See, *e.g.*, California Department of Industrial Relations web-site "Frequently Asked Questions" >http://www.dir.ca.gov/QAundoc.html<; California Division of Labor Standards Enforcement website - Feature - All Californians Have Rights. >http://www.dir.ca.gov/dlse/DLSE-Feature.htm<.)

[30] *Amicus Curiae* Delgado in her brief to this Court in Cortez, noted: "CRLA insists that settlements - - regardless of whether they will be reduced to judgments - - specify procedures for making and evaluating claims, and for providing notice to potential claimants. Typically, claims for other than current employees are processed and evaluated by plaintiff-counsel's office (CRLA), given our unique combination facilities and availability during other than traditional office hours, our familiarity and experience with non-English-speaking workers and issues of immigration status and trans-border residency, and the generally high level of confidence of immigrant workers in CRLA. Frequently, the settlement requires the employer to establish a separate interest-bearing trust account rather than transfer a lump sum to CRLA's client-trust account, and, upon claim approval, to issue employer wage checks with appropriate deductions for payroll taxes and trust-fund contributions. . . ." (Brief of *Amicus Curiae* Delgado, *supra*, p. 19.)

counsel's offices. In our long years of experience in both providing the above-described rural, employee-side representation and encouraging and soliciting the private bar to undertake similar representa-tion, at any given time we have never identified more than six law offices – all relatively modest-size – in the entire state that are available to participate in employee-side farmworker advocacy, even utilizing the streamlined, more-economical procedures formerly available under the UCL. Of these, no more than three have been willing to undertake this representation on their own, *i.e.*, un-supported by CRLA as co-counsel.[31] (One of these three is, itself, a California non-profit organization which has limited advocacy capacity.)

The additional time and expense obligations incurred in pursuing class certification in representational suits as anticipated by Proposition 64's proponents will simply further discourage private counsel[32] from assuming

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[31] We note that the previously-referenced federal prohibition on CRLA's participation in class actions, as consistently interpreted by the Legal Services Corporation, precludes us from making any of our physical or personnel resources available to private counsel who might be willing to undertake future representation of the cases described herein as class actions.

[32] Although class certification might theoretically increase the available remedies (*see,* Kraus v. Trinity Management Services, *supra*, 23 Cal.4th, at 136-137) suggesting greater attractiveness to the private bar, this potential [advantage] is negated by the fact that, as noted above, over half of California's farmworkers are not directly hired by the grower or

these cases.[33] The procedural complexity, expense, and additional time requirements and general additional burdensomeness for class actions have been judicially recognized. (Frieman, *supra*, 116 Cal.App.4th, at 29, __-__ [10 Cal.Rptr.3d, at 89-90]; Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal.App.3d 758, 775.)

Amicus CRLA, responding prophylactically to the passage of Proposition 64, has been pursuing efforts to locate new counsel for our cases in the event that we would find ourselves in the position of being prohibited from going forward in these matters. Private counsel's analyses of the burdens imposed by potentially-required class certification are dismaying. One small firm which in recent years has both been one of our most active co-counsel in these cases as well as almost the only private firm

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entrepreneur (who may possess assets sufficient to satisfy potential judgments), but by independent labor intermediaries, commonly known as farm labor contractors. In *amicus* CRLA's experience, these latter are often only marginally capitalized (if at all). The question of whether employer liability extends to principals above these intermediaries is presently before this Court. (Martinez, et al. v. Munoz, et al., *supra*, No. S121552.)

[33] Without retreating from our observation, we also acknowledge that CRLA was fortunate to secure the assistance of private co-counsel in one of the above-described cases filed in the Superior Court for San Diego County in July, 2003, from a Chicago-based firm (licensed to practice in California) that provides extensive pro-bono advocacy for low-wage workers throughout the nation. When the superior court recently ruled that Proposition 64 applies to the pending suit and ordered plaintiffs to file an amended complaint in compliance with the UCL's new provisions, co-counsel agreed to undertake sole representation of plaintiffs.

to undertake extensive farmworker wage-and-hour representation, has concluded that undertaking such cases is now economically unviable unless recoveries will reach seven figures. Another small Bay Area firm, well-experienced in § 17200 and class litigation, believes it can undertake cases with potential recoveries as low as $500,000, but only within counties that do not extend "south of the San Francisco Bay Area. As described earlier, the overwhelming majority of *amicus* CRLA's current cases do not even remotely approach these economic parameters.

The conclusion is unavoidable that thousands of workers will lose their currently-asserted remedies unless they remain represented by counsel. But, as demonstrated, individual claims rarely reach amounts that will attract private counsel. Moreover, these claims and potential remedies will be substantially diminished in the event of re-filing by the running of the respective statutes of limitations.[34] These workers are not strangers to the subject lawsuits nor disinterested members of some abstract "general public" otherwise known as the People of the State of California whose interest is simply the public's general interest in compliance with the State's

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[34] While filing a class action serves to toll the statute of limitations for the entire class, there appears to be no such tolling in a non-class representative action under Section 17200. (Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1118-1124; *see*, American Pipe & Constr. Co. v. Utah (1974) 414 U.S. 538, 552.)

laws. They are statutorily defined and empowered/addressed/benefitted under the UCL as "person[s] in interest" with respect to money or property which has been acquired by the defendants' unfair competition. (Bus. & Profs. Code § 17203.) They are–or were--statutorily provided with, and entitled to, remedies that other members of the public are not.

b. Public Resources Will Not Preserve These Preenactment Claims

Public enforcement and recovery of these existing claims is a myth. Many of these workers, fearful about their status, will never approach a public enforcement or other agency[35] (including the Small Claims courts), and will forego assertion of their rights and claims. The Labor Commissioner does not pursue UCL causes of action through its administrative procedures (Labor Code, § 98(a); *see*, Cuadra v. Millan (1998) 17 Cal.4th 855), thus reducing the time period for which recoveries may be obtained.[36] The Division of Labor Standards Enforcement's

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[35] We hasten to add our perception that California's Division of Labor Standards Enforcement strives to enforce the legal rights of undocumented workers equally as those of workers legally entitled to be employed.

[36] Farmworkers' general reluctance to enforce their wage-and-hour rights perversely contributes to the lengthy persistance of these violations, and underscores the importance and value of the longer, four-year statute of limitations available under the UCL. (Cortez v. Purolator, *supra*, 23 Cal.4th, at 178-179.)

resources are incapable of addressing the need. In 2003, there were–for the entire California economy–only a total of 100 citations issued for state minimum wage violations, and a total of 126 citations issued for violations of state overtime compensation law. (A SURVEY OF 1,028 CALIFORNIA AGRICULTURAL WORKERS FOUND WIDESPREAD WAGE AND HOUR VIOLATIONS, California Rural Legal Assistance Foundation (January, 2005) p. 9, citing, "Annual Report on the Effectiveness of the Bureau of Field Enforcement," State of California, DIR, DLSE (March 2004) p. 2.)

Although Proposition 64 references the abilities of the Attorney General and local District Attorneys to pursue unfair competition cases, none has the experience nor the staffing resources to undertake wage-and-hour enforcement. The political will of local district attorneys in rural California to undertake wage-and-hour enforcement against agricultural employers simply does not exist and, at least in part, this is a consequence of inadequate resources to address current prosecutorial functions, a circumstance that is not about to change in the foreseeable future.[37]

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[37]The Legislative Analyst makes clear that Proposition 64 "could result in increased workload and costs to the Attorney General and local public prosecutors to the extent that they pursue certain unfair competition cases that other persons are precluded from bringing under this measure." (VOTER INFORMATION GUIDE, *supra*, p. 39.)

Indeed, our experiences leave little doubt in our minds that enforcement agencies, although of good intent, depended heavily on the private enforcement actions brought by *amicus* and a few other public-interest advocates in allocating their own under-funded resources to enforcement in rural California and particularly to enforcement in agricultural employment.

5. Defendants' Liabilities and Obligations for Past Conduct Is Largely Eliminated by Application of Proposition 64 to Preenactment Cases

Retroactive application of Proposition 64 to CRLA's preenactment representative cases will overwhelmingly relieve the respective defendants of their liabilities for pre-enactment conduct and their obligations arising therefrom.

CONCLUSION

What Proposition 64 does express clearly was the voters' intent to curb "frivolous" and abusive lawsuits. (Prop. 64, § 1(d).) These representative UCL suits were surely not. Instead, as this Court acknowledged in Kraus v. Trinity Management Services, *supra*, these suits "serve important roles in enforcement of . . . rights and have filled an enforcement void that public prosecutors strapped for both time and resources, have not been able to fill. (Kraus, 23 Cal.4th at 126.)

Proposition 64 "amends" the Business & Professions Code which contains its own long-standing savings provision. Retroactive application of Proposition 64 will deny thousands of low-income workers and tenants of remedies which they were able to pursue and recover only through the pre-November 3 provisions of the Unfair Competition law.

Yet, the text of Proposition 64 contains no expression of retroactivity. Extrinsic sources fail to express that Proposition 64 was intended to apply retroactively. No evidence exists that the electorate intended independently of the initiative's proponents to apply Proposition 64 retroactively.

The voters are entitled to get what they voted for–not more and not less.

DATED: March 4, 2005

Respectfully submitted,

CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

By_____
William G. Hoerger

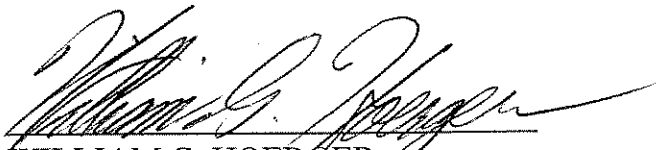
CONSUMER ATTORNEYS OF CALIFORNIA

By_____
James C. Sturdevant

RULE 14 CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the BRIEF AMICI CURIAE REGARDING PASSAGE OF PROPOSITION 64 IN SUPPORT OF PLAINTIFFS AND RESPONDENTS uses a proportionately-spaced Times New Roman 13-point typeface, and that the text of this brief comprises 11,958 words according to the word count provided by the Corel WordPerfect 9.0 word-processing software.

Dated: March 4, 2005



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CERTIFICATE OF SERVICE BY MAIL

I, Theresa Do, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 475 Sansome Street, Suite 1750, San Francisco, California 94111.

I am readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for mailing with the ***United States Postal Service***, being that true and correct copies of the documents are deposited with the United States Postal Service, with postage thereon fully prepaid, for collection on the date stated below in the ordinary course of business.

On March 4, 2005, I served the within **Brief of Amici Curiae Regarding Passage of Proposition 64 in Support of Plaintiffs and Respondents** by ***U.S. mail*** on the interested parties in this action, by placing true and correct copies thereof in envelopes addressed to:

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I declare under penalty of perjury that this declaration is executed on the date first stated above at San Francisco, California.

_____

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