Unfair Competition Case
(*See* Cal R. Ct. 16(d),
Cal Bus. & Prof. Code §17209)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIDS AGAINST POLLUTION, ET AL. Plaintiffs and Respondents, v. CALIFORNIA DENTAL ASSOCIATION, Defendant and Appellant.	**Case No.: S117156** From an Opinion of the Court of Appeal, First Appellate District On Appeal from an Order Denying Respondent's Special Motion to Strike Pursuant to California Code of Civil Procedure § 425.16 The Honorable A. James Robertson II, Judge of the Superior Court, County of San Francisco, Consolidated

PLAINTIFFS' AND RESPONDENTS' ANSWER BRIEF TO THE CALIFORNIA DENTAL ASSOCIATION'S SUPPLEMENTAL BRIEF REGARDING THE PASSAGE OF PROPOSITION 64

Shawn Khorrami (SBN: 180411)
Matt C. Bailey (SBN: 218685)
LAW OFFICES OF SHAWN KHORRAMI
14550 Haynes Street, Third Floor
Van Nuys, CA 91411
Telephone: (818) 947-5111
Facsimile: (818) 947-5121

Attorneys for Plaintiffs and Respondents:
Kids Against Pollution, Dental Amalgam Mercury Syndrome, Inc., American Academy of Biological Dentistry, Debra Seltenreich, Anita Tibau, and Cindy Blake

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14550 Haynes Street, Third Floor
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Telephone: (818) 947-5111
Facsimile: (818) 947-5121

Attorneys for Plaintiffs and Respondents:
Kids Against Pollution, Dental Amalgam Mercury Syndrome, Inc., American Academy of Biological Dentistry, Debra Seltenreich, Anita Tibau, and Cindy Blake

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I. INTRODUCTION

California Dental Association ("CDA") contends that Prop 64 requires this Court to dismiss Respondents' instant action. For several reasons, this contention is wrong.

As an initial point, this Court need not – and properly should not – consider the Prop 64 issue unless this Court gets to the second prong of Section 425.16. Standing (like statute of limitations) is a technical defense, which properly should considered in the second prong with CDA's other asserted defenses. For this reason, CDA's claim that Prop 64 provides this Court with a basis vacate the grant of review is incorrect. If this Court finds that Section 425.17(b) applies, this Court need not even consider the Prop 64 issue at all.

However, even if this Court were to reach the Prop 64 issue, it must hold that Prop 64's amendment to standing cannot be applied to pending UCL cases such as the case at bar. Based on the analytical framework provided by this Court, Prop 64 cannot be applied to pending cases, as such application would have a substantive effect on the rights and liabilities of the parties that existed prior to enactment.

Moreover, contrary to CDA's claim, the "repeal of statute" rule is inapplicable to this action – no matter how Prop 64 is construed by this

Court. If this Court finds that Prop 64 did not substantively "repeal" the UCL cause of action itself, the common-law "repeal of statute" rule does not apply to pending UCL actions – the repealing statute must actually "repeal" the statutory cause of action itself for the common-law rule to apply. However, if this Court finds that Prop 64 did substantively "repeal" the UCL cause of action, the general savings clause codified at Bus. & Prof. Code § 4 would preclude application of Prop 64 to actions commenced before Prop 64's effective date.

II. AS STANDING IS A DEFENSE, THE PROP 64 ISSUE RAISED BY CDA CAN BE CONSIDERED ONLY IF IT CONCLUDES THAT CDA'S ANTI-SLAPP MOTION IS NOT BARRED BY SECTION 425.17

Assuming, *arguendo*, that Prop 64 applies to this action, consideration of this issue is not appropriate unless this Court finds that CDA's anti-SLAPP motion is not barred by Code Civ. Proc. § 425.17(b). As standing is a technical defense [*See* Casa Herra, Inc. v. Beydoun, 32 Cal.4th 336, 348 (2004)], consideration of this issue within the confines of CDA's anti-SLAPP Motion (like CDA's other defenses) is contingent on the very propriety of CDA's anti-SLAPP motion in the first instance. *See* Brenton v. Metabolife Int'l, Inc, 116 Cal.App.4th 679, 691 n.6 (2004) ("applying section 425.17 here does not eliminate that purported *right* [to be free from meritless lawsuits], but only removes one procedural mechanism

for enforcing that right and requires . . . [the defendant] to enforce the right to be free of meritless lawsuits by other procedures or remedies."); *See also* Northern Cal. Carpenters Regional Council v. Warmington Hercules Assocs., 124 Cal. App. 4th 296, 302 (2004) (holding that because Section 425.17(b) applied, "Defendants were deprived of this [anti-SLAPP motion] remedy when the statute became effective, and we have no need to consider the merits of their motion.").

Accordingly, to the extent that CDA's anti-SLAPP motion is barred by Section 425.17(b), CDA necessarily will be deprived of the very motion upon which it now seeks to assert all of its defenses – including a standing defense. Under such circumstances, CDA will have to assert such defenses through other procedural means.

III. PROP 64 CANNOT BE APPLIED TO AN EXISTING CASE SUCH AS THE CASE AT BAR

A. PROPOSITION 64 CANNOT BE APPLIED TO PENDING CASES, AS SUCH APPLICATION WOULD HAVE A SUBSTANTIVE EFFECT ON THE RIGHTS AND LIABILITIES OF THE PARTIES THAT EXISTED PRIOR TO ENACTMENT

Regardless of whether Prop 64's amendment to standing is or is not procedural, Prop 64 cannot be applied to pending cases. As such application will have a substantive effect on the rights and liabilities of the parties that existed prior to Prop 64's enactment, such retroactive application is not

permissible based on the analytical framework provided by this Court.

As held by this Court, "a retroactive or retrospective law' 'is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.'" *See* Myers v. Philip Morris Companies, Inc., 28 Cal.4th 828, 839 (2002). In other words, "a law is retrospective if it changes 'the legal effects of past events'" *See* Tapia v. Superior Court, 53 Cal.3d 282, 289 (1991) (*citing* Aetna Cas. & Surety Co. v. Ind. Acc. Com., 30 Cal.2d 388, 394 (1947)). While courts have sometimes used the terms "substantive" and "procedural" in determining whether such statutes changed "the legal effects of past events[,]" this Court has held that "it is the law's effect, not its form or label, which is important." *See* Tapia, 53 Cal.3d at 289 (1991); Aetna, 30 Cal. 2d at 394. Based on this framework, a determination that a statute is procedural is not determinative, as only the "sub-category" of procedural statutes that "can have no effect on substantive rights or liabilities" may properly be applied to pending cases. *See* Borden v. Division of Medical Quality, 30 Cal.App.4th 874, 880 (1994) ("The only exception which we can discern from the cases is a subcategory of procedural statutes which can have no effect on substantive rights or liabilities, but which affect only modes of procedure to be followed in future proceedings."); Beeman v.

Burling, 216 Cal. App. 3d 1586, 1606-1607 (1990); Russell v. Superior Court, 185 Cal.App.3d 810, 816 (1986).

As application of Prop 64's standing amendment to pending cases would in fact substantively effect rights and liabilities, Prop 64 cannot be applied to pending actions.

Specifically, prior to the passage of Prop 64, a private plaintiff had a right to pursue a UCL action without having sustained injury in fact, and a defendant could be subject to liability thereto without any showing of injury by the private plaintiff. Application of Prop 64's standing provision to pending cases would terminate the private plaintiff's lawsuit and exonerate the defendant for purported conduct preserved within Bus. & Prof. Code § 17208's four year statute of limitations period unless injury in fact is shown. Thus, it cannot be said that Prop 64 is of the variety of procedural statutes which, if applied to pending actions, "can have no effect on substantive rights or liabilities, but which affect only modes of procedure to be followed in future proceedings." *See* Beeman, 216 Cal. App. 3d at 1606-09.

The circumstances presented by Prop 64 are no different than the amendments to Code of Civil Procedure § 473 presented in Beeman, 216 Cal. App. 3d 1586. In that case, the Court reasoned that an amendment to

C.C.P. § 473 (which would create a mandatory procedural defense to a default on the grounds of "mistake, inadvertence, surprise or neglect") could not be applied to a pending action, as such application of the statute would substantively impair rights existing at the time of the default judgment. *See id.* at 1604-07. Based on the framework set down by this Court, there can be no principled basis for rejecting the application of the procedural defense in Beeman while permitting the application of the Prop 64 standing defense to existing 17200 claims.

Conversely, the application of Prop 64 to pending cases would conflict with analysis justifying the application of Code Civ. Proc. § 425.17 to pending actions. In Brenton, *supra*, 116 Cal. App. 4th 679, the Court reasoned that Code Civ. Proc.§ 425.17 could permissibly be applied to an existing case because such application would only remove the procedural mechanism used to assert defenses to the action – leaving the defendant's right to assert all defenses fully intact by means of other procedural vehicles. *See* Brenton, 116 Cal. App. 4th at 689-90, 691 n.6. Here, unlike Section 425.17, which neither created nor destroyed a defense to the underlying action, Prop 64 creates a defense which stands to terminate an action unless injury in fact is shown.

In sum, because applying Proposition 64 to pending cases would in

fact have a substantive effect on the rights and liabilities of the parties that existed prior to enactment, this Court must find that such application is "retroactive" in effect, and there, impermissible.

B. THE "REPEAL OF STATUTE" RULE CITED BY CDA IS INAPPLICABLE TO THIS ACTION

CDA wrongly contends that under the common-law "repeal of statute" rule, Prop 64 can be applied to terminate pending actions. That rule, as set forth by the Court in Governing Board v. Mann, 18 Cal.3.d 819, 829 (1977) provides that in the absence of a savings clause, a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action is pending. This rule cannot apply Prop 64's amendments to pending UCL causes of action – no matter how Prop 64 is construed by this Court. If this Court finds that Prop 64 did not substantively "repeal" the UCL cause of action itself, the common-law "repeal of statute" rule does not apply to pending UCL actions. As held by this, and other Courts, the repealing statute must actually "repeal" the statutory cause of action itself for the common-law rule to apply. However, if this Court finds that Prop 64 did substantively "repeal" the UCL cause of action, the general savings clause codified at Bus. & Prof. Code § 4 would preclude application of Prop 64 to actions commenced before Prop 64's effective date.

1. To the Extent That Prop 64 Did Not Substantively "Repeal" the UCL Cause of Action Itself, the Common-law "Repeal of Statute" Rule Does Not Apply

Under existing authority, the repealing statute must actually "repeal" the statutory cause of action for the common-law rule to apply.

In Krause v. Rarity, 210 Cal. 644 (1930), this Court held that the "repeal of statute" rule did not apply to a pending action based on a purely statutory claim where there "was no abolishment of the right or cause of action, but only a change in the proof required...." *See id.* at 654-55. This distinction was also recognized by the Court in In Re Estate of Whiting, 110 Cal.App. 399 (1930), wherein the Court held the "repeal of statute" rule did not apply to a plaintiff's probate contest action when the amendment did not "repeal" the right to contest probate itself, but rather, only limited the maintenance such actions to certain persons and shortened the time in which to bring such an action. *See id.* at 405.

Thus, to the extent that this Court holds that Prop 64 does not substantively "repeal" the UCL cause of action under Section 17200, the common-law "repeal of statute" rule does not – and cannot – be applied to pending UCL cases.

2. If Prop 64 Did Substantively "Repeal" the UCL Cause of Action, Bus. & Prof. Code § 4 Would Preclude Application of Prop 64 to Actions Commenced Before Prop 64's Effective Date

If Prop 64 did substantively "repeal" the UCL cause of action, however, the common-law rule still does not apply here – the Business and Professions Code itself contains a general savings clause precluding the application of substantive repeals to pending cases. As set forth in Cal. Bus & Prof Code § 4, "[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." This general savings clause precludes the application of newly enacted provisions of the Code to affect 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. This Court has repeatedly held that "a general saving clause in the general body of the law is as effective as a special saving clause in the particular section." *See* Peterson v. Ball, 211 Cal. 461, 475 (1931); People v. McNulty, 93 Cal. 427, 437 (1892) ("a general saving clause, if it be clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute."); *See also* People v. Alexander, 178 Cal. App. 3d 1250,

1264 (1986) ("California has a general saving clause in *Government Code section 9608*, and such a clause is just as effective as a specific one."). As such, Bus. & Prof. Code § 4 is just as effective as any savings clause that could have been inserted within Prop 64.

Second, the general savings clause set forth in Bus. & Prof. Code § 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 commenced *before* this code takes effect, and no right accrued, is affected by the provisions of this code....") (*emphasis added*). Such as construction is consistent with this Court's analysis in Hogan v. Ingold, 38 Cal. 2d 802 (1952). In that case, this Court reasoned that the express language of Corp. Code § 4 – a provision identical to Bus. & Prof. Code § 4 – would not preclude the application of a subsequently enacted section to the Corp. Code when the action was commenced *after* the statute's effective date:

> "we are of the view that section 4 of the Corporations Code is pertinent. It provides that '*No action . . . 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.*' Certainly there is nothing in the quoted language which implies that section 834 shall not be applied to actions commenced *after* its effective date." *See* Hogan, 38 Cal. 2d at

816 (*ellipsis in original, emphasis added*).

Third, the general savings clause set forth in Bus. & Prof. Code § 4 is not limited only to the original provisions of the code, but extends to subsequent enactments and amendments as well. This is confirmed by Cal. Bus. & Prof. Code § 12, which states "[w]henever any reference is made to any portion of this code or of any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made." 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 Corp. 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.

Moreover, as held by the Court in Sobey v. Molony, 40 Cal. App. 2d 381 (1940), Bus. & Prof. Code § 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.*" *See* Sobey, 40 Cal. App. 2d at 388-389 (distinguishing Bus. & Prof. Code § 2 "as a saving clause where no substantial change was made in the law.").

In fact, this Court has repeatedly held that similar "general

provisions" contained in the California codes were intended by the legislature to apply to "amendments" of the code and not just "the original enactment" of the code. In Evangelatos v. Superior Court, 44 Cal. 3d 1188 (1988), the Court held that Cal. Civ. Code § 3 (which states only that "[n]o part of it is retroactive, unless expressly so declared"), and comparable provisions contained in other codes, properly applied to "amendments" of the codes themselves. *See* Evangelatos, 44 Cal. 3d at 1208 n.11. In fact, the Evangelatos Court explicitly disapproved of an appellate opinion suggesting that such general provisions had "no application to amendments to such codes and applies only to the original provisions of the codes" – asserting that such a position was in direct conflict with the numerous decisions of this Court. *See id.*

In sum, the general savings clause codified at Cal. Bus. & Prof. Code § 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. To the extent that Respondent's action was filed several years before Prop 64 became effective, Prop 64 cannot be applied to the instant action.

IV. CONCLUSION

This Court need not even consider the Prop 64 issue if it finds that

CDA's anti-SLAPP motion is barred by Code of Civ. Proc. § 425.17(b). However, if this Court gets to the Prop 64 question, it must find that Prop 64 cannot be applied to actions commenced before the statute's effective date.

CERTIFICATE OF WORD COUNT

I certify that the text of this Brief consists of 2796 words. This number was confirmed by the Wordperfect word-processing program.

DATED: January 18, 2005

LAW OFFICES OF SHAWN KHORRAMI

By: _____
SHAWN KHORRAMI, ESQ.
MATT BAILEY, ESQ.
Attorneys for Plaintiffs and Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is 14550 Haynes Street, Third Floor, Van Nuys, California, 91411.

On January 19, 2005 I served the foregoing:

PLAINTIFFS' AND RESPONDENTS' ANSWER BRIEF TO THE CALIFORNIA DENTAL ASSOCIATION'S SUPPLEMENTAL BRIEF REGARDING THE PASSAGE OF PROPOSITION 64

on the interested parties below by enclosing a copy in a sealed envelope addressed as follows:

[By U.S. Mail]
Luanne Sacks, Esq.
Gray, Cary, Ware & Freidenreich
153 Townsend Street
Suite 800
San Francisco, CA 94107

Attorneys for Defendant American Dental Association

[By U.S. Mail]
Seth Hufsteadler, Esq.
Morrison and Foerster
555 W. Fifth St.
Los Angeles, CA. 90013
213-892-5200

Co-Counsel for Defendant California Dental Association

[By U.S. Mail]
Peter Sfikas, Esq.
Bell, Boyd & Lloyd
70 West Madison Street
Chicago, IL 60602
312 372 1121

Co-Counsel for Defendant American Dental Association

[By U.S. Mail]
Fletcher Alford, Esq.
Jewel Kolling Basse, Esq.
Gordon & Rees LLP
Embarcadero Center West
275 Battery St., Suite 2000
San Francisco, CA. 94111

Counsel for Defendant and Appellant
California Dental Association

[By U.S. Mail]
Linda Seifert, Esq.
California Dental Association
1201 'K' Street
Sacramento, CA. 95814
916 443 0505

Co-Counsel for Defendant and
Appellant California Dental
Association

[By U.S. Mail]
Bill Lockyer, Attorney General
of the State of California
Department of Justice
Consumer Law Section
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-0550

[By U.S. Mail]
Terrence Hallinan
District Attorney
City and County of San Francisco
850 Bryant Street Room 301
San Francisco, CA 94103

[By U.S. Mail]
Honorable A. James Robertson
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

[By U.S. Mail]
California Court of Appeal
First Appellate District
350 McAllister Street, Room 1185
San Francisco, CA 94102-3600

/X/ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 19, 2005 at Van Nuys, California.

Elsa Camargo, Paralegal