

APPLYING PROPOSITION 64 TO PENDING CASES:

The Consumers' Perspective

For more than 70 years, "private attorney general" suits under California's Unfair Competition Law (Business & Professions Code § 17200 *et seq.* ("UCL")) have been a vital tool for the enforcement of important public rights. The California Supreme Court consistently has acknowledged that such "representative UCL actions serve important roles in the enforcement of consumers' rights." (*Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 126 (2000).) These private efforts have filled an enforcement void that district attorneys and the Attorney General, strapped for both time and resources, have not been able to fill. As the high court stated, UCL representative actions "supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts." (*Ibid.*)



Pamela M. Parker

Thus, while the existence of UCL representative suits may have perplexed our colleagues in the defense bar and their clients, as the companion article suggests, consumers and the California Supreme Court clearly understood the value of such lawsuits. Over the years, UCL actions brought on behalf of the general public have made a significant contribution to the vindication of important consumer and other public interests. (*See, e.g., Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002) [reversing sustaining of demurrer in case brought by California resident on behalf of general public challenging defendant's allegedly false advertising about its labor practices and working

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The Business Defendants' Perspective

One of the difficulties facing any lawyer defending consumer mass actions always has been describing the unique reaches of California's Unfair Competition Law (Business and Professions Code Section 17200, *et seq.*) and False Advertising Act (Business and Professions Code Section 17500, *et seq.*) (collectively, the "UCL"). Clients outside California would think they had a slam dunk demurrer because the plaintiff suing them had not done any business with the defendant, seen the challenged advertising, or used the defendant's products or services at all. Or they would assume that uninjured private plaintiffs suing them could not possibly pursue representative, non-class, actions on behalf of an elusive and undefined "general public." (*See generally* Hon. Ronald M. Sabraw, *Making Sense of "The General Public" Under B&P Section 17200*, ABTL No. Cal. Report, Vol. 13, No. 3 (Summer 2004) (discussing the approaches to defining this term)). These anomalies made California state courts a magnet for representative and class action consumer claims.



Gail E. Lees

On November 2, 2004, however, California voters took a huge step toward aligning California's consumer laws with the "Little FTC Acts" in the rest of the country by overwhelmingly (by a margin of 59% to 41%) passing Proposition 64, a statewide ballot initiative entitled "Limits on Private Enforcement of Unfair Business Competition Laws." As most business lawyers know, Proposition 64 effected many significant revisions to the UCL. Specifically, it amended the UCL to require that the private plaintiff "has suffered injury in fact and lost money or property" as a result of the alleged unfair competition and/or untrue or misleading advertising. (Cal. Bus. & Prof. Code §§ 17203, 17204, 17535). Proposition 64 also deleted the UCL's vague reference to the "general public" (*id.* § 17204) and made clear that traditional class action requirements must apply to UCL claims. (*Id.* § 17203).

By enacting Proposition 64, voters expressed their frustration with "frivolous lawsuits" that serve as nothing more than "a means of generating attorney's fees without creating a corresponding public benefit." (Prop. 64, § 1(b)(1) (available at <http://voterguide.ss.ca.gov/propositions/prop64text.pdf>)). They declared their intent: (1) "to *eliminate* frivolous unfair competi-

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tion lawsuits"; (2) to require "injur[y] in fact under the standing requirements of the United States Constitution"; and (3) to ensure "that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." (*Id.* § 1(d)-(h) (emphasis added)).

Pursuant to California Constitution Article II, Section 10(a), "[a]n initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise." (Cal. Const. art. II, § 10(a)). The text of Proposition 64 does not contain an effective date, so the amendments to the UCL became effective on November 3, 2004. The issue presented is whether the revised UCL applies immediately to actions filed before November 3.

Recent Appellate Decisions: A "North"- "South" Split Amongst the Courts of Appeal



Christopher Chorba

While many were looking south in anticipation of the first appellate decision to address the applicability of Proposition 64 to pending cases, it was an appellate court to the north that surprised everyone by acting first. The First Appellate District, Division Four, held that Proposition 64 did not bar the plaintiff, "a nonprofit corporation organized to protect the interests of persons with disabilities," from pursuing the appeal of an adverse judgment on the UCL claim. (*See Californians for Disability Rights v. Mervyn's, LLC*, Case No. A106199, 2005 Cal. App. LEXIS 160, at *2 (Cal. Ct. App. Feb. 1, 2005)).

It did not take long for the appellate courts in Southern California to act. A little more than one week after this decision, the Second Appellate District, Division Five, held that Proposition 64 removed the statutory authority for the private plaintiff to pursue its action against the defendant. (*See Branick v. Downey Savings & Loan Ass'n*, Case No. B172981, 2005 Cal. App. LEXIS 201, at *14-25 (Cal. Ct. App. Feb. 9, 2005)). The next day, the Fourth Appellate District, Division Three, reached the same conclusion. (*See Benson v. Kwikset Corp.*, Case No. G030956, 2005 Cal. App. LEXIS 208, at *11-29 (Cal. Ct. App. Feb. 10, 2005)).

In *Branick*, Associate Justice Richard M. Mosk, joined by Acting Presiding Justice Orville A. Armstrong and Judge Sandy R. Krieglner (Los Angeles County Superior Court), wrote that the presumption "against retroactivity" does not apply. (*Branick*, 2005 Cal. App. LEXIS 201, at *16-17). Section 9606 of the Government Code provides that "[p]ersons acting under any statute act in contemplation of this power of repeal." (Cal. Gov't Code § 9606). Because Proposition 64 affects a statutory right (the right of unaffected private plaintiffs to bring and pursue claims notwithstanding their lack of injury in fact), and does not contain a savings clause permitting the repealed version of the statute to continue, courts must apply it to pending cases. *See also Benson*, 2005 Cal. App. LEXIS 208, at *23-25).

This article explains that pursuant to the Supreme Court's "well settled rule" regarding statutory repeals — as applied by the Second Appellate District in *Branick* and the Fourth Appellate District in *Benson* — Proposition 64 terminates actions in which a private plaintiff lacks standing under the revised UCL.

The Supreme Court's "Well Settled Rule" Governs

As the initiative affects rights based solely on statute (the UCL) (*see generally Bank of the West v. Super. Ct.*, 2 Cal. 4th

1254, 1263-64 (1992)), and California courts regularly apply changes to statutory causes of actions to pending claims (including those already adjudicated and on appeal), Proposition 64 applies to pending UCL claims. According to the California Supreme Court, this is "because of the *well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final.*" (*Younger v. Super. Ct.*, 21 Cal. 3d 102, 109 (1978)).

While a private plaintiff who has not suffered any injury in fact was able to file suit under the UCL as it existed on November 2, the basis for this right was purely statutory. The California Government Code confirms that litigants pursue statutory claims with fair warning that their statutory rights may change: "*Persons acting under any statute act in contemplation of this power of repeal.*" (Cal. Gov't Code § 9606 (emphasis added)). "[A] repeal of a statute," the panel in *Californians for Disability Rights* continued, is actually evidence of legislative intent that the new legislation apply "retroactively," and thus "rebut[s] the presumption of prospectivity." (*Californians for Disability Rights*, 2005 Cal. App. LEXIS 160, at *13). Yet that is precisely what California voters did when they approved Proposition 64: they repealed the statutory loophole that permitted uninjured private plaintiffs to sue and recover under the UCL.

It is no defense to the Supreme Court's "well settled rule" that the revision did not effect a complete "repeal" of every subparagraph of the existing statute. In fact, appellate decisions apply this rule whether the "repeal": (a) completely or partially deletes a statute; (b) directly or indirectly affects the statute in question; (c) is a deletion or amendment to the old law; (d) impacts part of a statute or the entire code or section; and (e) explicitly refers to the old law or simply repeals it by implication. (*Branick*, 2005 Cal. App. LEXIS 201, at *25-25; *Benson*, 2005 Cal. App. LEXIS 208, at *21; *see also Younger*, 21 Cal. 3d at 109; *Governing Bd. v. Mann*, 18 Cal. 3d 819, 828 (1977); *Krause v. Rarity*, 210 Cal. 644, 653 (1930)).

The California Supreme Court has applied this rule specifically to statutory unfair competition claims. In *International Ass'n of Cleaning & Dye House Workers v. Landowitz*, 20 Cal. 2d 418 (1942), the Supreme Court held that a cause of action under the predecessor to the UCL (which specifically prohibited a certain form of competition) was vitiated by the Legislature's repeal of the statute that created it. (*Id.* at 422).

The Second Appellate District correctly applied this "well settled rule" in *Branick*. It rejected plaintiff's argument that UCL claims are derived from the common law. (*Branick*, 2005 Cal. App. LEXIS 201, at *21-22). Citing California Supreme Court decisions, the panel explained that UCL claims "cannot be equated with the common law definition of 'unfair competition.'" (*Id.*; citing *Bank of the West*, 2 Cal. 4th at 1264). In addition, and "[m]ost importantly for the purposes of this case, the statute granted to persons who did not suffer competitive injury the right to bring representative actions on behalf of the general public — a right that did not exist under the common law." (*Id.* at *22; *see also Benson*, 2005 Cal. App. LEXIS 208, at *23).

Because it did not confront the Supreme Court's "well settled rule," the panel that decided *Californians for Disability Rights* ignored several court decisions explaining that the anti-"retroactivity" presumption is completely inapplicable in the case of a statutory repeal. According to the Supreme Court, "[a] long well-established line of California decisions *conclusively refutes plaintiff's contention*" that the presumption against "retroactivity" applies. (*Mann*, 18 Cal. 3d at 829). The Second Appellate District, addressing this argument in another decision, explained that "[t]his principle is not applicable here.... [Plaintiff] overlooks that we deal here with a repeal, not a 'retroactive' application of a new statute." (*Beckman v. Thompson*, 4 Cal. App. 4th 481, 489 (1992) (emphasis added)); *see also Physicians Comm.*

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for *Responsible Medicine v. Tyson Foods, Inc.*, 119 Cal. App. 4th 120, 125 (2004) (“The repeal of a statutory right or remedy... presents entirely distinct issues from that of the prospective or retroactive application of a statute.”)).

In fact, there is an entirely *opposite* presumption in the context of statutory rights or remedies: Absent an express “saving” clause to allow the revoked version of a statute to continue to govern a pending case, there is a *presumption* that a new law applies immediately to all cases, even those commenced before its enactment. (*Younger*, 21 Cal. 3d at 110; *Mann*, 18 Cal. 3d at 829; *Southern Serv. Co.*, 15 Cal. 2d at 11-12; *Wolf v. Pac. Southwest Disc. Corp.*, 10 Cal. 2d 183, 185 (1937)). Indeed, this “well settled rule” also obviates an inquiry into what voters or the Legislature intended in enacting the new law: “The only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal...” (*Younger*, 21 Cal. 3d at 110).

Application of Proposition 64 to Pending Actions Would Be Prospective, Not “Retroactive”

Because it found that the Supreme Court’s “well settled rule” was dispositive, the Second Appellate District did not consider the defendant’s remaining arguments as to why Proposition 64 should apply to the pending action. (*Branick*, 2005 Cal. App. LEXIS 201, at *16). The First Appellate District panel in *Californians for Disability Rights* confronted these issues in reaching the opposite, and incorrect, conclusion.

That panel dismissed the Supreme Court’s “well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final” (*Younger v. Super. Ct.*, 21 Cal. 3d 102, 109 (1978), discussed *infra*), without confronting it. Instead, it discerned and then purported to resolve “a seeming conflict in canons of statutory interpretation”: “On the one hand, legislative enactments are presumed to operate prospectively. On the other hand, a court should apply the law in effect at the time it renders its decision, including recent statutory amendments.” (*Californians for Disability Rights*, 2005 Cal. App. LEXIS 160, at *12). The panel wrote that the high courts have reconciled this apparent conflict and that “the presumption of prospectivity is the controlling principle.” (*Id.* at *12 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 263-80 (1994); *Evangelatos v. Super. Ct.*, 44 Cal. 3d 1188, 1207-08 (1988))).

In relying on a lengthy, seventeen-page excerpt of *Landgraf* to support its holding, the First Appellate District failed to reconcile its own holding with language in that opinion that suggested a different conclusion. The Court in *Landgraf* explicitly observed that “[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.” (*Landgraf*, 511 U.S. at 273 (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921))). Because UCL claims are equitable, there is no authority for the trial or appellate courts to grant relief to private plaintiffs who fail to “meet[] the standing requirements of Section 17204.” (Cal. Bus. & Prof. Code § 17203). Moreover, as the Court observed, “[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.” (*Landgraf*, 511 U.S. at 274).

Simply concluding that application of Proposition 64 to pending cases would be “retroactive,” as did the court in *Californians for Disability Rights*, is not sufficient: “the conclusion that a particular rule operates ‘retroactively’ comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of

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Joint Defense/Common Interest Doctrine in California

The joint defense/common interest doctrine provides a means by which litigants, under some circumstances, may shield from discovery in court proceedings privileged documents that would otherwise be discoverable because they have been shared with a party/counsel outside the attorney-client relationship. In California state courts, the doctrine is typically referred to as the common interest doctrine. The doctrine applies when the sharing of these documents is reasonably necessary for the accomplishment of the purposes for which counsel was consulted.

This past year, the California Court of Appeal issued two significant decisions concerning the recognition, utilization and scope of the joint defense/common interest doctrine in California. In *OXY Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874 (2004) (“*OXY Resources*”), the Court expressly recognized the existence of a common interest doctrine in California, upheld the use of common interest agreements in connection with pre-litigation business transactions, and significantly clarified the scope of protection provided by the common interest doctrine and the requirements for obtaining such protection. In *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (“*McKesson HBOC*”), the Court sounded a note of warning to parties considering entering into common interest agreements with government entities. These decisions are particularly important to businesses that rely upon common interest agreements in California to protect exchanges of privileged/work product information with others, in both litigation and non-litigation contexts.



Robert F. Scoular

OXY Resources California LLC v. Superior Court

In *OXY Resources*, the Court of Appeal was confronted with the question of whether parties negotiating a business transaction may rely upon a joint defense agreement as the basis for refusing to produce privileged documents exchanged long before they are actually sued by a third party.

OXY Resources arose out of a complex transaction between OXY Resources California LLC (“OXY”) and another company, EOG Resources, Inc. (“EOG”), for the exchange of interests in a number of oil and gas producing properties. One of the properties was the subject of another agreement between EOG and Calpine Natural Gas LP (“Calpine”), which gave Calpine the right of first refusal to purchase the property from EOG. In connection with their transaction, and in anticipation of a likely suit by Calpine, OXY and EOG entered into a common interest agreement. (Unlike many common interest cases, the common interest agreement in *OXY Resources* was not prepared during litigation, but rather was prepared in anticipation of litigation likely to result from the transaction.) Pursuant to that agreement, counsel for OXY and EOG exchanged privileged documents both before and after completion of the transaction.

In the ensuing litigation, Calpine sought production of documents reflecting communications between OXY and EOG that

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Joint Defense/Common Interest Doctrine

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occurred both before and after they finalized their transaction. OXY withheld over 200 documents that it claimed were protected by either the attorney-client privilege or the work product doctrine, and which it also claimed were encompassed by the common interest agreement.

Calpine challenged OXY's withholding of these documents, arguing that there is no joint defense privilege in California, OXY and EOG could not "retroactively invoke their 'joint defendant' status to prevent disclosure of communications made long before this action was filed," and "OXY and EOG waived any applicable privileges by disclosing the communications to an adverse party on the opposite side of a business transaction." *Oxy Resources*, 115 Cal. App. 4th at 884. The trial court ordered OXY to produce those documents exchanged with EOG after the completion of

the transaction, but not those exchanged before consummation of the transaction.

On cross-appeals by both OXY and Calpine from the trial court ruling, the Court of Appeal noted that the "joint defense privilege" and the "common interest privilege" have not been recognized by statute in California. *Id.* at 889. However, after observing that "[t]here is little California case law discussing the 'common interest' or 'joint defense' doctrine" (*Id.* at 888), the Court, relying upon the opinion in *Raytheon Co. v. Superior Court*, (208 Cal. App. 3d 683 (1989)), expressly

recognized the existence and availability of such a doctrine in California. *Oxy Resources*, 115 Cal. App. 4th at 889. (In *Raytheon*, the court held that while no joint defense privilege "as such" exists in California, in cases involving the exchange of privileged information, the appropriate inquiry by the trial court is whether there has been a waiver of such privilege. "[T]he issue of waiver must be determined under the [applicable statutes] with respect to the attorney-client privilege [and attorney work product doctrine], and depends on the necessity for the disclosure." *Raytheon*, 208 Cal. App. 3d at 689.) In doing so, the Court rejected the idea that the doctrine was an extension of the attorney-client privilege, instead characterizing it as a doctrine of non-waiver. *Oxy Resources*, 115 Cal. App. 4th at 889.

The *OXY Resources* court ruled that three requirements must be met before a communication will be accorded protection under the common interest doctrine. First, the party seeking to avail itself of the doctrine must show that "the communicated information would otherwise be protected from disclosure by a claim of privilege" — either the attorney-client privilege or the work product doctrine. *Id.* at 890. Second, the parties to the exchange must have a reasonable expectation that the confidentiality of the information disclosed will be preserved. *Id.* at 891. Third, the "disclosure of the information must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted." *Id.*

Rejecting Calpine's claim that the defendants' use of a common interest agreement in that case amounted to "a premeditated and intentional plan to shield conspiratorial communications involving a transaction that directly and adversely affected Calpine's contractual rights," the Court also recognized the use of common interest agreements in California. *Id.* at 893. While noting that such agreements are neither a requirement nor a guarantee for protection under the common interest doctrine, they do provide "evidence of a reasonable expectation of confidentiality required to invoke the common interest doctrine and avoid waiv-

er by disclosure." *Id.* at 892. Moreover, the Court found that such agreements can be used to protect privileged communications not only in the litigation area, but in the context of business transactions as well. *Id.* at 893-94.

The Court further held that in determining whether the common interest doctrine applies in a given situation — particularly with respect to whether the disclosures were reasonably necessary to accomplish the lawyer's purpose in the consultation — *in camera* review by the court of the documents/communications sought to be protected may be necessary. *Id.* at 895-96. In doing so, the Court rejected OXY's claim that such *in camera* review would violate California Evidence Code Section 915, which prohibits a court from requiring disclosure of information alleged to be privileged in order to rule on a claim of privilege. *Id.* at 896. The Court observed that "the rule against *in camera* review, however, is not absolute" and such review may be used to determine, among other things, whether the privilege has been waived. *Id.*

McKesson HBOC, Inc. v. Superior Court

Nine days after the issuance of the *OXY Resources* opinion, the Court of Appeal handed down its decision in *McKesson HBOC*. (The decisions in the *OXY Resources* case and the *McKesson HBOC* litigation were issued by the First District Court of Appeal in San Francisco. However, the *OXY Resources* opinion was handed down by Division Three of that court, while *McKesson HBOC* was decided by Division Four.) In *McKesson HBOC*, the Court of Appeal addressed the issue whether, pursuant to a common interest agreement, the target of a government investigation may share privileged documents with the government without waiving the protection from disclosure afforded by the attorney-client privilege or the attorney work product doctrine. *McKesson HBOC*, 115 Cal. App. 4th at 1233.

In 1999, McKesson publicly disclosed that its auditors had discovered improperly recorded revenues in its subsidiary, HBO & Company. As a result of that disclosure, several lawsuits were initiated by shareholders and investigations were commenced by the United States Attorney and the Securities and Exchange Commission.

McKesson retained counsel both to represent it in the lawsuits and to perform an internal review of the matter. That review included interviews of 37 current and past McKesson and HBO employees. Counsel for McKesson prepared an interview memorandum for each employee and an audit committee report detailing the results of its investigation. McKesson's counsel further notified the U.S. Attorney and the SEC that McKesson would disclose the results of the internal review to them, subject to a joint defense/common interest agreement. Both government entities agreed. However, under that common interest agreement, the U.S. Attorney was permitted to disclose the documents to the grand jury and in any criminal prosecution that might result from its investigation. As to the SEC, the documents were to be kept confidential except to the extent that SEC staff determined that disclosure was either required by federal law or would further the agency's discharge of its duties and responsibilities.

In the civil cases that resulted from McKesson's initial disclosure regarding the accounting irregularities at HBOC, the plaintiffs asserted that McKesson had waived both the attorney-client privilege and the work product doctrine in disclosing the memoranda and internal reviews to the government. McKesson contended that it had a valid common interest agreement and that the documents were shielded from production to the plaintiffs in the civil actions. The trial court granted the plaintiff's motion to compel.

In affirming the lower court ruling, the Court of Appeal found that because McKesson had retained its counsel to provide legal advice and to assist it in the civil litigation that was pending



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against it, it was not reasonably necessary to the purpose for which counsel was retained to disclose the memoranda and internal review documents to the government agencies. *McKesson HBOC*, 115 Cal. App. 4th at 1237.

The court rejected *McKesson's* argument that providing the information to the government had furthered its common purpose with those entities in finding the source of the accounting discrepancies at HBO. The court noted that the sharing of information must be founded upon the furtherance of the attorney-client privilege. The fact that the parties had overlapping interests was not sufficient. *Id.* The Court of Appeal also held that the government's interest was *not* in maintaining confidentiality, but in *obtaining* materials that would make its investigations easier. *Id.* at 1239-40. An interest in maintaining confidentiality can exist only when the parties are aligned on the same side of the litigation and have a similar stake in its outcome. When one of the parties does not face prejudice to its case when confidential material is disclosed or exchanged, there is no mutual or common interest in confidentiality such that the common interest doctrine will be applicable. *Id.* at 1240.

Lessons Learned

The *OXY Resources* and *McKesson HBOC* decisions are highly instructive for parties contemplating the use of common interest agreements in California:

- The *OXY Resources* court recognized the existence of a common interest doctrine in California.
- To invoke the protection of the common interest doctrine in California, three requirements must be met:
 - The party seeking to avail itself of the doctrine must show that the information to be withheld would otherwise be protected from disclosure by a claim of privilege — the attorney-client privilege and/or the attorney work product doctrine;
 - The parties to the exchange must have a reasonable expectation that the confidentiality of the shared information will be preserved; and
 - The disclosure of the information must be reasonably necessary for the accomplishment of the purpose for which the attorney was consulted.
- The *OXY Resources* court also recognized and upheld the use of common interest agreements.
- Common interest agreements may be utilized not only in the litigation arena, but also in connection with business transactions.
- Despite California's prohibition against a court's review of allegedly privileged documents to establish a claim of privilege, a court may conduct an *in camera* review of documents sought to be protected under the common interest doctrine to determine whether there has been a waiver of any privilege.
- Entities contemplating sharing information with government agencies should be absolutely certain that their interests are clearly aligned with those of the government.
- If the government agency is investigating an entity or its employees, the common interest agreement will not shield any privileged materials shared with the government.
- The holding in *McKesson HBOC* should not be viewed as applying only to situations where the government is a party to the agreement. If the parties to the agreement are not clearly aligned on the same side of the litigation, the exchange of privileged information may be considered a waiver of privilege.
- The holding in *McKesson HBOC* should not be viewed as always applying when the government is a party to the agreement because situations may arise where the interests of the private parties and the government are clearly aligned.

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Overview of 2005 Amendments to Cal Rules of Court, Code of Civil Procedure Previewed

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Well, it's that time of year again. No I'm not referring to joining a gym, quitting smoking or losing weight. I'm referring to the significant rule changes that affect the daily lives of busy litigators. This article does not address every single rule change and does not address changes to the appellate rules. Furthermore, you should always consult the rules themselves to ensure compliance with proper procedure. The goal of this article is to highlight some of the most significant rule changes that will likely affect the day-to-day practice of a busy litigator.

Perhaps the most significant change for 2005 is the amendment of California Code of Civil Procedure Section 1005 changing the notice period for motions and replacing "calendar days" with "court days." It's time to say goodbye to "21, 10 and 5 calendar days" and get used to "16, 9 and 5 court days." Motions made on or after January 1, 2005 must be filed at least 16 court days before the hearing date. However, keep in mind that when the notice is served by mail, the notice period is extended by calendar days, not court days. So, if the notice is served by mail, and the place of mailing and the place of address are within California, the required 16 day period of notice is increased by five calendar days. Add ten calendar days if either the place of mailing or the place of address is outside the State of California, but within the United States, and add 20 calendar days if either the place of mailing or the place of address is outside the United States. If the notice is served by facsimile, express mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by two calendar days.



Amy B. Alderfer

Oppositions must be filed at least 9 court days before the hearing date and replies must be filed at least 5 court days before the hearing. All papers opposing a noticed motion shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing. Opposition and reply papers must be served in a manner to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers are filed.

The Legislature has attempted to address the confusion that previously occurred when the last day to perform certain acts under the discovery code fell on a weekend or judicial holiday as well as when the discovery cut-off date fell on a weekend or holiday. The Legislature also added Section 2016.060 to the California Code of Civil Procedure. Section 2016.060 provides that when the last day to perform or complete any act provided for under the discovery statutes falls on a Saturday, Sunday, or judicial holiday, the time limit is extended until the next court day closer to the trial date.

The Legislature also amended California Code of Civil Procedure Section 2024 to provide that if the last day to complete discovery proceedings or to have discovery motions heard falls on a weekend or a judicial holiday, the last day shall be the

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next court day closer to the trial date. The Legislature provided that except as provided in Section 2024(e), a continuance or postponement of the trial date does not operate to reopen discovery proceedings.

California Rules of Court Rule 201.6 was amended to provide that whenever a clerk's office filing counter is closed at any time between 8:30 a.m. and 4:00 p.m. on a court day, the court must provide a drop box for depositing documents to be filed with the clerk and that a court may provide a drop box during other times.

California Rules of Court Rule 388, which addresses default judgments, has been amended as to unlawful detainer cases and addresses what must be submitted.

Los Angeles Superior Court Rule 7.9 (f) was amended to provide that if a plaintiff or other party seeking affirmative relief fails to notify the court-connected ADR neutral involved in the case of a settlement at least 2 days before the scheduled hearing or session, the court may order the party to compensate the neutral in an amount not less than \$150 and not to exceed \$450. The neutral must file an Application and Motion for compensation within 5 court days of the scheduled hearing or session. If a dismissal has been filed, the court maintains jurisdiction to hear the neutral's application.

Los Angeles Superior Court Rule 7.10, which addressed stipulations, has been repealed. Los Angeles Superior Court Rules 8.25, 8.26, 8.51 and 8.52 have been modified to reflect the court's use of CACI jury instructions.

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conditions in its factories], *cert. dismissed as improvidently granted* (2003) 539 U.S. 654; *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057 (1994) [action challenging cigarette advertising targeted at minors]; *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963 (1992) [public interest groups sue dairy under UCL for falsely advertising that raw milk is safe, and failing to disclose its dangers].)

Because of its success in enforcing consumer and public rights, the UCL has been in the crosshairs of business lobbyists for years. After consistently failing to achieve their goals in the Legislature, these interests resorted to the initiative process. After a well-funded advertising blitz built on a theme of ending "abusive" lawsuits, and with the blessing of the new Governor in Sacramento, Proposition 64 was approved by California voters on November 2, 2004.

Proposition 64, however, does not purport to alter the substantive grounds for UCL liability. The UCL has long proscribed "unlawful," "unfair" and "fraudulent" business practices, and continues to do so after Proposition 64. Likewise, Proposition 64 does not repeal any remedies available for violation of section 17200. The initiative does limit standing to file a private UCL suit to any person "who has suffered injury in fact and has lost money or property as a result of such unfair competition." In addition, a private UCL suit for "representative claims or relief on behalf of others" must comply with Code of Civil Procedure section 382, which governs class actions.

According to its drafters, Proposition 64 was aimed at eliminating "frivolous" UCL suits. The defense bar, however, has quickly attacked virtually all UCL representative suits under the new provisions, even meritorious ones that were filed before passage of the initiative, or that already have resulted in a judgment against the defendant. These efforts so far have met with mixed results in the trial courts. (See decisions compiled at www.

17200blog.com.) But on February 1, 2005, in the first appellate ruling to address the retroactivity of Proposition 64, the First Appellate District, Division Four, held that Proposition 64 does not apply to lawsuits filed before its effective date of November 3, 2004. (*Californians for Disability Rights v. Mervyn's LLC* (Feb. 1, 2005) No. A106199, 2005 Cal. App. LEXIS 160 (*Californians for Disability Rights*)).

Californians for Disability Rights reached the correct result. The decision, authored by Justice Patricia K. Sepulveda, hews closely to the fundamental precept of statutory construction that a new law will not be given retroactive effect unless that was the *clear* intention of the legislature or the voters. No such intention can be gleaned from the text or history of Proposition 64. In addition, the First Appellate District rejected a mechanistic application of familiar rules of construction, including the procedural/substantive analysis and the so-called "repeal rule." Instead, the court properly examined the function, not the form, of the initiative, and concluded that the application of Proposition 64 to cases filed before its passage would substantively alter the rights and liabilities of the parties to existing UCL actions.

Just days after *Californians for Disability Rights* was issued, the Second Appellate District, Division Five, issued *Branick v. Downey Savings and Loan Assn.* (Feb. 9, 2005), No. B172981, 2005 Cal. App. LEXIS 201 (*Branick*) and the Fourth Appellate District, Division Three, issued *Benson v. Kwikset Corp.* (Feb. 10, 2005), No. G030956, 2005 Cal. App. LEXIS 208 (*Benson*). These cases part company with the First District's approach. They hold that Proposition 64 repealed the standing of uninjured persons to pursue UCL claims; thus, it applies to pre-existing cases. This article respectfully disagrees with *Branick's* and *Benson's* analysis in at least one key respect, as explained below. In light of the intermediate appellate court split on this issue, however, it now appears inevitable that this issue eventually will be resolved by the California Supreme Court.

Proposition 64 Contains No Clear Expression of Retroactive Intent

As acknowledged in the companion article, a retroactive law is one that "affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." (*Myers v. Philip Morris Companies*, 28 Cal. 4th 828, 839 (2002), citing *Aetna Casualty & Surety Co. v. Indus. Accident Comm'n*, 30 Cal. 2d 388, 391 (1947); see also *McClung v. Employment Development Dep't*, 34 Cal. 4th 467, 472 (2004).) California courts have long recognized the strong presumption against retroactive application of new laws. Indeed, it is a fundamental canon of statutory construction that "statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207 (1988) [holding that Proposition 51, which eliminated joint and several liability for tort defendants, applied prospectively (emphasis added, citation omitted)].) *Californians for Disability Rights* underscores the importance of this basic principle, noting that it is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." (*Californians for Disability Rights, supra*, 2005 Cal. App. LEXIS 160, at p.*8, quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).)

When interpreting a voter initiative, the intent of the voters is "the paramount consideration." (*In re Lance W.*, 37 Cal. 3d 863, 889 (1985).) Agreeing with most of the trial courts that have addressed the issue to date, the panel in *Californians for Disability Rights* recognized that Proposition 64 and the accompanying ballot materials contain "no express declaration of retrospectivity" and, in fact, are "wholly silent on the matter." (*Californians for Disability Rights, supra*, 2005 Cal. App. LEXIS 160, at p. *6.) "If anything," the court concluded, "the statutory

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First in a Series

Judicial Advice...

from *The Hon. Consuelo B. Marshall*

Recently, Chief Judge Consuelo B. Marshall of the U.S. District Court for the Central District of California graciously responded to a written questionnaire prepared by *abtl Report*, providing advice for lawyers who may be appearing in her courtroom. Below are her tips and suggestions:

General Protocols and Technology

- Judge Marshall does not customarily have “dark” days. The standard times for beginning and concluding each day’s proceedings depends on the convenience of the parties and counsel. She prefers to start jury trials at 8:00 a.m., and to work through lunch in order to recess early at 1:30 p.m. However, if this time frame is not convenient for the parties, then she is also amenable to starting at 8:00 a.m., taking a break for lunch and then recessing the jury at 4:00 or 4:30 p.m.

- Judge Marshall prefers that counsel stand and use the lectern when speaking in her courtroom.

- Counsel may bring their own audio-visual equipment to use in the courtroom but there is audio-visual equipment already available, including an ELMO machine, DVD, VCR, video conferencing, and laptop connections to the ELMO machine. Judge Marshall encourages counsel to familiarize themselves with the equipment in her courtroom prior to trial. Her staff is ready to provide instructions on operating the equipment for those who may need it.

Pre-Trial

- With respect to the parties’ submission of motions in limine, exhibit lists and witness lists, Judge Marshall does not require any additional procedures other than what is set forth in the court rules.

- Although no party has ever asked to inspect the jury room before the commencement of trial, Judge Marshall would allow this inspection upon request.

- She may also bifurcate a trial into liability and damages phases if she believes that it will save time and/or prevent prejudice to a party.

Jury Selection

- Judge Marshall will grant extra peremptory challenges if requested by the parties for cases involving multiple plaintiffs and/or multiple defendants.

- She conducts *voir dire* using questions filed by counsel. Counsel can ask their own questions if they request to do so.

- She would permit the use of juror questionnaires for complex, high publicity or lengthy cases.



Hon. Consuelo B. Marshall

Opening

- Judge Marshall does not discourage opening statements at bench trials.

- Opening statements in Judge Marshall’s courtroom vary from fifteen to thirty minutes, depending on the nature of the case. She may permit opening statement to exceed thirty minutes if counsel can show that the extended opening statement serves a useful purpose.

- Counsel must exchange copies of all exhibits, time lines or other materials to be displayed during opening statements.

Presentation of Evidence

- Witnesses must be present in the courtroom just prior to providing testimony.

- Although the ELMO machine makes it unnecessary for counsel to give jurors copies of exhibits, Judge Marshall would allow copies to be provided to jurors if doing so would serve a useful purpose.

- In order to clarify matters for the jury, Judge Marshall will examine a witness herself or ask follow-up questions if she finds a witness’ testimony to be unclear.

- Jurors can take notes during all phases of the trial and also submit written questions to be posed to witnesses.

- Judge Marshall almost never allows counsel sidebar approaches for objections.

- Counsel should move an exhibit to be admitted at the time the evidence is the subject of questioning. However, where there are objections to evidence that require discussion, Judge Marshall prefers that counsel discuss or argue admissibility after the jury has been excused for the day.

- Judge Marshall rarely allows direct testimony to be submitted in writing.

- The jury automatically receives a complete set of admitted exhibits.

Closing

- Judge Marshall typically limits the time for a closing argument. She believes that if the argument is too long, the jury will not be listening.

- During final arguments, Judge Marshall finds the following to be objectionable behavior: commenting on matters not in evidence; referring to the jury instructions but failing to read them verbatim or to display them; and leaving the area of the lectern.

Jury Instructions

- Judge Marshall instructs the jury after closing arguments.

Verdict

- The preparation and submission of special verdicts must be in compliance with local rules.

— Phoebe Liu

Proposition 64: The Consumers' Perspective

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language and ballot materials suggest an intention that the law apply prospectively to future lawsuits.” (*Ibid.*) For example, Proposition 64’s Findings and Declaration of Purpose states that “[i]t is the intent of California voters in enacting this act to prohibit private attorneys from *filing* lawsuits for unfair competition” where the new standing requirements are not met. (Prop. 64, § 1(e) [emphasis added]; *see also id.* § 1(d).) In addition, consistent with the measure’s findings, the Legislative Analyst explained that Proposition 64 “prohibits any person, other than the Attorney General and local public prosecutors, from *bringing* a lawsuit for unfair competition unless the person has suffered injury and lost money or property.” (Prop. 64, Analysis of the Legislative Analyst [emphasis added].) The First Appellate District acknowledged, however, that this “isolated language is far from decisive as to the electorate’s intent on the question of retroactivity.” (*Californians for Disability Rights, supra*, 2005 Cal. App. LEXIS 160, at p. *7.)

For its part, the defense bar has attempted to glean “clear” retroactive intent from other words in the initiative. Amended section 17203 now directs, for instance, that only those persons meeting the new standing requirements may “pursue” or “prosecute” UCL claims. (Prop. 64, § 1(f); § 2.) UCL defendants contend that these words indicate that Proposition 64’s requirements must be met throughout a litigation, not just at the time of filing. However, as Judge Richard Kramer noted in his recent decision in *California Law Institute v. Visa U.S.A., Inc.* (Dec. 29, 2004) No. CGC-03-421180, this language “might reasonably be read to apply to new filings as readily as to the continuation of existing actions.” (*Id.*, slip op. at p. 7.) Like the First Appellate District, Judge Kramer concluded that these words “cannot be seen to be an explicit expression of retroactive intent” as required by California law. (*California Law Institute, supra*, slip op. at p. 8.) Indeed, the California Supreme Court in *Evangelatos* rejected efforts “to stretch the language of isolated portions of the statute” and instead viewed the proposition at issue “as a whole” to conclude, as is true with Proposition 64, that “the subject of retroactivity or prospectivity was simply not addressed.” (*Evangelatos, supra*, 44 Cal. 3d at p. 1209.)

There can be little doubt, after *Evangelatos* and *Myers*, that when interpreting the applicability of new legislation to pre-existing cases, courts will be looking for a clear expression of retroactive intent. Drafters of voter initiatives know how to make them explicitly retroactive — that is, applicable to pending cases — when that is their actual intention. For example, Proposition 213, passed eight years ago, prohibited uninsured motorists and drunk drivers from collecting non-economic damages in any action to recover damages arising from the use or operation of a motor vehicle. The measure explicitly provided: “This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997.” (*See Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 979 (1997) [based largely on this language, court held Proposition 213 applied to a case not tried at the time of its passage].) Indeed, other measures appearing on the ballot with Proposition 64 — including Propositions 66 and 69 — included express retroactivity language. Yet Proposition 64 is devoid of any unambiguous retroactivity language. California courts properly have held that the “failure to include an express provision for retroactivity is, in and of itself, ‘highly persuasive’ of a lack of intent in light of [the presumption against retroactivity].” (*Russell v. Superior Court*, 185 Cal. App. 3d 810, 818 (1986).)

Some UCL defendants have also argued that application to existing cases would further Proposition 64’s purpose of ending “abusive” lawsuits. The First Appellate District was unpersuaded by this assertion. Citing *Evangelatos*, it concluded that “a reme-

dial objective is not alone sufficient to demonstrate a legislative intent to apply a statute retrospectively. . . . [T]he fact that the electorate chose to adopt a new remedial rule for the future does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law.” (*Californians for Disability Rights, supra*, 2005 Cal. App. LEXIS 160, at p. *10, citing *Evangelatos, supra*, 44 Cal. 3d at pp. 1213-14.) Indeed, it would hardly further Proposition 64’s purpose of ending so-called “frivolous” lawsuits to dismiss outright cases that already have survived a demurrer or summary judgment motion, or that have resulted in a judgment *against the defendant* merely because the plaintiff, who had the requisite standing when the case was commenced, does not satisfy the new requirements of Proposition 64. In such circumstances, retrospective application of Proposition 64 not only defeats the reasonable expectations of the parties; it defeats justice as well.

The “Repeal Rule” Does Not Apply to Proposition 64

As shown, in the absence of an express retroactivity provision or any other evidence of a “very clear” intent of retroactivity, the presumption of prospectivity applies to Proposition 64 under controlling California Supreme Court authority. To avoid this inexorable conclusion, UCL defendants have sought to circumvent the retroactivity analysis altogether by invoking the so-called “repeal rule” — a rule of construction derived from a pre-*Evangelatos* line of cases involving statutory repeals. These cases say that “where a cause of action unknown at the common law has been created by statute and no vested or contractual rights have arisen under it [,] the repeal of the statute without a saving clause before a judgment becomes final destroys the right of action.” (*Dep’t of Social Welfare v. Wingo*, 77 Cal. App. 2d 316, 320 (1946); *see also Governing Bd. v. Mann*, 18 Cal. 3d 819, 829 (1977) [“a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute”]; *Younger v. Superior Court*, 21 Cal. 3d 102, 109 (1978); Cal. Gov’t Code §9606.)

This approach, as applied to Proposition 64, is seriously flawed. First, Proposition 64 did not repeal a cause of action or remedy, or any part thereof. The measure in fact expressly preserves the familiar bases of a UCL claim and its remedies. (Prop. 64, § 1(a).) If conduct that occurred prior to 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. By contrast, in *Int’l Ass’n of Cleaning & Dye House Workers v. Landowitz*, 20 Cal. 2d 418 (1942), one of the older cases cited in the companion article, the Legislature had repealed the very statutory authority that had allowed the cause of action in the first place.

Second, the California Supreme Court has indicated that it now views the repeal rule through the prism of legislative (or voter) intent. In *Myers v. Phillip Morris Cos., supra*, 28 Cal. 4th 828, the Supreme Court held that repeal of a statute giving tobacco companies immunity from suit by smokers who contracted cancer could not impose liability on the companies for conduct that occurred during the 10-year period the immunity statute was in effect. The Court never even mentioned the repeal rule. Instead, it rested its decision on the familiar ground that “a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature...must have intended a retroactive application.” (*Id.* at p. 841 [emphasis by the Court], quoting *Evangelatos, supra*, 44 Cal. 3d at p. 1209.) That intent was lacking from the statute modifying tobacco company immunity. (*Myers, supra*, 28 Cal. 4th at pp. 841-842.) The First Appellate District followed this more modern approach in reject-

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ing application of the repeal rule to Proposition 64 in *Californians for Disability Rights*. The court held that the repeal rule “is not an exception to the prospectivity presumption, but an application of it.” (*Californians for Disability Rights, supra*, 2005 Cal. App. LEXIS 160, at p. *13.) This is so precisely because a true repeal statute evinces legislative intent that the statute be applied retroactively. (*Ibid.*) Proposition 64 contains no such clear expression of retroactive intent.

Significantly, *Branick* and *Benson* make no effort to grapple with *Myers*. *Benson* mentions *Myers* only in passing and *Branick* does not discuss the case at all. The Second and Fourth Appellate Districts did seek to distinguish *Evangelatos* (and perhaps, by extension, *Myers*) on the ground that the statute at issue in *Evangelatos* affected a common law, and thus “vested,” right. (See, e.g., *Branick, supra*, 2005 Cal. App. LEXIS 201, at pp. *20-*21.) But *Myers* did not turn on whether there were vested or unvested rights at stake. On the contrary, the Supreme Court focused on the intent question, expressly noting that retroactive application of a statute is impermissible “unless there is an express intent of the Legislature” to make it retroactive. (*Myers, supra*, 28 Cal. 4th at p. 840.)

Standing Is a Substantive Requirement

The companion article suggests that retroactive application of Proposition 64 is also appropriate because standing is merely a procedural concept. As the court in *Californians for Disability Rights* emphasized, however, “[t]he relevant question is not whether the statutory amendments to the UCLs standing requirements are best characterized as procedural or substantive.” (*Californians for Disability Rights, supra*, 2005 Cal. App. LEXIS 160, at p. *15.) Rather, the courts look to function, not form. “We consider the effect of a law on a party’s rights and liabilities, not whether a procedural or substantive label best applies.” (*Id.* at p. *16, quoting *Elsner v. Uveges*, 34 Cal. 4th 915, 936-37 (2004); see also *Tapia v. Superior Court*, 53 Cal. 3d 282, 289 (1991); *Aetna Casualty, supra*, 30 Cal. 2d at pp. 394-395.)

As Professor Witkin explains, because standing involves the right to sue, its effect is substantive even if it may appear procedural in form: “The person who has the right to sue under the substantive law is the real party in interest; the inquiry, therefore, while superficially concerned with procedural rules, really calls for a consideration of rights and obligations.” (4 Witkin, Cal. Procedure (4th ed. 1997) *Pleading*, §104, p. 162.) Likewise in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the U.S. Supreme Court stated that “the mere fact that a new rule is procedural does not mean that it applies to every pending case.” (*Id.* at p. 275 n.29.) The example given in *Landgraf* fits Proposition 64: “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.” (*Ibid.*; see also *Hughes Aircraft Co. v. United States ex. rel. Schumer*, 520 U.S. 939, 951 (1997) [a statute that affects “whether” a suit “may be brought at all” as opposed to “where,” is substantive and cannot be applied retroactively. (emphasis by the Court)].) UCL defendants frequently cite *Parsons v. Tickner*, 31 Cal. App. 4th 1513 (1995), which held that the statutory revisions regarding standing in a probate-related matter were only procedural and thus could be applied retroactively. In that case, however, the legislative changes at issue, unlike Proposition 64, did not strip the plaintiff of her right to bring a lawsuit and provide the defendant in a pending action with a new defense — one that could be dispositive and that did not exist when the action was brought.

Recent decisions involving amendments to the anti-SLAPP motion statute illustrate how Proposition 64 stands in stark contrast with a purely “procedural” measure. The anti-SLAPP amendments, codified at California Code of Civil Procedure sec-

tion 425.17, removed certain types of cases from the reach of the anti-SLAPP motion to strike. In *Brenton v. Metabolife Int’l, Inc.*, 116 Cal. App. 4th 679 (2004), the court explained that a newly enacted statute that merely changes the remedies or procedures to be used in ongoing litigation may be applied to a pending action because the change is considered only to regulate the ongoing conduct of the litigation and, thus, is not retrospective. (*Id.* at p. 691.) *Brenton* concluded that the statute in question simply withdrew “a procedural screening mechanism” in the form of a motion, but did “not impose new, additional or different liabilities based on past conduct or deprive [the defendant] of any substantive defense to the action.” (*Id.* at pp. 689-690.)

Judge Kramer, in his *California Law Institute* decision, recognized the distinction between the anti-SLAPP motion amendments and Proposition 64. (*California Law Institute*, slip op. at p. 4.) Unlike the former, Proposition 64 does not address the procedures of how ongoing litigation is to be conducted. Losing the ability to seek a preliminary remedy is very different from being deprived retroactively of the right to bring any action at all. The former does not deprive a defendant of its ability to defend a case on its merits. But retroactive application of Proposition 64 would deprive a plaintiff of the ability to prosecute a case altogether. Under the defense interpretation of the initiative, and depending on the posture of the case, that may mean losing the right to protect on appeal years of work resulting in a favorable judgment for the plaintiff. If the limitations period has run, the defendant is provided with an absolute windfall. Our defense colleagues acknowledge that a retroactive law is one that, among other things, changes the legal consequences of past conduct. It is hard to imagine a more significant change than providing a defendant with immunity for conduct already found to violate the UCL.

In this way, applying Proposition 64 to pre-existing cases will have significant consequences having nothing to do with the measure’s stated purpose of ending abusive lawsuits — consequences that the voters could not have intended. For example, overextended public agencies may have neither the time nor the resources to take up the consumers’ claims if cases, including meritorious ones, are routinely dismissed on Proposition 64-related grounds. California citizens who have suffered actual injury as a result of an unfair business practice may well have relied to their detriment on the existence of a representative suit filed on their behalf. Had such injured citizens known that Proposition 64 could be applied to pending cases, they might have brought their own actions or sought timely intervention, but may now be barred by the statute of limitations. This was an important factor in *Evangelatos*, in which the California Supreme Court held that Proposition 51 was not retroactive. (*Evangelatos, supra*, 44 Cal. 3d at pp. 1215-1217.) The Court recognized that it would be unfair to change “the rules of the game” in the middle of the contest by applying new law to pending cases absent explicit notice in the legislation. (*Id.* at p. 1194.)

Similarly, the First Appellate District concluded that “[a]pplication of Proposition 64 to cases filed before the initiative’s effective date would deny parties fair notice and defeat their reasonable reliance and settled expectations.” (*Californians for Disability Rights, supra*, 2005 Cal. App. LEXIS 160, at p. *18.) The court emphasized that the disruption that would result from Proposition 64’s application to all preexisting lawsuits cannot be trivialized. Our colleagues in the opposing column ignore these substantive impacts. Instead, they contend the only limitation on applying a new law to pending cases is a constitutional one — namely, that such application cannot interfere with a “vested right.” With respect, that is an unduly constricted view of the law. As explained earlier, courts have declined to apply new laws, and even new “procedural” or “evidentiary” rules, when to do so

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would “substantially affect existing rights and obligations,” regardless of whether a “vested right” is at issue. (*Aetna Casualty, supra*, 30 Cal. 2d at p. 394 [rejecting application of amended statutory disability payment provision, because it would enlarge the employee’s existing rights and the employer’s corresponding obligations]; *see also Elsner v. Uveges, supra*, 34 Cal. 4th at 924 [holding that retroactive application of amended statutory evidentiary rule was improper because it had the effect of establishing a new standard of care and shifting the burden of proof].)

Conclusion

For these principal reasons, Proposition 64 is not properly applied to cases on file before the initiative became effective. As the California Supreme 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*, 21 Cal. 4th 109, 114 (1999).) The voters enacted a provision for the purpose of preventing the future filing of abusive lawsuits. If the proponents of Proposition 64 had intended the measure to terminate all prior UCL actions not meeting the new standing requirements, regardless of how meritorious, they could have said so.

— Pamela M. Parker

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the new rule and a relevant past event.” (*Id.* at 270). Accordingly, merely describing the effect of a new law as “retroactive” begs the legal question. (*Tapia v. Super. Ct.*, 53 Cal. 3d 282, 288 (1991)). Our Supreme Court has defined a law as “retroactive” if it “change[s] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct.” (*Id.* at 290-91; *Compare Landgraf*, 511 U.S. at 280 (observing that application of a new law to a pending case has “retroactive effect” if “it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed”).)

That is not the case here. Our colleagues concede (on page 6) that the UCL “has long proscribed ‘unlawful,’ ‘unfair’ and ‘fraudulent’ business practices, and continues to do so after Proposition 64” and that “[i]f conduct that occurred prior to passage of the measure was actionable then, it remains actionable now, and the public’s right to be protected from it remains unchanged.” It follows necessarily that the new standing and class action requirements do not “change[] the legal consequences” of completed acts or “impos[e] new or different liabilities based upon such conduct.” Moreover, even if no private plaintiff can satisfy either of these requirements, a remedy remains: the Attorney General may bring such an action.

Conversely, in cases such as *Evangelatos v. Superior Court*, 44 Cal. 3d 1188 (1988), which provided the underpinnings for the decision in *Californians for Disability Rights*, there was a change in the legal consequences of completed acts. The defendant in *Evangelatos* sought to apply the changes to “accrued” common law claims (44 Cal. 3d at 1193), which would impermissibly have interfered with the plaintiff’s “vested property right” in his “accrued” claims. (*Callet v. Alioto*, 210 Cal. 65, 67-68 (1930); *see also Branick*, 2005 Cal. App. LEXIS 201, at *19-20; *Benson*, 2005 Cal. App. LEXIS 208, at *27-28). The Court emphasized the “substantial and significant change” the initiative at issue in *Evangelatos* made to “long-standing common law doctrine applicable to all negligence actions.” (*Evangelatos*, 44 Cal. 3d at 1225).

Similarly, in the other cases cited by plaintiffs’ counsel, the use of the new law would have impermissibly “changed the legal consequences” of completed acts or “impos[ed] new or different liabilities based upon such conduct.” (*Tapia*, 53 Cal. 3d at 291; *see Myers v. Phillip Morris Cos.*, 28 Cal. 4th 828, 839-40 (2002) (applying the new law to the pending action would have changed the legal effects of past conduct by making unlawful and “tortious” conduct that had been lawful at the time it occurred, and such “retroactive application” would be “impermissible”); *McClung v. Employment Dev. Dep’t*, 34 Cal. 4th 467, 472 (2004) (refusing to apply new law that *expanded* the scope of personal liability under FEHA, because this would “attach[] new legal consequences to events completed before its enactment” and “increase a party’s liability for past conduct”).)

Courts determining whether an application of new law would be “retroactive” also examine whether the underlying law is “substantive” or “procedural.” (*Landgraf*, 511 U.S. at 275; *Tapia*, 53 Cal. 3d at 288). As the California Supreme Court recognized in *Tapia*, “the effect of [procedural] statutes is actually prospective in nature since they relate to the procedure to be followed in the future,” and “it is a misnomer to designate” these laws “as having retrospective effect.” (*Id.*) The courts consistently hold that statutes altering rules of standing are “procedural” for purposes of this analysis.

The decision of the Second District Court of Appeal in *Parsons v. Tickner*, 31 Cal. App. 4th 1513 (1995), illustrates this application. In that case, the change in the law altered the rules governing plaintiff’s standing. The court held that the new law applied to the pending action, even if such application was considered to be “retroactive.” (*Id.* at 1523). Nothing in the decision suggests (as our colleagues do across the page), that the Court’s decision hinged on whether the plaintiff was allowed to maintain the action following the application of the new law. Any plaintiff must satisfy standing at every stage of a suit, and it is his burden to “plead and prove facts showing standing.” (*Tahoe Vista Concerned Citizens v. County of Placer*, 81 Cal. App. 4th 577, 590-91 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *cf. Corbett v. Super. Ct.*, 101 Cal. App. 4th 649, 680 (2002) (“Section 17200 is the *substantive* provision and sections 17203 and 17204 the principal *procedural* ones”) (Haerle, J., dissenting)).

In Approving Proposition 64, California Voters Expressed Their Intent to Apply the Revised UCL to Pending Actions

The panel in *Californians for Disability Rights* also ignored the fact that the absence of an express “retroactivity” clause also is not the end of the analysis. (*See Evangelatos*, 44 Cal. 3d at 1209; *Yoshioka v. Super. Ct.*, 58 Cal. App. 4th 972, 979 (1997)). The next step is to determine whether voters intended to apply the new law to cases pending before the legislative change. (*Tapia*, 53 Cal. 3d at 287). Here, there is evidence of the voters’ intent to immediately apply Proposition 64 to pending cases that the court in *Californians for Disability Rights* did not consider.

The voters expressed their intentions in detail and unequivocally: “in enacting this Act [the voters intend] that only the California Attorney General and local public officials be authorized to file *and prosecute* actions on behalf of the general public.” (Prop. 64, *supra*, § 1(f) (emphasis added)). Similarly, and more significantly, the amended language of the actual underlying statute now provides that “[a]ny person *may pursue* representative claims or relief on behalf of others *only if* the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure. . . .” (Cal. Bus. & Prof. Code § 17203 (emphasis added)). The *Californians for Disability Rights* opinion cites this new language but ignores its impact. (2005 Cal. App. LEXIS 160, at *5). These “standing re-

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Proposition 64: Business Defendants' Perspective

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quirements of Section 17204" mandate that UCL actions "shall be prosecuted exclusively...[by public prosecutors] or by any person...who has suffered injury in fact and has lost money or property as a result of such unfair competition." (*Id.* § 17204 (emphasis added)). Voters approved similar revisions to the text of Sections 17500 and 17535 of the Business and Professions Code.

Application of Proposition 64 to Pending Actions Would Not Disturb Any "Vested" Rights

The final step in the "retroactivity" analysis involves constitutional considerations. Because there is no constitutional bar to "retroactive" application of new laws in the civil context (*see generally* 7 Witkin, *Summary of Cal. Law, Constitutional Law*, § 486, p. 675 (9th ed. 1990)), however, the voters' power to enact new laws that apply to pending cases is limited only if it would interfere with "vested rights." (*McCann v. Jordan*, 218 Cal. 577, 579 (1933); *Los Angeles v. Oliver*, 102 Cal. App. 299, 309 (1929)). By definition, no plaintiff has any "vested right" in standing to bring a lawsuit, to assert statutory causes of action, or to seek statutory remedies. (*Southern Serv. Co. v. City of Los Angeles*, 15 Cal. 2d 1, 12 (1940); *Parsons*, 31 Cal. App. 4th at 1523; *Graczyk v. Workers' Comp. App. Bd.*, 184 Cal. App. 3d 997, 1006 (1986); *Lemon v. Los Angeles Terminal Ry. Co.*, 38 Cal. App. 2d 659, 670-71 (1940); *see also Landgraf*, 511 U.S. at 273).

UCL claims are purely statutory, so application of Proposition 64 to pending actions would not disturb any "vested" rights. (*Branick*, 2005 Cal. App. LEXIS 201, at *19-21). The panel in *Californians for Disability Rights* acknowledged as much, but it expressed concern over the rights of uninjured private plaintiffs to continue to maintain their actions. 2005 Cal. App. LEXIS 160, at *13. It would defy logic for uninjured plaintiffs to have a "vested" right to continue to prosecute an action when they expressly admit that they suffered no injury in fact as a result of the challenged business practices, or to have a "vested" right to prosecute an action on behalf of the "general public" when the voting public criticized and *repealed* their statutory right to do so. Their previous ability to state a cause of action absent any injury in fact was wholly dependent upon a unique statutory provision that voters repealed on November 2, 2004.

Conclusion

When private plaintiffs invoked the UCL to bring their claims before November 3, 2004, they "act[ed] in contemplation" of the power of California voters to "repeal" or take away the authority of uninjured private plaintiffs to assert such claims. (Cal. Gov't Code § 9606). On November 2, 2004, the people removed this statutory authority. It is not the courts' "task in reviewing an initiative...to second-guess the electorate's decision that the benefits to the state outweigh hardships to individual plaintiffs adversely affected by the measure." (*Jenkins v. County of Los Angeles*, 74 Cal. App. 4th 524, 530-31 (1999)). In particular, in this context, the Supreme Court has observed that "however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it." (*Southern Serv. Co.*, 15 Cal. 2d at 12 (quoting *People v. Lindheimer*, 21 N.E.2d 318 (Ill. 1939))). However beneficial the old UCL may have been to uninjured persons and their counsel, the voters on November 2 took away their statutory right to sue without injuries and to seek relief on behalf of others without satisfying class action requirements.

— Gail E. Lees and Christopher Chorba

Joint Defense Agreements in Federal Court

The view of federal courts in California regarding the common interest/joint defense doctrine is different from that of state courts in California. Unlike California state courts, which, as noted above, consider the common interest doctrine to be a doctrine of non-waiver, the Ninth Circuit Court of Appeals views the joint defense privilege to be an extension of the attorney-client privilege.

As early as the mid-1960s, the Ninth Circuit considered the issue of joint defense agreements. *See, e.g., Hunydee v. United States*, 355 F. 2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F. 2d 347 (9th Cir. 1964). In those cases, the Ninth Circuit specifically held that where two or more persons have common interests in connection with the same proceeding, confidential statements made by them to their attorneys and then shared between counsel are considered to be privileged communications. *Hunydee*, 355 F. 2d at 185; *Continental Oil Co.*, 330 F. 2d at 350. The fact that these early cases were criminal in nature does not alter the analysis or the scope of the privilege in the Circuit.

The essential elements of the common interest/joint defense doctrine are the same in state and federal courts. *See, e.g., Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n.7 (9th Cir. 1997), *citing United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979) (As is the case in state court, an attorney's disclo-

sure must be of privileged information and must be for the purposes of the common defense.). The fundamental difference between the California state and Ninth Circuit views on common interest agreements is that under Ninth Circuit law, parties having common interests create an implied attorney-client relationship with the co-defendant's counsel upon entering into a common interest or joint defense agreement. *See, e.g., United States v. Henke*, 222 F. 3d 637 (9th Cir. 2000). Under California law, the designation of documents or other communications as being subject to a common interest agreement notifies the court that otherwise privileged communications have been disclosed to a third party. In that event, the trial court may conduct an *in camera* review of communications claimed to be covered by a common interest agreement to ensure that they are in fact privileged and that their disclosure was necessary for the purposes for which counsel was retained.

Under the federal standard, the implied attorney-client relationship renders the communications themselves privileged and it does not necessarily follow that there will be an *in camera* review by the court. If the party seeking to obtain communications purported to be covered by the joint defense agreement wishes to have the court examine those communications to ensure that they are privileged, that party will carry the burden of establishing good cause for the court to conduct such an examination. In this regard, the federal courts' view of such agreements and designations provides a more effective shield to the discovery of shared privileged materials.

— **Robert F. Scoular and Mark T. Hansen**

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