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Court of Appeal, First District, Division 4, California.

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,
v.
MERVYN'S, LLC, Defendant and Respondent.

No. A106199.
|
Feb. 1, 2005.
|
Review Granted April 27, 2005.

Synopsis

Background: Nonprofit corporation organized to protect the interests of persons with disabilities sued corporation which operated retail department stores, alleging unlawful business practices under the unfair competition law (UCL). The Superior Court, Alameda County, No. 2002-151738, Henry Needham, Jr., J., entered judgment in favor of retailer. Nonprofit appealed, and retailer moved to dismiss appeal.

The Court of Appeal, Sepulveda, J., held that proposition imposing limits on private enforcement of UCL violations applied only prospectively, and thus did not apply to this UCL action.

Motion denied.

Attorneys and Law Firms

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Opinion

SEPULVEDA, J.

We deny a motion to dismiss an appeal upon concluding that Proposition 64, which imposes limits on private enforcement of unfair competition laws, does not apply to lawsuits filed before its effective date of November 3, 2004.

FACTS

Appellant Californians for Disability Rights (CDR) is a nonprofit corporation organized to protect the interests of persons with disabilities. On May 21, 2002, CDR filed a lawsuit against respondent Mervyn's, LLC (Mervyn's), a corporation that operates 125 retail department stores throughout the state of California.[1] CDR pleaded a single cause of action, seeking injunctive relief against alleged unlawful business practices by Mervyn's. (Bus. & Prof.Code, § 17200 et seq.) CDR claimed that Mervyn's denied store access to persons with mobility disabilities by failing to provide adequate pathway space between merchandise displays. CDR alleged that the business practices of Mervyn's were unlawful because they violated California's Unruh Civil Rights Act (Civ.Code § 51 et seq.) and California's Disabled Persons Act (Civ.Code § 54 et seq.).

The case proceeded to a bench trial in August 2003. The court denied relief to CDR and entered judgment in favor of Mervyn's on February 2, 2004. CDR appealed on April 1, 2004. While this case was pending on appeal, the voters of California amended the statute under which the case had been prosecuted. The voter's enactment, popularly known as Proposition 64, was passed by the California General Election on November 2, 2004, and went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) Proposition 64 limits private enforcement of unfair business competition laws by providing that a private person may not bring a lawsuit unless he or she has suffered injury and lost money or property as a result of the challenged business practices, and meets the requirements for a class representative in a class action.[2]

On December 6, 2004, Mervyn's moved to dismiss this appeal upon the claim that Proposition 64's change in standing requirements ***304** applies to pending actions, and compels the dismissal of CDR's appeal of this private enforcement action. CDR filed its opposition to that motion on December 21, 2004, and we heard oral argument on January 25, 2005. (Cal. Rules of Court, rule 41.)

DISCUSSION

Business and Professions Code section 17200 et seq. prohibits unfair competition, including "any unlawful, unfair or fraudulent business act or practice."[3] The unfair competition law, or UCL, "covers a wide range of conduct." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143, 131 Cal.Rptr.2d 29, 63 P.3d 937.) Before passage of Proposition 64, the UCL also authorized a wide array of enforcement actions. As the California Supreme Court observed in the year preceding passage of Proposition 64: "Standing to sue under the UCL is expansive.... Unfair competition actions can be brought by a public prosecutor or 'by any person acting for the interests of itself, its members, or the general public.' (§ 17204.)" (*Ibid.*)

In enacting Proposition 64, the voters found that the unfair competition laws were being "misused," and acted to limit private enforcement actions under the UCL. Proposition 64 retained public prosecutors' authority to bring UCL actions but struck the provision in section 17204 authorizing initiation of a complaint by "any person acting for the interests of itself, its members, or the general public," and substituted a provision for enforcement by "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Similarly, Proposition 64 amended section 17203, concerning UCL injunctive relief, to provide that a private person "may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 [i.e., actual injury] and complies with Section 382 of the Code of Civil Procedure" governing class actions.

Mervyn's contends that Proposition 64 applies to cases filed before the law's effective date of November 3, 2004, and compels dismissal of this appeal in a case initiated in May 2002 and tried in August 2003. We reject the contention.

"It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287, 279 Cal.Rptr. 592, 807 P.2d 434.) Proposition 64 contains no express declaration of retrospectivity, as Mervyn's rightly concedes. Proposition 64 is wholly silent on the matter. The terms of the statutory amendments, the legislative analysis, and the ballot arguments make no mention as to whether Proposition 64 is meant to apply retroactively to preexisting lawsuits. The language used in the proposition and ballot materials also fails to provide any implicit indication that the electorate intended the law to be retroactive. If anything, the statutory language and ballot materials suggest an intention that the law apply prospectively to future lawsuits. The voters' "Findings and Declarations of Purpose" contained in Proposition 64 express an intention to prohibit the "filing" of lawsuits by private parties uninjured by the challenged business practice. The ballot ***305** arguments likewise emphasize Proposition 64's effect on the filing of lawsuits. However, this isolated language is far from decisive as to the electorate's intent on the question of retroactivity. When read as a whole, the only fair conclusion is that the question of whether Proposition 64 applies to pending lawsuits was not presented to, nor considered by, the electorate.

A similar situation was presented in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 246 Cal.Rptr. 629, 753 P.2d 585, in which our Supreme Court held that Proposition 51 could not be applied to actions that

accrued before the measure's effective date. Proposition 51, approved by the voters in 1986, "modified the traditional, common law 'joint and several liability' doctrine, limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault." (*Id.* at p. 1192, 246 Cal.Rptr. 629, 753 P.2d 585.) The high court found that "a fair reading of the proposition as a whole makes it clear that the subject of retroactivity or prospectivity was simply not addressed." (*Id.* at p. 1209, 246 Cal.Rptr. 629, 753 P.2d 585.) The principles that guided the California Supreme Court's interpretation of Proposition 51 guide our interpretation of Proposition 64, and dictate the same conclusion: "the absence of any express provision directing retroactive application strongly supports prospective operation of the measure." (*Ibid.*)

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229, fn. omitted.) California follows the same prospectivity rules as the United States Supreme Court. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841, 123 Cal.Rptr.2d 40, 50 P.3d 751.)

The California Supreme Court has explained that "[t]he presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1214, 246 Cal.Rptr. 629, 753 P.2d 585.) The requirement of clear legislative intent of retroactivity "helps ensure that [the Legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." (*Landgraf v. USI Film Products, supra,* 511 U.S. at p. 268, 114 S.Ct. 1483.) Unless there is "an express retroactivity provision, a statute will not be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos, supra,* at p. 1209, 246 Cal.Rptr. 629, 753 P.2d 585, italics added.) " '[A] statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective.' " (*Myers v. Philip Morris Companies, Inc., supra,* 28 Cal.4th at p. 841, 123 Cal.Rptr.2d 40, 50 P.3d 751, quoting *INS v. St. Cyr* (2001) 533 U.S. 289, 320–321, fn. 45, 121 S.Ct. 2271, 150 L.Ed.2d 347.)

Mervyn's contends that a retroactive application of Proposition 64 would further the initiative's intent to stop misuse of the unfair competition law. But "[m]ost statutory changes are ... intended to improve a preexisting situation and to bring about a fairer state of affairs." (*Evangelatos v.* ***306** *Superior Court, supra,* 44 Cal.3d at p. 1213, 246 Cal.Rptr. 629, 753 P.2d 585.) Such a remedial objective is not alone sufficient to demonstrate a legislative intent to apply a statute retrospectively. (*Ibid.*) Contentions like Mervyn's overlook that "there are special considerations—quite distinct from the merits of the substantive legal change embodied in the new legislation—that are frequently triggered by the application of a new, 'improved' legal principle retroactively to circumstances in which individuals may have already taken action in reasonable reliance on the previously existing state of the law. Thus, the 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." (*Id.* at pp. 1213–1214, 246 Cal.Rptr. 629, 753 P.2d 585.)

Nor is it proper for this court to exploit the voters' silence on the question of retroactivity and impose its own view as to whether the remedial purposes of Proposition 64 warrant disrupting pending litigation. "[I]t was the electorate who made the policy decision to implement a change in the [law], and thus it was the voters who possessed the authority to decide the policy question of whether the new statute should be applied retroactively." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1222, 246 Cal.Rptr. 629, 753 P.2d 585.) This court "has no power to impose its own views as to the wisdom or appropriateness" of applying Proposition 64 retroactively. (*Ibid.*) Had the drafters, and voters, intended the initiative to apply retroactively, they could have so provided. They did not. The voters' silence on the issue of whether Proposition 64 is meant to have retroactive effect implicates the general presumption, unrebutted here, that the initiative applies prospectively.

Mervyn's acknowledges the long-standing rule that legislative enactments are applied prospectively, absent unequivocal contrary intent. However, Mervyn's argues that a different, and opposite, rule applies when statutory rights are at issue. Mervyn's relies upon cases holding that "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." (*Callet v. Alioto* (1930) 210 Cal. 65, 67, 290 P. 438; see Gov.Code, § 9606 ["Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."]) This holding is sometimes encapsulated by the principle that a " 'reviewing court must dispose of the case under the law in force when its decision is rendered.' " (*Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 12, 97 P.2d 963; accord *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829, 135 Cal.Rptr. 526, 558 P.2d 1.)

The argument exposes 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. The United States Supreme Court has acknowledged this seeming conflict, and provided a reconciliation. (*Landgraf v. USI Film Products, supra,* 511 U.S. at pp. 263–280, 114 S.Ct. 1483.) As the high court explained, the presumption of prospectivity is the controlling principle. (*Ibid.;* accord *Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1207–1208, 246 Cal.Rptr. 629, 753 P.2d 585.) Legislative enactments are *presumed* to be prospective, but the presumption is rebutted if the enactment clearly indicates an intent ***307** that it be applied retroactively. (*Landgraf, supra,* at p. 273, 114 S.Ct. 1483.) If the statute indicates such an intent, and retroactive application will not violate constitutional provisions, then the new statute (the law in effect) is applied to pending cases. (*Id.* at pp. 267–268, 273, 114 S.Ct. 1483.)

A case holding that the repeal of a statute terminates pending actions is not an exception to the prospectivity presumption, but an application of it. In those cases, the repeal of a statute indicated legislative intent that the repeal legislation apply retroactively, thus rebutting the presumption of prospectivity. Such cases also reflect an analytically distinct determination that the legislature had the *power* to retroactively affect pending litigation, because the rights being prosecuted were contingent statutory rights rather than vested rights, which implicate constitutional concerns. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1222–1224, 246 Cal.Rptr. 629, 753 P.2d 585.)

In *Evangelatos,* our Supreme Court acknowledged a line of California cases applying statutory amendments to trials conducted after the effective date of the revised statute. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1222, 246 Cal.Rptr. 629, 753 P.2d 585.) The court explained that cases applying the repeal or amendment of statutes retroactively do not displace the general principle of prospectivity applicable to all legislation. (*Id.* at p. 1224, 246 Cal.Rptr. 629, 753 P.2d 585.) In those cases, "the language of the statute in question showed that the Legislature intended the measure to be applied retroactively," and the primary focus of concern was whether the Legislature had the constitutional authority to apply the measure retroactively. (*Id.* at pp. 1223–1224, 246 Cal.Rptr. 629, 753 P.2d 585.) As the court emphasized in *Evangelatos,* "the question whether [a voter's proposition] may constitutionally be applied retroactively is quite distinct from the question whether the proposition should be properly interpreted as retroactive or prospective as a matter of statutory interpretation." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1224, 246 Cal.Rptr. 629, 753 P.2d 585.) We are concerned solely with the question of whether Proposition 64 should be interpreted as retroactive. Unlike the cases Mervyn's relies upon, Proposition 64 does not show an unmistakable intent that its statutory amendments apply retroactively.

As an alternative argument, Mervyn's maintains that CDR's appeal should be dismissed even under a prospective application of Proposition 64. Mervyn's argues that Proposition 64 establishes new procedural rules that are properly applied to all pending litigation. It is true that the rule of prospectivity generally applicable to statutes "does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. [Citation.] This is so because these uses typically affect only future conduct—the future conduct of the trial." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936, 22 Cal.Rptr.3d 530, 102 P.3d 915.)

However, Mervyn's argument is ill suited to the situation presented here. Dismissal of CDR's appeal would be a retroactive, not prospective, application of Proposition 64. The relevant question is not whether the statutory amendments to the UCL's standing requirements are best characterized as procedural or substantive. "In deciding whether the application of a law is prospective or retroactive, we look to function, not form. [Citations.] We consider the effect of a law on a party's ***308** rights and liabilities, not whether a procedural or substantive label best applies." (*Elsner v. Uveges, supra,* 34 Cal.4th at pp.

936–937, 22 Cal.Rptr.3d 530, 102 P.3d 915.) The relevant question is whether the law substantially affects existing rights and obligations. (*Id.* at p. 937, 22 Cal.Rptr.3d 530, 102 P.3d 915.)

Dismissal of CDR's appeal would substantially affect CDR's rights. CDR filed this lawsuit in May 2002, over two years before passage of Proposition 64. At that time, CDR had the right to file and prosecute a UCL cause of action, and maintained that right through trial in August 2003. Dismissal of the appeal at this juncture would foreclose consideration of CDR's claims that it should have prevailed at trial, or is entitled to a new trial. Were Proposition 64 applied to pending appeals, as Mervyn's advocates, even those plaintiffs who prevailed at trial could be stripped of their judgments. It does not lessen the effect upon CDR's rights to observe, as Mervyn's does, that another plaintiff might be able to file an action against it for alleged unlawful business practices.

In determining whether a new law has retroactive effect, we must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." (*Landgraf v. USI Film Products, supra,* 511 U.S. at p. 270, 114 S.Ct. 1483.) In making that determination, we are guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." (*Ibid.*) Here, Proposition 64 imposes limits on private enforcement of the UCL by precluding the filing of a complaint by a private party who has not suffered injury in fact and lost money or property as a result of the challenged business conduct. The law, if applied retroactively, would sweep up all pending complaints by uninjured plaintiffs. The application of a new law restricting the filing of complaints to previously filed complaints would plainly constitute a retroactive application of the law. While the filing of a complaint may be characterized as "procedural," 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...." (*Id.* at 275, fn. 29, 114 S.Ct. 1483.)

Application 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. In this case, the change in the UCL's standing rules denied CDR the opportunity to seek the intervention of a public prosecutor or to obtain the participation of a representative member of its organization who may have suffered monetary loss from the alleged unlawful business practices.

The disruption that would result from application of Proposition 64 to preexisting lawsuits should not be minimized. Plaintiffs who filed and prosecuted cases for years, like CDR, could suffer dismissal of their lawsuit at all stages of litigation. The prospect of such dismissals raises a host of difficult questions, including whether a plaintiff who did not allege actual injury is entitled to amend his or her complaint to make the allegation or substitute another party who was injured; whether a plaintiff may amend his or her complaint to add class action allegations; and whether any amended standing allegations relate back to the filing of the complaint so as to toll the statute of limitations. Retroactive application of a statute often entails difficulties in enforcement and unanticipated consequences, and should not be embarked upon where, as ***309** here, there is no indication that retroactivity was ever considered or intended by the voters. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1215, 246 Cal.Rptr. 629, 753 P.2d 585.)

DISPOSITION

The motion to dismiss the appeal is denied.

We concur: KAY, P.J., and REARDON, J.

TEXT OF PROPOSED LAWS

Proposition 64

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Business and Professions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout~~ type and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declarations of Purpose

The people of the State of California find and declare that:

(a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices.

(b) These unfair competition laws are being misused by some private attorneys who:

(1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.

(2) File lawsuits where no client has been injured in fact.

(3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

(4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

(c) Frivolous unfair competition lawsuits clog our courts and cost taxpayers. Such lawsuits cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits.

(d) It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code.

(e) It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.

(f) It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public.

(g) It is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.

(h) It is the intent of California voters in enacting this act to require that civil penalty payments be used by the Attorney General, district attorneys, county counsels, and city attorneys to strengthen the enforcement of California's unfair competition and consumer protection laws.

SEC. 2. Section 17203 of the Business and Professions Code is amended to read:

17203. *Injunctive Relief—Court Orders*

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Any 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, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

SEC. 3. Section 17204 of the Business and Professions Code is amended to read:

17204. *Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys*

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of such unfair competition.*

SEC. 4. Section 17206 of the Business and Professions Code is amended to read:

17206. *Civil Penalty for Violation of Chapter*

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. *The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered *for the exclusive use by the city attorney for the enforcement of consumer protection laws.* However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

SEC. 5. Section 17535 of the Business and Professions Code is amended to read:

17535. *Obtaining Injunctive Relief*

TEXT OF PROPOSED LAWS

Proposition 64 *(cont.)*

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

SEC. 6. Section 17536 of the Business and Professions Code is amended to read:

17536. *Penalty for Violations of Chapter; Proceedings; Disposition of Proceeds*

(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer.

If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city. *The aforementioned funds shall be for the exclusive use by the Attorney General, district attorney, county counsel, and city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality which funds the local agency.

(e) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive.

SEC. 7. In the event that between July 1, 2003, and the effective date of this measure, legislation is enacted that is inconsistent with this measure, said legislation is void and repealed irrespective of the code in which it appears.

SEC. 8. In the event that this measure and another measure or measures relating to unfair competition law shall appear on the same statewide election ballot, the provisions of the other measures shall be deemed to be in conflict with this measure. In the event that this measure shall receive a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure relating to unfair competition law shall be null and void.

SEC. 9. If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

Proposition 65

Pursuant to statute, Proposition 65 will appear in a Supplemental Voter Information Guide.

Proposition 66

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Penal Code and amends a section of the Welfare and Institutions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout~~ type and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

THE THREE STRIKES AND CHILD PROTECTION ACT OF 2004

SECTION 1. Title

This initiative shall be known and may be cited as the Three Strikes and Child Protection Act of 2004.

SEC. 2. Findings and Declarations

The people of the State of California do hereby find and declare that:

(a) Proposition 184 (the "Three Strikes" law) was overwhelmingly approved in 1994 with the intent of protecting law-abiding citizens by enhancing the sentences of repeat offenders who commit serious and/or violent felonies;

(b) Proposition 184 did not set reasonable limits to determine what criminal acts to prosecute as a second and/or third strike; and

(c) Since its enactment, Proposition 184 has been used to enhance the sentences of more than 35,000 persons who did not commit a serious and/or violent crime against another person, at a cost to taxpayers of more than eight hundred million dollars ($800,000,000) per year.

SEC. 3. Purposes

The people do hereby enact this measure to:

(a) Continue to protect the people from criminals who commit serious and/or violent crimes;

(b) Ensure greater punishment and longer prison sentences for those who have been previously convicted of serious and/or violent felonies, and who commit another serious and/or violent felony;

(c) Require that no more than one strike be prosecuted for each criminal act and to conform the burglary and arson statutes; and

(d) Protect children from dangerous sex offenders and reduce the cost to taxpayers for warehousing offenders who commit crimes that do not qualify for increased punishment according to this act.

PROPOSITION **64**

LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE.

OFFICIAL TITLE AND SUMMARY

Prepared by the Attorney General

Limits on Private Enforcement of Unfair Business Competition Laws. Initiative Statute.

- Limits individual's right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss because of, an unfair business practice.
- Requires private representative claims to comply with procedural requirements applicable to class action lawsuits.
- Authorizes only the California Attorney General or local government prosecutors to sue on behalf of general public to enforce unfair business competition laws.
- Limits use of monetary penalties recovered by Attorney General or local government prosecutors to enforcement of consumer protection laws.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Unknown state costs or savings depending on whether the measure significantly increases or decreases court workload related to unfair competition lawsuits and the extent to which funds diverted by this measure are replaced.
- Unknown potential costs to local governments depending on the extent to which funds diverted by this measure are replaced.

ANALYSIS BY THE LEGISLATIVE ANALYST

BACKGROUND

California's unfair competition law prohibits any person from engaging in any unlawful or fraudulent business act. This law may be enforced in court by the Attorney General, local public prosecutors, or a person acting in the interest of itself, its members, or the public. Examples of this type of lawsuit include cases involving deceptive or misleading advertising or violations of state law intended to protect the public well-being, such as health and safety requirements.

Currently, a person initiating a lawsuit under the unfair competition law is not required to show that he/she suffered injury or lost money or property. Also, the Attorney General and local public prosecutors can bring an unfair competition lawsuit without demonstrating an injury or the loss of money or property of a claimant.

Currently, persons initiating unfair competition lawsuits do not have to meet the requirements for class action lawsuits. Requirements for a class action lawsuit include (1) certification by the court of a group of individuals as a class of persons with a common interest, (2) demonstration that there is a benefit to the parties of the lawsuit and the court from having a single case, and (3) notification of all potential members of the class.

In cases brought by the Attorney General or local public prosecutors, violators of the unfair competition law may be required to pay civil penalties up to $2,500 per violation. Currently, state and local governments may use the revenue from such civil penalties for general purposes.

PROPOSAL

This measure makes the following changes to the current unfair competition law:

- ***Restricts Who Can Bring Unfair Competition Lawsuits.*** This measure 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.

ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

- ***Requires Lawsuits Brought on Behalf of Others to Be Class Actions.*** This measure requires that unfair competition lawsuits initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits.
- ***Restricts the Use of Civil Penalty Revenues.*** This measure requires that civil penalty revenues received by state and local governments from the violation of unfair competition law be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws.

FISCAL EFFECTS

State Government

Trial Courts. This measure would have an unknown fiscal impact on state support for local trial courts. This effect would depend primarily on whether the measure increases or decreases the overall level of court workload dedicated to unfair competition cases. If the level of court workload significantly decreases because of the proposed restrictions on unfair competition lawsuits, there could be state savings. Alternatively, this measure could increase court workload, and therefore state costs, to the extent there is an increase in class action lawsuits and their related requirements. The number of cases that would be affected by this measure and the corresponding state costs or savings for support of local trial courts is unknown.

Revenues. This measure requires that certain state civil penalty revenue be diverted from general state purposes to the Attorney General for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by the General Fund, there would be a state cost. However, there is no provision in the measure requiring such replacement.

Local Government

The measure requires that local government civil penalty revenue be diverted from general local purposes to local public prosecutors for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by local general fund monies, there would be a cost to local government. However, there is no provision in the measure requiring the replacement of diverted revenues.

Other Effects on State and Local Government Costs

The measure could result in other less direct, unknown fiscal effects on the state and localities. For example, this measure could result in increased workload and costs to the Attorney General and local public prosecutors to the extent that they pursue certain unfair competition cases that other persons are precluded from bringing under this measure. These costs would be offset to some unknown extent by civil penalty revenue earmarked by the measure for the enforcement of consumer protection laws.

Also, to the extent the measure reduces business costs associated with unfair competition lawsuits, it may improve firms' profitability and eventually encourage additional economic activity, thereby increasing state and local revenues. Alternatively, there could be increased state and local government costs. This could occur to the extent that future lawsuits that would have been brought under current law by a person on behalf of others involving, for example, violations of health and safety requirements, are not brought by the Attorney General or a public prosecutor. In this instance, to the extent that violations of health and safety requirements are not corrected, government could potentially incur increased costs in health-related programs.

For text of Proposition 64 see page 109.

64 LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE.

ARGUMENT in Favor of Proposition 64

PROTECT SMALL BUSINESSES FROM FRIVOLOUS LAWSUITS—CLOSE THE SHAKEDOWN LOOPHOLE

There's a LOOPHOLE IN CALIFORNIA LAW that allows private lawyers to file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled. Shakedown lawyers "appoint" themselves to act like the Attorney General and file lawsuits on behalf of the people of the State of California, demanding thousands of dollars from small businesses that can't afford to fight in court.

Here's the little secret these lawyers don't want you to know: *MOST OF THE TIME, THE LAWYERS OR THEIR FRONT GROUPS KEEP ALL THE MONEY!*

No other state allows this. It's time California voters stopped it. For years, Sacramento politicians, flush with special interest trial lawyer money, have protected the lawyers at the expense of California consumers, taxpayers, and small businesses.

Yes on Proposition 64 will stop thousands of frivolous shakedown lawsuits like these:

- Hundreds of travel agents have been shaken down for not including their license number on their website.
- Local homebuilders have been sued for using 'APR' in advertisements instead of spelling out 'Annual Percentage Rate.'

HERE'S WHAT ACTUALLY HAPPENED TO ONE SMALL BUSINESS VICTIM:

"My family came to this country to pursue the American Dream. We work hard to make sure our customers like the job we do. One day I got a letter from a law firm demanding $2,500. The letter didn't claim we broke the law, just that we might have and if we wanted to stop the lawsuit, we needed to send them $2,500. I called a lawyer who said it would cost even more to fight, so we sent money even though we'd done nothing wrong. It's just not right."

Humberto Galvez, Santa Ana

Here's why "YES" on Proposition 64 makes sense:

- *Stops these shakedown lawsuits.*
- *Protects your right to file a lawsuit if you've been damaged.*
- *Allows only the Attorney General, district attorneys, and other public officials to file lawsuits on behalf of the People of the State of California to enforce California's unfair competition law.*
- *Settlement money goes to the public, not the pockets of unscrupulous trial lawyers.*

"Public Prosecutors have a long, distinguished history of protecting consumers and honest businesses. Proposition 64 *will give those officials the resources they need to increase enforcement of consumer protection laws* by designating penalties from their lawsuits to supplement additional enforcement efforts, above their normal budgets."

Michael D. Bradbury, Former President
California District Attorneys Association

Vote Yes on Proposition 64: Help California's Economy Recover

"Frivolous shakedown lawsuits cost consumers and businesses millions of dollars each year. They make businesses want to move to other states where lawyers don't have a legal extortion loophole. When businesses leave, taxpayers who remain pick up the burden. Proposition 64 closes this loophole and helps improve California's business climate and overall economic health."

Larry McCarthy, President
California Taxpayers Association

Vote Yes on Proposition 64. Close the frivolous shakedown lawsuit loophole.

RAY DURAZO, *Chairman*
Latin Business Association
MARTYN HOPPER, *State Director*
National Federation of Independent Business
MARYANN MALONEY
Citizens Against Lawsuit Abuse

REBUTTAL to Argument in Favor of Proposition 64

Small business?!?

The Associated Press reported:

"Here are some of the companies that have made donations to the campaign to pass Proposition 64 and some of the lawsuits that have been filed against them under California's unfair competition law:

—Blue Cross of California. Donation: $250,000. Unfair competition suits have accused the health care company of . . . discriminating against non-company emergency room doctors and underpaying hospitals.

—Bank of America. Donation: $100,000. A jury found the bank misrepresented to customers that it had the right to take Social Security and disability funds from their accounts to pay overdraft charges and other fees.

—Microsoft. Donation: $100,000. Suit . . . accuses the computer giant of failing to alert customers to security flaws that allow hackers to break into its computer systems by gaining some personal information.

—Kaiser Foundation Health Plan. Donation: $100,000. One suit accused the health care provider of false advertising for claiming that only doctors, not administrators, made decisions about care . . .

—State Farm. Donation: $100,000. A group of victims of the 1994 Northridge earthquake accused the company of reducing their quake coverage without adequate notice. State Farm reportedly was forced to pay $100 million to policyholders."

Quoting the Attorney General's senior consumer attorney in the Department of Justice, the *Los Angeles Times* reports: "The initiative 'goes unbelievably far,' . . . Throwing the baby out with the bathwater is not the best thing' . . . the (current) law has been used successfully to protect the public from polluters, unscrupulous financing schemes and religious discrimination."

ELIZABETH M. IMHOLZ, *Director*
Consumers Union, West Coast Office
SUSAN SMARTT, *Executive Director*
California League of Conservation Voters
DEBORAH BURGER, RN, *President*
California Nurses Association

40 | Arguments

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LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE. 64

ARGUMENT Against Proposition 64

Proposition 64 LIMITS THE RIGHTS OF CALIFORNIANS TO ENFORCE ENVIRONMENTAL, PUBLIC HEALTH, PRIVACY, AND CONSUMER PROTECTION LAWS.

The Attorney General's Official Title for the Proposition 64 petition read: "LIMITATIONS on Enforcement of Unfair Business Competition Laws."

Across California headlines warn the public about this special interest initiative. San Francisco Chronicle: *"Measure would limit public interest suits"*; Ventura County Star: *"Consumers lose if initiative succeeds"*; Orange County Register: *"Consumer lawsuits targeted"*; San Francisco Examiner: *"Bank of America's shakedown: Unfair-competition law under fire from businesses."*

Look who is supporting Proposition 64. Consider why they want to limit California's 71-year-old Unfair Business Competition law.

Chemical companies support Proposition 64. They want to stop environmental organizations from enforcing laws against polluting streams, rivers, lakes, and our coast.

Oil companies support Proposition 64. They want to stop community organizations from suing them for polluting drinking water supplies with cancer-causing MTBE.

Credit card companies support Proposition 64. They want to stop consumer groups from enforcing privacy laws protecting our financial information.

IF A CORPORATION PROFITS FROM INTENTIONALLY POLLUTING OUR AIR AND WATER, OR INVADING OUR PRIVACY, WE SHOULD BE ABLE TO STOP IT.

The Los Angeles Times reports: *"The measure would weaken a state law that allows private groups and government prosecutors to sue businesses for polluting the environment and for engaging in misleading advertising and other unfair business practices . . . If voters approve the measure, the current law would be drastically curtailed."*

Tobacco companies support Proposition 64. They want to block health organizations from enforcing the laws against selling tobacco to children.

Banks support Proposition 64. They want to stop elderly and disabled people who sued them for confiscating Social Security funds.

Insurance companies and HMOs support Proposition 64. They don't want to be held accountable for fraudulent marketing or denying medically necessary treatment to patients.

Energy companies support Proposition 64. They ripped off California during the "energy crisis" and want to block ratepayers from attacking energy company fraud.

Since 1933, the Unfair Business Competition Laws have protected Californians from pollution, invasions of privacy, and consumer fraud. Here are examples of cases successfully brought under this law:

- Supermarkets had to stop changing the expiration date on old meat and reselling it.
- HMOs had to stop misrepresenting their services to patients.
- Bottled water companies had to stop selling water that hadn't been tested for dangerous levels of bacteria, arsenic, and other chemicals.

The Los Angeles Times editorialized: *"(Proposition 64) would make it very difficult for citizens, businesses, and consumer groups to file justified lawsuits."*

Proposition 64 is strongly opposed by:

- AARP
- California Nurses Association
- California League of Conservation Voters
- Consumers Union
- Sierra Club California
- Congress of California Seniors
- Center for Environmental Health
- California Advocates for Nursing Home Reform
- Foundation for Taxpayer and Consumer Rights

Please join us in voting NO on Proposition 64. Don't let them limit your right to enforce the laws that protect us all.

ELIZABETH M. IMHOLZ, *Director*
Consumers Union, West Coast Office
SUSAN SMARTT, *Executive Director*
California League of Conservation Voters
DEBORAH BURGER, RN, *President*
California Nurses Association

REBUTTAL to Argument Against Proposition 64

The argument against Proposition 64 is a trial lawyer smokescreen: Read the official title and the law yourself.

- *Nowhere is Environment, Public Health, or Privacy mentioned!*
- *California has dozens of strong laws to protect the environment, public health, and privacy, including Proposition 65, passed by voters in 1986, the California Environmental Quality Act and the California Financial Information Privacy Act.*
- *Proposition 64 doesn't change any of these laws.*
- *Proposition 64 would permit ALL the suits cited by its opponents.*

". . . the trial attorneys who benefit from the current system are going bonkers, and misrepresenting what (Prop. 64) will do. They claim that (Prop. 64) . . . will somehow undermine the state's environmental laws. That's patently untrue."

Orange County Register

Here's what 64 really does:

- *Stops Abusive Shakedown Lawsuits*
- Stops fee-seeking trial lawyers from exploiting a loophole in California law—*A LOOPHOLE NO OTHER STATE HAS*—that lets them "appoint" themselves Attorney General and file lawsuits on behalf of the People of the State of California.
- *Stops trial lawyers from pocketing FEE AND SETTLEMENT MONEY that belongs to the public.*
- *Protects your right to file suit if you've been harmed.*
- *Permits only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California.*

Join 7004 groups, small businesses, and shakedown victims, including:

California Taxpayers Association
California Black Chamber of Commerce
California Mexican American Chamber of Commerce
Vote YES on 64—www.yeson64.org

JOHN KEHOE, *Founding Director*
Senior Action Network
ALLAN ZAREMBERG, *President*
California Chamber of Commerce
CHRISTOPHER M. GEORGE, *Chairman of the Board of Governors*
Small Business Action Committee

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Arguments | 41

All Citations

24 Cal.Rptr.3d 301, 05 Cal. Daily Op. Serv. 1010, 2005 Daily Journal D.A.R. 1347

Footnotes

[1] Mervyn's was sued as Mervyn's California, Inc.; however, counsel for Mervyn's advises us that the correct corporate name is Mervyn's LLC.

[2] The complete text of Proposition 64 and all relevant portions of the Voter Information Guide, including the Legislative Analyst's analysis and the arguments of the proponents and opponents, are set forth in an appendix to this opinion. (Voter Information Guide, Gen. Elec. (Nov. 2, 2004) text of proposed law, pp. 109–110; argument in favor of Prop. 64, p. 40; rebuttal to argument in favor of Prop. 63, pp. 40–41; rebuttal to argument against Prop. 64, p. 41.)

[3] All further statutory citations are to the Business and Professions Code, unless otherwise noted.