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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

HARTFORD FIRE INS. CO. et al., Petitioners, v. SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; SCOTT C. TURNER, Real Party in Interest.	A109257 (San Francisco County Super. Ct. No. 323192)

Scott Turner, an attorney, brought suit against petitioners, three groups of insurance companies, in separate but consolidated actions, alleging violations of California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.). The suit, brought on behalf of the general public, claims that petitioners pay insurance brokers an annual sum of money based upon the volume of business the broker has generated for the insurance company, conduct Turner characterizes as an "illegal kickback." Turner's complaints do not allege that Turner has suffered actual injury, or loss of property or money, as a result of petitioners' conduct.

When Turner filed suit, the UCL allowed private parties to bring UCL suits on behalf of the general public. On November 2, 2004, California's voters approved Proposition 64, which, as relevant, repealed the provision permitting suit on behalf of the general public, replacing it with a provision allowing a private party to bring a UCL action only if the person filing suit "has suffered injury in fact and has lost money or property as a result of such unfair competition." (Bus. & Prof. Code, § 17204.) In light

of the change in the law, petitioners filed a motion in the superior court, seeking judgment on the pleadings on the grounds that Turner lacked standing to pursue his claims. The superior court denied the motion. Petitioners seek to overturn that ruling.

I.

There is a split in authority on the effect of Proposition 64 on cases not final as of the proposition's effective date. Courts in the Second and Fourth Districts have held that Proposition 64 applies to pending litigation, requiring dismissal of section 17200 suits brought by persons who have not themselves suffered actual injury as a result of the alleged unfair business practice. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1262 (*Huntingdon*); *Thornton v. Career Training Center, Inc.* (2005) 128 Cal.App.4th 116, 127; *Frey v. Trans Union Corp.* (2005) 127 Cal.App.4th 986, 998; *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455, 1480, fn. 13; *Branick v. Downey Savings & Loan Assn.* (2005) 126 Cal.App.4th 828; *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392, 1404-1405 (*Bivens*); *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887, 902-903.) The Second Division of this court agreed in *Schwartz v. Visa Internat. Service Assn.* (2005) 132 Cal.App.4th 1452, 1463 (*Schwartz*). In *Californians for Disability Rights v. Mervyn's* (2005) 126 Cal.App.4th 386 (*Mervyn's*), however, the Fourth Division of this court reasoned that because there is no clear expression of legislative or voter intent that Proposition 64 be applied retroactively, it should not be applied to pending claims. One court in the Second District similarly reasoned that Proposition 64 should not apply to pending claims in the absence of an express intent to repeal existing legislation. (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2005) 129 Cal.App.4th 540, 573.) The Supreme Court has granted review in all of these cases, except for *Huntingdon*, *supra*, 129 Cal.App.4th 1228, and *Schwartz*, *supra*, 132 Cal.App.4th 1452.

It is well-established that statutes are not to be given a retrospective operation unless it clearly appears that such was the legislative intent. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 (*Evangelatos*); *Aetna Cas. & Surety Co. v. Ind. Acc.*

Comm. (1947) 30 Cal.2d 388, 393 (*Aetna*).) There is little in Proposition 64 itself, or in the relevant proposition and ballot materials, expressing legislative or voter intent on the question of whether the change in the law was to apply to pending litigation. Turner therefore contends that applying Proposition 64 to pending litigation would be an unauthorized retrospective application of law.

There is, however, a second legal principle. "[W]hen a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of such a statute without a saving clause will terminate all pending actions based thereon.' [Citation.]" (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829.) The Supreme Court reaffirmed this principle—sometimes called the "statutory repeal rule"—in *Younger v. Superior Court (Younger)* (1978) 21 Cal.3d 102, 109.) A remedy conferred by statute does not vest until final judgment. (*South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 619.) Therefore, "[a] repeal of the statute, or an amendment thereof, resulting in a repeal of the statutory provision under which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment." (*Wolf v. Pacific Southwest Etc. Discount Corp.* (1937) 10 Cal.2d 183, 185.) The justification for this rule was stated in *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 (*Callet*): "[A]ll statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.[[1]] [Citation.] This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right, should not be construed to affect existing causes of action. [Citations.]"

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[1] "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." (Gov. Code, § 9606.)

While we have not previously grappled with the effect of Proposition 64 on pending cases, we recognized and applied the statutory repeal rule recently in *Northern Cal. Carpenters Regional Council v. Warmington Hercules Assocs.* (2004) 124 Cal.App.4th 296, 302 (*Warmington*) and *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125-126. In *Warmington*, we held: "The general canon of interpretation is 'that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent. [Citation.] The repeal of a statutory remedy, however, presents entirely distinct issues. 'A well-established line of authority holds: " ' "The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. *The reviewing court must dispose of the case under the law in force when its decision is rendered.*" ' " ' " (*Warmington, supra,* 124 Cal.App.4th at pp. 301-302, italics in the original.)

The "statutory repeal rule" is not an exception to the general rule against retrospective application of the law, but a recognition that the general rule applies only to vested rights. A "retroactive or retrospective law" is one affecting rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839 (*Myers*); *Evangelatos, supra,* 44 Cal.3d at pp. 1193-1194; *Aetna, supra,* 30 Cal.2d at p. 393.) As the court explained in *Callet, supra,* 210 Cal. at page 68, a common law cause of action or remedy is a vested cause of action or remedy. Legislation that interferes with such a cause of action or remedy, accordingly, is a retrospective application of the law, and cannot stand in the absence of a clear expression of legislative intent. Unlike a common law right, "[a] statutory remedy does not vest until final judgment." (*South Coast Regional Com. v. Gordon*, *supra*, 84 Cal.App.3d at p. 619.) The repeal of the enabling statute does not alter a vested right, and therefore is not a retroactive application of the law.

Myers, supra, 28 Cal.4th 828, involved the repeal (by the "Repeal Statute") of a statutory immunity (the "Immunity Statute"). While at first blush appearing to support the argument that the courts should not give retroactive effect to statutes unless the Legislature has clearly expressed an intent to do so, *Myers* actually confirms the viability of the "statutory repeal rule." In January 1988, Civil Code section 1714.45 took effect, granting a statutory immunity to manufacturers and sellers of specified products, including manufacturers and sellers of tobacco, from product liability actions arising from the consumption of their products. Section 1714.45 was amended 10 years later to remove the statutory bar to tobacco-related tort claims against tobacco companies. The plaintiff in *Myers* sought compensation for injuries resulting from exposure to tobacco before, during, and after the time the Immunity Statute was in effect.

The Supreme Court ruled that holding tobacco companies liable for conduct taken during the period of statutory immunity would be a retroactive application of the law. Under the Immunity Statute, neither the manufacture nor the sale of covered products was tortious "from January 1, 1988, to December 31, 1997. . . . Accordingly, to have the Repeal Statute govern product liability suits against tobacco companies for supplying tobacco products to smokers during the immunity period would indeed be a retroactive application of that statute because it could subject those companies to 'liability for past conduct' [citations] . . . ." (*Meyers, supra,* 28 Cal.4th at p. 840.) In other words, as to the period from January 1, 1988, to December 31, 1997, the Repeal Statute was a retroactive[2] application of the law because it created a liability for conduct that was not subject to liability when it took place. As to conduct occurring before January 1, 1988—for which the tobacco companies had been liable until the Immunity Statute was in effect, the court held: "Although the Repeal Statute has no retroactive effect, it nonetheless removed the

[2] Any conclusion that the Supreme Court's holding in *Myers* is inconsistent with the "statutory repeal rule" is dispelled by that court's definition of "retroactive or retrospective law," as a law that " 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.' " (*Myers, supra,* 28 Cal.4th at p. 839.)

protection that the Immunity Statute gave to tobacco companies for their conduct occurring *before* the Immunity Statute's effective date. This is so because a retroactive effect is one that 'impairs[s] rights a party possessed *when he acted.*' [Citation.] The Repeal Statute did not impair any rights that tobacco companies possessed *before* the immunity period. On the contrary, by abrogating the Immunity Statute, the Repeal Statute restored the law governing product liability for the manufacture or sale of tobacco products to what it had been before the January 1, 1988, effective date of the Immunity Statute." (*Id.* at p. 847, italics in the original.)

Myers, therefore, holds, consistent with the "statutory repeal rule," that the Legislature's repeal of a statute terminates all nonvested rights established by the statute. Where there are no vested rights at issue, applying the repealing legislation to existing claims simply is not a retroactive application of the law.

Turner's right to prosecute UCL actions was created by statute. That right has not vested and cannot vest until final judgment. When Proposition 64 went into effect, it did not reach back and retroactively affect a vested right, it simply repealed earlier legislation, thereby depriving persons such as Turner of the statutorily conferred power (i.e., standing) to prosecute UCL claims.

II.

Turner contends Business and Professions Code sections 4 and 12 create a savings clause that extends to subsequent enactments and amendments of the Business and Professions Code, such as Proposition 64. Business and Professions Code section 4 provides that "[n]o action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." Business and Professions Code section 12 provides, "Whenever any reference is made to any portion of this code . . . such reference shall apply to all amendments and additions thereto now or hereafter made." The evident purpose of Business and Professions Code section 4 was to preserve actions, proceedings and accrued rights in existence at the time the code itself was enacted. The evident purpose of Business and Professions Code section 12 was to

ensure that any references to a Business and Professions code section by some other code would apply also to any amendments or enactments of the Business and Professions Code. The Supreme Court in *Younger, supra,* declined to find a legislative intent to save a repealed provision of the Health and Safety Code, notwithstanding that sections 4 and 9 of that code contain language substantially the same as that in sections 4 and 12 of the Business and Professions Code.[3] (*Younger, supra,* 21 Cal.3d at p. 110.) We decline to impose a meaning on the Business and Professions Code that does not seem to have been intended by the Legislature and that would be at odds with the rulings of the state's high court.

CONCLUSION

Let a peremptory writ of mandate issue commanding respondent San Francisco County Superior Court to vacate its order denying petitioners' motion for judgment on the pleadings and to enter a new order granting the motion for judgment on the pleadings. The stay previously imposed shall remain in effective until the remittitur issues.

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[3] Health and Safety Code section 4 provides: "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible."

Health and Safety Code section 9 provides: "Whenever reference is made to any portion of this code or of any other law of this State, the reference applies to all amendments and additions now or hereafter made."

STEIN, Acting P. J.

We concur:

SWAGER, J.

MARGULIES, J.

Trial Court:	The Superior Court of San Francisco County
Trial Judge:	Hon. Richard A. Kramer
Counsel for Petitioners:	
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Hartford Fire Ins. Co. v. Superior Court (A109257)