

Forum

LOS ANGELES DAILY JOURNAL • THURSDAY, MARCH 17, 2005 • PAGE 6

1st DCA Falls Out of Step With Voters, Intent of Prop. 64

By Michael A. S. Newman

In 1795, Congressman Fisher Ames, speaking to the House of Representatives, likened a monarchy to a large ship that "sails well, but will sometimes strike on a rock, and go to the bottom." A republic, Ames concluded, is "a raft which will never sink, but then your feet are always in the water."

Democracy is effective, but it is also messy, even unappetizing. "Laws are like sausages," an age-old witticism goes. "It's best we don't see how they are made."

Ironically, the strength of democracy derives in part from what makes it at times so unappealing. By fomenting adversity and dissent amongst legislators, democracy impels lawmakers toward deal-making and compromise, an essential but sometimes unsavory process. By contrast, a dictatorship appears to be strong and unified only because the voice of dissent is stifled.

As Ames illustrates, a dictatorship's apparent strength is in fact illusory. Thus, as Winston Churchill concluded, "Democracy is the worst form of government except for all those others that have been tried."

But on occasion, democracy displays an elegance and even beauty to match its resilience and utility. Sometimes the voters, bypassing their elected legislators, speak with a single and unequivocal voice on a key matter, cutting to the essence of the issue like Alexander severing the Gordian Knot.

The direct ballot initiative provides such an opportunity. While California's voters have not always displayed infallible wisdom in passing ballot initiatives (but then, neither have California's legislators in passing laws), the voters occasionally display a practical sense and acuity that reminds us why the people are the boss in a democracy, and why the legislators are their servants. For example, Californians recently voted by direct initiative to pass Proposition 64, which profoundly modified California's Unfair Competition Law.

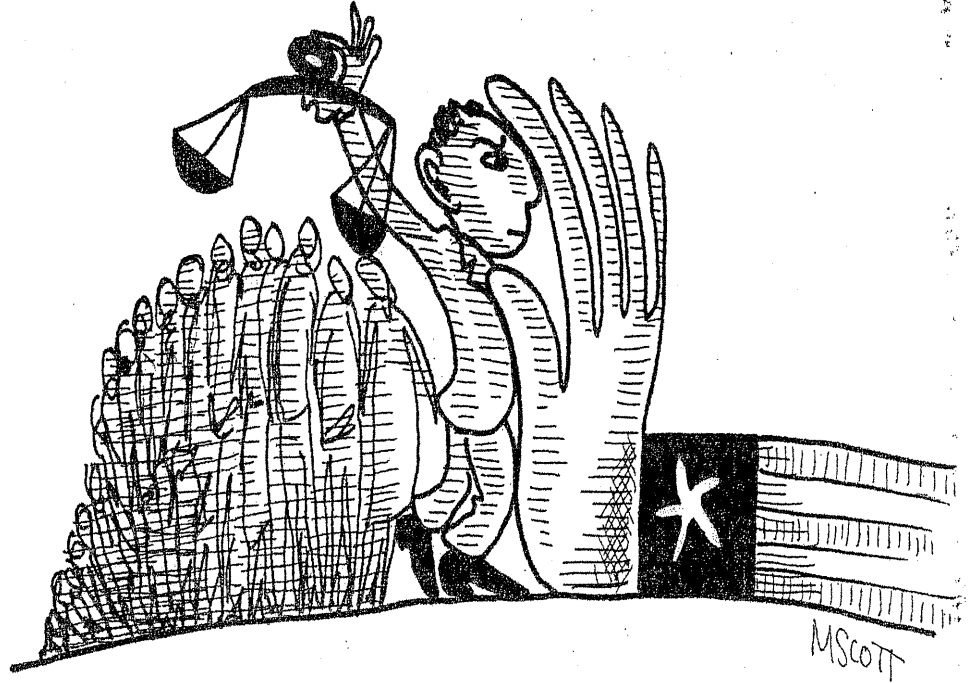
The purpose of the Unfair Competition Law is to penalize "unfair" competition. Prior to the passage of Proposition 64, California statute permitted anyone to sue a business for unfair competition as a "private attorney general," even if the plaintiff had never been damaged by the alleged wrongdoing of the defendant. As a result of this law, unethical attorneys were given carte blanche to sue at random, extorting settlements from unsophisticated business owners or those without the means to hire defense counsel.

In one famous instance, the Trevor Law Group (since shut down by state authorities) obtained names of its defendants from state agency Web sites listing small businesses cited for minor code infractions. The firm would then sue the businesses for violation of the Unfair Competition Law, offering to drop such suits in exchange for quick settlements. Fed up with such practices, Californians finally voted to put a stop to them.

On Nov. 2, 2004, Californians changed the law, with a vote of 59 percent in favor of Proposition 64. The initiative provides that unless the plaintiff is an appropriate government agent or entity, only those "who ha[ve] suffered injury in fact and have lost money or property as a result of such unfair competition" may assert a cause of action under the Unfair Competition Law. Californians had provided a clear mandate against what they deemed to be "shakedown" lawsuits.

But this is a democracy, and therefore, as Ames would say, our feet continue to be in the water. No sooner was the law passed than the following question arose in the courts: Was Proposition 64 retroactive or prospective in effect? In other words, does Proposition 64 apply to still-pending suits that were filed before Nov. 2, 2004? Or did Proposition 64 merely affect suits filed on or after Nov. 2, 2004, allowing those filed before the election to proceed to trial despite their non-compliance with Proposition 64?

Since November, this question has been addressed by no fewer than five state appeal panels. Of these, only one



— the 1st District Court of Appeal in *Californians for Disability Rights v. Mervyn's* — has held that Proposition 64 applies prospectively, that is, only to actions filed after Election Day. In so holding, the 1st District reasoned that statutes are presumably prospective in effect, unless it is clear that the California voters intended the statute to be retroactive. Because Proposition 64 is not by its express terms retroactive in effect, it only applies to cases filed after Election Day.

However, the *Mervyn's* court failed to adequately address a basic principle of California law: Under Government Code Section 9606, when a pending action is based on a statute, rather than common law, a repeal of that statute instantly terminates all pending actions based on that statute.

For example, the right to sue for assault has existed for hundreds of years and is therefore a part of the common law. If California statute revoked the right to sue for assault, section 9606 provides that such a revocation would only affect cases filed after the passage of the statute. On the other hand, the right to obtain heightened damages for "elder abuse" in California is derived from statute.

If the legislature revoked the "elder abuse" statute, arguably all pending actions seeking heightened damages for elder abuse would be rendered invalid — even those filed prior to the revocation. "The justification for that rule," one court explained, "is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time." Since *Mervyn's*, four appellate panels (those sitting in *Lytwyn v. Fry's Electronics, Inc.*; *Bivens v. Corel Corp.*; *Benson v. Kwitset Corp.*; and *Branich v. Downey Savings & Loan Association*) have adopted the above reasoning in reaching a conclusion contrary to *Mervyn's*.

As applied to Proposition 64, their reasoning is as follows. Proposition 64 revoked the right to sue where the plaintiff had suffered no harm. Statute alone had permitted a person to sue under the Unfair Competition Law where he or she had suffered no harm; indeed, the ordinary common law rule prohibits plaintiffs with no direct interest in a dispute from filing suit. Because Proposition 64 revokes a cause of action arising from statute alone,

under Section 9606 it applies to all pending actions, even those filed before Nov. 2, 2004.

It is clear that the reasoning of *Lytwyn*, *Bivens*, *Benson* and *Branich* is correct and that *Mervyn's* is mistaken. *Mervyn's* only touches on Government Code Section 9606 and does not adequately deal with cases interpreting it. Instead, *Mervyn's* attempts to draw an analogy to another earlier case (*Evangelatos v. Superior Court*) where, as the *Bivens* court noted, the proposition "did not repeal a statutory right, as Prop. 64 did, but rather modified a common law right."

Thus, the authority *Mervyn's* relied on is inapplicable. Moreover, the conclusion in *Mervyn's* that Californians did not clearly wish the statute to apply retroactively defies common sense. As John Sullivan, president of the Civil Justice Association of California (which co-sponsored Proposition 64), wrote recently, this reasoning implies that "voters think it just fine for shakedown lawyers using economic torture against mom-and-pop businesses to complete their extortion just because they rushed to file their lawsuits before Election Day."

If Californians believed the Unfair Competition Law was fundamentally flawed and required radical change, they would have no reason to exempt actions merely because they were filed before Nov. 2. If such actions were reprehensible after Nov. 2, they were just as reprehensible before that date.

However, while the weight of authority has tipped in favor of applying Proposition 64 retroactively, the split among California courts can be resolved only by the California Supreme Court. It would be unfortunate if the clear message of the California electorate was obscured by this one outstanding question. Therefore, it is to be hoped that the Supreme Court will settle this issue soon — either by issuing an opinion on the matter, or merely by removing *Mervyn's* from the ranks of published opinions. Maybe then we will be able to shake some of the water out of our shoes.

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