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## WHITE PAPER ALERT

### Proposition 64 California Supreme Court Rules

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**CONFIDENTIAL COMMUNICATION  
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Californians for Disability Rights v. Mervyn's LLC, \_\_\_ Cal.4th \_\_\_ (2006)  
Branick v. Downey Savings & Loan Assn., \_\_\_ Cal.4th \_\_\_ (2006)  
California Supreme Court – July 24, 2006

Supreme Court holds in *Mervyn's* and *Branick* that Prop. 64 applies to pending cases, but trial court has discretion to grant leave to amend

### Summary

The decisions, both unanimous, were posted online this morning. In [Californians for Disability Rights v. Mervyn's LLC](#), \_\_\_ Cal.4th \_\_\_ (2006), the Supreme Court held that Proposition 64 applies to pending cases. [Branick v. Downey Savings & Loan Assn.](#), \_\_\_ Cal.4th \_\_\_ (2006), holds that the trial court has discretion to grant leave to amend to add an affected plaintiff.

### Brief Overview – Mervyn's

The *Mervyn's* decision is relatively brief. The Court concluded that Prop. 64 does not have an unequivocal expression of the electorate's intent. (Slip op. at 4-5.) The Court did not address the "statutory repeal rule." (*Id.* at 8 n.3.) Instead, the holding is based purely on the substantive/procedural distinction. The following language is of interest:

To apply Proposition 64's standing provisions to the case before us is not to apply them "retroactively," as we have defined that term, because *the measure does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct.* (See *Elsner, supra*, 34 Cal.4th 915, 937.) *The measure left entirely unchanged the substantive*

*rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover. Now, as before, no one may recover damages under the UCL (Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1266), and now, as before, a private person may recover restitution only of those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144-1150). (Slip op. at 8-9 (footnote omitted) (emphasis added)).*

## **COMMENT**

We believe this language may implicitly overrule *Pfizer*, which was discussed in our last White Paper. We will provide a further summary in the days ahead.

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