## UNITED STATES SUPREME COURT

### City of Columbia v. Omni Outdoor Advertising, Inc.,

___U.S.___, 111 S.Ct. 1344, No. 89-1671 (Apr. 1, 1991).

*Court Rejects Conspiracy Exemption To City's Federal Antitrust Immunity*

Columbia Outdoor Advertising (COA), a billboard company with 95% of the market in Columbia, South Carolina and close ties to local political leaders, was accused by a competitor of violating federal antitrust law. The plaintiff contended that the local regulators and its competitor had conspired to enact zoning and other restrictions to favor the existing company and inhibit competition. After trial, a jury trial found such a conspiracy and awarded $1 million in damages, before trebling. The trial court granted COA's motion for judgment notwithstanding the verdict, on grounds that its activities were outside the scope of the federal antitrust laws. The Fourth Circuit Court of Appeals reversed and reinstated the verdict.

The Supreme Court reversed and invalidated the jury award, holding that two separate doctrines provide immunity for the conduct. First, the Court noted that "state action" immunity from federal antitrust scrutiny under *Parker v. Brown*, 317 U.S. 341 (1943), allows local government to engage in anticompetitive conduct where authorized by state law and subject to independent state supervision. The Court declined to establish a "conspiracy" exception to regulatory immunity, arguing that such an exception could "swallow the rule" since local regulators must choose a policy option advanced by some proponent—who then may be alleged to be a conspirator. The Court also declined to recognize such an exception even where such a conspiracy is believed to be the product of a corrupt relationship, since "virtually all anticompetitive regulation is open to such charges." The Court opined that the risk of *post facto* judicial assessment would "impair the states' ability to regulate their domestic commerce."

The Court also held that the private defendant was protected in its advocacy to the public regulators by the *Noerr-Pennington* doctrine. This doctrine allows competitors to join together and restrain trade where such restraints consist of advocacy to public agencies designed to influence official acts; as such, they are protected by first amendment freedom of petition rights. The Court has recognized a "sham" exception to this immunity, one found to exist here by the Fourth Circuit. Defendants are not entitled to claim free speech immunity where they use the regulatory forum in bad faith as a device to accomplish anticompetitive purposes. However, the Supreme Court held that there is "sham" only where the defendant uses the regulatory process itself, not the *outcome* of the process, as a way of restraining trade. For example, where a defendant routinely files objections with regulatory agencies merely to require a competitor to pay the costs of a hearing, or the defendant uses the regulatory process to delay a competitor, there may be a "sham" use of political advocacy and liability may be found. However, the Court held that a "sham" claim may not be based on an adverse outcome from such advocacy. The Court also rejected a "conspiracy" or corruption exception to the *Noerr-Pennington* doctrine for the same reasons as given for rejecting it as applied to the state action doctrine.

The decision is subject to a vigorous and persuasive dissent by Justices Stevens, White, and Marshall. The dissent notes that the majority opinion categorically precludes inquiry into the nature of private-public official dealings because of the possibility that "innocent municipal officials may be harassed with baseless charges. The holding evidences an unfortunate lack of confidence in our judicial system and will foster the evils the Sherman Act was designed to eradicate." The dissent notes that the courts are the primary check on private abuse, and that private abuse which has corruptively captured a public agency is no less in need of such a check. The dissent argues that to categorically preclude inquiry and remedy because of possible false charges is to allow unchecked abuse by institutions. The speculative possibility that groundless charges may discourage maximum latitude in regulatory discretion is hardly a reasonable rationale for carving out an impregnable area of immunity for harmful public abuse.

The regrettable decision in *City of Columbia* is a continuation of a line of cases conferring judicial deference to their public official peers in the regulatory sector. The impact of these cases is momentous: local and state regulators have the power to award contracts, licenses, and exclusive franchises worth many millions of dollars. In terms of unfair competition, public/private interface arguably requires more examination than private conduct alone. For the former, market check may be inherently precluded. Judicial abdication of review of possible abuses is extended here to a categorical exclusion from inquiry or remedy, whatever the facts. For a discussion of the corruptive impact of such a policy, see Fellmeth, *Regulation by Local Government—A Case Study of Monopoly, State Nonfeasance and Promised Corruption*, 3:1 **Cal. Reg. L. Rep.** (Winter 1983) at 3.

### McCormick v. United States,

___U.S.___, 111 S.Ct. 1807, No. 89-1918 (May 23, 1991).

*Hobbs Act Allegation Requires Proof of Quid Pro Quo*

A West Virginia legislator agreed to carry a bill enabling foreign medical graduates to practice medicine based on their years of practice, notwithstanding their inability to pass medical licensing examinations. Before the bill was introduced, however, the legislator told the lobbyist for the affected practitioners that "his campaign was expensive, that he had paid considerable sums out of his own pocket, and that he had not heard anything from the foreign doctors." Shortly thereafter, about $3,000 in cash was given by the practitioners and delivered by their lobbyist to the legislator. The cash payments were not reported as campaign contributions. The legislator introduced the bill, spoke for it, and it was enacted. Another cash contribution was received after enactment.

Following an investigation, a federal grand jury returned an indictment charging the legislator with five counts of violating the Hobbs Act, 18 U.S.C. section 1951, by extorting payments under color of official right, and several other counts. A jury convicted the legislator on one of the Hobbs Act counts. The Fourth Circuit Court of Appeals affirmed.

The Supreme Court reversed. The Court found the trial court's jury instructions insufficient in that they failed to distinguish between payments which could have been campaign contributions, and payments that are illegal under the Hobbs Act. Although the jury was instructed that extortion does not occur "where a public official receives a...voluntary political contribution," and that "voluntary" means "that which is freely given without expectation of benefit," the instruction was deemed insufficient. The Court noted with sympathy that "[s]erving constituents and supporting legislation that will benefit [them] is the everyday business of a legislator. It is also true that campaigns must be run and financed." The Court concluded that soliciting contributions and doing favors for those who contribute is unavoidable conduct and "well within the law." Rather, a Hobbs Act violation requires that the payments are made "in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking....This formulation defines the forbidden zone of conduct with sufficient clarity."

Justice Stevens, joined by Justices Blackmun and O'Connor, dissented, arguing that the crime consisted of soliciting and accepting cash "pursuant to an understanding" that an earlier threat not to proceed with the legislation would be thereby ameliorated. The dissenters stated that acceptance of the money under these circumstances established the requisite *quid pro quo*, and factual examination of and relevant instructions concerning subsequent behavior are irrelevant.

Interestingly, both the majority and dissenting opinions believe that a *quid pro quo* intent is a necessary element of the offense. The significance of this case does not rest in its analysis of the standard, but in its implications about proof necessary to support a finding of intent to solicit monies through the use of official acts or forebearance. Most corruption is not achieved by explicit contract, but is communicated by a pattern of behavior or indirect message. It has been the law that if the trier of fact believes that the money is buying the act or the act is controlled by the money, a violation is established. To the extent the Court is implying that confessory admissions must be made in the form of money for performance contracts, the prohibition is rendered nugatory.

## NINTH CIRCUIT COURT OF APPEALS

### Mortgages, Inc. v. U.S. District Court for the District of Nevada (Lawyers Title Insurance Corporation, et al., Real Parties in Interest),

934 F.2d 209, 91 D.A.R. 6114,
No. 90-70418 (May 24, 1991).

*'Qui Tam' Plaintiffs Are Not Required to Answer Third-Party Complaints*

In this proceeding, the Ninth Circuit Court of Appeals was presented with "a significant question of first impression": whether a qui tam plaintiff in a False Claims Act (FCA) action should be required to answer counterclaims or be liable to third-party complainants for indemnification and/or contribution. The underlying action involved Mortgages, Inc., a mortgage lending company. In 1983, Mortgages accepted from real parties various applications for loans insured by the Department of Housing and Urban Development (HUD); the applications allegedly contained false and misleading statements. Following default on the loans, HUD was required to cover several million dollars in losses; Mortgages entered into a settlement with the government under which Mortgages agreed to indemnify the government $437,000.

In 1988, Mortgages instituted an action under the FCA, 31 U.S.C. section 3279 *et seq.*, revealing information regarding real parties' allegedly false statements contained in the applications. The United States elected to proceed with the action, making Mortgages a qui tam plaintiff. Real parties then filed third-party complaints against Mortgages, seeking full indemnification and/or contribution from Mortgages against any recovery or judgment in favor of the United States in the FCA action. The district court denied Mortgages' motion to dismiss the third-party complaints; Mortgages then filed a petition for writ of mandamus with the Ninth Circuit.

The Ninth Circuit noted that the FCA does not address the right of contribution or indemnification. Further, the court determined that nothing in the legislative history of the FCA mentions contribution or indemnification, and that "the framers of the Act recognized that wrongdoers might be rewarded under the Act, acknowledging the qui tam provisions are based upon the idea of 'setting a rogue to catch a rogue.'" The court stated that the FCA "in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a qui tam plaintiff with 'unclean hands.'" The court also determined that because Congress has enacted a comprehensive legislative scheme, courts are prevented from formulating federal common law in this area. Interestingly, the court noted that nothing in the Act prevents the government from naming the qui tam plaintiff as a defendant, if that would be appropriate.

Because the court found no basis in the FCA or federal common law to provide a right to contribution and/or indemnification in a FCA proceeding, the court concluded that there can be no right to assert counterclaims seeking such a result. Therefore, the court granted Mortgages' petition for writ of mandamus and ordered the district court to vacate its order requiring Mortgages to answer the third-party complaints.

## CALIFORNIA SUPREME COURT

### Anderson v. Owens-Corning Fiberglas Corporation,

53 Cal. 3d, 281 Cal. Rptr. 528
No. S014500 (May 39, 1991).

*Defendant's Actual or Constructive Knowledge of Danger Must Be Proven in Strict Liability Case Based on Failure to Warn*

Defendant manufactures products containing asbestos, and plaintiff contracted asbestosis through exposure to defendant's products while working in the Long Beach Naval Shipyard from 1941 to 1976. Proceeding in pertinent part on a "failure to warn" theory, plaintiff alleged a cause of action for strict tort liability. Defendant asserted that its failure to warn was justified since the hazard was not known based on state-of-the-art scientific evidence available at the time. The Second District Court of Appeal held that in a strict product liability case, including a "failure to warn" case, "state of the art evidence is not admissible since it focuses on the reasonableness of the defendant's conduct, which is irrelevant in strict liability."

The California Supreme Court reversed, holding that "strict liability...was never intended to make the manufacturer or distributor of a product its insurer." In *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978), the court held that a strict product liability case based upon a design defect may be established by either one of two tests: "whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner," and the troublesome alternative test—"whether on balance the benefits of the challenged design outweighed the risk of danger inherent in the design." In *Barker*, the court also noted the third type of defect, inadequacy of warning, but did not address the issue since it was not necessary to the issues on appeal.

Squarely presented with this issue in *Anderson*, the court took the opportunity to reaffirm and expand its holding in *Brown v. Superior Court*, 44 Cal. 3d 1049 (1988), holding that "knowledge, actual or constructive, is a requisite for strict liability for failure to warn...."

**Legislature v. Eu,**

No. S019660 (Mar. 27, 1991).

*State Supreme Court to Hear Challenge to Proposition 140*

On March 27, the California Supreme Court agreed to hear *Legislature v. Eu*, the constitutional challenge to Proposition 140 brought by the legislature and several individuals and legislators. Proposition 140 is the term limitation initiative approved by voters in November 1990. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 35 for background information.) All seven justices signed the order and instructed attorneys to file briefs by May 1, but no date was set for oral argument.

Represented by San Francisco attorney Joe Remcho, plaintiffs challenge the validity of Proposition 140 on several grounds, including the following: (1) its term limit provisions are fundamental revisions to the state constitution which are properly made through a special constitutional hearing process—not by way of a mere constitutional amendment in a citizens' initiative; (2) Proposition 140's inclusion of provisions on term limits for legislators, a 38% cut in the legislature's operating budget, and elimination of the legislature's pension plan violates the single-subject rule; and (3) the initiative violates the right of self-determination in that it has allowed voters in one part of the state to determine who may not represent voters in other parts of the state. (*See supra* reports on PACIFIC LEGAL FOUNDATION, OFFICE OF THE AUDITOR GENERAL, and OFFICE OF LEGISLATIVE ANALYST for related discussion.)

**Kennedy Wholesale, Inc. v. State Board of Equalization,**

53 Cal. 3d 245, 279 Cal. Rptr. 325, No. S013840 (Apr. 1, 1991).

*Tobacco Tax Initiative Upheld*

The California Supreme Court has upheld the validity of Proposition 99, the Tobacco Tax and Health Protection Act of 1988 passed by the California voters on November 8, 1988. In its appeal, Kennedy, a distributor of cigarettes and tobacco products, repeated the arguments which it had made to—and which had been rejected by—the Third District Court of Appeal. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 157 for detailed background information on the Third District's decision.) In affirming the appellate court, the Supreme Court stated that voters have the power to raise taxes in an initiative measure, and that this may be accomplished by a simple majority vote. The court also found that Proposition 99 complied with the state constitution's single-subject rule, as all of the initiative's parts are reasonably germane to its primary stated objective "to reduce the economic costs of tobacco use in California."

**Chemical Specialties Manufacturers Ass'n, Inc. v. Deukmejian,**

___Cal. 3d___, ___Cal. Rptr.___, No. S020072 (Apr. 25, 1991).

*Court Refuses to Review Proposition 105 Ruling*

On April 25, the California Supreme Court denied respondents' petition for review in this proceeding, leaving intact the First District Court of Appeal's determination that Proposition 105, the "Public's Right to Know Act" approved by voters at the November 1988 general election, violates the single-subject rule of the state constitution and is therefore void. (See CRLR Vol. 11, No. 2 (Spring 1991) pp. 187-88 for background information.)

## CALIFORNIA COURTS OF APPEAL

**Northwest Financial, Inc. v. State Board of Equalization and San Diego County,**

229 Cal. App. 3d 198, 280 Cal. Rptr. 24, No. D011121 (Apr. 10, 1991).

*Acquisition Value Taxation System Does Not Violate Equal Protection*

In this proceeding, the Fourth District Court of Appeal rejected Northwest Financial's challenge to the real property "acquisition value" taxation system established by Proposition 13, which was adopted by the California voters on June 6, 1978. Northwest Financial based its challenge on the grounds that the acquisition value taxation system violates equal protection guarantees and infringes upon the constitutional right to travel. Regarding the equal protection challenge, the court reasoned that a system which creates classifications based on value at the time of purchase need not result in uniform tax rates for all taxpayers "since the classifications have a rational basis related to a legitimate state purpose. In short, no equal protection violation has been shown since the alleged disparity arises from a rationally based classification system, rather than from different treatment of those within the same classification."

The Fourth District similarly rejected plaintiff's arguments that Proposition 13 infringes on the constitutional right to travel by noting that the acquisition value taxation system "differentiates between property purchasers, regardless of their residency. Both longtime residents, new residents, and nonresidents are subject to the same 'acquisition value' system...." The court even went on to opine that because Proposition 13 "carries the benefit of predictability of future tax bills," its provisions "could encourage travel more than the former current value system which had no such predictability."

In rejecting Northwest Financial's challenge to Proposition 13, the Fourth District became the third appellate court to uphold the initiative in the past six months. The other two cases have already moved to the U.S. Supreme Court. On June 3, the U.S. Supreme Court agreed to review the constitutionality of Proposition 13 in *R.H. Macy & Co. v. Contra Costa County,* No. 90-1603. However, only four days later, Macy's abruptly abandoned its challenge, claiming that a court opinion might extend beyond commercial real estate property taxes to include residential tax issues. [Macy's had been threatened with a consumer boycott of its stores by Richard Gann, son of the late Paul Gann; and had been harshly criticized by the business community, which claimed that a Macy's win in court would mean massive property tax hikes.] Although it dodged that bullet, Proposition 13 is not completely safe; the U.S. Supreme Court is currently reviewing *Nordlinger v. Lynch*, a petition for certiorari filed by residential homeowners challenging the validity of the initiative. (*See supra* report on CENTER FOR LAW IN THE PUBLIC INTEREST; *see also* CRLR Vol. 11, No. 2 (Spring 1991) p. 28 and Vol. 11, No. 1 (Winter 1991) pp. 23 and 156 for background information.)

## State Board of Control v. Superior Court of Sacramento County (San Jose Mercury News, Real Party in Interest),

228 Cal.App.3d 1188,
279 Cal. Rptr. 413,
No. C009882 (Mar. 26, 1991).

*Statute Preventing Appellate Review of Public Records Cases Invalidated*

In this proceeding, the Third District Court of Appeal ruled that because part of Government Code section 6259(c) prohibits review by appeal of cases arising under the Public Records Act, Government Code section 6250 *et seq.*, the provision "conflicts with and is thereby invalidated by the express grant of the appellate jurisdiction in article VI, section 11, of the California Constitution, which provides: `[C]ourts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.'"

The Public Records Act creates a statutory right of public access to information concerning the conduct of the People's business and defines the public records subject to disclosure; to enforce this right, the Act authorizes a proceeding in superior court to compel the disclosure of records which it defines as public. However, section 6259(c) declares that the order of the superior court "is not a final judgment or order...from which an appeal may be taken" and provides for discretionary appellate review by petition to the appellate court for the issuance of an extraordinary writ of review.

The court found that review of a decision made pursuant to the Public Records Act is the kind of case over which the superior courts have by statute been given original jurisdiction; therefore, appeals of such cases are governed by article VI, section 11 of the state constitution. Further, the court noted that "if the right of appeal is constitutionally granted in any given case such right cannot be destroyed or delimited by legislative enactment." The court thus concluded that "[s]ince the first sentence of subdivision (c) of section 6259 forbids an appeal in all public records act cases it is void as in conflict with the grant of appellate jurisdiction in article VI, section 11 of the California Constitution."

On May 23, the California Supreme Court granted respondent's petition for review in this proceeding; at this writing, no briefing schedule has been announced.

## County of Fresno v. Lehman, et al.,

229 Cal. App. 3d 340,
280 Cal. Rptr. 310,
No. F013637 (Apr. 17, 1991).

*Private Attorney General Law Is Not State-Mandated Program*

In *Sequoia Community Health Foundation, etc. v. Board of Supervisors of Fresno County, et al.*, No. 269458-7 (Fresno County Superior Court), the County of Fresno was ordered to pay attorneys' fees in the amount of $88,120 pursuant to Code of Civil Procedure section 1021.5, the "private attorney general" attorneys' fees statute. The County contended that it is entitled to reimbursement of that amount from the state by alleging that the expenditure arose out of a state-mandated new program or higher level of service pursuant to article XIIIB, section 6 of the California Constitution, which generally requires the state to reimburse local governments for the costs of such programs or services.

According to the Fifth District, "[t]he intent underlying article XIIIB, section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities." The court noted that the reimbursements envisioned in article XIIIB, section 6 are for expenses or increased costs of programs administered locally, and found that it "would be tortuous to interpret Code of Civil Procedure section 1021.5 as a program administered locally. A more logical interpretation is to view the expenses incurred therewith as an 'incidental impact' of existing law." Thus, the court concluded that section 1021.5 is not a state-mandated program as interpreted by article XIIIB, section 6.

## Committee to Defend Reproductive Rights, et al., v. A Free Pregnancy Center, et al.,

229 Cal.App. 3d 633, 280 Cal.Rptr. 329,
No. A046189 (Apr. 23, 1991).

*Denial of Fees to Private Attorneys in Public/Private Trial Justifies Remand*

In 1986, appellant Committee and others initiated an action against respondents based primarily on respondents' alleged violation of the unfair business practices statutes, Business and Professions Code section 17200 *et seq.* Four months after appellants filed their initial complaint, the San Francisco District Attorney filed a similar action, seeking injunctive relief and civil damages for respondents' alleged unfair business practices. Appellants' lawsuit, which involved a cause of action and defendants not contained in the District Attorney's complaint, was consolidated with the public suit. Following a six-week trial, the court issued its judgment against respondents. However, the court denied appellants' request for attorneys' fees, finding that their suit was not "necessary" as that term is defined in Code of Civil Procedure section 1021.5.

The First District Court of Appeal reversed and remanded, holding that an attorneys' fee award in such a case is dependent upon an ultimate finding that the "colitigating party rendered necessary and significant services of value to the public or to a large class of persons benefitted by the result of the litigation." Further, the court determined that the trial court construed the necessity requirement of section 1021.5 too narrowly, and that appellants are not prohibited from receiving attorneys' fees simply because the government subsequently filed a similar suit. In remanding the action to the trial court, the First District acknowledged that trial courts "must carefully walk the line between unreasonably transmuting section 1021.5 into an unwarranted cornucopia of attorney fees for those who intervene in, or initiate litigation against, private parties under the guise of benefiting the public interest while actually performing duplicative, unnecessary, and valueless services; and providing appropriate compensation under that statute in cases where the colitigating private party does render necessary, significant services of value and benefit the public."