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Public Entities, Officers and Employees

Expedited Judicial Review Ensures that Restraints on the Adult Entertainment Industry Pass Constitutional Muster

Sandra C. Di Giulio

Code Section Affected

Code of Civil Procedure § 1094.8 (new).

SB 1165 (Sher); 1999 STAT. Ch. 49 (*Effective July 1, 1999*)

I. INTRODUCTION

Business licensing is a power used by California cities and counties to regulate the types of business transacted within their jurisdictions.¹ Often, local legislative bodies use this power to regulate by ordinance adult and sexually oriented businesses, doing so in fear of the effects these businesses may have on their surroundings.² California's local legislative bodies have broad power to control the issuance of permits and licenses for adult businesses.³ However, many of these sexually oriented businesses, which are regulated through licensing schemes properly analyzed as prior restraints,⁴ engage in constitutionally protected free speech.

Many forms of expression, such as speech and entertainment, are protected by the First Amendment.⁵ Examples include film, radio and television broadcasts and live entertainment.⁶ Courts have found many businesses, such as bookstores, live theaters, motion picture theaters and nude dancing establishments, which "purvey

1. See CAL. BUS. & PROF. CODE § 16000(a) (West 1997) (granting any incorporated city the authority to license any kind of business within its jurisdiction for the purpose of regulating businesses); *id.* § 16100(a) (extending to any county board of directors the authority to license any kind of business within its jurisdiction for the purpose of regulating businesses).

2. See CAL. GOV'T CODE § 65850(g)(1)-(3) (West 1997) (conferring upon city and county legislative bodies the power to regulate by ordinance the time, place and manner of operation of sexually oriented businesses); *id.* § 65850.4 (West Supp. 1999) (authorizing city and county legislative bodies to join powers to regulate the established negative effects of sexually oriented businesses as well as to consider any harmful effects such businesses may have on nearby cities, counties, churches, schools, residents and businesses).

3. See CAL. BUS. & PROF. CODE § 16000(a) (West 1997) (affording to the legislative body of any incorporated city the authority to utilize its police power to regulate by licensing); *id.* § 16100(a) (affording to the legislative body of any incorporated county the authority to employ its police power to regulate by licensing).

4. See *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (explaining that "a prior restraint exists when enjoyment of protected expression is contingent upon the approval of government officials").

5. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).

6. *Id.*

sexually explicit speech” to be protected by the First Amendment.⁷ The U.S. Supreme Court has acknowledged that nudity alone does not automatically constitute obscenity,⁸ which is not protected by the First Amendment.⁹

Since 1965, the U.S. Supreme Court has required that any process having the effect of restricting protected expression take place under specific procedural safeguards that work to avert the dangers of a censorship system.¹⁰ A recent Ninth Circuit case gave clear meaning to one of the safeguards promulgated in the 1965 *Freedman v. Maryland* decision.¹¹ The Ninth Circuit, in *Baby Tam & Co. v. City of Las Vegas*,¹² held that in the context of adult business licensing schemes, “prompt judicial review” encompasses both a hearing *and* a decision on the merits by a judicial officer.¹³ Furthermore, the court held that a provision for mandamus relief does not satisfy the required procedural safeguard of “prompt judicial review.”¹⁴

This case prompted the introduction and passage of Chapter 49.¹⁵ The new law was created after the *Baby Tam* case wrapped cities and counties in a catch-22, threatening to lead to judicial invalidation of their licensing regulations.¹⁶ *Baby Tam* reaffirmed that local governments could impose no licensing ordinance that did not provide for a prompt hearing and decision upon challenge.¹⁷ However, prior to Chapter 49, cities and counties could not ensure prompt review because local governments do not have power to govern the speed of judicial review.¹⁸ Chapter 49 addresses this problem by setting a time line which provides for expedited judicial review of license denials upon challenge.

7. See *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 224 (1990) (giving examples of cases involving various adult businesses “purveying sexually explicit speech” and which are protected by the First Amendment in so doing).

8. See *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that in order to be classified by law as obscene, the material, taken as a whole, must appeal to the “prurient interest” in sex, depict sexual acts in a patently offensive way, and hold no serious literary, artistic, political or scientific value).

9. *Id.* at 23.

10. See *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (holding that in order for a censorship proceeding to avoid constitutional inadequacy, it must contain three procedural safeguards to protect against the dangers of censorship: (1) the procedure must assure a prompt judicial decision in the event a license is denied; (2) any restraint imposed prior to final judicial determination must be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; and (3) the censor must bear the burden of going to court and proving that the expression is unprotected).

11. 380 U.S. 697 (1965); see also *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998) (holding that “prompt judicial review” means a hearing *and* a decision by a judicial officer, and holding that a writ of mandamus does not qualify as “prompt judicial review”).

12. 154 F.3d 1097 (9th Cir. 1998).

13. *Id.* at 1101.

14. *Id.*

15. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 3-4 (June 8, 1999) (noting the *Baby Tam* decision, and stating the necessity of Chapter 49 in order to ensure that California has a mechanism for sufficiently expeditious judicial review of license denials and revocations).

16. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 4 (June 8, 1999).

17. See *Baby Tam*, 154 F.3d at 1101 (stating that “[a] licensing scheme involving a prior restraint must also provide an avenue for prompt judicial review in the event a license is denied”).

18. *Id.*

II. LEGAL BACKGROUND

Since 1965, the U.S. Supreme Court has been developing guidelines for the censorship and suppression of speech and expression.¹⁹ The Court has specifically addressed the issue of licensing schemes for sexually oriented businesses²⁰ and has concluded that certain protections must be built into the ordinances.²¹ Recently, the Ninth Circuit defined one of the protections mandated by the Supreme Court in a way that invalidated certain licensing schemes and threatened to undermine city and state power to regulate the adult entertainment industry.²²

A. License Denials, Prior Restraints, and the First Amendment

1. United States Supreme Court Decisions

The U.S. Supreme Court has defined the proper safeguards for licensing schemes involving prior restraints on protected speech. In *Freedman*,²³ the Court established a set of procedural safeguards that are triggered by prior restraints on protected speech or expression.²⁴ The Court stated that “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”²⁵ The Court reasoned that censorship proceedings pose a specific danger that the censor will be less protective of constitutionally protected interests in free expression than a court would be.²⁶ The Court held that in order to safeguard against the dangers of censorship, a prior restraint on protected expression must contain three procedural safeguards: (1) prompt and final judicial determination on the merits in the event a license is denied; (2) any restraint must be limited to the shortest period of time compatible with judicial resolution so as to preserve the status quo; and (3) the censor must bear the burden of proving that the material is unprotected expression.²⁷

19. *Freedman*, *supra* note 10; *see also* discussion *infra* Part II.A.1 (reviewing the cases which established and modified the guidelines for restraints on expression).

20. *FW/PBS, Inc.*, 439 U.S. at 220.

21. *See id.* at 228 (concluding that two procedural safeguards are required: the decision of whether or not to grant the license must be made within a set and reasonable time, and there must be an avenue for prompt judicial review in the event of an erroneous denial); *see also* discussion *infra* Part II.A.1 (discussing *FW/PBS, Inc.*, v. *City of Dallas*, 439 U.S. 215 (1990)).

22. *See supra* note 12; *see also* discussion *infra* Part II.A.2-B (examining the definition given by the court in *Baby Tam* as well as the impact of that decision).

23. 380 U.S. 51 (1965).

24. *Id.* at 58-59.

25. *Id.* at 57 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

26. *Id.* at 56-57.

27. *Id.* at 58-59.

The next major U.S. Supreme Court case to revisit the issue of procedural safeguards for prior restraints on protected expression was *FW/PBS, Inc. v. City of Dallas*.²⁸ The petitioners therein raised a facial challenge to a city ordinance which provided a licensing scheme for the adult entertainment industry.²⁹ The Court noted that a licensing scheme is similar to a censorship system in that both create the possibility that protected expression will be suppressed in the absence of adequate procedural safeguards.³⁰ The plurality opinion in *FW/PBS* reaffirmed two parts of the *Freedman* test in holding that a city or county must make a licensing decision relatively quickly and within a specific time frame during which the status quo must be preserved, and that a licensing scheme must afford prompt judicial review to minimize the risk of suppression of protected speech in the event that a city or county improperly denies a license.³¹ However, the plurality found that the First Amendment does not require a city to bear the burden of proving the validity of a license denial in court.³² The status of the third safeguard—that the censor meet its burden of proof regarding the expression’s unprotected stature—is unclear today, as *FW/PBS* was a plurality opinion and thus did not expressly overrule *Freedman*.³³

2. The Law in the Ninth Circuit

Disagreement exists among the circuits as to what constitutes “prompt judicial review.”³⁴ In 1998, the Ninth Circuit, in a case similar to *FW/PBS*, announced its interpretation of the meaning of the “prompt judicial review” safeguard.³⁵ In *Baby Tam & Co. v. City of Las Vegas*, an adult bookstore challenged a Las Vegas ordinance which required that all proposed businesses receive a license before operating.³⁶ The plaintiff claimed that the ordinance was an unconstitutional prior restraint of free speech and expression.³⁷ The ordinance provided that in the event the city denied a license, the applicant could file a petition for a writ of mandamus in Nevada state court.³⁸ The Ninth Circuit determined that a writ of mandamus did

28. 493 U.S. 215 (1990).

29. *Id.* at 223.

30. *Id.* at 226.

31. *Id.* at 228.

32. *Id.* at 230.

33. *See Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998) (explaining that because only three justices joined the portion of the opinion which dispensed of the safeguard requiring the licenser to bear the burden of justifying a license denial in court, the current status of this safeguard is questionable).

34. *Id.*

35. *See id.* at 1101 (recognizing that the meaning of “prompt judicial review” in the context of adult business licensing schemes has been the subject of disagreement among the circuits, and announcing its own definition, stating that “prompt judicial review” includes both a prompt hearing and a decision).

36. *Id.* at 1099-1100.

37. *Id.* at 1100.

38. *Id.* at 1101.

not satisfy the required procedural safeguard of prompt judicial review, in that the ordinance also lacked a provision requiring that a judicial hearing be held or a decision returned within a prescribed time period.³⁹ The *Baby Tam* court held that the proper standard included both a prompt consideration of a dispute by a judicial officer *and* a prompt decision.⁴⁰ The court reasoned that to hold otherwise would be to render the safeguard meaningless.⁴¹

The purpose of a writ of mandate is (1) to command the performance of an act that the law enjoins, or (2) to command the admission of a party to the enjoyment of a right to which that party is entitled, but has been unlawfully precluded from enjoying.⁴² Because a traditional writ of mandate cannot compel a court to consider and decide a matter within a prescribed period of time while the applicant's rights are being stifled, the court held that it does not satisfy the requirement of prompt judicial review;⁴³ therefore, the ordinance constituted a prior restraint in violation of the First Amendment.⁴⁴ The Ninth Circuit never reached the issue concerning the *Freedman* requirement that the censor bear the burden of justifying the restraint in court.⁴⁵

B. *Judicial Review of License Denials in California*

On December 2, 1998, Cheerleaders, a Citrus Heights, California, adult bar, filed an action and moved for a preliminary injunction seeking to enjoin the city from enforcing an ordinance that restricted adult-oriented businesses from operating without first obtaining a license from the city.⁴⁶ The plaintiff asserted that the ordinance's licensing scheme constituted a prior restraint on protected speech, and "fail[ed] to provide for a prompt judicial decision as is required."⁴⁷ A prior restraint exists when exercise of protected expression is made dependent upon approval by government officials.⁴⁸ The defendants acknowledged that the ordinance failed to provide a quick hearing and decision by a judicial officer.⁴⁹ Consequently, in light of the *Baby Tam* decision, the judge found that the plaintiff had shown the requisite

39. *Id.*

40. *Id.*

41. *Id.*

42. CAL. CIV. PROC. CODE § 1085(a) (West Supp. 2000).

43. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998).

44. *Id.* at 1102.

45. *Id.* at 1101.

46. *Le v. City of Citrus Heights*, No. Civ. S-98-2305 WBS/DAD, 1998 WL 1069451, at *1 (E.D. Cal. Dec. 15, 1998) [hereinafter *Le I*].

47. *Id.* at *3.

48. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998).

49. *Le I*, 1998 WL 1069451, at *3.

probability of success on the merits of its claim,⁵⁰ and, accordingly granted the preliminary injunction.⁵¹

In an effort to address the city ordinance's failure to provide both a prompt hearing and a decision by a judicial officer in the event of a license's denial, Citrus Heights passed several revised urgency ordinances.⁵² Cheerleaders challenged the ordinances in court on two subsequent occasions.⁵³ Both times, the court found that the plaintiff had shown a probability of success on the merits, and enjoined the city from enforcing portions of the ordinances in question. The court concluded that Citrus Heights continued to lack adequate procedural safeguards assuring prompt judicial determination on the merits in the event of a license denial.⁵⁴ The court further indicated that establishing the necessary procedural safeguards may be "an impossible burden on the [c]ity," because the city has no authority to require a judicial officer to render a decision by a certain date—although the California Legislature may have such power.⁵⁵ The court also expressed substantial doubts regarding whether a trial judge faced with today's significant caseloads can give enough priority to such matters to satisfy the stringent standard required by the First Amendment after the *Baby Tam* case.⁵⁶

Existing California law requires that upon denial of an application for a license, an administrative board⁵⁷ must either file and serve a statement of issues,⁵⁸ or notify the applicant that their business license application has been denied.⁵⁹ If the board chooses the latter, the board must state the reason why the license was denied, and inform the applicant that she has the right to a hearing on the matter if she makes such a request within sixty days after service of the notice of denial.⁶⁰ If the applicant desires a hearing, she must request it within the sixty days or her right is

50. *Id.*

51. *Id.* at *4.

52. See *Le v. City of Citrus Heights*, No. Civ. S-98-2305 WBS/DAD, 1999 WL 420153, at *2 (E.D. Cal. Feb. 11, 1999) [hereinafter *Le II*] (declaring that the city has thirty days to approve or deny the application; if denied, the applicant may seek prompt judicial review as provided by law or request that the city file the action, and, when the city is the one bringing the action, they must do so within three business days of the request); *Ma Lee v. City of Citrus Heights*, No. Civ. S-98-2305 WBS/DAD, 1999 WL 420158, at *3 (E.D. Cal. June 15, 1999) [hereinafter *Le III*] (allowing an applicant who has been denied a license to be issued a temporary license which shall remain in effect until a decision on an application for a temporary restraining order or for a preliminary injunction)

53. See *Le II*, 1999 WL 420153, at *1 (challenging two new urgency ordinances passed by the city immediately following the first case); *Le III*, 1999 WL 420158, at *1-2 (challenging yet another pair of urgency ordinances which were passed by the city hours after the second case).

54. *Le II*, 1999 WL 420153, at *7; *Le III*, 1999 WL 420158, at *5.

55. *Le II*, 1999 WL 420153, at *8.

56. *Le III*, 1999 WL 420158, at *5.

57. See CAL. BUS. & PROF. CODE § 22 (West Supp. 2000) (defining a board as the body in which the administration of a certain provision is vested).

58. See *id.* § 485(a) (West Supp. 1999) (explaining that a statement is to be filed and served in accordance with a subpart of Title 2 of the Government Code).

59. *Id.* § 485(b) (West Supp. 2000).

60. *Id.* § 485(b) (West Supp. 2000).

deemed waived.⁶¹ An applicant who submits a written request is entitled to a board hearing within ninety days of the request.⁶² However, the hearing could be postponed for between 45 and 180 additional days.⁶³ If an applicant loses the hearing and wishes to appeal the denial through the judicial system, a writ of mandate is the appropriate method of appeal.⁶⁴

After the *Baby Tam* decision, cities and counties faced a catch-22; they could not regulate adult-oriented businesses without providing a speedy judicial decision upon challenge, yet they had no way of compelling local courts to render swift decisions in such challenges.⁶⁵ The city of San Jose, concerned that it would be unable to regulate adult-oriented businesses for lack of power to compel local courts to review permit denials in an expedited manner, sponsored Chapter 49 with support from Citrus Heights and other localities.⁶⁶

III. CHAPTER 49

In response to the potential inability of local governments to apply licensing schemes to adult-oriented businesses after the *Baby Tam* decision, the California Legislature passed Chapter 49.⁶⁷ The purpose of Chapter 49 is to create an expedited judicial review process to appeal a local administrative revocation, suspension or denial of a permit or other entitlement for expressive conduct protected by the First Amendment of the United States Constitution.⁶⁸ The new law creates a time line for expedited judicial review within which a writ petition must proceed once filed.⁶⁹ California cities may now regulate adult-oriented businesses in accordance with the Constitution and the *Baby Tam* decision.

Under Chapter 49, either the public agency or the permit applicant may bring an action.⁷⁰ If the applicant brings such an action, it must be in the form of a petition for a writ of mandate.⁷¹ The applicant must file and serve the petition on the agency within twenty-one calendar days of the final decision on the permit.⁷² After

61. *Id.* § 485(b) (West Supp. 2000).

62. *Id.* § 487 (West 1990).

63. *See id.* (stating that upon a showing of good cause or an order by the Office of Administrative Hearings, two additional requests of up to 45 days each may be made, except in cases involving fraud, in which case the hearing may be delayed up to 180 days).

64. *See* CAL. CIV. PROC. CODE § 1094.5(a) (West Supp. 2000) (explaining that a court may issue a writ to determine the soundness of a final administrative order).

65. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1165, at 3 (June 11, 1999).

66. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1165, at 2 (June 11, 1999).

67. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1165, at 3 (June 11, 1999) (stressing the need for the bill to ensure that city and county regulations of adult-oriented businesses do not become invalidated by the *Baby Tam* decision).

68. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 1 (June 8, 1999).

69. *See* CAL. CIV. PROC. CODE § 1094.8(d)(1)-(5) (enacted by Chapter 49).

70. CAL. CIV. PROC. CODE § 1094.8(d)(2) (enacted by Chapter 49).

71. *Id.* (enacted by Chapter 49).

72. *Id.* § 1094.8(d)(3) (enacted by Chapter 49).

being notified that the permit applicant wishes to seek a judicial review of the decision on the permit, the public agency has five court days to prepare, certify and make available the administrative record of the permit application proceeding.⁷³ The petitioner/applicant must file the administrative record with the court no later than ten calendar days before the hearing date.⁷⁴

The title page of the petition is to contain language calling the court's attention to the fact that the petition is entitled to priority and an expedited hearing pursuant to section 1094.8 of the California Code of Civil Procedure.⁷⁵ The clerk of the court must then set a hearing for review of the petition within twenty-five calendar days of the date of the petition's filing.⁷⁶ After the hearing, the court must render its decision no later than twenty calendar days after the matter's submission, or fifty calendar days after the date of the petition's filing, whichever is earlier.⁷⁷

If for some reason the court cannot meet one or more of the deadlines imposed by the time line, Chapter 49 requires that the presiding judge assign a judicial officer to hear the petition and render a decision in accordance with the time line.⁷⁸ If the parties to the action prefer to have a judge preside over the action, they may jointly waive the time limits mandated by Chapter 49.⁷⁹

IV. ANALYSIS OF THE NEW LAW

The purpose of Chapter 49 is to create an expedited writ of mandate proceeding in order to review the decision of a public agency denying a permit to a business that engages in expressive conduct.⁸⁰ Chapter 49 allows cities that use licensing schemes to regulate adult entertainment businesses to do so in accordance with the constitutionally mandated judicial review requirement of both a hearing and a decision.⁸¹

According to the California Business and Professions Code, an applicant who has been denied a permit has sixty days to submit an application for a hearing.⁸² However, the applicable *Freedman* safeguard states that any restraint imposed prior to final judicial determination must be limited to the shortest fixed period compatible with judicial determination.⁸³ Chapter 49 cuts the time to twenty-one

73. *Id.* § 1094.8(d)(1) (enacted by Chapter 49).

74. *Id.* § 1094.8(d)(4) (enacted by Chapter 49)

75. *Id.* § 1094.8(d)(3) (enacted by Chapter 49).

76. *Id.* § 1094.8(d)(4) (enacted by Chapter 49).

77. *Id.* § 1094.8(d)(5) (enacted by Chapter 49).

78. *Id.* § 1094.8(e) (enacted by Chapter 49).

79. *Id.* § 1094.8(f) (enacted by Chapter 49).

80. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 1 (June 8, 1999).

81. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 3-4 (June 8, 1999) (explaining the holding in the *Baby Tam* and stating that SB 1165 [Chapter 49] seeks to guarantee that California has a sufficiently quick mechanism for judicial review of license denials and revocations).

82. CAL. BUS. & PROF. CODE § 485(b) (West Supp. 1999).

83. *See supra* note 10 (listing the procedural safeguards mandated by *Freedman*).

days from the date of the agency's final decision on the permit.⁸⁴ The text of Chapter 49 declares that its provisions "shall supersede anything to the contrary set forth in this chapter."⁸⁵ Prior to Chapter 49, no schedule existed by which a writ needed to proceed once filed. The applicable *Freedman* safeguard is that the licensing procedure must assure prompt judicial review,⁸⁶ which was defined in *Baby Tam* as requiring both a review and determination on the merits.⁸⁷ Chapter 49 sets a rigid time line which the court must follow.⁸⁸ If the time line is followed, every challenge would be decided in around seven weeks. This should be sufficiently expeditious for licensing schemes to survive constitutional scrutiny.

Chapter 49 provides a workable solution to a difficult requirement imposed upon cities and administrative boards within the Ninth Circuit after *Baby Tam*. Although this bill was enacted in response to problems and concerns with regulation of the adult entertainment industry, the fact is, Chapter 49 applies to all licensing and permitting actions that involve expressive conduct such as special event permits, park permits, sign regulations, and other analogous regulations.⁸⁹ It extends beyond the adult entertainment world and provides expedited review for all permitting actions that involve protected expression.⁹⁰

This extra protection is good for erroneous suppression of protected speech, however, the number of writs brought under this new section may overwhelm courts. In addition, Chapter 49 may be too broad because it gives unnecessary expedited review in cases where the administrative board has revoked or suspended an existing license.⁹¹ It is unnecessary because ever since the *Freedman* case, the court held that reviewing agencies may not alter the status quo prior to judicial review of their actions; thus, the agency wouldn't be able to immediately enforce a revocation or suspension pending judicial determination.⁹² This reality carries the possibility that the number of cases that may be brought to the courts under this new law may overwhelm the courts and their judicial officers.⁹³

84. CAL. CIV. PROC. CODE § 1094.8(d)(3) (enacted by Chapter 49).

85. *Id.* § 1094.8(d) (enacted by Chapter 49).

86. *See supra* note 10 (listing the procedural safeguards mandated by *Freedman*).

87. *See supra* note 12 (explaining the holding of the case as defining "prompt judicial review" to entail both review and a decision).

88. *See supra* notes 69-79 and accompanying text (explaining the time line set by Chapter 49).

89. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 4 (June 8, 1999) (noting the wide scope of the *Baby Tam* decision).

90. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 4 (June 8, 1999).

91. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 5-6 (June 8, 1999).

92. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1165, at 5-6 (June 8, 1999).

93. *See id.* at 5 (arguing in opposition to the bill that expedient review will place a heavy burden on the courts). *But see id.* at 6 (observing that, although the Judicial Council took no position regarding Chapter 49, it helped to draft the bill and a representative of the Judicial Council indicated that "increased costs to trial courts [resulting from the bill] are expected to be minimal").

V. CONCLUSION

In view of the *Baby Tam* decision, Chapter 49 sends local governments on their way to creating licensing schemes involving prior restraints on protected expression in accordance with “prompt judicial review.”⁹⁴ Given the strict interpretation this phrase has been given by the Ninth Circuit, Chapter 49’s passage was a logical reaction to the *Baby Tam* decision, although the new law may grant too much protection because it applies to *all* licensing and permitting actions that involve expressive conduct.⁹⁵ Though its constitutionality is untested and its effects have yet to be seen, Chapter 49 will likely result in cities and counties being capable of regulating adult-oriented businesses while conforming with constitutional law.

As for Cheerleaders, the Citrus Heights topless bar, the bar’s owners are closing their doors and leaving the city.⁹⁶ Unable to pay for the costs of the legal battle any more, Cheerleaders’ owners have settled with Citrus Heights and dropped their lawsuit.⁹⁷ The bar owners will be paid a sum of money by the city, and in return they will close the bar and never return.⁹⁸

94. See *supra* Part III (specifying the specific provisions that Chapter 49 adds in order to meet the stringent standard set by *Baby Tam*).

95. See *supra* Part IV (pointing out that the new law will also apply to special event permits, park permits, sign regulations, and other analogous regulations).

96. Denny Walsh, *Topless Bar Will Leave Citrus Heights*, SACRAMENTO BEE, Apr. 4, 2000, at B4.

97. *Id.*

98. *Id.*

Regulation of Permanent Amusement Park Rides

David D. Kremenetsky

Code Sections Affected

Labor Code §§ 7920, 7921, 7922, 7923, 7924, 7925, 7926, 7927, 7928, 7929, 7030, 7931, 7932 (new).
AB 850 (Torlakson); 1999 STAT. Ch. 585

I. INTRODUCTION

Are serious injuries and deaths from accidents at California's amusement parks needless tragedies, or merely the cost of doing business? The California Legislature revisited that question in the wake of recent highly publicized incidents.¹ Disneyland was the scene of an accident which ignited this year's debate on the issue.² A nine-pound metal cleat which tore loose from the Columbia Sailing Ship ride flew into a crowd of tourists, striking and killing one man.³ His wife and a Disneyland employee were also seriously injured.⁴ A probe into the accident launched by the California Division of Occupational Safety and Health (Cal-OSHA) revealed that repeated misuse of equipment and failure to train a key employee were the reasons for the mishap.⁵ As a result, Cal-OSHA fined Disneyland \$12,500.⁶

An increase in the number of amusement park ride accidents is a national problem.⁷ The rate of emergency room visits resulting from amusement park

1. See Nancy Hill-Holtzman, *Safety Bill May Defer to Disney on Inspections Legislation*, L.A. TIMES, Feb. 23, 1999, at B1 (revealing that since 1968, six bills were introduced in the California Legislature to regulate permanent amusement park rides, and that all six bills failed to pass); see also CAL. LAB. CODE §§ 7920-7932 (enacted by Chapter 585) (establishing the Permanent Amusement Ride Safety Program in California).

2. See Deborah Schoch & Tracy Weber, *Amusement Park Safety Bill Gains New Life*, L.A. TIMES, Dec. 29, 1998, at B1 (explaining that hopes for amusement park legislation in 1999 were revived by a fatal Christmas Eve accident at Disneyland).

3. Nancy Weaver Teichert, *Calls for Oversight of Rides Intensify*, SACRAMENTO BEE, Apr. 19, 1999, at A1; see also Nancy Hill-Holtzman, *supra* note 1, at B1 (describing the December 1998 accident at Disneyland); Schoch & Weber, *supra* note 2, at B1 (recounting the story of how 33-year-old Luan Phi Dawson, of Duvall, Washington died of head injuries at Disneyland).

4. Schoch & Weber, *supra* note 2, at B1; see also *id.* (reporting that Mr. Dawson's wife Lieu Thuy Young, and Disneyland employee Christine Carpenter, were also struck by the cleat and suffered serious injuries; Mrs. Young was taken to intensive care and Ms. Carpenter was hospitalized with a severe foot injury).

5. Teichert, *supra* note 3, at A1.

6. *Id.*

7. See *Theme Park Ride Injuries Rise 87% over Five Years*, L.A. TIMES, Sept. 21, 1999, at B8 (stating that across the nation, serious injuries at amusement parks resulting in emergency treatment increased from "2,400 in 1994 to 4,500 in 1998").

injuries across the nation has risen by an estimated eighty-seven percent over the past five years.⁸ Much of the increase is due to accidents at permanent parks.⁹ California leads the nation in amusement park fatalities, with sixteen over the past twenty-eight years.¹⁰ Assemblyman Tom Torlakson introduced the bill that later became Chapter 585 to curb this alarming trend.¹¹ However, the proposed legislation received additional immediacy when two more accidents occurred over the summer, just as the bill was being debated.¹² This new law promises to reduce the number of injuries at permanent amusement park rides and brings California in line with other states which already regulate this industry.¹³

II. LEGAL BACKGROUND

Regulation of permanent amusement parks has been left largely to the states.¹⁴ California was among the first states in the country to pass amusement park safety legislation.¹⁵ The 1968 Amusement Park Safety Law gave authority to Cal-OSHA to inspect traveling carnival rides, but specifically excluded regulation of permanent

8. *Id.*

9. *See id.* (observing that while the total number of injuries rose from approximately 7,400 to 9,200 over the five-year period from 1994 to 1998, "injuries on rides at mobile sites increased just slightly, from 2,000 to 2,100").

10. *Legislator Announces Amusement Park Bill*, L.A. TIMES, Feb. 24, 1999, at B4. New Jersey is second to California in the number of deaths from amusement rides, with six such deaths. *Safety Law History Outlined in Research Bureau Report*, NEWSWIRE, Jan. 22, 1999.

11. *See Legislator Announces Amusement Park Bill*, *supra* note 10, at B4 (quoting Assemblymember Tom Torlakson, the author of AB 850, as saying "[w]e can make a difference that will avoid future tragedies and deaths").

12. *See* Doug Willis, *Bill Requiring Safety Inspections Advances*, NEWSWIRE, Sept. 3, 1999 (discussing the death of a 12-year-old disabled boy who fell from the Drop Zone Stunt Tower at Paramount's Great America in Santa Clara on August 22, 1999, and an accident at Six Flags Marine World in Vallejo, where 28 passengers were stranded on a roller coaster for nearly four hours on August 25, 1999, just as the California Legislature was debating the bill that later became Chapter 585).

13. CAL. LAB. CODE §§ 7920-7932 (enacted by Chapter 585); *see* ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF AB 850, at 6 (Sept. 7, 1999) (stating that prior to the enactment of Chapter 585, California was one of four states that regulated only mobile amusement rides).

14. *See* Susan J. Reiss, *Amusement Park Safety: Who Should Regulate?*, 5 CARDOZO ART & ENT. L.J. 195, 196 (1986) (describing how the 1981 amendments to the Consumer Product Safety Act exempted permanent amusement rides and ended the controversy over whether the Act gave regulatory power over amusement park rides to the federal government).

15. *See Safety Law History Outlined in Research Bureau Report*, *supra* note 10 (outlining the development of amusement park safety legislation in the United States).

rides.¹⁶ While most states enacted permanent amusement park regulation,¹⁷ repeated attempts at removing the exemption failed in California.¹⁸

While other states, such as New Jersey, required independent annual inspections and disclosure of records of previous injuries, prior to Chapter 585, California did not.¹⁹ In California, injury records were kept confidential.²⁰ Not only did the public lack information on parks' safety records, but logbooks documenting previous injuries were sometimes difficult to obtain even through discovery in a lawsuit.²¹ As a result, the public has demanded greater disclosure of potential problems.²²

III. CHAPTER 585

Chapter 585 provides a comprehensive approach subjecting amusement parks with permanent amusement rides to the authority of Cal-OSHA.²³ The program provides for annual certificates of compliance²⁴ to be issued by a qualified safety

16. CAL. LAB. CODE § 7901(West 1989).

17. *See, e.g.*, CONN. GEN. STAT. § 29-133(1) (West 1990) (regulating any "place where one or more mechanical rides or devices [is] capable of accommodating five or more persons . . . for amusement or entertainment purposes"); PA. STAT. ANN. tit. 4, § 407(a)(1) (West 1995) (requiring inspections of permanent "amusement park rides"); N.Y. LAB. LAW § 870-b(1) (McKinney 1988) (including "amusement parks" in a permanent location).

18. *See* Hill-Holtzman, *supra* note 3, at B1 (detailing three decades of unsuccessful attempts to regulate permanent amusement park rides).

19. *Compare, e.g.*, N.J. STAT. ANN. T. 5, Ch. 3, Art. 6 (West 1996) (regulating carnivals and amusement rides in New Jersey), with Schoch & Weber, *supra* note 2, at A3 (comparing regulation of amusement parks in California with that of other states).

20. Schoch & Weber, *supra* note 2, at A3.

21. *Cf., e.g.*, Teichert, *supra* note 3, at A1 (explaining how Disneyland was sanctioned \$7,050 for initially withholding logbooks documenting prior complaints by a woman claiming brain injuries from the Indiana Jones Adventure ride).

22. *See, e.g., id.* (quoting a mother of a child who had his foot half amputated by an amusement ride as calling for greater disclosure and accountability, stating that while amusement parks have "hidden the danger[,] . . . they owe it to [the public] to tell the truth").

23. *See* CAL. LAB. CODE §§ 7920-7932 (enacted by Chapter 585) (providing for thorough regulation of permanent amusement rides, including: qualifications for qualified inspectors, annual certificates of compliance, notification and maintenance of accurate records, a random inspection program, curbs on unsafe patron behavior, minimum insurance coverage, penalties for intentional non-compliance, and partial self maintenance); *id.* § 7921(a) (enacted by Chapter 585) (defining a "permanent amusement ride" as "a mechanical device, aquatic device, or combination of devices, of a permanent nature that carries or conveys passengers along, around, or over a fixed or restricted route or course for the purpose of giving its passengers amusement, pleasure, thrills, or excitement"); *id.* (giving Cal-OSHA the authority to determine which specific devices fall under the definition of a "permanent amusement ride"); *id.* (including bungee jumping as among those activities considered to be a permanent amusement ride, but excluding "slides, playground equipment, coin-operated devices or conveyances that operate directly on the ground or on a surface or pavement directly on the ground").

24. *See id.* § 7924(a) (enacted by Chapter 585) (requiring the owner of the permanent amusement ride to submit a certificate of compliance to Cal-OSHA).

inspector,²⁵ who may be employed either by the owner of the amusement park or by a third party.²⁶ The new law requires the park to immediately notify Cal-OSHA of any accidents²⁷ and to maintain accurate records of such accidents for future inspection.²⁸ Chapter 585 also prohibits operation of an amusement park ride which a qualified safety inspector has found to be unsafe.²⁹ Moreover, to ensure that ride equipment is properly operated, the new law mandates training of park employees.³⁰

Furthermore, the new legislation prevents parks from operating unless a minimum level of liability insurance covers the use of rides.³¹ Civil penalties of \$25,000 to \$70,000 will act as the teeth to take a bite out of any owner or operator who intentionally violates the provisions of the program.³² The law grants Cal-OSHA the authority necessary for fixing and collecting reasonable fees to raise funds³³ and to adopt any other rules and regulations necessary to administer the program.³⁴ However, Chapter 585 does not apply to permanent amusement parks that are located within a county which had adopted the provisions of the Uniform Building Code³⁵ prior to April 1, 1998.³⁶

25. *Id.* § 7921(c) (enacted by Chapter 585); *see id.* (defining the term "qualified safety inspector" as either (1) a licensed professional engineer, or (2) a person with a minimum of five years' experience in the amusement park field, at least two of which involved the actual inspection of amusement rides, who has completed at least 80 hours of formal education in the last five years and complied with a 15-hour-per-year continuing education requirement).

26. *Id.* § 7924(e) (enacted by Chapter 585).

27. *Id.* § 7925(a) (enacted by Chapter 585).

28. *Id.* § 7924(f) (enacted by Chapter 585).

29. *See id.* § 7924(d) (enacted by Chapter 585) (mandating that amusement park operators make the necessary repairs to any unsafe ride prior to resuming operation of the ride).

30. *Id.* § 7927 (enacted by Chapter 585).

31. *See id.* § 7926(a) (enacted by Chapter 585) (requiring that park owners carry a liability policy of insurance with a minimum face value of \$1,000,000 per occurrence, post an equivalent bond, or meet a financial test of self-insurance, in case of injury or death resulting from a park ride).

32. *Id.* § 7930 (enacted by Chapter 585).

33. *Id.* § 7929 (enacted by Chapter 585); *see id.* (using the fees charged for the division's services to run the program and fixing the fees as a percentage attributable to the expense of the program's administration).

34. *Id.* § 7928 (enacted by Chapter 585).

35. CAL HEALTH AND SAFETY CODE § 9507 (West Supp. 2000).

36. CAL. LAB. CODE § 7932(a) (enacted by Chapter 585) (exempting permanent amusement rides from provisions of Chapter 585 contingent upon a Cal-OSHA determination that these inspections meet or exceed the standards of Chapter 585); *see also* Daniel M. Weintraub, *Davis to OK Oversight Bill for Fun Parks Amusement*, ORANGE COUNTY REG., Sept. 11, 1999, at A10 (reporting that Universal Studios and Magic Mountain in Los Angeles County will be exempt because that county's inspection program has been state certified to meet or exceed the new standards).

IV. ANALYSIS OF THE NEW LAW

Amusement park accidents which cause injuries to people are rare by any standard.³⁷ Because injuries are so rare, news of such occurrences draws sensational coverage.³⁸ Injuries which do occur are frequently the result of risky behavior by the riders.³⁹ However, members of the public do want to know that such incidents will not happen to them or members of their families.⁴⁰ The public wants reassurance that the government will hold the industry accountable for preventing accidents. Chapter 585 was drafted in response to these concerns.⁴¹

The history of amusement park laws shows that since 1945, legislators have recognized amusement ride safety as a serious concern.⁴² The only reason that California law previously had not drawn amusement parks within its sphere is that the industry had ameliorated state lawmakers' concerns by promulgating an internal safety system.⁴³ However, when that system's flaws were revealed, the credibility of the industry's assurances as to the system's reliability was strained, and calls for regulation resumed.⁴⁴ In a poll conducted in Orange County, California, prior to the passage of Chapter 585, a majority of those polled favored regulation of amusement parks.⁴⁵ However, they voted in this way not because they thought amusement parks were unsafe, but because they perceived inspections done by an independent third party to be more trustworthy.⁴⁶

Chapter 585 promises to provide accountability, which may give permanent amusement parks added incentive to prevent injuries. It provides for much-needed disclosure of injury records.⁴⁷ Moreover, inspections by an independent third party should serve to reassure the public.⁴⁸

37. See Jerry Hirsch, *California Leads the Nation in Amusement-Park Ride Deaths*, ORANGE COUNTY REG., Jan. 13, 1999, at A01 (characterizing a visit to an amusement park as a "fairly safe activity" with a "relatively low" risk of death).

38. See Noah Isackson, *Committee OKs Bill Aiming for State Oversight over Amusement Parks*, NEWSWIRE, May 12, 1999 (disclosing that there has been an "increased public awareness about amusement park accidents").

39. Hirsch, *supra* note 37, at A01.

40. See Editorial, *Marine World's Woes*, S.F. CHRON., Aug. 27, 1999, at A24 (noting the reluctance of parents in "letting their sons and daughters partake in these thrill-seeking rides").

41. See Willis, *supra* note 12 (quoting the author of Chapter 585 as saying that the passage of the new law "is a major step forward for consumers and for the safety of families, [as it] make[s] sure that parks are meeting the state-of-the-art best standards").

42. See generally *Safety Law History Outlined in Research Bureau Report*, *supra* note 15 (citing a 1997 historical study by the California Research Bureau).

43. *Id.*

44. *Id.*; Schoch & Weber, *supra* note 2, at B1 (discussing increased interest in safety after a fatal Christmas Eve accident at Disneyland).

45. E. Scott Reckard, *Times Orange County Poll*, L.A. TIMES, Mar. 7, 1999, at A1.

46. See, e.g., *id.* (quoting one Orange County resident as stating, "I think Disneyland and Knott's Berry Farm are safe places[,] . . . [b]ut how reasonable is it to have them monitor themselves?").

47. CAL. LAB. CODE § 7924(f) (enacted by Chapter 585).

48. Schoch & Weber, *supra* note 2, at A3.

The amusement park industry and its representatives in the Legislature have their own concerns.⁴⁹ They argue that the burden that Chapter 585 imposes on the industry is not justified, noting that the risk of harm posed by amusement park rides is low relative to other human activities.⁵⁰ In other words, the public should accept the few deaths and serious injuries which occur as a cost of doing business.⁵¹

Another consideration is a possible impact on the prices of tickets at permanent amusement parks.⁵² The annual cost of running the program that Chapter 585 envisions is estimated at between \$169,000 and \$283,000.⁵³ This cost will be passed on to the parks through fees collected by Cal-OSHA.⁵⁴ Moreover, the parks will have to spend money to comply with the program's provisions.⁵⁵ The increased cost of operation to parks is equivalent to a tax which may be passed on to consumers through higher ticket prices.⁵⁶

V. CONCLUSION

The public has indicated through recent legislation that it will not accept deaths and serious injuries at amusement parks as a cost of doing business.⁵⁷ The rash of recent accidents has served to make people skeptical that permanent amusement parks are doing all they can to provide for the safety of their visitors.⁵⁸ Chapter 585 addresses these concerns by creating a comprehensive system which provides reliable evidence that measures are being taken to assure public safety.⁵⁹ Although

49. See Willis, *supra* note 12 (repeating the concerns of Senator Ray Haynes that the bill increases government bureaucracy without increasing safety); *id.* (stating that Chapter 585 assumes "that someone who has invested millions and millions of dollars in a ride will do a less effective job (inspecting it) than a state inspector who gets paid whether he does his job or not . . ."). But see Matthew Yi & Marsha Ginsburg, *Carnivals Got Safer in 1972; Recent Accidents May Bring Regulation to Amusement Parks*, S.F. EXAMINER, Aug. 27, 1999, at A19 (quoting Dana Babin) (acknowledging that while the parks are under "pressure to be open and presentable," safety could be subject to discretion in a self-regulated park).

50. See Hirsch, *supra* note 37, at A01 (estimating that permanent amusement park ride accidents account for about 4,600 people injured annually, only four percent of whom are hospitalized); *id.* (comparing the low rate of permanent amusement park accidents with those of playground and traffic accidents, accounting for 200,000 injuries and 20 deaths per year for the former and 115,000 deaths from 1973 to 1997 for the latter).

51. Willis, *supra* note 12.

52. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF AB 850, at 6 (Sept. 7, 1999).

53. *Id.*

54. See CAL. LAB. CODE § 7929 (enacted by Chapter 585) (providing for collection of fees for running the program).

55. See *id.* (allowing Cal-OSHA to collect reasonable fees from parks to raise funds).

56. See ARMEN A. ALCHAIN & WILLIAM R. ALLEN, EXCHANGE AND PRODUCTION 64-66 (1983) (explaining that taxes on suppliers operating by the market-pricing system will cause a portion of the funds raised by that tax to be "borne by the consumer[s] at the higher price") (copy on file with the *McGeorge Law Review*).

57. CAL. LAB. CODE §§ 7920-7932 (enacted by Chapter 585).

58. See Reckard, *supra* note 45, at A1 (revealing that the calls for increased regulation were based on a lack of trust of the industry to regulate itself).

59. CAL. LAB. CODE §§ 7920-7932 (enacted by Chapter 585).

the risk of accidents at permanent amusement parks is low,⁶⁰ the sheer magnitude of people susceptible to this risk justifies the regulation.⁶¹

60. *See supra* note 50 and accompanying text.

61. *See* Mary Katches, *Disney's Clout in Politics Evident in Legislation*, ORANGE COUNTY REG., May 9, 1999, at A01 (disclosing that "500 million patrons go to amusement parks each year").

