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Health and Welfare

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Health and Welfare

Health and Welfare; AFDC—restricted payments

Welfare and Institutions Code § 11274 (new).
SB 1110 (Maddy); 1995 STAT. Ch. 838

Existing law provides for the Aid to Families with Dependent Children (AFDC) program, pursuant to which qualified families¹ are provided with cash assistance.² The AFDC program is administered and partially funded by the

1. See CAL. WELF. & INST. CODE § 11250 (West 1991) (stating that aid, services, or both must be granted to families in need with children under 18 years of age, except as provided in § 11253 of the California Welfare and Institutions Code, because they have been deprived of support or care due to any of the following: (1) a parent's death, physical or mental incapacity, or incarceration; (2) the unemployment of either or both parents; or (3) absence of a parent from the home for a continuous duration because of divorce, separation, desertion, or any other reason, except for absence due to active duty requirements in the uniformed services of the United States); *id.* (defining "continued absence" as occurring when the parent's absence either interrupts or terminates his or her role as a provider for the child, and the known or indefinite duration of the absence precludes relying upon the parent's involvement in the present support or care of the child); see also *id.* § 11253 (West 1991) (stating that aid may not be disbursed to any child who has reached 18 years of age unless the child is under 19 years of age while attending high school or some equivalent full-time vocational or technical training school, and the child is reasonably expected to complete either educational program before his or her nineteenth birthday). But see generally *Carleson v. Remillard*, 406 U.S. 598, 601-04 (1972) (holding that a California regulation construing the "continued absence" provisions of 42 U.S.C.A. § 606(a) so as to exclude military absence was without congressional authority, violative of the Social Security Act, and invalid under the Supremacy Clause).

2. CAL. WELF. & INST. CODE § 11207 (West 1991); see *id.* (requiring every county to grant aid to any eligible child, in any amount necessary—but not exceeding the amount specified in § 11450 of the California Welfare and Institutions Code—and to administer the AFDC program so as to achieve the greatest reduction of dependency and to support recipient rehabilitation; furthermore, the county department must discuss parental responsibility with the applicant at the time of application); *id.* § 11450 (West Supp. 1995) (setting forth the amounts of aid paid to qualified recipients of AFDC); see also 42 U.S.C.A. § 606(b) (West 1991) (defining "aid to families with dependent children" as money payments with respect to a dependent child or dependent children); 45 C.F.R. § 234.11(a) (1994) (stating that federal financial support is available to eligible families and individuals through money payments under a State plan pursuant to title I, IV-A, XIV, or XVI of the Social Security Act; "money payments" are made in cash, checks, or warrants redeemable at par, to the grantee or his legal representative with no agency imposed restrictions on the use individual's of the funds). See generally CAL. WELF. & INST. CODE § 11205 (West 1991) (declaring that the Legislature finds the family unit is fundamentally important in nurturing society's members, transmitting values, avoiding potential social problems, and establishing a secure environment in which citizens live out their lives; each family has the right and obligation to provide its own security by participating in the work force to the extent possible, and each family has responsibility to provide for its children sufficient protection and support, to raise them with appropriate societal values and to provide opportunity for educational and social progress); Martha Minow, *The Day, Berry & Howard Visiting Scholar: The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 838 (1994) (commenting that the public expressed anger towards parents on public assistance with many children); Vlae Kershner, *Californians Split Over Governor's Welfare Plan*, S.F. CHRON., Feb. 4, 1992, at A1 (suggesting that voters hold conflicting attitudes about the AFDC program); *id.* (noting, for example, that many Californians believe that welfare creates a state of dependency and discourages recipients from finding work; however, many also believe that the budget should not be balanced by taking food away from needy children); Christopher Matthews, *Americans of 2 Minds Over GOP "Contract": Polls Show Conflict With Republicans' 100 Days in House*, S.F. EXAMINER, Apr. 9, 1995, at A11 (noting that most Americans want the amount spent on welfare to be cut, yet they do not want cuts aimed at unwed teenage mothers).

counties.³ Furthermore, the AFDC program is partially funded by federal participation and is subject to federal requirements.⁴

Existing law also authorizes the use of restricted payments,⁵ on behalf of certain AFDC recipients,⁶ for homeless benefits⁷ if the recipient has mismanaged⁸ AFDC funds or the recipient has voluntarily requested restricted payments.⁹

Chapter 838 authorizes any county to provide restricted AFDC payments¹⁰ for rent or utilities, or both, for any AFDC recipient,¹¹ in the form of a two-party

3. CAL. WELF. & INST. CODE § 11207 (West 1991).

4. 42 U.S.C.A. §§ 601-617 (West 1991 & Supp. 1995); *see id.* § 602 (West Supp. 1995) (setting forth the criteria for state plans for aid and services to needy families with children); *id.* § 603 (West Supp. 1995) (setting forth the payments to the states); *see also* CAL. WELF. & INST. CODE § 15150 (West 1991) (stating the distribution and payment of federal grants-in-aid amounts from the State to the counties).

5. *See* CAL. WELF. & INST. CODE § 11271(a) (West Supp. 1995) (defining "restricted payment" as a payment of homeless assistance benefits to the provider of shelter or utilities, or both, or a two-party payment for rent or utilities, or both).

6. *See id.* § 11271(b) (West Supp. 1995) (defining "recipient" as a recipient of aid pursuant to California Welfare and Institutions Code § 11450(a)); *see also id.* § 11450(a)(1) (West Supp. 1995) (instructing that "aid must be paid for each needy family, which must include all eligible brothers and sisters of each eligible applicant or recipient child and the parents of the children, but does not include unborn children, or recipients of aid under California Welfare and Institutions Code §§ 12000 to 12400, qualified for aid under this chapter").

7. *See id.* § 11271(e) (West Supp. 1995) (defining "homeless assistance benefits" as those paid pursuant to California Welfare and Institutions Code §§ 11450(2)(f) and 11450.4); *id.* § 11271.5 (West Supp. 1995) (stating that restricted payments for homeless assistance benefits must be disbursed to a county welfare department to a recipient, if the recipient has mismanaged AFDC funds or has requested restricted payments); *id.* § 11272 (West Supp. 1995) (setting forth the duties of the county welfare department when restricted payments are provided to a recipient); *id.* § 11273 (West Supp. 1995) (noting that homeless assistance provided is subject to restricted payments consistent with federal regulations when the county welfare department has determined the existence of mismanagement); *see also id.* § 11450.4 (West Supp. 1995) (declaring legislative intent to establish an emergency assistance for needy families program to meet the shelter needs of homeless families who appear to be eligible for aid pursuant to California Welfare and Institutions Code § 11450(a)).

8. *See id.* § 11273(a) (West Supp. 1995) (defining instances where mismanagement exists as including, but not limited to, the following situations: (1) nonpayment of rent except when it is due to certain specified circumstances, (2) the homeless assistance payment was not used for shelter, and (3) the recipient or applicant does not provide proof that payments of homeless assistance were used for shelter).

9. CAL. WELF. & INST. CODE §§ 11271.5(a) (West Supp. 1995); *see id.* § 11272 (West Supp. 1995) (stating that when restricted payments are provided to a recipient, the county welfare department must do all of the following: (1) issue the vendor or two-party payment, by mail or delivery, to the recipient for delivery to the service provider or, by mail or delivery, directly to the service provider; (2) provide each family with informational materials designed to improve the recipient's ability to manage funds and refer the family to appropriate services where these exist; and (3) provide for timely and correct vendor payments and two-party payments); *see also id.* § 11271(d) (West Supp. 1995) (defining "vendor payment" as a voucher or check drawn to the order of the service provider); *id.* § 11271(c) (West Supp. 1995) (defining "two-party payment" as a check that is drawn jointly to the order of the recipient and the service provider and is negotiable only upon the endorsement of both parties).

10. *See id.* § 11274(a)(3) (enacted by Chapter 838) (defining "restricted payment" as a payment of AFDC benefits in the form of any of the following: (1) a vendor payment to the provider of shelter, of utilities, or both; or (2) a two-party payment for rent, utilities, or both); *see also id.* § 11274(a)(1) (enacted by Chapter 838) (defining "AFDC benefits" as benefits paid pursuant to California Welfare and Institutions Code § 11450(a)).

11. *See id.* § 11274(a)(2) (enacted by Chapter 838) (defining "recipient" as a recipient of aid pursuant to California Welfare and Institutions Code § 11450(a)).

payment¹² to both the recipient and service provider, or a vendor payment,¹³ if the county determines that the recipient has demonstrated such an inability to manage funds that payments are not used in the best interest of the recipient's child, or the recipient voluntarily requests the restricted payments.¹⁴ However, a landlord is not

12. See *id.* § 11274(a)(4) (enacted by Chapter 838) (defining "two-party payment" as a check drawn jointly to the order of the recipient and the service provider and negotiable only upon both party's endorsement).

13. See *id.* § 11274(a)(5) (enacted by Chapter 838) (defining "vendor payment" as a "voucher or check drawn to the order of the service provider").

14. *Id.* § 11274(b)-(c)(1) (enacted by Chapter 838); see *id.* § 11274(b) (enacted by Chapter 838) (noting that a recipient is presumed to have mismanaged funds if the person has previously not paid rent within the past 12 months, unless due to significant rent increase, reasonable exercising of the right to withhold rent for repair and deduct, or domestic violence); *id.* § 11274(c) (enacted by Chapter 838) (declaring that if the county decides to establish a program to provide restricted payments to providers of shelter or utilities, or both, the county must also provide for and meet other specified conditions); see also *id.* § 11274(f) (enacted by Chapter 838) (declaring that when restricted payments are provided on behalf of a recipient, the county welfare department must do all of the following: (1) mail or deliver the voucher or check to the recipient for delivery to the service provider, or directly to the service provider; (2) provide timely notification that the restricted payment has been made to the recipient; and (3) refer the family to money management services, where appropriate and if in existence); *id.* § 11274(g) (enacted by Chapter 838) (stating that if the restricted payment involves a third party, the third-party payee must be an individual or organization interested in, the recipient's welfare, and cannot include any county welfare department employees or vendors who stand to financially gain from doing business with the recipient; furthermore, to the extent possible, a third-party payee selection must be made by the recipient, or with his or her participation and consent). See generally 42 U.S.C.A. § 606(b)(D) (West 1991) (stating that payments with respect to a dependent child which are intended to enable the recipient to pay for specific goods, services, or items recognized by the state agency as a part of the child's need under the state plan may (in the discretion of the state or local agency administering the plan in the political subdivision) be made, pursuant to a determination referred to in clause (2)(A), in the form of checks drawn jointly to the order of the recipient and the person furnishing such goods, services, or items and negotiable only upon endorsement by both such recipient and such person); 45 C.F.R. § 234.60(a)(1) (1994) (noting that if a state plan for AFDC under title IV-A of the Social Security Act provides for protective, vendor and two-party payments, certain requirements must be met; the plan may provide for protective, vendor, and two-party payments at the request of recipients); cf. COLO. REV. STAT. § 26-2-125 (1989) (stating that the county department, upon reconsideration in cases involving aid to families with dependent children, may authorize direct payment to vendors of the portion of the assistance grant budgeted for essential services and subsistence items for the children, if evidence has been shown that the relative payee is using that portion of the grant provided for the care, maintenance, and welfare of the children for other proper reasons); CONN. GEN. STAT. ANN. § 17b-808(b) (West Supp. 1995) (declaring that the commissioner of social services must provide for the direct vendor payment of the rent of any recipient of payments under the program of aid to families with dependent children for whom he has found mismanagement and who resides in housing where the total rent, or the recipient's share of the total rent, does not exceed thirty percent of the payment standard, adjusted for region and family size); D.C. CODE ANN. § 3-212.2(a) (1994) (allowing the mayor to authorize protective or vendor payments on behalf of dependent children under certain circumstances, including that the parent or relative persistently mismanages the assistance payment to the detriment of the child as shown by the improper clothing and feeding of the children, failure to pay rent resulting in repeated evictions, and other similar indications of money mismanagement); MASS. GEN. LAWS ANN. ch. 18, § 2(D) (West Supp. 1995) (declaring that the department must utilize mechanisms, such as payment of all or part of a regular assistance grant directly to vendors, to prevent the misuse of the public welfare financial assistance program, provided, however, that such mechanisms are authorized under federal or state law); MINN. STAT. ANN. § 256.034(2) (West 1994) (stating that families have the option to receive a standardized amount of assistance designated by the commissioner, in the form of food coupons or vendor payments); MONT. CODE ANN. § 53-2-608(2) (1993) (noting that whenever the Department of Social and Rehabilitation Services, acting pursuant to standards established by the Department, determines that any otherwise eligible recipient of public assistance has, by reason of any physical or mental condition, such inability to manage funds that making payments to the recipient would be contrary to the recipient's welfare, the Department may, under standards established under the state plan, make

entitled to payment for days that the recipient was not residing at the landlord's property.¹⁵ Moreover, Chapter 838 provides that restricted payments will expire after a period of twelve months, unless the recipient requests a continuation of that period, or unless the county finds that the recipient continues to experience money management problems.¹⁶

Chapter 838 further prohibits a landlord who accepts restricted AFDC payments from charging the tenant the last month's rent in advance, or from retaining any portion of the tenant's security deposit as rent owing.¹⁷ However, a landlord who accepts restricted payments is allowed to charge an amount equal to up to one month's rent for a cleaning and/or damage deposit.¹⁸ Lastly, nothing in Chapter 838 limits the tenant's right to withhold rent in cases where the rental unit has become uninhabitable.¹⁹

the public assistance payment on behalf of the recipient to another person found by the Department to be interested in or concerned with the welfare of the recipient; payments may be made to appropriate vendors); OHIO REV. CODE ANN. § 5107.05(B) (Anderson Supp. 1994) (providing that warrants, direct deposits, or debit cards must be delivered or made payable to the child's caretaker, the appointed guardian, or another individual who is concerned with the recipient's welfare, or vendor payments may be made on behalf of child under conditions that would qualify such payments for federal matching, by the department in the manner as the department prescribes); WIS. STAT. ANN. § 49.19(5)(cm)(2) (West Supp. 1994) (stating that a two-party payment shall be made whenever a recipient of aid under this section has failed to pay rent to the landlord for two months or more, unless the failure to pay rent is authorized by law).

15. CAL. WELF. & INST. CODE § 11274(d)(1) (enacted by Chapter 838); *see id.* § 11274(d)(2) (enacted by Chapter 838) (noting that if a landlord does receive a restricted payment for days that the recipient did not reside at the landlord's property, the landlord must pay to the county welfare department an amount that represents the overpaid rent); *id.* § 11274(d)(3) (enacted by Chapter 838) (prohibiting a county from assessing an overpayment against a recipient for payments made to a landlord for periods in which the recipient was not residing at that location); *id.* § 11274(d)(4) (enacted by Chapter 838) (declaring that a landlord may not evict or assess a late fee for failure to receive rent due to a county administrative error); *id.* § 11274(d)(5) (enacted by Chapter 838) (stating that if notice from the recipient is given less than two weeks prior to a move, the county must pay the new landlord as soon as practicable); *id.* § 11274(d)(6) (enacted by Chapter 838) (noting that nothing in California Welfare and Institutions Code § 11274(d) is to be construed to prevent a landlord accepting restricted payments from pursuing other remedies against a tenant or former tenant for money owed by the tenant).

16. *Id.* § 11274(e) (enacted by Chapter 838); *see id.* (requiring the county to provide notification to the recipient within 30 days of the restricted payments expiration).

17. *Id.* § 11274(h) (enacted by Chapter 838); *see* CAL. CIV. CODE § 1950.5 (West Supp. 1995) (setting forth the law on security of a rental agreement for residential property).

18. CAL. WELF. & INST. CODE § 11274(i)(1) (enacted by Chapter 838); *cf.* CAL. CIV. CODE § 1950.5(c) (West Supp. 1995) (stating that a landlord may not demand or receive security, however denominated, in an amount or value in excess of an amount equal to two months' rent in the case of unfurnished residential property, and an amount equal to three months' rent in the case of furnished residential property, in addition to any rent for the first month paid on or before initial occupancy).

19. CAL. WELF. & INST. CODE § 11274(i)(2) (enacted by Chapter 838); *see id.* (declaring that nothing in California Welfare and Institutions Code § 11274 is to be construed to limit tenants' rights under California Civil Code § 1942); *id.* § 11274(j)(1) (enacted by Chapter 838) (requiring the county welfare department to seek all appropriate federal waivers for the implementation of Chapter 838); *id.* § 11274(j)(2) (enacted by Chapter 838) (requiring the Department to implement California Welfare and Institutions Code § 11274 on the date the Director of Social Services executes a declaration, stating that the administrative actions required by paragraph (1) as a condition of implementation of subdivisions (a) to (i), inclusive, have been taken by the Director of Social Services and the waivers from the United States Secretary of Health and Human Services have been obtained); *see also* CAL. CIV. CODE § 1942(a) (West 1985) (stating that if within a reasonable time after notice to the landlord or his agent of "dilatations rendering the premises untenable," which the

COMMENT

Chapter 838 expands current law to allow county welfare departments to impose restricted payments, in lieu of cash aid, under the regular AFDC program as well as under the Homeless Assistance Program.²⁰ However, the county welfare departments' decision to impose restricted payments for rent or utilities, or both, is within the county's sole discretion.²¹

Supporters of Chapter 838 believe that landlords who may decline to rent to clients with a history of money management problems, or who charge high deposits to such clients, will be encouraged by restricted payments to enter rental agreements.²² Thus, the housing supply for such clients should be increased.²³

landlord should repair but has neglected to do so, the tenant may make the repairs where the cost of such does not require more than one month's rent of the premises and may deduct the expenses of such repairs from the rent, or the tenant may vacate, in which case the tenant will be discharged from further rental obligations or performance of other conditions as of the date the premises are vacated; however, this remedy is not available to the tenant more than twice during any 12 month period); *id.* § 1962(a) (West Supp. 1995) (requiring an owner of a "dwelling structure," or a party signing a rental agreement or lease on behalf of the owner, to disclose the name and address at which personal service may be given to each individual authorized to manage the premises and an owner of the premises or one who is authorized to act on behalf of the owner for receiving service of process and all notices and demands); *Green v. Superior Court*, 10 Cal. 3d 616, 637, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974) (recognizing a common law implied warranty of habitability in residential leases in California); *id.* (stating, ". . . the implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained"). See generally Jonathan M. Purver, Annotation, *Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R. 3d 646 (1971) (discussing cases which have expressly recognized an implied warranty of habitability or fitness for leased premises).

20. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1110, at 1 (Apr. 5, 1995); see ASSEMBLY COMMITTEE ON HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1110, at 2 (July 12, 1995) (noting that according to the Department of Social Services, 25% of the Homeless Assistance program applicants are repeaters; thus, restricted payments for rent should decrease the abuse and fraud in the AFDC and Homeless Assistance programs); *id.* (stating that restricted payments for those who mismanage their welfare benefits can prevent "self-caused" homelessness and decrease the number who depend on the Homeless Assistance program); Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315, 333 (1990) (asserting that the use of "vendor rent payments" may be an appropriate measure to forestall eviction because they prevent the non-payment of rent); see also Karen Terhune, Comment, *Reformation of the Food Stamp Act: Abating Domestic Hunger Means Resisting "Legislative Junk Food"*, 41 CATH. U. L. REV. 421, 454, n. 204 (1992) (noting that vendor payments rules were designed, in part, to prevent recipients of both AFDC and food stamps from converting all of the recipient's AFDC benefits into vendor payments and thereby excluding the benefits from the income calculations). See generally Amy Bayer, *Clinton Again Flails GOP's Welfare Reform Plan*, SAN DIEGO UNION-TRIB., Mar. 8, 1995, at A5 (discussing the Republican plan to cut AFDC by \$35 billion and food stamps by \$16 billion over five years); Dana Wilkie, *Governor's Budget Has Counties Shouldering More Welfare Costs*, SAN DIEGO UNION-TRIB., Jan. 11, 1995, at A19 (stating that Governor Wilson wants to cut AFDC grants by 10% since the number of Californians on welfare has grown at a rate equal to four times the state's population growth rate); *id.* (citing consecutive statistics which show that AFDC has been cut during four consecutive years: 4.4% in 1991, 5.8% in 1992, 2.7% in 1993, and 2.3% in 1994).

21. CAL. WELF. & INST. CODE § 11274(b) (enacted by Chapter 838).

22. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1110, at 2 (Apr. 5, 1995).

23. *Id.* See generally Beth D. Jarrett and Wes Daniels, *Law and the Homeless: An Annotated Bibliography*, 85 L. LIBR. J. 463, 477 (1993) (citing a report discussing the inadequacy of AFDC levels and the correlation with the increase in homelessness among families).

Moreover, a client is currently eligible for Homeless Assistance Program benefits once every two years.²⁴ Supporters of Chapter 838 argue that if a client with money management problems is not currently eligible for Homeless Assistance Program benefits, because of the two year restriction, the client may have trouble finding a rental unit.²⁵

Chapter 838 was also enacted because the misuse of AFDC funds by parents or caretaker relatives of AFDC children can create a threat to the health and safety of the children.²⁶ Thus, restricted payments, in some circumstances, should prevent child abuse and neglect.²⁷

Nevertheless, opponents to Chapter 838, including the Coalition of California Welfare Rights Organizations, Inc. (CCWRO), are concerned that by providing counties with sole discretion to impose restricted or vendor payments on any family they deem desirable, bureaucrats will be given too much power, and this will violate federal law requiring the AFDC program to be administered uniformly.²⁸ Furthermore, opponents are concerned that there is no cap on how many families can be placed on vendor payments.²⁹

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24. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1110, at 2 (Apr. 5, 1995).

25. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1110, at 3 (May 30, 1995).

26. ASSEMBLY COMMITTEE ON HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1110, at 3 (July 12, 1995).

27. *Id.*

28. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1110, at 3 (May 30, 1995); see SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1110, at 3 (Apr. 5, 1995) (noting that opponents are concerned that if county welfare departments are given sole discretion to impose restricted payments, recipients' due process rights would be violated); see also Roger Parloff, *The Death of Common Sense—And Its Apotheosis*, AM. LAW., Apr. 1995, at 34 (reviewing PHILIP HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1995)) (noting that Philip Howard states in his book that we deny government officials discretion in carrying out their tasks, fearful that, otherwise, they will abuse their powers—harassing those they inspect, extorting bribes, or enforcing rules unfairly, arbitrarily, or discriminatorily).

29. ASSEMBLY COMMITTEE ON HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1110, at 3 (July 12, 1995).

**Health and Welfare; authorization for pharmacists to dispense contact lenses
—requirements for nonresident pharmacies**

Business and Professions Code §§ 4050.3, 4050.4 (new); § 4350.6
(amended); § 4050.1 (amended and repealed).
AB 1107 (Campbell); 1995 STAT. Ch. 719

Under existing law, licensed physicians and surgeons,¹ licensed optometrists,² and registered dispensing opticians³ are authorized to dispense,⁴ sell, or furnish⁵ prescription lenses⁶ to a person named in a prescription.⁷ Under prior law, pharmacists⁸ were not permitted to dispense contact lenses.⁹ Chapter 719 provides

1. See CAL. BUS. & PROF. CODE §§ 2080-2099 (West 1990 & Supp. 1995) (setting forth provisions governing requirements for licensure).

2. See *id.* §§ 3000-3167 (West 1990 & Supp. 1995) (setting forth provisions governing optometry).

3. See *id.* § 2550 (West Supp. 1995) (defining “dispensing opticians” as individuals, corporations, and firms engaged in the business of filling prescriptions of licensed physicians and surgeons, or of licensed optometrists for prescription lenses and kindred products, and as incidental to the filling of those prescriptions, doing any or all of the following acts either singly or in combination with others: (1) taking facial measurements, (2) fitting and adjusting lenses, and (3) fitting and adjusting spectacle frames); see also *id.* § 2542 (West 1990) (specifying that a registered dispensing optician may fit, adjust, or dispense contact lenses only pursuant to a valid prescription from a physician and surgeon or optometrist, and that he or she must comply with the requirements of California Business and Professions Code § 2560); *id.* § 2560 (West Supp. 1995) (stating that an individual may not fit and adjust contact lenses unless he or she has complied with the registration requirement of California Business and Professions Code § 2550 and unless the individual is a duly registered contact lens dispenser as provided in California Business and Professions Code § 2561, or the individual performs the fitting and adjusting under the supervision of a registered contact lens dispenser who is then present on the premises); *id.* § 2561 (West Supp. 1995) (outlining the qualifications for registration as a registered contact lens dispenser and the grounds for its denial).

4. See *id.* § 4049 (West 1990) (defining “dispense” as the furnishing of drugs or devices pursuant to a prescription from a physician, dentist, podiatrist or veterinarian).

5. See *id.* § 4048.5 (West 1990) (defining “furnish” as supplying by any means, by sale or otherwise).

6. See *id.* § 2541 (West 1990) (defining “prescription lens” to mean a device ordered by a physician and surgeon or optometrist, that alters or changes the visual powers of the human eye, including, but not limited to, ophthalmic, contact, and plano contact lenses).

7. *Id.* § 2543 (West 1990).

8. See *id.* § 4033 (West Supp. 1995) (defining “pharmacist” as a person authorized by a currently valid and unrevoked license to practice his or her profession in the State of California); *id.* § 4037 (West 1990) (defining “registered pharmacist” as a person to whom a certificate has been issued by the California State Board of Pharmacy, under the provisions of California Business and Profession Code § 4085); see also *id.* § 4085 (West 1990) (outlining requirements that applicants must meet before they may be registered as pharmacists and issued a certificate). See generally *id.* §§ 4350-4368 (West 1990 & Supp. 1995) (outlining provisions for the discipline of pharmacies and pharmacists).

9. 1988 Cal. Stat. ch. 1448, sec. 2.2, at 4946 (enacting CAL. BUS. & PROF. CODE § 4050.1(e)); see *id.* (instructing that nonresident pharmacists are not authorized to dispense contact lenses); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1107, at 1 (May 25, 1995) (noting that prior to AB 1107, pharmacists were prohibited from dispensing contact lenses, and that only physicians, optometrists, and registered dispensing opticians were authorized to do so); see also CAL. BUS. & PROF. CODE § 2543 (West 1990) (providing that the right to dispense, sell, or furnish prescription lenses is exclusively limited to licensed physicians and surgeons, license optometrists, and registered dispensing opticians).

express authorization for pharmacists to dispense replacement contact lenses¹⁰ pursuant to a valid prescription¹¹ of a physician and surgeon or optometrist.¹²

Chapter 719 requires that pharmacists dispense exactly the lenses that are specified in the prescription, and no substitutions may be made.¹³ Additionally, when a pharmacist or pharmacy¹⁴ dispenses replacement contact lenses, the patient must be instructed to consult his or her eye care practitioner in the event of any eye problems or reactions to the lenses.¹⁵ The patient must also be provided with a written warning when replacement contact lenses are supplied.¹⁶

10. See CAL. BUS. & PROF. CODE § 4050.3(a) (enacted by Chapter 719) (defining "replacement contact lenses" as soft contact lenses that require no fitting or adjustment, and that are dispensed as packaged and sealed by the manufacturer).

11. *Id.* § 4050.3(b) (enacted by Chapter 719); see *id.* (stating that the prescription must meet all of the following requirements: (1) conforms to state and federal statutes and regulations governing those prescriptions and includes the name, address, and state license number of the prescribing practitioner; (2) explicitly states an expiration date of not more than one year from the date of the last prescribing examination; and (3) explicitly states that the prescription is for contact lenses and includes the lens brand name, type, and tint, including all specification necessary for the ordering of the lenses).

12. *Id.* § 4050.3(a) (enacted by Chapter 719); see *id.* (specifying that a pharmacist is not authorized to conduct an examination of the eyes or to fit or adjust contact lenses); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1107, at 3 (Aug. 30, 1995) (directing that AB 1107 does not authorize pharmacists to dispense hard contact lenses, nor may pharmacists dispense the original pair lenses prescribed by an eye care practitioner). Statutes of other states allow pharmacists to dispense contact lenses. See, e.g., N.H. REV. STAT. ANN. § 327:25-a (1995); see also Paul Klein, *Disposable Contact Lenses Have Trashed Old Rules*, VISION MONDAY, April 4, 1995, at 50 (discussing an opinion by the Attorney General for the State of Florida which authorizes pharmacists to dispense contact lenses); Letter from John Fern, Professional Contacts on Call, to Gary Hodge, Walgreen's Corp., (Aug. 23, 1993) (copy on file with the *Pacific Law Journal*) (suggesting that Florida statutes permit pharmacists to dispense contact lenses despite the plain language of the statute to the contrary). Chapter 719 repeals a provision enacted by Section 2 of Chapter 1424 of the Statutes of 1988 which never became law because it was "chapters out" by Section 2.2 of Chapter 1448 of the Statutes of 1988 pursuant to Government Code § 9605 which states that when two or more statutes are enacted which affect the same code provision, the statute enacted last with a higher chapter number prevails over statutes enacted earlier. See 1995 Cal. Legis. Serv. ch. 719, sec. 1, at 4216 (repealing 1988 Cal. Stat. ch. 1424, sec. 2, at 4845).

13. CAL. BUS. & PROF. CODE § 4050.3(c) (enacted by Chapter 719).

14. See *id.* 4035 (West Supp. 1995) (defining "pharmacy" as an area, place, or premises in which the profession of pharmacy is practiced and where prescriptions are compounded); *id.* (stating that "pharmacy" includes, but is not limited to, any area, place, or premises described in a permit issued by the board by reference to plans filed with and approved by the board wherein controlled substances or dangerous drugs or dangerous devices, as defined, are stored, possessed, prepared, manufactured, derived, compounded, or repackaged, and from which the controlled substances or dangerous drugs or dangerous devices are furnished, sold or dispensed at retail); *id.* (instructing that "pharmacy" does not include any area in a facility licensed by the State Department of Health Services where floor supplies, ward supplies, operating room supplies, or emergency room supplies of drugs or dangerous devices are stored or possessed solely for treatment of patients registered for treatment in the facility or for treatment of patients receiving emergency care in the facility); see also *id.* (defining "controlled substances or dangerous drugs or dangerous devices" as including, but not limited to, all controlled substances, drugs, or devices that are included with one or more of the following classifications: (1) drugs or devices bearing the legend, "Caution, federal law prohibits dispensing without prescription," or words of similar import; (2) controlled substances as defined in certain provisions of the Health and Safety Code; (3) drugs or devices enumerated in California Business and Professions Code § 4211; and (4) hypodermic syringes and needles, or other drugs or devices, the sale of which is restricted by law to a registered pharmacist).

15. *Id.* § 4050.3(d) (enacted by Chapter 719).

16. *Id.* § 4050.3(e) (enacted by Chapter 719); see *id.* (requiring that the pharmacist or pharmacy dispensing contact lenses provide the following, or a substantially equivalent, written notification to the patient:
WARNING: IF YOU ARE HAVING ANY UNEXPLAINED EYE DISCOMFORT, WATERING,

Chapter 719 specifies that nonresident pharmacies¹⁷ must comply with all of the requirements set forth in California Business and Professions Code section 4050.3.¹⁸

Under Chapter 719, any pharmacist or pharmacy dispensing replacement contact lenses is subject to all of the statutes, regulations, and ordinances that govern the advertising of contact lenses.¹⁹ Further, Chapter 719 requires that any advertisement by a pharmacy or pharmacist that mentions replacement contact lenses must include all fees, charges, and costs associated with the purchase of the lenses from the pharmacy or pharmacist.²⁰ Chapter 719 also requires that any pharmacy that dispenses replacement contact lenses must register with the Medical Board of California when it initially applies for, or when it renews, its license or registration.²¹ Chapter 719 expressly states that these provisions regulating advertising of replacement contact lenses and requiring pharmacies to register with the Medical Board of California apply to nonresident pharmacies.²²

Under existing law, all nonresident pharmacies must register with the California State Board of Pharmacy and disclose to the board the location, names, and titles of their principal corporate officers, if any, and their pharmacists who are dispensing controlled substances or dangerous drugs or devices to residents of the State of California.²³ Chapter 719 requires that nonresident pharmacies must additionally disclose the location, names, and titles of an agent for service of process in the State of California, and, if applicable, of all general partners.²⁴ Existing law specifies that the registration requirements contained in California Business and Professions Code § 4050.1 apply solely to nonresident pharmacies which only ship, mail, or deliver controlled substances or dangerous drugs or devices into the State of California pursuant to a prescription.²⁵

Existing law provides that every nonresident pharmacy must do each of the following: (1) comply with all lawful directions and requests for information made by regulatory and licensing agencies in the state in which it is licensed; (2) comply with all requests for information made by the California State Board of

VISION CHANGE, OR REDNESS, REMOVE YOUR LENSES IMMEDIATELY AND CONSULT YOUR EYE CARE PRACTITIONER BEFORE WEARING YOUR LENSES AGAIN).

17. *Id.* § 4050.1(a) (amended by Chapter 719) (defining "nonresident pharmacy" as any pharmacy outside of the State of California that ships, mails, or delivers, in any manner, any controlled substances or dangerous drugs or devices into the State of California).

18. *Id.* § 4050.3(f) (enacted by Chapter 719); *see supra* notes 10-16 and accompanying text (discussing provisions of California Business and Professions Code § 4050.3).

19. CAL. BUS. & PROF. CODE § 4050.4(a) (enacted by Chapter 719).

20. *Id.*

21. *Id.* § 4050.4(b) (enacted by Chapter 719).

22. *Id.* § 4050.4(c) (enacted by Chapter 719).

23. *Id.* § 4050.1(b), (c) (amended by Chapter 719).

24. *Id.* § 4050.1(c) (amended by Chapter 719); *see id.* (requiring nonresident pharmacies to submit a report, disclosing the location, names, and titles of all specified persons, on an annual basis, and within 30 days after any change of office, corporate officer, partner, or pharmacist).

25. *Id.* § 4050.1(h) (amended by Chapter 719).

Pharmacy pursuant to California Business and Professions Code § 4050.1; (3) maintain a valid license, permit, or registration to operate a pharmacy in compliance with the laws of the state in which it is a resident; (4) submit a copy of its latest inspection report;²⁶ (5) maintain records of all controlled substances or dangerous drugs or devices dispensed to patients in the State of California in a manner that makes those records readily retrievable from the records of other drugs dispensed; (6) provide a toll-free telephone service to all patients in California during normal hours of the pharmacy's operation²⁷ in order to facilitate communication between California patients and a pharmacist that has access to patients' records; and (7) affix a label listing the toll-free telephone service number to each container of drugs dispensed to patients in the State of California.²⁸

Chapter 719 adds the requirement that nonresident pharmacies must maintain records of all replacement contact lenses that are shipped, mailed, or delivered to persons in the State of California for a minimum of three years.²⁹ Such records must be made available for inspection upon request by the Board³⁰ or the Division of Licensing of the Medical Board of California.³¹

Chapter 719 explicitly states that nothing in California Business and Professions Code section 4050.1 can be construed to allow nonresident pharmacies to dispense contact lenses except as provided in California Business and Professions Code section 4050.3.³²

When a pharmacy is registered as a nonresident pharmacy, it is only required to comply with a limited set of provisions.³³ Specifically, the Board may deny, suspend, or revoke the registration of a nonresident pharmacy if it fails to comply with the requirements of California Business and Professions Code sections 4050.1 or 4383, or California Health and Safety Code section 11164.³⁴ Existing law additionally provides that a nonresident pharmacy may have its registration

26. *See id.* § 4050.1(d) (amended by Chapter 719) (stating that every nonresident pharmacy must, as a prerequisite to registering with the California State Board of Pharmacy, submit a copy of its latest inspection report from an inspection conducted by the licensing or regulatory agency of the state in which it is located).

27. *See id.* § 4050.1(f) (amended by Chapter 719) (specifying that a pharmacist with access to patients' records must be available via the toll-free telephone service during the normal hours of the pharmacy's operation, and that regardless of the pharmacy's hours, the telephone service must be operated a minimum of six days per week, and for at least 40 hours per week).

28. *Id.* § 4050.1(d), (e)(1), (f) (amended by Chapter 719).

29. *Id.* § 4050.1(e)(2) (amended by Chapter 719).

30. *Id.* § 4044 (West 1990); *see id.* (referring to the California State Board of Pharmacy).

31. *Id.* § 4050.1(e)(2) (amended by Chapter 719).

32. *See id.* § 4050.1(i) (amended by Chapter 719); *see supra* notes 10-16 and accompanying text (discussing provisions of California Business and Professions Code § 4050.3).

33. 75 Op. Cal. Att'y Gen. 41 (1992).

34. CAL. BUS. & PROF. CODE § 4350.6 (amended by Chapter 719); *see supra* notes 17, 23-29 and accompanying text (discussing California Business and Professions Code § 4050.1); *see also* CAL. BUS. & PROF. CODE § 4383 (West 1990) (prohibiting the advertising of the services in the State of California of any nonresident pharmacy which is not registered pursuant to California Business and Professions Code § 4050.1); CAL. HEALTH & SAFETY CODE § 11164 (West Supp. 1995) (listing the requirements for prescriptions for controlled substances).

denied, revoked, or suspended if it engages in conduct that causes serious bodily or serious psychological injury to a California resident if the Board refers the matter to the regulatory or licensing agency in the state in which the nonresident pharmacy is located, and the agency fails to initiate an investigation within 45 days of the referral.³⁵ Chapter 719 provides that nonresident pharmacies must also comply with two additional sections of the California Business and Professions Code.³⁶

COMMENT

An estimated 25 million people in the United States wear contact lenses, thereby creating a market worth close to \$2 billion a year.³⁷ Professional Contacts on Call, a company which supplies soft contact lenses to pharmacies and individuals, sponsored Chapter 719 in order to expand its business operations.³⁸

Proponents of Chapter 719 argue that as a result of improvements in the design of soft contact lenses, and in the manufacturing process, replacement contact lenses are virtually identical to the original lenses that are fitted and examined by a patient's eye care practitioner, thus making additional visits to the eye care practitioner unnecessary unless a patient has a problem.³⁹ Supporters therefore believe that in allowing pharmacists to dispense replacement contact lenses, a safe alternative is provided for consumers.⁴⁰ They argue that in providing consumers with additional sources from which they may obtain contact

35. CAL. BUS. & PROF. CODE § 4350.6(b) (amended by Chapter 719).

36. *Id.* § 4350.6 (amended by Chapter 719); see *supra* notes 10-16 and accompanying text (discussing California Business and Professions Code § 4050.3); *supra* notes 19-22 and accompanying text (discussing California Business and Professions Code § 4050.4). Note that California Business and Professions Code § 4350.6 still does not include California Business and Professions Code § 4050.2, which was added in 1993, and requires the Board of Pharmacy to adopt regulations that apply the same requirements or standards for oral consultation to a nonresident pharmacy, as apply to an in-state pharmacy. The Board of Pharmacy has not yet adopted the regulations that the statute requires. See Telephone Interview with John Cronin, California Pharmacists Association, Oct. 3, 1995 (notes on file with the *Pacific Law Journal*). There remains the question, however, of whether nonresident pharmacies will be required to comply with such regulations once adopted.

37. *Good Morning America: Mail Order Contact Lenses* (ABC television broadcast, Aug. 26, 1993) (transcript on file with the *Pacific Law Journal*) [hereinafter *Good Morning America*]; see Gail DeGeorge et al., *Contact-Lens Sellers Just Don't See Eye-to-Eye*, BUSINESS WEEK, July 12, 1993, at 28 (stating that the mail order industry makes up about 5% of the \$1.8 billion a year market, and that Lens Express, the largest American mail order business for contact lenses, says that its sales have been doubling every year since 1986, reaching \$40 million in annual sales in 1993); Yumiko Ono, *Contacts by Mail Change Industry's Look*, WALL ST. J., Oct. 11, 1994, at B1 (reporting that sales of soft contact lenses by mail order companies for the year ending on June 30, 1995, were expected to be between \$60 and \$70 million, up from the \$52 million total for the previous year).

38. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 1107, at 2 (July 10, 1995); see *Florida Allows Sales of Pharmacy-Dispensed Replacement CLs*, VISION MONDAY, Jan. 10, 1994, at 6 (reporting that the president of Professional Contacts on Call, in looking for ways to expand his business, surveys state laws to determine if they allow pharmacists to dispense contact lenses).

39. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1107, at 2 (May 25, 1995); Letter from Don Brown, President, and Bruce Young, Advocate, Advocacy, Inc., to Members, California State Assembly (May 23, 1995) (copy on file with the *Pacific Law Journal*).

40. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1107, at 4 (Aug. 30, 1995).

lenses, opportunities for lower prices are created.⁴¹ Supporters additionally argue that consumers benefit from being provided with additional sources because they are provided with greater access when seeking to obtain replacement contact lenses.⁴² Since pharmacies are often located in major chain grocery stores, they provide a convenient alternative for consumers of contact lenses, especially consumers living in remote or rural areas.⁴³

In support of Chapter 719, proponents also point out that pharmacists in California are already authorized to dispense other medical devices, and they assert that pharmacists are permitted to dispense replacement contact lenses in 40 other states.⁴⁴ Additionally, supporters argue that prior to the enactment of Chapter 719, consumers were already purchasing replacement soft contact lenses from mail-order companies.⁴⁵ Such purchases were unregulated by the State of California, they escaped sales taxation, and such transactions lacked the protections promulgated by Chapter 719.⁴⁶

Despite the claims of the supporters of Chapter 719, it is not clear that consumers will benefit from lower prices for contact lenses.⁴⁷ More importantly, some optometrists and contact lens manufacturers have concerns about the safety of allowing patients to obtain contact lenses from pharmacists.⁴⁸

41. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1107, at 2 (May 25, 1995); *see id.* (noting that an anecdotal survey performed by the sponsor, Professional Contacts on Call, found that opportunities for lower prices may be created); *see also* DeGeorge et al., *supra* note 37 (discussing how one customer saved perhaps \$300 over two years by using a mail-order pharmacy); Ruth Grunbaum, *Optometrists Go to Court Over Bartell Co.'s Mail-Order Lenses*, PUGET SOUND BUS. J., Oct. 23, 1989, at 4 (citing the senior vice president of Bartell Drug Co., a drugstore chain, as estimating that consumers can save up to 35-40% on the average pair of contact lenses by purchasing them through mail-order companies); Ono, *supra* note 37 (quoting Scott Palmer, an assistant state attorney general in Florida in his assessment that consumers who buy their disposable contact lenses from optometrists are paying too much); *Florida Allows Sales of Pharmacy-Dispensed Replacement CLs*, *supra* note 38 (reporting that Professional Contacts on Call conducted a sample poll in which it called over 100 doctors in Florida and found that the average prices were 20-30% higher than at Walgreens, a pharmacy chain for which Profession Contacts on Call is a supplier); *Good Morning America*, *supra* note 37 (stating that Lens Express promises consumers that they will save up to 50%).

42. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1107, at 4 (Aug. 30, 1995).

43. *Id.*

44. *Id.* at 3-4; *see* CAL. BUS. & PROF. CODE § 4034.5(c)(3) (West Supp. 1995) (providing that the sale of hypodermic syringes and needles, which are classified as dangerous devices, and the sale of other devices, is restricted by law to a registered pharmacist). *But cf. id.* § 4034.5(d) (West Supp. 1995) (clarifying that for the purposes of the provisions regulating pharmacies, California Business and Professions Code §§ 4000-4480, "device" does not include contact lenses).

45. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1107, at 3-4 (Aug. 30, 1995).

46. *Id.* at 4.

47. DeGeorge et al., *supra* note 37; *see id.* (reporting that Business Week placed orders with six mail-order companies and found that three of them did not require a doctor's name or a written prescription); *id.* (finding that the prices, membership fees, and mailing fees varied considerably among the mail-order companies, that none of companies' prices were much less than prices charged by an optometrist located in Manhattan, and that some of the mail-order companies charged prices that were even higher).

48. DeGeorge et al., *supra* note 37; Paul Klein, *OD Perspective: Disposable Contact Lenses Have Trashed Old Rules*, VISION MONDAY, Apr. 4, 1994, at 50; *see* DeGeorge et al., *supra* note 37 (reporting that the three largest contact lens manufacturers, Bausch & Lomb, Ciba-Vision Optics, and Johnson & Johnson, have refused to sell contact lenses to mail-order companies, to distributors that may in turn supply mail-order companies, and to some retailers because they do not have on-site professionals trained to fit contact lenses).

In addition to regulating the sale and dispensing of replacement contact lenses, Chapter 719 requires nonresident pharmacies to designate an agent for service of process in the State of California.⁴⁹ This requirement was added in order to make it clear that nonresident pharmacies are subject to suit and other legal processes in California.⁵⁰ The Legislature enacted this requirement in order to protect California consumers, the State of California, and any others who encounter legal disputes with out-of-state companies.⁵¹

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on patients); *id.* (quoting the president of Bausch & Lomb's contact lens division, Harold O. Johnson, as saying that their decision to refuse to supply contact lenses to mail-order companies is based on health concerns; "[t]his is a medical device that is in direct contact with the cornea and is controlled by the FDA and by prescription"); *id.* (expressing eye care professionals' concerns that their patients' prescriptions for contact lenses will be filled incorrectly, and that patients will fail to keep follow-up appointments); Klein, *supra* (noting that Florida Opticians object to the Florida State Attorney General's decision to allow pharmacists to dispense replacement contact lenses because they fear that patients' health and safety will be compromised); Ono, *supra* note 37 (reporting that since mail-order companies can not obtain contact lenses from major manufacturers, they often acquire them through distributors who, in turn, have often collected the lenses from excess supplies from doctors or other sources); *id.* (asserting that although the mail-order companies claim that they sell high quality lenses, they will not identify their distributors); *id.* (recounting an incident where a mail-order customer bought Acuvue lenses, made by Johnson & Johnson, a company which refuses to sell lenses to mail-order companies, and found that they were manufacturers' samples with a different expiration date taped around the package than that displayed on the samples, themselves); Roy S. Rubinfeld, *Letters*, WASH. POST, Aug. 24, 1993, at Z4 (writing, in a letter to the editor of the Washington Post, that contact lens patients in his office are carefully instructed about lens care, and are examined for the fit and condition of their lenses at every visit, which is usually twice a year); *id.* (stating that refusing to supply patients with replacement contact lenses is an effective safeguard which encourages patients to keep their follow-up appointments); *id.* (suggesting that by requiring an examination before renewing a patient's prescription for lenses, an eye care practitioner can make sure that the lenses fit properly, and that this is especially important for patients who use extended wear lenses because the risk for ulcerative keratitis is 10 to 15 times higher for such patients than for patients using daily wear lenses); *see also* Jane E. Brody, *Personal Health*, N.Y. TIMES, Aug. 14, 1991, at C10 (identifying numerous eye problems that occur more frequently among persons who wear contact lenses, including, but not limited to, the following: (1) corneal ulcers, frequently caused by a bacterial infection; (2) giant papillary conjunctivitis, an allergic reaction; and (3) acanthamoeba keratitis, a very dangerous type of corneal infection); *id.* (reporting that persons who wear extended-wear lenses have also been found to have tiny cysts on their corneas, and abnormal growth of blood vessels in their eyes); Reuters, *Type of Contact Lens Affects Risks to Eyes*, N.Y. TIMES, Nov. 13, 1992, at A14 (reporting that a study of 323 contact lens wearers conducted by the Moorfields Eye Hospital in London found that 34 of the 41 people who wore disposable contacts suffered from complications); *id.* (noting that of the 34 persons who developed complications, keratitis was the most common problem, occurring in 16 of the patients); *Eye Care; Studies Suggest Daily Removal of All Contacts*, N.Y. TIMES, Sept. 21, 1989, at B21 (explaining that "ulcerative keratitis" or a "corneal ulcer" "is caused by the growth of bacteria between contact lenses and the surface of the cornea"); *id.* (warning that the bacteria can lead to infections that cause tiny scars and blurry or distorted vision); *id.* (reporting that the risk of developing ulcerative keratitis increases over time, and that over a 20 year period, the risk for persons who use extended-wear lenses is possibly as high as 1 in 20 or 25); *id.* (quoting Dr. Scott M. MacRae, professor of ophthalmology at Oregon Health Sciences University in Portland, as explaining that "[i]f a corneal ulcer occurs over the pupil and if left untreated for 12 to 24 hours, it can cause permanent significant vision loss that can require a cornea transplant to correct"); *U.S. Suggests Caution by Contact Lens Users*, N.Y. TIMES, June 1, 1989, at B7 (reporting that of the approximately 24 million contact lens wearers in the United States in 1989, about 5 million wear extended-wear lenses).

49. CAL. BUS. & PROF. CODE § 4050.1(c) (amended by Chapter 719).

50. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 1107, at 3 (May 9, 1995).

51. *Id.*

Health and Welfare; care facilities

Health and Safety Code § 1562.4 (new); §§ 1524.5, 1550, 1551, 1562.3 (amended).

SB 815 (Peace); 1995 STAT. Ch. 706

Existing law requires community care facilities¹ to be licensed and regulated by the State Department of Social Services (Department).² Existing law also requires a community care facility that provides care for six or fewer individuals to establish a procedure for response to problems and complaints.³ In addition, existing law requires the owner or director of a community care facility to meet weekly with neighborhood residents to discuss any problems with the facility or with the neighborhood.⁴ Prior law required community care facilities to establish these procedures by July 1, 1995.⁵

Under existing law the staff and operators of community care facilities are required to complete a formal training program before being allowed to work in a community care facility.⁶ Existing law establishes the Residential Care Facility

1. See CAL. HEALTH & SAFETY CODE § 1502(a) (West Supp. 1995) (defining "community care facility" as any facility or building maintained and operated to provide nonmedical residential care or day treatment for children or adults, including physically handicapped, mentally impaired, incompetent persons, and abused or neglected children).

2. *Id.* § 1508 (West 1990); *see id.* (stating that a current license is necessary to operate, establish or manage a community care facility); *id.* § 1525.5 (West 1990) (stating that provisional licenses may be granted to operate community care facilities for up to six months, allowing for the facility to reach compliance with state regulations); *id.* § 1531 (West 1990) (providing that regulations should be established for the safety and sanitation of community care facilities, and should also focus on the qualifications of the staff and the needs of the individuals being served by the facility); *see also* CAL. WELF. & INST. CODE §§ 10600.1-10612 (West 1991 & Supp. 1995) (setting forth the powers, duties, and authority of the California Department of Social Services). *See generally* CAL. CODE REGS. tit. 22, §§ 80019-80025 (1995) (listing requirements that community care facilities must meet in order to be licensed, including a criminal record check of personnel, a fire inspection, a water supply inspection, insurance coverage, and bonding of employees).

3. CAL. HEALTH & SAFETY CODE § 1524.5(a) (amended by Chapter 706); *see id.* (requiring a procedure to be in place which allows for the complaint to reach the owner or licensee of the facility, and that a written response to the complaint must be made to the person who lodged the complaint stating that the complaint was investigated and what actions, if any, will be taken in the matter); *see also* Hugo Martin, *State Investigates Home for the Elderly*, L.A. TIMES, Oct. 7, 1990, at B1 (discussing a care facility that had been cited 29 times for violations of the health code, even though the administrator of the facility had stated that each complaint was reviewed and corrected after being reported); *cf.* ALA. CODE § 22-5A-3 (1990) (vesting the state ombudsman and commission which supervises care facilities with the authority to investigate complaints); S.C. CODE ANN. § 40-35-131 (Law. Co-op. Supp. Pamphlet 1994) (detailing the procedure for investigating complaints regarding community care facilities).

4. CAL. HEALTH & SAFETY CODE § 1524.5(b) (amended by Chapter 706); *see id.* (stating that the weekly meetings were established to ensure that neighbors had the opportunity for their complaints to be heard; thus, the meetings must be attended by the owner or licensee of the facility, and the meetings must also be held at a fixed time each week to ensure that all neighbors know of the meetings and have a chance to attend).

5. 1994 Cal. Legis. Serv. ch. 1258, sec. 1, at 6483 (amending CAL. HEALTH & SAFETY CODE § 1524.5(c)).

6. CAL. HEALTH & SAFETY CODE § 1562.3(a) (amended by Chapter 706); *see id.* § 1562.3(c)(1) (amended by Chapter 706) (requiring the administrator of a community care facility to complete 35 hours of classroom instruction that provides training on a uniform core of knowledge concerning community care

for the Elderly Fund which provided funds for the administration of all training and certification programs.⁷

Chapter 706 exempts foster family homes⁸ and small family homes⁹ from complying with regulations which establish the procedure for handling complaints, and which require a weekly meeting for discussion of problems and complaints.¹⁰ For the facilities still required to perform these procedures and meetings, Chapter 706 extends the required date for compliance from July 1, 1995, to July 1, 1996.¹¹

In addition, Chapter 706 changes the existing training program for staff of residential care facilities into a certification program.¹² Chapter 706 also makes changes to the regulations regarding expiration of certificates and fees for

facilities); *id.* (listing the areas of knowledge which the administrator must be taught and tested on as (1) laws and regulations concerning operation of facilities, (2) business operations, (3) supervision of staff, (4) social needs of facility residents, (5) community support services, (6) physical needs for facility residents, (7) use and interaction of medications, and (8) resident admission and assessment procedures); *id.* § 1562.3(c)(2) (amended by Chapter 706) (stating that administrators must take and pass a written test demonstrating their knowledge in the area of community care); *see also* John Woolfolk, *State Crackdown on Group Homes*, S.F. CHRON., Apr. 6, 1993, at A18 (reporting that in five group homes for emotionally disturbed teenage girls, the staff lacked proper training); *cf.* FLA. STAT. ANN. § 400.452 (West 1993 & Supp. 1995) (detailing the training and educational requirements that an administrator must complete before becoming certified by the State); MISS. CODE ANN. § 43-7-61 (1993) (listing the areas in which the administrators of care facilities must have knowledge and training); NEB. REV. STAT. § 81-2253 (1994) (detailing the required areas of training for the staff of care facilities); N.M. STAT. ANN. § 28-17-7 (Michie 1991) (detailing the areas in which the staff of care facilities need to be trained). *Compare* 1994 Cal. Legis. Serv. ch. 1258, sec. 4, at 6484 (enacting CAL. HEALTH & SAFETY CODE § 1562.3(g)(3)) (establishing that certificates issued for completion of these educational requirements expire three years after their issuance, on the administrator's birthday) *with* CAL. HEALTH & SAFETY CODE § 1562.3(f)(3) (amended by Chapter 706) (specifying that the certificate issued for completion of these educational requirements expires two years from the date the certificate was issued).

7. CAL. HEALTH & SAFETY CODE § 1569.617(a) (West Supp. 1995); *see id.* (stating that \$150,000 would be transferred from the state's General Fund for use as the Residential Care Facility for the Elderly Fund).

8. *See id.* § 1502(a)(5) (West Supp. 1995) (defining "foster family home" as a family residence that is licensed by the state to provide 24-hour care and supervision for not more than six foster children). *See generally* CAL. CODE REGS. tit. 22, §§ 87000-87088 (1995) (discussing the procedures and regulations with which foster family homes must comply).

9. *See* CAL. HEALTH & SAFETY CODE § 1502(a)(6) (West Supp. 1995) (defining "small family home" as a family residence that is licensed by the state to provide 24-hour care for not more than six foster children who have mental disorders or physical disabilities, and who require special care and supervision as a result of these disabilities). *See generally* CAL. CODE REGS. tit. 22, §§ 83000-83088 (1995) (discussing the procedures and regulations with which small family homes must comply).

10. CAL. HEALTH & SAFETY CODE § 1524.5(a), (b) (amended by Chapter 706).

11. *Id.* § 1524.5(c) (amended by Chapter 706); *see id.* § 1562.3(i) (amended by Chapter 706) (stating that if regulations are not adopted by the Department to implement this new legislation by July 1, 1996, then California Health and Safety Code § 1562.3 will not become operative).

12. *Id.* § 1562.3(b)(1) (amended by Chapter 706); *see id.* (requiring administrators of community care facilities to pass an approved certification program); *cf.* ALASKA STAT. § 44.21.233(a) (1993) (stating that training and certification is required for all staff of care facilities, including volunteer staff); MISS. CODE ANN. § 43-7-61(1) (1993) (mandating that each care facility must bear the cost of a training program to certify its own staff).

reissuance of lost certificates.¹³ Chapter 706 establishes a thirty-day time period in which license holders must report to the Department any change in the administrative staff of a care facility.¹⁴ Chapter 706 also requires the Department to establish a registry of certificate holders that includes information on their employment status and a history of their convictions¹⁵ for crimes other than minor traffic violations.¹⁶

Chapter 706 authorizes the Department, in certain circumstances, to deny approval to any agency or person providing certification training programs or continuing education courses for residential care providers.¹⁷ Chapter 706 also

13. CAL. HEALTH & SAFETY CODE § 1562.3(f)(3) (amended by Chapter 706); *see id.* (stating that a certificate expires two years from its effective date); *id.* § 1562.3(f)(7) (amended by Chapter 706) (assessing a fee of \$25 to be charged for the reissuance of a lost certificate); *cf.* ARIZ. REV. STAT. ANN. § 36-591(c) (West Supp. 1994) (stating that certificates expire two years after the date of issuance); IDAHO CODE § 54-4203(2)(b) (1994) (providing that licenses shall terminate two years after the date of issuance).

14. CAL. HEALTH & SAFETY CODE § 1562.3(b)(4) (amended by Chapter 706); *see id.* § 1562.3(f)(8) (amended by Chapter 706) (establishing a thirty-day time period for certificate holders to inform the Department of any change in his or her employment status).

15. *See* CAL. PENAL CODE § 689 (West 1985) (delineating the manner of conviction); *see also* *People v. Banks*, 53 Cal. 2d 370, 390-91, 348 P.2d 102, 116, 1 Cal. Rptr. 669, 683 (1959) (specifying that a conviction will generally include a plea of guilty); *Ex parte Brown*, 68 Cal. 176, 182, 8 P. 829, 832 (1885) (stating that a conviction indicates a finding of a guilty verdict).

16. CAL. HEALTH & SAFETY CODE § 1562.3(j) (amended by Chapter 706); *see id.* § 1522(a) (West Supp. 1995) (mandating that all criminal convictions, except for those of minor traffic violations, must be reported); CAL. CODE REGS. tit. 11, § 935(a) (1995) (stating that all interested parties may have access to a registry containing information on in-home child care providers); *id.* tit. 22, § 76541(c) (1995) (stating that a registry containing employment history must be maintained regarding staff of community care facilities); *see also* *Loder v. Municipal Court*, 17 Cal. 3d 859, 864-65, 553 P.2d 624, 628, 132 Cal. Rptr. 464, 468 (1976) (holding that the interest in permitting law enforcement agencies to consult arrest records outweighs the constitutional right to privacy), *cert. denied*, 429 U.S. 1109 (1977); *Central Valley Chapter v. Younger*, 214 Cal. App. 3d 145, 151, 262 Cal. Rptr. 496, 499 (1989) (noting that dissemination of arrest records for employment, licensing, and certification purposes significantly affects a person's right to privacy); *Child-Care Safety Registry*, SACRAMENTO BEE, Apr. 19, 1995, at B3 (discussing how parents may now check, via a toll free number, on potential child-care providers by using a state maintained registry of persons disqualified because of criminal convictions); *Nursing Home Aide Screening Considered*, SACRAMENTO BEE, Apr. 3, 1994, at A3 (reporting that there is a push for the creation of a national registry that would catalog State disciplinary actions against nursing home workers, and that between 20,000 and 30,000 nursing home aides with criminal records are working in the nation's nursing homes); *cf.* FLA. STAT. ANN. § 393.067(5)(a)(1) (West Supp. 1995) (stating that a residential facility must provide the state with a list of employees so that the State may conduct a criminal record search for employees who may have criminal records); MISS. CODE ANN. § 43-20-8(3),(4) (1993) (allowing child care facilities to seek access to a registry of child abuse and sex offenders before hiring any individual to work in a care facility); N.H. REV. STAT. ANN. § 170-E:7 (1994) (requiring child care facilities and residential care facilities to report the names and personal information of any new employees to the state for background checks into the employee's criminal records); VT. STAT. ANN. tit. 33, § 6914(b) (Supp. 1994) (allowing an owner or operator of an elderly care facility access to a registry of information that will show the criminal history of any potential employee of the facility). *See generally* Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859 (1991) (discussing methods to lessen the amount of elder abuse in California).

17. CAL. HEALTH & SAFETY CODE § 1562.3(h)(1) (amended by Chapter 706); *see id.* (instructing that a vendor's approval may be denied in any of the following circumstances: (1) The applicant has not provided the Department with satisfactory evidence of the ability of the applicant to satisfy requirements of California Health and Safety Code § 1562.3, (2) the applicant has a conflict of interest in that the applicant places its clients in adult residential facilities, or (3) the applicant has a conflict of interest in that the agency is mandated to place clients in adult residential facilities and to pay directly for the services).

revises the grounds for which the Department may suspend, revoke, or deny an application for an administrator certificate.¹⁸

COMMENT

The purpose of Chapter 706 is to clarify and ensure consistency in the care of the elderly in residential care facilities.¹⁹ According to the author, Chapter 706 is follow-up legislation to SB 1368 which, when enacted in 1994, established the framework for training requirements for the staff of residential care facilities.²⁰ Chapter 706 is designed to provide the mechanism for the Department of Social Services to implement a certification program for the care of the elderly in residential care facilities.²¹

Chapter 706 also exempts certified foster family homes and small family homes from the new training and complaint handling requirements because the Legislature does not wish to step into the family structure of volunteer foster families and change how they operate.²² Chapter 706 was designed and enacted

18. *Id.* § 1562.4 (enacted by Chapter 706); *see id.* (stating that after July 1, 1996, new administrators of community care facilities must fulfill all of the following: (1) be at least 21 years of age, (2) provide documentation of having successfully completed a certification program approved by the Department and successfully passed the state examination, (3) have a high school diploma or pass a general education development test, and (4) obtain a criminal record clearance as provided in California Health and Safety Code §§ 1522 and 1522.03); *see also id.* § 1522(a) (West Supp. 1995) (mandating that before a person may be hired as an employee of a community care facility, his or her fingerprints must be checked against a statewide system of criminal offenders, and that before any license may be issued to a community care facility a criminal background check of all the staff must be completed); *id.* § 1522.03 (West Supp. 1995) (stating that the Department of Justice may demand a fee for the service of running background checks on potential licensees and employees of community care facilities).

19. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 815, at 1 (Apr. 19, 1995); *see* Linda Feldman, *Home, Sweet Home; Ivy House Provides Elderly With Alternative to Institutionalized Care*, L.A. TIMES, Dec. 6, 1992, at J1 (explaining that there are 4320 board-and-care homes in the state of California, with monthly fees ranging from \$1900 to \$5000, and that experts predict that there will be a severe shortage of adequate and affordable housing for the elderly as the nation's population ages).

20. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 815, at 2 (May 18, 1995); *see also* 1994 Cal. Legis. Serv. ch. 1258, sec. 1-4, at 6483-85 (amending CAL. HEALTH & SAFETY CODE §§ 1524.5, 1562; enacting CAL. HEALTH & SAFETY CODE §§ 1536.3, 1562.3) (establishing the training program for residential care providers).

21. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 815, at 2 (May 18, 1995); *see* Telephone Interview with Michael Cann, Legislative Consultant to Senator Steve Peace on SB 815 (July 10, 1995) (notes on file with the *Pacific Law Journal*) (reporting that the sole purpose of Chapter 706 is to supplement and clarify previous legislation which enacted a training program and methods for handling complaints in community care facilities).

22. CAL. HEALTH & SAFETY CODE § 1524.5(a),(b) (amended by Chapter 706); *see* Telephone Interview with Michael Cann, *supra* note 21 (stating that the Legislature recognizes that most foster family homes are operated by volunteers, and that foster homes have their own families to worry about, as well as the individuals being cared for, and thus interference by the State is not only illegal, but unnecessary); *see also* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (holding that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Fourteenth Amendment); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that parents have the right to and the duty to educate and bring up their children in whatever manner they choose, without state interference); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) (holding that parents may seek to educate their children in whatever manner they deem best without any state interference).

to monitor and protect only those individuals who are under the care of businesses that operate community care facilities for profit.²³

Ralph J. Barry

Health and Welfare; certification for building inspectors

Health and Safety Code §§ 18965, 18966, 18967, 18968, 18969, 18970, 18971 (new).
AB 717 (Ducheny and Hauser); 1995 STAT. Ch. 623

Existing law provides the framework for establishing and enforcing state building standards.¹ Existing law also requires individuals who design and build buildings to meet minimum licensing and training requirements.²

Chapter 623 establishes continuing education,³ certification, and training

23. Telephone Interview with Michael Cann, *supra* note 21; *see id.* (noting that Chapter 706 is only designed to affect businesses that operate community care facilities, because past experience has shown that these businesses are less concerned, and less trained, to spot signs of emotional and physical neglect to persons in their care).

1. CAL. HEALTH & SAFETY CODE § 18938(a) (West Supp. 1995); *see id.* § 18930(a) (West Supp. 1995) (detailing the Building Standards Commission's authority to approve any building standard established by state agencies); *id.* § 18931(a) (West Supp. 1995) (defining further the power and authority of the Building Standards Commission to oversee state building code establishment and enforcement); *id.* § 18938(a) (West Supp. 1995) (granting the California Building Standards Commission the power to codify all building codes). *See generally id.* § 17922 (West Supp. 1995) (listing specific building standards to be established by the Building Standards Commission, dealing with everything from plumbing to fire safety).

2. CAL. BUS. & PROF. CODE § 5552(b) (West 1990); *see id.* (stating that architects need to have completed eight years of training and educational experience in architectural work before becoming certified by the State); *id.* § 6751 (West Supp. Pamphlet 1995) (listing the necessary requirements in education and experience for engineers); *id.* § 6752 (West 1995) (stating that civil engineers must have gained experience under the direction of a civil engineer who was legally qualified to practice that trade); *id.* § 7068(a) (West Supp. Pamphlet 1995) (detailing the experience and training necessary in order for a contractor to be issued a license by the State); *see also* *Latipac, Inc. v. Superior Court*, 64 Cal. 2d 278, 283, 411 P.2d 564, 568, 49 Cal. Rptr. 676, 681 (1966) (stating that possession of a valid contractor's license attests to the holder's competence and responsibility as a contractor); *Andrews v. State Bd. of Registration*, 123 Cal. App. 2d 685, 695-96, 267 P.2d 352, 360-61 (1954) (discussing how courts may establish the review process for determining experience and education requirements for similar code requirements).

3. *See* CAL. HEALTH & SAFETY CODE § 18969(b) (enacted by Chapter 623) (defining "continuing education" as that education relating to the enforcement of Title 24 of the California Code of Regulations, and any other locally enforced building and construction standards including the model uniform codes adopted by California); *see also id.* § 18969 (enacted by Chapter 623) (stating that all construction inspectors need to complete a minimum of 45 hours of continuing education for every three year period); *cf.* CONN. GEN. STAT. ANN. § 29-262 (West Supp. 1995) (creating continuing education and training requirements for building inspectors); FLA. STAT. ANN. § 468.631 (West Supp. 1995) (establishing a fund for the certification and regulation of building inspectors); KY. REV. STAT. ANN. § 198B.090 (Baldwin 1991) (establishing a training and certification process for building inspectors); OKLA. STAT. ANN. tit. 59, § 1032 (West Supp. 1995) (stating that the State Board of Health has the authority to adopt certification and training requirements for building inspectors).

requirements for construction inspectors,⁴ plans examiners, and building officials.⁶ Chapter 623 requires these construction inspectors, plans examiners, and building officials to complete one year of experience in their field, and then to obtain certification from a recognized state, national, or international association of building inspectors.⁷ Chapter 623 also mandates that every three years all construction inspectors, plans examiners, and building officials must complete at least 45 hours of continuing education to be provided by an organization that the local agency deems qualified.⁸

COMMENT

Chapter 623 was enacted to improve the quality of building inspections by requiring local construction inspectors, plans examiners, and building officials to satisfy these new requirements as established by Chapter 623.⁹ The authors of Chapter 623 believe that these inspectors and examiners are the last line of defense in the construction process and are best situated to find potentially

4. See CAL. HEALTH & SAFETY CODE § 18965 (enacted by Chapter 623) (defining “construction inspector” as a person who is hired by a local agency for the purpose of inspecting construction sites for compliance with the adopted uniform codes or standards).

5. See *id.* § 18966 (enacted by Chapter 623) (defining “plans examiner” as a person who is hired by a local agency for the purpose of performing construction plan review for compliance with adopted uniform codes or standards).

6. *Id.* §§ 18968, 18969 (enacted by Chapter 623); see *id.* § 18968 (enacted by Chapter 623) (stating that all construction inspectors, plans examiners and building officials who are not exempt from these requirements shall complete at least one year of training in order to become certified in California); *id.* § 18969 (enacted by Chapter 623) (requiring all construction inspectors, plans examiners and building officials to complete continuing education requirements); see also *id.* § 18967 (enacted by Chapter 623) (defining “building official” as a person invested with the responsibility for overseeing local code enforcement activities); Tracey Kaplan, *Panel Seeks More Seismic Training for Builders; Architects, Engineers, Contractors and Code Enforcement Officials Are Targeted for Increased Education*, L.A. TIMES, Nov. 12, 1994, at B3 (stating that the California Seismic Safety Commission recommends new laws requiring additional training and education for code enforcement officials).

7. CAL. HEALTH & SAFETY CODE § 18968(a) (enacted by Chapter 623). *But see id.* § 18968(b) (enacted by Chapter 623) (exempting any person who has been employed as a building inspector for not less than two years from these new regulations); *id.* § 18968(c) (enacted by Chapter 623) (stating that local agencies may still prescribe additional criteria for the certification of construction inspectors); *id.* § 18970 (enacted by Chapter 623) (establishing an exemption for registered professional engineers, licensed land surveyors, and licensed architects performing inspection services, unless these individuals are employed by any local agency); *id.* (stating further that construction inspectors or plans examiners employed by any city or county fire department, or any district providing fire protection, are also exempt from the new requirements of Chapter 623).

8. *Id.* § 18969(a) (enacted by Chapter 623); see *id.* (discussing the eligible providers of the required education, namely, community colleges or other organizations affiliated with code enforcement); *cf.* CONN. GEN. STAT. ANN. § 29-262(b) (West Supp. 1995) (establishing the necessary continuing education hours at 90).

9. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 717, at 1-2 (May 3, 1995); see *id.* (stating that it is illogical to have minimum criteria for design and building professionals, without having similar criteria for building inspectors, and concluding that building inspectors need to have additional knowledge and training to correctly perform their jobs); see also *Dresser v. City of Torrance*, 140 Cal. App. 2d 42, 43, 294 P.2d 962, 963 (1956) (stating that California needs a training program for all building inspectors).

dangerous defects.¹⁰

Another purpose of Chapter 623 is to create minimum levels of experience and training for construction inspectors, plans examiners, and building officials which would correlate with levels required of other building professionals.¹¹ Chapter 623 is specifically aimed at curing problems uncovered after the Northridge earthquake by the Seismic Safety Commission, which reported that much of the damage caused by the earthquake could have been averted with better code enforcement.¹²

The added requirements of Chapter 623 are not overly burdensome on the local agencies it affects as Chapter 623 merely codifies what nearly two-thirds of the local jurisdictions previously required in the form of certification and training.¹³

Ralph J. Barry

10. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 717, at 2 (May 3, 1995); *see id.* (stating that establishing some minimum professional standard for building inspectors will lead to improved inspections to ensure that buildings are built in compliance with state building codes).

11. *Id.* at 1; *see Kaplan, supra note 6* (stating that code enforcement officials need to receive additional training to be able to adequately perform their duties, while construction companies should hire architects or engineers to review sophisticated blueprints).

12. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 717, at 2-3 (May 3, 1995); *see id.* (determining that a significant portion of the 1994 Northridge earthquake damage was caused by inadequate design reviews, lack of understanding of the building code, misguided or incorrect construction practices, and most importantly, inadequate inspection or observation of construction); *see also Building Inspection Pact Was Needed; The Agreement Should Go Even Further, However, to Help Improve Seismic Safety*, L.A. TIMES, Feb. 19, 1995, at B18 (stating that building codes are adequately designed for safety, but many buildings have not been constructed to conform with those codes); Doug Smith, *Building Flaws Cited in Report on Quake; Seismic Standards: Better Enforcement of Current Codes Could Have Prevented Much Damage, Engineers Find*, L.A. TIMES, Dec. 8, 1994, at B1 (stating that a team of engineers commissioned by the State to examine the effects of the Northridge earthquake found that in many cases, failure of design, construction and inspection caused more damage than building code deficiencies).

13. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 717, at 2 (May 3, 1995); *see CAL. HEALTH & SAFETY CODE § 18968(c)* (enacted by Chapter 623) (stating that Chapter 623 is aimed primarily at individuals employed by local agencies, and thus local agencies can require even more training than required by Chapter 623).

Health and Welfare; controlled substances—addiction treatment

Family Code § 6929 (amended); Harbors and Navigation Code § 655 (amended); Health and Safety Code § 11875.1 (new); §§ 11054, 11055, 11153, 11215, 11217, 11218, 11219, 11220, 11222, 11483, 11755, 11875, 11876, 11877, 11877.5, 11877.6, 11877.7, 11877.8, 11877.9, 11877.13, 11877.14, 11878, 11880, 11970.5, 11971 (amended); Vehicle Code §§ 12806, 23152 (amended); Welfare and Institutions Code §§ 3154, 3200 (amended).

AB 1113 (Rogan); 1995 STAT. Ch. 455
(Effective September 2, 1995)

Existing law categorizes controlled substances¹ into five schedules and prohibits Schedule I substances from being prescribed,² but allows all substances in Schedules II through V to be prescribed.³ Existing law further provides for the establishment of programs to administer methadone, a Schedule II substance, to narcotic⁴ addicts for treatment of their addiction.⁵ Existing law also allows addicts

1. See CAL. HEALTH & SAFETY CODE § 11007 (West 1991) (defining “controlled substance” as a drug, substance, or immediate precursor which is listed in any schedule in the California Health and Safety Code §§ 11054, 11055, 11056, 11057, or 11058); *id.* § 11054 (amended by Chapter 455) (listing Schedule I of controlled substances as including, among other substances, certain opiates, hallucinogens, and depressants); *id.* § 11055 (amended by Chapter 455) (listing Schedule II of controlled substances as including certain opiates, stimulants, depressants, and hallucinogens); *id.* § 11056 (West Supp. 1995) (listing Schedule III of controlled substances as including certain stimulants, depressants, narcotic drugs, and anabolic steroids); *id.* 11057 (West Supp. 1995) (listing Schedule IV of controlled substances as including certain narcotic drugs, stimulants, and other substances).

2. See *id.* § 11027 (West 1991) (defining “prescription” as an oral or written order for a controlled substance given individually for the person for whom prescribed, made to the furnisher).

3. *Id.* §§ 11158, 11164 (West 1991 & Supp. 1995); see *id.* § 11158 (West 1991) (setting forth requirements and exceptions for those who may issue prescriptions of controlled substances in schedules II through V, but not authorizing the prescription of Schedule I substances); *id.* § 11164 (West Supp. 1995) (setting forth the required contents of written and oral prescriptions); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 1 (July 31, 1995) (stating that Schedule I substances may not be prescribed); *cf.* 21 U.S.C.A. § 812(b)(1) (West 1981) (requiring that before a drug is listed as a Schedule I substance, it must be found to have a high potential for abuse, no currently accepted medical use in treatment, and a lack of accepted safety for use under medical supervision).

4. See CAL. HEALTH & SAFETY CODE § 11019 (West 1991) (defining “narcotic drug” as including, but not limited to, any opiates or opium, cocaine, ecgonine, or actylfentanyl).

5. *Id.* §§ 11875-11882 (West 1991, Supp. 1995 & amended by Chapter 455); see *id.* (empowering the State Department of Alcohol and Drug Programs to develop and set forth licensure requirements for narcotics treatment programs); *id.* § 11875.1(a) (enacted by Chapter 455) (permitting methadone to be used for replacement narcotic therapy); *id.* §§ 11885-11896 (West 1991) (setting forth requirements for methadone program body fluids testing); CAL. CODE REGS. tit. 9, §§ 10010-10055 (1993) (setting forth requirements for licensure of methadone treatment programs); *cf.* LA. REV. STAT. ANN. § 40:1052 (West 1992) (authorizing an experimental program for the administration of methadone as a substitute for addictive drugs); MD. ANN. CODE art. 27, § 700F (1992) (requiring a methadone detoxification program for all addicted prisoners); NEV. REV. STAT. ANN. § 453.660(1) (Michie 1991) (authorizing an experimental program for treating narcotic addicts with methadone or other addictive drugs); N.Y. PUB. HEALTH LAW § 3351(2)-(5) (McKinney 1993) (allowing methadone to be administered to addicts who are on a waiting list for an authorized maintenance program, as a regime intended to withdraw the patient from addiction, or as part of an authorized substance abuse program).

participating in a methadone treatment program to operate boats and automobiles, even though they are addicted to a drug.⁶ Under prior law, levoalphacetyl-methadol (LAAM), another drug which eases the symptoms of heroine withdrawal, was a Schedule I substance.⁷

Chapter 455 transfers LAAM from Schedule I to Schedule II, and makes it available for the treatment of heroin addicts, the same as methadone.⁸

COMMENT

California instituted methadone programs in 1977 to help rehabilitate heroin addicts.⁹ Before the institution of methadone treatment programs, methadone had been used to ease withdrawal pains of heroin and opiate addicts when they were incarcerated.¹⁰

Chapter 455 is intended to provide a more convenient, effective, and financially viable option to methadone for narcotic addict treatment.¹¹ Methadone

6. CAL. HARB. & NAV. CODE § 655(e) (amended by Chapter 455); *see id.* (allowing participating addicts to operate vessels, manipulate water skis, aquaplanes, or similar devices); CAL. VEH. CODE § 12806(b) (amended by Chapter 455) (barring the Department of Motor Vehicles from refusing to issue a driver's license to any person addicted to drugs if that person is participating in a methadone treatment program); *id.* § 23152(c) (amended by Chapter 455) (permitting addicts participating in a methadone program to operate automobiles); CAL. WELF. & INST. § 3154 (amended by Chapter 455) (allowing persons released from a California Rehabilitation Center to participate in a methadone program without violating the condition of their release which requires them to abstain from the use of narcotics).

7. 1987 Cal. Stat. ch. 1174, sec. 1.5, at 4149 (amending CAL. HEALTH & SAFETY CODE § 11054(b)(3)); *see* CAL. HEALTH & SAFETY CODE § 11054(b)(3) (amended by Chapter 455) (excluding levoalphacetylmethadol from the listing of alphacetylmethadol); *cf.* N.Y. PUB. HEALTH LAW § 3306(b)(3) (McKinney 1993) (making alphacetylmethadol a Schedule I substance).

8. CAL. HEALTH & SAFETY CODE § 11054(b)(3) (amended by Chapter 455); *see id.* (excluding levoalphacetylmethadol from the more general listing of alphacetylmethadol as a Schedule I substance); *id.* § 11055(c)(10) (amended by Chapter 455) (listing levoalphacetylmethadol as a Schedule II substance); *id.* § 11875.1(b) (enacted by Chapter 455) (allowing levoalphacetylmethadol to be used in replacement narcotic therapy); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 2 (July 6, 1995) (stating that the purpose of AB 1113 is to provide for the treatment of heroine addicts by levoalphacetylmethadol as well as methadone); *cf.* MD. ANN. CODE art. 27, § 279(b) (1994) (making levoalphacetylmethadol a Schedule II substance); NEV. REV. STAT. ANN. § 453.660(1) (1991) (directing the health department to develop and implement a program for treatment of addicts using maintenance doses of methadone or other addictive drugs).

9. 1977 Cal. Stat. ch. 1252, sec. 301, at 4411-14 (enacting CAL. HEALTH & SAFETY CODE §§ 11875-11882); *see* CAL. HEALTH & SAFETY CODE § 11880 (amended by Chapter 455) (declaring that the intent of the Legislature in licensing narcotic treatment programs is to rehabilitate heroin addicts).

10. 1972 Cal. Stat. ch. 1407, sub. ch. 5, art. 2, at 3010 (amending CAL. HEALTH & SAFETY CODE § 11222); *see id.* (requiring the person in charge of the place of confinement to provide medical aid to persons suffering from symptoms of narcotic withdrawal); *see also* David L. Goldin, *Methadone Detoxification: A Non-Controversial Solution to In-Custody Narcotics Withdrawal*, 47 CAL. ST. B.J., 14, 15 (1972) (describing the use of methadone on incarcerated heroin addicts in California jails); *id.* at 15-16 (stating that although methadone is highly addictive, the euphoria associated with heroin injection is not present with an oral dose of methadone); *id.* at 18 (reporting that the symptoms of withdrawal from heroin include, but are not limited to, diarrhea, nausea, sharp abdominal pain, and leg cramps; that the addict is a sick man, and to force him to go through his withdrawal "cold turkey" is cruel and inhumane).

11. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 2 (July 6, 1995); *see id.* (discussing the benefits of using levoalphacetylmethadol over methadone for heroin addiction treatment); *see also* Letter from Fredrick H. Noteware, Associate Director of Governmental Relations, California Medical Association, to

requires the addict to visit the clinic on a daily basis for drug administration while LAAM only requires three visits per week, which reduces the burden on clinics, as well as addicts.¹²

With methadone, there is a potential for addicts to sell it on the street; since LAAM is never administered outside the clinic, though, there is no chance for addicts to sell it on the street.¹³ Furthermore, many addicts refuse to take methadone, and prefer heroin.¹⁴

Supporters argue that LAAM is needed to help protect the public from AIDS, hepatitis, crime, and other afflictions associated with heroin addiction.¹⁵

Michael A. Guiliana

Assemblymember Jim Rogan (Mar. 29, 1995) (copy on file with the *Pacific Law Journal*) (stating that levoalphacetylmethadol has undergone more than 20 years of intensive clinical testing and has proven to be as effective as methadone in the treatment of opiate addiction).

12. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 2 (July 6, 1995).

13. *Id.*; see Thomas J. Maier, *The Business of Addiction: Methadone in New York City*, *NEWSDAY*, June 12, 1989, at 3 (quoting Detective Carmelo Ortiz of the New York Police department in his belief that many patients leave the clinic, sell their methadone, and attract other addicts to the area); *id.* (quoting clinic patient, Anthony Cosba, in his assessment that about half of the patients at the 125th Street clinic sell their methadone); *Methadone Alternative Nears Approval*, *ALCOHOLISM & DRUG ABUSE WEEK*, May 31, 1993, at 4 (quoting Herbert Kleber, M.D., medical director for the Center for Addiction and Substance Abuse (CASA), stating that LAAM can be administered every three days which will markedly diminish or eliminate the diversion of methadone for illegal sales).

14. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 2 (July 6, 1995); see also Rosie Mestel & David Concar, *New Treatments for Addiction*, *WORLD PRESS REV.*, Mar. 1995, at 38 (stating that up to 80% of addicts who seek drug therapy treatments relapse within a year); *id.* (stating that clinics are hoping for new, longer-lasting heroin mimics like levoalphacetylmethadol).

15. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 2 (July 6, 1995); see *id.* (stating that there are approximately 150,000 heroin addicts in California who are the major carriers of certain incurable diseases); *id.* (citing a report which estimates that drug abusers caused \$3.1 billion in crime and medical costs in the years before they entered treatment, but following treatment the cost to taxpayers was cut in half); Letter from Walter Ling, M.D., Professor of Psychiatry and Chief of Substance Abuse Program, UCLA, to Assemblymember James Rogan (Mar. 14, 1995) (copy on file with the *Pacific Law Journal*) (stating that AB 1113 will directly contribute to preventing the spread of AIDS, hepatitis, and tuberculosis); see also *Prepared Statement of Dr. Alan I. Leshner, Director, National Institute on Drug Abuse, Department of Health and Human Services, National Institutes of Health National Before House Appropriations Subcommittee Hearings*, *Federal News Serv.*, Mar. 22, 1995, available in LEXIS, Nexis Library, Curnws File (stating that LAAM is effectively used in over half of the United States and is progressing towards use in many other states).

Health and Welfare; disclosure of immunization information

Health and Safety Code § 3396 (new).
AB 254 (Alpert); 1995 STAT. Ch. 314

Existing law requires county health officers to operate programs designed to provide immunizations to all persons required to be immunized.¹ Further, it requires that children receive certain immunizations before admission to school or licensed child care facilities.²

Chapter 314 states the Legislature's findings and intent regarding the need for immunizations and the need for better compliance with immunization policies.³ It empowers local health officers to operate immunization information systems which can disclose specified information regarding patients' medical records to the State Department of Health Services and local health departments.⁴ Chapter

1. CAL. HEALTH & SAFETY CODE § 3388 (West 1990). *But see* Michael J. Jordan, *Clinics Hope for Shot in the Arm*, SACRAMENTO BEE, Apr. 22, 1993, at N3 (indicating that the increased cost of vaccinations, lack of accessible county programs, and lack of community awareness about these programs has led to less than half of American two-year-olds being immunized).

2. CAL. HEALTH & SAFETY CODE § 3381 (West Supp. 1995); *see id.* (listing the following as required immunizations: diphtheria, haemophilus influenza type b, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, and any other diseases deemed appropriate by the State Department); *see also* CAL. EDUC. CODE § 49403(a) (West 1993) (mandating that school district boards cooperate with local health officers to prevent the spread of communicable diseases in school-age children); 56 CAL. JUR. 3D *Schools* § 285 (1980) (stating that school district governing boards must cooperate with local health officers regarding the prevention and control of communicable diseases and may expend funds for those purposes); *cf. In re Christine M.*, 595 N.Y.S.2d 606, 618 (N.Y. Fam. Ct. 1992) (determining that a child was neglected due to her father's refusal to have the child immunized based on medical and scientific concerns). *But see* CAL. HEALTH & SAFETY CODE § 3385 (West 1990) (permitting an exemption to the immunization requirement if it is contrary to a patient's beliefs); *id.* § 3386 (West 1990) (allowing an exemption from the immunization requirement based on a licensed physician's written statement which provides that the patient's medical condition makes immunization unsafe). *See generally* James A. Baker, *Court Ordered Non-Emergency Medical Care for Infants*, 18 CLEV.-MAR. L. REV. 296 (1969) (examining the court's power to order non-emergency medical care, such as immunizations, for infants in spite of parental objections); Stuart J. Baskin, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974) (debating the justifications and limitations for state intrusion into child-welfare controversies and child rearing practices); John C. Williams, Annotation, *Power of Court or Other Public Agency to Order Medical Treatment for Child Over Parental Objections Not Based on Religious Grounds*, 97 A.L.R. 3D 421 (1980 & Supp. 1995) (discussing the authority of a court or public agency to order medical treatment for a child whose life is endangered, including a child who has not been immunized during an epidemic despite parental objections); Jay M. Zitter, Annotation, *Power of Court or Other Public Agency to Order Medical Treatment Over Parental Religious Objections for Child Whose Life is Not Immediately Endangered*, 21 A.L.R. 5TH 248, 256 (1994) (stating that the authority of a court or public agency to require immunization prior to school attendance outweighs parental religious objections due to a greater interest in protecting the community at large).

3. 1995 Cal. Legis. Serv. ch. 314, sec. 1, at 1552-53; *see California Children Need Preventive Care*, S.F. CHRON., Sept. 8, 1994, at A20 (noting Medi-Cal contractors often fail to provide preventive services, such as immunizations, to children); Loring Dales et al., *Measles Epidemic from Failure to Immunize*, W. J. OF MED., Oct. 1993, at 455 (analyzing the increased incidence of measles epidemics and finding that the key to preventing future epidemics is immunization of preschool-age children, especially in low-income communities).

4. CAL. HEALTH & SAFETY CODE § 3396(b), (c) (enacted by Chapter 314); *see id.* (delineating the following as disclosable information: (1) a patient's name, parents' names, or guardians' names; (2) a patient's birthdate; (3) immunization types and dates received by a patient; (4) immunization manufacturer and lot

314 also requires local health officers to inform patients, their parents, or their guardians that they have the right to examine the information, correct any errors, and refuse to consent to the disclosure of information.⁵ Finally, Chapter 314 provides that immunization information may only be used to provide immunization services and reminders, to facilitate third party payments, and to provide statistical information which does not identify patients.⁶

COMMENT

Immunizations are necessary, particularly for infants and pre-school age children, to preclude the spread of contagious and potentially fatal childhood diseases.⁷ Timely immunizations are one of the most cost-effective means of

number; (5) adverse reactions to immunizations; (6) other non-medical information necessary to establish a patient's unique identity and record; (7) a patient's, parents', or guardians' current address and telephone number; (8) a patient's gender; and (9) a patient's birthplace); *see also id.* § 3110 (West 1990) (empowering health officers who know or have reason to believe a person is infected with a communicable disease to take actions as may be necessary to prevent the spread of disease); *In re Shepard*, 51 Cal. App. 49, 51, 195 P. 1077, 1077 (1921) (finding that a health officer's reason to believe a person has an isolable disease must be based on more than a mere suspicion); *cf.* 51 Op. Cal. Att'y Gen. 217, 218-21 (1968) (discussing the State Board of Public Health's authority to disclose the identities of persons with viral hepatitis to blood banks in order to promote public health and safety); 28 Op. Cal. Att'y Gen. 244, 245-47 (1956) (commenting on the need to establish regulations which require clinical laboratories to report communicable disease test results to local authorities). *See generally* 39 AM. JUR. 2D *Health* § 29 (1995) (describing the use of quarantine powers to prevent communicable diseases); 37 CAL. JUR 3D *Health and Sanitation* § 13 (1995) (explaining the general duty to prevent the spread of communicable diseases, which includes exclusion of unimmunized children from school).

5. CAL. HEALTH & SAFETY CODE § 3396(e) (enacted by Chapter 314); *see id.* § 3396(f) (enacted by Chapter 314) (prohibiting the sharing of immunization information if the patient, the patient's parent, or the patient's guardian refuses the sharing of such information); *id.* § 3396(g) (enacted by Chapter 314) (mandating that, upon request of the patient, the patient's parent, or the patient's guardian, recipients of immunization information—such as local health departments, or the State Department of Health Services—must (1) provide the names and addresses of persons and agencies with whom the immunization information has been shared, and (2) desist from sharing the immunization information after the receipt date of the request); *id.* § 3396(h) (enacted by Chapter 314) (requiring that local health departments or the State Department of Health Services, upon notification, must correct errors in their records regarding immunization information).

6. *Id.* § 3396(d) (enacted by Chapter 314); *see ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 254*, at 3 (May 11, 1995) (mentioning that the Governor vetoed similar legislation, because the legislation allowed the release of immunization information to schools and child care providers).

7. *See* 1995 Cal. Legis. Serv. ch. 314, sec. 1(a), at 1552 (noting that early childhood immunizations are imperative to prevent the spread of potentially fatal diseases, such as the 1988-1991 California measles epidemic which resulted in 17,000 cases, 3,400 hospitalizations, 70 deaths, and \$30 million in costs); *id.* sec. 1(b), at 1552 (reiterating the State Department of Health Services' finding that 30% to 40% of California preschool children are inadequately immunized); *id.* sec. 1(c), at 1552 (recognizing that children between birth and two years of age have the highest risk of contracting diseases with serious complications which are preventable by vaccination); *id.* sec. 1(d), at 1553 (indicating that although many children are required to be immunized prior to school enrollment, this requirement leaves infants and pre-school-age children unprotected); Anita Cecchin, *Childhood Immunizations Getting a Shot in the Arm*, MED. WORLD NEWS, Jan. 1993, at 45 (describing the need to have children under the age of two vaccinated); *id.* (mentioning that over half of all children under the age of two are not appropriately vaccinated and some urban areas experience rates as high as 85% to 90%); *id.* (emphasizing that immunization-preventable diseases have resurged to epidemic levels); Gary L. Freed et al., *Childhood Immunization Programs: An Analysis of Policy Issues*, MILBANK Q., Mar. 22, 1993, at 65 (analyzing the benefits of early childhood immunization and recognizing concerns that

preventive medical care.⁸ The lack of a coordinated immunization information system leads to inadequate immunization and unnecessary costs.⁹ Chapter 314 is intended to protect public health and help more children receive timely immunizations through the use of better information systems.¹⁰

recent immunization-preventable epidemics indicate a need for a more coordinated immunization policy); Mary Graham, *Unprotected Children; Unvaccinated Children in U.S.*, THE ATLANTIC, Mar. 1993, at 20 (detailing the need for a continuous, coordinated immunization effort in order to prevent the increasing rate of immunization-preventable diseases in both rural and urban children across the United States); Walter A. Orenstein & Roger H. Bernier, *Crossing the Divide from Vaccine Technology to Vaccine Delivery: The Critical Role of Providers*, JAMA, Oct. 12, 1994, at 1138 (reporting that underimmunization is a prevalent problem in all population groups); Michael Scheiber & Neal Halfon, *Immunizing California's Children: Effects of Current Policies on Immunization Levels*, W. J. OF MED., Oct. 1990, at 400 (recognizing that the immunization rate of California's children is below the national average); see also Richard J. Lemen et al., *Pediatric Lung Diseases; Task Force on Research and Education for the Prevention and Control of Respiratory Diseases*, CHEST, Sept. 1992, at 232S (revealing that respiratory disease causes 30% of all infant deaths, yet it is easily preventable through immunization programs, improved nutrition, effective prenatal care, and existing technology application); Chester A. Robinson et al., *Progress on the Childhood Immunization Initiative*, PUB. HEALTH REP., Sept. 1994, at 594 (specifying that the nationwide movement for health care reform includes a goal to immunize 90% of 2-year old children by 1996).

8. See 1995 Cal. Legis. Serv. ch 314, sec. 1(h), at 1553 (explaining that immunizations are one of the most cost-effective types of preventive health care and save \$14 in costs spent treating and managing disease outbreaks for every one dollar spent on immunizations); Chester A. Robinson et al., *The President's Child Immunization Initiative—A Summary of the Problem and the Response*, PUB. HEALTH R., July 1993, at 419 (enumerating the cost benefits of vaccinations); Scheiber & Halfon, *supra* note 7, at 400 (specifying that measles vaccination has resulted in a cost savings of \$5.1 billion during the first 20 years it was licensed in the United States and the overall cost savings ratio for the Diphtheria, Tetanus, Pertussis vaccine is \$5.70 to every \$1 spent on immunizations). *But see* Orenstein & Bernier, *supra* note 7 (detailing the rising costs of vaccinations and their potential to deter widespread immunization).

9. See 1995 Cal. Legis. Serv. ch. 314, sec. 1(f), at 1553 (asserting that immunization policies are thwarted by incomplete health care provider records, lack of parental awareness, and children's treatment by multiple health care providers); *id.* sec. 1(g), at 1553 (indicating that poor recordkeeping regarding immunizations and vaccinations is both medically unwanted and costly); F.T. Cutts et al., *Surveillance for the Expanded Programme on Immunization*, WORLD HEALTH ORG. BULL., Sept. 1993, at 633 (discussing the need for a surveillance system to collect and disseminate immunization data in order to institute a world-wide immunization policy); Graham, *supra* note 7 (detailing the need for an immunization information system in order to inform parents, doctors, and policy-makers which vaccinations are necessary regardless of where children are being treated); see also Orenstein & Bernier, *supra* note 7 (urging health care providers to institute their own immunization information systems to combat underimmunization until a more comprehensive nationwide system is developed); cf. Robinson et al., *supra* note 8 (emphasizing that one of the keys to improved utilization of immunization services is knowledge); Richard K. Zimmerman & G. Scott Giebink, *Childhood Immunizations: A Practical Approach for Clinicians*, AM. FAMILY PHYS., Apr. 1992, at 1759 (describing how patient reminder systems and increased physician knowledge about vaccinations and their effects, even at the health care provider strata, would help increase immunization levels). *But see* Cecchin, *supra* note 7 (arguing that low immunization rates are due to some physicians' reluctance to administer vaccinations because they believe them to be unwarranted, costly, and a liability risk); Theodore G. Ganiats et al., *Universal Neonatal Hepatitis B Immunization—Are We Jumping on the Bandwagon Too Early?*, J. OF FAM. PRAC., Feb. 1993, at 147 (debating the need to vaccinate children against Hepatitis B).

10. 1995 Cal. Legis. Serv. ch. 314, sec. 1(i), at 1553; see ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 254, at 2 (July 15, 1995) (specifying AB 254's chief purpose is to create a database for children's immunization status); SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF AB 254, at 3 (June 21, 1995) (revealing the sponsor's belief that 30-40% of California pre-school age children have incomplete or inaccurate immunization records due to the inability of health providers to share vaccination records); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 254, at 2 (May 11, 1995) (stating that AB 254 aids immunization registries by facilitating information sharing); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1171, at 2 (July 4, 1994) (advocating the implementation of an immunization information system similar to

Chapter 314 addresses potential privacy issues regarding the release of the immunization information by allowing patients, their parents, or their guardians to opt out of the immunization disclosure system at any time.¹¹ Opponents argue that signed consent is a better safeguard.¹²

Kelly L. McDole

Health and Welfare; hazardous materials—business plan for emergency response

Health and Safety Code § 25503.5 (amended).
AB 1324 (Boland); 1995 STAT. Ch. 144

Existing law requires any business that handles a hazardous material¹ as a

AB 254's which would raise childhood immunization levels as much as 40%, discussing the benefits of such systems due to their timely provision of immunization information, and recognizing the lowered incidence of negative reactions caused by duplicate immunizations because of such systems); *see also Doctor Urges Parents to Protect Their Children with Vaccinations*, L.A. TIMES, Sept. 8, 1985, at 19 (reporting a doctor's belief that delaying immunization until children reach school age leaves them susceptible to serious diseases); Danielle Starkey, *Children in Crisis*, CAL. J., Nov. 1992, at 528 (predicting the increased occurrence of communicable disease epidemics due to inadequate immunization). *But see* S.S. Hutchins et al., *Studies of Missed Opportunities for Immunization in Developing and Industrialized Countries*, WORLD HEALTH ORG. BULL., Sept. 1993, at 549 (arguing that the best approach for increasing immunization coverage is to vaccinate all eligible persons at every opportunity).

11. CAL. HEALTH & SAFETY CODE § 3396(g) (enacted by Chapter 314); *see* SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF AB 254, at 3 (June 21, 1995) (discussing the sponsor's attempt to address the Governor's concerns regarding the lack of a refusal to disclose provision in similar vetoed legislation); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 254, at 2-3 (May 11, 1995) (explaining that AB 254 addresses the Governor's concerns, regarding an affected person's lack of opportunity to refuse release of his or her address and telephone number and the need for the sharing of this information with schools and child care providers, by allowing the patient, their parent, or their guardian to elect, at any time, not to participate in the system, by allowing the patient, their parent, or their guardian to correct errors, and by not releasing information to schools and child care providers); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 254, at 2 (July 15, 1995) (emphasizing that tuberculosis screening information was excluded from the database due to its potentially stigmatizing nature). *But see* Scheiber & Halfon, *supra* note 7 (discussing the effectiveness of requiring proof of immunization prior to school enrollment as a means of increasing vaccination coverage).

12. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF AB 254, at 3 (June 21, 1995).

1. *See* CAL. HEALTH & SAFETY CODE § 25260(d) (West Supp. 1995) (defining "hazardous material" as a substance or waste that, because of its physical, chemical, or other characteristics, may pose the risk of endangering human health or safety or of degrading the environment); *see also id.* § 25400(d)(1) (West 1992) (defining "hazardous substance" as a "substance that presents a threat to the public because of toxicity, radioactivity, flammability, or other characteristic dangerous to the public health or the environment"); 16 C.F.R. § 1500.3(b)(4)(i)(A) (1995) (defining a "hazardous substance" as any substance or mixture of substances that is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonable foreseeable handling or use).

compressed gas in quantities equal to 200 cubic feet or more, at any given time, to submit a completed hazardous materials inventory report each year to the responsible local agency, and to prepare and implement a business plan² for emergency response to a release³, or threatened release⁴, of the hazardous substance.⁵ Existing law exempts from these requirements oxygen and nitrous oxide, stored in quantities of not more than 1000 cubic feet of each material, at the place of business of a physician, dentist, podiatrist, veterinarian, or pharmacist.⁶

Chapter 144 adds nitrogen to the list of hazardous materials exempted from the inventory and business plan requirements when the nitrogen is stored at the place of business of a physician, dentist, podiatrist, veterinarian, or pharmacist, in quantities of not more than 1000 cubic feet.⁷

COMMENT

The rationale behind Chapter 144 is that nitrogen stored in small quantities in health care providers' offices presents little, if any, toxic risk and that emergency personnel can simply assume that any dental office will have one or both tanks on the premises.⁸ Proponents argue that nitrogen is a nonflammable gas and poses little risk in the small quantities equal to, or less than, oxygen or nitrous oxide which are already exempted.⁹

2. See CAL. HEALTH & SAFETY CODE § 25501(e) (West 1992) (defining "business plan" as a plan for each facility, site, or branch of a business which meets the requirements of California Health and Safety Code § 25504); see also *id.* § 25504(b) (West 1992) (requiring emergency response plans to include (1) immediate notification of local emergency rescue personnel, (2) procedures to minimize any potential harm or damage from a release or threatened release, and (3) evacuation plans and procedures for the site); *Ohio Chamber of Commerce v. State Emergency Response Comm'n*, 597 N.E.2d 487, 491 (Ohio 1992) (finding that individual states are permitted to enforce their own emergency response plans beyond the scope of federal requirements set forth in the Emergency Right-to-Know Act of 1986).

3. See CAL. HEALTH & SAFETY CODE § 25501(o) (West 1992) (defining "release" as "any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, unless permitted or authorized by a regulatory agency").

4. See *id.* § 25501(q) (West 1992) (defining "threatened release" as "a condition creating a substantial probability of harm, when the probability and potential extent of harm makes it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or the environment").

5. *Id.* § 25503.5(a) (amended by Chapter 144); see 77 Op. Cal. Att'y Gen. 227 (1994) (providing that any business which handles hazardous material is required to establish and implement a business plan for an emergency response to a hazardous materials release or threat thereof).

6. *Id.* § 25503.5(b) (amended by Chapter 144).

7. *Id.* § 25503.5(b)(1) (amended by Chapter 144).

8. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1324, at 2 (May 17, 1995).

9. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1324, at 2 (July 3, 1995); see *id.* (stating that the California Dental Association supports AB 1324 because nitrogen is a nonflammable gas and poses little risk in the small quantities used by oral surgeons); see also Letter from William J. Keese, Director of Governmental Relations for the California Dental Association, to Governor Pete Wilson (July 10, 1995) (copy on file with the *Pacific Law Journal*) (stating that the California Dental Association believes that extending the hazardous release plan exemption to nitrogen is entirely consistent with the original intent of the Legislature in determining the materials to be exempt from a hazardous materials inventory report).

Opponents of Chapter 144 contend that the intent of the Hazardous Materials Disclosure Program is to provide the public and emergency responders with information relating to the types of hazardous materials and their location before an emergency.¹⁰ They believe Chapter 144 will further limit, and in many cases eliminate, the information local emergency response agencies now receive.¹¹

Todd D. Ruggiero

Health and Welfare; health care services—breast feeding consultations

Health and Safety Code §§ 319.50, 319.55 (new).
AB 977 (McDonald); 1995 STAT. Ch. 463

Under existing law, the Department of Health Services (Department)¹ is responsible for the administration of the State's maternal and child health programs.² Chapter 463 mandates that the Department develop and implement a public service campaign that encourages mothers to breast-feed their infants.³

Additionally, existing law empowers the Department to regulate and license the various health facilities providing medical care throughout the state.⁴ Chapter 463 requires general acute care hospitals⁵ and special hospitals⁶ providing

10. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1324, at 2 (July 3, 1995); *see id.* (stating that the Apple Valley Fire Protection District believes that the lack of information, specifically fire, health, reactivity, and special hazards information, will be detrimental to the community and responding firefighters at the scene of an accident). *See generally* 42 U.S.C.A. § 11001-11050 (West Supp. 1995) (enacting the Emergency Planning and Community Right-to-Know Act of 1986, which established emergency planning and notification requirements to protect the public in the event of a release of a hazardous substance). *But see* Letter from William J. Keese, *supra* note 9 (stating that the California Dental Association believes that the exemption of nitrogen from hazardous materials inventory reports will not create a hazard for emergency personnel or for the general public).

11. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1324, at 2 (July 3, 1995).

1. *See* CAL. HEALTH & SAFETY CODE § 100 (West 1990) (establishing the state Department of Health Services within the Health and Welfare Agency).

2. *Id.* § 300 (West 1990).

3. *Id.* § 319.50 (enacted by Chapter 463); *cf.* MINN. STAT. ANN. § 145.894 (West Supp. 1995) (mandating a campaign to promote breast feeding); N.Y. PUB. HEALTH LAW § 2522 (McKinney 1993) (providing for health education regarding prenatal care, including breast feeding).

4. CAL. HEALTH & SAFETY CODE § 1250.1 (West Supp. 1995); *see id.* (granting power to the Department to regulate and license any health facility, including general acute care hospitals, nursing facilities, intermediate care facilities, acute psychiatric centers, chemical dependency clinics, congregate living health facilities, pediatric day health and respite care facilities, and correctional treatment centers).

5. *See id.* § 1250(a) (West Supp. 1995) (defining "general acute care hospital" as a health facility having a governing body with overall administration and professional responsibility, and having an organized staff that provides 24-hour inpatient care such as, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary service).

6. *See id.* § 1250(f) (West Supp. 1995) (defining "special hospital" as a health facility having a governing body with overall administration and professional responsibility, and having an organized medical staff that provides inpatient or outpatient maternity care).

maternity care to make available an optional breast-feeding consultation to each maternity patient.⁷ The consultation must be made available during the hospitalization associated with the delivery.⁸

Chapter 463 also permits the hospital to simply inform the mother of where to receive information on breast feeding.⁹

COMMENT

Enactment of Chapter 463 demonstrates the State's recognition of the need to educate expectant mothers about the benefits and myths of breast-feeding.¹⁰ The California Nurses Association (CNA) believes that the increasing number of working mothers has resulted in fewer mothers who breast-feed.¹¹ The CNA advocates that the nutritional needs of infants are better served by breast milk rather than formula.¹²

Furthermore, the CNA contends that breast-feeding "contributes to an infant's immunological and psychological development, creates proper jaw and mouth formation, [and] enhances antibody response to vaccines."¹³ Additionally, studies show that breast-fed babies have lower death rates, and mothers who decline to breast-feed demonstrate an increased rate of breast and ovarian cancers.¹⁴

7. *Id.* § 319.55(a) (enacted by Chapter 463); *see id.* § 319.55(d) (enacted by Chapter 463) (stating that the patient may decline the consultation); *see also id.* § 319.55(b) (enacted by Chapter 463) (providing that the consultant may be a registered nurse with maternal and newborn care experience, if such a nurse is available).

8. *Id.* § 319.55(c) (enacted by Chapter 463).

9. *Id.* § 319.55(a),(c) (enacted by Chapter 463).

10. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 977, at 2 (June 1, 1994) (stating that the California Nurses Association intends to encourage, through education and instruction, 75% of new mothers to decide in favor of breast-feeding); *see also* Joan M. Bedinghaus & Joy Melinkow, *Prompting Successful Breast-Feeding Skills*, 45 AM. FAM. PHYS. 1309 (1992) (highlighting the benefits of breast-feeding goals); Gary L. Freed, *Breast-Feeding: Time to Teach What We Preach*, 269 JAMA 243 (1993) (discussing declining rates of breast-feeding, describing the need to train and educate physicians regarding breast-feeding, and issuing recommendations for educational programs for residents and physicians).

11. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 977, at 2 (June 1, 1995).

12. *Id.*; *see Position of the American Dietetic Association: Promotion and Support of Breast-Feeding*, 93 J. AM. DIETETIC ASS'N 467 (1993) (suggesting that breast feeding is desired due to the nutritional and immunological benefits for the infant, the physiological, social, and hygienic benefits of the breast-feeding process for both mother and infant, and the economic benefits to all involved).

13. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 977, at 2 (June 1, 1995); *see Marketing of Infant Formulas, ADA Timely Statement*, 89 J. AM. DIETETIC ASS'N 268 (1989) (concluding the nutritional and immunological benefits of human milk are well documented).

14. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 977, at 1-2 (July 17, 1995); *see Breast vs. Bottle as an Infant May Affect Cancer Risk as an Adult*, ENV'T NUTRITION, Dec. 1994, at 8 (discussing a recent study of women between the ages of 40 and 85 which suggests that not only does breast-feeding reduce a woman's risk of developing breast cancer, but it also lowers the risk of the child developing breast cancer as well); *Breast Feeding and Cancer Prevention*, PEDIATRICS FOR PARENTS, Mar. 1994, at 1 (stating that "after reviewing almost 6,000 cases of breast cancer, researchers found a 22% reduced risk among premenopausal woman with a history of lactating").

Because Chapter 463 mandates a new level of service, some suggest that the consumer will ultimately bear the cost of providing the consultations.¹⁵

Anthony A. Babcock

Health and Welfare; health care service plans—toll-free telephone number for receiving complaints and prohibition of compensation to claim reviewers

Health and Safety Code § 1368.02 (new); § 1399.56 (amended);
Insurance Code § 796.02 (amended).
AB 73 (Friedman); 1995 STAT. Ch. 787

Under existing law, the Knox-Keene Health Care Service Plan Act of 1975,¹ the Commissioner of Corporations licenses and regulates health care service plans.² Existing law also provides for the regulation of disability insurance policies by the Insurance Commissioner.³ Furthermore, existing law specifies certain requirements which health care service plan contracts and disability

15. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 977, at 1 (July 30, 1995) (stating “costs could be substantial if most maternity patients choose to have the consultation,” and that such costs would be absorbed by the General Fund and federal funds to the extent that Medi-Cal maternity and postpartum rates are adjusted to cover the new costs); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 977, at 2 (June 1, 1995) (concluding that consumers will ultimately incur an increase in health care premiums).

1. See CAL. HEALTH & SAFETY CODE §§ 1340-1399.64 (West 1990, Supp. 1995, enacted by Chapter 787 & amended by Chapter 787) (setting forth the Knox-Keene Health Care Service Plan Act of 1975); see also *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 504 (9th Cir. 1978) (holding that Congress unmistakably intended the Employee Retirement Income Security Act (ERISA) of 1974 to preempt California’s Knox-Keene Health Care Service Plan Act of 1975 to the extent that Knox-Keene seeks to regulate ERISA covered employee benefit plans), *cert. denied*, 439 U.S. 831 (1978). See generally 29 U.S.C.A. §§ 1001-1381 (West 1985 & Supp. 1995) (setting forth ERISA).

2. CAL. HEALTH & SAFETY CODE § 1341 (West 1990); see *id.* § 1346 (West Supp. 1995) (delineating the powers of the Commissioner of Corporations); see also *id.* § 1342 (West 1990) (stating the Legislature’s intent to promote the delivery of health and medical care to Californians who enroll in, or subscribe for services rendered by, a health care service plan by: (1) reaffirming the role of the professional as the one to determine the patient’s health needs, (2) assuring the education of subscribers and enrollees as to available benefits and services to foster rational consumer choice, (3) prosecuting those who fraudulently solicit or use deceptive practices which hinder rational consumer choice, (4) helping to assure the public of the best possible health care at the lowest possible cost by transferring the financial risk from patients to providers, (5) promoting effective representation of the interests of subscribers and enrollees, (6) assuring the financial stability by proper regulations, and (7) assuring the continuation of available and accessible health and medical services); *id.* § 1345(f) (West Supp. 1995) (defining “Health care service plan” as any person who provides health care services to subscribers or enrollees, or who pays for or reimburses any part of the cost for such services, in return for a prepaid or periodic charge to such subscribers or enrollees); *Van de Kamp v. Gumbiner*, 221 Cal. App. 3d 1260, 1285, 270 Cal. Rptr. 907, 922 (1990) (holding that the Legislature, in granting authority to regulate and supervise health care plans to the Department of Corporations, intended to occupy the field and to supplant the Attorney General’s common law authority with respect to such plans).

3. CAL. INS. CODE § 12921 (West 1988); see *id.* § 685.3 (West 1993) (stating that the Insurance Commissioner has the duty to initiate the enforcement and execution of insurance provisions in the law).

insurance policy contracts must meet.⁴ A willful violation of the Knox-Keene Health Care Service Plan Act of 1975 constitutes a misdemeanor.⁵

Existing law further prohibits persons retained by a health care service plan or a disability insurer from reviewing claims for health care services, or from being compensated based on a percentage of the amount by which a claim is reduced for payment.⁶ Chapter 787 prohibits both health care service plans and disability insurers from paying any person to review claims based on either a percentage of the amount claims are reduced or the number or value of claims denied.⁷

Lastly, existing law requires the Insurance Commissioner to establish a program to investigate complaints, to respond to inquiries, and to bring enforcement actions against insurers.⁸ The program must, among other things, install a toll-free telephone number to handle complaints and inquiries.⁹

4. CAL. HEALTH & SAFETY CODE § 1367 (West Supp. 1995); *see id.* (listing the requirements each health care service plan contract must meet); *see also* CAL. INS. CODE §§ 10110-10198.8 (West 1993, Supp. 1995 & enacted by Chapter 787) (discussing disability insurance law).

5. CAL. HEALTH & SAFETY CODE § 1390 (West 1990); *see id.* (stating that a willful violation of this chapter is punishable by a fine of up to \$10,000, or imprisonment in a state prison or county jail for not more than one year, or is punishable by both a fine and imprisonment, except that no person may be imprisoned for a violation of any rule or order if it is proven that such person had no knowledge of the rule or order); *see also* CAL. PENAL CODE § 17 (West Supp. 1995) (defining a misdemeanor).

6. CAL. HEALTH & SAFETY CODE § 1399.56 (amended by Chapter 787); CAL. INS. CODE § 796.02 (amended by Chapter 787).

7. CAL. HEALTH & SAFETY CODE § 1399.56 (amended by Chapter 787); CAL. INS. CODE § 796.02 (amended by Chapter 787); *see* Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 574, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973) (holding that insurance companies have an implied-in-law duty of good faith and fair dealing with other parties to a contract of insurance); *see also* Richard B. Graves III, Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395, 395 (1990) (advocating a shift in the focus of the bad-faith cause of action from the conduct of the employee to the incentives and policies created by the employer insurance company). *See generally* Caroll J. Miller, Annotation, *What Constitutes Bad Faith on Part of Insurer Rendering It Liable for Statutory Penalty Imposed for Bad Faith in Failure to Pay, or Delay in Paying, Insured's Claim*, 33 A.L.R. 4TH 579 (1984) (discussing state and federal cases wherein the courts have assessed what constitutes "bad faith" under a state statute imposing a penalty on an insurer for a bad-faith refusal to pay, or delay in paying, the claim of an insured).

8. CAL. INS. CODE § 12921.1 (West Supp. 1995); *id.* § 12921.3 (West Supp. 1995).

9. *Id.* § 12921.1(a)(1) (West Supp. 1995); *see id.* § 12921.1(a) (West Supp. 1995) (mandating that the program to investigate complaints and respond to inquiries include, but not be limited to, the following: (1) a toll-free number dedicated to the handling of complaints and inquiries; (2) public service announcements to inform consumers of the toll-free telephone number and how to register a complaint or make an inquiry; (3) a standardized complaint form designed to assure the proper registration and tracking of complaints; (4) retention of complaint records for at least three years after the complaint has been closed; (5) guidelines for public dissemination of complaint and enforcement information on individual insurers; (6) procedures and average processing times for each step of complaint mediation, investigation, and enforcement; (7) a list of criteria to determine which violations should be pursued and enforcement guidelines that set forth appropriate penalties based on the nature, severity, and frequency of the violations; (8) referral of complaints not within the department's jurisdiction to the appropriate public or private agency; (9) complaint handling goals that can be tested against surveys carried out pursuant to California Insurance Code § 12921.4(a); and (10) inclusion in its annual report to the Governor, as required by California Insurance Code § 12922, detailed information regarding the program required by this section); *see also id.* § 12921.4(a) (West Supp. 1995) (declaring that the commissioner must, upon receipt of a written complaint regarding an insurance claim, policy, or alleged misconduct of such an agency, notify the complainant within 10 working days of receipt of the complaint;

Chapter 787 requires the Commissioner of the Department of Corporations to establish and maintain a toll-free telephone number for the purpose of receiving complaints regarding health care service plans.¹⁰ Chapter 787 further requires every health care service plan to publish this toll-free number on certain documents issued by the plan by specified dates, together with a prescribed statement explaining that the toll-free number is available for the purpose of receiving complaints about plans.¹¹

COMMENT

In 1993, a Riverside County jury awarded the Fox family an \$89 million dollar verdict against Health Net, the second-largest Health Maintenance Organization (HMO) in California.¹² Health Net denied Ms. Fox a \$150,000 bone marrow transplant for breast cancer, asserting that the procedure was experimental.¹³ Although Health Net eventually reached an out of court settlement

thereafter, the commissioner must notify the complainant within 30 days of the final action taken on the complaint); *id.* § 12922 (West Supp. 1995) (requiring that the commissioner, on or before the first day of August of each year, make a report to the Governor containing information on the reports which have been filed in his or her office, and showing, generally, the condition of the insurance business and interests in this state, and other matters concerning insurance, as well as a detailed verified statement of the amount of moneys received by the commissioner's office, along with a statement explaining the purposes of those moneys).

10. CAL. HEALTH & SAFETY CODE § 1368.02(a) (enacted by Chapter 787); *cf.* ILL. ANN. STAT. ch. 305, para. 5/5-16.3(e) (Smith-Hurd Supp. 1995) (requiring the Illinois Department to maintain a toll-free telephone number for program enrollees' use in reporting problems with managed health care entities); KY. REV. STAT. ANN. § 304.17A-160(5) (Baldwin Supp. 1994) (stating that the Kentucky Health Policy Board shall broadly publicize a twenty-four hour toll-free telephone number for information on available health care benefit plans); TEX. REV. CIV. STAT. ANN. art. 4495b(S)(3) (West Supp. 1995) (stating that the Texas State Board of Medical Examiners must list, along with the regular telephone number, a toll-free telephone number for presenting complaints about a health professional if the toll-free number is established under other state law).

11. CAL. HEALTH & SAFETY CODE § 1368.02(b), (c) (enacted by Chapter 787); *see id.* § 1368.02(b) (enacted by Chapter 787) (mandating that every health care service plan publish the required toll-free number on every new plan contract, evidence of coverage, copies of plan grievance procedures, plan complaint forms, and all written notices to enrollees required under the grievance process of the plan). This section requires that the toll-free number be displayed in each of these documents in 12-point boldface type in the following regular type statement:

The California Department of Corporations is responsible for regulating health care service plans. The Department has a toll-free telephone number (1-(800)-____-____) to receive complaints regarding health plans. If you have a grievance against the health plan, you should contact the plan and use the plan's grievance process. If you need the Department's help with a complaint involving an emergency grievance or with a grievance that has not been satisfactorily resolved by the plan, you may call the Department's toll-free telephone number.

Id.; *id.* § 1368.02(c) (enacted by Chapter 787) (stating that if the plan's revised evidence of coverage is not published and distributed to all enrollees by April 1, 1996, the plan must provide all enrollees the specified statement no later than January 1, 1997 in a written notification document addressing only the grievance process, and each plan's revised evidence of coverage must include the specified statement); *see also id.* § 1368 (West 1990) (setting forth the grievance system for health care service plans).

12. Greg Miller, *Lawyer Makes It His Business to Fight HMOS*, L.A. TIMES, Aug. 16, 1994, at 3.

13. *Id.*; *see id.* (reporting that Ms. Fox died at age 40 in April, 1993, of breast cancer); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 73, at 2 (June 1, 1995) (noting that the jury in this case determined that Health Net refused the treatment to save money, and that the denial of the treatment reduced the patient's chance of survival).

with the Fox family for a lesser, undisclosed sum, this incident, in part, spawned the introduction of AB 3681 by Assemblymember Margolin in February of 1994.¹⁴ AB 3681 would have prohibited health care service plans and disability insurers from awarding bonus compensation to any employee on the basis of that employee's performance in denying authorization or payment for costly services.¹⁵

Although AB 3681 never became law, Chapter 787 has similar provisions.¹⁶ The author of Chapter 787 intends to clearly outlaw financial incentives for claim reviewers to limit medical services.¹⁷ Thus, by prohibiting both health care service plans and disability insurers from paying compensation to claims reviewers based on claims denied or reduced, the credibility of the health care delivery system should be increased.¹⁸

Supporters of Chapter 787 also believe that the toll-free telephone number will effectively allow consumers to protest and file complaints regarding an HMO's decision to deny medical services.¹⁹

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14. *Id.*; Miller, *supra* note 12.

15. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 3681, at 1 (Aug. 23, 1994).

16. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 73, at 2 (June 1, 1995); *see id.* (explaining that AB 3681 of 1994 never became law because it was held in the Senate Appropriations Committee).

17. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 73, at 2 (May 24, 1995).

18. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 73, at 2 (June 1, 1995). *But see* James F. Doherty, *HMO Members Find Quality of Programs Much Superior to Traditional Health Care*, L.A. TIMES, Apr. 16, 1989, Part IV, at 3 (noting that numerous surveys indicate that HMO members find the coverage, cost and quality of care preferable to the fee-for-service system; members give their HMO's high marks for the caring attitude of the physicians, availability of appointments at short notice and the extent of their coverage); Barbara Marsh, *Will Giant HMOS Help Health Care?*, L.A. TIMES, Apr. 10, 1995, at D1 (interviewing William W. Price III, vice chairman and chief executive of FHP International Corp. in Fountain Valley, one of the industry's largest HMOs, who states that recent studies show that the quality and access of HMO's are equal to or better than fee-for-service care).

19. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 73, at 2 (Apr. 4, 1995); *see* Miller, *supra* note 12 (stating that in 1994, Health Net had enrolled 108,350 new members from January to August, bringing its total enrollment to 1.38 million and that such rapid growth could test an HMO's ability to keep costs down possibly triggering more complaints from members); David R. Olmos, *Health Care Squabble: HMO Denies Engaging in Deceptive Sales Practices*, L.A. TIMES, Feb. 11, 1995, at D1 (commenting that consumer advocates say that complaints about HMO marketing practices targeting Medi-Cal recipients have risen sharply as insurers have rushed to compete for a slice of a market worth billions of dollars annually); David R. Olmos, *State Fines HMO \$500,000 in Case of Girl With Cancer*, L.A. TIMES, Nov. 18, 1994, at D1 (quoting Judith Bell, co-director for the San Francisco office of Consumers Union, as saying that there are many HMO complaints, but consumers either do not know they can file with the Department of Corporations or they do not think the agency will remedy the situation).

Health and Welfare; Indian tribes—child welfare and foster care

Health and Safety Code § 1505 (amended); Welfare and Institutions Code §§ 10553.1, 10553.2 (new); §§ 215, 272, 306, 11404, 11460 (amended).
AB 1525 (Granlund); 1995 STAT. Ch. 724

Existing law specifies that counties must implement Child Welfare Services (CWS)¹ and the Aid to Families with Dependent Children-Foster Care (AFDC-FC) program,² subject to regulations adopted by the State Department of Social Services (DSS).³

1. See generally CAL. WELF. & INST. CODE §§ 16500-16522.6 (West 1991 & Supp. 1995) (setting forth the provisions regarding Child Welfare Services).

2. See *id.* § 11400(a) (West Supp. 1995) (defining “Aid to Families with Dependent Children-Foster Care” (AFDC-FC) as aid provided on behalf of needy children in foster care under the terms of the division on public social services). See generally §§ 11400-11409 (West 1991 & Supp. 1995) (setting forth provisions regarding the AFDC-FC program).

3. *Id.* § 11405 (West 1991); see *id.* § 11405(a) (West 1991) (stating that AFDC-FC must be paid to eligible children residing with a “nonrelated legal guardian,” provided that the guardian cooperates with the county welfare department with respect to the following: (1) developing a written assessment of the needs of the children, (2) updating the assessment at least once every six months, and (3) carrying out the county’s developed case-plan); *id.* § 11405(b) (requiring the county welfare department to develop a written assessment of the child’s needs, updated at least once every six months, to create a case plan that clarifies how the problems described in the assessment are to be addressed, and to make visits to the child as often as appropriate, but under no circumstances less than once every six months); see also *id.* § 11401 (West Supp. 1995) (authorizing AFDC-FC aid on behalf of children under 18 years of age, except as provided in California Welfare and Institutions Code § 11403, who meet the following conditions: (1) the child has been given up for adoption to a licensed adoption agency, or the department, or the parental rights of either or both parents have been terminated after an action has been brought by an adoption agency, or the department, if responsible for placement and care, provides all services as required by the department to foster care children; (2) the child was removed from the physical custody of the parent or guardian as a result of a voluntary placement agreement, or a judicial finding that continuance in the home would not be in the child’s welfare, and that if the child was placed in foster care, reasonable efforts were taken to eliminate the need for removal of the child and to make it possible for the child to return home, or, in cases where the first contact occurs during an emergency crisis in which the child could not remain at home and be safe even with reasonable efforts being provided, the child has been removed as a result of a judge’s conclusion that lack of preplacement preventive efforts was reasonable; (3) the child has been voluntarily placed by a parent or guardian; (4) the child is living in the home of a nonrelated legal guardian; (5) the child has been placed in foster care under the federal Indian Child Welfare Act; and (6) to be eligible for federal financial participation, the child must meet certain conditions and have been deprived of parental support or care for any of the reasons set forth in California Welfare and Institutions Code § 11250); *id.* § 11402 (West Supp. 1995) (providing that in order to be eligible for AFDC-FC, a child must be placed in one of the following: (1) a relative’s home, provided it has been documented as being suited to the child’s needs and the child is otherwise eligible for federal financial participation under the AFDC-FC; (2) the licensed home of a nonrelative; (3) a licensed “group” home; (4) the home of a nonrelated legal guardian or a former nonrelated legal guardian when the guardianship of a child AFDC-FC eligible has been dismissed due to the child’s attaining 18 years of age; (5) a home which has been certified by a social worker or probation officer as meeting licensing standards; (6) an “exclusive-use” home; or (7) a “licensed transitional housing placement facility”); *id.* § 11403 (West 1991) (permitting a child in foster care already receiving aid and attending high school or the same level of vocational or technical training on a full-time basis prior to turning eighteen, to continue to obtain aid following that birthday so long as the child continues to live in foster care placement, remains eligible for AFDC-FC, and continues with his or her aforementioned education on a full-time basis and may reasonably be expected to complete the educational or training program prior to his or her nineteenth birthday). See generally *id.* §§ 10550-10618 (West 1991 &

Chapter 724 authorizes the DSS, to the extent consistent with federal law, to enter into agreements with California Indian tribes⁴ concerning child welfare services and foster care for Indian children.⁵

Supp. 1995) (describing the organization, powers, and duties of the State Department of Social Services); *id.* § 11250 (West 1991) (declaring that aid, services, or both is granted under the provisions of the AFDC chapter, and subject to the regulations of the department, to families with related children under the age of 18 years, except as provided in California Welfare and Institutions Code § 11253, in need thereof because they have been deprived of parental support or care due to the following: (1) the parent's death, physical or mental incapacity, or incarceration; (2) the parent or parents unemployment; and (3) a parent's continued absence from the home due to divorce, desertion, separation, or any other reason, except absence caused only because of active duty requirements in the United States uniformed services); *id.* (defining "continued absence" as where the "nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of the function of planning for the present support or care of the child"); *id.* § 11253 (West 1991) (noting that aid may not be granted under the provisions of the AFDC chapter to or in behalf of any child who has attained the age of 18 unless all of the following apply: (1) the child is under the age of 19 and is in high school or an equivalent level of vocational or technical training on a full-time basis, and (2) the child can reasonably be expected to finish the educational or training program before his or her nineteenth birthday).

4. See 25 U.S.C.A. § 1903(8) (West 1983) (defining "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village"); see also *id.* § 1903(11) (West 1983) (defining "Secretary" as the Secretary of the Interior).

5. CAL. WELF. & INST. CODE § 10553.1(a) (enacted by Chapter 724); see *id.* (providing that the director may enter into an agreement, in accordance with Section 1919 of Title 25 of the United States Code, with any California Indian tribe or any out-of-state Indian tribe, as defined in Section 1903 of Title 25 of the United States Code that has reservation lands extending into California); *id.* § 10553.1(b) (enacted by Chapter 724) (noting that the following applies to an agreement under California Welfare and Institutions Code § 10553.1(a): (1) an agreement shall provide for the delegation to the tribe or tribes the county's responsibility for the provision of child welfare services or AFDC-FC assistance payments or both; (2) an agreement concerning the provision of child welfare services shall confirm that a tribe meets current standards for service delivery as described under California Welfare and Institutions Code §§ 16500 to 16522.6, and provides the local matching share of costs required by § 10101; and (3) an agreement concerning AFDC-FC assistance payments shall ensure that a tribe meets current foster care standards provided for under California Welfare and Institutions Code §§ 11400 to 11409, and provides the local matching share of costs required by § 15200); *id.* § 10553.1(c) (enacted by Chapter 724) (declaring that upon the implementation date of an agreement pursuant to California Welfare and Institutions Code § 10553.1(a), the county otherwise responsible for providing child welfare services or AFDC-FC payments specified as being provided by the tribe shall no longer be subject to that obligation to children served under the agreement); *id.* § 10553.1(d) (enacted by Chapter 724) (noting that upon the effective date of an agreement authorized by California Welfare and Institutions Code § 10553.1(a), the tribe must meet fiscal reporting requirements specified by the department for federal and state reimbursement); *id.* § 10553.1(e) (enacted by Chapter 724) (requiring an Indian tribe that is a party to an agreement under California Welfare and Institutions Code § 10553.1(a), to, in accordance with the agreement, be eligible to receive child welfare services funds under California Welfare and Institutions Code § 10102); *id.* § 10553.2 (enacted by Chapter 724) (declaring that "child welfare services allocation methodologies for Indian tribes" pursuant to California Welfare and Institutions Code § 10553.1 must be developed and agreed to by the State Department of Social Services, the affected counties, and the affected Indian tribe); see also *id.* § 215 (amended by Chapter 724) (including in the term "probation officer" any social worker in a California Indian tribe or any out-of-state Indian tribe with reservation land extending into California, that has authority, pursuant to an agreement with the department concerning child welfare services or foster care payments under the AFDC program); *id.* § 272(a)(2), (b) (amended by Chapter 724) (stating that Social Services may delegate child welfare service or AFDC-FC foster care payment duties, or both, concerning dependent children to any Indian tribe that has entered into an agreement under California Welfare and Institutions Code § 10553.1; moreover, the board of supervisors may also delegate to those persons within the county welfare department, and to any Indian tribe that has entered into an agreement pursuant to California Welfare and Institutions Code § 10553.1 performing child welfare services, the right of a probation officer to access a state criminal history

Under the California Community Care Facilities Act,⁶ the DSS licenses⁷

summary); *id.* § 272(c) (amended by Chapter 724) (noting that notwithstanding California Welfare and Institutions Code § 272(a), a social worker in a county welfare department or an Indian tribe that has entered an agreement under § 10553.1, may perform the duties described in § 306); *id.* § 306(a) (amended by Chapter 724) (authorizing any social worker in a county welfare department, or an Indian tribe that has entered an agreement under California Welfare and Institutions Code § 10553.1 while performing his or her regular duties under juvenile court direction and pursuant to § 272(b), to do all of the following: (1) receive and maintain, temporary custody of a minor delivered by a peace officer, pending investigation; and (2) take into and maintain temporary custody of a minor who has been declared a dependent child of the juvenile court, without a warrant, pursuant to California Welfare and Institutions Code § 300, when the social worker has reasonable cause to believe that the minor is in immediate need of medical care in imminent danger of physical or sexual abuse, or the physical environment poses an immediate threat to the health or safety of the child); *id.* § 11404(a) (amended by Chapter 724) (stating that a child is not AFDC-FC eligible unless placement and care responsibility is with the county welfare department or Indian tribe that entered an agreement under California Welfare and Institutions Code § 10553.1, the county probation department acting an agreement with the county welfare department, or a licensed public or private adoption agency, or the department); *id.* § 11460(a) (amended by Chapter 724) (noting that foster care providers must be paid a per child per month rate in return for the care and supervision of the AFDC-FC child placed with them; furthermore, the department is designated the organization whose responsibility will be to administer a state system for establishing AFDC-FC program rates); *id.* (stating that state functions must either be performed by the department or by delegating to county welfare departments or Indian tribes under an agreement pursuant to California Welfare and Institutions Code § 10553.1). *See generally* 25 U.S.C.A. § 1903(4) (West 1983) (defining "Indian child" as any unmarried person who is under age 18 and is either a member of an Indian tribe, or a person who is eligible for membership in an Indian tribe and who is the biological child of a member of an Indian tribe); *id.* § 1919(a) (West 1983) (authorizing States and Indian tribes to enter into agreements concerning the care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for jurisdictional transfer on a case-by-case basis and agreements which establish concurrent jurisdiction between States and the tribes); CAL. WELF. & INST. CODE § 300 (West Supp. 1995) (listing persons subject to the jurisdiction of juvenile court); *id.* § 10101 (West Supp. 1995) (noting that for the 1991-1992 fiscal year and each year thereafter, the state's share of the child welfare program costs shall be 70% of the actual nonfederal expenditures for the program or the amount legislatively granted for that purpose, whichever is less; however, federal funds received under Title 20 of the federal Social Security Act and directed by the Legislature toward child welfare services must be considered part of California's share of cost and not part of the federal expenditures); *id.* § 10102 (West 1991) (declaring that "the State Department of Social Services must establish and maintain a plan whereby costs of county administered social services programs will be effectively controlled within the amount annually appropriated for these services"); *id.* § 15200 (West Supp. 1995) (appropriating funds for needy children, pregnant mothers, and hard-to-place adoptive children); *cf.* NEB. REV. STAT. § 43-1511(1) (1993) (authorizing the appropriate departments and agencies of Nebraska to enter into agreements with Indian tribes concerning the care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for transfer of jurisdiction concurrent jurisdiction between the state and Indian tribes); N.Y. SOC. SERV. LAW § 39(2) (McKinney 1992) (declaring that the department may enter into an agreement with an Indian tribe for the provision of foster care, preventive and adoption services to Indian children after the Indian tribe has submitted to the department a satisfactory plan demonstrating that the tribe can meet the standards for foster care services, preventive services and adoptive services as provided in the applicable federal law and the department is authorized to reimburse the tribe for the service costs); OKLA. STAT. ANN. tit. 10, § 40.7 (West 1987) (authorizing the Director of the Department of Human Services to enter into agreements with Indian tribes in Oklahoma regarding care and custody of Indian children as authorized by the Federal Indian Child Welfare Act, 25 U.S.C. § 1919).

6. *See* CAL. HEALTH & SAFETY CODE §§ 1500-1567.3 (West 1990 & Supp. 1995) (providing the California Community Care Facilities Act).

7. *See id.* § 1503 (West 1990) (defining "license" as a basic permit to operate a community care facility, and declaring that the license is not transferable); *see also id.* § 1502(a) (West Supp. 1995) (defining "community care facility" as any facility, place, or building that is maintained and operated to provide nonmedical residential care, day treatment, adult day care, or foster family agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, incompetent persons, and abused or neglected children, and including the following: (1) residential facilities,

various types of facilities that provide nonmedical care, including residential care facilities,⁸ for children and adults.⁹ However, specified facilities are exempted from those provisions.¹⁰ Chapter 724 exempts from licensing requirements certain facilities in which only Indian children eligible under the federal Indian Child Welfare Act are placed.¹¹ Lastly, Chapter 724 authorizes the DSS to adopt emergency regulations in order to implement Chapter 724.¹²

COMMENT

In 1978, Congress passed the Indian Child Welfare Act (ICWA), which establishes minimum federal standards for out-of-home placement of Indian

(2) adult day care facilities, (3) therapeutic day services facilities, (4) foster family agencies, (5) foster family homes, (6) small family homes, (7) social rehabilitation facilities, (8) community treatment facilities, (9) full-service adoption agencies, (10) noncustodial adoption agencies, and (11) transitional shelter care facilities).

8. See *id.* § 1502(a)(1) (West Supp. 1995) (defining "residential facility" as any family home, group care facility, or similar facility determined by the director, for 24-hour nonmedical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual); *id.* § 1502(c) (West Supp. 1995) (defining "director" as the Director of Social Services).

9. *Id.* §§ 1500-1567.3 (West 1990 & Supp. 1995); see *id.* (setting forth the California Community Care Facilities Act); *id.* § 1501(a) (West 1990) (setting forth the Legislature's findings and declarations that "there is an urgent need to establish a coordinated and comprehensive statewide service system of quality community care for the mentally ill, the developmentally and physically disabled, and children and adults who require care or services by a facility or organization issued a license or special permit pursuant" to the California Community Care Facilities Act); *id.* § 1501.1(a) (West 1990) (discussing the placement of children in residential care facilities).

10. *Id.* § 1505 (amended by Chapter 724).

11. *Id.* § 1505(n) (amended by Chapter 724); see *id.* (exempting from licensing requirements any facility in which only Indian children who are eligible under the federal Indian Child Welfare Act are placed, and which also is either an extended family member of the Indian child, or a foster home that is licensed, approved, or specified by the Indian child's tribe pursuant to Section 1915 of Title 25 of the United States Code); *id.* § 1505 (amended by Chapter 724) (exempting also the following facilities from licensing requirements: (1) any health facility; (2) any clinic; (3) any juvenile hall operated by a county or any juvenile placement facility approved by the California Youth Authority; (4) any place in which a juvenile has been placed pursuant to a judicial order; (5) any child day care facility; (6) any facility conducted by any well-recognized church or religious group for the purpose of providing facilities for the care or treatment of the sick who rely upon prayer or spiritual means for healing; (7) any school dormitory or similar facility determined by the department; (8) any house, institution, hotel, homeless shelter, or similar location supplying room and board only, or either separately provided that residents thereof do not require any element of care as determined by the director; (9) recovery houses or similar group living facilities providing arrangements for those recovering from alcoholism or drug addiction where the location no care or supervision; (10) any alcoholism or drug abuse recovery or treatment facility; (11) any arrangement for the receiving and care of persons by a relative or by a close friend of the parent, guardian, or conservator, if the situation is not for profit and occurs only occasionally and irregularly, as defined by state department regulations; (12) any supported living arrangement for individuals with developmental disabilities; (13) any family home agency or family home that is vendored by the State Department of Developmental Services and meets certain requirements; (14) any facility in which only Indian children who are eligible under the federal Indian Child Welfare Act are placed; and (15) any similar facility determined by the director); see also 25 U.S.C.A. § 1915 (West 1983) (describing the preferences for the placement of Indian children in adoptive placements and foster care or preadoptive placements).

12. 1995 Cal. Legis. Serv. ch. 724, sec. 8, at 4242.

children.¹³ The ICWA seeks to protect the interests of Indian children by providing for their placement in homes which reflect the values of Indian culture, and by providing assistance to Indian tribes for the operation of child and family programs.¹⁴

However, numerous tribal representatives have communicated to the DSS that California is not meeting the mandates of the ICWA.¹⁵ Thus, Chapter 724, which was sponsored by the DSS, attempts to bring the state AFDC-FC and CWS

13. 25 U.S.C.A. §§ 1901-1963 (West 1983); *see id.* § 1911(a) (West 1983) (providing that "Indian tribes have exclusive jurisdiction over any child custody proceeding involving Indian children residing or domiciled within the tribe's reservation, except where jurisdiction is already vested by existing federal law in the State).

14. *Id.* § 1902 (West 1983); *see id.* (declaring that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs); *see also id.* § 1901 (West 1983) (describing the Congressional findings as follows: (1) clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs; (2) Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources; (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members or are eligible for membership in an Indian tribe; (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families). *See generally* Barbara A. Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989) (arguing that the ICWA is faulty because although it attempts to deal with the problems related to the removal of Indian children from their homes, it neglects to deal with custody disputes between parents); Michael E. Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1978: Are the States Respecting Indian Sovereignty?*, 23 N.M. L. REV. 479 (1993) (analyzing how state courts have increasingly not transferred Indian child custody proceedings to the tribes, but rather have exercised their concurrent jurisdiction over Indian child custody cases, although the ICWA mandates that they be transferred to tribal courts); Toni H. Davis, *The Existing Indian Family Exceptions to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 466-75 (1993) (discussing the purposes, definitions, structure, and applicability of the ICWA); Barbara J. Barrett et al., *Indian Child Welfare: A Status Report*, CHILDREN TODAY, Jan. 1989, at 24 (highlighting findings from the first systematic national examination of the effects of the ICWA; for example, native American children in substitute care are younger than the overall population in substitute care, 77% of Indian foster children live in family settings, 10% live in institutions, and the greatest increase in the number of Indian children in care has occurred in tribally operated child welfare programs).

15. ASSEMBLY COMMITTEE ON HUMAN SERVICES, COMMITTEE ANALYSIS OF AB 1525, at 2 (Apr. 5, 1995); *see id.* (commenting that California's current state administered, county-run, CWS and AFDC-FC programs are seen as not fully cooperating with the purpose of ICWA to assist Indian tribes in assuming responsibility for their children; thus, failure to fully comply with ICWA's mandates at the local level may result in adverse outcomes for California Indian children in CWS and AFDC-FC programs).

programs into conformity with the ICWA.¹⁶

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Health and Welfare; Medi-Cal—liens

Welfare and Institutions Code § 14009.5 (amended), § 14006.7 (repealed).
SB 412 (Marks); 1995 STAT. Ch. 548

Existing law establishes the federal Medicaid Act¹ which provides states with the framework for providing the impoverished with free or reduced-cost medical assistance.² The federal Medicaid Act allows states to recover reimbursement after the death of the Medicaid recipient.³ California's Medicaid program, "Medi-Cal,"⁴ administered by the State Department of Health Services, provides health

16. *Id.* See generally Connelly, *supra* note 14, at 480 (discussing surveys conducted by the Association of American Indian Affairs in 1969 and 1974, which showed that 25-35% of all Indian children were separated from their families and placed in foster homes, adoptive homes, or institutions); Davis, *supra* note 14, at 468 (commenting that the adoption rate of Indian children is eight times more than that of non-Indian children); *id.* at 496 (noting that psychological problems often develop in later years in Indian children placed in non-Indian homes); Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 542 (1984) (listing the problems faced by Indian children raised in non-Indian homes as cultural disorientation, a sense of powerlessness, and a loss of self-esteem); Kim L. Schnuelle, *When the Bough Breaks: Federal and Washington State Indian Child Welfare Law and Its Application*, 17 PUGET SOUND L. REV. 101, 101 (1993) (suggesting that Indian children are often removed from their homes with little prior investigation and with no cultural sensitivity); *id.* at 105 (stating that when Indian children are removed from their natural families, they often experience emotional and psychological problems); Michelle L. Lehmann, Comment, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, 38 CATH. U. L. REV. 511, 515 (1989) (noting that Indian children raised in non-Indian homes experience more social problems when they are older); Guy Maxtone-Graham, *Indians to Meet at CSUN for Summit Conference*, L.A. TIMES, Sept. 24, 1988, at 4 (Metro) (quoting Kathi Manness, a member of the Huron tribe and a social worker in a mental health department, as saying that 20% to 25% of Indian children suffer from some kind of mental illness, and their incarceration rate is ten times greater than the national average).

1. See 42 U.S.C.A. §§ 1396-1396u (West 1992 & Supp. 1995) (setting forth the federal Medicaid Act). See generally John E. Theuman, Annotation, *Supreme Court's Views as to Construction and Application of Medicaid Act (42 U.S.C.S. §§ 1396-1396s)*, 85 L. Ed. 2d 935, 940 (1995) (explaining that the Medicaid Act provides the appropriation of federal funds as grants to each state to pay a percentage of the amount spent by the state); *id.* (specifying that this is done in order to assist the states in providing medical assistance to people who might otherwise be unable to afford medical care); 79 AM. JUR. 2D *Welfare Laws* § 40 (1975) (elaborating on the eligibility specifications for receiving benefits under the Medicaid Act).

2. 42 U.S.C.A. § 1396 (West 1992); see *id.* § 1396d(a) (West Supp. 1995) (defining "medical assistance" as payment of part or all of specified care and services to eligible individuals); *id.* (defining the qualifications for receiving medical assistance, and listing, as examples, those individuals who are age 65 or older, individuals who are blind, or individuals who are 18 or older and who are permanently and totally disabled).

3. *Id.* § 1396p (West Supp. 1995).

4. See CAL. WELF. & INST. CODE §§ 14000-14195 (West 1991 & Supp. 1995) (setting forth the provisions of the Medi-Cal programs); see also *id.* § 14063 (West 1991) (defining "Medi-Cal" as the California Medical Assistance Program).

care services⁵ for qualified needy persons.⁶

Under existing law, the Department is required to seek reimbursement for Medi-Cal services received in certain circumstances.⁷ Under prior law, the department was required, except under specified circumstances, to impose a lien⁸ on the equity interest in the home or other property of an institutionalized Medi-Cal beneficiary,⁹ to secure the beneficiary's assets for future recovery.¹⁰ Chapter 548 repeals this requirement.¹¹

Existing law requires that, except under specified circumstances, after a surviving spouse dies, the department must make a claim against the estate of that surviving spouse in order to recover the payments for the Medi-Cal services received.¹² Prior law also required the department to place a lien on the decedent's interest in the real property of the surviving spouse, with the lien becoming due and payable only upon the death of the surviving spouse or the sale, transfer or exchange of the real property.¹³ Chapter 548 removes the requirement that a lien be placed on the decedent's interest in the real property of the surviving spouse

5. See *id.* § 14053 (West 1991) (defining health care services and listing the services that do not qualify as such as the following: (1) care or services for any individual who is an inmate of an institution other than patient of a medical institution; (2) care or services for any individual who has not attained the age of 65 years and who is a patient in an institution for tuberculosis; (3) care or services for any individual who is 21 years of age or older and has not attained 65 years of age and who is a patient in an institution for mental diseases; or (4) inpatient services provided to individuals 21 to 64 years of age, inclusive, in an institution for mental diseases operating under a consolidated license with a general acute care hospital pursuant to California Health & Safety Code § 1250.8, unless federal financial participation is available for such inpatient services); see also CAL. HEALTH & SAFETY CODE § 1250.8 (West Supp. 1995) (specifying the required criteria for qualifying for a single consolidated general acute care hospital license).

6. CAL. HEALTH & SAFETY CODE §§ 14000-14195 (West 1991 & Supp. 1995); see *id.* § 14000 (West Supp. 1995) (declaring the legislative intent to afford to qualified individuals health care and related remedial preventative services, including related social services which are necessary for those receiving health care benefits under this chapter); *id.* (specifying that the intent of the Legislature is to provide health care for those aged and other persons, including family members who lack sufficient annual income to meet the costs of health care and whose other assets are so limited that the cost of such care would jeopardize the person's or family's security); *id.* § 14005.1 (West 1991) (defining the eligibility criteria for categorically needy persons).

7. *Id.* § 14009.5(a) (amended by Chapter 548).

8. See 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Personal Property* § 168 (9th ed. 1987 & Supp. 1995) (defining liens and explaining their application); see also Ron Galperin, *Property Values: Protecting Your Property from Surprise Legal Claims*, L.A. TIMES, May 31, 1994, at 8 (Bus.) (explaining that a lien is an encumbrance, or a charge against property in the form of a notice, that essentially warns others of a creditor's claim on the property; and that to sell a piece of property, an owner must have "clear title;" the encumbrance "clouds" the title so that it is unmarketable); *id.* (noting that it may still be feasible to sell a piece of property with unmarketable title, but many people will not buy such property unless it is sold for a considerably lower price because of the lien).

9. See CAL. WELF. & INST. CODE § 14124.70(b) (West 1991) (defining "beneficiary" as any person who has received, or will be provided, benefits because of an injury for which another person may be liable); *id.* (noting that the definition of "beneficiary" includes the beneficiary's guardian, conservator or other personal representative, estate, or his survivors).

10. 1993 Cal. Legis. Serv. ch. 69, sec. 49, at 865-66 (amending CAL. WELF. & INST. CODE § 14006.7).

11. 1995 Cal. Legis. Serv. ch. 548, sec. 1, at 3350 (repealing CAL. WELF. & INST. CODE § 14006.7).

12. CAL. WELF. & INST. CODE § 14009.5(b)(2)(A) (amended by Chapter 548).

13. 1993 Cal. Legis. Serv. ch. 69, sec. 50, at 866-67 (amending CAL. WELF. & INST. CODE § 14009.5).

during the surviving spouse's lifetime.¹⁴

COMMENT

Although the lien program was designed to help recoup the costs of Medi-Cal, it was found to inflict hardship on many people.¹⁵ Chapter 548 was introduced to codify a recent United States District Court decision—*DeMille v. Belshe*¹⁶—which held that California Welfare and Institutions Code section 14009.5(c) was invalid and unenforceable since it required liens to be due and payable during the surviving spouse's lifetime.¹⁷ That decision also held that section 14009.5(c) was inconsistent with the federal Medicaid Act.¹⁸ Chapter 548 removes these inconsistencies.¹⁹

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14. CAL. WELF. & INST. CODE § 14009.5 (amended by Ch. 548); cf. ALASKA STAT. § 47.07.055(b) (1994) (specifying that a lien may not be filed against an individual's home if the home is lawfully occupied by the individual's spouse, a child under 21 years of age, or a blind or disabled child); DEL. CODE ANN. tit. 25, § 5003(1) (Supp. 1994) (stating that recovery for monies paid for medical assistance on behalf of the individual can only be recovered after the death of the individual and the death of a surviving spouse who was residing in the home on a continuous basis); IDAHO CODE § 56-218(2) (Supp. 1995) (providing that recovery for medical assistance may not be recovered when there is a surviving spouse or a surviving child who is under 21, or is blind and permanently and totally disabled); ILL. ANN. STAT. ch. 305, para. 5/5-13 (Smith-Hurd Supp. 1995) (specifying that no recovery shall be made until after the death of the surviving spouse); UTAH CODE ANN. § 26-19-13(2)(a) (1995) (specifying that the right to recovery is not exercised until after the death of the surviving spouse).

15. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 412, at 3 (July 11, 1995); See *California Ordered to Lift Improper Liens, Repay All Money Wrongfully Collected*, BNA HEALTH CARE DAILY, Jan. 31, 1995, at 1 (discussing the lien program and stating that a total of 809 liens, valued at over \$6 million, have been imposed on property by the Department of Health Services since the policy was enacted in 1994); Nancy Weaver, *Widow's House Is Hit with Lien by Medi-Cal*, FRESNO BEE, Aug. 14, 1994, at D11 (discussing the tragedy faced by a widow upon receiving a notice of a \$14,000 lien placed on her house). But see Herbert Semmel, *Medi-Cal Liens on Homes*, L.A. TIMES, May 25, 1994, at B6 (explaining that the Medi-Cal laws are only a trap for the unwary if a person does not consult a lawyer especially familiar with the Medi-Cal laws and regulations).

16. No. C-94-0726-VRW, 1995 U.S. Dist. LEXIS 695.

17. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 412, at 3 (July 11, 1995); see *DeMille*, No. C-94-0726-VRW, 1995 U.S. Dist. LEXIS 695, at *1-2 (finding California's Welfare and Institutions Code § 14009.5(c) invalid and unenforceable because it is inconsistent with the Federal Medicaid Act, 42 U.S.C. § 1396(B)(b) to the extent it required the surviving spouse to repay the decedent's lien during the surviving spouse's lifetime); *California Ordered to Lift Improper Liens*, supra note 15, at 2 (discussing the holding of *DeMille* which prohibits California from placing liens on the homes of surviving spouses of former Medi-Cal patients who died in nursing homes); *id.* (stating that *DeMille* did not find the program illegal per se, so California still has the right to place a lien on the real property of a surviving spouse if the property remains in joint tenancy at the time the institutionalized spouse dies, although there must be prior notice and an opportunity for a hearing); Claire Cooper, *Medi-Cal Lien Program Blocked*, SACRAMENTO BEE, Jan. 13, 1995, at B5 (quoting Amitai Schwartz, one of the plaintiff's lawyers, as crediting the court for getting the state "to rethink [whether] they can swoop down on old people's homes right after their spouses died"); Weaver, supra note 15 (noting that up until the *DeMille* decision, state officials were filing between 100 and 150 such liens every month).

18. *DeMille*, 1995 U.S. Dist. LEXIS 695, at *1-2.

19. CAL. WELF. & INST. § 14009.5 (amended by Chapter 548); see 1993 Cal. Legis. Serv. ch. 69, sec. 49 at 865-66 (amending CAL. WELF. & INST. CODE § 14006.7).

Health and Welfare; public disclosure and county medical facilities

Health and Safety Code § 1457 (amended).
AB 803 (Villaraigosa); 1995 STAT. Ch. 138

Existing law mandates that the county board of supervisors¹ establish, maintain, and administer county hospitals.² Existing law also requires that the State Department of Health Services,³ in conjunction with advice from the State Department of Social Services,⁴ determine the records to be kept by the county hospitals.⁵ Chapter 138 amends existing law by providing that records which contain rates of payment for health care services performed or purchased by a county medical facility are not considered to be public records⁶ that may be

1. See CAL. GOV'T CODE § 25000 (West 1988) (requiring each county to have a board of supervisors that consists of five members); *Harris v. Gibbins*, 114 Cal. 418, 420, 46 P. 292, 292 (1896) (describing the board of supervisors as a general governing body within the realm of local county governmental affairs); *In re Heckman*, 90 Cal. App. 700, 707, 266 P. 585, 588 (1928) (stating that a board of supervisors is not a judicial body).

2. CAL. HEALTH & SAFETY CODE § 1441 (West 1990); see *id.* (requiring the board of supervisors in every county to create and maintain a county hospital, create rules for the management of a county hospital, and appoint to run such facility all necessary individuals who may join any local or national group committed to the promotion of public health and welfare); *Nickerson v. San Bernardino Cty.*, 179 Cal. 518, 522, 177 P. 465, 467 (1918) (stating that the power given to a county board of supervisors to purchase land for hospitals, and the erection of hospital buildings and their equipment, is both legislative and discretionary in nature); *Griffin v. Colusa County*, 44 Cal. App. 2d 915, 921-22, 113 P. 2d 270, 273 (1941) (holding that a county is not liable in tort for tortious acts committed by its agents in the operation of a county hospital due to the doctrine of governmental immunity for tort).

3. See CAL. HEALTH & SAFETY CODE §§ 200-223 (West 1990 & Supp. 1995) (describing the State Department of Health Services and its duties).

4. See CAL. WELF. & INST. CODE § 10600 (West 1991) (declaring the State Department of Social Services as the single state agency with the full power to oversee every phase of the administration of public social services, except health care services and medical assistance in which the federal government provides aid).

5. CAL. HEALTH & SAFETY CODE § 1457(a) (amended by Chapter 138); see *id.* § 1457(b) (amended by Chapter 138) (providing that the records must be kept pursuant to regulations formulated by the California Department of Health Services, but upon request of the county physician or any other individual in charge of the county hospital, any record, paper, or document may be ordered destroyed by the county board of supervisors pursuant to California Government Code § 26205); see also CAL. GOV'T CODE § 26205 (West Supp. 1995) (setting forth a list of conditions that must be met when records are destroyed).

6. See CAL. GOV'T CODE § 6252(d) (West 1995) (defining "public records" to include any writing that contains information that relates to the conduct of the public's business, and that is owned, prepared, retained, or used by any state or local agency regardless of the form of the writing); *id.* (explaining that "public records under the control of the Governor's office" means any such writing drafted on or after January 6, 1975); see also *id.* § 6252(e) (West 1995) (defining the term "writing" as handwriting, printing, photostating, photographing, typewriting, and all other types of recording of any form of communication or representation which include but are not limited to letters, pictures, sounds, symbols, or words, or any combination thereof, and magnetic or paper tapes, magnetic or punched cards, discs, or drums, maps, photographic films and prints, and any other document); *San Gabriel Trib. v. Superior Court*, 143 Cal. App. 3d 762, 774-75, 192 Cal. Rptr. 415, 422 (1983) (declaring that financial data supplied by a private party to a city was within the definition of "public records" since the city relied upon the information in granting a rate increase to a waste disposal company); *Cook v. Craig*, 55 Cal. App. 3d 773, 782, 127 Cal. Rptr. 712, 717 (1976) (holding that the scope of the definition of "public records" as defined in California Government Code § 6252 for use in the context of the California Public Records Act, does not depend upon "public records" as defined in the context of other

disclosed pursuant to the California Public Records Act.⁷ Chapter 138 does, however, allow for disclosure of such records after three years following the execution of a contract that concerns rates of payment.⁸

COMMENT

Chapter 138 will put public hospitals on an even playing field with private hospitals.⁹ When partaking in negotiations for contracts with managed care bodies, private hospitals have the flexibility to condition their contracts on keeping rates of payment confidential.¹⁰ The sponsor of Chapter 138 argues that this disparity causes public hospitals to be undercut by competitors since they cannot condition their contracts on keeping rates of payment confidential.¹¹

Existing law forbids disclosure of a public record if the benefit of withholding disclosure clearly outweighs the public interest in disclosure of the record.¹² The sponsor of Chapter 138 suggests that the public interest in

areas of law); *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 220, 71 Cal. Rptr. 193, 197 (1968) (explaining that the terms "public records" and "public writings" are synonymous in California).

7. CAL. HEALTH & SAFETY CODE § 1457(c)(1) (amended by Chapter 138); *see* CAL. GOV'T CODE § 6253(a) (West 1995) (providing that public records must be made available to the public during the office hours of the state or local agency, and every person has a right to examine any public record except where exempted elsewhere under the California Public Records Act); *see also id.* § 6251 (West 1995) (declaring that California Government Code §§ 6250-6268, which concern laws governing public records, will be collectively known as the California Public Records Act); *cf.* ARIZ. REV. STAT. ANN. § 39-121.01(D)(1) (1985) (allowing any individual to request a copy of any public record during the regular office hours of the providing agency); IDAHO CODE § 9-338(1) (1990) (announcing the right of every individual to examine and make a copy of any public record, and declaring that all public records will be made available at all reasonable times for inspection); N.M. STAT. ANN. § 14-2-1 (Michie Supp. 1988) (providing that every person has a right to inspect any public record in the state of New Mexico).

8. CAL. HEALTH & SAFETY CODE § 1457(c)(1) (amended by Chapter 138).

9. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 803, at 1-2 (May 2, 1995); *see* Telephone Interview with Teresa Stark, Legislative Consultant to Assemblymember Villaraigosa on AB 803 (Sept. 1, 1995) (notes on file with the *Pacific Law Journal*) (noting that AB 803 has wide spread support with no known opposition); *id.* (stating that another reason for the enactment of Chapter 138 was to increase the probability that insured patients would use public hospitals, thereby creating a paying base of clients that would provide additional funds to care for indigent patients).

10. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 803, at 2 (May 2, 1995).

11. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF AB 803, at 1-2 (June 21, 1995); *see* Theodore R. Marmor et al., *A New Look at Nonprofits: Health Care Policy in a Competitive Age*, 3 YALE J. ON REG. 313, 316 (1986) (noting that between 1973 and 1987, investor-owned-and-backed hospitals doubled in number); *see also* Josephine Gittler, *Hospital Cost Containment in Iowa: A Guide for State Public Policymakers*, 69 IOWA L. REV. 1263, 1268 (1984) (arguing that the national trend is leaning toward investor owned, multi-hospital chains operated by large corporate management organizations).

12. CAL. GOV'T CODE § 6255 (West 1995); *see* ACLU Found. v. Deukmejian, 32 Cal. 3d 440, 453 n.13, 651 P. 2d 822, 830 n.13, 186 Cal. Rptr. 235, 243 n.13 (1982) (noting that the burdens and costs of disclosure, including all expenses and inconveniences involved in separating nonexempt information from exempt, must be weighed against the public interest gained by the disclosure); *Rogers v. Superior Court*, 19 Cal. App. 4th 469, 477, 23 Cal. Rptr. 2d 412, 415 (1993) (citing *CBS, Inc. v. Block*, 42 Cal. 3d 646, 662, 725 P. 2d 470, 473-74, 230 Cal. Rptr. 362, 372 (1972) and finding that California Government Code § 6255 provides a catch-all provision that allows an agency to withhold disclosure of a public record that would not be exempt under California Government Code § 6254); *State Bd. of Equalization v. Superior Court*, 10 Cal. App. 4th 1177, 1190-91, 13 Cal. Rptr. 2d 342, 350 (1992) (holding that disclosure still served the public interest even though

withholding disclosure outweighs the benefits of disclosure when these contracts are negotiated.¹³

However, the sponsor of Chapter 138 believes this exception to be time-limited and that over time, the benefit of disclosure will eventually outweigh any benefit gained through non-disclosure of the contract negotiation in question.¹⁴ Chapter 138 recognizes this with its built-in three year limitation.¹⁵

Matthew E. Farmer

Health and Welfare; public health laboratory services

Health and Safety Code § 1003 (new); §§ 1000, 1001, 1002 (amended).
AB 819 (Cannella); 1995 STAT. Ch. 807

Under prior law, any city or county was authorized to establish a bacteriological and chemical laboratory.¹ Chapter 807 instead requires that the local health department of a city or county make the services of a public health laboratory² available.³ Significantly, Chapter 807 replaces the term “bacterio-

the party who requested public documents in this case was a commercial enterprise and the information was to be used by the requesting party for commercial purposes, because it made the State Board of Equalization’s working law available to the public); *Braun v. City of Taft*, 154 Cal. App. 3d 332, 345, 201 Cal. Rptr. 654, 661 (1984) (placing the burden of demonstrating the need to withhold information in the hands of the agency asserting the right of nondisclosure); *see also* CAL. GOV’T CODE § 6254 (West 1995) (setting forth an extensive list of records that are exempt from public disclosure).

13. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 803, at 2 (May 2, 1995).

14. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF AB 803, at 2 (June 21, 1995).

15. CAL. HEALTH & SAFETY CODE § 1457(c)(1) (amended by Chapter 138).

1. 1927 Cal. Stat. ch. 282, sec 1, at 502 (enacting CAL. HEALTH & SAFETY CODE § 1000).

2. *See* CAL. CODE REGS. tit. 17, § 1076.1 (1995) (explaining that an “official public health laboratory” consists of a principal public health laboratory and may include branch public health laboratories); *id.* § 1076.1(a) (1995) (defining “principal public health laboratory” as a laboratory facility that provides the major or total laboratory services to a public health department); *id.* § 1076.1(b) (1995) (defining “branch public health laboratory” as any laboratory facility that provides minor or auxiliary laboratory services); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 819, at 2 (Sept. 8, 1995) (explaining that public health laboratories deal with diseases that threaten overall public health); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 668, at 2 (May 26, 1995) (explaining that public health laboratories deal with environmental issues, vector control, food and water purity, and such issues as disease outbreaks that threaten the general public health and are beyond the capabilities of clinical laboratories); *id.* (noting that public health laboratories are not to be confused with clinical laboratories which provide laboratory services for individual health needs); Letter from Kenneth K. Takata, Director of the Sacramento County Public Health Laboratory, to Assemblymember Curt Pringle (May 5, 1995) (copy on file with the *Pacific Law Journal*) (stating that public health laboratories deal with rabies, tuberculosis, HIV, hepatitis, and foodborne outbreaks on a daily basis, and they also investigate less common diseases such as botulism, hantavirus, and cholera); Letter from Mark J. Miller, Chairman of Legislative Committee for California Association of Public Health Laboratory Directors, CAPHLD, to Assemblymember Valerie Brown (May 3, 1995) (copy on file with the *Pacific Law Journal*) (explaining that public health laboratories provide services to support programs designed to protect communities from infectious diseases and other health threats); *id.* (setting forth examples of public health

logical and chemical laboratory” with “public health laboratory” in order to update the statutory language with current practice.⁴

Chapter 807 adds that the services of a public health laboratory must be made available to provide analyses that are necessary to assist in the surveillance of community diseases, and to meet the responsibilities and support the programs of the local health department.⁵

Existing law requires the State Department of Health Services to approve the equipment and technical personnel of the laboratories.⁶ Chapter 807 specifies that in addition to equipment and personnel, quality assurance programs must also meet with the approval of the State Department of Health Services.⁷

Additionally, Chapter 807 requires that its provisions are not to be construed in such a way as to restrict, limit, or prevent any individuals, who are certified under statutory provisions governing local administration of public health, from performing their duties for the protection of public health.⁸

Finally, Chapter 807 states that the Legislature finds and declares that any changes made by Chapter 807 are solely declaratory and do not expand the

laboratory services, such as analyzing water supplies and food products in numerous California counties during the 1995 floods, testing for *Escherichia coli* (*E. coli*), during foodborne outbreaks, and testing for Hantavirus in an effort to prevent the spread of the deadly communicable disease); see also OXFORD AMERICAN DICTIONARY 1031 (1980) (defining “vector” as a carrier of a disease or infection).

3. CAL. HEALTH & SAFETY CODE § 1000 (amended by Chapter 807); see *id.* (explaining that the purpose of requiring that the services of public health laboratories be made available is to protect the community and public health).

4. *Id.* § 1001 (amended by Chapter 807); see *id.* (substituting the term “public health laboratory” for “bacteriological and chemical laboratory” and stating that the cost is a legal expenditure from any city or county funds that are for disbursement under the direction of the city or county health officer for the protection of public health); Telephone Interview with Mark J. Miller, Chairman of the Legislative Committee for California Association of Public Health Laboratory Directors, CAPHLD (July 10, 1995) (notes on file with the *Pacific Law Journal*) (explaining that the terminology incorporated into the statute in 1927 is outdated and not supportive or reflective of what public health laboratories do; they are no longer just “bacteriological and chemical laboratories”). Compare 1927 Cal. Stat. ch. 282, sec. 1, at 502 (enacting CAL. HEALTH & SAFETY CODE § 1000) (authorizing any city or county to establish a bacteriological and chemical laboratory for the examination of specimens from suspected cases of disease and for the examination of milk, waters, and food products) with CAL. HEALTH & SAFETY CODE § 1000 (amended by Chapter 807) (noting that for the purpose of protecting the community and the public health, the local health department of a city or county has available the services of a public health laboratory for the examination of specimens from suspected cases of infectious and environmental diseases, that may include, but need not be limited to, the examination of specimens from milk, milk products, waters, food products, vectors, and the environment).

5. CAL. HEALTH & SAFETY CODE § 1000 (amended by Chapter 807); see Telephone Interview with Mark J. Miller, *supra* note 4 (explaining that this provision in California Health and Safety Code § 1000 was added in order to bring statutory language in line with current State regulations).

6. CAL. HEALTH & SAFETY CODE § 1002 (amended by Chapter 807).

7. *Id.*; see CAL. CODE REGS. tit. 17, § 1076 (1995) (providing for issuance of a certificate of approval after inspection by the Department, requiring every principal and branch laboratory to display the certificate); *id.* (prohibiting any laboratory from continuing operation upon receipt of notice of cancellation of any existing certificate, or of refusal of the Department to issue a certificate); *id.* § 1083 (1995) (declaring that laboratories approved under California Code of Regulations title 17, § 1076 will be inspected by a duly authorized representative of the Department, for maintenance and conduct in conformity with these regulations); *id.* § 1150(c) (1995) (defining “Department” to mean the State Department of Public Health).

8. CAL. HEALTH & SAFETY CODE § 1003 (enacted by Chapter 807); see *id.* §§ 450-1158 (West 1990 & Supp. 1996) (setting forth provisions governing local administration of public health).

requirements of existing law.⁹

COMMENT

Currently, services of public health laboratories are available in all fifty-eight counties in California.¹⁰ Under existing regulations, local health departments are required to make available the services of a public health laboratory.¹¹ Additionally, existing statutes and regulations provide that local health departments must perform a number of public health services, many of which would be impossible to perform without a local public health laboratory.¹²

Chapter 807 was not enacted in order to impose new mandates on local

9. 1995 Cal. Legis. Serv. ch. 807, sec. 5, at 4839.

10. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 668, at 2, (May 26, 1995); *see id.* (explaining that some counties are served by their own public health laboratory while some contract with other counties).

11. CAL. CODE REGS. tit. 17, §§ 1075, 1276(f) (1995); *see id.* § 1075 (1995) (mandating that every local health department make available the services of a public health laboratory); *id.* § 1276(f) (1995) (requiring that each local health department serving a population of 50,000 or more people establish a public health laboratory as one of its minimum basic services, and that such laboratories must provide the following: (1) services necessary for the various programs of the health department; and (2) consultation and reference services in order to facilitate the development of improved procedures and practices in laboratories that work to prevent and control human disease); *see also id.* § 1084 (1995) (authorizing a health officer of a municipality or county to designate any laboratory as an official public health laboratory, whereupon it would perform any of the basic services, as defined in California Code of Regulations title 17, § 1276(f), and would be subject to all of the same requirements as an official public health laboratory, as specified in §§ 1075-1083 of title 17 of the California Code of Regulations). *See generally id.* § 1076 (1995) (requiring a certificate of approval from the Department); *id.* § 1076.1 (1995) (defining "public health laboratories"); *id.* § 1077 (1995) (mandating that reports be filed with the Department by all laboratories approved under § 1076 of title 17 of the California Code of Regulations); *id.* § 1078 (1995) (specifying minimum requirements for all approved laboratories); *id.* § 1079 (1995) (requiring professional personnel to be certified with the Department); *id.* § 1080(a) (1995) (directing that persons who are receiving the professional training that is required for certification as a Public Health Microbiologist are to be designated as Public Health Microbiologist-trainees); *id.* § 1081 (1995) (specifying that certain cultures and specimens must be sent to the Department); *id.* § 1082 (1995) (instructing physicians that certain specimens be sent to a public health laboratory approved by the Department under § 1076 of title 17 of the California Code of Regulations); *id.* § 1083 (1995) (permitting the Department to make inspections of public health laboratories).

12. Telephone Interview with Mark J. Miller, *supra* note 4; *see CAL. HEALTH & SAFETY CODE* § 3194 (West 1990) (requiring local health officers to use every available means to ascertain the existence of infectious venereal diseases within their jurisdictions, and to take all reasonably necessary measures to prevent the transmission of infection); *id.* § 3285 (West Supp. 1995) (directing local health officers to use every available means to ascertain the existence of, and immediately investigate, all reported or suspected cases of active tuberculosis disease in their jurisdictions, and to ascertain the sources of those infections); CAL. CODE REGS. tit. 17, § 1082 (1995) (instructing that when specimens are taken for laboratory diagnosis of rabies or botulism, or for release from isolation of cases of diphtheria, typhoid fever, salmonellosis, or shigellosis, they must be sent to a public health laboratory); *id.* § 2534 (1995) (specifying that when laboratory tests are required for the release of cases or carriers, the tests must be submitted to a public health laboratory); *id.* § 2550(b) (mandating that food handlers with amebiasis submit to testing by a public health laboratory before resuming work); *id.* § 2606(b)(4) (1995) (specifying that the testing of animals for rabies must be done by an approved public health laboratory); *id.* § 2612(a) (1995) (requiring that cultures on which a diagnosis of salmonella is based be submitted to a local public health laboratory); *id.* § 2613(a) (1995) (prohibiting a patient from engaging in any occupation involving the preparation, serving or handling of food, to be consumed by individuals other than his or her immediate family, or any occupation involving the direct care of children, or of the elderly, or of patients in hospitals or other institutional settings, until a public health laboratory has determined that the tests for shigella are negative).

government, nor is it intended to change any existing practices of public health laboratories.¹³ The Legislature's intent in enacting Chapter 807 was to modernize the existing language in the California Health and Safety Code and to establish statutory authority for current practices of public health laboratories.¹⁴

With established statutory authority, public health laboratories' programs are more insulated from the possibility of elimination as a result of budget constraints.¹⁵ Providing this statutory authority is important, considering that public health needs have increased and public health laboratories' capabilities and programs have grown since the relevant code sections were originally drafted in 1927.¹⁶

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13. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 668, at 2 (May 26, 1995); see Letter from Kenneth K. Takata, *supra* note 2 (stating that the enactment of AB 819 will not change current practice because existing regulations already mandate that the services of public health laboratories be made available).

14. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 668, at 2 (May 26, 1995); see Letter from Bruce Pomer, Executive Director, *Health Officers Association of California*, to Assemblymember Doris Allen, Chair of the Assembly Health Committee (Mar. 23, 1993) (copy on file with the *Pacific Law Journal*) (explaining that the enactment of AB 819 clarifies and modernizes statutory authority, so that it more clearly defines and describes the responsibilities of public health laboratories).

15. Telephone Interview with Mark J. Miller, *supra* note 4.

16. *Id.* See generally J. Anders et al., *Rapid Assessment of Vectorborne Diseases During the Midwest Flood—United States 1993*, 272 JAMA 264 (1994), available in LEXIS, News Library, JAMA File, at 2 (explaining that the collaborative surveillance efforts of the CDC (Centers for Diseases Control and Prevention) and state and local health departments for arboviral disease after flooding in the Midwest in 1993 indicated that there was little risk for arboviral disease in the disaster area; plans for expensive large-scale prophylactic mosquito abatement were not implemented); *id.* (noting that such surveillance efforts saved over \$10 million); Ralph T. Bryan et al., *Addressing Emerging Infectious Disease Threats: A Prevention Strategy for the United States*, MORBIDITY AND MORTALITY WKLY. REP., Apr. 15, 1994, at 1, 4 (reporting that infectious diseases play a role in 25% of all visits to physicians, and estimating the costs of infectious diseases to exceed \$120 billion per year); *id.* at 1 (stating that even in the United States, infectious diseases are a leading cause of death); *id.* at 4 (reporting that the largest recognized outbreak of waterborne illness in the United States occurred in 1993, in Milwaukee, Wisconsin, and affected approximately 403,000 people, 4400 of which required hospitalization); *id.* at 6 (reporting that an *E. coli* outbreak, covering several states, resulted in the deaths of four children in 1993); *id.* (explaining that the hantavirus pulmonary syndrome is transmitted to humans as a result of exposure to infected rodents, the virus has been detected in more than a dozen states, and over half of the approximately 60 cases that have been reported have resulted in death); Jon Engellenner, *Placer's Woodlands Again Breeding Ground for Rabies*, SACRAMENTO BEE, Apr. 22, 1995, at B1 (outlining the prevalence of rabies in Placer County); Theresa Flynn, *Creating Awareness about STDs*, PHARMACY TODAY, Mar. 1, 1995, at 28 (reporting that almost two-thirds of new sexually transmitted disease (STD) infections occur in people below the age of 25, at least 55 million Americans are infected with STDs, and STDs are spreading at a rate of 12 million new cases per year); Philip Hager, *Courts Get Health Alert Authority*, L.A. TIMES, Mar. 20, 1992, at A3 (reporting that illnesses linked to raw milk have caused the deaths of 31 people in California); Jeff Stryker et al., *Prevention of HIV Infection: Looking Back, Looking Ahead*, 273 JAMA 1143 (1995), available in LEXIS, News Library, JAMA File, at 1 (reporting that AIDS is the leading cause of death among Americans aged 25 to 44 years); *id.* (reporting that an estimated 40,000 to 80,000 people are infected with HIV each year); *Surveillance/Outreach Active TB Search Finds 288 Cases in Santa Clara County, California*, AIDS WKLY., Apr. 17, 1995, available in LEXIS, News Library, Cumws File, at 1-2 (reporting that cases of tuberculosis in California increased by 39% between 1985 and 1994, and that although tuberculosis cases dropped by 6% in the past year for the state as a whole, cases in Santa Clara and Alameda counties increased by 24%); *id.*, at 2 (reporting that 1.6% of the 4861 tuberculosis cases reported last year in California were drug-resistant, and that at least 20% of the cases in New York City are drug-resistant); Nora Zamichow, *County Girds to Act Should Cholera Strike*, L.A. TIMES, Sept. 29, 1991, at B1 (reporting that the public health laboratory in San Diego County began testing sewage for a strain of cholera that had been found in 23 countries).

Health and Welfare; residential care facilities for the elderly—secured or locked premises

Health and Safety Code § 1569.697 (amended and repealed); §§ 1569.698, 1569.699 (new).
SB 732 (Mello); 1995 STAT. Ch. 550
(Effective October 4, 1995)

Existing law requires the State Department of Social Services¹ to institute a pilot program to test the appropriateness of allowing secured perimeters,² in residential care facilities for the elderly,³ in order to protect persons with irreversible dementia.⁴ Chapter 550 modifies existing law by enabling residential care facilities for the elderly that care for residents with dementia to use locked

1. See CAL. WELF. & INST. CODE § 10550 (West 1991) (establishing the State Department of Social Services); see also *id.* § 10551 (West 1991) (listing the duties of the Director of the State Department of Social Services).

2. See CAL. HEALTH & SAFETY CODE § 1569.692(b) (West Supp. 1995) (defining “secured perimeter” as an environment which restricts residents’ access to external boundaries, including yard areas); see also *id.* (declaring that the purpose of the secured perimeter is to provide for the safety of the residents, while at the same time allowing free movement within the facility perimeters); *id.* § 1569.693 (West 1990) (defining “functionally locked” as secured boundaries that, for all intents and purposes, render it impossible for the resident to leave without assistance because the means by which the facility is secured is beyond the functional capacity of the resident to negotiate).

3. See *id.* § 1569.2(1) (West 1990) (defining “residential care facility for the elderly” as a housing arrangement chosen voluntarily by persons 60 years of age or over that is equipped to fulfill the various health needs of its residents).

4. *Id.* § 1569.691 (West Supp. 1995); see *id.* (mandating that the California State Department of Social Services institute particular pilot programs that conform with specified requirements); *id.* § 1569.691(b)(1), (2) (West Supp. 1995) (declaring that the pilot project is to be composed of six sites—three that have secured perimeters, and three that employ door alarms or wrist bands to provide a secure environment); *id.* § 1569.691(c) (West Supp. 1995) (outlining the criteria and standards for participation in the pilot project); *id.* § 1569.692 (West Supp. 1995) (describing the requirements with which a residential care facility for the elderly must comply if it plans to operate with a secured or locked perimeter); *id.* § 1569.697 (amended and repealed by Chapter 550) (providing that §§ 1569.69-1569.697 of the California Health and Safety Code shall become inoperative on January 1, 1998, or on the date that regulations adopted by the department become effective); see also *id.* § 1569.69(a) (West 1990) (stating that persons with the medical diagnosis of dementia include, but are not limited to, people with Alzheimer’s disease); *id.* § 1569.69(b)-(g) (West 1990) (outlining the typical characteristics of dementia, describing the behavior exhibited by patients with the disease, explaining the problems inherent in providing long-term care for persons with dementia, and proposing a pilot project as a means of reaching a solution); cf. 42 U.S.C.A. § 11221 (West Supp. 1995) (establishing an Advisory Panel on Alzheimer’s Disease composed of 15 members, three of whom must be individuals that have experience caring for people suffering from any form of dementia); *id.* § 11261 (West Supp. 1995) (granting funds to promote research concerning different aspects of Alzheimer’s disease, including research that explores the costs incurred by families in providing long-term care for relatives with Alzheimer’s disease). See generally Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 *FORDHAM L. REV.* 1177 (1994) (discussing the difficulty in determining the degree to which dementia impairs a person’s decisional capacity); U.S. DEP’T OF HEALTH AND HUMAN SERVS., *ALZHEIMER’S DISEASE: FACT SHEET* (Sept. 3, 1993) (giving a basic overview of Alzheimer’s disease and describing the present trends in medical research regarding the disease). Compare 1993 Cal. Stat. ch. 702, sec. 5, at 3260 (amending CAL. HEALTH & SAFETY CODE § 1569.697) (providing for the repeal of the pilot projects on January 1, 1996) with CAL. HEALTH & SAFETY CODE § 1569.697 (amended and repealed by Chapter 550) (specifying that the pilot programs will be repealed on January 1, 1998, or if regulations are established, the first of January after the regulations become effective).

or secured perimeters, provided that they comply with departmental regulations.⁵ Moreover, Chapter 550 mandates that the Department of Social Services adopt the necessary regulations to implement the provisions as emergency regulations.⁶ These regulations will be effective for no more than 180 days.⁷

Additionally, Chapter 550 authorizes licensed residential care facilities for the elderly to provide certain exit doors with egress-control devices, subject to certain restrictions, provided that the building is protected throughout by an approved automatic sprinkler system and an approved automatic smoke-detection system.⁸ Chapter 550 further states that the grounds of residential care facilities that care for dementia⁹ patients may be fenced, and the gates may be locked, provided that certain conditions are met.¹⁰ Finally, Chapter 550 requires that the department adopt regulations that ensure that the staff employed at secured perimeter facilities receive adequate training in the care of residents with Alzheimer's disease and other related dementia.¹¹

5. CAL. HEALTH & SAFETY CODE § 1569.698 (enacted by Chapter 550); *see id.* § 1569.698(a) (enacted by Chapter 550) (stating that State Building Standards Commission must consider adopting, into the California Building Standards Code, a proposal that will provide for locked and secured perimeters in residential care facilities for the elderly that care for persons with dementia); *id.* § 1569.698(a)(1) (enacted by Chapter 550) (providing that these building standards will not become effective until October 1, 1996); *id.* § 1569.698(b)(7) (enacted by Chapter 550) (mandating that all admissions to residential care facilities for the elderly continue to either be voluntary on the part of the resident or with the lawful consent of the resident's legal conservator); *id.* § 1569.698(f) (enacted by Chapter 550) (requiring that any person entering a secured perimeter facility sign a statement of voluntary entry, unless that person is a conservatee).

6. *Id.* § 1569.698(c) (enacted by Chapter 550); *see id.* § 1569.698(a)(3) (enacted by Chapter 550) (stating that, in recognition of the urgent need to provide a secured environment to patients with dementia, the building standards proposed by the State Fire Marshal pursuant to California Health & Safety Code § 1569.699 shall become effective immediately); *id.* § 1569.698(d) (enacted by Chapter 550) (requiring that all residential care facilities for the elderly that serve persons with dementia comply with the regulations proposed by either the State Fire Marshal, or the regulations imposed by the State Building Standards Commission regarding secured perimeters, whichever is operative); *see also* CAL. CONST. art. IV, § 8 (empowering the Legislature to enact urgency measures for the immediate preservation of the public peace, health, or safety).

7. CAL. HEALTH & SAFETY CODE § 1569.698(c) (enacted by Chapter 550).

8. *Id.* § 1569.699(a) (enacted by Chapter 550); *see id.* (stating that egress-control devices must not be installed without the consent of the person responsible for enforcement of building standards); *id.* (requiring the automatic deactivation of the egress-control device, in such situations as upon the activation of either the sprinkler system or the detection system); *id.* (stating that all doors must be equipped with audible alarms); *id.* (mandating that a sign be posted which informs residents that if manual pressure is applied on the door, an alarm will sound and the egress-control device will deactivate); *id.* § 13146 (West Supp. 1995) (designating the person responsible for the enforcement of building standards in specified situations).

9. *See id.* § 1569.698(b)(2) (amended by Chapter 550) (stating that the term "dementia" encompasses Alzheimer's disease and related disorders that increase the patient's tendency to wander and impair the patient's ability to communicate).

10. *Id.* § 1569.699(b) (enacted by Chapter 550); *see id.* (stating that if a facility wishes to construct fences equipped with locked gates, it must comply with the following requirements: (1) safe dispersal areas located within 50 feet of the facility; (2) dispersal areas provide an area of at least three square feet per occupant; (3) gates do not obstruct hallways leading to the dispersal areas, unless they conform to the requirements of the California Building Standards Code § 1021).

11. *Id.* § 1569.698(b)(4) (enacted by Chapter 550); *see id.* § 1569.698(b)(5) (enacted by Chapter 550) (stating that those facilities for the elderly that can fully meet the needs of their patients using care options permitted by existing law and regulations are not compelled to utilize secured perimeters); *id.* § 1569.698(b)(6) (enacted by Chapter 550) (declaring that the Legislature does not intend to authorize an increase in the level of care provided in a residential care facility for the elderly nor to establish a supplemental rate structure

COMMENT

Prior to the enactment of Chapter 550, patients suffering from dementia were forced to reside in skilled nursing facilities, not because they were in need of extensive medical treatment, but rather, because their frequent episodes of wandering¹² necessitated a secured environment.¹³ In 1989, the Legislature instituted a pilot program that tested alternative methods of caring for dementia patients, in response to studies that demonstrated that the restraints imposed by skilled nursing facilities inhibited the improvement of dementia patients.¹⁴ By authorizing the use of secured perimeters, Chapter 550 aims to provide a safe housing environment that is targeted to meet the special needs of dementia patients.¹⁵

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commensurate with the services provided in the facility).

12. See M. Lucero et al., *Wandering in Alzheimer's Dementia Patients*, 2 CLIN. NURS. RES., 160, 161-63 (1993) (describing the wandering behaviors of institutionalized patients with Alzheimer's disease in their natural environment).

13. Fact Sheet on SB 732, provided by Senator Harry J. Mello, Chair, Senate Subcommittee on Aging (May 22, 1995) (copy on file with the *Pacific Law Journal*); see *id.* (stating that prior law prohibited the use of a locked facility for residential care facilities for the elderly, since these facilities were usually considered a person's home). See generally Susan McGlamery, *Bibliography: Gerontology and the Law: A Selected Bibliography, 1986-1990 Update*, 64 S. CAL. L. REV. 1675 (1991) (providing, among other things, a list of articles that discuss the housing resources available to the elderly).

14. ASSEMBLY COMMITTEE ON HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 732, at 2 (June 28, 1995); see CAL. HEALTH & SAFETY CODE § 1569.691 (West Supp. 1995) (providing for the institution of pilot programs); see also *Alzheimer's Units Seek to Improve Quality of Care; Includes Information on Increase in Alzheimer's Death*, BROWN UNIV. LONG-TERM CARE LETTER, Nov. 8, 1990, Vol. 2, No. 21, at 6 (declaring that the needs of patients with dementia have not been optimally met by nursing homes); *id.* (describing a study that illustrates the importance of targeting care and activities directly to the needs of dementia patients); Cailin Brown, *Alzheimer's Facility Eyes Europe as Model*, TIMES UNION (Albany, N.Y.) June 23, 1994, at B9 (describing the way in which European countries use architecturally designed environments that give dementia patients the freedom to wander, while at the same time preserving their safety); Judy Creighton, *Facility Alters Dementia Care*, CALGARY HERALD, Aug. 10, 1994, at B4 (stating that the locked wards of long-term care facilities deprive dementia patients of the flexibility that is necessary for their development); *Ohio Leads Nation in Fight Against Alzheimer's Disease*, PR Newswire, Dec. 12, 1994, available in LEXIS, Nexis Library, UPI file (describing the effects of Ohio legislation that authorizes the creation of specialized nursing facilities devoted entirely to persons with dementia); *Hospital Tracks Alzheimer Patients With Sensor Tags*, CNN Broadcast (Apr. 9, 1995), available in LEXIS, Nexis Library, Curnws File (describing a Chicago hospital's practice of employing electrical tags to keep track of people who might wander away from the facility); cf. OHIO REV. CODE ANN. § 173.04 (Anderson 1994) (requiring, among other things, that the director of aging develop and distribute new training materials for those institutions that care for patients with Alzheimer's disease); *id.* (stating that respite care programs shall be administered for persons with Alzheimer's disease for specified purposes); see also Memorandum from the Senate Subcommittee on Aging (May 22, 1995) (copy on file with the *Pacific Law Journal*) (stating that studies have shown that Alzheimer's residents show a marked improvement when they are accorded a greater degree of freedom and flexibility); *id.* (explaining that skilled nursing facilities were ill-equipped to provide the social and recreational activities necessary to foster the development of dementia patients).

15. 1995 Cal. Legis. Serv. ch. 550, sec. 4 at 3356 (enacting CAL. HEALTH & SAFETY CODE §§ 1569.697-1569.699); see *id.* (stating that Chapter 550 is to take effect immediately in order to provide the option of a secured environment for those elderly persons who are prone to wandering); Fact Sheet on SB 732, *supra* note 13 (noting that Chapter 550 will allow persons with dementia to remain in the lowest, least restrictive environment appropriate to meet their special needs).

Health and Welfare; straw-bale structures

Health and Safety Code §§ 18944.30, 18944.31, 18944.32, 18944.33, 18944.34, 18944.35, 18944.40 (new).
AB 1314 (Sher); 1995 STAT. Ch. 941

Pursuant to existing law, commonly known as the State Building Standards Law,¹ the California Building Standards Commission² is authorized to review, adopt, or reject proposed building standards,³ as well as to codify and publish any adopted⁴ standards in the California Building Standards Code.⁵

1. See CAL. HEALTH & SAFETY CODE § 18901(a) (West 1992) (stating that this section is to be known as the State Building Standards Law); see also *id.* § 18902 (West Supp. 1996) (stating that the State Building Standards Code is also known as the California Building Standards Code, and that both refer to Title 24 of the California Administrative Code).

2. See *id.* § 18920 (West Supp. 1996) (establishing in the State and Consumer Services Agency, the California Building Standards Commission composed of the Secretary of State and Consumer Services Agency, and ten Governor appointed members).

3. See *id.* § 18909(a) (West Supp. 1996) (defining "building standard" as any rule, regulation, order, or other requirement, which specifically regulates construction, alteration, improvement, repair, or rehabilitation of a building, structure, factory-built housing, or other improvement to real property as determined by the California Building Standard Commission); see also 74 Op. Cal. Att'y Gen. 1, 3, 4 (1991) (stating that building standards have three backgrounds: (1) Some have been adopted by state agencies without any change from building standards contained in various model industry codes, (2) some have been adapted from model codes to meet California conditions, and (3) some are adopted to address a particular California concern and constitute extensive additions to the model codes and if a model code has been amended it is only the model code in its amended version that appears in the State Building Standards Code that is valid).

4. See CAL. HEALTH & SAFETY CODE § 18906 (West Supp. 1996) (defining "adoption" as the final act of a state agency with respect to the procedure for promulgation of a building standard); see also *id.* § 18944 (West Supp. 1996) (stating that state agencies shall adopt regulations for publication in the California Code of Regulations).

5. *Id.* § 18930(a) (West Supp. 1996); see *id.* (requiring that the California Building Standards Commission approve any building standard adopted by any state agency prior to its codification); see also *id.* § 17922(d) (West Supp. 1996) (stating that building standards contained in the California Building Standards Code can be modified to allow the use of alternate materials and methods of construction); *id.* § 18930(a) (West Supp. 1996) (providing the criteria that proposed building standards must satisfy before their adoption: (1) They must not overlap or duplicate existing standards; (2) another agency must not have exclusive jurisdiction over the proposed building standard; (3) there must be strong public interest in adopting the proposed standard; (4) they can not be arbitrary or unreasonable; (5) their cost to the public must be reasonable; (6) they cannot be unnecessarily ambiguous or vague; (7) the applicable model codes and national specifications must be incorporated therein; (8) their format must be consistent with other building standards; and (9) if they promote fire and panic safety, they must be approved by the State Fire Marshall); *id.* § 18931(a)-(g) (West Supp. 1996) (establishing the duties of the California Building Standards Commission as follows: (1) review proposed standards, return proposed standards for amendment, or reject proposed standards; (2) codify all building standards approved by the commission into one California Building Standards Code; (3) resolve conflict and overlap in building standards; ensure consistency; (4) hear appeals resulting from the administration of building standards; (5) adopt any procedural rule deemed necessary to the administration of building standards; and (6) prepare a comprehensive listing of all state amendments to the state building code); *id.* § 18935(a) (West Supp. 1996) (stating that notice and hearings are to be held by the adopting agencies, as required by the Administrative Procedure Act, prior to the adoption of any proposed building standards and submission to the Building Standards Commission for approval); *id.* § 18944.5 (West 1992) (stating that the California Building Standards Code is binding on state and other public agencies, including any federal agencies as permitted by federal law, as well as private parties and entities); *Thompson v. City of Lake Elsinore*, 18 Cal. App. 4th 49, 57, 22 Cal. Rptr. 2d 344, 349 (1993) (stating that the issuance of building permits is a discretionary function;

Chapter 941 adds a chapter⁶ to the California Building Standards Code establishing safety guidelines for buildings⁷ or structures⁸ that utilize or are constructed of baled⁹ rice straw.¹⁰ Specifically, Chapter 941 sets guidelines for bale construction, as well as for bale building construction.¹¹ These guidelines, however, only become operative within a city or county if local conditions make

there is no mandatory duty to issue a building permit even if an application and plans meet all existing codes and regulatory requirements); *Smith v. City and County of San Francisco*, 225 Cal. App. 3d 38, 55, 275 Cal. Rptr. 17, 28 (1990) (stating that a city's promise to forgo the application of its building code requirements is invalid and such a promise is unenforceable as contrary to public policy).

6. See 1995 Cal. Legis. Serv. ch. 941, sec. 1, at 5617-21 (enacting Chapter 4.5 of the California Health and Safety Code, §§ 18944.30-18944.40).

7. See CAL. HEALTH & SAFETY CODE § 18908(a) (West 1992) (defining "building" as any structure used for support or shelter of any use or occupancy).

8. See *id.* (defining "structure" as anything which is built or constructed, except any mobilehome as defined in California Health and Safety Code § 18008, or recreational vehicle as defined in California Health and Safety Code § 18010, or any manufactured home as defined in California Health and Safety Code § 18012.5); see also *id.* § 18008 (West Supp. 1996) (defining "mobilehome" as a transportable structure designed to contain not more than two dwellings to be used with or without a foundation system or a transportable structure designed to be used with a foundation system for three or more dwelling units, a dormitory, a residential hotel, or efficiency units); *id.* § 18010 (West Supp. 1996) (defining a "recreational vehicle" as a motor home, travel trailer, truck camper, meeting specified criteria, designed for human habitation for recreational, emergency, or other occupancy or a park trailer, meeting specified criteria, designed for human habitation for recreational or seasonal use only); *id.* § 18012.5 (West 1984) (defining a "special purposes commercial coach" as a vehicle with or without motive power designed and equipped for human occupancy for industrial, professional, or commercial purposes).

9. See *id.* § 18944.33(a) (enacted by Chapter 941) (defining a "bale" as a rectangular block of compressed rice straw, bound by strings or wire).

10. *Id.* § 18944.30(b) (enacted by Chapter 941); see *id.* (providing that the safety guidelines apply to the construction of structures—including single family dwellings—that use baled straw as a loadbearing or nonloadbearing material); see also *id.* § 18944.30(a)(3) (enacted by Chapter 941) (stating that rice straw is a source of cellulose that is annually renewable, which can be used as an energy-efficient substitute for stud-framed wall construction); *id.* § 18944.33(f) (enacted by Chapter 941) (defining "straw" as dry stems of cereal grains which remain once the seed heads have been removed); Facsimile Transmission from the Office of Assemblymember Byron D. Sher (July 27, 1995) (copy on file with the *Pacific Law Journal*) (stating that in Douglas, Wyoming, on October 18, 1984, a straw bale house that was built in 1949 went through a 5.5 earthquake with the epicenter 33 miles southwest of the city, suffering only a hair line crack in the stucco under the kitchen window; however, in that same earthquake the town hall was damaged badly enough that officials condemned it) *id.* (stating that there is a straw bale house in Rockport, Washington where the annual rainfall is 80 inches); Lynn Graebner, *The Three Little Pigs Could Have Been on to Something*, BUS. J., Apr. 17, 1995, at 2 (stating that rice straw construction is seismically stable because of the bale's flexibility, slow burning due to a lack of oxygen in the bale, and is sealed with stucco to protect against moisture).

11. CAL. HEALTH & SAFETY CODE §§ 18944.35, 18944.40 (enacted by Chapter 941); see *id.* § 18944.35 (enacted by Chapter 941) (setting bale specifications as follows: (1) They must be rectangular; (2) they must be of consistent height and width to ensure even load distribution; (3) they must be bound with baling wire or a polypropylene string; (4) moisture content of the bales must not exceed 20% of the bale's total weight; (5) their density must be at least be 7.5 pounds per cubic foot; (6) custom made partial bales must comply to specifications of standard size bales; and (7) bales can be constructed from wheat, rye, rice, barley, oats, and similar plants so long as they meet the minimum requirements of shape, ties, moisture content and density); *id.* § 18944.40 (enacted by Chapter 941) (outlining the specifications for buildings and structures constructed from bales). Compare 1995 Cal. Legis. Serv. ch. 941, sec. 1, at 5618, 5619 (enacting CAL. HEALTH & SAFETY CODE §§ 18944.35, 18944.40) (establishing guidelines for rice straw bale construction and straw bale building construction) with Facsimile from Assemblymember Sher, *supra* note 10 (illustrating a Tucson and Pima County, Arizona draft Prescriptive Standard for Structural and Non-Structural Straw Bale Construction, which outlines safety guidelines for straw bale construction).

them reasonably necessary.¹² Nothing in Chapter 941 is to be construed as an exemption from regulations¹³ relative to preparation of plans, drawings, specifications, or calculations under the direct supervision of a licensed architect or civil engineer.¹⁴ Chapter 941 requires the California Building Standards Commission, subject to the availability of funds, to submit a report to the Department of Housing and Community Development¹⁵ and the Legislature regarding the implementation of these guidelines for straw-bale structures.¹⁶

COMMENT

Chapter 941 is a legislative attempt to provide solutions to two problems: (1) the urgent need for low cost, energy-efficient housing, and (2) the desire to develop an environmentally safe way to eliminate more than one million tons of rice straw produced each year.¹⁷ Finding new ways to dispose of rice straw is necessary because, under a 1991 law,¹⁸ rice straw burning must be reduced

12. CAL. HEALTH & SAFETY CODE § 18944.31(a) (enacted by Chapter 941); *see id.* (stating that the bale construction safety guidelines are not operative within any city or county until the locality's legislative body makes an express finding that because of local conditions the safety guidelines are reasonably necessary, and files any such finding with the California Department of Housing and Community Development); *see also id.* § 18938.5(a) (West Supp. 1996) (providing that only building standards approved by the California Building Standards Commission, which are also applicable at the local level at the time an application for a building permit is submitted, apply to the plans, specifications, and ongoing construction under that building permit); *id.* § 18941.5(b) (West Supp. 1996) (stating that nothing in the State Building Standards Law limits the authority of a local governing entity from establishing more restrictive standards that are reasonably necessary because of local climatic, geological, or topographical conditions); *Danville Fire Protection Dist. v. Duffel Fin. & Constr. Co.*, 58 Cal. App. 3d 241, 248, 129 Cal. Rptr. 882, 886 (1976) (discussing and applying the California Supreme Court decision in *In re Lane*, 58 Cal. 2d 99, 102, 372 P.2d 897, 899, 22 Cal. Rptr. 857, 859 (1962), which held that whenever the Legislature sees fit to adopt a general scheme for regulation of a subject, control of local legislation ceases).

13. *See* CAL. BUS. & PROF. CODE §§ 5500-5610.7 (West 1990 & Supp. 1996) (outlining architectural regulations); *see also id.* §§ 6700-6799 (West 1995) (specifying professional engineering regulations).

14. CAL. HEALTH & SAFETY CODE § 18944.32 (enacted by Chapter 941).

15. *See id.* §§ 34900-34919 (West 1973) (outlining the powers and duties of the California Department of Housing and Community Development).

16. *Id.* § 18944.34(a) (enacted by Chapter 941); *see id.* § 18944.34(b) (enacted by Chapter 941) (stating that the implementation report is to describe which cities and counties have utilized the straw-bale construction guidelines, the number and type of structures that have been built, and may include recommendations for amendment to the guidelines).

17. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1314, at 2 (May 25, 1995); *see also* Facsimile from Assemblymember Sher, *supra* note 10 (explaining that straw bale building construction (1) helps to cure the straw waste disposal problem for the California rice industry, (2) helps to reduce greenhouse gases, (3) produces highly fire resistant and earthquake friendly buildings, and (4) increases energy efficient housing); *id.* (noting that straw is an annually renewable building material, whereas trees take decades to grow); Mareva Brown, *Is He Grasping at Straws or Blazing Housing Trial?*, SACRAMENTO BEE, Aug. 6, 1994, at B1 (reporting that straw homes are durable and provide a cheap environmentally clean way for farmers to dispose of rice straw); Graebner, *supra* note 10 (stating that rice straw bale construction is a boon for rice growers looking for ways to dispose of the troublesome by-product and stating that straw bale construction will improve the miserable air quality in the Sacramento area).

18. *See* CAL. HEALTH & SAFETY CODE § 41865(a) (West Supp. Pamphlet 1996) (establishing the Connelly-Areias-Chandler Rice Straw Burning Reduction Act of 1991).

seventy-five percent by the year 2000.¹⁹ A current alternative to burning rice straw is winter flooding of the rice fields; however, even this is not without environmental problems.²⁰ The straw bale housing industry is a fledgling one, however, the idea is not new; the pioneers of the late 1800's in Nebraska were building homes and churches out of baled meadow hay.²¹

Chapter 941 is precedential because the Legislature usually does not establish mandatory building standards.²² Instead, it relies on the California Building Standards Commission together with local building official who have the technical background and expertise to go through the highly technical information and make a decision.²³ However, in this instance the standards were introduced in the Legislature because the existing standards lacked flexibility due to input from numerous agencies, as well as reliance upon model codes.²⁴

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19. *Id.* § 41865(c) (West Supp. Pamphlet 1996); *see id.* (stating that under the Connelly-Areias-Chandler Rice Straw Burning Reduction Act of 1991, rice straw burning is to be phased down beginning September 1, 1992, and be completed by September 1, 1999). *But see Letters to the Editor; Rice Fields Must Burn*, S.F. EXAMINER., Apr. 21, 1995, at A22 (noting that the state let rice farmers burn more rice straw than allowed under the Connelly-Areias-Chandler Rice Straw Burning Reduction Act of 1991 because of bad weather in 1995).

20. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1314, at 2 (May 25, 1995); *see id.* (stating that flooding the rice fields provides additional water fowl habitat, but causes large amounts of water to be taken from rivers and streams when the water is needed for maintaining salmon runs). *But see Vicky Boyd, Farmers Roll with the Times*, SACRAMENTO BEE, Oct. 7, 1993, at N1 (explaining that winter rice field flooding, rather than burning the rice straw, helps decompose rice straw while providing a temporary wetlands for ducks and geese spending the winter in Sacramento).

21. Graebner, *supra* note 10; *see id.* (providing that California architects get weekly calls regarding rice straw homes). The California Department of Transportation is thinking about using baled rice straw for sound walls and the Colusa County Sheriff is considering constructing a baled rice straw wall around the county jail. *Id.* *But see* Brown, *supra* note 17 (reporting that building industry experts cannot support large scale home construction with straw bales until test results as to the straw's durability are available).

22. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1314, at 2 (May 17, 1995).

23. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1314, at 3-4 (Apr. 5, 1995).

24. *Id.*

Health and Welfare; tobacco product sales—vending machines

Business and Professions Code § 22960 (new); § 22958 (amended).
AB 686 (Tucker); 1995 STAT. Ch. 823

Existing law establishes the Stop Tobacco Access to Kids Enforcement Act (STAKE Act).¹ Under the provisions of the STAKE Act, the State Department of Health Services is required to develop a program on or before July 1, 1995, designed to reduce the availability of tobacco products² to minors.³

Additionally, under the provisions of the STAKE Act, existing law allows the State Department of Health Services to assess civil penalties upon those persons, firms, or corporations that sell or furnish tobacco products to persons under the age of eighteen.⁴

Chapter 823 generally prohibits the sale or distribution of tobacco products from any vending machines or coin operated mechanical devices.⁵ The general prohibition of Chapter 823 will not apply to those tobacco product vending

1. CAL. BUS. & PROF. CODE §§ 22950-22959 (West Supp. 1995).

2. *See id.* § 22958(a) (amended by Chapter 823) (indicating that "tobacco products" include cigarette papers or any other paraphernalia designed for the smoking or ingesting of tobacco); *cf.* ILL. ANN. STAT. ch. 720, para. 685/4(b) (Smith-Hurd 1993) (defining "tobacco products" as cigarettes, cigars, smokeless tobacco, or tobacco in any of its forms); LA. REV. STAT. ANN. § 14:91.8(E)(1) (West Supp. 1995) (providing that "tobacco products" include any cigar, cigarette, or other smoking tobacco); MD. CODE ANN., COM. LAW § 11-501(c)(1), (2) (1990) (indicating that "cigarettes" are any size or shaped roll for smoking that is made of tobacco or tobacco mixed with another ingredient and wrapped in paper or in any other material except tobacco); *id.* (providing further that the definition of "cigarette" does not include cigars).

3. CAL. BUS. & PROF. CODE § 22952(a) (West Supp. 1995); *see id.* § 22952(b), (c) (West Supp. 1995) (instructing the State Department of Health Services to do the following in implementing an availability reduction program: (1) require that tobacco retailers post a conspicuous warning sign stating that the sale of tobacco products to persons under 18 years of age is illegal, that state law requires all persons selling tobacco products to check the identification of any purchaser that reasonably appears to be under the age of 18 and that there is a toll-free number to the state department for reporting unlawful sales; (2) provide that enforcement responsibility of this act is upon the State Department of Health Services, and that they must conduct random sting inspections on retail sites using persons that are 15 and 16 years of age); *see also* CAL. FAM. CODE § 6500 (West 1994) (defining a "minor" as an individual who is under 18 years of age); *cf.* ILL. ANN. STAT. ch. 720, para. 685/4(a) (Smith-Hurd 1993) (providing that no person may knowingly sell or permit to be sold any smoking herbs to a person under the age of 18); *id.* 685/4(e) (Smith-Hurd 1993) (providing further that any person, who operates a business where smoking herbs are sold, must conspicuously post a sign that states the sale of smoking herbs to persons under 18 years of age is prohibited by law); N.D. CENT. CODE § 12.1-31-03(1) (1985) (finding that it is a misdemeanor for any person to sell or furnish to a minor, cigarettes, cigars, or tobacco in any other form where it can be smoked or chewed).

4. CAL. BUS. & PROF. CODE § 22958(a) (amended by Chapter 823); *see id.* (providing a schedule of the penalties as follows: (1) a \$200 to \$300 fine for the first violation, (2) a \$600 to \$900 fine for the second violation within 5 years, (3) a \$1200 to \$1800 fine for the third violation within 5 years, (4) a \$3000 to \$4000 fine for the fourth violation within a 5 year period, (5) a \$5000 to \$6000 fine for the fifth or subsequent violation within 5 years).

5. *Id.* § 22960(a) (enacted by Chapter 823); *cf.* LA. REV. STAT. ANN. § 14:91.8(C) (West Supp. 1995) (indicating that it is unlawful for any vending machine operator to place in use a tobacco vending machine that vends automatically, unless the machine displays a sign or sticker, of proper size, that indicates that it is unlawful for any person to sell tobacco to persons under the age of 18).

machines located within fifteen feet of the entrance⁶ of an establishment issued an on-sale public premises license.⁷

Chapter 823 will not preempt or prohibit the enactment of local ordinances that further restrict the access or availability of tobacco products from vending machines or that impose a complete ban on the sale of tobacco products from vending machines.⁸

COMMENT

Chapter 823 is intended to prohibit the sale of tobacco products from vending machines, except in bars, in an effort to limit the accessibility of these products to minors.⁹ Chapter 823 is written to provide a minimum standard of tobacco vending machine restrictions that can be supplemented by local ordinances that provide stronger anti-smoking restrictions.¹⁰

The Tobacco Control Section of the California Department of Health Services indicates that vending machines are the principal source of tobacco for first-time smokers, and that children as young as fourteen years old are able to successfully purchase tobacco products from vending machines 85% of the time.¹¹ However, despite this easy access, the National Automatic Merchandising Association reports that only sixteen percent of illegal cigarette sales to minors came from vending machines.¹²

Supporters of Chapter 823 argue that any effort to reduce smoking is in the

6. See CAL. BUS. & PROF. CODE § 22960(b)(2) (enacted by Chapter 823) (clarifying that the phrase "within 15 feet of the entrance" means 15 feet within the premises and not outside the premises).

7. *Id.* § 22960(b)(1) (enacted by Chapter 823); see *id.* § 23039(a)(1) (West 1985) (instructing that "public premises" means any type of premises licensed, maintained, and operated for the selling and serving of alcoholic beverages to the public that will be consumed on the premises); *id.* (indicating further that the premises are ones in which food cannot be served except when being served incidentally to the sale or service of alcohol).

8. *Id.* § 22960(c) (enacted by Chapter 823).

9. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 686, at 2 (Sept. 7, 1995); see *Drugs, Clinton Seeks Curbs on Tobacco Use by Teens Through Rule or Legislation*, DAILY EXEC. REP. (BNA), at A155 (Aug. 11, 1995) (quoting President Clinton in his pronouncement that he would use his executive authority to initiate Food & Drug Administration action to outlaw vending machine sales of cigarettes and chewing tobacco); see also Eleanore J. Hajian, *Teen Smokers: Cigarette Ban Inconvenient*, RALEIGH EXTRA, Aug. 27, 1995, at 22 (finding that in the city of Raleigh, cigarette vending machines can only operate in places where minors are not allowed, namely in over-21 bars); Carol Kreck, *Teen Love Affair With Cigarettes Accelerates Efforts Toward Bans*, DENVER POST, Aug. 28, 1995, at F1 (reporting that an ordinance in Colorado Springs has banned cigarette vending machines except in private clubs, businesses that do not employ minors, and restaurant bar areas).

10. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 686, at 2 (Sept. 7, 1995); see *id.* (finding that currently 12 cities impose stricter restrictions than AB 686).

11. *Id.*; see *id.* (providing statistics from the Vallejo Police Department demonstrating that in their program to test tobacco vending machine access, the 16 year old children that were employed were successful in 9 out of every 10 attempts to purchase cigarettes from vending machines).

12. *Id.*; see *id.* (suggesting that vending machines typically are not the principal source of tobacco for minors); *id.* (finding further that children routinely purchase tobacco from mini-markets and grocery stores).

best interest of the people of the State of California.¹³ However, some of these supporters indicate that their support is conditioned upon the maintenance of the provision permitting cities to establish stronger local ordinances.¹⁴

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13. Letter from Donna M. Kaylor, Legislative Advocate, *California Association of Hospitals and Health Systems*, to Assemblymember Doris Allen, Chair, Assembly Health Committee (Mar. 24, 1995) (copy on file with the *Pacific Law Journal*).

14. Letter from the *League of California Cities* to the Members of the California State Senate (Sept. 7, 1995) (copy on file with the *Pacific Law Journal*).