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## California Supreme Court Survey: April 1996-July 1997

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# California Supreme Court Survey

April 1996 - July 1997

*The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of issues that the supreme court has addressed, as well as to serve as a starting point for researching any of the topical areas. Attorney discipline, judicial misconduct, and death penalty appeal cases have been omitted from the survey.*

*The survey will review California Supreme Court cases in either an article or summary format. Articles provide an in-depth analysis of selected California Supreme Court cases including the potential impact a case may have on California law. Additionally, articles guide the reader to secondary sources that focus on specific points of law.*

*Summaries provide a brief outline of the areas of law addressed in selected California Supreme Court cases and include references to additional research sources. Summaries are designed to provide the reader with a basic understanding of the legal implications of cases in a concise format.*

## ARTICLES

### I. ARBITRATION

*A jury trial is not required in California state courts to meet the constitutional guarantee of due process when the existence of an arbitration agreement covered by the United States Arbitration Act is at issue:*

**Rosenthal v. Great Western Financial Securities Corp. . . . . 196**

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**Smith v. Fair Employment & Housing Commission. . . 225**

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- Engalla v. Permanente Medical Group, Inc. . . . . 235**

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- The jurisdiction provision of the Washington Metropolitan Area Transit Authority Compact, which expressly grants jurisdiction to courts of United States, Maryland, and Virginia, impliedly denies jurisdiction to courts of other states:*
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V. CRIMINAL LAW

- A. *A criminal defendant may waive the statute of limitations for a lesser included offense as part of a plea agreement involving a greater offense, provided: (1) the waiver is knowing, intelligent, and voluntary; (2) the waiver is made for the defendant's benefit and after consultation with counsel; and (3) the waiver does not handicap the defendant's defense or contravene any other public policy. Further, waiver of the statute of limitations precludes challenging the conviction on that ground:*  
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- B. *The trial court did not abuse its discretion when it found that an alleged victim's payments to the district attorney's office for investigation costs created a conflict of interest that allowed for recusal of the district attorney's office:*  
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- C. *The Street Terrorism Enforcement and Prevention (STEP) Act, which provides for enhanced penalties when the defendant's offense is gang related and the defendant has committed two or more crimes enumerated therein, does not require the state to prove that the two or more previous crimes were gang related:*  
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**People v. Humphrey.** . . . . . 267
  
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VI. FAMILY LAW

*A creditor that forfeits a security interest in community real property pursuant to former Civil Code section 5127 retains the rights of any other unsecured creditor to seek a judgment against the debtor spouse for satisfaction of*



*the underlying debt and to enforce a money judgment lien against the community estate:*

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*A county acting on behalf of a custodial parent may successfully bring a cause of action against the non-custodial parent for child support and arrearages, even though the custodial parent actively concealed the child's whereabouts, if the claim is brought before the child reaches the age of majority:*

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**IX. LABOR LAW**

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**X. LETTERS OF CREDIT**

*Legislation enacted with the express intent to clarify existing law has no impermissible retroactive consequences and thus, applies to transactions predating its enactment. Furthermore, the antideficiency laws govern-*

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*Education Code section 44919(b), governing the hiring of athletic coaches, requires school districts to give an advantage to their credentialed teachers currently employed in the district by considering their applications before others. If the district determines that its credentialed teachers fail to meet the district's qualification standards, it is free to consider other applicants:*

**California Teachers Ass'n v. Governing Board of Rialto Unified School District. . . . . 356**

XVI. TRADE REGULATION/UNFAIR COMPETITION

*A purchaser may bring a cause of action against a seller by alleging that special discounts given to other buyers injured the purchaser and had a tendency to destroy competition among purchasers; a purchaser need not show harm to competition among sellers. Furthermore, a party may seek restitution under the Unfair Practices Act without additionally seeking an injunction:*

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XVII. UNEMPLOYMENT COMPENSATION

*Administrative law judges do not have statutory authority to order pre-judgment interest on a routine award of retroactive unemployment insurance benefit payments:*

**AFL-CIO v. Unemployment Insurance Appeals Board. . . . . 371**

XVIII. WATER LAW

*When a public entity's flood control measures, which divert and re-channel water, fail in areas historically known for flooding, private property owners seeking recovery for inverse condemnation must prove that the failure was due to unreasonable conduct on the part of the public entity. In determining reasonableness, courts must consider the following: (1) the overall public pur-*

*pose served by such flood control measures; (2) the degree to which plaintiff's loss is offset by reciprocal benefits; (3) the availability of low risk alternatives; (4) the severity of plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which the kind of damage is a normal risk of land ownership; and (6) the degree to which the damage is distributed to a benefited public:*

**Bunch v. Coachella Valley Water District. . . . . 377**

**XIX. WORKERS' COMPENSATION**

*When a maritime employee suffers an industrial injury that falls within the concurrent jurisdiction of the Longshore and Harbor Workers' Compensation Act (LHWCA) and the California Workers' Compensation Act (the California Act), credit for LHWCA disability benefits previously paid by the employer against an award under the California Act must be calculated on a dollar-for-dollar basis, regardless of whether the payment was categorized as temporary or permanent indemnity:*

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SUMMARIES

**I. Abatement, Survival and Revival**

**Code of Civil Procedure section 377.34, which prohibits recovery of damages for pain and suffering in an action brought or maintained on behalf of a deceased plaintiff, applies when the plaintiff dies before a final appealable judgment; section 377.34 does not bar recovery for such damages when the plaintiff dies following the trial court's judgment but before resolution of an appeal from that judgment.**

*Sullivan v. Delta Air Lines, Inc., Supreme Court of California, Decided May 5, 1997, 15 Cal. 4th 288, 935 P.2d 781, 63 Cal. Rptr. 2d 74. . . . . 393*

**II. Appellate Review**

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*Torres v. Automobile Club of Southern California, Supreme Court of California, Decided June 2, 1997, 15 Cal. 4th 771, 937 P.2d 290, 63 Cal. Rptr. 2d 859. . . . . 398*

**III. Civil Procedure**

**For a notice of entry mailed by the court clerk to qualify as notice under California Code of Civil Procedure section 664.5, and thus constitute the date on which the time to rule on a motion for new trial begins, the notice must "affirmatively state that it was given 'upon order by the court' or 'under section 664.5.'"**

*Van Beurden Insurance Services, Inc. v. Customized Worldwide Weather Insurance Agency, Inc., Supreme Court of California, Decided March 6, 1997, 15 Cal. 4th 51, 931 P.2d 344, 61 Cal. Rptr. 2d 166. . . . .* 401

**IV. Criminal Law**

- A. The Sixth Amendment right to confrontation does not extend to pretrial disclosure of confidential or privileged records in camera.**

*People v. Hammon, Supreme Court of California, Decided July 7, 1997, 15 Cal. 4th 1117, 938 P.2d 986, 65 Cal. Rptr. 2d 74. . . . .* 404

- B. Penal Code section 1170.12, which provides for sentence enhancements for “third strike” convictions, is not violated when an indeterminate term is imposed and runs consecutive to a prior determinate term; section 1170.12 does not violate the state and federal ex post facto constitutional provisions by mandating that a sentence for a third strike offense run consecutive to a sentence imposed before the third strike law was enacted.**

*People v. Helms, Supreme Court of California, Decided May 22, 1997, 15 Cal. 4th 608, 936 P.2d 1230, 63 Cal. Rptr. 2d 620. . . . .* 407

- C. When a criminal defendant is convicted and sentenced for a felony offense while on probation for a prior felony conviction, the probationary conviction is not a current conviction for the purposes of California Penal Code section 667(c)(7), nor is the probation term considered as already serving another sentence for the purposes of California Penal Code section 667(c)(8), so that the sentences imposed for the felony conviction and the probation violation**

should be served concurrently rather than consecutively.

*People v. Rosbury, Supreme Court of California, Decided March 17, 1997, 15 Cal. 4th 206, 932 P.2d 207, 61 Cal. Rptr. 2d 635. . . . .* 410

- D. **A request for reversal of a criminal conviction based on ineffective assistance of counsel is appropriate in a habeas corpus proceeding, but not on direct appeal unless the record is sufficiently clear concerning the motivations of counsel.**

*People v. Tello, Supreme Court of California, Decided April 17, 1997, As Modified June 11, 1997, 15 Cal. 4th 264, 933 P.2d 1134, 62 Cal. Rptr. 2d 437. . . . .* 413

- E. **Failure by a trial court to obtain a personal waiver of the statutory right to jury trial on the issue of prior prison terms from a defendant will result in error if the issue is tried to the court, but does not implicate state or federal constitutional issues of the right to jury trial or due process; therefore, the error must be preserved by objection in order to raise the issue on appeal.**

*People v. Vera, Supreme Court of California, Decided May 1, 1997, 15 Cal. 4th 269, 934 P.2d 1279, 62 Cal. Rptr. 2d 754. . . . .* 415

- F. **A sex offender's failure to register a change of address pursuant to California Penal Code section 290(f) is a continuing offense; thus, felony prosecution after the effective date of amendment increasing the crime from a misdemeanor to a felony, did not violate the constitutional prohibition against ex post facto laws.**

*Wright v. Superior Court, Supreme Court of California, Decided May 12, 1997, 15 Cal. 4th 521, 936 P.2d 101, 63 Cal. Rptr. 2d 322. . . . .* 419

**V. Delinquent, Dependent and Neglected Children**

**Where orders of a juvenile court referee require approval of a juvenile court judge to become effective, such orders do not become final until the later of ten calendar days after service of a written copy of the juvenile court referee's order and findings or twenty judicial days after the hearing; Welfare and Institutions Code section 250 finalizing an order ten calendar days after service applies only to orders which do not require juvenile court judge approval.**

*In re Clifford C., Supreme Court of California, Decided July 3, 1997, 15 Cal. 4th 1085, 938 P.2d 932, 64 Cal. Rptr. 2d 873. . . . . 423*

**VI. Employer and Employee**

**Statute of limitations in breach of contract action based upon constructive termination of employment begins to run when the employee is actually terminated, not when the intolerable working conditions occur.**

*Mullins v. Rockwell International Corp., Supreme Court of California, Decided May 29, 1997, 15 Cal. 4th 731, 936 P.2d 1246, 63 Cal. Rptr. 2d 636. . . . . 426*

**VII. Hospital Liens**

**When an insurer or payor, who has received timely notice of a hospital lien, fails to honor the hospital lien at the time of the judgment, compromise, or settlement, the hospital may recover the original amount imposed under the lien and no more.**



*Mercy Hospital v. Farmers Insurance Group, Supreme Court of California, Decided March 20, 1997, 15 Cal. 4th 213, 932 P.2d 210, 61 Cal. Rptr. 2d 638. . . . .* 429

**VIII. Insurance Contracts and Coverage**

**After the expiration of the contestability period, an imposter defense is unavailable where the named insured personally applied for the insurance policy, but substituted an imposter for the required medical examination.**

*Amex Life Assurance Company v. Superior Court of Los Angeles County, Supreme Court of California, Decided February 24, 1997, 14 Cal. 4th 1231, 930 P.2d 1264, 60 Cal. Rptr. 2d 898. . . . .* 433

**IX. Juvenile Adjudications**

**Penal Code section 667(d)(3)(C), requiring that in previous adjudication a juvenile be found a fit and proper subject to be dealt with under the juvenile court law to qualify as a prior felony subjecting a defendant to increased penalty under the three strikes law, does not require an express finding of fitness.**

*People v. Davis, Supreme Court of California, Decided July 3, 1997, 15 Cal. 4th 1096, 938 P.2d 938, 64 Cal. Rptr. 2d 879. . . . .* 436

**X. Negligence**

**Where the noise in the operation of machinery frightens a horse, causing injury to the rider, the operator breaches no duty of care to the rider when the operation of such machinery is socially beneficial, and is performed in a "regular and necessary" manner.**

*Parsons v. Crown Disposal Co., Supreme Court of California, Decided May 8, 1997, 15 Cal. 4th 456, 936 P.2d 70, 63 Cal. Rptr. 2d 291. . . . . 440*

**XI. Property Taxes**

**Fees imposed under the Childhood Lead Poisoning Act on paint manufactures for failing to screen potential child lead poisoning victims were regulatory fees, not taxes, and required only a legislative majority's approval.**

*Sinclair Paint Co. v. State Board of Equalization, Supreme Court of California, Decided June 26, 1997, 15 Cal. 4th 866, 937 P.2d 1350, 64 Cal. Rptr. 2d 447. . . . . 443*

**XII. Workers' Compensation**

**Labor Code section 5814 prohibits the imposition of multiple penalties for a workers' compensation insurer's single unreasonable act in terminating pre-award benefits; furthermore, a workers' compensation insurer's or an employer's refusal to reinstate benefits after a claimant gives notice of an intention to seek penalties under section 5814 does not constitute a separate and distinct act for which multiple penalties may be awarded.**

*Christian v. Workers' Compensation Appeals Board, Supreme Court of California, Decided May 12, 1997, 15 Cal. 4th 505, 936 P.2d 115, 63 Cal. Rptr. 2d 336. . . . . 446*

## I. ARBITRATION

*A jury trial is not required in California state courts to meet the constitutional guarantee of due process when the existence of an arbitration agreement covered by the United States Arbitration Act is at issue: Rosenthal v. Great Western Financial Securities Corp.*

### I. INTRODUCTION

In *Rosenthal v. Great Western Financial Securities Corp.*,<sup>1</sup> the California Supreme Court considered how the state could resolve disputes over the existence of arbitration agreements subject to the United States Arbitration Act.<sup>2</sup> Federal law provides for a jury trial determination, but the supreme court held that such disputes could properly be decided by the superior courts based solely on written evidence produced in motions or hearings.<sup>3</sup>

On that basis, the court held that many plaintiffs provided insufficient evidence to prove fraud in the execution of the arbitration agreements made with the defendant.<sup>4</sup> Thus, most plaintiffs were compelled to arbitrate their dispute.<sup>5</sup>

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1. 14 Cal. 4th 394, 926 P.2d 1061, 58 Cal. Rptr. 2d 875 (1996). Justice Werdegar wrote the majority opinion, in which Chief Justice George, and Justices Mosk, Baxter, Chin, and Brown concurred. *See id.* at 402-31, 926 P.2d at 1065-84, 58 Cal. Rptr. 2d at 878-97. Justice Kennard authored a separate concurring opinion. *See id.* at 431-33, 926 P.2d at 1084-85, 58 Cal. Rptr. 2d at 897-99 (Kennard, J., concurring).

2. *See id.* at 402, 926 P.2d at 1065, 58 Cal. Rptr. 2d at 878. *See* 9 U.S.C. §§ 1-16 (United States Arbitration Act) (1994). *See* Jay M. Zitter, J.D., Annotation, *Claim of Fraud in Inducement of Contract as Subject to Compulsory Arbitration Clause Contained in Contract*, 11 A.L.R. 4th 774, 780-84 (1984) (examining the arguments for and against subjecting fraudulent inducement to arbitration).

3. *See Rosenthal*, 14 Cal. 4th at 402, 926 P.2d at 1065, 58 Cal. Rptr. 2d at 878-79. Moreover, the court did not rule out the possibility of hearing live testimony to clarify conflicting written evidence. *See id.*

4. *See id.* at 402, 926 P.2d at 1065, 58 Cal. Rptr. 2d at 879. Twenty-three plaintiffs invested in stocks and mutual funds via Great Western Financial Securities Corporation (GWFSFC). *See id.* at 402-03, 926 P.2d at 1065, 58 Cal. Rptr. 2d at 879. Most plaintiffs banked at Great Western Bank (GWB) prior to the investments. *See id.* at 403, 926 P.2d at 1065, 58 Cal. Rptr. 2d at 879. The plaintiffs claimed that GWFSFC representatives fostered the belief that deposits in GWFSFC were just as safe as deposits in GWB. *See id.* When the plaintiffs' funds declined, they brought suit against GWFSFC. *See id.* GWFSFC promptly petitioned the trial court for an order compelling arbitration, which the plaintiffs opposed. *See id.* The plaintiffs argued there was fraud in the inception of the contract and that the contracts were "permeated with fraud." *See id.*

5. *See id.* at 402, 926 P.2d at 1065, 58 Cal. Rptr. 2d at 879.

## II. TREATMENT

A. *Majority Opinion*

## 1. Trial Court Procedure for Deciding a Petition to Compel Arbitration

a. *Section 4 of the United States Arbitration Act*

First, the court acknowledged that the United States Arbitration Act (Act) governed the present issue because the arbitration agreements were provisions of contracts involving interstate commerce.<sup>6</sup> Section 2 of the Act states that agreements to arbitrate are "valid, irrevocable, and enforceable."<sup>7</sup> As a federal law with the power of preemption, the court reasoned that state courts must uphold the federal policy of enforcing arbitration agreements.<sup>8</sup>

Next, the court proceeded to explain how sections 3 and 4 of the Act implement section 2.<sup>9</sup> Section 3 dictates that litigation over arbitrable

6. See *id.* at 405, 926 P.2d at 1066, 58 Cal. Rptr. 2d at 880. See William G. Phelps, J.D., Annotation, *Pre-Emption by Federal Arbitration Act of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179, 180-256 (1992) (explaining the preemption process).

See also Lauri Washington Sawyer, Casenote, *Allied-Bruce Terminix Companies v. Dobson: The Implementation of the Purposes of the Federal Arbitration Act or an Unjustified Intrusion into State Sovereignty?*, 47 MERCER L. REV. 645, 648-49 (1996) (examining the Supreme Court's ruling that "evidencing a transaction in interstate commerce" of section 2 of the Act means the Act only applies if interstate commerce is proven in fact and holding that section 2 preempts any opposing state laws in state courts if the "contract at issue involves or affects interstate commerce 'in fact'"); Scott R. Swier, Note, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Possible Manner: Allied-Bruce Terminix Companies, Inc. v. Dobson*, 41 S.D. L. REV. 131, 165 (1996) (concluding that the Court's expansive view of what constitutes interstate commerce is incorrect).

7. See *Rosenthal*, 14 Cal. 4th at 405, 926 P.2d at 1066-67, 58 Cal. Rptr. 2d at 880 (quoting 9 U.S.C. § 2 (1995)); Michael R. Holden, Note, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1707-14 (1995) (detailing the evolving methods by which the federal courts have sought to promulgate the policy behind section 2).

8. See *Rosenthal*, 14 Cal. 4th at 405, 926 P.2d at 1067, 58 Cal. Rptr. 2d at 880. Additionally, California's public policy also prefers arbitration over litigation "because it is expeditious, inexpensive, avoids the delays of litigation, and relieves court congestion." 6 CAL. JUR. 3D *Arbitration & Award* § 1 (1988).

9. See *Rosenthal*, 14 Cal. 4th at 405, 926 P.2d at 1067, 58 Cal. Rptr. 2d at 881.

issues cease until the arbitration is concluded.<sup>10</sup> Section 4 mandates that a federal district court consider applications to force arbitration.<sup>11</sup> When an arbitration agreement's existence is at issue, the party opposing arbitration can insist on a jury trial.<sup>12</sup>

The court emphasized the similarity of section 4 of the Act to section 1281.2 of the California Code of Civil Procedure.<sup>13</sup> Section 1281.2 states that "the court may deny the application [to compel arbitration] if it finds the party resisting arbitration did not in fact agree to arbitrate."<sup>14</sup> The court noted that a key difference between the sections was California's denial of a jury trial and the Act's provision that such matters only be decided according to the "law for making and hearing of motions."<sup>15</sup>

In deciding whether section 4 should control in California's state courts, the supreme court noted that the section's wording to applies only to federal district courts.<sup>16</sup> In a broader analysis, the court noted that section 2 does not limit its application to federal courts.<sup>17</sup> However, the court viewed section 2 as the general rule of enforceability of arbitration clauses and section 4 as only one means of implementing enforceability, maintaining that other means, including comparable state procedures, may serve to implement the federal goal embodied in section 2.<sup>18</sup>

The court supported this conclusion by pointing to the general preemption standard that allows states to establish their own procedural rules even when the case is governed by federal substantive law, as long as the rules do not prevent "the uniform application of the federal statute essential to effectuate its purpose."<sup>19</sup> On that basis, the court concluded that California's implementation procedure of a summary judgment on the motions was not offensive to the federal goal of arbitration clause enforcement.<sup>20</sup>

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10. *See id.*

11. *See id.* at 405-06, 926 P.2d at 1067, 58 Cal. Rptr. 2d at 881.

12. *See id.* at 406, 926 P.2d at 1067, 58 Cal. Rptr. 2d at 881.

13. *See id.*

14. *Id.*

15. *See id.* at 407, 926 P.2d at 1067-68, 58 Cal. Rptr. 2d at 881. Any state procedures which would thwart the goal of section 2 would be superseded by the Act. *See id.* at 408, 926 P.2d at 1069, 58 Cal. Rptr. 2d at 882.

16. *See id.* at 407-08, 926 P.2d at 1068, 58 Cal. Rptr. 2d at 882.

17. *See id.* at 408, 926 P.2d at 1068, 58 Cal. Rptr. 2d at 882.

18. *See id.* at 408, 926 P.2d at 1068-69, 58 Cal. Rptr. 2d at 882-83.

19. *See id.* at 409, 926 P.2d at 1069, 58 Cal. Rptr. 2d at 883 (citing *McCarroll v. Los Angeles County Carpenters*, 49 Cal. 2d 45, 61-62, 315 P.2d 322, 331 (1957)).

20. *See id.* at 410, 926 P.2d at 1070, 58 Cal. Rptr. 2d at 883.

*b. Jury trial under the California Constitution*

In response to the plaintiffs' contentions that their due process rights under the California Constitution were violated by the denial of a jury trial, the supreme court explained why the state procedure was valid.<sup>21</sup> The court analogized petitions to compel arbitration to equity causes of action for specific performance of a contract, and reasoned that because the latter were not available at common law and are not guaranteed a jury trial, petitions to compel arbitration are not ensured a jury trial either.<sup>22</sup> In dismissing other arguments made by the plaintiffs,<sup>23</sup> the court stated that the decision of whether to compel arbitration is not a decision on the merits of the case, but only a decision as to whether the arbitration clause should be carried out.<sup>24</sup>

*c. Requirement of an evidentiary hearing*

The defendant argued that the failure to hold an evidentiary hearing to decide the relevant issues of fact constituted an abuse of discretion.<sup>25</sup> The court rejected this argument, finding no authoritative basis for it.<sup>26</sup> The court agreed, however, that a trial court should hear oral testimony when the factual issues are especially unclear.<sup>27</sup>

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21. *See id.* at 410-11, 926 P.2d at 1070, 58 Cal. Rptr. 2d at 884.

22. *See id.* at 411, 926 P.2d at 1070, 58 Cal. Rptr. 2d at 884.

23. *See id.* at 411-13, 926 P.2d at 1070-72, 58 Cal. Rptr. 2d at 884-86. The plaintiffs unsuccessfully compared their suit to cases in which there was fraud in the inception or inducement of a release of liability and a jury trial was mandated. *See id.* at 411, 926 P.2d at 1070, 58 Cal. Rptr. 2d at 884. The plaintiffs also tried arguing that the California procedures would prevent pleading certain causes of action and damage claims if a claim had to be proven to the trial court before the jury. *See id.* at 411-12, 926 P.2d at 1071, 58 Cal. Rptr. 2d at 885.

24. *See id.* at 412, 926 P.2d at 1071, 58 Cal. Rptr. 2d at 885. The court also dismissed the defendant's argument that the party resisting arbitration should have to prove fraud by clear and convincing evidence rather than by a preponderance of the evidence. *See id.* at 413, 926 P.2d at 1072, 58 Cal. Rptr. 2d at 886.

25. *See id.* at 414, 926 P.2d at 1072, 58 Cal. Rptr. 2d at 886.

26. *See id.*

27. *See id.*

d. *Correctness of the procedures followed*

The conflicting written evidence presented to the trial court left it unclear whether the court needed to decide the actual factual issues or only whether the plaintiff sufficiently stated a cause of action.<sup>28</sup> The trial court did the latter, but the supreme court held that the former course was correct and that the trial court could have heard oral testimony and made a ruling.<sup>29</sup> As a result, the factual issues were remanded to the trial court.<sup>30</sup>

2. Legal Sufficiency of the Plaintiff's Declarations

a. *Arbitrability of fraud claims under Prima Paint*

The second part of Justice Werdegar's decision discussed the applicability of the rule stated in *Prima Paint Corp. v. Flood & Conklin*.<sup>31</sup> *Prima Paint*<sup>32</sup> held that claims of fraud directed at an entire contract and solely at the agreement to arbitrate are arbitrable issues.<sup>33</sup> Regarding the first claim of fraud in the execution of the agreements, the defendant argued that *Prima Paint* requires arbitration of all fraud claims unless there is "an 'independent' or 'separate and distinct' challenge to the arbitration clause itself."<sup>34</sup> Unpersuaded, the court concluded that a trial court must hear claims of fraud in the execution of a contract because there is never an understanding to arbitrate when fraud renders an entire agreement void.<sup>35</sup>

With respect to the second claim of fraud "permeating" the agreements, the court reached the opposite conclusion and found such claims arbitrable.<sup>36</sup> The court explained that while the permeation of fraud was considered an exception to the general rule of arbitrability under *Prima Paint*, it was "ill-defined" and confusing because different opinions used

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28. See *id.* at 414, 926 P.2d at 1072-73, 58 Cal. Rptr. 2d at 886.

29. See *id.* at 414, 926 P.2d at 1073, 58 Cal. Rptr. 2d at 886.

30. See *id.*

31. See *id.* at 414-19, 926 P.2d at 1073-1076, 58 Cal. Rptr. 2d at 887-89.

32. 388 U.S. 395 (1967).

33. See *id.* at 404. *Prima Paint* is described as the seminal case, installing the "separability doctrine" in federal arbitration law. See Janet A. Rosen, *Arbitration Under Private International Law: The Doctrines of Separability and Competence De La Competence*, 17 FORDHAM INT'L L.J. 599, 622 (1994).

34. See *Rosenthal*, 14 Cal. 4th at 415, 926 P.2d at 1073, 58 Cal. Rptr. 2d at 887. See Jon R. Schumacher, Note, *The Reach of the Federal Arbitration Act: Implications on State Procedural Law*, 70 N.D. L. REV. 459, 474 (1994) (noting that "nothing in section 4 requires the separability of the arbitration clause from the contract").

35. See *Rosenthal*, 14 Cal. 4th at 416, 926 P.2d at 1074, 58 Cal. Rptr. 2d at 887-88.

36. See *id.* at 417, 926 P.2d at 1074, 58 Cal. Rptr. 2d at 888.

the permeation language to describe instances of fraud in the execution and to address instances in which arbitration clauses were found invalid because the entire agreement was induced by fraud.<sup>37</sup> Finding the permeation doctrine devoid of any legal merit, the court denounced the doctrine's further acknowledgement.<sup>38</sup>

*b. Reasonableness of reliance as an element of fraud in the inception*

Whether the plaintiffs justifiably relied on the defendant's misrepresentations was examined next.<sup>39</sup> The court applied the principle that "fraud does not render a written contract void where the defrauded party had a reasonable opportunity to discover the real terms of the contract,"<sup>40</sup> and held that the plaintiffs had not met the reliance requirement because their failure to read the contracts before signing rendered their reliance unreasonable.<sup>41</sup> Justice Werdegar further declared that such unjustified reliance was an "insufficient basis" to support a claim for fraud in the execution.<sup>42</sup>

*c. Sufficiency of plaintiffs' showings of fraud in the execution*

The court quickly dismissed most of plaintiffs' claims that the defendant misrepresented the true nature of the agreements through assertions of their standardness and triviality.<sup>43</sup> The court rejected the

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37. *See id.* at 417-19, 926 P.2d at 1074-76, 58 Cal. Rptr. 2d at 888-89. To remove the confusion, the court stated definitively that the trial courts would hear claims that fraud was used to induce consent to the arbitration clause and claims that fraud in the execution prohibited contract formation. *See id.* at 419, 926 P.2d at 1075-76, 58 Cal. Rptr. 2d at 889. The court specifically held that claims of fraud inducing the formation of the entire contract, including arguments of fraud "permeating" the agreement, are arbitrable. *See id.* at 419, 926 P.2d at 1076, 58 Cal. Rptr. 2d at 889.

38. *See id.* at 419, 926 P.2d at 1075, 58 Cal. Rptr. 2d at 889.

39. *See id.* at 419-23, 926 P.2d at 1076-79, 58 Cal. Rptr. 2d at 889-92.

40. *Id.* at 419-20, 926 P.2d at 1076, 58 Cal. Rptr. 2d at 890.

41. *See id.* at 423, 926 P.2d at 1078-79, 58 Cal. Rptr. 2d at 892. Actual fraud requires: (1) a false representation or concealment of a material fact, (2) made with knowledge of its falsity or when one should have known of its falsity, (3) with the intent to induce action on a person who, (4) acts in reliance upon the representation, and (5) who is damaged by the misrepresentation. *See* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 393 (1987 & Supp. 1996).

42. *See Rosenthal*, 14 Cal. 4th at 423, 926 P.2d at 1079, 58 Cal. Rptr. 2d at 892.

43. *See id.* at 423-24, 926 P.2d at 1079, 58 Cal. Rptr. 2d at 892-93. To find fraud



plaintiffs' arguments that their reliance was reasonable due to the length of time they transacted business with the defendant and that the defendant was under a fiduciary duty to inform the plaintiffs of the arbitration clause contained within the agreements.<sup>44</sup> Instead, the court focused on the plaintiffs' failure to allege actual concealment of the arbitration clause or any "affirmative misrepresentations regarding the existence or meaning of an arbitration clause . . . ."<sup>45</sup>

### B. Justice Kennard's Concurring Opinion

Justice Kennard wrote separately to address how the impending arbitration claims before the court should proceed.<sup>46</sup> She noted that after the court's initial determination of whether the party opposing arbitration possessed the opportunity to discover the contract's claimed misrepresentation, the arbitrator must determine whether misrepresentations were actually made and whether reformation of the agreement or another remedy is "justified under the circumstances."<sup>47</sup> Justice Kennard stressed the importance of making the former determination first because that answer potentially affects all the related issues, such as whether the arbitrator even has the continued ability to make further judgments.<sup>48</sup>

## III. IMPACT

The impact of *Rosenthal* falls primarily upon the banking industry. To avoid future claims of the kind asserted by the *Rosenthal* plaintiffs,<sup>49</sup>

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there must have been an intentional misrepresentation—the suggestion of a fact's truth when the party making such claim knows of its falsity. See 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 394 (1987 & Supp. 1996).

44. See *Rosenthal*, 14 Cal. 4th at 424-27, 926 P.2d at 1079-81, 58 Cal. Rptr. 2d at 893-95.

45. See *id.* at 426, 926 P.2d at 1080, 58 Cal. Rptr. 2d at 894. The court gave individual attention to those plaintiffs who alleged additional facts pointing to fraud. See *id.* at 427-31, 926 P.2d at 1081-83, 58 Cal. Rptr. 2d at 895-97. For example, the court concluded that plaintiffs who had a limited command of the English language, were legally blind, or were afflicted with Alzheimer's disease, would have their cases sent back on remand. See *id.*

46. See *id.* at 431, 926 P.2d at 1084, 58 Cal. Rptr. 2d at 897-98 (Kennard, J., concurring).

47. See *id.* at 431-32, 926 P.2d at 1084, 58 Cal. Rptr. 2d at 898 (Kennard, J., concurring). The standard remedies for a party fraudulently induced into an agreement are either rescission of the entire contract or affirmation with the ability to recover pursuant to the contract. See 14 CAL. JUR. 3D *Contracts* § 63 (1974 & Supp. 1996).

48. See *Rosenthal*, 14 Cal. 4th at 432-33, 926 P.2d at 1085, 58 Cal. Rptr. 2d at 898-99 (Kennard, J., concurring).

49. In addition to the *Rosenthal* plaintiffs, there is a similar federal action being

banks will have to analyze how they sell their different investment options.<sup>50</sup> Banks and brokerage houses may need to establish standard mechanisms for dealing with complaints before a dispute reaches the point of arbitration or litigation because any dissatisfied client or customer can bring suit.<sup>51</sup>

A further result is the increasing difficulty future plaintiffs will face in trying to challenge arbitration clauses.<sup>52</sup> Plaintiffs will not be able to benefit from the option of a jury trial; instead, they must prove that they acted diligently by reading the contracts they signed.<sup>53</sup> One plaintiff's attorney stated that "the court has set too high a fraud standard."<sup>54</sup>

#### IV. CONCLUSION

In a unanimous decision, the California Supreme Court ruled that the United States Arbitration Act's provision for a jury trial to decide issues surrounding the enforceability of an arbitration agreement is not required in California courts.<sup>55</sup> While section 4 of the Act establishes the basic federal policy favoring arbitration, California is free to achieve that policy according to its own laws, providing the federal goal is not impeded.<sup>56</sup> Summary adjudication is an acceptable state method because it does not violate a citizen's constitutional due process rights.<sup>57</sup>

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brought by tens of thousands of investors. See *Fraud Claim Over Arbitration Agreement Not Triable by Jury-S.C.*, METRO. NEWS-ENTERPRISE, Dec. 13, 1996, at 3, available in LEXIS, News Library, Curnews File.

50. See *id.* (noting that in April there will likely be a "thorough review" of sales policies).

51. See Carl Sullivan, *Double Jeopardy*, BANK INV. MKTG., June 1995, at 31, available in LEXIS, News Library, Curnews File. He suggests treating complaints seriously by training personnel how to respond to complaints, getting complaints in writing, responding in writing, and keeping detailed records of all complaints. See *id.*

52. See Rinat Fried, *Court Bolsters Mandatory Arbitration*, THE RECORDER, Dec. 13, 1996, at 1, available in LEXIS, New Library, Curnews File.

53. See *id.*

54. *Id.*

55. See *Rosenthal*, 14 Cal. 4th at 402, 926 P.2d at 1065, 58 Cal. Rptr. 2d at 878.

56. See *id.* at 409-10, 926 P.2d at 1069-70, 58 Cal. Rptr. 2d at 883.

57. See *id.* at 410-11, 926 P.2d at 1070, 58 Cal. Rptr. 2d at 884.

## II. CONSTITUTIONAL LAW

- A. *Preemployment drug testing, as part of a required medical examination, is valid under both the United States Constitution and the California Constitution, whereas prepromotional drug screening is unconstitutional under the Fourth Amendment's reasonableness clause: Loder v. City of Glendale.*

### I. INTRODUCTION

In *Loder v. City of Glendale*,<sup>1</sup> the California Supreme Court decided whether the City of Glendale could require all applicants for employment and promotion to undergo urinalysis drug testing as part of a medical examination prior to hiring or promotion.<sup>2</sup> The plaintiff brought a

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1. 14 Cal. 4th 846, 927 P.2d 1200, 59 Cal. Rptr. 2d 696 (1997). Chief Justice George wrote the lead opinion in which Justice Werdegar concurred. *See id.* at 852-900, 927 P.2d at 1202-35, 59 Cal. Rptr. 2d at 698-731. Justice Mosk wrote a separate opinion concurring and dissenting. *See id.* at 900-18, 927 P.2d at 1235-47, 59 Cal. Rptr. 2d at 731-43 (Mosk, J., concurring and dissenting). Justice Kennard wrote a separate opinion concurring and dissenting. *See id.* at 918-22, 927 P.2d at 1247-49, 59 Cal. Rptr. 2d at 743-45 (Kennard, J., concurring and dissenting). Justice Chin wrote an opinion concurring and dissenting, with whom Justices Baxter and Brown concurred. *See id.* at 922-33, 927 P.2d at 1249-57, 59 Cal. Rptr. 2d at 745-53 (Chin, J., concurring and dissenting). Finally, Justice Brown wrote an opinion concurring and dissenting. *See id.* at 933-38, 927 P.2d at 1257-60, 59 Cal. Rptr. 2d at 753-56 (Brown, J., concurring and dissenting). The following chart shows the voting pattern of the court with regard to the validity of both preemployment and prepromotional drug testing:

	PREEMPLOYMENT	PREPROMOTIONAL
George, C.J.:	Invalid	Valid
Werdegar, J.:	Invalid	Valid
Mosk, J.:	Invalid	Invalid
Kennard, J.:	Invalid	Invalid
Chin, J.:	Valid	Valid
Baxter, J.:	Valid	Valid
Brown, J.:	Valid	Valid

2. *See id.* at 852, 927 P.2d at 1202, 59 Cal. Rptr. 2d at 698. The City of Glendale enacted an employment-related drug screening provision in 1986 which required applicants for employment and promotion to submit to suspicionless urinalysis drug and alcohol testing as a condition of employment or advancement. *See id.* Such testing was conducted along with a required preplacement medical examination. *See id.* The city notified applicants for employment of the potential drug and medical testing prior to completing the initial application process. *See id.* at 853-54, 927 P.2d at 1203, 59 Cal. Rptr. 2d at 699. Subsequently, if the city extended an offer of employment or a promotion, the city notified the applicant that the offer was contingent upon the results of the medical examination and drug screening. *See id.* To ensure receipt of the results, a medical employee asked the applicant to consent to the testing and the "release of the test results to the city." *Id.* at 854, 927 P.2d at 1203-04, 59 Cal. Rptr. 2d at 699-700. As

taxpayer's action to enjoin the use of public funds for drug testing.<sup>3</sup> First, the plaintiff contended that the drug testing scheme violated the California Confidentiality of Medical Information Act (CMIA).<sup>4</sup> Second, the plaintiff alleged the drug screening provision violated the United States Constitution as an unreasonable search and seizure and a violation of the right of privacy.<sup>5</sup> Additionally, the plaintiff argued that the drug testing program violated the California Constitution, in the event it was not invalidated under the United States Constitution.<sup>6</sup>

The trial court concluded that the testing did not violate the CMIA.<sup>7</sup> However, in analyzing each job category affected by Glendale's policy, the trial court determined that as to thirty-six of the eighty job categories, the drug testing was constitutionally invalid in both the

part of the testing process, the medical employee asked the applicant to disrobe and put on a hospital gown. *See id.* at 854, 927 P.2d at 1204, 59 Cal. Rptr. 2d at 700. Next, the medical employee would give the applicant a sealed container in which to provide a urine sample. *See id.* At this point, a medical employee "accompanie[d] the applicant to a restroom and [stood] in a cubicle next to the applicant's cubicle . . . ." *Id.* The toilet bowl contained a blue dye to prevent tampering. *See id.* After collecting the sample, the medical employee would test it to "screen for medical problems." *Id.* at 854-55, 927 P.2d at 1204, 59 Cal. Rptr. 2d at 700. The employee then sealed the sample with evidence tape and sent it to an independent laboratory to conduct the drug and alcohol testing. *See id.* at 855, 927 P.2d at 1204, 59 Cal. Rptr. 2d at 700. To ensure a positive chain of custody, the applicant and the medical employee signed a confirmation slip that was sealed in a laboratory envelope along with the sample. *See id.* Finally, the laboratory forwarded the results to the city with a recommendation by a physician, at which time the doctor hired by the city would review the test results and place them into a confidential medical file. *See id.* at 855-56, 927 P.2d at 1205, 59 Cal. Rptr. 2d at 701. Applicants could appeal and request retesting in the event of a positive test result. *See id.* at 856, 927 P.2d at 1205, 59 Cal. Rptr. 2d at 701. If the results were negative upon retesting, a doctor reviewed the results and either recommended qualifying or disqualifying the applicant for employment. *See id.*

3. *See id.*

4. *See id.*

5. *See id.* *See generally* U.S. CONST. amend. IV; 68 AM. JUR. 2D *Searches and Seizures* § 1 (1993 & Supp. 1997) (discussing Fourth Amendment protection from unreasonable searches and seizures).

6. *See Loder*, 14 Cal. 4th at 856, 927 P.2d at 1205, 59 Cal. Rptr. 2d at 701. *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 410, 454 (9th ed. 1988 & Supp. 1996) (reviewing unreasonable searches and seizures and the nature and scope of protection under the California Constitution); 20 CAL. JUR. 3D *Criminal Law* § 2505 (1985 & Supp. 1997) (addressing searches and seizures under the Fourth Amendment and the California Constitution).

7. *See Loder*, 14 Cal. 4th at 858, 927 P.2d at 1206, 59 Cal. Rptr. 2d at 702.

preemployment and prepromotion contexts.<sup>8</sup> The court of appeal upheld the initial determination of the trial court, invalidating the drug testing in both the preemployment and prepromotion contexts.<sup>9</sup> However, the court of appeal also found that the trial court improperly “upheld the validity of the drug testing program with regard to many job classifications . . . .”<sup>10</sup>

In a lead opinion written by Chief Justice George, the California Supreme Court found that the drug testing provisions did not violate the CMIA.<sup>11</sup> As for plaintiff’s constitutional claims, the court held that prepromotion drug testing violated the Fourth Amendment of the United States Constitution,<sup>12</sup> but upheld the drug testing in the preemployment context under both the United States<sup>13</sup> and California<sup>14</sup> Constitutions.

## II. TREATMENT

### A. *Majority Opinion*

#### 1. Statutory Claims

##### a. *Confidentiality of Medical Information Act*

The California Supreme Court first reviewed the plaintiff’s contention that Glendale’s drug screening program violated the CMIA.<sup>15</sup> The plain-

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8. See *id.* at 857, 927 P.2d at 1206, 59 Cal. Rptr. 2d at 702.

9. See *id.* at 858, 927 P.2d at 1206, 59 Cal. Rptr. 2d at 702.

10. *Id.* The court of appeal held that the drug testing was valid only in those areas “in which the regular duties involve[d] some special and obvious physical or ethical demand. . . .” *Id.* (quoting the lower court opinion). Furthermore, drug testing was permissible only (1) upon “initial” employment in that particular job category, (2) if a job offer was previously made, (3) if the test did not violate the Americans with Disabilities Act (ADA), (4) if the sample was collected without unnecessary intrusion on privacy, and (5) if the test was “confirmed by a second test regarded as reliable by the relevant scientific community.” *Id.* at 858-59, 927 P.2d at 1207, 59 Cal. Rptr. 2d at 703 (quoting the lower court opinion).

11. See *id.* at 862, 927 P.2d at 1209, 59 Cal. Rptr. 2d at 705. See also *infra* notes 15-20 and accompanying text (discussing the analysis of the court concerning the CMIA).

12. See *Loder*, 14 Cal. 4th at 880, 927 P.2d at 1221, 59 Cal. Rptr. 2d at 717.

13. See *id.* at 882, 927 P.2d at 1222, 59 Cal. Rptr. 2d at 718; see also *infra* notes 67-95 and accompanying text (discussing the validity of preemployment drug testing under the United States Constitution).

14. See *Loder*, 14 Cal. 4th at 898, 927 P.2d at 1233, 59 Cal. Rptr. 2d at 729; see also *infra* notes 96-124 and accompanying text (discussing the validity of preemployment drug testing under the California Constitution).

15. See *Loder*, 14 Cal. 4th at 859-62, 927 P.2d at 1207-09, 59 Cal. Rptr. 2d at 703-05. The CMIA provides in pertinent part that “[n]o provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an au-

tiff first argued that the city's testing procedure violated the CMIA's non-discrimination provision because "the program automatically disqualifie[d] from employment or promotion any employee who refuse[d] to sign a form" authorizing receipt of the results by the city.<sup>16</sup> The court found that the City of Glendale did not discriminate against employees who refused to provide an authorization because a drug testing requirement would be "totally ineffective" if an employee could simply refuse to take the test.<sup>17</sup>

Second, the plaintiff asserted that the reference to "necessary" under the CMIA required both a "compelling reason to act in the absence of information" and that the employer had no less restrictive means by which to obtain the information.<sup>18</sup> The court disagreed with this construction of the statute and found that the Legislature did not intend to strictly limit an employer's access to necessary information.<sup>19</sup>

Therefore, the court found that Glendale's disqualification of an applicant who refused to disclose medical and drug testing results did not violate the CMIA.<sup>20</sup>

#### *b. Americans with Disabilities Act*<sup>21</sup>

Chief Justice George included a discussion about the Americans with Disabilities Act (ADA) in order to outline the parameters of a valid preemployment medical examination.<sup>22</sup> The ADA imposes three general

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thorization. . . ." CAL. CIV. CODE § 56.10(a) (West 1982 & Supp. 1997). Furthermore, section 56.20(b) states that "[n]o employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization. . . . However, nothing in this section shall prohibit an employer from taking such action as is necessary . . . due to an employee's refusal to sign an authorization. . . ." CAL. CIV. CODE § 56.20(b) (West 1982 & Supp. 1997). See generally Jill L. Rosenberg, *Legal Issues Surrounding Employee Hiring, Privacy and Investigations*, in 25TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 569 (Practising Law Institute 1996) (discussing the CMIA).

16. *Loder*, 14 Cal. 4th at 860, 927 P.2d at 1208, 59 Cal. Rptr. 2d at 704.

17. See *id.* at 861, 927 P.2d at 1208, 59 Cal. Rptr. 2d at 704.

18. *Id.* at 860-61, 927 P.2d at 1208, 59 Cal. Rptr. 2d at 704.

19. See *id.* at 861-62, 927 P.2d at 1209, 59 Cal. Rptr. 2d at 705.

20. See *id.* at 862, 927 P.2d at 1209, 59 Cal. Rptr. 2d at 705.

21. 42 U.S.C. §§ 12101-12213 (1995). See generally Gary P. Scholick, *Issues of Workplace Privacy*, 491 PLILit 93, 100-05 (1994) (reviewing the requirements of the ADA in connection with privacy in the workplace).

22. See *Loder*, 14 Cal. 4th at 862-65, 927 P.2d at 1209-10, 59 Cal. Rptr. 2d at 705-07.

requirements on post-offer medical examinations.<sup>23</sup> First, the examination must be mandatory for all incoming employees without taking into consideration any particular disability.<sup>24</sup> Second, the information and test results must be stored by the employer in confidential medical files.<sup>25</sup> Third, the results must be used in accordance with the ADA as a whole.<sup>26</sup> The ADA also addresses post-employment medical examinations (e.g. prepromotional medical testing) and states that "an employer 'shall not require a medical examination . . . unless such examination . . . is shown to be job-related and consistent with business necessity.'"<sup>27</sup> Finally, Chief Justice George pointed out that the ADA specifically excluded drug testing from its definition of a medical examination, and therefore, the ADA does not mandate procedures for an employer with respect to preemployment and prepromotion drug testing.<sup>28</sup>

c. *Fair Employment and Housing Act*<sup>29</sup>

The California Supreme Court also took a brief look at the Fair Employment and Housing Act (FEHA) to illustrate the state counterpart of the general limitations upon preemployment medical examinations.<sup>30</sup> FEHA requires that the same three conditions imposed by the ADA be met prior to allowing the medical examination of a prospective employee.<sup>31</sup> In addition, FEHA, like the ADA, does not purport to govern employer-mandated drug screening.<sup>32</sup>

2. Federal Constitutional Claim

Because the California Supreme Court had not yet addressed the issue of employer-mandated drug testing, Chief Justice George discussed three United States Supreme Court decisions which set forth the federal principles involved in reviewing the constitutionality of such a provision: *Skin-*

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23. See *id.* at 862-63, 927 P.2d at 1209, 59 Cal. Rptr. 2d at 705.

24. See *id.* at 863, 927 P.2d at 1209, 59 Cal. Rptr. 2d at 705.

25. See *id.*

26. See *id.*

27. *Id.* at 863, 927 P.2d at 1209-10, 59 Cal. Rptr. 2d at 705-06 (quoting the ADA, 42 U.S.C. § 12112(d)(4)(A) (1995)). See generally George P. Smith, II, *Accessing Genomic Information or Safeguarding Genetic Privacy*, 9 J.L. & HEALTH 121, 130 n.55 (1994-95) (reviewing the provisions of FEHA under § 12112(d)(4)(A)).

28. See *Loder*, 14 Cal. 4th at 864, 927 P.2d at 1210, 59 Cal. Rptr. 2d at 706.

29. CAL. GOV'T CODE §§ 12935(a), 12940 (West 1995).

30. See *Loder*, 14 Cal. 4th at 865, 927 P.2d at 1211, 59 Cal. Rptr. 2d at 707.

31. See *id.*; see also *supra* notes 24-26 and accompanying text.

32. See *Loder*, 14 Cal. 4th at 865, 927 P.2d at 1211, 59 Cal. Rptr. 2d at 707.

*ner v. Railway Labor Executives' Ass'n*,<sup>33</sup> *National Treasury Employees Union v. Von Raab*,<sup>34</sup> and *Vernonia School District 47J v. Acton*.<sup>35</sup>

a. *United States Supreme Court Cases*

In *Skinner*, the United States Supreme Court reviewed the constitutionality of suspicionless drug testing of all railroad employees working on a train immediately following a serious accident.<sup>36</sup> The first question addressed by the Court was whether or not such testing constituted a "search" under the Fourth Amendment.<sup>37</sup> Although urine testing does not require a "surgical intrusion into the body," the *Skinner* Court found that such testing constituted a search because the act of urinating is uniquely private in nature.<sup>38</sup>

Turning to the issue of reasonableness, the Court noted that an otherwise unreasonable search may be valid when "special needs" surpass the necessity of a warrant or probable cause.<sup>39</sup> In such a situation, the question of reasonableness is determined by weighing the government's interest against the privacy interest of the individual.<sup>40</sup>

In *Skinner*, the Court found that the government possessed a special need to ensure the safety of the railroad employees and customers.<sup>41</sup> Therefore, the Court allowed suspicionless drug testing despite the lack

33. 489 U.S. 602 (1989).

34. 489 U.S. 656 (1989).

35. 115 S. Ct. 2386 (1995).

36. See *Loder*, 14 Cal. 4th at 866, 927 P.2d at 1212, 59 Cal. Rptr. 2d at 708; see also George E. Warner, Jr., Note, *The Ratification of the "Special Needs" Analysis to Employer Substance Abuse Testing: Skinner v. Railway Labor Executives' Association*, 13 HAMLIN L. REV. 167 (1990) (providing an analysis of *Skinner* and its importance to Fourth Amendment jurisprudence).

37. See *Loder*, 14 Cal. 4th at 867, 927 P.2d at 1212, 59 Cal. Rptr. 2d at 708; see also 68 AM. JUR. 2D *Searches and Seizures* § 195 (1993 & Supp. 1996).

38. See *Loder*, 14 Cal. 4th at 867, 927 P.2d at 1212, 59 Cal. Rptr. 2d at 708 (quoting *Skinner*, 489 U.S. at 617).

39. See *id.* at 867-68, 927 P.2d at 1212-13, 59 Cal. Rptr. 2d at 708-09 (citing *Skinner*, 489 U.S. at 619); see also Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89 (1992) (discussing the special needs analysis created by the Court in *Skinner*).

40. See *Loder*, 14 Cal. 4th at 867, 927 P.2d at 1212-13, 59 Cal. Rptr. 2d at 708-09 (citing *Skinner*, 489 U.S. at 619).

41. See *id.* at 868, 927 P.2d at 1213, 59 Cal. Rptr. 2d at 709 (citing *Skinner*, 489 U.S. at 620).



of probable cause.<sup>42</sup> Furthermore, the Court observed that railroad employees had diminished privacy interests for two reasons: first, the “sample was to be collected ‘in a medical environment,’” and second, the extensive regulation of the railroad industry operated to minimize the employees’ reasonable expectations of privacy.<sup>43</sup> Therefore, the *Skinner* Court upheld the validity of suspicionless drug testing in the private context because the governmental interest outweighed the employees’ privacy expectations.<sup>44</sup>

The California Supreme Court also sought guidance from *National Treasury Employees Union v. Von Raab*,<sup>45</sup> a case decided on the same day as *Skinner*.<sup>46</sup> Chief Justice George noted the similarity of the facts in *Von Raab* to *Loder* in that the drug testing requirement was imposed upon public employees.<sup>47</sup> Specifically, *Von Raab* involved the imposition of drug testing on any individual whose potential employment falls under three categories of United States Customs Service employees.<sup>48</sup> The first category involved agents who were directly involved in “drug interdiction or enforcement of related laws.”<sup>49</sup> The second classification included employees who were required to carry a firearm.<sup>50</sup> The third category was composed of agents who were required to “handle ‘classified’ material.”<sup>51</sup> The Court found that the deterrence of drug use in the Customs Service embodied a special need under the *Skinner* analysis,<sup>52</sup> and therefore, the Court undertook a balancing of the government’s interests against the privacy expectations of the employees.<sup>53</sup>

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42. See *id.* (citing *Skinner*, 489 U.S. at 620).

43. See *id.* at 869, 927 P.2d at 1213-14, 59 Cal. Rptr. 2d at 709-10 (quoting *Skinner*, 489 U.S. at 626-27).

44. See *id.* at 870, 927 P.2d at 1214, 59 Cal. Rptr. 2d at 710 (citing *Skinner*, 489 U.S. at 633).

45. 489 U.S. 556 (1989).

46. *Loder*, 14 Cal. 4th at 870, 927 P.2d at 1214, 59 Cal. Rptr. 2d at 710.

47. See *id.*

48. See *id.* at 870-71, 927 P.2d at 1214-15, 59 Cal. Rptr. 2d at 710-11 (citing *Von Raab*, 489 U.S. at 660); see also Alyssa C. Westover, Note, *National Treasury Employees Union v. Von Raab—Will the War Against Drugs Abrogate Constitutional Guarantees?*, 17 PEPP. L. REV. 793 (1990) (discussing the *Von Raab* decision and its implications on privacy concerns and drug testing).

49. *Id.* at 870, 927 P.2d at 1215, 59 Cal. Rptr. 2d at 711.

50. See *id.* at 870-71, 927 P.2d at 1215, 59 Cal. Rptr. 2d at 711 (citing *Von Raab*, 489 U.S. at 660-61).

51. *Id.* at 871, 927 P.2d at 1215, 59 Cal. Rptr. 2d at 711 (quoting *Von Raab*, 489 U.S. at 661).

52. See *id.* at 872, 927 P.2d at 1215, 59 Cal. Rptr. 2d at 711.

53. See *id.* at 872-74, 927 P.2d at 1216-17, 59 Cal. Rptr. 2d at 712-13 (citing *Von Raab*, 489 U.S. at 670-72).

With respect to the first and second categories, the Court found that the government had a compelling interest in maintaining the "integrity and judgment" of Customs employees.<sup>54</sup> In addition, the Court held that such employees have a diminished privacy expectation because "these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness."<sup>55</sup> Therefore, the Court upheld the testing of employees classified under the first two categories of the Customs Service drug testing program.<sup>56</sup>

Finally, the Court addressed the third category of Customs Service drug testing.<sup>57</sup> The Court held that the scope of "classified material" as defined in the third category, was too broad, and therefore, the Court remanded this particular issue for further deliberations.<sup>58</sup>

The California Supreme Court looked at one final United States Supreme Court case to determine the proper Fourth Amendment analysis for an intrusion on privacy.<sup>59</sup> In *Vernonia School District 47J v. Acton*,<sup>60</sup> the school district required all students who wished to participate in the schools' athletic programs be tested for drugs.<sup>61</sup> The Court upheld the validity of the program because the government had a "parens patriae" interest in the children while they were at school, and the students had a diminished expectation of privacy when they chose to "go out for' a sport."<sup>62</sup>

The *Vernonia* Court provided a good analysis to determine what is reasonable under the Fourth Amendment, and addressed whether the state must provide a "compelling" interest to justify an intrusion on privacy.<sup>63</sup> The Court did not construe the compelling interest requirement

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54. See *id.* at 872-73, 927 P.2d at 1216, 59 Cal. Rptr. 2d at 712 (quoting *Von Raab*, 489 U.S. at 670).

55. *Id.* at 873-74, 927 P.2d at 1216-17, 59 Cal. Rptr. 2d at 712-13 (quoting *Von Raab*, 489 U.S. at 672).

56. See *id.* at 874, 927 P.2d at 1217, 59 Cal. Rptr. 2d at 713.

57. See *id.*

58. See *id.*

59. See *id.* at 875, 927 P.2d at 1217-18, 59 Cal. Rptr. 2d at 713-14; see also Alex J. Barker, Note, *Vernonia School District 47J v. Acton: Defining the Constitutional Scope of Random Suspicionless Drug Testing in Interscholastic Athletics and Beyond*, 5 WIDENER J. PUB. L. 445 (1996) (providing a look at *Vernonia* to determine the validity of drug testing in connection with collegiate and high school athletics).

60. 115 S. Ct. 2386 (1995).

61. See *Loder*, 14 Cal. 4th at 875, 927 P.2d at 1218, 59 Cal. Rptr. 2d at 714.

62. *Id.* (quoting *Vernonia*, 115 S. Ct. at 2393).

63. See *id.*

strictly.<sup>64</sup> Rather, the Court concluded that the interest must “appear[] *important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.”<sup>65</sup>

*b. Application to the present case*

The California Supreme Court shifted the focus back to the instant case to determine whether the Fourth Amendment bars the drug testing required by the City of Glendale.<sup>66</sup> First, the court acknowledged that under *Skinner*, *Von Raab*, and *Vernonia*, drug testing clearly falls into the realm of the Fourth Amendment.<sup>67</sup> Furthermore, the court determined that because urinalysis drug testing is a search, it must satisfy the Fourth Amendment’s reasonableness requirement.<sup>68</sup>

Next, the court addressed whether the city could perform suspicionless drug testing.<sup>69</sup> To conduct such drug testing, the city must show that its interest in “maintaining a drug-free workplace” outweighs the individual applicant’s privacy expectations.<sup>70</sup> The court first analyzed the issue with respect to applicants for promotion,<sup>71</sup> and then turned to applicants for employment.<sup>72</sup>

Chief Justice George first found that the city’s application of its drug testing program to current employees who sought promotion was inconsistent with *Von Raab*.<sup>73</sup> For the employer to impose testing upon current employees, the employer must provide a link with the particular nature and duties of the position.<sup>74</sup> Under *Von Raab*, the Government’s interest in itself is insufficient for three reasons.<sup>75</sup> First, the *Von Raab* Court would not have placed as much emphasis on the categories of Customs Service agents who were subjected to drug testing.<sup>76</sup> Second, the Court recognized that certain forms of employment entail a great deal of supervision, thereby minimizing the privacy expectations of the

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64. *See id.* at 876, 927 P.2d at 1218, 59 Cal. Rptr. 2d at 714.

65. *Id.* (emphasis in original).

66. *See id.* at 876-87, 927 P.2d at 1218-26, 59 Cal. Rptr. 2d at 714-22.

67. *See id.* at 876, 927 P.2d at 1218, 59 Cal. Rptr. 2d at 714.

68. *See id.*

69. *See id.* at 876, 927 P.2d at 1218-19, 59 Cal. Rptr. 2d at 714-15.

70. *See id.* at 877, 927 P.2d at 1219, 59 Cal. Rptr. 2d at 715.

71. *See id.* at 877-81, 927 P.2d at 1219-21, 59 Cal. Rptr. 2d at 715-17.

72. *See id.* at 881-87, 927 P.2d at 1222-26, 59 Cal. Rptr. 2d at 718-22.

73. *See id.* at 877-78, 927 P.2d at 1219, 59 Cal. Rptr. 2d at 715.

74. *See id.* at 878, 927 P.2d at 1219-20, 59 Cal. Rptr. 2d at 715-16.

75. *See id.* at 878-79, 927 P.2d at 1219-20, 59 Cal. Rptr. 2d at 715-16.

76. *See id.* at 878, 927 P.2d at 1219-20, 59 Cal. Rptr. 2d at 715-16.

employee.<sup>77</sup> Third, the Court in *Von Raab* would not have invalidated the third classification of employees simply because the scope of employees entrusted with classified information was too broad.<sup>78</sup>

Therefore, the California Supreme Court found that a public employer may not constitutionally require all applicants who apply for promotion to submit to urinalysis drug testing.<sup>79</sup> Rather, the nature and duties of the particular position must necessarily require drug testing.<sup>80</sup>

Chief Justice George next addressed the validity of testing job applicants for drugs.<sup>81</sup> *Skinner* and *Von Raab*, however, did not specifically address drug testing of job applicants.<sup>82</sup> The court, therefore, used the reasonableness test to balance the interests involved.<sup>83</sup>

In doing so, the court first looked to the strength of the Government's interest involved.<sup>84</sup> The court held that all employers—government or otherwise—have a “legitimate . . . interest in ascertaining whether persons to be employed in any position currently are abusing drugs or alcohol.”<sup>85</sup> Unlike testing decisions regarding present employees, the city does not have the chance to view new applicants to determine whether drug testing is advisable.<sup>86</sup> Furthermore, the court recognized that the “hiring of a new employee frequently represents a considerable investment on the part of an employer . . . .”<sup>87</sup> Accordingly, the City of Glendale possesses a strong interest in requiring drug screening for prospective applicants.<sup>88</sup>

The court next reviewed the privacy expectations of the individuals applying for government positions.<sup>89</sup> The key to this analysis was that the drug testing was administered as part of a required preemployment medical examination.<sup>90</sup> Therefore, the court examined the additional in-

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77. *See id.* at 878-79, 927 P.2d at 1220, 59 Cal. Rptr. 2d at 716.

78. *See id.* at 879-80, 927 P.2d at 1220-21, 59 Cal. Rptr. 2d at 716-17.

79. *See id.* at 880, 927 P.2d at 1221, 59 Cal. Rptr. 2d at 717.

80. *See id.* at 881 n.12, 927 P.2d at 1221 n.12, 59 Cal. Rptr. 2d at 717 n.12.

81. *See id.* at 881-87, 927 P.2d at 1222-26, 59 Cal. Rptr. 2d at 718-22.

82. *See id.* at 881-82, 927 P.2d at 1222, 59 Cal. Rptr. 2d at 718.

83. *See id.* at 882, 927 P.2d at 1222, 59 Cal. Rptr. 2d at 718.

84. *See id.* at 882-83, 927 P.2d at 1222-23, 59 Cal. Rptr. 2d at 718-19.

85. *Id.* at 882-83, 927 P.2d at 1223, 59 Cal. Rptr. 2d at 719.

86. *See id.* at 883, 927 P.2d at 1223, 59 Cal. Rptr. 2d at 719.

87. *Id.*

88. *See id.*

89. *See id.* at 883-86, 927 P.2d at 1223-25, 59 Cal. Rptr. 2d at 719-21.

90. *See id.* at 883-84, 927 P.2d at 1223-24, 59 Cal. Rptr. 2d at 719-20. The plaintiff

trusions on privacy (including added security measures to ensure the accuracy of the testing sample) and determined that the invasion of privacy was minimal when combined with the medical examination as a whole.<sup>91</sup> Chief Justice George again looked to the ADA and determined that, unlike the prepromotion context, once an offer of employment has been made, an employer can require the applicant to undergo a medical examination without regard to the particular position being filled.<sup>92</sup>

The government interest involved clearly outweighed the minimal additional intrusion on privacy resulting from the drug screening.<sup>93</sup> Consequently, the California Supreme Court held that the City of Glendale's drug testing program for new applicants was constitutionally permissible under the Fourth Amendment.<sup>94</sup>

### 3. State Constitutional Claim

The California Supreme Court next turned to the plaintiff's contention that the City of Glendale's drug testing policy violated the privacy provision of the California Constitution.<sup>95</sup> Because the provision relating to prepromotional drug testing was invalid under the United States Constitution, the court was required only to review the preemployment drug testing under the California Constitution.<sup>96</sup>

#### a. Cases reviewed by Chief Justice George

The court first reviewed the court of appeal decision in *Wilkinson v. Times Mirror Corp.*<sup>97</sup> *Wilkinson* involved a private publishing company that required job applicants to undergo urinalysis drug testing as part of a preemployment medical examination.<sup>98</sup> The court of appeal first concluded that the California Constitution applied to the drug testing pro-

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did not contest the validity of the preemployment medical examination, because it was not an issue in the case. *See id.* at 885, 927 P.2d at 1224, 59 Cal. Rptr. 2d at 720.

91. *See id.* at 884, 927 P.2d at 1224, 59 Cal. Rptr. 2d at 720.

92. *See id.* at 885-86, 927 P.2d at 1225, 59 Cal. Rptr. 2d at 721.

93. *See id.* at 886-87, 927 P.2d at 1225-26, 59 Cal. Rptr. 2d at 721-22.

94. *See id.* at 887, 927 P.2d at 1226, 59 Cal. Rptr. 2d at 722.

95. *See id.* at 887-99, 927 P.2d at 1226-34, 59 Cal. Rptr. 2d at 722-30; *see also* CAL. CONST. art. I, § 1; 20 CAL. JUR. 3D *Criminal Law* § 2566 (1985 & Supp. 1997) (discussing blood and urine testing as a search of the body).

96. *See Loder*, 14 Cal. 4th at 887, 927 P.2d at 1226, 59 Cal. Rptr. 2d at 722.

97. 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989); *see Loder*, 14 Cal. 4th at 888, 927 P.2d at 1226-27, 59 Cal. Rptr. 2d at 722-23.

98. *See Loder*, 14 Cal. 4th at 888, 927 P.2d at 1226, 59 Cal. Rptr. 2d at 722. The drug testing and procedures involved in *Wilkinson* were virtually identical to those involved in *Loder*. *See id.*

gram employed by the private company.<sup>99</sup> The court then upheld the drug testing program for two main reasons: (1) a preemployment medical examination, which typically included the collection of a urine sample, should be reasonably anticipated by a job applicant; and (2) the submission of a urine sample for further testing for drugs and alcohol is only a minimal additional invasion of privacy.<sup>100</sup>

The California Supreme Court next addressed its decision in *Hill v. National Collegiate Athletic Ass'n*<sup>101</sup> to aid the court in determining the proper scope and application of California's privacy provision.<sup>102</sup> *Hill* concerned the drug testing of college athletes who chose to participate in NCAA-sponsored athletics.<sup>103</sup> The court determined that the California constitution applied to the NCAA, despite the fact that it was a non-governmental entity.<sup>104</sup>

The *Hill* court addressed the proper standard of review to apply to California Constitutional privacy claims.<sup>105</sup> The lower court applied a strict standard of review, requiring the NCAA to prove a compelling interest and the lack of less restrictive means by which to obtain the information.<sup>106</sup> However, the California Supreme Court in *Hill* disagreed, finding that the standard of review is heightened only when the case involves an invasion of a fundamental privacy interest.<sup>107</sup> On the other hand, where the employer uses less intrusive means, the court will balance the interests involved.<sup>108</sup>

The *Hill* court next devised three threshold elements of a state constitutional privacy cause of action.<sup>109</sup> The plaintiff must initially show

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99. *See id.*

100. *See id.* at 888, 927 P.2d at 1226-27, 59 Cal. Rptr. 2d at 722-23 (citing *Wilkinson*, 215 Cal. App. 3d at 1046-52, 264 Cal. Rptr. at 202-06).

101. 7 Cal. 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994).

102. *See Loder*, 14 Cal. 4th at 889-96, 927 P.2d at 1227-32, 59 Cal. Rptr. 2d at 723-28.

103. *See id.* at 889, 927 P.2d at 1227, 59 Cal. Rptr. 2d at 723 (citing *Hill*, 7 Cal. 4th at 8-9, 865 P.2d at 637, 26 Cal. Rptr. 2d at 838).

104. *See id.* (citing *Hill*, 7 Cal. 4th at 20, 865 P.2d at 644, 26 Cal. Rptr. 2d at 845).

105. *See id.* at 889-90, 927 P.2d at 1227-28, 59 Cal. Rptr. 2d at 723-24 (citing *Hill*, 7 Cal. 4th at 20-35, 865 P.2d at 644-54, 26 Cal. Rptr. 2d at 845-56).

106. *See id.* at 890, 927 P.2d at 1227, 59 Cal. Rptr. 2d at 723 (citing *Hill*, 7 Cal. 4th at 20, 865 P.2d at 644, 26 Cal. Rptr. 2d at 845-46).

107. *See id.* at 890, 927 P.2d at 1228, 59 Cal. Rptr. 2d at 724 (citing *Hill*, 7 Cal. 4th at 34, 865 P.2d at 653, 26 Cal. Rptr. 2d at 855).

108. *See id.*

109. *See id.* at 890-91, 927 P.2d at 1228, 59 Cal. Rptr. 2d at 724 (citing *Hill*, 7 Cal. 4th at 39-40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859).

“(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.”<sup>110</sup> Chief Justice George, in the instant case, stressed the fact that these three elements are not to be deemed new requirements.<sup>111</sup> Rather, these elements constitute a *screening* tool which the court can use to eliminate those claims that “do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision.”<sup>112</sup> According to many California Supreme Court decisions, the courts must conduct a balancing test between the employer’s interests and the privacy expectations of the individual.<sup>113</sup> This contention is supported by the *Hill* decision because the court conducted the balancing test despite an initial finding that the three elements were satisfied.<sup>114</sup>

The *Hill* court found that the NCAA’s drug screening program was valid under the state constitution.<sup>115</sup> The interest of the NCAA to “maintain[] the integrity of intercollegiate athletic competition and its interest in protecting the health and safety of student athletes” outweighed the minimal intrusion on privacy resulting from the drug testing.<sup>116</sup> However, the court limited its holding to the facts of the case by providing that nothing in the opinion applied to preemployment drug testing.<sup>117</sup> Consequently, the *Loder* court was compelled to undertake its own balancing of the interests involved in the preemployment context.<sup>118</sup>

*b. Application to the present case*

The lead opinion in *Loder* next balanced the privacy expectations of the job applicants against the interests of the City of Glendale to determine whether the testing requirement was valid under the California Constitution.<sup>119</sup> The balancing test undertaken by the court to review the state constitutional claim was analogous to the one discussed under the United States Constitution.<sup>120</sup> The court found that the intrusion on

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110. *Id.* (quoting *Hill*, 7 Cal. 4th at 39-40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859).

111. *See id.* at 891, 927 P.2d at 1228, 59 Cal. Rptr. 2d at 724.

112. *Id.* at 893, 927 P.2d at 1230, 59 Cal. Rptr. 2d at 726.

113. *See id.* at 891-92, 927 P.2d at 1229, 59 Cal. Rptr. 2d at 725.

114. *See id.* at 894-95, 927 P.2d at 1231, 59 Cal. Rptr. 2d at 727 (citing *Hill*, 7 Cal. 4th at 40-55, 865 P.2d at 657-69, 26 Cal. Rptr. 2d at 859-71).

115. *See id.* at 895, 927 P.2d at 1231, 59 Cal. Rptr. 2d at 727 (citing *Hill*, 7 Cal. 4th at 57, 865 P.2d at 669, 26 Cal. Rptr. 2d at 871).

116. *Id.*

117. *See id.* at 895-96, 927 P.2d at 1231-32, 59 Cal. Rptr. 2d at 727-28 (citing *Hill*, 7 Cal. 4th at 54-55, 865 P.2d at 657, 26 Cal. Rptr. 2d at 869).

118. *See id.* at 896-98, 927 P.2d at 1232-33, 59 Cal. Rptr. 2d at 728-29.

119. *See id.*

120. *See supra* notes 67-95 and accompanying text (discussing the application of a

the privacy of the individual was minimal in light of the required preemployment medical examination.<sup>121</sup> Furthermore, the "legitimate and substantial interest" of the city not to hire applicants who are currently abusing drugs outweighed the privacy interest of the job applicant.<sup>122</sup> Therefore, the court held that the City of Glendale did not violate the state constitution insofar as it required job applicants to submit to drug testing "as part of a general preemployment medical examination."<sup>123</sup>

#### 4. Review of Specific Job Categories

The California Supreme Court next addressed the issue of whether it should review each one of the city's job titles in order to determine for which positions the city has constitutional authority to require prepromotional drug testing.<sup>124</sup> Chief Justice George wrote that such review was unnecessary for two reasons.<sup>125</sup> First, because the city enacted its drug testing program three years prior to the United States Supreme Court's decisions in *Skinner* and *Von Raab*, the city officials did not create the city's drug testing policy under the "position-by-position review" standard described in those cases.<sup>126</sup> Second, the ADA was enacted after Glendale promulgated its drug screening program.<sup>127</sup> The ADA also restricts the city's ability to require the examination of current employees.<sup>128</sup> Consequently, the California Supreme Court invalidated Glendale's prepromotional drug testing requirement because it was incurably overbroad, and ordered the city to restructure the program to comply with constitutional requirements.<sup>129</sup>

Therefore, the lead opinion of the California Supreme Court held that the prepromotional drug testing program was in violation of the United

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balancing test to the City of Glendale's drug testing program under federal standards).

121. See *Loder*, 14 Cal. 4th at 897, 927 P.2d at 1232-33, 59 Cal. Rptr. 2d at 728-29.

122. See *id.* at 897-98, 927 P.2d at 1233, 59 Cal. Rptr. 2d at 729.

123. *Id.* at 898, 927 P.2d at 1233, 59 Cal. Rptr. 2d at 729.

124. See *id.*

125. See *id.* at 898-99, 927 P.2d at 1233-34, 59 Cal. Rptr. 2d at 729-30.

126. See *id.* at 898, 927 P.2d at 1233-34, 59 Cal. Rptr. 2d at 729-30. For a discussion of the review standards required under *Skinner* and *Von Raab*, see *supra* notes 33-59 and accompanying text.

127. See *Loder*, 14 Cal. 4th at 898-99, 927 P.2d at 1234, 59 Cal. Rptr. 2d at 730.

128. See *id.*

129. See *id.* at 899, 927 P.2d at 1234, 59 Cal. Rptr. 2d at 730.



States Constitution, and preemployment drug screening was permissible under both the federal and state constitutions.<sup>130</sup>

*B. Justice Mosk's Concurring and Dissenting Opinion*

Justice Mosk wrote a separate opinion concurring with the lead opinion insofar as it invalidated prepromotional drug testing.<sup>131</sup> However, he dissented with the lead's determination that Glendale's drug testing program for all job applicants was constitutionally permissible under both the federal and state constitutions.<sup>132</sup> In particular, Justice Mosk's dissent rested on the conclusion that the city failed to demonstrate that its drug testing program actually promoted a legitimate and substantial need to ensure that people applying for jobs, such as typists or city attorneys, are drug-free.<sup>133</sup>

Justice Mosk first addressed the privacy concerns of the individual applicant under the Fourth Amendment.<sup>134</sup> According to Justice Mosk, both the nature of the excretory function and the intrusion on informational privacy evidence are a significant interference with an individual's right to privacy.<sup>135</sup> Moreover, simply performing testing as part of a preemployment medical examination does not diminish these privacy concerns.<sup>136</sup> Rather, significant additional intrusions on privacy included "the aural monitoring of the applicant's urination" and the disclosure of personal medical information that would not otherwise be required.<sup>137</sup>

Reviewing the governmental interest involved, Justice Mosk asserted that the interest in maintaining a drug-free workplace is not in itself sufficient to permit suspicionless preemployment drug testing.<sup>138</sup> He asserted that even if employers have a legitimate and substantial interest in testing potential employees for drug abuse, that interest does not elimi-

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130. *See id.* at 900, 927 P.2d at 1234-35, 59 Cal. Rptr. 2d at 730-31.

131. *See id.* at 900, 927 P.2d at 1235, 59 Cal. Rptr. 2d at 731 (Mosk, J., concurring and dissenting).

132. *See id.* (Mosk, J., concurring and dissenting).

133. *See id.* at 900-01, 927 P.2d at 1235, 59 Cal. Rptr. 2d at 731 (Mosk, J., concurring and dissenting).

134. *See id.* at 901-15, 927 P.2d at 1235-44, 59 Cal. Rptr. 2d at 731-40 (Mosk, J., concurring and dissenting).

135. *See id.* at 901, 927 P.2d at 1235-36, 59 Cal. Rptr. 2d at 731-32 (Mosk, J., concurring and dissenting).

136. *See id.* at 902-03, 927 P.2d at 1236, 59 Cal. Rptr. 2d at 732 (Mosk, J., concurring and dissenting).

137. *See id.* at 902, 927 P.2d at 1236, 59 Cal. Rptr. 2d at 732 (Mosk, J., concurring and dissenting).

138. *See id.* at 905, 927 P.2d at 1238, 59 Cal. Rptr. 2d at 734 (Mosk, J., concurring and dissenting).

nate the need to conduct a "fact-specific" balancing test.<sup>139</sup> *Skinner*<sup>140</sup> and *Von Raab*<sup>141</sup> permit suspicionless drug testing only in situations where the government can articulate a compelling interest.<sup>142</sup> Furthermore, under *Harmon v. Thornburgh*,<sup>143</sup> Justice Mosk contended that the government must establish "a clear, direct nexus . . . between the nature of the employee's duty and the nature of the feared violation."<sup>144</sup> According to Justice Mosk, the government interest must be tied to health and public safety rather than to mere "efficiency" because "the general interest in government efficiency . . . can in the abstract be used to justify drug testing of any and all positions. . . ."<sup>145</sup>

Next, Justice Mosk outlined his preferred approach for reviewing the constitutionality of a privacy claim.<sup>146</sup> First, the Government must provide a specific demonstration that drug abuse is a problem within the position being tested.<sup>147</sup> Second, the drug testing must be "a reasonable means of addressing the problems at hand" in that the results of the testing can accurately predict the performance of job applicants.<sup>148</sup> Third, the drug testing must be the least restrictive means to eliminate the drug problem and improve the productivity within the particular department or employment classification.<sup>149</sup>

Justice Mosk found that the City of Glendale failed to meet all three of these requirements: (1) the city did not prove that a problem existed as to drug abuse within its system,<sup>150</sup> (2) urinalysis drug testing did not

139. See *id.* (Mosk, J., concurring and dissenting).

140. See *supra* notes 36-44 and accompanying text.

141. See *supra* notes 45-59 and accompanying text.

142. See *Loder*, 14 Cal. 4th at 905-06, 927 P.2d at 1238-39, 59 Cal. Rptr. 2d at 734-35 (Mosk, J., concurring and dissenting).

143. 878 F.2d 484 (D.C. Cir. 1989).

144. *Loder*, 14 Cal. 4th at 906, 927 P.2d at 1239, 59 Cal. Rptr. 2d at 735 (Mosk, J., concurring and dissenting) (quoting *Harmon*, 878 F.2d at 490).

145. *Id.* at 910, 927 P.2d at 1241, 59 Cal. Rptr. 2d at 737 (Mosk, J., concurring and dissenting).

146. See *id.* at 910-12, 927 P.2d at 1241-42, 59 Cal. Rptr. 2d at 737-38 (Mosk, J., concurring and dissenting).

147. See *id.* at 910, 927 P.2d at 1241-42, 59 Cal. Rptr. 2d at 737-38 (Mosk, J., concurring and dissenting).

148. *Id.* at 911, 927 P.2d at 1242, 59 Cal. Rptr. 2d at 738 (Mosk, J., concurring and dissenting).

149. See *id.* at 911-12, 927 P.2d at 1242, 59 Cal. Rptr. 2d at 738 (Mosk, J., concurring and dissenting).

150. See *id.* at 912, 927 P.2d at 1242-43, 59 Cal. Rptr. 2d at 738-39 (Mosk, J., con-

foreclose the possibility that inefficiency among employees would remain in existence,<sup>151</sup> and (3) the city did not consider less intrusive means to obtain information regarding the performance of job applicants.<sup>152</sup> Therefore, Justice Mosk concluded that the preemployment drug test required by the City of Glendale violated the United States Constitution.<sup>153</sup>

Justice Mosk also found that the preemployment drug testing scheme violated the privacy provision of the California Constitution.<sup>154</sup> He relied on his dissent in *Hill* to illustrate the necessity of a compelling interest in the event that the Government interfered with the privacy of the plaintiff.<sup>155</sup> For the same reasons discussed in connection with the United States constitutional claim, Justice Mosk found that the Government intruded upon the plaintiff's right of privacy.<sup>156</sup> In addition, the Government failed to provide the necessary compelling interest to justify such an intrusion.<sup>157</sup>

### C. Justice Kennard's Concurring and Dissenting Opinion

Justice Kennard wrote a separate opinion concurring with the majority opinion which invalidated prepromotion drug testing under the Fourth Amendment.<sup>158</sup> However, she asserted that preemployment drug testing also violated the reasonableness clause of the Fourth Amendment.<sup>159</sup>

Justice Kennard contended the requirement to provide the employer with personal medical information, including the medications currently

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curring and dissenting).

151. *See id.* at 912-14, 927 P.2d at 1243-44, 59 Cal. Rptr. 2d at 739-40 (Mosk, J., concurring and dissenting).

152. *See id.* at 914, 927 P.2d at 1244, 59 Cal. Rptr. 2d at 740 (Mosk, J., concurring and dissenting).

153. *See id.* at 915, 927 P.2d at 1244, 59 Cal. Rptr. 2d at 740 (Mosk, J., concurring and dissenting).

154. *See id.* (Mosk, J., concurring and dissenting).

155. *See id.* at 916, 927 P.2d at 1245, 59 Cal. Rptr. 2d at 741 (Mosk, J., concurring and dissenting) (citing *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 85-86, 865 P.2d 633, 688, 26 Cal. Rptr. 2d 834, 890-91 (1994)).

156. *See id.* at 916-17, 927 P.2d at 1245-46, 59 Cal. Rptr. 2d at 741-42 (Mosk, J., concurring and dissenting) (citing *Hill*, 7 Cal. 4th at 85-86, 865 P.2d at 688, 26 Cal. Rptr. 2d at 890-91; *White v. Davis*, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975)); *see also* notes 90-93 and accompanying text (discussing the privacy expectations of persons applying for government positions).

157. *See Loder*, 14 Cal. 4th at 917, 927 P.2d at 1246, 59 Cal. Rptr. 2d at 742 (Mosk, J., concurring and dissenting).

158. *See id.* at 918, 927 P.2d at 1247, 59 Cal. Rptr. 2d at 743 (Kennard, J., concurring and dissenting).

159. *See id.* (Kennard, J., concurring and dissenting).

being taken, was a significant intrusion on the privacy of the individual.<sup>160</sup> Moreover, aural monitoring of urination is an invasion on privacy which is "offensive to personal dignity."<sup>161</sup>

Justice Kennard also argued that the Government's interest in economic efficiency was not sufficient "to overcome the interests in vindicating human dignity."<sup>162</sup> According to Justice Kennard, even if the interest in economics was sufficient, the Government was required to prove that no less intrusive alternative was available.<sup>163</sup> She contended that such an alternative existed where the Government could hire the prospective employee on a probationary basis to observe potential problems in efficiency and job performance.<sup>164</sup>

Therefore, according to Justice Kennard, the City of Glendale's "blanket suspicionless urinalysis drug and alcohol testing" program was invalid under the Fourth Amendment.<sup>165</sup>

#### D. Justice Chin's Concurring and Dissenting Opinion

Justice Chin concurred with the lead decision to uphold the city's drug testing program as applied to job applicants.<sup>166</sup> He argued, however, that the balancing test supported the constitutionality of prepromotional drug testing.<sup>167</sup>

According to Justice Chin, four factors operated to minimize the intrusion upon the privacy of applicants for promotion.<sup>168</sup> First, the test occurred as part of a routine medical examination.<sup>169</sup> Justice Chin con-

160. See *id.* at 919, 927 P.2d at 1247, 59 Cal. Rptr. 2d at 743 (Kennard, J., concurring and dissenting).

161. See *id.* (Kennard, J., concurring and dissenting) (quoting *Loder*, 14 Cal. 4th at 903, 927 P.2d at 1237, 59 Cal. Rptr. 2d at 733 (Mosk, J., concurring and dissenting)).

162. *Id.* at 920, 927 P.2d at 1248, 59 Cal. Rptr. 2d at 744 (Kennard, J., concurring and dissenting) (quoting Jonathan V. Holtzman, *Applicant Testing for Drug Use: A Policy and Legal Inquiry*, 33 WM. & MARY L. REV. 47, 90 (1991)).

163. See *id.* (Kennard, J., concurring and dissenting).

164. See *id.* at 921, 927 P.2d at 1249, 59 Cal. Rptr. 2d at 745 (Kennard, J., concurring and dissenting).

165. *Id.* (Kennard, J., concurring and dissenting).

166. See *id.* at 922, 927 P.2d at 1249, 59 Cal. Rptr. 2d at 745 (Chin, J., concurring and dissenting).

167. See *id.* (Chin, J., concurring and dissenting).

168. See *id.* at 923-26, 927 P.2d at 1250-52, 59 Cal. Rptr. 2d at 746-48 (Chin, J., concurring and dissenting).

169. See *id.* at 923, 927 P.2d at 1250, 59 Cal. Rptr. 2d at 746 (Chin, J., concurring

tended that the *Von Raab* decision dictated that drug testing was appropriate when included as part of a medical examination.<sup>170</sup> Second, he disagreed that the ADA prohibited medical examinations of applicants for promotion.<sup>171</sup> Rather, the ADA provides that medical examinations are permitted in the employment context so long as they are “job-related and consistent with business necessity.”<sup>172</sup> Third, the monitoring of urination was aural rather than visual, thereby minimizing the intrusion on privacy.<sup>173</sup> Finally, Justice Chin contended that requiring applicants to provide their medical history and a list of current medications served to “protect[] applicants from ‘false positive’ drug test results” and was not a significant intrusion on privacy.<sup>174</sup> Justice Chin further claimed that employees who apply for promotion have a reduced expectation of privacy because they are notified of the drug testing procedure before they make the final decision to apply for the job.<sup>175</sup>

Justice Chin advanced three arguments in support of the Government’s interest in maintaining a drug-free workplace.<sup>176</sup> First, “[d]rug testing helps assure work force economy, efficiency, and safety.”<sup>177</sup> Moreover, prepromotion drug testing is important because a promotion generally elevates an employee into a position requiring a higher level of responsibility.<sup>178</sup> Second, Justice Chin opined that the city’s public nature requires that a number of factors be taken into consideration, including “public safety, health, security, morale, and fiscal integrity. . . .”<sup>179</sup> It is therefore important to ensure that none of the city’s employees are abus-

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and dissenting).

170. *See id.* at 923-24, 927 P.2d at 1250-51, 59 Cal. Rptr. 2d at 746-47 (Chin, J., concurring and dissenting).

171. *See id.* at 924, 927 P.2d at 1251, 59 Cal. Rptr. 2d at 747 (Chin, J., concurring and dissenting).

172. *Id.* (Chin, J., concurring and dissenting) (quoting 42 U.S.C. § 12112(d)(4)(A) (1994)).

173. *See id.* at 925, 927 P.2d at 1251-52, 59 Cal. Rptr. 2d at 747-48 (Chin, J., concurring and dissenting).

174. *See id.* at 925-26, 927 P.2d at 1252, 59 Cal. Rptr. 2d at 748 (Chin, J., concurring and dissenting) (citing *Hill v. National Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 52-54, 865 P.2d 633, 666-67, 26 Cal. Rptr. 2d 834, 868-69 (1994)).

175. *See id.* at 926, 927 P.2d at 1252, 59 Cal. Rptr. 2d at 748 (Chin, J., concurring and dissenting).

176. *See id.* at 926-33, 927 P.2d at 1252-56, 59 Cal. Rptr. 2d at 748-52 (Chin, J., concurring and dissenting).

177. *Id.* at 927, 927 P.2d at 1253, 59 Cal. Rptr. 2d at 749 (Chin, J., concurring and dissenting).

178. *See id.* at 928, 927 P.2d at 1253, 59 Cal. Rptr. 2d at 749 (Chin, J., concurring and dissenting).

179. *Id.* at 928-29, 927 P.2d at 1254, 59 Cal. Rptr. 2d at 750 (Chin, J., concurring and dissenting).

ing drugs.<sup>180</sup> Finally, Justice Chin asserted that case law fails to distinguish between prepromotional and preemployment drug screening.<sup>181</sup> Moreover, courts have only overruled “random, unannounced testing.”<sup>182</sup>

For these reasons, Justice Chin found the strong interests of the Government outweighed the minimal privacy intrusion on both employment and promotion applicants and, therefore, the City of Glendale’s drug testing scheme was constitutionally valid in its entirety.<sup>183</sup>

#### *E. Justice Brown’s Concurring and Dissenting Opinion*

Justice Brown concurred with the opinion written by Justice Chin, but wrote a separate opinion to emphasize her concern with the balancing approach utilized in Fourth Amendment drug testing claims.<sup>184</sup> Justice Brown argued that applicants for employment and promotion were aware in advance that hiring was conditioned upon passing a drug and alcohol test and, therefore, waived their constitutional right to privacy by applying for the position.<sup>185</sup> In addition, “[n]either job applicants nor employees risk the loss of anything they already possess. Employees who test positive are not fired; they are simply ineligible for promotion.”<sup>186</sup> Finally, Justice Brown argued that, as an employer, the Government should not be held to higher constitutional standards than those imputed to private employers.<sup>187</sup>

180. *See id.* (Chin, J., concurring and dissenting).

181. *See id.* at 929-33, 927 P.2d at 1254-56, 59 Cal. Rptr. 2d at 750-52 (Chin, J., concurring and dissenting).

182. *Id.* at 929, 927 P.2d at 1254, 59 Cal. Rptr. 2d at 750 (emphasis in original) (Chin, J., concurring and dissenting). In particular, Justice Chin addressed the decision in *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991). *See id.* at 931-32, 927 P.2d at 1256, 59 Cal. Rptr. 2d at 751-52 (Chin, J., concurring and dissenting). The *Willner* court noted that employees were in the position to choose whether or not to apply for a promotion and, therefore, “had control over whether they would be tested . . . .” *Id.* at 932, 927 P.2d at 1256, 59 Cal. Rptr. 2d at 752 (Chin, J., concurring and dissenting).

183. *See id.* at 933, 927 P.2d at 1256-57, 59 Cal. Rptr. 2d at 753 (Chin, J., concurring and dissenting).

184. *See id.* at 933-34, 927 P.2d at 1257, 59 Cal. Rptr. 2d at 753-54 (Brown, J., concurring and dissenting).

185. *See id.* at 935, 927 P.2d at 1258, 59 Cal. Rptr. 2d at 754 (Brown, J., concurring and dissenting).

186. *Id.* (Brown, J., concurring and dissenting).

187. *See id.* at 937, 927 P.2d at 1259, 59 Cal. Rptr. 2d at 755 (Brown, J., concurring and dissenting).

### III. IMPACT & CONCLUSION

For the first time, the California Supreme Court addressed preemployment and prepromotional drug testing in the public context.<sup>188</sup> By specifically holding that drug testing is valid as part of a preemployment medical examination, the court allows the City of Glendale and other cities to intrude upon the privacy of job applicants without violating the Fourth Amendment of the United States Constitution.<sup>189</sup> Such broad drug testing power may eventually lead to random, unannounced testing.

However, the court expressly denied the City of Glendale the right to test applicants for promotion.<sup>190</sup> As a result, cities may be investing a great deal of time and effort to train employees who it may later find are inept due to drug or alcohol abuse.<sup>191</sup> Moreover, the upper level functioning of a city may be in danger due to the ineffectiveness of employees who may be involved with drugs or alcohol.<sup>192</sup>

Lastly, because the reasonableness test involves balancing the interests of the government and the privacy of the individual, it is inherently subjective. The court may choose to weigh one factor more heavily than another, thereby changing the entire outcome of the case. This is readily apparent from the number of opinions written in the present case. Consequently, the court has leeway in applying the reasonableness test in other drug testing scenarios; it can choose to follow this precedent, or it can apply the factors differently to arrive at a different outcome.

MARISA CASTAGNET

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188. *See id.* at 852, 927 P.2d at 1202, 59 Cal. Rptr. 2d at 698.

189. *See id.* at 882, 927 P.2d at 1222, 59 Cal. Rptr. 2d at 718.

190. *See id.* at 880-81, 927 P.2d at 1221, 59 Cal. Rptr. 2d at 717.

191. *See id.* at 883, 927 P.2d at 1223, 59 Cal. Rptr. 2d at 719.

192. *See id.* at 928, 927 P.2d at 1254, 59 Cal. Rptr. 2d at 750 (Chin, J., concurring and dissenting).

- B. *A regulation prohibiting discrimination against prospective tenants on the basis of marital status does not violate a landlord's rights under the free exercise of religion clauses of the United States and California Constitutions, and is therefore enforceable against a landlord: Smith v. Fair Employment & Housing Commission.*

### I. INTRODUCTION

In *Smith v. Fair Employment & Housing Commission*,<sup>1</sup> the California Supreme Court considered whether the California Fair Employment and Housing Act (FEHA), California Government Code section 12955, and the Unruh Civil Rights Act, both of which provide that it is unlawful for a landlord to discriminate against any persons based on marital status, violate a landlord's right to free exercise of religion under the United States and California Constitutions.<sup>2</sup> The administrative law judge found

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1. 12 Cal. 4th 1143, 913 P.2d 909, 51 Cal. Rptr. 2d 700 (1996). Justice Werdegar delivered the majority opinion in which Chief Justice George and retired Associate Justice Arabian concurred. *See id.* at 1150-79, 913 P.2d at 912-31, 51 Cal. Rptr. 2d at 702-22. Justice Mosk wrote a concurring opinion. *See id.* at 1179-92, 913 P.2d at 931-39, 51 Cal. Rptr. 2d at 722-30 (Mosk, J., concurring). Justice Kennard concurred in part and dissented in part. *See id.* at 1192-218, 913 P.2d at 939-57, 51 Cal. Rptr. 2d at 730-47 (Kennard, J., concurring and dissenting). Justice Baxter concurred in part and dissented in part, joined by Justice Lucas. *See id.* at 1218-51, 913 P.2d at 957-80, 51 Cal. Rptr. 2d at 747-70 (Baxter, J., concurring and dissenting).

2. *See id.* at 1192, 913 P.2d at 939, 51 Cal. Rptr. 2d at 730. Evelyn Smith (Smith), a Christian, owns and leases four rental units in Chico, California entirely for business and commercial purposes. *See id.* at 1151, 913 P.2d at 912, 51 Cal. Rptr. 2d at 702-03. Her customary rental routine is to advertise in local newspapers. *See id.* at 1151, 913 P.2d at 912, 51 Cal. Rptr. at 703. Upon inquiry by a prospective tenant, Smith informs them that she prefers to rent to married couples because her religious beliefs oppose sex outside of marriage. *See id.* Further, she believes it is sinful to rent her units to tenants who will engage in nonmarital sex. *See id.* Other than her preference not to rent to persons who will engage in non-marital sex, Smith does not discriminate based on the religious beliefs, race, origin, color or other physical handicaps of her tenants. *See id.* Between March and April, 1997, Smith advertised one of her apartments. Gail Randall and Kenneth Phillips responded to the advertisement by telephone. *See id.* at 1152, 913 P.2d at 912, 51 Cal. Rptr. 2d at 703. During the initial telephone conversation, Smith informed Randall and Phillips, that she preferred to rent to married couples. *See id.* at 1152, 913 P.2d at 912-13, 51 Cal. Rptr. 2d at 703. When Randall and Phillips went to observe the unit, Smith stated she would not rent to an unmarried couple. *See id.* at 1152, 913 P.2d at 913, 51 Cal. Rptr. 2d at 703. Phillips falsely repre-



that the FEHA prohibits discrimination against unmarried couples.<sup>3</sup> Further, the judge rejected Smith's argument that the FEHA mandate to rent to unmarried couples violated the free exercise of religion clauses of the United States and California Constitutions.<sup>4</sup> The Fair Employment and Housing Commission (Commission) agreed that Smith's refusal to rent an apartment to an unmarried couple violated the discrimination prohibitions under the FEHA and the Unruh Civil Rights Act.<sup>5</sup> The Commission refused to address Smith's constitutional arguments and ordered Smith to pay \$454.00 in compensatory damages and \$500.00 in emotional distress damages to Phillips and Randall.<sup>6</sup>

The court of appeal reversed the Commission's finding, ruling that the application of the FEHA to a landlord whose religious beliefs transgress the renting of an apartment to an unmarried couple is unconstitutional under the free exercise clauses of the United States and California Constitutions.<sup>7</sup> The court also found no right to privacy violation under the

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sented that he and Randall were married, and they proceeded to complete an informal application. *See id.* On or about April 7, 1987, Randall and Phillips entered into a lease agreement with Smith, beginning May 1, 1987, for a monthly rent of \$325.00 and they paid a security deposit of \$150.00. *See id.* During this meeting, Smith reiterated her refusal to rent to unmarried couples. *See id.* Later that same day, Randall telephoned Smith to inquire if Smith doubted that she and Phillips were married, and if Smith wanted a copy of their marriage license. *See id.* Smith said that was unnecessary. *See id.* Later that same day, Phillips telephoned Smith and informed her that he and Randall were not married. *See id.* Smith stated that she would not rent to an unmarried couple because it violated her religious beliefs, and returned their security deposit by mail. *See id.* at 1152, 913 P.2d at 913, 51 Cal. Rptr. 2d at 703-04. Randall and Phillips filed individual complaints with the Commission, alleging Smith had violated California Government Code (FEHA) section 12955, and California Civil Code section 51. *See id.* at 1152-53, 913 P.2d 913, 51 Cal. Rptr. 2d at 704. *See* CAL. GOV'T CODE § 12955 (West & Supp. 1997) (providing the anti-discrimination provisions of the FEHA); CAL. CONST. art. I, § 4 (stating that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed"). *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 764-765 (9th ed. 1988) (discussing FEHA and outlining the unlawful activities pursuant to the FEHA); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 373-374 (9th ed. 1988) (discussing the parameters of the federal and state free exercise clauses); 51 CAL. JUR. 3D *Public Housing* § 61 (1979) (detailing unlawful acts by owners of housing accommodations); 12 CAL. JUR. 3D *Civil Rights* §§ 5-6 (1974) (explaining the Unruh Civil Rights Act's discrimination prohibitions on business establishments).

3. *See Smith*, 12 Cal 4th at 1153, 913 P.2d at 913-14, 51 Cal. Rptr. 2d at 704.

4. *See id.*

5. *See id.* at 1153, 913 P.2d at 914, 51 Cal. Rptr. 2d at 704; *see* CAL. CIV. CODE § 51 (West 1992) (containing the Unruh Civil Rights Act).

6. *See Smith*, 12 Cal. 4th at 1153, 913 P.2d at 914, 51 Cal. Rptr. 2d at 704-05.

7. *See id.* at 1154, 913 P.2d at 914, 51 Cal. Rptr. 2d at 705.

California Constitution by Smith's inquiry into Phillips and Randall's marital status.<sup>8</sup>

The California Supreme Court reversed the court of appeal's decision and held that the FEHA prohibited Smith from refusing to rent to unmarried cohabitants and thus concluded that, the FEHA provision was a religiously neutral, generally applicable law, which did not violate the federal or state free exercise of religion clauses.<sup>9</sup>

## II. TREATMENT

### A. *Majority Opinion*

#### 1. The FEHA ban on housing discrimination applies to unmarried couples.

The court began its analysis by considering the legislative intent behind the FEHA "marital status" discrimination prohibition.<sup>10</sup> Giving the words their ordinary meaning, the court stated that a landlord may not inquire into two prospective tenants' marital status or refuse to rent to two prospective tenants because they are, or are not, married.<sup>11</sup> The court found no legislative intent to treat married and unmarried couples differently.<sup>12</sup> The Legislature has used the term "marital status" in other statutes to convey the idea of the presence or absence of a marital relationship between two people.<sup>13</sup> Moreover, the Commission and the courts consistently have interpreted section 12955 to protect married and unmarried couples alike.<sup>14</sup> Finally, the court noted that courts construe the Rumford Act, which was superseded by the FEHA, to bar discrimination of both married and unmarried couples.<sup>15</sup> In instances where the

8. *See id.*

9. *See id.* at 1160, 1176, 913 P.2d at 918, 929, 51 Cal. Rptr. 2d at 709, 719-20.

10. *See id.* at 1154-60, 913 P.2d at 914-18, 51 Cal. Rptr. 2d at 705-09. For an opposing viewpoint suggesting that the state overreaches its powers by including unmarried couples within the marital status anti-discrimination prohibition, see Peter M. Stein, Casenote, *Smith v. Fair Employment and Housing Commission: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under Employment Division v. Smith?*, 4 GEO. MASON L. REV. 141, 211-12 (1995).

11. *See Smith*, 12 Cal. 4th at 1155, 913 P.2d at 915, 51 Cal. Rptr. 2d at 706.

12. *See id.* at 1156, 913 P.2d at 915, 51 Cal. Rptr. 2d at 706.

13. *See id.* at 1160, 913 P.2d at 918, 51 Cal. Rptr. 2d at 709.

14. *See id.* at 1156-60, 913 P.2d at 916-18, 51 Cal. Rptr. 2d at 706-09.

15. *See id.* at 1157-59, 913 P.2d at 916-17, 51 Cal. Rptr. 2d at 707-08.

Legislature reenacted a statute and did not change statutory interpretation, the court presumed the Legislature acquiesced to the court's prior statutory construction.<sup>16</sup> Therefore, the court held that the FEHA protects unmarried cohabitants against housing discrimination.<sup>17</sup>

2. Neither the Federal nor State Constitutions' free exercise of religion clause exempts Smith from complying with the FEHA requirements.

The court next turned its attention to whether California must exempt Smith from the FEHA mandates to avoid burdening the exercise of her religious freedom.<sup>18</sup> In examining the First Amendment of the United States Constitution, the court stated that the right to free exercise of religion does not exempt individuals from compliance with valid and neutral laws of general applicability.<sup>19</sup> The court reasoned that because section 12955 is generally applicable, prohibits all discrimination without reference to motivation, and is neutral towards religion in that its objective is to prohibit discrimination regardless of reason, section 12955 does not violate the free exercise clause of the United States Constitution.<sup>20</sup> Although the court found no issue regarding the United States Supreme Court's view of the free exercise clause, the court proceeded to examine the Supreme Court's derivation of the current approach to neutral laws of general applicability which incidentally burden religious exercise.<sup>21</sup>

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16. See *id.* at 1158, 913 P.2d at 917, 51 Cal. Rptr. 2d at 707.

17. See *id.* at 1160, 913 P.2d at 918, 51 Cal. Rptr. 2d at 709.

18. See *id.* at 1161, 913 P.2d at 918, 51 Cal. Rptr. 2d at 709.

19. See *id.* at 1161, 913 P.2d at 919, 51 Cal. Rptr. 2d at 709. The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Establishment Clause was made applicable to the states through *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). See 42 U.S.C. § 3603 (b) (1997) (providing the exceptions to the federal Fair Housing Act). See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 373 (9th ed. 1988) (discussing the Establishment Clause of the United States Constitution).

20. See *Smith*, 12 Cal. 4th at 1161-62, 913 P.2d at 919, 51 Cal. Rptr. 2d at 709-10. The court found the law generally applicable because it prohibited "all discrimination without reference to motivation." *Id.* at 1161, 913 P.2d at 919, 51 Cal. Rptr. 2d at 709-10. The law neutrality was derived from its prohibition of "discrimination irrespective of reason." *Id.* at 1161, 913 P.2d at 919, 51 Cal. Rptr. 2d at 710.

21. See *id.* at 1162-65, 913 P.2d at 919-21, 51 Cal. Rptr. 2d at 710-12. See generally Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U.L. REV. 65, 67-71 (1995) (describing the evolution of the Supreme Court's approach to the free exercise clause); James C. Geoly & Kevin R. Gustafson, *Religious Liberty and Fair Housing: Must a Landlord Rent Against His Conscience?*, 29 J. MARSHALL L. REV. 455, 458-65 (1996) (discussing standard of review of free exercise claims).

The court concluded that the proper test to apply in instances of a substantial governmental burden on freedom of religious exercise is the "compelling interest" test.<sup>22</sup>

The court next considered the application of the Religious Freedom Restoration Act (RFRA) to the case at bar because Smith argued that the FEHA burdened her religious exercise.<sup>23</sup> The court outlined the proper analysis for cases involving neutral, generally applicable laws which arguably burdened one's exercise of religious freedom.<sup>24</sup> First, "the burden must fall on a religious belief rather than on a philosophy or way of life."<sup>25</sup> Second, the claimant must sincerely believe the burdened religious belief.<sup>26</sup> Third, the claimant must prove the burden is substantial or legally significant.<sup>27</sup> Finally, if the claimant proves the aforementioned elements, the government must demonstrate that the application of the burden furthers a compelling governmental interest and that such burden is the least restrictive means of furthering said interest.<sup>28</sup> The court also noted that a regulation which indirectly impacts one's religious beliefs, such as one requiring Smith to rent to unmarried couples and thereby implicating her religious belief against extramarital promiscuity, is sufficient to test a claim under the RFRA analysis.<sup>29</sup>

In applying the test to the instant case, the court first concluded that Smith sincerely held her religious beliefs, as evidenced by "an honest

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22. See *Smith*, 12 Cal. 4th at 1165, 913 P.2d at 921, 51 Cal. Rptr. 2d at 712. See generally Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071 (1996) (analyzing each element of the compelling interest test).

23. See *Smith*, 12 Cal. 4th at 1165, 913 P.2d at 921, 51 Cal. Rptr. 2d at 712. Under the Religious Freedom of Restoration Act (RFRA) a government shall not substantially burden an individual's freedom of religious exercise unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

24. See *Smith*, 12 Cal. 4th at 1166-67, 913 P.2d at 922-23, 51 Cal. Rptr. 2d at 713. See Farris & Lorence, *supra* note 21; Wistner, *supra* note 22.

25. *Smith*, 12 Cal. 4th at 1166-67, 913 P.2d at 922-23, 51 Cal. Rptr. 2d at 713.

26. See *id.*

27. See *id.*

28. See *id.* at 1166-67, 913 P.2d at 922-23, 51 Cal. Rptr. 2d at 713.

29. See *id.* at 1167, 913 P.2d at 923, 51 Cal. Rptr. 2d at 713-14. See Geoly & Gustafson, *supra* note 21, at 458-72 (summarizing the legal basis of free exercise of religion and RFRA as a defense to discrimination claims, and discussing the states' case law application of RFRA to landlords).

conviction" that her religion prohibited her compliance with the FEHA.<sup>30</sup> The court struggled to find a substantial burden because Congress has not clearly defined "substantial burden," nor has case precedent offered a definition or determining test.<sup>31</sup> The court set forth a rule, stating that a burden exists when a benefit is conferred or denied based upon "conduct mandated by a religious belief, thereby asserting substantial pressure on . . . [a party to] violate his beliefs."<sup>32</sup> The court concluded that Smith, "without threatening her livelihood," could sell her units and reinvest her capital in investments other than rental units if she did not wish to comply with the FEHA.<sup>33</sup> The court further argued that because of the commercial nature of Smith's activities, any exemption from the FEHA requirements would sacrifice the public's right to have equal access to accommodations.<sup>34</sup> Thus, because Smith could avoid burdening her religious beliefs by following alternative investment opportunities, the court found no substantial burden in the instant case.<sup>35</sup> The court also stated that any additional economic cost Smith might incur in order to follow her religious convictions under the FEHA would not trigger a substantial burden.<sup>36</sup> Therefore, the court concluded that the alleged burden is a result of a religious-neutral, generally applicable law that happens to make Smith's exercise of religion more expensive, but does not substantially burden her free exercise of religion.<sup>37</sup>

Finally, the court considered whether article I, section 4 of the California Constitution, which provides for the free exercise of religion, exempts Smith from the FEHA mandates.<sup>38</sup> The court, upon reviewing both federal and state case law, explained that California courts have construed article I, section 4 to afford the same protection as the United

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30. See *Smith*, 12 Cal. 4th at 1167-68, 913 P.2d at 923, 51 Cal. Rptr. 2d at 714.

31. See *id.* at 1168-69, 913 P.2d at 923-24, 51 Cal. Rptr. 2d at 714-15.

32. *Id.* at 1170, 913 P.2d at 925, 51 Cal. Rptr. 2d at 715.

33. See *id.* at 1170, 913 P.2d at 925, 51 Cal. Rptr. 2d at 715-16.

34. See *id.* at 1170, 913 P.2d at 925, 51 Cal. Rptr. 2d at 716.

35. See *id.* at 1171, 913 P.2d at 926, 51 Cal. Rptr. 2d at 716.

36. See *id.* at 1172, 913 P.2d at 926-27, 51 Cal. Rptr. 2d at 717.

37. See *id.* at 1175-76, 913 P.2d at 928-29, 51 Cal. Rptr. 2d at 719-20. See generally Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699 (1995) (arguing that the preservation of the delicate balance between religious freedom and religious tolerance mandates that no "individual, court-ordered free exercise [of religion] exemption" should be granted to landlords who violate fair housing laws by refusing to rent to unmarried couples).

38. See *Smith*, 12 Cal. 4th at 1177, 913 P.2d at 929, 51 Cal. Rptr. 2d at 720. The California Constitution provides, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." CAL. CONST., art. I, § 4 (West 1983).

States Constitution.<sup>39</sup> Therefore, the court concluded that the RFRA analysis set forth above also disposes of Smith's argument based on the California Constitution.<sup>40</sup> Therefore, because the court found that the FEHA protection extends to unmarried cohabitants, the court held that no exemption from the FEHA non-discrimination requirements is merited where no substantial burden on Smith's religious beliefs exists.<sup>41</sup> The court affirmed the judgment of the court of appeals to the extent that it vacated the Commission's \$500.00 emotional distress damage award.<sup>42</sup>

### B. Justice Mosk's Concurring Opinion

Justice Mosk concurred with the majority, but took issue with the majority's application of RFRA to the instant case.<sup>43</sup> Justice Mosk argued that RFRA itself is unconstitutional.<sup>44</sup> While acknowledging that the First Amendment's free exercise clause affords every individual the absolute right to hold and profess his own religious beliefs and "engage in religious conduct immune from intentionally invidious government action," Justice Mosk insisted that the right to free exercise of religion does not include exempting religious conduct from "neutral and generally applicable government action."<sup>45</sup> Justice Mosk argued that it is beyond the role of the courts to determine the validity of an individual's religious beliefs or practices.<sup>46</sup> After a brief review of RFRA and its limitations, focusing on the threshold inquiry of whether a government action substantially burdens an individual's exercise of religion,<sup>47</sup> Justice Mosk concluded that RFRA violates the separation of powers doctrine because the substantial burden determination empowers courts to decide the

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39. See *Smith*, 12 Cal. 4th at 1177, 913 P.2d at 930, 51 Cal. Rptr. 2d at 720-21. See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 385 (9th ed. 1988 & Supp. 1996) (finding broader protection under the free exercise clause of the California Constitution).

40. See *Smith*, 12 Cal. 4th at 1178, 913 P.2d at 930, 51 Cal. Rptr. 2d at 721.

41. See *id.* at 1175-76, 913 P.2d at 928-29, 51 Cal. Rptr. 2d at 719-20.

42. See *id.* at 1154, 1179, 913 P.2d at 914, 931, 51 Cal. Rptr. 2d at 704-05, 722.

43. See *id.* at 1179-80, 913 P.2d at 931, 51 Cal. Rptr. 2d at 722. (Mosk, J., concurring).

44. See *id.* at 1180, 913 P.2d at 931, 51 Cal. Rptr. 2d at 722 (Mosk, J., concurring).

45. *Id.* at 1180-81, 913 P.2d at 932, 51 Cal. Rptr. 2d at 722-23 (Mosk, J., concurring).

46. See *id.* at 1182, 913 P.2d at 933, 51 Cal. Rptr. 2d at 723 (Mosk, J., concurring).

47. See *id.* at 1184-88, 913 P.2d at 934-36, 51 Cal. Rptr. 2d at 725-27 (Mosk, J., concurring).

validity of specific religious conduct or beliefs.<sup>48</sup> Consequently, Justice Mosk found RFRA to be violative of the United States Constitution.<sup>49</sup>

### *C. Justice Kennard's Concurring and Dissenting Opinion*

Justice Kennard concurred with the majority's holding that the FEHA protects unmarried couples from housing discrimination.<sup>50</sup> Further, Justice Kennard also agreed that RFRA's substantial burden test intended to expand protection for religiously motivated conduct.<sup>51</sup>

Justice Kennard disagreed, however, with the majority's holding that under RFRA, the State need not justify its action by demonstrating that such action is the least restrictive means of advancing a compelling government interest.<sup>52</sup> She argued that requiring Smith to comply with state law by renting to an unmarried couple, contrary to her religious beliefs, substantially burdened her exercise of those beliefs.<sup>53</sup> Justice Kennard then concluded that because California had failed to justify the substantial burden it imposed on Smith's religious beliefs through the demonstration of no existing, less restrictive alternative that would allow the State to pursue its goal of abolishing discrimination against unmarried couples while granting case-by-case exemptions to landlords with religious objections, RFRA precludes the State from requiring Smith to rent to unmarried couples.<sup>54</sup>

### *D. Justice Baxter's Concurring and Dissenting Opinion*

Justice Baxter concurred with the majority's finding that the FEHA prohibited discrimination against unmarried cohabiting couples.<sup>55</sup> Justice Baxter disagreed, however, with the majority's conclusion that, as a matter of law, the state policy of prohibiting housing discrimination must

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48. *See id.* at 1188-91, 913 P.2d at 937-39, 51 Cal. Rptr. 2d at 727-29 (Mosk, J., concurring).

49. *See id.* (Mosk, J., concurring).

50. *See id.* at 1195, 913 P.2d at 941, 51 Cal. Rptr. 2d at 732 (Kennard, J., concurring and dissenting).

51. *See id.* at 1196, 913 P.2d at 942, 51 Cal. Rptr. 2d at 732 (Kennard, J., concurring and dissenting).

52. *See id.* at 1193, 913 P.2d at 940, 51 Cal. Rptr. 2d at 731 (Kennard, J., concurring and dissenting).

53. *See id.* at 1197-209, 1217-18, 913 P.2d at 942-51, 957, 51 Cal. Rptr. 2d at 733-42, 747 (Kennard, J., concurring and dissenting).

54. *See id.* at 1209-17, 913 P.2d at 951-56, 51 Cal. Rptr. 2d at 742-47 (Kennard, J., concurring and dissenting).

55. *See id.* at 1218, 913 P.2d at 957, 51 Cal. Rptr. 2d at 747 (Baxter, J., concurring and dissenting).

always prevail over a landlord's right to free exercise of religion.<sup>56</sup> Justice Baxter argued that, under the Federal Supremacy Clause,<sup>57</sup> RFRA must prevail over any contrary state law; therefore, California had the burden of proving the existence of a compelling interest before the court could make a determination that there was a substantial burden.<sup>58</sup> Because Justice Baxter believed that the state was never forced to demonstrate that the FEHA was the least restrictive means of implementing the compelling governmental interest of the statute, he concluded that the present case should have been remanded to the Commission for such a determination.<sup>59</sup>

### III. IMPACT

The holding in *Smith* adds to the body of conflicting state case law involving religious adherents seeking exemption from anti-discrimination laws.<sup>60</sup> These cases force courts to consider whether there is any inherent limit to the number and type of classifications that a state legislature may add to its fair housing laws.<sup>61</sup> In *Smith*, the court confirmed the applicability of the FEHA to unmarried couples.<sup>62</sup> As the concurring and dissenting opinions discussed, however, the court failed to reach the issue of whether the government's interest in preventing discrimination against unmarried couples was a compelling one.<sup>63</sup> Until the court pro-

56. See *id.* at 1219, 913 P.2d at 957, 51 Cal. Rptr. 2d at 748 (Baxter, J., concurring and dissenting).

57. See U.S. CONST., art. VI, cl. 2.

58. See *Smith*, 12 Cal. 4th at 1219, 913 P.2d at 957-58, 51 Cal. Rptr. 2d at 748 (Baxter, J., concurring and dissenting).

59. See *id.* at 1219-20, 913 P.2d at 958, 51 Cal. Rptr. 2d at 748-49 (Baxter, J., concurring and dissenting).

60. See generally Melissa Fishman Cordish, Comment, *A Proposal for the Reconciliation of Free Exercise Rights and Anti-Discrimination Law*, 43 UCLA L. REV. 2113, 2117-28 (1996) (discussing the problems and inconsistencies of the prevailing test where a religious individual seeks an exemption from an anti-discrimination statute); Geoly & Gustafson, *supra* note 21 (tracing the modern history of the Federal Free Expression Clause); Kelly D. Eckel, Comment, *Legitimate Limitation of a Landlord's Rights—A New Dawn for Unmarried Cohabitants*, 68 TEMP. L. REV. 811, 811-17 (1995) (explaining that no uniform standard exists to resolve the competing values among landlords and their prospective, unmarried tenants).

61. See Stein, *supra* note 10 (arguing that unmarried cohabitants' status is self-imposed and should not, therefore, be afforded the protection of anti-discrimination laws).

62. See *Smith*, 12 Cal. 4th at 1160, 913 P.2d at 918, 51 Cal. Rptr. 2d at 709.

63. See *id.* at 1193, 913 P.2d at 940, 51 Cal. Rptr. 2d at 731 (Kennard, J., concurring



vides a clear approach to these free exercise claims, lower courts will continue to have difficulty in resolving the clash between the fundamental right to a free society and the preservation of religious and civil rights.<sup>64</sup>

#### IV. CONCLUSION

In *Smith*, the California Supreme Court confirmed that the FEHA prohibited a landlord from refusing to rent to unmarried cohabitants, and because the FEHA requirement was a religiously neutral, generally applicable law, it did not violate either the federal or state free exercise of religion clause.<sup>65</sup>

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and dissenting); *Id.* at 1219, 913 P.2d at 957-58, 51 Cal. Rptr. 2d at 748 (Baxter, J., concurring and dissenting).

64. *See* Cordish, *supra* note 60, at 2116 (describing the clash between free exercise rights and the compelling interest of states to enforce their fair housing laws).

65. *See Smith*, 12 Cal. 4th at 1160, 1175-76, 913 P.2d at 918, 928-29, 51 Cal. Rptr. 2d at 709, 719-20.

### III. CONTRACT/BINDING ARBITRATION

*Where a health maintenance organization makes contractual promises of expeditious claim processing in an arbitration agreement, with the knowledge they are likely false and with the intent to induce reliance on the part of the insured, the insured may seek remedies in court, including rescission of the agreement. And, a court may deny a petition to compel arbitration based on theories of fraud in the inducement or waiver of the agreement.*  
**Engalla v. Permanente Medical Group, Inc.**

#### I. INTRODUCTION

In *Engalla v. Permanente Medical Group, Inc.*,<sup>1</sup> the California Supreme Court considered whether to enforce a binding arbitration agreement between an insured and a health maintenance organization (HMO) when the HMO makes contractual promises of speedy claim processing, knows they are likely to be false, and conceals an unofficial policy of delaying the arbitration process.<sup>2</sup> The trial court denied Permanente

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1. 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997). Justice Mosk delivered the majority opinion in which Chief Justice George and Justices Baxter, Werdegar, and Chin concurred. *See id.* at 960-86, 938 P.2d at 907-25, 64 Cal. Rptr. 2d at 847-66. Justice Kennard wrote a concurring opinion. *See id.* at 986-89, 938 P.2d at 925-27, 64 Cal. Rptr. 2d at 866-68 (Kennard, J., concurring). Justice Brown wrote a dissenting opinion. *See id.* at 989-96, 938 P.2d at 927-32, 64 Cal. Rptr. 2d at 868-73 (Brown, J., dissenting).

2. *See id.* at 960, 938 P.2d at 907-08, 64 Cal. Rptr. 2d at 847-48. Wilfredo Engalla (Engalla) was enrolled through his employer, Olive Tire and Rubber Company, in a health insurance plan operated by the Permanente Medical Group, Inc., Kaiser Foundation Hospitals, and the Kaiser Foundation Health Plan (Kaiser). *See id.* at 960-61, 938 P.2d at 908, 64 Cal. Rptr. 2d at 847-48. Engalla enrolled in the plan by signing an application agreeing to submit any monetary claims against Kaiser for injury or death to binding arbitration, rather than pursuing a remedy in court. *See id.* at 961, 938 P.2d at 908, 64 Cal. Rptr. 2d at 848. The arbitration program was designed and administered by Kaiser rather than through an independent agency. *See id.* at 962, 938 P.2d at 909, 64 Cal. Rptr. 2d at 849. The administrative functions of the arbitration program were handled by Kaiser's outside counsel, which represented Kaiser in an adversarial capacity. *See id.*

In 1986, Engalla began to experience various symptoms of respiratory illness, such as coughing and shortness of breath. *See id.* at 961, 938 P.2d at 908, 64 Cal. Rptr. 2d

Medical Group's (Kaiser) petition to compel arbitration based on specific factual findings including fraud in the inducement, as well as a determination that the agreement was unconscionable as a violation of public policy.<sup>3</sup>

The court of appeal reversed the trial court, finding that Kaiser did not defraud Wilfredo Engalla and his family (Engalla).<sup>4</sup> The court reasoned that because the contractual representations at issue in the arbitration agreement involved cooperation of the parties, they were neither binding promises nor statements of fact.<sup>5</sup> The court also determined that there

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at 848. Radiologic tests ordered by a Kaiser doctor indicated an abnormality in Engalla's right lung. *See id.* At that time, the doctor indicated the need for follow-up treatment, but none was performed. *See id.* at 961, 938 P.2d at 908-09, 64 Cal. Rptr. 2d at 848.

Over the next five years, Engalla repeatedly complained to Kaiser of his worsening symptoms, but was diagnosed with colds or allergies and treated with inhalation medication. *See id.* at 961, 938 P.2d at 909, 64 Cal. Rptr. 2d at 848. Kaiser failed to perform diagnostic tests that could have detected Engalla's lung cancer until 1991, but by that time his condition was inoperable. *See id.* at 961, 938 P.2d at 909, 64 Cal. Rptr. 2d at 848-49. In May 1991, Engalla served a written demand for arbitration on Kaiser, claiming negligence for their failure to diagnose and treat his cancer in a timely manner. *See id.* at 961-62, 938 P.2d at 909, 64 Cal. Rptr. 2d at 849. Despite the fact that Engalla's attorney made it clear to Kaiser on several occasions that his client was gravely ill, and that the arbitration proceeding should be expedited as much as possible in order to conclude it before Engalla's death, Kaiser persisted in delaying the proceeding. *See id.* at 963-67, 938 P.2d at 910-12, 64 Cal. Rptr. 2d at 850-52.

Engalla died on October 23, 1991, with the arbitration proceeding still in its initial stages. *See id.* at 967, 938 P.2d at 912, 64 Cal. Rptr. 2d at 852. Subsequent to Engalla's death, the family's attorney notified Kaiser of their refusal to continue with the arbitration, and suit was filed in superior court alleging, among other things, malpractice and fraud. *See id.* at 969-70, 938 P.2d at 914, 64 Cal. Rptr. 2d at 854.

3. *See id.* at 970, 938 P.2d at 915, 64 Cal. Rptr. 2d at 855. *See generally* 6 CAL. JUR. 3D *Arbitration & Award* §§ 6-23 (1986 & Supp. 1997) (providing an overview of the judicial enforcement of arbitration agreements); 11 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW, Equity* §§ 36-40 (9th ed. 1990 & Supp. 1996) (providing a general discussion of arbitration agreements); William A. Chittenden III, *Malpractice Liability and Managed Health Care: History and Prognosis*, 26 TORT & INS. L.J. 451 (1991) (discussing forms of managed health care as well as liability and defense theories); Amy E. Elliott, Comment, *Arbitration and Managed Care: Will Consumers Suffer if the Two are Combined?*, 10 OHIO ST. J. ON DISP. RESOL. 417 (1995) (discussing medical malpractice arbitration in the managed care setting); Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203 (1996) (discussing the benefits and perceived drawbacks of medical malpractice arbitration).

4. *See Engalla*, 15 Cal. 4th at 971, 938 P.2d at 915, 64 Cal. Rptr. 2d at 855.

5. *See id.* The specific representations involving the timing of the arbitration at issue in the agreement were that "each side 'shall' designate a party arbitrator within 30 days of service of the claim and that the 2 party arbitrators 'shall' designate a third, neutral arbitrator within 30 days thereafter." *Id.* at 962, 938 P.2d at 909, 64 Cal. Rptr. 2d at 849.

was no evidence of reliance by Engalla on the promises made in the agreement.<sup>6</sup>

The California Supreme Court reversed the court of appeal and denied Kaiser's petition for enforcement of the arbitration agreement pending factual determinations by the trial court as to the issues of fraud and waiver of the agreement.<sup>7</sup> The court concluded that, while there was sufficient evidence in the record to support the trial court's initial finding that Kaiser acted fraudulently, the trial court must decide questions of fact to determine if Kaiser did commit fraud.<sup>8</sup>

## II. TREATMENT

### A. *Majority Opinion*

The court discussed three separate grounds raised by Engalla for denying Kaiser's petition to compel arbitration: (1) fraud in the inducement,<sup>9</sup> (2) waiver of the agreement,<sup>10</sup> and (3) unconscionability.<sup>11</sup> The court indicated that if it found evidence to support any of these defenses to enforcement, it must remand the case to the trial court to resolve the factual disputes and to reach a final determination on the petition.<sup>12</sup>

#### 1. Fraud in the Inducement

The court began its discussion of fraud in the inducement by noting that California Civil Code section 1689(b)(1) designates fraud as a ground upon which a party may rescind a contract.<sup>13</sup> The court indicated that Engalla alleged a "subspecies" of fraud, known as promissory fraud, as a defense to enforcement of the petition to compel arbitration, and then

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6. *See id.* at 971, 938 P.2d at 915, 64 Cal. Rptr. 2d at 855.

7. *See id.* at 960, 938 P.2d at 908, 64 Cal. Rptr. 2d at 848.

8. *See id.*

9. *See id.* at 973-81, 938 P.2d at 916-22, 64 Cal. Rptr. 2d at 856-62.

10. *See id.* at 982-84, 938 P.2d at 922-24, 64 Cal. Rptr. 2d at 863-64.

11. *See id.* at 984-86, 938 P.2d at 924-25, 64 Cal. Rptr. 2d at 864-66.

12. *See id.* at 973, 938 P.2d at 916, 64 Cal. Rptr. 2d at 856. The court noted that the trial court in the original proceeding erroneously treated the petition to compel arbitration as a summary judgment motion, rather than acting as the trier of fact and reaching a final determination as to the disposition of the motion. *See id.* at 972, 938 P.2d at 916, 64 Cal. Rptr. 2d at 856.

13. *See id.* at 973, 938 P.2d at 916, 64 Cal. Rptr. 2d at 857; *see also* CAL. CIV. CODE § 1689(b)(1) (West 1985).

discussed each element of promissory fraud (knowing misrepresentation, intent to induce reliance, actual reliance, and injury) as it applied to the facts of the instant case.<sup>14</sup>

*a. Knowing misrepresentation*

The court found that there were sufficient facts in the present case to support a conclusion that Kaiser induced Engalla to enter into the arbitration agreement through false representations made either knowingly or with a reckless disregard for their truth.<sup>15</sup> The two main factors on which the court relied were (1) a survey indicating that a neutral arbitrator was named within the sixty day time limit in only one percent of Kaiser arbitrations performed between 1984 and 1986, and (2) depositions by two of Kaiser's in-house attorneys stating that Kaiser was aware of the delays inherent in its arbitration system, yet it persisted in including representations of quick resolution of claims in its arbitration agreements.<sup>16</sup>

*b. Intent to induce reliance*

The court stated that newsletters distributed by Kaiser to its subscribers indicated an intent on the behalf of Kaiser to induce reliance on the misrepresentations of expeditious claim processing.<sup>17</sup> These newsletters represented Kaiser's arbitration program as being much more efficient than the court system, with claims adjudicated in months rather than years.<sup>18</sup> The court reasoned that these assertions could indicate Kaiser's intent to gain subscribers or to renew subscriptions based on its misrepresentations.<sup>19</sup>

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14. See *Engalla*, 15 Cal. 4th at 973-81, 938 P.2d at 916-22, 64 Cal. Rptr. 2d at 856-62. See generally 34 CAL. JUR. 3D *Fraud & Deceit* §§ 1-94 (1987 & Supp. 1997) (providing an overview of actionable fraud); 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 392-415 (9th ed. 1988 & Supp. 1997) (discussing fraud in the context of contracts, including rescission as a remedy); R. Alston Hamilton, Note, *Tennessee's Long-Awaited Adoption of Promissory Fraud: Steed Realty v. Oveisi*, 59 TENN. L. REV. 325 (1992) (discussing the doctrine of promissory fraud); Terri Schallenkamp, Note, *California Supreme Court Survey: A Review of Decisions, Lazar v. Superior Court*, 24 PEPP. L. REV. 1119 (1997) (discussing promissory fraud in an employment contract context).

15. See *Engalla*, 15 Cal. 4th at 974, 938 P.2d at 917, 64 Cal. Rptr. 2d at 857.

16. See *id.* at 974-75, 938 P.2d at 917, 64 Cal. Rptr. 2d at 858.

17. See *id.* at 976, 938 P.2d at 918-19, 64 Cal. Rptr. 2d at 859.

18. See *id.*

19. See *id.* at 976, 938 P.2d at 919, 64 Cal. Rptr. 2d at 859.

*c. Actual Reliance*

In discussing the element of actual reliance, which is required to establish a prima facie case of promissory fraud, the court noted that Engalla need only show that the misrepresentations in the arbitration agreement were material to Engalla's employer selecting Kaiser's health plan.<sup>20</sup> The court reasoned that one of the most important selling points of a health plan utilizing an arbitration process is its speed and economy compared with the court system.<sup>21</sup> Therefore, if Kaiser's representation of its program's efficiency falsely concealed a system rife with delay, the court determined that this misrepresentation could have influenced the selection of Kaiser's health plan by Engalla's employer.<sup>22</sup>

*d. Resulting Injury*

The court explained that rescission of an arbitration agreement does not require a showing of pecuniary loss;<sup>23</sup> rather, Engalla must prove a breach of the agreement creating a result contrary to the party's "reasonable, fraudulently induced, contractual expectations."<sup>24</sup> The court found ample evidence in the record indicating that Kaiser obstructed the arbitration process through non-response, as well as by adding conditions not contained in the original agreement.<sup>25</sup> Because of this course of conduct, the court decided that there was sufficient evidence to determine that Kaiser breached its contractual obligation to timely appoint an arbitrator.<sup>26</sup>

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20. *See id.* at 977, 938 P.2d at 919, 64 Cal. Rptr. 2d at 859. The court stated that a misrepresentation is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977)).

21. *See id.* at 978, 938 P.2d at 920, 64 Cal. Rptr. 2d at 860.

22. *See id.*

23. *See id.* at 979, 938 P.2d at 921, 64 Cal. Rptr. 2d at 861.

24. *Id.* at 980, 938 P.2d at 921, 64 Cal. Rptr. 2d at 861.

25. *See id.* at 980, 938 P.2d at 921, 64 Cal. Rptr. 2d at 862. The "extracontractual" condition that the court referenced was Kaiser's position that Engalla had to choose a party arbitrator before Kaiser would make its choice. *See id.* This was not a requirement of the original arbitration agreement. *See id.* at 964, 938 P.2d at 910, 64 Cal. Rptr. 2d at 850.

26. *See id.* at 980, 938 P.2d at 921, 64 Cal. Rptr. 2d at 862. Further, the court disagreed with Kaiser's assertion that California Civil Procedure Code section 1281.6, providing for court appointment of arbitrators when the agreed method of appointment

The court concluded its promissory fraud analysis by finding sufficient evidence in the record that Kaiser fraudulently induced Engalla to enter into the arbitration agreement, and that Engalla relied on the inducement to his detriment by suffering significant delays in the settlement of his malpractice claim.<sup>27</sup>

## 2. Waiver of the Arbitration Agreement

Engalla also alleged that by delaying and obstructing the arbitration process, Kaiser waived its right to compel arbitration.<sup>28</sup> The court noted that California Civil Procedure Code section 1281.2(a) allows for a trial court finding of waiver by the petitioner of a motion to compel arbitration.<sup>29</sup> The court indicated that bad faith or willful misconduct may be grounds for a finding of waiver, but that waiver of arbitration “is not to be lightly inferred.”<sup>30</sup> The court then referenced the previously discussed delay tactics used by Kaiser and stated that a trial court could construe those actions as unreasonable or in bad faith.<sup>31</sup> The court emphasized that parties should normally resolve any good faith disputes through a petition to the court, as provided for by California Civil Procedure Code section 1281.6, but because there was ample evidence of Kaiser’s unreasonable, bad faith misconduct in the present case, it would be left to the trial court to determine if Kaiser’s actions constituted a waiver of the arbitration agreement.<sup>32</sup>

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fails, excused Kaiser’s duty to select an arbitrator with reasonable diligence and in good faith. *See id.* at 980-81, 938 P.2d at 921, 64 Cal. Rptr. 2d at 862; CAL. CIV. PROC. CODE § 1281.6 (West 1982 & Supp. 1997).

27. *See Engalla*, 15 Cal. 4th at 981, 938 P.2d at 922, 64 Cal. Rptr. 2d at 862.

28. *See id.* at 982, 938 P.2d at 922, 64 Cal. Rptr. 2d at 863.

29. *See id.* Section 1281.2 provides in pertinent part, that “the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner.” CAL. CIV. PROC. CODE § 1281.2 (West 1982 & Supp. 1997).

30. *Engalla*, 15 Cal. 4th at 983, 938 P.2d at 923, 64 Cal. Rptr. 2d at 864 (citing *Davis v. Blue Cross of N. Cal.*, 25 Cal. 3d 418, 426, 600 P.2d 1060, 1064, 158 Cal. Rptr. 828, 832 (1979)). The court defined waiver as both “the voluntary relinquishment of a known right” and “the loss of an opportunity or a right as a result of a party’s failure to perform an act it is required to perform, regardless of the party’s intent to . . . relinquish the right.” *Id.* at 983, 938 P.2d at 923, 64 Cal. Rptr. 2d at 863 (citing *Platt Pacific, Inc. v. Andelson*, 6 Cal. 4th 307, 315, 862 P.2d 158, 162, 24 Cal. Rptr. 2d 597, 601 (1993)).

31. *See id.* at 984, 938 P.2d at 924, 64 Cal. Rptr. 2d at 864.

32. *See id.* Section 1281.6 provides, in pertinent part, “[I]f the agreed method [to appoint an arbitrator] fails . . . the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.” CAL. CIV. PROC. CODE § 1281.6 (West 1982 & Supp. 1997)

### 3. Unconscionability

The court dismissed Engalla's allegation that the arbitration agreement was unconscionable by noting that the issues raised did not involve one-sidedness in the agreement, but rather concerned Kaiser's bad faith delays and obstruction in the arbitration process despite contractual representations of expeditiousness.<sup>33</sup> The court stated that, given the facts of the present case, the most relevant laws to apply to settle the dispute were the doctrines of fraud and waiver.<sup>34</sup>

#### *B. Justice Kennard's Concurring Opinion*

Justice Kennard concurred in the majority opinion, but wrote separately in order to emphasize her view that the courts play an important role in ensuring the fundamental fairness of the arbitration system.<sup>35</sup> She indicated that Kaiser's arbitration process, which was offered on a "take it or leave it" basis and administered by Kaiser's own defense attorneys,<sup>36</sup> manifested a degree of procedural unfairness extreme enough to warrant intervention by the court.<sup>37</sup> Justice Kennard reasoned that it is the duty of the courts to ensure not only that private arbitration remains an efficient method of dispute resolution, but also to prevent it from becoming "an instrument of injustice."<sup>38</sup>

#### *C. Justice Brown's Dissenting Opinion*

In her dissenting opinion, Justice Brown did not defend the conduct of Kaiser.<sup>39</sup> Instead, she contended that the appropriate arbitral forum should have handled Engalla's claims rather than Engalla unilaterally exiting the arbitration process to seek relief in the courts.<sup>40</sup> Justice Brown indicated that there are adequate remedies for the types of fraudulent conduct perpetrated by Kaiser within the arbitration system, such as

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33. See *Engalla*, 15 Cal. 4th at 986, 938 P.2d at 925, 64 Cal. Rptr. 2d at 865-66.

34. See *id.* at 986, 938 P.2d at 925, 64 Cal. Rptr. 2d at 866.

35. See *id.* at 986, 938 P.2d at 925, 64 Cal. Rptr. 2d at 866 (Kennard, J., concurring).

36. See *id.* at 988, 938 P.2d at 927, 64 Cal. Rptr. 2d at 867-68 (Kennard, J., concurring).

37. See *id.* at 986-87, 938 P.2d at 925-26, 64 Cal. Rptr. 2d at 866 (Kennard, J., concurring).

38. See *id.* at 989, 938 P.2d at 927, 64 Cal. Rptr. 2d at 868 (Kennard, J., concurring).

39. See *id.* at 991, 938 P.2d at 929, 64 Cal. Rptr. 2d at 869 (Brown, J., dissenting).

40. See *id.* at 990, 938 P.2d at 928, 64 Cal. Rptr. 2d at 868 (Brown, J., dissenting).



those provided for by California Civil Procedure Code section 1281.6.<sup>41</sup> She reasoned that, by allowing Engalla to exit the arbitration process in this case, the majority set a dangerous precedent of allowing a dissatisfied party involved in arbitration to seek remedies in court rather than through the arbitration process itself, as intended by California law.<sup>42</sup>

### III. IMPACT & CONCLUSION

It is clear that this opinion will have a significant impact on how California health care insurers will contract and perform arbitration agreements in the future. What is not clear is whether that impact will be positive or negative. The court certainly implied that attempts by insurers to delay or obstruct arbitration proceedings will likely result in rescission of the arbitration agreement on the basis of fraud or waiver.<sup>43</sup> This evaluation of the law should cause health care insurers to review their arbitration agreements and procedures in order to insure compliance with contractual representations of efficiency. As Justice Kennard indicated in her concurring opinion, the court's decision should go far in ensuring the procedural and substantive fairness of arbitration proceedings.<sup>44</sup>

On the negative side, a potential for abuse, resulting from the majority's opinion, also exists. With precedence now established supporting unilateral withdrawal from an arbitration proceeding, parties who have no desire to involve themselves in binding arbitration will potentially be able to use this opinion as an escape hatch from their contractual obligation to arbitrate disputes. The likely result will be a flood of litigation in the courts. As Justice Brown noted, the majority's opinion "pokes a hole in the barrier separating private arbitrations and the courts . . . [and] like any such breach, this hole will eventually cause the dam to burst."<sup>45</sup>

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41. *See id.* at 992-94, 938 P.2d at 929-31, 64 Cal. Rptr. 2d at 870-72 (Brown, J., dissenting). *But cf. supra* note 29 and accompanying text (describing the majority's interpretation of section 1281.6).

42. *See Engalla*, 15 Cal. 4th at 994-96, 938 P.2d at 931-32, 64 Cal. Rptr. 2d at 872-73 (Brown, J., dissenting).

43. *See id.* at 960, 938 P.2d at 908, 64 Cal. Rptr. 2d at 848.

44. *See id.* at 986-89, 938 P.2d at 925-27, 64 Cal. Rptr. 2d at 861-68 (Kennard, J., concurring).

45. *Id.* at 995, 938 P.2d at 932, 64 Cal. Rptr. 2d at 873 (Brown, J., dissenting).

## IV. COURTS

*The jurisdiction provision of the Washington Metropolitan Area Transit Authority Compact, which expressly grants jurisdiction to courts of United States, Maryland, and Virginia, impliedly denies jurisdiction to courts of other states: Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority.*

## I. INTRODUCTION

In *Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority*,<sup>1</sup> the California Supreme Court considered whether California courts have jurisdiction over actions brought by or against the Washington Metropolitan Area Transit Authority (WMATA).<sup>2</sup> The superi-

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1. 14 Cal. 4th 939, 928 P.2d 581, 59 Cal. Rptr. 2d 866 (1997), *cert. denied*, 117 S. Ct. 2454 (1997). Justice Mosk delivered the unanimous opinion in which Chief Justice George and Justices Kennard, Baxter, Werdegar, Chin, and Brown concurred. *See id.* at 952, 928 P.2d at 589, 59 Cal. Rptr. 2d at 874.

2. *See id.* at 941, 928 P.2d at 582, 59 Cal. Rptr. 2d at 867. The Washington Metropolitan Area Transit Authority (WMATA) "is a regional instrumentality empowered . . . to provide transit facilities in and around the District of Columbia and neighboring parts of the State of Maryland and the Commonwealth of Virginia." *Id.* On May 28, 1992, Power Energy Industries (PEI), a California corporation, brought a contract and tort action in the Los Angeles Superior Court against Kingston Constructors, Inc. (Kingston), a California corporation, and the WMATA. *See id.* PEI alleged that the WMATA had entered into a contract with Kingston to supply and install certain electrical transformers with the intention that PEI design and manufacture the transformers. *See id.* at 941-42, 928 P.2d at 582, 59 Cal. Rptr. 2d at 867. PEI maintained that the WMATA and Kingston breached duties owed to PEI pursuant to the contract and the subcontract, causing PEI to sustain both contractual and tortious injuries. *See id.* In a letter to the superior court dated July 24, 1992, the WMATA disavowed an appearance because, under section 81 of the WMATA Compact, the superior court did not have jurisdiction in this action. *See id.* at 942, 928 P.2d at 582, 59 Cal. Rptr. 2d at 867-68. On or about September 9, 1992, the superior court, without prejudice, dismissed Kingston as a party to this action and PEI proceeded to bring a separate action against Kingston alone on or about November 10, 1992 (the "Second Action"). *See id.* at 942, 928 P.2d at 582, 59 Cal. Rptr. 2d at 868. On October 19, 1992, the clerk of the superior court, on PEI's application, entered the WMATA's default. *See id.* As part of PEI's settlement of the Second Action, on December 22, 1993, PEI assigned to Kingston its claims against the WMATA. *See id.* On May 5, 1994, the Los Angeles Superior Court rendered default judgment in the First Action in favor of Kingston, as PEI's successor,

or court vacated a \$6,985,413 damages, interest, and attorneys' fees award on the basis that under section 81 of the WMATA Compact (Compact), it lacked jurisdiction over the action.<sup>3</sup> The court of appeal affirmed the trial court's order, ruling that the lower court did not have proper jurisdiction pursuant to the Compact.<sup>4</sup>

The California Supreme Court affirmed the court of appeal's decision, holding that courts of the state of California do not have jurisdiction over actions brought by or against the WMATA.<sup>5</sup>

## II. TREATMENT

The court began its analysis by discussing the history of the WMATA and the validity of the Compact, a document empowering the WMATA to provide transit facilities in and around the District of Columbia, Maryland, and Virginia, and by setting forth the WMATA's zone of governed territory.<sup>6</sup> The court found that Congress' consummation of the Compact was to further joint federal, state, and local purposes.<sup>7</sup> After the Compact's initial creation, the District of Columbia joined through an

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and awarded damages against the WMATA of \$6,934,758, as well as interest and attorneys' fees totaling \$50,655. *See id.* On September 1, 1994, the superior court granted the WMATA's motion to vacate the default judgment, finding that, under section 81 of the WMATA Compact, the court lacked proper jurisdiction. *See id.* at 942, 928 P.2d at 582-83, 59 Cal. Rptr. 2d at 868. *See generally* 16 CAL. JUR. 3D *Courts* § 112 (1983) (stating that "state courts have concurrent jurisdiction in federal matters unless Congress or the federal constitution expressly or impliedly indicates otherwise" and detailing specific instances of concurrent jurisdiction); 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdictions* § 83 (4th ed. 1996) (explaining that state courts generally have concurrent jurisdiction for actions arising under federal statute where such jurisdiction is not denied by statute, or where there is no statutory indication that federal jurisdiction is intended to be exclusive). For a commentary which anticipates the end of concurrent jurisdiction, see Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep,"* 45 CASE W. RES. L. REV. 705, 773-78 (1995).

3. *See Kingston*, 14 Cal. 4th at 942, 928 P.2d at 582-83, 59 Cal. Rptr. 2d at 868.

4. *See id.* at 943, 928 P.2d at 583, 59 Cal. Rptr. 2d at 868.

5. *See id.* at 941, 928 P.2d at 582, 59 Cal. Rptr. 2d at 867.

6. *See id.* at 943, 928 P.2d at 583, 59 Cal. Rptr. 2d at 868. *See generally* Dale D. Goble, *The Compact Clause and Transboundary Problems: "A Federal Remedy for the Disease Most Incident to a Federal Government"*, 17 ENVTL. L. 785 (1987) (outlining two applications of the Compact Clause as a response to transboundary disputes); Herbert H. Naujoks, *Compacts and Agreements Between States and a Foreign Power*, 36 MARQ. L. REV. 219 (1952-53) (analyzing the history of interstate compacts in the United States).

7. *See Kingston*, 14 Cal. 4th at 943, 928 P.2d at 583, 59 Cal. Rptr. 2d at 868; Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, § 2, 80 Stat. 1324, 1325 (1966) (explaining Congress' purposes behind the creation of the WMATA and the Compact).

enactment by Congress pursuant to its powers under article I, section 8, Clauses 3 and 17 of the United States Constitution.<sup>8</sup> Further, the court stated that congressional consent to the Compact made it a law of the United States and rendered any conflicting state provisions invalid.<sup>9</sup>

The court next turned its attention to the meaning behind the specific Compact provision that addresses jurisdiction.<sup>10</sup> The court found that section 81 expressly granted original jurisdiction over actions brought by or against the WMATA to the United States District Courts and concurrent jurisdiction to the courts of Maryland and Virginia.<sup>11</sup> Moreover, the court noted that because the Compact was a federal law, the federal courts also had jurisdiction under Article III, Section 2, Clause 1 of the Constitution.<sup>12</sup> Because of the express jurisdictional language adopted in section 81 of the Compact, the court found no congressional intent to grant jurisdiction over WMATA actions to courts of other states.<sup>13</sup> The court concluded that the explicit inclusion of Maryland and

8. See *Kingston*, 14 Cal. 4th at 943-44, 928 P.2d at 583, 59 Cal. Rptr. 2d at 868-69. Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power to "regulate Commerce . . . among the several States." U.S. CONST. art I, § 8, cl. 3. Article I, Section 8, Clause 17 of the Constitution grants Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over [the] District" as "the Seat of Government of the United States." U.S. CONST. art. I, § 8, cl. 17.

9. See *Kingston*, 14 Cal. 4th at 944, 928 P.2d at 583-84, 59 Cal. Rptr. 2d at 869. Congress consented to the Compact pursuant to Article I, Section 10, Clause 3 of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any . . . Compact with another State." *Id.* at 944, 928 P.2d at 583, 59 Cal. Rptr. 2d at 869 (quoting U.S. Const. art. I, § 10, cl. 3). As a law of the United States, the Compact is "supreme" and "renders without effect any such state provision that is in conflict." *Id.* at 944, 928 P.2d at 583-84, 59 Cal. Rptr. 2d at 869.

10. See *id.* at 944-45, 928 P.2d at 584, 59 Cal. Rptr. 2d at 869. Section 81 of the Compact, entitled "Jurisdiction of Courts," provides that:

"The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [the WMATA] and to enforce subpoenas issued under [the WMATA Compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court. . . ."

*Id.* at 944, 928 P.2d at 584, 59 Cal. Rptr. 2d at 869 (alteration in original (quoting § 81, 80 Stat. at 1350)). See generally 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 10 (4th ed. 1996) (discussing jurisdiction of the subject matter).

11. See *Kingston*, 14 Cal. 4th at 945-46, 928 P.2d at 584-85, 59 Cal. Rptr. 2d at 869-70.

12. See *id.* at 945, 928 P.2d at 984, 59 Cal. Rptr. 2d at 870. See generally 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 75 (4th ed. 1996) (noting that district courts may be given exclusive jurisdiction over certain activities by special statute).

13. See *Kingston*, 14 Cal. 4th at 946-47, 928 P.2d at 585, 59 Cal. Rptr. 2d at 870-71.

Virginia courts impliedly denied original jurisdiction to any other state court.<sup>14</sup> The court further noted that because the zone of governance of the WMATA includes no other state territories, state courts other than Maryland and Virginia could not exercise proper judicial power over WMATA actions.<sup>15</sup> The court resolved that because section 81 impliedly bars jurisdiction to state courts other than Maryland and Virginia, California courts do not have jurisdiction over WMATA actions.<sup>16</sup>

The court found that the general presumption, that state and federal courts share concurrent jurisdiction, arises only when statutory provisions are silent as to state court jurisdictional authority.<sup>17</sup> In applying this rule to the present case, the court reasoned that section 81's express jurisdictional grant to Maryland and Virginia impliedly denied other states concurrent jurisdiction with federal courts in WMATA actions.<sup>18</sup>

Finally, the court addressed whether a jurisdictional grant to United States District Courts and certain state courts violated the Constitution as discriminatory against other states.<sup>19</sup> The court reasoned that Congress' broad constitutional seat-of-government and commerce powers made the enactment of section 81 a valid exercise of congressional authority.<sup>20</sup> The court also found the fact that the WMATA does not embrace territories in states other than Maryland and Virginia to fail to evidence serious discrimination and, that by consenting to the Compact, Congress agreed.<sup>21</sup>

Therefore, the California Supreme Court concluded that the court of appeal did not err in denying the superior court subject matter jurisdiction over this WMATA matter.<sup>22</sup>

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*See generally* 16 CAL. JUR. 3D *Courts* § 103 (1983) (stating that jurisdiction of a subject matter for which a court has no jurisdiction cannot be conferred by contract or other means); Timothy C. Blank, Significant Development, *A Proposed Application of the Compact Clause*, 66 B.U.L. REV. 1067 (1986) (discussing the impact of the Compact Clause on contracts between states and foreign nations).

14. *See Kingston*, 14 Cal. 4th at 946-47, 928 P.2d at 585, 59 Cal. Rptr. 2d at 870-71.

15. *See id.* at 946, 928 P.2d at 585, 59 Cal. Rptr. 2d at 870.

16. *See id.* at 946-47, 928 P.2d at 585-86, 59 Cal. Rptr. 2d at 871.

17. *See id.* at 947-48, 928 P.2d at 586, 59 Cal. Rptr. 2d at 871.

18. *See id.* at 949, 928 P.2d at 587, 59 Cal. Rptr. 2d at 872.

19. *See id.*

20. *See id.* at 949-50, 928 P.2d at 587, 59 Cal. Rptr. 2d at 872-73.

21. *See id.* at 951, 928 P.2d at 588, 59 Cal. Rptr. 2d at 873-74.

22. *See id.* at 951-52, 928 P.2d at 588, 59 Cal. Rptr. 2d at 874.

### III. IMPACT AND CONCLUSION

The unanimous decision in *Kingston* enforces the policy of implicit denial of state court jurisdiction in certain instances. Because the Compact explicitly limited jurisdiction to the courts of the United States, Maryland, and Virginia, the court affirmatively recognized the limitations of the reach of the state court system. The court's acknowledgment that certain jurisdictional grants are not only permissive, but necessary to uphold congressional intent, can only further judicial economy and encourage efficient resolution of matters which directly impact the state of California.

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## V. CRIMINAL LAW

- A. *A criminal defendant may waive the statute of limitations for a lesser included offense as part of a plea agreement involving a greater offense, provided: (1) the waiver is knowing, intelligent, and voluntary; (2) the waiver is made for the defendant's benefit and after consultation with counsel; and (3) the waiver does not handicap the defendant's defense or contravene any other public policy. Further, waiver of the statute of limitations precludes challenging the conviction on that ground: Cowan v. Superior Court.*

### I. INTRODUCTION

In *Cowan v. Superior Court*,<sup>1</sup> the California Supreme Court considered whether a criminal defendant may waive the statute of limitations for a lesser included offense as part of a plea agreement for a greater offense.<sup>2</sup> The trial court granted the prosecution's motion to set aside the plea, reasoning that the statute of limitations was a jurisdictional defect

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1. 14 Cal. 4th 367, 926 P.2d 438, 58 Cal. Rptr. 2d 458 (1996). Justice Chin wrote the majority opinion in which Chief Justice George and Justices Mosk and Werdegar concurred. *See id.* at 370-77, 926 P.2d at 439-44, 58 Cal. Rptr. 2d at 459-64. Justice Baxter wrote a separate concurring opinion. *See id.* at 377-78, 926 P.2d at 444, 58 Cal. Rptr. 2d at 464. Justice Chin also wrote a separate concurring opinion. *See id.* at 378-83, 926 P.2d at 444-48, 58 Cal. Rptr. 2d at 464-68. Justice Brown wrote a concurring and dissenting opinion in which Justice Kennard joined. *See id.* at 383-93, 926 P.2d at 448-55, 58 Cal. Rptr. 2d at 468-75.

2. *See id.* at 370-77, 926 P.2d at 439-44, 58 Cal. Rptr. 2d at 459-64. In *Cowan*, a criminal complaint was filed in 1994 against the defendant for three murders committed in 1984. *See id.* at 370, 926 P.2d at 439, 58 Cal. Rptr. 2d at 459. Following a preliminary hearing, the defendant and the district attorney negotiated a plea agreement whereby the defendant would plead no contest to voluntary manslaughter in exchange for dismissal of the remaining charges. *See id.* Prior to sentencing, the district attorney discovered that the six year statute of limitations had run on voluntary manslaughter and moved to set aside the plea on the grounds that the plea was illegal because the statute of limitations had run and that the statute of limitations was jurisdictional and could not be waived. *See id.*; CAL. PENAL CODE § 800 (Deering Supp. 1997) (setting forth the statute of limitations for manslaughter). At the hearing to set aside the plea, the defendant stated that he was willing to waive the statute of limitations. *See Cowan*, 14 Cal. 4th at 370, 926 P.2d at 439, 58 Cal. Rptr. 2d at 459. *See generally* 17 CAL. JUR. 3D *Criminal Law* §§ 78, 79 (1984 & Supp. 1996) (discussing lesser included offenses).

that could not be cured by stipulation of the parties.<sup>3</sup> The court of appeal denied the defendant's petition for writ of mandate which sought to order the trial court to accept the plea.<sup>4</sup> The supreme court granted review and issued an alternative writ of mandate to allow the plea.<sup>5</sup>

## II. TREATMENT

### A. Majority Opinion

Justice Chin, writing for the majority, cited *People v. McGee*<sup>6</sup> for the assertion that the statute of limitations in criminal cases is jurisdictional rather than a defense to be affirmatively pleaded.<sup>7</sup> Furthermore, because jurisdiction defines a court's power to proceed, jurisdiction cannot be conferred over the subject matter by consent of the litigants.<sup>8</sup> To demonstrate the literal manner in which courts have applied the holding of *McGee*, Justice Chin offered two cases in which attempts to waive the statute of limitations were rebuffed.<sup>9</sup> In support of allowing waiver of the statute of limitations despite the apparent lack of jurisdiction, Justice Chin distinguished *Cowan* from precedent on the ground that no other case "involved a lesser offense to a charged offense . . . that was not time-barred and over which the court unquestionably *did* have jurisdic-

3. See *Cowan*, 14 Cal. 4th at 370, 926 P.2d at 439, 58 Cal. Rptr. 2d at 459.

4. See *id.*

5. See *id.* at 377, 926 P.2d at 444, 58 Cal. Rptr. 2d at 464.

6. 1 Cal. 2d 611, 36 P.2d 378 (1934), *overruled by Cowan*, 14 Cal. 4th 367, 926 P.2d 438, 58 Cal. Rptr. 2d 458.

7. See *Cowan*, 14 Cal. 4th at 371-72, 926 P.2d at 440, 58 Cal. Rptr. 2d at 460.

8. See *id.*; see also 17 CAL. JUR. 3D *Criminal Law* § 2259 (1985 & Supp. 1996) (describing the statute of limitations as jurisdictional); 1 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 368 (2d ed. 1988 & Supp. 1996) (explaining that because the statute of limitations is jurisdictional, failure to raise it does not constitute waiver).

9. See *Cowan*, 14 Cal. 4th at 375, 926 P.2d at 442-43, 58 Cal. Rptr. 2d at 462-63 (citing *People v. Brice*, 206 Cal. App. 3d 111 (1988), 253 Cal. Rptr. 370 (reversing conviction on ground that requesting jury instruction of time-barred lesser related offense was an invalid waiver of the statute of limitations under *McGee*); *People v. Ognibene*, 12 Cal. App. 4th 1286 (1993), 16 Cal. Rptr. 2d 96 (affirming trial court's refusal to instruct the jury on the time-barred lesser related offense despite the defendant's willingness to expressly waive the statute of limitations), *overruled by Cowan*, 14 Cal. 4th 367, 926 P.2d 438, 58 Cal. Rptr. 2d 458). See generally 6 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Reversible Error* § 3303 (2d ed. 1989 & Supp. 1996) (providing that acting without jurisdiction may constitute per se reversible error).



tion, i.e., the power to proceed."<sup>10</sup> Justice Chin concluded that because of the charged offense, the court had fundamental subject matter jurisdiction and could act in excess of its jurisdiction to accept a plea to a time-barred lesser offense.<sup>11</sup> The majority expressly overruled *McGee* and its progeny only to the extent that *McGee* suggests that a trial court lacks fundamental jurisdiction, reserving for the future a reconsideration of the statute of limitations as jurisdictional or an affirmative defense.<sup>12</sup>

Justice Chin advanced several arguments in favor of allowing waiver. First, he cited the proposition that criminal defendants may ordinarily waive rights that exist for their benefit, provided the public does not have a countervailing interest.<sup>13</sup> Second, the statute of limitations' language does not prohibit waiver.<sup>14</sup> Third, the United States Supreme Court has held that waiver may even be necessary in some cases.<sup>15</sup> Finally, other states have allowed waiver.<sup>16</sup>

The majority discussed the Alaska Supreme Court's reasoning in *Padie v. State*,<sup>17</sup> which had addressed the same issue.<sup>18</sup> Adopting the test enunciated in *Padie*, the majority held that a criminal defendant may waive the statute of limitations if the trial court determines the following: "(1) the waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statutes."<sup>19</sup>

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10. *Cowan*, 14 Cal. 4th at 373, 926 P.2d at 441, 58 Cal. Rptr. 2d at 461.

11. *See id.* at 374, 926 P.2d at 442, 58 Cal. Rptr. 2d at 462.

12. *See id.* Justice Chin emphasized the need to distinguish between waiver, which is the intentional relinquishing of a known right, and forfeiture, which is the loss of a right by failing to assert it. *See id.* at 371, 926 P.2d at 440, 58 Cal. Rptr. 2d at 460. When the statute of limitations is jurisdictional it cannot be forfeited, only waived. *See id.*

13. *See id.* at 371, 926 P.2d at 439, 58 Cal. Rptr. 2d at 459.

14. *See id.* at 372, 926 P.2d at 440, 58 Cal. Rptr. 2d at 460.

15. *See id.*; *Spaziano v. Florida*, 468 U.S. 447, 454-57 (1984) (holding that a defendant in a capital case may be required to waive the statute of limitations to permit the trial court to instruct on the lesser included offense); *see also* Jodi L. Short & Mark D. Spoto, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 597, 1219 (1994) (discussing *Spaziano's* impact).

16. *See Cowan*, 14 Cal. 4th 372, 926 P.2d at 440, 58 Cal. Rptr. 2d at 460. For a discussion of how other jurisdictions address the statute of limitations, see Tim A. Thomas, Annotation, *Waivability of Bar of Limitations Against Criminal Prosecution*, 78 A.L.R. 4th 693 (1990 & Supp. 1996), and Chris L. Kleppin, Comment, *Yossarian is Back, the Ultimate Catch-22: What to Do When the Statute of Limitations Has Run on Lesser Offenses*, 8 ST. THOMAS L. REV. 229 (1995).

17. 594 P.2d 50 (Alaska 1979).

18. *See Cowan*, 14 Cal. 4th 372-74, 926 P.2d at 440-42, 58 Cal. Rptr. 2d at 460-62.

19. *Id.* at 372, 926 P.2d at 440-41, 58 Cal. Rptr. 2d at 460-61 (quoting *Padie*, 594

Convinced that satisfying these prerequisites would not be difficult, the majority simply required the following: (1) that the court inform the defendant that the charge is, or may be, time-barred, and elicit a waiver of the bar; (2) absent evidence to the contrary, an appellate court may presume that a represented defendant consulted with counsel; and (3) waiving the bar as part of a plea agreement would be for the defendant's benefit and would not handicap the defense.<sup>20</sup> In adopting the new rule, the majority expressly disapproved *People v. Brice*<sup>21</sup> and *People v. Ognibene*<sup>22</sup> to the extent that they were inconsistent.<sup>23</sup>

Justice Chin perceived no public policy reasons to preclude waiving the statute of limitations in this context.<sup>24</sup> To the contrary, the majority stated that allowing waiver actually promotes the three policy considerations of a statute of limitations as follows: limiting litigation, reducing the risk of blackmail, and reducing the threat of further prosecution.<sup>25</sup> Moreover, by holding that a defendant who waives the statute of limitations may not later challenge the conviction on the statute of limitations ground, the majority allayed concerns that the waiver would be abused.<sup>26</sup>

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P.2d at 57) (footnote omitted) (citing Comment, *The Statute of Limitations in a Criminal Case: Can it be Waived?*, 18 WM. & MARY L. REV. 823, 840 (1977) (enunciating the test later adopted by the court in *Padie*)).

20. See *Cowan*, 14 Cal. 4th at 373, 926 P.2d at 441, 58 Cal. Rptr. 2d at 461.

21. 206 Cal. App. 3d 111 (1988), 253 Cal. Rptr. 370.

22. 12 Cal. App. 4th 1286 (1993), 16 Cal. Rptr. 2d 96.

23. See *Cowan*, 14 Cal. 4th at 375, 926 P.2d at 443, 58 Cal. Rptr. 2d at 463.

24. See *id.* at 374, 926 P.2d at 442, 58 Cal. Rptr. 2d at 462 (citing *People v. Trejo*, 217 Cal. App. 3d 1026, 1032 (1990), 266 Cal. Rptr. 266, 269; *Padie*, 594 P.2d at 57).

25. See *id.* at 375, 926 P.2d at 442, 58 Cal. Rptr. 2d at 462; see also *People v. Zamora*, 18 Cal. 3d 538, 546-48, 557 P.2d 75, 80-81, 134 Cal. Rptr. 784, 789-90 (1976) (identifying policy considerations of a statute of limitations). See generally Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations With Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 261-69 (1995) (discussing purposes of the statute of limitations in criminal cases). But see J. Anthony Chavez, *Statutes of Limitations and the Right to a Fair Trial: When is a Crime Complete?*, 10 CRIM. JUST. 2 (Summer 1995) (arguing that extending statutes of limitations may compromise a defendant's right to a fair trial).

26. See *Cowan*, 14 Cal. 4th at 376, 926 P.2d at 443, 58 Cal. Rptr. 2d at 463.

### B. Justice Baxter's Concurring Opinion

In his concurrence, Justice Baxter identified two reasons for joining the majority: it did not overrule *McGee* in its entirety and it did not reconsider whether the statute of limitations is a jurisdictional matter or an affirmative defense.<sup>27</sup> Justice Baxter warned that had the facts of the case been an appropriate vehicle for addressing his second concern, he likely would have joined Justice Brown's concurring and dissenting opinion.<sup>28</sup>

### C. Justice Chin's Concurring Opinion

While concurring completely in his majority opinion, Justice Chin also wrote separately to reinforce his view that the statute of limitations should remain jurisdictional and not be treated as an affirmative defense.<sup>29</sup> Justice Chin listed several justifications for this view.<sup>30</sup> First, stare decisis should insulate sixty years of jurisprudence from sudden change, absent some compelling reason.<sup>31</sup> Second, fairness dictates that no defendant languish in prison for accidentally failing to assert an absolute bar to his prosecution.<sup>32</sup> Third, fairness also requires that defendants knowingly waive the statute of limitations, requiring them to be aware of all options.<sup>33</sup> Finally, requiring an express waiver will fully develop the trial record for appeal, eliminating the ambiguity of a silent record and the likelihood of ineffective assistance of counsel claims that such silence would breed.<sup>34</sup> Justice Chin concluded his concurrence by responding to Justice Brown's criticisms of the jurisdictional approach.<sup>35</sup>

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27. *See id.* at 377-78, 926 P.2d at 444, 58 Cal. Rptr. 2d at 464 (Baxter, J., concurring).

28. *See id.* at 378, 926 P.2d at 444, 58 Cal. Rptr. 2d at 464 (Baxter, J., concurring).

29. *See id.* at 378, 926 P.2d at 444-45, 58 Cal. Rptr. 2d at 464-65 (Chin, J., concurring).

30. *See id.* at 378-81, 926 P.2d at 445-46, 58 Cal. Rptr. 2d at 465-66 (Chin, J., concurring).

31. *See id.* at 378, 926 P.2d at 445, 58 Cal. Rptr. 2d at 465 (Chin, J., concurring).

32. *See id.* at 379, 926 P.2d at 445, 58 Cal. Rptr. 2d at 465 (Chin, J., concurring).

33. *See id.* (Chin, J., concurring).

34. *See id.* at 379-80, 926 P.2d at 445-46, 58 Cal. Rptr. 2d at 465-66 (Chin, J., concurring).

35. *See id.* at 381-83, 926 P.2d at 447-48, 58 Cal. Rptr. 2d at 467-68 (Chin, J., concurring). Justice Chin rejected claims by Justice Brown that determining the statute of limitations can be too complex and that requiring an express waiver adds to the complexity of plea allocation. *See id.* (Chin, J., concurring).

*D. Justice Brown's Concurring and Dissenting Opinion*

Justice Brown concurred in the majority's holding that a defendant may waive the statute of limitations but dissented over the majority's requirement that the waiver be express rather than a forfeiture for failing to assert it as an affirmative defense.<sup>36</sup> Justice Brown discussed several policy reasons in support of an affirmative defense approach.<sup>37</sup> First, due to the statute of limitations' importance in promoting a fair trial by ensuring that evidence is not stale, a defendant is likely to raise it as a defense.<sup>38</sup> Second, because an affirmative defense must be raised at trial, an adequate record will be developed.<sup>39</sup> Third, there are no "statutory or constitutional impediments to adopting an affirmative defense approach. . . ."<sup>40</sup> Finally, Justice Brown argued that adopting an affirmative defense approach would bring California in conformity with other jurisdictions that have addressed the issue.<sup>41</sup>

Justice Brown argued that a forfeiture approach is preferable to an express waiver approach for several reasons.<sup>42</sup> First, forfeiture avoids adding an additional element to plea allocution and obviates the need to calculate the statute of limitations.<sup>43</sup> Second, the affirmative defense

36. *See id.* at 383, 926 P.2d at 448, 58 Cal. Rptr. 2d at 468 (Brown, J., concurring and dissenting).

37. *See id.* at 387-89, 926 P.2d at 450-52, 58 Cal. Rptr. 2d at 470-72 (Brown, J., concurring and dissenting).

38. *See id.* at 387, 926 P.2d at 450, 58 Cal. Rptr. 2d at 470 (Brown, J., concurring and dissenting).

39. *See id.* (Brown, J., concurring and dissenting). Justice Brown argued that for several reasons a well developed record is more important now than at the time *McGee* was decided: (1) the statute of limitations discovery rule applies to some offenses but not others; (2) it is difficult to determine who qualifies to discover an offense; and (3) tolling provisions add to the complexity of calculating the statute of limitations. *See id.* at 387-88, 926 P.2d at 451, 58 Cal. Rptr. 2d at 471 (Brown, J., concurring and dissenting).

40. *Id.* at 388, 926 P.2d at 451, 58 Cal. Rptr. 2d at 471 (Brown, J., concurring and dissenting). Justice Brown emphasized that California adopted the jurisdictional approach simply because it seemed more desirable, not because it was constitutionally or statutorily required. *See id.* at 388, 926 P.2d at 451-52, 58 Cal. Rptr. 2d at 471-72 (Brown, J., concurring and dissenting).

41. *See id.* at 389, 926 P.2d at 452, 58 Cal. Rptr. 2d at 472 (Brown, J., concurring and dissenting).

42. *See id.* at 389-93, 926 P.2d at 452-55, 58 Cal. Rptr. 2d at 472-75 (Brown, J., concurring and dissenting).

43. *See id.* at 390, 926 P.2d at 453, 58 Cal. Rptr. 2d at 473 (Brown, J., concurring and dissenting).

approach is consistent with California precedent allowing forfeiture of certain constitutional rights.<sup>44</sup> Third, forfeiture would resolve the problems related to the jurisdictional approach invoked in *Cowan*, *Brice*, and *Ognibene*.<sup>45</sup> Finally, Justice Brown argued that ineffective assistance of counsel claims would not dramatically increase with a forfeiture approach.<sup>46</sup> In addition, she criticized the jurisdictional approach for encouraging “gamesmanship” and requiring collateral proceedings to determine if the waiver of the statute of limitations was knowing and intelligent.<sup>47</sup> Justice Brown concluded by stating that existing California criminal procedure provides ample opportunity for a defendant to assert the statute of limitations as an affirmative defense.<sup>48</sup>

### III. IMPACT AND CONCLUSION

Prior to *Cowan* a criminal defendant could not plead guilty to a time-barred lesser included offense, despite his own willingness and the cooperation of the prosecution. Without discarding the jurisdictional approach, the court at least has clarified it so that a court has jurisdiction to accept a plea to a time-barred lesser included offense of a greater offense over which the court has jurisdiction.<sup>49</sup> *Cowan* may allow for greater efficiency in the administration of justice by allowing a plea agreement for a lesser included offense whose statute of limitations is shorter than the greater offense. The supreme court appears to be readying itself for a battle over the proper approach to the statute of limitations with Justices Brown, Baxter, and Kennard, at the least, in support of abandoning the majority’s jurisdictional approach in favor of the affirmative defense approach. Without regard to the jurisdiction versus affirmative defense debate, the California Supreme Court’s holding in

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44. *See id.* at 391, 926 P.2d at 454, 58 Cal. Rptr. 2d at 474 (Brown, J., concurring and dissenting).

45. *See id.* at 391-92, 926 P.2d at 454, 58 Cal. Rptr. 2d at 474 (Brown, J., concurring and dissenting).

46. *See id.* (Brown, J., concurring and dissenting).

47. *See id.* (Brown, J., concurring and dissenting).

48. *See id.* at 392-93, 926 P.2d at 454-55, 58 Cal. Rptr. 2d at 474-75 (Brown, J., concurring and dissenting). Justice Brown argued that a facially deficient criminal complaint can simply be met with a demurrer. *See id.* Furthermore, a complaint that is not facially deficient can be opposed in a pretrial hearing on the defense, during jury instructions, or by objecting when a judge instructs the jury on a time-barred lesser related offense. *See id.* at 393, 926 P.2d at 455, 58 Cal. Rptr. 2d at 475 (Brown, J., concurring and dissenting).

49. *See id.* at 373, 926 P.2d at 441, 58 Cal. Rptr. 2d at 461.

*Cowan* is a step toward a more consistent jurisprudence, in which a criminal defendant can waive a statutory right as easily as a constitutional one.

PAUL A. ROSE

- B. *The trial court did not abuse its discretion when it found that an alleged victim's payments to the district attorney's office for investigation costs created a conflict of interest that allowed for recusal of the district attorney's office: People v. Eubanks.*

## I. INTRODUCTION

In *People v. Eubanks*,<sup>1</sup> the California Supreme Court held that the trial court did not abuse its discretion when it found that financial assistance from an alleged victim to the district attorney's office created a conflict of interest that required disqualification.<sup>2</sup> The superior court granted the

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1. 14 Cal. 4th 580, 927 P.2d 310, 59 Cal. Rptr. 2d 200 (1996), *modified*, 14 Cal. 4th 1282d (modification only altered the footnote language and did not affect the judgment). Justice Werdegar authored the opinion of the court in which Justices Mosk, Kennard, Baxter, Chin, and Brown concurred. *See id.* at 583-601, 927 P.2d 312-23, 59 Cal. Rptr. 2d at 202-13. Chief Justice George filed a concurring opinion in which Justice Mosk joined. *See id.* at 601-04, 927 P.2d at 323-25, 59 Cal. Rptr. 2d 213-15 (George, C.J., concurring). Although the criminal charges against both defendants were dropped, the supreme court heard the case "to resolve the legal issues raised, which are of continuing public interest and are likely to recur." *See id.* at 584 n.2, 927 P.2d at 312 n.2, 59 Cal. Rptr. 2d at 202 n.2 (citing *Baluyut v. Superior Court*, 12 Cal. 4th 876, 829 n.4, 911 P.2d 1, 3 n.4, 50 Cal. Rptr. 2d 101, 103 n.4 (1996); *Liberty Mut. Ins. Co. v. Fales*, 8 Cal.3d 712, 715-16, 505 P.2d 213, 215, 106 Cal. Rptr. 21, 23 (1973)). *See generally* 12 CAL. JUR. 3D *Certiorari* § 10 (1974) (discussing the review of moot or abstract questions); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 72 (9th ed. 1988 & Supp. 1996) (examining the constitutional "case or controversy" requirement).

2. *See Eubanks*, 14 Cal. 4th at 584, 927 P.2d at 312, 59 Cal. Rptr. 2d at 202. In 1992, defendant Wang quit his job as vice president of Borland International (Borland), a computer software developer. *See id.* at 584-85, 927 P.2d at 312, 59 Cal. Rptr. 2d at 202. Defendant Eubanks was president of Symantec, Borland's competitor. *See id.* at 585, 927 P.2d at 312, 59 Cal. Rptr. 2d at 202. After Wang's departure, executives at Borland found several electronic mail messages from Wang to Eubanks. *See id.* Borland contacted the police. *See id.* The grand jury indicted defendants Eubanks and Wang on conspiracy to receive stolen property and conspiracy to access and make use of computer information. *See id.* Furthermore, the grand jury charged Wang with trade secret theft and unlawful use of information and Eubanks with several more counts of receiving stolen property. *See id.* at 584, 927 P.2d at 312, 59 Cal. Rptr. 2d at 202. Lacking manpower, the district attorney requested that Borland representatives provide the technical support necessary to sufficiently investigate the case. *See id.* at 585, 927 P.2d at 312, 59 Cal. Rptr. 2d at 202. Rather than use its employees, Borland suggested and agreed to pay for independent consultants to assist the district attorney's office. *See id.* at 585, 927 P.2d at 313, 59 Cal. Rptr. 2d at 203. Further, Borland paid for a private company to transcribe interview tapes after the district attorney's investigator stated that the investigation would be delayed because of a backup in tape transcription. *See id.* at 587, 927 P.2d at 314, 59 Cal. Rptr. 2d at 204. Defendants moved to recuse the district attorney's office on the grounds that the payments constituted a conflict of

recusal motion, holding that the victim's payments created an actual conflict of interest.<sup>3</sup> The court of appeal reverse,d viewing the payments as "comparable to the cooperation victims often give to prosecutors in criminal cases."<sup>4</sup> Reversing the court of appeal, the California Supreme Court held that the trial court did not abuse its discretion in finding that the district attorney's office could be disqualified due to an alleged victim's contributions to the investigation.<sup>5</sup>

## II. TREATMENT

### A. Majority Opinion

Justice Werdegar divided the majority opinion into three sections.<sup>6</sup> The first section discussed the role of the prosecutor.<sup>7</sup> This section focused on the need of the prosecutor to be independent from persons and influences giving rise to questions concerning the office's impartiality.<sup>8</sup> The court noted that although the district attorney has a duty to ardently litigate each case to, "both the accused and the public have a legitimate expectation that his zeal . . . will be born of objective and impartial consideration of each individual case."<sup>9</sup>

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interest. *See id.*

3. *See id.* See generally 27 CAL. JUR. 3D *District and Municipal Attorneys* § 28 (1987 & Supp. 1997) (discussing recusal of the district attorney's office); Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415 (1993) (discussing the disqualification of prosecutors); Joseph T. McLaughlin et al., *Disqualification of Attorneys and Judges*, C824 A.L.I.-A.B.A. 785 (1993), available in WL, ALI-ABA database (discussing the disqualification of attorneys and judges); Christopher Vaeth, Annotation, *Disqualification or Recusal of Prosecuting Attorney Because of Relationship with Alleged Victim or Victim's Family*, 12 A.L.R. 5th 909 (1993) (discussing the disqualification of the district attorney's office due to a conflict of interest).

4. *See Eubanks*, 14 Cal. 4th at 588, 927 P.2d at 314, 59 Cal. Rptr. 2d at 204 (quoting *People v. Eubanks*, 44 Cal. Rptr. 2d 846, 853 (Cal. Ct. App. 1995) (depublished), *rev'd*, 14 Cal. 4th 580, 927 P.2d 310, 59 Cal. Rptr. 2d 200 (1997)).

5. *See id.* at 600-01, 927 P.2d at 323, 59 Cal. Rptr. 2d at 213.

6. *See id.* at 583-601, 927 P.2d at 312-23, 59 Cal. Rptr. 2d at 202-13.

7. *See id.* at 588-90, 927 P.2d at 315-16, 59 Cal. Rptr. 2d at 205-06.

8. *See id.* Additionally, Justice Werdegar discussed the nature of the California criminal system in this section. *See id.* For a discussion on the roles and responsibilities of the prosecutor, see 27 CAL. JUR. 3D *District and Municipal Attorneys* §§ 19-22 (1987 & Supp. 1997).

9. *See Eubanks*, 14 Cal. 4th at 590, 927 P.2d at 316, 59 Cal. Rptr. 2d at 206 (quoting *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 267, 561 P.2d 1164, 1172, 137 Cal.



The opinion's second section traced the development of California's standards for prosecutorial recusal, examining both case and statutory law.<sup>10</sup> The opinion noted that section 1424, as enacted in 1980, established that a motion for recusal "shall not be granted unless it is shown by the evidence that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."<sup>11</sup> The court added that the conflict may be either "actual" or "apparent."<sup>12</sup> The court relied on its holding in *People v. McPartland*<sup>13</sup> which recognized that "recusal cannot be warranted solely by how a case may appear to the public."<sup>14</sup>

Lastly, the majority examined the facts of the case at bar and addressed the appropriate standard to employ when reviewing a trial court's refusal or grant of a motion to recuse.<sup>15</sup> The supreme court determined that abuse of discretion was the proper standard.<sup>16</sup> The court

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Rptr. 476, 484 (1977) (omission in original), *superseded* by statute as stated in *People v. Conner*, 34 Cal. 3d 141, 147, 666 P.2d 5, 8, 193 Cal. Rptr. 148, 151 (1983)).

10. See *id.* at 590-94, 927 P.2d at 316-19, 59 Cal. Rptr. 2d at 206-09. The California Supreme Court first addressed the issue of recusal of the district attorney's office in *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977). *Greer* discussed actual conflict and the "appearance of impropriety." See *id.* at 255, 561 P.2d at 1164, 137 Cal. Rptr. at 476. Subsequently, the Legislature enacted Penal Code section 1424 which stated that "[t]he motion shall not be granted unless it is shown by the evidence that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial." CAL. PENAL CODE § 1424 (West 1982) (current version located at CAL. PENAL CODE § 1424 (West Supp. 1997)).

11. See CAL. PENAL CODE § 1424 (West 1982).

12. See *Eubanks*, 14 Cal. 4th at 592-93, 927 P.2d at 317, 59 Cal. Rptr. 2d at 207; see also *People v. Conner*, 34 Cal. 3d 141, 147, 666 P.2d 5, 8, 193 Cal. Rptr. 148, 151 (1983). In *Conner*, the California Supreme Court established a two-part test: (1) is there a conflict of interest? and (2) is the conflict so severe as to disqualify the district attorney from acting? See *Eubanks*, 14 Cal. 4th at 594, 927 P.2d at 318, 59 Cal. Rptr. 2d at 209 (citing *Conner* 34 Cal. 3d at 148-49, 666 P.2d at 9, 193 Cal. Rptr. at 152).

13. 198 Cal. App. 3d 569, 243 Cal. Rptr. 752 (1988).

14. See *Eubanks*, 14 Cal. 4th at 592, 927 P.2d at 317, 59 Cal. Rptr. at 207 (quoting *McPartland*, 198 Cal. App. 3d at 574, 243 Cal. Rptr. at 755).

15. See *id.* at 594-601, 927 P.2d at 319-23, 59 Cal. Rptr. 2d at 209-13.

16. See *id.* at 594-95, 927 P.2d at 319, 59 Cal. Rptr. 2d at 209. The supreme court previously addressed this issue in *Conner*, finding that the lower court's decision was reviewable if evidence was supported by "substantial evidence." See *Conner*, 34 Cal. 3d at 149, 666 P.2d at 6, 193 Cal. Rptr. at 152. However, in *People v. Hamilton*, the court stated that "abuse of discretion" was the appropriate standard. See *Hamilton*, 46 Cal. 3d 123, 141, 756 P.2d 1348, 1356, 249 Cal. Rptr. 320, 328 (1988). In *People v. Breaur*, the court cleared up the inconsistency, stating that, "[o]ur role is to determine whether there is substantial evidence to support the findings, and, based on those findings, to determine whether the trial court abused its discretion in denying the motion." See *Breaur*, 1 Cal. 4th 281, 293-94, 821 P.2d 585, 590, 3 Cal. Rptr. 2d 81, 86 (1991) (citing *Hamilton*, 46 Cal. 3d at 140, 756 P.2d at 1348, 249 Cal. Rptr. at 320; *Conner*, 34 Cal.

rejected the notion that the conflict must arise from a personal interest by a member of the district attorney's office.<sup>17</sup> The supreme court found that institutional interests were enough to recuse the district attorney's office.<sup>18</sup> Accordingly, the court concluded that payments to the district attorney's office were adequate grounds for recusal and that the money did not need to "benefit any official's personal pocketbook."<sup>19</sup>

### B. Concurring Opinion

Chief Justice George joined the majority opinion, but wrote a separate concurrence because he believed that recusal of the district attorney's office should have been mandatory as a matter of law.<sup>20</sup> Chief Justice George maintained that the circumstances did not only "support" recusal, they "mandated" it under statutory and case law.<sup>21</sup> In reaching this conclusion, Chief Justice George relied on three factors: (1) the solicitation of contributions to pay for expenses incurred by the district attorney's investigation of the case; (2) the size of the contributions relative to the small budget of the district attorney's office; and (3) the weakness of the prosecution's case.<sup>22</sup> Chief Justice George further noted that because

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3d at 141, 666 P.2d at 5, 193 Cal. Rptr. at 148; *Love v. Superior Court*, 111 Cal. App. 3d 367, 371, 168 Cal. Rptr. 577, 579 (1980), *superseded by statute as stated in People v. Lopez*, 155 Cal. App. 3d 813, 822, 202 Cal. Rptr. 333, 338 (1984); *People v. Battin*, 77 Cal. App. 3d 635, 671, 143 Cal. Rptr. 731, 753 (1978), *superseded by statute as stated in Conner*, 34 Cal. 3d at 147, 666 P.2d at 8, 193 Cal. Rptr. at 151). See generally Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 VA. TAX REV. 423 (1994) (discussing the abuse of discretion standard in the tax field); Jeffrey L. Romig, *Administrative Review of Cases Involving the Exercise of Discretion Under Section 212(c): Should the Board of Immigration Appeals Adopt an "Abuse of Discretion" Standard?*, 9 GEO. IMMIGR. L.J. 63 (1995) (advocating that the Board of Immigration Appeals adopt an abuse of discretion standard).

17. See *Eubanks*, 14 Cal. 4th at 595, 927 P.2d at 319-20, 59 Cal. Rptr. 2d at 209-10.

18. See *id.*

19. *Id.* at 595, 927 P.2d at 319, 59 Cal. Rptr. 2d at 209 (quoting the Attorney General).

20. See *id.* at 601, 927 P.2d at 323, 59 Cal. Rptr. 2d at 213 (George, C.J., concurring).

21. See *id.* at 602, 927 P.2d at 324, 59 Cal. Rptr. 2d at 214 (George, C.J., concurring).

22. See *id.* at 601-03, 927 P.2d at 324, 59 Cal. Rptr. 2d at 214 (George, C.J., concurring). Chief Justice George highlighted several benefits that Borland stood to receive if the prosecution succeeded: protection of trade secrets, ammunition in the pending civil trial, disruption of Symantec's business operations, and deterrence of similar future

Borland had so much to gain from the successful prosecution of the case, it may have exerted pressure on the district attorney's office by paying the office for investigation costs.<sup>23</sup> As a result, the district attorney may have felt obligated to continue pursuing the case because of the contributions.<sup>24</sup>

### III. IMPACT

The majority opinion did not directly address whether alleged victims may contribute money to the district attorney's office to further investigations without creating a conflict of interest.<sup>25</sup> Instead, the court determined the appropriate standard of review and found that the trial court had not abused its discretion.<sup>26</sup> The supreme court noted that financial assistance to the prosecution "may create a legally cognizable conflict of interest for the prosecutor."<sup>27</sup> Therefore, the question remains unresolved as to whether an alleged victim can safely contribute to the district attorney's office.

### IV. CONCLUSION

The California Supreme Court did not draw any bright line conclusions about whether an alleged victim can give money to the district attorney's office to fund an investigation. The court did, however, hold that the lower court did not abuse its discretion when it found that the alleged victim's donation created a conflict of interest that allowed for recusal of the district attorney's office.

KELLY C. QUINN

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acts. *See id.* at 602-03, 927 P.2d at 324, 59 Cal. Rptr. 2d at 214 (George, C.J., concurring). *See generally* 19 CAL. JUR. 3D *Criminal Law* §§ 2067-2068 (1984 & Supp. 1997) (discussing discriminatory prosecution and equal protection in criminal cases); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 415 (9th ed. 1988 & Supp. 1996) (describing the protections afforded to persons accused of a crime in California).

23. *See Eubanks*, 14 Cal. 4th at 602-03, 927 P.2d at 324, 59 Cal. Rptr. 2d at 214 (George, C.J., concurring).

24. *See id.* (George, C.J., concurring).

25. *See id.* at 583-601, 927 P.2d at 312-23, 59 Cal. Rptr. 2d at 202-13.

26. *See id.* at 600-01, 927 P.2d at 323, 59 Cal. Rptr. 2d at 213.

27. *See id.* at 598, 927 P.2d at 321, 59 Cal. Rptr. 2d at 211.

- C. *The Street Terrorism Enforcement and Prevention (STEP) Act, which provides for enhanced penalties when the defendant's offense is gang related and the defendant has committed two or more crimes enumerated therein, does not require the state to prove that the two or more previous crimes were gang related: People v. Gardeley.*

## I. INTRODUCTION

In *People v. Gardeley*,<sup>1</sup> the California Supreme Court considered whether the STEP Act, which requires prosecutors to prove that a defendant sustained a "pattern of criminal gang activity" by showing the defendant committed "two or more" enumerated offenses (the "predicate offenses") in order to seek an enhanced sentence for the defendant, mandates that the predicate offenses be "gang related."<sup>2</sup> After the jury found

1. 14 Cal. 4th 605, 927 P.2d 713, 59 Cal. Rptr. 2d 356 (1996). Justice Kennard wrote the majority opinion in which Chief Justice George and Justices Mosk, Baxter, Werdegar, Chin and Brown concurred. *See id.* at 609-26, 927 P.2d at 715-27, 59 Cal. Rptr. 2d at 358-70.

2. *Id.* at 609-10, 927 P.2d at 715-16, 59 Cal. Rptr. 2d at 358-59. In the summer of 1992, the defendants, Rochelle Gardeley and Tommie Thompson, along with another man, approached the victim, who was urinating in an apartment complex garage located "in an area controlled by the Family Crip gang." *See id.* at 610, 927 P.2d at 716, 59 Cal. Rptr. 2d at 359. The defendants beat the victim and robbed him of a watch, a necklace, and some cash. *See id.* at 610-11, 927 P.2d at 716, 59 Cal. Rptr. 2d at 359. A short while later, the police stopped and searched a car in which Thompson was driving and Gardeley was a passenger. *See id.* at 611, 927 P.2d at 716, 59 Cal. Rptr. 2d at 359. The police found a baggie containing cocaine outside the car door next to Gardeley and observed that he had a bloody shirt and lip. *See id.* The State charged the defendants with attempted murder, assault with a deadly weapon (with a great bodily injury enhancement), robbery, as well as gang related assault and/or battery. *See id.*

At trial, the prosecution introduced Patrick Boyd, a highly experienced detective who had interviewed the defendants after their arrest. *See id.* at 611, 927 P.2d at 716-17, 59 Cal. Rptr. 2d at 359-60. After a hearsay determination outside the presence of the jury and a limiting instruction to the jury, Detective Boyd, testifying as an expert, revealed that the defendants had told him their Family Crip gang names. *See id.* at 611-12, 927 P.2d at 717, 59 Cal. Rptr. 2d at 360. Detective Boyd also gave opinion testimony that the gang's primary purpose was to deal drugs and engage in violence "to further its drug-dealing activities." *See id.* at 612, 927 P.2d at 717, 59 Cal. Rptr. 2d at 360. When presented with hypothetical facts identical to those of the instant case, Boyd opined that the defendants' actions were gang activity to intimidate the residents

the defendants guilty of attempted murder, assault with a deadly weapon with the intent to do great bodily injury, engaging in a pattern of gang activity, and gang-related assault and/or battery, the trial court utilized the STEP Act's sentence enhancement guidelines to sentence the defendants.<sup>3</sup> The court of appeal reversed, concluding that the prosecution had "failed to prove the statutorily required 'two or more' predicate offenses to establish that the Family Crip gang was a criminal street gang within the meaning of the statute" because Detective Boyd's testimony was not based on facts in evidence or personal knowledge.<sup>4</sup> The California Supreme Court reversed the court of appeal and found that the prosecution proved each of the elements required by the STEP Act.<sup>5</sup>

## II. TREATMENT

The court began its opinion with a discussion of the STEP Act of 1988 and the underlying legislative rationale of coping with California's street gang problem.<sup>6</sup> The court explained that the STEP Act provides for enhanced penalties for gang crimes and set forth the relevant definitions of a "criminal street gang," a "pattern of criminal gang activity" and "predicate offenses."<sup>7</sup> After a recitation of the facts of the case, the court reit-

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of the neighborhood in which they were dealing drugs. *See id.* at 612-13, 927 P.2d at 717-18, 59 Cal. Rptr. 2d at 360-61. The detective also testified that three previous incidents involving the defendants, namely a 1992 shooting, a threat against a drug dealer, and possession of crack cocaine were gang-related activities. *See id.* at 613, 927 P.2d at 718, 59 Cal. Rptr. 2d at 361. The trial court allowed three abstracts of judgment concerning these three incidents to be admitted as evidence. *See id.* at 613-14, 927 P.2d at 718, 59 Cal. Rptr. 2d at 361. For a discussion of the issues involved in presenting "gang evidence," see Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739 (1990).

3. *See Gardeley*, 14 Cal. 4th at 614 & n.6, 927 P.2d at 718 & n.6, 59 Cal. Rptr. 2d at 361-62 & n.6; *see also Criminal Street Gangs: Spencer v. Beni*, 25 PAC. L.J. 523-24 (giving statutory examples of street gang crime penalties).

4. *See Gardeley*, 14 Cal. 4th at 614, 927 P.2d at 718-19, 59 Cal. Rptr. 2d at 361-62.

5. *See id.* at 626, 927 P.2d at 726-27, 59 Cal. Rptr. 2d at 369-70.

6. *See id.* at 609, 927 P.2d at 715, 59 Cal. Rptr. 2d at 358; *see also* 17 CAL. JUR. 3D *Criminal Law* § 33 (1994 & Supp. 1997) (discussing the gang violence problem in California); 2 B.E. WITKIN, CALIFORNIA CRIMINAL LAW 2D, *Crimes Against Governmental Authority* § 1251B (Supp. 1996) (outlining the STEP Act).

7. *See Gardeley*, 14 Cal. 4th at 609-10, 927 P.2d at 715-16, 59 Cal. Rptr. 2d at 358-59. A criminal street gang is an "ongoing association of three or more persons that shares a common name or common identifying sign or symbol," and systematically commits a "pattern of criminal gang activity." *Id.* A pattern of criminal gang activity is found when gang members engage in certain "predicate offenses" within a specified period of time. *See id.* at 610, 927 P.2d at 715-16, 59 Cal. Rptr. 2d at 258-59. The "predicate offenses" are listed in the STEP Act. *See id.*; *see also infra* note 9 (setting out listed offenses); 17 CAL. JUR. 3D *Criminal Law* § 35 (1994 & Supp. 1996) (defining

erated that the purpose of the STEP Act is to target and eliminate the California gang problem by granting trial courts the discretion to increase gang members' sentences if the crime at issue was gang related.<sup>8</sup>

Although the STEP Act requires that the offense be in furtherance of the purposes of the gang, the court recognized that the statute enumerates the predicate offenses.<sup>9</sup> Accordingly, the court listed the elements the prosecution needed to prove in order to comply with the STEP Act.<sup>10</sup> The remainder of the court's opinion illustrated how the prosecution met its burden of proving each element.<sup>11</sup>

First, the court examined the testimony of Detective Boyd and determined that the jury needed Boyd's expert opinion to explain gang activity because it was outside the common experience of the ordinary person.<sup>12</sup> The court then recited the rules concerning expert opinion testimony, noting that judges may allow comment on hypotheticals if "rooted in facts shown by the evidence," statements on facts not in evidence are permissible if "it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions," and if reliable,

a criminal street gang member); B.E. WITKIN, CALIFORNIA CRIMINAL LAW 2D, *Punishment for Crime* § 1501 (2d ed. 1988 & Supp. 1996) (discussing enhancement provisions for defendants who carry or use a firearm); Lori L. Proudfit, Note, *California Supreme Court Survey; A Review of Decisions*, People v. Bland, 23 PEPP. L. REV. 1033, 1034 (1996) (discussing the deterrent effect of enhancement provisions).

8. See *Gardeley*, 14 Cal. 4th at 610-17, 927 P.2d at 716-20, 59 Cal. Rptr. 2d at 358-63; see also David R. Truman, Note, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683 (1995) (outlining California's, South Dakota's, Florida's, and Illinois' responses to the criminal street gang problem).

9. See *Gardeley*, 14 Cal. 4th at 615-16, 927 P.2d at 720, 59 Cal. Rptr. 2d at 363. These listed offenses include:

- (1) [a]ssault with a deadly weapon or by means of force likely to produce great bodily injury . . .
- (2) [r]obbery . . .
- (3) [u]nlawful homicide or manslaughter . . .
- (4) [t]he sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances . . .
- (5) [s]hooting at an inhabited dwelling or occupied motor vehicle . . .
- (6) [a]rson . . .
- (7) [t]he intimidation of witnesses and victims . . .
- [and] (8) [g]rand theft of any vehicle, trailer, or vessel . . . ."

*Id.* at 616 n.8, 927 P.2d at 720 n.8, 59 Cal. Rptr. 2d at 363 n.8.

10. See *id.* at 616-17, 927 P.2d at 720, 59 Cal. Rptr. 2d at 363. The court required that the prosecution prove the instant crime was gang-related, the defendants were members of a gang, and they "engaged in a 'pattern of criminal gang activity.'" See *id.*

11. See *id.* at 617-26, 927 P.2d at 720-26, 59 Cal. Rptr. 2d at 363-70.

12. See *id.* at 617, 927 P.2d at 720-21, 59 Cal. Rptr. 2d at 363-64.

even inadmissible hearsay can be the basis of an expert opinion.<sup>13</sup> The court concluded that, based upon Detective Boyd's answer to the hypothetical rooted in the facts of the instant case, the jury could reasonably find that the STEP Act requirements of a gang related offense committed by members of a criminal street gang were satisfied.<sup>14</sup>

Turning to the pattern of criminal gang activity element, the supreme court reviewed the STEP Act's definition and timing requirements.<sup>15</sup> The court inferred the legislative intent behind the act by examining the plain language of the statute requiring that predicate offenses be two or more of the enumerated offenses, not two or more gang related offenses.<sup>16</sup> Responding to the defendants' argument that because the statute deals with penalties, the court must construe the statute in favor of the defendant, the court noted that the language was not ambiguous and thus the letter of the law controlled, even though it had consequences adverse to the defendants.<sup>17</sup>

Next, the court addressed the defendants' reliance on a New Jersey case holding that a statute making it a crime to belong to a gang violated constitutionally mandated due process.<sup>18</sup> The court distinguished the New Jersey statute by indicating that the STEP Act gave a more specific definition of a gang and involved gang crime rather than gang membership.<sup>19</sup> Finally, the court concluded its analysis by applying the facts of the case to the statute and declaring the defendants' prior conviction for shooting at a dwelling, plus the instant conviction for assault with a deadly weapon with the intent to do great bodily injury, to be two enumerated offenses, thus finding that the timing requirements of the STEP

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13. *See id.* at 618, 927 P.2d at 721, 59 Cal. Rptr. 2d at 364.

14. *See id.* at 619-20, 927 P.2d at 722-23, 59 Cal. Rptr. 2d at 365-66.

15. *See id.* at 620-21, 927 P.2d at 723, 59 Cal. Rptr. 2d at 366. A "pattern of criminal gang activity" exists where the defendants committed two or more of the listed crimes "provided at least one of those offenses occurred after the effective date of [the STEP Act] and the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions, or by two or more persons." *Id.*

16. *See id.* at 621, 927 P.2d at 723, 59 Cal. Rptr. 2d at 366. The court reasoned that because the phrase triggering the interpretation that the offense be gang-related is used elsewhere in the statute, but is absent in the part of the statute at issue, the court cannot imply its existence. *See id.* at 622, 927 P.2d at 723-24, 59 Cal. Rptr. 2d at 366-67.

17. *See id.* at 621-22, 927 P.2d at 724, 59 Cal. Rptr. 2d at 366-67.

18. *See id.* at 622-23, 927 P.2d at 724, 59 Cal. Rptr. 2d at 367 (discussing *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939)).

19. *See id.* at 623-24, 927 P.2d at 724-25, 59 Cal. Rptr. 2d at 367-68.

Act were met.<sup>20</sup> Accordingly, the court decreed that the prosecution had met their burden and reversed the decision of the court of appeal.<sup>21</sup>

### III. IMPACT

The decision of the California Supreme Court in *Gardeley* cleared up confusion as to whether predicate offenses must be gang related; the court declared that they do not.<sup>22</sup> The court further clarified that the instant offense, which must be gang-related, can count as one of the two or more enumerated offenses required to satisfy the STEP Act.<sup>23</sup> By setting forth such a rule, the supreme court and the Legislature have sent a message to criminal street gangs that crimes committed by gang members will be punished severely.<sup>24</sup>

### IV. CONCLUSION

Prior to *Gardeley*, there was uncertainty as to whether the STEP Act's pattern of criminal gang activity element required that a defendant commit two or more *gang related* offenses.<sup>25</sup> However, in *Gardeley*, the California Supreme Court declared that the predicate offenses do not have to be gang related, only enumerated in the STEP Act.<sup>26</sup> Furthermore, the State can rely on the instant offense in fulfilling the two or more predi-

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20. See *id.* at 624-26, 927 P.2d at 725-26, 59 Cal. Rptr. 2d at 368-69. The court emphasized that although the instant offense could be considered in reaching the adequate number of predicate offenses, it still had to be gang related to satisfy the mandates of the statute. See *id.* at 625 n.12, 927 P.2d at 726 n.12, 59 Cal. Rptr. 2d at 369 n.12.

21. See *id.* at 626, 927 P.2d at 726-27, 59 Cal. Rptr. 2d at 369-70.

22. See *supra* notes 16-17 and accompanying text.

23. See *supra* notes 20-21 and accompanying text.

24. See *supra* notes 20-21 and accompanying text. As noted in *Lanzetta v. New Jersey*, this stance appears to rest on a guilt by association rationale. See *supra* note 18 and accompanying text. See also Alexander A. Molina, Note, *California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 Sw. U. L. REV. 457 (1993) (arguing that the STEP Act's guilt by association basis is unconstitutional). For another method to curb the street gang problem, see Sharon A. Ligorsky, Note, *Williams v. Garcetti: Constitutional Defects in California's "Gang-Parent" Liability Statute*, 28 LOY. L.A. L. REV. 447 (1994).

25. See *supra* note 2 and accompanying text.

26. See *supra* note 16 and accompanying text.



cate offenses requirement, so long as the defendant committed the offense in furtherance of gang purposes.<sup>27</sup>

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27. See *supra* notes 16-20 and accompanying text; see also 17 CAL. JUR. 3D *Criminal Law* § 34 (1994 & Supp. 1996) (discussing "enhanced prosecution efforts" to battle California street gangs).

D. *Evidence regarding battered woman's syndrome is admissible to prove that a defendant had an actual and reasonable belief that deadly force was necessary to defend against an abusive spouse: People v. Humphrey.*

I. INTRODUCTION

In *People v. Humphrey*,<sup>1</sup> the California Supreme Court decided whether evidence of battered woman's syndrome (BWS) could be used by the jury to determine the reasonableness of the defendant's belief that (1) the defendant was in imminent harm and (2) it was necessary for the defendant to use deadly force in self-defense.<sup>2</sup> The trial court granted a

1. 13 Cal. 4th 1073, 921 P.2d 1, 56 Cal. Rptr. 2d 142 (1996). Justice Chin authored the majority opinion in which Chief Justice George and Justices Mosk, Kennard, and Werdegar concurred. *See id.* at 1076-90, 921 P.2d at 2-11, 56 Cal. Rptr. 2d at 144-53. Justice Baxter filed a separate concurring opinion. *See id.* at 1090-91, 921 P.2d at 11-12, 56 Cal. Rptr. 2d at 153-54 (Baxter, J., concurring). Justice Werdegar also wrote a concurring opinion. *See id.* at 1091-92, 921 P.2d at 12-13, 56 Cal. Rptr. 2d at 154 (Werdegar, J., concurring). Justice Brown wrote a concurring opinion in which Chief Justice George and Justice Baxter concurred. *See id.* at 1092-1103, 921 P.2d at 13-20, 56 Cal. Rptr. 2d at 154-62 (Brown, J., concurring).

2. *See id.* at 1076-77, 921 P.2d at 2, 56 Cal. Rptr. 2d at 144. At trial, the defendant asserted that she shot and killed her husband, Albert Hampton, in self-defense. *See id.* at 1078, 921 P.2d at 3, 56 Cal. Rptr. 2d at 145. The defendant made several statements to the police, including "I shot him . . . I just couldn't take him beating on me no more." *Id.* at 1077, 921 P.2d at 3, 56 Cal. Rptr. 2d at 144. At the police station, the defendant stated that her husband often abused her and attempted to shoot her the night before. *See id.* The defendant alleged that she shot Hampton in self-defense because she believed he was about to hit her with an object he had picked up. *See id.* at 1077, 921 P.2d at 3, 56 Cal. Rptr. 2d at 144-45. In her defense, the defendant presented the expert testimony of Dr. Lee Bowker on battered woman's syndrome. *See id.* at 1078-79, 921 P.2d at 3-4, 56 Cal. Rptr. 2d at 145-46. Battered woman's syndrome is defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." *Id.* at 1083-84, 921 P.2d at 7, 56 Cal. Rptr. 2d at 148-49 (quoting *State v. Kelly*, 478 A.2d 364, 371 (1984)); Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U.J. GENDER & L. 141 (1995) (addressing battered woman's syndrome); Symposium, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (1996) (providing further comment about battered woman's syndrome); Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141 (1995) (analyzing the use of battered woman's syndrome as evidence); Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596 (1996) (book review) (discuss-

section 1118.1 motion to acquit the defendant of first degree murder.<sup>3</sup> As to the remaining charges of second degree murder and manslaughter,<sup>4</sup> however, the court instructed the jury that evidence regarding battered woman's syndrome may only be considered to determine whether the defendant held the required subjective honest belief.<sup>5</sup> In addition, the court instructed the jury that such evidence may not be considered objectively in determining the reasonableness requirement for perfect self-defense.<sup>6</sup> The jury convicted the defendant of voluntary manslaughter, and she was sentenced to eight years in prison.<sup>7</sup> The court of appeal affirmed the judgment, remanding solely for the purpose of resentencing.<sup>8</sup>

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ing the use of battered woman's syndrome in self-defense scenarios); Symposium, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579 (1996) (discussing self-defense and battered woman's syndrome); see also 1 B.E. WITKIN, *California Evidence* § 493 (1986 & Supp. 1996) (discussing the admissibility of battered woman's syndrome as evidence). Dr. Bowker testified about the possible reasons why defendant failed to leave her husband, such as economic insecurity, social isolation, lack of self-confidence, and perhaps most importantly, fear of the abuser. See *Humphrey*, 13 Cal. 4th at 1078, 921 P.2d at 3, 56 Cal. Rptr. 2d at 145. In addition, Dr. Bowker described the nature of an abusive relationship, testifying that "[t]he violence can gradually escalate, as the batterer keeps control using ever more severe actions." *Id.* at 1078, 921 P.2d at 4, 56 Cal. Rptr. 2d at 145. Dr. Bowker concluded by testifying that the defendant "suffered from battered woman's syndrome in 'about as extreme a pattern as you could find.'" *Id.* at 1079, 921 P.2d at 4, 56 Cal. Rptr. 2d at 146. The defendant also testified as to the occurrences of abuse, including her husband's attempt to shoot her the night before she shot him and the details of the night of the shooting. See *id.* at 1079-80, 921 P.2d at 4-5, 56 Cal. Rptr. 2d at 146. Furthermore, other witnesses corroborated the defendant's testimony regarding her relationship with her husband. See *id.* at 1080, 921 P.2d at 5, 56 Cal. Rptr. 2d at 146.

3. See *id.* at 1081, 921 P.2d at 5, 56 Cal. Rptr. 2d at 147.

4. See 17 CAL. JUR. 3D *Criminal Law* § 185 (1984 & Supp. 1997) (discussing the classification of culpable homicide).

5. See *Humphrey*, 13 Cal. 4th at 1081, 921 P.2d at 5, 56 Cal. Rptr. 2d at 147.

6. See *id.* The self-defense instruction included the following language:

[A]n actual and reasonable belief that the killing was necessary [is] a complete defense; an actual but unreasonable belief [is] a defense to murder, but not to voluntary manslaughter. In determining reasonableness, the jury [is] to consider what would appear to be necessary to a reasonable person in a similar situation and with similar knowledge.

*Id.* For more information regarding self-defense, see 20 CAL. JUR. 3D *Criminal Law* § 2286 (1985 & Supp. 1996) and 1 B.E. WITKIN & NORMAN L. EPSTEIN, *California Criminal Law*, § 239 (2d ed. 1988 & Supp. 1996).

7. See *Humphrey*, 13 Cal. 4th at 1081, 921 P.2d at 5, 56 Cal. Rptr. 2d at 147.

8. See *id.*

## II. TREATMENT

## A. Majority Opinion

Justice Chin, writing for the majority, began by discussing the attempt at trial to use Evidence Code section 1107 in order to allow the admission of expert testimony regarding battered woman's syndrome into evidence.<sup>9</sup> In the instant case, only the issue of relevancy prevented admission of the testimony under section 1107.<sup>10</sup> To determine relevancy, the majority reviewed the elements of self-defense.<sup>11</sup> First, a defendant "must actually and reasonably believe in the need to defend."<sup>12</sup> Second, in order for the defense to be perfect, thereby preventing a prosecution, the belief in the need to defend must be objectively reasonable.<sup>13</sup> In the case at bar, the lower court allowed the expert testimony of Dr. Lee Bowker to be considered as to the first element of self-defense, but specifically instructed the jury that such evidence could not be considered in regard to the second element.<sup>14</sup> Therefore, Justice Chin discussed primarily the relevancy of the evidence to determine the objective reasonableness of the defendant in her claim of self-defense.<sup>15</sup>

The majority found that in determining objective reasonableness, "a jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge.'"<sup>16</sup> The court used the decision in *People v. Ochoa*<sup>17</sup> to support the proposition that

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9. See *id.* at 1081-82, 921 P.2d at 5-6, 56 Cal. Rptr. 2d at 147. California Evidence Code § 1107 provides in pertinent part:

(a) In a criminal action, expert testimony is admissible . . . regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence. . . .

(b) The foundation shall be sufficient for admission of this expert testimony if the proponent . . . establishes its relevancy and the proper qualifications of the expert witness.

CAL. EVID. CODE § 1107 (West 1995).

10. See *Humphrey*, 13 Cal. 4th at 1082, 921 P.2d at 6, 56 Cal. Rptr. 2d at 147.

11. See *id.* at 1082-83, 921 P.2d at 6, 56 Cal. Rptr. 2d at 147-48.

12. *Id.* at 1082, 921 P.2d at 6, 56 Cal. Rptr. 2d at 147.

13. See *id.* at 1082-83, 921 P.2d at 6, 56 Cal. Rptr. 2d at 148.

14. See *id.* at 1076, 921 P.2d at 2, 56 Cal. Rptr. 2d at 144.

15. See *id.* at 1082-83, 921 P.2d at 6-7, 56 Cal. Rptr. 2d at 148.

16. *Id.* at 1082-83, 921 P.2d at 6, 56 Cal. Rptr. 2d at 148 (quoting 1 California Jury Instructions, Criminal (CALJIC) No. 5.50 (5th ed. 1988)).

17. 6 Cal. 4th 1199, 864 P.2d 103, 26 Cal. Rptr. 2d 23 (1993).

the jury must take into consideration the subjective state of mind of the defendant in determining objective reasonableness.<sup>18</sup>

Next, the California Supreme Court addressed two California appellate decisions that disallowed expert testimony of battered woman's syndrome based on irrelevance. First, in *People v. Aris*,<sup>19</sup> the appellate court decided that battered woman's syndrome evidence was not relevant to the reasonableness requirement because an inquiry into reasonableness required not "an evaluation of the defendant's subjective state of mind, but . . . an objective evaluation of the defendant's assertedly defensive acts."<sup>20</sup> Second, in *People v. Day*,<sup>21</sup> the court of appeal again concluded that evidence of BWS "would not have been relevant to show the objective reasonableness of the defendant's actions."<sup>22</sup>

Despite these two appellate decisions, Justice Chin and the majority stated that "the jury, in determining objective reasonableness, must view the situation from the defendant's perspective."<sup>23</sup> To clarify its decision, the court stated that the jury may be presented with a full professional explanation of battered woman's syndrome through expert testimony.<sup>24</sup> Furthermore, the court explained that it was not "changing the standard from objective to subjective, or replacing the reasonable 'person' standard with a reasonable 'battered woman' standard."<sup>25</sup> The majority simply stated that subjective factors may be used to consider objective reasonableness as a whole.<sup>26</sup> Finally, the court ruled that evidence of battered woman's syndrome is also relevant to determine the credibility of the defendant.<sup>27</sup>

Therefore, the California Supreme Court held that "evidence of battered woman's syndrome is generally *relevant* to the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend, and, to the extent it is relevant, the jury may *consider* it in deciding both questions."<sup>28</sup>

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18. See *Humphrey*, 13 Cal. 4th at 1083, 921 P.2d at 6-7, 56 Cal. Rptr. 2d at 148 (1996).

19. 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (1989).

20. *Humphrey*, 13 Cal. 4th at 1085, 921 P.2d at 8, 56 Cal. Rptr. 2d at 149 (quoting *Aris*, 215 Cal. App. 3d at 1196, 264 Cal. Rptr. at 179) (emphasis omitted).

21. 2 Cal. App. 4th 405, 2 Cal. Rptr. 2d 916 (1992).

22. *Humphrey*, 13 Cal. 4th at 1085-86, 921 P.2d at 8, 56 Cal. Rptr. 2d at 150 (citing *Day*, 2 Cal. App. 4th at 414-15, 2 Cal. Rptr. 2d at 921-22).

23. *Id.* at 1086, 921 P.2d at 8, 56 Cal. Rptr. 2d at 150.

24. See *id.* at 1086, 921 P.2d at 9, 56 Cal. Rptr. 2d at 151; *State v. Allery*, 682 P.2d 312, 316 (Wash. 1984).

25. *Humphrey*, 13 Cal. 4th at 1087, 921 P.2d at 9, 56 Cal. Rptr. 2d at 151.

26. See *id.* at 1082-83, 921 P.2d at 6-7, 56 Cal. Rptr. 2d at 148.

27. See *id.* at 1087, 921 P.2d at 9, 56 Cal. Rptr. 2d at 152.

28. *Id.* at 1088-89, 921 P.2d at 10, 56 Cal. Rptr. 2d at 152. Furthermore, the court

*B. Justice Baxter's Concurring Opinion*

Justice Baxter wrote separately to emphasize his opinion that expert testimony regarding battered woman's syndrome is not absolutely relevant in deciding objective reasonableness and, therefore, should not be "admissible without regard to the facts of the particular case or the content of the expert testimony."<sup>29</sup> According to Justice Baxter, such expert testimony is only relevant under Evidence Code section 1107 if it is related to "the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence."<sup>30</sup> Justice Baxter asserted that much of Dr. Bowker's testimony related to the specific experiences of the defendant, and therefore, was only relevant for the limited purpose of "explain[ing] the basis for his opinion that defendant suffered from battered woman's syndrome."<sup>31</sup> Furthermore, Justice Baxter contended that "[i]f the evidence is admitted, the court, on request, must give instructions limiting consideration of the evidence to the specific issue or issues to which it is relevant."<sup>32</sup>

*C. Justice Werdegar's Concurring Opinion*

Justice Werdegar wrote a separate concurring opinion expressing the view that expert testimony regarding BWS is only relevant where "the defendant's claim of reasonableness is based upon facts that would not, outside of a battering relationship, tend to show the reasonableness of the defendant's belief in the need to use deadly force."<sup>33</sup> Therefore, if the expert testimony is not necessary to establish a claim of reasonable belief, according to Justice Werdegar, a court should give a limiting instruction to the jury forbidding the use of that testimony to determine reasonableness.<sup>34</sup>

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found that the instructional error was prejudicial because there was a "reasonable probability [that] the error affected the verdict adversely to [the] defendant." *Id.* at 1089, 921 P.2d at 10-11, 56 Cal. Rptr. 2d at 152. The jury likely based the defendant's guilt on the lack of objective reasonableness. *See id.* at 1089, 921 P.2d at 11, 56 Cal. Rptr. 2d at 152.

29. *Id.* at 1090, 921 P.2d at 11, 56 Cal. Rptr. 2d at 153 (Baxter, J., concurring).

30. *Id.* at 1091, 921 P.2d at 12, 56 Cal. Rptr. 2d at 153 (Baxter, J., concurring) (quoting CAL. EVID. CODE § 1107 (West 1995)).

31. *Id.* at 1091, 921 P.2d at 12, 56 Cal. Rptr. 2d at 153-54 (Baxter, J., concurring).

32. *Id.* at 1091, 921 P.2d at 12, 56 Cal. Rptr. 2d at 154 (Baxter, J., concurring).

33. *Id.* at 1092, 921 P.2d at 12, 56 Cal. Rptr. 2d at 154 (Werdegar, J., concurring).

34. *See id.* at 1092, 921 P.2d at 13, 56 Cal. Rptr. 2d at 154 (Werdegar, J., concur-

#### D. Justice Brown's Concurring Opinion

Justice Brown began her concurring opinion by explaining the nature of battered woman's syndrome<sup>35</sup> and agreeing that evidence of it is useful to prove objective reasonableness where "the victim's threats caused the defendant 'to fear greater peril than she would have had otherwise.'"<sup>36</sup> Justice Brown contended, however, that expert testimony on battered woman's syndrome is of limited relevance and is not admissible "until the defendant puts at issue conduct or circumstances the jury might not otherwise understand as the basis for self-defense."<sup>37</sup> Justice Brown explained that traditional claims of self-defense, such as "when the victim threatens . . . the defendant with a gun or knife" create the common feeling of fear which a jury is capable of comprehending without the assistance of expert testimony.<sup>38</sup> Finally, Justice Brown supported the majority's emphasis that the inquiry remain objective, stating that "[t]he concept of hypervigilance is not the evidentiary equivalent of, or substitute for, an actual perception of impending danger, only a possible explanation."<sup>39</sup>

### III. IMPACT

The primary impact of the decision by the California Supreme Court in *People v. Humphrey* is that expert testimony regarding battered woman's syndrome will almost always be deemed relevant by trial courts.<sup>40</sup> In addition, although the majority of the court claimed that the test for objective reasonableness remains purely objective,<sup>41</sup> the *Humphrey* decision provides an avenue for a jury to consider subjective factors.<sup>42</sup> Therefore, it is possible that despite a proper limiting instruction,<sup>43</sup> a jury will subjectively consider expert testimony on battered woman's syndrome in its ultimate determination of the guilt or innocence of a defendant claiming self-defense.<sup>44</sup>

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ring).

35. *See id.* at 1095-98, 921 P.2d at 14-16, 56 Cal. Rptr. 2d at 156-58 (Brown, J., concurring).

36. *Id.* at 1098, 921 P.2d at 17, 56 Cal. Rptr. 2d at 158 (Brown, J., concurring) (quoting *People v. Moore*, 43 Cal. 2d 517, 528, 275 P.2d 485).

37. *Id.* (Brown, J., concurring).

38. *See id.* at 1098, 921 P.2d at 17, 56 Cal. Rptr. 2d at 158-59 (Brown, J., concurring).

39. *Id.* at 1099, 921 P.2d at 18, 56 Cal. Rptr. 2d at 159 (Brown, J., concurring).

40. *See id.* at 1088-89, 921 P.2d at 10, 56 Cal. Rptr. 2d at 152.

41. *See id.* at 1087, 921 P.2d at 9, 56 Cal. Rptr. 2d at 151.

42. *See id.* at 1082-83, 921 P.2d at 6-7, 56 Cal. Rptr. 2d at 148.

43. *See id.* at 1088, 921 P.2d at 10, 56 Cal. Rptr. 2d at 152.

44. *See id.*

#### IV. CONCLUSION

In *Humphrey*, the California Supreme Court extended the scope of the permissible use of evidence regarding battered woman's syndrome.<sup>45</sup> The court found that expert testimony is relevant not only in determining whether a defendant had an actual belief of imminent harm, but also to assess the reasonableness of that belief.<sup>46</sup>

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45. *See id.* at 1088-89, 921 P.2d at 10, 56 Cal. Rptr. 2d at 152.

46. *See id.*



- E. *When a defendant is prosecuted under the “natural and probable consequences” doctrine, a trial court must provide a jury instruction identifying and describing target crimes that a defendant may have aided or abetted. This duty arises only when “substantial evidence” supports the conclusion that the defendant intended to assist or encourage the target offense, and a jury could reasonably conclude that the committed crime was a natural and probable consequence of the target crime: People v. Prettyman.*

## I. INTRODUCTION

In *People v. Prettyman*,<sup>1</sup> the California Supreme Court addressed whether the trial court has an obligation to give jury instructions, *sua sponte*, identifying and describing target crimes in which a defendant might have aided or abetted, when jurors are instructed on the natural and probable consequences doctrine.<sup>2</sup> Affirming the court of appeal's

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1. 14 Cal. 4th 248, 926 P.2d 1013, 58 Cal. Rptr. 2d 827 (1996). Justice Kennard wrote the majority opinion in which Chief Justice George and Justices Werdegar and Chin concurred. *See id.* at 254-76, 926 P.2d at 1015-30, 58 Cal. Rptr. 2d at 829-44. Justice Mosk wrote a concurring opinion. *See id.* at 277-83, 926 P.2d at 1030-35, 58 Cal. Rptr. 2d at 844-49 (Mosk, J., concurring). Justice Baxter wrote a separate concurring opinion. *See id.* at 283-84, 926 P.2d at 1035, 58 Cal. Rptr. 2d at 849 (Baxter, J., concurring). Justice Brown also wrote a separate concurring and dissenting opinion. *See id.* at 284-93, 926 P.2d at 1035-41, 58 Cal. Rptr. 2d at 849-55 (Brown, J., concurring and dissenting).

2. *See id.* at 254, 926 P.2d at 1015, 58 Cal. Rptr. 2d at 829. The defendant Debra Bray and codefendant Richard Prettyman were each found guilty of first degree murder of a fellow homeless person, Gaylord Van Camp. *See id.* Bray and Prettyman argued about Bray's identification papers, which were in Prettyman's possession, because Bray needed them to collect a benefit check. *See id.* at 255, 926 P.2d at 1016, 58 Cal. Rptr. 2d at 830. A church director intervened, asking Van Camp, the murder victim, to leave the church with Prettyman until Bray was calm. *See id.* As the two men started to leave, Bray gave her wallet to Van Camp for "safekeeping." *See id.* Later that evening, Prettyman and Van Camp returned to the church and found separate places in the courtyard to sleep. *See id.* Between approximately 3:00 and 4:00 a.m., a homeless man overheard a conversation between Bray and Prettyman in which Bray stated, "We are going to get . . . Vance. He has no idea who he is messing with. He ain't getting away with this s\*\*\*." *Id.* at 255-56, 926 P.2d at 1016, 58 Cal. Rptr. 2d at 830. Prettyman replied, "Yep. Okay." *Id.* at 256, 926 P.2d at 1016, 58 Cal. Rptr. 2d at 830. Later that evening, between 4:00 and 5:30 a.m., another homeless man awoke to loud "thumping noises," and heard Prettyman say "Take that." *Id.* The witness said that Prettyman walked away from the courtyard carrying a "three-to-four-foot pipe," while Van Camp remained, making "gagging noises." *Id.* Before the homeless man could approach Van Camp, Bray appeared and told the man to leave. *See id.* Prettyman returned to the

decision, the supreme court held that when a defendant is prosecuted under the natural and probable consequences doctrine, a trial court must provide a jury instruction identifying and describing target crimes in which a defendant may have aided or abetted.<sup>3</sup> The court explained that such a jury instruction would help jurors determine whether the committed crime was a natural and probable consequence of the intended target crimes, and also reduce the risk of jury speculation.<sup>4</sup>

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courtyard where he had left Van Camp and reported to Bray, "Van Camp had choked on his own blood . . . teach him to steal a wallet [and] to threaten us, . . . [he] deserved it." *Id.* Prettyman later admitted to another homeless man that he had killed Van Camp with a metal pipe. *See id.* The prosecution tried Bray as an accomplice to first degree murder. *See id.* at 254, 926 P.2d at 1015, 58 Cal. Rptr. 2d at 829. The trial court instructed the jury on "aiding and abetting," and the court gave the natural and probable consequences instruction on its own motion. *See id.* at 257-58, 926 P.2d at 1017-18, 58 Cal. Rptr. 2d at 831-32; *see infra* note 3. The court did not identify or describe for the jury a target crime that Bray may have "originally contemplated." *Id.* The jury convicted Bray and Prettyman of first degree murder, and the court of appeal affirmed their convictions. *See id.* at 258, 926 P.2d at 1018, 58 Cal. Rptr. 2d at 832. For a general discussion of aiding and abetting and criminal liability under the doctrine, see 17 CAL. JUR. 3D *Criminal Law* § 105, 194 (1984 & Supp. 1996).

3. *See Prettyman*, 14 Cal. 4th at 254, 926 P.2d at 1015, 58 Cal. Rptr. 2d at 829. The California Jury Instruction that the trial court used to explain the natural and probable consequences doctrine was similar to the first version of CALJIC No. 3.02, written in 1988. *See id.* at 258, 926 P.2d at 1017, 58 Cal. Rptr. 2d at 831. The jury instruction provided in relevant part:

One who aids and abets is not only guilty of the particular crime aided and abetted, but is also liable for the natural and probable consequences of the commission of such crime. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether any other crime charged was a natural and probable consequence of such originally contemplated crime.

*Id.* at 257-58, 926 P.2d at 1017, 58 Cal. Rptr. 2d at 831. Had the trial court relied on CALJIC No. 3.02 as it was revised in 1992, the language would have included the following requirements:

In order to find the defendant guilty of the crime[s] of \_\_, . . . you must be satisfied beyond a reasonable doubt that: (1) The crime [or crimes] of \_\_ [was] [were] committed, (2) The defendant aided and abetted such crime[s], (3) A co-principal in such crime committed the crime[s] of \_\_, and (4) The crime[s] of \_\_ was a natural and probable consequence of the commission of the crime[s] of \_\_.

*Id.* at 258 n.3, 926 P.2d at 1018 n.3, 58 Cal. Rptr. 2d at 832 n.3. This revision specifies the target crime which the defendant may have originally contemplated. *See id.*

4. *See id.* at 254, 926 P.2d at 1015, 58 Cal. Rptr. 2d at 829.

## II. TREATMENT

### A. *Majority Opinion*

The court first stated the fundamental principles of aiding and abetting liability, and then explained the natural and probable consequences doctrine.<sup>5</sup> In its analysis, the court set forth the elements of the natural and probable consequences doctrine:

[T]he trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated, the commission of the target crime . . . (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.<sup>6</sup>

1. The trial court must identify and describe any target crimes which the natural and probable consequences doctrine contemplates.

Justice Kennard, writing for the majority, addressed whether the trial court must provide jury instructions identifying and describing target crimes under the natural and probable consequences doctrine.<sup>7</sup> Although this was a case of first impression, the court first directed its attention to an earlier case, *People v. Failla*,<sup>8</sup> which also addressed a trial court's failure to instruct jurors on an uncharged target offense.<sup>9</sup> Applying *Failla* to the instant case, the court held that a trial court has a duty to identify and describe uncharged target offenses to jurors when the prosecution's theory of liability relies on the uncharged offenses and substantial evidence supports the theory.<sup>10</sup>

The court opined that the identification of a target offense would aid jurors in determining whether the charged crime was a natural and prob-

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5. *See id.* at 262, 926 P.2d at 1020, 58 Cal. Rptr. 2d at 834.

6. *Id.*

7. *See id.* at 266-70, 926 P.2d at 1023-26, 58 Cal. Rptr. 2d at 837-40. The defendant Bray argued, and the court agreed, that the trial court should have given jury instructions, *sua sponte*, from the 1992 revision of CALJIC No. 3.02, which would have identified the target crime that may have led to the murder of Van Camp as a natural and probable consequence. *See id.* at 265, 926 P.2d at 1023, 58 Cal. Rptr. 2d at 837.

8. 64 Cal. 2d 560, 414 P.2d 39, 51 Cal. Rptr. 103 (1966) (holding that in a prosecution for burglary, jurors must be instructed on the meaning of the term "felony" to fully explain the element of intent).

9. *See Prettyman*, 14 Cal. 4th at 266, 926 P.2d at 1023, 58 Cal. Rptr. 2d at 837.

10. *See id.* at 266-67, 926 P.2d at 1023, 58 Cal. Rptr. 2d at 837.

able consequence of the uncharged target crime.<sup>11</sup> The court noted that because of the potential difficulty of factual application to the five elements of the natural and probable consequences doctrine,<sup>12</sup> further instructions "describing each step in this process" would ensure that jurors correctly applied the doctrine.<sup>13</sup>

An additional concern of the court was "unguided speculation" by the jurors.<sup>14</sup> Believing that jurors might convict a person on a "generalized belief that the defendant intended to assist . . . unspecified 'nefarious' conduct," the court reasoned that its decision was necessary to ensure that jurors based their convictions on specific criminal conduct.<sup>15</sup>

To avoid placing an additional burden on trial courts, the court implemented a test which limits its holding.<sup>16</sup> Under this test, when a prosecutor relies on the doctrine, the trial court should grant the prosecutor's request for the instruction if substantial evidence supports a defendant's intent to aid or abet a target offense and from the evidence a jury reasonably could conclude that the committed crime was a natural and probable consequence of the intended target crime.<sup>17</sup>

2. The trial court's inadequate instruction on the natural and probable consequences doctrine constituted harmless error.

Next, the court addressed the prejudicial effect of the trial court's inadequate instructions regarding the natural and probable consequences doctrine in this case.<sup>18</sup> The court found that the error was harmless for

11. *See id.* at 267, 926 P.2d at 1024, 58 Cal. Rptr. 2d at 837-38.

12. *See id.* at 267, 926 P.2d at 1024, 58 Cal. Rptr. 2d at 838. The five elements are:

[W]hether the defendant (1) with knowledge of the confederate's unlawful purpose, and (2) the intent of committing, encouraging, or facilitating the commission of any target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the defendant's confederate committed an offense other than the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated.

*Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 267-68, 926 P.2d at 1024-25, 58 Cal. Rptr. 2d at 838-39.

16. *See id.*

17. *See id.*

18. *See id.* at 270-74, 926 P.2d at 1026-28, 58 Cal. Rptr. 2d at 840-42.

two reasons.<sup>19</sup> First, jury reliance on the doctrine was unlikely because the parties did not refer to it when they addressed the jury.<sup>20</sup> Second, even if the jury had relied on the doctrine, there was no reasonable likelihood that the trial court's failure to specify assault with a deadly weapon as a target crime caused the jury to misapply the doctrine.<sup>21</sup>

3. Even if the trial court erred in failing to instruct the jury on involuntary manslaughter, the error was harmless.

Finally, the court considered whether the trial court erred by failing to instruct the jury on involuntary manslaughter.<sup>22</sup> No determination of trial court error was needed, however, because the court found no prejudice.<sup>23</sup> The trial court instructed the jury on first and second degree murder and the jury convicted under first degree murder, necessarily rejecting the lesser included offense of involuntary manslaughter.<sup>24</sup>

### B. Justice Mosk's Concurring Opinion

Justice Mosk concurred with the majority, agreeing that there was no reversible error in the appellate court's decision.<sup>25</sup> He disagreed, however, with the majority's discussion regarding a trial court's duty to give instructions on a target crime.<sup>26</sup> Justice Mosk stated that the court should be cautious when it imposes, *sua sponte*, instructional duties on trial courts, which are already burdened by similar obligations.<sup>27</sup> Justice Mosk next expressed concern that the additional instructions would misguide jurors, causing them to focus on inapplicable law rather than the relevant facts of a case.<sup>28</sup> Finally, Justice Mosk stated that the instructions could impair a defendant's right to receive a fair trial and a reliable outcome because jurors might emphasize the target crimes and overlook the criminal activity at issue.<sup>29</sup>

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19. *See id.* For a discussion of harmless error when a court fails to give proper jury instructions, see 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 341 (9th ed. 1985 & Supp. 1996).

20. *See Prettyman*, 14 Cal. 4th at 273, 926 P.2d at 1028, 58 Cal. Rptr. 2d at 842.

21. *See id.*

22. *See id.* at 274-76, 926 P.2d at 1028-30, 58 Cal. Rptr. 2d at 842-44.

23. *See id.*

24. *See id.* at 276, 926 P.2d at 1030, 58 Cal. Rptr. 2d at 844.

25. *See id.* at 277-83, 926 P.2d at 1030-35, 58 Cal. Rptr. 2d at 844-49 (Mosk, J., concurring).

26. *See id.* at 277, 926 P.2d at 1030, 58 Cal. Rptr. 2d at 844 (Mosk, J., concurring).

27. *See id.* at 278, 926 P.2d at 1031, 58 Cal. Rptr. 2d at 845 (Mosk, J., concurring).

28. *See id.* at 279, 926 P.2d at 1032, 58 Cal. Rptr. 2d at 846 (Mosk, J., concurring).

29. *See id.* (Mosk, J., concurring).

### C. Justice Baxter's Concurring Opinion

Justice Baxter concurred with the majority opinion, finding no reversible error.<sup>30</sup> He disagreed, however, with the majority's rationale for finding the harmless error.<sup>31</sup> Justice Baxter argued that the harmless error was not initiated by a failure to give additional instructions regarding the natural and probable consequences doctrine, but rather arose when the court instructed the jury, *sua sponte*, on a doctrine which was factually inapplicable to the prosecution's case-in-chief.<sup>32</sup>

### D. Justice Brown's Concurring and Dissenting Opinion

Justice Brown concurred in the judgment affirming the decision of the court of appeal.<sup>33</sup> She dissented, however, from the majority's decision to impose a duty on trial courts to instruct on the natural and probable consequences doctrine.<sup>34</sup> Justice Brown argued that such instructions were likely to confuse jurors and "hopelessly derail the central fact-finding task."<sup>35</sup> Further, she argued that the majority ignored the critical role of causation, stating, "[w]hether there is a nexus of foreseeability between the predicate and the perpetrated offense depends not on crime definitions but on the specific facts of each offense."<sup>36</sup>

## III. IMPACT

Prior to *Prettyman*, the failure of the California Supreme Court to directly impose a duty upon trial courts to describe and identify target offenses in relation to the natural and probable consequences doctrine resulted in conflicting precedents from appellate courts.<sup>37</sup> While

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30. See *id.* at 283, 926 P.2d at 1035, 58 Cal. Rptr. 2d at 849 (Baxter, J., concurring).

31. See *id.* at 283-84, 926 P.2d at 1035, 58 Cal. Rptr. 2d at 849 (Baxter, J., concurring).

32. See *id.* (Baxter, J., concurring).

33. See *id.* at 284, 926 P.2d at 1035, 58 Cal. Rptr. 2d at 849 (Brown, J., concurring and dissenting).

34. See *id.* at 284, 926 P.2d at 1036, 58 Cal. Rptr. 2d at 849 (Brown, J., concurring and dissenting).

35. *Id.* (Brown, J., concurring and dissenting).

36. *Id.* at 290, 926 P.2d at 1039, 58 Cal. Rptr. 2d at 853 (quoting *People v. Solis*, 20 Cal. App. 4th 269, 273 (1993), 25 Cal. Rptr. 2d 184, 190 (1993), *overruled by* *People v. Prettyman*, 14 Cal. 4th 248, 926 P.2d 1013, 58 Cal. Rptr. 2d 827 (1996)) (Brown, J., concurring and dissenting).

37. See *People v. Mouton*, 15 Cal. App. 4th 1313, 1319, 19 Cal. Rptr. 2d 423, 426

*Prettyman* eliminates this conflict, it may adversely impact trial courts and jurors. By imposing a duty on trial courts to provide jury instructions, the court gives trial judges discretion regarding the prosecution of a particular case.<sup>38</sup> This duty will burden trial judges who now must act on their own initiative to avoid potentially reversible error.<sup>39</sup> This decision's impact on jurors also is questionable. As the majority speculated, the description of a target offense may clarify the natural and probable consequences doctrine, assisting jurors in their decisions and simplifying the application of facts to the doctrine.<sup>40</sup> As some of the concurring opinions argued, however, the added instruction may appear complicated to jurors, confusing them and causing them to lose sight of the factual issues to be determined.<sup>41</sup>

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(1993) (holding that trial courts have a duty to "instruct the jury on all general legal principles raised by the evidence and necessary for the jury's understanding of the case"); *but see Solis*, 20 Cal. App. 4th at 273, 25 Cal. Rptr. 2d at 190 (holding that "the finder of fact need identify the nature of the predicate offense only in a generalized manner"), *overruled by People v. Prettyman*, 14 Cal. 4th 248, 926 P.2d 1013, 58 Cal. Rptr. 2d 827 (1996).

38. See 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 277 (9th ed. 1985 & Supp. 1996) (discussing the limits of a trial judge's legal discretion, and the possibility of reversible error if no reasonable basis for the action is shown).

39. Requiring judicial discretion in determining whether the proffered evidence in a given case substantially supports the natural and probable consequences doctrine may prove problematic. See generally David McCord, "But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty, 63 TENN. L. REV. 917, 919 (1996) (giving "alternative perpetrator evidence the attention it merits"). Some scholars have argued that such an approach "obscures the trial court's [traditional] obligation[s]." *Id.* at 933.

40. See Douglas W. Schwartz, Note, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 37 STAN. L. REV. 857 (1985) (discussing the death penalty as it may be applied to an accomplice, regardless of the individual defendant's culpability in a murder). Certain states impose the death sentence on accomplices to a capital crime; therefore, the court may be attempting to err on the side of caution by giving the jurors complete and thorough instructions necessary to reach the correct verdict. See *id.*

41. See Christopher N. May, "What Do We Do Now?": Helping Juries Apply the Instructions, 28 LOY. L.A. L. REV. 869 (1995) (arguing that a considerable body of evidence shows that rewriting and simplifying the language of jury instructions significantly increases jurors' understanding of the law); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1333, 1370 (1979) (reporting a study in which mock jurors who were read California jury instructions had a comprehension level of 44.7%, while their understanding of modified instructions was 59.2%); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575 (1991) (arguing that jurors have difficulty understanding cases adequately). While this last article deals with the complexity of *civil* litigation, it is relevant here in a discussion of a juror's potential confusion which may be caused by increased complexity in *criminal* jury instructions.

#### IV. CONCLUSION

The California Supreme Court established new precedent in *People v. Prettyman*, in which a trial court must provide a jury instruction to identify and describe the target crimes that a defendant might have assisted in or encouraged whenever a prosecutor relies on the natural and probable consequences doctrine. While this holding imposes an added burden on trial courts, the court has narrowed its focus to situations where a prosecutor relies upon the doctrine and the evidence brought at trial supports such an instruction. While the impact of this decision is somewhat unclear at this time, the scope of this holding may prove sufficiently narrow to avoid the concurring Justices' concerns.

CHRISTIANE E. CARGILL



## VI. FAMILY LAW

*A creditor that forfeits a security interest in community real property pursuant to former Civil Code section 5127 retains the rights of any other unsecured creditor to seek a judgment against the debtor spouse for satisfaction of the underlying debt and to enforce a money judgment lien against the community estate: Lezine v. Security Pacific Financial Services, Inc.*

### I. INTRODUCTION

In *Lezine v. Security Pacific Financial Services, Inc.*,<sup>1</sup> the California Supreme Court addressed whether community real property remains subject to a debt after the transfer of a security interest in the property, which secured repayment of that debt, is found to have been void under former Civil Code section 5127 (hereafter former section 5127).<sup>2</sup> The supreme court affirmed the court of appeal's reversal of the trial court,<sup>3</sup>

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1. 14 Cal. 4th 56, 925 P.2d 1002, 58 Cal. Rptr. 2d 76 (1996). Chief Justice George delivered the majority opinion, in which Justices Mosk, Kennard, Baxter, Werdegar, Chin, and Brown concurred. *See id.* at 59-75, 925 P.2d at 1003-14, 58 Cal. Rptr. 2d at 77-88.

2. *See id.* at 59-75, 925 P.2d at 1003-14, 58 Cal. Rptr. 2d at 77-88. In *Lezine*, Henry Lezine (Lezine), during his marriage to plaintiff Gloria Lezine, unilaterally transferred two deeds of trust in community real property, one to Guardian Savings & Loan and one to Security Pacific, in violation of former section 5127. *See id.* at 60-61, 925 P.2d at 1004, 58 Cal. Rptr. 2d at 78. The plaintiff, in addition to filing for dissolution of the marriage, sought declaratory relief, quiet title, and cancellation of the deeds of trust pursuant to the rules set forth in former section 5127 and *Droeger v. Friedman, Sloan & Ross*, 54 Cal. 3d 26, 812 P.2d 931, 283 Cal. Rptr. 584 (1991) (holding that a transfer to a spouse made in violation of former section 5127 was voidable in its entirety when the nonconsenting spouse, during marriage, challenged the transfer in a timely manner). *See Lezine*, 14 Cal. 4th at 61, 925 P.2d at 1004, 58 Cal. Rptr. 2d at 78. After the court awarded the encumbered property to the plaintiff as her separate property and awarded judgment in favor of Guardian and Security Pacific against Lezine personally, the plaintiff sought to have the abstracts of judgment recorded by Guardian and Security Pacific set aside pursuant to *Droeger*. *See id.* at 59, 925 P.2d at 1003, 58 Cal. Rptr. 2d at 77. The trial court issued an order providing that the abstracts of judgment did not constitute liens against the real property. *See id.* However, the court of appeal reversed. *See id.*; *infra* note 3 (discussing the court of appeal's rationale for reversing the trial court).

3. *See Lezine v. Security Pac. Fin. Servs., Inc.*, 37 Cal. App. 4th 1132, 44 Cal. Rptr. 2d 116 (1995), *review granted and opinion superseded*, 907 P.2d 1323, 48 Cal. Rptr. 2d 777 (1995), *aff'd*, 14 Cal. 4th 56, 925 P.2d 1002, 58 Cal. Rptr. 2d 76 (1996). The court of appeal reasoned that because the recording of the abstract of judgment was made prior to the dissolution proceedings, a judgment lien that attached to the community

and held that when a spouse improperly transfers a security interest in community real property and the creditor subsequently forfeits the interest pursuant to former section 5127, the community estate remains subject to the underlying debt and the loss of security does not extinguish the debt.<sup>4</sup>

## II. TREATMENT

### A. Majority Opinion

As a basis for its analysis, the majority set forth the applicable rules governing the liability of community property for debts incurred during the marriage.<sup>5</sup> The court stated that "the liability of community property

property was created. *See Lezine*, 14 Cal. 4th at 62-63, 925 P.2d at 1005, 58 Cal. Rptr. 2d at 79. Accordingly, the court of appeal reversed the trial court after concluding that the property awarded to the plaintiff at dissolution was taken subject to the judgment lien held by Security Pacific. *See id.*

4. *See id.* at 70, 925 P.2d at 1010, 58 Cal. Rptr. 2d at 84. "Effective January 1, 1994, section 5127 was repealed and reenacted without substantive change as Family Code section 1102." *Id.* at 59 n.1, 925 P.2d at 1003 n.1, 58 Cal. Rptr. 2d at 77 n.1.

Former section 5127 provided in pertinent part that:

"either spouse has the management and control of the community real property . . . but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered . . . ."

*Id.* at 66, 925 P.2d at 1007, 58 Cal. Rptr. 2d at 81 (quoting CAL. CIV. CODE § 5127, repealed by CAL. FAM. CODE § 1102 (West 1994)). *See generally* Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235 (1995) (outlining the history of community property law).

5. *See Lezine*, 14 Cal. 4th at 64, 925 P.2d at 1006, 58 Cal. Rptr. 2d at 80. The majority cited the Family Code for the general rule regarding the liability of community property:

"[E]xcept as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt."

*Id.* (quoting CAL. FAM. CODE § 910(a) (West 1994)). *See generally* 32 CAL. JUR. 3D *Family Law* § 474 (1994) (summarizing the requirements for the sale, conveyance, or encumbrance of community real property and a nonconsenting spouse's recourse if such requirements are not satisfied); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Communi-*

is not limited to debts incurred for the benefit of the community, but extends to debts incurred by one spouse alone exclusively for his or her own personal benefit.<sup>6</sup> Accordingly, the majority concluded that the community property of the plaintiff and Lezine was liable for the loan obligations owed to Guardian and Security Pacific, which were incurred by Lezine without the knowledge or consent of the plaintiff.<sup>7</sup>

Because it found that Security Pacific's judgment lien was created before the real community property was awarded solely to the plaintiff in the dissolution proceedings, the court determined the following: (1) that the plaintiff took the property subject to the judgment lien; (2) that the property remained liable for the satisfaction of the lien, notwithstanding the fact that the underlying loan obligation was assigned to Lezine; and (3) that the plaintiff had the right to seek reimbursement from Lezine to the extent that the property was used to satisfy the lien.<sup>8</sup>

The majority next addressed whether former section 5127 and the applicable cases were consistent with the rules and principles the court

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*nity Property* § 151 (9th ed. 1990) (setting forth the general rule regarding the liability of community property for debts incurred by one or both spouses).

6. *Lezine*, 14 Cal. 4th at 64, 925 P.2d at 1006, 58 Cal. Rptr. 2d at 80 (citing *Robertson v. Willis*, 77 Cal. App. 3d 358, 362, 143 Cal. Rptr. 523, 527 (1978); *Stratton v. Superior Court*, 87 Cal. App. 2d 809, 197 P.2d 821 (1948)); see also William A. Reppy, Jr., *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 SAN DIEGO L. REV. 143, 169 (1981) (footnote omitted) (stating that "[i]n effect, one spouse alone can indirectly alienate community realty by incurring an enforceable obligation and refusing to pay it").

7. See *Lezine*, 14 Cal. 4th at 64, 925 P.2d at 1006, 58 Cal. Rptr. 2d at 80. The court further stated that Security Pacific's recordation of an abstract of judgment created a judgment lien that attached to the community property. See *id.* at 64-65, 925 P.2d at 1007, 58 Cal. Rptr. 2d at 81 (citing CAL. CIV. PROC. CODE §§ 697.310, 697.340 (West 1995)). See generally 15A AM. JUR. 2D *Community Property* § 90 (2d ed. 1976) (discussing the liabilities of the community estate in terms of obligations arising from management of the estate).

8. See *Lezine*, 14 Cal. 4th at 65-66, 925 P.2d at 1007, 58 Cal. Rptr. 2d at 81. The plaintiff's right to reimbursement was codified in section 5120.160 of the Civil Code (subdivisions (a)(2) and (b)), which was repealed without substantive change by Family Code section 916, effective January 1, 1994. See *id.* at 65 n.5, 925 P.2d at 1007 n.5, 58 Cal. Rptr. 2d at 81 n.5. See generally William A. Reppy, Jr., *Acquisitions with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or a Right of Reimbursement*, 31 IDAHO L. REV. 965, 1028 n.236 (1995) ("Where the interest is community, the co-owning spouse who has not joined in the deed of conveyance usually can recover from the other spouse's grantee the entire community interest."); 32 CAL. JUR. 3D *Family Law* §§ 503-517 (1994) (setting forth the right to reimbursement of a spouse when the other spouse applies community property to the satisfaction of a debt); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 157(a) (9th ed. 1990) (discussing a spouse's right to reimbursement as established in section 5120(a) of the Civil Code).

used in its analysis.<sup>9</sup> After examining the language of former section 5127 and the decisions reached by earlier courts addressing similar issues, the court found the same result.<sup>10</sup> Accordingly, the majority stated that "if the security interest is forfeited pursuant to former section 5127 the community remains liable . . . for the underlying debt. The loss of the security does not extinguish the underlying debt, or the character of that unsecured debt as one for which the community estate is liable."<sup>11</sup> Therefore, even though Security Pacific forfeited its security interest pursuant to former section 5127, it could resort to the community estate for satisfaction of the underlying debt, notwithstanding the fact that Lezine incurred the debt unilaterally.<sup>12</sup>

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9. See *Lezine*, 14 Cal. 4th at 66-71, 925 P.2d at 1007-11, 58 Cal. Rptr. 2d at 81-85. See generally Carol S. Bruch, *Management Powers and Duties under California's Community Property Law*, 34 HASTINGS L.J. 229 (1982) (setting forth existing and proposed remedies for unauthorized transfers and discussing former Civil Code section 5127).

10. See *Lezine*, 14 Cal. 4th at 66-71, 925 P.2d at 1007-11, 58 Cal. Rptr. 2d at 81-85; *Droeger v. Friedman*, Sloan & Ross, 54 Cal. 3d 26, 812 P.2d 931, 283 Cal. Rptr. 584 (1991) (failing to address the effect of a cancellation of the deeds of trust at issue on the underlying obligation for payment of attorney fees); *Andrade Dev. Co. v. Martin*, 138 Cal. App. 3d 330, 187 Cal. Rptr. 863 (1982) (holding that although a contract for the sale of community property was voided pursuant to former section 5127, the bona fide purchaser might be entitled to damages for breach of contract from the community estate); *Mark v. Title Guar. & Trust Co.*, 122 Cal. App. 301, 9 P.2d 839 (1932) (holding that although the improper transfer of a security interest was voidable by the non-consenting spouse, the community was required to reimburse the bona fide purchaser for the consideration paid for the interest).

11. *Lezine*, 14 Cal. 4th at 70, 925 P.2d at 1010, 58 Cal. Rptr. 2d at 84; *Mitchell v. American Reserve Ins. Co.*, 110 Cal. App. 3d 220, 167 Cal. Rptr. 760 (1980) (holding that where the improper transfer that is set aside is an encumbrance, "what is removed is only the encumbrance, without any effect upon the underlying obligation which it secures"), *overruling recognized by Lezine*, 14 Cal. 4th 56, 925 P.2d 1002, 58 Cal. Rptr. 2d 76. See generally 32 CAL. JUR. 3D *Family Law* §§ 479-483 (1994) (outlining the procedural aspects of setting aside a transfer that was in violation of statutory requirements).

12. See *Lezine*, 14 Cal. 4th at 72, 925 P.2d at 1012, 58 Cal. Rptr. 2d at 86. The majority stated further that Security Pacific, after forfeiting its security interest, would be placed in the same position as any other judgment creditor entitled to enforce the judgment against the community estate. See *id.* at 73, 925 P.2d at 1012, 58 Cal. Rptr. 2d at 86; Carol S. Bruch, *Protecting the Rights of Spouses in Intact Marriages: The 1987 California Community Property Reform and Why It Was So Hard to Get*, 1990 WIS. L. REV. 731, 743 n.35 (1990) (stating that "[t]his solution [that a third party transferee should be permitted to assert rights as an unsecured creditor for reimbursement of consideration paid for the forfeited interest] would entail no violation of community property management principles . . .").

Accordingly, the majority affirmed the conclusion of the court of appeal, holding that the trial court "lacked authority to expunge Security Pacific's judgment lien" after the plaintiff was awarded the property encumbered by the lien.<sup>13</sup>

### III. IMPACT

The majority's holding may negate a substantial portion of the relief available under former section 5127 when, as in *Lezine*, the voidable transfer is an interest securing repayment of a debt.<sup>14</sup> After the security interest is set aside and an abstract of judgment is recorded, a judgment is converted into a judgment lien against the real community property.<sup>15</sup>

Furthermore, a trend may evolve that places innocent nondebtor spouses at a significant disadvantage because institutional lenders, such as Security Pacific, are in a better position to prevent forgeries and deception by debtor spouses.<sup>16</sup>

### IV. CONCLUSION

In sum, the majority in *Lezine* concluded that where a creditor was awarded a judgment and recorded an abstract of judgment creating a judgment lien enforceable against a community estate, the forfeiture of a security interest pursuant to former section 5127 had no effect on the enforceability of the underlying debt.<sup>17</sup> Applied to the instant case, Security Pacific's judgment lien is enforceable against the community estate, notwithstanding the fact that its security interest was forfeited.

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13. *Lezine*, 14 Cal. 4th at 74, 925 P.2d at 1013, 58 Cal. Rptr. 2d at 87.

14. *See id.* at 73, 925 P.2d at 1012, 58 Cal. Rptr. 2d at 86.

15. *See id.*

16. *See id.* at 75, 925 P.2d at 1013-14, 58 Cal. Rptr. 2d at 87-88.

17. *See id.* at 59-75, 925 P.2d at 1003-14, 58 Cal. Rptr. 2d at 77-88.

## VII. HUSBAND AND WIFE

*A county acting on behalf of a custodial parent may successfully bring a cause of action against the non-custodial parent for child support and arrearages, even though the custodial parent actively concealed the child's whereabouts, if the claim is brought before the child reaches the age of majority: In re Marriage of Comer.*

## I. INTRODUCTION

In *In re Marriage of Comer*,<sup>1</sup> the California Supreme Court considered whether a father had a valid defense against a mother's claim for child support and arrearages, brought on her behalf by the State, when she concealed the location of their two children from him.<sup>2</sup> The trial court reduced the amount of the existing child support decree between the two parties and ordered Mr. Comer to pay \$4952 in arrearages, but it rejected the county's argument for past support during a period when the

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1. 14 Cal. 4th 504, 927 P.2d 265, 59 Cal. Rptr. 2d 155 (1996). Chief Justice George wrote the majority opinion in which Justices Kennard, Werdegar, and Chin concurred. *See id.* at 509-30, 927 P.2d at 266-79, 59 Cal. Rptr. 2d at 155-69. Justice Mosk wrote a separate concurring opinion. *See id.* at 530-31, 927 P.2d at 279-80, 59 Cal. Rptr. 2d at 169-70 (Mosk, J., concurring). Justice Baxter also wrote a concurring opinion in which Justice Brown concurred. *See id.* at 531-43, 927 P.2d at 280-88, 59 Cal. Rptr. 2d at 170-78 (Baxter, J., concurring).

2. *See id.* at 515-16, 927 P.2d at 270, 59 Cal. Rptr. 2d at 160. The plaintiff, Donna Jean Comer, and the defendant, Gerald Lee Comer, were married and had two children while living in Florida in the early 1980s. *See id.* at 510-11, 927 P.2d at 266, 59 Cal. Rptr. 2d at 156. In 1985, Mrs. Comer and the children moved to Gila County, Arizona, where she obtained a divorce. *See id.* Despite Mr. Comer's absence from the proceedings, the Gila County court granted custody of the children to the mother, allowed visitation by the father, and awarded \$700 per month in child support. *See id.* at 511, 927 P.2d at 267, 59 Cal. Rptr. 2d at 157. Mrs. Comer did not tell her ex-husband where she and the children were living. *See id.* Consequently, Mr. Comer paid only \$400 in child support over a seven year period. *See id.* Between 1985 and 1992, Mrs. Comer collected welfare from Gila County and assigned to them her legal "rights to all current and past due support." *See id.* In late 1992, Gila County sued Mr. Comer, who had moved to Orange County, California, to enforce the 1985 child support order and collect all past-due amounts. *See id.* In response, Mr. Comer asserted a number of defenses, including the defense that Mrs. Comer was estopped from collecting child support because she concealed her whereabouts and those of their children. *See id.* at 512-13, 927 P.2d at 268, 59 Cal. Rptr. 2d at 157-58.

mother actively concealed the children from the father.<sup>3</sup> The court of appeal affirmed the trial court's decision, concluding that the mother's concealment of the children estopped the State from collecting on its assigned right to receive support arrearages.<sup>4</sup> The California Supreme Court reversed the court of appeal, and held that a non-custodial parent cannot assert an estoppel defense against a governmental entity if the concealment ends when the child is a minor.<sup>5</sup>

## II. TREATMENT

### A. *Majority Opinion*

The California Supreme Court began its opinion by reviewing *In re Marriage of Damico*,<sup>6</sup> in which the court held that a custodial parent who concealed a child from a non-custodial parent until the minor reached adulthood may be estopped from seeking child support arrearages.<sup>7</sup> The court reasoned in *Damico* that awarding support to benefit a minor child is defeated when that child reaches adulthood because it would simply be a financial windfall to the custodial parent.<sup>8</sup> The supreme court illustrated two factors that distinguished the instant case from *Damico*. First, the Comer children were still minors; and second, the government was a party to the suit in *Comer*.<sup>9</sup>

Accordingly, the supreme court held that when the concealment of a child ends before the child reaches adulthood, the non-custodial parent does not have a valid defense to paying arrearages in child support be-

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3. See *id.* at 513, 927 P.2d at 268, 59 Cal. Rptr. 2d at 158. The trial court reasoned that the father could not send child support or serve his ex-wife with proper documents for modification of the court order if he did not know her address. See *id.*

4. See *id.* at 514, 927 P.2d at 268, 59 Cal. Rptr. 2d at 158; see also *Case Developments, Child Support, Does Concealment Bar Collection of Child Support?*, FAIR\$HARE, Jan. 1994, at 32 (noting conflicting holdings regarding the concealment defense); Ira Lurvey, *California: 1993 Bellwether Matrimonial Cases*, FAIR\$HARE, Mar. 1995, at 19 (same).

5. See *Comer*, 14 Cal. 4th at 510, 927 P.2d at 266, 59 Cal. Rptr. 2d at 156.

6. 7 Cal. 4th 673, 872 P.2d 126, 29 Cal. Rptr. 2d 787 (1994). For a discussion of *Damico*, see April Anstett, *California Supreme Court Survey, Review of Decisions*, 22 PEPP. L. REV. 1739 (1995).

7. See *Comer*, 14 Cal. 4th at 514-15, 927 P.2d at 269, 59 Cal. Rptr. 2d at 159; *Damico*, 7 Cal. 4th at 676, 872 P.2d at 126, 29 Cal. Rptr. 2d at 787. In *Damico*, the court expressed no opinion as to whether a custodial parent would be estopped from collecting arrearages if the child's concealment ended while the child was a minor. See *id.* at 685, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794. The court also declined to decide whether concealment by a custodial parent would estop a governmental agency from recouping public assistance payments made to that parent. See *id.*

8. See *Comer*, 14 Cal. 4th at 514-15, 927 P.2d at 269, 59 Cal. Rptr. 2d at 159.

9. See *id.* at 515, 927 P.2d at 269, 59 Cal. Rptr. 2d at 159.

cause the child may still reap the benefits of the payments.<sup>10</sup> Furthermore, the court reasoned that its holding complied with the public policy of separating the legal issues of support and visitation.<sup>11</sup>

Next, the court noted that during the pendency of the appeal to the supreme court, the federal government passed the Full Faith and Credit for Child Support Orders Act (FFCCSOA).<sup>12</sup> The plaintiff argued that the FFCCSOA precluded the defendant from raising the concealment defense, and the defendant contended that, under the choice of law provisions of the FFCCSOA, the plaintiff's concealment constituted a "complete defense" for owed child support.<sup>13</sup> The court, however, decided that any issues raised by passage of the FFCCSOA were irrelevant because the court already rejected the defendant's concept of the estoppel defense.<sup>14</sup>

The court then considered whether a governmental entity, which had been assigned the custodial parent's right to receive past-due child support, could be estopped from collecting those arrearages based upon the mother's concealment of herself and the child.<sup>15</sup> The court concluded that, as assignees of the custodial parent's right to sue for child support, the government assumes the same rights as the custodial parent.<sup>16</sup> Ac-

10. *See id.* at 515-16, 927 P.2d at 270, 59 Cal. Rptr. 2d at 160-61.

11. *See id.* at 516, 927 P.2d at 270, 59 Cal. Rptr. 2d at 160. In *Moffat v. Moffat*, 27 Cal. 3d 645, 612 P.2d 967, 165 Cal. Rptr. 877 (1980), the supreme court noted that while it may seem unfair to the non-custodial parent who wants to withhold support until the custodial parent complies with visitation orders, the support of the child "must be the paramount consideration." *See id.* at 651, 612 P.2d at 970, 165 Cal. Rptr. at 880; *see also* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 326B(6) (Supp. 1996) (positing that support issues should be kept separate from visitation issues); 33 CAL. JUR. 3D *Family Law* § 1084 (1994) (same). *But see* Greg Geisman, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 S.D. L. REV. 568 (1993) (arguing the inherent connection between child support and visitation).

12. *See Comer*, 14 Cal. 4th at 518, 927 P.2d at 271-72, 59 Cal. Rptr. 2d at 161-62. The FFCCSOA, which mandates that state courts award "full faith and credit" to child support decrees from other states, is codified in 28 U.S.C. § 1738B (1994).

13. *See Comer*, 14 Cal. 4th at 519, 927 P.2d at 272, 59 Cal. Rptr. 2d at 162.

14. *See id.*

15. *See id.* at 520, 927 P.2d at 272, 59 Cal. Rptr. 2d at 162.

16. *See id.* at 520-25, 927 P.2d at 272-76, 59 Cal. Rptr. 2d at 162-66. The court relied on several statutes and cases to support this conclusion. *See* CAL. FAM. CODE § 4822 (West 1994) (stating that the government may bring a cause of action for child support when they furnish support to a custodial parent); *State of Washington ex rel. Burton v. Leyer*, 196 Cal. App. 3d 451, 457, 241 Cal. Rptr. 812, 816 (1987) (stating that "[a] pub-



cordingly, the court concluded that because the father could not use the "concealment defense" against the mother, he could not use it against the State in their action to recover child support arrearages.<sup>17</sup>

In response to the father's argument that the State did not attempt to locate him to enforce the support decree, the court concluded that there was no authority for his position because the father had a duty to support his children regardless of the State's failure to act.<sup>18</sup> Additionally, the court noted that the State provides resources to non-custodial parents to help locate children, including the California District Attorney's Office and the California Parent Locator Service.<sup>19</sup> While the court recognized the near impossibility of providing notice to non-custodial parents that custodial parents assigned their child support rights to the government, the court emphasized the State's strong public policies of conserving tax dollars and preserving family unity.<sup>20</sup> The court, while sympathizing with non-custodial parents whose children are hidden from them, concluded by reiterating that such concealment is not a legal defense to a failure to pay child support.<sup>21</sup>

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lic agency cannot be estopped because of the conduct of the parents"); *In re Marriage of Kelley*, 186 Cal. App. 3d 613, 231 Cal. Rptr. 6 (1986) (rejecting the argument that the State is subject to the same defenses as the custodial parent); *In re Marriage of Lugo*, 170 Cal. App. 3d 427, 217 Cal. Rptr. 74 (1985) (asserting that a non-custodial parent cannot claim a valid estoppel defense against the State unless the State makes some affirmative action upon which the defendant relies); *In re Marriage of Shore*, 71 Cal. App. 3d 290, 139 Cal. Rptr. 349 (1977) (holding that the State's cause of action is not dependent on bad faith actions of a custodial parent).

The court disagreed with one case upon which the appellate court relied, *In re Marriage of Smith*, 209 Cal. App. 3d 196, 257 Cal. Rptr. 47 (1989), which held that the government, as assignee of rights to child support, was subject to the same defenses as the assignor. *See Comer*, 14 Cal. 4th at 523-24, 927 P.2d at 275, 59 Cal. Rptr. 2d at 165. The majority reasoned that the *Smith* court failed to consider all of the policy implications of such a rule and reiterated that because the father did not have a "concealment defense" against the mother, he could not assert the defense against the State. *See id.* at 523-25, 927 P.2d at 275-76, 59 Cal. Rptr. 2d at 165-66.

17. *See Comer*, 14 Cal. 4th at 525, 927 P.2d at 276, 59 Cal. Rptr. 2d at 166.

18. *See id.* at 525-26, 927 P.2d at 276-77, 59 Cal. Rptr. 2d at 166-67.

19. *See id.* at 526-27, 927 P.2d at 277, 59 Cal. Rptr. 2d at 167.

20. *See id.* at 527-29, 927 P.2d at 277-79, 59 Cal. Rptr. 2d at 167-69.

21. *See id.* at 529-30, 927 P.2d at 279, 59 Cal. Rptr. 2d at 169. *But see* Ira H. Lurvey, *What Goes Around Comes Around—Even in Family Law*, FAM. ADVOC., Winter 1995, at 6 (describing the act of forcing a parent to pay support after the other parent hides the child as "violence").

*B. Justice Mosk's Concurring Opinion*

Justice Mosk wrote separately to confirm that the majority's holding was consistent with *Damico*.<sup>22</sup> He analogized the child support system to a trust, where the custodial parent is the trustee and the children are the beneficiaries.<sup>23</sup> He argued that the holdings in *Comer* and *Damico* simply mean that during the minority of the child, the trustee cannot deprive the child of support. However, once the child reaches the age of majority, the trust terminates.<sup>24</sup>

*C. Justice Baxter's Concurring Opinion*

Justice Baxter joined the majority's holding but additionally asserted that the concealment defense should never be recognized, and that *Damico* should be overruled.<sup>25</sup> He argued that the concealment defense violates public policy because it promotes distance and disinterest by non-custodial parents, by encouraging them to stay away until the child reaches the age of majority to avoid financial obligations.<sup>26</sup> Furthermore, Justice Baxter reasoned that minor children may still benefit from the child support award because any awards will go to the government as assignees of the child support rights.<sup>27</sup> He blasted *Damico*, labeling it "a judicial effort to punish custodial parents who deny non-custodial parents access to their children."<sup>28</sup>

Justice Baxter concluded his concurring opinion by detailing how the majority's holding in *Damico* conflicts with federal law.<sup>29</sup> He reasoned

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22. See *Comer*, 14 Cal. 4th at 530-31, 927 P.2d at 279-80, 59 Cal. Rptr. 2d at 169-70 (Mosk, J., concurring).

23. See *id.* (Mosk, J., concurring).

24. See *id.* (Mosk, J., concurring).

25. See *id.* at 531-32, 927 P.2d at 280, 59 Cal. Rptr. 2d at 170 (Baxter, J., concurring); see also Rebecca C. Raskin, *Fisco v. Department of Human Services: The Inequity of Equitable Defenses in Child Support Arrearage Cases*, 48 ME. L. REV. 153 (1996) (arguing that equitable defenses should not be recognized in the area of child support).

26. See *Comer*, 14 Cal. 4th at 532, 927 P.2d at 281, 59 Cal. Rptr. 2d at 171 (Baxter, J., concurring). Justice Baxter also pointed out that California law allows the collection of arrearages for up to 10 years after the child reaches the age of majority. See *id.* (Baxter, J., concurring).

27. See *id.* at 533, 927 P.2d at 281, 59 Cal. Rptr. 2d at 171 (Baxter, J., concurring).

28. *Id.* at 534, 927 P.2d at 282, 59 Cal. Rptr. 2d at 172 (Baxter, J., concurring).

29. See *id.* at 534-43, 927 P.2d at 282-88, 59 Cal. Rptr. 2d at 172-78 (Baxter, J., concurring); cf. Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States:*

that the purpose of federal legislation was to create uniformity throughout the states to ensure that different states do not allow different defenses.<sup>30</sup> Finally, Justice Baxter asserted that allowing the concealment defense once the child reaches the age of majority deprives the custodial parents of property rights to enforce obligations owed to them without due process.<sup>31</sup>

### III. IMPACT

On its face, the *Comer* opinion creates a bright line rule that dictates when the concealment defense may properly be asserted.<sup>32</sup> The court conditioned its holding on a determination of whether the child has reached adulthood.<sup>33</sup> However, this test is inconsistent with the applicable statute of limitations which allows a custodial parent to sue for child support arrearages up to ten years after the child reaches the age of majority.<sup>34</sup>

The majority's holding allows non-custodial parents to successfully argue the concealment defense once the child reaches age eighteen.<sup>35</sup> Consequently, the holding may encourage non-custodial parents to avoid contact with their children until they reach that magic age.<sup>36</sup> The rule adopted by the court also presents attorneys with the ethical dilemma of how to advise non-custodial parents.<sup>37</sup> On the other hand, custodial parents and county officials now have an added incentive to end conceal-

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*An Overview*, 22 FAM. L.Q. 367 (1989) (providing an overview of family law distinctions between states). For a discussion of uniform federal legislation for child support, see Robert E. Oliphant, *Is Sweeping Change Possible? Minnesota Adopts the Uniform Interstate Family Support Act*, 21 WM. MITCHELL L. REV. 989 (1996).

30. See *Comer*, 14 Cal. 4th at 535, 927 P.2d at 282, 59 Cal. Rptr. 2d at 172 (Baxter, J., concurring). Justice Baxter wrote that *Damico's* equitable defense to URESA transformed "routine matter[s] . . . [into] full blown lawsuit[s] over concealment," and conditioned support on visitation compliance—a concept that directly contradicts California case law. See *id.* at 536, 927 P.2d at 283, 59 Cal. Rptr. 2d at 173 (Baxter, J., concurring); see also 33 CAL. JUR. 3D *Family Law* § 1103 (1994) (noting that the California Legislature passed guidelines "to ensure that California remains in compliance with federal regulations for child support").

31. See *Comer*, 14 Cal. 4th at 541, 927 P.2d at 286, 59 Cal. Rptr. 2d at 176 (Baxter, J., concurring). For a discussion of custodial parents' remedies, see 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 325B (Supp. 1996).

32. See *Comer*, 14 Cal. 4th at 510, 927 P.2d at 266, 59 Cal. Rptr. 2d at 156.

33. See *id.*

34. See *supra* note 25.

35. See *Comer*, 14 Cal. 4th at 510, 927 P.2d at 266, 59 Cal. Rptr. 2d at 156.

36. See *supra* note 25 and accompanying text.

37. See *id.*

ment of children from non-custodial parents and to encourage continuing contact between them.<sup>38</sup>

#### IV. CONCLUSION

In *Comer*, the California Supreme Court examined the equitable concealment defense to child support payments and decided to draw a bright line rule based on the age of the child at the time the concealment ends.<sup>39</sup> Consequently, non-custodial parents have one less excuse for avoiding support of their children and custodial parents have a financial incentive to open channels of communication and end concealment.<sup>40</sup>

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38. *See id.*

39. *See Comer*, 14 Cal. 4th at 510, 927 P.2d at 266, 59 Cal. Rptr. 2d at 156.

40. *See supra* note 25 and accompanying text. *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 324 (9th ed. 1989) (outlining a list of defenses to paying child support).

## VIII. INJUNCTIONS

*An injunction prohibiting gang members from certain lawful and unlawful conduct did not violate the First Amendment and was neither overbroad nor void for vagueness. Additionally, the Street Terrorism Enforcement and Prevention Act does not preempt a city's use of public nuisance statutes to abate gang activity: People ex rel. Gallo v. Acuna.*

### I. INTRODUCTION

In *People ex rel. Gallo v. Acuna*,<sup>1</sup> the California Supreme Court considered whether an injunction preventing gang members from appearing in public with other gang members violates the First Amendment, whether the injunction was overbroad or void for vagueness, whether the Street Terrorism Enforcement and Prevention (STEP) Act was the exclusive means of enjoining criminal street gang activity, and whether the gang members' conduct constituted a public nuisance.<sup>2</sup> The trial court

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1. 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277 (1997). Justice Brown wrote the majority opinion in which Chief Justice George and Justices Baxter and Werdegar concurred. *See id.* at 1099-126, 929 P.2d at 601-19, 60 Cal. Rptr. 2d at 282-300. Justice Kennard wrote a concurring and dissenting opinion. *See id.* at 1126-28, 929 P.2d at 619-20, 60 Cal. Rptr. 2d at 300-01 (Kennard, J., concurring and dissenting). Justice Chin also wrote a concurring and dissenting opinion. *See id.* at 1128-32, 929 P.2d at 620-23, 60 Cal. Rptr. 2d at 301-04 (Chin, J., concurring and dissenting). Justice Mosk wrote a dissenting opinion. *See id.* at 1132-48, 929 P.2d at 623-33, 60 Cal. Rptr. 2d at 304-14 (Mosk, J., dissenting).

2. *See id.* at 1090-126, 929 P.2d at 596-619, 60 Cal. Rptr. 2d at 277-300. In *Gallo*, the City of San Jose sought to enjoin individual members of a criminal street gang known as Varrio Sureno Town (VST), or Varrio Sureno Locos (VSL), pursuant to section 731 of the California Code of Civil Procedure and section 3480 of the Civil Code, California's public nuisance statutes. *See id.* at 1100, 929 P.2d at 601, 60 Cal. Rptr. 2d at 282. The City submitted declarations from 48 neighbors describing in graphic detail the gang members' conduct. *See id.* Descriptions of the conduct included the following: the open consumption of alcohol and drugs; loud talking and music; vulgarity and profanity; murder, attempted murder, and other violent crimes; urinating on residents' homes, using homes as escape routes, obstructing traffic on public roads, and vandalizing property and vehicles; and verbal harassment, physical intimidation, and threats of retaliation against anyone who complained to the police. *See id.* at 1100, 929 P.2d at 601-02, 60 Cal. Rptr. 2d at 282-83. The City's complaint alleged that the gang members' conduct "constitute[d] a public nuisance . . . injurious to the health, indecent or offensive to the senses, [and] an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property . . . ." *Id.* at 1100-01, 929 P.2d at 602, 60 Cal. Rptr. 2d at 283. The superior court, finding "the prospect of 'great and irreparable injury' and the absence of 'a plain, adequate and speedy remedy at law,'"

granted a temporary restraining order, followed by a preliminary injunction.<sup>3</sup> The court of appeal upheld that portion of the injunction enjoining conduct which was independently criminal in nature.<sup>4</sup> The court of appeal also ruled that many provisions of the injunction, including paragraphs (a) and (k), either violated the First Amendment's right to association or were overbroad or void for vagueness.<sup>5</sup> Reversing the court of appeal, the supreme court held that paragraphs (a) and (k) did not violate the First or Fifth Amendments.<sup>6</sup>

## II. TREATMENT

### A. Justice Brown's Majority Opinion

1. The superior court acted within the scope of its equitable jurisdiction to enjoin a public nuisance.

The court began its analysis by discussing the scope and purpose of public nuisance law.<sup>7</sup> Relying on the theory of a social contract between the government and its citizens,<sup>8</sup> the court stated that the government's primary obligation is to maintain a decent society, while a citizen's reciprocal duty is to accept societally-imposed standards in place of his or her

granted an ex parte temporary restraining order enjoining thirty-eight defendants individually named in the complaint and issued an order to show cause. *See id.* at 1101, 929 P.2d at 602, 60 Cal. Rptr. 2d at 283. Only five defendants responded to the order to show cause, which resulted in the issuance of a preliminary injunction against the remaining thirty-three defendants. *See id.* Following the court of appeal's invalidation of the injunction, the City challenged the reversal of paragraphs (a) and (k). *See id.*

3. *See id.* at 1101, 929 P.2d at 602, 60 Cal. Rptr. 2d at 283.

4. *See id.*

5. *See id.* Paragraph (a) enjoined the following acts: "Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known 'VST' . . . member[.]" *Id.* at 1135 n.3, 929 P.2d at 624 n.3, 60 Cal. Rptr. 2d at 305 n.3 (Mosk, J., dissenting). Paragraph (k) enjoined the following acts: "In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities . . ." *Id.* at 1135 n.3, 929 P.2d at 625 n.3, 60 Cal. Rptr. 2d 306 n.3 (Mosk, J., dissenting).

6. *See id.* at 1126, 929 P.2d at 619, 60 Cal. Rptr. 2d at 300.

7. *See id.* at 1102-03, 929 P.2d at 602-03, 60 Cal. Rptr. 2d at 283-84.

8. The court relied on Montesquieu, Madison, and Locke. *See id.* at 1102-03, 929 P.2d at 603, 60 Cal. Rptr. 2d at 284.

own.<sup>9</sup> The court then stated that a principal use of the public nuisance doctrine was the “maintenance of public order—tranquillity, security and protection—when the criminal law proves inadequate.”<sup>10</sup> After recounting the historical origin of public nuisance as an offense against the public, the court stated that California’s codification of nuisance embraced the same purpose.<sup>11</sup> The court noted that *People v. Lim*<sup>12</sup> warned of the judicial expansion of the definition of a public nuisance when granting injunctions on behalf of the state, but the court was satisfied that the Legislature’s ultimate authority to define a nuisance served as a check on the potential for judicial activism.<sup>13</sup> The court then stated that in addition to property rights, public and social interests deserve equity’s protection via public nuisance law.<sup>14</sup> The court addressed the court of appeal’s conclusion that a public nuisance can only enjoin independently criminal acts.<sup>15</sup> The court reasoned that under California’s statutory nuisance scheme every public nuisance is also a criminal offense, but not every act must be precluded by criminal law (aside from section 370 of the Penal Code) to constitute a public nuisance.<sup>16</sup> The supreme court concluded that the superior court acted within its equitable jurisdiction when it enjoined acts not independently criminal in nature.<sup>17</sup>

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9. See *id.* at 1102, 929 P.2d at 603, 60 Cal. Rptr. 2d at 284.

10. *Id.* at 1103, 929 P.2d at 603, 60 Cal. Rptr. 2d at 284.

11. See *id.* at 1103-04, 929 P.2d at 603-04, 60 Cal. Rptr. 2d at 284-85; see also CAL. CIV. CODE § 3479 (West 1997) (defining nuisance as anything “injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property”); CAL. CIV. CODE § 3480 (West 1997) (“A public nuisance is one which affects at the same time an entire community or neighborhood . . . .”); CAL. CIV. CODE § 3491 (West 1997) (stating that the remedies for public nuisance are indictment or information, a civil action, or abatement); CAL. PENAL CODE § 372n (regarding public nuisance as a misdemeanor). See generally 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §§ 121-124, 143 (9th ed. 1990 & Supp. 1996) (defining nuisance and distinguishing between public and private nuisance and declaring public nuisance a misdemeanor); 47 CAL. JUR. 3D *Nuisance* § 24 (1979 & Supp. 1997) (distinguishing between public and private nuisance).

12. 18 Cal. 2d 872, 118 P.2d 472 (1941).

13. See *Gallo*, 14 Cal. 4th at 1106-07, 929 P.2d at 605-06, 60 Cal. Rptr. 2d at 286-87.

14. See *id.* at 1107, 929 P.2d at 606, 60 Cal. Rptr. 2d at 287.

15. See *id.* For a discussion of the implications of using civil remedies for criminal conduct, see Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

16. See *Gallo*, 14 Cal. 4th at 1108-09, 929 P.2d at 607, 60 Cal. Rptr. 2d at 288.

17. See *id.* See generally 47 CAL. JUR. 3D *Nuisance* § 42 (1979 & Supp. 1997) (stating that the superior court has jurisdiction over public nuisance actions).

2. Paragraphs (a) and (k) do not violate the First Amendment's right to association, nor are they overbroad or void for vagueness.

The court applied the constitutional standard enunciated by the United States Supreme Court in *Roberts v. United States Jaycees*<sup>18</sup> to determine whether the injunction violated the gang members' right to association.<sup>19</sup> The court concluded that the gang activity at issue did not come within either of the two protected classes of association.<sup>20</sup> The court further foreclosed any opportunity for protection based on the freedom of association by stating that "the First Amendment, 'does not extend to joining with others for the purpose of depriving third parties of their lawful rights.'<sup>21</sup>

The court then addressed the court of appeal's conclusion that paragraph (a) of the injunction was overbroad.<sup>22</sup> The court explained the overbreadth doctrine as "the inhibitory effect a contested statute may

18. 468 U.S. 609 (1984). In *Jaycees*, the Court held that rights of association are limited to two types of classifications as follows: (1) association for the purpose of exercising specific First Amendment rights such as protected speech or religious activities, and (2) association for the purpose of maintaining certain intimate human relationships. See *id.* at 617-18. The latter commonly applies to families, but may also apply to associations with "such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620. For a discussion of *Jaycees*' impact on the right to association, see Douglas O. Linder, Comment, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878 (1984).

19. See *Gallo*, 14 Cal. 4th at 1110-11, 929 P.2d at 608, 60 Cal. Rptr. 2d at 289. For a general discussion of the freedom of association and its limits, see 13 CAL. JUR. 3D *Constitutional Law* §§ 268-269 (1989 & Supp. 1997).

20. See *Gallo*, 14 Cal. 4th at 1111, 929 P.2d at 608, 60 Cal. Rptr. 2d at 289. Addressing the issue of association for the exercise of First Amendment rights, the court stated that the "loosely structured, elective form of social association . . . is in itself insufficient to command constitutional protection . . ." *Id.* at 1111, 929 P.2d at 609, 60 Cal. Rptr. 2d at 290. Addressing the intimate association category, the court stated that although gangs "may thus share one or two of the characteristics that define intrinsically valuable and constitutionally protected associations," the type of association intended to be protected is "a narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization's fundamental values . . ." *Id.* at 1112, 929 P.2d at 609, 60 Cal. Rptr. 2d at 290. The court also stated that it did not consider the activities of the gang to be either "private or intimate as constitutionally defined." *Id.*

21. See *id.* (quoting *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2530 (1994)).

22. See *id.* at 1112-15, 929 P.2d at 609-11, 60 Cal. Rptr. 2d at 290-92.



exert on the freedom of those who, although possibly subject to its reach, are *not* before the court."<sup>23</sup> The court rejected the claim of overbreadth, reasoning that the doctrine was inapplicable.<sup>24</sup> The court stated that the doctrine was intended to protect absent members of a class from being inhibited by a statute that may apply to them, but concluded that injunctions are different because they are addressed to identifiable members of a class, all of whom are before the court, and the enjoined conduct is described with particularity.<sup>25</sup>

The court then addressed the court of appeal's conclusion that paragraphs (a) and (k) of the injunction were void for vagueness.<sup>26</sup> The court stated that vagueness is grounds for invalidation when a vague law fails to provide adequate notice to the citizenry of what conduct is prohibited, potentially resulting in arbitrary and discriminatory enforcement.<sup>27</sup> The court followed two guidelines provided by the United States Supreme Court. First, "abstract legal commands must be applied in a specific context."<sup>28</sup> Second, the court must determine whether the injunction satisfies the principle of "reasonable specificity," which states that a law is not void for vagueness where a reasonable construction can give its terms reasonably certain meaning.<sup>29</sup> The court addressed paragraph (a)'s prohibition against associating with "known" gang members.<sup>30</sup> The court disagreed with the court of appeal and stated that the

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23. *Id.* at 1113, 929 P.2d at 610, 60 Cal. Rptr. 2d at 291 (italics in original); *see also* 16A AM. JUR. 2D *Constitutional Law* §§ 460-462 (1979 & Supp. 1993) (discussing overbreadth of legislation generally). *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (defining overbreadth and providing an approach for its analysis).

24. *See Gallo*, 14 Cal. 4th. at 1113-15, 929 P.2d at 610-11, 60 Cal. Rptr. 2d at 291-92.

25. *See id.* at 1114, 929 P.2d at 611, 60 Cal. Rptr. 2d at 292. The court also relied on *Madsen* to conclude that, in the context of overbreadth, injunctions are different than statutes. *See id.* Bryan K. Elliott, Note, *Madsen v. Women's Health Center, Inc.: Heightened Scrutiny for Injunctions Implicating First Amendment Freedoms*, 24 CAP. U. L. REV. 457 (1995) (discussing the same); Mathew D. Staver, *Injunctive Relief and the Madsen Test*, 14 ST. LOUIS U. PUB. L. REV. 465 (1995) (addressing the impact of *Madsen* on injunctions against speech activity).

26. *See Gallo*, 14 Cal. 4th at 1115, 929 P.2d at 611, 60 Cal. Rptr. 2d at 292. *See generally* 16A AM. JUR. 2D *Constitutional Law* § 459 (1979 & Supp. 1997) (discussing vagueness in a First Amendment context).

27. *See Gallo*, 14 Cal. 4th at 1115-16, 929 P.2d at 611-12, 60 Cal. Rptr. 2d at 292-93.

28. *Id.* at 1116, 929 P.2d at 612, 60 Cal. Rptr. 2d at 293.

29. *See id.* at 1117, 929 P.2d at 612-13, 60 Cal. Rptr. 2d at 293-94. The court reasoned that due to the lack of precision inherent in words, requiring a higher standard would be impractical. *See id.* The court further reasoned that if the terms were reasonably certain, it would not be "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Id.* (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)).

30. *See id.* at 1117-18, 929 P.2d at 613, 60 Cal. Rptr. 2d at 294.

word "known" fairly implied that the city would have to establish a defendant's own knowledge of his associate's gang membership, thus withstanding the challenge on vagueness grounds.<sup>31</sup> The court also disagreed with the court of appeal's conclusion regarding paragraph (k) for two reasons.<sup>32</sup> First, the knowledge requirement, like paragraph (a), was fairly implied.<sup>33</sup> Second, when considered in the context of the injunction, words describing the prohibited conduct were sufficiently definite.<sup>34</sup>

3. The STEP Act is not the exclusive means of abating criminal gang activity as a public nuisance.

The court summarily rejected the gang members' argument that the Street Terrorism Enforcement and Prevention Act<sup>35</sup> was the exclusive means of enjoining criminal street gang activity.<sup>36</sup> Relying on express language within the statute, the court rejected the preemption claim.<sup>37</sup>

4. The preliminary injunction's substantive limits are valid, the enjoined activity is within the statutory definition of public nuisance, and the provisions comply with the constitutional standard of burdening no more speech than is necessary.

Examining the neighbors' declarations in light of the statutory requirements of public nuisance, the court held that the enjoined activity was within the statutory definition.<sup>38</sup> The court then considered whether

31. *See id.*

32. *See id.* at 1118, 929 P.2d at 613, 60 Cal. Rptr. 2d at 294.

33. *See id.*

34. *See id.* The court also noted that the *Madsen* court upheld similar terminology against a vagueness challenge. *See id.*

35. CAL. PENAL CODE §§ 186.20-28 (Deering 1997).

36. *See Gallo*, 14 Cal. 4th at 1119, 929 P.2d at 614, 60 Cal. Rptr. 2d at 295.

37. *See id.*; *see also* CAL. PENAL CODE § 186.25 (Deering 1997) ("[T]his chapter shall be construed as providing alternative remedies and not as preempting the field."). *See generally* Omar Saleem, *Killing the Proverbial Two Birds with One Stone: Using Environmental Statutes and Nuisance to Combat the Crime of Illegal Drug Trafficking*, 100 DICK. L. REV. 685 (1996) (discussing additional means of enjoining criminal activity); Suzanne G. Lieberman, Note, *Drug Dealing and Street Gangs—the New Nuisances: Modernizing Old Theories and Bringing Neighbors Together in the War Against Crime*, 50 WASH. U. J. URB. & CONTEMP. L. 235 (1996) (discussing nuisance and other theories of liability).

38. *See Gallo*, 14 Cal. 4th at 1120, 929 P.2d at 614-15, 60 Cal. Rptr. 2d at 295-96;

the activity enjoined by paragraph (a) burdened more speech than necessary to serve an important government interest.<sup>39</sup> The court stated that it was the congregation of gang members that created the public nuisance and enjoining the association of two members was not excessive, particularly in light of the “carnival-like atmosphere of collective mayhem” described in the declarations.<sup>40</sup> The court further stated that the impact on protected speech was minimal because most of the gang’s protected speech was “inextricably intertwined with unlawful conduct,” either criminal or civil.<sup>41</sup> Additionally, because the injunction only applied to a limited geographical area, the court concluded that paragraph (a) was valid.<sup>42</sup> Based on the premise that violence and threats of violence are not protected speech, the court reached the same conclusion with respect to paragraph (k).<sup>43</sup>

5. Individualized proof is not required for the entry of a preliminary injunction upon a showing that it is the gang, acting through its individual members, that is responsible for the conditions prevailing.

In determining to whom the preliminary injunction applied, the court rejected the gang members’ contention that each member, in order to be bound, must have “a specific intent to further an unlawful aim embraced by [the gang].”<sup>44</sup> Instead, the court stated that courts may enjoin an entire organization when acts that are “themselves peaceful . . . are enmeshed with contemporaneously violent conduct which is concededly outlawed.”<sup>45</sup> Because the city could have enjoined the gang as an entity, the court concluded that enjoining its individual members was also valid.<sup>46</sup>

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*supra* notes 2 and 11 (comparing the activity complained of and statutory definitions).

39. *See Gallo*, 14 Cal. 4th at 1120-21, 929 P.2d at 615, 60 Cal. Rptr. 2d at 296.

40. *See id.* at 1121, 929 P.2d at 615, 60 Cal. Rptr. 2d at 296.

41. *See id.*

42. *See id.* at 1122, 929 P.2d at 616, 60 Cal. Rptr. 2d at 297.

43. *See id.*

44. *See id.* at 1122-23, 929 P.2d at 616, 60 Cal. Rptr. 2d at 297 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 (1982)). *But see* Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 *Nw. U. L. Rev.* 212, 237 (1994) (suggesting that courts scrutinize the determination of each defendant’s involvement in gang activity).

45. *Gallo*, 14 Cal. 4th at 1123, 929 P.2d at 617, 60 Cal. Rptr. 2d at 298 (quoting *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292 (1941)).

46. *See id.* at 1125, 929 P.2d at 618, 60 Cal. Rptr. 2d at 299.

*B. Justice Kennard's Concurring and Dissenting Opinion*

Justice Kennard concurred with the majority on the validity of paragraph (k), but dissented on the validity of paragraph (a).<sup>47</sup> Justice Kennard stated that the prohibitions of paragraph (a) were not tailored narrowly enough to achieve the government goal with a minimal level of infringement upon protected interests.<sup>48</sup> She further stated that "a state may not make criminal the exercise of the right of assembly simply because its exercise may offend some people."<sup>49</sup>

*C. Justice Chin's Concurring and Dissenting Opinion*

Justice Chin concurred with the majority on the general validity of paragraphs (a) and (k), but dissented with respect to applying the injunction to two of the thirty-eight defendants.<sup>50</sup> While he agreed with the majority's application of *Milk Wagon Drivers*, Justice Chin stated that *Claiborne Hardware* should also apply, requiring evidence of specific intent to participate in the enjoined activity.<sup>51</sup> Justice Chin argued that applying these standards simultaneously was not inconsistent because one could infer the specific intent to participate from membership in an organization whose purpose is clearly established.<sup>52</sup> Because the city's criteria for gang membership did not include the intent to promote the gang's illicit purposes, Justice Chin concluded that membership alone was insufficient to infer the members' criminal intent.<sup>53</sup>

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47. *See id.* at 1126-27, 929 P.2d at 619-20, 60 Cal. Rptr. 2d at 300-01 (Kennard, J., concurring and dissenting).

48. *See id.* at 1127, 929 P.2d at 620, 60 Cal. Rptr. 2d at 301 (Kennard, J., concurring and dissenting) (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971)).

49. *Id.* at 1127, 929 P.2d at 619, 60 Cal. Rptr. 2d at 300 (Kennard, J., concurring and dissenting).

50. *See id.* at 1128, 929 P.2d at 620, 60 Cal. Rptr. 2d at 301 (Chin, J., concurring and dissenting). For a discussion of the difficulty of determining gang membership, see Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 746-51 (1990).

51. *See Gallo*, 14 Cal. 4th at 1129, 929 P.2d at 620, 60 Cal. Rptr. 2d at 301 (Chin, J., concurring and dissenting).

52. *See id.* at 1129-30, 929 P.2d at 621, 60 Cal. Rptr. 2d at 302 (Chin, J., concurring and dissenting).

53. *See id.* at 1131, 929 P.2d at 622, 60 Cal. Rptr. 2d at 303 (Chin, J., concurring and dissenting.)

#### D. Justice Mosk's Dissenting Opinion

Although dissenting, Justice Mosk agreed with the majority that the STEP Act was not the exclusive means of enjoining criminal street gang activity.<sup>54</sup> Justice Mosk argued that paragraph (a) was void for vagueness and went further than necessary.<sup>55</sup> He also disagreed with the majority's application of *Jaycees* and *Dallas v. Stranglin*,<sup>56</sup> stating that some gang conduct is not only innocent, but is of the type of intimate and expressive conduct *Jaycees* protects.<sup>57</sup> Justice Mosk further argued that paragraph (k), aside from the words "harassing" and "intimidating," was void for vagueness.<sup>58</sup> Justice Mosk asserted that none of the individual gang members could be enjoined absent proof that the member was likely to engage in conduct constituting a public nuisance.<sup>59</sup>

### III. IMPACT AND CONCLUSION

Prior to *Gallo*, the supreme court had not addressed the legality of enjoining criminal street gang activity as a public nuisance. With this holding there will likely be a revival of public nuisance as a means of supplementing criminal law when it proves inadequate. Additionally, the

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54. *Id.* at 1137, 929 P.2d at 626, 60 Cal. Rptr. 2d at 307 (Mosk, J., dissenting).

55. *See id.* 1142-43, 929 P.2d at 629-30, 60 Cal. Rptr. 2d at 310-11 (Mosk, J., dissenting). The injunction was vague, Justice Mosk argued, because it failed to define gang membership and, therefore, did not provide adequate notice to those bound by the injunction, thereby subjecting them to arbitrary enforcement by police officers operating with the same want of a definition. *See id.* (Mosk, J., dissenting). Justice Mosk argued that the injunction went too far because it "penaliz[ed] much ordinary and lawful activity that does not fall within the statutory definition of a public nuisance." *Id.* at 1143, 929 P.2d at 630, 60 Cal. Rptr. 2d at 311 (Mosk, J., dissenting).

56. 490 U.S. 19 (1989).

57. *See Gallo*, 14 Cal. 4th at 1143, 929 P.2d at 630, 60 Cal. Rptr. 2d at 311 (Mosk, J., dissenting); *see also* Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477, 486-89 (1994) (discussing the social and communal aspects of gang membership).

58. *See id.* at 1144, 929 P.2d at 631, 60 Cal. Rptr. 2d at 312 (Mosk, J., dissenting).

59. *See id.* at 1146, 929 P.2d at 632, 60 Cal. Rptr. 2d at 313 (Mosk, J., dissenting). Justice Mosk reasoned that this was due to the fluid nature of gang membership compared with the unions in *Milk Wagon Drivers* and the anti-abortion organizations in *Madsen*. *See id.* at 1145-46, 929 P.2d at 632, 60 Cal. Rptr. 2d at 313 (Mosk, J., dissenting). Justice Mosk stated that equity is offended when an injunction prohibits someone from doing something he has never done nor is likely to ever do. *See id.* at 1146, 929 P.2d at 632, 60 Cal. Rptr. 2d at 313 (Mosk, J., dissenting). Based on the absence of intent, Justice Mosk concluded that the record did not support enjoining three of the named defendants. *See id.* at 1147, 929 P.2d at 632-33, 60 Cal. Rptr. 2d at 313-14 (Mosk, J., dissenting).

state may now use either the STEP Act or the public nuisance doctrine to enjoin gang activity, furthering crime prevention by expanding the universe of available remedies. As Justice Kennard noted, however, the ability to enjoin the innocent acts of politically unpopular groups is accompanied by the concomitant potential for abuse.<sup>60</sup> Thus, the anticipated enthusiasm for this recently sanctioned remedy must be tempered by a resolve for egalitarianism among law-abiding citizens.

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60. *See id.* at 1127, 929 P.2d at 619, 60 Cal. Rptr. 2d at 300 (Kennard, J., concurring and dissenting).

## IX. LABOR LAW

*The Fair Labor Standards Act (FLSA) does not preempt state regulation of overtime pay for maritime employees. Additionally, the Division of Labor Standards Enforcement (DLSE) compliance requirements with Industrial Welfare Commission (IWC) orders to maritime employees operating off the coast constitute regulations and are therefore subject to the Administrative Procedure Act (APA): Tidewater Marine Western, Inc. v. Bradshaw.*

### I. INTRODUCTION

In *Tidewater Marine Western, Inc. v. Bradshaw*,<sup>1</sup> the California Supreme Court addressed whether the FLSA preempted state laws regulating overtime compensation for maritime employees.<sup>2</sup> The court also addressed whether the DLSE enforcement of the IWC orders violated the procedural requirements of the APA.<sup>3</sup> The superior court granted the

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1. 14 Cal. 4th 557, 927 P.2d 296, 59 Cal. Rptr. 2d 186 (1996), *cert. denied*, 117 S. Ct. 1862 (1997). Justice Chin wrote a unanimous opinion in which Chief Justice George and Justices Mosk, Kennard, Baxter, Werdegar, and Brown joined. *See id.* at 561-79, 927 P.2d at 298-309, 59 Cal. Rptr. 2d at 188-99.

2. *See id.* at 564-68, 927 P.2d at 300-02, 59 Cal. Rptr. 2d at 190-92. The plaintiffs, two maritime transport firms and a maritime trade association, brought the present action seeking an injunction to prevent the enforcement of the California labor laws. *See id.* at 563, 927 P.2d at 299, 59 Cal. Rptr. 2d at 189. Under the California labor laws, employees are entitled to "[o]ne and one-half (1 1/2) times the employee's regular rate of pay" for time worked in excess of eight hours per day not exceeding twelve hours. *See id.* at 562, 927 P.2d at 298, 59 Cal. Rptr. 2d at 188 (quoting CAL. CODE REGS. tit. 8, §§ 11040, subd. 3(A)(1), 11090, subd. 3(A)(1) (1990)). Crew members for the maritime fleets were on duty for twelve hours per day during which time shifts were broken up between leisure time and work. *See id.* at 561, 927 P.2d at 298, 59 Cal. Rptr. 2d at 188. Despite California regulations, the plaintiffs' policy was to compensate the workers with "a flat daily rate without special compensation for 'overtime.'" *Id.* The plaintiffs instituted this action after the plaintiffs' employees began filing suit in 1992 for recovery of their past overtime compensation under the California labor laws. *See id.* at 563, 927 P.2d at 299, 59 Cal. Rptr. 2d at 189. According to the plaintiffs, seamen are exempted under the FLSA from paying overtime wages to their employees. *See id.* (citing 29 U.S.C. § 213(b)(6) (1994)).

3. *See id.* at 568-77, 927 P.2d at 302-08, 59 Cal. Rptr. 2d at 192-98. While both the IWC and DLSE play a role in agency oversight in the employment arena, they have differing functions. The IWC is responsible for ascertaining the wages, hours, and conditions of employment for all employees in the state. *See* 41 CAL. JUR. 3D *Labor* §§ 24-27 (1978 & Supp. 1997). On the other hand, the primary goal of the DLSE is to enforce labor laws where "enforcement is not specifically vested elsewhere." 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 290(a) (1987) (citing

plaintiffs' request for an injunction, "barring application of IWC wage orders to [plaintiffs'] employees working more than three miles off the coast."<sup>4</sup> The court of appeal reversed, holding that the DLSE provisions were not regulations subject to APA guidelines.<sup>5</sup> Affirming the court of appeal, the California Supreme Court held that federal law did not preempt state law in this situation, but nevertheless found the DLSE provisions to be regulations in violation of the APA.<sup>6</sup> Ultimately, however, the court found the IWC wage orders applicable to the maritime workers.<sup>7</sup>

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CAL. LAB. CODE § 95 (West 1989)). For a discussion of the APA, see 48 AM. JUR. 2D *Labor and Labor Relations* § 929 (1994) (stating that the APA "dictates judicial review standards and procedures but does not grant any party rights that it does not already have under the NLRA").

4. *Tidewater*, 14 Cal. 4th at 563, 927 P.2d at 299, 59 Cal. Rptr. 2d at 189.

5. *See id.* As opposed to "regulations," the court of appeal found the provisions to be "interpretations" applying to "a specific group of employers." *Id.* at 563-64, 927 P.2d at 299, 59 Cal. Rptr. 2d at 189.

6. *See id.* at 577-79, 927 P.2d at 308-09, 59 Cal. Rptr. 2d at 198-99. Where federal and state law conflict, federal law may preempt the enforcement of the state law. *See* discussion *infra* Part II.A. and accompanying notes. *See also* 58 CAL. JUR. 3D *Statutes* § 80 (1980) (stating that state law may be suspended where it is in conflict with a valid federal law); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 438-439 (1987 & Supp. 1997) (discussing when federal laws preempt state laws and providing examples of cases where preemption has been upheld). *See generally* Kevin J. McKeon, Comment, *NLRA Preemption Put Simply: Livadas v. Bradshaw*, 33 DUQ. L. REV. 887 (1995) (discussing the preemption doctrine in general and as applied to the NLRA); Dan M. Scheuermann, *Labor Law*, 42 LA. B.J. 301 (1994) (stating that the United States Supreme Court does not determine the reasonableness of state statutes in preemption cases but looks for conflict with the federal statute).

7. *See Tidewater*, 14 Cal. 4th at 568, 927 P.2d at 302, 59 Cal. Rptr. 2d at 192. Despite the invalidity of the DLSE and a great deal of federal law in the area of seaman wage provisions, the court found that the state wage orders prevailed. *See id.* *See also* 57 CAL. JUR. 3D *Ships and Shipping* § 53 (1980 & Supp. 1997) ("Federal statutes contain various provisions with respect to wages of crew members."); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 430 (1987 & Supp. 1997) (stating that the FLSA "regulates the hours and wages of employees or enterprises engaged in commerce or in the production of goods for commerce.").



## II. TREATMENT

### A. Federal Preemption

Justice Chin, writing for a unanimous court, held that California may regulate maritime employment in the Santa Barbara Channel.<sup>8</sup> Justice Chin stated that even though federal law defined the state's territory lying off the coast in more narrow terms than state law, Congress did not intend to prevent California from regulating outside the federal boundaries but within the state's boundaries.<sup>9</sup> Furthermore, Justice Chin cited a 1947 United States Supreme Court opinion which held that California had the power to regulate conduct in territory belonging to the United States, as defined by federal law.<sup>10</sup> Thus, even under federal territorial limits of state boundaries, the state of California can exercise its police powers.<sup>11</sup>

The court next determined the applicability of the federal definitions of state boundaries.<sup>12</sup> Justice Chin asserted, "federal law boundaries apply 'when the extent of a state's territorial jurisdiction is relevant to the operation of federal law.'"<sup>13</sup> Thus, according to the court, where federal and state laws do not conflict, state law boundaries apply.<sup>14</sup> Moreover, the court expressed that even if California defined its boundaries in the

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8. *See Tidewater*, 14 Cal. 4th at 564, 927 P.2d at 300, 59 Cal. Rptr. 2d at 190. According to Justice Chin, the court needed to first decide whether federal law preempted state law. *See id.* If the court answered affirmatively, they would not need to consider the second issue. *See id.*

9. *See id.* Under federal law, California's boundaries extend "three nautical miles from the coast, and including a three-mile-wide band around any islands lying off the coast, but excluding waters between the islands and the coast." *Id.* (citing 43 U.S.C. §§ 1301(b), 1312 (1994)). California's broader definition extends three nautical miles from the islands, "including waters between those islands and the coast." *Id.* (citing CAL. CONST., art. III, § 2 (1972); CAL. GOV'T CODE §§ 170, 171 (West 1995)).

10. *See id.* at 565, 927 P.2d at 300, 59 Cal. Rptr. 2d at 190 (citing *United States v. California*, 332 U.S. 19 (1947) (supp. opinion at 332 U.S. 804)). In *California*, the Supreme Court held that the United States owned the lands, excluding the bays, contained in the territory where federal and state laws conflict. *See id.* (citing *California*, 332 U.S. at 805). However, the Court limited its opinion to ownership, allowing California to "exercise local police power functions." *See id.* (quoting *California*, 332 U.S. at 36).

11. *See id.*

12. *See id.* at 565, 927 P.2d at 300-01, 59 Cal. Rptr. 2d at 190-91.

13. *Id.* at 565, 927 P.2d at 300, 59 Cal. Rptr. 2d at 190 (quoting *People v. Weeren*, 26 Cal. 3d 654, 660, 607 P.2d 1279, 1282, 163 Cal. Rptr. 255, 258 (1980)). In *Weeren*, the court declared that federal law defines "the state's 'boundaries' for all purposes, political or proprietary as between Nation and State." *Weeren*, 26 Cal. 3d at 663, 607 P.2d at 1283, 163 Cal. Rptr. at 259 (quoting *United States v. California*, 381 U.S. 139, 157 (1965)).

14. *See Tidewater*, 14 Cal. 4th at 565, 927 P.2d at 300-01, 59 Cal. Rptr. 2d at 190-91.

same manner as federal law, the state could still regulate beyond those boundaries.<sup>15</sup>

Lastly, the court found that the FLSA neither conflicted with nor preempted the state overtime regulations.<sup>16</sup> In determining preemption, the court stated that it must "ascertain the intent of Congress."<sup>17</sup> According to the court, preemption occurs as follows: "(1) where the federal law expressly so states, (2) where the federal law is so comprehensive that it leaves 'no room for supplementary state regulation,' or (3) where the federal and state laws 'actually conflict.'"<sup>18</sup> In the instant case, the court found that the FLSA expressly allowed for state regulation.<sup>19</sup> Additionally, the court reasoned that the laws did not conflict because the FLSA did not preclude state regulation either expressly or implicitly.<sup>20</sup>

15. *See id.* at 565, 927 P.2d at 301, 59 Cal. Rptr. 2d at 191 (citing *Smith v. United States*, 507 U.S. 197, 213 (1993); *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941); *Weeren*, 26 Cal. 3d at 666, 163 Cal. Rptr. at 261, 607 P.2d at 1285). In *Skiriotes*, the Court held that Florida could prohibit the use of certain dive equipment regardless of whether *Skiriotes* was beyond Florida's coastal boundaries. *See Skiriotes*, 313 U.S. at 77 ("[W]e see no reason why the state of Florida may not . . . govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress.").

16. *See Tidewater*, 14 Cal. 4th at 566, 927 P.2d at 301, 59 Cal. Rptr. 2d at 191. According to the plaintiffs, the FLSA exemption for seamen in regards to overtime pay regulations was Congress' manifestation of "an affirmative preemption of state regulation." *See id.* However, the court rejected this argument. *See id.* at 567-69, 927 P.2d at 301-02, 59 Cal. Rptr. 2d at 191-92. For a discussion of FLSA rules for overtime compensation, see 48A AM. JUR. 2D *Labor and Labor Relations* §§ 4260-4435 (1994 & Supp. 1997). In particular, section 4261 states that state or local overtime pay rules apply where the laws are more stringent than the FLSA. *See id.* at § 4261.

17. *Tidewater*, 14 Cal. 4th at 567, 927 P.2d at 302, 59 Cal. Rptr. 2d at 192 (quoting *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987)). The court also stated that Congress' intent must be "clear and manifest." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

18. *Id.* (quoting *Guerra*, 479 U.S. at 280-81).

19. *See id.* The "savings clause" of the FLSA provides the following: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any . . . state law or municipal ordinance establishing . . . a maximum workweek lower than the maximum workweek established under this chapter . . ." *Id.* (quoting 29 U.S.C. § 218(a) (1994)). The court stated that the savings clause has been interpreted by federal courts to extend to overtime wages. *See id.* at 567, 927 P.2d at 302, 59 Cal. Rptr. 2d at 192.

20. *See id.* at 568, 927 P.2d at 302, 59 Cal. Rptr. 2d at 192. The court based its conclusion from the legislative history of the FLSA's seaman exemption. *See id.* (citing 29 C.F.R. § 783.29 (1996) (discussing the legislative history of the FLSA's seaman exemption)). *See generally* C. Todd Jones, *The Practical Effects on Labor of Repealing*

## B. The APA Requirements for Proposed Regulations

In the second part of his opinion, Justice Chin held that the DLSE's policy was void because the agency did not follow the policy requirements under the APA.<sup>21</sup> Justice Chin asserted that the DLSE was subject to the APA requirements because of its involvement in creating regulations and other rules, and its lack of governance from the Labor Code.<sup>22</sup> Additionally, Justice Chin found that the DLSE policy was a regulation because of its general applicability to and its interpreting function of the scope of the IWC wage orders.<sup>23</sup> Thus, the court concluded that because the DLSE policy was a regulation, it was subject to APA procedural requirements.<sup>24</sup> Furthermore, because the DLSE did not follow the APA requirements, the court held that the regulation was void.<sup>25</sup>

## C. The Applicability of the Wage Orders to the Plaintiffs

Despite finding the DSLE's policy an invalid regulation, the court determined that the underlying IWC wage orders were applicable to the plaintiffs.<sup>26</sup> The court stated that IWC wage orders apply where an em-

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*American Cabotage Laws*, 22 TRANSP. L.J. 403, 415-22 (1995) (discussing the FLSA application to seamen); Louis B. Livingston & Sharon Toncray, *Fair Labor Standards Act: Substance and Procedure*, available in WESTLAW, C983 A.L.I.-A.B.A. 601 (1995) (discussing the FLSA as applied to overtime and seamen).

21. See *Tidewater*, 14 Cal. 4th at 568, 927 P.2d at 302, 59 Cal. Rptr. 2d at 192. The court listed several procedures that must be followed under the APA. See *id.* at 568, 927 P.2d at 302-03, 59 Cal. Rptr. 2d at 192-93. For an additional source of APA requirements, see CAL. GOV'T CODE §§ 11346-11347.5 (West 1992 & Supp. 1997). According to the court, the purpose of the APA requirements "is to ensure that those persons or entities whom a regulation will affect have a voice in its creation." *Tidewater*, 14 Cal. 4th at 568, 927 P.2d at 303, 59 Cal. Rptr. 2d at 193 (citing *Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 204-05, 583 P.2d 744, 747-48, 149 Cal. Rptr. 1, 4-5 (1978)).

22. See *id.* at 569-70, 927 P.2d at 303-04, 59 Cal. Rptr. 2d at 193-94. Even though the procedural requirements in the California Labor Code are analogous to the APA requirements, the court found that the Labor Code only applied to the IWC. See *id.* at 569, 927 P.2d at 303, 59 Cal. Rptr. 2d at 193. Moreover, the court could not find any provision in the California Labor Code exempting the DLSE from APA regulation. See *id.* at 570, 927 P.2d at 303, 59 Cal. Rptr. 2d at 193.

23. See *id.* at 572, 927 P.2d at 305, 59 Cal. Rptr. 2d at 195. The APA defines a regulation as including "every rule, regulation, order, or standard of general application . . . by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . ." CAL. GOV'T CODE § 11342(g) (West 1992 & Supp. 1997).

24. See *Tidewater*, 14 Cal. 4th at 576, 927 P.2d at 308, 59 Cal. Rptr. 2d at 198.

25. See *id.*

26. See *id.* at 576-77, 927 P.2d at 308, 59 Cal. Rptr. 2d at 198. The plaintiffs argued that the IWC's and DLSE's jurisdiction is limited to California's territorial bound-

ployee is a resident of California, principally works in the state, and gets paid there.<sup>27</sup> Moreover, the court cited its previous discussion to find that federal law did not preempt the wage orders.<sup>28</sup> Thus, because the plaintiffs' employees were residents of California and worked in the Santa Barbara Channel, they were protected by the IWC wage orders.<sup>29</sup>

### III. IMPACT AND CONCLUSION

As a result of the court's holding, other maritime transport firms may be required to compensate their employees for previously unpaid overtime.<sup>30</sup> While the impact on these firms may be great, the court's holding is not overly surprising. In 1987, the IWC wage orders were first applied to the maritime employees located in the Santa Barbara channel.<sup>31</sup> Furthermore, in 1990, the Court of Appeals for the Ninth Circuit held that "federal law did not preempt the IWC wage orders governing overtime wages."<sup>32</sup> Thus, the lack of favorability toward maritime firms by

aries. *See id.* However, the court found no such limitations in the Labor Code. *See id.*

27. *See id.* at 578, 927 P.2d at 309, 59 Cal. Rptr. 2d at 199. In support of its rule, the court quoted the Labor Code which provides that "[o]ne of the functions of the Department of Industrial Relations [which includes the IWC and the DLSE] is to foster, promote, and develop the welfare of the *wage earners of California . . .*" *Id.* (quoting CAL. LAB. CODE § 50.5 (West 1989) (italics not in original)).

28. *See id.* Restating its previous discussion, the court concluded that the federal and state laws did not conflict. *See id.* Thus, the court held that the California state law boundaries applied. *See id.* Nevertheless, even where conflict emerges, the United States Supreme Court gives the states considerable power to regulate. *See* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 440 (1987 & Supp. 1997) ("[T]he United States Supreme Court has recognized a substantial area of enforceable state law and state court and administrative jurisdiction, even in areas of coincidence of federal and state law.").

29. *See Tidewater*, 14 Cal. 4th at 578-79, 927 P.2d at 309, 59 Cal. Rptr. 2d at 199.

30. In 1992, the employees of the firms began filing claims for retroactive pay. *See id.* at 563, 927 P.2d at 299, 59 Cal. Rptr. 2d at 189. The present suit by the plaintiffs was to enjoin those actions. *See id.* However, the holding by the court removes that injunction. *See id.* at 579, 927 P.2d at 309, 59 Cal. Rptr. 2d at 199.

31. *See id.* at 562-63, 927 P.2d at 299, 59 Cal. Rptr. 2d at 189.

32. *Id.* at 563, 927 P.2d at 299, 59 Cal. Rptr. 2d at 189 (citing *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1427 (9th Cir. 1990)). With the exception of the Ninth Circuit, courts generally look to "the character of the work" and not what the work is called or where it is performed to determine if the seamen exemption applies. *See* 48A AM. JUR. 2D *Labor and Labor Relations* § 4150 (1994). *See generally* Marc Wall & Karen Houston, *Survey: Recent Maritime Decisions Within the Ninth Circuit Region*, 8 U.S.F. MAR. L.J. 379 (1996) (summarizing 1995 federal and state maritime

the courts should have been ample warning that IWC wage orders would eventually be applied.

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decisions within the Ninth Circuit); Michael A. Faillace, *Fair Labor Standards Act: Recent Case Law Development*, available in WESTLAW, 548 PLI/LIT 681, 715 (1996) (stating which employees fall under the seaman exception).

## X. LETTERS OF CREDIT

*Legislation enacted with the express intent to clarify existing law has no impermissible retroactive consequences and thus, applies to transactions predating its enactment. Furthermore, the antideficiency laws governing nonjudicial foreclosures do not operate to relieve an issuer of its obligation to honor a standby letter of credit used as additional support for loan obligations secured by real property: Western Security Bank, N.A. v. Superior Court.*

## I. INTRODUCTION

In *Western Security Bank, N.A. v. Superior Court*,<sup>1</sup> the California Supreme Court granted review to reconcile the conflict between California's antideficiency laws and the "independence principle" applicable to letters of credit.<sup>2</sup> Specifically, the supreme court considered whether urgency legislation circumscribing the use of standby letters of credit issued as additional security for real estate loan obligations governed the case at bar or, instead, had only prospective application.<sup>3</sup> The trial court de-

1. 15 Cal. 4th 232, 933 P.2d 507, 62 Cal. Rptr. 2d 243 (1997). Justice Chin delivered the majority opinion in which Chief Justice George, and Justices Baxter and Brown concurred. *See id.* at 236-53, 933 P.2d at 509-20, 62 Cal. Rptr. 2d at 245-56. Justice Werdegar wrote a concurring and dissenting opinion. *See id.* at 253-54, 933 P.2d at 521, 62 Cal. Rptr. 2d at 257 (Werdegar, J., concurring and dissenting). Justice Mosk also wrote a concurring and dissenting opinion in which Justice Kennard joined. *See id.* at 254-63, 933 P.2d at 521-27, 62 Cal. Rptr. 2d at 257-63 (Mosk, J., concurring and dissenting).

2. *See id.* at 236-37, 933 P.2d at 509, 62 Cal. Rptr. 2d at 245; CAL. COM. CODE § 5103(a) (West 1964 & Supp. 1997) (defining a letter of credit as "an engagement by a bank or other person made at the request of a customer . . . that the [bank] will honor drafts or other demands for payment upon compliance with the conditions specified in the [letter of] credit"). For a general discussion of the uses, operation, and effect of letters of credit, see 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Negotiable Instruments* §§ 10, 11 (9th ed. 1987 & Supp. 1997); Peter J. Gregora, *Letters of Credit in Real Property Finance Transactions*, 9 CAL. REAL PROP. J. 1, 1-2 (1991) [hereinafter Gregora] (noting that the use of letters of credit is a relatively new phenomenon in real estate financing but is now commonplace).

3. *See Western Sec. Bank*, 15 Cal. 4th at 236-38, 933 P.2d at 509-10, 62 Cal. Rptr. 2d at 245-46. In *Western Security Bank*, Vista Place Associates (Vista) defaulted on the

clared that the beneficiary, Beverly Hills Business Bank (the Bank) could recover \$375,000 from plaintiff Western Security Bank (Western), the issuer of a standby letter of credit, following the beneficiary's nonjudicial foreclosure sale of the real property collateral.<sup>4</sup> The trial court further declared that Western could seek reimbursement from each of the defaulting debtors pursuant to the promissory notes given in consideration of the letters of credit.<sup>5</sup>

On rehearing, the court of appeal reversed the trial court's pronouncements, concluding that California's antideficiency laws relieve a standby letter of credit issuer of its obligation to pay the beneficiary upon proper presentment, if the purpose is to satisfy a deficiency following the beneficiary's nonjudicial foreclosure sale of the real property security.<sup>6</sup> The court of appeal equated such an attempt to draw on a standby letter of credit to an improper deficiency judgment and consequently, concluded that such an attempt would constitute a "fraud in the transaction" under section 5114(2)(b) of the California Commercial Code,

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\$3,250,000 loan it obtained from Beverly Hills Business Bank (the Bank) to purchase a shopping center. *See id.* at 238, 933 P.2d at 510-11, 62 Cal. Rptr. 2d at 246-47. Vista's loan obligation was in the form of a purchase money mortgage secured by a deed of trust and a letter of credit. *See id.* at 238, 933 P.2d at 511, 62 Cal. Rptr. 2d at 247. Under a subsequent loan modification agreement, the Bank agreed to modify the loan terms in exchange for additional collateral security in the form of three \$125,000 irrevocable standby letters of credit issued by Western Security Bank (Western) (totalling \$375,000 of additional security). *See id.* at 238-39, 933 P.2d at 511, 62 Cal. Rptr. at 247. As is customary in a letter of credit transaction, each of the three Vista partners agreed to reimburse Western for any payment made to the Bank pursuant to the letters and each executed a \$125,000 promissory note in favor of Western. *See id.* at 239 & n.3, 933 P.2d at 511, 62 Cal. Rptr. at 247. In 1990, three years later, Vista defaulted on the restructured loan. *See id.* at 238, 933 P.2d 511, 62 Cal. Rptr. 247. The Bank elected the remedy of a nonjudicial foreclosure and, as the only bidder, purchased the shopping center in a Trustee's Sale, leaving an unpaid deficiency of over \$500,000. *See id.* at 239-40, 933 P.2d at 511-12, 62 Cal. Rptr. 2d at 247-48. The Bank immediately presented the three letters of credit to Western and demanded payment. *See id.* at 240, 933 P.2d at 512, 62 Cal. Rptr. 2d at 248. Relying on the assertion of the Vista attorneys that section 580d of the Code of Civil Procedure precluded any reimbursement from the Vista partners, Western refused to honor the letters of credit. *See id.* Rather, Western filed an action against the Bank, Vista, and the Vista partners, seeking a declaration that it was either not obligated to honor the letters of credit or, if so obligated, that it was entitled to reimbursement from the Vista partners under the terms of their promissory notes. *See id.* Although there were multiple cross-complaints in this action, the trial court ultimately addressed only Western's complaint for declaratory relief and the Bank's complaint against Western alleging that the issuer wrongfully dishonored the letters of credit. *See id.* at 240-41, 933 P.2d at 512, 62 Cal. Rptr. 2d at 248.

4. *See id.* at 241, 933 P.2d at 512, 62 Cal. Rptr. 2d at 248.

5. *See id.*

6. *See id.*

relieving the issuer of any obligation to honor the beneficiary's demand for payment.<sup>7</sup>

While the case was pending review by the supreme court, the Legislature responded to the court of appeal's decision by enacting Senate Bill No. 1612, which essentially provides that the antideficiency laws do not operate to relieve an issuer of its obligation to honor a standby letter of credit issued as additional security in a real estate loan transaction following the beneficiary's private foreclosure sale of the real property security.<sup>8</sup> Consequently, the supreme court transferred the case to the court of appeal for further consideration in light of Senate Bill No. 1612.<sup>9</sup> On reconsideration, the court of appeal confirmed its prior holding, concluding that the legislation was prospective only because it effected a "substantial change in existing law" and therefore had no effect on the parties in the case at bar.<sup>10</sup>

The California Supreme Court again granted review and reversed the court of appeal, rejecting the contention that Senate Bill No. 1612 had no bearing on the present case or any other existing letter of credit transactions.<sup>11</sup> The supreme court, by contrast, concluded that because the legislation did not substantially change, but rather merely clarified existing law, it had no impermissible retrospective effect and thus governed the transaction in this case.<sup>12</sup> Moreover, the antideficiency laws, and specifically section 580d of the Code of Civil Procedure,<sup>13</sup> did not

7. *See id.*; *see also* CAL. COM. CODE § 5114(2)(b) (West 1964 & Supp. 1997) (providing that an issuer that has been notified by the customer of "fraud, forgery or other defect not apparent on the face of the documents" may, but is not obligated to, honor an otherwise conforming draw on the letter of credit). *See generally*, Neil R. Rubenstein, *The Issuer's Rights and Obligations Under a Letter of Credit*, 17 UCC L.J. 129 (1984).

8. *See Western Sec. Bank*, 15 Cal. 4th at 241-42, 933 P.2d at 513, 62 Cal. Rptr. 2d at 249 (citing Legislative Counsel's Digest, Sen. Bill No. 1612 (1993-1994 Reg. Sess.)).

9. *See id.* at 242, 933 P.2d at 513, 62 Cal. Rptr. 2d at 249.

10. *See id.*

11. *See id.* at 238, 933 P.2d at 510, 62 Cal. Rptr. 2d at 246.

12. *See id.* at 238, 252, 933 P.2d at 510, 520, 62 Cal. Rptr. 2d at 246, 256.

13. CAL. CIV. PROC. CODE § 580d (West 1976 & Supp. 1997). Section 580d provides in relevant part:

No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property . . . in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.



relieve Western of its obligation to honor the standby letter of credit following the beneficiary's nonjudicial foreclosure of the real property security.<sup>14</sup>

## II. TREATMENT

### A. *Majority Opinion*

The court initially considered whether Senate Bill No. 1612,<sup>15</sup> enacted during the pendency of the court's initial grant of review, governed the litigants in the case at bar.<sup>16</sup> Summarizing the rules applicable to retrospective application of new legislation, the court noted that although new legislation is presumptively prospective, absent due process constraints, a statute will apply retroactively when the Legislature manifestly intends such an effect.<sup>17</sup> The court further explained that legislation which "merely *clarifies*, rather than changes, existing law" has no retrospective effect.<sup>18</sup> Such legislation does not "substantially change[] the legal consequences of past events"<sup>19</sup> but merely explains the true meaning of the existing law.<sup>20</sup> Furthermore, even material changes in statutory language can constitute clarification if the surrounding circumstances support such a finding.<sup>21</sup>

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*Id.* For a general discussion of California's antideficiency laws, see Cynthia A. Mertens, *California's Foreclosure Statutes: Some Proposals for Reform*, 26 SANTA CLARA L. REV. 533 (1986); David A. Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Again*, 22 UCLA L. REV. 753 (1975); see also 57 CAL. JUR. 3D *Secured Transactions* §§ 198-204 (1980 & Supp. 1997) (summarizing nonjudicial sales or other dispositions of collateral).

14. See *Western Sec. Bank*, 15 Cal. 4th at 252-53, 933 P.2d at 520, 62 Cal. Rptr. 2d at 256.

15. 1994 CAL. STAT. ch. 11 (specifically abrogating the decision of the court of appeal in this case to provide that a draw on a letter of credit does not violate the antideficiency laws and those laws afford no basis for an issuer to refuse a demand for payment).

16. See *Western Sec. Bank*, 15 Cal. 4th at 242-46, 933 P.2d at 513-16, 62 Cal. Rptr. 2d at 249-52.

17. See *id.* at 243, 933 P.2d at 513, 62 Cal. Rptr. 2d at 249. "Whether a statute is to apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute." *Id.* at 244, 933 P.2d at 515, 62 Cal. Rptr. 2d at 251 (citing *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1206, 753 P.2d 585, 596, 246 Cal. Rptr. 629, 640 (1988)).

18. *Id.* at 243, 933 P.2d at 514, 62 Cal. Rptr. 2d at 250.

19. *Id.* at 243, 933 P.2d at 513, 62 Cal. Rptr. 2d at 249 (citing *Kizer v. Hanna*, 48 Cal. 3d 1, 7, 767 P.2d 679, 682, 255 Cal. Rptr. 412, 415 (1989)).

20. See *id.* at 243, 933 P.2d at 513-14, 62 Cal. Rptr. 2d at 249-50.

21. See *id.* at 243, 933 P.2d at 514, 62 Cal. Rptr. 2d at 250. The majority noted that the Legislature's prompt amendment of statutory language in response to a court's

While conceding that the Legislature's subsequent interpretation of an existing statute is "neither binding nor conclusive in construing the statute,"<sup>22</sup> the majority noted that a court may properly consider the Legislature's expressed views in construing prior legislation.<sup>23</sup> Regardless of whether the court agrees with the Legislature's characterization of new legislation as simply a "clarification,"<sup>24</sup> an express provision that the statute clarifies or declares existing law establishes the necessary legislative intent required for the statute to apply retrospectively.<sup>25</sup> In this case, the court found that the statute's express statements that the statute clarified and declared existing law<sup>26</sup> clearly established that Congress intended Senate Bill No. 1612 to apply not only to the case at bar,

initial interpretation of a prior statute would be a circumstance indicating that even material changes in the statutory language are for clarification only. *See id.*

22. *Id.* at 244, 933 P.2d at 514, 62 Cal. Rptr. 2d at 250. The court explained that, as delineated in the California Constitution, statutory interpretation is exclusively within the province of the judiciary. *See id.*

23. *See id.* at 244, 933 P.2d at 514, 62 Cal. Rptr. 2d at 250.

24. *Id.* at 244, 933 P.2d at 515, 62 Cal. Rptr. 2d at 251 (citing *California Empl. Stabilization Comm'n v. Payne*, 31 Cal. 2d 210, 214, 187 P.2d 702, 704 (1947)).

25. *See id.* at 244, 933 P.2d at 514-15, 62 Cal. Rptr. 2d at 250-51.

26. The court observed that both section 5 of the statute and the statement of facts justifying its enactment as an urgency statute expressly provided that the purpose of the statute was to clarify existing law. *See id.* at 245-46, 933 P.2d at 515-16, 62 Cal. Rptr. 2d at 251-52. Section 5 states:

It is the intent of the Legislature in enacting Sections 2 and 4 of this act to confirm the independent nature of the letter of credit engagement and to abrogate the holding in [the court of appeal's earlier opinion in this case], that presentment of a draft under a letter of credit issued in connection with a real property secured loan following foreclosure violates Section 580d of the Code of Civil Procedure and constitutes a "fraud . . . or other defect not apparent on the face of the documents" under paragraph (b) of subdivision (2) of Section 5114 of the Commercial Code . . . .

The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either.

1994 CAL. STAT. ch. 611 § 5; *see Western Sec. Bank*, 15 Cal. 4th at 245-46, 933 P.2d at 515-16, 62 Cal. Rptr. at 251-52. Congress also expressed its intent that the statute take effect immediately in the statement of facts, which provides that immediate application is necessary to fulfill the statute's purpose of "confirm[ing] and clarify[ing] the law applicable to obligations which are secured by real property . . . and which also are supported by a letter of credit." *See id.* at 245, 933 P.2d at 515, 62 Cal. Rptr. at 251 (quoting 1994 CAL. STAT. ch. 611, § 6).

but to all outstanding real estate transactions secured by both real property and outstanding letters of credit.<sup>27</sup>

The court next examined the state of the law prior to the enactment of Senate Bill No. 1612 to determine whether the statute substantially changed or merely clarified existing law.<sup>28</sup> As a preliminary matter, the court concluded that the statute's amendments to section 5114 of the California Commercial Code were "technical, nonsubstantive changes" related to a letter of credit issuer's obligation to honor a conforming draw.<sup>29</sup> The court then turned its focus to the statute's amendment of Civil Code section 2787 codifying the legal distinction between a letter of credit and a suretyship obligation.<sup>30</sup> Prior to the enactment of Senate Bill No. 1612, existing law clearly recognized the distinction between the guarantor or surety's secondary obligation and the letter of credit issuer's primary, independent obligation.<sup>31</sup>

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27. See *Western Sec. Bank*, 15 Cal. 4th at 246, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252.

28. See *id.* at 246-52, 933 P.2d at 516-20, 62 Cal. Rptr. 2d at 252-56. As noted by the court, Senate Bill No. 1612 amended California Uniform Commercial Code section 5114 and California Civil Code section 2787, and added sections 580.5 and 580.7 to the California Code of Civil Procedure. See *id.* at 246, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252. The court, however, did not address the addition of section 580.7 to the Code of Civil Procedure, which renders a letter of credit unenforceable in certain residential real estate loan transactions, explaining that the section did not apply to the case at bar and therefore no interpretation was required. See *id.* at 247 n.6, 933 P.2d at 517 n.6, 62 Cal. Rptr. 2d at 253 n.6.

29. *Id.* at 246, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252 (quoting *Legislative Counsel's Digest, Senate Bill No. 1612*, 1993-94 Reg. Sess.).

30. See *id.* at 246-47, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252. Section 2787 pertains primarily to surety relationships and defines a guarantor or surety as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." CAL. CIV. CODE § 2787 (West 1993 & Supp. 1997), amended by 1994 Cal. Stat. ch. 611, sec. 1; see *Western Sec. Bank*, 15 Cal. 4th at 246, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252. The amendment to section 2787 clarified the definition by providing that "[a] letter of credit is not a form of suretyship obligation." CAL. CIV. CODE § 2787; see *Western Sec. Bank*, 15 Cal. 4th at 246, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252.

31. See *Western Sec. Bank*, 15 Cal. 4th at 246-47, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252; see also CAL. CIV. CODE §§ 2806-2810 (West 1993 & Supp. 1997) (establishing the secondary liability of a surety); *San Diego Gas & Elec. Co. v. Bank Leumi*, 42 Cal. App. 4th 928, 933-34, 50 Cal. Rptr. 2d 20, 23-24 (1996) (describing the background and relationships of a letter of credit); *Paramount Export Co. v. Asia Trust Bank*, 193 Cal. App. 3d 1474, 1480, 238 Cal. Rptr. 920, 923 (1987) (detailing the functions of a letter of credit); *Lumbermans Acceptance Co. v. Security Pac. Nat'l Bank*, 86 Cal. App. 3d 175, 178, 150 Cal. Rptr. 69, 71 (1978) (recognizing the primary obligation of an issuer of a letter of credit). For an in-depth analysis of the "independence principle," see Michael Stern, *The Independence Rule in Standby Letters of Credit*, 52 U. CHI. L. REV. 218 (1985); Gregora, *supra* note 2, at 3-4.

The court's analysis focused on the addition of section 580.5 to the Code of Civil Procedure.<sup>32</sup> The supreme court rejected the court of appeal's view that section 580.5,<sup>33</sup> which essentially provides that letter of credit draws are not tantamount to deficiency judgments, effected a change in the existing law.<sup>34</sup> The supreme court criticized the decision of the court of appeal because it employed an improper analogy, which established a rule far broader than warranted by the precedent cases.<sup>35</sup> By improperly viewing a letter of credit as a form of guaranty or surety obligation, the court of appeal misguidedly relied on *Union Bank v. Gradsky*<sup>36</sup> and *Commonwealth Mortgage Assurance Co. v. Superior Court*<sup>37</sup> for the proposition that, under the existing law, the antideficiency provisions of Code of Civil Procedure section 580d prevent a beneficiary from drawing on a letter of credit issued as additional security for a real estate loan obligation.<sup>38</sup> Moreover, the supreme court ob-

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32. See *Western Sec. Bank*, 15 Cal. 4th at 247-52, 933 P.2d at 516-20, 62 Cal. Rptr. 2d at 252-56.

33. CAL. CIV. PROC. CODE § 580.5 (West Supp. 1997).

34. See *Western Sec. Bank*, 15 Cal. 4th at 252, 933 P.2d at 520, 62 Cal. Rptr. 2d at 256.

35. See *id.* at 247-50, 933 P.2d at 517-19, 62 Cal. Rptr. 2d at 253-55.

36. 265 Cal. App. 2d 40, 71 Cal. Rptr. 64 (1968) (holding that a creditor may not recover any deficiency remaining following a private, nonjudicial foreclosure sale of the real property collateral from the guarantor). As the supreme court noted, however, the *Gradsky* court did not base its holding on a perceived conflict with section 580d; rather, the court's decision was founded on estoppel principles that bar a creditor from recovering a deficiency from the guarantor after the creditor has destroyed the guarantor's right of subrogation against the debtor by electing the remedy of nonjudicial foreclosure. See *Western Sec. Bank*, 15 Cal. 4th at 248, 933 P.2d at 517, 62 Cal. Rptr. 2d at 253 (citing *Gradsky*, 265 Cal. App. 2d at 41, 71 Cal. Rptr. at 65). For a discussion of the election of remedies applicable to real estate loan transactions including judicial and nonjudicial foreclosure, see 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions In Real Property* §§ 124-150 (9th ed. 1987 & Supp. 1997); 27 CAL. JUR. 3D *Deeds of Trust* §§ 201-203 (1987 & Supp. 1997).

37. 211 Cal. App. 3d 508, 259 Cal. Rptr. 425 (1989). *Commonwealth Mortgage* expanded *Gradsky* to prevent a mortgage guaranty insurer from seeking reimbursement from the defaulting mortgagor for payments made to the mortgagee following a nonjudicial foreclosure sale of the real property collateral securing the mortgage. See *id.* at 517, 259 Cal. Rptr. at 430. Significantly, the *Commonwealth Mortgage* court viewed the mortgage insurance policy as a form of guaranty similar to the one in *Gradsky* and thus, voided the indemnity agreements contained in the policy as invalid attempts to avoid section 580d's prohibition against deficiency judgments. See *id.*

38. See *Western Sec. Bank*, 15 Cal. 4th at 250, 933 P.2d at 518-19, 62 Cal. Rptr. 2d at 254-55.

served that the rules extrapolated from these precedent cases were grounded primarily in dicta.<sup>39</sup>

The supreme court explained that, contrary to the court of appeal's proposition, letters of credit are unique instruments "not governed by suretyship principles" because they create an independent obligation between the issuer and the beneficiary.<sup>40</sup> The court held that a letter of credit issued as additional security in a real estate loan transaction, as in this case, does not run afoul of the existing antideficiency laws.<sup>41</sup> The court reasoned that because a standby letter of credit issued as additional security is separate, distinct, and unrelated to the real property security, the antideficiency laws should not affect a real estate lender's draw on the letter of credit.<sup>42</sup>

The court concluded its analysis by holding that Senate Bill No. 1612 did not substantially change the existing law because prior to its enactment, the applicable antideficiency laws did not operate to prevent a real estate lender from calling upon a letter of credit issued as additional security following the nonjudicial foreclosure sale of the real property that also secured the loan obligation.<sup>43</sup> Thus, the supreme court reversed the court of appeal and held that Senate Bill No. 1612 did not operate retroactively and, therefore, governed the rights of the parties in the case at bar and in similar existing transactions supported by both real property and letters of credit.<sup>44</sup>

#### *B. Justice Werdegar's Concurring and Dissenting Opinion*

Although Justice Werdegar criticized the majority's reasoning, she agreed with the conclusion that a lender's attempt to draw on a standby letter of credit does not constitute a fraud in the transaction under sec-

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39. See *id.* at 249-50, 933 P.2d at 518-19, 62 Cal. Rptr. 2d at 254-55. Specifically, the supreme court rejected the court of appeal's assertion that *Gradskey* and *Commonwealth Mortgage* established the principle "that a lender should not be able to utilize a device of any kind [including letters of credit] to avoid the limitations of section 580d." See *id.* at 250, 933 P.2d at 519, 62 Cal. Rptr. 2d at 255 (quoting *Western Sec. Bank v. Superior Court*, 47 Cal. App. 4th 1257, 45 Cal. Rptr. 2d 664 (1995) (the court of appeal's decision in this case)).

40. See *id.* at 250-51, 933 P.2d at 519, 62 Cal. Rptr. 2d at 255. See generally *Stern*, *supra* note 30 (discussing the independence principle applicable to letters of credit).

41. See *Western Sec. Bank*, 15 Cal. 4th at 251-52, 933 P.2d at 519-20, 62 Cal. Rptr. at 255-56.

42. See *id.* at 252, 933 P.2d at 520, 62 Cal. Rptr. 2d at 256. "A creditor that draws on a letter of credit does no more than call on all the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments." *Id.*

43. See *id.* at 252, 933 P.2d at 520, 62 Cal. Rptr. 2d at 256.

44. See *id.* at 252-53, 933 P.2d at 520, 62 Cal. Rptr. 2d at 256.

tion 5114(2)(b) of the California Commercial Code.<sup>45</sup> Contrary to the majority, Justice Werdegar viewed Senate Bill No. 1612 as a substantial change in the law requiring prospective application.<sup>46</sup> Specifically, Justice Werdegar argued that Senate Bill No. 1612's addition of new Civil Code section 580.7 went beyond existing law and created a distinction between residential and nonresidential real estate transactions that did not exist prior to the statute's enactment.<sup>47</sup> Thus, Justice Werdegar concluded that Senate Bill No. 1612 had prospective application only and therefore, did not govern the case at bar.<sup>48</sup>

Justice Werdegar agreed with Justice Mosk's view that because section 5114 did not apply to the case at bar, the issuer was obligated to honor its letter of credit upon proper presentment by the beneficiary.<sup>49</sup> Moreover, Justice Werdegar asserted that under the principle of judicial restraint, the majority should have limited its holding to the facts of the case at bar and refrained from making "broader pronouncements on the antideficiency law's effect on other claims and other parties."<sup>50</sup>

### C. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk agreed with the majority's holding that Senate Bill No. 1612 did not have retrospective application.<sup>51</sup> But, Justice Mosk disagreed with the majority's underlying determination that Senate Bill No. 1612 merely clarified and did not change existing law.<sup>52</sup> Justice Mosk

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45. *See id.* at 253-55, 933 P.2d at 521, 62 Cal. Rptr. 2d at 257 (Werdegar, J., concurring and dissenting).

46. *See id.* (Werdegar, J., concurring and dissenting).

47. *See id.* at 254, 933 P.2d at 521, 62 Cal. Rptr. 2d at 257 (Werdegar, J., concurring and dissenting).

48. *See id.* (Werdegar, J., concurring and dissenting). As noted above, the majority concluded that section 580.7 did not apply to the case at bar and consequently did not consider the effect of the addition of this section on existing law. *See id.* at 247 n.6, 933 P.2d at 517 n.6, 62 Cal. Rptr. 2d at 253 n.6.

49. *See id.* at 253, 933 P.2d at 521, 62 Cal. Rptr. 2d at 257 (Werdegar, J., concurring and dissenting).

50. *Id.* at 253-54, 933 P.2d at 521, 62 Cal. Rptr. 2d at 257 (Werdegar, J., concurring and dissenting).

51. *See id.* at 254, 933 P.2d at 521-22, 62 Cal. Rptr. 2d at 257-58 (Mosk, J., concurring and dissenting). Justice Mosk's conclusion, however, is based on the premise that Senate Bill No. 1612 "significantly altered prior law" warranting prospective application, contrary to the majority's premise that the legislation was a clarification only and therefore had no retrospective effect. *See id.* at 260, 933 P.2d at 525, 62 Cal. Rptr. 2d at 261 (Mosk, J., concurring and dissenting).

52. *See id.* at 255, 933 P.2d at 522, 62 Cal. Rptr. 2d at 258 (Mosk, J., concurring

argued that under prior applicable law, the antideficiency statutes applied to real estate loan transactions supported by letters of credit and precluded the issuer from seeking reimbursement from the defaulting debtor after the beneficiary's election of a nonjudicial foreclosure sale.<sup>53</sup> In reaching this conclusion, Justice Mosk analogized the specific use of a standby letter of credit as additional loan collateral to a guarantee device.<sup>54</sup>

Justice Mosk further asserted that because the applicable statutes and their legislative histories provide no express or implied exception to the general prohibition against deficiency judgments,<sup>55</sup> the court of appeal correctly relied upon the precedent cases of *Gradsky* and *Commonwealth Mortgage*.<sup>56</sup>

Although Justice Mosk agreed with the court of appeal that the antideficiency statutes afford some protection to defaulting debtors in transactions involving standby letters of credit, he disagreed with the proposition that a conforming draw on such a letter of credit constitutes a fraud in the transaction under Uniform Commercial Code section 5114.<sup>57</sup> Justice Mosk found that a letter of credit issuer has no authority to decline a conforming draw under section 5114; but rather, the issuer must consider only the documents presented by the beneficiary and honor a demand for payment if the documents conform to the letter's terms.<sup>58</sup> Nevertheless, Justice Mosk stated that section 580d afforded some protection to the defaulting debtors in this case.<sup>59</sup> Under Justice Mosk's view, the Vista partners would be entitled to seek disgorgement of the Bank's recovery, following their reimbursement of Western pursuant to the promissory notes.<sup>60</sup>

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and dissenting).

53. *See id.* at 262, 933 P.2d at 526, 62 Cal. Rptr. 2d at 262 (Mosk, J., concurring and dissenting).

54. *See id.* at 256, 933 P.2d at 523, 62 Cal. Rptr. 2d at 259 (Mosk, J., concurring and dissenting).

55. *See id.* at 257, 933 P.2d at 523, 62 Cal. Rptr. 2d at 259 (Mosk, J., concurring and dissenting).

56. *See id.* at 259, 933 P.2d at 254, 62 Cal. Rptr. 2d at 260 (Mosk, J., concurring and dissenting).

57. *See id.* at 262, 933 P.2d at 526, 62 Cal. Rptr. 2d at 262 (Mosk, J., concurring and dissenting).

58. *See id.* at 262, 933 P.2d at 526-27, 62 Cal. Rptr. 2d at 262-63 (Mosk, J., concurring and dissenting).

59. *See id.* at 262-63, 933 P.2d at 527, 62 Cal. Rptr. 2d at 263 (Mosk, J., concurring and dissenting).

60. *See id.* (Mosk, J., concurring and dissenting). This conclusion presumes that the Vista partners did not legally waive protection under the antideficiency laws—a presumption not addressed here. *See id.* (Mosk, J., concurring and dissenting).

Justice Mosk rejected the majority's contention that a standby letter of credit is more analogous to cash collateral than to a guaranty or surety obligation.<sup>61</sup> Furthermore, he criticized the majority's disregard of the "strong judicial concern" about lenders' attempts to avoid the proscriptions of section 580d after a nonjudicial foreclosure sale by employing various financial mechanisms between the debtor and third parties, espoused in both *Gradsky* and *Commonwealth Mortgage*.<sup>62</sup>

### III. IMPACT & CONCLUSION

Following the decision in *Western Security Bank*, real estate lenders and borrowers no doubt breathed a sigh of relief.<sup>63</sup> The majority's reversal of the court of appeal's decision expanding the fraud in the transaction exception relieved their fears that the independence principle applicable to letters of credit would be all but lost in real estate financing transactions.<sup>64</sup> This decision served to realize the intent of the Legislature to clarify the interrelationship between the antideficiency laws and the independence principle applicable to letters of credit, thereby providing stability to the real estate finance market.<sup>65</sup> The majority's holding serves to facilitate commercial real estate transactions and gives effect to the express intentions of the Legislature.<sup>66</sup>

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61. See *id.* at 261 & n.4, 933 P.2d at 525-26 & n.4, 62 Cal. Rptr. 2d at 261-62 & n.4 (Mosk, J., concurring and dissenting).

62. See *id.* at 260, 933 P.2d at 525, 62 Cal. Rptr. 2d at 261 (Mosk, J., concurring and dissenting).

63. See Monte M. Brem, Note, *Western Security Bank v. Beverly Hills Business Bank: The Vanishing Utility of Letters of Credit in Real Estate Transactions*, 31 SAN DIEGO L. REV. 775, 777 (1994) (arguing that the use of letters of credit in real estate financing is vital to the California real estate market).

64. See *id.* at 799-802 (discussing the impairment of the utility of letters of credit).

65. See *Western Sec. Bank*, 15 Cal. 4th at 245, 933 P.2d at 515, 62 Cal. Rptr. 2d at 251.

66. See *id.* at 256, 933 P.2d at 516, 62 Cal. Rptr. 2d at 252.



## XI. LIMITATIONS OF ACTIONS

*The statute of limitations period for a wrongful termination cause of action begins to run upon actual termination of employment, not upon notice of such termination.*  
**Romano v. Rockwell International, Inc.**

### I. INTRODUCTION

In *Romano v. Rockwell International, Inc.*, the California Supreme Court addressed whether the statute of limitations begins to run in a wrongful termination action when the employer informs the employee of his or her termination or when the employment relationship is actually terminated.<sup>1</sup> The trial court entered summary judgment for Rockwell, reasoning that Romano's claims were time-barred because the statute of limitations began to run when the company notified the plaintiff of his termination.<sup>2</sup> The court of appeal reversed the trial court, holding that

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1. See 14 Cal. 4th 479, 926 P.2d 1114, 59 Cal. Rptr. 2d 20 (1996). Chief Justice George wrote the majority opinion in which Justices Mosk, Baxter, Werdegar, Chin, and Brown concurred. See *id.* at 483-503, 926 P.2d at 1116-29, 59 Cal. Rptr. 2d at 22-34. Justice Kennard wrote a concurring opinion. See *id.* at 503, 926 P.2d at 1129, 59 Cal. Rptr. 2d at 35 (Kennard, J., concurring).

2. See *id.* at 486, 926 P.2d at 1117-18, 59 Cal. Rptr. 2d at 23. On December 6, 1988, Rockwell International, Inc. [hereinafter Rockwell] notified Romano that his employment would be terminated. See *id.* at 484, 926 P.2d at 1116, 59 Cal. Rptr. 2d at 22. Rockwell proposed an agreement that would allow Romano to pursue a teaching fellowship until he reached 85 service points, which would qualify him for early retirement under Rockwell's retirement plan. See *id.* Romano accepted this proposal, continued to work until he reached 85 service points, and retired on May 31, 1991. See *id.* at 484-85, 926 P.2d at 1116-17, 59 Cal. Rptr. 2d at 22. On September 18, 1991, Romano filed a complaint with the Department of Fair Employment and Housing [hereinafter DFEH]. See *id.* at 485, 926 P.2d at 1117, 59 Cal. Rptr. 2d at 22. On September 21, 1991, the DFEH notified Romano that his case had been closed. See *id.* On December 9, 1991, Romano filed a complaint with the superior court against Rockwell alleging breach of an implied contract, breach of the implied covenant of good faith and fair dealing, retaliatory termination under the Fair Employment and Housing Act [hereinafter FEHA], age discrimination under FEHA, and wrongful termination in violation of public policy. See *id.* at 485, 926 P.2d at 1117, 59 Cal. Rptr. 2d at 22-23. Rockwell filed a motion for summary judgment, claiming that the causes of action were time-barred under the applicable statutes of limitations. See *id.* at 485, 926 P.2d at 1117, 59 Cal. Rptr. 2d at 23. Both parties stipulated that the following statutes of limitations applied: a two-year limitation on the breach of contract claims, a one-year filing deadline for FEHA claims, and a one-year limitation on the termination in violation of public policy claim. See *id.* at 485-86, 926 P.2d at 1117, 59 Cal. Rptr. 2d at 23; see also CAL. CIV. PROC. CODE § 339 (West 1982 & Supp. 1997) (setting the limitations period for a breach of contract cause of action at one year); CAL. GOV'T CODE § 12960 (West 1992

the statute of limitations begins to run when the employer actually terminates the employee, and therefore, the applicable statute of limitations had not expired as to Romano.<sup>3</sup> The California Supreme Court affirmed the court of appeal.<sup>4</sup>

## II. TREATMENT

### A. Majority Opinion

#### 1. Breach of Contract Causes of Action

The court first considered when the statute of limitations begins to run for breach of an implied contract not to terminate absent good cause and for breach of an implied covenant of good faith and fair dealing.<sup>5</sup> The court stated that a cause of action for breach of a contract may not ac-

& Supp. 1997) (setting the limitations period for FEHA claims at one year); CAL. CIV. PROC. CODE § 340 (West 1982 & Supp. 1997) (setting the limitations period for a termination in violation of public policy cause of action at one year). For an annotated listing of California statutes of limitations, see *Annotated California Statutes of Limitation*, 25 SW. U. L. REV. 745 (1996). However, the parties disagreed as to when the applicable statutes accrued. See *Romano*, 14 Cal. 4th 486, 926 P.2d at 1117, 59 Cal. Rptr. 2d at 23. See generally Tyler T. Ochoa & Andrew J. Wistrich, *Unraveling the Tangled Web: Choosing the Proper Statute of Limitation for Breach of the Implied Covenant of Good Faith and Fair Dealing*, 26 SW. U. L. REV. 1, 21-24 (1996) (discussing various approaches to cause of action accrual). Rockwell argued that the applicable statutes of limitations began to run on December 6, 1988, when Rockwell notified Romano of his termination. See *Romano*, 14 Cal. 4th at 486, 926 P.2d at 1117, 59 Cal. Rptr. 2d at 23. Romano argued that the statutes of limitations began to run on May 31, 1991, when his employment was terminated. See *id.*

3. See *Romano*, 14 Cal. 4th 486, 926 P.2d at 1118, 59 Cal. Rptr. 2d at 23. The court of appeal reasoned that allowing the limitations period to run at the time of notice of termination would "destroy any possibility that the employer might rescind the termination decision." See *id.* Further, it would "create a situation in which employees would be likely to sleep on their claims, and ultimately lose them under the statute of limitations." *Id.*

4. See *id.* at 503, 926 P.2d at 1129, 59 Cal. Rptr. 2d at 34.

5. See *id.* at 488-91, 926 P.2d at 1119-21, 59 Cal. Rptr. 2d at 25-27. See generally 29 CAL. JUR. 3D *Employer and Employee* § 72 (1987 & Supp. 1996) (explaining a breach of an implied-in-fact promise not to terminate without good cause); 29 CAL. JUR. 3D *Employer and Employee* § 73 (1987 & Supp. 1996) (explaining a breach of an implied covenant of good faith and fair dealing); Elisabeth C. Brandon, Note, *From Tameny to Foley: Time for Constitutional Limitations on California's Employment at Will Doctrine?*, 15 HASTINGS CONST. L.Q. 359, 360-79 (1987) (tracing the evolution of wrongful termination causes of action under the employment at will doctrine in California).

cruce prior to the time of breach.<sup>6</sup> The court reasoned that both breach of contract causes of action at issue preclude the employer from terminating employment without good cause.<sup>7</sup> Therefore, the act of termination without good cause would constitute the breach, thereby triggering the commencement of the statute of limitations.<sup>8</sup>

Additionally, the court reasoned that it could consider Rockwell's notification of its intent to terminate Romano an anticipatory repudiation because Rockwell repudiated the contract before actual termination.<sup>9</sup> Therefore, the court concluded that Romano could elect to file suit immediately upon notice or, alternatively, continue employment and await the employer's future performance.<sup>10</sup> Under this alternate theory, the statute of limitations was tolled as to an anticipatory repudiation cause of action upon actual termination because Romano elected to continue the fulfillment of his contractual obligations with Rockwell after the notice of termination.<sup>11</sup> Additionally, the court reasoned that regardless of an anticipatory repudiation, Rockwell had an ongoing obligation to Romano, which allowed Romano to choose to rely on the contract until the cessation of Rockwell's performance and then treat the action as a breach.<sup>12</sup>

## 2. FEHA Causes of Action

The court next considered when the statute of limitations begins to run for causes of action under the FEHA for retaliatory termination in violation of California Government Code section 12940(f) and age discrimination in violation of California Government Code section 12941.<sup>13</sup>

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6. *See Romano*, 14 Cal. 4th 488, 926 P.2d at 1119, 59 Cal. Rptr. 2d at 25. *See generally* 43 CAL. JUR. 3D *Limitations of Actions* § 39 (1978 & Supp. 1996) (explaining the accrual of a breach of contract cause of action).

7. *See Romano*, 14 Cal. 4th at 490, 926 P.2d at 1120, 59 Cal. Rptr. 2d at 26.

8. *See id.* at 489-91, 926 P.2d at 1119-21, 59 Cal. Rptr. 2d at 25-27.

9. *See id.* *See generally* 51 AM. JUR. 2D *Limitation of Actions* § 132 (1970 & Supp. 1996) (explaining the effect of an anticipatory repudiation on statute of limitations accrual).

10. *See Romano*, 14 Cal. 4th at 489-90, 926 P.2d at 1119-20, 59 Cal. Rptr. 2d at 25-26.

11. *See id.* *See generally* James M. Fischer, *The Limits of Statutes of Limitation*, 16 SW. U. L. REV. 1, 3-4, 8-14 (1986) (discussing tolling in general and exploring the equitable tolling concept which permits judicially created tolling beyond tolling expressly allowed in statutes).

12. *See Romano*, 14 Cal. 4th at 489-91, 926 P.2d at 1119-21, 59 Cal. Rptr. 2d at 25-27.

13. *See id.* at 491-500, 926 P.2d at 1121-27, 59 Cal. Rptr. 2d at 27-33. For a description of the process of filing FEHA claims and a discussion on whether Congress intended FEHA to replace common law causes of action for wrongful termination, see

The court analyzed the plain meaning of the code sections to determine when the causes of action accrue.<sup>14</sup> The court noted that both code sections expressly include the term "discharge" as an "unlawful employment practice," and further noted that no other unlawful employment practices listed in the Code sections apply to these facts.<sup>15</sup> Additionally, California Government Code section 12960 states that the limitations period accrues "after" the unlawful employment practice occurs.<sup>16</sup> Therefore, the court concluded that the actual discharge or termination of Romano was the alleged unlawful employment practice which triggered the commencement of the statute of limitations, not the notice of such termination.<sup>17</sup>

Chief Justice George asserted several reasons in support of the majority's interpretation of the FEHA.<sup>18</sup> First, if the court held that the date of notice of termination commenced the statute of limitations, then such a holding would preclude the adjudication of legitimate claims.<sup>19</sup> Second, the majority's interpretation of the Government Code would not create an excessive burden on employers because employers control both the date of notice and the date of actual termination.<sup>20</sup> Third, the date of actual termination was more easily ascertainable than the date of

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David Benjamin Oppenheimer & Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the Fair Employment and Housing Act Displace Common Law Remedies*, 23 U.S.F. L. REV. 145, 155-82 (1989).

14. See *Romano*, 14 Cal. 4th at 493, 926 P.2d at 1122, 59 Cal. Rptr. 2d at 27.

15. See *id.* at 492, 926 P.2d at 1122, 59 Cal. Rptr. 2d at 27. California Government Code section 12940 states: "It shall be an unlawful employment practice . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." CAL. GOV'T CODE § 12940(f) (West 1992) (emphasis added). California Government Code section 12941(a) provides: "It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action." CAL. GOV'T CODE § 12941(a) (West 1992) (emphasis added).

16. See *Romano*, 14 Cal. 4th at 493, 926 P.2d at 1122, 59 Cal. Rptr. 2d at 28; see also CAL. GOV'T CODE § 12960 (West 1992) (governing procedures for prevention and culmination of unlawful employment practices).

17. See *Romano*, 14 Cal. 4th at 492-93, 926 P.2d at 1122, 59 Cal. Rptr. 2d at 27.

18. See *id.* at 493-95, 926 P.2d at 1122-23, 59 Cal. Rptr. 2d at 28-29.

19. See *id.* at 494, 926 P.2d at 1122-23, 59 Cal. Rptr. 2d at 28. See generally Fischer, *supra* note 11, at 3 (questioning the arbitrariness of fixed statutes of limitations which may preclude meritorious claims).

20. See *Romano*, 14 Cal. 4th at 494, 926 P.2d at 1123, 59 Cal. Rptr. 2d at 28.

notice of termination.<sup>21</sup> Fourth, adopting notice as the triggering event for the commencement of the statute of limitations may cause employees to file premature claims that could be resolved prior to actual termination without resorting to litigation.<sup>22</sup> Finally, the court noted that other states had reached similar conclusions when interpreting the applicability of statutes of limitations to unlawful employment practice laws.<sup>23</sup>

The court next addressed Rockwell's claim that federal case law dictated the use of the date of notification to commence the statute of limitations.<sup>24</sup> The court rejected Rockwell's contention and noted that federal authority did not control the court's interpretation of the language of the state statute.<sup>25</sup> Further, because the FEHA requires that the limitations period begin to run after the unlawful employment practice, a different interpretation would be wholly inconsistent with the plain language of the statute.<sup>26</sup> Additionally, the court declined to apply the federal authorities cited by Rockwell because it determined that employees should not be required to file suit prior to discharge when no "concrete harm has been suffered."<sup>27</sup>

The court next considered Rockwell's contention that the court follow the court of appeal's ruling in *Regents of University of California v.*

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21. *See id.*

22. *See id.* at 494-95, 926 P.2d at 1123, 59 Cal. Rptr. 2d at 28-29.

23. *See id.* at 495, 926 P.2d at 1123-24, 59 Cal. Rptr. 2d at 29; *see also* Keelan v. Bell Communications Research, 674 A.2d 603, 606-07 (N.J. Super. Ct. App. Div. 1996) (construing the New Jersey state Conscientious Employee Protection Act containing the term "retaliatory action" to include "discharge" or termination as the date the cause of action accrues, not the date of notice of such termination); *Allison v. Jumping Horse Ranch, Inc.*, 843 P.2d 753, 755-56 (Mont. 1992) (holding that the Montana Wrongful Discharge From Employment Act requires the statute of limitations to run from the date of actual termination); *Harris v. Home Sav. and Loan Ass'n*, 663 So. 2d 92, 95 (La. Ct. App. 1995) (construing the Louisiana Age Discrimination in Employment Act to run from the date of actual termination, rather than an earlier date of notice).

24. *See Romano*, 14 Cal. 4th at 495-99, 926 P.2d at 1124-26, 59 Cal. Rptr. 2d at 29-31; *see also* *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (holding that notice of the decision to terminate based on political reasons violating the First Amendment started the statute of limitations running, not the consequence of actual termination); *Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980) (holding the denial of tenure as the discriminatory practice which started the statute of limitations running, not the eventual termination of employment). The court distinguished the denial of tenure in academic situations by stating that notification of denial of tenure is different than notification of termination because in non-academic situations it is possible that termination may never culminate. *See Romano*, 14 Cal. 4th at 497, 926 P.2d at 1125, 59 Cal. Rptr. 2d at 30.

25. *See Romano*, 14 Cal. 4th at 497, 926 P.2d at 1125, 59 Cal. Rptr. 2d at 30.

26. *See id.*; *see also* CAL. GOV'T CODE § 12960 (West 1992) (stating the time frame for the statute of limitations period as to FEHA claims).

27. *See Romano*, 14 Cal. 4th at 497-98, 926 P.2d at 1125, 59 Cal. Rptr. 2d at 31.

*Superior Court*.<sup>28</sup> However, the court distinguished this decision because the plaintiff in *Regents* did not base her claim on statutory interpretation of the FEHA, but instead claimed that continual violations caused the statute of limitations to run anew.<sup>29</sup>

Lastly, the court addressed Rockwell's assertion that allowing the statute of limitations to commence on the date of actual termination would discourage employers from giving advance notice of termination to employees.<sup>30</sup> The court reiterated that because employers control both the date of notice and termination, this ruling would not heavily burden employers.<sup>31</sup> Further, the rule supported by the majority continues to serve the policy justifications for the statute of limitations by "protect[ing] defendants from the necessity of defending stale claims and requir[ing] plaintiffs to pursue their claims diligently."<sup>32</sup>

### 3. Tort Cause of Action

Lastly, the court addressed when the statute of limitations accrues for a tort cause of action for wrongful termination in violation of public policy.<sup>33</sup> The court stated that, generally, the statute of limitations begins to run in a tort action when "the events have developed to a point where plaintiff is entitled to a legal remedy . . . ."<sup>34</sup> Tort causes of ac-

28. See *id.* at 499-500, 926 P.2d at 1131-32, 59 Cal. Rptr. 2d at 25; see also *Regents*, 33 Cal. App. 4th 1710, 1717-18, 39 Cal. Rptr. 2d 919, 922-23 (1995) (holding that the limitations period for a FEHA claim began running upon notice that Regents required the plaintiff to repeat her third year of the residency program, not the inevitable consequence of having to leave the program without graduating after not fulfilling this requirement), *overruled by* 14 Cal. 4th 479, 926 P.2d 1114, 59 Cal. Rptr. 2d 20 (1996).

29. See *Romano*, 14 Cal. 4th at 499-500, 926 P.2d at 1126, 59 Cal. Rptr. 2d at 32. See generally 54 C.J.S. *Limitations of Actions* § 84 (1987) (explaining that a cause of action accrues anew with each new violation until permanent injury occurs).

30. See *Romano*, 14 Cal. 4th at 500, 926 P.2d at 1126-27, 59 Cal. Rptr. 2d at 32-33.

31. See *id.* at 500, 926 P.2d at 1127, 59 Cal. Rptr. 2d at 32.

32. See *id.* at 488, 500, 926 P.2d at 1119, 1127, 59 Cal. Rptr. 2d at 24, 32. See generally Fischer, *supra* note 11, at 1-2 (listing the policies for the running of the statute of limitations); 43 CAL. JUR. 3D *Limitations of Actions* § 4 (1978) (discussing various court opinions about the running of the statute of limitations).

33. See *Romano*, 14 Cal. 4th at 500-03, 926 P.2d at 1127-29, 59 Cal. Rptr. 2d at 33-35. See generally *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (recognizing a cause of action for the dismissal of an employee who refuses to engage in unlawful activities); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 169, 183 (9th ed. 1987 & Supp. 1996) (discussing *Tameny's* role in recognizing a cause of action for wrongful termination).

34. See *Romano*, 14 Cal. 4th at 500-01, 926 P.2d at 1127, 59 Cal. Rptr. 2d at 33

tion for wrongful termination in violation of public policy restrict the employer's power to discharge employees.<sup>35</sup> Therefore, the court concluded that the act which would entitle the plaintiff to a remedy would be the actual act of dismissal on improper grounds.<sup>36</sup>

### *B. Justice Kennard's Concurring Opinion*

Justice Kennard concurred with the majority, but stated that a case discussed by the majority, *Delaware State College v. Ricks*,<sup>37</sup> did not necessarily apply to denial of tenure situations.<sup>38</sup>

### III. IMPACT

The holding in *Romano* clarifies when wrongful termination causes of action accrue and also eliminates future litigation regarding notice as the date the statute of limitations begins to run.<sup>39</sup> Further, the holding will allow employees additional time to attempt to reconcile disputes with their employers in hopes of retaining employment, rather than filing suit, thereby immediately foreclosing future reconciliation.<sup>40</sup> However, it will be interesting to monitor the willingness of employers after *Romano* to delay actual termination to allow pension accrual in order to avoid extending the limitations period.<sup>41</sup>

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(quoting *Davies v. Krasna*, 14 Cal. 3d 502, 513, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975)).

35. See *id.* at 501, 926 P.2d at 1128, 59 Cal. Rptr. 2d at 33. See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 730 (3d ed. 1985) (explaining that a tort cause of action may be brought against an employer for terminating an employee in violation of an important public policy).

36. See *Romano*, 14 Cal. 4th at 501, 926 P.2d at 1128, 59 Cal. Rptr. 2d at 33.

37. 449 U.S. 250 (1980).

38. See *Romano*, 14 Cal. 4th at 503, 926 P.2d at 1129, 59 Cal. Rptr. 2d at 34 (Kennard, J., concurring).

39. See *id.* at 494, 926 P.2d at 1123, 59 Cal. Rptr. 2d at 28.

40. See *id.* at 500, 926 P.2d at 1126-27, 59 Cal. Rptr. 2d at 32-33.

41. See *id.*

#### IV. CONCLUSION

Prior to *Romano*, the California Supreme Court's approach to the date of commencement of the limitations period for wrongful termination causes of action was ambiguous.<sup>42</sup> The court resolved this uncertainty by holding that the statute of limitations begins to run in a wrongful termination cause of action when the employer actually terminates the employee and not upon notice of such termination.<sup>43</sup>

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42. See Ochoa & Wistrich, *supra* note 2, at 32-34, n.135 (attempting to resolve the inconsistency by theorizing that the California Supreme Court intended to hold the date of notice of termination as the date of accrual while noting that final resolution would be forthcoming in *Romano*.); see also Shoemaker v. Myers, 2 Cal. App. 4th 1407, 1427, 4 Cal. Rptr. 2d 203, 215 (1992) (holding a wrongful termination cause of action did not accrue until termination, the date when plaintiff suffered sufficient harm justifying a legal remedy); Loehr v. Ventura County Community College Dist., 147 Cal. App. 3d 1071, 1078, 195 Cal. Rptr. 576, 580 (1983) (holding that causes of action for wrongful termination began to run on the date the employer's act injures the employee).

43. See *Romano*, 14 Cal. 4th at 489-90, 492-93, 501, 926 P.2d at 1119-20, 1122, 1128, 59 Cal. Rptr. 2d at 25-28, 33.



## XII. NEGLIGENCE

*Shopkeepers do not owe a duty to comply with a robber's unlawful demand for property in order to avoid injury to customers: Kentucky Fried Chicken of California, Inc. v. Superior Court (Brown).*

### I. INTRODUCTION

In *Kentucky Fried Chicken of California, Inc. v. Superior Court (Brown)*,<sup>1</sup> the California Supreme Court addressed whether shopkeepers owe a duty to their customers to comply with an armed robber's demand for money to avoid injury to customers.<sup>2</sup> Kentucky Fried Chicken of California, Inc. (KFC) moved for summary judgment, arguing that the complaint failed to state a cause of action because KFC did not owe a duty to comply with an armed robber's demands and, alternatively, KFC did not breach this duty.<sup>3</sup> The trial court denied the motion for summary judgment.<sup>4</sup>

Seeking to reverse the trial court's decision, KFC filed a petition for writ of mandate arguing the nonexistence of a duty to concede to an armed robber's demands to avoid injury to customers.<sup>5</sup> The court of appeal denied the petition for writ of mandate, holding that KFC owed a duty of reasonable care to ensure its customers' safety.<sup>6</sup> The court

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1. 14 Cal. 4th 814, 927 P.2d 1260, 59 Cal. Rptr. 2d 756 (1997). Justice Baxter wrote the majority opinion in which Chief Justice George and Justices Chin and Brown concurred. *See id.* at 817-30, 927 P.2d at 1262-70, 59 Cal. Rptr. 2d at 758-66. Justice Mosk wrote a dissenting opinion. *See id.* at 830-31, 927 P.2d at 1270-71, 59 Cal. Rptr. 2d at 766-67. Justice Kennard wrote a separate dissenting opinion, joined by Justice Werdegar. *See id.* at 831-45, 927 P.2d at 1271-80, 59 Cal. Rptr. 2d at 767-76.

2. *See id.* at 817, 927 P.2d at 1262, 59 Cal. Rptr. 2d at 758. A robber entered the Kentucky Fried Chicken Restaurant and stuck a gun in the back of Kathy Brown, the restaurant's only customer. Brown complied with the robber's demands for her money and wallet. *See id.* at 818, 927 P.2d at 1262, 59 Cal. Rptr. 2d at 758. The robber demanded the clerk to open the cash register and give him the money. *See id.* The clerk did not comply with this demand and said she had to get the key from the back of the store. *See id.* The robber became angry and "shoved his gun harder into Brown's back, and told the employee he would shoot Brown if the employee did not 'quit playing games' and open the cash register immediately." *See id.* After Brown screamed to the clerk to open the cash register, the clerk complied with the demands and turned over the money to the robber. *See id.* The robber fled with the money. *See id.* The store was unaware of any prior crimes at this location. *See id.* at 818, 927 P.2d at 1263, 59 Cal. Rptr. 2d at 759.

3. *See id.* at 818, 927 P.2d at 1262-63, 59 Cal. Rptr. 2d at 758-59.

4. *See id.* at 818, 927 P.2d at 1263, 59 Cal. Rptr. 2d at 759.

5. *See id.* at 818-19, 927 P.2d at 1263, 59 Cal. Rptr. 2d at 759.

6. *See id.* at 819-20, 927 P.2d at 1263, 59 Cal. Rptr. 2d at 759. For a general dis-

found it was reasonably foreseeable that noncompliance with the armed robber's demands would increase the possibility of harm or death to hostages.<sup>7</sup> Further, the court reasoned that the shopkeeper's compliance with such demands was a minimal burden and his interest in protecting his property was outweighed by the concern for customer safety.<sup>8</sup> The court stated that imposing a duty to comply with a robber's demands will not increase hostage-taking situations because criminals are usually not aware of current tort law standards.<sup>9</sup> Reversing the court of appeal's judgment, the California Supreme Court held that KFC did not owe a customer a duty to comply with an unlawful demand for money.<sup>10</sup>

## II. TREATMENT

### A. Majority Opinion

The court began its analysis by considering the duty shopkeepers owe to their customers.<sup>11</sup> The court recognized that shopkeepers who open their premises to the public owe a duty to protect their customers.<sup>12</sup> The court noted that business operators are subject to liability "for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons' . . . ."<sup>13</sup> Acknowledging that a business is not required to guarantee a visitor's safety,<sup>14</sup> the court held that shopkeepers

cussion of business owner liability for criminal acts of third parties, see Marjorie A. Caner, Annotation, *Liability of Owner or Operator of Shopping Center, or Business Housed Therein, for Injury to Patron on Premises from Criminal Attack by Third Party*, 31 A.L.R. 5th 550 (1995 & Supp. 1996).

7. See *KFC*, 14 Cal. 4th at 820, 927 P.2d at 1264, 59 Cal. Rptr. 2d at 760. See generally 62 AM. JUR. 2D *Premises Liability* § 48 (1990) (discussing the foreseeability of third party criminal acts).

8. See *KFC*, 14 Cal. 4th at 821-22, 927 P.2d at 1264-65, 59 Cal. Rptr. 2d at 760-61.

9. See *id.* at 822, 927 P.2d at 1265, 59 Cal. Rptr. 2d at 761.

10. See *id.* at 817, 927 P.2d at 1262, 59 Cal. Rptr. 2d at 758.

11. See *id.* at 822-24, 927 P.2d at 1265-66, 59 Cal. Rptr. 2d at 761-62. See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 933 (9th ed. 1988 & Supp. 1996) (discussing a landowner's duty to take affirmative actions to control the wrongful acts of third parties).

12. See *KFC*, 14 Cal. 4th at 822-23, 927 P.2d at 1265, 59 Cal. Rptr. 2d at 761.

13. *Id.* at 823, 927 P.2d at 1265, 59 Cal. Rptr. 2d at 761 (quoting RESTATEMENT (SECOND) OF TORTS § 344 (1965)).

14. See *id.* 14 Cal. 4th at 823, 927 P.2d at 1265, 59 Cal. Rptr. 2d at 761. See generally RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (stating that "the possessor [of land] is not an insurer of the visitor's safety").

only have a duty of care to customers when they know or have reason to know harmful third party acts are likely to occur.<sup>15</sup> Therefore, shopkeepers are only required to take reasonable actions under the circumstances to protect their customers' safety.<sup>16</sup>

Because California has never held that shopkeepers have a duty to comply with an armed robber to protect others,<sup>17</sup> the court turned to other jurisdictions for guidance.<sup>18</sup> The court found that no jurisdiction has recognized a duty to comply with a robber's demand for property.<sup>19</sup> Furthermore, some jurisdictions recognize the right to actively re-

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15. See *KFC*, 14 Cal. 4th at 823-24, 927 P.2d at 1266, 59 Cal. Rptr. 2d at 762. See generally 50 CAL. JUR. 3D *Premises Liability* § 39 (1993 & Supp. 1997) (stating that a landlord has a duty to protect against "known or reasonably foreseeable" criminal acts of third parties).

16. See *KFC*, 14 Cal. 4th at 823-24, 927 P.2d at 1266, 59 Cal. Rptr. 2d at 762. See generally Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996) (discussing the concept of reasonableness and comparing it with the concept of rationality).

17. See *KFC*, 14 Cal. 4th at 824, 927 P.2d at 1266, 59 Cal. Rptr. 2d at 762.

18. See *id.* at 824-28, 927 P.2d at 1266-69, 59 Cal. Rptr. 2d at 762-65; see also *Kelly v. Kroger Co.*, 484 F.2d 1362, 1363-64 (10th Cir. 1973) (focusing on foreseeability of the harm to customers during an armed robbery after a pamphlet had been distributed to employees advising actions to take during an armed robbery); *Bennett v. Estate of Baker*, 557 P.2d 195, 198 (Ariz. Ct. App. 1976) (holding that the law should not impose a duty to comply with the unlawful demands of a criminal); *Schubowsky v. Hearn Food Store, Inc.*, 247 So.2d 484, 484 (Fla. Dist. Ct. App. 1971) (holding that the victim of the armed robbery was "justified and privileged against liability" from injuries of a customer arising from the shopkeeper's active resistance); *Bence v. Crawford Sav. & Loan Ass'n*, 400 N.E.2d 39, 42 (Ill. App. Ct. 1980) (holding that the existence of a duty is determined by weighing various factors, not solely upon the foreseeability of the event); *Yingst v. Pratt*, 220 N.E.2d 276, 279 (Ind. App. 1966) (holding that resistance is superior public policy even where third parties are injured as a result); *Adkins v. Ashland Supermarkets, Inc.*, 569 S.W.2d 698, 700 (Ky. Ct. App. 1978) (holding there is no duty to comply with third party criminal demands); *Helms v. Church's Fried Chicken, Inc.*, 344 S.E.2d 349, 351 (N.C. Ct. App. 1986) (holding that storekeepers have a duty to avoid increasing harm to customers during an armed robbery); *Genovay v. Fox*, 143 A.2d 229, 239-40 (N.J. Super. Ct. App. Div. 1958) (balancing the storeowner's right to protect property with his duty to prevent foreseeable harm to customers from criminal acts of third parties), *rev'd on other grounds*, 149 A.2d 212 (N.J. 1959); *Helms v. Harris*, 281 S.W.2d 770, 772 (Tex. Civ. App. 1955) (holding that liability should arise only where the individual should have foreseen that such active resistance created unreasonable risk of physical harm to others). See generally David A. Roodman, Note, *Business Owners Duty to Protect Invitees from Third Party Attacks-or-"Business Owners Beware: Missouri Ups the Ante,"* 54 MO. L. REV. 443 (1989) (discussing premises liability for third party criminal acts in Missouri); Donald W. Giffin & Brian F. Stayton, *Landowners Beware: The Current Status of Premises Liability in Kansas*, J. KAN. B. ASS'N, Jan. 1995, at 18 (discussing premises liability in Kansas).

19. See *KFC*, 14 Cal. 4th at 824, 927 P.2d at 1266, 59 Cal. Rptr. 2d at 762.

sist robbery attempts if the resistance is reasonable under the circumstances.<sup>20</sup>

The court next addressed the plaintiff's argument that section 1714(a) of the California Civil Code imposed a responsibility on KFC for "injury occasioned to another by his want of ordinary care or skill in the management of his property or person' . . . ."<sup>21</sup> Although the court recognized such a duty, the court reasoned that this provision has never been construed to require a shopkeeper to comply with the unlawful demands of a robber.<sup>22</sup> The court adopted the reasoning in *Vandermost v. Alpha Beta Co.*<sup>23</sup> for not imposing such a duty on shopkeepers.<sup>24</sup> First, due to the unpredictability of robbers, the connection between complying with a robber's demands and avoiding injury to customers is tenuous.<sup>25</sup> Second, imposing such a duty is contrary to public policy because it may encourage hostage-taking situations with the expectation of compliance by shopkeepers.<sup>26</sup>

The court further reasoned that both the California Constitution and the California Civil Code grant shopkeepers the right to protect their property with reasonable force.<sup>27</sup> The court concluded that recognizing a shopkeeper's duty to comply with unlawful requests for property by a robber is inconsistent with California law.<sup>28</sup> Moreover, the court noted that no active resistance occurred in this situation, only noncompliance with demands.<sup>29</sup>

Disagreeing with the court of appeal, the court was concerned that criminals might become aware of a shopkeeper's duty to comply with a robber's demand for property and, as a result, increase hostage-taking

20. *See id.*

21. *Id.* at 828, 927 P.2d at 1269, 59 Cal. Rptr. 2d at 765 (quoting CAL. CIV. CODE § 1714(a) (West 1985 & Supp. 1997)).

22. *See id.* 14 Cal. 4th at 828, 927 P.2d at 1269, 59 Cal. Rptr. 2d at 765; *see also* CAL. CIV. CODE § 1714 (West 1985 & Supp. 1997).

23. 164 Cal. App. 3d 771, 210 Cal. Rptr. 613 (1985).

24. *See KFC*, 14 Cal. 4th at 829-30, 927 P.2d at 1269-70, 59 Cal. Rptr. 2d at 765-66 (citing *Vandermost*, 164 Cal. App. 3d 771, 775, 210 Cal. Rptr. 613, 618 (1985) (holding that no duty to comply with robber's demands should be imposed because it is poor public policy to hold otherwise)).

25. *See id.* 14 Cal. 4th at 829-30, 927 P.2d at 1269-70, 59 Cal. Rptr. 2d at 765-66.

26. *See id.*

27. *See id.* at 829, 927 P.2d at 1269-70, 59 Cal. Rptr. 2d at 765-66; CAL. CONST. art. I, § 1 (West 1983 & Supp. 1997); CAL. CIV. CODE § 50 (West 1982 & Supp. 1997).

28. *See KFC*, 14 Cal. 4th at 829, 927 P.2d at 1269-70, 59 Cal. Rptr. 2d at 765-66.

29. *See id.* at 829, 927 P.2d at 1270, 59 Cal. Rptr. 2d at 766.

occurrences.<sup>30</sup> Additionally, the court reiterated its uncertainty that compliance would prevent injury to customers.<sup>31</sup> Accordingly, the court concluded that public policy is best served by not imposing a duty to accede to such criminal demands.<sup>32</sup>

### B. Justice Mosk's Dissenting Opinion

In a separate opinion, Justice Mosk disagreed with the majority's holding that a shopkeeper never owes a duty to comply with a robber's demands to protect customers.<sup>33</sup> Reiterating the court's holding in *Taylor v. Centennial Bowl, Inc.*,<sup>34</sup> that a shopkeeper must exercise reasonable care to protect customers from third party criminal acts, Justice Mosk urged that the imposition of the duty to comply with such demands should be fact-specific, not absolute.<sup>35</sup>

Justice Mosk found two flaws in the majority's reasoning.<sup>36</sup> First, Justice Mosk noted the majority's reasoning, that not imposing a duty to comply will deter criminal acts, is at odds with their reasoning that criminals are unpredictable.<sup>37</sup> Second, the right to protect property under California law is not absolute and is subject to the requirement that a shopkeeper exercise reasonable care to protect customers from third party criminal acts.<sup>38</sup>

### C. Justice Kennard's Dissenting Opinion

Justice Kennard disagreed with the majority's formulation of the issue.<sup>39</sup> Justice Kennard argued that the issue involves two questions: (1)

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30. See *id.* at 829-30, 927 P.2d at 1270, 59 Cal. Rptr. 2d at 766.

31. See *id.* at 830, 927 P.2d at 1270, 59 Cal. Rptr. 2d at 766.

32. See *id.*

33. See *id.* (Mosk, J., dissenting).

34. 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 561 (1966).

35. See *KFC* 14 Cal. 4th at 830-31, 927 P.2d at 1270-71, 59 Cal. Rptr. 2d at 766-67 (Mosk, J., dissenting); see also *Taylor*, 65 Cal. 2d at 121, 416 P.2d at 797, 52 Cal. Rptr. at 565 (holding that a shopkeeper has a duty of reasonable care to protect against foreseeable criminal acts of third parties).

36. See *KFC*, 14 Cal. 4th at 831, 927 P.2d at 1270-71, 59 Cal. Rptr. 2d at 766-67 (Mosk, J., dissenting).

37. See *id.* (Mosk, J., dissenting).

38. See *id.* at 831, 927 P.2d at 1271, 59 Cal. Rptr. 2d at 767 (Mosk, J., dissenting). See generally Robert C. Bishop, J.D., Annotation, *Liability of Storekeeper for Death of or Injury to Customer in Course of Robbery*, 72 A.L.R. 3d 1269, 1275-77 (1976) (discussing the weighing of the shopkeeper's right to protect property against the duty of care owed to customers).

39. See *KFC*, 14 Cal. 4th at 832, 927 P.2d at 1271, 59 Cal. Rptr. 2d at 767 (Kennard, J., dissenting).

whether KFC owed a duty of reasonable care to protect its customers from criminal third party acts, and (2) whether KFC breached this duty of care by not complying with the robber's initial demand for money.<sup>40</sup> The first issue as to whether a duty exists "is decided as a matter of law by the court."<sup>41</sup> The second issue as to whether the defendant breached this duty of care is a question for the jury to determine if the court finds reasonable minds could differ.<sup>42</sup> Agreeing with the majority's recognition of a shopkeeper's duty to protect customers from third party criminal acts,<sup>43</sup> Justice Kennard argued that reasonable minds could differ as to the question of breach.<sup>44</sup> Accordingly, Justice Kennard would have affirmed the court of appeal's denial of the writ of mandate because the trial court was correct in denying the summary judgment motion, leaving the jury to decide the question of breach.<sup>45</sup>

Justice Kennard stated that the majority, by deciding this case as a question of duty, created an absolute standard and abandoned the more flexible fact-sensitive standard normally applied in negligence actions.<sup>46</sup> By abandoning the flexibility of the reasonable person standard, future cases will be bound by the same rule, although the specific circumstances may demand a different outcome.<sup>47</sup>

40. See *id.* at 831-32, 927 P.2d at 1271-72, 59 Cal. Rptr. 2d at 767-68. (Kennard, J., dissenting).

41. See *id.* at 832, 927 P.2d at 1271, 59 Cal. Rptr. 2d at 767 (Kennard, J., dissenting). See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 748 (9th ed. 1988 & Supp. 1997) (discussing the determination of a legal duty as a question of law).

42. See *KFC*, 14 Cal. 4th at 832, 927 P.2d at 1271, 59 Cal. Rptr. 2d at 767 (Kennard, J., dissenting).

43. See *id.* at 832, 927 P.2d at 1271, 59 Cal. Rptr. 2d at 767 (Kennard, J., dissenting).

44. See *id.* at 835, 927 P.2d at 1273, 59 Cal. Rptr. 2d at 769 (Kennard, J., dissenting).

45. See *id.* at 845, 927 P.2d at 1280, 59 Cal. Rptr. 2d at 776 (Kennard, J., dissenting).

46. See *id.* at 839, 927 P.2d at 1276, 59 Cal. Rptr. 2d at 772 (Kennard, J., dissenting). See generally 46 CAL. JUR. 3D *Negligence* § 9 (1978 & Supp. 1997) (examining the factors considered by courts in deciding whether to create a duty); Charles M. Riffle, Comment, *A Landlord's Duty to Protect his Tenants from the Criminal Acts of Third Persons*, 5 U.S.F. L. REV. 378, 384-86 (1971) (discussing the policy considerations of imposing liability on landlords for third party criminal acts); Joseph N. Kornowski, Comment, *California's Approach to Third Party Liability for Criminal Violence*, 13 LOY. L. REV. 535, 546-56 (1980) (discussing various approaches of determining the existence of a duty of third parties for liability arising from criminal acts).

47. See *KFC*, 14 Cal. 4th at 839, 927 P.2d at 1276, 59 Cal. Rptr. 2d at 772 (Kennard,

Justice Kennard discussed the reasoning behind the preference of a jury determining this issue as a question of breach.<sup>48</sup> First, reasonable conduct of a shopkeeper is dependent on specific circumstances requiring a fact-sensitive inquiry by a jury.<sup>49</sup> Second, permitting a jury to determine what is reasonable conduct under the circumstances allows the standard of reasonableness to adjust to changes in society, thereby giving shopkeepers an incentive to update and increase precautionary measures.<sup>50</sup> Third, it is preferable to allow a jury with diverse experiences, rather than a single judge, to determine what is reasonable under the circumstances.<sup>51</sup>

### III. IMPACT

The holding in *KFC* is narrowly limited to a refusal to comply with a robber's unlawful demand for property; active resistance was not considered.<sup>52</sup> The holding affords a shopkeeper flexibility in deciding whether to comply with a robber's demands and injects uncertainty in the response expected by a robber. It is possible, however, that situations will arise where compliance would have been the most reasonable act, demonstrating Justice Kennard's concern for the overbreadth of establishing no duty to comply, rather than a fact-sensitive analysis of the circumstances.<sup>53</sup>

### IV. CONCLUSION

Prior to *KFC*, it was unclear how far the duty to protect customers extended when responding to unlawful demands of a robber. The California Supreme Court resolved this uncertainty by holding that a shop-

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J., dissenting).

48. *See id.* at 840-43, 927 P.2d at 1276-79, 59 Cal. Rptr. 2d at 772-75 (Kennard, J., dissenting).

49. *See id.* at 840-41, 927 P.2d at 1277-78, 59 Cal. Rptr. 2d at 773-74 (Kennard, J., dissenting).

50. *See id.* at 841-42, 927 P.2d at 1278, 59 Cal. Rptr. 2d at 774 (Kennard, J., dissenting).

51. *See id.* at 842-43, 927 P.2d at 1278-79, 59 Cal. Rptr. 2d at 774-75 (Kennard, J., dissenting).

52. *See id.* at 829, 927 P.2d at 1269-70, 59 Cal. Rptr. 2d at 765-66.

53. *See id.* at 839, 927 P.2d at 1276, 59 Cal. Rptr. 2d at 772 (Kennard, J., dissenting).

keeper does not owe a duty to comply with a robber's unlawful demands for property in order to protect his customers from injury.<sup>54</sup>

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54. *See id.* at 817, 927 P.2d at 1262, 59 Cal. Rptr. 2d at 758.



### XIII. PREMISES LIABILITY LAW

*A triable issue of fact exists regarding whether a landowner can be liable for failure to warn of a potential hazard when a party is injured on property adjacent to and controlled by the landowner, but which the landowner does not possess: Alcaraz v. Vece.*

#### I. INTRODUCTION

In *Alcaraz v. Vece*,<sup>1</sup> the California Supreme Court examined whether a landlord had a duty to warn<sup>2</sup> a tenant of a potential danger on land bordering the landlord's property, over which the landlord had exercised some control.<sup>3</sup> The potential danger was an uncovered "utility meter box embedded in the lawn" of the neighboring land.<sup>4</sup> The defendant argued that he owed no duty because both the land and the meter box were not his property.<sup>5</sup> The superior court agreed, granting summary judgment for the defendant, finding that the city owned the property where the box was located.<sup>6</sup> The appellate court reversed the lower court decision, holding that the defendant's maintenance of the yard surrounding the meter box and the fact that he had actual notice that the meter box was uncovered raised triable issues of fact as to whether the defendant owed

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1. 14 Cal. 4th 1149, 929 P.2d 1239, 60 Cal. Rptr. 2d 448 (1997). Chief Justice George authored the majority opinion. *See id.* at 1152, 929 P.2d at 1240, 60 Cal. Rptr. 2d at 449. Justices Chin, Mosk, and Werdegar concurred. *See id.* at 1171, 929 P.2d at 1253, 60 Cal. Rptr. 2d at 462. Justice Mosk wrote a separate concurring opinion. *See id.* at 1171-74, 929 P.2d at 1253-55, 60 Cal. Rptr. 2d at 462-64 (Mosk, J., concurring). Justice Kennard filed a dissenting opinion. *See id.* at 1174-86, 929 P.2d at 1255-64, 60 Cal. Rptr. 2d at 464-72 (Kennard, J., dissenting). Justice Baxter authored a separate dissenting opinion. *See id.* at 1186-90, 929 P.2d at 1264-66, 60 Cal. Rptr. 2d at 472-74 (Baxter, J., dissenting). Justice Brown also wrote a separate dissenting opinion. *See id.* at 1190-98, 929 P.2d at 1266-72, 60 Cal. Rptr. 2d at 474-80 (Brown, J., dissenting).

2. *See* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 935 (9th ed. 1988) (detailing landowner warnings that have sufficed to discharge the landowner of his duty without taking other steps to remove the cause of harm).

3. *See Alcaraz*, 14 Cal. 4th at 1152-53, 929 P.2d at 1241, 60 Cal. Rptr. 2d at 449-50.

4. *Id.* at 1153, 929 P.2d at 1241, 60 Cal. Rptr. 2d at 450. Gilardo Alcaraz was injured when he walked into an uncovered utility meter box positioned in the ground adjacent to the sidewalk in front of the apartment building in which he lived. *See id.* His amended complaint alleged that the landlord had actual notice of the exposed meter box. *See id.*

5. *See id.* at 1153, 929 P.2d at 1241, 60 Cal. Rptr. 2d at 450; 51 CAL. JUR. 3D *Property* § 19 (1979) (stating the general rule that a landowner is normally only responsible for injuries to third parties on his property if he fails to use ordinary care).

6. *See Alcaraz*, 14 Cal. 4th at 1154-55, 929 P.2d at 1242, 60 Cal. Rptr. 2d at 451.

a duty to the plaintiff.<sup>7</sup> Affirming the court of appeal, the California Supreme Court held that triable issues existed and, therefore, the defendant was not entitled to summary judgment.<sup>8</sup>

## II. TREATMENT

### A. Majority Opinion

The first part of Chief Justice George's opinion set forth the appropriate rule to apply in assessing the liability of a landowner.<sup>9</sup> Namely, the proper standard "is whether in the management of his property [the landowner] acted as a reasonable man in view of the probability of injury to others."<sup>10</sup> Thus, the court found a duty to keep property under one's control in a "reasonably safe condition."<sup>11</sup> Based on precedent,<sup>12</sup> the court extended the duty to cover situations in which the property is con-

7. See *id.* at 1155, 929 P.2d at 1242, 60 Cal. Rptr. 2d at 451.

8. See *id.* at 1170-71, 929 P.2d at 1253, 60 Cal. Rptr. 2d at 461-62.

9. See *id.* at 1156, 929 P.2d at 1243, 60 Cal. Rptr. 2d at 451.

10. *Id.* (quoting *Rowland v. Christian*, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968)). See John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 870 (1991) (recommending that the court impose a duty to act reasonably, even when there is no common law duty to do so unless countervailing considerations demand otherwise). *But see* Mark K. Osbeck, *Bad Samaritanism and the Duty to Render Aid: A Proposal*, 19 U. MICH. J.L. REF. 315, 318-19 (1985) (arguing that there should be a duty to notify in lieu of a duty to rescue).

11. *Alcaraz*, 14 Cal. 4th at 1156, 929 P.2d at 1243, 60 Cal. Rptr. 2d at 452. See James T.R. Jones, *Trains, Trucks, Trees and Shrubs: Vision-Blocking Natural Vegetation and a Landowner's Duty to Those Off the Premises*, 39 VILL. L. REV. 1263, 1266 (1994) (concluding that, at least in regard to trimming back overgrown natural vegetation, "all possessors and occupiers of property are obligated to act reasonably to safeguard those adjacent to their premises from harm.")

12. The court cited *Austin v. Riverside Portland Cement Co.*, 44 Cal. 2d 225, 282 P.2d 69 (1955), and *Krongos v. Pacific Gas & Electric Co.*, 7 Cal. App. 4th 387, 9 Cal. Rptr. 2d 124 (1992), to demonstrate that a landowner could be liable for failure to warn of the danger posed by a crane working near electrical lines despite the landowner's clear non-possessory interest in the power lines. See *Alcaraz*, 14 Cal. 4th at 1156, 929 P.2d at 1243, 60 Cal. Rptr. 2d at 452. In a hypothetical, the court stated that the proper course of conduct in a similar situation would be either to set up barriers or give warnings of the danger. See *id.*

trolled by the landowner even though the cause of the potential harm is not under his control.<sup>13</sup>

The defendant, relying on *Hamilton v. Gage Bowl, Inc.*,<sup>14</sup> argued that owners of property are not liable for injuries occurring outside of their property.<sup>15</sup> In *Hamilton*, the court held that a bowling alley was not liable for injuries caused from a sign falling down from an adjacent building.<sup>16</sup> The *Alcaraz* court discounted *Hamilton's* applicability, distinguishing it on the basis that *Hamilton* dealt with the duty to detect a dangerous situation while in the present case, the defendant knew of the potential harm.<sup>17</sup>

The second part of the majority opinion centered upon explaining why control, as opposed to actual possession of land, is the key determination in assigning liability.<sup>18</sup> The court first specified the cases standing for the principle that the law imposes liability on defendants who control injury-inducing property, despite lack of official title.<sup>19</sup> The court continued by noting that the Restatement Second of Torts<sup>20</sup> defines the person responsible for injuries caused on land as the one who possesses land, not as the one who owns or leases land.<sup>21</sup> Finally, the court discussed the appellate court's practice of basing liability on control rather than title.<sup>22</sup>

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13. *See id.*

14. 6 Cal. App. 4th 1706, 8 Cal. Rptr. 2d 819 (1992).

15. *See Alcaraz*, 14 Cal. 4th at 1156-57, 929 P.2d at 1243, 60 Cal. Rptr. 2d at 452.

16. *See id.*

17. *See id.* at 1157, 929 P.2d at 1243-44, 60 Cal. Rptr. 2d at 452.

18. *See id.* at 1157-62, 929 P.2d at 1244-47, 60 Cal. Rptr. 2d at 453-56; *see also* 51 CAL. JUR. 3D *Property* § 14 (1979) (associating the rights to control and possess with ownership).

19. *See Alcaraz*, 14 Cal. 4th at 1157-58, 929 P.2d at 1244-45, 60 Cal. Rptr. 2d at 453 (citing *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981), *Johnston v. De La Guerra Properties, Inc.*, 28 Cal. 2d 394, 170 P.2d 5 (1946), and *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967)). *See also* David W. Burcham, *Sprecher v. Adamson Companies: Nonfeasance Immunity Slides by the California Supreme Court*, 16 LOY. L.A. L. REV. 625, 627 (1983) (discussing the court's imposition of a new rule placing an affirmative duty on landowners to "manage their property reasonably" when a natural condition on land causes harm).

20. *See Alcaraz*, 14 Cal. 4th at 1158-59, 929 P.2d at 1245, 60 Cal. Rptr. 2d at 453 (citing RESTATEMENT (SECOND) OF TORTS § 328E (1965)). One definition the Restatement gives for a possessor of land is "a person who is in occupation of the land with the intent to control it." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 328E (1965)). Comment (a) explains, "The important thing in the law of torts is the possession, and not whether it is or is not rightful as between the possessor and some third person." RESTATEMENT (SECOND) OF TORTS § 328E cmt. a (1965)).

21. *See Alcaraz*, 14 Cal. 4th at 1158-59, 929 P.2d at 1245, 60 Cal. Rptr. 2d at 453.

22. *See id.* at 1159, 929 P.2d at 1245, 60 Cal. Rptr. 2d at 453-54.

Discovering additional support in the similar application of the principle in two federal circuit court opinions,<sup>23</sup> the majority continued its analysis by applying the principle to the instant case.<sup>24</sup> By finding evidence that the landowner had exercised control over the land surrounding the meter box by maintaining the lawn and fencing off the area after the plaintiff's injury, the court concluded that there were triable issues of fact upon which reasonable jurors could differ.<sup>25</sup>

Chief Justice George concluded the second part of his opinion by addressing the issue raised by Justice Brown's dissent.<sup>26</sup> The majority read Justice Brown's dissent as requiring a finding that a landowner both exercised control over the property on which a party is injured and received a commercial benefit from that property before liability can arise.<sup>27</sup> Acknowledging that two recent appellate court decisions suggested a commercial benefit element,<sup>28</sup> the Chief Justice discounted reli-

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23. The cited cases were: *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909 (7th Cir. 1985) and *Husovsky v. United States*, 590 F.2d 944 (D.C. Cir. 1978). See *Alcaraz*, 14 Cal. 4th at 1159-61, 929 P.2d at 1245-47, 60 Cal. Rptr. 2d at 454-55. In *Orthmann*, the court refused to grant a 12(b)(6) motion to dismiss filed by the defendant, an inner tube rental association, when the plaintiff rented an inner tube to float down a river, stopped at a place not owned by the association along the river, dove from the riverbank, and injured himself on a rock. See *id.* at 1159-60, 929 P.2d at 1245, 60 Cal. Rptr. 2d at 454 (citing *Orthmann*, 757 F.2d at 910). The court refused to grant the 12(b)(6) motion for dismissal because the association had exercised control over the property by keeping it clean and by subsequently cutting down the tree, even though it did not own that particular piece of property. See *id.* at 1160, 929 P.2d at 1245-46, 60 Cal. Rptr. 2d at 454-55 (citing *Orthmann*, 757 F.2d 909). In *Husovsky*, the plaintiff was injured while driving on a public road when a tree fell and struck his car. See *id.* at 1160, 929 P.2d at 1246, 60 Cal. Rptr. 2d at 455 (citing *Husovsky*, 590 F.2d at 948). The court found the United States Government liable even though the tree was on land owned by the Government of India because the United States treated the tract of land in all respects exactly like the surrounding federal parkland. See *id.* at 1160-61, 929 P.2d at 1246, 60 Cal. Rptr. 2d at 455 (citing *Husovsky*, 590 F.2d at 953).

24. See *id.* at 1161, 929 P.2d at 1247, 60 Cal. Rptr. 2d at 455-56.

25. See *id.* at 1161-62, 929 P.2d at 1247, 60 Cal. Rptr. 2d at 455-56.

26. See *id.* at 1162-66, 929 P.2d at 1247-50, 60 Cal. Rptr. 2d at 456-58.

27. See *id.* at 1162, 929 P.2d at 1247, 60 Cal. Rptr. 2d at 456.

28. See *id.* at 1164-65, 929 P.2d at 1249-50, 60 Cal. Rptr. 2d at 457-58. *Alcaraz* quoted *Swann v. Olivier* as recognizing that liability has been imposed on businesses which have "received a special commercial benefit from the area of the injury plus had direct or de facto control of that area." *Id.* at 1164-65, 929 P.2d at 1249, 60 Cal. Rptr. 2d at 457 (quoting *Swann v. Olivier*, 22 Cal. App. 4th 1324, 1330 (1994)). Referencing *Princess Hotels Int'l Inc. v. Superior Court*, the *Alcaraz* court also observed

ance on these opinions, maintaining that the references to a commercial benefit requirement were only made in dicta.<sup>29</sup> The failure of the two cases to account for why a commercial benefit element should be a prerequisite to finding liability also influenced the Chief Justice's disapproval.<sup>30</sup>

The final section of the majority opinion focused on whether the introduction of evidence that the defendant had built a fence around the entire lawn was proper.<sup>31</sup> The defendant first argued that the evidence concerning the construction of the fence was irrelevant.<sup>32</sup> After defining relevant evidence,<sup>33</sup> the court found that both the defendant's mowing of the city lawn and the defendant's construction of a fence around the meter box were relevant.<sup>34</sup> The court held the mowing to be slightly relevant<sup>35</sup> as circumstantial evidence that the defendant "exercised possession and control over the property at the time plaintiff was injured."<sup>36</sup>

The defendant's second argument was that the admission of evidence of building the fence violated Evidence Code section 1151<sup>37</sup> which prohibits evidence of subsequent remedial measures to prove negligence.<sup>38</sup> Disregarding the applicability of the statute, the court stated that the rule only applies when the purpose is to prove negligence, not to prove

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the precedent cases "require control as well as a commercial benefit." *Id.* at 1165, 929 P.2d at 1249, 60 Cal. Rptr. 2d at 458 (quoting *Princess Hotels Int'l Inc. v. Superior Ct.*, 33 Cal. App. 4th 645, 652 (1995)).

29. *See Alcaraz*, 14 Cal. 4th at 1164-65, 929 P.2d at 1249, 60 Cal. Rptr. 2d at 457-58.

30. *See id.* at 1165-66, 929 P.2d at 1250, 60 Cal. Rptr. 2d at 458.

31. *See id.* at 1166-71, 929 P.2d at 1250-53, 60 Cal. Rptr. 2d at 458-62. The trial court disallowed the evidence and although the appellate court overruled the lower court decision, it never held specifically on the evidential issue. *See id.* at 1166, 929 P.2d at 1250, 60 Cal. Rptr. 2d at 459.

32. *See id.* at 1166, 929 P.2d at 1250, 60 Cal. Rptr. 2d at 458-59.

33. The court defined relevant evidence as "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." *Id.* at 1167, 929 P.2d at 1250, 60 Cal. Rptr. 2d at 459 (quoting CAL. EVID. CODE § 210 (West 1995)).

34. *See Alcaraz*, 14 Cal. 4th at 1166, 929 P.2d at 1250, 60 Cal. Rptr. 2d at 459.

35. *See id.* at 1167, 929 P.2d at 1250, 60 Cal. Rptr. 2d at 459.

36. *Id.* The court conceded that building the fence before the injury would have been more indicative of control and, thus, more probative evidence, but it still found the evidence to be relevant. *See id.* at 1167-68, 929 P.2d at 1251, 60 Cal. Rptr. 2d at 459-60.

37. The California statute states: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." CAL. EVID. CODE § 1151 (West 1995 & Supp. 1997).

38. *See Alcaraz*, 14 Cal. 4th at 1168-69, 929 P.2d at 1252, 60 Cal. Rptr. 2d at 460.

whether control was exercised.<sup>39</sup> Thus, the evidence was proper for use in determining whether the defendant controlled the strip of city land.<sup>40</sup>

### B. Justice Mosk's Concurring Opinion

Justice Mosk concurred in the majority's judgment but wrote separately because he found two reasons to deny the motion for summary judgment.<sup>41</sup> The first reason followed the majority's opinion that the plaintiff had displayed enough proof that the defendant controlled the area of injury to create a triable issue of fact for a jury.<sup>42</sup> Justice Mosk based his second reason in the law of appurtenances.<sup>43</sup> He stated that, because the defendant received a benefit from an appurtenance located on adjoining land, the defendant's failure to maintain the appurtenance was sufficient to preclude a summary judgment ruling on liability.<sup>44</sup> Justice Mosk cited case law establishing the principle that "an abutting landowner may be held liable for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of his property."<sup>45</sup> Because appurtenances, such as meter boxes, benefit the possessor and controller of adjacent land, the imposition of liability on the one who receives the advantage is justifiable.<sup>46</sup> Although, in the present case, the appurtenance was within the lawn and not on a sidewalk, Justice Mosk concluded that liability should still arise because the injured party was not just a passerby, but was a tenant who could be expected to walk on the lawn.<sup>47</sup>

39. *See id.*

40. *See id.* at 1170, 929 P.2d at 1252-53, 60 Cal. Rptr. 2d at 461.

41. *See id.* at 1174, 929 P.2d at 1255, 60 Cal. Rptr. 2d at 464 (Mosk, J., concurring).

42. *See id.* at 1171-72, 929 P.2d at 1253-54, 60 Cal. Rptr. 2d at 462 (Mosk, J., concurring).

43. *See id.* at 1171-73, 929 P.2d at 1253-55, 60 Cal. Rptr. 2d at 462-64 (Mosk, J., concurring). An appurtenance is "[t]hat which belongs to something else . . . [a]n article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold." BLACK'S LAW DICTIONARY 103 (6th ed. 1990).

44. *See Alcaraz*, 14 Cal. 4th at 1172, 929 P.2d at 1254, 60 Cal. Rptr. 2d at 462 (Mosk, J., concurring).

45. *Id.* at 1172, 929 P.2d at 1254, 60 Cal. Rptr. 2d at 463 (Mosk, J., concurring) (quoting *Peters v. City & County of San Francisco*, 41 Cal. 2d 419, 423, 260 P.2d 55, 58 (1953)).

46. *See id.* at 1173, 929 P.2d at 1254-55, 60 Cal. Rptr. 2d at 463 (Mosk, J., concurring).

47. *See id.* at 1174, 929 P.2d at 1255, 60 Cal. Rptr. 2d at 463-64 (Mosk, J., concur-

### C. Justice Kennard's Dissenting Opinion

In a three-part dissent, Justice Kennard posited her reasons for coming to the opposite conclusion.<sup>48</sup> The thrust of Justice Kennard's dissent was that a landowner with no possessory interest in adjacent property, no legal right to control the property or the cause of harm, and no responsibility for causing or increasing the harm has no duty to defend others from a present danger.<sup>49</sup> Justice Kennard also maintained that the majority opinion changes California law and runs counter to traditional tort policies by exposing "innocuous or good-neighborly conduct" to potential liability.<sup>50</sup>

After recounting the facts in the first part of her dissent, Justice Kennard began by defining the inconsistency of the majority's rule with the previous California law that only imposed liability when the landowner (1) had a legal right to control the hazard or the property containing the hazard or (2) produced or increased the harm.<sup>51</sup> Justice Kennard's examination of relevant case law<sup>52</sup> led her to conclude that California's general rule is that "[a]bsent the right to control either the premises or the dangerous condition, there generally is no duty to correct or to warn."<sup>53</sup> Justice Kennard recognized an exception that assigns liability when a party's conduct on another's property exacerbates the likelihood of harm, but she ruled out its applicability because the facts presented

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ring).

48. *See id.* at 1174-86, 929 P.2d at 1255-64, 60 Cal. Rptr. 2d at 464-72 (Kennard, J., dissenting).

49. *See id.* at 1174, 929 P.2d at 1255, 60 Cal. Rptr. 2d at 464 (Kennard, J., dissenting).

50. *Id.* at 1174, 929 P.2d at 1256, 60 Cal. Rptr. 2d at 464 (Kennard, J., dissenting).

51. *See id.* at 1175-76, 929 P.2d at 1256, 60 Cal. Rptr. 2d at 465 (Kennard, J., dissenting).

52. Justice Kennard discussed *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981), to establish the principle that landowners have an affirmative duty to protect people from dangers on their land because, as owners, they have the right to control the property. *See Alcaraz*, 14 Cal. 4th at 1176, 929 P.2d at 1257, 60 Cal. Rptr. 2d at 465 (Kennard, J., dissenting). Thus, landowners are in the best position to prevent harm. *See id.* Justice Kennard also named *Johnston v. De La Guerra Properties*, 28 Cal. 2d 394, 170 P.2d 5 (1946), *Morehouse v. Taubman Co.*, 5 Cal. App. 3d 548, 85 Cal. Rptr. 308 (1970), and *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975), to demonstrate, respectively, that: 1) both a landlord and a tenant may possess limited rights of control over the same area; 2) a non-owner may be liable for a hazardous condition on property if he had the right to control the premises; and 3) a person may be liable even if he had only the right to control the device of harm and not the property on which the harm occurred. *See Alcaraz*, 14 Cal. 4th at 1176-77, 929 P.2d at 1257-58, 60 Cal. Rptr. 2d at 465-66 (Kennard, J., dissenting).

53. *Alcaraz*, 14 Cal. 4th at 1178, 929 P.2d at 1258, 60 Cal. Rptr. 2d at 466 (Kennard, J., dissenting).

no evidence that the landlord had conducted himself in a manner which would make the exposed meter box more danger-prone.<sup>54</sup>

Justice Kennard proceeded with her dissent by discrediting those sources relied upon by the majority.<sup>55</sup> Justice Kennard described the majority's reliance on the federal cases of *Husovsky v. United States* and *Orthmann v. Apple River Campground, Inc.* as misguided because these cases already fit within what she recognized to be California's general rule.<sup>56</sup> The cases were consistent with prior law because the defendants in both cases had in some way contributed to the dangerous condition.<sup>57</sup> Thus, the cases could not justify the majority's amendment of the law.<sup>58</sup>

Justice Kennard found further fault in the majority's reading of the Restatement Second of Torts.<sup>59</sup> The failure of the Chief Justice to incorporate the final sentence of comment (a) to section 328E into his analysis led to, in Justice Kennard's opinion, an erroneous interpretation of who is a possessor of land.<sup>60</sup> Justice Kennard pointed to the section's use of the term "possessor" as one who is a "disseisor," defined as someone acquiring ownership via adverse possession.<sup>61</sup> Thus, under the dissent's reading, Restatement Second of Torts section 328E refers to a possessor, not as one who exerts any act of control, but rather as one who exerts control for all intents and purposes, sufficient to be characterized as an adverse possessor.<sup>62</sup>

54. See *id.* at 1178-79, 929 P.2d at 1258-59, 60 Cal. Rptr. 2d at 466-67 (Kennard, J., dissenting). For support, Justice Kennard relied upon *Hamilton v. Gage Bowl, Inc.*, 6 Cal. App. 4th 1706, 8 Cal. Rptr. 2d 819 (1992) which was utilized in the defendant's argument, and *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 (1988). See *Alcaraz*, 14 Cal. 4th at 1179, 929 P.2d at 1259, 60 Cal. Rptr. 2d at 467. (Kennard, J., dissenting).

55. See *id.* at 1179-83, 929 P.2d at 1259-62, 60 Cal. Rptr. 2d at 467-70 (Kennard, J., dissenting).

56. See *id.* at 1179-81, 929 P.2d at 1259-60, 60 Cal. Rptr. 2d at 467-68 (Kennard, J., dissenting).

57. See *id.* (Kennard, J., dissenting).

58. See *id.* (Kennard, J., dissenting).

59. See *id.* at 1181-82, 929 P.2d at 1260-61, 60 Cal. Rptr. 2d at 468-69 (Kennard, J., dissenting).

60. See *id.* at 1181, 929 P.2d at 1260, 60 Cal. Rptr. 2d at 468 (Kennard, J., dissenting).

61. See *id.* at 1181, 929 P.2d at 1260, 60 Cal. Rptr. 2d at 468-69 (Kennard, J., dissenting).

62. See *id.* (Kennard, J., dissenting); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* § 96 (9th ed. 1987 & Supp. 1997) (describing acts of adverse possession as those "which proclaim to the world, and bring notice to the owner, that a right is



Additionally, Justice Kennard remarked on the majority opinion's failure to acknowledge the test for liability established in *Rowland v. Christian*.<sup>63</sup> *Rowland* evaluated liability in light of five factors: (1) whether the injured party and the defendant had a close affiliation; (2) whether the defendant's behavior warranted any moral condemnation; (3) whether imposing liability would promote the public policy of avoiding future injuries; (4) the degree to which imposing liability on the defendant would have negative consequences to both the defendant and the larger community; and (5) whether the defendant had access to insurance.<sup>64</sup> Evaluating the present facts in view of these factors, Justice Kennard deduced that there was no connection between the injury and the defendant's conduct, no moral blame was borne by the defendant, the imposition of liability on the landowner would only serve to discourage citizens from engaging in socially beneficial activity on adjacent property, and that non-owners of property will not usually have an insurable interest in the land possessing the hazard.<sup>65</sup>

The last component of Justice Kennard's dissent focused on the fact that the majority failed to clearly define what constitutes an exercise of control over adjacent property, leaving the jury to determine on a case-by-case basis when an owner has exercised sufficient control.<sup>66</sup> Justice Kennard noted that, despite the majority's contention that an occasional mowing of a yard owned by another will generally not give rise to a duty to warn or protect, the Chief Justice never settled the issue because he never specifically answered whether the occasional mowing performed by the instant defendant constituted the "minimal, neighborly maintenance of property owned by another that will not give rise to a duty."<sup>67</sup> Without such a specific ruling, Justice Kennard opined that a jury might decide that such acts do amount to an exercise of control.<sup>68</sup>

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claimed in the land over which the claimant is seeking to exercise dominion").

63. See *Alcaraz*, 14 Cal. 4th at 1182-83, 929 P.2d at 1261, 60 Cal. Rptr. 2d at 469 (Kennard, J., dissenting); see also 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 944 (9th ed. 1988 & Supp. 1996) (discussing *Rowland* and *Uccello*).

64. See *Alcaraz*, 14 Cal. 4th at 1182-83, 929 P.2d at 1261, 60 Cal. Rptr. 2d at 469 (Kennard, J., dissenting) (citing *Rowland*, 69 Cal. 2d 106, 117, 70 Cal. Rptr. 97, 103, 443 P.2d 561, 567 (1968)).

65. See *id.* at 1183, 929 P.2d at 1261-62, 60 Cal. Rptr. 2d at 469-70 (Kennard, J., dissenting).

66. See *id.* at 1183-86, 929 P.2d at 1262-64, 60 Cal. Rptr. 2d at 470-72 (Kennard, J., dissenting).

67. *Id.* at 1184, 929 P.2d at 1262-63, 60 Cal. Rptr. 2d at 470-71 (Kennard, J., dissenting) (quoting *Alcaraz*, 14 Cal. 4th at 1167, 929 P.2d at 1250, 60 Cal. Rptr. 2d at 459).

68. See *id.* at 1184, 929 P.2d at 1263, 60 Cal. Rptr. 2d at 471 (Kennard, J., dissenting).

Justice Kennard further explained that a jury is not the appropriate body to decide when certain acts result in a duty of care.<sup>69</sup> She reiterated that juries decide issues when the facts are in dispute, not issues of when certain sets of facts produce a legal duty.<sup>70</sup> In the present case, Justice Kennard concluded that there were no actual issues for the jury to decide because the parties did not dispute that the defendant mowed the grass around the meter box at times and fenced the property after the accident.<sup>71</sup>

Finally, Justice Kennard attacked the relevance of evidence relied upon by the majority concerning the construction of a fence around the meter box.<sup>72</sup> Justice Kennard reasoned that the evidence offered no indication that the defendant had exercised control over the property prior to the injury-causing event "as the action took place *after* the accident."<sup>73</sup> She further recognized that such a ruling will be a disincentive for landowners to take remedial steps to save others after injuries occur on neighboring land.<sup>74</sup>

#### D. Justice Baxter's Dissenting Opinion

Agreeing with Justice Kennard that the majority holding is "bad public policy,"<sup>75</sup> Justice Baxter dissented to specifically enumerate the principles precluding the defendant's liability.<sup>76</sup> Justice Baxter explained that no case law cited by the majority or the other dissents establishes that a nonowner should be liable if he: (1) has neither created the harm nor made it worse; (2) has no legal claims of management or control over the land or peril; (3) has not acted in a manner suggesting such control; (4) has not gained any visible advantage; and (5) has no power to remove the hazard.<sup>77</sup> According to Justice Baxter, comparison of these

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69. *See id.* at 1183-84, 929 P.2d at 1262, 60 Cal. Rptr. 2d at 470 (Kennard, J., dissenting).

70. *Id.* at 1184, 929 P.2d at 1262, 60 Cal. Rptr. 2d at 470 (Kennard, J., dissenting).

71. *Id.*

72. *Id.* at 1184-85, 929 P.2d at 1263, 60 Cal. Rptr. 2d at 471 (Kennard, J., dissenting).

73. *Id.*

74. *See id.*

75. *See id.* at 1188, 929 P.2d at 1265, 60 Cal. Rptr. 2d at 473 (Baxter, J., dissenting).

76. *See id.* at 1186, 929 P.2d at 1264, 60 Cal. Rptr. 2d at 472 (Baxter, J., dissenting).

77. *See id.* at 1187, 929 P.2d at 1264-65, 60 Cal. Rptr. 2d at 472-73 (Baxter, J., dissenting).

factors to the facts of the case revealed no reason to deny the defendant summary judgment.<sup>78</sup>

### *E. Justice Brown's Dissenting Opinion*

In a final dissenting voice, Justice Brown chastised the majority for expanding tort liability beyond the bounds of precedent and good judgment.<sup>79</sup> He argued that liability for off-premises harm has been and should be restrained by evidence of substantial control, the nonowners receipt of a clear advantage from use of the land that caused the injury, or a combination of both.<sup>80</sup> Justice Brown predicted that the majority opinion's dissolution of the bond linking commercial benefit with a corresponding legal duty will effectively eradicate precedent and present the possibility that "the majority is impliedly adopting a new rule."<sup>81</sup>

### III. IMPACT

As the dissent remarked, the effect of *Alcaraz* creates uncertainty.<sup>82</sup> It is only certain that a defendant is not guaranteed summary judgment when he takes steps toward maintaining neighboring property which contains a harm ultimately causing injury.<sup>83</sup> The extent of maintenance which amounts to control and the subsequent duty to warn or protect others remains unresolved by the ruling that the question of control is a triable issue of fact left to a jury to decide.<sup>84</sup> Thus, future interpretations

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78. See *id.* at 1187-88, 929 P.2d at 1265, 60 Cal. Rptr. 2d at 473 (Baxter, J., dissenting).

79. See *id.* at 1190, 929 P.2d at 1266, 60 Cal. Rptr. 2d at 474 (Brown, J., dissenting).

80. See *id.* at 1190, 929 P.2d at 1267, 60 Cal. Rptr. 2d at 474-75 (Brown, J., dissenting). His own analysis of the federal appellate court cases, *Swann*, 22 Cal. app. 4th 1324, and *Princess Hotels*, 33 Cal. App. 4th 645 informs this opinion. See *Alcaraz*, 14 Cal. 4th at 1191-93, 929 P.2d at 1267-68, 60 Cal. Rptr. 2d at 475-76 (Brown, J., dissenting). Justice Brown also based his conclusion on the court's own precedent, finding a requirement of at least one or a combination of these factors in: *Southland Corp. v. Superior Court*, 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 (1988), *Johnston v. De La Guerra Properties, Inc.*, 28 Cal. 2d 394, 170 P.2d 5 (1946), *Schwartz v. Helms Bakery Limited*, 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967), and *Ross v. Kirby*, 251 Cal. App. 2d 267, 59 Cal. Rptr. 601 (1967). *Id.* at 1193-97, 929 P.2d at 1269-72, 60 Cal. Rptr. 2d at 476-79 (Brown, J., dissenting).

81. See *id.* at 1197, 929 P.2d at 1272, 60 Cal. Rptr. 2d at 479 (Brown, J., dissenting).

82. See *id.* at 1186, 929 P.2d at 1264, 60 Cal. Rptr. 2d at 472 (Kennard, J., dissenting).

83. See *id.* at 1170-71, 929 P.2d at 1253, 60 Cal. Rptr. 2d at 461.

84. See *id.*

of *Alcaraz* will determine the consequences of precluding summary judgment when a landowner is held accountable for injuries occurring off his land.

By allowing a plaintiff to survive this initial step, *Alcaraz* expanded the range of claims that may be brought under a premise liability theory.<sup>85</sup> Justice Kennard's dissenting opinion forewarned that any "innocuous or good-neighborly acts on the land of another . . . can now make him or her liable to anyone coming on that land, even though there is no causal connection between the acts and the subsequent injury."<sup>86</sup> Justice Brown echoed this predicted negative effect of *Alcaraz* with incantation of the proverb that "no good deed goes unpunished."<sup>87</sup>

#### IV. CONCLUSION

In *Alcaraz v. Vece*, the California Supreme Court held that a landowner who occasionally mowed a strip of lawn adjacent to his property and who erected a fence around the lawn containing the hazard of an uncovered meter box was not entitled to summary judgment simply because he did not own the land harboring the source of injury. Instead, the court concluded that the question of whether those acts amounted to an exercise of control over the property giving rise to a duty to warn and protect was a decision for a jury.<sup>88</sup>

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85. Other states have also broadened the scope of their premise liability laws. See Jacqueline L. Hourigan, *Where Hazardous Condition is of an Open and Obvious Nature, Premises Owner Retains Duty to Warn of Unreasonable Risk*, 73 U. DET. MERCY L. REV. 613 (1996) (summarizing the Michigan Supreme Court's ruling to impose liability on landowners who fail to warn invitees of an "open and obvious" danger); see also Eric Carlson, Note, *Premises Liability: The Exception that Swallowed the Rule*, 19 S. ILL. U. L.J. 217 (1994) (discussing an Illinois Supreme Court case requiring landowners to exercise reasonable care to warn or protect a trespasser from a man-made danger when the trespasser's presence can reasonably be expected). See generally Michael Sears, Comment, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U. KAN L. REV. 175 (1995).

86. *Alcaraz*, 14 Cal. 4th at 1186, 929 P.2d at 1264, 60 Cal. Rptr. 2d at 472 (Kennard, J., dissenting).

87. See *id.* at 1198, 929 P.2d at 1272, 60 Cal. Rptr. 2d at 480 (Brown, J., dissenting).

88. See *id.* at 1170-71, 929 P.2d at 1253, 60 Cal. Rptr. 2d at 461-62.

## XIV. PRODUCTS LIABILITY

*There is a cause of action for strict liability based on failure to warn when the manufacturer of a prescription drug fails to warn of risks that are known or reasonably scientifically knowable: Carlin v. Superior Court (Upjohn Co.).*

### I. INTRODUCTION

In *Carlin v. Superior Court (Upjohn Co.)*,<sup>1</sup> the California Supreme Court considered whether knowledge of risks was a necessary element to state a cause of action against prescription drug manufacturers for strict liability based on failure to warn.<sup>2</sup> The superior court granted the defendant's demurrer holding that there was no cause of action in strict liability for failure to warn in a suit brought against a prescription drug manufacturer.<sup>3</sup> The court of appeal issued a writ of mandate instructing the lower court to vacate its order.<sup>4</sup> Affirming the decision of the court of appeal, the California Supreme Court held that the plaintiff could state a cause of action for strict liability based on failure to warn when the

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1. 13 Cal. 4th 1104, 920 P.2d 1347, 56 Cal. Rptr. 2d 162 (1996). Acting Chief Justice Mosk wrote the majority opinion, in which Justices Werdegar, Spencer, and Vogel concurred. *See id.* at 1108-18, 920 P.2d at 1348-55, 56 Cal. Rptr. 2d at 163-70. Justice Kennard wrote a separate concurring and dissenting opinion. *See id.* at 1118-35, 920 P.2d at 1355-66, 56 Cal. Rptr. 2d at 170-82 (Kennard, J., concurring and dissenting). Justice Turner also wrote a separate concurring and dissenting opinion. *See id.* at 1135-46, 920 P.2d at 1366-74, 56 Cal. Rptr. 2d at 182-89 (Turner, J., concurring and dissenting). Justice Baxter wrote a dissenting opinion. *See id.* at 1146-63, 920 P.2d at 1374-86, 56 Cal. Rptr. 2d at 189-201 (Baxter, J., dissenting).

Justices Spencer, Vogel, and Turner are not members of the California Supreme Court; they are the Presiding Justices of Divisions One, Four, and Five, respectively, for the California Court of Appeal, Second Appellate District. *See id.* at 1105, 920 P.2d at 1355, 1366, 56 Cal. Rptr. 2d at 170, 182. Acting Chief Justice Mosk assigned Justices Spencer, Vogel, and Turner to sit on this case pursuant to article VI, section 6, of the California Constitution. *See id.*; CAL. CONST. art. VI, § 6.

2. *See Carlin*, 13 Cal. 4th at 1108-18, 920 P.2d 1348-55, 56 Cal. Rptr. 2d 163-70. The plaintiff, Peggy Carlin, attempted to sue Upjohn, a drug manufacturer, for injuries she allegedly received from ingesting the prescription drug Halcion. *See id.* at 1109, 920 P.2d at 1349, 56 Cal. Rptr. 2d at 164. The plaintiff claimed that Upjohn knew that the drug could and did cause severe physical, mental, and emotional injuries in some individuals. *See id.* She further claimed that Upjohn was strictly liable for its failure to warn of such "dangerous propensities of Halcion." *See id.*

3. *See id.* at 1109-10, 920 P.2d at 1349, 56 Cal. Rptr. 2d at 164.

4. *See id.* at 1110, 920 P.2d at 1349, 56 Cal. Rptr. 2d at 164.

prescription drug manufacturer fails to warn of risks that are known or reasonably scientifically knowable.<sup>5</sup>

## II. TREATMENT

### A. Majority Opinion

The court found there is a strict liability cause of action against prescription drug manufacturers for failure to warn about drugs with known or reasonably scientifically knowable dangerous propensities.<sup>6</sup> The majority opinion considered whether knowledge of the risks by the drug manufacturer is necessary to bring a claim of strict liability for failure to warn.<sup>7</sup> Acting Chief Justice Mosk found primary support for the proposition that a drug manufacturer must know of the risks in two of the court's previous decisions.<sup>8</sup> The majority first relied on *Anderson v. Owens-Corning Fiberglas Corp.*<sup>9</sup> Justice Mosk noted that in *Anderson*

5. See *id.* at 1110, 920 P.2d at 1349, 56 Cal. Rptr. 2d at 164. For a general discussion on failure to warn, see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1265 (9th ed. 1988 & Supp. 1996). See also 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1268 (9th ed. 1988 & Supp. 1996) (discussing drug manufacturers specifically); 50 CAL. JUR. 3D *Products Liability* § 62 (1993 & Supp. 1996).

6. See *Carlín*, 13 Cal. 4th at 1108, 920 P.2d at 1348, 56 Cal. Rptr. 2d at 163. The California Supreme Court first established the notion of strict liability in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). For a discussion of the *Greenman* case, see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1242 (9th ed. 1988 & Supp. 1996).

7. See *Carlín*, 13 Cal. 4th at 1108-18, 920 P.2d at 1348-55, 56 Cal. Rptr. 2d at 163-70. For a discussion on what is necessary to establish a manufacturer as a defendant, see 51 A.L.R. 3d 1344 (1996). See also 50 CAL. JUR. 3D *Products Liability* § 63 (discussing a drug manufacturer's duty to warn); 6 A.L.R. 3d 91 (1996) (discussing a manufacturer's duty to test or inspect and its relation to his liability).

8. See *Carlín*, 13 Cal. 4th at 1108-18, 920 P.2d at 1348-55, 56 Cal. Rptr. 2d at 163-70. For a look into the difficulties the Pennsylvania Supreme Court is having with this issue and a discussion of its controversial strict liability decision, see Sally Apter, *Strict Liability—Pharmacist Liability in Dispensing Prescription Drugs—Drugs and Narcotics*, 30 DUQ. L. REV. 181 (1991).

9. 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991). The issue presented in *Anderson* was whether a manufacturer of asbestos could be held strictly liable for failure to warn. See *id.* at 1000, 810 P.2d at 557, 281 Cal. Rptr. 536. The *Carlín* court defended its use of *Anderson*, which does not involve a drug manufacturer, by noting that the *Anderson* court's reasoning was based on cases that involved drug manufacturers. See *Carlín*, 13 Cal. 4th at 1111, 920 P.2d at 1350, 56 Cal. Rptr. 2d at 165. In *Anderson*, the court noted that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for

the California Supreme Court had already expressly held that knowledge is a component of a strict liability cause of action for failure to warn.<sup>10</sup> The majority also relied on *Brown v. Superior Court*,<sup>11</sup> in which the court reasoned that if a manufacturer's liability was not limited to risks that are known, or knowable, a manufacturer would be "discouraged from developing new and improved products for fear that later significant advances in scientific knowledge would increase its liability."<sup>12</sup> Combining notions from both *Anderson* and *Brown*, the majority recognized that the manufacturer is not held to a standard of actual knowledge, but rather the manufacturer is "held to the knowledge and skill of an expert in the field."<sup>13</sup>

Justice Mosk then acknowledged that by making knowledge a requirement, the line between strict liability and traditional negligence becomes more nebulous.<sup>14</sup> The majority rejected, however, the notion that the incorporation of a knowledge standard in strict liability actions implies the use of a simple negligence test.<sup>15</sup>

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defects, proves to have a defect that causes injury to a human being." *Anderson*, 53 Cal. 3d at 994, 810 P.2d at 552, 281 Cal. Rptr. at 531 (quoting *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700). The *Anderson* court also noted that strict liability was never intended to be absolute liability. *See id.* For a discussion on the California Supreme Court's decision in *Anderson*, see Dana K. Astrachan, *Anderson v. Owens-Corning Fiberglass [sic] Corp.: Asbestos Manufacturers and Strict Liability: Just How Strict Is It?*, 23 PAC. L.J. 1807 (1992).

10. *See Carlin*, 13 Cal. 4th at 1110, 920 P.2d at 1350, 56 Cal. Rptr. 2d at 165; *Anderson*, 53 Cal. 3d at 990, 810 P.2d at 550, 281 Cal. Rptr. at 529. *See also* Michael A. Pittenger, *Reformulating the Strict Liability Failure to Warn*, 49 WASH. & LEE L. REV. 1509 (1992) (discussing the problems surrounding strict liability failure to warn laws); Kevin J. Dunne, *Drafting Warnings for Medical Products: Practical Considerations for Minimizing Litigation*, 10 No. 8 HEALTHSPAN 11 (1993) (discussing steps that manufacturers should take to avoid suits).

11. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

12. *See Carlin*, 13 Cal. 4th at 1111, 920 P.2d at 1350, 56 Cal. Rptr. 2d at 165 (quoting *Anderson*, 53 Cal. 3d at 999, 810 P.2d at 549, 281 Cal. Rptr. at 528). For a discussion on products liability citing specific health-related items, see 63 AM. JUR. 2D, *Products Liability*, §§ 718-732 (1984 & Supp. 1993).

13. *See Carlin*, 13 Cal. 4th at 1113 n.3, 920 P.2d at 1351 n.3, 56 Cal. Rptr. 2d at 166 n.3.

14. *See id.* at 1111, 920 P.2d at 1350, 56 Cal. Rptr. 2d at 165-66. For a comparison on the principles of negligence and strict liability, see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1244 (9th ed. 1988 & Supp. 1996).

15. *See Carlin*, 13 Cal. 4th at 1112, 920 P.2d at 1351, 56 Cal. Rptr. 2d at 166. Justice Mosk explained that the actual standard for strict liability for failure to warn is a fusion of traditional strict liability and traditional negligence principles. *See id.* at 1112, 920 P.2d at 1350-51, 56 Cal. Rptr. 2d at 166. Justice Mosk focused on a key difference between the current negligence standard and a strict liability standard in failure-to-warn cases. *See id.* at 1112, 920 P.2d at 1351, 56 Cal. Rptr. 2d at 166. Negligence imposes a reasonableness standard on manufacturers, while a strict liability standard considers

Justice Mosk concluded by dismissing Upjohn's contention that regulations by the Food and Drug Administration (FDA) preempt state law.<sup>16</sup>

### B. Justice Kennard's Concurring and Dissenting Opinion

Justice Kennard both concurred and dissented from the majority opinion.<sup>17</sup> Although Justice Kennard agreed with the majority's finding that knowledge should be a requirement of strict liability for failure to warn, she would hold that this knowledge does not by itself impose liability and that the manufacturer should be able to raise as a defense that it acted reasonably in not warning the consumer.<sup>18</sup> She believed that this "intermediate approach" would cure the flaws in the majority and dissenting approaches by imposing neither traditional strict liability nor traditional negligence.<sup>19</sup> Her approach would negate both the manufacturer's disincentive to produce for fear of suit and the great burden on the consumer.<sup>20</sup>

### C. Justice Turner's Concurring and Dissenting Opinion

Justice Turner began his concurring and dissenting opinion by agreeing with the majority's finding that the plaintiff did state a cause of action

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only actual or constructive knowledge, regardless of what a reasonable manufacturer would do. *See id.*

16. *See id.* at 1113-17, 920 P.2d at 1352-54, 56 Cal. Rptr. 2d at 167-70. The court noted that the regulations of the FDA are not without impact on a discussion of strict liability. *See id.* at 1114, 920 P.2d at 1352, 56 Cal. Rptr. 2d at 167. The FDA prohibits a manufacturer from placing a warning on a product when the hazard is not clear. *See id.* The court noted that a pharmaceutical manufacturer will not be held liable for failure to give a warning that the FDA has prohibited it from giving. *See id.* at 1115 n.4, 920 P.2d at 1353 n.4, 56 Cal. Rptr. 2d at 168 n.4. For a more in-depth discussion, see Vicki Lawrence MacDougall, *Products Liability Law in the Nineties: Will Federal or State Law Control?*, 49 CONSUMER FIN. L.Q. REP. 327 (1995) (discussing the evolution of products liability law); see also Tim Moore, *Comment K Immunity to Strict Liability: Should All Prescription Drugs Be Protected?*, 26 HOUS. L. REV. 707 (1989) (arguing against strict liability immunity for prescription drugs).

17. *See Cartin*, 13 Cal. 4th at 1118-35, 920 P.2d at 1355-66, 56 Cal. Rptr. 2d at 170-82 (Kennard, J., concurring and dissenting).

18. *See id.* at 1119, 920 P.2d at 1356, 56 Cal. Rptr. 2d at 171 (Kennard, J., concurring and dissenting).

19. *See id.* at 1131, 920 P.2d at 1364, 56 Cal. Rptr. 2d at 179 (Kennard, J., concurring and dissenting).

20. *See id.*



for a failure to warn of a known risk.<sup>21</sup> Justice Turner, however, diverged from the majority in his belief that failure to warn is not an action in strict liability.<sup>22</sup> Rather, Justice Turner contended that failure to warn cases create a heightened liability which does not reach the level of strict liability but is above the simple negligence standard.<sup>23</sup>

#### *D. Justice Baxter's Dissenting Opinion*

In a lengthy dissent, Justice Baxter argued that the court in *Brown* suggested that liability for failure to warn was governed by comment k to section 402A of the Restatement Second of Torts.<sup>24</sup> Justice Baxter further noted that if drug manufacturers are held to the elevated standard of strict liability, they will surely be impaired in their pursuit to find new drugs and cures.<sup>25</sup> Justice Baxter concluded by stating that the appropriate standard is one of negligence.<sup>26</sup>

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21. See *id.* at 1135, 920 P.2d at 1367, 56 Cal. Rptr. 2d at 182 (Turner, J., concurring and dissenting).

22. See *id.* at 1136, 920 P.2d at 1367, 56 Cal. Rptr. 2d at 182 (Turner, J., concurring and dissenting).

23. See *id.* For a thorough discussion on an intermediate standard for failure to warn, see Richard L. Cupp, Jr., *Rethinking Conscious Design Liability for Prescription Drugs: The Restatement (Third) Standard Versus a Negligence Approach*, 63 GEO. WASH. L. REV. 76 (1994) (analyzing the new restatement's proposed approach to prescription drugs).

24. See *Cartin*, 13 Cal. 4th at 1154, 920 P.2d at 1379, 56 Cal. Rptr. 2d at 194-95 (Baxter, J., dissenting). Comment k has been adopted in a majority of jurisdictions. See *id.* at 1151, 920 P.2d at 1377, 56 Cal. Rptr. 2d at 192-93 (Baxter, J., dissenting). The California Supreme Court had previously noted that the standard set by comment k was a negligence standard. See *Brown v. Superior Court*, 44 Cal. 3d 1049, 1059 n.4, 751 P.2d 470, 476 n.4, 245 Cal. Rptr. 412, 417 n.4 (1988).

Comment k to section 402A of the Restatement (Second) of Torts provides:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

25. See *Cartin*, 13 Cal. 4th at 1162, 920 P.2d at 1385, 56 Cal. Rptr. at 200 (Baxter, J., dissenting).

26. See *id.* at 1162-63, 920 P.2d at 1385, 56 Cal. Rptr. 2d at 200-01 (Baxter, J., dis-

### III. IMPACT

The majority opinion did not state that this ruling was a change in the law.<sup>27</sup> In fact, the majority implied that *Carlin* simply reiterated the law.<sup>28</sup> However, if the law always provided a cause of action in strict liability based on failure to warn by a drug manufacturer, then many of the lower courts did not recognize it.<sup>29</sup>

Whatever label the California Supreme Court decides to use, this decision does not create a cause of action based on traditional strict liability. Instead of creating a new intermediate standard, as proposed by the concurring and dissenting opinions, the court created a new "strict liability" standard that applies only to drug manufacturers which relaxes the traditional strict liability rules while still requiring more than traditional negligence.<sup>30</sup>

### IV. CONCLUSION

The California Supreme Court held that there is a cause of action based on strict liability for a drug manufacturer's failure to warn of risks that are known or reasonably scientifically knowable.

KELLY C. QUINN

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sending).

27. See *id.* at 1104-18, 920 P.2d at 1347-55, 56 Cal. Rptr. 2d at 162-70.

28. See *id.*

29. See *Brown*, 44 Cal. 3d at 1069, 751 P.2d at 470, 245 Cal. Rptr. at 412 (noting that the standard for design and warning defects for drug manufacturers is negligence); see also *Hufft v. Horowitz*, 4 Cal. App. 4th 8, 5 Cal. Rptr. 2d 377 (1992) (holding that *Brown* sets a negligence standard for drug manufacturers); *Kearl v. Lederle Lab.*, 172 Cal. App. 3d 812, 218 Cal. Rptr. 453 (1985) (holding that drugs are subject to negligence liability for warning defects).

30. See *Carlin*, 13 Cal. 4th at 1118-35, 920 P.2d at 1355-66, 56 Cal. Rptr. 2d at 170-82 (Kennard, J., concurring and dissenting); see also *id.* at 1135-46, 920 P.2d at 1366-74, 56 Cal. Rptr. 2d at 182-89 (Turner, J., concurring and dissenting).

## XV. SCHOOLS

*Education Code section 44919(b), governing the hiring of athletic coaches, requires school districts to give an advantage to their credentialed teachers currently employed in the district by considering their applications before others. If the district determines that its credentialed teachers fail to meet the district's qualification standards, it is free to consider other applicants: California Teachers Ass'n v. Governing Board of Rialto Unified School District.*

### I. INTRODUCTION

In *California Teachers Ass'n v. Governing Board of Rialto Unified School District*,<sup>1</sup> the California Supreme Court addressed whether the Legislature enacted Education Code section 44919(b) to create an employment preference for teachers currently employed in a particular school district by providing that athletic coaching assignments "first be made available" to a school district's teachers.<sup>2</sup> The California Supreme

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1. 14 Cal. 4th 627, 927 P.2d 1175, 59 Cal. Rptr. 2d 671 (1997). Justice Werdegar wrote the majority opinion, in which Chief Justice George and Justices Mosk and Kennard concurred. *See id.* at 630-53, 927 P.2d at 1175-90, 59 Cal. Rptr. 2d at 671-86. Justice Chin filed a dissenting opinion, in which Justices Baxter and Brown joined. *See id.* at 653-67, 927 P.2d at 1190-1200, 59 Cal. Rptr. 2d at 686-96 (Chin, J., dissenting).

2. *See id.* at 630, 927 P.2d at 1176, 59 Cal. Rptr. 2d at 672 (quoting CAL. EDUC. CODE § 44919(b) (West 1993)). Rialto Unified School District (District) opened Rialto High School in September 1992, and distributed flyers to encourage applications for a boys varsity basketball coach at the high school. *See id.* at 631, 927 P.2d at 1176, 59 Cal. Rptr. 2d at 672. Gary Stanley, an appellant in this case, was a credentialed teacher employed at the District's junior high school when he applied for the position of varsity basketball coach, varsity assistant coach, and freshman assistant coach. *See id.* The District hired Martin Sipe, a credentialed teacher currently employed in the District at Eisenhower High School, as the new boys varsity basketball coach. *See id.* The District then hired a noncredentialed employee to be the new assistant varsity coach. *See id.* Gary Stanley was not interviewed for these positions. *See id.* The District interviewed Stanley and two additional applicants for the position of freshman assistant coach, and eventually hired a noncredentialed teacher to fill that position. *See id.* Stanley, the California Teachers Association and the Rialto Education Association filed a petition in superior court, seeking the District's compliance with Education Code section 44919(b). *See id.* The trial court rejected the petition, finding that section 44919(b) did not create a hiring preference for credentialed teachers employed in a given school district. *See id.* The court of appeal reversed, holding that the statute gave credentialed employees a "right of first refusal" when applying for athletic coaching positions. *See id.*

Court interpreted section 44919(b) by giving effect to the plain meaning of the language and the Legislature's probable intent, and held that school districts are required to give an employment preference to credentialed employees by considering their applications before those of noncredentialed employees or nonemployees.<sup>3</sup> The court also held that if school districts determine that credentialed employees do not meet the qualification standards set forth by the districts, they are free to consider outside applicants.<sup>4</sup>

## II. TREATMENT

### A. Majority Opinion

Justice Werdegar's majority opinion focused on the language of Education Code section 44919(b), which provides in relevant part:

Governing boards shall classify as temporary employees persons, other than substitute employees, who are employed to serve in a limited assignment supervising athletic activities of pupils; *provided, such assignment shall first be made available to teachers presently employed by the district.*<sup>5</sup>

The court was required to interpret this statute according to the plain meaning of its words to give effect to the probable legislative intent.<sup>6</sup>

The Governing Board of Rialto School District (the "District") argued that the phrase "made available" simply required school districts to "make the application and interview process available" to its currently employed, certified teachers.<sup>7</sup> The court rejected the District's argument on three grounds.<sup>8</sup> First, the court stated that such an interpretation would be inconsistent with the plain meaning of the statute because the application and interview process was not mentioned.<sup>9</sup> Second, the court

3. See *id.* at 652, 927 P.2d at 1190, 59 Cal. Rptr. 2d at 686.

4. See *id.*

5. *Id.* at 632, 927 P.2d at 1176, 59 Cal. Rptr. 2d at 672 (quoting CAL. EDUC. CODE § 44919(b) (West 1993) (emphasis added)).

6. See *id.* at 632, 927 P.2d at 1177, 59 Cal. Rptr. 2d at 673. See also 58 CAL. JUR. 3D *Statutes* § 83 (1980 & Supp. 1997) (discussing the importance of determining legislative intent when interpreting a statute).

7. *Rialto*, 14 Cal. 4th at 633, 927 P.2d at 1177, 59 Cal. Rptr. 2d at 673.

8. See *id.* at 633-34, 927 P.2d at 1177-78, 59 Cal. Rptr. 2d at 673-74.

9. See *id.* at 633, 927 P.2d at 1177-78, 59 Cal. Rptr. 2d at 673-74. See generally 58 CAL. JUR. 3D *Statutes* § 102 (1980 & Supp. 1997) (discussing the theory that a court cannot find legislative intent if such an intention is inconsistent with the words of a statute).

asserted that, under the District's interpretation, the statute would be superfluous because it would not have any effect on the employment process.<sup>10</sup> Third, the court noted that the suggested interpretation would not give effect to the term "first"—language which the court argued was a clear indication of the Legislature's intent to give an advantage to the District's credentialed employees.<sup>11</sup>

The appellant in the instant case argued that the statute required school districts to give credentialed employees a right of first refusal for athletic coaching positions—an argument upheld by the court of appeal.<sup>12</sup> The supreme court rejected this interpretation as too rigid, because it failed to consider a school district's ability to create standards regarding the qualifications and skills offered by various applicants.<sup>13</sup>

After determining that Education Code section 44919(b) created an employment preference for credentialed employees seeking athletic coaching assignments, the court then addressed the degree to which this advantage should be applied by examining a public policy decision articulated by the Legislature in related statutes.<sup>14</sup> After reviewing some legislative history regarding statutes governing the hiring of athletic coaches,<sup>15</sup> the court determined that the Legislature delegated broad discre-

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10. See *Rialto*, 14 Cal. 4th at 633-34, 927 P.2d at 1178, 59 Cal. Rptr. 2d at 674.

11. See *id.* at 634, 927 P.2d at 1178, 59 Cal. Rptr. 2d at 674. The dissent suggested that the term "first" meant that school districts must first give notice to its credentialed employees before other applicants could be hired. See *id.* at 688, 59 Cal. Rptr. 2d at 688 (Chin, J., dissenting). However, the court rejected this interpretation because it would not provide an advantage to credentialed employees and would render the statute ineffective. See *id.* at 634-35, 927 P.2d at 1178, 59 Cal. Rptr. 2d at 674. See generally Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) (discussing the Court's "strict adherence" to the legislature's chosen words when interpreting statutes).

12. See *Rialto*, 14 Cal. 4th at 635-36, 927 P.2d at 1179, 59 Cal. Rptr. 2d at 675.

13. See *id.*

14. See *id.* at 636, 927 P.2d at 1179, 59 Cal. Rptr. 2d at 675.

15. See *id.* at 636-37, 927 P.2d at 1179-80, 59 Cal. Rptr. 2d at 675-76. The court recognized that, before 1981, the Legislature had given the State Department of Education primary control over athletic activities in public schools. See *id.* In 1981, the Legislature began delegating control over athletic activities to the individual school districts. See *id.* at 636, 927 P.2d at 1179, 59 Cal. Rptr. 2d at 675. The state Board of Education established statewide regulations enabling it to set minimum qualification standards for athletic coaches, while acknowledging that individual school districts would be permitted to set their own regulations according to local standards. See *id.* at 637-38, 927 P.2d at 1180-81, 59 Cal. Rptr. 2d at 676-77. In addition, the state Board of Education permitted each district to evaluate the competency of temporary athletic coaches in four general areas: "(1) Care and prevention of athletic injuries, basic first aid and emergency procedures; (2) Coaching techniques; (3) Rules and regulations in the athletic activity being coached; and (4) Child or adolescent psychology." *Id.* at 637 n.5, 927 P.2d at 1180 n.5, 59 Cal. Rptr. 2d at 676 n.5.

tion to individual school districts by allowing them to establish qualifications for athletic coaches and to assess the competency of coaching applicants in accordance with established qualifications.<sup>16</sup> With this public policy in mind, the court held that school districts were required to consider applications of qualified credentialed employees in the district before considering other applicants, and then make a hiring decision in accordance with the individual school district's qualification standards.<sup>17</sup>

In contrast, the District argued that the Legislature used clear and unambiguous language in other sections of the Education Code when they intended to establish an employment preference, and thus, the Legislature's failure to use clear language indicated that it did not intend to give credentialed employees such an advantage.<sup>18</sup> The court rejected this argument, however, stating that the Legislature did not duplicate any "term of art" when creating employment preferences in other sections of the Education Code, and their failure to use unambiguous language similar to other statutes did not refute such an intention.<sup>19</sup>

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16. *See id.* at 640, 927 P.2d at 1182, 59 Cal. Rptr. 2d at 678.

17. *See id.* at 641, 927 P.2d at 1182, 59 Cal. Rptr. 2d at 678. With this public policy in mind, the court rejected two additional arguments made by the District. *See id.* First, the District argued that the court's interpretation would force school districts to hire unqualified athletic coaches on the basis of their position as a credentialed employee. *See id.* at 643, 927 P.2d at 1184, 59 Cal. Rptr. 2d at 680. The court rejected this argument, stating that the school district was allowed to establish its own qualification standards, and therefore, it would not be forced to hire unqualified applicants. *See id.* at 643-44, 927 P.2d at 1184, 59 Cal. Rptr. 2d at 680. Second, the District argued that such an interpretation would require them to violate the "Right to Safe Schools" provision found in the California Constitution, art. I, section 28, subdivision (c), by requiring them to hire unqualified coaches and resulting in an unsafe school environment. *See id.* at 644-45, 927 P.2d at 1185, 59 Cal. Rptr. 2d at 681. The court rejected this argument on the same grounds. *See id.* at 645, 927 P.2d at 1185, 59 Cal. Rptr. 2d at 681. *See also* Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7 (1996) (discussing the liability of athletic coaches when students are injured playing sports); J. Barton Goplerud, Note, *Liability of Schools and Coaches: The Current Status of Sovereign Immunity and Assumption of the Risk*, 39 DRAKE L. REV. 759 (1989-1990) (discussing the liability of schools and athletic coaches when students are injured while involved in school-related athletic activities).

18. *See Rialto*, 14 Cal. 4th at 641-42, 927 P.2d at 1182-83, 59 Cal. Rptr. 2d at 678-79.

19. *See id.* at 642-43, 927 P.2d at 1183-84, 59 Cal. Rptr. 2d at 679-80. *See also infra* text accompanying note 26 (discussing the claim that a lack of legislative intent is evidenced by the use of ambiguous language).

The District next suggested that public policy mandated that school districts be free to “hire the most qualified coach available.”<sup>20</sup> However, neither the court nor the District were able to find any clear legislative policy to support this contention, and the court stated that the resulting unsupported argument was inadequate to outweigh the Legislature’s expressed employment preference for credentialed employees.<sup>21</sup>

Establishing that Education Code section 44919(b) requires school districts to give an advantage to qualified credentialed employees in a given school district, the court vacated the judgment of the court of appeal and remanded the case to the trial court to determine whether the appellant’s application was rejected on the basis of his qualifications.<sup>22</sup>

### *B. Justice Chin’s Dissenting Opinion*

Justice Chin disagreed with the majority’s “tortured interpretation” of Education Code section 44919(b).<sup>23</sup> In his dissent, Justice Chin argued that Education Code section 44919(b) meant that a school district may not hire an outside applicant until it has given credentialed employees notice of vacant coaching positions.<sup>24</sup> To support this interpretation, Justice Chin referred to *Black’s Law Dictionary* for a synonym of the term “available,” and found the term “accessible,” which could reasonably be interpreted to mean “giving notice to teachers.”<sup>25</sup> In further support of this interpretation, Justice Chin stated that the Legislature used clear and unambiguous language in the past when creating an employment preference, and thus, the use of ambiguous language seemed to indicate a lack of legislative intent to create such a preference under section 44919(b).<sup>26</sup>

Justice Chin examined the legislative history of section 44919(b) to support his interpretation of the statute.<sup>27</sup> Examining Assembly Bill

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20. *Id.* at 649, 927 P.2d at 1188, 59 Cal. Rptr. 2d at 684 (quoting Amicus Curiae Brief by Templeton Unified School District). *See also infra* note 32 and accompanying text (arguing that public policy requires school districts to hire the most qualified applicants).

21. *See id.* at 650, 927 P.2d at 1188-89, 59 Cal. Rptr. 2d at 684-85.

22. *See id.* at 652-53, 927 P.2d at 1190, 59 Cal. Rptr. 2d at 686.

23. *Id.* at 653, 927 P.2d at 1191, 59 Cal. Rptr. 2d at 687 (Chin, J., dissenting).

24. *See id.* at 654, 927 P.2d at 1191, 59 Cal. Rptr. 2d at 687 (Chin, J., dissenting).

25. *Id.* at 655, 927 P.2d at 1192, 59 Cal. Rptr. 2d at 688 (Chin, J., dissenting).

26. *See id.* at 657, 927 P.2d at 1193, 59 Cal. Rptr. 2d at 689 (Chin, J., dissenting).

27. *See id.* at 659-62, 927 P.2d at 1194-196, 59 Cal. Rptr. 2d at 690-92 (Chin, J., dissenting). *See also* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 97-98 (9th ed. 1988 & Supp. 1997) (discussing subsequent expressions by the Legislature and their bearing upon the interpretation of a previously enacted statute); W.

1690, Justice Chin explained that the bill, which was created to increase the flexibility of local school districts when hiring athletic coaches, was initially ambiguous regarding a district's ability to hire tenured teachers as athletic coaches.<sup>28</sup> Thus, the Legislature amended the bill, adding the current language of section 44919(b).<sup>29</sup> Justice Chin argued that the amendment was merely intended as a "clarification" to indicate that school districts could hire both tenured teachers and outside applicants as coaches.<sup>30</sup> In addition, the *Legislative Counsel's Digest*, in the preface to Assembly Bill 1690, did not discuss the language at issue in the instant case, which, Justice Chin asserted, indicated support for his contention that the amendment served merely to clarify.<sup>31</sup>

Finally, Justice Chin argued that public policy should prevail—allowing public school districts to hire the most qualified applicants for vacant coaching positions and encouraging public schools to pursue excellence in their hiring decisions.<sup>32</sup> Therefore, the dissent would reverse the court of appeal and reinstate the trial court's decision because the school district made the coaching positions available to credentialed employees.<sup>33</sup>

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David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992) (discussing the use of legislative history in interpreting statutes).

28. See *Rialto*, 14 Cal. 4th at 660, 927 P.2d at 1195, 59 Cal. Rptr. 2d at 691 (Chin, J., dissenting).

29. See *id.* (Chin, J., dissenting).

30. See *id.* (Chin, J., dissenting).

31. See *id.* at 661, 927 P.2d at 1196, 59 Cal. Rptr. 2d at 692 (Chin, J., dissenting).

32. See *id.* at 662-63, 927 P.2d at 1196-97, 59 Cal. Rptr. 2d at 692-93 (Chin, J., dissenting). For a general discussion of the need for academic excellence in the public school system, see Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119 (1995) (noting that "[t]he United States . . . seems to encourage students to strive for academic adequacy rather than for academic excellence"). See also Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (discussing statutory interpretation which promotes the broader public good).

33. See *Rialto*, 14 Cal. 4th at 654, 927 P.2d at 1191, 59 Cal. Rptr. 3d at 687 (Chin, J., dissenting).



### III. IMPACT AND CONCLUSION

Prior to *Rialto*, school districts had broad local authority to hire athletic coaches.<sup>34</sup> The majority argued that their interpretation of section 44919(b), which gives an employment preference to teachers currently employed in a school district, remained consistent with the Legislature's intent to provide school districts with greater flexibility in hiring athletic coaches.<sup>35</sup> However, the majority's interpretation of Education Code section 44919(b) is certain to hinder the school district's ability to hire superior candidates for positions as athletic coaches in public schools, which, as the dissent argues, will harm the public school system and increase the gap between public and private school systems in their search for excellence.<sup>36</sup> Although this outcome may impede the school district's flexibility in hiring athletic coaches, the court is bound by the Legislature's language when they interpret statutes;<sup>37</sup> any unintended harm to individual school districts is more properly corrected by the legislative branch, not the judicial branch.

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34. See, e.g., *San Jose Teachers Ass'n v. Barozzi*, 230 Cal. App. 2d 1376, 281 Cal. Rptr. 724 (1991). The dissenting opinion in *Rialto* discussed this case, stating that the majority's interpretation of section 44919(b) has been overlooked for approximately two decades by the *Barozzi* court of appeal, the Legislative Counsel, and the State Board of Education. See *Rialto*, 14 Cal. 4th at 656-57, 927 P.2d at 1193, 59 Cal. Rptr. 2d at 689 (Chin, J., dissenting).

35. See *id.* at 648, 927 P.2d at 1187, 59 Cal. Rptr. 2d at 683.

36. See *id.* at 662-63, 927 P.2d at 1196-97, 59 Cal. Rptr. 2d at 692-93 (Chin, J., dissenting). See also Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883 (1993) (focusing on the need to revitalize the public school system); James S. Liebman, *Voice, Not Choice*, 101 YALE L. J. 259 (1991) (reviewing JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990)) (discussing the differences between public and private school systems, the teachers, and the levels of achievement by students).

37. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (discussing the judge's limited role in interpreting statutes in accordance with the textual approach to interpretation); Bradley C. Karkkainen, Article, "*Plain Meaning*": *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401 (1994) (arguing for the textual approach to statutory interpretation).

## XVI. TRADE REGULATION/UNFAIR COMPETITION

*A purchaser may bring a cause of action against a seller by alleging that special discounts given to other buyers injured the purchaser and had a tendency to destroy competition among purchasers; a purchaser need not show harm to competition among sellers. Furthermore, a party may seek restitution under the Unfair Practices Act without additionally seeking an injunction: ABC International Traders, Inc. v. Matsushita Electric Corp. of America.*

## I. INTRODUCTION

In *ABC International Traders, Inc. v. Matsushita Electric Corp. of America*,<sup>1</sup> the California Supreme Court considered whether section 17045 of the Business and Professions Code was limited in scope to competition between sellers of particular products or services, or included in its definition competition between buyers.<sup>2</sup> The court further considered whether section 17203 required a request for injunctive relief before a court can award restitution.<sup>3</sup> The trial court dismissed ABC Inter-

1. 14 Cal. 4th 1247, 931 P.2d 290, 61 Cal. Rptr. 2d 112 (1997). Justice Werdegar delivered the majority opinion in which Chief Justice George and Justices Kennard, Baxter, and Chin concurred. *See id.* at 1252-71, 931 P.2d at 291-304, 61 Cal. Rptr. 2d at 113-26. Justice Mosk wrote a concurring opinion. *See id.* at 1271, 931 P.2d at 304-05, 61 Cal. Rptr. 2d at 126-27 (Mosk, J., concurring). Justice Brown wrote a dissenting opinion. *See id.* at 1272-82, 931 P.2d at 305-12, 61 Cal. Rptr. 2d at 127-34 (Brown, J., dissenting).

2. *See id.* at 1252, 931 P.2d at 292, 61 Cal. Rptr. 2d at 114.

3. *See id.* ABC International Traders, Inc. (ABC) distributed electronic products, including telephones. *See id.* Like its competitors Procom Supply Corp. (Procom) and Tele-Com Office Products Corp. (Tele-Com), ABC purchased products for distribution from Matsushita Electric Corp. of America (MECA) under the name Panasonic. *See id.* at 1253, 931 P.2d at 292, 61 Cal. Rptr. 2d at 114. In 1989, ABC suspected that MECA was providing Procom and Tele-Com with 5% discounts on its products; a discount was not provided to ABC. *See id.* In 1991, MECA completely stopped selling its products to ABC. *See id.* A Procom employee informed ABC in 1992 that MECA had been providing the suspected discounts to Procom and Tele-Com, but not other purchasers, for several years. *See id.* ABC filed suit against MECA, alleging that the discounts were "unearned" and "secret." *See id.* ABC claimed damages for the withheld discounts and lost profits. *See id.* ABC asserted that the secret discounts "tended to destroy

national Traders' (ABC) action against Matsushita Electronics Corp. of America (MECA), sustaining MECA's demurrer without leave to amend.<sup>4</sup>

The court of appeal affirmed the trial court's ruling, finding on the first issue that ABC failed to state a claim against MECA by not alleging injury to MECA's competitors.<sup>5</sup> As to the second issue, the court found that ABC failed to state a cause of action when ABC requested restitution without also requesting injunctive relief, which the court found to be a prerequisite to restitution.<sup>6</sup>

The California Supreme Court reversed the court of appeal on the section 17045 claim, holding that section 17045 competition included not only competition between wholesalers, but also between retailers.<sup>7</sup> The supreme court also reversed on the section 17023 claim, holding that the issuance of an injunction is not a prerequisite to a restitution award for money lost due to unfair competition.<sup>8</sup>

## II. TREATMENT

### A. *Majority Opinion*

#### 1. Competition Under Section 17045 Includes Competition Between Retailers, as Well as Wholesalers.

##### a. *The statutory language and context provide that the intent was to include retailers.*

The court first analyzed the statutory language, as well as the context of section 17045.<sup>9</sup> The court found no language in the statute containing

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competition" because the purchasers receiving the discount were able to offer lower prices. *Id.* ABC finally stated that MECA's conduct violated unfair competition law and requested restitution of money lost and the profits gained by the defendants as a result of the unfair conduct. *See id.*

4. *See id.*

5. *See id.* at 1253-54, 931 P.2d at 292-93, 61 Cal. Rptr. 2d at 114-15.

6. *See id.* at 1254, 931 P.2d at 293, 61 Cal. Rptr. 2d at 115.

7. *See id.* at 1268, 931 P.2d at 302, 61 Cal. Rptr. 2d at 124.

8. *See id.* at 1271, 931 P.2d at 304, 61 Cal. Rptr. 2d at 126. For a discussion of the availability of injunctive relief in unfair competition actions, see 61 CAL. JUR. 3D *Unfair Competition* § 20 (1980 & Supp. 1997).

9. *See ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1254-56, 931 P.2d at 293-94, 61 Cal. Rptr. 2d at 115-16. The statute states:

The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

a restriction of the term "competition" to the "primary line of commerce," as opposed to the "secondary line of commerce."<sup>10</sup> The court reasoned that the purpose behind California's Unfair Practices Act (UPA)<sup>11</sup> was analagous to the purposes of the federal Clayton Act of 1914<sup>12</sup> and the Robinson-Patman Act of 1936.<sup>13</sup> The court noted that both federal acts focus on competition between buyers while section 17045 does not provide similar language.<sup>14</sup> The sections surrounding section 17045 do, however, evidence such an intent.<sup>15</sup> Additionally, while no explicit language exists in section 17045, the court found no reason to infer from this absence an implied restriction against such coverage by the statute.<sup>16</sup> The court found that the Legislature's focus went beyond the giving or receiving of special discounts, governing the effect such discounts would have on the recipient's competitors.<sup>17</sup>

*b. The purpose and history behind section 17045 show an intent to include retailers.*

The court next considered the purpose and history behind section 17045.<sup>18</sup> The court explained that the purposes of the UPA are to protect the public against monopolies and to prevent trade practices that would handicap "fair and honest competition."<sup>19</sup> Following another

CAL. BUS. & PROF. CODE § 17045 (West 1997); see *ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1254, 931 P.2d at 293, 61 Cal. Rptr. 2d at 115.

10. *Id.* The primary line includes those competitors on the level of the one offering the discounts; the secondary is among those receiving the discount. See *id.*

11. See CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1997).

12. 15 U.S.C. § 13(a) (1994).

13. *Id.* For a discussion of federal regulation of unfair competition, see Jeffrey H. Liebling, Comment, *Judicial Usurpation of the F.T.C.'s Authority: A Return to the Rule of Reason*, 30 J. MARSHALL L. REV. 283, 285-96 (1996). For a more detailed discussion of the requirements of the Robinson-Patman Act, see Michael M. Briley, Antitrust Symposium, *Price Discrimination Under the Robinson-Patman Act*, 27 U. TOL. L. REV. 401, 401-13 (1996).

14. See *ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1254, 931 P.2d at 293, 61 Cal. Rptr. 2d at 115; see also CAL. BUS. & PROF. CODE § 17045 (West 1997).

15. See *ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1255, 931 P.2d at 293-94, 61 Cal. Rptr. 2d at 115-16; see also CAL. BUS. & PROF. CODE §§ 17046-17048 (West 1997) (making it unlawful to solicit or participate in a violation of the UPA).

16. See *ABC Int'l Traders*, 14 Cal. 4th at 1255-56, 931 P.2d at 294, 61 Cal. Rptr. 2d at 116.

17. See *id.* at 1255, 931 P.2d at 294, 61 Cal. Rptr. 2d at 116.

18. See *id.* at 1256-63, 931 P.2d at 294-99, 61 Cal. Rptr. 2d at 116-21.

19. *Id.* at 1256, 931 P.2d at 294, 61 Cal. Rptr. 2d at 116 (quoting CAL. BUS. & PROF.

section of the UPA, the court noted that the UPA is to be construed liberally to effectuate these purposes.<sup>20</sup> The court held that the inclusion within the statute's purview of injury to retail competition effectively addresses the legislative intent.<sup>21</sup> The court further explained that the statute's allowance of actions by "[a]ny person or trade association"<sup>22</sup> injured by unfair trade practices, includes a purchaser.<sup>23</sup>

The court found the history of the UPA evidenced an intent to protect competition among retailers, specifically smaller shops, from the unfair practice of wholesalers offering special discounts to chain stores.<sup>24</sup> Because under such circumstances, the injury to competition was on the secondary level,<sup>25</sup> the court found support in the statute's history for inclusion within the statutory coverage of competition in the secondary line of commerce.<sup>26</sup>

*c. Judicial interpretation in Harris v. Capitol Records Corp.<sup>27</sup> does not limit section 17045 to the primary line of commerce.*

The court next examined the court of appeal's conclusion that the prior ruling in *Harris* limited competition under the UPA to the primary line of commerce.<sup>28</sup> The court explained that the holding in *Harris* was not applicable to the present case.<sup>29</sup> The court concluded that *Harris'* focus on locality discrimination posed a "fundamentally different" threat to competition than the special discounts discussed under section 17045.<sup>30</sup> The court noted that the threat to competition caused by locality discrimination was to the primary line, while special discounts

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CODE § 17001 (West 1997)).

20. *See id.*; *see also* CAL. BUS. & PROF. CODE § 17002 (West 1997). For a discussion of issues facing courts when interpreting unfair business practices legislation, *see* James P. Nehf, Comment, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 34-39 (1994).

21. *See ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1256, 931 P.2d at 294, 61 Cal. Rptr. 2d at 116.

22. *Id.* at 1257, 931 P.2d at 295, 61 Cal. Rptr. 2d at 117 (quoting CAL. BUS. & PROF. CODE § 17070 (West 1997)) (alteration in original).

23. *See ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1257, 931 P.2d at 295, 61 Cal. Rptr. 2d at 117.

24. *See id.* at 1261, 931 P.2d at 297, 61 Cal. Rptr. 2d at 119.

25. *See id.*

26. *See id.* at 1261-62, 931 P.2d at 298, 61 Cal. Rptr. 2d at 120.

27. 64 Cal. 2d 454, 413 P.2d 139, 50 Cal. Rptr. 539 (1966).

28. *See ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1263-68, 931 P.2d at 299-302, 61 Cal. Rptr. 2d at 121-24.

29. *See id.* at 1263-64, 931 P.2d at 299-300, 61 Cal. Rptr. 2d at 121-22.

30. *Id.* at 1265-66, 931 P.2d at 300-01, 61 Cal. Rptr. 2d at 122-23.

threaten competition on the secondary line.<sup>31</sup> Thus, the court reversed the court of appeal on the section 17045 claim, as the language, purpose, and history of the section permit a claim by a retailer based on injury to competition among retailers.<sup>32</sup>

## 2. Section 17023 Does Not Require an Injunction Prior to Awarding Restitution.

Finally, the court looked to section 17023<sup>33</sup> to determine whether a court must grant an injunction as a prerequisite to awarding restitution.<sup>34</sup> The court stated that no language in the statute supports such a contention.<sup>35</sup> The court further rejected the reasoning of the appellate court, which found such a prerequisite to exist based on the holdings of three previous cases: *People v. Superior Court (Jayhill)*, *Fletcher v. Security Pacific*, and *People v. Thomas Shelton Powers, M.D.*<sup>36</sup> The court opined that although the court in each of these cases found monetary damages were ancillary to the injunction granted, none of these cases stated that such a relationship must exist between the two forms of relief.<sup>37</sup> The court concluded that requiring an injunction prior to restitution would circumvent the purpose behind the UPA, particularly in cases where the injunction would not prove to be a viable remedy.<sup>38</sup>

31. *See id.*

32. *See id.* at 1268, 931 P.2d at 302, 61 Cal. Rptr. 2d at 124.

33. Section 17023 states:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

CAL. BUS. & PROF. CODE § 17023 (West 1997). *See ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1268, 931 P.2d at 302, 61 Cal. Rptr. 2d at 124.

34. *See ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1268-71, 931 P.2d at 302-04, 61 Cal. Rptr. 2d at 124-26.

35. *See id.* at 1268, 931 P.2d at 302, 61 Cal. Rptr. 2d at 124.

36. *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973) (granting restitution, but describing this remedy as ancillary to the injunction provided in the statute); *Fletcher v. Security Pacific*, 23 Cal. 3d 442, 591 P.2d 51, 153 Cal. Rptr. 28 (1979) (accord); *People v. Thomas Shelton Powers, M.D.*, 2 Cal. App. 4th 330, 3 Cal. Rptr. 2d 34 (1992) (accord). *See ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1268-71, 931 P.2d at 303-04, 61 Cal. Rptr. 2d at 125-26.

37. *See id.*

38. *See id.* at 1271, 931 P.2d at 304, 61 Cal. Rptr. 2d at 126.

Therefore, the court reversed the court of appeal, holding that restitution is available for unfair competition, regardless of whether or not an injunction is granted.<sup>39</sup>

### B. Justice Mosk's Concurring Opinion

Justice Mosk concurred with the majority opinion, noting, however, that certain issues were not addressed.<sup>40</sup> Justice Mosk agreed that section 17045 implicitly defines "unfair competition"<sup>41</sup> and "injury to a competitor."<sup>42</sup> He stated, however, that the statute does not address a definition for "tendency to destroy competition."<sup>43</sup> Although this definition is not given in the case at bar, Justice Mosk explained that it was a question reserved for a future time.<sup>44</sup>

### C. Justice Brown's Dissenting Opinion

Justice Brown disagreed with the court's reading of the statutory language of section 17045.<sup>45</sup> She explained that the court erroneously looked to outside sources when the language of the statute was clear.<sup>46</sup> Justice Brown stated that the statute's language showed the Legislature's concern with acts of the seller, not the purchaser.<sup>47</sup> She explained that the language clearly referred to acts by the party granting the discounts, not the recipient.<sup>48</sup>

Justice Brown further disagreed with the majority's reading of *Harris*.<sup>49</sup> Justice Brown explained that the decision in *Harris* referred to the UPA as a whole, and thus, the entire statute only prohibited unfair

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39. *See id.*

40. *See id.* at 1271, 931 P.2d at 304-05, 61 Cal. Rptr. 2d at 126-27 (Mosk, J., concurring).

41. *Id.* at 1271, 931 P.2d at 304, 61 Cal. Rptr. 2d at 126 (Mosk, J., concurring). Justice Mosk stated that the statute defines the term as "secret discrimination by a seller between or among its buyers." *Id.* (Mosk, J., concurring).

42. *Id.* (Mosk, J., concurring). "Injury to a competitor" is defined as "harm to a competitor of either the seller or a favored buyer." *Id.* (Mosk, J., concurring).

43. *Id.* at 1271, 931 P.2d at 304-05, 61 Cal. Rptr. 2d at 126-27 (Mosk, J., concurring). Justice Mosk recognized that "[w]hether the phrase should be understood so as to further '[c]onsumer welfare' . . . and to prevent 'output restriction,' . . . is a question for another day." *Id.* (Mosk, J., concurring) (internal citations omitted).

44. *See id.* at 1271, 931 P.2d at 305, 61 Cal. Rptr. 2d at 127 (Mosk, J., concurring).

45. *See id.* at 1272, 931 P.2d at 305, 61 Cal. Rptr. 2d at 127 (Brown, J., dissenting).

46. *See id.* (Brown, J., dissenting).

47. *See id.* at 1274, 931 P.2d at 306, 61 Cal. Rptr. 2d at 128 (Brown, J., dissenting).

48. *See id.* (Brown, J., dissenting)

49. *See id.* at 1276-80, 931 P.2d at 308-10, 61 Cal. Rptr. 2d at 129-32 (Brown, J., dissenting).

practices by sellers and did not include the secondary line of commerce.<sup>50</sup> Justice Brown further noted that at about the same time as the UPA was consolidated into one act, the Fair Trade Act<sup>51</sup> was enacted, which provided protection to retailers.<sup>52</sup> She concluded that the original focus of the UPA was, and should be, on the primary line of commerce.<sup>53</sup>

Justice Brown lastly questioned the majority's holding and its impact on trade regulation.<sup>54</sup> Justice Brown stated that the majority's restriction will not only inhibit competition, but may also cause a backlash against California as being an "unfriendly" regulatory and legal climate.<sup>55</sup>

### III. IMPACT

The holding in *ABC International Traders, Inc.* will place further restrictions on the actions of wholesalers, as it broadens the scope of the injury that parties may claim against such entities.<sup>56</sup> The holding extended to the secondary line of commerce,<sup>57</sup> a claim previously recognized as exclusive to the primary line.<sup>58</sup> Under this holding, the court will force wholesalers to allow retailers to purchase on equal footing with one another. Such a ruling will better serve the goal of promoting competition.<sup>59</sup> While some concern may arise that such restrictions will actually hinder competition by imposing restrictions where no competitive injury would otherwise be present,<sup>60</sup> the court has not overlooked the

50. See *id.* at 1276, 931 P.2d at 307-08, 61 Cal. Rptr. 2d at 129-30 (Brown, J., dissenting).

51. See CAL. BUS. & PROF. CODE §§ 16900-16905, repealed by Stats. 1975, c. 402, § 1 and Stats. 1975, c. 429, § 1. For a discussion of the Fair Trade Act and its repeal, see 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 597 (9th ed. 1987 & Supp. 1997).

52. See *ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1277-78, 931 P.2d at 308-09, 61 Cal. Rptr. 2d at 130-31 (Brown, J., dissenting).

53. See *id.* (Brown, J., dissenting).

54. See *id.* at 1280-82, 931 P.2d at 310-11, 61 Cal. Rptr. 2d at 132-33 (Brown, J., dissenting).

55. *Id.* at 1281, 931 P.2d at 311, 61 Cal. Rptr. 2d at 133 (Brown, J., dissenting).

56. See *id.* at 1268, 931 P.2d at 302, 61 Cal. Rptr. 2d at 124.

57. See *id.*

58. See, e.g., 61 CAL. JUR. 3D *Unfair Competition* § 22 (1980 & Supp. 1997); 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 594 (9th ed. 1987 & Supp. 1997) (stating that the UPA extends only to the primary line of commerce).

59. See Dr. Anthony J. Greco, *Vertical Restraints and Market Power: Killing Price Competition in Court*, 20 ANTITRUST L. & ECON. REV. 79, 80 (1988).

60. See generally Sherie L. Coons, Note, *Robinson-Patman Act Jurisdiction Over*



statutory requirement of a "tendency to destroy competition."<sup>61</sup> In fact, the court did not find such a violation existed in this case, but merely allowed a claim to be brought alleging such misconduct.<sup>62</sup> Thus, the holding will allow greater protection to retailers from conduct that tends to destroy their ability to compete by broadening their right to take action against wholesalers.<sup>63</sup> The holding also ensures the recovery of restitution without a prior request for injunctive relief, where such a right was previously unclear.<sup>64</sup>

#### IV. CONCLUSION

Before the decision in *ABC International Traders, Inc.*, uncertainty existed as to whether California law limited restrictions on special discounts that injured trade to the primary line of commerce.<sup>65</sup> The California Supreme Court's holding extended the restrictions to the secondary line of commerce by allowing those retailers in the secondary line to bring an action against wholesalers.<sup>66</sup> The court also solidified the ability to claim restitution without seeking an injunction against future acts of unfair competition.<sup>67</sup>

LEALLEN FROST

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*Retail Sales: A Reexamination of the Cases and the Case for Reform*, 20 JUD. CORP. L. 541, 571-74 (1996) (expressing the same concerns over the Robinson-Patman Act's similar provisions).

61. *ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1262, 931 P.2d at 298, 61 Cal. Rptr. 2d at 120. See CAL. BUS. & PROF. CODE § 17045 (West 1997).

62. See *ABC Int'l Traders, Inc.*, 14 Cal. 4th at 1252, 931 P.2d at 292, 61 Cal. Rptr. 2d at 114.

63. See *id.* at 1256, 931 P.2d at 294, 61 Cal. Rptr. 2d at 116.

64. See *id.* at 1268-71, 931 P.2d at 302-04, 61 Cal. Rptr. 2d at 124-26.

65. See *id.* at 1252, 931 P.2d at 292, 61 Cal. Rptr. 2d at 114.

66. See *id.*

67. See *id.*

## XVII. UNEMPLOYMENT COMPENSATION

*Administrative law judges do not have statutory authority to order pre-judgment interest on a routine award of retroactive unemployment insurance benefit payments: AFL-CIO v. Unemployment Insurance Appeals Board.*

## I. INTRODUCTION

In *AFL-CIO v. Unemployment Insurance Appeals Board*,<sup>1</sup> the California Supreme Court considered “whether an administrative law judge may award interest on a payment of retroactive insurance benefits.”<sup>2</sup> The superior court concluded “that administrative law judges have ‘the power and the duty’ to award prejudgment interest” and reversed the decision of the Unemployment Insurance Appeals Board to deny such interest.<sup>3</sup>

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1. 13 Cal. 4th 1017, 920 P.2d 1314, 56 Cal. Rptr. 2d 109 (1996). Justice Chin wrote the majority opinion in which Chief Justice George and Justices Baxter and Brown concurred. *See id.* at 1021-43, 920 P.2d at 1315-30, 56 Cal. Rptr. 2d at 111-25. Justice Mosk wrote a dissenting opinion in which Justice Werdegar concurred. *See id.* at 1043-46, 920 P.2d at 1330-32, 56 Cal. Rptr. 2d at 125-27 (Mosk, J., dissenting). Justice Kennard also wrote a dissenting opinion in which Justice Werdegar concurred. *See id.* at 1046-54, 920 P.2d at 1332-37, 56 Cal. Rptr. 2d at 127-32 (Kennard, J., dissenting).

2. *Id.* at 1021, 920 P.2d at 1315, 56 Cal. Rptr. 2d at 110. To obtain benefits from an earlier period, claimant wanted to “backdate” her unemployment insurance. *See id.* at 1028, 920 P.2d at 1319, 56 Cal. Rptr. 2d at 115. The Employment Development Department (EDD) denied her request and she sought an administrative appeal. *See id.* at 1028, 920 P.2d at 1319-20, 56 Cal. Rptr. 2d at 115. Following an administrative hearing, the administrative law judge reversed the EDD’s decision, and ordered retroactive benefits dating back to the initial denial of eligibility. *See id.* at 1028, 920 P.2d at 1320, 56 Cal. Rptr. 2d at 115. Claimant then sought interest on the retroactive benefits from the Unemployment Insurance Appeals Board (Board). *See id.* The Board denied the claimant’s request for payment of interest on the grounds that it lacked the authority for such an award. *See id.* The AFL-CIO, an outside party to the prior actions, brought this action in the superior court challenging the Board’s conclusion that administrative law judges lack the power to award interest. *See id.*

3. *Id.* at 1028, 920 P.2d at 1320, 56 Cal. Rptr. 2d at 115. To bring an unemployment action before a superior court, a claimant must first complete each step of the judicial process. First, a claimant must apply to the EDD for unemployment benefits. *See* 60 CAL. JUR. 3D *Unemployment Compensation* §§ 25, 28 (1994 & Supp. 1996) (describing the powers of the EDD and its procedures for determining unemployment benefits). If the EDD denies benefits, a claimant may appeal to an administrative law judge. *See* 60 CAL. JUR. 3D *Unemployment Compensation* § 31 (1994 & Supp. 1996)

The court of appeal affirmed the trial court, reasoning that “the claimant successfully recovered benefits in the normal course of administrative review.”<sup>4</sup> The California Supreme Court reversed, holding that administrative law judges do not have the power to award interest.<sup>5</sup>

## II. TREATMENT

### A. *Majority Opinion*

Justice Chin, writing for the majority, held that interest awards on wrongfully withheld benefits are available only in mandamus actions.<sup>6</sup> Relying on *Tripp v. Swoap*,<sup>7</sup> Justice Chin stated that trial courts may award interest in judicial mandamus actions in which the government has wrongfully withheld benefits.<sup>8</sup> Justice Chin reasoned that the interest award is designed to compensate a claimant forced to file a mandamus action for the egregious delay in receiving benefits.<sup>9</sup> However, Justice Chin found that the same rationale did not apply to administrative hearings on appeal.<sup>10</sup>

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(discussing appeals of EDD decisions); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 351 (9th ed. 1987) (discussing the same). If the administrative law judge denies the claimant benefits, the claimant may appeal to the Board. *See id.* § 353 (9th ed. 1987) (discussing appeals to the Board). Finally, after a decision from the Board, one may appeal that decision to a superior court. *See* 60 CAL. JUR. 3D *Unemployment Compensation* § 39 (1994) (discussing the reviewability and procedures for judicial review of administrative decisions).

4. *AFL-CIO*, 13 Cal. 4th at 1029, 920 P.2d at 1320, 56 Cal. Rptr. 2d at 115.

5. *See id.* at 1043, 920 P.2d at 1330, 56 Cal. Rptr. 2d at 125. For a historical analysis of unemployment insurance, see Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259 (1994).

6. *See* 13 Cal. 4th at 1030, 920 P.2d at 1321, 56 Cal. Rptr. 2d at 116. Section 3287(a) of the California Civil Code provides, “Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . .” CAL. CIV. CODE § 3287(a) (West 1978). Justice Chin concluded that this section’s meaning clearly allows interest “in damage actions based on a general monetary obligation.” 13 Cal. 4th at 1030, 920 P.2d at 1321, 56 Cal. Rptr. 2d at 116.

7. 17 Cal. 3d 671, 552 P.2d 749, 131 Cal. Rptr. 789 (1976). While allowing interest in mandamus actions, the decision in *Tripp* left unresolved the question of whether an award of interest was appropriate in the administrative stages. *See AFL-CIO*, 13 Cal. 4th at 1031-32, 552 P.2d at 1322, 56 Cal. Rptr. at 117.

8. *See id.* at 1030, 920 P.2d at 1321, 56 Cal. Rptr. 2d at 116.

9. *See id.* at 1022, 920 P.2d at 1316, 56 Cal. Rptr. 2d at 111.

10. *See id.* at 1023, 920 P.2d at 1316-17, 56 Cal. Rptr. 2d at 111-12. Justice Chin reasoned that an interest award is not justified “[b]ecause there is no potential ‘wrongful withholding’ of benefits . . . and no damages ‘capable of being made certain’ that

The court next distinguished the function of the administrative process from that of courts of general jurisdiction.<sup>11</sup> The court stated that "the function of the administrative law judge in a proceeding to recover unemployment insurance benefits is simply to determine if claimants are eligible and then . . . to calculate benefits owed . . ."<sup>12</sup> However, the court found that administrative law judges, as compared to trial court judges, do not consider wrongdoing or delay when determining a claimant's benefits.<sup>13</sup> Thus, because the administrative process only determines eligibility, no delay occurs until after eligibility is denied and a mandamus action is sought.<sup>14</sup>

Finally, the court found that a prior lower court opinion granting administrative judges the power to award interest was decided incorrectly.<sup>15</sup> In *Knight v. McMahon*,<sup>16</sup> the court of appeal reasoned that "[i]f interest is part of the 'damage' to a recipient by not being awarded benefits

would give rise to even an implied obligation to award interest on the benefits recovered during the administrative process." *Id.* at 1023, 920 P.2d at 1316-17, 56 Cal. Rptr. 2d at 112 (citing *Tripp*, 17 Cal. 3d at 683, 552 P.2d at 758, 131 Cal. Rptr. at 798).

11. *See id.* at 1035-37, 920 P.2d at 1324-26, 56 Cal. Rptr. 2d at 119-21. In its analysis, the court cited *Dyna-Med Inc. v. Fair Employment and Housing Commission*, 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987), which held that the Fair Employment and Housing Act (FEHA) did not grant the Fair Employment and Housing Commission (FEHC) the power to award punitive damages. *See id.* at 1035, 920 P.2d at 1324, 56 Cal. Rptr. 2d at 119 (citing *Dyna-Med*, 43 Cal. 3d at 1393, 743 P.2d at 1331, 241 Cal. Rptr. at 74 (denying the FEHC the power to award punitive damages where such power is not specifically granted by the Legislature)).

12. *Id.* at 1036-37, 920 P.2d at 1326, 56 Cal. Rptr. 2d at 121.

13. *See id.* at 1037, 920 P.2d at 1326, 56 Cal. Rptr. 2d at 121.

14. *See id.* In 1996, the University of Michigan Journal of Law Reform published an issue dedicated solely to issues regarding unemployment compensation. A few of the articles published in that issue include: Marla D. Clark & Jesse S. Reyes, *Procedural Reform in the Unemployment Insurance System*, 29 U. MICH. J.L. REFORM 217 (1996) (discussing the tension between the need for more unemployment resources versus "the scarcity of resources available to meet this need"); Sharon M. Dietrich & Cynthia L. Rice, *Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight*, 29 U. MICH. J.L. REFORM 235 (1996) (proposing methods for improving state backlog and delay in the unemployment insurance appeals process); Richard W. Fanning, Jr., *The Federal-State Partnership of Unemployment Compensation*, 29 U. MICH. J.L. REFORM 475 (1996) (discussing the relative power between the federal government and the states with respect to unemployment compensation and their responsibilities in its administration).

15. *See AFL-CIO*, 13 Cal. 4th at 1037-41, 920 P.2d at 1326-29, 56 Cal. Rptr. 2d at 121-24.

16. 26 Cal. App. 4th 747, 31 Cal. Rptr. 2d 832 (1994).

in a timely fashion, then an award of interest is no different than an award of the benefits withheld.<sup>17</sup> However, the majority in *AFL-CIO* agreed with the dissent in *Knight* that the court of appeal was improperly acting as a “super-legislature” by granting administrative judges this power.<sup>18</sup> Finding neither express nor implied legislative authority, the supreme court refused to grant administrative judges the power to award interest.<sup>19</sup>

### B. Justice Mosk's Dissenting Opinion

Dissenting from the majority, Justice Mosk argued that the court's ruling would undermine the policy of the Unemployment Insurance Code “to reduce involuntary unemployment and the suffering caused thereby to a minimum.”<sup>20</sup> Justice Mosk stated that requiring a court proceeding is inefficient because it would require much time and expense in relation to the amount of the interest award.<sup>21</sup> Furthermore, he noted that requiring court proceedings will burden the system with a “multiplicity of proceedings.”<sup>22</sup> Lastly, Justice Mosk argued that administrative law judges have no discretion in awarding interest because under Civil Code section 3287(a), interest must be awarded once it is determined that retroactive compensation is due.<sup>23</sup>

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17. *AFL-CIO*, 13 Cal. 4th at 1038, 920 P.2d at 1326, 56 Cal. Rptr. 2d at 121 (quoting *Knight*, 26 Cal. App. 4th at 756, 31 Cal. Rptr. 2d at 838).

18. *See id.* at 1038, 920 P.2d at 1326-27, 56 Cal. Rptr. 2d at 122 (citing *Knight*, 26 Cal. App. 4th at 758, 31 Cal. Rptr. 2d at 839 (Yegan, J., dissenting)).

19. *See id.* at 1041, 920 P.2d at 1328-29, 56 Cal. Rptr. 2d at 124. The court briefly discussed whether federal law authorized administrative judges to award interest. *See id.* at 1041-42, 920 P.2d at 1329, 56 Cal. Rptr. 2d at 124-25. The court found no such authorization in the United States Code or federal case law. *See id.* *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 348 (9th ed. 1987 & Supp. 1996) (discussing the effect of federal statutes on the state unemployment compensation code).

20. *AFL-CIO*, 13 Cal. 4th at 1043, 920 P.2d at 1330, 56 Cal. Rptr. 2d at 125 (Mosk, J., dissenting). For a discussion of the purposes of unemployment insurance laws, see 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 347 (9th ed. 1987 & Supp. 1994).

21. *See AFL-CIO*, 13 Cal. 4th at 1045, 920 P.2d at 1331, 56 Cal. Rptr. 2d at 126 (Mosk, J., dissenting).

22. *See id.* at 1045, 920 P.2d at 1331, 56 Cal. Rptr. 2d at 127 (Mosk, J., dissenting) (quoting *Knight*, 26 Cal. App. 4th at 755-56, 31 Cal. Rptr. 2d at 837-38).

23. *See id.* at 1045, 920 P.2d at 1331, 56 Cal. Rptr. 2d at 126 (Mosk, J., dissenting). Prejudgment interest denial is also an issue with regard to unemployment discrimination. *See* William L. Kandel, *Age Discrimination: Recent Decisions by Appellate Courts Under the Age Discrimination in Employment Act Through Mid-1996*, in 25TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 7, 995-1212 (PLI/Litig. & Admin. Practice Course Handbook Series N. H4-5237, 1996), available in WESTLAW, 549 PLI/LIT 7. *See gener-*

### C. Justice Kennard's Dissenting Opinion

In a separate opinion, Justice Kennard argued that a claimant is entitled to retroactive interest from the date the Employment Development Department (EDD) initially denied eligibility.<sup>24</sup> Justice Kennard reasoned that the same public interests in awarding retroactive benefits justify an award for interest.<sup>25</sup> Denying benefits forbids the use of salary for a given time period, thus, an unemployment claimant "is denied the use of the funds at a time of particular hardship" as a result of delay while pending an administrative appeal.<sup>26</sup> In closing, Justice Kennard argued that the majority erred by characterizing a delay in receiving benefits as "inconsequential" when the normal processing time for an administrative appeal is seven weeks.<sup>27</sup>

### III. IMPACT AND CONCLUSION

The supreme court's decision in *AFL-CIO* prohibits administrative law judges from awarding prejudgment interest to claimants who are successful in appealing for benefits denied by the EDD. As Justice Kennard indicates, claimants will be denied compensation for the period of time during which they were denied benefits to which they were otherwise entitled.<sup>28</sup> In essence, the state is enriched at the expense of the unemployed claimant. Furthermore, as Justice Mosk emphasizes, the decision may have a substantial impact on the caseloads of courts because

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ally Thomas W. Lee, Comment, *Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 EMORY L.J. 325 (1994) (arguing for a "clear and consistent policy of denying reductions of back pay awards").

24. See *AFL-CIO*, 13 Cal. 4th at 1047, 920 P.2d at 1332, 56 Cal. Rptr. 2d at 127 (Kennard, J., dissenting).

25. See *id.* at 1050, 920 P.2d at 1334-35, 56 Cal. Rptr. 2d at 130 (Kennard, J., dissenting).

26. See *id.* at 1050, 920 P.2d at 1335, 56 Cal. Rptr. 2d at 130 (Kennard, J., dissenting). Another problem claimants face in some states is collateral estoppel. See Ann C. Hodges, *The Preclusive Effect of Unemployment Compensation Determinations in Subsequent Litigation: A Federal Solution*, 38 WAYNE L. REV. 1803 (1992) (arguing that the use of collateral estoppel has an adverse effect in unemployment compensation cases and proposing federal legislation denying the use of the doctrine in these cases).

27. See *AFL-CIO*, 13 Cal. 4th at 1051, 920 P.2d at 1335-36, 56 Cal. Rptr. 2d at 130-31 (Kennard, J., dissenting).

28. See *id.* at 1047, 920 P.2d at 1332, 56 Cal. Rptr. 2d at 127 (Kennard, J., dissenting).

claimants will have to look to the superior courts for recovery of interest.<sup>29</sup> Thus, this case may place an additional burden on the already backlogged courts.

JEREMY D. DOLNICK

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29. *See id.* at 1045, 920 P.2d at 1331, 56 Cal. Rptr. 2d at 126-27 (Mosk, J., dissenting).

## XVIII. WATER LAW

*When a public entity's flood control measures, which divert and re-channel water, fail in areas historically known for flooding, private property owners seeking recovery for inverse condemnation must prove that the failure was due to unreasonable conduct on the part of the public entity. In determining reasonableness, courts must consider the following: (1) the overall public purpose served by such flood control measures; (2) the degree to which plaintiff's loss is offset by reciprocal benefits; (3) the availability of low risk alternatives; (4) the severity of plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which the kind of damage is a normal risk of land ownership; and (6) the degree to which the damage is distributed to a benefited public:*  
**Bunch v. Coachella Valley Water District.**

## I. INTRODUCTION

In *Bunch v. Coachella Valley Water District*,<sup>1</sup> the California Supreme Court considered whether to apply a strict liability or a reasonableness standard in determining inverse condemnation liability<sup>2</sup> where a flood control facility, located in an area historically subject to flooding, failed to function properly, thus damaging the plaintiff's property.<sup>3</sup>

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1. 15 Cal. 4th 432, 935 P.2d 796, 63 Cal. Rptr. 2d 89 (1997). Justice Chin delivered a unanimous opinion. *See id.* at 435-55, 935 P.2d at 797-810, 63 Cal. Rptr. 2d at 90-103. Justice Mosk also wrote a separate concurring opinion. *See id.* at 455, 935 P.2d at 810, 63 Cal. Rptr. 2d at 103 (Mosk, J., concurring).

2. *See id.* at 439, 935 P.2d at 800, 63 Cal. Rptr. 2d at 93. *See generally* 29A C.J.S. *Eminent Domain* § 375 (1992 & Supp. 1997) (defining inverse condemnation as the taking of private property for public use); Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967) (discussing the constitutional basis for all inverse condemnation actions); 29 CAL. JUR. 3D *Eminent Domain* § 318 (1986 & Supp. 1997) (explaining that compensation must be made when a public entity causes flooding that damages private property).

3. *See id.* at 438, 935 P.2d at 799, 63 Cal. Rptr. 2d at 92. The Coachella Water District (defendant), a state agency, maintained the flood control facility in the Coachella Valley. *See id.* at 437, 935 P.2d at 798, 63 Cal. Rptr. 2d at 91. The defendant



The trial court applied a reasonableness test and held that the defendant had acted reasonably regarding the facilities' design, construction, and maintenance.<sup>4</sup> The court of appeal affirmed, rejecting the plaintiff's argument that the trial court erroneously applied the reasonableness standard instead of strict liability.<sup>5</sup> The California Supreme Court affirmed the court of appeal, holding that the proper standard in cases involving public flood control failures that cause physical damage to private property is not strict liability, but reasonableness.<sup>6</sup>

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constructed a number of dikes and levees in order to divert storm floodwaters from populated areas. *See id.* The Bunches (plaintiffs) owned an apartment building within the Coachella Valley that was "subject to flooding before the flood control facilities were built." *Id.* Between 1976 and 1979, three intense tropical storms struck the region. *See id.* Following the first storm, the damaged facilities needed emergency repairs. *See id.* at 438, 935 P.2d at 798-99, 63 Cal. Rptr. 2d at 92. The defendant's repairs to the facility withstood the second storm; however, the 1979 storm, the worst in the state's recorded history, created floods beyond the capacity of the dikes and levees. *See id.* at 438, 935 P.2d at 799, 63 Cal. Rptr. at 92. As a result, floodwaters overflowed the dikes and flooded property in the Coachella Valley. *See id.* Water inundated the plaintiffs' apartment, mud buried cars, and a property line wall collapsed. *See id.* The plaintiffs filed an inverse condemnation suit, seeking recovery "for [the] physical invasion and destruction of their property." *Id.* The trial court applied the traditional strict liability standard and the jury awarded the plaintiffs \$690,000.00. *See id.* Subsequently, both sides appealed. *See id.* While awaiting the appeal, the California Supreme Court decided *Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 550, 764 P.2d 1070, 253 Cal. Rptr. 693 (1988), and held that when a public flood control facility fails in areas historically known for flooding, the property owner must show that the failure was due to some unreasonable conduct of the public entity. *See Bunch*, 15 Cal. 4th at 438-39, 935 P.2d at 799, 63 Cal. Rptr. 2d at 92 (quoting *Belair*, 47 Cal. 3d at 567, 764 P.2d 1070, 1080, 253 Cal. Rptr. 693, 703). Accordingly, the court of appeal remanded the present case for a determination of whether the defendant acted reasonably in regards to the facilities construction, design, and maintenance. *See id.* at 439, 935 P.2d at 799, 63 Cal. Rptr. 2d at 92.

4. *See Bunch*, 15 Cal. 4th at 437, 935 P.2d at 799, 63 Cal. Rptr. 2d at 92. The trial court based its decision on expert witnesses and other relevant evidence. *See id.* at 452, 935 P.2d at 809, 63 Cal. Rptr. 2d at 102.

5. *See id.* at 439, 935 P.2d at 800, 63 Cal. Rptr. 2d at 93.

6. *See id.* at 454, 935 P.2d at 810, 63 Cal. Rptr. 2d at 103. The court asserted that the *Belair* reasonableness test was applicable in all cases involving public flood control, and that, therefore, both the court of appeal and trial court were correct in their understanding and application of that standard. *See id.*

## II. TREATMENT

A. *Majority Opinion*

## 1. An Historical Overview

The court began its opinion by addressing the different rules governing inverse condemnation actions.<sup>7</sup> The court noted that, at common law, these actions were based on real property and tort law.<sup>8</sup> Common law courts recognized two immunities from liability: (1) private landowner actions defending their property from "the 'common enemy' of floodwaters" despite physical damage to a neighbor's property downstream; and (2) government actions where an overriding public purpose governed the damage-causing activity.<sup>9</sup>

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7. See *Bunch*, 15 Cal. 4th at 439, 935 P.2d at 800, 63 Cal. Rptr. 2d at 93. See generally Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 596-604 (1954) (tracing the constitutional and case law history of just compensation for damaged property).

8. See *Bunch*, 15 Cal. 4th at 439, 935 P.2d at 800, 63 Cal. Rptr. at 93. The court explained that inverse liability issues generally involved situations where both plaintiff and defendant were private property owners. See *id.*

9. *Id.* at 440-41, 935 P.2d at 800-01, 63 Cal. Rptr. 2d at 93-94. The "common enemy" privilege resulted in a classification system regarding inverse condemnation liability. See *id.* Under the classification system, "a public . . . entity's liability for damage substantially caused by its flood control improvement efforts depended on whether its flood control system was intended to 'improve' or 'divert' the water's natural flow." *Id.* at 441, 935 P.2d at 801, 63 Cal. Rptr. 2d at 94 (citing *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 26, 119 P.2d 1, 5-6 (1941)). A public or private attempt at flood control which involved water diversion, as opposed to flood control improvements, resulted in strict liability for damage from such facilities. See *id.* See generally 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 800 (9th ed. 1987 & Supp. 1997) (defining the common enemy doctrine and discussing its applicability); 63 CAL. JUR. 3D *Water* § 716 (1981 & Supp. 1997) (explaining that the "upper or dominant estate has a legal and natural easement or servitude in the lower or servient estate to discharge all surface waters").

The court then analyzed *Albers v. County of Los Angeles*<sup>10</sup> that held public entities strictly liable to private property owners for actual physical injury to their land when a public improvement was the proximate cause of the damage.<sup>11</sup> The *Albers* court was reluctant, however, to extend a strict liability standard to cases involving the two common law exceptions.<sup>12</sup>

The court then discussed *Belair v. Riverside County Flood Control District*,<sup>13</sup> a case which further defined California flood control law.<sup>14</sup> Under *Belair*, a reasonableness standard replaced the harsh doctrine of strict liability set forth in *Albers*.<sup>15</sup> The reasonableness standard emphasized the need to balance public interests with the "gravity of private harm."<sup>16</sup> Similar to the court in *Albers*, the *Belair* court was reluctant to extend the reasonableness test to areas of traditional immunity.<sup>17</sup> How-

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10. 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). In *Albers*, the court considered whether a county was liable to private landowners whose property was damaged by a mudslide resulting from county road construction. *See id.* The *Albers* court found the county liable despite an absence of negligent conduct, rejecting the "notion that there need be a congruence between public and private liability in inverse condemnation actions." *See Bunch*, 15 Cal. 4th at 440, 935 P.2d at 800, 63 Cal. Rptr. 2d at 93 (quoting *Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d at 563-64, 764 P.2d at 1078, 253 Cal. Rptr. at 701 (1988) (quoting *Holtz v. Superior Court*, 3 Cal. 3d 296, 302, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 348 (1970))). *See generally* Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 432-38 (1969) (discussing the rationale supporting the *Albers* court's introduction of strict liability in inverse condemnation actions).

11. *Bunch*, 15 Cal. 4th at 440, 935 P.2d at 800, 63 Cal. Rptr. 2d at 93. *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 941 (9th ed. 1988 & Supp. 1997) (explaining that the court in *Albers* limited the application of strict liability in order to avoid open-ended liability which might produce a reluctance on the part of public entities to become involved in constructing and improving vitally needed flood control facilities).

12. *Bunch*, 15 Cal. 4th at 441, 935 P.2d at 801, 63 Cal. Rptr. 2d at 94.

13. 47 Cal. 3d 550, 764 P.2d 1070, 253 Cal. Rptr. 693 (1988). *Belair* involved the failure of a levee to hold back floodwaters after several days of heavy rain; once the levee broke, the San Jacinto River damaged the plaintiff's property. *See id.* at 555, 764 P.2d at 1071, 253 Cal. Rptr. at 695.

14. *See Bunch*, 15 Cal. 4th at 442-44, 935 P.2d at 802-03, 63 Cal. Rptr. 2d at 95-96.

15. *See id.* at 442-43, 935 P.2d at 802, 63 Cal. Rptr. 2d at 95. In *Bunch*, the plaintiffs argued that *Belair's* holding applied only to conduct privileged under the common enemy doctrine and was therefore not applicable to the instant case. *See id.* at 447, 935 P.2d at 805, 63 Cal. Rptr. 2d at 98.

16. *Id.* at 443, 935 P.2d at 802, 63 Cal. Rptr. 2d at 95 (quoting *Belair*, 47 Cal. 3d at 565-66, 764 P.2d at 1079, 253 Cal. Rptr. at 702 (quoting Van Alstyne, *supra* note 10, at 455)).

17. *See id.* at 441-42, 935 P.2d at 801-02, 63 Cal. Rptr. 2d at 94-95.

ever, the court in *Bunch* did note that *Belair* dictum alluded to the use of a reasonableness standard in all future flood control cases.<sup>18</sup>

Next, the court briefly analyzed the *Locklin v. City of Lafayette*<sup>19</sup> decision which expanded the use of the reasonableness test beyond *Belair* to instances where a public entity had intentionally "drained excess surface water into a natural watercourse, eventually causing damage to downstream property."<sup>20</sup>

Traditionally, the common enemy doctrine protected upstream property owners from liability for damage to downstream property.<sup>21</sup> Yet, the *Locklin* court held that a "public agency is liable only if its conduct posed an unreasonable risk of harm to the plaintiffs . . ." <sup>22</sup> In determining whether the public entity acted unreasonably, the *Locklin* court set forth the following six factors for review: (1) the overall purpose of the flood control; (2) "the degree to which plaintiff's loss is offset by reciprocal benefits"; (3) the availability of low risk alternatives; (4) "the severity of the plaintiff's damage in relation to risk-bearing capabilities"; (5) the extent to which the kind of damage is "a normal risk of land ownership"; and (6) the degree to which the damage is distributed to a benefited public.<sup>23</sup>

## 2. The Applicability of *Belair* and *Locklin* to *Bunch*

The court then considered whether the rules of *Belair* and *Locklin* applied in cases involving flood control improvements where the public entity diverted and re-channeled water in areas historically subject to

18. See *id.* at 444, 935 P.2d at 803, 63 Cal. Rptr. 2d at 96.

19. 7 Cal. 4th 327, 867 P.2d 724, 27 Cal. Rptr. 2d 613 (1994). In *Locklin*, the court considered whether a public entity was liable for private property damage when public and private developments along a creek increased the amount of water in the creek resulting in floods. See *id.* at 338-40, 867 P.2d at 729-31, 27 Cal. Rptr. 2d at 618-20.

20. *Bunch*, 15 Cal. 4th at 444, 935 P.2d at 803, 63 Cal. Rptr. 2d at 96. See generally, Eric Masaki Tokuyama, Note, *California Supreme Court Survey: A Review of Decisions*, *Locklin v. City of Lafayette*, 22 PEPP. L. REV. 1352 (1995) (discussing the court's willingness to expand the reasonableness test to cases where traditional common enemy immunity applies).

21. See *Locklin*, 7 Cal. 4th at 348, 867 P.2d at 736, 27 Cal. Rptr. 2d at 625.

22. *Bunch*, 15 Cal. 4th at 445, 935 P.2d at 806, 63 Cal. Rptr. 2d at 97 (quoting *Locklin*, 7 Cal. 4th at 367, 867 P.2d at 749, 27 Cal. Rptr. 2d at 638).

23. *Id.* at 446, 935 P.2d at 804, 63 Cal. Rptr. 2d at 97 (quoting *Locklin*, 7 Cal. 4th at 368-69, 867 P.2d at 750, 27 Cal. Rptr. 2d at 639).

flooding.<sup>24</sup> The court asserted that public policy mandated an expansion of *Belair* and *Locklin* to all flood control failures that result in private property damage.

The court found that the policy reasons underlying *Belair's* reasonableness test "extend[s] logically to all cases involving flood control improvements affecting property historically subject to flooding, . . . whether the activity was privileged at common law."<sup>25</sup> The court held that the *Locklin* factors were crucial in determining the reasonableness of flood control projects and the lower courts "should apply [them] uniformly in all flood control cases."<sup>26</sup> The court reasoned that failing to extend the reasonableness standard would result in open-ended liability, unnecessarily burdening the development of vital flood control facilities, and possibly resulting in a reluctance of public entities to construct or repair needed facilities in an urbanizing society.<sup>27</sup> Based on precedent and public need, the court eliminated the two common law privileges and imposed a general reasonableness standard in all instances.<sup>28</sup>

### *B. Justice Mosk's Concurring Opinion*

Justice Mosk concurred with the majority opinion, yet explained that his opinion presented in this case was not inconsistent with his dissent in *Belair*.<sup>29</sup> In *Belair*, Justice Mosk opined that liability in inverse condemnation actions should not rest on archaic classifications and traditional immunities.<sup>30</sup> Instead, Justice Mosk argued that liability should "rest directly on an explicit balancing of the interests implicated by the constitutional provision."<sup>31</sup> Therefore, the court's decision in *Bunch* to replace strict liability with a reasonableness standard reflected Justice Mosk's dissent in *Belair*.

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24. *See id.* at 448, 935 P.2d at 806, 63 Cal. Rptr. 2d at 99.

25. *Id.* at 449, 935 P.2d at 806, 63 Cal. Rptr. 2d at 99.

26. *Id.* at 454, 935 P.2d at 810, 63 Cal. Rptr. 2d at 103.

27. *See id.* at 450, 935 P.2d at 807, 63 Cal. Rptr. 2d at 100 (citing *Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 556, 565, 764 P.2d 1070, 1079, 253 Cal. Rptr. 693, 702 (1988)).

28. *See id.* at 454, 935 P.2d at 810, 63 Cal. Rptr. 2d at 103.

29. *See id.* at 455, 935 P.2d at 810, 63 Cal. Rptr. 2d at 103 (Mosk, J., concurring).

30. *See Belair*, 47 Cal. 3d at 570-71, 764 P.2d at 1083, 253 Cal. Rptr. at 706 (Mosk, J., dissenting).

31. *See id.* at 574, 764 P.2d at 1086, 253 Cal. Rptr. at 709 (Mosk, J., dissenting).

## III. IMPACT

Prior to *Bunch*, the law governing public entity liability where a flood control facility had failed was inconsistent and complex. Moreover, courts appeared reluctant to abandon the common law privileges and adopt a general standard.<sup>32</sup> However, in *Bunch*, the court created a concise and uniform test that is applicable when a public entity's flood control measures fail.<sup>33</sup> By employing a reasonableness test, as opposed to an inconsistent strict liability standard, the unique facts of each inverse condemnation case will determine liability.<sup>34</sup> The assurance of a case by case analysis to determine liability, coupled with the six *Locklin* factors that courts must evaluate, will increase public entities' willingness to involve themselves with needed flood control facilities and improvements.<sup>35</sup>

Conversely, to employ a strict liability standard would result in public entity accountability for events outside their control that cause flood control failures. Such a liability risk would deter future involvement in flood control—a pressing and vital need in our growing society.

## IV. CONCLUSION

In *Bunch*, the court created a fair and concise reasonableness standard for trial courts to apply in inverse condemnation actions resulting from flood control failures.<sup>36</sup> This standard promotes the important public need of flood control, while guaranteeing property owners a fair opportunity to seek compensation for physical injury to their land, in a manner

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32. See Van Alstyne, *supra* note 10, at 431 (noting that "the law of inverse condemnation liability of public entities for . . . injuries to private property is entangled in a complex web . . .").

33. See *Bunch*, 15 Cal. 4th at 454, 935 P.2d at 810, 63 Cal. Rptr. 2d at 103. See generally John H. Abbott, Note, *Weaver v. Bishop and Negligence: A Path Toward Clearing the Muddy Water*, 26 SAN DIEGO L. REV. 685 (1989) (discussing the need for a reasonableness standard which, once adopted, would develop a single rule and clear precedent when evaluating inverse condemnation liability).

34. See generally Abbott, *supra* note 33, at 698 (noting that the flexibility of a reasonableness standard guarantees fairness to all landowners when seeking compensation for damage to their property).

35. See *Bunch*, 15 Cal. 4th at 449-50, 935 P.2d at 806-07, 63 Cal. Rptr. 2d at 99-100.

36. See *id.* at 454, 935 P.2d at 810, 63 Cal. Rptr. 2d at 103. See generally Abbott, *supra* note 33, at 698 (discussing the advantages of applying a reasonableness standard to property owners, public entities, and the courts).

that does not employ the traditional common law privileges which deprived property owners compensation.<sup>37</sup>

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37. See Abbott, *supra* note 33, at 686.

## XIX. WORKERS' COMPENSATION

*When a maritime employee suffers an industrial injury that falls within the concurrent jurisdiction of the Longshore and Harbor Workers' Compensation Act (LHWCA) and the California Workers' Compensation Act (the California Act), credit for LHWCA disability benefits previously paid by the employer against an award under the California Act must be calculated on a dollar-for-dollar basis, regardless of whether the payment was categorized as temporary or permanent indemnity: Sea-Land Service, Inc. v. Workers' Compensation Appeals Board.*

## I. INTRODUCTION

In *Sea-Land Service, Inc. v. Workers' Compensation Appeals Board*,<sup>1</sup> the California Supreme Court addressed whether the total amount of disability benefits paid to an employee under the Longshore and Harbor Workers' Compensation Act<sup>2</sup> (LHWCA) must be credited against the total amount of disability benefits awarded under the California Workers' Compensation Act<sup>3</sup> (the California Act) or be determined by comparing

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1. 14 Cal. 4th 76, 925 P.2d 1309, 58 Cal. Rptr. 2d 190 (1996). Justice Baxter delivered the majority opinion, in which Chief Justice George and Justices Brown and Chin concurred. *See id.* at 80-92, 925 P.2d at 1310-18, 58 Cal. Rptr. 2d at 191-99. Justice Mosk wrote a dissenting opinion, in which Justices Kennard and Werdegar concurred. *See id.* at 92-100, 925 P.2d at 1318-23, 58 Cal. Rptr. 2d at 199-204 (Mosk, J., dissenting).

2. 33 U.S.C. §§ 901-950 (1994). The crediting provision of the LHWCA, added by Congress in 1984, provides in pertinent part: "Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this Act." *Sea-Land Serv.*, 14 Cal. 4th at 84-85, 925 P.2d at 1313, 58 Cal. Rptr. 2d at 194 (emphasis omitted) (quoting 33 U.S.C. § 903(e) (1994)). *See generally* Gerald Marvin Bober & Michael Wible, *Compensable Injury or Death Arising Under the Longshore and Harbor Workers' Compensation Act*, 35 LOY. L. REV. 1129 (1990) (discussing disability compensation under the LHWCA).

3. CAL. LAB. CODE §§ 3200-6208 (West 1989 & Supp. 1997). Although the California Act does not explicitly require that payments made under the LHWCA be credited against a Workers' Compensation Appeal Board (WCAB) award, Labor Code section



the amounts paid or awarded in each specific category—temporary or permanent disability payments—under each act.<sup>4</sup> While the court of appeal affirmed the WCAB application of the category-by-category crediting system,<sup>5</sup> the California Supreme Court reversed the decision and held

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4909 contains a crediting provision, which provides in pertinent part:

'Any payment, allowance, or benefit received by the injured employee during the period of his incapacity, . . . which by the terms of this division was not then due and payable or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit may be taken into account by the appeals board in fixing the amount of the compensation to be paid . . . .'

*Sea-Land Serv.*, 14 Cal. 4th at 86, 925 P.2d at 1314, 58 Cal. Rptr. 2d at 195 (quoting CAL. LAB. CODE § 4909 (West 1989 & Supp. 1997)). See generally Howard A. Emmer, *California Workers' Compensation and Third-Party Litigation: A Survey of Recent Developments*, 15 U. WEST L.A. L. REV. 1 (1983) (discussing disability compensation under the California Workers' Compensation Act).

4. See *Sea-Land Serv.*, 14 Cal. 4th at 80-92, 925 P.2d at 1310-18, 58 Cal. Rptr. 2d at 191-99. In the instant case, Sea-Land Service, Inc. (Sea-Land) employed Chris Lopez (Lopez) as a maritime warehouse worker, who was injured while working for Sea-Land. See *id.* at 80, 925 P.2d at 1310, 58 Cal. Rptr. 2d at 191. The parties stipulated that Lopez's injury fell within the concurrent jurisdiction of the California Act and the LHWCA. See *id.* Disability payments by Sea-Land to Lopez were as follows: (1) under the LHWCA, \$25,457 in temporary disability payments (\$9,617 more than the \$15,840 in temporary disability indemnity to which Lopez was entitled under the California Act) and \$7,041 in permanent disability benefits (later reversed on appeal), and (2) under the California Act, \$9,020 in permanent disability indemnity. See *id.* at 80-81, 925 P.2d at 1311, 58 Cal. Rptr. 2d at 192. In sum, the maximum amount of temporary disability benefits available under the LHWCA (\$25,457) exceeded the total amount of temporary and permanent disability benefits available under the California Act (\$24,860) by \$1,979. See *id.* at 81, 925 P.2d at 1311, 58 Cal. Rptr. 2d at 192.

5. See *Sea-Land Serv., Inc. v. Workers' Compensation Appeals Bd.*, 46 Cal. App. 4th 94, 42 Cal. Rptr. 2d 865 (1995), *rev'd*, 14 Cal. 4th 76, 925 P.2d 1309, 58 Cal. Rptr. 2d 190 (1996). Because the LHWCA did not provide permanent disability benefits, Lopez sought state permanent disability benefits. See *Sea-Land Serv.*, 14 Cal. 4th at 81, 925 P.2d at 1311, 58 Cal. Rptr. 2d at 192. Lopez agreed that Sea-Land could credit the amount of state permanent disability owed with the amount already paid by Sea-Land for the federal permanent disability paid prior to the reversal of the federal award for permanent disability. See *id.* Lopez also agreed that he was not entitled to any state award for temporary disability because the federal award exceeded any amount allowed by California state law. See *id.* Sea-Land filed a petition for credit of its excess federal temporary disability payments of \$9,617 against its remaining liability of \$1,979 for state permanent disability benefits (\$9,020 award for state permanent disability indemnity less \$7,041 credit from reversal of federal permanent disability award). See *id.* Lopez conceded, and the WCAB held in its denial of Sea-Land's petition, that federal temporary disability payments must be credited against state temporary disability payments and that federal permanent disability payments must be credited against state permanent disability payments. See *id.* at 81-82, 925 P.2d at 1311, 58 Cal. Rptr. 2d at 192. The court of appeal affirmed the WCAB's grant of a category-by-category credit.

that credit for LHWCA disability benefits must be calculated according to the dollar-for-dollar credit system.<sup>6</sup>

## II. TREATMENT

### A. Justice Baxter's Majority Opinion

As a basis for its analysis, the majority set forth two basic premises of compensation law: (1) "[T]here shall be but a single recovery . . . [for] a single injury or disability;"<sup>7</sup> and (2) "the right to recovery of compensation from more than one source is subject to the rule that a credit shall be allowed against an award for any payment to the extent that it permits double recovery."<sup>8</sup> Recognizing the foregoing principles, the majority summarized the parties' stipulations as follows: (1) Because Lopez's injury fell within the concurrent jurisdiction of the LHWCA and the California Act, Lopez was not entitled to a double recovery of disability benefits,<sup>9</sup> and (2) benefit payments made by Sea-Land pursuant to the LHWCA should be credited against an award for the same injury under the California Act to prevent such double recovery.<sup>10</sup> Notwithstanding the foregoing stipulations, the majority, prior to undertaking the resolution of the parties' disagreement as to the appropriate method of crediting, distinguished the two crediting systems.<sup>11</sup>

*See id.* at 82, 925 P.2d at 1311, 58 Cal. Rptr. 2d at 192. The supreme court granted Sea-Land's petition for review. *See id.*

6. *See Sea-Land Serv.*, 14 Cal. 4th at 92, 925 P.2d at 1318, 58 Cal. Rptr. 2d at 199.

7. *See id.* at 82, 925 P.2d at 1311-12, 58 Cal. Rptr. 2d at 192-93 (quoting *Raischell & Cottrell, Inc. v. Workmen's Compensation Appeals Bd.*, 249 Cal. App. 2d 991, 997, 58 Cal. Rptr. 159, 163 (1967)).

8. *See id.* (quoting *Raischell*, 249 Cal. App. 2d at 997, 58 Cal. Rptr. at 163). *See generally* Marie R. Yeates et al., *Contribution and Indemnity in Maritime Litigation*, 30 S. TEX. L. REV. 215 (1989) (providing an overview of disability compensation in the context of injuries to maritime workers).

9. *See Sea-Land Serv.*, 14 Cal. 4th at 82, 925 P.2d at 1312, 58 Cal. Rptr. 2d at 193. *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 124-131 (9th ed. 1987 & Supp. 1997) (discussing the LHWCA and the impact of concurrent federal and state jurisdiction); 57 CAL. JUR. 3D *Ships and Shipping* §§ 98-106 (1980 & Supp. 1997) (summarizing the compensatory provisions of the LHWCA and their relation to the remedies provided by the state workers' compensation law).

10. *See Sea-Land Serv.*, 14 Cal. 4th at 82, 925 P.2d at 1312, 58 Cal. Rptr. 2d at 193.

11. *See id.* Sea-Land contended that a dollar-for-dollar system, under which the court compared the total payments or awards made under each act (LHWCA and California Act) in determining the credit that should be given, was the appropriate method of

After establishing the court's concurrent jurisdiction over both the LHWCA and California Act claims,<sup>12</sup> the majority addressed the issues of double recovery and crediting in the context of LHWCA disability awards.<sup>13</sup> Justice Baxter then cited *Sun Ship, Inc. v. Pennsylvania* for the proposition that "a system of concurrent federal-state workers' compensation jurisdiction does not threaten double recovery since awards under one compensation system are credited against any recovery under the second system."<sup>14</sup> Although the majority concluded that neither *Sun Ship* nor *Calbeck v. Travelers Insurance Co.* were dispositive, it determined that both decisions supported the application of a dollar-for-dollar crediting system to LHWCA benefit payments.<sup>15</sup>

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crediting in the instant case. *See id.* On the other hand, Lopez urged the court to utilize a category-by-category system, under which credit for payments under the LHWCA would be determined on a category-by-category basis (temporary versus permanent disability payments). *See id.* The difference between the two systems is that a category-by-category system permits an employee's total recovery to exceed that available under the LHWCA or the California Act alone, while a dollar-for-dollar system limits an injured employee's total recovery to the higher available recovery under one act or the other. *See id.* at 83, 925 P.2d at 1312, 58 Cal. Rptr. 2d at 193. *See generally* George R. Alvey, Jr. & John O. Piekens, Jr., *Falling In and Out of Coverage: Jurisprudential Legislating Eviscerates the Status Requirement of the Longshore and Harbor Workers' Compensation Act*, 19 TUL. MAR. L.J. 227 (1995) (outlining the historical development of the LHWCA and the effect of the 1972 amendments to the LHWCA on state workers' compensation claims).

12. *See Sea-Land Serv.*, 14 Cal. 4th at 83, 925 P.2d at 1312, 58 Cal. Rptr. 2d at 193. *See generally* Charles M. Davis, *Federal Supersession of State Workers' Compensation Acts as Applied to Jones Act Seamen*, 8 U.S.F. MAR. L.J. 185, 201-02 (1996) (discussing the term "twilight zone" as it applies to situations where concurrent LHWCA-state jurisdiction exists).

13. *See Sea-Land Serv.*, 14 Cal. 4th at 83, 925 P.2d at 1312, 58 Cal. Rptr. 2d at 193. The United States Supreme Court has interpreted the 1972 amendments to the LHWCA as "allowing states to apply their own workers' compensation schemes to injuries falling within the coverage of the federal act." *See id.* (citing *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 723-26 (1980)). *See generally* 32B AM. JUR. 2D *Federal Employers' Liability and Compensation Acts* §§ 104-144 (1996 & Supp. 1997) (summarizing the applicability of the LHWCA and its relation to state workers' compensation acts).

14. *Sea-Land Serv.*, 14 Cal. 4th at 83, 925 P.2d at 1312, 58 Cal. Rptr. 2d at 193 (citing *Sun Ship*, 447 U.S. at 725 n.8). In further support of this proposition, the majority relied on a United States Supreme Court decision for its observation that "in the order [to pay compensation under the LHWCA] the full amount of all payments made by the employer [under the state act] was credited against the [LHWCA] award, and no impermissible double recovery [was] possible." *Id.* (emphasis omitted) (quoting *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 131 (1962)).

15. *See id.* at 84, 925 P.2d at 1313, 58 Cal. Rptr. 2d at 194. According to the majority, the two decisions were not dispositive because both concerned injured workers who initially sought state compensation. *See id.* at 86, 925 P.2d at 1312-13, 58 Cal. Rptr. 2d at 195. Significant to the instant case, however, was the fact that neither case

In further support of the dollar-for-dollar system, the majority examined the LHWCA and its crediting provision.<sup>16</sup> Courts construing the LHWCA have determined that it entitles an employer to full economic credit, indicative of a dollar-for-dollar system, for all state workers' compensation payments arising from the same injury, regardless of whether the payments were made for temporary or permanent disability.<sup>17</sup> Thus, although the majority stated that such interpretative decisions, such as *Sun Ship* and *Calbeck*, were not dispositive, it did conclude that "federal law strongly supports application of full economic credit (a dollar-for-dollar system) for LHWCA benefit payments."<sup>18</sup>

After determining that federal law supported the application of a dollar-for-dollar approach, the majority shifted its focus to ascertaining whether the California Act provided similar support.<sup>19</sup> Although the court found that no statute expressly provided for a credit against a WCAB award for payments made under the LHWCA, it did consider the applicability of the California Act's crediting provision, Labor Code section 4909.<sup>20</sup> After determining that section 4909 was inapplicable,<sup>21</sup> the

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premiered its conclusion on whether the state or the federal award occurred first. *See id.* at 86, 925 P.2d at 1313, 58 Cal. Rptr. 2d at 195. Accordingly, the majority stated that declining to employ a dollar-for-dollar system would "seriously undermine one of the express assumptions underlying the *Sun Ship* decision." *See id.*

16. *See id.* at 84-85, 925 P.2d at 1313-14, 58 Cal. Rptr. 2d at 194-95; *see also supra* note 2 (setting forth the language of the LHWCA's crediting provision).

17. *See Sea-Land Serv.*, 14 Cal. 4th at 84-85, 925 P.2d at 1313-14, 58 Cal. Rptr. 2d at 194-95; *see also* D'Errico v. General Dynamics Corp., 996 F.2d 503, 505 (1st Cir. 1993) (stating that "because [the] statute lists injury, disability, or death in the disjunctive, [the] employer's liability under the LHWCA for temporary . . . and permanent total disability must be offset by its previous payments under [the] state workers' compensation act for permanent loss").

18. *See Sea-Land Serv.*, 14 Cal. 4th at 85, 925 P.2d at 1314, 58 Cal. Rptr. 2d at 195.

19. *See id.* at 85-88, 925 P.2d at 1314-16, 58 Cal. Rptr. 2d at 195-97. *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 331 (9th ed. 1987 & Supp. 1997) (discussing the application of section 4909 and its discretionary prevention of double recovery).

20. *See Sea-Land Serv.*, 14 Cal. 4th at 85-86, 925 P.2d at 1314, 58 Cal. Rptr. 2d at 195; *see also supra* note 3 (setting forth the language of section 4909). *See generally* 65 CAL. JUR. 3D *Work Injury Compensation* §§ 137, 156 (1981 & Supp. 1997) (discussing Labor Code section 4909 and the circumstances under which credit has been allowed).

21. *See Sea-Land Serv.*, 14 Cal. 4th at 86, 925 P.2d at 1314, 58 Cal. Rptr. at 195. Section 4909 provides for credit in two situations: (1) where payments exceed compensation liability and such payments are intended as an advance on compensation to become due, or (2) absent an agreement, where the WCAB has discretion to permit

majority addressed two California cases that proscribed a rule against double recovery in the context of concurrent jurisdiction and the LHWCA.<sup>22</sup>

After finding that both *Duong v. Workers' Compensation Appeals Board* and *Bobbitt v. Workers' Compensation Appeals Board* supported the conclusion "that double recovery is impermissible and that full economic credit for LHWCA benefit payments is proper," the majority discussed its reasons for rejecting the court of appeal's application of a category-by-category crediting system.<sup>23</sup>

Furthermore, the majority highlighted several cases that approved the use of a dollar-for-dollar crediting system in an analogous context where two sister state workers' compensation statutes applied to a single compensable injury.<sup>24</sup>

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credit where payments described in the statute were voluntarily made by the employer. See *id.* (citing *Ott v. Workers' Compensation Appeals Bd.*, 118 Cal. App. 3d 912, 920-21, 173 Cal. Rptr. 648, 653-54 (1981)). Section 4909 was not applicable because the payments to Lopez were not intended as an advance, and the payments made by Sea-Land were compelled by the LHWCA. See *id.*

22. See *id.* at 86-87, 925 P.2d at 1314-15, 58 Cal. Rptr. 2d at 195-96. The majority discussed *Duong v. Workers' Compensation Appeals Board*, 169 Cal. App. 3d 980, 215 Cal. Rptr. 609 (1985), and *Bobbitt v. Workers' Compensation Appeals Board*, 143 Cal. App. 3d 845, 192 Cal. Rptr. 267 (1983). See *id.* In *Duong*, after the court determined that the injured employee was entitled to seek compensation under the LHWCA and the California Act simultaneously, it stated that "there is no danger of double recovery because an employer's contributions under one [act] will be credited against the other." See *Sea-Land Serv.*, 14 Cal. 4th at 86-87, 925 P.2d at 1314-15, 58 Cal. Rptr. 2d at 195-96 (quoting *Duong*, 169 Cal. App. 3d at 982, 215 Cal. Rptr. at 611). Also, following a similar employee injury in *Bobbitt*, the court stated that "any benefits [the employee] might receive in the federal proceeding may be credited against benefits [the employee] might receive in the instant [state] proceedings." See *id.* at 87, 925 P.2d at 1315, 58 Cal. Rptr. 2d at 196 (emphasis omitted) (quoting *Bobbitt*, 143 Cal. App. 3d at 849, 192 Cal. Rptr. at 269).

23. See *Sea-Land Serv.*, 14 Cal. 4th at 87-88, 925 P.2d at 1315-16, 58 Cal. Rptr. 2d at 196-97. The court of appeal reasoned that the application of a category-by-category crediting system was consistent with section 4661 of the Labor Code. See *id.* at 87, 925 P.2d at 1315, 58 Cal. Rptr. 2d at 196; see also CAL. LAB. CODE § 4661 (West 1989 & Supp. 1997) ("Where an injury causes both temporary and permanent disability, the injured employee is entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability."). Although the supreme court supported the court of appeal's distinction between temporary and permanent disability indemnity, the majority of the supreme court concluded that the history and context of section 4661 suggests that it is inapplicable in the instant case. See *Sea-Land Serv.*, 14 Cal. 4th at 88, 925 P.2d at 1315-16, 58 Cal. Rptr. 2d at 196-97.

24. See *Sea-Land Serv.*, 14 Cal. 4th at 88-89, 925 P.2d at 1316, 58 Cal. Rptr. 2d at 197. See, e.g., *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281 (1980) (plurality opinion) (holding that successive sister-state workers' compensation awards do not

Finally, Justice Baxter indicated that public policy notions of fairness and predictability supported the application of a dollar-for-dollar crediting system.<sup>25</sup> Accordingly, the majority held that such a system was appropriate in the context of successive LHWCA and state workers' compensation awards.<sup>26</sup>

### B. Justice Mosk's Dissenting Opinion

In his dissenting opinion, Justice Mosk contended that Labor Code section 4661 was controlling in the instant case even though the majority found it inapplicable.<sup>27</sup> According to Justice Mosk, the language of the statute was clear and unambiguous in entitling employees to permanent disability benefits "in addition to any payment . . . for temporary disability."<sup>28</sup> Focusing primarily on the distinction between temporary and permanent disability, as set forth in *Maples v. Workers' Compensation Appeals Board*,<sup>29</sup> Justice Mosk concluded that the category-by-category

allow a double recovery because an earlier award is credited against a subsequent award); *Travelers Ins. Co. v. Industrial Accident Comm'n*, 240 Cal. App. 2d 804, 810, 50 Cal. Rptr. 114, 119 (1966) (allowing benefits received under an Alaska workers' compensation program to be credited against a California workers' compensation award); *Industrial Indem. Exch. v. Industrial Accident Comm'n*, 80 Cal. App. 2d 480, 486, 182 P.2d 309, 313 (1947) (allowing successive sister-state workers' compensation awards, but requiring the amounts received under Utah's compensation program to be credited against the subsequent California worker's compensation award).

25. See *Sea-Land Serv.*, 14 Cal. 4th at 89-91, 925 P.2d at 1317, 58 Cal. Rptr. 2d at 197-98.

26. See *id.* at 92, 925 P.2d at 1318, 58 Cal. Rptr. 2d at 199. See generally 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 263 (9th ed. 1987 & Supp. 1997) (summarizing indemnity for disability in general and specifying the effect of section 4661 on awarding compensation for disability); 65 CAL. JUR. 3D *Work Injury Compensation* § 151 (1981 & Supp. 1997) (setting forth the effect on compensation under section 4661 where an injury causes both temporary and permanent disability).

27. See *Sea-Land Serv.*, 14 Cal. 4th at 92-100, 925 P.2d at 1318-23, 58 Cal. Rptr. 2d at 199-204 (Mosk, J., dissenting); see also *supra* note 24 (setting forth the language of Labor Code section 4661).

28. See *Sea-Land Serv.*, 14 Cal. 4th at 94, 925 P.2d at 1319, 58 Cal. Rptr. 2d at 200 (Mosk, J., dissenting) (emphasis omitted). Furthermore, the dissent stated that an injured employee must receive both temporary and permanent disability if entitled to both, and section 4661 did not limit such temporary disability payment to that received under the California Act. See *id.* (Mosk, J., dissenting).

29. 111 Cal. App. 3d 827, 836-37, 168 Cal. Rptr. 884, 889 (1980). See generally Annotation, *Workmen's Compensation: Right to Compensation for Temporary Total Disability in Addition to Compensation for Permanent Partial Disability*, 88 A.L.R. 385

crediting system embodied in section 4661 would have been appropriate in deciding the instant case.<sup>30</sup>

### III. IMPACT

Prior to *Sea-Land Service*, the supreme court had not determined the appropriate crediting system for situations in which the court had concurrent jurisdiction over both LHWCA and California Act claims for indemnity. By virtue of its application of a dollar-for-dollar system, apparently ignoring the explicit language of section 4661, the majority's decision may "upset the balance of distinct economic interests embodied in California workers' compensation law."<sup>31</sup>

Furthermore, allowance of credit for excessive temporary disability payments against permanent disability payments may be "disruptive and in some instances totally destructive of the purpose of permanent disability indemnity[, which is to aid the employee in his return to the job market]."<sup>32</sup>

### IV. CONCLUSION

After considering the language of both the LHWCA and the California Act, the majority concluded that a dollar-for-dollar crediting system was appropriate in cases where the court has concurrent federal-state jurisdiction over an injured employee's indemnity claims.<sup>33</sup> To allow an injured employee to receive the maximum disability benefits under both acts, without crediting, would entitle the employee to the "best of both worlds."<sup>34</sup> According to the dissent in the court below, that is "exactly what the United States Supreme Court had in mind when it twice cautioned that 'double recovery' should not be permitted."<sup>35</sup>

JOSEPH E. FOSS

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(1934) (discussing the right to compensation for temporary total disability in addition to compensation for permanent partial disability).

30. See *Sea-Land Serv.*, 14 Cal. 4th at 92-100, 925 P.2d at 1318-23, 58 Cal. Rptr. 2d at 199-204 (Mosk, J., dissenting).

31. See *id.* at 93, 925 P.2d at 1318, 58 Cal. Rptr. 2d at 199 (Mosk, J., dissenting).

32. See *id.* at 94, 925 P.2d at 1319-20, 58 Cal. Rptr. 2d at 200-01 (Mosk, J., dissenting) (quoting *Maples*, 111 Cal. App. 3d at 836-37, 168 Cal. Rptr. at 889).

33. See *id.* at 92, 925 P.2d at 1318, 58 Cal. Rptr. 2d at 199.

34. See *id.*

35. *Id.*; see *Sun Ship*, 447 U.S. at 725 n.8; *Calbeck*, 370 U.S. at 131.

## SUMMARIES

### I. Abatement, Survival and Revival

**Code of Civil Procedure section 377.34, which prohibits recovery of damages for pain and suffering in an action brought or maintained on behalf of a deceased plaintiff, applies when the plaintiff dies before a final appealable judgment; section 377.34 does not bar recovery for such damages when the plaintiff dies following the trial court's judgment but before resolution of an appeal from that judgment.**

*Sullivan v. Delta Air Lines, Inc., Supreme Court of California, Decided May 5, 1997, 15 Cal. 4th 288, 935 P.2d 781, 63 Cal. Rptr. 2d 74.*

**Facts.** As a result of his termination from employment, the plaintiff brought fourteen causes of action against his employer based on multiple legal theories. The defendant prevailed on ten causes of action. Of the four remaining causes of action, the jury returned special verdicts for the plaintiff on three claims awarding the plaintiff \$275,000 in damages for emotional distress. The jury deadlocked on the plaintiff's sixth cause of action resulting in a mistrial on that claim. On May 10, 1994, the trial court rendered a purported judgment on the three plaintiff verdicts, granted the plaintiff's motion for new trial on the sixth cause of action, but failed to render judgment on the ten causes of action decided in the defendant's favor. The defendant appealed from the trial court's purported judgment, new trial order and the denial of its motion for judgment notwithstanding the verdict.

The plaintiff died on February 19, 1995 during the pendency of the appeal, and the special administrator of his estate substituted as plaintiff. The court of appeal did not reach the merits of the appeal, but considered only the issue of whether it should reverse the trial court's judgment for the plaintiff on the ground that the damages were no longer recoverable due to the plaintiff's death. The court of appeal concluded that California Code of Civil Procedure section 377.34 barred recovery of



damages for pain and suffering awarded in a judgment if the plaintiff dies while an appeal is pending. Consequently, the court of appeal reversed both the judgment for the plaintiff and the new trial order and directed the trial court to dismiss the action. The California Supreme Court granted review to determine the correct application of section 377.34.

**Holding.** Reversing the court of appeal, the supreme court held that Code of Civil Procedure section 377.34 does not preclude recovery of pain and suffering damages awarded in a judgment if the plaintiff dies after that judgment is rendered but while an appeal is pending. Section 377.34 limits the damages recoverable “[i]n an action or proceeding by a decedent’s personal representative or successor in interest on the decedent’s cause of action” and specifically prohibits recovery of damages for pain, suffering, or disfigurement in such an action. After examining the history of section 377.34 and its predecessors, former Probate Code section 573 and former Civil Code section 956, the court determined that the Legislature had not abrogated the longstanding common law rule, expressed in the leading case of *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 151, 86 P. 178 (1906). *Fowden* held that the death of the plaintiff following a judgment but during the pendency of an appeal or a motion for new trial does not abate the action or affect the validity of the judgment. The court noted that such a judgment is fully enforceable by the representatives of the decedent’s estate.

The court first determined that the current statutory language, “[i]n an action or proceeding by the decedent’s personal representative or successor in interest,” has the same meaning as the language in former section 573, “[w]here a person having a cause of action dies before judgment.” Second, the court disagreed with the court of appeal’s inference that the word “action” in the current statute also includes an “appeal,” explaining that the drafters of the legislation, the California Law Review Commission, did not intend to abrogate the common law rule expressed in *Fowden* by implication. Moreover, the drafters would not have characterized section 377.34 as a restatement of former section 573 “without substantive change” if they had intended to abolish or modify the *Fowden* rule.

The supreme court construed the phrase “before judgment” to mean an “appealable judicial determination,” and not a “final judgment” in the sense that it has been affirmed on appeal or the time for an appeal has expired. The court reasoned that this construction is consistent with both the Legislature’s omission of the word “final” from the statute and the common law rule of *Fowden*. Applying this construction, section 377.34 will not prohibit recovery for pain and suffering when the pre-

vailing plaintiff dies after the trial court has rendered a final appealable judgment, but while the appeal is pending.

Finally, the supreme court held that the purported judgment in this case did not violate the one final judgment rule. In the interest of justice, the supreme court exercised its discretion to cure the trial court's inadvertent failure to dispose of the ten causes of action decided in the defendant's favor by directing the appellate court to amend the judgment nunc pro tunc to reflect the trial court's manifest intent. Additionally, because the plaintiff in substitution expressly waived the right to retrial on the sixth cause of action, the court exercised its discretion and directed the court of appeal to amend the judgment nunc pro tunc to reflect dismissal of that claim with prejudice. Thus, as amended, the judgment was a final appealable judgment effective as of May 10, 1994, before the plaintiff's death.

In a concurring opinion, Justice Chin asserted that the majority had unnecessarily gone too far by construing the phrase "before judgment" to mean before a final appealable judgment. Justice Chin argued that an interlocutory judgment may also be sufficient to preserve the pain and suffering damages that are part of that judgment. Justice Chin observed that the majority's construction presents a "cruel Hobson's choice" to a plaintiff suffering from a life-threatening condition. Under those circumstances, the plaintiff must either waive any unresolved claim or risk the loss to his estate of any pain and suffering damages already awarded if the court does not render a final appealable judgment before his death.

## REFERENCES

### **Statutes and Legislative History:**

CAL. CIV. PROC. CODE § 377.34 (West 1973 & Supp. 1996) (limiting the damages recoverable by decedent's representatives when the plaintiff dies before judgment and barring recovery of pain and suffering damages in such actions).

CAL. PROB. CODE § 573 (West 1991 & Supp. 1997) (replaced by Civil Procedure Code section 377.34).

CAL. CIV. CODE § 956 (West 1982 & Supp. 1997) (replaced with certain modifications by Probate Code section 573).

CAL. L. REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO SURVIVAL OF ACTIONS, 3 CAL. L. REVISION COMM'N REP. F-1 (1961).

CAL. L. REVISION COMM'N, COMMENT TO CAL. CIV. PROC. CODE § 377.34, 22 CAL. L. REVISION COMM'N REP. 895 (1992) (noting that section 377.34 replaced former Probate Code section 573 "without substantive change").

#### **Legal Texts:**

1 AM. JUR. 2D *Abatement, Survival, and Revival* §§ 51-60 (1962) (discussing the common-law principles and statutory modifications governing survival of actions and the effect of death after judgment).

1 AM. JUR. 2D *Abatement, Survival, and Revival* § 61 (1994) (explaining the effect of death after judgment).

46 AM. JUR. 2D *Judgments* § 111 (1994) (noting the common law rule that a judgment rendered after a party's death is generally regarded as void).

1 C.J.S. *Abatement and Revival* §§ 117-129 (1985) (discussing, in general, the abatement and survival of pending actions and proceedings and the effect of death before and after final judgment).

1 CAL. JUR. 3D *Actions* §§ 316-319, 331-338 (1996) (respectively discussing the survival of an action following the death of a party and the damages recoverable from judgment in favor of the decedent).

#### **Law Review and Journal Articles:**

David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 260-70 (1989) (describing the nature of pain and suffering damages).

Lawrence Livingston, *Survival of Tort Actions: A Proposal for California Legislation*, 37 CAL. L. REV. 63 (1949) (discussing proposed changes to tort law which provide for survival of tort actions, including proposed section 956 of the Civil Code).

Thomas E. Stanton, Jr., *Survival of Tort Actions*, 24 CAL. ST. B.J. 424 (1949).

Lawrence O. Erickson, Jr., Note, *Survival of Personal Injury Actions: A Legislative Proposal*, 24 CAL. L. REV. 716 (1936) (discussing new section 956 of the Civil Code and other proposed amendments applicable to survivability and assignability).

SHANNON M. MASON

## II. Appellate Review

**California Civil Code section 3295, subdivision (d) does not entitle a defendant to a new trial on liability and compensatory damages following the reversal of an award of punitive damages.**

*Torres v. Automobile Club of Southern California, Supreme Court of California, Decided June 2, 1997, 15 Cal. 4th 771, 937 P.2d 290, 63 Cal. Rptr. 2d 859.*

**Facts.** The plaintiffs, Richard Torres and his son Anthony Torres, filed suit against the Automobile Club of Southern California, the defendant, for violations of Insurance Code section 790.03. A jury awarded Richard Torres \$4251 in economic damages and twenty thousand dollars for emotional distress while Anthony Torres was awarded no economic damages but ten thousand dollars for emotional distress. The defendant was also found guilty of malice, fraud, or oppression, and the jury awarded \$1.7 million in punitive damages.

The trial court granted the defendant's motion for judgement notwithstanding the verdict with regard to Anthony Torres, but affirmed the judgment for Richard Torres and the punitive damages award. The defendant appealed only the noneconomic and punitive damages awards. Neither the award of economic damages nor the jury's finding of liability for insurance code violations was challenged on appeal. The court of appeal held that Richard Torres had made an insufficient showing for the recovery of noneconomic damages and found that the \$1.7 million in punitive damages was excessive in relation to his actual damages. The court of appeal then remanded the entire case for a complete retrial based on the court of appeal's opinion that Civil Code section 3295(d) did not allow a retrial only for punitive damages even though there was no question of error regarding the amount of economic damages or the issue of liability.

**Holding.** The supreme court reversed the decision of the court of appeal, holding that Civil Code section 3295(d) does not require a complete retrial upon the reversal of a punitive damages award. The court first stated that established principles of law allow appellate courts to order a retrial on the limited issue of punitive damages. Next, the court examined the language of the statute while considering the legislative intent

behind the overall statutory scheme. In doing so, the court found nothing to suggest that the Legislature intended to give defendants the right to a complete retrial when punitive damages are reversed on appeal.

The court also noted that courts should not assume that the Legislature intends to discard well-established principles of law unless there is a clear expression of such intent. In addition, the court stated that there are adequate safeguards to ensure that a jury in a limited retrial will maintain a reasonable relationship between punitive and actual damages. In closing, the court noted that their decision was not based on considerations of public policy, but was based solely on legislative intent and firmly established rules of statutory construction. Therefore, the court concluded that Civil Code section 3295(d) does not entitle a defendant to a complete retrial following the reversal of a punitive damages award.

## REFERENCES

### Statutes and Legislative History:

CAL. CIV. CODE § 3295 (West 1997) (the last sentence of subdivision (d) holding that “[e]vidence of profit and financial condition shall be presented to the same trier of fact”).

1987 CAL. STAT. 1498 (part of the Medical Injury Compensation Reform Act that added subdivision (d) to Civil Code section 3295).

### Legal Texts:

16 CAL. JUR. 3D *Courts* § 192 (1983 & Supp. 1997) (generally discussing how courts construe statutes).

23 CAL. JUR. 3D *Damages* §§ 116-134 (1975 & Supp. 1997) (discussing all aspects of punitive damages).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1374 (1988 & Supp. 1996) (discussing the relation of actual damages to punitive damages).

**Law Review and Journal Articles:**

Barbara Eckert Buchanan, *New Limits, New Licenses? Impact of Adams v. Murakami on the California Punitive Damages System*, 33 SANTA CLARA L. REV. 735 (1993) (discussing the *Murakami* case where the retrial was limited to the issue of punitive damages).

Patrick M. Malone, *Adams v. Murakami—New Judicially Made Rules Affecting Punitive Damages in California*, 25 LOY. L.A. L. REV. 1441 (1992) (providing the history of development of punitive damages in California and a discussion of introducing evidence of a defendant's financial condition).

Gary T. Walker, *Punitive Claims in Bad Faith Cases*, in BAD FAITH LITIGATION AND INSURER VS. INSURER DISPUTES 1987 (Practising Law Institute 1987).

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### III. Civil Procedure

**For a notice of entry mailed by the court clerk to qualify as notice under California Code of Civil Procedure section 664.5, and thus constitute the date on which the time to rule on a motion for new trial begins, the notice must "affirmatively state that it was given 'upon order by the court' or 'under section 664.5.'"**

*Van Beurden Insurance Services, Inc. v. Customized Worldwide Weather Insurance Agency, Inc., Supreme Court of California, Decided March 6, 1997, 15 Cal. 4th 51, 931 P.2d 344, 61 Cal. Rptr. 2d 166.*

**Facts.** The plaintiff brought an action against the defendant to recover damages resulting from the breach of a written agreement and for money had and received. The defendant filed a cross-complaint for breach of an oral contract. On April 1, the jury found the defendant liable to the plaintiff for \$52,081.69, and found the plaintiff liable to the defendant for \$187,654.48. The court directed the defendant to prepare a written judgment. On July 28, the court signed the judgment and the clerk filed it. That same day, the clerk mailed a file-stamped copy of the judgment to the parties. The defendant, however, did not serve notice of entry of judgment on the plaintiff. On August 5, the plaintiff served notice of a motion for new trial, which was subsequently filed on August 8. The motion was denied, however, on October 8. Finally, on November 4, the plaintiff filed a notice of appeal. The defendant moved to dismiss the appeal as untimely.

The court of appeal held that because the trial court ordered the clerk to mail the notice of entry, the time to rule on the plaintiff's motion for new trial began to toll on the date of this mailing, and not on the filing date of the plaintiff's notice. Because the plaintiff's notice of appeal fell outside the required time limit, the court held the appeal to be untimely.

**Holding.** Reversing the court of appeal, the supreme court held that the plaintiff's appeal was timely for two reasons. First, the defendant did not serve proper notice on the plaintiff. Second, the court found that the trial court did not order the court clerk to mail such notice. Therefore, the



court concluded that the proper date from which the time to rule on the new trial motion extended was the filing date of the plaintiff's motion for new trial.

In so holding, the court stated that evidence that the court ordered the mailing of the notice of entry can only be found where such notice expressly states "upon order by the court' or 'under section 664.5.'" Without such a statement, the notice of entry will not be valid for the purposes of inception of the time period to rule on the motion. Because the notice of entry in this case did not make such statements, the court held that the time to rule on the motion extended from the date of its filing. Consequently, the notice of appeal fell within the mandated statutory period, and the court held that the plaintiff's appeal was timely and remanded the case to be heard on appeal.

## **REFERENCES**

### **Statutes and Legislative History:**

CAL. CIV. PROC. CODE § 659 (West 1997).

CAL. CIV. PROC. CODE § 659a (West 1997).

CAL. CIV. PROC. CODE § 660 (West 1997).

CAL. CIV. PROC. CODE § 664 (West 1997).

CAL. CIV. PROC. CODE § 664.5 (West 1997).

CAL. RULES OF CT., Rule 2(a).

CAL. RULES OF CT., Rule 3(d).

### **Case Law:**

Erickson v. Weiner, 48 Cal. App. 4th 1663, 56 Cal. Rptr. 2d 362 (Cal. Ct. App. 1996).

Freiberg v. City of Mission Viejo, 33 Cal. App. 4th 1484, 39 Cal. Rptr. 2d 802 (Cal. Ct. App. 1995).

Steinhart v. South Coast Area Transit, 183 Cal. App. 3d 770, 228 Cal. Rptr. 283 (Cal. Ct. App. 1986).

Sauche-Corea v. Bank of Am., 38 Cal. 3d 892, 701 P.2d 826, 215 Cal. Rptr. 679 (Cal. 1985).

Bunton v. Arizona Pac. Tanklines, 141 Cal. App. 3d 210, 190 Cal. Rptr. 295 (Cal. Ct. App. 1983).

**Legal Texts:**

8 B.E. WITKIN, CAL. PROCEDURE, *Attack* §§ 76-77 (4th ed. 1997).

7 B.E. WITKIN, CAL. PROCEDURE, *Trial* § 450 (4th ed. 1997).

8 B.E. WITKIN, CAL. PROCEDURE, *Attack* § 66 (4th ed. 1997).

7 B.E. WITKIN, CAL. PROCEDURE, *Judgment* § 59 (4th ed. 1997).

*Civil Trials on Evidence*, [1993-1996] William E. Wegner, et al., CAL. PRAC. GUIDE §§ 17:69-73.

**Law Review and Journal Articles:**

*Annotated Calif. Statutes of Limitations: Code of Civ. Proc.*, 25 SW. U. L. REV. 814, 853-54 (1996).

LEALLEN FROST

## IV. Criminal Law

### A. The Sixth Amendment right to confrontation does not extend to pretrial disclosure of confidential or privileged records in camera.

*People v. Hammon, Supreme Court of California, Decided July 7, 1997, 15 Cal. 4th 1117, 938 P.2d 986, 65 Cal. Rptr. 2d 74.*

**Facts.** The defendant was convicted by the trial court on eight counts of committing lewd and lascivious acts on a minor under the age of fourteen. The minor was the defendant's foster child who lived at the defendant's home from the age of twelve to the age of sixteen. The defendant confirmed having sex with the minor but denied anything occurred before she was fourteen years old. On appeal, the defense argued that the trial court erred in quashing subpoenas directed to the psychologists of the minor because the information was necessary to challenge the plaintiff's credibility on cross-examination. The court of appeal affirmed the trial court's decision, holding that the defendant failed to make a proper showing of good cause. The court noted that the time period of the requested records was not relevant and there was no evidence of psychosis on the part of the minor. The Supreme Court of California granted the petition for review to determine whether the trial court erred by not reviewing the subpoenaed records in camera.

**Holding.** The California Supreme Court held that the defendant did not have a Sixth Amendment right to trial court in camera review of privileged or confidential records. The court began its analysis by reviewing the case authority cited by the defense concerning disclosure of documents protected by the psychotherapist-patient privilege. The supreme court disagreed with the determination that the Confrontation Clause of the Sixth Amendment required pretrial disclosure when the defendant's need for the information outweighed the plaintiff/patient's need for confidentiality. The court stated that the line of cases offered by the defense involved the defendant's trial rights, not pretrial rights. The court next examined the United State's Supreme Court decision in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie*, a case involving pretrial discovery in a child molestation case, no majority consensus emerged on the proper application of the Confrontation Clause of the Sixth Amendment to the pretrial discovery issue. However, the lead opinion articulated that the Sixth Amendment right to confrontation is a trial right, not a pretrial

right. Finally, the court acknowledged the strong public policy of protecting a patient's treatment history. Because of the reasons stated, the California Supreme Court declined to extend the defendant's Sixth Amendment<sup>6</sup> rights of confrontation and cross-examination to pretrial disclosure of privileged information.

## REFERENCES

### Statutes and Legislative History:

U.S. CONST. amend. VI. (The Confrontation Clause of the Sixth Amendment guarantees that a criminal defendant will have the right "to be confronted with the witnesses against him." The right to confrontation includes the right to cross-examine witnesses.).

CAL. PENAL CODE § 288(a) (West 1988 & Supp. 1997).

### Legal Texts:

7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 415 (9th ed. 1988 & Supp. 1996) (discussing right of the defendant to be confronted with adverse witness).

19 CAL. JUR. 3D *Criminal Law* §§ 2063, 2123-2124 (1984 & Supp. 1997) (respectively discussing guaranteed rights of the accused, the general right of the accused to be confronted with the witnesses against him and the fact that the right of confrontation is basically a trial right).

### Law Review and Journal Articles:

Christopher K. Descherer & David L. Fogel, *Sixth Amendment at Trial*, 84 GEO. L.J. 1222, 1230 (1996) (discussing the Confrontation Clause and a defendant's right to be present at any crucial stage in which his presence would contribute to his opportunity for effective cross-examination).

Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117 (1996).

CAROL SOVINSKI

**B. Penal Code section 1170.12, which provides for sentence enhancements for “third strike” convictions, is not violated when an indeterminate term is imposed and runs consecutive to a prior determinate term; section 1170.12 does not violate the state and federal ex post facto constitutional provisions by mandating that a sentence for a third strike offense run consecutive to a sentence imposed before the third strike law was enacted.**

*People v. Helms, Supreme Court of California, Decided May 22, 1997, 15 Cal. 4th 608, 936 P.2d 1230, 63 Cal. Rptr. 2d 620.*

**Facts.** The defendant, convicted in Marin County for possessing a controlled substance with a state prison prior, was sentenced to four years in state prison but was placed on probation. Shortly after California voters enacted the three strikes law, California Penal Code section 1170.12, the defendant committed a felony in Santa Clara County, which was prosecuted as a third strike offense. The trial court convicted the defendant and sentenced him to an indeterminate term of twenty-five years to life. The trial court also revoked probation of the Marin County conviction and ordered the previously-imposed four year sentence to run consecutive to his indeterminate term pursuant to California Penal Code section 1170.12(c)(2)(B). The defendant appealed. The court of appeal modified the defendant’s sentences to run concurrently on the basis that sentencing the defendant to consecutive terms violated the state and federal ex post facto provisions by altering the consequences of violating probation. The California Supreme Court granted review to determine the correct interpretation of section 1170.12 and whether its mandate that the defendant serve consecutive terms violated the state and federal ex post facto provisions.

**Holding.** Reversing the court of appeal, the supreme court first held that Penal Code section 1170.12 was not violated when the trial court ordered the defendant’s third strike indeterminate term to run consecutive to his prior four year term. The court held that although the language of section 1170.12, subdivision (c)(2)(B), which provides that a third strike

term "shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law," was imprecise, the most reasonable interpretation of it is that "the voters intended for the third strike term to be served consecutively to any other for which a consecutive term was legally permissible, without regard to the chronology of imposition and execution of judgment and sentence." Further, the court stated that the language of section 1170.12(c)(2)(B) is comprehensive, thereby requiring consecutive sentencing for an offense committed before the three strikes law was enacted.

Second, the supreme court held that section 1170.12 did not violate the ex post facto clauses of the federal and state constitutions by mandating that a sentence for a third strike offense run consecutive to a sentence imposed before the law was enacted. The court reasoned that the applicable provisions of the three strikes law did not in any way alter the punishment for the defendant's pre-three strikes offense, a determinate term, because the defendant would have served the same time for his determinate term as he would have served if the three strikes law had never been enacted. In particular, the three strikes law did not eliminate any potential concurrency of his prior term. Finally, the court reasoned that the new law's only effect was that, whenever imposed or executed, the term for a three strikes offense must be consecutive to all other previously-imposed terms.

## **REFERENCES**

### **Statutes and Legislative History:**

CAL. PENAL CODE § 1170.12 (West 1985 & Supp. 1997) (mandating sentence enhancements for prior felony convictions).

CAL. PENAL CODE § 667(e)(2)(B) (West 1988 & Supp. 1997) (providing that a defendant with two or more felony convictions shall serve an indeterminate term consecutive to any other term of imprisonment for which a consecutive term may be imposed by law).

### **Legal Texts:**

16A C.J.S. *Constitutional Law* §§ 409-413, 321, 424-426 (1984) (discussing, in general, the nature and extent of ex post facto laws).

16A AM. JUR. 2D *Constitutional Law* §§ 634-661 (1979) (discussing, in general, the nature and extent of ex post facto laws).

**Law Review and Journal Articles:**

David C. Owen, *Striking Out Juveniles: A Reexamination of the Right to a Jury Trial in Light of California's "Three Strikes" Legislation*, 29 U.C. DAVIS L. REV. 437 (1996) (exploring the constitutional problems of using prior juvenile adjudications as felony convictions for the purpose of sentence enhancement).

Gary R. Nichols & Harry M. Caldwell, *Consecutive Misdemeanor Sentencing: Curing the Inequity*, 13 PEPP. L. REV. 965 (1986).

ERIC W. SWANIS



**C. When a criminal defendant is convicted and sentenced for a felony offense while on probation for a prior felony conviction, the probationary conviction is not a current conviction for the purposes of California Penal Code section 667(c)(7), nor is the probation term considered as already serving another sentence for the purposes of California Penal Code section 667(c)(8), so that the sentences imposed for the felony conviction and the probation violation should be served concurrently rather than consecutively.**

*People v. Rosbury, Supreme Court of California, Decided March 17, 1997, 15 Cal. 4th 206, 932 P.2d 207, 61 Cal. Rptr. 2d 635.*

**Facts.** The defendant was convicted of attempted robbery while still on probation for a prior robbery committed in 1993. The trial court, applying Penal Code section 667, California's "three strikes law," sentenced the defendant to a nine year prison term for the attempted robbery and a three year prison term for violating probation; the sentences were to be served concurrently. Subsequent to the defendant's appeal of his conviction, the state argued that section 667(c)(8) required the sentences to be served consecutively rather than concurrently because the defendant's probation equated to "already serving another sentence" when he was sentenced for the attempted robbery.

The court of appeal held that the trial court erred in the defendant's concurrent sentencing, reasoning that the 1993 probation conviction was a "current conviction" for purposes of section 667(c)(7), and therefore, the section required the sentences to run consecutively rather than concurrently.

**Holding.** The supreme court reversed the court of appeal, determining that section 667(c)(7) did not require the defendant's sentences to be served consecutively. The court stated that the trial court correctly applied section 667 when it determined that the defendant's two year sentence should be increased to nine years as the result of a "second strike," premised on the state's proof that the defendant had a prior felony conviction. The court reasoned that because the state proved the defendant's 1993 conviction was a prior conviction in the present proceeding, it could not also be considered a current conviction for the

purposes of section 667(c)(7); therefore, the defendant's sentences should run concurrently rather than consecutively.

The supreme court also addressed the state's contention that section 667(c)(8) required consecutive sentences in the present case. The court disagreed with the state, determining that a defendant is not serving another sentence while on probation. The court indicated that the Legislature distinguished between the concepts of sentence and probation in the wording of its three strikes legislation, and noted that a sentence does not begin to be served until the defendant is remanded to custody and delivered to prison. The court concluded that because the defendant was on probation at the time of his sentencing for the attempted robbery, rather than incarcerated, he was not serving another sentence for the purposes of section 667(c)(8), and therefore, his sentences should run concurrently.

As a final note, the court added that if the defendant's probation had been revoked and a sentence imposed prior to sentencing for his attempted robbery conviction, he might have been subject to consecutive sentences under section 667(c)(8). The court expressed distaste with this "race to the courthouse" scenario, but stated that it was bound to enforce the wording of the statute.

## REFERENCES

### Statutes and Legislative History:

CAL. PENAL CODE § 667 (Deering 1983 & Supp. 1997).

CAL. PENAL CODE § 1170.12 (Deering 1983 & Supp. 1997).

### Legal Texts:

22 CAL. JUR. 3D *Concurrent and Consecutive Sentences* §§ 3414-3421 (1985 & Supp. 1997).

22 CAL. JUR. 3D *Habitual Offenders* § 3369 (1985 & Supp. 1997).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW 2D, *Consecutive or Concurrent Sentences* §§ 1475-1477 (1989 & Supp. 1997).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW 2D, *Prior Serious Felony* § 1515 (1989 & Supp. 1997).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW 2D, *Imposition or Execution of Sentence Following Revocation of Probation* §§ 1708-1715 (1989).

**Law Review and Journal Articles:**

Meredith McClain, Note, *"Three Strikes and You're Out": The Solution to the Repeat Offender Problem?*, 20 SETON HALL LEGIS. J. 97 (1996).

Christine Markel, Note & Comment, *A Swing and a Miss: California's Three Strikes Law*, 17 WHITTIER L. REV. 651 (1996).

Victor S. Sze, Note & Comment, *A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost*, 28 LOY. L.A. L. REV. 1047 (1995).

Mark W. Owens, Legislative Note, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will It Work?*, 26 PAC. L.J. 881 (1995).

Keith C. Owens, Comment, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129 (1995).

JOHN W. CORRINGTON

**D. A request for reversal of a criminal conviction based on ineffective assistance of counsel is appropriate in a habeas corpus proceeding, but not on direct appeal unless the record is sufficiently clear concerning the motivations of counsel.**

*People v. Tello, Supreme Court of California, Decided April 17, 1997, As Modified June 11, 1997, 15 Cal. 4th 264, 933 P.2d 1134, 62 Cal. Rptr. 2d 437.*

**Facts.** The defendant was convicted in a jury trial of cocaine possession following his arrest by Orange County Deputy Sheriff Gomez. Deputy Gomez testified at trial that he stopped the defendant's car when he noticed that the passenger was lighting a marijuana cigarette. After the defendant "consented to a search of the car," Deputy Gomez decided to conduct a patdown search, and he told the defendant to turn around. When the defendant obeyed the deputy's instruction, "a vial of cocaine fell from his right pant leg."

The court of appeal reversed the defendant's conviction on the ground of ineffective assistance of counsel because defense counsel never moved to suppress the cocaine. Relying solely on the trial record, the court of appeal recognized that the cocaine was appropriate evidence for suppression, as it was discovered in an illegal demand for a patdown search.

**Holding.** Reversing the court of appeal, Justice Chin, writing for the majority, held that the facts on the record were inadequate for determining whether or not representation was inadequate. The court recognized that a habeas corpus proceeding, rather than a direct appeal, was the proper avenue for a claim of ineffective assistance of counsel where there was no indication on the record why counsel acted the way that he did, counsel was not asked to explain, and there is a possibility of some "satisfactory explanation." The court acknowledged that it did not know why defense counsel did not make a motion to suppress the cocaine. Referring to Justice Rylaarsdam's dissent at the court of appeal, the supreme court stated that facts not raised at trial might justify the actions of both the officer and defense counsel. Likewise, the prosecution was never afforded an opportunity to explain why the evidence should not be

suppressed. The court noted that the court of appeal should not have reversed when the prosecution and the police were never given an opportunity to explain why the evidence was admissible. Although the court explained that an appeal may be the proper avenue for claiming ineffective assistance of counsel where the record contains sufficient information, the court determined that the instant record did not achieve this level of adequacy.

## REFERENCES

### Statutes and Legislative History:

CAL. PENAL CODE § 1538.5 (West 1982 & Supp. 1997).

### Legal Texts:

21A AM. JUR. 2D *Criminal Law* §§ 732-763, 967-992 (1981 & Supp. 1997) (regarding effectiveness of counsel).

39 AM. JUR. 2D *Habeas Corpus* § 53 (1968 & Supp. 1997) (discussing habeas corpus with regard to denials of counsel, in which the authors include ineffective assistance).

6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW 2D, *Extraordinary Writs* § 3350 (1989 & Supp. 1997) (recognizing ineffective assistance as grounds for habeas corpus attack of a judgment).

### Law Review and Journal Articles:

Justine A. Fitzgerald & Ashley Whitesides, *Right to Counsel*, 85 GEO. L.J. 1215 (1997).

John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990).

Gregory G. Samo, J.D., *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Search and Seizure Issues*, 12 A.L.R. 4th 318 (1981).

CHRISTOPHER FROST

- E. Failure by a trial court to obtain a personal waiver of the statutory right to jury trial on the issue of prior prison terms from a defendant will result in error if the issue is tried to the court, but does not implicate state or federal constitutional issues of the right to jury trial or due process; therefore, the error must be preserved by objection in order to raise the issue on appeal.**

*People v. Vera, Supreme Court of California, Decided May 1, 1997, 15 Cal. 4th 269, 934 P.2d 1279, 62 Cal. Rptr. 2d 754.*

**Facts.** The defendant was charged with three counts each of robbery and kidnapping. The trial court granted the defendant's motion to bifurcate the trial on the substantive charges from that of the trial on the issue of prior prison terms. The defendant was convicted on all counts in a jury trial. The trial court subsequently dismissed the jury conviction based on defense counsel's prior indication at the time of the bifurcation that the defendant would waive his statutory right to a jury trial concerning the prior prison terms issue. The defendant did not personally waive his jury trial right before the court. The prior prison terms issue was tried to the court on the date of sentencing without objection by defense counsel, and the court found the allegations to be true. The defendant was sentenced to a seven year prison term, with two one year enhancements for his prior convictions. The defendant appealed, claiming that the finding of prior prison terms should be stricken because he did not waive his right to a jury trial on the issue.

The court of appeal found that failure by the trial court to obtain the defendant's personal waiver of his jury trial right was harmless error. The defendant's conviction and sentence, including the trial court's imposition of the one year sentence enhancements, were affirmed.

**Holding.** The supreme court affirmed the court of appeal's decision, determining that the defendant's failure to timely object to the trial court's error resulted in a waiver of the right to appeal the issue. The court initially noted that the defendant's right to a jury trial on the prior prison terms issue is created by California Penal Code section 1025. The court then pointed out that prior California case law has established that

any deviation from this statutory procedure must be noted by a defendant's timely objection in order to preserve the issue for appeal.

The court then discussed the potential constitutional issues raised by the defendant's appeal. The court noted that if the defendant's claim involved deprivation of constitutional rights, he would not be precluded from raising those issues for the first time on appeal. The court then analyzed two potential constitutional issues raised by the defendant: the right to jury trial and federal due process.

In discussing the right to jury trial, the court indicated that constitutional rights were only implicated concerning the defendant's right to jury trial on the substantive charges. The defendant's right to jury trial on the prior prison terms issue was created by statute, not by the state or federal constitutions, and, therefore, the defendant's claim of a deprivation of this right could not be raised for the first time on appeal.

In discussing the federal due process issue, the court indicated that this issue arises in the context of the present case when a defendant is denied a state-created right to jury discretion concerning sentencing. The court reasoned that a statutory right to a jury finding on prior prison convictions is distinctly different from jury discretion concerning sentencing. Because the jury was not performing a discretionary function, but rather was performing a fact-finding determination of the truth of prior convictions, the court concluded that federal due process was not implicated in the present case. The court concluded its analysis by stating that because no state or federal constitutional issues were involved, the defendant had waived his right to appeal the jury trial issue by failing to make a timely objection.

## **REFERENCES**

### **Statutes and Legislative History:**

CAL. PENAL CODE § 1025 (West 1985 & Supp. 1997) (granting a defendant the right to jury trial on alleged prior convictions by the same jury that tried the substantive issues).

CAL. PENAL CODE § 1158 (West 1985 & Supp. 1997) (stating that prior prison terms issue may be tried to the court if jury trial right is waived by a defendant).

**Legal Texts:**

19 CAL. JUR. 3D *Trial by Jury* §§ 2114-2122 (1985 & Supp. 1997) (discussing waiver of right to jury trial by a defendant).

22 CAL. JUR. 3D *Enhancement of Punishment* §§ 3384-3391 (1985 & Supp. 1997) (discussing procedures for enhancement of criminal sentences).

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW 2D, *Waiver of Right to Jury Trial* §§ 2644-2649 (1989 & Supp. 1997) (discussing waiver of right to jury trial by a defendant).

6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW 2D, *Reversible Error* § 3306 (1989 & Supp. 1997) (discussing the denial or impairment of jury trial).

**Law Review and Journal Articles:**

Nancy Kornick, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1981-1982, Right to Jury Trial*, 71 GEO. L.J. 615 (1982) (discussing constitutional right to jury trial).

Robert E. Sabido, Note, *California Supreme Court Survey: A Review of Decisions, People v. Calderon*, 22 PEPP. L. REV. 1038 (1996) (discussing the California law allowing bifurcation of criminal trials).

Miguel Schor, *State v. Green—Recidivist Statutes: The Procedure for the Introduction of Prior Crime Evidence*, 61 TUL. L. REV. 960 (1987) (supporting criminal trial bifurcation as less prejudicial to a defendant than unified procedure).

Leonard N. Sosnov, *No Mere Error of State Law: When State Appellate Courts Deny Criminal Defendants Due Process*, 63 TENN. L. REV. 281 (1996) (discussing due process issues of state sentencing procedures).



Eric Weitz, Note, *California Supreme Court Survey: A Review of Decisions*, *People v. Saunders*, 22 PEPP. L. REV. 290 (1994) (discussing bifurcation procedure when a defendant fails to object or waives right to jury trial).

JOHN W. CORRINGTON

- F. A sex offender's failure to register a change of address pursuant to California Penal Code section 290(f) is a continuing offense; thus, felony prosecution after the effective date of amendment increasing the crime from a misdemeanor to a felony, did not violate the constitutional prohibition against ex post facto laws.**

*Wright v. Superior Court, Supreme Court of California, Decided May 12, 1997, 15 Cal. 4th 521, 936 P.2d 101, 63 Cal. Rptr. 2d 322.*

**Facts.** California Penal Code section 290(a) requires convicted sex offenders to register with local law enforcement agencies. Subdivision (f) requires a registered sex offender to notify the law enforcement agency of last registration of a change of residence address within a specified period. Effective January 1, 1995, violation of the notification requirements constitutes a felony. Prior to that date, failure to comply with section 290(f) was a misdemeanor. The defendant, William Wright, registered with the Buena Park Police Department as a sex offender on August 15, 1994. On March 23, 1995, a special agent with the California Department of Justice discovered that the defendant had moved from his last known address in Buena Park sometime in November 1994. The defendant never informed the Buena Park Police Department of his change of residence. The People initially filed a felony information alleging that the defendant violated section 290(f) sometime between November 1994 and March 23, 1995. Realizing that their pleading was defective, the People filed an amended information charging the defendant with a felony violation of section 290(f) alleging that the failure to notify occurred sometime between February 1 and March 23, 1995.

The defendant claimed that felony prosecution was an ex post facto law and therefore moved to dismiss the charges pursuant to Penal Code section 995. The defendant argued that his offense occurred in November 1994 when he initially failed to report his change of address. The trial court denied the defendant's motion to dismiss concluding that the violation was a continuing offense and thus properly was prosecuted as a felony. The court of appeal disagreed and determined that a violation of section 290(f) is an instantaneous offense that is completed upon expiration of the thirty-day notification grace period. Thus, the court of appeal concluded that, in this case, the defendant's offense occurred sometime

in December 1994, warranting only misdemeanor prosecution. The California Supreme Court granted review to consider whether felony prosecution is prohibited as *ex post facto* if the defendant's failure to comply with section 290(f) occurred prior to January 1, 1995.

**Holding.** Reversing the decision of the court of appeal, the California Supreme Court held that failure to comply with the notification requirements of section 290(f) is a continuing offense that is not completed as long as the sex offender's obligation remains unfulfilled. Consequently, the court further held that felony prosecution of a sex offender's continuing failure to comply with section 290(f) after January 1, 1995 did not violate the prohibition against *ex post facto* laws.

Although section 290(f) does not expressly state a continuing offense, the "overarching legislative intent and comprehensive statutory scheme governing the registration of sex offenders" indicates that the statute imposes a continuing duty of notification on sex offenders. Thus, the offense continues as long as the offender violates that duty by failing to register an address change pursuant to the statute. The court reiterated that the well-established purpose of section 290 is to assure that sex offenders are "readily available for police surveillance at all times" to protect the public from the high potential for sex offender recidivism. The court explained that section 290(f) is one of the limited circumstances that warrant application of the doctrine of continuing offenses. "Failure by any sex offender to comply with any provision of section 290, including subdivision (f), would substantially undermine the goal of assuring that such persons 'shall be readily available for police surveillance at all times.'" The court further noted that characterization of a violation as an instantaneous offense would essentially "eviscerate" the statute by allowing sex offenders to escape prosecution by "laying low" until the expiration of the statute of limitations.

Consequently, the supreme court rejected the court of appeal's narrow construction of the statute and the assertion that the offense must occur within the ten day (now five working days) statutory notification period. The court explained that the notification grace period simply allows the registrant reasonable time to comply with the notification requirements and is not intended to provide a means for sex offenders to avoid compliance by deliberately concealing their whereabouts until the expiration of the statute of limitations.

Accordingly, prosecution of the defendant's failure to notify the Buena Park Police Department of his address change as a felony did not violate the prohibition against *ex post facto* laws. The court reasoned that the defendant's failure to comply with the statute continued after the January 1, 1995 amendment and thus did not change the legal consequences

of the defendant's conduct prior to the effective date of the change. Although the defendant's initial violation of the statute occurred prior to January, 1, 1995, his continuing failure to notify the appropriate law enforcement authorities after that date constituted the more serious offense of a felony. Because the defendant's failure to register continued after the amendment of section 290(f), felony prosecution did not violate the constitutional prohibition against ex post facto laws.

## REFERENCES

### Statutes and Legislative History:

U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

CAL. CONST. art. I, § 9 ("A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed.").

CAL. PENAL CODE § 290(a), (f) (West 1988 & Supp. 1997) (imposing lifetime duty of registration on convicted sex offenders residing in California and requiring notification of address change within five working days).

### Case Law:

*Toussie v. United States*, 397 U.S. 112 (1970) (discussing the guidelines for determining whether a particular violation of law constitutes a continuing offense).

*In re Parks*, 184 Cal. App. 3d 476 (1986) (concluding that the violation of section 290(a) constitutes a continuing offense).

*Duncan v. State*, 384 A.2d 456, 459 (Md. 1978) (defining a continuing offense as "marked by a continuing duty in the defendant to do an act which he fails to do. The offense continues as long as the duty persists, and there is a failure to perform that duty.").

### **Legal Texts:**

17 CAL. JUR. 3D *Criminal Law* § 9 (1984 & Supp. 1997) (generally discussing ex post facto laws).

20 CAL. JUR. 3D *Criminal Law* § 2266 (1985 & Supp. 1997) (discussing the statute of limitations with respect to continuing offenses).

22 CAL. JUR. 3D *Criminal Law* §§ 3362-3391 (1985 & Supp. 1997) (generally discussing the enhancement of punishment for crimes).

3 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1417 (2d ed. 1989) (discussing the statutory registration requirements for convicted sex offenders).

1 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* §§ 16-20 (discussing the general principles concerning ex post facto laws).

### **Law Review and Journal Articles:**

Robin L. Deems, Comment, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1209-12 (1996) (analyzing the constitutional issues implicated by sex offender registration, in particular, the implication of the ex post facto clause).

Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885 (1995) (discussing sex offender notification laws and concluding that they are constitutionally infirm because they violate the Eighth Amendment guarantee against cruel and unusual punishment).

Sean P. Lafferty, *Criminal Procedure; Sex Offender Registration—Expansion of Included Offenses*, 26 PAC. L.J. 495 (1995) (discussing the elevation of failure to register from misdemeanor to felony status).

SHANNON M. MASON

## V. Delinquent, Dependent and Neglected Children

**Where orders of a juvenile court referee require approval of a juvenile court judge to become effective, such orders do not become final until the later of ten calendar days after service of a written copy of the juvenile court referee's order and findings or twenty judicial days after the hearing; Welfare and Institutions Code section 250 finalizing an order ten calendar days after service applies only to orders which do not require juvenile court judge approval.**

*In re Clifford C., Supreme Court of California, Decided July 3, 1997, 15 Cal. 4th 1085, 938 P.2d 932, 64 Cal. Rptr. 2d 873.*

**Facts.** On June 15, 1995 a juvenile wardship petition alleged that Clifford C., the minor defendant, had committed several felonies including car-jacking, robbery, assault, and evading a peace officer. The defendant, appearing before a juvenile court referee, admitted to the two car-jacking allegations. The referee agreed to the truth of the admissions and dismissed the remaining charges. At the August 2 dispositional hearing, the referee then committed the minor defendant to a youth camp. A juvenile court judge approved the resulting dispositional order on August 4 and it was served on the parties. On August 15, the district attorney objected by letter and requested that the judge, on his own motion, grant a rehearing of this order. On August 22, the judge granted the requested rehearing. Ultimately, the judge overturned the referee's order and committed the minor defendant to the California Youth Authority for a maximum period of twenty-one years—not to exceed his twenty-fifth birthday.

The minor appealed this altered result on several grounds. The court of appeal focused solely on the issue of timeliness of the rehearing order. This court determined that the judge's rehearing order was untimely and reinstated the referee's original dispositional order. The California Supreme Court granted the petition to review the issue of the order's timeliness.

**Holding.** Reversing the court of appeal, a unanimous court found that the express finality provisions of Welfare and Institutions Code section

250 applied only to a juvenile court referee order which did not require approval of a juvenile court judge to take effect. The court held that orders that required such approval, on the other hand, did not enjoy final status until the later of ten calendar days following service of a written copy of the referee's order or twenty judicial days after the hearing.

The court first canvassed the applicable sections 247 through 253 of the Welfare and Institutions Code. The controversy engendered by the case arose out of the seemingly contradictory language as to time limitations for rehearings. Section 250 in partnership with section 252 established the finality of referee orders at ten calendar days after the date of service. Contrarily, section 253 permitted a juvenile court, on its own motion, to order a rehearing of at any point within 20 judicial days following the referee's hearing on the matter.

The California Supreme Court then deflated the logic of the court of appeal. That court had relied heavily upon *In re Henley*, 9 Cal. App. 3d 924, 88 Cal. Rptr. 458 (1970), which had determined that the final provision section of the code precluded a juvenile court from ordering a rehearing on its own motion after the end of the ten day period. The court of appeal further determined that the Legislature's amendment of section 253 about a year after *Henley* did not disturb that court's ruling. The California Supreme Court punctured this reasoning, stating that "we cannot agree with the Court of Appeal's conclusion that section 250, as construed in *Henley*, poses an 'irreconcilable conflict' with section 253."

The court then "harmonized" the two statutes. The court noted that section 250 applied only in cases where a referee's order took effect without approval of a juvenile court judge and that not all referee orders fell within this purview. The court then added that the Legislature "failed to provide a comparable express finality provision governing orders of a juvenile court referee which require the approval of a juvenile court judge." According to the court, this category of referee orders, "as a practical matter," achieve finality upon the expiration of the time period in which a judge may grant a rehearing.

The court further classified the types of rehearings and their separate time constraints into two categories. First, pursuant to section 252, a minor or a minor's parent have ten days after service to petition for a rehearing. Second, pursuant to section 253, a juvenile court judge has 20 days to grant the judge's own motion for rehearing.

The court then held that the statutory scheme required a two-pronged interpretation of section 250 and 253. Where a referee's order does not require judge approval, it becomes final within ten calendar days following service. The minor or the minor's parents may petition for rehearing within this time frame and extend the finality period. Moreover, the judge may grant a rehearing on the judge's own motion under section

253 if the ten day period has not ended. Where a referee's order requires a judge's approval, it achieves finality after the later of ten calendar days after service or twenty judicial days after the referee's hearing. In addition, a minor or minor's parent may petition for rehearing during the first ten days while judges, on their own motion, may grant a rehearing within the twenty day time frame.

In clarifying the apparent conflict of the section 250 and 253 time frames, the court added that even where the judge had "approved" the order pursuant to requirements, such approval was only a requirement to be "countersigned" by a judge for authentication purposes and that such approval was not a "substantive" approval. Accordingly, the court noted that where, as here, a judge has approved an order granting a rehearing, the action was entirely consistent with legislative intent. As a result of its holding the court found the juvenile judge's grant of rehearing to be timely.

## REFERENCES

### Statutes and Legislative History:

CAL. WELF. & INST. CODE §§ 249-253 (West 1984 & Supp. 1997).

### Legal Texts:

27 CAL. JUR. 3D *Delinquent and Dependent Children* § 204 (3d ed. 1987 & Supp. 1997) (discussing rehearing of referee matters).

10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent & Child* § 481 (9th ed. 1989 & Supp. 1997) (discussing judge's review and approval of referee orders).

10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent & Child* §§ 610-612 (9th ed. 1989 & Supp. 1997) (discussing procedures for rehearing, application and denial of rehearing).

KEVIN J. SLATTUM



## VI. Employer and Employee

**Statute of limitations in breach of contract action based upon constructive termination of employment begins to run when the employee is actually terminated, not when the intolerable working conditions occur.**

*Mullins v. Rockwell Int'l Corp., Supreme Court of California, Decided May 29, 1997, 15 Cal. 4th 731, 936 P.2d 1246, 63 Cal. Rptr. 2d 636.*

**Facts.** The plaintiff, Cornelius Mullins, was employed by the defendant, Rockwell International Corporation, for twenty-two years in various managerial level positions. In October of 1989, the plaintiff resigned from his position with the defendant. In September of 1991, the plaintiff filed a complaint against the defendant for constructive discharge. The plaintiff contended that the defendant forced his resignation by intending to demote him and reduce his salary and benefit level. The complaint alleged wrongful termination, wrongful termination based upon a breach of the covenant of good faith and fair dealing, and breach of an oral employment contract.

The defendant sought summary judgment for all causes of action asserting that the wrongful termination action was barred by the one-year statute of limitations under California Code of Civil Procedure section 340(3), and the actions for breach of the covenant of good faith and fair dealing and breach of an oral employment contract were barred by the two-year limit set out in California Code of Civil Procedure section 339. The applicability of sections 339 and 340(3) was not at issue. Instead, the issue was when the statutes of limitation began to run.

The trial court granted the defendant's motion for summary judgment on the ground that all claims were barred by the applicable statutes of limitation. The court held that the first cause of action was barred by the one-year statute of limitations period because the plaintiff resigned on September 20, 1989, and did not file his complaint until September 19, 1991. The second and third causes of action were barred by the two-year statute of limitations which "began to run once plaintiff suffered appreciable harm." The plaintiff, according to the trial court, suffered appreciable harm in January of 1988 when he was notified of his change in employment status. Thus, the complaint filed in September of 1991 was untimely.

The court of appeal affirmed, holding that the first cause of action was barred by the one-year limit because the complaint was not filed within a

year of the plaintiff's resignation. The court further held that the second and third breach of contract causes of action were barred by the two-year statute of limitations which began to run when the employee was given notice of the constructive termination, not when the termination actually occurred. Therefore, the court concluded that the plaintiff's breach of contract claims accrued in January of 1989, at the latest, when the plaintiff became aware of the defendant's attitude towards him.

The California Supreme Court granted review to determine whether the statute of limitations in a breach of contract action based upon alleged constructive termination of employment begins to run when the intolerable working conditions occur, or upon actual termination.

**Holding.** The California Supreme Court reversed the judgment of the court of appeal insofar as the judgment barred the plaintiff's breach of contract causes of action on statute of limitations grounds. The court held that the statute of limitations does not begin to run until actual termination of employment.

The court analogized this case to its recent decision in *Romano v. Rockwell Int'l, Inc.*, 14 Cal. 4th 479, 926 P.2d 1114, 59 Cal. Rptr. 2d 20 (1996). In *Romano*, the court held that the statute of limitations began to run, for the purposes of an implied contract not to terminate employment without good cause, at the time of the actual termination even if the employer previously issued a notification of termination. The court reasoned that the breach occurred at the time of the actual termination without good cause. Furthermore, even if the breach occurred at the notification of termination, such breach constituted an anticipatory breach, giving the plaintiff a number of possible remedies. The plaintiff could sue on the breach immediately, or could continue employment until the breach came to pass. Because the plaintiff continued to perform, the court concluded that the statute of limitations began to run when the announced breach actually occurred—at termination.

The court applied the same reasoning to a breach of contract action based upon an alleged constructive discharge. The breach of contract is the actual termination of the employment without good cause. The creation of poor or intolerable working conditions to force resignation may also be a breach in the same way notification of termination is a breach. The court held that "[b]ecause (1) constructive discharge is an employer-directed termination of employment, (2) termination normally is the breach alleged, and (3) the employee may elect to overlook earlier ad-

verse actions of the employer in the hope of conciliation, . . . the statute of limitations does not begin to run until actual termination.”

JENNIFER B. HILDEBRANDT

## VII. Hospital Liens

**When an insurer or payor, who has received timely notice of a hospital lien, fails to honor the hospital lien at the time of the judgment, compromise, or settlement, the hospital may recover the 'original amount imposed under the lien and no more.**

*Mercy Hospital v. Farmers Insurance Group, Supreme Court of California, Decided March 20, 1997, 15 Cal. 4th 213, 932 P.2d 210, 61 Cal. Rptr. 2d 638.*

**Facts.** The plaintiff, a hospital and medical center that provided emergency medical treatment for an accident victim, brought suit against the defendant, an insurance company, to recover the full amount of its lien under former California Civil Code section 3045, after the defendant failed to pay the plaintiff "as much of its lien as [could] be satisfied out of fifty percent" of the judgment, compromise, or settlement. In accordance with former section 3045, the plaintiff provided timely notice of the lien prior to the settlement. The defendant failed, however, to honor the plaintiff's lien and disbursed the entire settlement to the injured party.

The trial court concluded that under former section 3045, the plaintiff was entitled to fifty percent less one hundred dollars of the proceeds of the insurance settlement, rejecting the plaintiff's assertion that it was entitled to the full amount of the hospital costs because the defendant failed to honor its lien at the time of disbursement.

**Holding.** Affirming the decision of the court of appeal, the supreme court held that under former section 3045, when an insurance company, with timely notice of a hospital lien, disburses a settlement without honoring the lien, the hospital is entitled to the amount that "can be satisfied out of fifty percent of the moneys exceeding one hundred dollars" at the time of the settlement, and no more. The court explained that a reasonable statutory interpretation of former section 3045, as well as the current section 3045, demonstrates that the drafters used past tense language. Accordingly, the court concluded that the "amount of [the hospital] lien claimed in the notice which the hospital was entitled to receive as payment," relates back to the amount the hospital was to receive at

the time of the disbursement of the settlement, not the hospital's entire costs. The court further reasoned that case law supports the contention that the hospital is entitled to the amount originally available had the insurance company paid the lien prior to distributing the proceeds to the injured party. The court noted that no case law exists which supports the position that "the amount of the debtor's obligation increases if it neglects to pay the lien creditor . . . ."

The court dismissed the plaintiff's argument that such an interpretation of section 3045 would allow insurance companies to dishonor hospital liens, leaving hospitals to collect the funds. Instead, the court demonstrated how the interpretation urged by the plaintiff would allow hospitals to recover the full amount due under the lien at the expense of the injured party who, more frequently, would be left with little or no insurance proceeds resulting in large debts to the hospital. The court concluded that had the Legislature wanted to provide hospitals with the ability to collect their entire costs, or more than specified in the lien at the time of disbursement, the Legislature could have included such a provision in the statute. Here, however, the court found that neither former section 3045 nor the newly enacted section 3045 included such language, and absent such legislative intent, the court based its decision on the language and past case law interpreting section 3045.

## **REFERENCES**

### **Statutes and Legislative History:**

CAL. CIV. CODE §§ 3045.1-6 (West Supp. 1997) (granting hospitals the power to create and enforce liens for medical treatment).

CAL. HEALTH & SAFETY CODE § 1250 (West Supp. 1990) (defining the meaning of health facility and hospital as applied in California Civil Code section 3045).

CAL. GOV'T CODE § 23004.1 (West Supp. 1997) (providing that in recovering for care or treatment provided to an injured person by a third person, the county shall notify the third person's insurer, when known to the county, in writing of the lien within thirty days).

**Case Law:**

San Francisco v. Sweet, 12 Cal. 4th 105, 906 P.2d 1196, 48 Cal. Rptr. 2d 42 (stating that "any reduction of a county lien claim for hospital treatment and related services are at the discretion of the county").

**Legal Texts:**

53 C.J.S. *Liens* § 14 (1987) (discussing generally the creation, existence, and discharge of a lien).

50 C.J.S. *Judgments* § 552 (1997) (defining a lien as a security interest in an underlying debt).

50 C.J.S. *Judgments* § 553 (1997) (detailing the ability of the Legislature to divest discretionary power regarding liens in the courts).

41 C.J.S. *Hospitals* § 15 (1991) (outlining the filing and notice requirements that the hospital must follow to establish a valid lien for medical treatment).

40 AM. JUR. 2D *Hospitals and Asylums* § 5 (1968 & Supp. 1996) (discussing the rights, powers, and duties of a hospital in creating a lien for services).

51 AM. JUR. 2D *Liens* § 40 (1970 & Supp. 1996) (defining a lien as a debt secured in a substantive property right).

51 AM. JUR. 2D *Liens* § 51 (1970 & Supp. 1996) (focusing on the general rule that common law liens override all other rights in the secured property).

19 A.L.R. 5th 262 (1993) (outlining the construction and operation, and effect of a statute giving a hospital lien against recovery from a tortfeasor causing the patient's injury).

36 CAL. JUR. 3D *Healing Arts and Institutions* § 17 (1977 & Supp. 1997)  
(explaining that because public hospitals are created by the state for the  
general welfare, they may operate as a business).

36 CAL. JUR. 3D *Healing Arts and Institutions* § 32 (1977 & Supp. 1997)  
(stating that hospital districts have the power to “do any act necessary to  
carry out the purposes of the law”).

MAIRI J. SANFORD

## VIII. Insurance Contracts and Coverage

**After the expiration of the contestability period, an imposter defense is unavailable where the named insured personally applied for the insurance policy, but substituted an imposter for the required medical examination.**

*Amex Life Assurance Company v. Superior Court of Los Angeles County, Supreme Court of California, Decided February 24, 1997, 14 Cal. 4th 1231, 930 P.2d 1264, 60 Cal. Rptr. 2d 898.*

**Facts.** The plaintiff, a purchaser of discounted life insurance policies prior to the named insured's death, filed suit against the defendant, a life insurance policy issuer, alleging breach of contract, insurance bad faith and equitable estoppel after the defendant refused to honor the policy. The defendant originally issued the policy to an HIV positive individual. The defendant was unaware of the insured's medical condition because the insured lied on the insurance application and sent an imposter to take the required medical examination.

At trial, the defendant conceded that the contestability period had expired, yet urged the court to adopt an imposter defense because someone other than the person named on the policy participated in the required medical examination. The use of an imposter, the defendant argued, created a life insurance policy in the imposter, not the deceased, and thus, the defendant was not obligated to pay on the policy.

The trial court denied the defendant's motion for summary judgment because the imposter defense was not recognized in California. Subsequently, the defendant sought a writ of mandamus from the court of appeal in an attempt to direct the trial court to grant summary judgment. The court of appeal granted the defendant's petition on the issue of insurance bad faith, but denied the petition in all other aspects, agreeing with the trial court that the imposter defense, even if available, did not apply to the case at bar.

**Holding.** Affirming the court of appeal, the supreme court held that the imposter defense was not available where the insured personally applied for the insurance policy and sent an imposter into the required medical



examination. The court reasoned that the requisite mutual assent to the insurance contract was present where the named insured personally applied for the policy. Thus, the court concluded that an imposter participating in the medical examination did not affect the underlying insurance contract. The court equated the use of an imposter in the medical examination to other forms of fraud, such as someone switching blood samples, and just as with other forms of fraud, the defendant had to raise this affirmative defense prior to the expiration of the contestability period.

The court also addressed the public policy reasons for rejecting an imposter defense after the expiration of the contestability period. The court noted that a contestability clause served two significant purposes: (1) the clause allowed the insurer a reasonable time to investigate whether the insured obtained the policy through fraud, and (2) the clause guaranteed that after the contestability period expired, beneficiaries would collect the proceeds of the policy without delay or costly litigation. The court believed that allowing an imposter defense after the contestability period expired, subjecting beneficiaries to possible litigation after the insurer had a reasonable time to discover fraudulent behavior, would undermine the fundamental purpose of a contestability clause.

## REFERENCES

### Legal Texts:

43 AM. JUR. 2D *Insurance* § 761 (1982 & Supp. 1997) (outlining incontestability clauses generally).

43 AM. JUR. 2D *Insurance* § 768 (1982 & Supp. 1997) (explaining the defense of fraud following the expirations of the contestability period).

39 CAL. JUR. *Insurance Contracts* §§ 258-265 (1996 & Supp. 1997) (outlining contestability clauses, the scope of coverage, and the public policy supporting contestability clauses).

39 CAL. JUR. *Insurance Contracts* § 263 (1996 & Supp. 1997) (discussing the defense of fraud to a contestability clause, specifically).

46 C.J.S. *Insurance* § 854 (1993) (noting that the insurance company is precluded from contesting coverage on any ground after the expiration of the contestability period).

44-46A C.J.S. *Insurance Contents* §§ 986-995 (1993) (discussing generally insurance, insurance contracts, and liability).

1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 646-647 (9th ed. 1987 & Supp. 1997) (defining the validity, effect and reformation of an incontestable clause).

GEORGE J. COUCH, 18 COUCH ON INSURANCE 2D, §§ 72:1-72:32 (1983) (discussing the general principles of incontestability clauses).

**Law Review and Journal Articles:**

James H. Fleming, *Recent Developments in California Life Insurance Law*, SB81 ALI-ABA 285 (1997) (noting the resurgence of insurance litigation in California, including actions for misrepresentation and fraud).

Mark Hughes, Jr., *Insurer's Ability to Contest Claims After the Contestability Cutoff*, 63 DEF. COUNS. J. 537 (1996) (discussing the length of contestability periods, as well as the effect of using an imposter in obtaining life insurance).

MAIRI J. SANFORD

## IX. Juvenile Adjudications

**Penal Code section 667(d)(3)(C), requiring that in previous adjudication a juvenile be found a fit and proper subject to be dealt with under the juvenile court law to qualify as a prior felony subjecting a defendant to increased penalty under the three strikes law, does not require an express finding of fitness.**

*People v. Davis, Supreme Court of California, Decided July 3, 1997, 15 Cal. 4th 1096, 938 P.2d 938, 64 Cal. Rptr. 2d 879.*

**Facts.** The District Attorney charged the defendant with one count of murder and one count of attempted murder, simultaneously alleging three prior convictions under the three strikes law and subjecting the defendant to the possibility of increased penalties. Two of the three prior convictions were for juvenile adjudications of felony assault and residential burglary. The defendant challenged the two juvenile adjudications on the ground that they did not qualify as a "strike" under subdivision (d)(3), and the trial court granted the motion. The court of appeal affirmed the trial court's order striking the prior burglary adjudication, but reversed the trial court as to the juvenile adjudication for assault. The California Supreme Court granted review to consider whether subdivision (d)(3), setting forth the requirements for qualifying juvenile adjudications as strikes, necessitates an express finding of fitness, and specifically whether a residential burglary conviction qualifies as a prior juvenile adjudication.

**Holding.** Without reaching the specific question of whether a conviction of burglary is a qualifying strike, the court affirmed the court of appeal, finding that Penal Code section 667(d)(3) does not require an express finding of fitness. Subdivision (d)(3) sets forth the four requirements to qualify a prior juvenile adjudication as a strike: (1) the juvenile must be at least 16 years old when he or she committed the prior offense; (2) the offense is listed in Welfare and Institutions Code section 707 or described as a serious or violent felony conviction in paragraph (1) or (2) of section 667 of the Penal Code; (3) the juvenile was found a "fit and proper subject to be dealt with under the juvenile court law;" and (4) the juvenile was a ward of the juvenile court under Welfare and Institutions

Code section 602 for committing an offense listed in Welfare and Institutions Code section 707, subdivision (b).

Justice Brown, writing for the court, found that the language of (d)(3) reasonably includes prior adjudications where the prosecutor does not seek to qualify the juvenile as an adult under Welfare and Institutions Code section 707. The "fit and proper subject" language of (d)(3) appears in section 707 of the Welfare and Institutions Code which allows prosecutors to challenge the fitness of a juvenile to be tried under juvenile court law. Thus, a finding of fitness under section 707 is a denial of removal to adult court. The court interpreted the language of (d)(3)(C) as distinguishing between those offenses adjudicated in juvenile rather than adult court. The court reasoned that requiring an express finding would so limit qualifying juvenile convictions that legislative intent—to reduce recidivism—would be frustrated. Further, the court indicated that such a construction would also raise constitutional questions as to the unequal treatment of similarly situated defendants where the severity of punishment depends solely on whether or not the prosecutor sought to qualify the juvenile as an adult in the previous juvenile adjudications. Finally, Justice Brown dismissed the argument that the court's interpretation of (d)(3)(C) rendered that subdivision superfluous because subdivision (d)(3) is repetitive under either an inclusive or exclusive interpretation and, therefore, not instructive as the meaning of the statute. Because the court's holding qualified the prior juvenile adjudication for felony assault and the defendant had an adult robbery conviction which qualified him for increased penalties under the three strikes law, the court did not address the issue of whether a prior juvenile adjudication for residential burglary also qualifies as a strike.

Justice Mosk wrote a dissenting opinion, arguing that subdivision (d)(3)(C) required a finding of fitness which could only be found under the auspices of the Welfare and Institutions Code section 707. Further, because subdivision (d)(3)(A) requires adjudication as a juvenile, Justice Mosk found that the court's interpretation of subdivision (d)(3)(C) was repetitive. Justice Mosk argued that the purpose of (d)(3)(C) was to act as a screening device for those offenses which the prosecutor deemed serious enough to warrant a section 707 petition. Finally, Justice Mosk challenged the court's interpretation as qualifying certain juvenile offenses as prior convictions under the three strikes law that would not qualify if the offense was charged as an adult crime.

Justice Kennard also dissented with the court's interpretation of subdivision (d)(3), favoring an express finding of fitness to differentiate

between offenses which result from “youthful immaturity” and those which evince a “commitment to crime.” Because the language of subdivision (d)(3)(C) is identical to that of section 707 of the Welfare and Institutions Code and subdivision (d)(3) refers to section 707, Justice Kennard reasoned that there exists a strong inference of legislative intent supporting an exclusive interpretation. Arguing that the court’s decision interprets subdivision (d)(3)(C) out of existence, Kennard cited principles of legislative construction looking first to the statutory language and second to interpretation of ambiguities in favor of criminal defendants.

## **REFERENCES**

### **Statutes and Legislative History:**

CAL. PENAL CODE § 667(d)(3) (West 1988 & 1997 Supp.).

CAL. WEL. & INST. CODE § 707 (West 1984 & 1997 Supp.).

### **Legal Texts:**

39 AM. JUR. 2d *Habitual Criminals and Subsequent Offenders* §§ 2-3, 5 (Supp. 1997) (state authority and purpose in enacting statutes that enhance punishment for recidivists).

1 C.J.S. *Criminal Law* § 1638 (1997 Supp.) (discussing habitual offender statutes).

1 CAL. JUR. 3D *Delinquent & Dependent Children* § 215 (1987 & 1997 Supp.) (discussing juvenile court certification process).

1 CAL. JUR. 3D *Criminal Law* §§ 3369-3391 (1987 & 1997 Supp.) (discussing purpose and components of California’s three strikes law).

### **Law Review and Journal Articles:**

*Constitutional Implications of California’s ‘Three Strikes’ Initiative as Applied to Juvenile Adjudications*, 16 J. JUV. L. 129 (1995).

Steven Pressman & Jennifer Kaal, *Three Strikes*, 16 CAL. LAWYER 33 (1996).

Lisa Forquer, Comment, *California's Three Strikes Law—Should a Juvenile Adjudication Be a Ball or a Strike?*, 32 SAN DIEGO L. REV. 1297 (1995).

Christine Markel, Comment, *A Swing and a Miss: California's Three Strikes Law*, 17 WHITTIER L. REV. 651 (1996).

CHRISTINA J. MOSER

## X. Negligence

**Where the noise in the operation of machinery frightens a horse, causing injury to the rider, the operator breaches no duty of care to the rider when the operation of such machinery is socially beneficial, and is performed in a “regular and necessary” manner.**

*Parsons v. Crown Disposal Co., Supreme Court of California, Decided May 8, 1997, 15 Cal. 4th 456, 936 P.2d 70, 63 Cal. Rptr. 2d 291.*

**Facts.** The plaintiff was riding his horse on a bridle path. At one location, the path ran within ten feet of a fence, which separated the path from a parking lot. As the plaintiff was approaching this portion of the path, a garbage truck owned by the defendant was emptying a trash dumpster in the parking lot across the fence. While the plaintiff and his horse were still behind the truck, the operator lifted the dumpster to empty it, causing a loud noise. The noise frightened the horse, causing it to throw the plaintiff to the ground, injuring him. The plaintiff sued the defendant, alleging that the defendant's negligent operation of the truck scared the horse, thus causing the plaintiff's injuries.

The trial court granted the defendant's motion for summary judgment. The court of appeal reversed, holding that the defendant owed a duty of care to the plaintiff to not frighten horses on the trail. The court, applying *Knight v. Jewett*, 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (Cal. 1992), further held that the defendant owed a duty to the plaintiff to not increase the risk of harm already present in the plaintiff's recreational activity.

**Holding.** Reversing the decision of the court of appeal, the California Supreme Court held that the defendant owed no duty of care to the plaintiff to not frighten horses ridden on the trail. The court balanced the utility of the machine used, specifically a garbage truck, against the potential for scaring a horse, and held that the social benefit derived from the use of such a machine outweighed the possible harm that could result from a horse startled by its use. Thus, no duty of care is imposed under such circumstances. The court did, however, note that exceptions to this general policy exist where the noise emitted from such machinery is unnecessary to its operation, where the defendant knows of the horse becoming startled but takes no subsequent protective actions, where the

defendant has acted maliciously to intentionally cause the fright, or where the defendant's actions are violative of a statute designed to protect a class of which the plaintiff is a member. The court noted that none of these exceptions applied; the truck was being operated in a usual fashion and the driver was not even aware of the plaintiff's presence.

The court further held that the court of appeal's reasoning regarding *Knight* was erroneous. The court stated that *Knight* imposed a duty of care to not increase the risk of harm inherent in the plaintiff's recreational activity only to those with a specific relationship with the participant, such as the owner of the facility or a fellow participant. Thus, the defendant owed no such duty in this case.

## REFERENCES

### Statutes and Legislative History:

CAL. CIV. CODE § 1714(a) (West 1997).

### Case Law:

*Knight v. Jewett*, 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992).

*Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

*Stanton v. Lewisville & N.R. Co.*, 8 So. 798 (Ala. 1891).

*Simonds v. Maine Tel. & Tel. Co.*, 72 A. 175 (Me. 1908).

*Johnson v. City of Santa Monica*, 8 Cal. 2d 473, 66 P.2d 433 (1937).

*Eddy v. Stowe*, 43 Cal. App. 789, 185 P. 1024 (Cal. Ct. App. 1919).

*Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).



Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

Burger v. Pond, 224 Cal. App. 3d 597, 273 Cal. Rptr. 709 (Cal. Ct. App. 1990).

Bily v. Arthur Young & Co., 3 Cal. 4th 370, 834 P.2d 745, 11 Cal. Rptr. 2d 51 (1992).

**Legal Texts:**

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 748 (9th ed. 1988) (discussing the balancing of social value against potential risks of actions in determining duty).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 751 (9th ed. 1988) (discussing that a finding of unreasonable risk of conduct requires that risks to others outweigh utility of the conduct).

8 CAL. JUR. 3D *Automobiles* § 221 (1993) (discussing the requirement to control a vehicle to prevent scaring a horse in a way that would injure the rider).

46 CAL. JUR. 3D *Negligence* § 9 (1978) (discussing the consideration of social utility of an action in determining duty in negligence action).

W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 31 at 171 (5th ed. 1984) (discussing the consideration of social value of conduct in a negligence action).

**Law Review and Journal Articles:**

John F. Emerson & Thomas A. Leggette, *Recent Developments in Automobile Law*, 32 TORT & INS. L. J. 203 (1997) (discussing generally, in part, negligence associated with automobiles).

Frank L. Branson, *Personal Torts*, 50 S.M.U. L. REV. 1409, 1410 (1997) (discussing the consideration of social utility in determining the existence of duty).

LEALLEN FROST

## XI. Property Taxes

**Fees imposed under the Childhood Lead Poisoning Act on paint manufactures for failing to screen potential child lead poisoning victims were regulatory fees, not taxes, and required only a legislative majority's approval.**

*Sinclair Paint Co. v. State Board of Equalization, Supreme Court of California, Decided June 26, 1997, 15 Cal. 4th 866, 937 P.2d 1350, 64 Cal. Rptr. 2d 447.*

**Facts.** The plaintiff, Sinclair Paint Co., filed a complaint with the Board of Equalization, demanding a refund for the \$97,825.26 in fees it paid for 1991. The defendant authorized the fees under the Childhood Lead Poisoning Act of 1991 (the Act) for the purpose of screening children for possible lead poisoning. The plaintiff argued that the fees were taxes in violation of Proposition 13, Article XIII A, Section 3 of the California Constitution. The defendant, on the other hand, argued that the fees were categorized as regulatory fees, and thus constitutional. The trial court held that the fees collected were unconstitutional, in violation of Proposition 13 which was passed by a legislative majority as part of the Act rather than by a two-thirds majority as required of tax measures. In addition, the court determined that the fees were actually taxes because no part of the fees was used for the regulation of the plaintiff or to provide any benefit or service to the plaintiff. The court of appeal affirmed the trial court's decision to declare the fee invalid and require a refund.

The defendant appealed, arguing that the fees were regulatory fees "imposed under police power, rather than the taxing power." The Department of Health Services as well as two children who have lead poisoning intervened. The California Supreme Court granted review to determine whether the fees under the Act were a tax that needed a two-thirds legislative vote under Proposition 13.

**Holding.** The California Supreme Court reversed the court of appeal, holding that the Act imposed regulatory fees, not taxes. The court determined that the fees were regulatory because they deterred manufacture and distribution of dangerous products, and the manufacturers were not free of state and federal regulation. First, the court discussed the

history of the Act in detail. Under the Act, various industries are directed to pay fees for the screening of children for possible lead poisoning. The Department of Health Services is given "broad regulatory authority to fully implement and effectuate the purposes" of the Act. Section 105300 compels fees on lead companies, based on the percentage of lead-based products the companies have produced in the past.

Next, the court discussed the enactment of Proposition 13, one of the state's major taxpayer statutes. According to Proposition 13, a state imposed tax must be approved by two-thirds of the California Legislature, not a majority.

The court then addressed whether the impositions were taxes or fees. First, the court recognized that the determination of whether impositions are taxes or fees is a question of law. The court defined special taxes and development fees. The court stated that the fact that fees are assessed on manufacturers "after, rather than before, the product's adverse effects were realized is immaterial to the question whether the measure imposes valid regulatory fees rather than taxes" for purposes of constitutional provision placing restrictions on state and local taxes.

The plaintiff argued that the fees were indeed taxes, and not similar to special assessments or development fees because "they neither reimburse the state for special benefits conferred on manufacturers of lead-based products nor compensate the state for governmental privileges granted to those manufacturers." The defendant, however, argued that the fees were analogous to regulatory fees "imposed under the police power, rather than the taxing power." The court agreed with the defendant, citing *Pennell v. City of San Jose*, 42 Cal. 3d 365, 375, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986). *Pennell* held that regulatory fees imposed by a city under its rent control ordinance in amounts necessary to fulfill the regulation's purpose were valid even though no benefit was given to the fee payers.

Finally, the supreme court concluded that "the Act imposed bona fide regulatory fees, not taxes, because the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers' operations, and under the Act the amount of the fees must bear a reasonable relationship to those adverse effects."

## REFERENCES

### Statutes and Legislative History:

CAL. CONST., art. XIII A, § 3.

CAL. HEALTH & SAFETY CODE, §§ 309.76, 372.1, art. 4.6, § 372.7 (West 1995) (providing evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning).

Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 (1994).

**Legal Texts:**

10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Poisons or Disease* § 8 (9th ed., Supp. 1996).

**Law Review and Journal Articles:**

Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46 (1990) (recommending that comprehensive legal approaches, such as mandated testing, must be combined with effective legal access for individuals at risk).

Jane Schukoske, *The Evolving Paradigm of Laws on Lead-Based Paint: from Code Violation to Environmental Hazard*, 45 S.C. L. REV. 510 (1994).

HEATHER JOY FOGEL

## **XII. Workers' Compensation**

**Labor Code section 5814 prohibits the imposition of multiple penalties for a workers' compensation insurer's single unreasonable act in terminating pre-award benefits; furthermore, a workers' compensation insurer's or an employer's refusal to reinstate benefits after a claimant gives notice of an intention to seek penalties under section 5814 does not constitute a separate and distinct act for which multiple penalties may be awarded.**

*Christian v. Workers' Compensation Appeals Board, Supreme Court of California, Decided May 12, 1997, 15 Cal. 4th 505, 936 P.2d 115, 63 Cal. Rptr. 2d 336.*

**Facts.** On February 3, 1993, the plaintiff sustained injuries in the course of her employment at a law firm. The plaintiff's injuries left her in a condition of "temporary total disability" (TTD); consequently, her employer's workers' compensation insurer, State Compensation Insurance Fund (SCIF), paid the plaintiff TTD benefits. However, on May 23, 1994, based upon medical reports, SCIF terminated the plaintiff's TTD payments and began dispersing permanent disability payments to her.

A workers' compensation judge (WCJ) determined that SCIF's medical reports were inadmissible and therefore, SCIF had no basis to conclude that the injuries were permanent. Therefore, SCIF's termination of the TTD benefits was found unreasonable, and the plaintiff was awarded the TTD benefits SCIF had not made as well as "a penalty of 10 percent 'cumulative,' for each TTD payment due after June 16, 1994." SCIF had to pay eleven total penalties for each of the terminated TTD payments.

SCIF petitioned the Workers' Compensation Appeals Board (the Board) to reconsider the WCJ's award. SCIF asserted that the WCJ misapplied Labor Code section 5814 and that one penalty should be imposed for its stoppage of the TTD benefits. The Board agreed with SCIF's argument and imposed only one, rather than eleven, section 5814 penalty for all of the TTD benefits due to the plaintiff. The Board reasoned that it could not impose multiple penalties for the stoppage of the TTD payments, a single act of misconduct.

The court of appeal reversed the Board's decision and ordered the reinstatement of the WJC's decision. The court of appeal reasoned that multiple penalties must be imposed where the insurer engages in "separate and distinct" acts of misconduct in nonpayment, and where the

claimant give notice of her intent "to seek separate or additional penalties for such acts."

The California Supreme Court granted review to determine if the imposition of multiple penalties, after a finding that an insurer has unreasonably terminated an injured employee's TTD benefits, is a correct application of Labor Code section 5814.

**Holding.** Reversing the court of appeal, the supreme court held that an insurer's unreasonable termination of TTD benefits, a single unreasonable act, cannot be a basis for imposing multiple penalties under section 5814. The court further held that notice of a claimant's intent to seek penalties or an opportunity for an employer or insurer to reconsider its decision does not constitute a separate and distinct act for which penalties may be imposed under section 5814.

The court first looked to the language of section 5814 which requires an insurer to pay an additional ten percent penalty "[w]hen payment of compensation has been unreasonably delayed, or refused, either prior to or subsequent to the issuance of an award . . . ." The court also looked to the legislative history of the statute. After examining both the language and the history, the court concluded that the Legislature intended a single penalty for the single act of refusing to pay benefits and did not intend multiple penalties to be imposed "for every missed or delayed TTD payment . . . ."

The court cited *Gallamore v. Workers' Compensation Appeals Board*, 23 Cal. App. 3d 815, 591 P.2d 1242, 153 Cal. Rptr. 590 (1979). *Gallamore* held that multiple penalties are permitted in certain circumstances where the insurer commits separate and distinct unreasonable acts in denying or delaying the payment of separate categories of benefits. The court stated that the situation here was distinguishable from *Gallamore* because refusing the TTD benefits constituted a single act; furthermore, the plaintiff's giving SCIF "multiple notices that penalties [would] be sought for each payment missed subsequent to the act of terminating the payments" did not constitute separate and distinctive acts. The court also cited *Davison v. Industrial Accident Commission*, 241 Cal. App. 2d 15, 50 Cal. Rptr. 76 (1966), a case which the court of appeal relied upon in its decision. *Davison* allowed multiple penalties to be imposed because of the insurer's separate and distinct acts in refusing the payment of different categories of benefits. The *Davison* court noted that allowing the multiple penalties served as a deterrent to insurers who might otherwise procrastinate payment indefinitely. However, the supreme court held that

multiple penalties would not serve as a deterrent purpose in this case, but rather would coerce insurers or employers to continue paying benefits to which they believe the claimant is not entitled. The court added that imposing multiple penalties in this situation would upset the balance of fairness between the injured worker and employer. Furthermore, the single penalty still provides an incentive for insurers to make timely payments.

Justice Mosk wrote a dissenting opinion stating his belief that each failure to pay a TTD installment constituted a separate and distinct act of misconduct. Moreover, he asserted that the majority decision ignored the fact that many workers live “paycheck to paycheck” and suffer great hardship when insurers terminate payments. Justice Mosk concluded that the majority’s decision wrongly tipped the balance in the employer’s and insurer’s favor and created an incentive for the employer or insurer not to make payments.

## **REFERENCES**

### **Statutes and Legislative History:**

CAL. LAB. CODE § 5814 (West 1989 & Supp. 1997) (imposing a mandatory penalty for an insurer’s or employer’s unreasonable refusal or delay of benefit payments).

CAL. LAB. CODE § 4650 (West 1989 & Supp. 1997) (explaining when workers’ compensation payments shall commence and cease).

CAL. LAB. CODE §§ 4653-4655 (West 1989 & Supp. 1997) (defining “temporary total disability” and “temporary partial disability”).

CAL. LAB. CODE § 4651.1 (West 1989 & Supp. 1997) (creating a presumption in favor of the continuance of disability payments).

### **Legal Texts:**

82 AM. JUR. 2D *Workers’ Compensation* § 477 (1992 & Supp. 1997) (discussing, in general, an insurer’s liability for delay or refusal to pay benefits).

65 CAL. JUR. 3D *Work Injury Compensation* §§ 287, 318-320, 370 (1981 & Supp. 1997) (discussing proceedings before the Workers’ Compensation

Appeals Board and employer's and insurance carrier's rights and remedies).

101 C.J.S. *Workmen's Compensation* § 848 (1958 & Supp. 1997) (describing various penalty provisions in workers' compensation legislation).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Workers' Compensation* §§408-413 (1987 & Supp. 1997) (explaining the nature and measure of section 5814 penalties).

**Law Review and Journal Articles:**

Arthur W. Coats, *Liability for Fault—Distinguishing Feature of Workmen's Compensation Law*, 42 CAL. ST. BAR J. 534 (1965) (discussing penalties under section 5814 for serious and wilful misconduct of an employer).

Stephan A. Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets*. 53 CAL. L. REV. 207 (1965) (outlining the history of workers' compensation legislation in California).

Michael A. Rosenhouse, J.D., *Tort Liability of Workers' Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due*, 8 A.L.R. 4th 902 (1981 & Supp. 1997) (comparing various jurisdictions' approaches toward penalizing insurers and employers who do not pay benefits to claimants).

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