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## California Supreme Court Survey - A Review of Decisions: January 1989-March 1989

Charles R. Eskridge III

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# California Supreme Court Survey

## January 1989 - March 1989

The California Supreme Court Survey is a synopsis of decisions by the Supreme Court of California. The survey's purpose is to supply the reader with information and a basic understanding of the issues addressed by the court, as well as to provide a starting point for research of the topical areas involved. Toward this end, each summary discusses one recent case before the court, while analyzing it according to the importance of the holding and the extent to which the court expands or modifies existing law. The survey treats death penalty decisions cumulatively every six months in a single article devoted to the recurrent issues within each case. Attorney discipline decisions are omitted from the survey.

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## I. CONSTITUTIONAL LAW

- A. *Neither the statutory power of the State Bar to involuntarily enroll an attorney as inactive when the attorney's misconduct poses a substantial threat of harm to clients or the public, nor the procedures adopted by the State Bar to enforce this statutory provision, compromise the attorney's due process rights: Conway v. State Bar of California.*

### I. INTRODUCTION

In *Conway v. State Bar of California*,<sup>1</sup> an attorney involuntarily enrolled as an inactive member by the state bar challenged that disciplinary action as a violation of his due process rights. The case presented the supreme court with its first opportunity to review the constitutionality of the powers and procedures employed by the State Bar of California (the State Bar) in taking action to enroll a member as involuntarily inactive.<sup>2</sup>

Section 6007(c) of the Business and Professions Code<sup>3</sup> grants the State Bar extended powers to suspend the license of an attorney deemed to pose a substantial threat to his clients and society.<sup>4</sup> In this case, the attorney conceded that he once had a cocaine addiction, which the referee determined had induced him to commit at least nine acts of professional misconduct. The evidence established that in four instances he misappropriated funds from settlements he reached on behalf of clients; that in another four instances, after failing entirely to perform the services for which he had been retained, he neglected to return the fees collected or to pay court-ordered sanctions; and that in another matter, he refused to continue work on a file or to surrender it to the client or a new attorney.<sup>5</sup> The referee's

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1. 47 Cal. 3d 1107, 767 P.2d 657, 255 Cal. Rptr. 390 (1989). Justice Arguelles wrote the majority opinion in which Chief Justice Lucas and Justices Broussard, Panelli, and Eagleson concurred. Justice Kaufman dissented in an opinion in which Justice Mosk concurred.

2. *Id.* at 1113, 767 P.2d at 661, 255 Cal. Rptr. at 394.

3. The statute, first enacted in 1985, allows the Board of Governors of the California State Bar to deem an attorney temporarily inactive after finding that the "attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public." CAL. BUS. & PROF. CODE § 6007(c)(1)(West Supp. 1989).

4. This action differs from the commencement of formal disciplinary charges that may lead to suspension or disbarment. The State Bar initiates formal disciplinary proceedings after conducting an investigation and issuing a notice to show cause to the attorney. See RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA Rules 502, 508-510, 550 (West Supp. 1989) [hereinafter RULES PROC. OF STATE BAR]; 1 B. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* §§ 476-503 (1985 & Supp. 1989); 7 CAL JUR. 3D *Attorneys at Law* §§ 272-78 (1989); Outcalt & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675, 676-82 (1973).

5. *Conway*, 47 Cal. 3d at 1124, 767 P.2d at 668, 255 Cal. Rptr. at 401. Although no

recommendation favored involuntary inactive enrollment, which the State Bar adopted.<sup>6</sup>

The supreme court readily acknowledged that the attorney's property interest in his right to practice law guaranteed him due process before deprivation of that interest.<sup>7</sup> The court then examined both the facial constitutionality of the statutory procedures employed by the State Bar<sup>8</sup> and their application to the petitioner.

## II. THE COURT'S DECISION

### A. *Majority Opinion*

The supreme court addressed each of the attorney's five procedural due process challenges and reviewed the admissibility of evidence supporting his involuntary transfer to inactive enrollment. The supreme court determined that the procedures followed by the State Bar met due process requirements by ensuring (1) adequacy of notice<sup>9</sup> and subpoena powers;<sup>10</sup> (2) fairness in the admissibility of evi-

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formal disciplinary charges had been brought against the attorney at the time he was involuntarily enrolled as inactive, the State Bar was investigating 11 complaints against him, and another 7 complaints had been lodged. *Id.* at 1111-12, 767 P.2d at 659, 255 Cal. Rptr. at 392.

6. *Id.*

7. *Id.* at 1113, 767 P.2d at 660, 255 Cal. Rptr. at 393 (citing *Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Civil Service Ass'n, Local 400 v. City and County of San Francisco*, 22 Cal. 3d 552, 560, 586 P.2d 162, 166, 150 Cal. Rptr. 129, 133 (1978)). Due process has been interpreted to require an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The court should weigh such factors as the individual interest at stake, the risk of its "erroneous deprivation" under the challenged procedures, possible alternative procedures, and the government's interest. *Id.* at 335.

8. The State Bar formulates its own procedures to implement this statute. CAL. BUS. & PROF. CODE § 6007(c)(3) (West Supp. 1989)(State Bar to adopt procedural rules to be followed when effectuating involuntary enrollment of attorneys as inactive members). This led the State Bar to adopt RULES PROC. OF STATE BAR Rules 789-798.

9. *Conway*, 47 Cal. 3d at 1116, 767 P.2d at 662, 255 Cal. Rptr. at 395 (citing RULES PROC. OF STATE BAR Rules 791-793, 795). The State Bar's rules require at least a 10-day notice of a scheduled hearing and allow the attorney one 10-day continuance upon a showing of good cause. The supreme court believed this would provide adequate time for preparing a defense. *Id.* The court noted that the petitioner requested only a single one-day continuance, which the State Bar granted, and that letters he received from the State Bar during the previous year-and-a-half provided constructive notice of the charges against him. *Id.* at 1116 n.4, 767 P.2d at 662 n.4, 255 Cal. Rptr. at 395 n.4.

10. *Id.* The supreme court rejected the attorney's argument that an accused attorney does not have the power of subpoena, finding that CAL. BUS. & PROF. CODE § 6086.5 and RULES PROC. OF STATE BAR Rules 310-314, incorporated into the proceedings by Rule 796, grant to the charged attorney power to issue subpoenas through the referee, who exercises such power under CAL. BUS. & PROF. CODE § 6049(a)(3). *Con-*

dence<sup>11</sup> and witness testimony;<sup>12</sup> (3) lack of prejudice in subsequent proceedings;<sup>13</sup> (4) a hearing before a single State Bar referee rather than a court;<sup>14</sup> and (5) prompt final disposition of the charges.<sup>15</sup>

Of these five, the supreme court considered the requirement of a prompt final disposition the most troublesome. The court refused to establish a definitive deadline for settling the charges against a temporarily suspended attorney, noting that the United States Supreme Court also has declined to establish any definitive timetable for the final adjudication of similar matters.<sup>16</sup> However, noting that a recent amendment to section 6007(c) calls for expedited final resolution of

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way, 47 Cal. 3d at 1116, 767 P.2d at 663, 255 Cal. Rptr. at 396; see also *Stephens v. State Bar of Cal.*, 19 Cal. 2d 580, 583, 122 P.2d 549, 550 (1942) (noting that although petitioner had every opportunity to subpoena witnesses, he made no such request).

11. *Conway*, 47 Cal. 3d at 1117-18, 767 P.2d at 663-664, 255 Cal. Rptr. at 396-977. "The interest in a prompt decision served by the use of affidavits and hearsay evidence outweighs whatever increase in accuracy of decision might result from a ban on such evidence." *Id.* (citing *Younger v. State Bar*, 12 Cal. 3d 274, 285, 522 P.2d 5, 10, 113 Cal. Rptr. 829, 834 (1974); *Werner v. State Bar*, 24 Cal. 2d 611, 615, 150 P.2d 892, 896 (1944)). The supreme court stated that uncorroborated hearsay may support an agency decision if permitted by statute. *Id.* (citing *Walker v. San Gabriel*, 20 Cal. 2d 879, 881, 129 P.2d 349, 351 (1942)). The language in section 6007(c)(2), which directs the referee to base the decision on "all the available evidence, including affidavits," provided the requisite statutory authorization. *Id.* at 1118, 767 P.2d at 664, 255 Cal. Rptr. at 397. See generally B. WITKIN, CALIFORNIA EVIDENCE, *Hearsay Rule* § 574 (3d ed. 1986); 1 B. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* § 477 (3d ed. 1985).

12. *Conway*, 47 Cal. 3d at 1118, 767 P.2d at 664, 255 Cal. Rptr. at 397 (citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (the right to confront witnesses not essential during hearing to determine whether a person may be temporarily excluded from a profession)). See generally 7 CAL. JUR. 3D *Attorneys at Law* § 284 (1989); 7A C.J.S. *Attorney & Client* § 105(b) (1980 & Supp. 1989). The supreme court pointed out that, regardless of whether or not constitutionally required, the statutory scheme provides a charged attorney with the "reasonable opportunity" to confront witnesses, to introduce evidence, and to be represented by counsel. *Conway*, 47 Cal. 3d at 1118, 767 P.2d at 664, 255 Cal. Rptr. at 397; see CAL. BUS. & PROF. CODE § 6085 (West Supp. 1989) (procedures required at all attorney disciplinary hearings).

13. *Conway*, 47 Cal. 3d at 1119, 767 P.2d at 664-65, 255 Cal. Rptr. at 397-98.

14. *Id.* at 1120, 767 P.2d at 665, 255 Cal. Rptr. at 398. The court believed the statutory authorization for the State Bar to proceed with involuntary inactive enrollment without prior judicial review was not an unconstitutional delegation of judicial power. *Id.* at 1120 n.7, 767 P.2d at 665 n.7, 255 Cal. Rptr. at 398 n.7. But see *infra* note 26 and accompanying text. See generally 1 B. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* § 303 (1985 & Supp. 1989); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 113 (1988) (delegation of judicial power); 13 CAL. JUR. 3D *Constitutional Law* § 109 (1989) (judicial and legislative powers distinguished).

15. *Conway*, 47 Cal. 3d at 1120-23, 767 P.2d at 665-67, 255 Cal. Rptr. at 398-400. The court distinguished the case petitioner relied upon, *Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F. Supp. 1419 (E.D. Pa. 1986). While the California procedure failed to specify a deadline for final decision, it provided an adequate predeprivation hearing, while the Pennsylvania procedures neither specified a deadline nor granted the attorney a hearing prior to temporary suspension. *Conway*, 47 Cal. 3d at 1120-21, 767 P.2d at 665-66, 255 Cal. Rptr. at 398-99.

16. 47 Cal. 3d at 1121, 767 P.2d at 666, 255 Cal. Rptr. at 399 (citing *Federal Deposit Ins. Corp. v. Mallen*, 108 S. Ct. 1780, 1787 (1988); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985)).

charges against an attorney,<sup>17</sup> the court advised the State Bar to set strict deadlines—"not mere recommended guidelines"—consistent with recent United States Supreme Court rulings.<sup>18</sup>

The petitioner also argued that he was treated unfairly, in violation of his due process rights, because the State Bar's charges of habitual use of intoxicants or drugs could have been brought under another statute affording him greater procedural rights.<sup>19</sup> The court responded that the State Bar was justified in its choice of procedure.<sup>20</sup> In order to proceed under section 6007(c), the State Bar must find not only that the attorney's conduct has already caused substantial harm to clients or the public, but also that the harmful conduct is likely to continue.<sup>21</sup> By contrast, the State Bar may proceed under the stricter safeguards of section 6007(b) when the impaired attorney's conduct threatens nonappreciable or prospective harm to clients or the public.<sup>22</sup>

In addition to determining the constitutionality of the involuntary inactive enrollment procedures, the supreme court concluded that the evidence in this case supported the recommendation of the referee and the action taken by the State Bar referee.<sup>23</sup> Although the proper standard of review is not specified by statute, the supreme court adopted the standard used to review other State Bar orders, such as suspensions and disbarments: independent review of the evidence and disciplinary order, but with great deference accorded to

17. CAL. BUS. & PROF. CODE § 6007(c)(3) (West Supp. 1989). This section states: "In the case of an enrollment under this subdivision, the underlying matter shall proceed on an expedited basis." *Id.*

18. *Conway*, 47 Cal. 3d at 1122 n.9, 767 P.2d at 667 n.9, 255 Cal. Rptr. at 400 n.9. The court specifically referenced *Loudermill*, which held constitutional a delay of nine months between temporary suspension and final adjudication of the matter. *Id.* at 1123, 767 P.2d at 667, 255 Cal. Rptr. at 400.

19. CAL. BUS. & PROF. CODE § 6007(b)(3) (West Supp. 1989). This statute provides, in relevant part, for the inactive enrollment by the State Bar of an attorney who:

because of mental infirmity or illness, or because of the habitual use of intoxicants or drugs, is (i) unable or habitually fails to perform his or her duties or undertakings competently, or (ii) unable to practice law without substantial threat of harm to the interests of his or her clients or the public.

*Id.* An attorney facing involuntary enrollment as inactive under this section, as compared with section 6007(c), would benefit from a longer time to prepare for the hearing, the full use of formal discovery methods, and stricter evidentiary rules. See *Conway*, 47 Cal. 3d at 1117, 767 P.2d at 663, 255 Cal. Rptr. at 396.

20. *Conway*, 47 Cal. 3d at 1117, 767 P.2d at 663, 255 Cal. Rptr. at 396.

21. *Id.*

22. *Id.* (noting that "[w]e cannot equate the two types of proceedings, and see no lack of justification for the different procedures").

23. *Id.* at 1124-26, 767 P.2d at 668-69, 255 Cal. Rptr. at 401-02.



the referee's findings.<sup>24</sup>

### B. Dissenting Opinion

In dissent, Justice Kaufman believed that the discrepancy between rights granted to the attorney in this case, and those granted to one similarly situated but for a charge of mere chemical dependence, constituted a violation of the equal protection clause of the fourteenth amendment.<sup>25</sup> Justice Kaufman also emphasized that only the courts, and not an agency like the State Bar, could exercise the power to discipline attorneys.<sup>26</sup> Finally, Justice Kaufman argued that the statute and procedures violated the attorney's due process rights by not requiring a prompt post-deprivation hearing to make a final determination regarding the involuntary enrollment.<sup>27</sup>

## III. CONCLUSION

This case upholds the constitutional authority of the State Bar to suspend quickly the license of an attorney charged with demonstrable misconduct causing substantial harm to clients. While the decision provides a sound constitutional basis for this weapon in the State Bar's arsenal, it leaves unresolved the issue of how quickly the sus-

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24. *Id.* at 1123, 767 P.2d at 667-68, 255 Cal. Rptr. at 400-01; see CAL. BUS. & PROF. CODE § 6083(c) (West Supp. 1989) (noting "[t]he burden is upon the petitioner to show wherein the decision or action is erroneous or unlawful").

25. *Conway*, 47 Cal. 3d at 1137-39, 767 P.2d at 677-79, 255 Cal. Rptr. at 410-12 (Kaufman, J., dissenting). Justice Kaufman criticized the distinction drawn by the majority between sections 6007(b) and 6007(c), arguing that an involuntary enrollment under the former section requires "probable cause" and evidence that the attorney is "unable or habitually fails" to live up to his duties, thus making clear that this statute, like the latter, foresees action being taken against the infirm, ill, or impaired attorney when evidence of harm to clients or the public already exists. *Id.*

26. *Id.* at 1127-34, 767 P.2d at 670-75, 255 Cal. Rptr. at 403-08 (Kaufman, J., dissenting); see *Saleeby v. State Bar*, 39 Cal. 3d 547, 557-58, 702 P.2d 525, 529-30, 216 Cal. Rptr. 367, 372-73 (1985). The majority responded that cases cited by Justice Kaufman for this proposition refer to the *final* adjudication of charges against an attorney but not to the temporary action authorized by section 6007(c). *Conway*, 47 Cal. 3d at 1120 n.7, 767 P.2d at 665 n.7, 255 Cal. Rptr. at 398 n.7. Justice Kaufman contended that the "power" to discipline rests solely with the courts, regardless of when it occurs. *Id.* at 1129 n.4, 767 P.2d at 672 n.4, 255 Cal. Rptr. at 405 n.4 (Kaufman, J., dissenting). He further noted that at least 10 states have statutes or rules authorizing the type of emergency attorney suspension at issue here, but in each of these states only the supreme court is authorized to make the suspension. *Id.* at 1133-34, 767 P.2d at 674-75, 255 Cal. Rptr. at 407-08 (Kaufman, J., dissenting).

27. *Id.* at 1134-37, 767 P.2d at 675-77, 255 Cal. Rptr. at 408-10 (Kaufman, J., dissenting). Noting that suspending an attorney's license can ruin his practice and devastate his personal finances, Justice Kaufman would require a "reasonably prompt" adjudication of the charges against the attorney. *Id.* at 1136, 767 P.2d at 676, 255 Cal. Rptr. at 409 (Kaufman, J., dissenting). Justice Kaufman specifically recommended that a notice to show cause on the underlying disciplinary matter be issued within 30 days after the involuntary inactive enrollment of an attorney. *Id.* (Kaufman, J., dissenting); see, e.g., PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT Rule 208(f)(5) (1986).

pendent attorney is entitled to a full and fair final hearing. Given that a 1988 amendment to the statute calls for an as yet undefined "expedited" resolution,<sup>28</sup> this issue will be raised anew if ever a disciplined attorney's request for a prompt hearing is denied. The court's admonishment to the State Bar to formulate strict rules of procedure in this area foreshadows such future challenges.<sup>29</sup>

The involuntary inactive enrollment of an attorney after only ten days notice is a powerful instrument that will aid the State Bar in weeding out those attorneys unfit to practice law. The public's estimation of the profession will be enhanced when unscrupulous attorneys are quickly suspended from practice. However, this procedure must be used judiciously in light of the diminished due process rights afforded and its potential to ruin an attorney's practice long before final adjudication on the allegations.

PAUL J. MCCUE

- B. *The California integrated bar may expend its members' mandatory dues to support political and ideological activities, except electioneering, if such expenditures aid in the improvement of the administration of justice:*  
**Keller v. State Bar of California.**

#### I. INTRODUCTION

Since its inception in 1927, the California State Bar<sup>1</sup> has survived many challenges to its authority to regulate practicing attorneys within the State of California.<sup>2</sup> It is arguably "the inherent repulsiveness of any type of regimentation or forced association" that has led to such attacks against the integrated bar.<sup>3</sup> In addition to that "inherent repulsiveness," California attorneys have objected to the annual fee requirements<sup>4</sup> and to the increasing activities of the bar.<sup>5</sup>

28. CAL. BUS. & PROF. CODE § 6007(c)(3) (West Supp. 1989).

29. *Conway*, 47 Cal. 3d at 1122 n.9, 255 Cal. Rptr. at 400 n.9, 767 P.2d at 667 n.9.

1. The California State Bar Act is codified in the California Business and Professions Code. CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1974 & Supp. 1989).

2. See *infra* notes 48-49 and accompanying text.

3. Sorenson, *The Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 NEB. L. REV. 30, 31 (1983).

4. See *Carpenter v. State Bar of Cal.*, 211 Cal. 358, 295 P. 23 (1931). The 110,000 practicing attorneys in California must pay an annual fee of \$417.00 to the bar to practice law within the state. Hager, *High Court Bans Use of Bar's Mandatory Dues for Ballot Races*, L.A. Times, Feb. 24, 1989, Part I, at 3, col. 5.

5. See *Keller v. State Bar of Cal.*, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542, cert. granted, 110 S. Ct. 46 (1989).

The activities of the bar recently were challenged by several bar members in the case of *Keller v. State Bar of California*.<sup>6</sup> The California Supreme Court in *Keller* held that the state bar, an integrated association, may use its mandatory dues to support any activity, except electioneering, to aid in the improvement of the administration of justice.<sup>7</sup> Thus, the bar was permitted to expend dues to lobby the legislature, to file amicus curiae briefs, and to finance Board of Governors' meetings, even though individual bar members objected to the political and ideological beliefs expressed by the bar in these activities.<sup>8</sup> The state bar was precluded, however, from using mandatory fees to participate in election campaigns.<sup>9</sup> Thus, the bar exceeded its statutory authority when it distributed material to local bar associations to assist judges in their 1982 election campaigns.<sup>10</sup> The United States Supreme Court has granted certiorari to review this decision.<sup>11</sup>

## II. HISTORICAL BACKGROUND

### A. *The Integrated Bar*

As of 1988, the legislatures and courts of thirty-three states<sup>12</sup> had organized integrated bar systems for their practicing attorneys.<sup>13</sup> An integrated bar requires that each attorney join the bar as a condition to practicing law within that state.<sup>14</sup> The compulsory membership subjects the attorney to the rules of the bar, which include the payment of annual dues, the adherence to the code of ethics, and the submission to disciplinary hearings.<sup>15</sup> The general purposes of an in-

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6. *Id.*

7. *Id.* at 1156, 767 P.2d at 1021, 255 Cal. Rptr. at 543.

8. *Id.* at 1157, 767 P.2d at 1022, 255 Cal. Rptr. at 544.

9. *Id.* at 1156, 767 P.2d at 1021, 255 Cal. Rptr. at 543.

10. *Id.* at 1157, 767 P.2d at 1022, 255 Cal. Rptr. at 544.

11. *Keller v. State Bar of Cal.*, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542, cert. granted, 110 S. Ct. 46 (1989).

12. Middleton, *Unified Bar Rules Struck; Violates First Amendment Rights*, Nat'l L. J., Mar. 7, 1988, at 3.

13. The integration of bars may be consummated in three ways: (1) by legislative enactment; (2) by legislative enactment giving the state's highest court the power to integrate; or (3) by rule of the state's highest court acting under its inherent power to regulate attorneys. Note, *First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-examined*, 22 ARIZ. L. REV. 939, 941 (1980) [hereinafter *First Amendment Proscriptions*]; Comment, *The Integrated Bar After Lathrop v. Donohue—Integration or Disintegration?*, 11 CATH. U.L. REV. 85, 86-87 (1962) [hereinafter *Lathrop v. Donohue—Integration or Disintegration?*].

For a comprehensive review of the pros and cons of the integrated bar, see *Sorenson*, *supra* note 3, at 34-40; Comment, *The Integrated Bar Association*, 30 FORDHAM L. REV. 477, 481-84 (1962) [hereinafter *The Integrated Bar Association*].

14. *First Amendment Proscriptions*, *supra* note 13, at 941; see also 7 AM. JUR. 2D *Attorneys at Law* § 7 (1980 & Supp. 1989).

15. *First Amendment Proscriptions*, *supra* note 13, at 941; see also 7 AM. JUR. 2D, *supra* note 14.

tegrated bar are:

to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.<sup>16</sup>

### B. The Constitutionality of the Integrated Bar

The issue of whether an attorney's right to freedom of association<sup>17</sup> is violated when that attorney is required to join an integrated bar as a condition of employment was raised before the United States Supreme Court in the case of *Lathrop v. Donohue*.<sup>18</sup> A plurality of the justices held that a Wisconsin attorney's right to freedom of association had not been abridged by the integrated bar's compulsory membership because the mandatory dues imposed were reasonably necessary to enhance the legal profession.<sup>19</sup> However, this decision failed to decide a parallel constitutional issue involving the integrated bar: whether an attorney's first amendment rights are violated when an integrated bar expends dues to support causes which the attorney opposes.<sup>20</sup> An examination of the five separate opinions from *Lath-*

16. *Lathrop v. Donohue*, 367 U.S. 820, 828-29 (1961) (plurality opinion), *reh'g denied*, 368 U.S. 871 (1961).

17. The United States Constitution does not expressly provide for the right to freedom of association. However, such a right has long been recognized as a derivative of the rights of speech and assembly under the first amendment. Note, *Falk v. State Bar of Michigan: First Amendment Challenges to Bar Expenditures*, 1982 DET. C.L. REV. 737, 738-40; Comment, *Freedom from Political Association: The Street and Lathrop Decisions*, 56 NW. U.L. REV. 777, 777-78 (1962) [hereinafter *Freedom from Political Association*]; see also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.41, at 947-52 (3d ed. 1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1010-22 (2d ed. 1988).

18. 367 U.S. 820 (1961) (plurality opinion). This is the only case in which the Supreme Court has directly reviewed the constitutional issues of the integrated bar. *Sorenson*, *supra* note 3, at 45. For commentaries analyzing the *Lathrop* decision, see *First Amendment Proscriptions*, *supra* note 13; *Lathrop v. Donohue—Integrating or Disintegration?*, *supra* note 13; *The Integrated Bar Association*, *supra* note 13; *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 133 (1961); *Freedom from Political Association*, *supra* note 17.

19. *Lathrop*, 367 U.S. at 843 (plurality opinion). The most recent case upholding the constitutionality of an integrated bar under the *Lathrop* decision was *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988).

20. *Lathrop*, 367 U.S. at 844-48 (plurality opinion).

rop sheds light on the issue.

The plurality, consisting of Chief Justice Warren and Justices Brennan, Clark, and Stewart, believed the record was insufficient on points concerning the constitutionality of a bar's expenditure of dues for political causes objected to by its individual members, thus avoiding such considerations.<sup>21</sup> Justice Harlan, joined by Justice Frankfurter, argued that this first amendment issue was "inescapably before" the Court<sup>22</sup> and argued that such expenditures were constitutional.<sup>23</sup> Justices Black and Douglas, in separate dissenting opinions, argued that this question was properly before the Court,<sup>24</sup> but held that the expenditure of bar dues for political purposes was unconstitutional.<sup>25</sup> Justice Whittaker, in a concurring opinion, simply held that an attorney exercises a privilege in practicing law, and thus has no constitutional rights requiring protection.<sup>26</sup> Thus, while the various opinions demonstrate that expenditure of dues by the bar on political activities implicates constitutional concerns,<sup>27</sup> the question remains open as to whether such bar activities are constitutional.

### C. *The Labor Union Analogy*

Because the United States Supreme Court has yet to determine the constitutionality of the expenditures of bar dues for political causes, state courts have looked to an analogous association for guidance: the labor union. Such an analogy may be drawn because both associations compel membership or financial aid as a prerequisite to employment,<sup>28</sup> and such compulsion is authorized by state action.<sup>29</sup>

The seminal case involving labor unions and the compulsion to pay dues, which ultimately are expended for political causes, is *Abood v. Detroit Board of Education*.<sup>30</sup> In *Abood*, the plaintiffs objected to payment of union dues as a condition of employment required by an agency shop provision of a Michigan statute. Those dues were used by the union in collective bargaining and other political activities to which the plaintiffs objected. The United States Supreme Court found the union's expenditure of mandatory fees for collective bar-

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21. *Id.* at 845 (plurality opinion).

22. *Id.* at 848-49 (Harlan, J., concurring).

23. *Id.* at 861-65 (Harlan, J., concurring).

24. *Id.* at 867 (Black, J., dissenting), 877-78 (Douglas, J., dissenting).

25. *Id.* at 868-71 (Black, J., dissenting), 884-85 (Douglas, J., dissenting).

26. *Id.* at 865 (Whittaker, J., concurring).

27. Justice Kaufman placed great emphasis in his dissent on the United States Supreme Court's recognition of constitutional implications. *Keller v. State Bar of Cal.*, 47 Cal. 3d 1152, 1179, 767 P.2d 1020, 1037, 255 Cal. Rptr. 542, 559, cert. granted, 110 S. Ct. 46 (1989) (Kaufman, J., dissenting); see *infra* notes 99-112 and accompanying text.

28. Comment, *The Compelled Contribution in the Integrated Bar and the All Union Shop*, 1962 Wis. L. Rev. 138, 148.

29. *Id.*

30. 431 U.S. 209, reh'g denied, 433 U.S. 915 (1977).

gaining to be valid.<sup>31</sup> However, the Court further held that the union may not expend dues to advance political and ideological causes unrelated to collective bargaining if individual members object to such use.<sup>32</sup> The Court conceded that courts would be faced with "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited," but refused to delineate that line.<sup>33</sup>

When considering the constitutionality of an integrated bar expending dues for political purposes, later courts have consistently applied the *Abood* labor union analysis, but have disagreed on the conclusions of whether such activities are constitutional.<sup>34</sup> As anticipated by *Abood*, these courts have had difficulty in drawing the distinction between permissible and impermissible activities, especially because the Court failed to provide a traditional first amendment test when examining this issue.<sup>35</sup> Consequently, in analyzing *Abood*,

31. *Id.* at 225-26.

32. *Id.* at 235-36. The Supreme Court later clarified its holding by stating, "*Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees." *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271, 291 n.13 (1984).

33. *Abood*, 431 U.S. at 236.

34. *Hollar v. Virgin Islands*, 857 F.2d 163, 170 (3d Cir. 1988) (court applied *Abood* ruling to hold the integrated bar of the Virgin Islands may constitutionally expend dues for causes objected to by its members if such expenditures are germane to the purpose of the integrated bar); *Gibson v. Florida Bar*, 798 F.2d 1564, 1567-69 (11th Cir. 1986) (court applied *Abood* ruling to Florida's integrated bar to hold that bar dues may be spent on ideological activities only if germane to the purpose of the bar); *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 977-78 (D.P.R. 1983) (court distinguished *Abood* and held that expenditures by the Puerto Rico bar for political practices violated speech and associational rights of members), *vacated and remanded on other grounds sub nom. Romany v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984), *on remand*, *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674, 686-89 (D.P.R. 1988) (court applied *Abood* ruling to hold bar expenditures for ideological activities must be germane to permissible governmental interests); *Arrow v. Dow*, 544 F. Supp. 458, 460-63 (D.N.M. 1982) (court held that *Abood* holding prohibits the use of bar fees objected to by members for political uses that do not serve important governmental interests); *Falk v. State Bar of Mich.*, 411 Mich. 63, 305 N.W.2d 201, 215-16 (1981) (per curiam) (court held *Abood* controlling on issue of constitutionality of bar expenditures for political causes, but remanded for further fact findings), *later proceeding*, 418 Mich. 270, 342 N.W.2d 504 (1983), *cert. denied*, 469 U.S. 925 (1984). *But see Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790, 795 (1969), *cert. denied*, 397 U.S. 914 (1970) (court refused to analogize integrated bar with labor union). *See generally Mitchell, Public Sector Union Security: The Impact of Abood*, 29 LAB. L.J. 697, 699-700 (1978); *Sorenson, supra* note 3, at 54.

35. Justice Powell's concurrence in *Abood* criticized the majority for failing to apply the traditional first amendment principles. *Abood*, 431 U.S. at 259-60 & n.14 (Pow-

courts and commentators have reached varying conclusions on what standard test should be applied to determine the constitutionality of the expenditures of compelled dues, including: (1) expenditure of mandatory dues for ideological causes are constitutional if expended to support any legitimate governmental interest;<sup>36</sup> (2) expenditure of compulsory dues is subject to exacting scrutiny and the governmental interest must be compelling;<sup>37</sup> and (3) expenditures of dues for political causes are constitutional only if germane to achieving an important governmental interest.<sup>38</sup>

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,<sup>39</sup> the United States Supreme Court provided some guidance in determining what political activities objected to by union members could be funded by union dues. The Court interpreted *Abood* to mean that the union could collect union fees for ideological activities objectionable to its members if the expenditures were "germane to its duties as a collective-bargaining agent."<sup>40</sup> Alternatively stated, the expenditure must be "necessarily or reasonably incurred" to perform the duties for which the union was formed.<sup>41</sup> Further inquiry then must be made to determine if these expenses trigger additional interference with first amendment rights other than the compelled contribution to the union.<sup>42</sup> If the expenses do involve additional interferences, the union may not use the dues unless "adequately supported by a governmental interest."<sup>43</sup>

The *Ellis* holding provides little guidance to future courts to delineate those activities which may be funded by the dues of an integrated bar. Even though some courts have referred to the *Ellis* "test,"<sup>44</sup> courts continue to struggle with this issue. The California Supreme Court in *Keller v. State Bar of California*<sup>45</sup> was faced with this dilemma of deciding whether the integrated bar of California

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ell, J., concurring). Justice Powell argued that such activities require exacting scrutiny and a vital governmental interest to avoid unnecessary abridgment of first amendment rights. *Id.* at 259-60 (Powell, J., concurring).

36. *Sorenson*, *supra* note 3, at 62 & n.227.

37. *Id.* at 62 & n.228.

38. *Id.* at 62 & n.229.

39. 466 U.S. 435 (1984).

40. *Id.* at 447.

41. *Id.* at 448.

42. *Id.* at 456.

43. *Id.*

44. *Virgin Islands Bar Ass'n v. Virgin Islands*, 648 F. Supp. 170 (D.V.I. 1986), *aff'd in part and vacated in part sub nom. Hollar v. Virgin Islands*, 857 F.2d 163 (3d Cir. 1988); *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *Romany v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984), *on remand sub nom. Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988).

45. 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542, *cert. granted*, 110 S. Ct. 46 (1989).

could expend dues for political concerns objectionable to its members.

### III. STATEMENT OF THE CASE

In 1927, the California State Bar Act<sup>46</sup> (the Act) established an integrated bar for practicing attorneys in California.<sup>47</sup> The Act has withstood many challenges to its validity since its enactment,<sup>48</sup> and the provision requiring an attorney to pay fees to the bar was upheld as early as 1931.<sup>49</sup>

The Act enumerates the various powers of the bar, including: (1) the power to examine all applicants who wish to practice law in California;<sup>50</sup> (2) the power to investigate and review complaints about a bar member and to render recommendations based on the investigations;<sup>51</sup> (3) the power to recommend to the supreme court discipline measures to be taken against a bar member;<sup>52</sup> (4) the power to enforce laws relating to the illegal practice of law;<sup>53</sup> (5) the power to oversee arbitrations of fee disputes;<sup>54</sup> and (6) the power to preserve a fund for client security.<sup>55</sup>

Supplementing these explicit powers is one of general power, allowing the bar to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice."<sup>56</sup> To improve the administration of justice, the state bar is empowered to assist the Commission on Judicial Performance,<sup>57</sup> to support the Law Revision Commission,<sup>58</sup> and to re-

46. CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1974 & Supp. 1989).

47. See generally 1 B. WITKIN, CALIFORNIA PROCEDURE, Attorneys § 259 (3d ed. 1985 & Supp. 1989); 7 AM. JUR. 2D, *supra* note 14; 7 CAL. JUR. 3D Attorneys at Law §§ 31-44 (1989).

48. See 1 B. WITKIN, *supra* note 47, § 265A; 7 CAL. JUR. 3D, *supra* note 47, § 32.

49. *Carpenter v. State Bar of Cal.*, 211 Cal. 358, 295 P. 23 (1931).

50. "The board may establish an examining committee having the power . . . [t]o examine all applicants for admission to practice law." CAL. BUS. & PROF. CODE § 6046(a) (West 1974 & Supp. 1989).

51. "Each local administrative committee shall . . . [r]eceive and investigate complaints as to the conduct of members [and] . . . [m]ake recommendations and forward its report to the board for action." *Id.* § 6043 (West 1974).

52. "[T]he board has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproval, public or private, without such recommendations." *Id.* § 6078 (West 1974 & Supp. 1989).

53. *Id.* §§ 6030, 6125-6133, 6150-6155 (West 1974 & Supp. 1989).

54. *Id.* §§ 6200-6206 (West Supp. 1989).

55. *Id.* § 6140.5 (West 1974 & Supp. 1989).

56. *Id.* § 6031(a) (West Supp. 1989) (emphasis added).

57. CAL. GOV'T CODE §§ 68701, 68725 (West 1976 & Supp. 1989).

58. *Id.* §§ 8280, 8287 (West 1980).



view and evaluate judicial qualifications.<sup>59</sup> No other bar activities involving the improvement of the administration of justice are statutorily delineated.

On September 12, 1982, Anthony Murray, the newly-elected president of the California bar, delivered his inaugural speech.<sup>60</sup> Murray's address referred to the upcoming 1982 election of California appellate justices,<sup>61</sup> asserting that each incumbent justice should be retained on the bench unless evidence existed of impropriety or incompetence of a justice.<sup>62</sup> Later, the state bar reprinted and disseminated the speech, along with other educational material aimed at voters, to the local bar associations.

On October 25, 1982, Deputy Attorney General Eddie Keller and twenty other state bar members sued the State Bar of California, alleging violation of their constitutional rights to freedom of speech and association.<sup>63</sup> The plaintiffs asserted that the bar used, and would continue to use, mandatory dues paid by bar members to further "political or ideological causes" specifically endorsed by the State Bar of California.<sup>64</sup> The plaintiffs, claiming that they as individuals did not endorse such political causes, objected to the expenditure of bar dues for: (1) lobbying the California legislature; (2) filing amicus curiae briefs; (3) supporting the bar's Board of Governors' meetings which furthered political causes; (4) disseminating the political speeches of the bar's president; and (5) financing and distributing other voter-education material which advanced political and ideological causes involving retention of sitting judges.<sup>65</sup>

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59. *Id.* § 12011.5 (West 1980 & Supp. 1989).

60. *6 1/2 Years Later*, L.A. Daily J., Feb. 24, 1989, Part I, at 22, col. 1.

61. *See Keller v. State Bar of Cal.*, 47 Cal. 3d 1152, 1171, 767 P.2d 1020, 1031-32, 255 Cal. Rptr. 542, 553-54, *cert. granted*, 110 S. Ct. 46 (1989). The 1982 judges' election was generally viewed as a referendum on Justice Rose Bird's liberal ideologies. Carrizosa, *Justices Allow Broad Use of State Bar Dues; Lobbying, Amicus Briefing Upheld, But Not Politicking; Conservatives Lose*, L.A. Daily J., Feb. 24, 1989, Part I, at 1, col. 6. The four supreme court justices on the 1982 ballot included Justice Frank Richardson, who retired from the bench in 1983; Justice Otto Kaus, who retired from the bench in 1985; Justice Cruz Reynoso, who was defeated in the 1986 election; and Justice Allen Broussard, who currently sits on the California Supreme Court bench. *Id.* Justice Broussard authored the *Keller* decision.

62. *Keller*, 47 Cal. 3d at 1171, 767 P.2d at 1032, 255 Cal. Rptr. at 554.

63. *6 1/2 Years Later*, *supra* note 60.

64. *Keller*, 47 Cal. 3d at 1157, 767 P.2d at 1022, 255 Cal. Rptr. at 544.

65. *Id.* at 1157-58, 767 P.2d at 1022, 255 Cal. Rptr. at 544. The representatives of the bar admitted the use of bar dues to fund all of the activities outlined in the plaintiffs' complaint. *Id.* at 1158, 767 P.2d at 1023, 255 Cal. Rptr. at 545. However, the representatives insisted these actions were made on the behalf of the bar itself, and were not meant to express the views of its individual members. *Id.*

## IV. CASE ANALYSIS

A. *Majority Opinion*

The California Supreme Court held that the bar was precluded from using its members' mandatory dues to participate in election campaigning.<sup>66</sup> However, the court tempered this by holding further that the bar was permitted to expend such dues for "the improvement of the administration of justice,"<sup>67</sup> including the use of dues to lobby the legislature,<sup>68</sup> to file amicus curiae briefs,<sup>69</sup> and to finance the Board of Governors' meetings.<sup>70</sup>

## 1. The State Bar is analogous to a governmental agency.

The court believed the bar was analogous to a governmental agency, as opposed to a labor union or private association.<sup>71</sup> The court noted that identifying the bar as an agency was envisioned by the framers of the state constitution, the creators of the Act, and the judges of the state courts.<sup>72</sup>

Six examples indicate that California lawmakers intended to label the bar a governmental agency: (1) Article VI, section 9, of the California Constitution specifically states that the bar is a public corporation;<sup>73</sup> (2) the Governor is authorized by statute to appoint several nonlawyers to sit on the Board of Governors;<sup>74</sup> (3) all state bar prop-

66. *Id.* at 1156, 1170-73, 767 P.2d at 1021, 1031-33, 255 Cal. Rptr. at 543, 553-55. Justice Broussard wrote the majority opinion, joined by Justices Mosk, Arguelles, and White. Justice White, a First District Court of Appeal judge, replaced Justice Eagleson, who disqualified himself for undisclosed reasons. Carrizosa, *supra* note 61.

67. *Id.* at 1156, 767 P.2d at 1021, 255 Cal. Rptr. at 543 (citing CAL. BUS. & PROF. CODE § 6031(a) (West Supp. 1989)).

68. *Id.* at 1169-70, 1173, 767 P.2d at 1030-31, 1033, 255 Cal. Rptr. at 552-53, 555.

69. *Id.*

70. *Id.* at 1170, 1173, 767 P.2d at 1031, 1033, 255 Cal. Rptr. at 553, 555.

71. *Id.* at 1161-67, 767 P.2d at 1025-29, 255 Cal. Rptr. at 547-51. The court acknowledged that almost every other court addressing this issue analogized an integrated bar to a labor union. *Id.* at 1166, 767 P.2d at 1028, 255 Cal. Rptr. at 550.

72. *Id.* at 1162, 767 P.2d at 1025-26, 255 Cal. Rptr. at 547-48.

73. Section 9 asserts that "[t]he State Bar of California is a public corporation." CAL. CONST. art VI, § 9. The court admitted that a public corporation is not always a governmental agency, but noted that all other public corporations in California are labeled as such. *Keller*, 47 Cal. 3d at 1163, 767 P.2d at 1026, 255 Cal. Rptr. at 548.

74. Section 6013.5 of the California Business and Professions Code provides that "six members of the board shall be members of the public who have never been members of the State Bar [and] . . . shall be appointed . . . by the Governor." CAL. BUS. & PROF. CODE § 6013.5 (West Supp. 1989). The court noted the Governor's similar ability to place consumer representatives on other state boards, as distinguished from labor unions, in which the Governor has no authority to appoint nonunion members to a

erty is exempt from taxation;<sup>75</sup> (4) all bar meetings must be publicly held;<sup>76</sup> (5) the state bar is immune to restrictions placed on other state agencies unless expressly stated otherwise by the legislature;<sup>77</sup> and (6) the Board of Governors is statutorily prohibited from evaluating or reviewing California appellate justices without prior authorization from the legislature,<sup>78</sup> which would be constitutionally suspect were the bar deemed other than a governmental agency.<sup>79</sup> Therefore, the court held that in all activities the State Bar functions as a governmental agency and should be treated as such when under constitutional scrutiny.<sup>80</sup>

## 2. The State Bar may expend its dues for any authorized activity.

Because a governmental agency may use revenues derived from any source for any authorized purpose, the supreme court held that the bar may use its mandatory dues for any purpose within its statutory authority.<sup>81</sup> Two court of appeal decisions upholding lobbying by governmental agencies were helpful to the court's analysis on this point.

First, in *Erzinger v. Regents of University of California*,<sup>82</sup> a California appellate court held that compulsory registration fees collected from college students by the Board of Regents, a governmental

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board of representatives. *Keller*, 47 Cal. 3d at 1163, 767 P.2d at 1026, 255 Cal. Rptr. at 548.

75. "All property of the State Bar is hereby declared to be held for essential public and governmental purposes . . . and such property is exempt from all taxes . . ." CAL. BUS. & PROF. CODE § 6008 (West 1974).

76. Subject to enumerated exceptions, "[e]very meeting of the board shall be open to the public . . ." *Id.* § 6026.5 (West Supp. 1989). This requirement does not extend to unions or private associations. *Keller*, 47 Cal. 3d at 1163, 767 P.2d at 1026, 255 Cal. Rptr. at 548.

77. "No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of . . . state agencies . . . shall be applicable to the State Bar, unless the Legislature expressly so declares." CAL. BUS. & PROF. CODE § 6001(g) (West 1974 & Supp. 1989). The court indicated this provision would be unnecessary had the legislature intended the State Bar to be other than a governmental agency. *Keller*, 47 Cal. 3d at 1164, 767 P.2d at 1026-27, 255 Cal. Rptr. at 548-49.

78. "[T]he board shall not conduct or participate in . . . any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice . . . without prior review and statutory authorization by the Legislature." CAL. BUS. & PROF. CODE § 6031(b) (West Supp. 1989).

79. *Keller*, 47 Cal. 3d at 1164, 767 P.2d at 1027, 255 Cal. Rptr. at 549. The prohibition on political speech would be difficult to justify if the State Bar were treated as a private association. *Id.*

80. *Id.* at 1172, 767 P.2d at 1033, 255 Cal. Rptr. at 554. The court rejected the notion of a "dichotomy," in which the bar performed governmental functions in regulating admissions and disciplining members, but performed as a private association when engaging in lobbies and amicus curiae activity. *Id.*

81. *Id.* at 1167-69, 767 P.2d at 1029-30, 255 Cal. Rptr. at 551-52.

82. 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (1982), *cert. denied*, 462 U.S. 1133 (1983).

agency, could be used for health services which included abortions.<sup>83</sup> A student paying registration fees, like a taxpayer paying taxes, cannot refuse to pay because of ideological or religious objections to the use of the fees.<sup>84</sup> Second, in *Miller v. California Commission on Status of Women*,<sup>85</sup> another appellate court held that the Commission could use public resources to lobby for the enactment of the equal rights amendment, despite some taxpayers' objections to this ideological cause.<sup>86</sup> The *Miller* court reasoned that the government has legitimate interests in informing, educating, and persuading the people through open dialogue on controversial topics to which the government may voice its opinion.<sup>87</sup> The supreme court in *Keller* held that the bar, like the governmental agencies in *Erzinger* and *Miller*, may expend its revenues for any purpose allowed by statute.<sup>88</sup>

### 3. The scope of the bar's authority to expend dues should be interpreted broadly.

The court held that the bar's statutory power to improve the administration of justice<sup>89</sup> should be interpreted broadly in the context of lobbying the legislature and filing amicus curiae briefs.<sup>90</sup> The court believed such an interpretation appropriate because the collective advice of the members of the bar would enhance proposed legislation and promote improvement in the administration of justice.<sup>91</sup> However, the court held that the scope of the bar's authority does not extend to electioneering.<sup>92</sup> The court referred to its previous holding

83. *Id.* at 393-95, 187 Cal. Rptr. at 167-68.

84. *Id.* at 393-94, 187 Cal. Rptr. at 167. Justice Kaufman questioned the authority of *Erzinger*, as the students were not compelled to associate with the school. *Keller*, 47 Cal. 3d at 1183, 767 P.2d at 1040, 255 Cal. Rptr. at 562 (Kaufman, J., concurring and dissenting).

85. 151 Cal. App. 3d 693, 198 Cal. Rptr. 877, *appeal dismissed*, 469 U.S. 806 (1984).

86. *Id.* at 702, 198 Cal. Rptr. at 883. Justice Kaufman questioned the authority of *Miller*, as the funds expended by the Commission were derived from general taxes, and not from compulsory dues to a mandatory association. *Keller*, 47 Cal. 3d at 1182, 767 P.2d at 1039-40, 255 Cal. Rptr. at 561-62 (Kaufman, J., concurring and dissenting).

87. *Miller*, 151 Cal. App. 3d at 701, 198 Cal. Rptr. at 882. The same district court of appeal decided *Miller* and *Keller*; however, that court expressly declined to apply the *Miller* holding to the *Keller* case. *Keller v. State Bar of Cal.*, 181 Cal. App. 3d 471, 226 Cal. Rptr. 448, *reprinted in* 201 Cal. App. 3d 1135 (1986).

88. *Keller*, 47 Cal. 3d at 1168, 767 P.2d at 1030, 255 Cal. Rptr. at 551.

89. CAL. BUS. & PROF. CODE § 6031(a) (West Supp. 1989); *see supra* notes 56-59 and accompanying text.

90. *Keller*, 47 Cal. 3d at 1169-70, 767 P.2d at 1030-31, 255 Cal. Rptr. at 552-53.

91. *Id.* at 1169, 767 P.2d at 1030-31, 255 Cal. Rptr. at 552-53.

92. *Id.* at 1170, 767 P.2d at 1031, 255 Cal. Rptr. at 553.

in *Stanson v. Mott*,<sup>93</sup> in which the court held that a state agency may not expend its funds to support a partisan position in an election campaign unless clearly authorized by legislation.<sup>94</sup> Although such reasoning applies to the bar, no explicit authorization is needed to disseminate general educational information to aid voters in reaching an informed choice<sup>95</sup> or to support the independence of the judicial system.<sup>96</sup>

The court found the material distributed to voters prior to the 1982 election to be a form of prohibited campaigning because it went beyond the standards of mere educational information by directly assisting in the election campaigns of incumbent judges.<sup>97</sup> Because the distribution promoted a partisan position, the State Bar exceeded its statutory authority, although the court released the Board of Governors from personal liability.<sup>98</sup>

### *B. Concurring and Dissenting Opinion*

Justice Kaufman<sup>99</sup> concurred with the majority's opinion that the bar is precluded from expending members' dues to engage in election campaigns.<sup>100</sup> However, Justice Kaufman disagreed with the majority's conclusion that the bar's other expenditures of dues are exempt from constitutional scrutiny simply because of its designation as a governmental agency.<sup>101</sup> He argued that the United States Supreme Court consistently has held that first amendment issues are raised when the state compels membership in an association as a condition of employment, and the mandatory dues are then expended to support political and ideological causes objectionable to the association's

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93. 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

94. *Id.* at 213, 551 P.2d at 6, 130 Cal. Rptr. at 702.

95. *Keller*, 47 Cal. 3d at 1170, 767 P.2d at 1031, 255 Cal. Rptr. at 553.

96. *Id.* at 1172, 767 P.2d at 1032, 255 Cal. Rptr. at 554.

97. *Id.* at 1172, 767 P.2d at 1032-33, 255 Cal. Rptr. at 554-55.

98. *Id.* at 1172-73, 767 P.2d at 1033, 255 Cal. Rptr. at 555. The court determined that the Board of Governors could have reasonably believed it possessed authority to make such expenditures on behalf of an independent judicial system, especially when coupling the lack of prior definition of the bar's authority with the Board's ethical duty to "defend the judiciary from unfair attack." *Id.*

99. Justices Panelli and Agliano joined Justice Kaufman in his concurring and dissenting opinion. Justice Agliano, of the Sixth District Court of Appeal, replaced Chief Justice Lucas, who disqualified himself for undisclosed reasons. Carrizosa, *supra* note 61.

100. *Keller*, 47 Cal. 3d at 1173, 767 P.2d at 1033, 255 Cal. Rptr. at 555 (Kaufman, J., concurring and dissenting). Justice Kaufman also agreed that the members of the Board of Governors were not personally liable for dues spent to distribute President Murray's speech to local bar associations. *Id.* (Kaufman, J., concurring and dissenting).

101. *Id.* (Kaufman, J., concurring and dissenting). Justice Kaufman reached the exact opposite conclusion of the majority, although both analyzed the same authority. *See id.* at 1185, 767 P.2d at 1042, 255 Cal. Rptr. at 564 (Kaufman, J., concurring and dissenting) (noting that "the United States Supreme Court obviously considered public, or governmental, agencies to be subject to First Amendment scrutiny").

member.<sup>102</sup> Furthermore, Justice Kaufman argued that the United States Supreme Court has intimated, at the very least, that an integrated bar's expenditures of mandatory dues for political causes raises constitutional issues.<sup>103</sup> He believed the majority avoided this issue by labeling the bar a "governmental agency" with power to "use unrestricted revenue . . . for any purposes within its authority."<sup>104</sup> Instead, he believed the Supreme Court's first amendment jurisprudence "prohibits the state from coercing an individual, by threatening the loss of livelihood, to financially support ideological or political causes to which he objects."<sup>105</sup>

Justice Kaufman then discussed the constitutional parameters set forth in *Ellis v. Brotherhood of Railway Airline & Steamship Clerks*,<sup>106</sup> which established the three-step first amendment analysis required whenever political or ideological causes are funded by compulsory dues over a member's objection.<sup>107</sup> The court must first determine whether lobbying the legislature, filing amicus curiae briefs, supporting the conference of delegates' meetings, or disseminating public information is "germane" to the bar's purpose and interest in enhancing the legal profession.<sup>108</sup> If this interest is served, the court must next consider whether an objecting member's first amendment rights are infringed upon in a manner beyond that contemplated by compulsory membership in the state bar.<sup>109</sup> Finally, if a member's rights are abridged, the burden is then placed on the bar to establish

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102. *Id.* at 1173-76, 767 P.2d at 1033-36, 255 Cal. Rptr. at 555-58. (Kaufman, J., concurring and dissenting). Justice Kaufman discussed various Supreme Court cases which he believed to hold that an association may not expend compelled dues for political causes objected to by its members, including *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986), *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 447 (1984), *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977), and *International Ass'n of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

103. *Keller*, 47 Cal. 3d at 1177-79, 767 P.2d at 1036-38, 255 Cal. Rptr. at 558-60 (Kaufman, J., concurring and dissenting) (citing *Lathrop v. Donohue*, 367 U.S. 820 (1960)); see *supra* notes 21-26 and accompanying text.

104. *Keller*, 47 Cal. 3d at 1177-79, 767 P.2d at 1036-38, 255 Cal. Rptr. at 558-60 (Kaufman, J., concurring and dissenting).

105. *Id.* at 1180, 767 P.2d at 1038, 255 Cal. Rptr. at 560 (Kaufman, J., concurring and dissenting) (citing *Abood*, 431 U.S. at 235-36).

106. 466 U.S. 435 (1984); see *supra* notes 39-43 and accompanying text.

107. *Keller*, 47 Cal. 3d at 1187-90, 767 P.2d at 1043-45, 255 Cal. Rptr. at 566-67 (Kaufman, J., concurring and dissenting).

108. *Id.* at 1187-90, 767 P.2d at 1043-45, 255 Cal. Rptr. at 565-67 (Kaufman, J., concurring and dissenting).

109. *Id.* at 1187-88, 767 P.2d at 1043, 255 Cal. Rptr. at 565 (Kaufman, J., concurring and dissenting).

a governmental interest justifying the abridgement.<sup>110</sup> Although Justice Kaufman clearly set forth what he believed to be the controlling law, he deemed the record before the court insufficient to determine the actual constitutionality of the bar's activities; therefore, he discussed generally "the constitutional parameters within which the objectionable activities should be analyzed,"<sup>111</sup> and recommended a remand to the trial court for further proceedings.<sup>112</sup>

## V. IMPACT

Anthony T. Caso of the Pacific Legal Foundation, representative for the *Keller* plaintiffs, stated that his clients had strong ground to appeal this case to the United States Supreme Court.<sup>113</sup> Caso believed an appeal was justified because "[t]he [California Supreme Court], in its analysis of this case, [took] a tack completely different from every other court in the nation that has examined this issue since . . . 1976."<sup>114</sup> As anticipated by Caso, the Pacific Legal Foundation, and the *Keller* plaintiffs, the United States Supreme Court has accepted this case for review.<sup>115</sup>

Critics believe the *Keller* decision is vulnerable to reversal by the United States Supreme Court.<sup>116</sup> Such criticism is understandable in light of the majority's failure to consider the constitutional issues raised when the bar expends dues for political causes objectionable to its members. The court could have diminished these concerns by holding that the bar's activities in lobbying the legislature and filing amicus curiae briefs were germane to the bar's interest in improving the legal profession, and thus did not violate its members' rights.<sup>117</sup> Instead, the court skirted the constitutional issue by simply labeling the bar a governmental agency with the right to expend revenues for whatever causes fall within its statutory authority.<sup>118</sup>

The court's decision is disconcerting for two reasons. First, it is difficult to distinguish the impermissible activity of electioneering from the permissible activities of lobbying the legislature, filing amicus curiae briefs, and financing only those meetings of the Board of Gover-

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110. *Id.* at 1188, 767 P.2d at 1043-44, 255 Cal. Rptr. at 565-66 (Kaufman, J., concurring and dissenting).

111. *Id.* at 1189, 767 P.2d at 1044, 255 Cal. Rptr. at 566 (Kaufman, J., concurring and dissenting).

112. *Id.* at 1193, 767 P.2d at 1047, 255 Cal. Rptr. at 569 (Kaufman, J., concurring and dissenting).

113. Carrizosa, *supra* note 61, at 1, col. 6 & at 22, col. 1.

114. *Id.* at 22, col. 1.

115. *See supra* note 11 and accompanying text.

116. Leland, *For the State Bar, a Victory*, CAL. LAW., Apr. 1989, at 28.

117. *Id.* at 29.

118. *See supra* notes 71-88 and accompanying text.

nors which generally serve to improve the legal profession.<sup>119</sup> All such activities are political in nature and attempt to influence the lawmaking process.<sup>120</sup> With this decision, the bar will continue "tak[ing] positions on . . . nuclear freeze, handgun control, prison conditions and environmental concerns . . . at the expense of the [bar's] members."<sup>121</sup>

Second, the *Keller* decision adds a peculiar threshold to future cases in which members challenge an association's political uses of compulsory dues. Instead of directly relying on the first amendment, a plaintiff first must argue that the association is more analogous to a private association than a governmental agency. Furthermore, the California legislature may statutorily designate a professional association as a government agency and, by this designation, that "governmental agency" may thereafter expend dues for any political and ideological concerns within its statutory authority, regardless of the beliefs and viewpoints of individual members.

## VI. CONCLUSION

Should the United States Supreme Court choose not to reverse this decision, other plaintiffs similarly situated in mandatory associations may be dissuaded from challenging association activities even though their association adverts to beliefs and causes disagreeable to individual members. It is indeed difficult to reconcile the state's ability to compel membership on the one hand when, on the other, the association may contravene the individual's own beliefs. Nonetheless, the *Keller* court was explicit in its support of the activities of the California integrated bar. In addition to continuing to comment on proposed legislation and pending litigation, the bar may take a more active stance on controversial matters which have been "put on hold" pending the *Keller* decision.<sup>122</sup>

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119. See *supra* notes 89-98 and accompanying text.

120. The majority recognized this difficulty, and seemingly committed the court to a case-by-case analysis in the future, although advertent to the contrary. *Keller v. State Bar of Cal.*, 47 Cal. 3d 1152, 1170-71, 767 P.2d 1020, 1031, 255 Cal. Rptr. 542, 553, cert. denied, 110 S. Ct. 46 (1989).

121. Hager, *supra* note 4.

122. Hall, *Officials Predict Little Change from Dues Ruling*, L.A. Daily J., Feb. 24, 1989, Part I, at 22, col. 2. Representatives of the bar expressed gratification over the decision, but doubted that *Keller* would "have much of an effect on the way the bar does business." *Id.*



## II. CRIMINAL LAW

- A. *Identical sexual penetrations occurring within a short space of time during a continuous sexual assault constitute distinct statutory violations for which a defendant may be convicted and consecutively sentenced: People v. Harrison.*

In *People v. Harrison*,<sup>1</sup> the supreme court held that the defendant committed three separate violations of section 289 of the Penal Code<sup>2</sup> when he penetrated his victim's vagina with his finger three separate times during one continuous sexual assault.<sup>3</sup> The court further held that the consecutive sentences imposed on the defendant did not violate section 654 of the Penal Code,<sup>4</sup> which prohibits the imposition of multiple sentences for the same criminal act.<sup>5</sup>

The court adhered to the long established principal that any penetration, regardless of duration, completes the crime.<sup>6</sup> Accordingly, each new penetration constituted a separate and complete violation of section 289.<sup>7</sup>

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1. 48 Cal. 3d 321, 768 P.2d 1078, 256 Cal. Rptr. 401 (1989). Justice Eagleson authored the majority opinion, with Chief Justice Lucas and Justices Panelli, Kaufman, and Arguelles concurring. Justice Broussard concurred in the judgment, as did Justice Mosk, who wrote separately.

2. The defendant was convicted under former section 289 of the Penal Code, which prohibited "the penetration, however slight, of the genital or anal openings of another person, by any foreign object . . . when the act is accomplished against the victim's will . . . for the purpose of sexual arousal, gratification or abuse . . ." CAL. PENAL CODE § 289 (West 1988). The current section remains substantially the same but expands the number of circumstances under which penetration is made unlawful. *Id.* (West Supp. 1989). See generally 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Decency and Morals* § 549B (Supp. 1985); 17 CAL. JUR. 3D *Criminal Law* §§ 721-724 (1984 & Supp. 1988); *Review of Selected 1978 California Legislation, Crimes*, 10 PAC. L.J. 392 (1979).

3. *Harrison*, 48 Cal. 3d at 324, 768 P.2d at 1078, 256 Cal. Rptr. at 401. According to the victim, the sexual assault lasted approximately ten minutes. During this period, the defendant inserted his finger into the victim's vagina three separate times, with each penetration lasting no more than five seconds. The defendant was convicted of three counts in violation of section 289 of the Penal Code and sentenced to consecutive sentences totaling 17 years. The appellate court affirmed this portion of the judgment and the consecutive sentences. *Id.* at 325, 768 P.2d at 1079, 256 Cal. Rptr. at 402.

4. Section 654 provides:

An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

CAL. PENAL CODE § 654 (West 1988 & Supp. 1989). See generally 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crime* §§ 948-951 (1963 & Supp. 1985); 22 CAL. JUR. 3D *Criminal Law* § 3358 (1985 & Supp. 1988).

5. *Harrison*, 48 Cal. 3d at 324-25, 768 P.2d at 1079, 256 Cal. Rptr. at 402.

6. Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R. 3D 163, 171 (1977) (noting that the "overwhelming weight of authority [holds] that slight penetration is all that is necessary to constitute rape").

7. *Harrison*, 48 Cal. 3d at 329, 768 P.2d at 1082, 256 Cal. Rptr. at 405. The court

The court further held that the consecutive sentences imposed on the defendant did not violate section 654 of the Penal Code because the defendant's acts of penetration did not constitute a single indivisible act, but were instead three separate violations of the Penal Code.<sup>8</sup> A defendant's motive determines what constitutes the same crime, not the "temporal proximity of his offenses"; and if a defendant secretes "multiple criminal objectives," he can be punished for each violation even though the acts were committed in a similar fashion within a short period of time.<sup>9</sup> The court found that the defendant harbored "multiple criminal objectives" because none of the penetrations facilitated or were incidental to any other penetration. Thus, section 654 did not bar consecutive sentences.<sup>10</sup>

The current trend concerning multiple sexual assaults committed on one victim is to convict and punish the offender for each criminal act. Past courts have held that: (1) criminal sex acts of a contrasting nature without an appreciable passage of time between acts can result in multiple convictions;<sup>11</sup> (2) criminal sex acts of the same nature committed along with different sexual offenses can result in multiple convictions;<sup>12</sup> and (3) interchangeable sex crimes committed

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specifically overruled the test devised by the appellate court in *People v. Hammon*, 191 Cal. App. 3d 1084, 236 Cal. Rptr. 822 (1987), by holding that the defendant violated section 289 three times within a span of 10 minutes with each penetration of his finger. The *Hammon* test provided that "identical sexual acts constitute separate and discrete crimes when they are separated (1) by the commission of a different sexual offense, (2) by sexual climax, (3) by an appreciable passage of time, or (4) by a reasonable opportunity for reflection." *Id.* at 1099, 236 Cal. Rptr. at 831. The supreme court rejected the *Hammon* test because it contemplated other Penal Code sections involving multiple sentencing. In *Hammon*, however, only section 289, which involves multiple violations, was at issue. Case law does not limit the number of violations with which a defendant can be charged. *Harrison*, 48 Cal. 3d at 332-33, 768 P.2d at 1084, 256 Cal. Rptr. at 407.

8. *Harrison*, 48 Cal. 3d at 335, 768 P.2d at 1086, 256 Cal. Rptr. at 409.

9. *Id.* The court emphasized that section 654 does not afford special treatment "simply because [defendant] chose to repeat, rather than to diversify or alternate, his many crimes." *Id.* at 337, 768 P.2d at 1087, 256 Cal. Rptr. at 410.

10. *Id.* at 336, 768 P.2d at 1086, 256 Cal. Rptr. at 409 (citing *People v. Perez*, 23 Cal. 3d 545, 553-54, 591 P.2d 63, 69, 153 Cal. Rptr. 40, 45 (1979)).

11. See *People v. Slobodion*, 31 Cal. 2d 555, 562-63, 191 P.2d 1, 5-6 (1948), cert. denied, 335 U.S. 835 (1948) (touching of penis to victim's vagina, followed by oral copulation); *People v. Phillips*, 169 Cal. App. 3d 632, 642, 215 Cal. Rptr. 394, 401 (1985) (insertion of finger into victim's vagina, followed by act of rape); *People v. Boyce*, 128 Cal. App. 3d 850, 860, 180 Cal. Rptr. 573, 578 (1982) (oral copulation, followed by act of rape); *People v. Rance*, 106 Cal. App. 3d 245, 255, 164 Cal. Rptr. 822, 828 (1980) (consecutive acts of rape, sodomy, and oral copulation); *People v. Mills*, 58 Cal. App. 2d 608, 610-11, 137 P.2d 698, 699 (1943) (successive acts of rape, sodomy, and sexual perversion).

12. See *People v. Reeder*, 152 Cal. App. 3d 900, 917, 200 Cal. Rptr. 479, 491 (1984)

in succession can result in multiple convictions.<sup>13</sup> The supreme court took the next step in holding that identical, volitional sex offenses committed through separate acts of force against the same victim within a short period of time can result in multiple convictions and separate, consecutive sentences.<sup>14</sup>

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B. *When separate instances of death and injury result from one incident of drunk driving, section 654 of the Penal Code does not prohibit separate punishments for vehicular manslaughter of one victim and drunk driving causing the injury of another victim: People v. McFarland.*

In *People v. McFarland*<sup>1</sup> the supreme court resolved the split between appellate courts<sup>2</sup> regarding whether section 654 of the Penal

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(oral copulation and act of rape; victim allowed to smoke cigarette; another act of oral copulation and rape); *People v. Sanchez*, 131 Cal. App. 3d 718, 728-29, 182 Cal. Rptr. 671, 675-76 (1982) (act of rape, interrupted by car trip, followed by oral copulation and act of rape); *People v. Brown*, 35 Cal. App. 3d 317, 322, 110 Cal. Rptr. 854, 857 (1973) (act of rape on first victim; defendant left room to rape second victim, but returned to rape and sodomize the first victim).

13. See *People v. Perez*, 23 Cal. 3d 545, 553-54, 591 P.2d 63, 69, 153 Cal. Rptr. 40, 45 (1979) (uninterrupted acts of oral copulation, sodomy, oral copulation, rape, oral copulation, rape, and insertion of foreign object into vagina); *In re McGrew*, 66 Cal. 2d 685, 688, 427 P.2d 161, 163, 58 Cal. Rptr. 561, 563 (1967) (three uninterrupted acts of rape and act of copulation); *People v. Price*, 184 Cal. App. 3d 1405, 1412, 229 Cal. Rptr. 550, 555 (1986) (two acts of sodomy, followed by consecutive acts of rape and sodomy).

14. *Harrison*, 48 Cal. 3d at 338, 768 P.2d at 1088, 256 Cal. Rptr. at 411. Justice Broussard concurred in the judgment without opinion. Justice Mosk also concurred in the judgment, while expressing concern that the majority opinion "could readily yield untenable results in individual cases" due to its declaration that each penetration *as a matter of law* constitutes a separate offense. *Id.* at 339, 768 P.2d at 1089, 256 Cal. Rptr. at 412 (Mosk, J., concurring).

1. 47 Cal. 3d 798, 765 P.2d 493, 254 Cal. Rptr. 331 (1989). *McFarland* was driving under the influence of alcohol when his car struck another vehicle. The driver of the other vehicle was killed and the two passengers sustained serious injuries. *McFarland* was prosecuted for vehicular manslaughter under former section 192 of the Penal Code, and for drunk driving with resultant injury under section 23153 of the Vehicle Code. The trial court also applied section 23182 of the Vehicle Code to impose consecutive sentence enhancements for the passengers' injuries. Justice Kaufman wrote the majority decision, in which all members of the court concurred except Justice Mosk, who wrote separately in dissent.

2. Compare *People v. McNiece*, 181 Cal. App. 3d 1048, 226 Cal. Rptr. 733 (1986) (proscribing separate punishments under section 654) with *People v. Gutierrez*, 189 Cal. App. 3d 596, 234 Cal. Rptr. 531 (1987) (permitting separate punishments under section 654). The supreme court also agreed with the appellate court's decision that two one-year enhancements imposed by the trial court under section 23182 of the Vehicle Code for additional injured victims were improper. *McFarland*, 47 Cal. 3d at 802, 765 P.2d at 494, 254 Cal. Rptr. at 332. When this action arose, section 23182 applied only to injuries resulting from felony drunk driving, but the trial court erroneously enhanced the vehicular manslaughter sentence. Subsequent to the decision by the court of appeal, the legislature closed this loophole by amending section 23182 to allow enhancements for each additional injured victim against any person who "proximately causes

Code<sup>3</sup> prohibits separate punishments for one incident of drunk driving which results in death to one victim and serious bodily harm to another. In concluding that separate punishment for these two offenses is not prohibited by section 654, the court followed extensive precedent allowing the imposition of multiple punishment when one criminal act injures more than one victim.<sup>4</sup>

In *McFarland*, the supreme court held that the legislature intended that vehicular manslaughter and drunk driving be treated as distinct criminal violations. The court asserted that vehicular manslaughter<sup>5</sup> is defined as a crime against a person, as indicated by its placement within the Penal Code; while drunk driving with a resultant injury is defined as a driving offense, as indicated by its placement within the Vehicle Code.<sup>6</sup> This distinction, the court reasoned, allowed separate punishments to be imposed as each punishment was for a different crime.<sup>7</sup>

Section 654 of the Penal Code ensures that the punishment imposed does not exceed the moral culpability of the defendant.<sup>8</sup> In *McFarland*, the supreme court realistically classified manslaughter

bodily injury or death to more than one victim in any one instance of driving" chargeable under section 23153 of the Vehicle Code or section 192 of the Penal Code. See CAL. VEH. CODE § 23182 (West Supp. 1989) (emphasis added).

3. CAL. PENAL CODE § 654 provides:

An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

*Id.* § 654 (West 1988).

4. See, e.g., *Wilkoff v. Superior Court*, 38 Cal. 3d 345, 696 P.2d 134, 211 Cal. Rptr. 742 (1985); *People v. Miller*, 18 Cal. 3d 873, 558 P.2d 552, 135 Cal. Rptr. 654 (1977); *Neal v. State*, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960). See generally L. TAYLOR, CALIFORNIA DRUNK DRIVING DEFENSE § 2:10 (1988); Hutton, *Drunk Driving Defense Strategies*, L.A. LAW., Dec. 1984, at 34; Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357 (1970); Note, *Double Jeopardy v. Double Punishment—Confusion in California*, 2 SAN DIEGO L. REV. 86 (1965).

5. Former Penal Code section 192(c)(3) is now contained in Penal Code section 191.5. See CAL. PENAL CODE § 191.5 (West 1988).

6. See *Wilkoff*, 38 Cal. 3d at 350, 696 P.2d at 138, 211 Cal. Rptr. at 745.

7. *McFarland*, 47 Cal. 3d at 805-06, 765 P.2d at 496-97, 254 Cal. Rptr. at 334-35. Justice Mosk dissented because he believed the driver committed only one criminal act. Although this act led to several criminal offenses, Justice Mosk interpreted section 654 as allowing only one punishment for each criminal act. *Id.* at 806, 765 P.2d at 497, 254 Cal. Rptr. at 335 (Mosk, J., dissenting).

8. See *People v. Perez*, 23 Cal. 3d 545, 591 P.2d 63, 153 Cal. Rptr. 40 (1979); see also 22 CAL. JUR. 3D *Criminal Law* § 3358 (1985 & Supp. 1989).

and drunk driving as separate offenses, allowing the punishment imposed to approximate the culpability of the criminal defendant.

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### III. CRIMINAL PROCEDURE

*Failure to object to jury instructions regarding nonincluded, lesser related offenses impliedly consents to the charge and waives objections on appeal based upon notice: People v. Toro.*

In *People v. Toro*,<sup>1</sup> the supreme court held that defense counsel's failure to object at trial to the court's sua sponte instruction concerning lesser, nonincluded offenses did not constitute an infringement of an accused's due process right to notification of criminal charges, and thus would not upset a conviction for the lesser related offense.<sup>2</sup> The supreme court found that a defense attorney who does not make a timely objection to the jury's consideration of lesser related offenses will be deemed to have waived possible objections based on unfair surprise or lack of notice, and thus to have impliedly consented to their consideration.<sup>3</sup> The consideration of lesser related offenses can be beneficial or detrimental to a defendant's case; therefore, it is ultimately up to the defendant, assisted by counsel, to decide whether such offenses should be considered.<sup>4</sup>

The court's primary analysis<sup>5</sup> focused upon the due process consid-

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1. 47 Cal. 3d 966, 766 P.2d 577, 254 Cal. Rptr. 811 (1989). The defendant was charged with several counts, including attempted murder and assault with a deadly weapon, for repeatedly stabbing and kicking his half-brother. The defendant had been arguing with his girlfriend when his half-brother tried to intervene by restraining him. The defendant then punched his half-brother, jumped on top of him, and repeatedly stabbed him. During his subsequent trial, the defendant conceded the stabbing, but argued that he did not act with intent to kill or to inflict great bodily injury. The jury received instructions regarding the charged offenses, as well as instructions about what the judge deemed "lesser included offenses." *Id.* at 971, 766 P.2d at 579, 254 Cal. Rptr. at 813. The jury convicted Toro of "battery with serious bodily injury as a lesser offense to the attempted murder charge." *Id.* The appellate court reversed, holding that because battery is not a lesser included offense of attempted murder, the lower court had erred in giving the lesser included offense instruction without a request by the defense. *Id.*

2. *Id.* at 977-78, 766 P.2d at 584, 254 Cal. Rptr. at 818. Justice Kaufman wrote the opinion of the court, in which Chief Justice Lucas and Justices Panelli, Arguelles, and Eagleson concurred. Justice Broussard filed a dissenting opinion in which Justice Mosk concurred.

3. *Id.* See generally B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §§ 480, 480B (Supp. 1985); Annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 A.L.R. 4TH 1081 (1986).

4. *Toro*, 47 Cal. 3d at 977, 766 P.2d at 583-84, 254 Cal. Rptr. at 817-18.

5. The court rejected the possibility of battery being a lesser included offense of attempted murder, finding instead that, as the parties conceded, attempted murder can be committed without a battery. *Id.* at 972, 766 P.2d at 580, 254 Cal. Rptr. at 814.

erations surrounding a conviction for a nonincluded offense. The court noted that, except in cases in which the defendant expressly or impliedly consents to an instruction for a nonincluded offense, a conviction based upon such instruction infringes on the defendant's due process right to notice of the charges against him.<sup>6</sup> Therefore, the court narrowed its inquiry to whether defense counsel's failure to object to jury instructions, including nonincluded, lesser related offenses, constituted implied waiver and consent.

The court cited its decision in *People v. Geiger*,<sup>7</sup> which held that courts must permit instructions on lesser related offenses when submitted by the defense.<sup>8</sup> However, the court in *Toro* recognized that the nature of such instructions could be "highly beneficial or prejudicial" to the defendant and held that counsel must decide whether to initiate or object to jury instructions concerning lesser related offenses.<sup>9</sup> The court expressed concern that "a defendant 'may not sit silently during the course of his trial, create a situation which may be to his advantage or disadvantage and require the court to make an election on his behalf without being bound by that election.'"<sup>10</sup> Therefore, the court held that when the trial court adds jury instructions of nonincluded, lesser related offenses sua sponte,<sup>11</sup> the defense counsel's "failure to promptly object will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice."<sup>12</sup>

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6. *Id.* at 973, 766 P.2d at 580-81, 254 Cal. Rptr. at 814-15. The court, citing *In re Hess*, 45 Cal. 2d 171, 288 P.2d 5 (1955), noted that a defendant may not be convicted of any crime not charged against him, other than a necessarily included offense, even when evidence at trial shows that a defendant committed another offense. *Toro*, 47 Cal. 3d at 973, 766 P.2d at 580-81, 254 Cal. Rptr. at 814-15.

7. 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984).

8. *Id.* at 530, 674 P.2d at 1315, 199 Cal. Rptr. at 57.

9. *Toro*, 47 Cal. 3d at 975, 766 P.2d at 582, 254 Cal. Rptr. at 816.

10. *Id.* (quoting *People v. Miller*, 185 Cal. App. 2d 59, 84, 8 Cal. Rptr. 91, 106 (1960), cert. denied, 365 U.S. 568 (1961)); see also *People v. Flanders*, 89 Cal. App. 3d 634, 640, 152 Cal. Rptr. 696, 699-700 (1979) (instruction acceptable when defendant made no objection or alternate request); *People v. Terry*, 99 Cal. App. 2d 579, 584, 222 P.2d 95, 99 (1950) (defendant cannot remain silent hoping for a favorable verdict and then raise objection on appeal).

11. See generally B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* § 480A (Supp. Part 1 1985); 21 CAL. JUR. 3D *Criminal Law* § 3049 (1985 & Supp. 1989).

12. *Toro*, 47 Cal. 3d at 976, 766 P.2d at 583, 254 Cal. Rptr. at 817. The court noted that when a defendant fails to object or to move for continuance upon the amendment of an information to include an additional offense at trial, issues pertaining to lack of notice may not be raised on appeal. *Id.*; see *People v. Lewis*, 147 Cal. App. 3d 1135, 1140, 195 Cal. Rptr. 728, 731 (1983) (amendment made in open court over which defendant takes no action may not be basis of first objection on appeal).

The court's holding effectively balances the criminal defendant's need to permit or object to jury instructions regarding lesser related offenses against the state's need to prevent defendants from gambling with the instructions and then claiming due process violations when the verdict is unfavorable. Although the court recognized that a defendant's mere silence might create the inference of consent and waiver of constitutional rights,<sup>13</sup> the court's decision weighed this concern against the ability of defense counsel to timely object and appeal and reached an appropriate balance:

MICHAEL J. GAINER

#### IV. INSURANCE LAW

*In a first-party property insurance claim, the trier of fact must determine whether the efficient proximate cause of the loss was a covered risk; if so, coverage for the claim will exist: Garvey v. State Farm Fire & Casualty Co.*

##### I. INTRODUCTION

The courts have struggled to establish criteria for determining whether insurance coverage should exist when a loss results from the interaction of two events in which one event is covered by an insurance policy and the other is excluded.<sup>1</sup> In *Garvey v. State Farm Fire & Casualty Co.*,<sup>2</sup> the court addressed this issue in the context of a first party claim under a homeowner's "all risk" property insurance policy.<sup>3</sup>

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13. Justice Broussard, in a dissenting opinion in which Justice Mosk concurred, expressed concern that such an inference would permit the state to overcharge a defendant at trial, while placing an onerous burden on the defendant to ensure that only offenses charged in the information are instructed at trial. *Toro*, 47 Cal. 3d at 978-82, 766 P.2d at 584-87, 254 Cal. Rptr. at 818-21 (Broussard, J., dissenting).

1. CAL. INS. CODE § 530 (West 1988) provides that coverage exists when the insured risk was the "proximate cause" of the loss. CAL. INS. CODE § 532 (West 1988) provides that if the risk is specifically excluded from coverage, and the loss would not have occurred "but for" that risk, the loss is excluded from coverage, even if the "immediate cause" of the loss was covered under the policy. In *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963), the court explained that, when reading the two sections together, the "but for" clause of section 532 necessarily refers to the proximate cause of the loss, and the "immediate cause" refers to the cause closer in time to the damage. *Id.* at 33-34, 377 P.2d at 896-97, 27 Cal. Rptr. at 696-97. For a list of cases misconstruing *Sabella*, see *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 416 n.1, 770 P.2d 704, 714 n.1, 257 Cal. Rptr. 292, 305 n.1 (1989) (Mosk, J., dissenting).

2. 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989). Chief Justice Lucas authored the opinion of the court, in which Justices Panelli, Eagleson, and Arguelles concurred. Justice Kaufman concurred separately. Justices Mosk and Broussard each dissented separately.

3. The court stated that "if the insured is seeking coverage against *loss or damage sustained by the insured*, the claim is first party in nature. If the insured is seeking

The plaintiff homeowners filed suit when their "all risk" property insurance carrier denied their claim for damage to a home addition which resulted from earth movement, a risk excluded by the homeowner's "all risk" property insurance policy, and from a building contractor's negligence, a covered risk. The plaintiff's insurance policy provided coverage only for "all risks" to the homeowners' property not excluded from the policy. The supreme court clarified the appropriate analysis for determining coverage in first-party, multiple-cause, "all risk" property insurance cases, and distinguished that approach from the third-party liability approach which the court of appeal incorrectly applied. The court held that the trial court erred in directing a verdict for the plaintiffs on the issue of coverage, which prevented the jury from determining the "efficient proximate cause" of the loss, the dispositive issue in this scenario.<sup>4</sup>

## II. THE COURT'S DECISION

### A. *The Majority Opinion*

Two distinct approaches have developed to deal with an insurance loss caused by the interaction of multiple events in which one risk is excluded and another covered: the efficient proximate cause standard and the doctrine of concurrent causation.<sup>5</sup> In *Sabella v. Wisler*,<sup>6</sup> the court created the efficient proximate cause analysis. Under this analysis, the trial jury first determines the "efficient cause"—the cause which "sets others in motion"—and then attributes the loss to that cause.<sup>7</sup> If this efficient or predominant cause is excluded from the in-

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coverage against *liability of the insured to another*, the claim is third party in nature." *Id.* at 399 n.2, 770 P.2d at 705 n.2, 257 Cal. Rptr. at 293 n.2 (emphasis in original).

4. *Id.* at 412-13, 770 P.2d at 714-15, 257 Cal. Rptr. at 302-03. On the issue of damages, the jury awarded the plaintiffs \$47,000 under the policy and \$1 million in punitive damages. The plaintiffs had sued under the policy, as well as under a theory of breach of the covenant of good faith and fair dealing.

5. *See id.* at 401-05, 770 P.2d at 706-09, 257 Cal. Rptr. at 294-97; *see also* 39 CAL. JUR. 3D *Insurance Contracts and Coverage* § 244 (1977 & Supp. 1989).

6. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

7. *See id.* at 31-32, 377 P.2d at 895, 27 Cal. Rptr. at 695. In *Sabella*, the policy at issue excluded losses resulting from settlement of the earth, but provided coverage for the negligence of a third party. The court ruled the efficient cause of the loss was a third party's negligence in construction which led to a rupture in the sewer line. The immediate cause of the loss was the water emptying into the loose fill, causing the house to settle. The court held that coverage existed. In fact, an interpretation on excluding coverage under the policy would have violated section 530 of the Insurance Code. *See supra* note 1; *see also* Houser & Kent, *Concurrent Causation in First-Party Insurance Claims: Consumers Cannot Afford Concurrent Causation*, 21 TORT & INS. L.J. 473, 474 (1986).



sured's policy, then coverage does not exist.<sup>8</sup> This analysis is necessary in a first-party claim because a property insurance policy creates specific exclusions. Unlike third-party claims, questions of liability are not involved. Where multiple causes appear to exist, the determination of whether the efficient or predominant cause is excluded under the policy is imperative because, even if other causes included under the policy exist, coverage under the policy is denied when those covered causes are too remote.<sup>9</sup>

In a third-party liability context, where none of the multiple causes predominates, the doctrine of concurrent causation applies. The court enunciated this doctrine in *State Farm Mutual Automobile Insurance Co. v. Partridge*,<sup>10</sup> in which neither of two independent causes predominated.<sup>11</sup> *Partridge* involved third-party liability insurance,<sup>12</sup> and the court held that under a liability insurance policy, coverage exists if *either* of the concurrent causes is an insured risk.<sup>13</sup> *Partridge* did not address coverage resulting from a first-party property insurance policy, nor did the decision analyze concurrent causation in relation to a first-party property contract.<sup>14</sup>

The court in *Garvey* distinguished between tort liability covered under a third-party insurance policy<sup>15</sup> and property loss covered under a first-party policy.<sup>16</sup> A liability policy turns on the insured's obligation to pay for the injury to another individual resulting from an event.<sup>17</sup> On the other hand, under an "all risk" property policy,

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8. *Garvey*, 48 Cal. 3d at 402-03, 770 P.2d at 707, 257 Cal. Rptr. at 295. In *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal. 2d 305, 163 P.2d 689 (1945), the court permitted recovery for the insured, a terminally ill man who died in a fire. Even though the disease contributed to his death, the court had determined that the fire was the efficient cause under the first-party policy, but defined it as the "prime or moving cause." *Id.* at 309-10, 163 P.2d at 689. The court in *Garvey* believed this misnomer contributed to the confusion in the courts of appeal. See *Garvey*, 48 Cal. 3d at 403, 770 P.2d at 708, 257 Cal. Rptr. at 296. See generally *Recent Development—Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause—Graham v. Public Employees Mut. Ins. Co.*, 59 WASH. L. REV. 565 (1984).

9. See *Garvey*, 48 Cal. 3d at 402-03, 770 P.2d at 707, 257 Cal. Rptr. at 295 (noting that "[c]overage would not exist if the covered risk was simply a remote cause of the loss, or if an excluded risk was the efficient proximate [meaning predominant] cause of the loss").

10. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

11. The insured, while driving negligently (an excluded risk under his homeowner's liability policy), negligently discharged his pistol which he had fired to a "hair-trigger" action (a covered risk under his homeowner's liability policy). The case involved the personal liability of the insured to his injured passenger, and not property damage. See *id.* at 97-99, 514 P.2d at 125-26, 109 Cal. Rptr. at 813-14.

12. See *infra* note 3.

13. *Partridge*, 10 Cal. 3d at 104-05, 514 P.2d at 130-31, 109 Cal. Rptr. at 818-19.

14. *Garvey*, 48 Cal. 3d at 405, 770 P.2d at 709, 257 Cal. Rptr. at 297.

15. See generally Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

16. See *Garvey*, 48 Cal. 3d at 406, 770 P.2d at 710, 257 Cal. Rptr. at 298.

17. *Id.* at 407, 770 P.2d at 710, 257 Cal. Rptr. at 298.

all physical loss is covered, unless specific exclusions from coverage are established through negotiations between the insurer and the insured.<sup>18</sup> If third-party negligence is not specifically exempted from an "all risk" property policy, it will be considered a covered risk.<sup>19</sup>

Although the court expressly left open the question of which approach to apply when the causes of damage to property are *independent* but only one of which is covered, the court stated that the *Partridge* concurrent causation test generally should be limited to third-party tort liability cases.<sup>20</sup> Thus, the court found that the *Sabella* analysis of efficient proximate cause should be applied to the type of first-party claim involved here.<sup>21</sup> If the efficient proximate cause was earth movement, then recovery should be denied because this risk was excluded from coverage. Conversely, if the efficient proximate cause was negligence by the building contractor, then recovery should be permitted because this risk was covered under the policy.<sup>22</sup> Because causation is a question of fact to be determined by a jury, the trial court erred in directing a verdict for the homeowners, and the supreme court remanded the case for determination by the jury of the efficient cause.<sup>23</sup>

### B. Separate Opinions

Justice Kaufman separately concurred. He believed *Partridge* should be overruled because it imports tort law into contractual questions of insurance.<sup>24</sup> He also criticized the assertion in *Partridge* that two acts of negligence are considered independent due to the absence

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18. *Id.* at 408, 770 P.2d at 711, 257 Cal. Rptr. at 299. "Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability." *Id.* at 406, 770 P.2d at 710, 257 Cal. Rptr. at 298 (quoting Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 386 (1985)).

19. *Id.* at 408, 770 P.2d at 711, 257 Cal. Rptr. at 299.

20. *Id.* at 410 n.9, 770 P.2d at 713 n.9, 257 Cal. Rptr. at 301 n.9. The court demonstrated several recent misuses of the *Partridge* concurrent causation doctrine. In *Safeco Ins. Co. of Am. v. Guyton*, 692 F.2d 551, 553 (9th Cir. 1982), the Ninth Circuit had misapplied *Partridge* and should have used *Sabella* to determine if a defectively maintained flood control system was the efficient proximate cause. In *Premier Ins. Co. v. Welch*, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983), it was unnecessary to reference *Partridge*, because whether a loss was caused by a negligently damaged drain or by unusually heavy rainfall was a classic *Sabella* scenario. See *Garvey*, 48 Cal. 3d at 411, 770 P.2d at 713-14, 257 Cal. Rptr. at 301-02.

21. *Id.* at 412, 770 P.2d at 714, 257 Cal. Rptr. at 302.

22. *Id.* at 412-13, 770 P.2d at 715, 257 Cal. Rptr. at 303.

23. *Id.*

24. *Id.* at 413-14, 770 P.2d at 715-16, 257 Cal. Rptr. at 303-04 (Kaufman, J., concurring); see *supra* note 15.

of any interrelationship between the two negligent acts.<sup>25</sup> Rather, Justice Kaufman believed the rule of concurrent causation should apply when neither of the causes predominates.<sup>26</sup>

Justice Mosk dissented, stating, "The majority, I must acknowledge, have succeeded in reaching a clear result: in this court, the insurer wins and the insured loses."<sup>27</sup> Contrary to the majority, he enunciated the following test: If there are two risks, only one of which is covered, and the covered risk triggers the excluded risk, then coverage exists; however, if the excluded risk triggers the covered risk, then no coverage exists. But if the two risks are independent, and both the excluded risk and the covered risk are proximate causes, then coverage would always exist.<sup>28</sup> Justice Mosk disagreed that *Sabella* established a single "workable" rule because the opinion lacked any standards which insureds, insurers, and juries may utilize.<sup>29</sup> Further, he did not agree that *Partridge* should be limited to third-party insurance policies.<sup>30</sup>

Justice Broussard's dissent provided an extensive review of the principles for interpreting insurance policies.<sup>31</sup> Justice Broussard cited *Pacific Heating and Ventilating Co. v. Williamsburgh City Fire Insurance Co. of Brooklyn*<sup>32</sup> for "well-settled rules" to interpret an insurance contract: the policy should be interpreted to meet the insured's expectations; the covered risks are to be broadly interpreted; the exclusion clause is to be narrowly interpreted; and any ambiguities are to be resolved in the insured's favor.<sup>33</sup> According to Justice Broussard, coverage of the loss involved here existed as a matter of law: if viewed under a concurrent causation analysis, *Partridge* provided coverage; if viewed under a successive causation approach, *Sabella* established coverage.<sup>34</sup> Turning to the expectation of the insured, Justice Broussard believed that individuals might reasonably

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25. *Id.* at 415, 770 P.2d at 716, 257 Cal. Rptr. at 304 (Kaufman, J., concurring).

26. *Id.* at 415, 770 P.2d at 717, 257 Cal. Rptr. at 305 (Kaufman, J., concurring).

27. *Id.* at 416, 770 P.2d at 717, 257 Cal. Rptr. at 305 (Mosk, J., dissenting).

28. *Id.* at 416, 770 P.2d at 717, 257 Cal. Rptr. at 305 (Mosk, J., dissenting).

29. *Id.* at 427, 770 P.2d at 724, 257 Cal. Rptr. at 312 (Mosk, J., dissenting).

30. Justice Mosk forwarded three reasons: the analysis of concurrent causation is the same for both first-party and third-party policies; *Partridge* does not prevent the realization of the insureds' and insurers' expectations in a first-party policy; and *Partridge* does not provide unfair results to insurers. *Id.* at 427-28, 770 P.2d at 724-25, 257 Cal. Rptr. at 312-13 (Mosk, J., dissenting).

31. *Id.* at 432-35, 770 P.2d at 728-30, 257 Cal. Rptr. at 316-18 (Broussard, J., dissenting).

32. 158 Cal. 367, 111 P. 4 (1910). The insured cause was fire, while earthquakes were excluded. The building was destroyed by a fire which spread from a nearby building during an earthquake. The court permitted recovery. *Id.*

33. *Garvey*, 48 Cal. 3d at 433, 770 P.2d at 729, 257 Cal. Rptr. at 317 (Broussard, J., dissenting).

34. *Id.* at 431-32, 770 P.2d at 727-28, 257 Cal. Rptr. at 315-16 (Broussard, J., dissenting).

believe that specifically insured risks and exclusions are mutually exclusive. It is also reasonable for the insured to believe coverage would be denied if the loss results solely from the excluded risk.<sup>35</sup> The exclusion clause in the policy at issue here was ambiguous as to whether coverage would be denied if the excluded cause alone caused the loss, or if the excluded cause interacted with an included cause to create the loss. Justice Broussard contended that his "interpretation of insurance contract" approach better provided for the expectation of parties, and created less confusion in analysis than the majority approach.<sup>36</sup>

### III. CONCLUSION

The court grappled with conceptually difficult questions of causation in an attempt to prevent further erroneous application of the *Partridge* concurrent causation doctrine to first-party property insurance claims. The court reasoned that allowing the extension of *Partridge* would render exclusion provisions in property policies inoperative because coverage would exist if one of the concurrent causes was a covered risk, despite the specific exclusion of the other concurrent cause. The court believed that the concurrent causation doctrine should be applied only when concurrent causes originate independently, yet join together to create an injury compensable under a liability policy.<sup>37</sup>

The many lines to be drawn—between first and third parties, between liability and property policies, between dependent and independent causes, between concurrent and consecutive forces—leave this area in a morass. The court here resolved what difficulties it could in a manner favoring insurance companies, although it did so in reliance on underlying contract principles. In this specific type of case, such a result is not unreasonable, as the involved parties freely negotiated excluded causes, and tort policies of compensating the injured are inapposite. After this decision, in first-party claims concerning damage to property, the trier of fact must determine which of the causes was the efficient or predominant proximate cause.<sup>38</sup> If that risk is covered by the insurance policy, a jury may determine

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35. *Id.* at 434-35, 770 P.2d at 729-30, 257 Cal. Rptr. at 317-18 (Broussard, J., dissenting).

36. *Id.* (Broussard, J., dissenting).

37. *Id.* at 399, 770 P.2d at 705, 257 Cal. Rptr. at 293.

38. *Id.* at 412-13, 770 P.2d at 714-15, 257 Cal. Rptr. at 302-03.

coverage exists. Conversely, if the efficient proximate cause is excluded under the policy, coverage will be denied.

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## V. REAL PROPERTY LAW

*Statute allowing privately owned mobilehome parks to restrict residence to individuals twenty-five years or older is not invalid under California law: Schmidt v. Superior Court.*

### I. INTRODUCTION

Two decades ago the California Legislature sought to protect mobilehome owners,<sup>1</sup> due to the unique features inherent in mobilehome parks, by limiting a park owner's discretion in disapproving the continuation of an existing lease.<sup>2</sup> However, the legislature also adopted statutes, such as section 798.76 of the California Civil Code, which afford mobilehome park owners discretion to approve new leases by requiring purchasers to adhere to then-existing park rules which establish the park's character.<sup>3</sup>

In *Schmidt v. Superior Court*,<sup>4</sup> the plaintiffs, who were denied the ability to lease space in a mobilehome park due to their age, challenged a mobilehome park rule requiring residents to be at least twenty-five years old.<sup>5</sup> The supreme court ultimately upheld the

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1. See CAL. CIV. CODE §§ 798-99 (West 1982 & Supp. 1989) (mobilehome residency law). See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 527-541 (9th ed. 1987); 44 CAL. JUR. 3D *Mobilehomes* § 14 (1978 & Supp. 1989); Comment, *Review of Selected 1978 California Legislation—Property: Mobilehome Residency Law*, 10 PAC. L.J. 563 (1978).

2. CAL. CIV. CODE §§ 798.55-.61 (West 1982 & Supp. 1989) (termination of tenancy requirements). See, e.g., 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 420F (8th ed. 1973 & Supp. 1984) (discrimination against children unlawful).

3. The statute states in full: "The management [of a mobilehome park] may require that a purchaser of a mobilehome which will remain in the park, comply with any rule or regulation limiting residence to adults only." CAL. CIV. CODE § 798.76 (West 1982).

4. 48 Cal. 3d 370, 769 P.2d 932, 256 Cal. Rptr. 750 (1989). Justice Arguelles authored the opinion of the court, in which Chief Justice Lucas and Justices Panelli, Eagleson, and Kaufman concurred. Justice Mosk, with Justice Broussard concurring, wrote separately to concur and to dissent.

5. The plaintiffs were three adult sisters who intended to reside in a mobilehome with a minor child. One sister was over 25 years of age, another was 24, and the third was 18. The owners of the mobilehome park rejected their application to rent mobilehome space, relying on a park rule requiring new residents to be at least 25 years old. The sisters then offered to live without the minor child but, based upon the same park rule, were again rejected. The sisters sought declaratory and injunctive relief against the park, as well as damages. After the trial court determined, on the plaintiffs' summary judgment motion, that the 25-years-or-older rule was valid under section 798.76, the sisters and minor child sought and received from the appellate court a writ of mandate. The appellate court interpreted section 798.76 to permit a park

mobilehome park rule despite diverse statutory and constitutional arguments.<sup>6</sup>

## II. THE COURT'S DECISION

### A. Majority Opinion

In 1988, Congress enacted the Fair Housing Amendments Act<sup>7</sup> (the Act) which prohibits, among other things, discrimination against families with minor children by businesses transacting in residential real estate.<sup>8</sup> The court stated this would not control the plaintiffs' damage claim because the Act does not govern conduct which occurred prior to the Act's effective date,<sup>9</sup> nor does the Act eliminate issues of statutory interpretation of California law as applied to the authority of the park owner to adopt a defined age-based policy which would be exempt from federal law.<sup>10</sup>

The court rejected the plaintiffs' initial contentions: that section 798.76 is limited to senior citizens due to the use of the term "adults only,"<sup>11</sup> and, alternatively, that section 798.76 allowed park owners to restrict residency only by requiring residents to be eighteen years or older, but that anyone over that age could not be refused.<sup>12</sup> Rather, the court concluded that the legislature, in enacting section 798.76, did not intend to invalidate any existing mobilehome park rules regarding the lessee's age.<sup>13</sup> The court viewed section 798.76 as part of a legislative scheme to limit a park owner's discretion to disapprove the continuation of a lease to those who would not comply with the

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owner to exclude children only when the park was especially reserved for senior citizens. *Id.* at 374, 769 P.2d at 933-34, 256 Cal. Rptr. at 751-52.

6. *Id.* at 391, 769 P.2d at 945, 256 Cal. Rptr. at 763.

7. See Fair Housing Amendments Act, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C.A. §§ 3601-3631 (West 1977 & Supp. 1989)). See generally Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989).

8. *Schmidt*, 48 Cal. 3d at 375, 769 P.2d at 934, 256 Cal. Rptr. at 752. The Fair Housing Amendments Act substantially changed the preexisting federal fair housing law. See generally Note, *Recent Developments: Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249 (1989).

9. *Schmidt*, 48 Cal. 3d at 375, 769 P.2d at 935, 256 Cal. Rptr. at 753.

10. *Id.* at 376, 769 P.2d at 935, 256 Cal. Rptr. at 753.

11. *Id.* at 379-80, 769 P.2d at 937, 256 Cal. Rptr. at 755. The court made clear that "adult" does not mean "senior citizen," and that the legislature intended no such interpretation. *Id.*

12. *Id.* at 380, 769 P.2d at 937-38, 256 Cal. Rptr. at 755-56. The court concluded that the legislature "did not intend to limit a park owner to only one particular 'adults only' rule." *Id.*

13. *Id.* at 382, 769 P.2d at 939, 256 Cal. Rptr. at 757.

park's rules, while still permitting park owners to establish the character of the park by utilizing age-based rules.<sup>14</sup>

The plaintiffs also asserted that section 798.76 was inconsistent with the Unruh Act<sup>15</sup> and its broad anti-discrimination policy.<sup>16</sup> The court stated that whether the policy of the Unruh Act limits the effect of section 798.76 is not a judicial but a legislative determination.<sup>17</sup> The Unruh Act does not contain any indication of legislative intent to eliminate section 798.76, as no provision addresses the validity of age-based rules.<sup>18</sup> In 1982, in *Marina Point, Ltd. v. Wolfson*,<sup>19</sup> the court held that section 51 of the Unruh Act prohibited a blanket rule excluding families with children from an ordinary apartment complex.<sup>20</sup> In 1983, in *O'Connor v. Village Green Owners Ass'n*,<sup>21</sup> the court applied *Marina Point* to the sale of condominiums and prohibited a rule excluding families with children from purchasing a unit.<sup>22</sup> While *O'Connor* did not discuss the applicability of section 51 to a mobilehome park, the *Marina Point* decision specifically noted section 798.76, stating that mobilehome parks were the only residential facilities recognized by the legislature which could have an "adults

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14. *Id.* at 381-82, 769 P.2d at 938-39, 256 Cal. Rptr. at 756-57.

15. CAL. CIV. CODE § 51 (1982 & Supp. 1989). Section 51 states that all persons are entitled to full and equal accommodations, irrespective of race, color, religion, ancestry, or national origin. *Burks v. Poppy Const. Co.*, 57 Cal. 2d 463, 467-71, 370 P.2d 313, 315-17, 20 Cal. Rptr. 609, 611-13 (1962), applied the Unruh Act to the housing field. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 423 (8th ed. 1974 & Supp. 1989).

16. *Schmidt*, 48 Cal. 3d at 382, 769 P.2d at 939, 256 Cal. Rptr. at 757. The antidiscrimination provisions of the Unruh Act were adopted in 1959. Age was not one of the specific bases of discrimination contained in section 51 of the Act, and no early cases challenged rules limiting housing on that basis. With *In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970), the court held that the bases of discrimination listed in section 51 were to illustrate, and not to limit, the bases of discrimination. *Id.* at 216, 474 P.2d at 999, 90 Cal. Rptr. at 31. Yet, no decisions in the 1970's utilized the Unruh Act to invalidate age restrictions. *See Schmidt*, 48 Cal. 3d at 376-78, 769 P.2d at 935-37, 256 Cal. Rptr. at 753-55 (court's discussion of history of Unruh Act).

17. *Schmidt*, 48 Cal. 3d at 383, 769 P.2d at 939-40, 256 Cal. Rptr. at 757-58. The court traced the recent legislative history of the Unruh Act and the Mobilehome Residency Law. *See id.* at 382-87, 769 P.2d at 939-43, 256 Cal. Rptr. at 757-61.

18. *See id.* at 383, 769 P.2d at 940, 256 Cal. Rptr. at 758.

19. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982). *See generally* Note, *Marina Point, Ltd. v. Wolfson: Discrimination in Rental Housing Against Families with Children*, 71 CALIF. L. REV. 697 (1983); Note, *Marina Point, Ltd. v. Wolfson: A Victory for Children in Rental Housing—Implications for Further Expansion of the Unruh Civil Rights Act*, 13 GOLDEN GATE U.L. REV. 697 (1983); Annotation, *Refusal to Rent Residential Premises to Persons with Children as Unlawful Discrimination—Marina Point, Ltd. v. Wolfson*, 30 A.L.R. 4TH 1161 (1984).

20. *See Marina Point*, 30 Cal. 3d at 742, 640 P.2d at 128-29, 180 Cal. Rptr. at 509-10.

21. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983). *See generally* Note, *Condominium Age-Restrictive Covenants Under the Unruh Civil Rights Act: O'Connor v. Village Green Owners Association*, 18 U.S.F. L. REV. 371 (1984).

22. *See O'Connor*, 33 Cal. 3d at 796-97, 662 P.2d at 431, 191 Cal. Rptr. at 324.

only" restriction.<sup>23</sup> In response to these two cases, the legislature amended the Unruh Act to address the general validity of age restrictions in the housing field.<sup>24</sup> Mobilehome parks were excluded from the application of the new amendments.<sup>25</sup> The legislature eliminated a proposed modification of section 798.76 which would have removed the mobilehome parks' exemption from the section, and the court therefore concluded that the legislative history indicates a clear intent that mobilehome parks not be within the provisions of the Unruh Act.<sup>26</sup>

The plaintiffs' final claim was that the exclusion of individuals under twenty-five years old violated the rights of family privacy and equal protection by interfering with the individual's right to live with family members or unrelated individuals.<sup>27</sup> This contention lacked merit for three reasons. First, by enacting section 798.76, the state did not create a rule which narrows living relationships of an individual, or restricts housing to certain age groups; rather, the legislature left this decision to the private park owner.<sup>28</sup> Second, even assuming that the enactment of the statute could be considered "state action," age is not a "suspect" classification warranting "strict scrutiny," as the court has refused to equate age discrimination with ethnic or race discrimination.<sup>29</sup> Third, a mobilehome park rule limiting residents to the age of twenty-five years or older does not compel the separation

23. See *Marina Point*, 30 Cal. 3d at 743 n.11, 640 P.2d at 128 n.11, 180 Cal. Rptr. at 510 n.11.

24. See *supra* note 17.

25. Housing was specifically defined to include all residential housing other than mobilehome developments. See *Schmidt v. Superior Court*, 48 Cal. 3d 370, 386, 769 P.2d 932, 942, 256 Cal. Rptr. 750, 760 (1989).

26. *Id.* at 387-88, 769 P.2d at 943, 256 Cal. Rptr. at 761. The court believed "it is inescapable that one of the compromises reached in the legislative process was to exclude mobilehome parks—the only category of housing as to which there was an already existing statutory provision—from the reach of the new Unruh Act provisions." *Id.* at 387, 769 P.2d at 943, 256 Cal. Rptr. at 761.

27. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (local zoning ordinance restricting an individual's ability to live with members of an extended family held invalid); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980) (local ordinance restricting an individual's right to live with an unrelated person held invalid). See generally Richards, *Zoning For Direct Social Control*, 1982 DUKE L.J. 761; Note, *Instant Planning—Land Use Regulation By Initiative In California*, 61 S. CAL. L. REV. 497 (1988); .

28. See *Schmidt*, 48 Cal. 3d at 388, 769 P.2d at 943-44, 256 Cal. Rptr. at 761-62. The court noted that merely enacting such a statute did not constitute state action because the private mobilehome park owner had authority to adopt age-based rules under "general common law property rights . . . which clearly preexisted the enactment of section 798.76." *Id.* at 388, 769 P.2d at 944, 256 Cal. Rptr. at 762.

29. See *id.* at 389, 769 P.2d at 944, 256 Cal. Rptr. at 762. See generally Schuck, *The*



of a parent from a child; rather, it simply precludes access to a certain type of housing for those individuals.<sup>30</sup> In sum, the court concluded that an age-based regulation was neither irrational nor arbitrary and thus withstood constitutional challenge.<sup>31</sup>

### B. *Separate Opinion*

Justice Mosk took exception to the majority's view of section 798.76.<sup>32</sup> He interpreted the section to limit mobilehome park owners' discretion to implement age limitations to a restriction requiring tenants to be eighteen years of age or older because the section does not allow *any* age restriction, but instead allows distinctions between children and adults.<sup>33</sup> Justice Mosk argued that the legislative history did not support the majority's assertion that a park owner may discriminate between adults based upon age, but instead allowed only the exclusion of children from mobilehome parks.<sup>34</sup>

## III. CONCLUSION

The court in this decision gave effect to the legislature's determination to exempt mobilehome parks from certain antidiscrimination provisions. In fact, the court simply adhered to the doctrine that decisions regarding broad policy are for the legislature, not the judiciary, to decide. Thus, it left the legislature to clarify any ambiguities in the interpretation of the antidiscrimination statutes. After consid-

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*Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979).

30. See *Schmidt*, 48 Cal. 3d at 389-90, 769 P.2d at 944-45, 256 Cal. Rptr. at 762-63. Other states have uniformly upheld the constitutional validity of such rules. See, e.g., *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974); *White Egret Condominium v. Franklin*, 379 So. 2d 346, 349-52 (Fla. 1979); *Hill v. Fontaine Condominium Ass'n*, 255 Ga. 24, 334 S.E.2d 690 (1985); *Lamont Bldg. Co. v. Court*, 147 Ohio St. 183, 70 N.E.2d 447 (1946); *Covered Bridge Condominium Ass'n v. Chambliss*, 705 S.W.2d 211 (Tex. Ct. App. 1985); see also *Bynes v. Toll*, 512 F.2d 252 (2d Cir. 1975) (state university exclusion from university housing of married students with children held constitutional). The California Supreme Court did not reach issues concerning the state constitutional privacy provision because the court held the rule at issue was constitutional "even if the state action requirement were met . . . ." *Schmidt*, 48 Cal. 3d at 389 n.14, 769 P.2d at 944 n.14, 256 Cal. Rptr. at 762 n.14.

31. *Schmidt*, 48 Cal. 3d at 390, 769 P.2d at 945, 256 Cal. Rptr. at 763. Reasons cited to defeat arguments of irrationality included the large percentage of senior citizens in mobilehome parks and their desire for privacy, the smaller size of mobilehomes, and the added expense necessary to make such parks safe for children. *Id.*

32. *Id.* at 391-94, 769 P.2d 946-48, 256 Cal. Rptr. at 764-66 (Mosk, J., concurring and dissenting). Justice Broussard concurred in Justice Mosk's opinion.

33. According to Justice Mosk, the section does not permit discrimination among classes of adults between 18 and 25 years old because if it did, the term "adult" would be unnecessary. *Id.* at 392, 769 P.2d at 946, 256 Cal. Rptr. at 764 (Mosk, J., concurring and dissenting).

34. *Id.* at 394, 769 P.2d at 947-48, 256 Cal. Rptr. at 765-66 (Mosk, J., concurring and dissenting).

ering the delicate balance between federal and state regulation of residential antidiscrimination policies, the court opted to include under state law those policies which would be valid under federal law. Thus, the court left intact the narrowly defined age-based policies designed to benefit the elderly residents of many mobilehome parks.

MARK A. CLAYTON

## VI. TAX LAW

*For purposes of reassessment under Proposition 13, a corporate merger results in a "change of ownership" for any wholly-owned subsidiary of the acquired parent corporation: Title Ins. & Trust Co. v. County of Riverside.*

Over ten years ago, the California Supreme Court first upheld Proposition 13<sup>1</sup> against constitutional challenges.<sup>2</sup> However, the term "change in ownership"<sup>3</sup> has been one of the most elusive terms to apply under Proposition 13, especially as that term applies to transfers of real property between legal entities.<sup>4</sup> In *Title Ins. & Trust Co. v. County of Riverside*,<sup>5</sup> the supreme court clarified the term by hold-

1. CAL. CONST. art. XIII A. On June 6, 1978, the California electorate overwhelmingly adopted Proposition 13 by a 2-1 margin. See Lefcoe & Allison, *The Legal Aspects of Proposition 13: The Amador Valley Case*, 53 S. CAL. L. REV. 173, 174 (1979). Proposition 13 limited ad valorem real property taxes to one percent of the property's full cash value. However, property changing ownership after the 1975-76 tax year was subject to reassessment. CAL. CONST. art. XIII A, §§ 1-2.

2. Proposition 13 withstood several constitutional attacks in *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978). For a discussion of the background of Proposition 13, see generally Lefcoe & Allison, *supra* note 1; Pope, *The Assessor's Perspective*, 53 S. CAL. L. REV. 155 (1979).

3. See generally Morris, *Proposition 13: Change in Ownership, Constitutional Problems*, L.A. LAW., Oct. 1981, at 11 (discussing the California Assembly Revenue and Taxation Committee's suggestion regarding legislative interpretation of "change in ownership"); Pope, *Proposition 13: Change in Ownership, An Administrative Nightmare*, L.A. LAW., Oct. 1981, at 10 (discussing the problems associated with "change in ownership," and summarizing the statutes, rules, and procedures established to add clarity).

4. See generally Morris, *supra* note 3, at 46-48 (discussing the "gaps, overlaps, and ambiguities" associated with property transfers between legal entities); Pope, *supra* note 3, at 13, 39 (discussing the application of "change in ownership" in normal arms-length transactions, as compared with transfers between legal entities).

5. 48 Cal. 3d 84, 767 P.2d 1148, 255 Cal. Rptr. 670 (1989). In 1979, Title Insurance and Trust Company [hereinafter TI], a wholly-owned subsidiary of Ticor, merged with Spicor, a wholly-owned subsidiary of Southern Pacific Company, by converting the common shares of Spicor into common shares of Ticor. Ticor, with its subsidiary TI,

ing that a "change in ownership" triggering reassessment of real property occurs when one corporation obtains, by the transfer or purchase of stocks, either direct or indirect control of another corporation, including a wholly-owned subsidiary whose stock is not directly purchased.<sup>6</sup>

The court primarily relied on the unambiguous language of statutes enacted after Proposition 13 to interpret the term "change in ownership."<sup>7</sup> This language led the court to reject the argument that a subsidiary whose parent corporation is involved in a merger must have its own stock purchased or transferred in order to trigger reassessment of real property owned by the subsidiary.<sup>8</sup> Additionally, the court recognized, as did the legislature, that it would be "patently unfair" to allow a corporation to avoid reassessment—and a higher tax burden—by placing title in a corporate subsidiary, when no such favorable tax shelter is available to the average homeowner.<sup>9</sup>

The court agreed with the State Board of Equalization, whose policy since 1979 has been to reassess the real property of subsidiaries when the parent corporation is acquired through a transfer of stock.<sup>10</sup> In upholding this practice, the court has saved the state "tens of millions of dollars or more in taxes paid on the [property] holdings [which] might have been subject to refund."<sup>11</sup> However, the court and the legislature have yet to address the inequitable adminis-

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became a subsidiary of Southern Pacific Company. After the merger, the County Assessors of Riverside and Merced Counties reassessed the property of TI pursuant to the advice of the State Board of Equalization, which interpreted the tax laws as applicable to the merger. See CAL. REV. & TAX. CODE § 64(c) (West Supp. 1989).

6. *Title Ins.*, 48 Cal. 3d at 91-92, 767 P.2d at 1152-53, 255 Cal. Rptr. at 674-75. The court specifically refused to address the constitutionality of the statutes underlying this case. *Id.* at 98-99, 767 P.2d at 1157, 255 Cal. Rptr. at 679. Justice Mosk wrote the unanimous opinion of the court, in which Chief Justice Lucas and Justices Broussard, Panelli, Arguelles, Eagleson, and Klein, sitting by designation, concurred.

7. See CAL. REV. & TAX. CODE § 64(c) (West Supp. 1989) (describing "change in ownership" for purchases or transfers of corporate stock); *id.* § 25105 (West 1979) (defining "control"). The court read these two statutes together and concluded that when a corporation "obtains [direct or indirect control of more than 50 percent of the voting stock] . . . in any [other] corporation . . . through the purchase or transfer of corporate stock . . . such purchase or transfer . . . shall be a change of ownership of property owned by the corporation in which the controlling interest is obtained." *Title Ins.*, 48 Cal. 3d at 91, 767 P.2d at 1152, 255 Cal. Rptr. at 674 (construing CAL. REV. & TAX. CODE §§ 64(c), 25105).

8. *Title Ins.*, 48 Cal. 3d at 91-94, 767 P.2d at 1152-54, 255 Cal. Rptr. at 674-76. The merger gave the acquiring company control of Ticor, and thus its subsidiary, TI. The court emphasized that "such indirect control over TI resulted in a change of ownership of TI's property for purposes of section 64(c)." *Id.* at 92, 767 P.2d at 1152, 255 Cal. Rptr. at 674.

9. *Id.* at 95-96, 767 P.2d at 1155, 255 Cal. Rptr. at 677. See generally Pope, *supra* note 3, at 169.

10. *Title Ins.*, 48 Cal. 3d at 90, 767 P.2d at 1151, 255 Cal. Rptr. at 673.

11. See *Top State Court Upholds Tax Boost on Firms; Involves Companies Acquired In Mergers*, L.A. Times, Feb. 28, 1989, at 2, col. 6.

trative difficulties in interpreting "control" while policing corporate mergers.<sup>12</sup>

MICHAEL J. GAINER

## VII. TORTS

- A. *For purposes of equitable estoppel, the time limit to file a claim under the California Tort Claims Act is tolled while a teacher's threats prevent a student from pursuing his claim, although for purposes of respondeat superior, the teacher's authority is not in itself sufficient to impose vicarious liability on the school district for the teacher's molestation of his student: John R. v. Oakland Unified School District.*

The California Tort Claims Act (the Act)<sup>1</sup> generally requires that a plaintiff present a written claim of an alleged tort within 100 days of the tortious event in order to file the claim in a timely manner.<sup>2</sup> In *John R. v. Oakland Unified School District*,<sup>3</sup> the court examined the timeliness of a claim filed under the Act, as well as the vicarious liability of a school district for an alleged sexual molestation of a student by his school teacher.

In *John R.*, the student did not file his claim until fifteen months after the alleged molestation occurred because his teacher threatened retaliation if he reported the event. The trial court granted the

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12. A major policing problem was predicted ten years ago. See Lefcoe & Allison, *supra* note 1, at 218. "The change in ownership provisions are to be enforced by a reporting system that depends on the recordation of a property title change in the county records. Only sales of real property are recordable, sales of stock are not." *Id.* However, as the court noted: "[I]t is the responsibility of the State Board of Equalization, the county boards, assessors, and sometimes the courts, to apply the terms of [Revenue and Taxation Code section 64(c)] to whatever circumstances may arise." *Title Ins.*, 48 Cal. 3d at 98, 767 P.2d at 1157, 255 Cal. Rptr. at 679.

1. CAL. GOV'T CODE §§ 900-935 (West 1980 & Supp. 1989).

2. *Id.* §§ 911.2, .4 (must present a written claim within 100 days of the accrual of the cause of action or make application within one year for leave to file a late claim). See generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 129-238 (9th ed. 1988) (concerning liability of California public entities).

3. 48 Cal. 3d 438, 769 P.2d 948, 256 Cal. Rptr. 766 (1989). Justice Arguelles, with Justice Broussard concurring, authored the opinion of a divided court. Justice Mosk wrote separately, concurring on the late-claim issue, but dissenting on the issue of vicarious liability. Justice Eagleson, with Chief Justice Lucas and Justice Panelli concurring, concurred on the vicarious liability issue but dissented on the late-claim issue. Justice Kaufman wrote separately as well, concurring on the late-claim issue and dissenting on the issue of vicarious liability. Thus, the court split 4-3 on the late claim, and 5-2 on the issue of vicarious liability.

school district a nonsuit on the timeliness issue, but the court of appeal held the claim to be within the allowable period under the "delayed discovery" doctrine.<sup>4</sup> Although the supreme court believed the doctrine of delayed discovery was inapplicable where the plaintiff was plainly aware of the molestation,<sup>5</sup> it determined that equitable estoppel may be proper to prohibit the school district from asserting a timeliness defense by suspending the filing time during the period the teacher threatened the student.<sup>6</sup> The court, therefore, remanded the timeliness issue to the trial court for a factual determination concerning the nature and duration of the threats made, as well as the reasonableness of the student's filing time once the threats no longer had a coercive effect.<sup>7</sup>

The court next considered whether the school district could be considered vicariously liable for the sexual molestation committed by the teacher on his student.<sup>8</sup> The plaintiff argued that vicarious liability exists when the tort is a foreseeable result of the employer's grant of official authority to the employee.<sup>9</sup> The plaintiff contended that, from his perception as a student, the teacher's authority was vast and that this authority ultimately permitted the assault.<sup>10</sup> The court declined to follow this factually-based contention,<sup>11</sup> and looked instead to the underlying rationale of vicarious liability. The court stated that vicarious liability of the employer for an employee's action (1) encourages accident prevention, (2) increases the availability of com-

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4. Under the doctrine of delayed discovery, the time period within which a claim must be filed is tolled until the facts for the basis of the claim are discovered. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 187, 491 P.2d 421, 430, 98 Cal. Rptr. 837, 849 (1971) (cause of action for legal malpractice does not accrue until the plaintiff learns, or should have learned, of the facts underlying the action).

5. *John R.*, 48 Cal. 3d at 445 n.4, 769 P.2d at 951 n.4, 256 Cal. Rptr. at 769 n.4. As the student was aware of his injury, his filing was not timely made, although estoppel might prevent the school district from asserting this defense. *Id.*

6. *Id.* at 446, 769 P.2d at 952, 256 Cal. Rptr. at 770; see, e.g., *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 1026, 242 Cal. Rptr. 368, 377 (1987) (acts of violence or intimidation intended to prevent the filing of claim will toll statute of limitations.).

7. *John R.*, 48 Cal. 3d at 446, 769 P.2d at 952, 256 Cal. Rptr. at 770.

8. Generally, an employer is liable for an employee's willful, malicious, or negligent torts committed within the scope of employment. See *Martinez v. Hagopian*, 182 Cal. App. 3d 1223, 227 Cal. Rptr. 763 (1986). The question is often whether the tort was within "the scope of employment" or on the employee's own time. See generally, 35 CAL. JUR. 3D *Government Tort Liability* § 54 (1988).

9. Justice Mosk focused on this point. See *John R.*, 48 Cal. 3d at 453-55, 769 P.2d at 957-58, 256 Cal. Rptr. at 975-76 (Mosk, J., concurring and dissenting).

10. The plaintiff sought to analogize *White v. County of Orange*, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (1985), in which the county was subject to vicarious liability for a deputy's rape and murder of a motorist because the incident flowed from the exercise of his authority. *John R.*, 48 Cal. 3d at 449, 769 P.2d at 954, 256 Cal. Rptr. at 772.

11. The job-created authority, in *White*, of a police officer over a motorist is vastly greater than the authority of a teacher over a student, as the officer is dressed in uniform, carries a firearm, and may criminally sanction disobedience. *John R.*, 48 Cal. 3d at 452, 769 P.2d at 956, 256 Cal. Rptr. at 774.

pensation for the injured, and (3) provides for distribution of cost and risk.<sup>12</sup> The first two reasons were not appropriate to the facts of this case.<sup>13</sup> As to the third, the court believed that spreading the risk of loss between a school and the community it serves was appropriate. Yet, the court held that the sexual assaults by the teacher were "too attenuated" from the authority granted to a teacher to be within the risks that should be allocated to the school district.<sup>14</sup>

The invocation of vicarious liability in this situation could have far-reaching consequences. If the court permitted a claim of vicarious liability, the school district might respond by curtailing teacher-student interaction. This, the court believed, was a "significant and unacceptable risk."<sup>15</sup> Instead, the court left open on remand the factual determination of estoppel which, if found to be applicable, would leave the school district to defend its due care in selecting the teacher as an employee. The court believed the school district should be liable only if negligent.

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12. *Id.* at 451, 769 P.2d at 955, 256 Cal. Rptr. at 773 (citing *Perez v. Van Groninger & Sons, Inc.*, 41 Cal. 3d 962, 967, 719 P.2d 676, 678, 227 Cal. Rptr. 106, 108 (1986)); see also 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency & Employment* §§ 113-143 (9th ed. 1987) (discussion of liability of principal for agent).

13. *John R.*, 48 Cal. 3d at 451, 769 P.2d at 955, 256 Cal. Rptr. at 773. The court believed that "accident prevention" played no part in assessing sexual misconduct, especially when the district must already exercise due care when selecting teachers. The court also noted that liability for an employee's sexual torts would either deprive the schools of their insurance or cause a diversion of significant funds away from the classroom. *Id.*

14. *Id.* at 452, 769 P.2d at 956, 256 Cal. Rptr. at 774. The molestation occurred at the teacher's apartment during an officially sanctioned extracurricular work-experience program.

15. *Id.* at 452, 769 P.2d at 957, 256 Cal. Rptr. at 775. Justice Mosk dissented from the decision concerning the respondeat superior doctrine. The test Justice Mosk would apply to the respondeat superior doctrine is whether the assault resulted from the reasonably foreseeable exercise of job-created authority, not whether the teacher's assault was foreseeable. *Id.* at 453-55, 768 P.2d 957-58, 256 Cal. Rptr. at 775-76 (Mosk, J., concurring and dissenting). Justice Eagleson, writing separately, stated that it is legally inconsistent to deny imputing the teacher's act to the school district for vicarious liability, yet to impute the teacher's threats in determining the time frame within which the claim must be filed. Further, the plaintiff had knowledge of the facts, and estoppel should provide no benefit to one so apprised. *Id.* at 455-62, 769 P.2d 958-64, 256 Cal. Rptr. at 776-82 (Eagleson, J., concurring and dissenting). Justice Kaufman believed that under the facts of this case, the school district should be held vicariously liable for the intentional tort of its teacher because such an event was not so unforeseeable as to be unfair to the district. *Id.* at 462-67, 769 P.2d at 964-66, 256 Cal. Rptr. at 782-84 (Kaufman, J., concurring and dissenting).

- B. *When no dispute exists as to the facts upon which an attorney acts in filing an action, the issue as to whether probable cause existed to institute that action must be resolved by the judge as a matter of law in a subsequent malicious prosecution case: Sheldon Appel Co. v. Albert & Oliker.*

California courts have provided conflicting answers concerning whether the judge or jury should decide the issue of probable cause in malicious prosecution actions.<sup>1</sup> In *Sheldon Appel Co. v. Albert & Oliker*,<sup>2</sup> the court resolved the issue by holding that when the facts of the underlying case are not in dispute, probable cause in a malicious prosecution action is an objective element to be determined by the court solely on the basis of whether the prior action was legally tenable.<sup>3</sup>

In *Sheldon Appel*, the court recognized that a party who institutes

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1. A cause of action for malicious prosecution exists when the underlying action was initiated (1) by the defendant, but terminated in the plaintiff's favor; (2) without probable cause; and (3) with malice. See RESTATEMENT (SECOND) OF TORTS §§ 653-681B (1977). The first element is an objective issue for the court to decide, while the third element is a subjective question for the jury to decide. However, whether the second element—probable cause—is objective or subjective in nature and how and by whom it should be decided is unclear. See, e.g., *Bertrero v. National General Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974); *Albertson v. Raboff*, 46 Cal. 2d 375, 295 P.2d 405 (1956); *Franzen v. Shenk*, 192 Cal. 572, 221 P. 932 (1923); see also *Tool Research & Eng'g Corp. v. Henigson*, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975) (noting in dicta that attorney's legal research bears upon probable cause element). The trial court in *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 877, 765 P.2d 499, 506, 254 Cal. Rptr. 336, 343 (1989), based its instructions on the *Tool Research* decision.

2. 47 Cal. 3d at 863, 765 P.2d at 499, 254 Cal. Rptr. at 336. After the *Sheldon Appel Company* [hereinafter the *Company*] purchased an apartment building, the sellers, believing that the *Company* was about to breach the purchase contract, instituted suit to obtain an equitable lien on the property. Additionally, their attorneys, *Albert & Oliker*, recorded a *lis pendens* on the property. Not only did the *Company* successfully sue to remove the *lis pendens*, but it successfully defended the other causes of action asserted by the sellers of the building. The *Company* then sued *Albert & Oliker* for malicious prosecution. Although the underlying facts were not in dispute, the trial court refused *Albert & Oliker's* request that the court decide the probable cause issue. Rather, the trial court submitted the question of probable cause to the jury. After losing in the trial court, *Albert & Oliker* appealed, arguing that the court, and not the jury, should have decided the probable cause element. The court of appeal affirmed the trial court's decision. *Id.* at 868-71, 765 P.2d at 500-02, 254 Cal. Rptr. at 337-39.

3. *Id.* at 868, 765 P.2d at 499, 254 Cal. Rptr. at 337. Justice Arguelles expressed the opinion of the unanimous court, indicating that a dispute as to underlying facts should be resolved by the jury before the judge decides whether the facts give rise to a tenable claim. *Id.* at 881, 765 P.2d at 508, 254 Cal. Rptr. at 346; see also Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 444 (1986). See generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 418, 424-425 (9th ed. 1988); 6 CAL. JUR. 3D *Assault and Other Willful Torts* §§ 310, 329-331 (1988); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979); Annotation, *Liability of Attorney, Acting for Client, for Malicious Prosecution*, 46 A.L.R. 4TH 249 (1986 & Supp. 1988).

a legal action may be subject to liability if no probable cause existed to file the action. The court held that the determination of whether the requisite probable cause existed is an objective analysis, to be made as a matter of law. The court asserted that because the probable cause element is viewed objectively, neither the defendant's subjective belief in the tenability of the claim,<sup>4</sup> nor the sufficiency of the attorney's preparation<sup>5</sup> or the opinion of experts,<sup>6</sup> is relevant to the determination. Rather, the court should determine whether a reasonable attorney would agree that the lawsuit was "totally and completely without merit."<sup>7</sup>

In holding that probable cause is to be analyzed through objective criteria, the court looked to the nature of the malicious prosecution tort, which serves to protect individuals from having to defend themselves against unreasonable and vexatious lawsuits.<sup>8</sup> The court opined that an objectively tenable claim *cannot* be unreasonable or vexatious. Although the court recognized that the malicious prosecution action may be a useful weapon in keeping warrantless lawsuits from further crowding court dockets, it reasoned that this goal would not be well-served by potentially chilling the assertion of tenable

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4. *Sheldon Appel*, 47 Cal. 3d at 881, 765 P.2d at 508, 254 Cal. Rptr. at 346. *See, e.g., Bertrero*, 13 Cal. 3d at 43, 529 P.2d at 608, 118 Cal. Rptr. at 184; *Albertson*, 46 Cal. 2d at 375, 295 P.2d at 405; *Franzen*, 192 Cal. at 572, 221 P. at 932. These cases support the assertion that knowledge and belief are essential to the defense of a malicious prosecution action. The court in *Sheldon Appel* distinguished these cases, which focus on the defendant's knowledge and belief in the underlying facts upon which the claim was based. This use of knowledge to determine probable cause is reasonable, the court argued, because the defendant must have believed those facts upon which the original claim was brought, or the action was warrantless. If the underlying facts are not in contention, however, the defendant's belief in the tenability of the claim is unimportant. *Sheldon Appel*, 47 Cal. 3d at 879-80, 765 P.2d at 507-08, 254 Cal. Rptr. at 344-45; *see Dobbs, Belief and Doubt in Malicious Prosecution and Libel*, 21 ARIZ. L. REV. 607, 609 (1979).

5. The court maintained that the sufficiency of the attorney's preparation was not relevant to the determination of probable cause because the claim can be objectively tenable even when the attorney's research is inadequate. *Sheldon Appel*, 47 Cal. 3d at 883, 765 P.2d at 509-10, 254 Cal. Rptr. at 347-48. Instead, the extent of an attorney's investigation may be relevant to the issue of malice. *Id.*

6. "[E]xperts may not give opinions on matters which are essentially within the province of the court to decide." *Id.* at 884, 765 P.2d at 510, 254 Cal. Rptr. at 348 (quoting *Carter v. City of Los Angeles*, 67 Cal. App. 2d 524, 528, 154 P.2d 907, 909 (1945)); *see also Williams v. Coombs*, 179 Cal. App. 3d 626, 638, 224 Cal. Rptr. 865, 873 (1986).

7. *Sheldon Appel*, 47 Cal. 3d at 885, 765 P.2d at 511, 254 Cal. Rptr. at 349 (quoting *In re Marriage of Flaherty*, 31 Cal. 3d 637, 650, 646 P.2d 179, 187, 183 Cal. Rptr. 508, 516 (1982) (setting the standard for determining frivolousness on appeal)).

8. *See* 6 CAL. JUR. 3D *Assault and Other Willful Torts* § 310 (1988).



## VIII. WELFARE AND INSTITUTIONS

*The Department of Health Services may seek reimbursement from a Medi-Cal recipient's estate for benefits received prior to the effective date of section 14009.5 of the Welfare and Institutions Code, provided the recipient died after the statute's effective date: Kizer v. Hanna.*

In *Kizer v. Hanna*,<sup>1</sup> the supreme court resolved the split in the courts of appeal<sup>2</sup> concerning the prospective effect of section 14009.5 of the Welfare and Institutions Code.<sup>3</sup> The court concluded that the Department of Health Services may seek reimbursement for Medi-

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9. The court rejected the advice of many legal commentators in reaching this conclusion. See, e.g., Comment, *It is Time to End the Lawyer's Immunity from Countersuit*, 35 UCLA L. REV. 99 (1987); Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980). But see Wade, *supra* note 3, at 433. The tort of malicious prosecution traditionally has been viewed with disfavor because of its potentially chilling effects. See 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 420 (9th ed. 1988); 6 CAL. JUR. 3D *Assault and Other Willful Torts* § 311 (1988). The court indicated that the better solution is for the legislature to provide for speedy resolution of the initial lawsuit by imposing sanctions for frivolous or delaying conduct. *Sheldon Appel*, 47 Cal. 3d at 873, 765 P.2d at 503, 254 Cal. Rptr. at 503; see also CAL. CIV. PROC. CODE §§ 128.5, 409.3, 437c, 1038 (West Supp. 1989).

1. 48 Cal. 3d 1, 767 P.2d 679, 255 Cal. Rptr. 412 (1988). The Department of Health Services [hereinafter the Department] sought from Hanna, the executor of Zyouid Jacob's estate, all Medi-Cal benefits paid to Jacob before his death. Hanna offered only the amount of benefits paid after June 28, 1981, the effective date of the statute under which the Department asserted its claim. See *infra* note 3. The Department filed suit for the entire amount, including benefits paid to the decedent before the statute's effective date. The trial court granted the Department's motion for summary judgment, and the court of appeal affirmed.

2. Compare *Department of Health Services v. Fontes*, 169 Cal. App. 3d 301, 215 Cal. Rptr. 14 (1985) (although section 14009.5 applies prospectively, when the Medi-Cal recipient dies after the effective date, the Department may reclaim all benefits) with *Estate of Messner*, 190 Cal. App. 3d 818, 235 Cal. Rptr. 495 (1987) (because section 14009.5 applies prospectively, the Department may seek reimbursement only for benefits paid after the effective date).

3. Section 14009.5 provides that when a decedent has received health care services under the Medi-Cal program, the Department may have a claim against the estate for the amount of services provided to the decedent. CAL. WELF. & INST. CODE § 14009.5 (West 1989). The Department may not pursue a claim if the recipient of the health services was under 65 years of age, or if there is a surviving spouse or a surviving child who is either under 21 years of age, blind, or permanently and totally disabled. The Department may waive its claim against the estate if repayment would cause a hardship to the other dependents. *Id.* See generally 51 CAL. JUR. 3D *Public Aid and Welfare* §§ 6-7, 34 (1979 & Supp. 1989). For a historical perspective, see tenBroek, *California's Welfare Law—Origins and Development*, 45 CALIF. L. REV. 241 (1957); Annotation, *Reimbursement of Public for Financial Assistance to Aged Persons*, 29 A.L.R. 2D 731 (1953).

Cal benefits<sup>4</sup> received prior to the effective date of section 14009.5, provided the recipient died after the statute's effective date.<sup>5</sup> Section 14009.5 is not retroactive as it applies only to those estates created after the statute's enactment;<sup>6</sup> nor does section 14009.5 infringe upon the testamentary disposition of property, which is within the legislature's dominion of control.<sup>7</sup> Finally, section 14009.5 does not create an "after-the-fact" debt.<sup>8</sup>

Section 14009.5 is not retroactive because the statute clearly is applicable only to estates created after the statute's effective date.<sup>9</sup> Although the statute applies to benefits received prior to its effective date, section 14009.5 should not be considered retroactive simply because the statute's application depends upon facts and conditions that existed prior to its enactment. The Department of Health Services, for policy reasons, should be permitted to seek reimbursement of all Medi-Cal benefits, provided the recipient died after the effective date of the statute. Reimbursement not only eases the state's financial

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4. The court noted that section 14009.5 seeks a balance between the state's financial interest and the interest of the Medi-Cal recipient's heirs. The state's ability to collect past benefits alleviates its financial burden and permits the program to continue. By seeking reimbursement under section 14009.5, the value of the estate remains the same as if the Medi-Cal benefits had not been paid; thus, the Medi-Cal recipient's heirs cannot personally profit from the recipient's accrued benefits under the program. *Kizer*, 48 Cal. 3d at 6, 767 P.2d at 681-82, 255 Cal. Rptr. at 414-15.

5. *Id.* at 12-13, 767 P.2d at 686, 255 Cal. Rptr. at 419. Justice Panelli authored the court's opinion, in which Chief Justice Lucas and Justices Arguelles and Eagleson concurred. Justice Kaufman dissented in an opinion in which Justices Mosk and Broussard concurred.

6. *Id.* at 9, 767 P.2d at 682, 255 Cal. Rptr. at 416. The court indicated that section 14009.5 applies only *prospectively* to estates arising after the effective date of the statute. Further, the statute has no impermissible retroactive effect because the legal effect of prior transactions is not substantially changed. *Id.* at 7-8, 767 P.2d at 682, 255 Cal. Rptr. at 415.

7. *Id.* at 10, 767 P.2d at 684, 255 Cal. Rptr. at 417; see *Estate of Burnison*, 33 Cal. 2d 638, 639-40, 204 P.2d 330, 331 (1949) (the legislature completely controls testamentary disposition of property and can impose any condition or limitation it desires).

8. *Kizer*, 48 Cal. 3d at 10, 767 P.2d at 684, 255 Cal. Rptr. at 417. The court noted that no "debt" is created under section 14009.5 because exceptions may preclude the Department from seeking reimbursement. See *supra* note 3. Moreover, Medi-Cal recipients may dispose of their property during their lifetimes in any way they see fit. See *Kizer*, 48 Cal. 3d at 11, 767 P.2d at 685, 255 Cal. Rptr. at 418; see also *UMF Systems, Inc. v. Eltra Corp.*, 17 Cal. 3d 753, 756, 553 P.2d 225, 226-27, 132 Cal. Rptr. 129, 130-31 (1976).

9. Justice Kaufman argued that, despite the majority's distinctions, its interpretation allowed the statute a retroactive effect not intended by the legislature. He further argued that neither the majority's discussion of the legislative control of testamentary disposition nor a narrow construction of the term "after-the-fact" debt, could save the majority's interpretation. *Kizer*, 48 Cal. 3d at 13-17, 767 P.2d at 686-89, 255 Cal. Rptr. at 419-22 (Kaufman, J., dissenting).

burden, it also permits the program to continue effectively. The alternative would allow a financial windfall to the recipient's heirs. Certainly, the legislature, when drafting section 14009.5, did not intend the collapse of the Medi-Cal program and the unjust enrichment of the recipient's heirs.

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## IX. WORKERS' COMPENSATION

*Agricultural laborers are deemed employees of growers under workers' compensation laws even though those laborers agreed by contract to independent contractor status; the growers retain all necessary control over the details of the harvest, and the laborers fall within the category of workers intended to be protected by the workers' compensation system: S.G. Borello & Sons, Inc. v. Department of Industrial Relations.*

### I. INTRODUCTION

Since the enactment of California workers' compensation laws,<sup>1</sup> both the California Legislature<sup>2</sup> and judiciary have attempted to extend the laws' coverage to additional groups of employees.<sup>3</sup> This ex-

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1. In 1911, section 21 of article XX was added to the California Constitution which, as amended in 1918, enabled the legislature to create workers' compensation systems in the state of California. 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 3 (9th ed. 1987). Several statutes were passed in the early 1900s pursuant to the power conferred on the legislature by this constitutional provision. The Workmen's Compensation, Insurance and Safety Act of 1917 became the basis of today's California workers' compensation laws. 1917 Cal. Stat. 586. See generally 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1.04[3] (2d ed. 1989); 2 B. WITKIN, *supra*, § 5.

In 1976, section 21 of article XX was repealed and replaced by section 4 of article XIV, changing the name of the compensation system from "Workmen's Compensation" to "Workers' Compensation," and vesting power in the legislature "to create, and enforce a complete system of workers' compensation, by appropriate legislation . . ." CAL. CONST. art XIV, § 4. See generally 2 B. WITKIN, *supra*, §§ 5-11; 65 CAL. JUR. 3D *Work Injury Compensation* §§ 2-4 (1981 & Supp. 1989). Today, the Workers' Compensation Act [hereinafter the Act] is codified in sections 3201 through 6149 of the California Labor Code. CAL. LAB. CODE §§ 3201-6149 (West 1971 & Supp. 1989).

2. The 1959 amendment to former section 3352(b) of the Labor Code is an example of the legislature's attempt to expand the categories of employees covered by the workers' compensation system. *S.G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341, 358 n.14, 769 P.2d 399, 409 n.14, 256 Cal. Rptr. 543, 553 n.14 (1989). The former section read as follows: "Employee *excludes* . . . (c) [a]ny person employed in farm, dairy, agricultural, viticultural or horticultural labor, or in stock or poultry raising . . ." CAL. LAB. CODE § 3352(b) (1937) (current version at CAL. LAB. CODE § 3352(c) (West 1971)) (emphasis added). By repealing this exclusion in 1959, the category of employees to be protected by the Act was expanded to include agricultural workers. *Borello*, 48 Cal. 3d at 358, 769 P.2d at 409, 256 Cal. Rptr. at 553. See generally 2 B. WITKIN, *supra* note 1, § 171.

3. Section 3202 of the Labor Code specifically provides that the workers' compen-

pansion, however, stops short of those workers classified as "independent contractors." The Workers' Compensation and Insurance Act (the Act)<sup>4</sup> provides that only an employee,<sup>5</sup> as distinguished from an independent contractor,<sup>6</sup> may recover workers' compensation for injuries sustained on the job.<sup>7</sup> The result of the nebulous definitions of "employee" and "independent contractor" is a "myriad of overlapping or confusing relationships."<sup>8</sup>

In their never-ending attempt to lend definition to statutory law, California courts have devised a principle test, which focuses on the "right-to-control" details of the work, to determine whether a working relationship is that of an employee/employer or principal/independent contractor.<sup>9</sup> This test requires that the court determine if the party receiving the services exercised control over the details and manner of the work as well as the means by which the job results were accomplished.<sup>10</sup> The courts have realized, however, that the right to control may not always be conclusive, and most courts are

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sation statutes "shall be liberally construed by the courts with the purpose of extending [the compensation] benefits for the protection of persons injured in the course of their employment." CAL. LAB. CODE § 3202 (West 1971 & Supp. 1989). See generally 1 S. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW § 1.3 (3d ed. 1988); 2 B. WITKIN, *supra* note 1, § 8; 65 CAL. JUR. 3D, *supra* note 1, § 4; CALIFORNIA DIGEST OF OFFICIAL REPORTS-3D SERIES, *Workers' Compensation* § 5 (1984 & Supp. 1988).

4. CAL. LAB. CODE §§ 3201-6149 (West 1971 & Supp. 1989).

5. Section 3351 of the Labor Code defines an employee as a "person in the service of an employer under any appointment or contract of hire . . ." *Id.* § 3351 (West 1971 & Supp. 1989).

6. Section 3353 of the Labor Code defines an independent contractor as a "person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." *Id.* § 3353 (West 1971).

7. Section 3357 of the Labor Code provides that "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." *Id.* § 3357 (West 1971) (emphasis added). Because agricultural workers are no longer expressly excluded, they are presumed to be employees and not independent contractors. See *supra* note 2.

8. 1 S. HERLICK, *supra* note 3, § 2.24; see Comment, *Employee or Independent Contractor: The Need for a Reassessment of the Standard Used Under California's Workmen's Compensation*, 10 U.S.F. L. REV. 133, 139 (1975) (determining who is an independent contractor, as opposed to an employee, is the subject of much debate).

9. The courts also use the terms "control-of-work" and "control-of-work-details." *S.G. Borello & Sons Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341, 350, 353, 769 P.2d 399, 404, 406, 256 Cal. Rptr. 543, 548, 550 (1989).

10. *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 946, 471 P.2d 975, 977, 88 Cal. Rptr. 175, 177 (1970) (citing *Isenberg v. California Employment Stabilization Comm'n*, 30 Cal. 2d 34, 39, 180 P.2d 11, 15 (1947)) (regarding Master and Servant Code and Unemployment Insurance Code); see 2 W. HANNA, *supra* note 1, § 4.02[2][b]; 1 S. HERLICK, *supra* note 3, § 2.27; 65 CAL. JUR. 3D, *supra* note 1, § 36; Comment, *supra* note 8, at 142-45.

willing to explore additional factors to determine whether a worker is an employee<sup>11</sup> or an independent contractor.<sup>12</sup>

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,<sup>13</sup> the California Supreme Court addressed the issue of whether a business arrangement between the growers of cucumbers and its "sharefarmers" was a relationship of employment or an independent contract. The court followed a trend in the appellate courts and applied the right-to-control test with deference to the remedial purposes of the Act, while considering other relevant factors of the working relationship.<sup>14</sup> Through the application of these additional factors, the court held that the workers were employees intended to benefit from the workers' compensation system.<sup>15</sup>

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11. Commentators and courts have devised certain factors, other than the right-to-control test, to indicate the existence of an employer/employee relationship, including, but not limited to, the following:

- (a) the employer has the legal right to terminate the relationship at will;
- (b) the employee is paid by a salary or wages;
- (c) the employer makes the typical deductions allowed an employer, such as unemployment liability insurance and social security;
- (d) the employer furnishes the tools and materials necessary to complete the job; and
- (e) the employee must work specific hours and days as required by the employer.

1 S. HERLICK, *supra* note 3, § 2.25. *See generally* 2 W. HANNA, *supra* note 1, § 4.02[2][a]; Comment, *supra* note 8, at 143 n.53 (noting that *Empire Star Mines Co. v. California Employment Comm'n*, 28 Cal. 2d 33, 43-44, 168 P.2d 686, 692 (1946), *overruled by* *People v. Simms*, 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982), was the first case to articulate additional factors to be considered).

12. Commentators also have devised factors which might indicate the existence of a principal/independent contractor relationship, including the following:

- (a) the principal has no legal right to terminate the relationship with the worker prior to completion of the work;
- (b) the principal pays the worker by a contract price, commission, or lump fee;
- (c) the principal makes no deduction for typical employee/employer deductions, such as unemployment disability insurance or social security;
- (d) the worker must furnish his own tools and materials to complete the work;
- (e) the principal lacks control over the hours worked;
- (f) the worker is an expert in the field;
- (g) the principal knows little about the area of work; and
- (h) the worker keeps regular business hours and works for several customers.

1 S. HERLICK, *supra* note 3, § 2.26; *see* 29 CAL. JUR. 3D *Employer and Employee* § 12 (1986) (discussing the right-to-control test and the definition of independent contractor). *See generally* 2 W. HANNA, *supra* note 1, § 4.02[2][a]; Comment, *supra* note 8, at 143.

13. 48 Cal. 3d 341, 769 P.2d 399, 256 Cal. Rptr. 543 (1989).

14. *Id.* at 352-55, 769 P.2d at 405-07, 256 Cal. Rptr. at 549-51.

15. *Id.* at 358, 769 P.2d at 409, 256 Cal. Rptr. at 553. Justice Eagleson authored the opinion of the court, in which Chief Justice Lucas and Justices Mosk, Broussard, and Arguelles concurred. Justice Kaufman filed a separate dissenting opinion, in which Justice Panelli concurred.

## II. THE COURT'S DECISION

The court in *Borello* held that the growers failed to prove the migrant harvesters were independent contractors, and thus the harvesters were entitled to workers' compensation coverage.<sup>16</sup> The court utilized several tests in reaching this conclusion, first noting that the growers retained the necessary control over the planting, cultivating, harvesting, storing, transporting, and selling of the cucumbers to meet the right-to-control test.<sup>17</sup> Thus, the growers maintained control over the details of the work.

The court further intimated that even if the growers lacked control over the details of the work, the remedial purpose of the Act<sup>18</sup> would dictate a finding that the "sharefarmers" were employees for purposes of the Act. In this case, the growers, rather than the workers, were better positioned to promote work safety and were better equipped to distribute the cost of injury as a risk of doing business.<sup>19</sup> Thus, the remedial purpose of the statute supported the expansion of the employee definition to include these workers.<sup>20</sup>

The court lastly considered several additional factors, other than the right-to-control test, to determine the status of these workers. The court noted that: (1) harvesting cucumbers required no special

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16. *Id.* at 360, 769 P.2d at 410, 256 Cal. Rptr. at 554. In 1985, penalties were assessed against S.G. Borello & Sons, Inc. (the growers) by the labor commissioner for failure to obtain workers' compensation insurance. The growers contended that their workers were independent contractors, not employees, and thus were excluded from workers' compensation coverage. The Division of Labor Standards Enforcement of the Department of Industrial Relations rejected the growers' claim and labeled the workers "employees." The trial court found that this conclusion was supported by the evidence and denied a writ of mandamus. However, the court of appeal found that the workers were independent contractors intended to be excluded from the Act. In an unusual move, the California Supreme Court reviewed the case sua sponte. This sua sponte grant of review was particularly troubling to Justice Kaufman, which he proclaimed "one of the sadder episodes in the history of this court—a wholly unnecessary and inappropriate intermeddling in the affairs of and curtailment of the liberties of California's residents." *Id.* at 360, 769 P.2d at 410-11, 256 Cal. Rptr. at 554-55 (Kaufman, J., dissenting).

17. *Id.* at 356-57, 769 P.2d at 408, 256 Cal. Rptr. at 552. The court rejected the growers' contention that the workers controlled the details of their work by managing their own labor and sharing in the profits. *Id.*

18. The court listed the four purposes of the Act: (1) to transfer the cost of injuries sustained on the job to the cost of the product and away from society; (2) to ensure the prompt payment to an injured worker, regardless of fault, rendering the compensation as a cost of production; (3) to encourage safety measures in the workplace; and (4) to protect the employer from unpredictable tort damages in civil suits brought by injured employees. *Id.* at 354, 769 P.2d at 406, 256 Cal. Rptr. at 550.

19. *Id.* at 354, 357, 769 P.2d at 406, 408, 256 Cal. Rptr. at 550, 552.

20. *Id.* at 358, 769 P.2d at 409, 256 Cal. Rptr. at 553.

skill beyond what was expected of the typical employee; (2) the work was performed on a permanent, although seasonal, basis; (3) the workers were not engaged in a distinct occupation; (4) the workers had no true opportunity to gain profit and were only paid by the number of cucumbers picked; and (5) the workers had no investment in the crop other than to provide their services and tools to the harvest.<sup>21</sup> Because these additional factors indicated the existence of an employment relationship, the court labeled the workers "employees."<sup>22</sup>

### III. CONCLUSION

The court's decision is discerning for several reasons. First, the court admitted that its classification of the "sharefarmers" as employees would have "implications for the employer-employee relationship upon which other state social legislation depends."<sup>23</sup> As the court noted,<sup>24</sup> this holding subjects both the employer and employee to the Agricultural Labor Relations Act,<sup>25</sup> the laws mandating the bonding of farm labor contractors,<sup>26</sup> the statutes governing minors' wages and hours,<sup>27</sup> the laws governing minors' employment,<sup>28</sup> the laws governing health and safety for employees,<sup>29</sup> and the statutes governing anti-discrimination acts.<sup>30</sup> Therefore, this decision propels these

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21. The court recognized that "the individual factors cannot be applied mechanically as separate tests." *Id.* at 351, 769 P.2d at 404, 256 Cal. Rptr. at 548 (quoting *Germann v. Workers' Compensation Appeals Bd.*, 123 Cal. App. 3d 776, 783, 176 Cal. Rptr. 868, 871 (1981)). Other facts, however, indicated the existence of an independent contracting relationship. Here, the workers specifically agreed to the formation of a principal/independent contractor relationship when they executed a written "sharefarmers" agreement. Also, the workers supplied their own tools for the harvesting and controlled many aspects of the harvest without supervision. Lastly, the workers' payment was not based on an hourly wage, but on the number of cucumbers sold, which depended on the skill of the sharefarmer. These and other facts led Justice Kaufman to conclude that a principal/independent contractor relation was intended and existed. *Id.* at 361-67, 769 P.2d at 411-15, 256 Cal. Rptr. at 555-59 (Kaufman, J., dissenting).

22. *Id.* at 357-60, 769 P.2d at 408-10, 256 Cal. Rptr. at 552-54. The court's specific conclusion was that the growers retained "all *necessary* control over the harvest portion of its operations. A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers." *Id.* at 357, 769 P.2d at 408, 256 Cal. Rptr. at 552 (emphasis in original).

23. *Id.* at 345, 769 P.2d at 400, 256 Cal. Rptr. at 544.

24. *Id.* at 359, 769 P.2d at 410, 256 Cal. Rptr. at 554.

25. CAL. LAB. CODE §§ 1141-1166.3 (West Supp. 1989).

26. *Id.* §§ 1682-1698.5 (West 1971 & Supp. 1989).

27. *Id.* §§ 1171-1199.5.

28. *Id.* §§ 1285-1312.

29. *Id.* §§ 6300-6711; CAL. HEALTH & SAFETY CODE §§ 5474.20-5474.31 (West 1970 & Supp. 1989).

30. CAL. GOV'T CODE §§ 12940-12996 (West 1980 & Supp. 1989); see Ziegler, *Sharefarmer Deemed Employee Under Workers' Comp*, L.A. Daily J., Mar. 24, 1989, § 1, at 3, col. 1 (reporting that the *Borello* decision affords these workers protection

workers not only into the workers' compensation system, but also into the purview of many other California laws.

Second, the *Borello* decision will also affect other workers typically classified as independent contractors.<sup>31</sup> The court exhibited a willingness to classify the workers as employees under any of the tests discussed. It appears that any worker who can satisfy either the right-to-control test or the "additional factors" test may possibly be declared an employee. Furthermore, the fact that a particular worker is of the kind intended to be protected under the Act may convince a court to declare him an employee. Under either scenario, the employee is placed under not only the workers' compensation laws, but also the many other laws designed to protect the employee.

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under "unemployment compensation, anti-discrimination laws, child labor laws, social security, the right to organize [laws], wage and hour laws, and occupational health and safety laws").

31. Commentators anticipate that the decision will impact other categories of workers, such as "garment industry workers, and computer programmers, who are often hired as independent contractors." Ziegler, *supra* note 30.



