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California Supreme Court Survey - A Review of Decisions: June 1995-April 1996

Roger Shaar Jr.

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California Supreme Court Survey

June 1995 - April 1996

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

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

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

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I. ADVERTISING

An attorney whose mailed advertisements offering a homestead filing service which are false or misleading in violation of Business and Professions Code section 17537.6 will be subject to discipline, and the supreme court has discretion to increase the lower court's recommended suspension in light of aggravating circumstances: In re Morse.

I. INTRODUCTION

In *In re Morse*,¹ the California Supreme Court addressed the following issues: (1) whether Business and Professions Code section 17537.6² violated the First Amendment as a restriction on free commercial speech; (2) whether the section was unconstitutionally vague as applied to attorneys; and (3) whether the sanction imposed on attorney Ivan O.B. Morse by the Review Department of the State Bar Court ("review department") was appropriate in light of his violation of the code.³ Answering each of

1. 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620 (1995). The court issued the majority opinion, in which Chief Justice Lucas and Justices Arabian, Baxter, George, and Kremer concurred. (Hon. Daniel J. Kremer, Presiding Justice, Court of Appeal, Fourth District, Division 1, assigned by the Acting Chairperson of the Judicial Council. Justice Werdegarr took no part in this opinion). *Id.* at 184-213, 900 P.2d at 1170-89, 44 Cal. Rptr. 2d at 620-39. Justice Kennard wrote a concurring opinion. *Id.* at 213-14, 900 P.2d at 1189, 44 Cal. Rptr. 2d at 639 (Kennard, J., concurring). Justice Mosk wrote a dissenting opinion. *Id.* at 214-16, 900 P.2d at 1189-90, 44 Cal. Rptr. 2d at 639-40 (Mosk, J., dissenting).

2. California Business and Professions Code § 17537.6 provides in relevant part:

(a) It is unlawful for any person to make any untrue or misleading statements in any manner in connection with the offering or performance of a homestead filing service. For the purpose of this section, an 'untrue or misleading statement' means and includes any representation that any of the following is true:

(1) The preparation or recordation of a homestead declaration will in any manner prevent the forced sale of a judgment debtor's dwelling.

(c) In addition to any other service, every offeror of a homestead filing service shall deliver each notarized homestead declaration to the appropriate county recorder for recordation . . . no later than 10 days after the homestead declaration is notarized.

CAL. BUS. & PROF. CODE § 17537.6 (West 1989 & Supp. 1996).

Section 17537.6 also requires several important disclosures, including the statement that a homeowner need not file a homestead declaration in order to be entitled to a homestead exemption. *Id.*

3. *Morse*, 11 Cal. 4th at 190, 900 P.2d at 1171, 44 Cal. Rptr. 2d at 621. For approximately five years, Ivan Morse engaged in mass mailing advertising offering home-

the three issues in the negative, the court agreed with both the court of appeal and the review department that the statute was constitutional as applied to commercial speech, and that Morse's false and misleading advertisements were not entitled to First Amendment protection.⁴ Concurring with both lower courts, the supreme court also held that the statute was not vague as to whether it applied to attorneys in Morse's position, since the code section's legislative history made clear the statute's application in mass mailing situations.⁵

The court's central focus, however, was the adequacy of the review department's recommended sanction of Morse for his ongoing violation of the statute.⁶ After considering both the presence of aggravating factors and the absence of mitigating circumstances, the court found that the disciplinary action against Morse should be increased to three years of actual suspension from the practice of law.⁷

owners assistance in filing homestead declarations on their properties. *Id.* As a result of these ads, Morse prepared declarations for nearly 100,000 property owners. *Id.* Although Morse was familiar with Business and Professions Code § 17537.6, his mailed ads did not comply with the code's requirements. *Id.* at 190-93, 900 P.2d at 1171-73, 44 Cal. Rptr. 2d at 621-23.

In 1992, the superior court, in response to a civil action filed by the California Attorney General's Office, permanently enjoined Morse from mailing his unlawful advertisements. *Id.* at 193, 900 P.2d at 1173, 44 Cal. Rptr. 2d at 623. Additionally, the court ordered Morse to pay \$800,000 in civil penalties and restitution. *Id.* Morse appealed, and the court of appeal affirmed the lower court's judgment, holding that "Morse's advertisements were . . . deceptive and misleading in a number of ways, and therefore not entitled to First Amendment protection." *Id.* at 193-94, 900 P.2d at 1173-74, 44 Cal. Rptr. 2d at 623-24 (quoting the lower court's opinion, *People v. Morse*, 21 Cal. App. 4th 259, 266, 25 Cal. Rptr. 2d 816, 821 (1993)).

In addition to the civil action, the State Bar Court initiated a proceeding against Morse. *Morse*, 11 Cal. 4th at 194, 900 P.2d at 1174, 44 Cal. Rptr. 2d at 624. After finding that Morse violated Rule 1-400(D) of the California Rules of Professional Conduct prohibiting misleading advertisements, the court recommended three years probation, with 15 days of actual suspension. *Id.* Morse appealed this decision to the Review Department of the State Bar Court. *Id.* The review department affirmed the State Bar Court's decision, but increased Morse's actual suspension time to 60 days. *Id.* at 198, 900 P.2d at 1177, 44 Cal. Rptr. 2d at 627.

4. *Id.* at 199-200, 900 P.2d at 1177-78, 44 Cal. Rptr. 2d at 627.

5. *Id.* at 200, 900 P.2d at 1178, 44 Cal. Rptr. 2d at 628. See CAL. BUS. & PROF. CODE § 17537.6 (West 1989 & Supp. 1996) (outlining requirements for offer of homestead filing service).

6. *Morse*, 11 Cal. 4th at 205, 900 P.2d at 1181, 44 Cal. Rptr. 2d at 631.

7. *Id.* The court stated that the suspension could be reduced to two years if Morse fully complied with the lower court's order to pay restitution and penalties. *Id.*

II. TREATMENT

A. *Majority Opinion*

The majority began its opinion with a review of Morse's actions from 1988 to 1992, which consisted of mass mailings to potential clients regarding assistance in filing homestead declarations.⁸ The court then reviewed the two separate actions brought against Morse as a result of those mailings.⁹ First, a civil action was filed against Morse by the California Attorney General and the Alameda County District Attorney seeking civil penalties and an injunction.¹⁰ Second, the State Bar Court brought a disciplinary action against Morse for violating the Rules of Professional Conduct which prohibit lawyers from engaging in misleading advertising.¹¹

Addressing Morse's contention that enforcement of section 17537.6 violated his First Amendment free speech rights, the court quickly noted that both the court of appeal in the civil matter and the State Bar Court found the ads to be misleading, and therefore not protected by the First Amendment.¹² The supreme court agreed with the court of appeal that the statute was not ambiguous as to whether it applied to Morse, since only attorneys filing homestead declarations for *preexisting clients* were exempted from the statute's requirements.¹³

8. *Id.* at 190-92, 900 P.2d at 1171-73, 44 Cal. Rptr. 2d at 621-23. During this time, Morse mailed approximately four million advertisements offering assistance to homeowners in filing homestead declarations. *Id.* at 190, 900 P.2d at 1171, 44 Cal. Rptr. 2d at 621. In response to these mass mailings, Morse prepared homestead declarations for as many as 100,000 property owners. *Id.*

9. *Id.* at 193-99, 900 P.2d at 1173-77, 44 Cal. Rptr. 2d at 623-27.

10. *Id.* at 193, 900 P.2d at 1173, 44 Cal. Rptr. 2d at 623. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-400 (D)(2) (1994) (proscribing false or misleading communications).

11. *Morse*, 11 Cal. 4th at 194, 900 P.2d at 1174, 44 Cal. Rptr. 2d at 624. See generally 1 B.E. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* § 423 (1985 & Supp. 1995) (defining false and misleading attorney communications); 7 CAL. JUR. 3D *Attorneys at Law* § 234 (1989 & Supp. 1995) (describing prohibition against false or misleading statements to the public).

12. *Morse*, 11 Cal. 4th at 199-200, 900 P.2d at 1177-78, 44 Cal. Rptr. 2d at 627. Morse's ads included the false statement that a recorded homestead declaration could avert a forced sale of the property, and the misleading inference that only a recorded homestead was effective. *Id.* at 201, 900 P.2d at 1178-80, 44 Cal. Rptr. 2d at 628-29; see 7 CAL. JUR. 3D *Attorneys at Law* § 233 (1989 & Supp. 1995) (detailing constitutional limitations on restriction of lawyer advertising). See generally Mylene Brooks, *Lawyer Advertising: Is There Really a Problem?*, 15 LOY. L.A. ENT. L.J. 1 (1994) (discussing the history of attorney regulation); Dennis W. Bishop, Note, *Building the House on a Weak Foundation: Edenfield v. Fane and the Current State of the Commercial Speech Doctrine*, 22 PEPP. L. REV. 1143 (1995) (reviewing the historical background of commercial speech regulation, including lawyer advertising).

13. *Morse*, 11 Cal. 4th at 200-01, 900 P.2d at 1178, 44 Cal. Rptr. 2d at 628. Al-

Turning to what the majority deemed to be "the heart of the case," the court focused on the adequacy of the discipline recommended by the review department.¹⁴ The majority reviewed both the presence of aggravating factors and the lack of significant mitigating circumstances which had been considered by the courts below.¹⁵ Finding the sixty day suspension too minor a sanction for the present circumstances, the court increased Morse's actual suspension to three years.¹⁶ The court explained that the increased penalty was necessary in light of Morse's serious misconduct over a prolonged period of time, as well as the need "to protect the public, the courts, and the profession."¹⁷

B. Justice Kennard's Concurring Opinion

Justice Kennard wrote a brief concurring opinion to express her concern over the reference in the majority opinion to Morse's bankruptcy filing and exhaustive appeals.¹⁸ Justice Kennard asserted that filing for bankruptcy should not be a factor considered by the court when reviewing a disciplinary action, nor should the court hold a petitioner's extensive use of non-frivolous appeals against him.¹⁹ In light of the circumstances, however, Justice Kennard agreed with the discipline imposed.²⁰

though Morse was familiar with the requirements of § 17537.6, he insisted that the statute did not apply to him, arguing that the section's exemption for a "retained" attorney was ambiguous. *Id.*

14. *Id.* at 205, 900 P.2d at 1181, 44 Cal. Rptr. 2d at 631.

15. *Id.* at 197-98, 900 P.2d at 1176-77, 44 Cal. Rptr. 2d at 626-27. The aggravating circumstances included Morse's "multiple acts of wrongdoing" which spanned a period of many years, his denial of any culpability, and his repeated appeals based on the same previously rejected grounds. *Id.* The court agreed with the review department that the only mitigating factor in Morse's favor, his lack of any previous disciplinary record, was only "entitled to minimal weight because his misconduct began slightly more than six years after his admission to the bar." *Id.* at 198, 900 P.2d at 1177, 44 Cal. Rptr. 2d at 626.

16. *Id.* at 210, 900 P.2d at 1184, 44 Cal. Rptr. 2d at 634. See generally 1 B.E. WITKIN, CALIFORNIA PROCEDURE, Attorneys § 520 (1985 & Supp. 1995) (describing instances where recommended punishment was increased).

17. *Morse*, 11 Cal. 4th at 209-10, 900 P.2d at 1184, 44 Cal. Rptr. 2d at 634. The court added that Morse could reduce his actual suspension to two years by fully complying with the order to pay civil penalties. *Id.* at 210-11, 900 P.2d at 1185, 44 Cal. Rptr. 2d at 635.

18. *Id.* at 213-14, 900 P.2d at 1189, 44 Cal. Rptr. 2d at 639 (Kennard, J., concurring).

19. *Id.* (Kennard, J., concurring).

20. *Id.* (Kennard, J., concurring). Justice Kennard asserted that the three year sus-

C. Justice Mosk's Dissenting Opinion

Justice Mosk expressed in his dissent that the discipline imposed by the majority was too harsh under the given circumstances.²¹ Justice Mosk agreed that Morse's advertisements were, in fact, misleading.²² However, Morse committed no felony and had not acted in bad faith; therefore, he argued that the three-year suspension was too severe a punishment.²³

Justice Mosk pointed to Morse's "mistaken belief" regarding the application of section 17537.6 to mass mailings as support for the lesser sanction.²⁴ He also attacked the majority for the "more than . . . subtle suggestion that Morse is being severely punished for exercising" his right to litigate the statute's validity and called the imposed discipline "a draconian penalty."²⁵

III. IMPACT & CONCLUSION

The present ruling stands for the proposition that when an attorney mass mails advertisements containing misleading or false statements, he or she will receive the appropriate sanctions.²⁶ In addition, the court stated that a wide range of sanctions may be appropriate in a situation where ethical violations have occurred.²⁷

Yes the real focal point of the *Morse* decision was the court's assertion of its role in reviewing State Bar Court sanctions for lawyer miscon-

pension was "within the appropriate range of discipline" in the present case. *Id.* at 214, 900 P.2d at 1189, 44 Cal. Rptr. 2d at 636 (Kennard, J., concurring).

21. *Id.* (Mosk, J., dissenting).

22. *Id.* (Mosk, J., dissenting).

23. *Id.* (Mosk, J., dissenting). Justice Mosk agreed with the review department that "Morse's misconduct merits no more than a 60-day actual suspension." *Id.* (Mosk, J., dissenting).

24. *Id.* at 214-15, 900 P.2d at 1190, 44 Cal. Rptr. 2d at 639-40 (Mosk, J., dissenting).

25. *Id.* at 215-16, 900 P.2d at 1190, 44 Cal. Rptr. 2d at 640 (Mosk, J., dissenting).

26. *Id.* at 190, 900 P.2d at 1171, 44 Cal. Rptr. 2d at 621. See generally Eric L. Graves, *Review of Selected 1993 California Legislation—Business Associations and Professions*, 25 PAC. L.J. 407 (1994) (reviewing recent statutes covering attorney advertising).

27. *Morse*, 11 Cal. 4th at 205-09, 900 P.2d at 1181-84, 44 Cal. Rptr. 2d at 631-34. See generally Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 328 (1992) (propounding a consumer point-of-view standard for what is false and misleading in consumer advertisements). Morton suggests, "In conjunction with abandoning lawyer regulation of the content of information dispersed and lawyer-administered sanctions for misconduct, the legal profession must do its utmost to educate consumers on what they should expect from an attorney." *Id.* at 329.

duct.²⁸ Although the court stressed that each case varied with its specific form of wrongdoing, as well as individual aggravating and mitigating circumstances, it sent a clear message: the supreme court will increase sanctions where circumstances warrant the increase.²⁹ In addition, this decision may encourage an attorney to think twice before "having the temerity to seek review of his State Bar case in this court."³⁰

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28. *Morse*, 11 Cal. 4th at 205-06, 900 P.2d at 1181-82, 44 Cal. Rptr. 2d at 631-32.

29. *Id.* at 206-08, 900 P.2d at 1181-82, 44 Cal. Rptr. 2d at 631-32. The court foreshadowed its opinion in the "order granting review [which] placed [Morse] on notice that we would consider . . . whether the level of discipline should be increased." *Id.* For a general review of the history of lawyer advertising, including a discussion of the concerns surrounding deceptive advertising, and public attitudes toward lawyer advertisements, see Al H. Ringleb et al., *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics, and Consumer Perceptions*, 17 PAC. L.J. 1199 (1986).

30. *Morse*, 11 Cal. 4th at 215, 900 P.2d at 1190, 44 Cal. Rptr. 2d at 640 (Mosk, J., dissenting). For a discussion of lawyer advertising regulation in the television context, see Brae Canlen, *Injured? Call Now! California Tries to Get Tough with TV Attorneys—and Touches Off a Class War in the Bar*, 15 CAL. LAW. 48 (1995). The author ominously portends: "As the number of new lawyers increases and the competition for business intensifies, attorneys will continue to move in the direction of car dealers, cereal companies, and breweries." *Id.* at 90.

II. CIVIL SERVICE

The time limits imposed on the California State Personnel Board by California Government Code section 18671.1 are directory, and although the Board retains jurisdiction when it fails to decide the appeal within the statutory time limits, an employee may seek a remedy in superior court: California Correctional Peace Officers Ass'n v. State Personnel Board.

I. INTRODUCTION

In *California Correctional Peace Officers Ass'n v. State Personnel Board*,¹ the California Supreme Court examined the time provisions that section 18671.1 of the California Government Code² imposes on the California State Personnel Board for dispensing with appeals of departmental disciplinary actions.³ Reversing the decision of the court of appeal,⁴

1. 10 Cal. 4th 1133, 899 P.2d 79, 43 Cal. Rptr. 2d 693 (1995). Justice Baxter wrote the majority opinion, in which, Chief Justice Lucas, and Justices George and Werdegard concurred. *Id.* at 1137-57, 899 P.2d at 82-94, 43 Cal. Rptr. 2d at 696-708. Justice Arabian filed a dissenting opinion, in which Justices Kennard and Mosk joined. *Id.* at 1157-69, 899 P.2d at 94-102, 43 Cal. Rptr. 2d at 708-16 (Arabian, J., dissenting).

2. California Government Code § 18671.1 in relevant part states:

Whenever a hearing or investigation is conducted by the board . . . the board shall render its decision within a reasonable time after the conclusion of the hearing or investigation, except that the period from the filing of the petition to the decision of the board shall not exceed six months or 90 days from the time of the submission, whichever time period is less . . . [t]he provision relating to the six-month or the 90-day periods for a decision may be waived by the employee but if not so waived a failure to render a timely decision is an exhaustion of all available administrative remedies.

CAL. GOV'T CODE § 18671.1 (West 1995). See generally 2 AM. JUR. 2D *Administrative Law* § 472 (1994 & Supp. 1995) (explaining time limits for decisions to be made under various statutes); 2 CAL. JUR. 3D *Administrative Law* §§ 223-231 (1973 & Supp. 1995) (impairing the general procedures used for hearings in administrative law courts); Michael A. Schmitt, *How Long is Six Months in California? Enquiring Minds Want to Know!*, 19 Sw. U. L. REV. 205 (1990) (discussing the various time limits in statutes and how they are applied).

3. *Peace Officers*, 10 Cal. 4th at 1138, 899 P.2d at 82-83, 43 Cal. Rptr. 2d at 696-97. The Department of Corrections and the Department of the Youth Authority brought disciplinary actions under the Civil Service Act against almost 50 employees. *Id.* at 1139, 899 P.2d at 83, 43 Cal. Rptr. 2d at 697; see CAL. GOV'T CODE §§ 19570-19589 (West 1995) (listing requirements for disciplinary proceedings); see also 15A AM. JUR. 2D *Civil Service* § 55 (1976 & Supp. 1995) (discussing suspensions and layoffs); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 194-204 (1987 & Supp. 1995) (giving reasons why employees could have a disciplinary action filed against them). Each employee then received a "notice of adverse action."

the supreme court held that the time restrictions were directory, not mandatory, with the Board retaining jurisdiction over an appeal even when failing to render a decision within the statutory time limitation.⁵ The court further held that an employee may seek a writ either ordering the Board to decide the appeal by a certain date or setting aside the adverse action.⁶ Lastly, the court professed that granting a de novo review of an employee's appeal to a superior court when the personnel board had failed to act within the statutory time limits was constitutional.⁷

II. TREATMENT

A. Majority Opinion

1. Time Limits Imposed by Section 18671.1 are Directory

Justice Baxter began with the premise that the time limits imposed by section 18671.1 served to further the court's previous holding in *Skelly v. State Personnel Board*,⁸ which mandated due process for civil service employees in disciplinary matters.⁹ He explained that a "directory" or a

Peace Officers, 10 Cal. 4th at 1139, 899 P.2d at 83, 43 Cal. Rptr. 2d at 697; see 52 CAL. JUR. 3D *Public Officers and Employees* §§ 146, 150 (1979 & Supp. 1995) (discussing the general procedure for notifying employees of disciplinary hearings). After receiving the notices, each employee appealed to the Board. *Peace Officers*, 10 Cal. 4th at 1139, 899 P.2d at 83, 43 Cal. Rptr. 2d at 697.

As of May 16, 1991, the Board had not rendered a decision on any of the appeals. *Id.* The plaintiff, on the same date, filed motions to dismiss all claims against the employees with the chief administrative law judge on the ground that the Board had failed to comply with § 18671.1. *Id.* After the chief administrative judge denied the motion, the plaintiff filed a writ of mandate with a superior court asking for various remedies depending on each employee's case. *Id.* at 1139-40, 899 P.2d at 83, 43 Cal. Rptr. 2d at 697. The superior court judge did not grant the relief requested by the plaintiff. *Id.* at 1141, 899 P.2d at 84, 43 Cal. Rptr. 2d at 698.

4. *Peace Officers*, 10 Cal. 4th at 1141, 899 P.2d at 84, 43 Cal. Rptr. 2d at 698. The court of appeal reversed the judgment of the superior court and remanded certain issues for further deliberations. *Id.* The appellate court held that time limits within § 18671.1 were mandatory and jurisdictional. *Id.* at 1143, 899 P.2d at 85, 43 Cal. Rptr. 2d at 699.

5. *Id.* at 1148, 899 P.2d at 88-89, 43 Cal. Rptr. 2d at 702-03.

6. *Id.* at 1152-53, 899 P.2d at 91-92, 43 Cal. Rptr. 2d at 705-06.

7. *Id.* at 1148-51, 899 P.2d at 88-91, 43 Cal. Rptr. 2d at 703-05. The court of appeal also held that the employee could seek more than one remedy. *Id.* at 1143-44, 899 P.2d at 85-86, 43 Cal. Rptr. 2d at 699-700.

8. 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975).

9. *Id.* at 1144-45, 899 P.2d at 86, 43 Cal. Rptr. 2d at 700. The court stated that

“mandatory”¹⁰ classification of a duty delineated whether the lack of compliance with a procedure would invalidate the governmental action to which the requirement related.¹¹ “If the action is invalidated, the requirement will be termed ‘mandatory.’ If not invalidated, it is ‘directory’ only.”¹² Generally, time limits within a statute are considered directory unless “the Legislature clearly expresses a contrary intent.”¹³

To ascertain this intent, Justice Baxter applied the standard that a time limitation is directory unless it is reinforced by a penalty that would effectively invalidate the government action.¹⁴ Thus, if there is a penalty that could invalidate government actions, the time limit is mandatory.¹⁵ The court noted that an employee may waive the time limits, so failure to comply with them did not invalidate the Board’s future actions regarding an appeal.¹⁶ Further, the statute provides a penalty for noncompliance with the time limits by allowing the employee to seek an alternative route for challenging the disciplinary action taken against him.¹⁷ Even so, this penalty did not reflect the requisite legislative intent to end the Board’s jurisdiction over the appeal.¹⁸ Therefore, the California Legislature did not express a clear intent that the time limits be classified as mandatory. For these reasons, the majority held the time limitations to be directory.¹⁹

§ 18671.1 was enacted to supplement other statutes in order to ensure that the Board would make decisions concerning employee appeals within a reasonable time, thus protecting due process. *Id.*; see 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 193 (1987 & Supp. 1995) (discussing hearings associated with civil service disciplinary actions). See generally Michael J. Higgins, Comment, *California Wrongful Discharge Law and the Public Employee*, 23 U.C. DAVIS L. REV. 117 (1989) (discussing discharges of civil servants).

10. *Peace Officers*, 10 Cal. 4th at 1145, 899 P.2d at 87, 43 Cal. Rptr. 2d at 701. Typically, “mandatory” in statutes refers to “a duty that a governmental entity is required to perform.” *Id.*

11. *Id.*

12. *Id.*; see 73 C.J.S. *Public Administrative Law and Procedure* § 72 (1983 & Supp. 1995) (discussing when a statutory duty is mandatory).

13. *Peace Officers*, 10 Cal. 4th at 1145, 899 P.2d at 87, 43 Cal. Rptr. 2d at 701 (citing *Edwards v. Steele*, 25 Cal. 3d 406, 410, 599 P.2d 1365, 1368, 158 Cal. Rptr. 662, 665 (1979)).

14. *Id.*; see *Morris v. County of Marin*, 18 Cal. 3d 901, 908, 559 P.2d 606, 610-11, 136 Cal. Rptr. 251, 255-56 (1977) (stating that the difference between directory and mandatory may be determined by the result of noncompliance).

15. *Peace Officers*, 10 Cal. 4th at 1145, 899 P.2d at 87, 43 Cal. Rptr. 2d at 701.

16. *Id.*

17. *Id.* at 1145-46, 899 P.2d at 87, 43 Cal. Rptr. 2d at 701.

18. *Id.* at 1147-48, 899 P.2d at 88-89, 43 Cal. Rptr. 2d at 702-03.

19. *Id.*

2. Employee's Right to Review by a Superior Court

Justice Baxter went on to conclude that if the Board failed to render a decision within the time limits of section 18671.1, an employee could, by writ of mandate,²⁰ seek to compel a Board decision or obtain a de novo review of the disciplinary action by the superior court.²¹ The Board argued that the employee's only remedy was to file a writ of mandate compelling the Board to make a decision on the employee's appeal.²² The court disagreed, however, stating that the statutory language, "exhaustion of all administrative remedies," meant that the employee had the right to bring an appeal of the disciplinary action before a superior court.²³

3. Constitutionality of De Novo Review

The court further noted that after the statutory time limits have expired, an employee may seek by writ either to compel the Board to render a decision or to obtain a de novo review in superior court.²⁴ During this time, the Board may continue to investigate and deliver a decision.²⁵ Once the decision is handed down, the employee may drop the writ pro-

20. See generally 52 AM. JUR. 2D *Mandamus* §§ 1-13 (1970 & Supp. 1995) (discussing the nature and purpose of mandamus); 32 CAL. JUR. 2D *Mandamus* §§ 1-5, 33-37 (1956 & Supp. 1978) (defining mandamus); 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Mandamus* §§ 113-116 (1985 & Supp. 1995) (explaining the remedy of mandamus).

21. *Peace Officers*, 10 Cal. 4th at 1148, 899 P.2d at 89, 43 Cal. Rptr. 2d at 703.

22. *Id.* at 1148-51, 899 P.2d at 89-91, 43 Cal. Rptr. 2d at 703-05. The court found that § 18671.1 did not grant a writ of compliance remedy because this was inherently included within the statute; thus, it was only logical that the remedy granted by the section was different. *Id.*; see CAL. CIV. PROC. CODE § 1085 (West 1980) (providing for issuance of writs of mandate). See generally Edward L. Barrett, Jr., *Recent Decisions*, 27 CAL. L. REV. 738 (1939) (examining cases dealing with review in mandamus); D.O. McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CAL. L. REV. 110 (1941) (discussing procedures that could involve mandamus actions).

23. *Peace Officers*, 10 Cal. 4th at 1148-52, 899 P.2d at 89-91, 43 Cal. Rptr. 2d at 703-05. For a deeper look into the doctrine of exhaustion of administrative remedies, see *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 291-96, 109 P.2d 942, 948-51 (1941). See generally 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 69 (1985 & Supp. 1995) (discussing the doctrine of administrative remedies); Willis S. Slusser, *Recent Decision*, 29 CAL. L. REV. 515 (1941) (examining the *Abelleira* court's analysis of the relationship between judicial review and exhaustion of administrative remedies). Additionally, the court made note of the legislative history of § 18671.1. *Peace Officers*, 10 Cal. 4th at 1148-52, 899 P.2d at 89-91, 43 Cal. Rptr. 2d at 703-05.

24. *Peace Officers*, 10 Cal. 4th at 1147-51, 899 P.2d at 88-90, 43 Cal. Rptr. 2d at 702-04.

25. *Id.* at 1150, 899 P.2d at 90, 43 Cal. Rptr. 2d at 704.

ceedings in superior court,²⁶ wait for the controlling superior court decision, or dismiss the writ proceeding and appeal the decision of the Board.²⁷

Both the Board and the plaintiff contended that allowing a superior court to conduct a de novo review of a disciplinary action would rob the State Board of its constitutional authority over civil service disciplinary actions.²⁸ The court refuted this argument by saying that a "constitutional grant of authority to an administrative agency does not preclude reasonable regulation of the procedures of the agency by the Legislature."²⁹ In conclusion, Justice Baxter found that allowing an employee to waive the right of appeal and seek a judicial remedy when the Board has failed to comply with time limits is consistent with the California Constitution.³⁰ Therefore, dismissal of the action is not the sole remedy when the Board exceeds the section 18671.1 time limits.³¹

B. Justice Arabian's Dissenting Opinion

In contrast to the majority, Justice Arabian asserted that the time limits within section 18671.1 were not directory, but mandatory and jurisdictional.³² He premised his opinion on the language of the statute which contains a consequence for noncompliance with the section's time lim-

26. *Id.* at 1151, 899 P.2d at 90, 43 Cal. Rptr. 2d at 704.

27. *Id.*

28. *Id.* at 1152, 899 P.2d at 91, 43 Cal. Rptr. 2d at 705.

29. *Id.* Justice Baxter pointed out that Article VII of the California Constitution actually contemplates this type of regulation, as § 3 provides that "the Board is to enforce the civil service statutes and adopt rules authorized by statute." *Id.* (citing CAL. CONST. art. VII, § 3); see also 52 CAL. JUR. 3D *Public Officers and Employees* §§ 4, 272 (1979 & Supp. 1995) (discussing enforcement and administration of civil service statutes by agency boards).

30. *Peace Officers*, 10 Cal. 4th at 1153, 899 P.2d at 92, 43 Cal. Rptr. 2d at 706. Justice Baxter also noted that the legislative history of § 18671.1 supported the court's conclusion. *Id.*

31. *Id.* The court added that if the employee chooses to seek review of his claim in superior court, then the employee will bear the burden of proof. *Id.* at 1153-56, 899 P.2d at 92-94, 43 Cal. Rptr. 2d at 706-07; see also 43 CAL. JUR. 3D *Mandamus and Prohibitions* §§ 1, 39 (1978 & Supp. 1995) (explaining the pleading burdens of mandamus writs). This is in contrast to the original agency hearing where the agency has the burden of proving the employee deserves the disciplinary action taken against him. *Peace Officers*, 10 Cal. 4th at 1153-1156, 899 P.2d at 92-94, 43 Cal. Rptr. 2d at 706-08.

32. *Id.* at 1157-63, 899 P.2d 94-98, 43 Cal. Rptr. 2d at 708-12 (Arabian, J., dissenting).

its.³³ He thus argued that the intent of the statute was to impose mandatory and jurisdictional time limits on the Board.³⁴

Justice Arabian agreed with the majority that the employee had the right to seek judicial relief by writ in superior court when the Board failed to comply with the statutory time limits.³⁵ He asserted, however, that as the time limits were mandatory the Board lost jurisdiction when they expired.³⁶ Thus, the only remedy available to an employee who had not waived the time limits was to seek relief in superior court.³⁷ Justice Arabian did not address the constitutionality of the remedy.³⁸

III. IMPACT AND CONCLUSION

The court's interpretation of section 18671.1 has clarified the fact that the time limits imposed by the statute are directory.³⁹ Because of this classification, the State Board retains jurisdiction over an employee's appeal after the time limits have expired, and the Board may still render a decision on the appeal.⁴⁰ Furthermore, an employee has at least two remedies when the Board fails to comply with statutory time limits.⁴¹ The employee, by writ, may seek either to compel the Board to make a decision or to initiate de novo review of the appeal in superior court.⁴² If the Board hands down a decision while the case is on appeal, the employee may either withdraw the filed writs or wait for the ruling of the superior court supplanting the decision of the Board.⁴³

While *Peace Officers* has clarified several aspects of section 18671.1, the court's use of an intent test may engender confusion. Under the in-

33. *Id.* at 1159, 899 P.2d at 96-98, 43 Cal. Rptr. 2d at 710-12 (Arabian, J., dissenting).

34. *Id.* (Arabian, J., dissenting).

35. *Id.* at 1164-69, 899 P.2d at 98-102, 43 Cal. Rptr. 2d at 712-16 (Arabian, J., dissenting).

36. *Id.* at 1164-65, 899 P.2d at 99, 43 Cal. Rptr. 2d at 713-14 (Arabian, J., dissenting).

37. *Id.* at 1165-66, 899 P.2d at 99-100, 43 Cal. Rptr. 2d at 713-14 (Arabian, J., dissenting). Justice Arabian agreed with the majority that if a qualified employee chooses to seek a remedy in superior court, then the employee will bear the burden of proof. *Id.* (Arabian, J., dissenting).

38. *Id.* at 1168, 899 P.2d at 101, 43 Cal. Rptr. 2d at 715 (Arabian, J., dissenting).

39. *Id.* at 1138-39, 899 P.2d at 82-83, 43 Cal. Rptr. 2d at 696-97.

40. *Id.* at 1150, 899 P.2d at 90, 43 Cal. Rptr. 2d at 704.

41. *Id.* at 1138-39, 1151, 899 P.2d at 82-83, 90, 43 Cal. Rptr. 2d at 696-97, 704.

42. *Id.*

43. *Id.*

tent test, subsequent courts may struggle to interpret what type of duties the Legislature intended to be mandatory. For example, the court found that time limits are mandatory if the statute provides a penalty for failure to comply with the limits.⁴⁴ Yet the court neither considered the penalty imposed by section 18671.1 to be the right type of penalty nor clearly defined what type of penalty would qualify.⁴⁵

It remains to be seen how lower courts will interpret the decision. Yet hopefully the confusion surrounding *Peace Officers* will prompt the legislature to provide clear language in statutes to ensure that administrative duties in statutes are mandatory.

WILLIAM ANTHONY BAIRD

44. *Id.* at 1145-48, 899 P.2d at 87-89, 43 Cal. Rptr. 2d at 701-03.

45. *Id.*

III. COMMUNITY PROPERTY

Retroactive application of former Civil Code section 4800.2, which creates a presumption that a spouse has a right to reimbursement for the separate property he or she used to acquire community property, unconstitutionally deprives the other spouse of a vested property interest without due process of law: In re Marriage of Heikes.

I. INTRODUCTION

In *In re Marriage of Heikes*,¹ the California Supreme Court revisited the issue of whether, upon division of community property, the reimbursement of a spouse's separate property contribution would deprive the other spouse of a vested property interest without due process of law.² Under former Civil Code section 4800.2, a spouse has a presumed

1. 10 Cal. 4th 1211, 899 P.2d 1349, 44 Cal. Rptr. 2d 155 (1995). Justice Werdegar authored the opinion of the court, in which Chief Justice Lucas and Justices Arabian, Baxter, George, Kennard, and Mosk joined. *Id.* at 1213-25, 899 P.2d at 1349-58, 44 Cal. Rptr. 2d at 155-64.

2. *Id.* at 1214, 899 P.2d at 1350, 44 Cal. Rptr. 2d at 156. Norman Heikes owned a home and a vacant lot in California. *Id.* After marrying Rose H. Heikes, he conveyed both properties to his wife and himself, thereby creating a joint tenancy. *Id.* The parties made no agreements whereby the husband would retain a separate property interest in the properties. *Id.* In 1990, the parties initiated a dissolution proceeding. *Id.* The trial court found that both parcels were community property. *Id.* at 1214-15, 899 P.2d at 1350, 44 Cal. Rptr. 2d at 156. Six days later, the California Supreme Court decided *In re Marriage of Hilke*. *Id.* at 1215, 899 P.2d at 1350, 44 Cal. Rptr. 2d at 156 (citing and discussing *In re Marriage of Hilke*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992)). In *Hilke*, the court held that Civil Code § 4800.1, which presumes that "property acquired [during the marriage] in joint tenancy is community property," was applicable retroactively. *Hilke*, 4 Cal. 4th at 223, 841 P.2d at 897, 14 Cal. Rptr. 2d at 377 (1992). Based on the argument that *Hilke* indicated a new view on the constitutionality of retroactively applying Civil Code §§ 4800.1 and 4800.2, the husband successfully moved for a new trial. *Heikes*, 10 Cal. 4th at 1215, 899 P.2d at 1350-51, 44 Cal. Rptr. 2d at 156-57. The court of appeal affirmed the new-trial order. *Id.* at 1215, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157. The California Supreme Court then granted the wife's petition to review the constitutionality of retroactively applying §§ 4800.1 and 4800.2 of the California Civil Code. *Id.*

Former California Civil Code § 4800.1 provided:

For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption . . . may be

right to reimbursement for the separate property that he or she contributed to the acquisition of community property.³ Only a written waiver of the reimbursement right rebuts this presumption.⁴ Prior to January 1, 1984⁵ however, all contributions of separate property to the community

rebutted by either of the following:

- (a) A clear statement in the deed . . .
- (b) Proof that the parties have made a written agreement that the property is separate property.

CAL. CIV. CODE § 4800.1 (West Supp. 1995) (superseded by CAL. FAM. CODE § 2581 (West 1994)).

Former California Civil Code § 4800.1 was amended in 1986 to include "property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property." CAL. FAM. CODE § 2581 (West 1994). As amended, former § 4800.1 was recodified without change in California Family Code §§ 2580 and 2581. CAL. FAM. CODE §§ 2580-2581 (West 1994). See generally 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§ 189, 191 (9th ed. 1990 & Supp. 1995) (citing cases that analyze the presumption codified in § 4800.1); 11 *id.*, *Community Property*, § 198 (examining the problems resulting from retroactive application of § 4800.1); 32 CAL. JUR. 3D *Family Law* § 433 (1994) (discussing § 4800.1's presumption).

Former California Civil Code § 4800.2 provided:

In the division of community property under this part unless a party has made a written waiver on the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source

CAL. CIV. CODE § 4800.2 (West Supp. 1995) (recodified without substantive change as CAL. FAM. CODE § 2640 (West 1994)). See generally 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 199 (9th ed. 1990 & Supp. 1995) (examining the problems resulting from retroactive application of § 4800.2); 11 *id.*, *Community Property*, §§ 192, 194, 268 (9th ed. 1990 & Supp. 1995) (discussing spousal reimbursement rights under § 4800.2); 32 CAL. JUR. 3D *Family Law* §§ 515, 534, 775 (1994) (analyzing presumptions relating to spousal reimbursement rights for separate property contributions); Susan A. Channick, *What's in a Name: A Critical Look at California's System of Characterizing Marital Property*, 26 CAL. W. L. REV. 1 (1989-90) (providing a prolegomenon of cases and statutes relating to marital property rights and presumptions); Harlon S. Roman, *The Division of Marital Property Before and After In re Marriage of Buol and In re Marriage of Fabian*, 16 SW. U. L. REV. 563 (1986) (examining cases that interpret the constitutionality of retroactive application of §§ 4800.1 and 4800.2); Virginia V. Shue & Sarah S. Velman, *California Civil Code §§ 4800.1 and 4800.2: Review, Analysis, and Suggestions for Reform*, 12 COMMUNITY PROP. J. 5 (1985) (examining potential problems arising from the application of §§ 4800.1 and 4800.2); Arthur G. Woodward, Comment, *The 1986 Amendments to California Civil Code Sections 4800.1 and 4800.2: Irreconcilable Differences Between the Legislature and the Court?*, 20 PAC. L.J. 97 (1988) (tracing the background from which §§ 4800.1 and 4800.2 arose).

3. *Heikes*, 10 Cal. 4th at 1213, 899 P.2d at 1349, 44 Cal. Rptr. 2d at 155; CAL. CIV. CODE § 4800.2 (West Supp. 1995) (recodified as CAL. FAM. CODE § 2640 (West 1994)).

4. *Heikes*, 10 Cal. 4th at 1213, 899 P.2d at 1349, 44 Cal. Rptr. 2d at 155; CAL. CIV. CODE § 4800.2 (West Supp. 1995) (recodified as CAL. FAM. CODE § 2640 (West 1994)).

5. On January 1, 1984, Civil Code § 4800.2 became operative. *Heikes*, 10 Cal. 4th

were presumed gifts to the community absent a contrary agreement by the parties.⁶

Accordingly, when the husband in *Heikes* conveyed separate property to himself and his wife as joint tenants in 1976, the wife obtained a vested property interest, an interest that would be impaired by retroactive application of the right to reimbursement provision of former Civil Code section 4800.2.⁷ The state's interest in fostering consistent and uniform treatment of community property distribution is not sufficient to justify retroactively applying the right to reimbursement.⁸ Therefore, the California Supreme Court unanimously held that the imposition of the husband's right of reimbursement for his separate property contribution to community property acquired before January 1, 1984, would strip the wife of a vested property interest without due process of law.⁹

II. TREATMENT

Because section 4800 of the California Civil Code applies only to the division of community property, the California Supreme Court reviewed the basis for classifying each of the parcels in question as community property.¹⁰ In 1976, when the husband conveyed the vacant lot and home to himself and his wife as joint tenants, single family residences acquired by spouses in joint tenancy were presumed to be community property for the purposes of dividing the property.¹¹ This presumption could be rebutted by an oral or written agreement to the contrary.¹²

at 1213, 899 P.2d at 1349-50, 44 Cal. Rptr. 2d at 155-56.

6. *Id.* at 1213, 899 P.2d at 1349, 44 Cal. Rptr. 2d at 155 (citing *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980)).

7. *Id.* at 1222-23, 899 P.2d at 1356, 44 Cal. Rptr. 2d at 162.

8. *Id.* at 1223, 899 P.2d at 1356, 44 Cal. Rptr. 2d at 162.

9. *Id.* at 1225, 899 P.2d at 1358, 44 Cal. Rptr. 2d at 164.

10. *Id.* at 1215, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157. California Civil Code § 4800.2 expressly provided for a spouse's reimbursement right in "division of community property." CAL. CIV. CODE § 4800.2 (West 1983 & Supp. 1995) (recodified as CAL. FAM. CODE § 2640 (West 1994)) (emphasis added). The continuation of § 4800.2 in California Family Code § 2640 substituted "community estate" for "community property" in conformity with judicial interpretation of § 4800.2 to embrace quasi-community property as well. See CAL. FAM. CODE § 2640(b) (West 1994); see, e.g., *In re Marriage of Craig*, 219 Cal. App. 3d 683, 268 Cal. Rptr. 396 (Ct. App. 1990) (applying § 4800.2 to quasi-community property).

11. *Heikes*, 10 Cal. 4th at 1216, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157; *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); CAL. CIV. CODE § 5110 (West 1983) (superseded by CAL. FAM. CODE § 803 (West 1994)).

12. *Heikes*, 10 Cal. 4th at 1216, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157; *Lucas*,

Section 4800.1 of the California Civil code, operative on January 1, 1984, provided that this presumption could be rebutted only by a statement in the deed or the parties' written agreement.¹³ The court noted that there existed no evidence to rebut this presumption in *Heikes*.¹⁴ Therefore, the court concluded that the parties' home was properly classified as community property.¹⁵

The court followed a similar analysis in considering whether the vacant lot was community property. Section 4800.1 expanded the scope of property presumably considered divisible community property from single family residences to include all property acquired in joint tenancy.¹⁶ Thus, the presumption of section 4800.1, if applied retroactively, would embrace the vacant lot.¹⁷ The court distinguished the instant case from *Buol*, where it held that retroactive application of the written evidence provision of section 4800.1 unconstitutionally deprived the wife of a vested property interest without due process of law.¹⁸ The court found that retroactive application in the instant case of the presumption created by section 4800.1 would not impair any vested property interest of the husband.¹⁹ The court recognized that the property interest the husband held as a joint tenant is the same property interest that he would hold under community property while both spouses remained alive.²⁰ The court reasoned that the husband's survivorship interest in the joint tenancy vests upon the death of the other spouse.²¹ Therefore, the court held that the trial court properly considered the vacant lot community property.²²

27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); former CAL. CIV. CODE § 5110 (West 1983) (superseded by CAL. FAM. CODE § 803 (West 1994)).

13. CAL. CIV. CODE § 4800.1 (West Supp. 1995) (recodified as CAL. FAM. CODE § 2580 (West 1994)); *Heikes*, 10 Cal. 4th at 1216, 899 P.2d at 1352, 44 Cal. Rptr. 2d at 158.

14. *Heikes*, 10 Cal. 4th at 1217, 899 P.2d at 1352, 44 Cal. Rptr. 2d at 158.

15. *Id.*

16. CAL. CIV. CODE § 4800.1 (West Supp. 1995) (recodified as CAL. FAM. CODE § 2580 (West 1994)); *Heikes*, 10 Cal. 4th at 1217, 899 P.2d at 1352, 44 Cal. Rptr. 2d at 158.

17. *Heikes*, 10 Cal. 4th at 1217, 899 P.2d at 1352, 44 Cal. Rptr. 2d at 158.

18. *Id.* at 1216-17, 899 P.2d at 1352, 44 Cal. Rptr. 2d at 158 (citing and discussing *In re Marriage of Buol*, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985)).

19. *Id.* at 1217, 899 P.2d at 1352, 44 Cal. Rptr. 2d at 158.

20. *Id.*

21. *Id.* (citing *In re Marriage of Hilke*, 4 Cal. 4th 215, 222, 841 P.2d 891, 896, 14 Cal. Rptr. 2d 371, 376 (1992)). For an analysis of *In re Marriage of Hilke*, see Michael E. Murphy, *California Supreme Court Survey*, 22 PEPP. L. REV. 269 (1994).

22. *Heikes*, 10 Cal. 4th at 1218, 899 P.2d at 1352, 44 Cal. Rptr. 2d at 158. Because the husband's complaint sought reimbursement under § 4800.2, which applies only to divisions of community property, presumably the husband agreed with the court's characterization of the parcels as community property. *Id.* at 1218, 899 P.2d at 1352-53, 44 Cal. Rptr. 2d at 158-59.

The supreme court next examined whether retroactively enforcing section 4800.2, which reimburses a spouse who contributes separate property to the acquisition of community property, would impair the non-contributing spouse's vested property interest without due process of law.²³ The court noted that the Legislature expressly intended sections 4800.1 and 4800.2 to apply in all "proceedings as to the division of property [that] are not yet final on January 1, 1984."²⁴ Nevertheless, in *Fabian*, the supreme court unanimously concluded that "retroactive application of section 4800.2 to cases pending on January 1, 1984, impairs vested property interests without due process of law."²⁵ The supreme court recognized that prior to January 1, 1984, any contributions of separate property to the community were considered gifts.²⁶ Therefore, property rights in the donated property vested in each spouse upon conveyance of the property in joint tenancy.²⁷ Thus, granting the husband a right to reimbursement in property given to the community, when no such right existed at the time the property was conveyed, would impair the wife's vested interest in the property.²⁸

In considering whether retroactive application of section 4800.2 would violate due process by impairing a spouse's vested property interest, the California Supreme Court balanced the state interest and the importance of applying section 4800.2 retroactively to further that interest, on one hand, and "reliance considerations" on the other.²⁹ The court relied heavily on its unanimous decision in *Fabian*, which utilized the same factors to conclude that retroactive application of section 4800.2 would strip the wife of a vested property interest without due process of law.³⁰ The court again concluded that each of these factors disfavored retroac-

23. *Heikes*, 10 Cal. 4th at 1218, 899 P.2d at 1353, 44 Cal. Rptr. 2d at 159.

24. *Id.* at 1218, 899 P.2d at 1353, 44 Cal. Rptr. 2d at 159 (citation omitted).

25. *Id.* (quoting *In re Marriage of Fabian*, 41 Cal. 3d 440, 451, 715 P.2d 255, 260, 224 Cal. Rptr. 333, 340 (1986)).

26. *Id.* at 1218, 899 P.2d at 1353, 44 Cal. Rptr. 2d at 159 (quoting *Fabian*, 41 Cal. 3d at 446, 715 P.2d at 256, 224 Cal. Rptr. at 336); accord *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

27. *Heikes*, 10 Cal. 4th at 1218, 1223 n.9, 899 P.2d at 1353, 1356 n.9, 44 Cal. Rptr. 2d at 159, 162 n.9.

28. *Id.* at 1218, 899 P.2d at 1353, 44 Cal. Rptr. 2d at 159; see *Fabian*, 41 Cal. 3d at 446, 715 P.2d at 256, 224 Cal. Rptr. at 336.

29. *Heikes*, 10 Cal. 4th at 1219, 1223, 899 P.2d at 1353, 1356, 44 Cal. Rptr. 2d at 159, 162 (citing *In re Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976)).

30. *Id.* at 1219, 899 P.2d at 1353, 44 Cal. Rptr. 2d at 159 (citing *Fabian*, 41 Cal. 3d at 449, 715 P.2d at 258, 224 Cal. Rptr. at 338).

tive application of the presumptive right to reimbursement codified in section 4800.2.³¹

The state's interest represented the first prong of the court's due process analysis.³² In *Fabian*, the court found that the Legislature's policy of providing consistent and uniform treatment of community property distribution is an insufficient state interest to justify retroactive application of section 4800.2.³³ The *Fabian* court noted that a written or oral agreement, had the parties so desired, would have been sufficient for the husband to preserve his interest in the separate property contributed to the community.³⁴ The *Heikes* court adopted the reasoning from *Fabian* and concluded that the status of the law was not patently unfair prior to the passing of section 4800.2.³⁵ Therefore, the court found that retroactively applying section 4800.2's presumptive right of reimbursement was not necessary to further the state's interest.³⁶

"Reliance considerations" represented the second prong of the court's due process analysis.³⁷ Specifically, the California Supreme Court examined the extent and legitimacy of reliance on the former status of the law and the disruptive effect that would flow from retroactive application of section 4800.2.³⁸ The court recognized that it was clearly legitimate for the parties to assume, prior to the enactment of section 4800.2, that the husband's conveyance of property to the community was a gift.³⁹ After January 1, 1984, the wife theoretically could have obtained the husband's written waiver of his right to reimbursement, which section 4800.2 created.⁴⁰ However, the unlikelihood that the wife would successfully extract such a waiver made this argument an insubstantial factor in the court's analysis.⁴¹ The court weighed more heavily the policy promoting uniformity and predictability in the application of community property princi-

31. *Id.* at 1219-25, 899 P.2d at 1353-58, 44 Cal. Rptr. 2d at 159-64; see *infra* notes 33-45 and accompanying text.

32. *Heikes*, 10 Cal. 4th at 1219, 1223, 899 P.2d at 1353, 1356, 44 Cal. Rptr. 2d at 159, 162.

33. *Fabian*, 41 Cal. 3d at 449, 715 P.2d at 258, 224 Cal. Rptr. at 338.

34. *Id.*

35. *Heikes*, 10 Cal. 4th at 1219, 1223, 899 P.2d at 1353, 1356, 44 Cal. Rptr. 2d at 159, 162 (citing *Fabian*, 41 Cal. 3d at 449, 715 P.2d at 258, 224 Cal. Rptr. at 338).

36. *Id.*

37. *Id.* (citing *Fabian*, 41 Cal. 3d at 449-50, 715 P.2d at 258-59, 224 Cal. Rptr. at 338-39).

38. *Id.* at 1219, 1223, 899 P.2d at 1353-54, 1356, 44 Cal. Rptr. 2d at 159-60 (citing *Fabian*, 41 Cal. 3d at 449-50, 715 P.2d at 258-59, 224 Cal. Rptr. at 338-39).

39. *Id.* at 1223-24, 899 P.2d at 1357, 44 Cal. Rptr. 2d at 163 (citing *Fabian*, 41 Cal. 3d at 449-50, 715 P.2d at 258-59, 224 Cal. Rptr. at 338-39).

40. *Id.* at 1224, 899 P.2d at 1357, 44 Cal. Rptr. 2d at 163.

41. *Id.* at 1214, 1224, 899 P.2d at 1350, 1357, 44 Cal. Rptr. 2d at 156, 163.

ples over the parties' actual reliance on the prior state of the law.⁴² The court reiterated that "[i]t is difficult to imagine greater disruption than retroactive application of an about-face in the law, which directly alters substantial property rights, to parties who are completely incapable of complying with the dictates of the new law."⁴³ Therefore, the supreme court held that retroactively imposing a spouse's right to reimbursement of separate property used to acquire community property prior to January 1, 1984 would unconstitutionally deprive the other spouse of a vested property interest without due process of law.⁴⁴

III. IMPACT AND CONCLUSION

Classification of property interests in community assets upon dissolution of the community has been fertile territory for disagreement and dispute.⁴⁵ *Heikes* is the most recent judicial statement in the dialogue regarding separate property interests in community property.

Before 1965, ownership interests stated in the deed were presumed to control the classification of the parties' property rights.⁴⁶ Evidence, including oral agreements, that the parties understood or otherwise agreed to a different title than was expressed in the deed, could rebut the presumption.⁴⁷ In 1965, the Legislature amended the statutory scheme to provide that a single family residence acquired in joint tenancy by a husband and wife during marriage was presumed to be community property for purposes of property division.⁴⁸ Through the Family Law Act of 1969, the legislature recodified this presumption in section 5110 of the Civil Code.⁴⁹

42. *Id.* at 1224-25, 899 P.2d at 1357-58, 44 Cal. Rptr. 2d at 163-64.

43. *Id.* at 1224, 899 P.2d at 1357, 44 Cal. Rptr. 2d at 163 (quoting *Fabian*, 41 Cal. 3d at 450, 715 P.2d at 259, 224 Cal. Rptr. at 339).

44. *Id.* at 1225, 899 P.2d at 1358, 44 Cal. Rptr. 2d at 164.

45. See Arthur G. Woodward, Comment, *The 1986 Amendments to California Civil Code Sections 4800.1 and 4800.2: Irreconcilable Differences Between the Legislature and the Court?*, 20 PAC. L.J. 97 (1988) (tracing the background from which §§ 4800.1 and 4800.2 arose).

46. *Heikes*, 10 Cal. 4th at 1215, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157 (quoting *In re Marriage of Lucas*, 27 Cal. 3d 808, 813, 614 P.2d 285, 287, 166 Cal. Rptr. 853, 856 (1980)).

47. *Id.*; *Lucas*, 27 Cal. 3d at 813, 614 P.2d at 287, 166 Cal. Rptr. at 856.

48. *Heikes*, 10 Cal. 4th at 1216, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157 (citing 1965 Cal. Stat. 1710).

49. *Id.* (citing 1969 Cal. Stat. 1608).

In 1980, the California Supreme Court decided *Lucas* which held that all separate property contributions were presumed gifts and that a contrary agreement by the parties could rebut this presumption.⁵⁰

In response to *Lucas*, the Legislature enacted Civil Code sections 4800.1 and 4800.2 in 1983.⁵¹ Section 4800.1 expanded the presumption that a single family residence that the spouses acquire during marriage in joint tenancy is community property for purposes of property division.⁵² Specifically, section 4800.1 made the presumption applicable to all property acquired during the marriage in joint tenancy.⁵³ In addition, section 4800.1 provided that only a contrary statement in the deed or a written agreement of the parties could rebut this presumption.⁵⁴

In 1985 and 1986, the California Supreme Court unanimously concluded, in two separate decisions, that retroactive application of sections 4800.1 and 4800.2 was unconstitutional.⁵⁵

Less than a month after the court's pronouncement in *Fabian*, the Governor issued emergency legislation purporting to make sections 4800.1 and 4800.2 applicable to all proceedings not yet final on January 1, 1984, regardless of when the community acquired the property.⁵⁶

The unanimous opinion in *Heikes* once again established that the Supreme Court of California is unwilling to apply these statutes retroactively, despite the fact that the Legislature labeled the state interests "compelling." As a result, January 1, 1984 becomes a pivotal date. Courts presume that community property acquired in joint tenancy before January 1, 1984 and traceable to separate property is a gift. Oral or written evidence of a contrary agreement by the spouses can rebut this presumption. In contrast, courts presume that community property acquired in

50. *Lucas*, 27 Cal. 3d 808, 815-16, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857-58 (1980).

51. *Heikes*, 10 Cal. 4th at 1216, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157 (citing 1983 Cal. Stat. 1539); CAL. CIV. CODE §§ 4800.1, 4800.2 (West 1983 & Supp. 1995) (superseded by CAL. FAM. CODE § 2581 (West 1994)).

52. See *Heikes*, 10 Cal. 4th at 1216, 899 P.2d at 1351, 44 Cal. Rptr. 2d at 157.

53. CAL. CIV. CODE § 4800.1 (West 1983 & Supp. 1995) (superseded by CAL. FAM. CODE § 2581 (West 1994)).

54. *Id.*

55. *In re Marriage of Buol*, 39 Cal. 3d 751, 763-64, 705 P.2d 354, 362, 218 Cal. Rptr. 31, 39 (1985) (holding that retroactive application of § 4800.1 is unconstitutional); *In re Marriage of Fabian*, 41 Cal. 3d 440, 451, 715 P.2d 253, 260, 224 Cal. Rptr. 333, 340 (1986) (holding that retroactive application of § 4800.2 is unconstitutional).

56. CAL. FAM. CODE § 2580(c) (West 1994) (formerly CAL. CIV. CODE § 4800.1(a)(3)).

joint tenancy after January 1, 1984 and traceable to separate property is subject to the right of reimbursement absent a written agreement to the contrary.

KIRK ALAN WALTON

IV. CONSTITUTIONAL LAW

- A. *Damages to property caused by police officers while enforcing criminal laws must be recovered under the Tort Claims Act rather than inverse condemnation: Customer Co. v. City of Sacramento.*

I. INTRODUCTION

In *Customer Co. v. City of Sacramento*,¹ the California Supreme Court considered whether an inverse condemnation action could be brought against governmental entities whose police officers severely damaged private property in the course of enforcing criminal laws.² The superior

1. 10 Cal. 4th 368, 895 P.2d 900, 41 Cal. Rptr. 2d 658 (1995), *cert. denied*, 116 S. Ct. 920 (1996). Justice George delivered the opinion of the court, in which Chief Justice Lucas and Justices Kennard and Werdegar joined. *Id.* at 370-93, 895 P.2d at 901-17, 41 Cal. Rptr. 2d at 660-75. Justice Kennard also filed a separate concurring opinion. *Id.* at 393-404, 895 P.2d at 917-24, 41 Cal. Rptr. 2d at 675-82 (Kennard, J., concurring). Justice Baxter wrote a dissenting opinion in which Justices Mosk and Arabian joined. *Id.* at 404-23, 895 Cal. Rptr. 2d at 924-36, 41 Cal. Rptr. 2d at 682-95 (Baxter, J., dissenting).

2. *Id.* at 371, 895 P.2d at 901, 41 Cal. Rptr. 2d at 660. On June 22, 1987, undercover police officers followed Christopher Nash and his girlfriend in their stolen automobile into a convenience store parking lot. *Id.* at 372, 895 P.2d at 902, 41 Cal. Rptr. 2d at 660. The officers knew that Nash, who had warrants for a series of armed robberies, "always" carried a semiautomatic pistol, and that he preferred to "shoot it out with police officers" rather than be apprehended. *Id.* Without informing the dispatcher that their pursuit was covert, the officers requested assistance. *Id.* Soon thereafter, four street-clothed officers driving unmarked vehicles joined the original officers in the parking lot. Two marked vehicles—one with its emergency lights flashing—entered the parking lot in response to the assistance request. *Id.* at 372, 895 P.2d at 902, 41 Cal. Rptr. 2d at 661. Nash tried to escape through a rear exit, but retreated into the store when he realized the building was surrounded. *Id.* The store was vacated, and Nash's girlfriend confirmed that only Nash remained inside. *Id.* at 373, 895 P.2d at 902, 41 Cal. Rptr. 2d at 661. She informed the officers that there were two firearms in the vehicle, but assured the police that Nash was not armed. *Id.* The officers seized a handgun and a shotgun from the stolen vehicle. *Id.* After police evacuated the vicinity, paramedics, the fire department, additional police, and a SWAT team were summoned. *Id.* at 373, 895 P.2d at 903, 41 Cal. Rptr. 2d at 661. Three hours after Nash entered the store and after numerous attempts to persuade him to surrender had failed, gas masks were distributed and the store's utilities were shut off. *Id.* The officers then fired 12 or 13 canisters of tear gas into the store over a course of 30 minutes, and mace was sprayed into its ventilation system. *Id.* at 375, 895 P.2d at 904, 41 Cal. Rptr. 2d at 662. Nearly five hours after he was first ordered to leave the building, Nash was discovered "burrowed under insulation" and "unable to offer resistance." *Id.* The convenience store sustained approximately \$275,000 in damages, including \$90,000 in contaminated inventory and \$18,000 in building repairs. *Id.* It cost nearly \$150,000 to dispose of the hazardous byproduct from the tear gas. *Id.*

court had granted each of the governments' motions for summary judgment³ and the California Court of Appeal affirmed.⁴ Because Customer expressly waived its right to relief under the Tort Claims Act⁵ and did not base its claim under the Takings Clause of the Fifth Amendment to the United States Constitution,⁶ the California Supreme Court granted review to consider its claim solely under the "just compensation" clause of the California Constitution.⁷ In a 4-3 decision, the court held that re-

Customer Co. (Customer) sued the City of Sacramento and Sacramento County alleging negligence and inverse condemnation. *Id.* at 371, 895 P.2d at 901-02, 41 Cal. Rptr. 2d at 659.

3. *Id.* at 371-72, 895 P.2d at 902, 41 Cal. Rptr. 2d at 660. The superior court granted the governments' motions for summary judgment on the negligence claim on grounds of immunity pursuant to Government Code § 820. *Id.* at 371, 895 P.2d at 902, 41 Cal. Rptr. 2d at 660. The court granted the governments' motion for summary judgment with respect to the inverse condemnation claim on the ground that the officers' actions were legitimate exercises of the sovereign's police power. *Id.* at 371-72, 895 P.2d at 902, 41 Cal. Rptr. 2d at 660.

4. Customer Co. v. City of Sacramento, 23 Cal. Rptr. 2d 154 (1993), *aff'd*, 10 Cal. 4th 368, 895 P.2d 900, 41 Cal. Rptr. 2d 658 (1995), *cert. denied*, 116 S. Ct. 920 (1996).

5. *Customer Co.*, 10 Cal. 4th at 372, 895 P.2d at 901, 41 Cal. Rptr. 2d at 660. In its supplemental brief, Customer stated that it had already expended \$360,000 in attorneys' fees, and it was not willing to incur further costs to litigate another claim. *Id.* at 392, 895 P.2d at 915, 41 Cal. Rptr. 2d at 674. Furthermore, Customer acknowledged that it would not be awarded attorneys' fees under the Tort Claims Act even if it were to prevail. *Id.*; see CAL. GOV'T CODE § 810, *et seq.* (West 1989 & Supp. 1995) (stating provisions of the Tort Claims Act); see also *infra* notes 27-33 and accompanying text (comparing remedies available under the Tort Claims Act and under an inverse condemnation claim).

6. *Customer Co.*, 10 Cal. 4th at 376 n.2, 895 P.2d at 905 n.2, 41 Cal. Rptr. 2d at 663 n.2. The Fifth Amendment states, in pertinent part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (enumerating the "rough proportionality" prong to the test for unconstitutional conditions in a takings context); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020-31 (1992) (holding that a prohibition on home construction on beachfront property constituted a *per se* taking, and reviewing the Court's history regarding realty and the police power of government); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that conditioning a building permit upon the conveyance of a beach easement constitutes a taking). See generally *Chauncey L. Walker & Scott D. Avitabile*, Symposium, *Regulatory Takings, Historic Preservation and Property Rights Since Penn Central: The Move Toward Greater Protection*, 6 FORDHAM ENVTL. L.J. 819 (1995) (charting the Court's recent approach that is more protective of property ownership rights); Paul F. Haffner, Note, *Regulatory Takings—A New Categorical Rule: Lucas v. South Carolina Coastal Council*, 61 U. CIN. L. REV. 1035 (1993).

7. *Customer Co.*, 10 Cal. 4th at 372, 895 P.2d at 902, 41 Cal. Rptr. 2d at 660.

covery under inverse condemnation principles was improper,⁸ that the city's actions fell within the emergency exception to the just compensation clause even if an inverse condemnation action could be brought,⁹ and that public entities could only be held liable in a negligence action filed pursuant to the Tort Claims Act.¹⁰

II. TREATMENT

A. *Majority Opinion*

The court examined whether public entities could be held liable under an inverse condemnation theory when their employees caused substantial damage to commercial property while enforcing criminal laws.¹¹ The court was split over whether this question was one of first impression in California.¹² In its opinion, the majority determined that Customer could not prevail on an inverse condemnation claim and reasoned that the Tort Claims Act would be a more appropriate remedy.¹³

Article I, section 19 of the California Constitution states:

Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

CAL. CONST. art. I, § 19. See generally Sharon L. Browne, California Practicum, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 PEPP. L. REV. 99 (1994) (tracing California's application of takings clause principles); 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 918 (9th ed. 1988 & Supp. 1995) (discussing eminent domain generally); 29 CAL. JUR. 3D *Eminent Domain* § 1 (1988 & Supp. 1995) (discussing same).

8. *Customer Co.*, 10 Cal. 4th at 376-83, 895 P.2d at 905-09, 41 Cal. Rptr. 2d at 663-68; see *infra* notes 14-21 and accompanying text (explaining inverse condemnation claim).

9. *Customer Co.*, 10 Cal. 4th at 383-89, 895 P.2d at 909-14, 41 Cal. Rptr. 2d at 668-72; see *infra* notes 22-26 and accompanying text (discussing emergency exception to the just compensation clause).

10. *Customer Co.*, 10 Cal. 4th at 389-93, 895 P.2d at 914-16, 41 Cal. Rptr. 2d at 672-75; see *infra* notes 27-32 and accompanying text (discussing Tort Claims Act).

11. *Customer Co.*, 10 Cal. 4th at 371, 895 P.2d at 901, 41 Cal. Rptr. 2d at 660.

12. Compare *id.* at 383 n.7, 895 P.2d 909 n.7, 41 Cal. Rptr. 2d at 667 n.7 ("[Our] authorities make it clear that [the just compensation clause] has been interpreted, consistently and repeatedly over the past century, not to apply to property damage caused by [this] type of governmental activity.") with *id.* at 406, 895 P.2d at 925, 41 Cal. Rptr. 2d at 683 (Baxter, J., dissenting) (question presented "is [one] of first impression in this state and unsettled elsewhere," because "decisions from other jurisdictions contain no consistent reasoning or result").

13. *Id.* at 375-93, 895 P.2d at 904-17, 41 Cal. Rptr. 2d at 663-75.

1. Propriety of an Inverse Condemnation Claim

Writing for the majority, Justice George began by stating that the just compensation clause exists to guarantee prompt compensation to property owners when the government exercises its power under eminent domain.¹⁴ Although the court acknowledged that the just compensation clause had been broadly construed in the past, it emphasized that the language of the clause had never been stretched to require the government to compensate private owners when its employees damaged property while engaged in law enforcement.¹⁵ The court criticized Customer's literal reading of the just compensation clause as being "overly simplistic"¹⁶ and declared that Customer's construction "pressed [the clause] to its grammatical extreme."¹⁷ The court reasoned that the clause had never been extended to encompass personal injuries because tort law was traditionally and consistently regulated by the legislature.¹⁸ The court ruled that the phrase "or damaged" in the just compensation clause was added to emphasize that physical invasion of property was not required if damage was caused by the construction of public improvements.¹⁹ Additionally, the phrase was not intended to extend gov-

14. *Id.* at 376-77, 895 P.2d at 905, 41 Cal. Rptr. 2d at 663. "Eminent domain is the right of the people or government to take private property for public use." *Id.* at 377 n.3, 895 P.2d at 905 n.3, 41 Cal. Rptr. 2d at 663 n.3 (quoting 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 918 (9th ed. 1988 & Supp. 1995)). The majority noted that eminent domain and inverse condemnation share the same substantive principles, but that their names differ depending upon who brings the action. *Id.* at 377 nn.3-4, 895 P.2d at 905 nn.3-4, 41 Cal. Rptr. 2d at 663 nn.3-4 (stating that eminent domain is brought by the state or on behalf of the people; inverse condemnation is brought by property owners after a "taking" by the government).

15. *Id.* at 377-78, 895 P.2d at 905-06, 41 Cal. Rptr. 2d at 663-64.

16. *Id.* at 378, 895 P.2d at 906, 41 Cal. Rptr. 2d at 664. Customer contended that their property was "damaged for public use" and that their claim fell within the parameters of the just compensation clause. *Id.*

17. *Id.* (quoting *Tyson & Brother v. Banton*, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting)).

18. *Id.* The majority added that the clause had only been extended to encompass takings of property for public use or damage to private property when constructing public works. *Id.*

19. *Id.* at 379, 895 P.2d at 906-07, 41 Cal. Rptr. 2d at 665 (citing 2 & 2A NICHOLS ON EMINENT DOMAIN, §§ 6.22-26 (3d ed. 1990) (reviewing origin of "or damaged" clauses in various state constitutional provisions)). See *Reardon v. San Francisco*, 66 Cal. 492, 501, 6 P. 317, 323 (1885) (finding liability where sewer construction destroyed the foundation of private property and reasoning "[i]f the word 'damaged' only embraced physical invasions of property, the right secured by this word would add nothing to the guaranty as it formerly stood.").

ernmental liability beyond the narrow parameters of eminent domain.²⁰ The majority held that the damage caused by police to Customer's store was not related to any kind of "public improvement" or "public work" and that it could be more properly compensable under traditional tort theories.²¹

2. The "Emergency Exception" to the Just Compensation Clause

Assuming that the "or damaged" phrase permitted Customer to recover under a claim of inverse condemnation, the court stated that actions by law enforcement agents while enforcing criminal laws fell within the "emergency exception" to the just compensation clause.²² The majority stated that the threshold query in every case is whether the acts giving rise to a claim were undertaken within the "legitimate purview and scope of the police power."²³ If the exercise of police power is legitimate, then

20. *Customer Co.*, 10 Cal. 4th at 379, 895 P.2d at 906, 41 Cal. Rptr. 2d at 665. The majority cited several cases to support its ruling that inverse condemnation actions are improper under the "or damaged" phrase of the just compensation clause unless the damage is somehow caused by the construction of a public improvement. *Id.* at 380-83, 895 P.2d at 907-09, 41 Cal. Rptr. 2d at 665-67. See *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (stating principle); *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P.2d 1 (1955) (holding that damages suffered by property owners caused by floods from public drainage system could not be recovered under inverse condemnation claim); *Miller v. City of Palo Alto*, 208 Cal. 74, 280 P. 108 (1929) (holding that city's negligent destruction of property during garbage incineration did not constitute a taking for public use); *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622, 163 P. 1024 (1917) (stating that damages resulting from the state's legitimate exercise of its police power does not give rise to a cause of action for inverse condemnation); *Brown v. San Francisco Bd. of Supervisors*, 124 Cal. 274, 57 P. 82 (1899) (finding no liability when property value diminished by changes made to city street).

21. *Customer Co.*, 10 Cal. 4th at 383, 895 P.2d at 909, 41 Cal. Rptr. 2d at 667.

22. *Id.* at 383, 895 P.2d at 909, 41 Cal. Rptr. 2d at 668. For more discussion about the police power defense to inverse condemnation recovery in California, see generally 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 950 (9th ed. 1988) (discussing exercise of police power); 29 CAL. JUR. 3D *Eminent Domain* § 325 (1987 & Supp. 1995) (discussing same). For a general discussion of the police power defense to inverse condemnation, see Scott R. Ferguson, Note, *The Evolution of the "Nuisance Exception" to the Just Compensation Clause: From Myth to Reality*, 45 HASTINGS L.J. 1539 (1994) (criticizing the categorical application of the nuisance exception and suggesting a balancing approach); see also 26 AM. JUR. 2D *Eminent Domain* § 41 (1966 & Supp. 1993); 29A C.J.S. *Eminent Domain* § 8 (1992 & Supp. 1995). For a distinction between the police power and other powers of government, see 26 AM. JUR. 2D *Eminent Domain* § 10 (1966 & Supp. 1995).

23. *Customer Co.*, 10 Cal. 4th at 383, 895 P.2d at 910, 41 Cal. Rptr. 2d at 668 (quoting *Gray*, 174 Cal. at 639, 163 P. at 1031). The court listed numerous examples of acts undertaken within this legitimate purview, including the demolition of buildings to prevent the spread of a fire and the destruction of vegetation or live-

the particular loss in each case becomes irrelevant because the owner would suffer a damage without injury.²⁴ The majority reasoned that permitting Customer to recover on a constitutional claim would have the future effect of discouraging police officers "from acting swiftly and effectively to protect public safety in emergency situations."²⁵ The court concluded its "emergency exception" analysis by declining to follow "poorly reasoned and internally inconsistent" decisions from other jurisdictions.²⁶

stock to protect the public welfare. *Id.* (quoting *Gray*, 174 Cal. at 638-39, 163 P. at 1031).

24. *Id.* (quoting *Gray*, 174 Cal. at 638-39, 163 P. at 1031). "[T]he injury inflicted [by government in the legitimate exercise of its police power] is without damage, and the damage without injury. . . . The right of the owner of the property, who has sustained such damage, must yield to the promotion and advancement of the public good." *Id.* at 381 n.6, 895 P.2d at 908 n.6, 41 Cal. Rptr. 2d at 666 n.6 (quoting *Reardon v. San Francisco*, 66 Cal. 492, 504, 6 P. 317, 325 (1885)).

The majority discussed numerous cases stating the proposition that the rights of private owners were deemed subservient to the public's rights during emergencies. *Id.* at 384, 895 P.2d at 910, 41 Cal. Rptr. 2d at 668. See *United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (holding that there was no taking when an offshore oil facility was blown up prior to invasion of the Philippine Islands because it deprived the Japanese of a valuable weapon); *United States v. Pacific R.R.*, 120 U.S. 227 (1887) (holding that there was no taking where bridges were destroyed by Union soldiers during Civil War because the destruction prevented a Confederate advance); *Holtz v. Superior Court*, 3 Cal. 3d 296, 415 P.2d 441, 90 Cal. Rptr. 345 (1970) (stating the proposition but holding that subway evacuation is not an emergency); *House v. Los Angeles County Flood Control Dist.*, 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944) ("[P]rivate interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety.").

25. *Customer Co.*, 10 Cal. 4th at 384-85, 895 P.2d at 910-11, 41 Cal. Rptr. 2d at 669. The majority failed to explain why recovery under the Tort Claims Act would not have a similar inhibiting effect on the police. *Id.* at 391, 895 P.2d at 915, 41 Cal. Rptr. 2d at 673.

26. *Id.* at 388, 895 P.2d at 912-13, 41 Cal. Rptr. 2d at 671. Customer relied on *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991) (finding liability under an inverse condemnation analysis when police caused \$71,000 in damages by firing tear gas and "flashbang" grenades into plaintiff's home) and *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980) (finding liability when police set fire to plaintiff's home in order to flush out escaped prisoners who sought refuge there). The majority criticized these cases because *Wegner* relied heavily upon *Steele*, which in turn cited no authority other than a bare reading of Texas' just compensation clause, and which made inconsistent findings regarding the emergency exception. *Customer Co.*, 10 Cal. 4th at 386-88, 895 P.2d at 912-13, 41 Cal. Rptr. 2d at 670-71.

3. Remedial Anomalies and California's Tort Claims Act

While the majority recognized that innocent individuals should be compensated for injury inflicted by the government, it emphasized that inverse condemnation was "not designed for such a purpose."²⁷ The majority emphasized that the remedies available under inverse condemnation actions are "unusually generous" in many respects.²⁸ Unlike provisions of the Tort Claims Act, prevailing plaintiffs are statutorily entitled to attorneys' fees, appraisal fees, engineering costs, and prejudgment interest which accrues from the time of injury.²⁹ The majority reasoned that an inverse condemnation action would result not only in the property owner being able to "trump" governmental immunity provisions in the Tort Claims Act,³⁰ but also could result in monetary awards far greater than the original property damage.³¹ Because the Tort Claims Act served

27. *Customer Co.*, 10 Cal. 4th at 389, 895 P.2d at 913, 41 Cal. Rptr. 2d at 672. Specifically, the court expressed its inability to justify Customer's approach because the result would be that *people* injured by law enforcement would have no constitutional remedy while *property* would gain full protection. *Id.* at 389, 895 P.2d at 914, 41 Cal. Rptr. 2d at 672. At oral argument, Customer conceded that if one of the store's employees had sustained injury by tear gas, he or she could not recover under inverse condemnation principles. *Id.*

28. *Id.* at 390, 895 P.2d at 914, 41 Cal. Rptr. 2d at 672.

29. *Id.* at 390, 895 P.2d at 914, 41 Cal. Rptr. 2d at 672-73. Civil Procedure Code § 1036 states:

[I]n any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, or the attorney representing the public entity who effects a settlement of such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

CAL. CIV. PROC. CODE § 1036 (West 1980 & Supp. 1996). "[I]nterest must be computed from the date the taking or damaging was sustained in order to fulfill the constitutional mandate for just compensation." *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal. 3d 648, 657, 552 P.2d 430, 437, 131 Cal. Rptr. 646, 653 (1976).

30. *Customer Co.*, 10 Cal. 4th at 391, 895 P.2d at 915, 41 Cal. Rptr. 2d at 673-74. The majority suggested that the government's conduct might have been protected under Government Code § 820.2 as well. *Id.* at 392, 895 P.2d at 915, 41 Cal. Rptr. 2d at 674. However, because Customer did not contest the lower courts' findings that the police officers were immune under the Act, and because Customer expressly waived its right to recovery under the Act in its supplemental brief, the supreme court did not decide whether the officers were actually protected by sovereign immunity. *Id.* at 391-93, 895 P.2d at 915-16, 41 Cal. Rptr. 2d at 674.

31. *Id.* at 391, 895 P.2d at 915, 41 Cal. Rptr. 2d at 673. The court pointed out that Customer's \$360,000 in attorneys' fees and \$186,784 in prejudgment interest "far eclipse[d]" their actual damages of \$275,000. *Id.*

as a more appropriate means to a remedy, the California Supreme Court found the superior court's grant of summary judgment was proper and affirmed the court of appeal.³²

B. Justice Kennard's Concurring Opinion

In her concurrence, Justice Kennard stated that even though the majority showed that the words "taken or damaged" have never encompassed property destroyed by police activities,³³ the majority merely added confusion to "a field of doctrinal incoherence littered with differing and inconsistent rationales."³⁴ She questioned why the court focused on the words "take" and "damage" instead of "use"³⁵ and opined that the majority obscured what should have been a clear case³⁶ by neglecting one of the clause's fundamental requirements.³⁷ Citing several cases referred to by the majority, Justice Kennard illustrated that the government did not "use" Customer's property within the meaning of the just compensation clause because the destroyed property was not put to any "utility or advantage."³⁸ She concluded by emphasizing that the Tort

32. *Id.* at 393, 895 P.2d at 916-17, 41 Cal. Rptr. 2d at 675.

33. *Id.* at 394, 895 P.2d at 917, 41 Cal. Rptr. 2d at 675 (Kennard, J., concurring).

34. *Id.* (Kennard, J., concurring) (citing Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077 (1993) ("[O]nly the right of privacy can compete seriously with takings law for the doctrine-in-most-need-of-a-principle prize.")).

35. *Id.* at 396, 895 P.2d at 918, 41 Cal. Rptr. 2d at 676 (Kennard, J., concurring).

36. *Id.* (Kennard, J., concurring).

37. *Id.* at 396, 895 P.2d at 918, 41 Cal. Rptr. 2d at 676-77 (Kennard, J., concurring). Justice Kennard explained that the majority's reading of the just compensation clause rendered it a "facially open-ended right to compensation for any government action that affects the value or use of private property" while her construction constituted a "self-limiting constitutional provision." *Id.* at 399-400, 895 P.2d at 921, 41 Cal. Rptr. 2d at 679 (Kennard, J., concurring).

38. *Id.* at 397-98, 895 P.2d at 919, 41 Cal. Rptr. 2d at 677-78 (Kennard, J., concurring) (quoting *Miller v. City of Palo Alto*, 208 Cal. 74, 77, 280 P. 108, 109 (1929)). Justice Kennard reasoned that Customer's windows, doors, ceiling, and inventory were not "used" by the government because the police "did not exploit any productive attribute or capacity of the property that they damaged or destroyed." *Id.* at 398, 895 P.2d at 920, 41 Cal. Rptr. 2d at 678 (Kennard, J., concurring); see *United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (holding that offshore oil facility destroyed prior to Japanese invasion of Philippine Islands was not a taking because it was not appropriated for subsequent use); *Miller v. Schoene*, 276 U.S. 272 (1928) (stating that destruction of cedar trees which were spreading disease to nearby apple orchards did not constitute a taking because state did not put trees to any use); *Miller*, 208 Cal. at 77, 280 P. at 109 (1929) (ruling that city's negligent destruction of home during garbage incineration did not constitute a taking because home was not put to any "utility or

Claims Act is not the only means of recovering property damages from the government.³⁹

C. Justice Baxter's Dissenting Opinion

In his dissent, Justice Baxter stated that both the plain language and the public purpose of article I, section 19 mandated just compensation to Customer.⁴⁰ Justice Baxter criticized the majority for parroting “truism[s]” instead of applying constitutional principles to novel questions of law.⁴¹ He found no support in any of the majority’s cited cases for the “outmoded view” that the just compensation clause compensated only damages that resulted from public improvements.⁴² Justice Baxter reasoned that the clause should be guided by fairness to landowners who

advantage”).

39. *Customer Co.*, 10 Cal. 4th at 402, 895 P.2d at 922-23, 41 Cal. Rptr. 2d at 681 (Kennard, J., concurring). Justice Kennard explained that federal civil rights statutes provided a statutory remedy for the “deprivation of any rights, privileges, or immunities secured by the [United States] Constitution.” *Id.* (Kennard, J., concurring) (quoting 42 U.S.C. § 1983 (1988 & Supp. 1995)). Justice Kennard reasoned that police activities that unreasonably damage or destroy property could constitute a seizure under the Fourth Amendment. *Id.* at 403, 895 P.2d at 923, 41 Cal. Rptr. at 681-82 (Kennard, J., concurring); see *Soldal v. Cook County*, 506 U.S. 56, (1992) (holding that mobile home owner may bring a § 1983 claim when home was damaged in the process of towing because it had been seized within the meaning of the Fourth Amendment). Justice Kennard also pointed out that attorneys’ fees would be awarded to the prevailing party under such a claim pursuant to 42 U.S.C. § 1988. *Customer Co.*, 10 Cal. 4th at 402 n.5, 895 P.2d at 922 n.5, 41 Cal. Rptr. 2d at 681 n.5 (Kennard, J., concurring).

40. *Id.* at 406-17, 895 P.2d at 924-32, 41 Cal. Rptr. 2d at 682-91 (Baxter, J., dissenting).

41. *Id.* at 407, 895 P.2d at 926, 41 Cal. Rptr. 2d at 684 (Baxter, J., dissenting). While he recognized that the just compensation clause “obviously appl[ie]d to ‘traditional’ exercises of eminent domain,” Justice Baxter stated that nothing prevented a reading of the clause which would compensate property owners who suffered nontraditional losses. *Id.* (Baxter, J., dissenting).

42. *Id.* at 408, 895 P.2d at 926, 41 Cal. Rptr. 2d at 684-85 (Baxter, J., dissenting). Justice Baxter stated that the plain language of the words “take,” “damage,” and “public use” should apply without regard to the government’s purpose or the authority the government uses to justify its actions. *Id.* at 406, 895 P.2d at 925, 41 Cal. Rptr. 2d at 684 (Baxter, J., dissenting).

are forced to shoulder public hardships⁴³ and not by the “arbitrary categories and labels” employed by the majority.⁴⁴

Justice Baxter criticized Justice Kennard’s concurrence for relying on “[i]solated snippets of caselaw” to determine that the police officers’ actions did not constitute a public use of Customer’s property.⁴⁵ Justice Baxter referred to several cases to support his conclusion that property is taken for public use whenever it is damaged as a “consequence of deliberate government action in furtherance of public purposes.”⁴⁶

Justice Baxter also assailed the majority’s application of the “emergency exception.”⁴⁷ He concluded that it was illogical for the government to escape liability on a necessity rationale when the very emergency acted upon was the “direct result of the time, place, and manner in

43. *Id.* at 409, 895 P.2d at 927, 41 Cal. Rptr. 2d at 685 (Baxter, J., dissenting). The just compensation clause should prevent “[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Id.* (Baxter, J., dissenting) (quoting *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318-19 (1987)); see Daniel R. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. REV. 3 (1966) (discussing the socialization-of-loss objective of inverse condemnation proceedings).

44. *Customer Co.*, 10 Cal. 4th at 408, 895 P.2d at 926, 41 Cal. Rptr. 2d at 685 (Baxter, J., dissenting). Justice Baxter explained that, unlike the majority, the United States Supreme Court has avoided delineated rules to determine when government action constitutes a taking. *Id.* at 410, 895 P.2d at 928, 41 Cal. Rptr. 2d at 686 (Baxter, J., dissenting) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

45. *Id.* at 415 n.7, 895 P.2d at 931 n.7, 41 Cal. Rptr. 2d at 689 n.7 (Baxter, J., dissenting).

46. *Id.* (Baxter, J., dissenting). See *Locklin v. City of Lafayette*, 7 Cal. 4th 327, 867 P.2d 724, 27 Cal. Rptr. 2d 613 (1994) (holding that land flooded by public improvements entitled landowner to compensation); *Holtz v. Superior Court*, 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970) (holding that property undermined by excavation for public transportation was actionable under inverse condemnation); *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (holding county liable under inverse condemnation for landslide caused by road construction); *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P.2d 1 (1955) (permitting inverse condemnation action for property flooded by public drainage system); *Rose v. City of Coalinga*, 190 Cal. App. 3d 1627, 236 Cal. Rptr. 124 (1987) (holding city responsible under inverse condemnation for demolishing an unsafe building for public safety reasons absent an emergency).

Justice Baxter reasoned that when police tactics result in physical invasion or damage to land, a public use logically occurs because damage is being inflicted on behalf of the public’s well-being. *Customer Co.*, 10 Cal. 4th at 414-15, 895 P.2d at 931, 41 Cal. Rptr. 2d at 689 (Baxter, J., dissenting).

47. *Id.* 10 Cal. 4th at 404, 895 P.2d at 924, 41 Cal. Rptr. 2d at 682.

which [the police] themselves decided to achieve the capture of a public enemy."⁴⁸

III. IMPACT AND CONCLUSION

In the wake of a "tear gas barrage"⁴⁹ lies a decision that leaves both private and commercial California landowners guessing as to how thick or how thin their bundle of property rights remains.⁵⁰ While the United States Supreme Court has gone to great lengths in order to protect individual landowners in recent years,⁵¹ *Customer Co.* likely keeps California a leader among those states that are "most hostile to private ownership rights."⁵² To be sure, the court's decision limits the possible theories of recovery for landowners whose property is damaged by the negligence of police officers or other public employees acting on behalf of the public welfare.⁵³ The court's decision will likely have no inhibitive effect upon the conduct of police officers or the means by which they choose to enforce the law on private land.⁵⁴ Although the court addressed the question whether police officers who destroy property while enforcing

48. *Id.* at 421, 895 P.2d at 935, 41 Cal. Rptr. 2d at 694 (Baxter, J., dissenting). Justice Baxter stated that each of the emergencies in the cases cited by the majority were distinguishable from *Customer's* because the existence of the emergency was "external" rather than one "of the government's own making." *Id.* at 421, 895 P.2d at 935, 41 Cal. Rptr. 2d at 693 (Baxter, J., dissenting) (emphasis omitted). "[W]hen [the police power] passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation." *Id.* at 411 n.3, 895 P.2d at 928 n.3, 41 Cal. Rptr. 2d 686 n.3 (Baxter, J., dissenting) (alteration in original) (quoting *House v. Los Angeles County Flood Control Dist.*, 25 Cal. 2d 384, 388, 153 P.2d 950, 952 (1944)).

49. *Id.* at 405, 895 P.2d at 924, 41 Cal. Rptr. 2d at 682 (Baxter, J., dissenting).

50. As Justice Kennard observed, the majority did a better job confusing the principles of inverse condemnation than clarifying them. *Id.* at 394, 895 P.2d at 917, 41 Cal. Rptr. 2d at 675 (Kennard, J., concurring).

51. See *supra* note 6 and accompanying text. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), the High Court reversed decisions by the California Supreme Court regarding the rights of landowners.

52. Browne, *supra* note 7, at 101 n.15 (citing work labeling California as the "near unanimous' choice of land use specialists as the state least likely to protect owners constitutional rights"); see also *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994) (holding condominium association's restriction against pets enforceable against individual condominium owner); Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1 (1995) (criticizing the court's decision in *Nahrstedt* and proposing legislation to protect the rights of homeowners).

53. *Customer Co.*, 10 Cal. 4th at 389-93, 895 P.2d at 914-16, 41 Cal. Rptr. 2d at 672-75; see *supra* notes 27-32 and accompanying text.

54. See *Customer Co.*, 10 Cal. 4th at 385, 895 P.2d at 911, 41 Cal. Rptr. 2d at 669.

the law are protected by statutory immunity,⁵⁵ it did not decide the issue or provide substantial guidance to lower courts.⁵⁶ Thus, whether police officers can *ever* be liable to landowners for negligently damaging private property is an issue that awaits resolution.

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55. See *supra* note 30 and accompanying text (discussing statutory immunity).

56. *Customer Co.*, 10 Cal. 4th at 385, 895 P.2d at 911, 41 Cal. Rptr. 2d at 669. While the court observed that government officials are immunized from the results of their "basic policy decisions" under Government Code § 820.2, it recognized that it had not resolved whether strategies implemented while effectuating an arrest fit within such a protected purview. *Id.* at 392, 895 P.2d at 916, 41 Cal. Rptr. 2d at 674.

- B. *Judicial reformation of unconstitutional statutes is permissible; however, reformation should only be undertaken if it can closely effectuate policy judgments clearly articulated by the legislative body: Kopp v. Fair Political Practices Commission.*

I. INTRODUCTION

In *Kopp v. Fair Political Practices Commission*,¹ the California Supreme Court considered whether judicial reformation was proper in a case involving a statute limiting campaign contributions which was declared invalid under the United States Constitution.² In reaching its deci-

1. 11 Cal. 4th 607, 905 P.2d 1248, 47 Cal. Rptr. 2d 108 (1995). Chief Justice Lucas wrote the majority opinion. *Id.* at 613-71, 905 P.2d at 1250-91, 47 Cal. Rptr. 2d at 110-50. Justice Mosk wrote a concurring opinion. *Id.* at 671-75, 905 P.2d at 1291-93, 47 Cal. Rptr. 2d at 150-52 (Mosk, J., concurring). Justice Werdegar wrote a separate concurring opinion. *Id.* at 675-78, 905 P.2d at 1293-95, 47 Cal. Rptr. 2d at 152-55 (Werdegar, J., concurring). Justice Kennard concurred in the judgment. *Id.* at 678-85, 905 P.2d at 1295-300, 47 Cal. Rptr. 2d at 155-60 (Kennard, J., concurring). Justice Baxter concurred and wrote a separate opinion in which Justices Arabian and George joined. *Id.* at 685-93, 905 P.2d at 1300-05, 47 Cal. Rptr. 2d at 160-65 (Baxter, J., concurring).

2. *Id.* at 613-16, 905 P.2d at 1250-52, 47 Cal. Rptr. 2d at 110-12.

In 1988, citizens of California passed Proposition 73 in an attempt to reform state and local political campaign financing. *Id.* at 613, 905 P.2d at 1250, 47 Cal. Rptr. 2d at 110; *see* CAL. GOV'T CODE §§ 82041.5, 85100-85400, 89001 (West 1993 & Supp. 1996). The following five provisions of that measure were at issue in this case: Section 85301(a), which provides that:

No person shall make, and no candidate for elective office, or campaign treasurer, shall solicit or accept any contribution or loan which would cause the total amount contributed or loaned by that person to that candidate, including contributions or loans to all committees controlled by the candidate, to exceed one thousand dollars (\$1,000) in any fiscal year.

CAL. GOV'T CODE § 85301(a) (West 1993).

Section 85302, which provides that:

No person shall make and no political committee, broad based political committee, or political party shall solicit or accept, any contribution or loan from a person which would cause the total amount contributed or loaned by that person to the same political committee, broad based political committee, or political party to exceed two thousand five hundred dollars (\$2,500) in any fiscal year to make contributions to candidates for elective office.

CAL. GOV'T CODE § 85302 (West 1993).

Section 85303(a), which provides that:

No political committee shall make, and no candidate or campaign treasurer shall solicit or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee to that candidate for elective office or any committee controlled by that candidate to exceed two thousand five hundred dollars (\$2,500) in any fiscal year.

sion, the court addressed three central issues. First, the supreme court found that the "public interest" exception to the doctrine of *res judicata* allowed the court to consider previous federal court determinations.³

CAL. GOV'T CODE § 85303(a) (West 1993).
Section 85303(b), which provides that:

No broad based political committee or political party shall make and no candidate or campaign treasurer shall solicit or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee or political party to that candidate to exceed five thousand dollars (\$5,000) in any fiscal year.

CAL. GOV'T CODE § 85303(b) (West 1993).
Section 85304, which provides that: "[n]o candidate for elective office or committee controlled by that candidate or candidates for elective office shall transfer any contribution to any other candidate for elective office. Transfers of funds between candidates or their controlled committees are prohibited." CAL. GOV'T CODE § 85304 (West 1993); see 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 212-214 (9th ed. 1988 & Supp. 1995) (enumerating limits on campaign expenditures, funds, and practices); 28 CAL. JUR. 3D *Elections* §§ 102-104 (1986 & Supp. 1995) (discussing election campaign contributions and expenditures in general).

In 1990, State Senator Kopp and Assemblyman Johnson intervened in a lawsuit on behalf of defendant Fair Political Practices Commission. *Kopp*, 11 Cal. 4th at 614, 905 P.2d at 1251, 47 Cal. Rptr. 2d at 110. The federal district court enjoined enforcement of California Government Code §§ 85301-85304, ruling that the "fiscal year" measures in §§ 85301-85303 were unconstitutional because they unfairly discriminated in favor of incumbents. *Service Employees Int'l Union v. Fair Political Practices Comm.*, 747 F. Supp. 580, 590 (E.D. Cal. 1990), *aff'd*, 955 F.2d 1312 (9th Cir.). The court reasoned that most incumbents begin their campaigns for re-election as soon as they get elected, which is usually more than one year before their challengers begin campaigning. *Id.* at 588. In addition to other advantages benefitting incumbents, the statute provided at least one more "fiscal year" of fundraising for incumbents than their challengers. *Id.* The court found that because the statute impacted free speech and the electoral process, such a "fiscal year" provision failed strict scrutiny and was therefore unconstitutional. *Id.* at 587-90; see Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985) (discussing first amendment ramifications of campaign finance laws); James L. Ross, *Regulation of Campaign Contributions: Maintaining the Integrity of the Political Process Through an Appearance of Fairness*, 56 S. CAL. L. REV. 669 (1983) (evaluating regulation of local campaign contributions).

State Senator Kopp and Assemblyman Johnson, who cosponsored Proposition 73, brought the original proceeding in the California Supreme Court. *Kopp*, 11 Cal. 4th at 614, 905 P.2d at 1251, 47 Cal. Rptr. 2d at 110-11. The supreme court issued an alternative writ of mandate to the Fair Political Practices Commission directing the commission to show why the court should not issue a peremptory writ of mandate to enforce the sections in question. *Id.* When the commission responded neutrally, the California Legislature and four legislators intervened on their behalf. *Id.*

3. *Id.* at 621, 905 P.2d at 1256, 47 Cal. Rptr. 2d at 115.

Second, the supreme court found that numerous decisions allowed reformation of unconstitutional statutes.⁴ Third, the supreme court chose to refrain from using its reformation power because it was not possible to make the statute constitutional and still effectuate the policy judgments clearly articulated by the electorate.⁵ Accordingly, the supreme court denied the petitioners' request that the statute be enforced as written.⁶

II. TREATMENT

A. *Majority Opinion*

1. The Court's Authority to Consider the Issues Raised in the Petition

After recounting a brief background of both the case and the statutes in question,⁷ Chief Justice Lucas examined the legislators' argument that the supreme court was precluded from considering whether to reform the statutes.⁸

The legislators' first argument was based on *res judicata*,⁹ which precludes courts from hearing actions that have been finally determined by a court of competent jurisdiction.¹⁰ The intervenors on the petitioner's behalf argued that because the petitioners received a final judgment in a prior lawsuit in federal court on the same issues, the California Supreme Court was precluded from hearing the case.¹¹ The majority found that *res judicata* did not apply to the present case because public interest required relitigation of the cause of action.¹² The court stopped short of holding that federal courts lack authority to construe or reform state laws, concluding only that the facts of *this* case allowed it to fall under the "public interest" exception to *res judicata*.¹³

The court then addressed the legislatures' second preclusion argument that since the statutes ceased to exist when the federal court declared them unconstitutional, there was nothing left to reform.¹⁴ The court rejected this argument noting that the federal courts never "invalidated"

4. *Id.* at 660-61, 905 P.2d at 1283-84, 47 Cal. Rptr. 2d at 143.

5. *Id.* at 671, 905 P.2d at 1290, 47 Cal. Rptr. 2d at 150.

6. *Id.*

7. *Id.* at 613-20, 905 P.2d at 1250-54, 47 Cal. Rptr. 2d at 110-14.

8. *Id.* at 620-26, 905 P.2d at 1255-59, 47 Cal. Rptr. 2d at 114-19.

9. See generally 40 CAL. JUR. 3D *Judgments* §§ 120-124 (1983 & Supp. 1995) (discussing the effect of *res judicata* on relitigating a cause of action).

10. *Kopp*, 11 Cal. 4th at 620-22, 905 P.2d at 1255-56, 47 Cal. Rptr. 2d at 114-16.

11. *Id.*

12. *Id.* at 621-22, 905 P.2d at 1256, 47 Cal. Rptr. 2d at 115-16.

13. *Id.* at 621, 905 P.2d at 1256, 47 Cal. Rptr. 2d at 115.

14. *Id.* at 623-25, 905 P.2d at 1257-59, 47 Cal. Rptr. 2d at 117-18.

the laws but simply enjoined the enforcement of statutes as written.¹⁵ The majority concluded that a "constitutionally invalid" statute should be treated "as if it had never been passed."¹⁶

After rejecting both preclusion arguments, the majority considered whether the California Supreme Court could reform the unconstitutional statute.¹⁷

2. The Court's Authority to Reform a Statute in Order to Preserve its Constitutionality

a. *Reformation by the United States Supreme Court and other courts*

Noting that much of the California Supreme Court's precedent is provided by the United States Supreme Court, Chief Justice Lucas began his analysis by discussing the United States Supreme Court's reformation cases.¹⁸

The court based the judicial power to reform a statute on Justice Harlan's concurring opinion in *Welsh v. United States*¹⁹ which contemplated the use of judicial reform in preserving the constitutionality of a statute. In *Welsh*, the Court discussed three general categories of cases in which reformation occurs: (1) cases involving procedural safeguards required by the First Amendment or due process;²⁰ (2) cases involving classifications that were held to be underinclusive under the equal protection clause;²¹ and (3) cases involving otherwise vague or overbroad

15. *Id.* at 624, 905 P.2d at 1258, 47 Cal. Rptr. 2d at 117-18.

16. *Id.* at 624-25, 905 P.2d at 1258-59, 47 Cal. Rptr. 2d at 118. In rendering its decision, the court found *Dombrowski v. Pfister*, 380 U.S. 479, 491-92 (1965), persuasive. *Id.*

17. *Id.* at 62-62, 905 P.2d at 1259-84, 47 Cal. Rptr. 2d at 119-44. See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 88-89 (9th ed. 1988 & Supp. 1995) (discussing judicial power to sever unconstitutional portions of statutes); 13 CAL. JUR. 3D *Constitutional Law* Pt. 1 § 78-82 (1989 & Supp. 1995) (detailing how a court treats partial unconstitutionality).

18. *Kopp*, 11 Cal. 4th at 627-41, 905 P.2d at 1260-69, 47 Cal. Rptr. 2d at 119-29.

19. *Id.* at 627-29, 905 P.2d at 1260-61, 47 Cal. Rptr. 2d at 119-21 (citing *Welsh v. United States*, 398 U.S. 333, 344-67 (1970) (Harlan, J., concurring)).

20. *Id.* at 629-32, 905 P.2d at 1261-63, 47 Cal. Rptr. 2d at 121-22; see, e.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (reforming an unconstitutional obscenity statute).

21. *Kopp*, 11 Cal. 4th at 632-37, 905 P.2d at 1263-67, 47 Cal. Rptr. 2d at 122-26. There has been a series of Supreme Court cases in which the Court has extended or

criminal statutes.²² Thus, the California Supreme Court determined that the United States Supreme Court reformed or rewrote statutes in order to preserve their constitutionality in these three categories.²³

b. Reformation by California Courts

In turning to state courts' power to reform a statute in order to preserve its constitutionality, the majority recited several classifications of cases in which reformation by state courts occurs:²⁴ (1) cases involving procedural safeguards required by the First Amendment or due process;²⁵ (2) cases involving classifications that are held to be

allowed the extension of benefit statutes to improperly excluded groups. *See* *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (extending workers' compensation benefits to widowers where statute provided more benefits to widows); *Califano v. Westcott*, 443 U.S. 76 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (extending aid to families that had been denied relief due to mother's unemployment where the same statute granted aid to families with unemployed fathers); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (eliminating the gender-based distinction between widows and widowers as it pertains to social security survivor benefits); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (eliminating the gender-based distinction contained in the part of the Social Security Act governing "Mother's insurance benefits"); *Graham v. Richardson*, 403 U.S. 365 (1971) (extending state welfare laws to legal aliens); *Levy v. Louisiana*, 391 U.S. 68 (1968) (extending right to recover in wrongful death cases to illegitimate children of the deceased); *Glonn v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968) (same).

22. *Kopp*, 11 Cal. 4th at 638-41, 905 P.2d at 1267-69, 47 Cal. Rptr. 2d at 127-29 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (reforming a state criminal statute in which the term "lust" was contained in a definition of regulated obscene matter)).

23. *Id.* at 626-41, 905 P.2d at 1259-69, 47 Cal. Rptr. 2d at 119-29. *See generally* Ruth B. Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979).

24. *Kopp*, 11 Cal. 4th at 643-53, 905 P.2d at 1271-78, 47 Cal. Rptr. 2d at 130-37.

25. *Id.* at 643-46, 905 P.2d at 1271-73, 47 Cal. Rptr. 2d at 130-32. The California Supreme Court reformed or allowed the reformation of statutes to avoid vagueness, overbreadth, or procedural due process problems on several occasions. *See* *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988) (reforming pandering statute such that the hiring of actors to perform non-obscene motion pictures containing sexually explicit acts would be legal); *Pryor v. Municipal Court*, 25 Cal. 3d 238, 559 P.2d 636, 158 Cal. Rptr. 330 (1979) (reforming disorderly conduct statute with respect to lewd or dissolute conduct so as to only pertain to conduct occurring in a public place or otherwise exposed to public view); *Bloom v. Municipal Court*, 16 Cal. 3d 71, 545 P.2d 229, 127 Cal. Rptr. 317 (1976) (reforming obscenity statute so as to only forbid "patently offensive representations or descriptions of specific 'hard core' sexual conduct"); *Braxton v. Municipal Court*, 10 Cal. 3d 138, 514 P.2d 697, 109 Cal. Rptr. 897 (1973) (reforming overbroad statute which allowed the summary barring of any person from a college or university campus for any reason); *Barrows v. Municipal Court*, 1 Cal. 3d 821, 464 P.2d 483, 83 Cal. Rptr. 819 (1970) (reforming obscenity statute so as not to apply to live performances in a theater before a live

underinclusive under the equal protection clause;²⁶ (3) cases involving otherwise vague or overbroad criminal statutes;²⁷ and (4) cases involving statutes that violate the state constitution.²⁸

The intervenors cited case law broadly stating that courts lack authority to "rewrite" statutes in order to preserve their constitutionality.²⁹ The court distinguished all except one of the cases. Most of the cases involved situations where it was inappropriate to reform the statutes because it was impossible to do so in a way that closely effectuated the policy judgments clearly articulated by the legislature or other enacting body.³⁰ The court distinguished the remainder of the intervenors' cases because they either had an enacting body's intent that was clearly inconsistent with reformation,³¹ did not violate the state constitution,³² or

audience).

26. See *In re Edgar M.*, 14 Cal. 3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975) (reforming a statute which permitted a juvenile referee's decision declaring a minor a ward of the court to be binding without any action by a trial court).

27. *San Francisco v. Eller Outdoor Adver.*, 192 Cal. App. 3d 643, 237 Cal. Rptr. 815 (1987) (reforming a statute which regulated commercial and non-commercial signs in which signs regarding certain subjects were exempted)

28. See *Hayes v. Superior Court*, 6 Cal. 3d 216, 490 P.2d 1137, 98 Cal. Rptr. 449 (1971) (reforming a statute that discriminated against defendants convicted in California and imprisoned out of state).

29. *Kopp*, 11 Cal. 4th at 653, 905 P.2d at 1278, 47 Cal. Rptr. 2d at 137-38; see *Metromedia, Inc. v. San Diego*, 32 Cal. 3d 180, 649 P.2d 902, 185 Cal. Rptr. 260.

30. See *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 18 Cal. Rptr. 2d 626 (1993) (city ordinance requiring binding arbitration for mobile home park rent disputes); *Leshar Communications, Inc. v. Walnut Creek*, 52 Cal. 3d 531, 802 P.2d 317, 277 Cal. Rptr. 1 (1990) (municipal initiative establishing a building moratorium to fight traffic congestion); *Spiritual Psychic Science Church v. Azusa*, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985) (city ordinance banning fortune telling); *Flood v. Riggs*, 80 Cal. App. 3d 138, 145 Cal. Rptr. 573 (1978) (election code in conflict with the constitutional provision banning ex-felons from voting); *Dillon v. Municipal Court*, 4 Cal. 3d 860, 484 P.2d 945, 94 Cal. Rptr. 777 (1971) (ordinance allowing for prosecution of persons engaging in a parade without a permit where city has uncontrolled discretion to grant or deny permits); *In re King*, 3 Cal. 3d 226, 474 P.2d 983, 90 Cal. Rptr. 15 (1970) (provision of welfare statute making it a felony for nonsupporting father to remain out of state for 30 days while only a misdemeanor for a nonsupporting father who remains in-state).

31. See *Mills v. Superior Court*, 42 Cal. 3d 951, 728 P.2d 211, 232 Cal. Rptr. 141 (1986) (statute requiring accused to initiate "reasonable efforts" to secure a witness' appearance at a preliminary hearing in order to avoid the admission of written statements by that witness); *McLaughlin v. Superior Court*, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (1983) (statute requiring prehearing mediation of both child custody and visitation disputes in divorce cases); *Rockwell v. Superior Court*, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976) (statute requiring capital punishment for

supported the court's power to reform statutes in order to preserve constitutionality.³³ Unable to distinguish one case that was more than 100 years old,³⁴ the majority ignored the lone case because its result conflicted with the numerous holdings of the courts in the last twenty years which allowed reformation.³⁵

The court concluded this section by summarizing the existing state of the law: courts may reform an unconstitutional statute in order to effectuate policy judgments clearly articulated by the legislature or other enacting body if invalidating the statute would be far more destructive of the will of the electorate.³⁶

3. Reformation of the Statute

The court reiterated the federal courts' view that, by its very nature, section 85302 is unenforceable if sections 85301(a), 85303(a), and 85303(b) are unenforceable.³⁷ Because the court later found these statutes to be unenforceable, there was no analysis as to whether section 85302 could be reformed.³⁸

In addition, the majority determined that section 85304 was not at issue in the litigation because the federal courts invalidated it, and the section did not involve the "fiscal year" measure laid out in sections 85301 and 85303.³⁹ Section 85304 therefore remained enjoined.⁴⁰

The court then examined the ways in which sections 85301 and 85303 could be reformed in order to preserve their constitutionality while closely effectuating the policy judgments of the electorate.⁴¹ The majori-

first-degree murder with special circumstances without regard for mitigating circumstances or other considerations).

32. See *Solberg v. Superior Court*, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977) (solicitation statute); *People v. One 1940 Ford V-8 Coupe*, 36 Cal. 2d 471, 224 P.2d 677 (1950) (seizure of property used in illegal activities); *Eureka v. Diaz*, 89 Cal. 467, 26 P. 961 (1891) (statute regarding illegal sale of intoxicating liquor).

33. See *San Francisco v. Eller Outdoor Adver.*, 192 Cal. App. 3d 643, 237 Cal. Rptr. 815 (1987); *People v. Skinner*, 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985) (statute restoring the M'Naghten test for criminal insanity).

34. *People v. Perry*, 79 Cal. 105, 21 P. 423 (1889).

35. *Kopp*, 11 Cal. 4th at 658-60, 905 P.2d at 1282-83, 47 Cal. Rptr. 2d at 141-43.

36. *Id.* at 660-62, 905 P.2d at 1283-84, 47 Cal. Rptr. 2d at 143-44.

37. *Id.* at 663, 905 P.2d at 1285, 47 Cal. Rptr. 2d at 144.

38. *Id.*

39. *Id.* at 663, 905 P.2d at 1285, 47 Cal. Rptr. 2d at 144-45.

40. *Id.*

41. *Id.* at 663-70, 905 P.2d at 1285-90, 47 Cal. Rptr. 2d at 145-49; see Andrew P. Buchsbaum, Comment, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CAL. L. REV. 673 (1983) (discussing the problems arising from independent political committees); Matthew J. Geyer, Note, *Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitu-*

ty noted three key policy judgments reflected in the statutes: (1) "establish[ing] a maximum dollar amount for particular contributions . . . (2) regulat[ing] the pace at which those contributions may be made . . . [and] (3) establish[ing] the rights to contribute and to accept a theoretical maximum aggregate amount of funds."⁴²

The court first looked at reforming the statutes by striking the word "fiscal" from the phrase "fiscal year."⁴³ Unfortunately, such reformation would maintain the unconstitutional result of an annual limit that discriminated against non-incumbents.⁴⁴

The court then considered reforming the statutes by replacing the words "per fiscal year" with "per election."⁴⁵ Although this manner of reformation would have the advantage of retaining the maximum amounts for certain contributions as well as effectuating the pacing requirement,⁴⁶ such a reformation would reduce the theoretical maximum amount of funds that could be contributed to and accepted by candidates for all offices except those with two-year terms.⁴⁷ Therefore, "such a reformation would not closely effectuate policy judgments . . . [of] the electorate."⁴⁸

Finally, the court examined the reformation proposed by Justice Baxter in which Justices Arabian and George joined.⁴⁹ This proposal

tionality, 36 HASTINGS L.J. 433 (1985) (offering arguments in favor of allowing restrictions on corporate spending in certain campaigns); Mark Weinberg, *Public Officials Soliciting Campaign Contributions Beware*, 15 WHITTIER L. REV. 1075 (1994) (providing information on the Hobbs Act and its use to defeat corrupt campaign contributions).

42. *Kopp*, 11 Cal. 4th at 664, 905 P.2d at 1286, 47 Cal. Rptr. 2d at 145.

43. *Id.*

44. *Id.* The court rejected replacement of "fiscal year" with the words "elections cycle" because that would create uncertainty as to what the limitation amount would be. *Id.*

45. *Id.* at 664-67, 905 P.2d at 1286-88, 47 Cal. Rptr. 2d at 145-47.

46. *Id.* at 664-65, 905 P.2d at 1286, 47 Cal. Rptr. 2d at 146.

47. *Id.* at 665, 905 P.2d at 1286-87, 47 Cal. Rptr. 2d at 146. Section 85301(a) allows a Senate or local nonpartisan office candidate to accept and solicit individual contributions totaling \$4000 (\$1000 per "fiscal year"). Conversely, under the "per election" reformation, Senate candidates could accept and solicit only \$2000 (\$1000 for the primary and \$1000 for the election), and a local nonpartisan office candidate could accept and solicit only \$1000. *Id.* at 665 n.64, 905 P.2d at 1287 n.64, 47 Cal. Rptr. 2d at 146 n.64.

48. *Id.* at 664-65, 905 P.2d at 1286, 47 Cal. Rptr. 2d at 145-46.

49. *Id.* at 667, 905 P.2d at 1288, 47 Cal. Rptr. 2d at 147; *see id.* at 685-93, 905 P.2d at 1300-05, 47 Cal. Rptr. 2d at 160-65 (Baxter, J., concurring and dissenting).

required changing monetary figures in the statute along with incorporating a "per election" mechanism to preserve the theoretical maximum amount of funds set forth in the statute as written.⁵⁰ Such a reformation would conflict with the voters' intent to restrict the size of particular contributions.⁵¹

Although the supreme court acknowledged that it had the power to reform the statutes, the court refrained from exercising that power because the statutes could not be reformed in a way that closely effectuated the policy judgments of the electorate.⁵² Therefore, the court invalidated the statutes by denying the petitioners relief.⁵³

B. Justice Mosk's Concurring Opinion

In his concurring opinion,⁵⁴ Justice Mosk stated that the California Supreme Court lacked the power to reform the statute.⁵⁵ Justice Mosk reasoned that the California Constitution provides for the separation of the powers of government and that any reformation undertaken by the courts without the authorization of the legislative body would infringe upon the power of the legislative branch.⁵⁶ Thus, a court can only strike down a statute, not reform it.⁵⁷

C. Justice Werdegar's Concurring Opinion

In a concurring opinion,⁵⁸ Justice Werdegar cautioned that the role of the judicial branch of government is to interpret laws, not to write them.⁵⁹ Thus, although the act of reformation is within the court's authority, it should be undertaken sparingly and cautiously.⁶⁰ Justice Werdegar concluded that, absent compelling circumstances, the court

50. *Id.* at 667-70, 905 P.2d at 1288-90, 47 Cal. Rptr. 2d at 147-49.

51. *Id.* at 669, 905 P.2d at 1289, 47 Cal. Rptr. 2d at 148-49.

52. *Id.* at 669-71, 905 P.2d at 1289-90, 47 Cal. Rptr. 2d at 149-50.

53. *Id.* at 670-71, 905 P.2d at 1290-91, 47 Cal. Rptr. 2d at 149-50.

54. *Id.* at 671-75, 905 P.2d at 1293-95, 47 Cal. Rptr. 2d at 152-55 (Mosk, J., concurring).

55. *Id.* at 671-75, 905 P.2d at 1291-93, 47 Cal. Rptr. 2d at 150-52 (Mosk, J., concurring).

56. *Id.* at 671-72, 905 P.2d at 1291, 47 Cal. Rptr. 2d at 150-51 (Mosk, J., concurring).

57. *Id.* at 673, 905 P.2d at 1292, 47 Cal. Rptr. 2d at 151 (Mosk, J., concurring).

58. *Id.* at 675-78, 905 P.2d at 1293-95, 47 Cal. Rptr. 2d at 152-55 (Werdegar, J., concurring).

59. *Id.* at 675, 905 P.2d at 1293, 47 Cal. Rptr. 2d at 152 (Werdegar, J., concurring).

60. *Id.* (Werdegar, J., concurring).

must refrain from making "an unwarranted departure from [its] normal judicial duties."⁶¹

D. Justice Kennard's Concurring and Dissenting Opinion

In her concurring and dissenting opinion,⁶² Justice Kennard agreed that the statute should not have been amended, but differed with the majority's rationale.⁶³ According to Justice Kennard, full faith and credit should have been given to the federal courts' final ruling, and the doctrine of res judicata should have precluded the California Supreme Court from hearing the case.⁶⁴

Justice Kennard noted that federal law does not recognize a "public interest" exception to res judicata and California only recognizes the "public interest" exception in the rare circumstance where the earlier judicial determination was erroneous.⁶⁵ The exception could not apply and the supreme court should have been precluded from hearing the case where the majority found that the federal court's determination was correct.⁶⁶

E. Justice Baxter's Concurring and Dissenting Opinion

In a separate concurring and dissenting opinion,⁶⁷ Justice Baxter stated that because it would be extremely difficult to cure a constitutional defect in a subsequent initiative measure considering the conflict between the interests of the people and the interests of the lawmakers, a court should exert a greater effort to reform a constitutionally invalid statute.⁶⁸ Furthermore, Justice Baxter noted that a modified "election cycle" method could have been implemented that would have closely effectuated the policy judgments of the electorate.⁶⁹

61. *Id.* at 678, 905 P.2d at 1295, 47 Cal. Rptr. 2d at 155 (Werdegar, J., concurring).

62. *Id.* at 678-85, 905 P.2d at 1295-1300, 47 Cal. Rptr. 2d at 155-60 (Kennard, J., concurring and dissenting).

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

64. *Id.* at 681-83, 905 P.2d at 1297-98, 47 Cal. Rptr. 2d at 157-58 (Kennard, J., concurring and dissenting).

65. *Id.* at 683-84, 905 P.2d at 1299, 47 Cal. Rptr. 2d at 158-59 (Kennard, J., concurring and dissenting).

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

67. *Id.* at 685-93, 905 P.2d at 1300-05, 47 Cal. Rptr. 2d at 160-65 (Baxter, J., concurring and dissenting).

68. *Id.* at 685-87, 905 P.2d at 1300-02, 47 Cal. Rptr. 2d at 160-61 (Baxter, J., concurring and dissenting).

69. *Id.* at 687-93, 905 P.2d at 1302-05, 47 Cal. Rptr. 2d at 161-65 (Baxter, J., con-

III. IMPACT

In the present case, the California Supreme Court upheld a court's power to reform an unconstitutional statute.⁷⁰ The power of reformation in the hands of the judicial branch of government risks crossing the line between interpreting laws and creating them.⁷¹ The supreme court attempted to limit this danger by stating that a court can only reform a statute if it is possible to do so in a way that closely effectuates the policy judgments of the legislative body and if "the enacting body would have preferred such a reformed version of the statute to invalidation of the statute."⁷² Without a bright-line test, it is still possible for a court to cross the line between the judicial branch and the legislative branch.

IV. CONCLUSION

Although it is within a court's power to reform an unconstitutional statute to preserve its constitutionality, such action should only be undertaken if it can be done in a way that closely effectuates the intent of the electorate or other legislative body. If that cannot be done, the court should simply invalidate the statute.

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curing and dissenting).

70. *Id.* at 615, 905 P.2d at 1251, 47 Cal. Rptr. 2d at 111.

71. *See id.* at 675-78, 905 P.2d at 1293-95, 47 Cal. Rptr. 2d at 152-55 (Werdegar, J., concurring).

72. *Id.* at 670-71, 905 P.2d at 1290-91, 47 Cal. Rptr. 2d at 149-50.

V. CRIMINAL LAW

During the execution of a search warrant, if a person arrives during the search and cannot be immediately identified, officers may constitutionally detain the person in a manner necessary to protect the safety of all present during the search: People v. Glaser.

I. INTRODUCTION

In *People v. Glaser*,¹ the California Supreme Court considered whether it is reasonable for officers to detain an unknown individual whom they encounter while executing a search warrant at a private residence for illegal drugs.² Reversing the decision of the court of appeal, the supreme court held that an officer may constitutionally detain a person encountered during a lawful search of a residence in order to identify the person, determine that person's connection with the premises, and protect

1. 11 Cal. 4th 354, 902 P.2d 729, 45 Cal. Rptr. 2d 425 (1995). Justice Werdegar wrote the unanimous opinion of the court, in which Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter and George concurred. *Id.* at 359-75, 902 P.2d at 730-40, 45 Cal. Rptr. 2d at 426-36.

2. *Id.* at 362, 902 P.2d at 732, 45 Cal. Rptr. at 428. On the evening of February 19, 1993, officers from various agencies executed a search warrant at the residence of Gregory Wagenman. *Id.* at 360, 902 P.2d at 730, 45 Cal. Rptr. 2d at 426. Ronnie Glaser arrived at the Wagenman residence seconds before the officers. *Id.* at 360, 902 P.2d at 730-31, 45 Cal. Rptr. 2d at 426-27. When Glaser was at the gate he observed a plain clothed officer calling out to him. *Id.* at 360-61, 902 P.2d at 731, 45 Cal. Rptr. 2d at 427. Once Glaser understood the orders of the officer, he complied by lying face down on the driveway and was then handcuffed. *Id.* at 361, 902 P.2d at 731, 45 Cal. Rptr. 2d at 427. After being detained at gunpoint for several minutes, Glaser was eventually led into the house. *Id.* Another officer recognized Glaser from a previous search of the Wagenman residence, which had resulted in Glaser being arrested on narcotics and weapons charges. The officers searched Glaser and his vehicle. *Id.* The search produced drugs, a pipe, syringes, and a police scanner. *Id.* Glaser was charged with possession and use of methamphetamine and use of a police scanner. *Id.* Although he moved to suppress the evidence, the superior court held that the initial detention and the searches were proper; Glaser pleaded no contest to the possession charge. *Id.* at 361-62, 902 P.2d at 731, 45 Cal. Rptr. 2d at 427. Glaser appealed his conviction and the court of appeal reversed, stating that because the initial detention was not supported by articulable suspicion, the subsequent searches were tainted. *Id.* at 362, 902 P.2d at 731-32, 45 Cal. Rptr. 2d at 427-28. The California Supreme Court granted review solely to decide the legality of the initial detention. *Id.* at 362, 902 P.2d at 732, 45 Cal. Rptr. 2d at 428. See Bob Egelko, *Police Can Hold Visitors at Homes Being Searched for Drugs*, ORANGE COUNTY REG., Oct. 13, 1995, at A10.

the safety of those present during the search.³ If the person is only a visitor, the court ruled that further detention is reasonable only if there is evidence connecting the person to criminal activity or if the person poses a danger to the officers.⁴

II. TREATMENT

Justice Werdegar, writing for a unanimous court, began by examining the landmark decision reached by the United States Supreme Court in *Terry v. Ohio*.⁵ The *Glaser* court explained that *Terry* requires specific and articulable facts which create a reasonable suspicion to justify an intrusion by police.⁶ *Terry* states that government interests such as effective crime prevention and ensuring the safety of the officers reasonably warrant a limited seizure and search for weapons.⁷ The court next examined the application of *Terry* in the case of *Michigan v. Summers*.⁸ *Summers* involved a detention during the search of a private residence.⁹ The *Summers* court held that a search warrant gives officers limited authority to detain occupants while the search is conducted.¹⁰

3. *Glaser*, 11 Cal. 4th at 374, 902 P.2d at 740, 45 Cal. Rptr. 2d at 436.

4. *Id.*

5. 392 U.S. 1 (1968) (cited in *Glaser*, 11 Cal. 4th at 363, 902 P.2d at 732, 45 Cal. Rptr. 2d at 428).

6. *Glaser*, 11 Cal. 4th at 363, 902 P.2d at 733, 45 Cal. Rptr. 2d at 429 (citing *Terry*, 392 U.S. at 21).

7. *Terry*, 392 U.S. at 22-24 (cited in *Glaser*, 11 Cal. 4th at 364, 902 P.2d at 733, 45 Cal. Rptr. 2d at 429).

8. 452 U.S. 692 (1981) (cited in *Glaser*, 11 Cal. 4th at 364, 902 P.2d at 733, 45 Cal. Rptr. 2d at 429).

9. *Summers*, 452 U.S. at 693 (cited in *Glaser*, 11 Cal. 4th at 364, 902 P.2d at 733, 45 Cal. Rptr. 2d at 429); see 4 B.E. WITKIN AND NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2362 (2d ed. 1989 & Supp. 1996) (summarizing the *Glaser* and *Summers* decisions, and explaining detentions during search under a search warrant).

10. *Glaser*, 11 Cal. 4th at 365, 902 P.2d at 734, 45 Cal. Rptr. 2d at 430 (citing *Summers*, 452 U.S. at 703); see David J. Krauss, Comment, *Reasonable Suspicion Authorizes Detention of Occupants of Validly Searched Premises*, 59 WASH. U. L.Q. 1393 (1982) (discussing the holding of *Summers*). *Glaser*'s argument that he was merely a visitor and therefore not subject to detention under *Summers* was found unpersuasive by the court. *Glaser*, 11 Cal. 4th at 370, 902 P.2d at 737, 45 Cal. Rptr. 2d at 433. See 2 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.9(e), at 309-10 (2d ed. 1987) (stating that the word "occupant" should be interpreted literally); 4 B.E. WITKIN AND NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2458 (2d ed. 1989 & Supp. 1996) (discussing search and seizure as applied to visitors); Charles L. Cantrell, *Search Warrants: A View of the Process*, 14 OKLA. CITY U. L. REV. 1 (1989) (discussing detention or search of persons on or near premises being searched).

The California Supreme Court then applied the principles of *Terry* and *Summers* to the present case.¹¹ The court stated that to determine the reasonableness of the initial detention, the character and extent of the intrusion must be balanced against the government interests justifying it.¹² First, the court stated that although Glaser was detained at gunpoint, the detention was extremely brief and out of the public's eye; therefore, the intrusiveness of the detention was diminished.¹³ Next, the court cited the officers' concern for safety and their interest in determining the identity of Glaser and his connection with the premises as legitimate government interests justifying the detention.¹⁴ Finally, the court weighed the government interests against the intrusiveness of the detention.¹⁵ The court emphasized that the police must point to specific and articulable facts in order to justify the detention.¹⁶ After analyzing the facts of the present case, the court determined that the officers acted reasonably when they briefly detained Glaser for purposes of identification and safety.¹⁷

III. IMPACT

Prior to the supreme court's decision in *Glaser*, it was unclear when and if nonoccupants could be detained during the execution of a search warrant.¹⁸ The rule established in *Summers* seemed only to apply to

11. *Glaser*, 11 Cal. 4th at 365, 902 P.2d at 734, 45 Cal. Rptr. 2d at 430.

12. *Id.*

13. *Id.* at 366-67, 902 P.2d at 734-35, 45 Cal. Rptr. 2d at 430-31.

14. *Id.* at 367-68, 902 P.2d at 735-36, 45 Cal. Rptr. 2d at 431-32. The court noted that when narcotics are the subject of the search warrant, there is a heightened potential for danger because firearms are commonly present. *Id.* at 367-68, 902 P.2d at 735, 45 Cal. Rptr. 2d at 431.

15. *Id.* at 368-69, 902 P.2d at 736, 45 Cal. Rptr. 2d at 432; see 20 CAL. JUR. 3D *Searches and Seizures* § 2492 (1985 & Supp. 1995) (discussing how to determine the validity of a temporary detention).

16. *Glaser*, 11 Cal. 4th at 369, 902 P.2d at 736, 45 Cal. Rptr. 2d at 432 (citing *Terry*, 392 U.S. at 21).

17. *Id.* The court noted that Glaser's familiarity with the premises and his unresponsiveness to the officers' attempts to communicate with him gave the officers no practical choice but to briefly detain him. *Id.*; see also 20 CAL. JUR. 3D *Searches and Seizures* § 2567 (1985 & Supp. 1995) (discussing an officer's right to conduct a limited search of someone who acts like an occupant).

18. See 68 AM. JUR. 2D *Searches and Seizures* § 209 (1993 & Supp. 1995) (discussing persons who may be searched during the execution of a search warrant); 79 C.J.S. *Searches and Seizures* § 210 (1995) (same); Angela S. Overgaard, Comment, *People, Places, and Fourth Amendment Protection: The Application of Ybarra v. Illi-*

residents. The *Glaser* court, however, explained that *Summers* does not prohibit the detention of nonresidents if there is reasonable suspicion under *Terry*.¹⁹ Therefore, officers may now briefly detain any suspicious person they encounter during a search under a warrant for drugs.²⁰ Further detention, beyond what is necessary to determine the identity of the detainee and protect the safety of the officers, is still justified only if there is a connection between the person and the premises or if criminal activity is suspected.²¹

The supreme court made a point to emphasize that the holding of *Glaser* applied to searches for illegal drugs or related items.²² Whether or not officers may briefly detain an individual encountered during the execution of a search warrant for non-drug related items remains to be determined.

IV. CONCLUSION

In *Glaser*, the California Supreme Court held that officers may detain any person encountered while executing a warranted search for drugs at a private residence if the person's identity and connection with the premises are unknown and there is a need to protect the safety of the officers.²³ The court also held that further detention of a nonoccupant must be justified by specific facts linking the detainee to the criminal activity suspected on the premises.²⁴ The individual may also be detained further if he or she poses a danger to the officers.²⁵

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nois to Searches of People Present During the Execution of Search Warrants on Private Premises, 25 LOY. U. CHI. L.J. 243 (1994); Jeffrey D. Winter, Comment, *Pondering the Scope of Premises Search Warrants After Ybarra v. Illinois*, 26 SAN DIEGO L. REV. 661 (1989).

19. *Glaser*, 11 Cal. 4th at 370, 902 P.2d at 737, 45 Cal. Rptr. 2d at 433. See generally Gretchen Slosser, Note, *Unreasonable Suspicion: The Minnesota Supreme Court Extends Terry to Nonsuspects Arriving at Premises Being Searched Under Warrant: State v. Gobely*, 70 MINN. L. REV. 1208 (1986).

20. *Glaser*, 11 Cal. 4th at 374-75, 902 P.2d at 740, 45 Cal. Rptr. 2d at 436.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

VI. INSURANCE CONTRACTS

Under a commercial general liability insurance policy, an insurer owes no duty to defend the insured against a lawsuit that alleges incidental emotional distress caused by the insured's noncovered acts. Absent specific intent to the contrary, an insurer does not automatically waive policy-based coverage defenses that it fails to enumerate in its initial denial of coverage:

Waller v. Truck Insurance Exchange, Inc.

I. INTRODUCTION

In *Waller v. Truck Insurance Exchange, Inc.*,¹ the California Supreme Court addressed whether an insurer owes a duty under a commercial general liability (CGL) policy to defend a suit against the insured that alleges emotional and physical distress resulting from economic losses caused by the insured's noncovered acts.² The appellate court, reversing

1. 11 Cal. 4th 1, 900 P.2d 619, 44 Cal. Rptr. 2d 370 (1995). Chief Justice Lucas wrote the opinion of the court which Justices Mosk, Arabian, Baxter, George, and Werdegar joined. *Id.* at 1-37, 900 P.2d at 619-39, 44 Cal. Rptr. 2d at 370-90. Justice Kennard filed a concurring and dissenting opinion. *Id.* at 37-49, 900 P.2d at 639-48, 44 Cal. Rptr. 2d at 390-99 (Kennard, J., concurring and dissenting).

2. *Id.* at 10, 900 P.2d at 621, 44 Cal. Rptr. 2d at 372. In 1985, Marmac, Inc., purchased a CGL policy from Truck Insurance Exchange, Inc. (T.I.E.). *Id.* at 10-11, 900 P.2d at 622, 44 Cal. Rptr. 2d at 373. Marmac renewed the policy in 1986 without substantial change. *Id.* The policy identified Marmac as the named insured, and included Lester Amey as one of the named insured in an attached endorsement letter. *Id.* at 11, 900 P.2d at 622, 44 Cal. Rptr. 2d at 373. The policy language was standard, providing liability for "all damages which the insured becomes legally obligated to pay because of . . . bodily injury to any person, and . . . damage to property . . . to which this insurance applies, caused by an occurrence." *Id.* The policy defined an "occurrence" as "an event, or series of events . . . proximately caused by an act or omission of the insured . . . which results . . . in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." *Id.* T.I.E.'s policy also contained definitions common in the industry for bodily injury (any "sickness or disease") and property damage ("physical injury or destruction of tangible property"). *Id.* at 19-20, 900 P.2d at 628, 44 Cal. Rptr. 2d at 379. The policy excluded coverage for personal injury to Marmac's directors and officers as well as bodily injury to any named insured. *Id.* at 11, 900 P.2d at 622, 44 Cal. Rptr. 2d at 373. The policy also excluded coverage for an employee's "bodily injury . . . arising out of and in the course of his employment by the insured." *Id.* at 20, 900 P.2d at 628, 44 Cal. Rptr. 2d at 379.

the trial court, held that the insurer did not owe a duty to defend, and

In 1986, Lester Amey, a former executive vice president of Marmac, filed a lawsuit against Marmac, its former president James R. Waller, and its four chief officers. *Id.* at 11-12, 900 P.2d at 622-23, 44 Cal. Rptr. 2d at 373-74. The complaint alleged eleven causes of actions including the following: (1) involuntary dissolution, (2) breach of fiduciary duty, (3) breach of statutory duty of good faith, (4) interference with prospective economic advantage, (5) breach of contract, (6) breach of implied covenant of good faith and fair dealing, (7) breach of duty of good faith and fair dealing, (8) inducing breach of contract, (9) conspiracy, (10) intentional infliction of emotional distress, and (11) injunctive relief. *Id.* Amey later amended his complaint to include a cause of action for wrongful termination. *Id.* at 12, 900 P.2d at 623, 44 Cal. Rptr. 2d at 374. In the complaint, Amey described the conduct of Waller and the other officers as "outrageous . . . intentional and malicious and . . . done for the purpose of causing [Amey] to suffer . . . emotional and physical distress." *Id.* at 12, 900 P.2d at 623, 44 Cal. Rptr. 2d at 374.

One week after filing suit, Marmac's corporate attorney sent a tender letter to T.I.E., requesting that the insurer defend the lawsuit. *Id.* Farmers Insurance Exchange, acting as T.I.E.'s adjuster, handled the claims filed by T.I.E.'s insured. *Id.* at 11, 900 P.2d at 622, 44 Cal. Rptr. 2d at 373. A claims representative from Farmers' Anaheim branch (William Vaughter), advised one of Marmac's officers that the claim would be processed for payment. *Id.* at 12, 900 P.2d at 623, 44 Cal. Rptr. 2d at 374. On December 29, Marmac sent Vaughter a billing for attorneys' fees incurred in defending the lawsuit totaling \$54,000. *Id.* at 12-13, 900 P.2d at 623, 44 Cal. Rptr. 2d at 374. In January 1987, the regional claims manager instructed the Farmers' Anaheim branch office manager to deny Marmac's request for coverage. *Id.* at 13, 900 P.2d at 623-24, 44 Cal. Rptr. 2d at 374-75. The office manager sent a letter denying coverage. *Id.* Based on a review of the policy and all the information submitted, he concluded, "the claim against Marmac [was] essentially a shareholder dispute regarding intentional Acts committed by Marmac and their principles [sic]. Intentional Acts are not covered under your . . . policy." *Id.* at 13, 900 P.2d at 624, 44 Cal. Rptr. 2d at 375. Marmac's requests for reconsideration were also denied. *Id.* at 13-14, 900 P.2d at 624, 44 Cal. Rptr. 2d at 375.

After successfully defending Amey's suit, Waller, Marmac, and Marmac's officers filed separate lawsuits against T.I.E. and Farmers alleging, inter alia, breach of the implied covenant of good faith and fair dealing. *Id.* at 14, 900 P.2d at 624, 44 Cal. Rptr. 2d at 375. Waller's suit also alleged a cause of action for statutory bad faith under California Insurance Code § 790.03(h). *Id.* These suits were later consolidated. *Id.* The trial court held: (1) Amey's first amended complaint alleged "facts potentially within bodily injury coverage" of the policy; (2) the occurrence clause of the policy obligated the insurer to defend the suit as a matter of law; (3) T.I.E.'s denial letter waived all "policy-based defenses not specified therein;" and (4) T.I.E. was not excused from its duty to defend under the policy notwithstanding statutory prohibition against insurance coverage for an insured's intentional acts. *Id.* The jury found that T.I.E. and Farmers violated Insurance Code § 790.03 and awarded aggregate damages in excess of \$61,000,000. *Id.* at 14-15, 900 P.2d at 624-25, 44 Cal. Rptr. 2d at 375-76. The court of appeal reversed, holding that there was no potential basis for coverage under the policy, and therefore, no duty to defend. *Id.* at 15, 900 P.2d at 625, 44 Cal. Rptr. 2d at 376. The court reasoned that there was no duty in light of the fact that Amey's complaint alleged only uncovered business torts and because the alleged emotional and physical distress were "clearly derivative of and caused by" Amey's noncovered economic losses. *Id.*

the supreme court affirmed.³

Under a CGL policy (formerly known as a "comprehensive" general liability policy), the insurer owes a duty to defend a third party lawsuit against an insured that alleges any potential basis for liability.⁴ The insured has the burden of establishing the existence of this potential basis for coverage.⁵ To determine if any potential basis for coverage exists, the insurer must compare the policy terms with the facts alleged and extrinsic evidence.⁶

The CGL in *Waller*, as is typical in the industry, provided coverage for bodily injury or damage to tangible property.⁷ Thus, suits based on intangible property losses fall outside the scope of coverage.⁸ In *Waller*, the supreme court affirmed the rule that claims of alleged emotional and physical distress, caused by economic loss, are insufficient to bring a claim under the bodily injury provision of the policy.⁹

The court also addressed collateral issues in *Waller*. Specifically, the court held that appellate courts may rely on case law published after trial but before appeal.¹⁰ The court also held that waiver of coverage defenses can only be made intentionally and cannot be inferred from an insurer's failure to assert all possible defenses to coverage in its initial denial letter.¹¹ Additionally, the court held that where an insurer justifiably denies coverage under a policy, there can be no independent cause of action for breach of the implied covenant of good faith and fair dealing, although the statutory duty under section 790.03 applies to all claims.¹²

3. *Id.* at 37, 900 P.2d at 639, 44 Cal. Rptr. 2d at 391.

4. *Id.* at 19, 900 P.2d at 627, 44 Cal. Rptr. 2d at 378.

5. *Id.* at 16, 900 P.2d at 625-26, 44 Cal. Rptr. 2d at 376-77.

6. *Id.* at 19, 900 P.2d at 627, 44 Cal. Rptr. 2d at 378.

7. *Id.* at 19-20, 900 P.2d at 628, 44 Cal. Rptr. 2d at 379.

8. *Id.*

9. *Id.* at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381; see *infra* notes 13-41 and accompanying text.

10. *Waller*, 11 Cal. 4th at 23-24, 900 P.2d at 630-31, 44 Cal. Rptr. 2d at 381-82; see *infra* notes 42-47 and accompanying text.

11. *Waller*, 11 Cal. 4th at 31-32, 900 P.2d at 635-36, 44 Cal. Rptr. 2d at 386-87; see *infra* notes 48-54 and accompanying text.

12. *Waller*, 11 Cal. 4th at 36, 900 P.2d at 639, 44 Cal. Rptr. 2d at 390; see *infra* notes 55-59 and accompanying text.

II. TREATMENT

A. Majority Opinion

Chief Justice Lucas began the majority opinion by generally discussing the nature of CGL insurance policies and the fundamental principles that guided the court's interpretation of the policy.¹³ The court noted that the insured bears the burden of proving that a covered claim exists, thereby triggering the insurer's duty to defend by demonstrating from the allegations in the suit and extrinsic evidence that there has been an "occurrence" as defined in the policy.¹⁴ The typical CGL policy provides coverage for an occurrence that is neither intentional nor expected by the insured, which causes "bodily injury" or tangible property loss to a third party.¹⁵ Exclusions may also remove from coverage risks that would otherwise be covered; but, if a risk falls outside the initial scope of the coverage, it need not be specifically excluded.¹⁶ An insurer owes no duty to defend suits that have no potential basis for coverage.¹⁷

13. *Waller*, 11 Cal. 4th at 16-19, 900 P.2d at 625-28, 44 Cal. Rptr. 2d at 376-79.

14. *Id.* at 16, 900 P.2d at 625-26, 44 Cal. Rptr. 2d at 376-77 (citing *Collin v. American Empire Ins. Co.*, 21 Cal. App. 4th 787, 803, 26 Cal. Rptr. 2d 391, 398 (1994)). An "occurrence" was defined in T.I.E.'s policy as "an event, or series of events . . . proximately caused by an act or omission of the insured . . . which results . . . in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." *Waller*, 11 Cal. 4th at 11, 900 P.2d at 622, 44 Cal. Rptr. 2d at 373.

15. *Id.* at 11, 900 P.2d at 622, 44 Cal. Rptr. 2d at 373. Bodily injury was defined in the policy as any "sickness or disease." *Id.* The property damage provision covers "physical injury or destruction of tangible property," and does not include economic losses or contractual obligations. *Id.* at 17, 900 P.2d at 626, 44 Cal. Rptr. 2d at 377; see *Gulf Ins. Co. v. L.A. Effects Group, Inc.*, 827 F.2d 574, 577 (9th Cir. 1987) (holding no coverage under CGL for alleged nonperformance of contractual obligations); *Lassen Canyon Nursery, Inc. v. Royal Ins. Co. of Am.*, 720 F.2d 1016, 1017 (9th Cir. 1983) (finding no coverage under CGL for economic losses caused by insured's alleged antitrust violations); *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 303, 861 P.2d 1153, 1162-63, 24 Cal. Rptr. 2d 467, 476-77 (1993) (holding that CGL does not cover suits alleging damages caused by intangible property losses); *Chatton v. National Union Fire Ins. Co.*, 10 Cal. App. 4th 846, 867, 13 Cal. Rptr. 2d 318, 332 (1992) (holding no coverage under CGL for emotional distress flowing from investment losses caused by insured's negligent misrepresentation); *Giddings v. Industrial Indem. Co.*, 112 Cal. App. 3d 213, 219, 169 Cal. Rptr. 278, 281 (1980) (finding no coverage under CGL for damage to intangible property caused by alleged fraud and securities laws violation). The definition reflects that both statute and public policy prohibit insurers from providing coverage for intentional injuries to third parties. *Waller*, 11 Cal. 4th at 18, 900 P.2d at 626-27, 44 Cal. Rptr. 2d at 377-78; CAL. INS. CODE § 533 (West 1985) ("An insurer is not liable for a loss caused by the willful act of the insured."). See generally James A. Fischer, *The Exclusion From Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95 (1990) (discussing policies regarding insurance exclusions for intentional acts).

16. *Waller*, 11 Cal. 4th at 16, 900 P.2d at 626, 44 Cal. Rptr. 2d at 377.

17. *Id.* at 19, 900 P.2d at 628, 44 Cal. Rptr. 2d at 378 (citing *Fire Ins. Exch. v.*

Next, the court outlined its methods of insurance policy interpretation.¹⁸ The majority noted that the determination of an existence of a duty to defend under an insurance contract is a question of law¹⁹ and that the parties' expressed mutual intent will govern what risks are covered.²⁰ Ambiguity arises only when a portion of a contract is capable of being reasonably construed in two or more ways, but courts should "not strain to create ambiguity where none exists."²¹ The insurer must compare the terms in the policy with the facts alleged and with extrinsic evidence in order to determine whether any potential basis for coverage exists.²²

Abbott, 204 Cal. App. 3d 1012, 1029, 251 Cal. Rptr. 620, 630 (1988)); *State Farm Fire & Cas. Co. v. Superior Court*, 191 Cal. App. 3d 74, 77, 236 Cal. Rptr. 216, 218 (1987) ("[W]here there is no possibility of coverage, there is no duty to defend.")

18. *Waller*, 11 Cal. 4th at 18-19, 900 P.2d at 627-28, 44 Cal. Rptr. 2d at 378-79. See generally 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 681-690 (9th ed. 1987 & Supp. 1995) (collecting cases analyzing the principles of contract interpretation); *id.* §§ 699-700 (collecting sources discussing the interpretation of insurance contracts); 14 CAL. JUR. 3D *Contracts* §§ 160-167 (1974 & Supp. 1995) (reviewing the precepts governing contract interpretation).

19. *Waller*, 11 Cal. 4th at 18, 900 P.2d at 627, 44 Cal. Rptr. 2d at 378; *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

20. *Waller*, 11 Cal. 4th at 18, 900 P.2d at 627, 44 Cal. Rptr. 2d at 378; *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992); *AIU*, 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820; see also CAL. CIV. CODE § 1636 (West 1985) (stating that the mutual intent of the contracting parties should be given effect); *id.* § 1638 (noting the clear language of a contract governs its interpretation); *id.* § 1639 (explaining "the intention of the parties is to be ascertained from [the written contract alone, if possible]"); *id.* § 1644 (stating that the ordinary meaning of the words of a contract controls, unless given a special meaning by the parties). See generally John L. Romaker & Virgil B. Prieto, *Expectations Lost: Bank of the West v. Superior Court Places the Fox in Charge of the Henhouse*, 29 CAL. W. L. REV. 83 (1992) (discussing the history of insurance contract interpretation).

21. *Waller*, 11 Cal. 4th at 18, 900 P.2d at 627, 44 Cal. Rptr. 2d at 378 (citing *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 807, 640 P.2d 764, 767-68, 180 Cal. Rptr. 628, 631-32 (1982)). See generally William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267 (1986) (discussing the treatment of ambiguities in contracts); David S. Miller, Comment, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988) (criticizing the contract interpretation doctrine of *contra proferentem* as applied to insurance companies).

22. *Waller*, 11 Cal. 4th at 19, 900 P.2d at 627-28, 44 Cal. Rptr. 2d at 378-79; *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 9 Cal. 4th 27, 44, 884 P.2d 1048, 1057, 36 Cal. Rptr. 2d 100, 109 (1994); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). See generally Daniel A. Miller, Note, *The Insurer's Duty to Defend Made Absolute: Gray v. Zurich*, 14 UCLA L. REV. 1328

The majority then applied these fundamental precepts of insurance contract interpretation to the facts presented in the instant case in order to determine whether T.I.E. owed a duty to defend the insured against Amey's lawsuit.²³ The majority dismissed plaintiffs' argument that the insured must always defend suits where a judicial authority has not definitively construed a specific provision of the policy.²⁴ The supreme court clarified that *CNA Casualty v. Seaboard Surety Co.*,²⁵ which plaintiffs "misinterpreted" in making their claim, merely restated the fundamental rule that an insurer may properly deny coverage where the complaint and extrinsic evidence demonstrate that no potential basis for coverage exists.²⁶ Thus, the court declared that there is no duty to defend where the only potential basis for coverage turns on the resolution of a question of law.²⁷

Of paramount importance to the majority in concluding that T.I.E. owed no duty to defend Amey's suit was the fact that Amey's alleged injuries were, in the majority's view, solely the result of economic losses.²⁸ The majority noted that the CGL policy provided no coverage for damage to intangible property.²⁹ The court stated that the "occurrence" in a complaint that alleges emotional or physical distress caused by economic losses³⁰ is the intangible property loss, not the resulting emotional or physical distress.³¹ Therefore, any incidental emotional or physical distress that was caused by the noncovered economic loss also falls outside the scope of coverage.³² The *Waller* court of appeal had found that

(1967) (discussing the insurer's broad duty to defend).

23. *Waller*, 11 Cal. 4th at 19-30, 900 P.2d at 628-35, 44 Cal. Rptr. 2d at 379-86; see *infra* notes 24-51 and accompanying text. For a statement of the relevant facts see *supra* note 2.

24. *Waller*, 11 Cal. 4th at 25, 900 P.2d at 632, 44 Cal. Rptr. 2d at 383.

25. 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986).

26. *Waller*, 11 Cal. 4th at 25, 900 P.2d at 632, 44 Cal. Rptr. 2d at 383; *CNA Casualty*, 176 Cal. App. 3d 598, 605, 222 Cal. Rptr. 276, 277-79.

27. *Waller*, 11 Cal. 4th at 25-26, 900 P.2d at 631, 44 Cal. Rptr. 2d at 382; see, e.g., *McLaughlin v. National Union Fire Ins. Co.*, 23 Cal. App. 4th 1132, 1152, 29 Cal. Rptr. 2d 559, 570 (1994); see also *Standard Fire Ins. Co. v. Peoples Church*, 985 F.2d 446, 448-51 (9th Cir. 1993) (applying case law decided during litigation to relieve insurers of duty to defend); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal. App. 4th 1595, 1608-09, 18 Cal. Rptr. 2d 692, 701 (1993) (relying on cases decided after the insurer denied coverage).

28. *Waller*, 11 Cal. 4th at 20-23, 900 P.2d at 628-30, 44 Cal. Rptr. 2d at 379-81.

29. *Id.* at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381.

30. This was the case in *Waller*, as well as *Keating v. National Union Fire Ins. Co.*, 995 F.2d 154 (9th Cir. 1993); *Chatton v. National Union Fire Ins. Co.*, 10 Cal. App. 4th 846, 13 Cal. Rptr. 2d 318 (1992); and *McLaughlin*, 23 Cal. App. 4th 1132, 29 Cal. Rptr. 2d 559. *Waller*, 11 Cal. 4th at 27, 900 P.2d at 633, 44 Cal. Rptr. 2d at 384.

31. *Waller*, 11 Cal. 4th at 27, 900 P.2d at 633, 44 Cal. Rptr. 2d at 384.

32. *Id.* at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 382; *Keating*, 995 F.2d at 156

the gravamen of Amey's complaint was damage to intangible property interests and, therefore, held that T.I.E. owed no duty to defend.³³ The majority affirmed this line of reasoning, emphasizing that the "occurrence" for which coverage was sought was based entirely on economic losses.³⁴ Therefore, there was "no potential [basis] for coverage and no corresponding duty to defend under the policy, regardless of the damages allegedly suffered by Amey as a result of that [economic] loss."³⁵ In the majority's view, the fact that an uncovered event causes emotional distress will not transform the emotional distress into a separate occurrence under the bodily injury clause of the policy.³⁶

The majority found additional justification for T.I.E.'s denial of coverage, stating that the parties could not have reasonably expected that their CGL policy would require T.I.E. to defend a third party suit alleging bodily injury caused by economic losses.³⁷ The court stated that CGL "policies were never intended to include emotional distress damages that flow from an uncovered 'occurrence.'"³⁸ Moreover, because of the well-established rule that CGL policies do not cover economic losses,³⁹ a par-

(applying California law and affirming that a CGL insurer owed no duty to defend a suit based on emotional and physical distress resulting from economic losses caused by an insured's alleged securities fraud); *Chatton*, 10 Cal. App. 4th 846, 857, 13 Cal. Rptr. 2d 318, 325 (denying coverage under CGL policy for emotional distress induced by economic losses caused by an insured's negligent misrepresentations); *Allstate Ins. Co. v. Interbank Fin. Servs.*, 215 Cal. App. 3d 825, 827, 264 Cal. Rptr. 25, 25 (1989) (holding an insurer owed no duty under a CGL policy to defend a suit alleging bodily injury flowing from economic losses caused by an insured's poor investment advice); *McLaughlin*, 23 Cal. App. 4th 1132, 1150, 29 Cal. Rptr. 2d 559, 569 (holding that a CGL policy does not cover emotional or physical distress induced by economic losses caused by an insured's negligence).

33. *Waller*, 11 Cal. 4th at 20, 900 P.2d at 628, 44 Cal. Rptr. 2d at 379.

34. *Id.* at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381.

35. *Id.* at 27, 900 P.2d at 633, 44 Cal. Rptr. 2d at 384.

36. *Id.* at 30, 900 P.2d at 635, 44 Cal. Rptr. 2d at 386.

37. *Id.* at 21, 900 P.2d at 629, 44 Cal. Rptr. 2d at 380 (citing *Allstate Ins. Co. v. Interbank Fin. Servs.*, 215 Cal. App. 3d 825, 830-31, 264 Cal. Rptr. 25, 28 (1989)); see also *McLaughlin v. National Union Fire Ins. Co.*, 23 Cal. App. 4th 1132, 1151, 29 Cal. Rptr. 2d 559, 569 (1994) ("It would expand coverage of [CGL] policies far beyond any reasonable expectation of the parties to sweep within their potential coverage any alleged emotional or physical distress that might result from economic loss that is itself clearly outside the scope of the policy.") (quoting *Keating v. National Union Fire Ins. Co.*, 995 F.2d 154, 156 (9th Cir. 1993)).

38. *Waller*, 11 Cal. 4th at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381; *Keating*, 995 F.2d at 157 n.1.

39. *Waller*, 11 Cal. 4th at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381; see relevant cases cited *supra* note 32.

ty could not reasonably expect that coverage would expand to include a suit merely because it alleges emotional or physical distress caused by intangible property loss.⁴⁰ Thus, the supreme court held that there is no potential basis for coverage under the bodily injury provision of the CGL policy for any alleged physical or emotional distress flowing from economic losses.⁴¹

The court in *Waller* also addressed the issue of whether a party on appeal may rely on case law published after the close of the trial but before the appeal.⁴² The supreme court observed that it is routine for appellate courts to rely on newly published case law,⁴³ and supplemental briefs are properly utilized in this context.⁴⁴ Moreover, the supreme court reaffirmed the well-settled principle that it is within the appellate court's discretion to address an issue raised for the first time on appeal involving a question of law regarding undisputed facts in the record.⁴⁵ The supreme court also noted that, as a general rule, civil decisions apply retroactively.⁴⁶ Thus, the court held it was proper for the court of appeal in *Waller* to consider cases, specifically, *Keating* and *McLaughlin*, which were decided after the trial.⁴⁷

The supreme court next addressed the issue of whether all unmentioned coverage defenses are implicitly waived if not raised when coverage is declined.⁴⁸ The majority refused to expand the doctrine of waiver

40. *Waller*, 11 Cal. 4th at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381.

41. *Id.*

42. *Id.* at 23-24, 900 P.2d at 630-31, 44 Cal. Rptr. 2d at 381-82.

43. *Id.* at 23-24, 900 P.2d at 631, 44 Cal. Rptr. 2d at 382; *see, e.g.*, *Hattersly v. American Nucleonics Corp.*, 3 Cal. App. 4th 397, 402, 4 Cal. Rptr. 2d 331, 333 (1992) (allowing appellant to rely on a newly decided opinion in litigating its appeal).

44. *Waller*, 11 Cal. 4th at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381; *Meier v. Ross Gen. Hosp.*, 69 Cal. 2d 420, 423, 445 P.2d 519, 522, 71 Cal. Rptr. 903, 906 (1968); *see* CAL. R. CT. 29.3(a) ("When a party desires to present new authorities . . . not available in time to have been included in the party's brief on the merits, the party may serve and file a supplemental brief . . .").

45. *Waller*, 11 Cal. 4th at 24, 900 P.2d at 631, 44 Cal. Rptr. 2d at 382; *see, e.g.*, *Ward v. Taggart*, 51 Cal. 2d 736, 742, 336 P.2d 534, 537 (1959). *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 323 (3d ed. 1985 & Supp. 1995) (collecting cases discussing questions of law raised on appeal).

46. *Waller*, 11 Cal. 4th at 24, 900 P.2d at 631, 44 Cal. Rptr. 2d at 382; *see, e.g.*, *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993); *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978-82, 772 P.2d 1059, 1062-65, 258 Cal. Rptr. 592, 595-98 (1989); *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207, 753 P.2d 585, 596, 246 Cal. Rptr. 629, 640 (1988).

47. *Waller*, 11 Cal. 4th at 24-25, 900 P.2d at 631, 44 Cal. Rptr. 2d at 382. The court, relying on the United States Supreme Court decision in *Harper*, also dismissed the plaintiffs' contention that *Keating* should not be applied retroactively because they relied on "pre-Keating law in deciding what facts needed to be explored." *Id.*; *see Harper*, 113 S. Ct. at 2517 (holding that generally civil decisions "must be given full retroactive effect in all cases still open on direct review").

48. *Waller*, 11 Cal. 4th at 30-31, 900 P.2d at 635, 44 Cal. Rptr. 2d at 386. The trial

to provide coverage where none existed under the terms of the policy.⁴⁹ The court stated that relinquishment of a right by waiver must be intentional, and such intent must be shown by clear and convincing evidence by the party asserting waiver as a defense.⁵⁰ Therefore, the court rejected the "automatic waiver doctrine," holding instead that the insurer retains the right to assert all applicable coverage defenses until they are intentionally waived, unless the insured can show either misconduct by the insurer or detrimental reliance by the insured.⁵¹

court ruled that T.I.E.'s denial letter "waived policy based defenses not specified therein." *Id.* The court of appeal did not address the issue. *Id.*

49. *Id.* at 31, 900 P.2d at 635, 44 Cal. Rptr. 2d at 386.

50. *Id.* at 31, 900 P.2d at 636, 44 Cal. Rptr. 2d at 387 (quoting *City of Ukiah v. Fones*, 64 Cal. 2d 104, 107-08, 410 P.2d 369, 370-71, 48 Cal. Rptr. 865, 866-67 (1962)); see, e.g., *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1559-60 (9th Cir. 1991) (holding that under California law an insurer retains the right to assert coverage defenses not asserted when denying coverage unless the insured establishes misconduct by the insurer or detrimental reliance by the insured); *Aceves v. Allstate Ins. Co.*, 827 F. Supp. 1473, 1476-77 (S.D. Cal. 1993) (stating that an insurer may raise all available coverage defenses unless the insured establishes detrimental reliance); *National Union Fire Ins. Co. v. Siliconix Inc.*, 726 F. Supp. 264, 270 (N.D. Cal. 1989) (holding that there is no waiver where there is no evidence of insurer's intentional relinquishment of right to contest coverage); *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.*, 30 Cal. App. 4th 54, 60, 35 Cal. Rptr. 2d 515, 518 (1994) (stating "waiver always rests upon intent"); *State Farm Fire & Casualty Co. v. Jioras*, 24 Cal. App. 4th 1619, 1628, 29 Cal. Rptr. 2d 840, 845 (1994) (same); *Velasquez v. Truck Ins. Exch.*, 1 Cal. App. 4th 712, 722, 5 Cal. Rptr. 2d 1, 6 (1991) (holding that failure to raise the limitations provision in a letter denying coverage does not evidence intent to waive the provision); *Brookview Condominium Owners' Ass'n v. Heltzer Enterprises-Brookview*, 218 Cal. App. 3d 502, 513, 267 Cal. Rptr. 76, 82 (1990) (stating waiver rests upon waiving party's intent). *But see* *McLaughlin v. Connecticut Gen. Life Ins. Co.*, 565 F. Supp. 434, 451 (N.D. Cal. 1983) (dictum) (stating "an insurance company which relies on specified grounds for denying a claim thereby waives the right to rely in a subsequent litigation on any other grounds which a reasonable investigation would have uncovered"); *Alta Cal. Regional Ctr. v. Fremont Indem. Co.*, 25 Cal. App. 4th 455, 466, 30 Cal. Rptr. 2d 841, 845 (1994) (dictum) (stating that an insurer automatically waives coverage defenses it fails to assert when denying coverage). See generally 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 767-769 (9th ed. 1987 & Supp. 1995) (collecting sources discussing waiver of contractual rights); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 178 (9th ed. 1990 & Supp. 1995) (distinguishing estoppel from waiver); 30 CAL. JUR. 3D *Estoppel and Waiver* §§ 22-26 (1987 & Supp. 1995) (collecting cases analyzing estoppel and waiver); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981) (discussing the doctrine of waiver).

51. *Waller*, 11 Cal. 4th at 31-32, 900 P.2d at 636, 44 Cal. Rptr. 2d at 387. The majority observed that of the 33 states to consider the issue, only Vermont recognizes the rule of automatic waiver. *Id.* at 32, 900 P.2d at 636, 44 Cal. Rptr. 2d at 387 (cita-

The court stated that no waiver occurred in the instant case because neither T.I.E.'s initial denial letter nor its subsequent acts revealed a clear intent to waive defenses to coverage.⁵² Additionally, the court rejected plaintiffs' estoppel argument, stating that it would have been unreasonable for the insured to rely on a belief that T.I.E. intended to waive coverage defense in its denial letter.⁵³ Therefore, T.I.E. retained the right to rely on the fact that Amey's complaint alleged emotional and physical distress caused only by losses to intangible property as a defense to coverage.⁵⁴

The supreme court also affirmed the ruling that no cause of action for breach of the implied covenant of good faith exists where an insurer properly denies coverage under the policy.⁵⁵ The court emphasized that the covenant of good faith and fair dealing is based on the contractual relationship of the parties.⁵⁶ Thus, a bad faith claim cannot be maintained where no policy benefits are due.⁵⁷

Finally, the majority addressed the alleged violations of California Insurance Code section 790.03 which imposes on insurers an independent duty to process all claims in a reasonable manner and with reasonable efficiency, even when no coverage applies to the claim.⁵⁸ An insurer may be liable for unfair practices that are independent of the insurance contract; however, the majority held that the record in *Waller* could not establish that T.I.E. mishandled the processing of the request for coverage.⁵⁹

B. Justice Kennard's Concurring and Dissenting Opinion

Justice Kennard criticized the majority for failing to closely analyze and uphold the "ordinary and unambiguous meaning of the policy language."⁶⁰ Justice Kennard would, however, affirm the appellate court's decision because the policy specifically excluded coverage for the injuries that the insured intended or expected, and the third party suit against the insured alleged bodily injury caused only by "intentional" acts

tions omitted).

52. *Id.* at 34, 900 P.2d at 637, 44 Cal. Rptr. 2d at 388.

53. *Id.* at 34, 900 P.2d at 637-38, 44 Cal. Rptr. 2d at 388-89.

54. *Id.* at 31, 900 P.2d at 635-36, 44 Cal. Rptr. 2d at 386-37.

55. *Id.* at 36, 900 P.2d at 639, 44 Cal. Rptr. 2d at 390; see *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1153, 271 Cal. Rptr. 246, 256 (1990).

56. *Waller*, 11 Cal. 4th at 36, 900 P.2d at 639, 44 Cal. Rptr. 2d at 390.

57. *Id.*; see *Love*, 221 Cal. App. 3d at 1153, 271 Cal. Rptr. at 256 (holding that "bad faith claim cannot be maintained unless policy benefits are due").

58. *Waller*, 11 Cal. 4th at 36, 900 P.2d at 639, 44 Cal. Rptr. 2d at 390.

59. *Id.* at 36-37, 900 P.2d at 639, 44 Cal. Rptr. 2d at 390.

60. *Id.* at 37, 900 P.2d at 640, 44 Cal. Rptr. 2d at 391 (Kennard, J., concurring and dissenting).

“done for the purpose of causing [Amey] . . . emotional and physical distress.”⁶¹

Justice Kennard stated that the mutual intent of the parties in *Waller*, as revealed by the terms of the policy, indicates coverage would apply to bodily injury even if caused by intangible property damage.⁶² In her view, there was no evidence of the parties’ intent to exclude from coverage bodily injuries resulting from harm to intangible property.⁶³ Instead, she stated, the majority fashioned the parties’ intent out of how it believed insurance policies should be drafted.⁶⁴ Justice Kennard, in contrast, would follow the plain meaning of the insurance contract where, as in *Waller*, the parties’ intent is clearly and unambiguously expressed.⁶⁵

Justice Kennard criticized the majority’s blanket rule that the bodily injury provision of the policy does not provide coverage if the bodily injury is “related to” property damage not covered by the policy.⁶⁶ Justice Kennard interpreted T.I.E.’s policy to provide bodily injury coverage to any event that “result[ed] in bodily injury.”⁶⁷ She stated that “[a]n occurrence does not become a nonoccurrence simply because the event causes both bodily injury and economic loss.”⁶⁸ Thus, in contrast to the majority, which relied on the interdependence between the property and bodily injury provisions in the CGL policy,⁶⁹ Justice Kennard viewed the bodily injury and property damage clauses as independent bases for coverage.⁷⁰ She emphasized that a duty to defend is triggered when any

61. *Id.* at 37-38, 900 P.2d at 640, 44 Cal. Rptr. 2d at 391 (Kennard, J., concurring and dissenting).

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

63. *Id.* at 43-44, 900 P.2d at 644, 44 Cal. Rptr. 2d at 395 (Kennard, J., concurring and dissenting).

64. *Id.* at 43-44, 900 P.2d at 644-45, 44 Cal. Rptr. 2d at 395-96 (Kennard, J., concurring and dissenting).

65. *Id.* at 48, 900 P.2d at 647, 44 Cal. Rptr. 2d at 398 (Kennard, J., concurring and dissenting).

66. *Id.* at 43-44, 900 P.2d at 644, 44 Cal. Rptr. 2d at 395 (Kennard, J., concurring and dissenting).

67. *Id.* at 44, 900 P.2d at 645, 44 Cal. Rptr. 2d at 396 (Kennard, J., concurring and dissenting).

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

69. *Id.* at 26-27, 900 P.2d at 632-33, 44 Cal. Rptr. 2d at 383-84; *see supra* notes 28-41 and accompanying text.

70. *Waller*, 11 Cal. 4th at 45, 900 P.2d at 645, 44 Cal. Rptr. 2d at 396 (Kennard, J., concurring and dissenting). Justice Kennard, in support of her view of the independence between the bodily injury clause and the property damage clause of the CGL policy, noted that the types of coverage “are subject to different exclusions, can be

potential basis for liability under the policy is alleged.⁷¹ Justice Kennard noted that in the instant case, in contrast to *Chatton*,⁷² *Keating*,⁷³ and *McLaughlin*,⁷⁴ where emotional or physical distress flowed successively from intangible property losses, the insured concurrently caused the bodily injury and economic losses.⁷⁵ Thus, the complaint alleged some potential basis for coverage.⁷⁶ Finally, Justice Kennard noted that T.I.E., as drafter of the policy, could have included in the policy an exclusion for bodily injury resulting from economic losses if that had been the parties' intent.⁷⁷

Justice Kennard concurred in the majority's resolution of the case because the CGL policy in *Waller* provided no coverage for intentionally caused injuries.⁷⁸ In light of the fact that Amey's complaint only alleged injuries intentionally caused by the insured, the insurer was justified in denying coverage.⁷⁹ Based on this ground, Justice Kennard would affirm the appellate court's decision.⁸⁰

separately purchased, and can be subject to different liability limits." *Id.* (Kennard, J., concurring and dissenting).

71. *Id.* at 47, 900 P.2d at 646, 44 Cal. Rptr. 2d at 397 (Kennard, J., concurring and dissenting) (citing *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1084, 846 P.2d 792, 797, 17 Cal. Rptr. 2d 210, 215 (1993)).

72. *Chatton v. National Union Fire Ins. Co.*, 10 Cal. App. 4th 846, 13 Cal. Rptr. 2d 318 (1992).

73. *Keating v. National Union Fire Ins. Co.*, 995 F.2d 154 (9th Cir. 1993).

74. *McLaughlin v. National Union Fire Ins. Co.*, 23 Cal. App. 4th 1132, 29 Cal. Rptr. 2d 559 (1989).

75. *Waller*, 11 Cal. 4th at 47, 900 P.2d at 646-47, 44 Cal. Rptr. 2d at 397-98 (Kennard, J., concurring and dissenting).

76. *Id.* at 47-48 n.8, 900 P.2d at 647 n.8, 44 Cal. Rptr. 2d at 398 n.8 (Kennard, J., concurring and dissenting). Illustrating her view of the flaws in the majority's ruling, Justice Kennard opined that where a policy covered bodily injury but not property damage, an insurer could avoid coverage under the majority's rule "if the insured's car strikes and damages a tree that falls and injures someone." *Id.* at 48, 900 P.2d at 647, 44 Cal. Rptr. 2d at 398 (Kennard, J., concurring and dissenting).

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

78. *Id.* at 42, 900 P.2d at 643, 44 Cal. Rptr. 2d at 394 (Kennard, J., concurring and dissenting).

79. *Id.* at 43, 900 P.2d at 643-44, 44 Cal. Rptr. 2d at 394-95 (Kennard, J., concurring and dissenting).

80. *Id.* at 49, 900 P.2d at 648, 44 Cal. Rptr. 2d at 399 (Kennard, J., concurring and dissenting).

III. IMPACT AND CONCLUSION

Waller represents a clear victory for insurance companies.⁸¹ *Waller* holds that for the insurer's duty to defend to be triggered under the bodily injury provision of a CGL policy, a lawsuit or other evidence must show that the alleged "bodily injury" flows from some source other than intangible property losses.⁸² Although the third party complaint at the heart of *Waller* alleged bodily injuries resulting from both the insured's intentional acts as well as from economic losses,⁸³ nevertheless, the majority stated that all of the injuries were "directly related to" the intangible property losses which were not covered under the policy.⁸⁴ Under the majority's view, the bodily injury and property damage clauses of a CGL are interdependent.⁸⁵ Thus, to obtain coverage, a complaint must allege bodily injury that is not directly related to the noncovered property damage.⁸⁶ In this manner, *Waller* will decrease the bodily injury coverage provided by a typical CGL policy that, on its face, covers bodily injury independent of whether any related property damage is covered by the policy.⁸⁷

However, the majority's "directly related to" language in *Waller* may pose problems for courts in the future.⁸⁸ In *Horace Mann*, the California Supreme Court explicitly rejected the argument that a duty to defend under a CGL would hinge on whether the policy provided coverage for the "dominant factor" of a lawsuit, reaffirming instead that *any* potential basis for coverage will trigger the insurer's duty to defend.⁸⁹ The line

81. T.I.E. itself avoided a \$60,000,000 judgment. *Id.* at 14-15, 900 P.2d at 624-25, 44 Cal. Rptr. 2d at 375-76. More significantly, *Waller* relieves an insurer of the duty to defend under a CGL policy in those cases where the alleged bodily injuries, which on the face of the CGL policy are covered, are directly related to an uncovered intangible property loss. *Id.* at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381; *see supra* notes 28-36 and accompanying text.

82. *Waller*, 11 Cal. 4th at 23, 900 P.2d at 630, 44 Cal. Rptr. 2d at 381; *see supra* notes 28-36 and accompanying text.

83. *Waller*, 11 Cal. 4th at 47 n.8, 900 P.2d at 646-47 n.8, 44 Cal. Rptr. 2d at 397-98 n.8 (Kennard, J., concurring and dissenting).

84. *Id.* at 30, 900 P.2d at 635, 44 Cal. Rptr. 2d at 386.

85. *See supra* notes 28-41, 66-77 and accompanying text.

86. *See supra* notes 28-41 and accompanying text.

87. *Waller*, 11 Cal. 4th at 45, 49, 900 P.2d at 645, 648, 44 Cal. Rptr. 2d at 397, 398 (Kennard, J., concurring and dissenting); *see supra* notes 60-65 and accompanying text.

88. *See supra* notes 66-77 and accompanying text.

89. *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1084, 846 P.2d 792, 797, 17 Cal. Rptr. 2d 210, 215 (1993).

between *Waller* and *Horace Mann* is a thin one.⁹⁰ Certainly, if a lawsuit alleges several causes of action of which at least one alleges a potentially covered risk, as in *Horace Mann*, the insurer owes a duty to defend.⁹¹ Just as clearly, an insurer owes no duty to defend, and the “directly-related” language in *Waller* is satisfied, where the alleged bodily injury is so incidental to the noncovered acts as to be solely caused by them.⁹² Yet, it remains unclear after *Waller* at what point the insurer’s duty to defend is triggered where the insured’s acts concurrently induce both potentially covered bodily injury as well as noncovered damages.

Justice Kennard opined that if the parties had intended, T.I.E., as the drafter of the policy, could have specifically excluded from coverage, under the bodily injury provision, emotional or physical distress damages resulting from uncovered intangible property losses.⁹³ Given that courts tend to follow the doctrine of *contra proferentem*, construing insurance policies against the insurers, the prudent drafter of CGL insurance policies will see this caveat in Justice Kennard’s concurrence as a factor to consider when drafting CGL policies.⁹⁴

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90. In *Waller*, Amey’s complaint alleged bodily injuries caused concurrently by the economic losses and by the insured’s intentional acts. *Waller*, 11 Cal. 4th at 47 n.8, 900 P.2d at 646-47 n.8, 44 Cal. Rptr. 2d at 397-98 n.8 (Kennard, J., concurring and dissenting). The majority in *Waller* based its holding on its view that the alleged bodily injury was caused by the “identical business and contract transgressions” comprising the rest of the complaint and thus was so “directly related” to the noncovered intangible property damage that the “noncovered acts . . . comprised the entire complaint.” *Id.* at 29, 900 P.2d at 634, 44 Cal. Rptr. 2d at 385; see *supra* notes 28-36 and accompanying text. In *Horace Mann*, a sexual misconduct complaint alleged at least one potentially covered risk, i.e., the negligent acts of the insured. *Horace Mann*, 4 Cal. 4th at 1084, 846 P.2d at 793, 17 Cal. Rptr. 2d at 216.

91. *Horace Mann*, 4 Cal. 4th at 1084, 846 P.2d at 797, 17 Cal. Rptr. 2d at 215.

92. See *supra* notes 28-36 and accompanying text.

93. *Waller*, 11 Cal. 4th at 48, 900 P.2d at 647, 44 Cal. Rptr. 2d at 398.

94. *Id.*

VII. INSURANCE LAW

In third party liability insurance cases involving continuous or progressively deteriorating losses and successive comprehensive general liability policy periods, a continuous injury trigger of coverage applies: Montrose Chemical Corp. v. Admiral Insurance Co.

I. INTRODUCTION

In *Montrose Chemical Corp. v. Admiral Insurance Co.*,¹ the California Supreme Court grappled with the issue of "whether four comprehensive general liability (CGL) policies issued by . . . Admiral Insurance Company (Admiral) to . . . Montrose Chemical Corporation of California (Montrose) obligate Admiral to defend Montrose in lawsuits seeking damages for continuous or progressively deteriorating bodily injury and property damage that occurred during the successive policy periods."² The court unanimously adopted a continuous trigger of coverage which obligates insurers to defend their policy holders against continuous and progressive damage claims that might have arisen before the issuance of the policy.³ The court granted review on this issue to resolve a conflict between the Court of Appeal, Fourth District, Division One and the Seventh District, Division Two.⁴ This case also raised the issue of the degree of knowledge necessary to invoke the loss-in-progress doctrine and

1. 10 Cal. 4th 645, 897 P.2d 1, 42 Cal. Rptr. 2d 324 (1995). Chief Justice Lucas wrote the majority opinion of the court, in which Justices Mosk, Kennard, Arabian, George, and Werdegar joined. *Id.* at 654-94, 897 P.2d at 3-30, 42 Cal. Rptr. 2d at 326-53. Justice Baxter wrote a concurring opinion. *Id.* at 695-97, 897 P.2d at 30-32, 42 Cal. Rptr. 2d at 353-55 (Baxter, J., concurring).

2. *Id.* at 654, 897 P.2d at 3, 42 Cal. Rptr. 2d at 326.

3. *Id.* at 654-55, 897 P.2d at 3-4, 42 Cal. Rptr. 2d at 326-27. In the context of third-party continuous claims, therefore, all insurance policies that take effect at any time during the contamination period potentially provide coverage. *Id.*

4. Compare *Montrose Chem. Corp. v. Admiral Ins. Co.*, 35 Cal. App. 4th 335, 5 Cal. Rptr. 2d 358 (1992) (using a continuous trigger) with *Fireman's Fund Ins. Co. v. Aetna Cas. & Sur. Co.*, 223 Cal. App. 3d 1621, 273 Cal. Rptr. 431 (1990) (adopting a manifestation of damage trigger in a construction defect context) and *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 5 Cal. App. 4th 714, 7 Cal. Rptr. 2d 53 (1992) (following *Fireman's Fund* and using a manifestation of damage trigger). See *infra* notes 74-89 and accompanying text for an explanation of the evolution of the conflict in California law. See also *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d at 674, 679, 694, 798 P.2d at 1230, 1233, 1243, 274 Cal. Rptr. at 387, 390, 400 (1990) (reserving this issue).

whether the receipt of a “potentially responsible party” (PRP) letter crossed that threshold.⁵ In holding that “as long as there remains uncertainty about damage . . . and the imposition of liability . . . and no legal obligation to pay third party claims has been established, there is a potentially insurable risk,” the court concluded that a PRP letter alone is insufficient to trigger the loss-in-progress doctrine.⁶

II. FACTS AND PROCEDURAL BACKGROUND

Between the years 1947 and 1982, Montrose manufactured dichlorodiphenyl-trichlorethane (DDT)⁷ and over the period from 1960 to 1986, seven different carriers issued CGL policies to Montrose.⁸ Admiral furnished four consecutive policies⁹ covering Montrose from October 13, 1982 to March 20, 1986.¹⁰

Five individual actions required Admiral to defend Montrose, which were divided into two distinct groups: the *Stringfellow* cases and the *Levin Metals* cases.¹¹ The first line of *Stringfellow* cases involved an action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹² brought by the United States and California against Montrose and various other businesses for “reimbursement for response costs incurred . . . at and near the . . . waste disposal site known as the Stringfellow acid pits.”¹³ Montrose had

5. *Montrose*, 10 Cal. 4th at 689-93, 897 P.2d at 27-31, 42 Cal. Rptr. 2d at 350-54. See *infra* notes 97-101 and accompanying text for discussion of the loss-in-progress issue; see also *infra* note 17 for discussion of the implications of a PRP letter.

6. *Montrose*, 10 Cal. 4th at 693, 897 P.2d at 29, 42 Cal. Rptr. 2d at 352.

7. *Id.* at 655, 897 P.2d at 4, 42 Cal. Rptr. 2d 327. DDT contains “a suspected human carcinogen.” *Id.* at 658, 897 P.2d at 5, 42 Cal. Rptr. 2d at 328.

8. *Id.* at 656, 897 P.2d at 4, 42 Cal. Rptr. 2d at 327.

9. The policy language specifically obligated Admiral to “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury, or . . . property damage to which the insurance applies, caused by an occurrence.” *Id.* The policy defined an occurrence as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” *Id.* All four Admiral policies reflected standard 1986 CGL Insurance Services Office (ISO) language. *Id.* at 668-69, 897 P.2d at 12-13, 42 Cal. Rptr. 2d at 335-36; see also RONALD B. ROBIE ET AL., CALIFORNIA CIVIL PRACTICE: ENVIRONMENTAL LITIGATION § 5:9 (1993) (describing the major changes made to CGL policies in 1966, 1973, and 1986).

10. *Montrose*, 10 Cal. 4th at 656, 897 P.2d at 4, 42 Cal. Rptr. 2d at 327.

11. *Id.* at 656-59, 897 P.2d at 4-6, 42 Cal. Rptr. 2d at 327-29.

12. See generally 42 U.S.C. §§ 9601-9675 (1995). The primary purposes of CERCLA are to clean up the nation’s hazardous waste sites and ultimately to cause the responsible parties to pay for the damage sustained by natural resources. Kevin M. Ward, *Recovery of Natural Resource Damages Under CERCLA*, 25 TORT & INS. L.J. 559 (1990); see also ROBIE, *supra* note 9, §§ 3:1, 3:2.

13. *Montrose*, 10 Cal. 4th at 656-57, 897 P.2d at 5, 42 Cal. Rptr. 2d at 328.

dumped byproducts from its DDT manufacturing process at this site between 1968 and 1972.¹⁴ The complaint alleged that toxic wastes had been seeping from the acid pits beginning in 1956.¹⁵ The other part of the *Stringfellow* cases involved set of lawsuits brought by numerous private plaintiffs seeking damages for bodily injury and property damage.¹⁶ Of particular interest is that “[o]n August 31, 1982, six weeks prior to commencement of the policy term under the first of Admiral’s policies issued to Montrose, Montrose was notified by the federal Environmental Protection Agency . . . that it considered Montrose a potentially responsible party” for the costs incurred in the cleanup at the Stringfellow acid pits.¹⁷

The second group of cases involved an action “brought by Levin Metals against Parr-Richmond, alleging that real property sold by Parr-Richmond to Levin Metals . . . was contaminated by hazardous wastes.”¹⁸ Montrose’s liability in the present case related to chemicals shipped by them to that site.¹⁹

Naturally, Montrose tendered its defense to all of its insurers, including Admiral.²⁰ Montrose brought a declaratory relief action to establish that all the insurers had both a duty to defend and a duty to indemnify.²¹ Admiral alone moved for summary judgment on the grounds that there was duty to either defend or indemnify.²² The trial court granted the

14. *Id.* at 657, 897 P.2d at 5, 42 Cal. Rptr. 2d at 328. The government’s CERCLA action did not allege bodily injury. *Id.*

15. *Id.*

16. *Id.* The complaint alleged that 27 deaths resulted from the release of trichlorethylene. *Id.*

17. *Id.* at 658, 897 P.2d at 5-6, 42 Cal. Rptr. 2d at 328-29. See *infra* notes 97-101 and accompanying text for a discussion of the implications of a PRP letter and the known loss rule. In order to be held liable for cleanup costs under CERCLA, a party must be identified as a potentially responsible party. *ROBIE*, *supra* note 9, § 3:3. The implications of a PRP letter are enormous because the party may be found responsible for: (1) all costs of removal and remediation; (2) any other necessary cost; (3) damages; and (4) cost of health assessment. *Id.* Additionally, if these expenses are indivisible, the PRPs are jointly and severally liable. *Id.* § 3:18.

18. *Montrose*, 10 Cal. 4th at 658, 897 P.2d at 6, 42 Cal. Rptr. 2d at 329.

19. *Id.* at 658-59, 897 P.2d at 6, 42 Cal. Rptr. 2d at 329. More accurately, the chemicals shipped by Montrose were in turn processed by a third party and the resulting by products caused the contamination. *Id.*

20. *Id.* Six other insurers also issued CGL policies to Montrose. *Id.*

21. *Id.* The court carefully limited this case to the duty to defend and not the duty to indemnify. *Id.* at n.9, 897 P.2d at 6 n.9, 42 Cal. Rptr. 2d at 329 n.9.

22. *Id.* at 659-60, 897 P.2d at 7, 42 Cal. Rptr. 2d at 330. The other remaining insurers agreed to defend, subject to a reservation of rights. *Id.* at 659, 897 P.2d at 7, 42

motion and dismissed the action as to Admiral.²³ The court of appeal reversed the trial court and “remanded Admiral’s affirmative defense, and declined “to address [Admiral’s] argument . . . that coverage for progressive damage at the Stringfellow site is also barred.”²⁴ The California Supreme Court granted review.²⁵

III. TREATMENT OF CASE

A. *The Majority Opinion*

1. Trigger of Coverage in Third Party Progressive Loss Cases

As noted above, the California Supreme Court adopted a continuous trigger of coverage supported by: (1) the specific policy language;²⁶ (2) settled California case law;²⁷ (3) the drafting history of CGL policies;²⁸ and (4) various policy considerations.²⁹

a. *Preliminary considerations*

Before addressing the trigger of coverage issue and to accurately set the context of the decision, the court explored several preliminary considerations. In reaching its decision, the court placed great emphasis on: (1) the differences between third party and first party insurance; (2) the

Cal. Rptr. 2d at 330. Admiral argued on two grounds: (1) that the circumstances triggering coverage in the *Levin Metals* cases “did not occur during the policy periods;” and (2) the contamination alleged in the *Stringfellow* cases was “an uninsurable loss-in-progress.” *Id.* The court noted that “Admiral did not advance the loss-in-progress theory in the *Levin Metals* cases.” *Id.* at n.11, 897 P.2d at 9 n.11, 42 Cal. Rptr. 2d at 332 n.11.

23. *Id.* at 660, 897 P.2d at 7, 42 Cal. Rptr. 2d at 330. The trial court applied a manifestation trigger and reasoned that there was no possibility for coverage because the contamination in the *Levin Metals* cases was discovered before the commencement of the first Admiral policy. *Id.* For a discussion of the manifestation trigger of coverage, see *infra* note 70 and accompanying text. The trial court granted summary judgment for the *Stringfellow* cases, reasoning that the loss-in-progress rule barred liability under Admiral’s policies because the a PRP letter implied that Montrose knew its liability for the contamination was “likely.” *Montrose*, 10 Cal. 4th at 660, 897 P.2d at 7, 42 Cal. Rptr. 2d at 330. For a discussion of the loss-in-progress rule, see *infra* notes 97-101 and accompanying text.

24. *Montrose*, 10 Cal. 4th at 660, 897 P.2d at 7, 42 Cal. Rptr. 2d at 330; see *Montrose*, 35 Cal. App. 4th 335, 5 Cal. Rptr. 2d 358.

25. *Montrose*, 10 Cal. 4th at 661, 897 P.2d at 7-8, 42 Cal. Rptr. 2d at 330-31.

26. See *infra* notes 53-59 and accompanying text.

27. See *infra* notes 69-91 and accompanying text.

28. See *infra* notes 60-68 and accompanying text.

29. See *infra* notes 92-96 and accompanying text.

differences between bodily injury and property damage; and (3) the relevance of the facts surrounding the actual event.³⁰

First-party insurance policies generally cover loss or damage sustained by the insured, and the insured is paid when the event happens.³¹ In contrast, third party insurance "provides coverage for liability of the insured to a 'third party,'" and the insurer pays on the policy only when the insured becomes "legally obligated" for damages.³² The court distinguished third-party liability insurance from first-party property insurance³³ by noting four inherent differences: (1) causation; (2) parties' expectations; (3) conditions of coverage; and (4) required party actions.³⁴

First-party policies raise different causation issues as opposed to those raised in third-party policies.³⁵ Coverage under a first-party policy is triggered when a loss is caused by "certain enumerated perils."³⁶ Under a third-party liability policy, coverage is predicated on "traditional tort concepts of fault, proximate cause, and duty."³⁷ Thus the key difference

30. *Montrose*, 10 Cal. 4th at 663, 897 P.2d at 9, 42 Cal. Rptr. 2d at 332. The court made these distinctions primarily to clearly explain the proper factors to consider in deciding a trigger of coverage issue and to differentiate the manifestation trigger adopted in *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 678-79, 798 P.2d 1230, 1232, 274 Cal. Rptr. 387, 389 (1990) (holding "in first party property damages case[s] . . . the carrier insuring the property at the time of manifestation of property damage is solely responsible for indemnification once coverage is found to exist").

31. *Montrose*, 10 Cal. 4th at 663, 897 P.2d at 9, 42 Cal. Rptr. 2d at 332. Under a first party policy, the insurer will compensate the insured for all covered losses up to the specified policy limit. See 1 GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 1.61 (2d ed. 1984).

32. *Montrose*, 10 Cal. 4th at 663, 897 P.2d at 9, 42 Cal. Rptr. 2d at 332; see also *Garvey v. State Farm Fire and Cas. Ins. Co.*, 48 Cal. 3d 395, 399, 770 P.2d 704, 705, 257 Cal. Rptr. 292, 293 (1989) (discussing coverage under a first-party homeowner's insurance policy). Third-party policies are set up to cover all liability actions except those specifically excluded. See also Chandra Lantz, Note, *Triggering Coverage of Progressive Property Loss: Preserving the Distinctions Between First—and Third-Party Insurance Policies*, 35 WM. & MARY L. REV. 1801, 1801-02 n.4 (1994) (citing 1 WARREN FREEDMAN, FREEDMAN'S RICHARDS ON INSURANCE § 4:7 (6th ed. 1990)).

33. *Montrose*, 10 Cal. 4th at 665, 897 P.2d at 10-11, 42 Cal. Rptr. 2d at 333-34; see also Lantz, *supra* note 32, at 1801-02 n.4 (reviewing the policy reasons and precedents involved in trigger of coverage issues).

34. *Montrose*, 10 Cal. 4th at 663-65, 897 P.2d at 9-11, 42 Cal. Rptr. 2d at 332-34.

35. *Id.* at 663-64, 897 P.2d at 9-10, 42 Cal. Rptr. 2d at 332-33.

36. *Id.* at 663, 897 P.2d at 9, 42 Cal. Rptr. 2d at 332. This generally refers to "fortuitous, active, physical forces such as lightning, wind, and explosion." *Id.* (citations omitted).

37. *Id.* at 664, 897 P.2d at 10, 42 Cal. Rptr. 2d at 333 (quoting *Garvey v. State Farm Fire and Cas. Ins. Co.*, 48 Cal. 3d 395, 407, 770 P.2d 704, 710, 257 Cal. Rptr. 292, 298

in the liability analysis focuses on the “broader spectrum of risks” covered by the policy.³⁸

Secondly, the expectations of the parties differ greatly depending on first- or third-party coverage.³⁹ An insured purchases first-party insurance in order to cover the full potential loss, which is generally the value of the insured property.⁴⁰ On the other hand, a third-party policy requires that the insured and the insurer make an “educated guess” as to the maximum amount of exposure and adjust the premium accordingly.⁴¹

The court drew a third distinction between the two types of policies by noting that “CGL policies do not impose, as a condition of coverage, a requirement that the damage or injury be discovered at any particular point in time.”⁴² Standard third-party policy language provides for coverage upon an “occurrence.”⁴³

Chief Justice Lucas noted as a final distinction the different actions policies require a party to take.⁴⁴ In most cases, first-party insurance policies mandate that the insured bring an “action against the insurer within twelve months after ‘inception of the loss.’”⁴⁵ Conversely, a CGL policy fails to impose such a duty because the injured third party is generally the initiator of legal action.⁴⁶

In addition to the distinction between first- and third-party insurance, the court focused on whether the policy covered “bodily injury, property damage, or both.”⁴⁷ Fortunately, Admiral’s policies covered both types of damage so the court failed to draw any distinctions.⁴⁸

(1989) (citations omitted)). Rather than a “grocery list” of covered or uncovered acts, the third-party liability policy spans all negligence on the part of the insured. *Id.*; see also 39 CAL. JUR. 3D *Insurance Contracts* §§ 237-395 (1977 & Supp. 1995) (discussing rules governing enforcement of insurance contracts).

38. *Montrose*, 10 Cal. 4th at 664, 897 P.2d at 10, 42 Cal. Rptr. 2d at 333 (quoting *Garvey*, 48 Cal. 3d at 407, 770 P.2d at 710, 257 Cal. Rptr. at 298).

39. *Id.*

40. *Id.*; see *supra* note 31 and accompanying text.

41. *Montrose*, 10 Cal. 4th at 664, 897 P.2d at 10, 42 Cal. Rptr. 2d at 333.

42. *Id.*

43. *Id.* These policies generally define occurrence “as an accident . . . including a ‘continuous or repeated exposure to conditions,’ that results in bodily injury or property damage during the policy period.” *Id.*; see *infra* notes 53-59 and accompanying text.

44. *Montrose*, 10 Cal. 4th at 664-65, 897 P.2d at 10, 42 Cal. Rptr. 2d at 333.

45. *Id.* (citing *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 682-87, 798 P.2d 1230, 1234-38, 274 Cal. Rptr. 387, 391-95 (1990)). This requirement imposes on the insureds a duty to know when they have suffered a loss. *Id.* (citing *Prudential-LMI*, 51 Cal. 3d 686-87, 798 P.2d 1238, 274 Cal. Rptr. 387, 395).

46. *Id.*

47. *Id.*

48. *Id.* at 666, 897 P.2d at 11, 42 Cal. Rptr. 2d at 334.

Finally, the individual facts of the case come into play when exploring the last preliminary consideration.⁴⁹ The triggering event is significant because it can be either: (1) "a single event resulting in immediate injury;" (2) "a single event resulting in delayed or progressively deteriorating injury;" or (3) "a continuing event . . . resulting in single or multiple injuries."⁵⁰ The court noted that the instant case contained both claims of continuous or progressively deteriorating bodily injury . . . and progressively deteriorating property damage . . . all arising from continuous or repeated exposure . . . over time."⁵¹ Ultimately, the court placed a great deal of importance on all three distinctions and stressed the significant role such differences play in determining a coverage-triggering issue.⁵²

b. Policy language

In this section of its analysis the court explored standard rules of contract interpretation because "[i]nsurance policies are contracts."⁵³ Accordingly, the threshold question becomes whether the policy language is clear⁵⁴ or ambiguous.⁵⁵ The supreme court, in contrast to the court of

49. *Id.*

50. *Id.*

51. *Id.* It is unclear what distinction the court would have made if the triggering event were a single event with immediate injury or a single event with delayed or progressively deteriorating injury. For a discussion of the application of this decision to construction defect and asbestos litigation, see *supra* notes 134-42 and accompanying text.

52. *Montrose*, 10 Cal. 4th at 665-66, 897 P.2d at 10-11, 42 Cal. Rptr. 2d at 333-34. The court warned that "cases whose analyses fail to take these distinctions into account . . . may shed more darkness than light on the [issues of allocation and trigger of coverage]." *Id.* at 665, 897 P.2d at 11, 42 Cal. Rptr. 2d at 334.

53. *Id.* at 666, 897 P.2d at 11, 42 Cal. Rptr. 2d at 334. The court acknowledged rather typical rules of contract interpretation: (1) the parties' mutual intention governs interpretation; and (2) intent is inferred from the contract itself. *Id.* at 666-67, 897 P.2d at 11, 42 Cal. Rptr. 2d at 334; see also CAL. CIV. CODE §§ 1636, 1639, 1649, 1654 (West 1995) (defining and explaining interpretation of intent); 39 CAL. JUR. 3D *Insurance Contracts*, §§ 37-45 (1977 & Supp. 1995) (discussing contract construction and interpretation); and 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 699-704 (9th ed. 1987 & Supp. 1995) (reviewing insurance contracts generally).

54. When policy language is "clear and explicit," the ordinary sense controls. CAL. CIV. CODE §§ 1638, 1644 (West 1995).

55. When ambiguity exists, "it is resolved by interpreting the ambiguous provision in the sense . . . the insurer . . . believed the [insured] understood them at the time of formation." *Montrose*, 10 Cal. 4th at 667, 897 P.2d at 11, 42 Cal. Rptr. 2d at 334 (paraphrasing California Civil Code § 1649); see also 39 CAL. JUR. 3D *Insurance Contracts* §§ 39, 42 (1977 & Supp. 1995) (discussing intent of contracting parties); 1 B.E. WITKIN,

appeal, found “that the express language of Admiral’s policies of insurance, when read as a whole, *unambiguously* provides potential coverage for the continuous and progressively deteriorating bodily injury and property damage alleged.”⁵⁶ Chief Justice Lucas focused on the triggering language for coverage⁵⁷ and the definition of occurrence⁵⁸ in reaching this conclusion.⁵⁹

c. Settled case law and the drafting history of the standard CGL policy

Admiral argued that to adopt a continuous trigger of coverage “is ‘to ignore[] the policy language’ and unnecessarily impose on subsequent policies the duty to defend.”⁶⁰ The court flatly rejected this argument based on the policy language, “settled case law,” and “the drafting history

SUMMARY OF CALIFORNIA LAW, *Contracts* § 699 (9th ed. 1987 & Supp. 1995) (explaining contract ambiguity). For a general background discussion of the drafting process of the CGL policy in the United States, see *American Home Prods. Corp. v. Liberty Mutual Ins. Co.*, 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983). If this rule fails to resolve the ambiguity, then the vague language is construed against the party who caused the ambiguity. *Montrose*, 10 Cal. 4th at 667, 897 P.2d at 11-12, 42 Cal. Rptr. 2d at 334-35. Finally, if the ambiguity still exists, it is resolved against the insurer. *Id.* The court reasoned that because the insurer generally drafts the policy and the insured has little or no bargaining power as to the policy’s modification, these rules of construction were reasonable. *Id.* at 667, 897 P.2d at 12, 42 Cal. Rptr. 2d at 335; *see also* 39 CAL. JUR. 3D *Insurance Contracts* § 42 (1977 & Supp. 1995) (explaining construction of contract ambiguity in favor of the insured).

56. *Montrose*, 10 Cal. 4th at 668, 897 P.2d at 12, 42 Cal. Rptr. 2d at 335 (emphasis added). In contrast, the court of appeal held “[t]he dozens of judicial definitions attributed to ‘occurrence’ leaves little room for argument about whether we are dealing with an ambiguity.” *Montrose*, 35 Cal. App. 4th at 348, 5 Cal. Rptr. 2d at 365. In fact, the Second District undertook an entire analysis of the expectations of the parties and the meaning of “occurrence.” *Id.* at 348-54, 5 Cal. Rptr. 2d at 365-70. Eventually, the court of appeal concluded that the insurer reasonably anticipated coverage for progressive continuing injuries in successive policies. *Id.* at 353, 5 Cal. Rptr. 2d at 369; *see also* ROBIE, *supra* note 9, § 5:9 (examining the interpretation of “occurrence” in California); Stuart I. Parker, *Insurance Coverage Issues Arising Out of Environmental Litigation*, available in WESTLAW, C757 ALI-ABA 495 (1992) (illustrating the perception that common occurrence language is generally considered ambiguous).

57. *Montrose*, 10 Cal. 4th at 668, 897 P.2d at 12-13, 42 Cal. Rptr. 2d at 335-36. The policy specifically obligated Admiral to pay all sums “the insured shall become legally obligated to pay as damages because of . . . *bodily injury, or . . . property damage . . .* caused by an occurrence.” *Id.* (quoting the policy language). According to the policy, the bodily injury or property damage must “occur during the policy period” in order to trigger coverage. *Id.* at 668, 897 P.2d at 13, 42 Cal. Rptr. 2d at 336.

58. The policy defined occurrence as “an accident, *including continuous or repeated exposure to conditions*, which results in bodily injury or property damage.” *Id.* at 669, 897 P.2d at 13, 42 Cal. Rptr. 2d at 336 (emphasis in original).

59. *Id.*

60. *Id.* *See infra* note 72 for a discussion of the injury-in-fact trigger of coverage.

of the standard CGL policy.⁶¹ In construing the policy language to support a continuous trigger of coverage, Chief Justice Lucas placed heavy emphasis on *Remmer v. Glens Falls Indemnity Co.*,⁶² which stands for the proposition that coverage begins at the time of actual damage to the party.⁶³ "The general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed, but the time when the complaining party was actually damaged."⁶⁴

The court then shifted its analysis to CGL drafting history and its usefulness in determining coverage issues.⁶⁵ Chief Justice Lucas concluded the specific changes made to the language of the standard CGL policy and the drafting history clearly indicated that the policy covered "all property damage or injury occurring during that period."⁶⁶ More importantly, the policy language failed to exclude continuous or progressive damage or injury that occurred during the policy period.⁶⁷ Accordingly, the court held that all policies during the period of continuous injury were in effect.⁶⁸

61. *Id.* at 669-73, 897 P.2d at 13-16, 42 Cal. Rptr. 2d at 336-39. See *infra* note 71 for discussion of the continuous trigger of coverage.

62. 140 Cal. App. 2d 84, 295 P.2d 19 (1956).

63. *Montrose*, 10 Cal. 4th at 669, 897 P.2d at 13, 42 Cal. Rptr. 2d at 336.

64. *Id.* at 670, 897 P.2d at 13, 42 Cal. Rptr. 2d at 336 (emphasis added) (quoting *Remmer*, 140 Cal. App. 2d at 88, 295 P.2d at 21).

65. *Montrose*, 10 Cal. 4th at 670-73, 897 P.2d at 14-16, 42 Cal. Rptr. 2d at 337-39; see also ROBIE, *supra* note 9, § 5:9 (tracing changes to the language of the CGL policies).

66. *Id.* at 672-73, 897 P.2d at 15, 42 Cal. Rptr. 2d at 338.

67. *Id.*

68. *Id.* at 673, 897 P.2d at 16, 42 Cal. Rptr. 2d at 339.

d. *Applicable case law and authorities discussing trigger of coverage for continuous damage or injury over successive policy periods*

Courts have formulated four general "trigger" theories that give rise to coverage: (1) the exposure or continuous exposure trigger;⁶⁹ (2) the manifestation or manifestation of loss trigger;⁷⁰ (3) the continuous injury or multiple trigger;⁷¹ and (4) the injury in fact trigger.⁷² The California

69. *Id.* at 674, 897 P.2d at 16, 42 Cal. Rptr. 2d at 339. The continuous exposure trigger "focuses on the date on which the injury-producing agent first contacts the body." *Id.* The insurer is liable for all policies in effect from the point of injury onward. *Id.*; see also Nicholas R. Andrea, Comment, *Exposure, Manifestation of Loss, Injury-In-Fact, Continuous Trigger: The Insurance Coverage Quagmire*, 21 PEPP. L. REV. 813, 831-36 (1994) (explaining the applicability of the exposure trigger in the context of bodily injury and property damage); see, e.g., *Continental Ins. Cos. v. Northeastern Pharms. & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988) (applying an exposure trigger of coverage in the context of environmental contamination), *cert. denied*, 488 U.S. 821 (1988); *Insurance Co. of N. Am. v. Forty-Eight Insulations Inc.*, 633 F.2d 1212 (6th Cir. 1980) (adopting the exposure theory for asbestos litigation), *cert. denied*, 454 U.S. 1109 (1981).

70. *Montrose*, 10 Cal. 4th at 674-75, 897 P.2d at 16-17, 42 Cal. Rptr. 2d at 339-40. Under a manifestation of loss trigger, only the insurer whose policy is in effect at the time when appreciable damage occurs is held liable. *Id.* Manifestation occurs when injuries first become reasonably capable of medical diagnosis. *Id.*; see also Andrea, *supra* note 69, at 836-41 (explaining the applicability of the manifestation trigger in the context of first- and third-party coverage); see, e.g., *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541 (C.D. Cal. 1992) (holding the insurer at the time of manifestation of damage liable even if damage progresses after the policy expires); *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 5 Cal. App. 4th 714, 7 Cal. Rptr. 2d 53; *Jackson v. State Farm Fire & Cas. Co.*, 835 P.2d 786 (Nev. 1992) (holding insurer liable whose policy was effective when progressive damage manifested).

71. *Montrose*, 10 Cal. 4th at 675, 897 P.2d at 17, 42 Cal. Rptr. 2d at 340. "[B]odily injuries and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods." *Id.* The actual time of the event causing the injury is relatively unimportant "to establishing coverage [because] it can occur before or during the policy period." *Id.*; see also Andrea, *supra* note 69, at 843-49 (discussing the applicability of the continuous trigger of coverage to both personal injury claims and property injury claims); see, e.g., *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993) (holding that insurers whose policies are in effect between time of exposure and manifestation are liable); *Lac D'Amiante Du Que., Ltee. v. American Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985) (noting that continuing injury or damage triggers liability as long as any part occurred during policy period).

72. *Montrose*, 10 Cal. 4th at 675-76, 897 P.2d at 17-18, 42 Cal. Rptr. 2d at 340-41. Coverage begins when the insured first suffers actual injury. *Id.* This has the effect of eliminating liability from the point of exposure to the point of injury-in-fact. *Id.*; see also Andrea, *supra* note 69, at 841-43 (presenting a brief history of the evolution and applicability of the injury-in-fact trigger of coverage and noting it as the least recognized of the four trigger theories); see, e.g., *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474 (E.D. Mich. 1989) (holding coverage triggered when damage

Supreme Court paid particular attention to the development and application of the various trigger theories in California, but conceded that the language of the policies must dictate which trigger ultimately applies.⁷³

In California, courts have applied only two of the trigger theories for third-party continuous or progressive injury: manifestation and continuous injury.⁷⁴ *California Union Insurance Co. v. Landmark Insurance Co.*⁷⁵ was the first California case to address the issue of successive third-party liability insurance policies for property damage that was both continuous and progressive.⁷⁶ *California Union*, a construction defect case, involved the construction of a swimming pool that caused property damage over a period of a year and a half.⁷⁷ The court of appeal held both successive insurers liable and adopted a continuous trigger on the grounds that the occurrence language was sufficient to trigger the policies.⁷⁸

The court then turned to the Fourth District's adoption of a manifestation trigger.⁷⁹ In *Fireman's Fund Insurance Co. v. Aetna Casualty & Surety Co.*,⁸⁰ another construction defect case, a contractor defectively restored a hotel facade, which caused it to crack over the period of the next year.⁸¹ The court based its decision on *Home Insurance Co. v. Landmark Insurance Co.*,⁸² which was a *first-party insurance case*.⁸³ The supreme court's preliminary considerations regarding the differences between first-party and third-party policies became the grounds for criti-

actually occurred).

73. *Montrose*, 10 Cal. 4th at 677-85, 897 P.2d at 19-24, 42 Cal. Rptr. 2d at 342-47.

74. *Id.*

75. 145 Cal. App. 3d 462, 193 Cal. Rptr. 461 (1983).

76. *Id.* at 468-78, 193 Cal. Rptr. at 464-71.

77. *Id.* at 466, 193 Cal. Rptr. at 463.

78. *Id.* at 473-76, 193 Cal. Rptr. at 467-69. The court specifically relied on *Guol Constr. Co. v. Insurance Co. of N. Am.*, 524 P.2d 427 (Wash. Ct. App. 1974) (adopting a continuous trigger of coverage in a progressive injury situation), *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980) (putting forth an exposure trigger of coverage), *cert. denied*, 454 U.S. 1109 (1981) and *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981) (adopting a continuous trigger based primarily on the expectations of the parties and the ambiguous policy language), *cert. denied*, 455 U.S. 1007 (1982)).

79. *Montrose*, 10 Cal. 4th at 682-85, 897 P.2d at 22-24, 42 Cal. Rptr. 2d at 345-47.

80. 223 Cal. App. 3d 1621, 273 Cal. Rptr. 431 (1990).

81. *Id.* at 1624, 273 Cal. Rptr. at 430-31.

82. 205 Cal. App. 3d 1388, 253 Cal. Rptr. 277 (1988).

83. *Id.* at 1390, 253 Cal. Rptr. at 278.

cizing *Fireman's Fund* as unreasoned.⁸⁴ In *Pines of La Jolla Homeowners Ass'n v. Industrial Indemnity*,⁸⁵ the only case to follow *Fireman's Fund*, "the Fourth District . . . concluded that a manifestation theory should be applied in determining the trigger of potential coverage . . . for continuous property damage resulting from construction defects."⁸⁶

Recently, however, in *Zurich Insurance Co. v. Transamerica Insurance Co.*,⁸⁷ the Fourth District declined to follow its own rationale from *Fireman's Fund*.⁸⁸ *Zurich* involved a construction defect case with successive periods of coverage and progressive damage.⁸⁹ Even though the case was factually similar to *Fireman's Fund* and *Pines*, the court adopted a continuing injury trigger "in this [third party] liability context, . . . [where] property damage occurred . . . and continued . . . [over the period of several years]."⁹⁰ *Fireman's Fund* and *Pines* remain the only examples of the manifestation trigger in California jurisprudence.

In light of this, Chief Justice Lucas concluded that California jurisprudence currently supports a continuous injury trigger in third-party liability cases in which a continuous or progressive loss extends over successive CGL policy periods.⁹¹

e. Policy considerations in support of a continuous injury trigger

As final support for a continuous trigger, Chief Justice Lucas examined a number of policy considerations.⁹² Admiral adopted a policy put forth by the California Supreme Court in *Prudential* and argued that the court should follow the general policy to establish predictable underwriting practices to allow insurance companies to set aside proper reserves.⁹³ The court rejected this argument by noting that insurers can predictably rely on the courts to apply equitable considerations and to spread the cost among the several insurers.⁹⁴ As an additional policy consideration, because the insurance industry willingly and knowingly changed to an

84. *Montrose*, 10 Cal. 4th at 682-85, 897 P.2d at 22-24, 42 Cal. Rptr. 2d at 345-47.

85. 5 Cal. App. 4th 714, 7 Cal. Rptr. 2d 53 (1992).

86. *Montrose*, 10 Cal. 4th at 684, 897 P.2d at 23-24, 42 Cal. Rptr. 2d at 346-47.

87. 34 Cal. App. 4th 933, 34 Cal. Rptr. 2d 913 (1994), *superseded by* 889 P.2d 539, 38 Cal. Rptr. 2d 345 (1995).

88. *Montrose*, 10 Cal. 4th at 685, 897 P.2d at 24, 42 Cal. Rptr. 2d at 347.

89. *Zurich*, 34 Cal. App. 4th 933, 34 Cal. Rptr. 2d 914.

90. *Montrose*, 10 Cal. 4th at 685, 897 P.2d at 24, 42 Cal. Rptr. 2d at 347.

91. *Id.* The *Montrose* court specifically disapproved of *Pines* and *Fireman's Fund* to the extent those decisions contradict the court's holding. *Id.*

92. *Id.* at 685-89, 897 P.2d at 24-27, 42 Cal. Rptr. 2d at 347-50.

93. *Id.* at 687, 897 P.2d at 25, 42 Cal. Rptr. 2d at 348. In applying a manifestation trigger in *Prudential*, the court acknowledged this rationale and the certainty it lends to underwriting practices. *Id.*

94. See *infra* notes 128-34 and accompanying text.

“occurrence” based policy with full knowledge of the implications, insurers should have been aware and set aside the proper reserves.⁹⁵ Ultimately, the court concluded that the adoption of a manifestation trigger would unduly transform the policy into a “claims made” policy and effectively rewrite the policy in favor of the insurer.⁹⁶

In light of the policy language, settled California law, CGL drafting history, and other policy considerations, the court held that a continuous trigger of coverage applies in third-party liability insurance cases involving continuous or progressively deteriorating losses and successive CGL policy periods.

2. Loss-In-Progress Rule

Admiral argued that the loss-in-progress rule precluded coverage because Montrose had knowledge of the problems at the Stringfellow site as shown by its receipt of a PRP letter in August 1982.⁹⁷ The court dis-

95. *Id.* at 687-88, 897 P.2d at 26, 42 Cal. Rptr. 2d at 349. In 1966, the insurance industry specifically rejected the inclusion of a manifestation trigger of coverage based on the following reasons: (1) the difficulty of applying a manifestation trigger in cases of continuous damage over successive policies; (2) who was to carry the burden of discovery; and (3) the problem with placing all the liability on one policy. *Id.* See *supra* notes 65-68 and accompanying text for discussion of the drafting history of CGL policies.

96. *Id.* at 688-89, 897 P.2d at 26-27, 42 Cal. Rptr. 2d at 349-50. Insurers designed claims-made policies to limit their risk to “the single policy in effect at the time a claim was asserted.” *Id.* at 688, 897 P.2d at 26, 42 Cal. Rptr. 2d at 349.

97. *Montrose*, 10 Cal. 4th at 689-93, 897 P.2d at 27-29, 42 Cal. Rptr. 2d at 350-52. Montrose received the PRP letter on August 31, 1982, six weeks before Admiral issued the first policy. *Id.* at 658, 897 P.2d at 5-6, 42 Cal. Rptr. 2d at 328-29. See *supra* note 17 for a discussion of the implications of a PRP letter.

The loss-in-progress rule is based upon two provisions in the California Insurance Code. Section 22 provides that insurance covers “a contingent or unknown event.” *Id.* at 689-90, 897 P.2d at 27, 42 Cal. Rptr. 2d at 350 (quoting CAL. INS. CODE § 22 (West 1995)). Section 250 provides in pertinent part: “any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against.” *Id.* (quoting CAL. INS. CODE § 250 (West 1995)).

The loss-in-progress rule codifies a fundamental principle of insurance law that an insurer cannot insure against a loss that is known or apparent to the insured The public policy is premised on the view that: To hold the insurer liable for a progressive and continuing property loss that was discovered before the carrier insured the risk “would be to impose upon the insurer a guaranty of the good quality of the [property] . . . , which liability under the policy the insurer had not assumed.”

agreed, however, holding that the receipt of a PRP letter does not make a risk so certain that it cannot be insured.⁹⁸ Only risks that are known to be inevitable are uninsurable under the loss-in-progress rule, and as long as any contingency remains, the risk is insurable.⁹⁹ Thus, the court emphasized that a PRP letter implies as much as its name suggests: it notifies a *potentially* responsible party.¹⁰⁰ Ultimately, the court held that:

the loss-in-progress rule will not defeat coverage for a claimed loss where it had yet to be established, at the time the insurer entered into the contract of insurance with the policyholder, that the insured had a legal obligation to pay damages to a third party in connection with a loss.¹⁰¹

3. Conclusion and Reservation of Issues

Rather than use its conclusion to recap the two key holdings, the court described the issues left unresolved by this opinion.¹⁰² The following issues are yet to be decided: (1) whether indemnity coverage under Admiral's policies for the injury and damage alleged in the underlying lawsuits can be established; (2) whether the damages and injuries were in fact continuous; (3) what is the possible effect of any policy exclusion on the ultimate issue of coverage; (4) whether any of the affirmative defenses (i.e. the pollution exclusion) have merit; and (5) the effect of Montrose's failure to advise Admiral upon its receipt of the PRP letter.¹⁰³

B. Justice Baxter's Concurring Opinion

Justice Baxter did not join the majority for two reasons: (1) he did not believe the policy language was as clear as the majority portrayed it; and (2) he disagreed with both of the rationales offered by the majority to support the loss-in-progress holding.¹⁰⁴

Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal. 3d 674, 695 n.7, 798 P.2d 1230, 1244 n.7, 274 Cal. Rptr. 387, 401 n.7 (1990) (citations omitted); *see also* 39 CAL. JUR. 3D *Insurance Contracts* § 1 (1977 & Supp. 1995).

98. *Montrose*, 10 Cal. 4th at 693, 897 P.2d at 29, 42 Cal. Rptr. 2d at 352.

99. *Id.* at 690, 897 P.2d at 27, 42 Cal. Rptr. 2d at 350 (citing *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963)).

100. *Id.* at 690, 897 P.2d at 27, 42 Cal. Rptr. 2d at 350.

101. *Id.* at 693, 897 P.2d at 29, 42 Cal. Rptr. 2d at 352.

102. *Id.* at 693-94, 897 P.2d at 29-30, 42 Cal. Rptr. 2d at 352-53.

103. *Id.* *See infra* note 127 and accompanying text for discussion of the resolution of these issues.

104. *Montrose*, 10 Cal. 4th at 695-97, 897 P.2d at 30-32, 42 Cal. Rptr. 2d at 330-31 (Baxter, J., concurring).

Justice Baxter began by analyzing the language of the policy and acknowledging Admiral's position that "the coverage language can *plausibly* be read . . . to mean that each *increment* of harm . . . which 'occurs' during a particular policy period is covered by the policy then in effect."¹⁰⁵ Further, in criticizing the majority's interpretation of the drafting history of CGL policies, the justice concluded that two themes may be gleaned from the drafting history: (1) "the drafters plainly rejected a 'manifestation of injury' trigger," and (2) the drafters created the potential for liability across successive policy periods.¹⁰⁶ In light of these two themes, however, Justice Baxter finally conceded that the majority's interpretation of the reasonable expectations of the parties could support a continuous trigger of coverage.¹⁰⁷

Of the two rationales set forth by the majority to support its conclusion that the loss-in-progress rule did not preclude coverage, Justice Baxter agreed with only one.¹⁰⁸ Justice Baxter criticized the majority's suggestion that a tortfeasor could purchase liability insurance up until the time of a final damage judgment.¹⁰⁹ Justice Baxter agreed, however, with the holding that under the loss-in-progress rule, a past act that creates a future harm can still be insured against.¹¹⁰

IV. IMPACT

A. *Effect on the Insurance Industry and Future Litigation*

In adopting a continuous trigger of coverage, *Montrose* is clearly one of the most significant insurance and environmental decisions handed down by the California Supreme Court in recent years.¹¹¹ As noted

105. *Id.* at 695, 897 P.2d at 30, 42 Cal. Rptr. 2d at 353 (Baxter, J., concurring).

106. *Id.* at 695-96, 897 P.2d at 31, 42 Cal. Rptr. 2d at 354 (Baxter, J., concurring).

107. *Id.* (Baxter, J., concurring). See *supra* note 55 discussing the applicability of intent to aid in the interpretation of an ambiguous contract term.

108. *Id.* (Baxter, J., concurring). See *supra* notes 97-101 and accompanying text for a detailed explanation of the loss-in-progress holding. The majority concluded that the loss-in-progress rule did not preclude coverage because: (1) the language of California Insurance Code §§ 22 & 250 allows for the possibility of insuring against some contingent liability; and (2) "the loss-in-progress rule does not preclude liability for future or unknown harm from a past act or omission, even if the insured does not know that some harm may already have arisen from his conduct." *Id.* at 696-97, 897 P.2d at 31-32, 42 Cal. Rptr. 2d at 354-55 (Baxter, J., concurring).

109. *Id.* at 696, 897 P.2d at 31, 42 Cal. Rptr. 2d at 354 (Baxter, J., concurring).

110. *Id.* (Baxter, J., concurring).

111. See Phillip Carrizosa, *Court Decides Insurers Have Duty to Defend*, L.A. DAILY J.,

above, a continuous trigger of coverage effectively allows an insured to "line up" every applicable policy and assert coverage under each one.¹¹² Even though other jurisdictions have previously adopted a continuous trigger,¹¹³ the insurance industry considers California to be a "harbinger state" and the immediate implication of this decision to the insurance industry is uncertain.¹¹⁴ The industry claims that *Montrose* will bankrupt it, yet the California Supreme Court and other experts view the decision as a risk-spreading measure.¹¹⁵ While the claims of bankruptcy may be slightly exaggerated, insurance companies are certainly reacting to *Montrose*.¹¹⁶

July 5, 1995, at A1 (outlining the ruling and its potentially devastating effect on the insurance industry); Robert I. McMurry, *Environmental Contamination*, available in WESTLAW, CA34 ALI-ABA 967 (1995) (presenting the implications of *Montrose* to the insurance industry); and *State Court Backs Companies over Pollution-Based Claims*, SACRAMENTO BEE, July 5, 1995, at D1 (stating that *Montrose* is the California Supreme Court's "most important ruling on insurance coverage in 30 years").

112. McMurry, *supra* note 111, at 969.

113. J. Niles Wright, *Construction Insurers Spooked by Court Ruling*, BUS. J. SACRAMENTO, July 24, 1995, at 3; *see also* Gruol Constr. Co. v. Insurance Co. of N. Am., 524 P.2d 427 (Wash. Ct. App. 1974) (holding all insurers liable in construction defect context); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (holding a continuous trigger applies for asbestos related bodily injury), *cert. denied*, 455 U.S. 1007 (1982); Trustees of Tufts Univ. v. Commercial Union Ins. Co., 616 N.E.2d 68 (Mass. 1993) (holding insurer had duty to defend even though damage discovered after policy expired); Harford Co. v. Harford Mut. Ins. Co., 610 A.2d 286 (Md. 1992) (holding coverage triggered when damage occurred); Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994) (holding a continuous trigger applies to asbestos related injury or damage); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993) (holding each stage of asbestosis constituted bodily injury, which triggered insurer's duty indemnify).

114. Wright, *supra* note 113, at 3; *see also* Roberto Cenicerros, *California Ruling May Widen Cover*, BUS. INS., July 10, 1995, at 1; Alfred G. Haggerty, *Calif. Court Hits Insurers on Pollution*, NAT'L UNDERWRITERS: PROP. & CASUALTY/RISK & BENEFITS MANAGEMENT ED., July 17, 1995, at 3 (stressing the importance of the ruling since there is no national standard).

115. *See supra* note 114; *see also* *Montrose*, 10 Cal. 4th at 687, 897 P.2d at 25-26, 42 Cal. Rptr. 2d at 348-49 (stating that one of the policy reasons for adopting a continuous trigger is to attempt to spread the costs over several policies and insurers). By "stacking" as many insurance policies as possible, the prohibitive cost of defense will be spread among the policies rather than borne by a single entity. Cenicerros, *supra* note 114, at 1; *Court Rules for Broad Coverage of Pollution*, ORANGE COUNTY REG., July 4, 1995, at C02. *See infra* notes 128-34 and accompanying text for discussion of the unresolved issue of allocation of costs.

116. *See* Janet Aschkenasy, *Mainstream Insurers Regain Appetite For High-Risk Market*, BEST'S REV., Sept. 1, 1995, at 5; *Cigna Leads off Hearing on Proposed Restructuring*, MEALEY'S LITIG. REP., Dec. 5, 1995; Douglas McLeod, *Aetna Move Unrelated to Montrose Decision*, BUS. INS., July 24, 1995, at 22 (citing Aetna's decision to bolster its loss reserves as based not on the *Montrose* decision, but on the assumption of a continuous trigger of coverage); Wright, *supra* note 113, at 1; *Policyholders Object to Pro-*

The primary reaction thus far can be characterized as a defensive one. Insurance companies are bolstering reserves, restructuring and isolating the environmental portions of their businesses, tightening underwriting standards, increasing premiums, and canceling policies.¹¹⁷ The decision has also caused insurers to not only raise coverage prices, but also to limit the amount and quality of coverage available.¹¹⁸ While the reaction seems to curtail the availability of insurance, considering the potential liability risk run by these companies the measures taken appear reasonable.¹¹⁹

Of equal concern is the effect that *Montrose* will have on litigation. Under the typical CGL language, an insurer has two primary duties: (1) the duty to defend; and (2) the duty to indemnify.¹²⁰ Recent California precedent, coupled with *Montrose*, give a giant boost to policyholders and their rights.¹²¹ The decision effectively eliminates an insurance

posed *Restructuring of Cigna Corporation*, MEALEY'S LITIG. REP., Nov. 21, 1995. See *infra* notes 118-24 and accompanying text for discussion of duty to defend and the associated costs.

117. See McCleod, *supra* note 116, at 22 (noting Aetna's strengthening of its environmental liability reserves by \$1.1 billion); *Policyholders Object*, *supra* note 116, at 9 (noting that Cigna finally strengthened its reserves by \$1.2 billion in addition to forming a new corporate entity solely for asbestos and environmental claims); Wright, *supra* note 113, at 3 (explaining that construction companies are noting an increase in the number of canceled policies in addition to a 10 percent increase in premiums).

118. Aschkenasy, *supra* note 116, at 5. Several insurance companies have changed their underwriting standards or completely ended writing new policies for the construction industry. Wright, *supra* note 113, at 2. Many in the industry fear that this may lead to policies that do not have coverage. *Id.* See generally Inter-Agency Task Force on Product Liability, U.S. Department of Commerce, Final Report at VI-11 to 24 (1978) (explaining how insurance companies reacted to a continuous trigger of coverage).

119. Many insurance companies are experiencing problems with the liability imposed on CGL policies. Joanne Wojcik, *Construction Defect Claim Threat Lurks Ahead: Insurer*, BUS. INS., Apr. 3, 1995, at 38. "[One] insurer, which wrote about \$20 million in premiums in liability coverage in the late 1980s and early 1990s . . . paid out more than \$35 million in claims . . ." *Id.* In light of the fact that the costs of environmental defense can often exceed the actual cost of remediation, insurers stand potentially liable for unanticipated billions. Jeffrey L. Fillerup & Dominic S. Nesbitt, *The Duty to Defend: Post-Montrose Issues*, 718 PRACTICING L. INST. 49 (1995).

120. 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1135-1136 (9th ed. 1988 & Supp. June 1995); see also *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (stating that facts extrinsic to the third-party complaint can generate a duty to defend); *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 861 P.2d 1153, 24 Cal. Rptr. 2d 467 (1993) (holding policyholders need only show a possibility of coverage to invoke the duty to defend).

121. Mark D. Harrison, *Policy Holders Have Rights in Environmental Lawsuits*, SAC-

carrier's first line of defense for coverage by imposing the costly duty to defend in all but a few situations.¹²² In light of the prohibitive legal fees associated with the duty to defend,¹²³ insurers will clearly have more incentive to settle.¹²⁴ Insurers, however, may take the fight to a more favorable jurisdiction in light of *Montrose*.¹²⁵ Overall, *Montrose* illustrates how broadly California is willing to extend the duty to defend to ensure that policyholders have a legal defense paid for by their insurers.¹²⁶

B. Unanswered Questions

Almost as important as the issues that *Montrose* resolved were the issues that the court's decision failed to resolve. As noted above, the court specifically enumerated several key issues left unresolved by its decision.¹²⁷ As of the time of publication, the trial court has yet to decide on any of these issues.

RAMENTO BEE, Nov. 26, 1995, at E2.

122. Initially, when questioning whether the duty to defend exists, the first fight generally is over: (1) "[w]hat must policyholders establish in order to trigger the duty to defend;" and (2) which insurance company owes that duty (i.e. which trigger of coverage applies). *Id.*; see also Fillerup, *supra* note 119, (explaining how the question of the duty to defend and the payment of the costs amounts to a "significant problem [between] the insurer and insured"). As much as *Montrose* has been characterized as the bane of the insurance industry, the decision has not eliminated the possibility of a specific policy exclusion or the lack of a potential for liability to preclude coverage. 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1136 (9th ed. 1988 & Supp. June 1995). See *infra* notes 126-32 and accompanying text for discussion of the allocation of these costs.

This decision, however, also deals another blow to the insurance industry. *Caniceros*, *supra* note 114, at 1. Up to this point, insurance companies have fought vigorously to keep drafting history outside a court's consideration. *Id.* The California Supreme Court, by basing its decision partially on the drafting history, has placed its imprimatur on the admissibility and relevance of drafting history. See *Montrose*, 10 Cal. 4th at 669-73, 897 P.2d at 13-16, 42 Cal. Rptr. 2d at 336-39. See *supra* notes 65-68 and accompanying text for a discussion of the applicability of drafting history to the court's decision.

123. McMurry, *supra* note 111, at 978-79 n.5. Not only do defense costs usually exceed the cost of indemnification, but a recent survey shows that legal fees account for nearly 90 percent of all expenditures. *Id.*

124. McMurry, *supra* note 111, at 980-81.

125. Russ Britt, *Insurers Sued over Toxic Sites' Cleanup Costs: Rockwell Tries to Pass on Burden*, L.A. DAILY NEWS, Aug. 27, 1995, at N1; see also Barry R. Ostrager, *Insurance Coverage for Tort Claims Under Comprehensive General Liability Policies*, available in WESTLAW, C534 ALI-ABA 833, 869-71 (1990) (noting that the plaintiffs forum-shopped in *Eli Lilly & Co. v. Home Ins. Co.*, 746 F.2d 876 (D.C. Cir. 1985), solely to take advantage of a continuous trigger of coverage); Parker, *supra* note 56, at 498-501 (discussing choice of law issues).

126. Harrison, *supra* note 121, at E2.

127. See *supra* note 103 and accompanying text.

Of paramount importance, the court specifically failed to discuss how to allocate these new defense costs among insurers.¹²⁸ The court provided some guidance in its discussion of *California Union*, however, where the Chief Justice specifically noted that the court was not endorsing *California Union's* holding of joint and several liability.¹²⁹ The majority further stated that "[a]llocation of the cost of indemnification requires application of principles of contract law to the express terms and limitations of the various policies of insurance on the risk."¹³⁰ This leaves open the question of which allocation formula California will follow.¹³¹ California precedent seems divided between a pro rata allocation of defense costs and joint and several liability.¹³² In light of *Montrose's* potential to increase settlements, the question of allocation

128. Haggerty, *supra* note 114, at 3.

129. *Montrose*, 10 Cal. 4th at 681 n.19, 897 P.2d at 21 n.19, 42 Cal. Rptr. 2d at 344 n.19. *But see* John H. Mathias Jr. et al., *Allocation: J.H. France and the Insureds' Right to Select from Multiple-Triggered Policies*, 4 N.2 Coverage 19, 21 available in WESTLAW, 4 No. 2 CVRG 19 (Mar./Apr. 1994) (arguing that allocation on a theory of joint and several liability "is most consistent with the [continuous trigger] of coverage").

130. *Montrose*, 10 Cal. 4th at 681 n.19, 897 P.2d at 21 n.19, 42 Cal. Rptr. 2d at 344 n.19. *See generally* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 674-676 (9th ed. 1987 & Supp. 1995) (outlining the general principles of joint and several liability); 39 CAL. JUR. 3D *Insurance Contracts* §§ 500, 509 (1977 & Supp. 1995) (discussing apportionment of loss between insurers and contribution of defense expenses).

131. Courts generally adopt one of four formulas for allocating costs in the insurance context: (1) joint and several; (2) pro rata; (3) sequential exhaustion; or (4) proportion of loss. Michael J. Brady & Lawrence O. Monin, *Reinsurance Disputes: Death of the Handshake*, 61 DEF. COUNS. J. 529, 540-41 (1994).

Naturally, joint and several liability assigns the entire loss to each insurer. *Id.* A pro rata formula can be applied either by taking the total loss and assigning an equal share to each year or by assigning on the basis of policy limits. Michael Dore, *Insurance Coverage for Toxic Tort Claims: Solving the Self-Insurance Allocation Dilemma*, 28 TORT & INS. L.J. 823, 829 (1993). Under a sequential exhaustion technique, the limits of the earliest policy are exhausted, then followed sequentially by all other triggered policies. Brady, *supra*, at 540. Finally, proportion of loss "quantifies the total amount of the injury that took place in each policy year." *Id.*

132. "Where two insurers cover the same risk, defense costs must also be shared between them pro rata in proportion to the respective coverage afforded by them to the insured." *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*, 83 Cal. App. 3d 593, 608, 148 Cal. Rptr. 57, 66 (1978). *But see* *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 35 Cal. App. 4th 192, 26 Cal. Rptr. 2d 35 (1993) (adopting a continuous trigger and construing the plain language of the policy to require "the insurer to pay 'all sums' which the insured shall become liable to pay."); *see supra* note 9 (reflecting exact same language in Admiral's policy as was construed in the *Armstrong* case).

will become even more complicated and will certainly occupy the court's attention for sometime.¹³³

While *Montrose* definitively answered the question of trigger of coverage in the environmental context, it raised the question of applicability to other areas where continuous and progressive damage occurs. Of main concern are the areas of asbestos and construction defect.¹³⁴ In the construction arena, the courts generally have "held that when contractors are sued on allegations of faulty construction, only those insurers that held policies with the contractor at the time of construction were liable."¹³⁵ In *Ohio Casualty Insurance Co. v. Hartford Accident & Indemnity Co.*,¹³⁶ a construction defect case, the court granted review pending a decision in *Montrose*. After the petition for rehearing on *Montrose*, the court vacated *Ohio Casualty* and instructed the Fourth District to "reconsider the cause in light of *Montrose*."¹³⁷

Crossover applicability to asbestos litigation seems a little more in doubt.¹³⁸ In discussing *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*,¹³⁹ the court acknowledged the adoption of a continuous trigger for asbestos claims but failed to extend *Montrose's* holding to that area of litigation.¹⁴⁰ The court noted that the discussion of the trigger of coverage issue in *Armstrong* appears largely consistent with *Montrose*, but insisted that the "unique facts of asbestos-related bodily injury claims" warrant waiting for an appropriate case.¹⁴¹ At least

133. Brady, *supra* note 131, at 538-41.

134. McMurry, *supra* note 111, at 981.

135. Wright, *supra* note 113, at 3. See also *supra* notes 30-52 and accompanying text for the preliminary considerations in deciding a trigger of coverage issue.

136. 38 Cal. App. 4th 1142, 40 Cal. Rptr. 2d 27 (Cal. Ct. App.), *vacated*, 900 P.2d 600, 44 Cal. Rptr. 2d 351 (1995). The lower court adopted a manifestation trigger for progressive property damage. *Ohio Casualty*, 38 Cal. App. 4th at 1142, 40 Cal. Rptr. 2d at 27.

137. *Ohio Cas. Ins. Co. v. Hartford Accident & Indem. Co.*, 902 P.2d 1298, 45 Cal. Rptr. 2d 645 (1995).

138. *Montrose*, 10 Cal. 4th at 676-77 n.16, 897 P.2d at 18-19 n.16, 42 Cal. Rptr. 2d at 341-42 n.16. See generally *Insurance Industry Suffers Big Loss in California Supreme Court*, ASBESTOS & LEAD ABATEMENT REP., July 17, 1995, at *1. See also *supra* notes 30-52 and accompanying text discussing the preliminary considerations for a trigger of coverage issue.

139. 35 Cal. App. 4th 192, 26 Cal. Rptr. 2d 35 (1993), *superseded by* 866 P.2d 1311, 27 Cal. Rptr. 2d 488 (1994). In *Armstrong*, the court of appeal based its decision on "factual findings that . . . an injury-in-fact took place during each triggered policy period." *Montrose*, 10 Cal. 4th at 676-77 n.16, 897 P.2d at 18-19 n.16, 42 Cal. Rptr. 2d at 341-42 n.16 (italics omitted) (quoting *Armstrong*, 35 Cal. App. 4th at 250, 26 Cal. Rptr. 2d at 54).

140. *Montrose*, 10 Cal. 4th at 676-77 n.16, 897 P.2d at 18-19 n.16, 42 Cal. Rptr. 2d at 341-42 n.16.

141. *Id.*

one commentator asserted that the same rationale as espoused in *Montrose* would apply to asbestos litigation and require a continuous trigger of coverage.¹⁴² As with construction defect, however, the preliminary considerations voiced by the court may make all the difference.

V. CONCLUSION

In *Montrose Chemical Corp. v. Admiral Insurance Co.*, the California Supreme Court dealt the insurance industry a serious blow. By adopting a continuous trigger of coverage for continuous or progressively deteriorating losses, the insurance industry lost a key defense to the duty to defend. Insurance companies will no longer be able to avoid defense costs based on the policy period and the timing of the harm. This decision will effectively force all insurers, regardless of whether the damage occurred before, after, or during the policy period, to bear the burden of defense costs. Ironically, Admiral may yet escape liability under the duty to indemnify, but not before expending an enormous sum as a result of the duty to defend.

TIMOTHY HIX

142. *Insurance Industry*, *supra* note 138, at 1.

VIII. PRETRIAL PROCEDURE

The statutory five-year period for bringing an action to trial will be tolled within the last six months of that period following arbitration if the plaintiff timely notifies the trial court of the impending five-year deadline date and requests that the trial be set prior to that date:

Howard v. Thrifty Drug and Discount Stores.

I. INTRODUCTION

In *Howard v. Thrifty Drug and Discount Stores*,¹ the California Supreme Court explained what a plaintiff must do in order to toll the statutory five-year period when requesting a trial de novo following an arbitration. In arriving at its decision, the court evaluated the relationship between Civil Code section 583.310,² which specifies the timeliness of setting a date for trial, and the Judicial Arbitration Act.³ The supreme court also considered whether section 583.340 mandated dismissal of the plaintiff's claim.⁴ Lastly, the court determined whether the trial court abused its discretion in dismissing the plaintiff's action subsequent to arbitration.⁵ Upholding the decisions of both the trial court and court of

1. 10 Cal. 4th 424, 895 P.2d 469, 41 Cal. Rptr. 2d 362 (1995). Justice Mosk authored the opinion of the court, in which Chief Justice Lucas and Justices Kennard, Arabian, George, and Werdegar concurred. *Id.* at 444, 895 P.2d at 481, 41 Cal. Rptr. 2d at 374. Justice Baxter filed a concurring opinion. *Id.* (Baxter, J., concurring).

2. California Code of Civil Procedure § 583.310 provides: "An action shall be brought to trial within five years after the action is commenced against the defendant." CAL. CIV. PROC. CODE § 583.310 (West 1976 & Supp. 1996).

3. *Howard*, 10 Cal. 4th at 429, 895 P.2d at 471, 41 Cal. Rptr. 2d at 364.

4. *Id.* at 437, 895 P.2d at 477, 41 Cal. Rptr. 2d at 370. California Code of Civil Procedure § 583.340 provides in relevant part: "In computing the time within which an action must be brought to trial . . . there shall be excluded the time during which . . . [b]ringing the action to trial . . . was impossible, impracticable, or futile." CAL. CIV. PROC. CODE § 583.340 (West 1976 & Supp. 1996).

5. *Howard*, 10 Cal. 4th at 439, 895 P.2d at 478, 41 Cal. Rptr. 2d at 371. On May 12, 1987, Arkita Howard filed a negligence action against Thrifty Drug and Discount Stores after she was assaulted on their property. *Id.* at 429-30, 895 P.2d at 472, 41 Cal. Rptr. 2d at 365. Although there was some discovery produced by both parties in 1988, there was relatively no other action until January of 1991 when Ms. Howard filed an at-issue memorandum. *Id.* at 430, 895 P.2d at 472, 41 Cal. Rptr. 2d at 365.

The case was placed on the court's civil active list, then assigned to judicial arbitration in April of 1991 in accordance with California Code of Civil Procedure § 1141.10. *Id.* After two arbitration hearings in August of 1991, Ms. Howard was awarded \$30,000. *Id.* The trial court entered the arbitrator's judgment for Ms. Howard on October 1, 1991. *Id.*

On October 11, 1991, Thrifty Drug and Discount Stores filed a motion to vacate the judgment and requested a trial de novo, which was denied because of technical de-

appeal, the California Supreme Court dismissed the plaintiff's action based on past precedent and public policy considerations.⁶

II. TREATMENT

A. Majority Opinion

1. Application of *Moran*

The supreme court first analyzed *Moran v. Superior Court*⁷ to determine whether dismissal of the plaintiff's case was appropriate.⁸ The court affirmed several court of appeal decisions that required the plaintiff to have acted reasonably "diligent" in order to toll the five-year timeline once a motion for a trial de novo had been made.⁹ The majority

facts. *Id.* On November 27, 1991, the court granted Thrifty's renewed motion to vacate the judgment, conditioned upon the defense paying for plaintiff's attorney's fees in opposing the motions. *Id.* On December 4, 1991, Thrifty requested a trial de novo. *Id.* at 439, 895 P.2d at 478, 41 Cal. Rptr. 2d at 371. On January 8, 1992, the court ordered Thrifty to pay an additional \$500 to plaintiff for attorneys fees. *Id.* at 430, 895 P.2d at 472-73, 41 Cal. Rptr. 2d at 365-66.

Neither party acted on the case until July 7, 1992, when the court granted Ms. Howard "an order shortening time which allowed her to schedule a July 10, 1992 motion to specially set the case for trial." *Id.* at 430, 895 P.2d at 433, 41 Cal. Rptr. 2d at 366. The trial court denied the plaintiff's motion to specially set the case for trial for two main reasons. First, the court found that § 583.310 required dismissal because the five-year time period had lapsed. *Id.* at 431, 895 P.2d at 473, 41 Cal. Rptr. 2d at 366. Second, "the plaintiff's lack of activity since defendant's request for a trial de novo made a denial of the motion to specifically set appropriate on *discretionary* grounds." *Id.* The court of appeal affirmed the lower court's holding on discretionary grounds. *Id.*

6. *Id.* at 444, 895 P.2d at 481, 41 Cal. Rptr. 2d at 374.

7. 35 Cal. 3d 229, 673 P.2d 216, 197 Cal. Rptr. 546 (1983).

8. *Howard*, 10 Cal. 4th at 431, 895 P.2d at 473, 41 Cal. Rptr. 2d at 366. In *Moran*, the court "recognized an implied exception to the five-year statute when, despite a plaintiff's reasonable diligence, prosecution of the action within five years proves to be 'impossible, impracticable, or futile.'" *Id.* at 432, 895 P.2d at 473-74, 41 Cal. Rptr. 2d at 366-67. The court also asserted in *Moran* that the time between the date of the request for a trial de novo and the date of trial should be excluded from the five year timeline. *Id.* at 432, 895 P.2d at 474, 41 Cal. Rptr. 2d at 367.

9. *Id.* at 433, 895 P.2d at 474, 41 Cal. Rptr. 2d at 367; see Matthew D. Disco, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113, 113 n.1 (1993) ("Judicial arbitration is a term for certain actions that are statutorily diverted to arbitration before trial judicial arbitration awards are nonbinding on the parties and either party may demand a trial *de novo* by judge or jury."); 6 CAL. JUR. 3D *Arbitration and Award* § 121 (1988 & Supp. 1995) (ex-

stressed the importance of requiring the plaintiffs to bear the burden of monitoring their case and complying with all of the statutory timelines.¹⁰

Subsequent to the *Moran* decision, the legislature enacted Code of Civil Procedure section 1141.17,¹¹ which the court held was contrary to the *Moran* tolling method.¹² The court found that under section 1141.17, "the five-year statute will only stop running for arbitrations beginning or continuing into the last six months of the five-year period, and then only from the four-year six-month date after filing the action until the date a trial de novo is requested."¹³ The majority acknowledged that California Code of Civil Procedure section 1141.20 provides that the plaintiff's trial "shall be given the same place on the active list as it had prior to arbitration."¹⁴

The court reconciled sections 1141.17 and 1141.20 by agreeing with *Moran* that "if prior to arbitration a plaintiff is eligible to receive a trial date within the five-year statute, . . . then the plaintiff is entitled to receive such a trial date upon a timely post arbitration request."¹⁵ Furthermore, the court determined that an action will only be tolled from the date of the request for trial de novo until the date of the new trial, in accordance with section 1141.20, when the trial court fails to place the case on the calendar after being fully informed.¹⁶ The plaintiff's respon-

plaining the rules and procedures regarding a request for a trial de novo after an arbitration award has been rendered); Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343, 361 (1992) (stating that the party who requests the trial de novo must fare better at trial than at arbitration, or suffer the penalty of paying their opponent's arbitration and litigation expenses).

10. *Howard*, 10 Cal. 4th at 434, 895 P.2d at 475, 41 Cal. Rptr. 2d at 368.

11. California Code of Civil Procedure section 1141.17 provides in pertinent part:

If an action is or remains submitted to arbitration . . . more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under Section 1141.20 shall not be included in computing the five-year period specified in Section 583.310.

CAL. CIV. PROC. CODE § 1141.17 (West 1982 & Supp. 1995). See generally Katherine J. Hamilton, *Litigation Timeline—Calculating the Five-Year Date After Arbitration*, 12 L.A. LAW. 8 (1989) (evaluating the five-year timeline according to § 1141.17 and the latest court decisions).

12. *Howard*, 10 Cal. 4th at 434, 895 P.2d at 475, 41 Cal. Rptr. 2d at 368.

13. *Id.* at 434, 895 P.2d at 475, 41 Cal. Rptr. 2d at 368. See generally 6 CAL. JUR. 3D *Arbitration and Award* § 101 (1988 & Supp. 1995) (explaining tolling and California Civil Procedure Code § 1141.17); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 37 (9th ed. 1990 & Supp. 1995) (providing an overview of California arbitration statutes).

14. *Howard*, 10 Cal. 4th at 435, 895 P.2d at 475, 41 Cal. Rptr. 2d at 368.

15. *Id.*

16. *Id.* However, Justice Mosk pointed out that § 1140.20 "does not guarantee a trial

sibility to keep track of important dates, and to advise the court of these dates,¹⁷ continues even if the court does not fulfill its duty to recalendar the case.¹⁸ The court warned that the “[p]laintiff’s failure to perform that duty leaves the five-year statute running.”¹⁹

2. Appropriateness of the Court’s Mandatory Dismissal

The court next considered whether the tolling of the plaintiff’s case was calculated correctly.²⁰ After determining that section 583.340, rather than section 1141.17, controlled the determination of the statutory period, the court held that the five-year time period had been miscalculated.²¹ The majority agreed with the plaintiff that section 583.340 governed because the tolling was “due to a post-arbitration condition of impossibility, impracticability, or futility.”²² The court explained that because there were periods of time when the case was at a “standstill,” the five-year period should have been tolled.²³ Thus, the five-year statute

date within the five-year period if a dilatory plaintiff would not have been eligible for a timely trial date prior to entering arbitration.” *Id.* at 435, 895 P.2d at 476, 41 Cal. Rptr. 2d at 369.

17. *Id.* at 435, 895 P.2d at 475, 41 Cal. Rptr. 2d at 368; see *Cannon v. Novato*, 167 Cal. App. 3d 216, 222, 213 Cal. Rptr. 132, 136 (1985) (allowing dismissal of the plaintiff’s case because the plaintiff should have properly kept track of the five-year limitation date).

18. *Howard*, 10 Cal. 4th at 436, 895 P.2d at 476, 41 Cal. Rptr. 2d at 369.

19. *Id.* The majority concluded that the five-year statute remained in force during the time between the request for trial and Ms. Howard’s motion to specially set the case for trial, since Ms. Howard “did not inform the trial court of the impending five-year deadline, or make any effort to have a trial date set immediately following defendant’s request for a trial *de novo*.” *Id.* at 435, 895 P.2d at 476, 41 Cal. Rptr. 2d at 369; see *Messih v. Levine*, 228 Cal. App. 3d 454, 458, 278 Cal. Rptr. 825, 828 (1991) (refusing to toll the running of the five-year limitation period between the plaintiff’s request for trial *de novo* and the trial date set by the court when the plaintiff did not engage in reasonable diligence), *cert. denied*, 502 U.S. 945 (1991); *Marchuk v. Ralphs Grocery Co.*, 226 Cal. App. 3d 1273, 1280, 276 Cal. Rptr. 627, 631 (1990) (upholding dismissal of the plaintiff’s claim even though the plaintiff filed a timely request for trial *de novo* when the plaintiff failed to keep the court informed of the impending five-year deadline).

20. *Howard*, 10 Cal. 4th at 437, 895 P.2d at 477, 41 Cal. Rptr. 2d at 370.

21. *Id.* at 437-39, 895 P.2d at 477-78, 41 Cal. Rptr. 2d at 370-71.

22. *Id.* at 438, 895 P.2d at 477, 41 Cal. Rptr. 2d at 370.

23. *Id.* at 438-39, 895 P.2d at 478, 41 Cal. Rptr. 2d at 371 (citing *Hughes v. Kimble*, 5 Cal. App. 4th 59, 71, 6 Cal. Rptr. 2d 616, 624 (1992) (stating that the five-year period should toll between the time of default and the default judgment). Justice Mosk tolled the five-year period during the week prior to the entry of judgment and during the

had not expired, and the trial court's dismissal of the plaintiff's action was therefore not mandatory under section 583.310.²⁴

3. Abuse of Discretion

Next, the majority contemplated whether the trial court abused its discretion in dismissing the plaintiff's case when the trial court denied the plaintiff's motion to specially set the case for trial.²⁵ The court noted that although public policy favors disposition of a case on the merits, the court must consider the totality of the circumstances.²⁶ The majority emphasized both the duty of the court to recalendar cases and the directive set forth in section 1141.20 which states that plaintiffs should not be penalized for going through the arbitration process.²⁷ However, the court noted that the trial court still has discretion to deny a motion to specifically set a date for trial if the plaintiff waits an "unreasonably long time in acting to correct the court's failure to recalendar the case."²⁸ Finally, the supreme court pointed out that a court may dismiss a motion to specially set a trial date if an accelerated trial date would prejudice the defendant.²⁹ Based on such rationale, the court concluded that the trial court did not abuse its discretion when it dismissed the plaintiff's case "in light of plaintiff's delay both before and after arbitration."³⁰

period between the date of defendant's default and the date that the court entered default judgment in the plaintiff's favor. *Id.*; see 1 CAL. JUR. 3D *Actions* § 253 (1988) ("The time during which the defendant was not amenable to the process of the court . . . is not included in computing the 5-year period.").

24. *Howard*, 10 Cal. 4th at 439, 895 P.2d at 469, 41 Cal. Rptr. 2d at 371.

25. *Id.* at 439, 895 P.2d at 478, 41 Cal. Rptr. 2d at 371.

26. *Id.* at 440-41, 895 P.2d at 479, 41 Cal. Rptr. 2d at 372.

27. *Id.* at 441-42, 895 P.2d at 480, 41 Cal. Rptr. 2d at 373. See generally 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §§ 36-39 (9th ed. 1990 & Supp. 1995) (providing a general overview of arbitration); 6 CAL. JUR. 3D *Arbitration and Award* §§ 1-5 (1988 & Supp. 1995) (same).

28. *Howard*, 10 Cal. 4th at 442, 895 P.2d at 480, 41 Cal. Rptr. 2d at 373 (citing *Karubian v. Security Pac. Nat'l Bank*, 152 Cal. App. 3d 134, 139, 199 Cal. Rptr. 295, 299 (1984) (finding no abuse of discretion when the trial court refused to specially set the matter for trial, since the plaintiff waited 40 days before the deadline to take any action)). Justice Mosk noted the plaintiff's delay both before and after the arbitration process. *Id.* at 443, 895 P.2d at 481, 41 Cal. Rptr. 2d at 373.

29. *Id.*

30. *Id.* at 444, 895 P.2d at 481, 41 Cal. Rptr. 2d at 374; see *Salas v. Sears, Roebuck & Co.*, 42 Cal. 3d 342, 349-50, 721 P.2d 590, 594-95, 228 Cal. Rptr. 504, 508-09 (1986) (considering the totality of the circumstances in determining that the trial court did not abuse its discretion in subjecting the plaintiff's claim to dismissal).

B. Concurring Opinion

Justice Baxter wrote a separate opinion, concurring with the majority's conclusion that dismissal of the plaintiff's action was appropriate.³¹ However, Justice Baxter disagreed with the majority's determination that the five-year period had not expired.³² Justice Baxter espoused that section 1141.17 should have applied instead of the more general section 583.340, because section 1141.17 "governs tolling of actions submitted to arbitration."³³ Justice Baxter asserted that section 1141.17 mandated dismissal because it permits tolling of arbitration-related time only within the last six months of the five-year period.³⁴ Justice Baxter concluded by criticizing the majority for giving plaintiffs more time to bring an action to trial.³⁵

III. IMPACT AND CONCLUSION

One of the leading California Supreme Court cases regarding a post-arbitration request for a trial de novo is *Moran v. Superior Court*.³⁶ In *Moran*, the court held that the five-year time limit set forth in section 583.310 should have been tolled when the plaintiff waited for the court to recalendar the case after the defendant requested a trial de novo.³⁷ The court further held that the plaintiff has a duty of reasonable diligence in prosecuting the case.³⁸ In *Messih v. Levine*, the appellate court added a new dimension to *Moran* when the court held that the "plaintiff has an ongoing duty of reasonable diligence."³⁹

In *Howard*, the California Supreme Court defined exactly what the plaintiff must do in order to toll the statutory five-year period within the last six months following arbitration; the plaintiff must timely notify the trial court of the impending five-year deadline and request that the court set the trial prior to that date.⁴⁰ The court clarified the relationship be-

31. *Howard*, 10 Cal. 4th at 444, 895 P.2d at 481, 41 Cal. Rptr. 2d at 374 (Baxter, J., concurring).

32. *Id.* (Baxter, J., concurring).

33. *Id.* at 444-45, 895 P.2d at 481, 41 Cal. Rptr. 2d at 375 (Baxter, J., concurring).

34. *Id.* (Baxter, J., concurring).

35. *Id.* at 446, 895 P.2d at 481, 41 Cal. Rptr. 2d at 376 (Baxter, J., concurring).

36. 35 Cal. 3d 229, 673 P.2d 216, 197 Cal. Rptr. 546 (1983).

37. *Id.* at 239, 673 P.2d at 223, 197 Cal. Rptr. at 553.

38. *Id.* at 238, 673 P.2d at 222, 197 Cal. Rptr. at 552.

39. 228 Cal. App. 3d 454, 458, 278 Cal. Rptr. 825, 828 (1991) (emphasis added).

40. *Howard*, 10 Cal. 4th at 435, 895 P.2d at 475, 41 Cal. Rptr. 2d at 368.

tween the Judicial Arbitration Act and Civil Code section 583.310, thereby giving attorneys a timeline to calculate the five-year period.⁴¹ The court set forth an appropriate timeline that will not harm plaintiffs who agree to arbitrate their case. This is an essential ruling since arbitration is a viable alternative to litigation in today's legal environment.⁴²

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41. *Id.*

42. *Id.*; see Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1840 n.133 (1986) ("[California's] trial de novo rate for cases placed on an arbitration hearing list was 1.4%"). See generally Kim Karelis, Comment, *Private Justice: How Civil Litigation is Becoming a Private Institution—The Rise of Private Dispute Centers*, 23 SW. U. L. REV. 62 (1994) (addressing the future of the civil justice system and the integration of private dispute resolution centers with the public court system).

IX. PRODUCTS LIABILITY

The court should only instruct jurors to consider ordinary consumer expectations in products liability cases where the question of whether the product defectively designed is within the common experience of the consumer. Additionally, errors in instructing a civil jury do not lead to automatic reversal; rather, the court must examine the evidence and the entire cause to determine whether the error constituted a miscarriage of justice: Soule v. General Motors Corp.

I. INTRODUCTION

In *Soule v. General Motors Corp.*,¹ the California Supreme Court first considered whether the ordinary consumer expectation test was properly put before the jury in a complex design defect case.² Next, the court determined whether the trial court erred in refusing to give jurors the specific legal cause instruction proposed by General Motors Corp. (GM).³ Finally, the court decided whether the refusal, if erroneous, constituted per se reversible error.⁴

The supreme court held in the first instance that the consumer expectation test was not an appropriate jury instruction in a complex case.⁵ Second, the court found that the trial court erred in not admitting GM's proposed jury instruction on legal causation, following the general rule that a party is entitled to have the jury instructed on every specific theory of defendant's case.⁶ Third, the court concluded that, although the

1. 8 Cal. 4th 548, 882 P.2d 298, 34 Cal. Rptr. 2d 607 (1994). Justice Baxter authored the majority opinion in which Justices Kennard, George, Werdegar, and Boren concurred. *Id.* at 556-83, 882 P.2d at 301-19, 34 Cal. Rptr. 2d at 610-28. Justice Mosk, Acting Chief Justice, filed a separate concurring opinion. *Id.* at 583, 882 P.2d at 319, 34 Cal. Rptr. 2d at 628. Justice Arabian wrote a concurring and dissenting opinion. *Id.* at 583-86, 882 P.2d at 319-21, 34 Cal. Rptr. 2d at 628-30.

2. *Id.* at 556, 882 P.2d at 301, 34 Cal. Rptr. 2d at 610. See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1259-1261 (9th ed. 1988 & Supp. 1993) (delineating the criteria and proof needed to sustain a design defect case); 50 CAL. JUR. 3D *Products Liability* § 12 (1993) (discussing the effect of a manufacturer's failure to design a reasonably safe product).

3. *Soule*, 8 Cal. 4th at 556, 882 P.2d at 301, 34 Cal. Rptr. 2d at 610.

4. *Id.*

5. *Id.*

6. *Id.* at 556, 571, 882 P.2d at 301, 311-12, 34 Cal. Rptr. 2d at 610, 620-21.

trial court erred in both the first and second instances, the errors were harmless and did not require reversal.⁷ Finally, the court made it clear that errors in issuing civil jury instructions will never necessitate per se reversal, but rather the court must examine the evidence and the entire cause to determine whether the error constituted a miscarriage of justice.⁸ For these reasons, the supreme court affirmed.⁹

II. STATEMENT OF THE CASE

Plaintiff, Terri Soule, was driving her Camaro, which was manufactured by GM, when a Datsun skidded out of control and struck her Camaro close to the left front wheel.¹⁰ The Camaro's wheel assembly was separated from its frame when the bracket tore loose.¹¹ "[T]he wheel collapsed rearward and inward. The wheel hit the underside of the 'toe pan'—the slanted floorboard area beneath the pedals—causing the toe pan to crumple, or 'deform,' upward into the passenger compartment."¹² Plaintiff suffered several injuries, including minor knee and scalp injuries, a fractured rib, and fractures of both her ankles, particularly her left ankle which was the most severely damaged.¹³

Plaintiff filed suit against GM, claiming strict liability for a tortiously defective product that caused the "enhanced" injury to her ankles.¹⁴ Plaintiff alleged that her ankle injuries were caused by a design defect, in that the bracket was improperly welded to the wheel assembly, allowing the wheel to collapse rearward and force the toe pan into the passenger compartment.¹⁵ At trial, plaintiff presented expert testimony and the results of crash tests tending to show that the force of the Datsun hitting her car was not enough to cause the injury to her ankles.¹⁶ This evidence, plaintiff asserted, proved that her injury would not have occurred but for the faulty weld that started the chain reaction ending in a deformed toe pan pushing through the driver's side floor.¹⁷ Specifically, plaintiff's metallurgist testified that the failed bracket's "weld was particularly weak because of excess 'porosity' caused by improper welding

7. *Id.*

8. *Id.* at 580-81, 882 P.2d at 317, 34 Cal. Rptr. 2d at 626.

9. *Id.* at 583, 882 P.2d at 319, 34 Cal. Rptr. 2d at 628.

10. *Id.* at 556-57, 882 P.2d at 301, 34 Cal. Rptr. 2d at 610.

11. *Id.* at 557, 882 P.2d at 301, 34 Cal. Rptr. 2d at 610.

12. *Id.*

13. *Id.*

14. *Id.* at 557-59, 882 P.2d at 302-03, 34 Cal. Rptr. 2d at 611-12. *See generally* 50 CAL. JUR. 3D *Products Liability* § 45 (1993) (explaining who can recover in a strict liability action).

15. *Soule*, 8 Cal. 4th at 557, 882 P.2d at 302, 34 Cal. Rptr. 2d at 611.

16. *Id.* at 558, 882 P.2d at 302, 34 Cal. Rptr. 2d at 611.

17. *Id.*

techniques."¹⁸ GM's metallurgist testified against plaintiff's expert's findings.¹⁹ GM also put forth the defense that "the force of the collision, rather than any product defect, was the sole cause of plaintiff's ankle injuries."²⁰

The trial judge instructed the jury on the ordinary consumer expectation standard for deciding whether there was a design defect, overruling GM's objection to the use of that standard instead of the risk-benefit test.²¹ The judge also rejected GM's request for a specific causation instruction and instead gave the jury a standard instruction on legal causation.²²

The jury returned a special verdict in favor of the plaintiff in the amount of \$1.65 million.²³ GM appealed, complaining that the court

18. *Id.*

19. *Id.*

20. *Id.* See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1304 (9th ed. 1988 & Supp. 1993) (discussing the defense that no causal connection exists between a plaintiff's injuries and the alleged defect). Specifically, the defense alleged that plaintiff's ankle injuries resulted when she braced her feet against the floor board on realization that an impact was imminent. *Soule*, 8 Cal. 4th at 558-59, 882 P.2d at 302, 34 Cal. Rptr. 2d at 612.

21. *Soule*, 8 Cal. 4th at 559, 569, 882 P.2d at 303, 309-10, 34 Cal. Rptr. 2d at 612, 618-19. See generally BAJI No. 9.00.5 (7th ed. 1986 & 1992 Revision) (setting forth the instruction for finding a design defect). Furthermore, the court instructed the jury that:

[I]n order to establish liability for a design defect under the "ordinary consumer expectations" standard, plaintiff must show (1) the manufacturer's product failed to perform as safely as an ordinary consumer would expect, (2) the defect existed when the product left the manufacturer's possession, (3) the defect was a "legal cause" of plaintiff's "enhanced injury," and (4) the product was used in a reasonably foreseeable manner.

Soule, 8 Cal. 4th at 559, 882 P.2d at 303, 34 Cal. Rptr. 2d at 612.

22. *Id.* at 559, 882 P.2d at 303, 34 Cal. Rptr. 2d at 612. See generally BAJI No. 3.76 (7th ed. 1986) (defining legal cause). GM proposed the following instruction:

If you find that the subject Camaro . . . was improperly designed, but you also find that [plaintiff] would have received enhanced injuries even if the design had been proper, then you must find that the design was not a substantial factor in bringing about her injuries and therefore was not a contributing cause thereto.

Soule, 8 Cal. 4th at 559, 882 P.2d at 303, 34 Cal. Rptr. 2d at 612.

23. *Soule*, 8 Cal. 4th at 559, 882 P.2d at 303, 34 Cal. Rptr. 2d at 612. See generally *Jury Finds Manufacturing Defect in Automobile*, 11 No. 9 VERDICTS, SETTLEMENTS & TACTICS 310 (1991) (summarizing the case, the parties involved, and the jury's verdict); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1360 (9th ed. 1988) (discussing products liability and punitive and compensatory damage awards).

erred by instructing the jury on the ordinary consumer expectations standard in a complex case, refusing to give the jury GM's specific causation instruction.²⁴ The California Court of Appeal held that the trial court should have given the jury GM's specific causation instruction, but its failure to do so was harmless error.²⁵ The court of appeal further held that the trial court did not err by using the ordinary consumer expectation standard, and "that a jury may rely on expert assistance to determine what level of safe performance an ordinary consumer would expect under particular circumstances."²⁶ GM subsequently appealed to the Supreme Court of California.²⁷

III. TREATMENT

A. *The Majority Opinion*

Justice Baxter, writing for the majority, considered GM's appeal in three distinct parts. First, the majority set forth the proper instruction for jurors deliberating the issue of design defect in a complex case.²⁸ Next, the majority considered whether the trial court's causation instruction was adequate, thereby making the court's refusal of GM's proposed specific causation instruction proper.²⁹ Finally, the majority announced the standard for determining whether an incorrect instruction to the jury in a civil case constitutes reversible error.³⁰

1. The court should only instruct jurors to consider ordinary consumer expectations in products liability cases where the question of whether the product is defectively designed is within the common experience of the consumer.³¹

The majority opinion began with a review of the leading cases that established and clarified the design defect test.³² The design defect test

24. *Soule*, 8 Cal. 4th at 559, 882 P.2d at 303, 34 Cal. Rptr. 2d at 612.

25. *Id.* at 560, 882 P.2d at 303, 34 Cal. Rptr. 2d at 612.

26. *Id.*

27. *Id.*

28. *See id.* at 560-71, 882 P.2d at 303-11, 34 Cal. Rptr. 2d at 612-20.

29. *See id.* at 572-73, 882 P.2d at 311-12, 34 Cal. Rptr. 2d at 620-21.

30. *See id.* at 573-83, 882 P.2d at 312-19, 34 Cal. Rptr. 2d at 621-28.

31. *See id.* at 567, 882 P.2d at 308, 34 Cal. Rptr. 2d at 617.

32. *Soule*, 8 Cal. 4th at 560-64, 882 P.2d at 303-06, 34 Cal. Rptr. 2d at 612-15. *See generally* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (establishing the proposition that manufacturers, retailers and distributors are liable for harm caused by their defective products if the product was "used in a reasonably foreseeable" manner); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (holding that the "unreasonably dangerous test" taken from the Second Restatement of Torts shall not be applied in California); Barker

is a two-prong test consisting of first, discerning whether the product performed within the ordinary consumer's expectations, and second, if the consumer expectation test is satisfied, performing risk-benefit analysis, weighing specified factors.³³ The majority next considered several ensuing court of appeal decisions, which appear to have increased the scope of the ordinary consumer expectations prong of the design defect test.³⁴ Finally, the majority laid the framework for the proper use of the ordinary consumer expectation test.³⁵

v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (setting forth a two-prong test for design defects—ordinary consumer expectations or risk-benefit analysis); *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982) (offering framework for properly applying the ordinary consumer expectations test); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1259, 1260 (9th ed. 1988) (discussing the importance of *Barker* and *Campbell*, respectively).

33. *Soule*, 8 Cal. 4th at 562, 882 P.2d at 304-05, 34 Cal. Rptr. 2d at 613-14. Risk-benefit factors a jury may consider include:

'the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'

Id. (quoting *Barker v. Lull Eng'g Co.*, 20 Cal. 3d at 431, 573 P.2d 443, 143 Cal. Rptr. 225 (1978)).

34. *Soule*, 8 Cal. 4th at 564-66, 882 P.2d at 306-07, 34 Cal. Rptr. 2d at 614-16; see *Bates v. John Deere Co.*, 148 Cal. App. 3d 40, 195 Cal. Rptr. 637 (1983) (holding that the ordinary consumer expectations test should not be applied where it is unlikely that the ordinary consumer would have any reasonable expectations as to the product); *Lunghi v. Clark Equip. Co.*, 153 Cal. App. 3d 485, 200 Cal. Rptr. 387 (1984) (allowing the plaintiff to offer an expert's opinion regarding ordinary consumer expectations towards particular products); *Akers v. Kelley Co.*, 173 Cal. App. 3d 633, 219 Cal. Rptr. 513 (1985) (asserting that the ordinary consumer expectations test is not limited to accidents or products within the jury's common experience); *West v. Johnson & Johnson Prods., Inc.*, 174 Cal. App. 3d 831, 220 Cal. Rptr. 437 (1985) (holding that the proper use of the ordinary consumer expectations test may include expert opinion in complex cases); *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cal. App. 3d 726, 226 Cal. Rptr. 299 (1986) (finding that the plaintiff's expectations regarding the effects of a procedure not within her expertise did not prove defect when expert opinion stated that plaintiff's expectations were incorrect or unreasonable). For an analysis of these cases, see also *supra* notes 82-103 and accompanying text and 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1261 (9th ed. 1988) (reviewing the above decisions).

35. *Soule*, 8 Cal. 4th at 566-71, 882 P.2d at 307-11, 34 Cal. Rptr. 2d at 616-20. See generally Howard Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173 (1994) (discussing Restatement (Third) proposals regarding the ordinary consumers expectations test); Aaron D. Twerski, *From Risk-Utility to Consumer Expectation*.

In applying the ordinary consumer expectation test, the appropriate question is "whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers."³⁶ If the facts support such an inference, the defendant will be foreclosed from presenting evidence by experts that the alleged design defect has more benefits to the public than risks.³⁷

Next, the majority limited the use of the consumer expectations test to cases where the consumers' familiarity with a product enables them to conclude that its design "violated *minimum* safety assumptions."³⁸ The court further prohibited the use of experts to illustrate what jurors "would or should expect."³⁹ Moreover, the court cautioned, a jury must not be allowed to consider whether a product performed within their expectations of the minimum level of safety unless the facts would permit such an inference.⁴⁰ If the facts do not permit this inference, the jury must be instructed to balance the relative benefits and risks of a product's design as *Barker* necessitates.⁴¹ The majority also emphasized that complex products, even when used properly, may cause injury in a manner that does not fall within a consumer's ordinary expectation of safe performance; thus, the risk-benefit analysis would be the correct test to determine design defect in such a case.⁴² Therefore, if jury instructions do not direct jurors to engage in the risk-benefit analysis where the ordinary consumer expectation test is not implicated, the instructions are "misleading and incorrect."⁴³

Enhancing the Role of Judicial Screening in Product Liability Litigation, 11 HOFSTRA L. REV. 861 (1983) (advocating a strong role for the judge in the consumer expectation test); William R. Pilat, Comment, *Strict Liability and Design Defects: Do Texas Courts Provide Jury Instructions that Instruct?*, 29 HOUS. L. REV. 633 (1992) (analyzing the effectiveness of the ordinary consumer expectation instruction in instructing the jury in their deliberations in Texas); David A. Urban, Comment, *Custom's Proper Role in Strict Product Liability Actions Based on Design Defect*, 38 UCLA L. REV. 439 (1990) (arguing that evidence on industry custom should be admitted and jury should be allowed to consider it when determining ordinary consumer expectations).

36. *Soule*, 8 Cal. 4th at 568-69, 882 P.2d at 309, 34 Cal. Rptr. 2d at 618.

37. *Id.* at 566, 882 P.2d at 308, 34 Cal. Rptr. 2d at 617.

38. *Id.* at 567, 882 P.2d at 308, 34 Cal. Rptr. 2d at 617.

39. *Id.*

40. *Id.* at 568, 882 P.2d at 309, 34 Cal. Rptr. 2d at 618.

41. *Id.*; see *supra* note 33 (listing factors to be weighed in the risk-benefit analysis).

42. *Soule*, 8 Cal. 4th at 566-67, 882 P.2d at 308, 34 Cal. Rptr. 2d at 617. Justice Baxter reasoned that automobiles were exactly such a product because consumers could not predict how the vehicle would perform in all driving scenarios or how safely the product should be designed to avoid those dangers. *Id.* at 567, 882 P.2d at 308, 34 Cal. Rptr. 2d at 617 (citing *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 237 (1978)).

43. *Id.* at 568, 882 P.2d at 309, 34 Cal. Rptr. 2d at 618.

GM argued that the ordinary consumer expectation test should be abolished in design defect cases because it "is an 'unworkable, amorphous, fleeting standard'" that is unfair and deficient.⁴⁴ The majority rejected GM's request to abolish the test, stating that its opinion limited the scope of the consumer expectation test sufficiently to protect GM's interests.⁴⁵ In addition, the majority explained, situations will arise where a product may perform so unsafely that the design defect is clear to the "common understanding, experience, and reason" of the ordinary consumer and a lay jury will be capable of making that judgment.⁴⁶

Finally, the majority determined that the trial court should not have instructed the jury to apply the ordinary consumer expectation test because the plaintiff's design defect theory encompassed mechanical and technical detail that an ordinary consumer could not reasonably be expected to understand without expert testimony.⁴⁷ The majority held that the instructional error was harmless because the consumer expectation theory was not emphasized at trial and it was unreasonable to assume that the jury "disregarded the voluminous evidence on the risks and benefits" of the car's design when it reached its verdict.⁴⁸

2. A party is entitled to have the jury instructed on every specific legal theory of their case; therefore, a general causation instruction is not sufficient where the defense's theory centers on causation.

Next, the majority considered whether the trial court's causation instruction was adequate and whether the court erred when it refused to

44. *Id.* at 569, 882 P.2d at 309, 34 Cal. Rptr. 2d at 618. Specifically, GM stated five ways they felt the ordinary consumer expectation test was unfair and deficient:

First, it defies definition. Second, it focuses not on the objective condition of products, but on the subjective, unstable, and often unreasonable opinions of consumers. Third, it ignores the reality that ordinary consumers know little about how safe the complex products they use can or should be made. Fourth, it invites the jury to isolate the particular consumer, component, accident, and injury before it instead of considering whether the whole product fairly accommodates the competing expectations of all consumers in all situations (citations omitted). Fifth, it eliminates the careful balancing of risks and benefits which is essential to any design issue.

Id. at 569, 882 P.2d at 309-10, 34 Cal. Rptr. 2d at 618-19 (internal citation omitted).

45. *Id.* at 569-70, 882 P.2d at 310, 34 Cal. Rptr. 2d at 619.

46. *Id.* at 569, 882 P.2d at 310, 34 Cal. Rptr. 2d at 619.

47. *Id.* at 570, 882 P.2d at 310, 34 Cal. Rptr. 2d at 619.

48. *Id.*

give GM's proposed specific causation instruction.⁴⁹ GM argued at trial that the force and angle of the collision would have caused the wheel to collapse despite any design defect and that the collapsing wheel did not cause plaintiff's ankle injuries.⁵⁰ GM requested the judge to instruct the jury that, if plaintiff's ankle injuries would have happened notwithstanding any design defect, then GM's design "was not a 'substantial' or 'contributing' cause of plaintiff's 'enhanced' injuries."⁵¹ Moreover, GM argued that the trial court's refusal to issue this instruction was per se reversible error.⁵²

The majority stated the general rule that "a party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence."⁵³ The majority found that GM's requested instruction was proper and should have been read to the jury.⁵⁴ The majority analyzed what prejudice, if any, GM suffered under the California Constitution⁵⁵ and precedent, due to the trial court's failure to issue the proposed instruction.⁵⁶ The court weighed several factors, set forth below, and determined that the trial court's erroneous denial of GM's proposed instruction did not prejudice their case and, therefore, constituted harmless error.⁵⁷

49. *Id.* at 572, 882 P.2d at 311-12, 34 Cal. Rptr. 2d at 620-21.

50. *Id.* at 572, 882 P.2d at 311, 34 Cal. Rptr. 2d at 620; see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1304 (9th ed. 1988 & Supp. 1996) (discussing the affirmative defense that a design defect is not the proximate cause of plaintiff's injuries).

51. *Soule*, 8 Cal. 4th at 572, 882 P.2d at 311, 34 Cal. Rptr. 2d at 620. The following is the actual proposed instruction:

If you find that the subject Camaro vehicle was improperly designed, but you also find that Terri Soule would have received enhanced injuries even if the design had been proper, then you must find that the design was not a substantial factor in bringing about her injuries and therefore was not a contributing cause thereto.

Id. at 584 n.1, 882 P.2d at 319 n.1, 34 Cal. Rptr. 2d at 628 n.1 (Arabian, J., concurring and dissenting).

52. *Id.* at 573, 882 P.2d at 312, 34 Cal. Rptr. 2d at 621. GM argued "that the erroneous denial of instructions explaining a 'central theory' of a party's case is prejudicial as a matter of law." *Id.*

53. *Id.* at 572, 882 P.2d at 311, 34 Cal. Rptr. 2d at 620.

54. *Id.* at 572-73, 882 P.2d at 312, 34 Cal. Rptr. 2d at 621.

55. *Id.* at 580, 882 P.2d at 317, 34 Cal. Rptr. 2d at 626. "A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" *Id.* (quoting CAL. CONST. art. VI, § 13 (West Supp. 1996)).

56. *Id.* at 580, 882 P.2d at 317, 34 Cal. Rptr. 2d at 626. The majority was guided by *People v. Cahill*, 5 Cal. 4th 478, 503, 853 P.2d 1037, 1054, 20 Cal. Rptr. 2d 582, 599 (1993), in determining the standard of reversibility for erroneous omission of jury instructions. *Id.* at 576, 882 P.2d at 314, 34 Cal. Rptr. 2d at 623.

57. *Id.* at 580-81, 882 P.2d at 317-18, 34 Cal. Rptr. 2d at 626-27.

3. Errors in instructing a civil jury do not lead to automatic reversal; rather, the court must examine the evidence and the entire cause to determine whether the error constituted a miscarriage of justice.

Finally, the majority announced the standard for determining whether it is reversible error when a trial judge gives incorrect jury instructions in a civil case:

[T]here is no rule of automatic reversal or "inherent" prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."⁵⁸

Moreover, the test for prejudice when there has been an erroneous omission, or an erroneous inclusion, of a jury instruction in a civil case is whether "it seems probable" that the error "prejudicially affected the verdict."⁵⁹ In making this determination, the court should take into consideration several factors.⁶⁰ First, the court should consider the nature of the error, which incorporates the likely and natural effect of the error on the party's ability to present his case to the jury.⁶¹ Second, the court should examine whether there has been any actual prejudice to the party, evaluated in the context of the trial record.⁶² The majority set forth a multifactor approach for making this determination, stating that "the court must also evaluate: (1) the state of the evidence; (2) the effect of other instructions; (3) the effect of counsel's arguments; and (4) any indications by the jury itself that it was misled."⁶³

In sum, although the court found that the trial court erred as to both the design defect instruction and the refusal to issue the specific causation instruction, it held that both errors were harmless, and they affirmed the court of appeal's judgment in favor of the plaintiff.⁶⁴

58. *Id.* at 580, 882 P.2d at 317, 34 Cal. Rptr. 2d at 626 (quoting CAL. CONST. art VI, § 13). Furthermore, the court overruled and disapproved of any prior decisions that implicated a rule to the contrary. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 580-81, 882 P.2d at 317, 34 Cal. Rptr. 2d at 626 (footnote omitted).

64. *Id.* at 581-83, 882 P.2d at 317-19, 34 Cal. Rptr. 2d at 627-28.

B. Acting Chief Justice Mosk's Concurring Opinion

Justice Mosk, Acting Chief Justice, concurred with the majority's conclusion.⁶⁵ He wrote separately to protest the majority's reference to *People v. Cahill*,⁶⁶ which the majority used as "guidance" in its discussion of the proper standard for determining prejudice resulting from erroneous jury instructions.⁶⁷ Justice Mosk found *Cahill* to be a "cruel aberration in the law" and asserted that the majority's use of this case weakened their analysis.⁶⁸

C. Justice Arabian's Concurring and Dissenting Opinion

Justice Arabian concurred with the majority holding that the issuance of the ordinary consumer expectation test for design defect was erroneous and that the trial court's refusal to issue GM's specific causation instruction was erroneous.⁶⁹ Justice Arabian dissented against the majority's finding that refusal to issue GM's causation instruction was harmless error.⁷⁰ He found it reasonably likely that the jury based its decision on the general causation instruction and that the erroneous exclusion of GM's specific causation instruction prejudiced the defendant's case.⁷¹

IV. IMPACT

Strict products liability is a relatively recent phenomenon, appearing only slightly more than thirty years ago in the now landmark case *Greenman v. Yuba Power Products, Inc.*⁷² Prior to *Greenman*, liability was established solely on a showing of negligence or warranty.⁷³ In re-

65. *Id.* at 583, 882 P.2d at 319, 34 Cal. Rptr. 2d at 628 (Mosk, J., concurring).

66. 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

67. *Soule*, 8 Cal. 4th at 583, 882 P.2d at 319, 34 Cal. Rptr. 2d at 628 (Mosk, J., concurring).

68. *Id.* (Mosk, J., concurring). Acting Chief Justice Mosk protested the use of *Cahill* because that decision held that a coerced confession was harmless. *Id.* (Mosk, J., concurring).

69. *Id.* at 583, 882 P.2d at 319, 34 Cal. Rptr. 2d at 628 (Arabian, J., concurring and dissenting).

70. *Id.* (Arabian, J., concurring and dissenting).

71. *Id.* at 586, 882 P.2d at 321, 34 Cal. Rptr. 2d at 630 (Arabian, J., concurring and dissenting). Justice Arabian refuted every part of the majority's analysis regarding prejudice resulting from this instruction. *Id.* at 585-86, 882 P.2d at 320-21, 34 Cal. Rptr. 2d at 629-30 (Arabian, J., concurring and dissenting).

72. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §.1242 (9th ed. 1988 & Supp. 1996) (describing the *Greenman* case).

73. 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1241 (9th ed. 1988 & Supp.

sponse to the numerous cases where plaintiffs harmed by products were precluded from recovering for their injuries under warranty and negligence standards, the California Supreme Court created the doctrine of strict liability.⁷⁴ Additionally, the Restatement (Second) of Torts, section 402A, accepted and incorporated the doctrine of strict products liability for design defects two years after the *Greenman* decision.⁷⁵

There are three main reasons for the courts imposing strict liability on manufacturers.⁷⁶ First, "manufacturers are in the best position to avoid the risks of defective products through control of the production pro-

1996) (delineating the period before *Greenman*).

74. Judge Todd M. Thornhill, *Products Liability: The Open and Obvious Danger Rule*, 51 J. Mo. B. 203, 203 (1995). "Negligence was, and often still is, perceived as inadequate for consumers because of the inherent difficulty of proving what a manufacturer did or failed to do in the design process." *Id.* (citations omitted). "The breach of warranty action had been increasingly seen as futile for many injured consumers because of the requirement of privity of contract between the injured party and manufacturer or seller." *Id.* Additionally, "manufacturers disclaimed liability and damages through contractual disclaimers, and argued that they were not liable if there was no express guarantee of the product." *Id.* (citations omitted).

75. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. "Defective condition" is defined in Comment g as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Pilat, *supra* note 35, at 637 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965)). Furthermore, Comment i defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* Pilat, *supra* note 35, at 637 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)).

76. Pilat, *supra* note 35, at 634; see also James A. Henderson Jr. et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1659-60 (1995) (discussing a different perspective on the social policy objectives of strict products liability).

cess.⁷⁷ Second, “the potential of strict liability hypothetically stimulates manufacturers to make their products safer.”⁷⁸ Third, “manufacturers stand in the best position to assume the costs for any injuries that their products cause.”⁷⁹

The California Supreme Court established in *Greenman* that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”⁸⁰ This rule simply requires the California plaintiff to show that the product was “defective,” unlike the Restatement (Second) of Torts which subsequently required the plaintiff to show that it was “unreasonably defective.”⁸¹

The California Supreme Court next considered the issue of strict liability in a design defect case. In *Barker v. Lull Engineering Co.*,⁸² the supreme court set forth the criteria and requirements of proof for design defect.⁸³ Specifically, the court delineated two alternative tests to instruct the jury on design defect: the ordinary consumer expectation test and the risk-benefit test.⁸⁴ A product design is defective under the ordinary consumer expectation test if “the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.”⁸⁵ On the other hand, a product design is defective under the risk-benefit test if “the plaintiff proves that the product’s design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.”⁸⁶

77. Pilat, *supra* note 35, at 634 (citations omitted).

78. *Id.*

79. *Id.*

80. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d at 900, 27 Cal. Rptr. at 700 (1963); *see also* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1242 (9th ed. 1988) (discussing strict liability after *Greenman*); Pilat, *supra* note 35, at 635 (same).

81. *See Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (holding that plaintiff need not prove that product was unreasonably dangerous, only that it was defective); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1248 (9th ed. 1988) (delineating the California approach); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

82. 20 Cal. 3d 413, 573 P.2d at 443, 143 Cal. Rptr. 225 (1978).

83. *Id.* at 426-35, 573 P.2d at 452-58, 143 Cal. Rptr. at 234-40. *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1259 (9th ed. 1988) (discussing the criteria and proof delineated in *Barker*).

84. *Barker*, 20 Cal. 3d at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.

85. *Id.*

86. *Id.*; *see supra* note 32 (factors to be considered in risk-benefit analysis).

The California Supreme Court revisited design defect again in *Campbell v. General Motors Corp.*⁸⁷ *Campbell* established the "quantum of proof" required to demonstrate a prima facie case of design defect.⁸⁸ Under the ordinary consumer expectation test, the court stated that proof will generally be adequate to create an inference of liability "if the plaintiff provides evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety."⁸⁹ The plaintiff's burden of proof under the risk-benefit test is simply to offer evidence that would permit the jury to determine that a defect in the product's design was the proximate cause of his or her injuries.⁹⁰ When this is accomplished the burden of proof shifts to the defendant to prove that the benefits of the product's design outweigh the risks.⁹¹

Finally, in *Soule v. General Motors Corp.*,⁹² the California Supreme Court determined when to properly use the ordinary consumer expectation test instead of, or in addition to the risk-benefit test.⁹³ The court granted certiorari in *Soule*, in part, to settle a disagreement among several courts of appeal on their interpretation of *Campbell*.⁹⁴ In *Bates v. John Deere, Co.*,⁹⁵ the court of appeal stated in dicta that the ordinary consumer expectation jury instruction was not appropriate in a case when the court believed that the ordinary consumer would not "know what to expect concerning the safety design of a commercial cotton picker."⁹⁶

In *Lunghi v. Clark Equipment Co.*,⁹⁷ the California Court of Appeal stated that although the ordinary consumer expectation test was not proper under the facts presented for appeal, if the plaintiff could prop-

87. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982). See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1260 (9th ed. 1988) (discussing the importance of *Campbell*).

88. *Campbell*, 32 Cal. 3d at 127, 649 P.2d at 233, 184 Cal. Rptr. at 900.

89. *Id.*

90. *Id.* at 119, 649 P.2d at 228, 184 Cal. Rptr. at 895.

91. *Id.*

92. 8 Cal. 4th 548, 882 P.2d 298, 34 Cal. Rptr. 2d 607 (1994).

93. *Id.* at 556, 882 P.2d at 301, 34 Cal. Rptr. 2d at 610; see *supra* notes 35-43 and accompanying text.

94. *Soule*, 8 Cal. 4th at 563-66, 882 P.2d at 305-08, 34 Cal. Rptr. 2d at 614-16.

95. 148 Cal. App. 3d 40, 195 Cal. Rptr. 637 (1983).

96. *Id.* at 52, 195 Cal. Rptr. at 645; see also *Soule*, 8 Cal. 4th at 564, 882 P.2d at 306, 34 Cal. Rptr. 2d at 615.

97. 153 Cal. App. 3d 485, 200 Cal. Rptr. 387 (1984).

erly offer expert opinion during retrial to allow a jury to determine what a consumer should reasonably expect from the product, the ordinary consumer expectation instruction could be properly placed before the jury.⁹⁸

Another court of appeal held in *Akers v. Kelley Co.*⁹⁹ that the trial court properly instructed the jury on the ordinary consumer expectation test in a case concerning a bizarre accident.¹⁰⁰ The court of appeal stated that the ordinary consumer expectation test is appropriate in situations where the accident is "so bizarre that the average juror, upon hearing the particulars, might reasonably think: 'Whatever the user may have expected from that contraption, it certainly wasn't that.'"¹⁰¹

Finally, in both *West v. Johnson & Johnson Products, Inc.*¹⁰² and *Rosburg v. Minnesota Mining Manufacturing Co.*,¹⁰³ two different courts of appeal held that *Campbell* did not prohibit the use of expert testimony to aid jurors in determining ordinary consumer expectations in complex cases.¹⁰⁴

The California Supreme Court settled the issue by limiting the ordinary consumer expectation instruction to cases where the consumers' familiarity with the product enables them to conclude that its design "violated minimum safety assumptions."¹⁰⁵ The supreme court further prohibited the use of experts to illustrate what the jurors should or would expect.¹⁰⁶ Additionally, the court emphasized that complex products may cause injury even when used properly in a manner that does not fall within a consumer's ordinary expectation of safe performance.¹⁰⁷ In such a case, the court should offer the alternative risk-benefit instruction to determine whether there is a design defect.¹⁰⁸ The court's decision clarified yet another ambiguity regarding products liability and in the pro-

98. *Id.* at 496, 200 Cal. Rptr. at 393; *see also Soule*, 8 Cal. 4th at 564, 882 P.2d at 306, 34 Cal. Rptr. 2d at 615.

99. 173 Cal. App. 3d 633, 219 Cal. Rptr. 513 (1985).

100. *Id.* at 651, 219 Cal. Rptr. at 524; *see also Soule*, 8 Cal. 4th at 565, 882 P.2d at 306-07, 34 Cal. Rptr. 2d at 615-16.

101. *Akers*, 173 Cal. App. at 651, 219 Cal. Rptr. at 524; *see also Soule*, 8 Cal. 4th at 565, 882 P.2d at 307, 34 Cal. Rptr. 2d at 616.

102. 174 Cal. App. 3d 831, 220 Cal. Rptr. 437 (1985).

103. 181 Cal. App. 3d 726, 226 Cal. Rptr. 299 (1986).

104. *West*, 174 Cal. App. 3d at 866-67, 220 Cal. Rptr. at 458; *Rosburg*, 181 Cal. App. 3d at 732-33, 226 Cal. Rptr. at 303-04; *see also Soule*, 8 Cal. 4th at 565-66, 882 P.2d at 307, 34 Cal. Rptr. 2d at 616.

105. *Soule*, 8 Cal. 4th at 567, 882 P.2d at 308, 34 Cal. Rptr. 2d at 617.

106. *Id.*

107. *Id.* at 566-67, 882 P.2d at 308, 34 Cal. Rptr. 2d at 617.

108. *Id.*

cess, severely limited the application of the ordinary consumer expectation test.¹⁰⁹

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109. *See id.* One court of appeal subsequently held that the operation of an automobile air bag was within the ordinary experience of the consumer, and affirmed the trial court's use of the ordinary consumer expectation test, reasoning that a product could fail to meet an ordinary consumer's expectations even though expert testimony would be required to explain the operation of the air bag since expectations were distinct and apart from factual issues of design and function. James R. Adams, *Current Decisions: Consumer Expectation Test Appropriate for Air Bags*, 62 DEF. COUNS. J. 453, 454-55 (1995) (abstracting *Bresnahan v. Chrysler Corp.*, 32 Cal. App. 4th 1559, 38 Cal. Rptr. 2d 446 (1995)).

Additionally, numerous law review articles have commented on the effect of *Soule*. *See* Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609 (1995); Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353 (1995); R. Ben Hogan, III, *What Should be Alabama's Analysis for Product Liability Design Cases?*, 56 ALA. LAW. 166 (1995); Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions*, 36 S. TEX. L. REV. 283 (1995); Thomas E. Powell, II, *Products Liability and Optional Safety Equipment—Who Knows More?*, 73 NEB. L. REV. 843 (1994); William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227 (1995).

* Sheri L. Marvin is now an associate attorney with the Los Angeles law firm of Howarth & Smith, which specializes in products liability litigation.

X. TORTS

In an action for intentional interference with prospective economic relations, the plaintiff has the burden of proving that the defendant engaged in conduct that was wrongful by some legal measure other than the fact of the interference itself: Della Penna v. Toyota Motor Sales, U.S.A., Inc.

I. INTRODUCTION

In *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*,¹ the California Supreme Court considered whether a plaintiff seeking to recover for the tort of intentional interference with prospective economic relations has the burden of proving that the defendant “wrongfully” interfered with the plaintiff’s prospective economic relations.² In addressing this issue, the court looked to legal history, policies established in other courts, and leading academic authorities for guidance.³ Overruling the decision of the court of appeal, the California Supreme Court held that in intentional interference with prospective economic relations tort cases, the plaintiff has “the burden of pleading and proving that the defendant’s interference was wrongful ‘by some measure beyond the fact of the interference itself.’”⁴

1. 11 Cal. 4th 376, 902 P.2d 740, 45 Cal. Rptr. 2d 436 (1995). Justice Arabian delivered the majority opinion, in which Chief Justice Lucas and Justices Kennard, Baxter, George and Werdegar concurred. *Id.* at 378-93, 902 P.2d at 741-51, 45 Cal. Rptr. 2d at 437-47. Justice Mosk wrote a concurring opinion. *Id.* at 393-415, 902 P.2d at 751-65, 45 Cal. Rptr. 2d at 447-61 (Mosk, J., concurring).

2. *Id.* at 378-93, 902 P.2d at 741-51, 45 Cal. Rptr. 2d at 437-47. In *Della Penna*, the plaintiff, John Della Penna was a dealer of Toyota cars. *Id.* at 379, 902 P.2d at 742, 45 Cal. Rptr. 2d at 438. He became upset when the defendant, Toyota Motor Sales and its Lexus division, inserted into its dealership agreements a “no export” clause, which provided that dealers were only authorized to sell Lexus automobiles to customers located in the United States. *Id.* Della Penna nonetheless purchased Lexus automobiles and exported them to Japan for resale until Toyota ceased selling models to Della Penna. *Id.* at 380, 902 P.2d at 742, 45 Cal. Rptr. 2d at 438. Della Penna brought a suit for intentional interference with prospective economic relations against Toyota. *Id.* at 380, 902 P.2d at 742, 45 Cal. Rptr. 2d at 438. At trial, the trial judge modified the standard jury instruction for intentional interference with prospective economic relations by requiring that the plaintiff prove in his prima facie case that the defendant’s interfering conduct was “wrongful.” *Id.* at 380, 902 P.2d at 742-43, 45 Cal. Rptr. 2d at 438-39. The jury rendered a verdict in favor of Toyota. *Id.* at 380, 902 P.2d at 743, 45 Cal. Rptr. 2d at 439. The court of appeal unanimously reversed the trial court’s decision and remanded the case for a new trial. *Id.*

3. *Id.* at 381-91, 902 P.2d at 743-50, 45 Cal. Rptr. 2d at 439-46.

4. *Id.* at 392-93, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447 (quoting *Top Serv. Body Shop v. Allstate Ins., Co.*, 582 P.2d 1365, 1371 (Or. 1978)).

II. TREATMENT

A. *Majority Opinion*

1. Intentional interference with prospective economic relations requires that the defendant intentionally engaged in "wrongful" acts or conduct designed to interfere with the plaintiff's economic relationship.

Justice Arabian, writing for the majority, began the opinion by examining the history of "interference" torts.⁵ In particular, his discussion focused upon distinguishing between claims for intentional interference with an existing contract⁶ and claims for intentional interference with a prospective economic relationship.⁷ Justice Arabian stated that while existing contracts are clearly entitled to protection from the interference of a stranger to the transaction, prospective economic relationships that are not contractual⁸ are not entitled to the same protection as existing

5. *Id.* at 381-91, 902 P.2d at 743-51, 45 Cal. Rptr. 2d at 439-47. See generally Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335 (1980) (describing the history and future of the tort of interference with contractual relationships); Francis B. Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923) (discussing the historical origins of the breach of contract cause of action); Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980) (explaining the history of the tort of interference with contractual relations).

6. See generally 45 AM. JUR. 2D *Interference* § 1 (1969 & Supp. 1993) (setting forth the basic principles of tort liability for interference); 40 CAL. JUR. 3D *Interference with Contract* § 1 (1978 & Supp. 1995) (discussing available causes of action when there has been contractual interference); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 642 (9th ed. 1988 & Supp. 1995) (explaining the rule against inducing a breach of contract); Jeffery F. Ghent, Annotation, *Liability of a Real Estate Broker for Interference with a Contract Between a Vendor and Another Real Estate Broker*, 34 A.L.R. 3D 720 (1970) (discussing the liability of a real estate broker for contractual interference).

7. *Della Penna*, 11 Cal. 4th at 392, 902 P.2d at 750-51, 45 Cal. Rptr. 2d at 446-47. See generally 45 AM. JUR. 2D *Interference* § 49 (1969 & Supp. 1993) (explaining the basic principles of interference with prospective economic advantage); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 655-658 (9th ed. 1988 & Supp. 1995) (giving illustrations of the tort of intentional interference with prospective economic relations).

8. The tort of interfering with economic relationships that are short of contractual is variously known as intentional interference with prospective economic advantage, intentional interference with prospective contractual relations, and intentional interference with prospective economic relations. See *Della Penna*, 11 Cal. 4th at 378, 902 P.2d at 741, 45 Cal. Rptr. 2d at 437. The court in *Della Penna* used the phrase "intentional interference with economic relations" in order to avoid confusion and to distinguish this tort from "the cognate form, 'intentional interference with contract.'" *Id.* at

contracts, because prospective economic relationships are not yet finalized.⁹ Looking to economic policy concerns regarding competition in the market place,¹⁰ the views of the American Law Institute,¹¹ and the precedent established by other courts,¹² the court stated that it was necessary to further obviate the differences between the existing and the prospective interference torts in order to avoid future confusion.¹³

Addressing these concerns, the court held that in order for a plaintiff to prevail in a cause of action based on intentional interference with prospective economic relations, the defendant's interference must have been "wrongful 'by some measure beyond the fact of the interference itself.'"¹⁴ Hence, by requiring that Toyota wrongfully interfered with

381 n.2, 902 P.2d at 743 n.2, 45 Cal. Rptr. 2d at 439 n.2.

9. *Id.* at 392-93, 902 P.2d at 750-51, 45 Cal. Rptr. 2d at 446-47. *See generally* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 652 (9th ed. 1988 & Supp. 1995) (explaining that the tort of interference with prospective economic advantage involves contracts still in the negotiation stage).

10. *Della Penna*, 11 Cal. 4th at 392, 902 P.2d at 750-51, 45 Cal. Rptr. 2d at 447. *See generally* 40 CAL. JUR. 3D *Interference with Contract* § 14 (1978 & Supp. 1995) (stating that competition can be a defense to intentional interference with prospective economic relations); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 666-669 (9th ed. 1988 & Supp. 1995) (describing the use of competition as a defense in interference cases); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097 (1993) (discussing efficiency and competition in the context of tortious interference cases); Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279 (1994) (explaining the conflict between interference torts and market efficiency).

11. *Della Penna*, 11 Cal. 4th at 383-86, 902 P.2d at 745-46, 45 Cal. Rptr. 2d at 441-42. The American Law Institute publishes the restatements of the law. *See generally* RESTATEMENT (SECOND) OF TORTS § 766B (1979) (explaining that a defendant who intentionally interferes with prospective contractual relations is liable if the defendant "improperly" interfered).

12. *See Top Serv. Body Shop v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 (Or. 1978) (holding that a claim of interference with economic relations "is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself").

13. *Della Penna*, 11 Cal. 4th at 392, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447. "Our courts should, in short, firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant." *Id.*

14. *Id.* at 392-93, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447 (quoting *Top Service*, 582 P.2d at 1371). "The standard jury instruction governing 'intentional interference with prospective economic advantage' is found in BAJI (the Book of Approved Jury Instructions) No. 7.82. *Id.* at 380 n.1, 902 P.2d at 743 n.1, 45 Cal. Rptr. 2d at 439 n.1.

[T]he essential elements of the claim [are] (1) an economic relationship between the plaintiff and another, "containing a probable future economic benefit or advantage to plaintiff," (2) defendant's knowledge of the existence of the relationship, (3) that defendant "intentionally engaged in acts or conduct

Della Penna's prospective economic relations, the court successfully achieved both of its intended policy goals: not only does the element of wrongfulness further differentiate the tort of interference with prospective economic relations from the tort of interference with an existing contract,¹⁵ but it also promotes economic efficiency by avoiding "the dangers inherent in imposing tort liability for competitive business practices."¹⁶

2. Plaintiff has the burden of proving that the defendant's interference was wrongful by some measure beyond the fact of the interference itself.

The court further held that in an action for intentional interference with prospective economic relations, it is the plaintiff who has the burden of proving¹⁷ that the defendant wrongfully interfered with the plaintiff's prospective economic relation.¹⁸ Hence, in the instant case, Della Penna had the burden of proving that Toyota's decision to cease selling automobiles to Della Penna was wrongful.¹⁹

The court's decision in *Della Penna* therefore rejects the traditional "prima facie tort"²⁰ of intentional interference with prospective econom-

designed to interfere with or disrupt" the relationship, (4) actual disruption, and (5) damage to the plaintiff as a result of defendant's acts.

Id. (quoting California Jury Instructions: Civil (BAJI) No. 7.34 (8th ed. 1994 & Supp. 1996)). "The modification sought by defendant and adopted by the trial court consisted in adding the word 'wrongful' in element (3) between the words 'in' and 'acts.'" *Della Penna*, 11 Cal. 4th at 380 n.1, 902 P.2d at 743 n.1, 45 Cal. Rptr. 2d at 439 n.1.

15. *Della Penna*, 11 Cal. 4th at 392, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447.

16. *Id.* at 390, 902 P.2d at 749, 45 Cal. Rptr. 2d at 445.

17. See generally 29 AM. JUR. 2D *Evidence* §§ 155-156 (1994 & Supp. 1995) (explaining the burden of proof); 31 CAL. JUR. 3D *Evidence* §§ 84-95 (1976 & Supp. 1995) (discussing the burden of proof and production of evidence); 86 C.J.S. *Torts* § 57 (1954 & Supp. 1995) (describing the burden of proof as it pertains to interference torts).

18. *Della Penna*, 11 Cal. 4th at 392, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447.

19. *Id.* Since Della Penna was unable to meet this burden of proof, the supreme court reversed the judgment of the court of appeal and remanded the case to the trial court with directions to affirm the judgment of the trial court. *Id.* at 393, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447.

20. To pursue an action under the traditional prima facie tort of intentional interference with prospective economic relations, the plaintiff need only show that the defendant was aware of the plaintiff's economic relation, that there was a deliberate interference with plaintiff's economic relation, and that the plaintiff suffered injury. *Id.* at 383, 902 P.2d at 744, 45 Cal. Rptr. 2d at 440. Hence, for a prima facie tort there is no requirement that the plaintiff must prove that the defendant's interference was

ic relations.²¹ Instead, the court adopts a “middle ground” approach,²² which requires the plaintiff to prove that the defendant’s interference was “wrongful ‘by some measure beyond the fact of the interference itself.’”²³ This additional burden of proof is significant because it promotes economic efficiency through free competition²⁴ and promotes judicial economy²⁵ by avoiding unwarranted litigation.²⁶

B. Justice Mosk’s Concurring Opinion

In his concurring opinion, Justice Mosk further analyzed the history and policy behind the tort of intentional interference with prospective economic relations.²⁷ Agreeing with the bulk of the majority’s opinion,

“wrongful.” See *id.* See generally 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts § 17 (9th ed. 1988 & Supp. 1992) (detailing the prima facie tort doctrine); Jack E. Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U. L. REV. 563 (1959) (discussing the history and future of the prima facie tort); Kenneth J. Vandeveld, *The Modern Prima Facie Tort Doctrine*, 79 KY. L.J. 519 (1991) (analyzing the prima facie tort doctrine in its contemporary form).

21. *Della Penna*, 11 Cal. 4th at 391, 902 P.2d at 750, 45 Cal. Rptr. 2d at 446. The court disfavored the traditional prima facie tort of intentional interference with prospective economic relations, relying in part on the reasoning adopted by Utah and Oregon:

The problem with the prima facie tort approach is that basing liability on a mere showing that defendant intentionally interfered with plaintiff’s prospective economic relations makes actionable all sorts of contemporary examples of otherwise legitimate persuasion, such as efforts to persuade others not to . . . engage in certain activities. . . . In short, the prima facie approach to the tort of interference with prospective economic relations requires too little of the plaintiff.

Id. at 385-86, 902 P.2d at 746, 45 Cal. Rptr. 2d at 442 (internal quotation marks omitted) (quoting *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 303 (Utah 1982)).

22. The Utah Supreme Court’s “middle ground” approach requires “the plaintiff to allege and prove more than the prima facie tort.” *Leigh Furniture*, 657 P.2d at 304.

23. *Della Penna*, 11 Cal. 4th at 392-93, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447 (quoting *Top Serv. Body Shop v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 (Or. 1978)).

24. Though the “wrongful” interference requirement makes the plaintiff’s burden of proof more difficult, it does advance economic policy: “Perhaps the most significant privilege or justification for interference with a prospective business advantage is free competition.” *Id.* at 389, 902 P.2d at 748, 45 Cal. Rptr. 2d at 444 (quoting *Buckaloo v. Johnson*, 14 Cal. 3d 815, 828, 537 P.2d 865, 872, 122 Cal. Rptr. 745, 752 (1975), *disapproved in part by Della Penna*, 11 Cal. 4th 376, 902 P.2d 740, 45 Cal. Rptr. 2d 436).

25. “Without this requirement of wrongfulness, we fear that actors in perfectly legitimate economic transactions would be ‘put to justifying the conduct of [their] business at the whim of a rival.’” *Id.* at 390, 902 P.2d at 749, 45 Cal. Rptr. 2d at 445 (quoting *Rickel v. Schwinn Bicycle Co.*, 144 Cal. App. 3d 648, 660, 192 Cal. Rptr. 732, 740 (1983)).

26. *Id.* at 390-91, 902 P.2d at 750, 45 Cal. Rptr. 2d at 445-46.

27. *Id.* at 393-412, 902 P.2d at 751-64, 45 Cal. Rptr. 2d at 447-60 (Mosk, J., concurring).

Justice Mosk disagreed on two key points.²⁸ First, he stated that the majority should not have adopted the term "wrongfulness" because it is inherently ambiguous.²⁹ Second, he argued in the alternative that if he did adopt the wrongfulness standard, he would not have allowed the term to remain undefined, as did the majority.³⁰ Justice Mosk concluded that this new change in law is "hardly an improvement," because it does a plaintiff little good to have a legitimate claim for intentional interference with prospective economic relations without knowing the substance of the wrongfulness element.³¹

III. IMPACT & CONCLUSION

Prior to *Della Penna*, a plaintiff bringing an intentional interference with prospective economic relations cause of action had never been required to prove that the defendant's interference was wrongful by some measure beyond the fact of the interference itself.³² Based upon economic policy concerns and the desire to avoid unneeded litigation, however, the California Supreme Court chose to follow the precedent established by other courts and to adopt this new standard.³³

Della Penna is, therefore, an important tort case because it clarifies several aspects of existing law and offers guidance into how California courts will treat future interference tort causes of action. Yet, the court's decision to wait until another day to define "wrongful" may ironically thwart the court's goals of judicial economy and free competition, based upon the inevitable litigation caused by ambiguity and indefiniteness. Hence, until an express determination is made by the supreme court, it remains to be seen what criteria will be used by the lower courts to define the "wrongful" standard in causes of action based on intentional interference with prospective economic relations.

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28. *Id.* at 413, 902 P.2d at 764, 45 Cal. Rptr. 2d at 460 (Mosk, J., concurring).

29. *Id.* at 414, 902 P.2d at 764, 45 Cal. Rptr. 2d at 460 (Mosk, J., concurring).

30. *Id.* (Mosk, J., concurring). The court decided to wait and define "wrongfulness" in another case. *Id.* at 393, 902 P.2d at 751, 45 Cal. Rptr. 2d at 447.

31. *Id.* at 414, 902 P.2d at 765, 45 Cal. Rptr. 2d at 461 (Mosk, J., concurring).

32. *Id.* at 378, 902 P.2d at 740, 45 Cal. Rptr. 2d at 437.

33. *Id.* at 391, 902 P.2d at 750, 45 Cal. Rptr. 2d at 446.

XI. WATERS

Accretion of deposits along shorelines is characterized as artificial and thus belongs to the state only when it is directly caused by human activities occurring in the immediate vicinity of the accreted land: State ex rel. State Lands Commission v. Superior Court (Lovelace).

I. INTRODUCTION

In *State ex rel. State Lands Commission v. Superior Court (Lovelace)*¹, the California Supreme Court settled the long-disputed definition of artificially accreted lands.² Relying heavily on precedent, the

1. 11 Cal. 4th 50, 900 P.2d 648, 44 Cal. Rptr. 2d 399 (1995) [hereinafter *Lovelace*]. Justice Arabian drafted the majority opinion, in which Chief Justice Lucas and Justices Baxter, George, and Werdegar joined. *Id.* at 55-81, 900 P.2d at 650-67, 44 Cal. Rptr. 2d at 401-18. Justice Mosk wrote a brief concurring opinion. *Id.* at 81, 900 P.2d at 667, 44 Cal. Rptr. 2d at 418 (Mosk, J., concurring). Justice Kennard also wrote a separate concurring opinion. *Id.* at 81-84, 900 P.2d at 667-69, 44 Cal. Rptr. 2d at 418-20 (Kennard, J., concurring).

2. The court quoted from the court of appeal's 2-1 decision which determined that, where tidelands are "covered by a gradual and imperceptible accumulation of material that has resulted from the action of the waters, even if artificially influenced, that land remains in private ownership." *Id.* at 59, 900 P.2d at 652-53, 44 Cal. Rptr. 2d at 403-04 (quoting *State ex rel. State Lands Comm'n v. Superior Court (Lovelace)*, 36 Cal. App. 4th 114, 150, 25 Cal. Rptr. 2d 761, 785 (1993), *superseded by* 870 P.2d 385, 28 Cal. Rptr. 2d 794 (1994), *aff'd*, 11 Cal. 4th 50, 900 P.2d 648, 44 Cal. Rptr. 2d 399)). The facts giving rise to this appeal are over a century old, beginning with hydraulic blasting by miners during the California Gold Rush in the late 1840s. *Lovelace*, 11 Cal. 4th at 55, 900 P.2d at 650, 44 Cal. Rptr. 2d at 401. See Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 233-34 (1984) (discussing the Gold Rush origins of California's law). The blasting forced monumental amounts of sedimentary material down the American, Feather, and Sacramento Rivers and eventually formed sandbars or adhered to the riverbanks (termed "accretion" or "accreted land"), extending the original shorelines of property situated along the rivers, the owners of which are generally termed "upland owners." *Id.*; see 63 CAL. JUR. 3D *Water* §§ 778-779 (1981) (reviewing the landowner's right to accreted lands); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 117 (9th ed. 1987) (discussing landowners' rights in accretion cases). One such parcel along the Sacramento River at Chicory Bend was expanded by twelve acres of accretion. *Lovelace*, 11 Cal. 4th at 56-57, 900 P.2d at 650-51, 44 Cal. Rptr. 2d at 401-02. When the private owners, Richard and Starla Lovelace, sued to quiet title to the accreted land, the State Lands Commission claimed ownership under the theory that the land consisted of artificial accretion from human activities such as the hydraulic mining, dredging, and the erection of levees and dams near the property, and thus belonged to the State under the California artificial accretion rule. *Id.* Both the trial and appellate courts ruled on behalf of the private landowner, and the State appealed to the California Supreme Court. *Id.* at 57-60, 900 P.2d at 651-53, 44 Cal. Rptr. 2d at 402-04. After review was granted, the parties

court reaffirmed California's rule of artificial accretion.³ The rule provides that land along the shoreline of navigable waters within the state, extended by the gradual accumulation of deposits as a result of artificial activities, becomes the property of the state under the Public Trust Doctrine.⁴ The court established a clear definition of artificial accretion.⁵ Accretion is artificial only if it is "directly caused by human activities, such as the dredging, wing dams or levees . . . that occurred in the *immediate vicinity* of the accreted land."⁶

II. TREATMENT

A. Majority Opinion

1. The Public Interest Exception to the Mootness Doctrine

The court first addressed the parties' joint motion to dismiss based on the settlement of the case,⁷ as the settlement rendered the controversy moot. The parties urged the court to order that the appellate court opinion remain unpublished, citing *Neary v. The Regents of the University of California*,⁸ which approved the discretionary reversal of a trial court decision by the court of appeal upon a subsequent settlement by the parties.⁹ Finding critical differences between the reversal of a trial court decision and the nonpublication of a precedential appellate court opin-

settled and jointly moved for a dismissal conditioned upon the receipt of the supreme court's order that the court of appeal's decision remain unpublished to avoid creating precedent. *Id.* at 60, 900 P.2d at 653, 44 Cal. Rptr. 2d at 404.

3. *Id.* at 73, 900 P.2d at 661, 44 Cal. Rptr. 2d at 412.

4. *Id.* The Public Trust Doctrine stands for the proposition that the State holds all tidelands in trust for the public. *See id.* at 73, 900 P.2d at 661-62, 44 Cal. Rptr. 2d at 412-13. With the government as trustee, that property is subject to special burdens. *See* Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 478-82 (1989) (evaluating the relationship between water rights and the public trust); Scheiber, *supra* note 2, at 240 (discussing applications of the California Public Trust Doctrine).

5. *Lovelace*, 11 Cal. 4th at 61, 900 P.2d at 653, 44 Cal. Rptr. at 404.

6. *Id.* at 79-80, 900 P.2d at 666, 44 Cal. Rptr. at 417 (emphasis added); *see also* Phillip W. Lear, *Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problems*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 265, 275-76 (1991) (defining and discussing the accretion process).

7. *Lovelace*, 11 Cal. 4th at 61-62, 900 P.2d at 653-54, 44 Cal. Rptr. at 404-05.

8. 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992).

9. *Id.* at 284, 834 P.2d at 125-26, 10 Cal. Rptr. 2d at 865. The decision in *Neary* was based on the desire to avoid further litigation, considering that trial decisions do not create binding precedent. *Lovelace*, 11 Cal. 4th at 62, 900 P.2d at 654, 44 Cal. Rptr. 2d at 405.

ion, the court denied the motion to dismiss and reiterated the well-established principle that an appellate court may choose to hear a case rendered moot by the parties' settlement if "the appeal raises issues of continuing public importance."¹⁰ Because dismissal of this case would result in continued litigation by future parties over the unsettled definition of artificial and natural accretions, the court exercised its discretion to resolve the dispute.¹¹

2. A History of Accretion Law

Justice Arabian undertook an extensive examination of accretion law beginning with Emperor Justinian who first espoused that naturally accreted lands become the property of the landowner.¹² At common law, the source of the deposits, whether natural or artificial, was irrelevant to a determination of ownership.¹³ California law, however, turns on the source of the accretion.

The cornerstone of California accretion law is the Equal Footing Doctrine which vested title to all navigable waters to their high tide lines in the State of California upon its admission into the Union.¹⁴ In the landmark accretion case *Dana v. Jackson Street Wharf Co.*,¹⁵ California first held that the property extended by accretion caused by human activity along the shoreline does not belong to the landowner.¹⁶ The legislature codified accretion law in 1872 by the adoption of section 1014 of the California Civil Code, which vested title to accreted property along rivers and streams in the upland property owner.¹⁷ A lone 1914 case strayed from the California approach and applied a common law analysis to conclude that accretions caused by the county while raising a roadbed belonged to the landowner.¹⁸ The following year, however, the court

10. *Id.* at 61-62, 900 P.2d at 654, 44 Cal. Rptr. 2d at 405; see William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 298-303 (1990) (discussing the Mootness Doctrine in state court justiciability).

11. *Lovelace*, 11 Cal. 4th at 61-62, 900 P.2d at 654, 44 Cal. Rptr. 2d at 405.

12. *Id.* at 65, 900 P.2d at 656, 44 Cal. Rptr. 2d at 407.

13. *Id.*

14. *Id.* at 66, 900 P.2d at 657, 44 Cal. Rptr. 2d at 408. For an explanation of the Equal Footing Doctrine, see Lear, *supra* note 6, at 271.

15. 31 Cal. 118 (1866).

16. *Id.* at 120. In *Dana*, the landowner erected a wharf along his waterfront lot, causing accretion to adhere to the lot. *Id.* The court found this to be a clear example of artificial accretion and concluded the land does not belong to the upland owner, but to the state. *Lovelace*, 11 Cal. 4th at 66, 900 P.2d at 657, 44 Cal. Rptr. 2d at 408 (citing CAL. CIV. CODE § 1014 (1872)).

17. See *Lovelace*, 11 Cal. 4th at 64, 900 P.2d at 656, 44 Cal. Rptr. 2d at 407.

18. See *Forgeus v. County of Santa Cruz*, 24 Cal. App. 193, 202-03, 140 P. 1092, 1096 (1914).

considered a similar case and resolved that the artificially accreted property belonged to the State.¹⁹ Subsequent case law reaffirmed the basic rule that the State owns such property²⁰ and expanded the rule to include oceanfront property.²¹ In 1944, the California Supreme Court refined the rule of accretion in *Carpenter v. City of Santa Monica*.²² “[A]ccretions formed gradually and imperceptibly, but caused entirely by artificial means—that is, by the works of man . . . and by the dumping of material into the ocean—belong to the state”²³ Any contrary rule would permit the state to transfer tidelands held in public trust to private landowners, a transaction which, if done directly, would violate “fundamental concepts of public policy.”²⁴ By 1960, the California Supreme Court considered the *Carpenter* rule “well-established.”²⁵

Justice Arabian did not consider only California caselaw in the *Lovelace* decision. He gave substantial credence to a 1947 opinion by the Attorney General that, although not binding on the court, supported the premise that artificially accreted property belongs to the state.²⁶ The majority further noted that, consistent with *Carpenter*, United States Supreme Court cases and various treatise authorities all indicate that most court decisions not granting title to the artificially accreted property to the upland owner involve tidelands.²⁷ In agreement with the *Car-*

19. *Patton v. City of Los Angeles*, 169 Cal. 521, 536-37, 147 P. 141, 146 (1915); see also 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 119 (9th ed. 1987) (discussing the State’s right to artificially accreted lands).

20. See *City of Los Angeles v. Anderson*, 206 Cal. 662, 668-69, 275 P. 789, 791-92 (1929) (ruling accreted lands, created when contractor dumped materials in bay, are artificial and belong to the state); see also *Miller v. Stockburger*, 12 Cal. 2d 440, 444-45, 85 P.2d 132, 134 (1938) (ruling accretions caused by the erection of railroad embankments belong to the state); *City of Newport Beach v. Fager*, 39 Cal. App. 2d 23, 31-32, 102 P.2d 438, 442 (1940) (ruling accretions resulting from nearby dredging operations belong to the state or its successor in interest).

21. See *Curtis v. Upton*, 175 Cal. 322, 335-36, 165 P. 935, 939-40 (1917); *Strand Improvement Co. v. Long Beach*, 173 Cal. 765, 772-73, 161 P. 975, 978 (1916).

22. 63 Cal. App. 2d 772, 147 P.2d 964 (1944).

23. *Id.* at 794, 147 P.2d at 984. For a review of California tidelands law, see 63 CAL. JUR. 3D *Water* § 780 (1981) and 2 ARTHUR G. BOWMAN, OGDEN’S REVISED CALIFORNIA REAL PROPERTY LAW § 26.56 (1975).

24. *Carpenter*, 63 Cal. App. 2d at 794, 147 P.2d at 984.

25. *People v. Hecker*, 179 Cal. App. 2d 823, 837, 4 Cal. Rptr. 334, 343 (1960).

26. *Lovelace*, 11 Cal. 4th at 71, 900 P.2d at 660, 44 Cal. Rptr. 2d at 411 (1995) (citing 9 Ops. Cal. Att’y Gen. 207 (1947)).

27. See *id.* at 71-72 & n.3, 900 P.2d at 660-61 & n.3, 44 Cal. Rptr. 2d at 411-12 & n.3; see also BOWMAN, *supra* note 23, § 26.55; *supra* notes 23-25 and accompanying text.

penter decision, Justice Arabian reaffirmed the “continuing validity of California’s artificial accretion rule,” stating that, although artificial accretion may not be awarded to private landowners, no public policy prevents the private ownership of natural accretion.²⁸

3. The Fleeting Question of Federal Supremacy and Common Law Rules

The court quickly rebuked the private landowners’ contention that federal law, not California law, controlled the ownership determination of artificial accretion.²⁹ Federal law, explained Justice Arabian, may govern oceanfront property, but the Equal Footing Doctrine clearly vested in the State the authority over in-state navigable waters and reclaimed lands.³⁰ Thus, California is free to determine its own law in this area, unrestrained by the federal system.³¹

Alternatively, the landowners argued that because California is a common law state and has been since 1850 when hydraulic mining initiated this accretion process, common law principles should apply and the artificial/natural distinction should be irrelevant, therefore, vesting title to the lands in the upland owners.³² Again the court disagreed, finding no authority for the landowners’ proposition and explaining that common law is elastic, adapting to a contemporary legal landscape and affected by case law and statutory provisions.³³

28. *Lovelace*, 11 Cal. 4th at 73, 900 P.2d at 661-62, 44 Cal. Rptr. 2d at 412-13.

29. *Id.* at 73-75, 900 P.2d at 662-63, 44 Cal. Rptr. 2d at 413-14.

30. *Id.* at 74-75, 900 P.2d at 662-63, 44 Cal. Rptr. 2d at 413-14; see also Richard P. Shanahan, Comment, *The Application of California Riparian Water Rights Doctrine to Federal Lands in the Mono Lake Basin*, 34 HASTINGS L.J. 1293, 1295-96 (1983) (“[T]he federal government has acquiesced in the states’ right to control water use . . .”). The *Lovelace* court relied on *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (“[P]roperty ownership is not governed by a general federal law, but rather by the laws of the several States.”), and *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (“[E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands . . .”).

31. *Lovelace*, 11 Cal. 4th at 75, 900 P.2d at 663, 44 Cal. Rptr. 2d at 414.

32. *Id.*

33. *Id.*

4. State Acquisition of Accreted Land is Not a Taking

Next, the court addressed the landowners' argument that permitting the State to retain artificially accreted land constitutes an uncompensated taking violating their due process rights.³⁴ The court noted that precedent supports the position that the California accretion rule did not constitute an illegal taking in violation of due process.³⁵

5. Proximity is the Key

Justice Arabian then defined the scope of the artificial accretion rule, considering whether it applied to hydraulic mining activities of a century past.³⁶ Relying heavily on the concurrence by Justice Scotland in the court of appeal's treatment of this case, Justice Arabian concluded that because the debris sent downstream from the hydraulic mining process was originally natural, it could not transmute into an artificial accretion simply by way of hydraulic mining.³⁷ Because it is virtually impossible to determine how much of the accreted land accumulated as a result of the hydraulic mining, as opposed to possible dredging or levees, which are clearly artificial in nature, the court simplified the inquiry by eliminating the need to fully analyze an old and questionable source.³⁸ The key to determining whether accretion is natural or artificial is the *proximity* between the source and the ultimate accumulation of the deposits.³⁹ Thus, accretion is only artificial if it directly results from human activities in the "immediate vicinity of the accreted land."⁴⁰ The

34. *Id.* at 75-76, 900 P.2d at 663, 44 Cal. Rptr. 2d at 414. This argument is based on dicta from a concurring opinion in a previously overruled case. *Id.* at 76, 900 P.2d at 663, 44 Cal. Rptr. 2d at 414; see *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313, 331-32 (1973), *overruled by Corvallis Sand & Gravel*, 429 U.S. 363. For a discussion of governmental takings, see Patrick G. Kruse, Note, 72 U. DET. MERCY L. REV. 669, 673-75 (1995).

35. *Lovelace*, 11 Cal. 4th at 76, 900 P.2d at 663-64, 44 Cal. Rptr. 2d at 414-15 (citing *State v. Superior Court of Lake County (Lyon)*, 29 Cal. 3d 210, 231-32, 625 P.2d 239, 251-52, 172 Cal. Rptr. 696, 708-09 (1981)).

36. *Id.* at 76-80, 900 P.2d at 664-66, 44 Cal. Rptr. 2d at 415-17.

37. *Id.* at 76-77, 900 P.2d at 664, 44 Cal. Rptr. 2d at 415.

38. *Id.* at 78, 900 P.2d at 665, 44 Cal. Rptr. 2d at 416. The court noted that a highly scrutinized analysis of the California river system could theoretically find that the entire system is artificial based on the effects of human activities such as dam building. *Id.* Taken as such, however, the exception (that artificially accreted lands belong to the state) would "swallow the rule" (that accreted lands belong to the upland owner). *Id.*

39. *Id.* at 79-80, 900 P.2d at 666, 44 Cal. Rptr. 2d at 417.

40. *Id.* "Human activities" generally include "dredging, wing dams or levees." *Id.* at

hydraulic mining activities in this case were far too attenuated to fall within the artificial accretion rule, therefore, the accreted land must be characterized as natural and its title vests in the upland property owners.⁴¹

6. No Attorney Fees Awarded

Following their success in this case, the upland owners moved for an award of attorney fees pursuant to the California Code of Civil Procedure.⁴² Section 1021.5 provides for the award of attorneys fees, under certain limited conditions, to the victorious party in a case concerning a public interest.⁴³ The court found that section 6461 of the Public Resources Code, which prevents recovery in suits against the State to quiet title in property related to navigable waters, precluded the owners from recovering attorney fees.⁴⁴ Although the statute does not explicitly cover accretion cases, the court found section 6461 clearly controlling and declined the landowners' request.⁴⁵

B. Justice Mosk's Concurring Opinion

Although Justice Mosk agreed with the majority's conclusion, he provided a five sentence concurrence in which he belatedly joined in Justice Kennard's dissent from the 1992 majority opinion in *Neary v. Regents of the University of California*.⁴⁶

C. Justice Kennard's Concurring Opinion

Justice Kennard also agreed with the majority's reaffirmation and refinement of California's artificial accretion rule, but wrote separately to reassert her dissenting position in *Neary*.⁴⁷ According to Justice

79, 900 P.2d at 666, 44 Cal. Rptr. 2d at 417. "[I]mmediate vicinity" will be determined on a case by case basis, but the more direct the human source, the greater the probability it will be characterized as artificial. *Id.* at 80, 900 P.2d at 666, 44 Cal. Rptr. 2d at 417. Also, "[t]he larger the structure or the scope of human activity . . . the farther away it can be and still be a direct cause . . . although it must always be in the general location of the accreted property to come within the artificial accretion rule." *Id.*

41. *Id.*

42. *Id.*; CAL. CIV. PROC. CODE § 1021.5 (West 1980 & Supp. 1996).

43. CAL. CIV. PROC. CODE § 1021.5.

44. *Lovelace*, 11 Cal. 4th at 80, 900 P.2d at 666, 44 Cal. Rptr. 2d at 417 (construing CAL. PUB. RESOURCES CODE § 6461 (West 1977)).

45. *Id.* at 81, 900 P.2d at 666-67, 44 Cal. Rptr. 2d at 417-18.

46. *Id.* at 81, 900 P.2d at 667, 44 Cal. Rptr. 2d at 418 (Mosk, J., concurring) (citing *Neary v. Regents of the Univ. of Cal.*, 3 Cal. 4th 273, 286-95, 834 P.2d 119, 127-32, 10 Cal. Rptr. 2d 859, 867-72 (1992)); see *infra* notes 47-50 and accompanying text.

47. *Lovelace*, 11 Cal. 4th at 81-84, 900 P.2d at 667-69, 44 Cal. Rptr. 2d at 418-20

Kennard, the *Neary* decision has created extra work for the court, because the court must now explain its denial of motions to suppress the publication of court of appeal decisions in light of *Neary*.⁴⁸ She recounted her *Neary* dissent, stressing her position that the presumption should be against reversal because a judgment is intended to “administer the laws of this state, and thereby do substantial justice.”⁴⁹ Judgments are not to be destroyed at the whim of parties to a settlement.⁵⁰

Since the *Neary* decision, the United States Supreme Court reviewed the issue in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,⁵¹ and supporting Justice Kennard’s position, unanimously held that “settlement of the parties is not a proper ground to vacate a prior judgment” at either the trial court or appellate court level.⁵² Like the Court in *U.S. Bancorp*, Justice Kennard emphasized the legal value of judgments, free from “collateral attack” by settlement.⁵³ Finally, Justice Kennard reminded the majority of her now-realized prediction in *Neary* that, when given a motion to nullify an appellate opinion as a condition of the parties’ settlement, the court would be forced to distinguish and sidestep *Neary*.⁵⁴ Accordingly, the court was faced with the unusual predicament “of having one rule for trial court judgments and a different and virtually opposite rule for appellate judgments.”⁵⁵

(Kennard, J., concurring).

48. *Id.* at 82, 900 P.2d at 668, 44 Cal. Rptr. 2d at 419 (Kennard, J., concurring). The *Neary* decision, as Justice Kennard points out, deals merely with trial court decisions which, unlike appellate courts, do not create precedent. *Id.* (Kennard, J., concurring); see *supra* notes 7-11 and accompanying text.

49. *Lovelace*, 11 Cal. 4th at 83, 900 P.2d at 668, 44 Cal. Rptr. 2d at 419 (Kennard, J., concurring) (quoting *Neary*, 3 Cal. 4th at 286, 834 P.2d at 127, 10 Cal. Rptr. 2d at 867).

50. *Id.* (Kennard, J., concurring).

51. 115 S. Ct. 386 (1994).

52. *Lovelace*, 11 Cal. 4th at 83, 900 P.2d at 668, 44 Cal. Rptr. 2d at 419 (Kennard, J., concurring) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 393 (1994)).

53. *Id.* at 83-84, 900 P.2d at 668-69, 44 Cal. Rptr. 2d at 419-20 (Kennard, J., concurring) (citing *U.S. Bancorp*, 115 S. Ct. at 392).

54. *Id.* at 84, 900 P.2d at 669, 44 Cal. Rptr. 2d at 420 (Kennard, J., concurring).

55. *Id.* (Kennard, J., concurring).

III. IMPACT AND CONCLUSION

The ownership of accreted lands has endured a 150 year battle between the California State Lands Commission and private property owners and has finally been resolved by the *Lovelace* decision.⁵⁶ Before the California Supreme Court's decision in *Lovelace*, the scope of California's definition of artificially accreted lands was ambiguous.⁵⁷ Now, private landowners situated along California's navigable waters have a more lucid definition of their property rights to land created by the gradual sedimentary buildup along the shores.⁵⁸ No longer will the State Lands Commission be able to take advantage of a vague law to force upland owners to settle their title claims.⁵⁹

A possibility for abuse still exists, however, due to the court's unwillingness to provide a bright line definition of "immediate vicinity," preferring to consider cases on an ad hoc basis.⁶⁰ As the State Lands Commission took advantage of the unclear definition of artificial accretion,⁶¹ the State may similarly maintain that courts must construe "immediate vicinity" broadly. Perhaps it will not be long before the court is forced to revisit the definition of artificially accreted lands.

A secondary impact of the *Lovelace* ruling is the court's clarification of its policies concerning judgment reversal and nonpublication.⁶² The court clarified its decision in *Neary* concerning trial court judgments, and recognized the importance of preserving appellate opinions for their precedential value.⁶³ No longer will the State Lands Commission be able to argue cases through the appellate level and then, if the law is decided in a manner injurious to the State's position, simply settle with the landowner and have the opinion kept from publication, thus removing its

56. *Id.* at 57, 79-80, 900 P.2d at 651, 666, 44 Cal. Rptr. 2d at 402, 417.

57. See *supra* note 4 and accompanying text.

58. See Ronald A. Zumbrun, *California Supreme Court Draws Line in the Sand for State Lands Commission*, SACRAMENTO BEE, Nov. 19, 1995, at FO3.

59. *Id.*

60. See *supra* note 40 and accompanying text.

61. Zumbrun, *supra* note 58, at FO3. ("[T]he State Lands Commission has opposed certainty concerning the law on accretion in order to abuse its powerful position and manipulate individual private property owners. What the state's been doing is nothing more than a modern form of claim jumping.")

62. See *supra* notes 7-11 and accompanying text.

63. See *supra* notes 8-10, 47-50 and accompanying text.

precedential effect.⁶⁴ Consequently, the decision may be characterized as a victory for both upland property owners and appellate courts.⁶⁵

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64. Zumbrun, *supra* note 58, at FO3.

65. *Id.*

SUMMARIES

I. Appellate Review

An appeal alleging disproportionate sentences in comparison to those of codefendants following a negotiated plea bargain directly attacks the plea, not the sentence, and requires a certificate of probable cause under California Penal Code section 1237.5 and rule 31(d) of the California Rules of Court.

People v. Panizzon, Supreme Court of California, decided April 18, 1996, 13 Cal. 4th 68, 913 P.2d 1061, 51 Cal. Rptr. 2d 851.

Facts. The defendant, as part of a negotiated plea agreement, pled no contest to kidnapping, anal rape by a foreign object, solicitation to dissuade a witness from testifying, and weapons use. The defendant agreed to a sentence of life with the possibility of parole, plus twelve years, and the imposition of a restitution fine between \$200 and \$10,000. The defendant and his attorney executed the plea agreement which specifically contained a waiver of the right to appeal the sentence. In exchange, the People agreed to dismiss counts of conspiracy, rape by foreign object, sexual battery, and residential burglary. Pursuant to the plea agreement, the trial court sentenced the defendant to life with the possibility of parole, plus twelve years, and a restitution fine of \$400. Subsequently, the defendant appealed his sentence alleging that it violated state and federal constitutional rights against cruel and unusual punishment because his sentence was disproportionate in relation to those imposed on his codefendants. The People requested the court of appeal to dismiss the appeal on two grounds. First, on the grounds that the defendant had failed to obtain a requisite certificate of probable cause as required by California Penal Code section 1237.5 and rule 31(d) of the California Rules of Court. Second, the People argued that the defendant waived his right to appeal his sentence under the plea agreement.

Holding. Reversing the decision of the court of appeal, the supreme court held that the defendant's constitutional challenge to his sentence was in substance a challenge to the validity of the negotiated plea, thus subject to the requirement of a certificate of probable cause. The trial court must therefore look to the substance of the appeal, and not the

time or manner in which the appeal is made, when determining whether a certificate of probable cause is required.

The court further held that trial courts may rely upon a validly executed waiver as a substitute for the trial court's requirement to specifically admonish the defendant of the consequences of a plea. The court stated that a valid waiver exists where both a defendant and his attorney have signed a waiver form, which attests to the defendant's knowing, intelligent and voluntary relinquishment of his rights. Furthermore, the court stated that a valid waiver requires that the trial court carefully examine the executed waiver, and that such an examination raises no further questions. The court concluded that even if a certificate was not necessary in the instant case, the negotiated plea agreement contained a valid waiver of the defendant's right to appeal the sentence despite the absence of a specific admonishment by the trial court.

II. Automobiles and Traffic

In a Department of Motor Vehicles Hearing, a duty to certify the facts of an apparent contempt and to transmit the certification to a superior court is imposed on the Department by California Vehicle Code section 11525. The superior court assumes the burden of initiating the contempt proceeding upon receipt of the certification.

Parris v. Zolin, Supreme Court of California, decided March 4, 1996, 12 Cal. 4th 839, 911 P.2d 9, 50 Cal. Rptr. 2d 109.

Facts. When the plaintiff was arrested for operating a motor vehicle under the influence of an intoxicant, his driver's license was suspended by the arresting officer. After requesting a hearing before the Department of Motor Vehicles, the plaintiff served the Department of Justice criminalist who analyzed his blood sample with a subpoena to appear. The criminalist did not appear, but the arresting officer's report and the documented results of the blood test were admitted into the record. The plaintiff asked the hearing officer to take measures to have the criminalist held in contempt pursuant to California Vehicle Code section 11525, which provides for judicial determinations of contempt in admin-

istrative hearings. The hearing officer offered to provide the plaintiff with any papers or documents necessary to initiate a contempt proceeding himself, but never offered to prepare a certification of the facts and transmit it to the superior court. The plaintiff concluded that the burden of enforcing the subpoena was unreasonable and declined to enforce it. The hearing officer then upheld the suspension of the plaintiff's driver's license.

The plaintiff filed a petition for a writ of mandate in the superior court seeking review of the hearing. The trial court set aside the decision and remanded to the Department for a determination consistent with *Fitzpatrick v. Department of Motor Vehicles*, 13 Cal. App. 4th 1771, 17 Cal. Rptr. 2d 110 (1993) (interpreting Vehicle Code section 11525), and ordered the Department to compel the attendance of the criminalist and rehear the matter. The Department appealed and the court of appeal reversed, holding that Vehicle Code section 11525 only requires the administrative agency to "certify the facts to the superior court," which the court of appeal interpreted as simply preparing a statement of facts for use by a party. The court further held that the burden of compelling attendance is on the party instituting the contempt action.

Holding. Reversing the court of appeal, the supreme court held that Vehicle Code section 11525 imposes on the administrative agency a duty to certify the facts to the superior court *and* to transmit the certification to the superior court, not merely to provide the plaintiff with documents or papers needed to initiate a contempt proceeding himself. The certification to the superior court need not be an affidavit; the hearing officer "need only certify the fact of the apparent contempt to the superior court." Furthermore, section 11525 does not impose the burden of initiating the court proceeding on either the party or the agency. Rather, upon receipt of the certified statement transmitted by the agency, the burden is on the superior court to initiate the contempt proceeding by issuing an order to show cause to the contemner.

III. Criminal Law

- A. **Under Penal Code, section 1203.2a, if the defendant has given written notification of his incarceration to his probation officer, and the probation officer fails to notify the court imposing probation that the defendant is incarcerated, the court loses jurisdiction to impose sentence on the initial offense.**

In re Hoddinott, Supreme Court of California, decided March 25, 1996, 12 Cal. 4th 992, 911 P.2d 1381, 50 Cal. Rptr. 2d 706.

Facts. The defendant plead guilty to possession of a controlled substance in San Francisco. Approximately one month later, the defendant plead guilty to a separate violation in Marin County. While awaiting sentencing on the violation in San Francisco, the Marin County Superior Court suspended the defendant's sentence and the defendant was placed on three years probation. The San Francisco Superior Court subsequently sentenced the defendant to sixteen months in state prison.

The defendant and defendant's attorney each notified the defendant's probation officer in Marin County that the defendant was in prison. Both asked that the court impose sentence in the defendant's absence under Penal Code, section 1203.2a, which states that a probation officer must report notice of commitment to the court within thirty days after being notified by the defendant, and if the probation officer does not report this information to the court within thirty days, or if the court fails to impose sentence within the specified time limit, the court loses jurisdiction. The defendant's probation officer failed to notify the court that the defendant was incarcerated. The defendant was later released from detention in San Francisco and placed on probation.

The following year, the defendant was incarcerated in San Francisco for violation of parole. While the defendant was incarcerated, the Marin County Superior Court revoked the defendant's probation. The defendant again notified his probation officer in Marin County that he was incarcerated and asked that sentence be imposed in his absence pursuant to Penal Code, section 1203.2a. This time the defendant's probation officer notified the court. Subsequently, the defendant was paroled in San Francisco. The Marin County Superior Court was unaware of this parole and imposed a two-year sentence in the defendant's absence to be served concurrently with his San Francisco sentence.

The defendant was again arrested in San Francisco for violation of parole and began serving his two-year Marin County sentence. The defendant claimed that the Marin County Superior Court had no jurisdiction to impose sentence. The Marin County Superior Court denied the defendant's habeas corpus petition. The defendant then filed a petition for writ of habeas corpus in the court of appeal. The court of appeal granted the petition and vacated the sentence in Marin County.

Holding. Affirming the decision of the court of appeal, the supreme court held that if, after written notification from the defendant, a probation officer fails to notify the court imposing probation that the defendant is incarcerated, that court loses jurisdiction to impose sentence on the initial offense. The supreme court found that the plain language of the statute, the statute's amendment history, and the legislative intent supported its interpretation.

The court concluded by disapproving prior appellate decisions which indicated that the defendant must make a valid, formal request for absentee sentencing in order to start the time limits. The court held that a defendant's notification to his parole officer does not need to be a formal request; however, a defendant must still submit a formal request to the court in order for the court to impose sentence in a defendant's absence.

- B. A defendant who committed grand theft, but was not convicted of or sentenced for the offense prior to the effective date of the amendment to Penal Code section 12022.6, which increases the amount of loss required for one and two-year sentence enhancements, is eligible for the lesser enhancement applicable at the time of defendant's sentencing.**

People v. Nasalga, Supreme Court of California, decided February 29, 1996, 12 Cal. 4th 784, 910 P.2d 1380, 50 Cal. Rptr. 2d 88.

Facts. The defendant, the office manager of a property management company, was charged with felony grand theft for allegedly depositing more than \$100,000 in rent checks into her personal bank account. Upon finding that the defendant had stolen \$124,000 in rent checks, the trial court convicted the defendant and sentenced her to the base term of sixteen-months for grand theft. At the time of the defendant's offense, Penal Code section 12022.6(b) provided: "If the loss exceeds [\$100,000], the court shall . . . impose an additional term of two years." However, before the defendant was sentenced, that section was amended to increase the loss required for a one-year enhancement from \$25,000 to \$50,000 and to increase the loss required for a two-year enhancement from \$100,000 to \$150,000. Applying the version of section 12022.6 that was operative when the defendant committed the offense, the trial court added a two-year sentence enhancement to the sixteen-month base term it had already imposed. The court of appeal affirmed the trial court, and the supreme court granted review.

Holding. Reversing the decision of the court of appeal, the supreme court held that the amended version of section 12022.6 should apply, and concluded that the defendant was eligible for only the one-year enhancement because the victim's loss did not exceed the amount required to impose a two-year enhancement (\$150,000). In reaching its decision, the court adhered to the ruling in *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965), which held that "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the prohibited act was committed, applies."

The supreme court further held that the legislature's failure, in amending section 12022.6, to express its intent that the amendment apply only prospectively permits the amendment to apply retroactively, thereby bringing the sentence in the instant case within its provisions.

- C. **When a defendant has committed multiple offenses incident to one objective, California Penal Code section 654 gives the trial court discretion to sentence the defendant for any one of such offenses, but does not provide the trial court with discretion to mandate the sentence with the greatest potential term of imprisonment.**

People v. Norrell, Supreme Court of California, decided April 11, 1996, 13 Cal. 4th 1, 913 P.2d 458, 51 Cal. Rptr. 2d 429.

Facts. The defendants were charged with, among other crimes, "kidnaping for robbery" and "robbery." Kidnaping for robbery is punishable by life imprisonment with the possibility of parole, while robbery is punishable by a term of two, three, or five years. California Penal Code section 654 states that when a defendant has committed multiple offenses which are incident to one objective, the defendant may be punished for any one of such offenses, but not for more than one. The trial court, pursuant to California Penal Code section 654, determined that the offenses of "kidnaping for robbery" and "robbery" were incident to one objective. The court then stayed the sentence for kidnaping for robbery, and imposed on the defendants the lesser sentence for robbery. The People appealed, contending that when multiple offenses are incident to one objective,

California Penal Code section 654 requires the trial court to impose upon the defendants the sentence with the greatest potential term of imprisonment, thus taking away the trial court's discretion in such cases. The court of appeal dismissed the appeal, and the supreme court granted review.

Holding. Affirming the sentence imposed by the trial court, the supreme court held that when a defendant has committed multiple offenses which are incident to one objective, California Penal Code section 654 gives the trial court discretion to sentence the defendant for any one of such multiple offenses, rather than to mandate the sentence with the greatest potential term of imprisonment. The court reasoned that the language of the Code clearly indicates that a defendant "may be punished under either of such provisions." The court further reasoned that if it was the legislature's intent to impose such a limitation on the trial court's discretion pursuant to this Code, the legislature would have been free to amend this section at any time since its enactment in 1872. Thus, the legislature's silence showed an intent on their part not to modify the Code. The court maintained that it would leave the power to modify the Code in the legislature's hands.

The supreme court further noted the importance of a trial court's discretion to impose a sentence which is most appropriate for the defendant's conduct in a given case. The court reasoned that such discretion allows the sentencing judge to take into account many factors, such as age, circumstances of a given crime, and personal culpability of a defendant, in order to make a determination most appropriate for the defendant's conduct in a given case.

- D. **For purposes of California Penal Code, section 192(c)(1), which provides that vehicular manslaughter is, among other things, "driving a vehicle in the commission of an unlawful act, not amounting to a felony, and with gross negligence," the term "unlawful act" means any offense that is dangerous according to the circumstances under which it was committed, rather than an act that is intrinsically perilous.**

People v. Wells, Supreme Court of California, decided March 26, 1996, 12 Cal. 4th 979, 911 P.2d 1374, 50 Cal. Rptr. 699.

Facts. The defendant was charged with vehicular manslaughter after his car collided with another vehicle which resulted in the death of a passenger. At trial, the evidence showed that the defendant was traveling at speeds of up to eighty miles per hour on a windy mountain road. In attempting to illustrate the "unlawful act" element of California Penal Code section 192(c)(1) to the jury, the trial court stated that a violation of Vehicle Code section 22349, or exceeding the maximum highway speed limit of fifty-five miles per hour, constituted an "unlawful act." After the jury convicted the defendant of vehicular manslaughter, the defendant appealed, claiming that speeding is not an innately unsafe act. Agreeing with the defendant, the court of appeal reversed the decision of the trial court, and held that the "unlawful act" element "must be one that is dangerous in the abstract."

Holding. Reversing the decision of the appellate court, the California Supreme Court held that the term "unlawful act" as used in California Penal Code section 192(c)(1) was intended by the legislature to mean any act that is dangerous according to the circumstances surrounding its commission. Furthermore, the court clarified its holding in *People v. Stuart*, 47 Cal. 2d 167, 302 P.2d 5 (1956) by stating that the underlying act does not have to be inherently risky to human life; it merely has to be dangerous when coupled with gross negligence.

Finally, the supreme court noted that although the trial court instructed the jury that a violation of Vehicle Code section 22349 was an inherently dangerous act, such error was harmless because the jury had determined that the defendant met all of the elements of vehicular manslaughter.

IV. Defenses

A defendant seeking to dismiss charges on the basis of discriminatory prosecution is not required to show that the People acted with "specific intent to punish the defendant for [his/her] membership in a particular class."

Baluyut v. Superior Court, Supreme Court of California, decided March 4, 1996, 12 Cal. 4th 826, 911 P.2d 1, 50 Cal. Rptr. 2d 101.

Facts. Petitioners were charged with violations of Penal Code, section 647(a), which prohibits solicitation of lewd conduct in a public place. In their defense, petitioners argued that their arrest was the result of discriminatory application of the statute, aimed particularly at eliminating homosexual activity. Ten arrest reports were introduced into evidence to prove that the arrests involved a “decoy officer” who approached other males outside of an adult bookstore. The officer would continue conversation until the person suggested going elsewhere to perform sexual acts, at which time the person was arrested. Furthermore, other evidence suggested that a “cruising pattern of homosexual men” was displayed, which served to attract homosexuals to the “decoy officer.” The municipal court, relying primarily on *People v. Smith*, 155 Cal. App. 3d 1103, 203 Cal. Rptr. 196 (1984), denied the motion to dismiss because petitioners failed to establish that the police acted with “specific intent to punish the defendants for their membership in a particular class.” Petitioners argued that “intent to punish” was not one of the required elements of discriminatory prosecution. The superior court denied a petition for writ of mandate, but the court of appeal reversed and ordered dismissal of the charges. At the Attorney General’s request, the California Supreme Court granted review to clarify the requisite showing for the defense of discriminatory prosecution. The California Supreme Court affirmed the substantive content of the decision of the court of appeal, but reversed because the petition for writ of mandate was rendered moot.

Holding. The California Supreme Court held that “specific intent to punish the defendants for their membership in a particular class” is not a necessary element of discriminatory prosecution. Looking to *Murgia v. Municipal Court*, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975), the court stated that the elements of a claim of discriminatory prosecution are (1) that the defendant was “deliberately singled out for prosecution on the basis of some invidious criterion,” and (2) “the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.”

The People argued and the municipal court agreed that *Smith* was controlling. The *Smith* court defined an “invidious purpose” as “one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests.” While the supreme court in the instant case agreed with the definition of “invidious purpose” as used in *Smith*, the court stated that *Smith* departed from precedent by adding the requirement that a defendant show “specific intent to punish.” The supreme court stated that the element of intent envisioned by *Murgia* does not require a showing of “specific intent to punish,” but rather merely requires a showing that the defendant was intentionally singled out for “disparate treatment on an invidiously discriminatory basis.”

V. Government Immunity

Government Code section 845.8's grant of immunity to public entities and employees precluding liability from injuries "caused by" an escaping prisoner includes protection from liability when a prisoner self-inflicts harm during an escape attempt.

Ladd v. County of San Mateo, Supreme Court of California, decided March 7, 1996, 12 Cal. 4th 913, 911 P.2d 496, 50 Cal. Rptr. 2d 309.

Facts. The fifteen-year-old plaintiff was being driven by two San Mateo County Juvenile Hall employees to Butte County Juvenile Hall when, en route, the plaintiff jumped out of the back seat of the automobile while it was stopped at a red signal. With her hands handcuffed in front of her body, the plaintiff ran up to and attempted to board a slow-moving freight train. In the process, the plaintiff fell under the train's wheels, and both her legs were destroyed. The plaintiff sued the county for negligently instructing its employees and for not providing a safe vehicle. A negligence suit against the county employees was based on their alleged failure to adequately control and care for the plaintiff. The trial court granted summary judgment for the defendants based on Government Code section 845.8 which shields government entities from liability when an escaped or escaping prisoner causes harm, and section 846 which provides immunity when a government entity fails to retain a prisoner. The court of appeal affirmed, basing their decision solely on Government Code section 845.8.

Holding. Affirming the decision of the court of appeal, the supreme court held that government immunity premised on Government Code section 845.8(b), prohibiting liability when any injury is "caused by" an escaping prisoner, encompasses injuries a plaintiff self-inflicts. The court noted that by the statute's absolute grant of immunity and broad terms, it was meant to apply to the widest range of conceivable injuries that could be caused by persons being deprived of their liberty. Furthermore, the court observed that the rationale for granting immunity, to ensure that officers perform their duties unimpaired by thoughts of potential

personal liability, applies whether it is an injured third party bringing suit or whether it is the actual prisoner bringing suit.

VI. Interest

The rate of postjudgment interest to be paid by a local public entity is seven percent per annum, as provided by the California Constitution, and not ten percent per annum as prescribed by the California Code of Civil Procedure.

California Federal Savings and Loan Ass'n v. City of Los Angeles, Supreme Court of California, decided October 5, 1995, 11 Cal. 4th 342, 902 P.2d 297, 45 Cal. Rptr. 2d 279.

Facts. In August 1983, California Federal Savings and Loan Association sought a refund from the City of Los Angeles for business license taxes and interest, alleging that the city's power to levy the business license tax against it was nullified by section 23182 of the Revenue and Taxation Code. Ruling against the city, the trial court held that California Federal was entitled to recover business taxes paid for the three preceding years. The trial court also ordered the city to pay postjudgment interest at a rate of seven percent per annum. Disagreeing with the trial court, the court of appeal held that the judgment should bear interest at a rate of ten percent per annum.

Holding. Overruling the decision of the court of appeal, the supreme court held that the applicable rate of postjudgment interest to be paid by local public entities is seven percent per annum. The court reasoned that the City of Los Angeles is not required to pay the higher interest rate prescribed by California Code of Civil Procedure, section 685.010(a), because as a local public entity, the city is exempt under California Government Code, section 970.1(b). The court further stated that because the statutory language of California Government Code, section 970.1, is clear and unambiguous, it was unnecessary for the court to rewrite or amend the code.

VII. Nuisances

In demonstrating that a nuisance is "temporary" rather than "permanent," the plaintiff must

present evidence that the contaminated condition is subject to cleanup and that the cost of the cleanup is "reasonable."

Mangini v. Aerojet-General Corp., Supreme Court of California, decided April 4, 1996, 12 Cal. 4th 1087, 912 P.2d 1220, 51 Cal. Rptr. 2d 272.

Facts. In an action for nuisance, the plaintiffs claimed that Aerojet's dumping of hazardous wastes on the land prior to the plaintiff's ownership of the land constituted a continuing nuisance. In 1960, Aerojet leased the 2400 acres of land from the prior owner, Cavitt, during which time hazardous materials were "dumped and burned" on the land by Aerojet. Following the termination of the lease, Cavitt complained to Aerojet that part of his land had been contaminated and that range grasses would not regenerate. Thereafter, in 1973, Cavitt signed a release discharging all claims against Aerojet for \$7500; this release was never recorded by either party. Two years later, the plaintiffs acquired the land unaware that the land was contaminated. Plaintiffs became aware of the contamination in 1984 and brought suit in 1988.

At the trial court, the jury returned a special verdict for \$13.2 million. Aerojet moved for judgment notwithstanding the verdict (or alternatively for a new trial) on the grounds that plaintiffs had not established that the nuisance could reasonably be abated at a reasonable cost. The trial court denied the motion for judgment notwithstanding the verdict but granted a new trial. Both parties appealed.

Holding. Affirming the decision of the court of appeal, the supreme court held that to show a continuing nuisance, plaintiffs must show "substantial" evidence that the contamination is capable of being abated at a reasonable cost. Furthermore, the court defined an abatable nuisance as one that can be practically removed considering both cost and hardship. While the court did not require the plaintiffs to show that the nuisance could be completely removed, the court held that the plaintiffs must present evidence of what an acceptable level might be. Because plaintiffs conceded that they did not know the extent of the contamination nor how to remove it, they were unable to succeed on their continuing nuisance claim.

VIII. Preliminary Injunction

A municipal court and an appellate department of the superior court have jurisdiction over a collateral attack of the validity of an injunctive order issued by a superior court.

People v. Gonzalez, Supreme Court of California, decided February 29, 1996, 12 Cal. 4th 804, 910 P.2d 1366, 50 Cal. Rptr. 2d. 74.

Facts. On May 28, 1993, the defendant was arrested for violating a preliminary injunction issued by the Los Angeles Superior Court which restricted the activities of gang members within a certain area of Los Angeles. The municipal court convicted the defendant on four counts of contempt, and denied a demurrer by the defendant which challenged the validity of the injunction. The appellate department of the superior court affirmed the municipal court's holding, stating that the municipal court did not possess jurisdiction over such a claim. The court of appeal held that since both the municipal court and the appellate department lacked jurisdiction to determine the validity of the injunctive order issued by the superior court, both had to accept the validity of the order. In order to preserve equal protection rights, the court of appeal further held that the validity of the order may be challenged when on appeal to the court of appeal.

Holding. Reversing the decision of the court of appeal, the supreme court held that the municipal court and the appellate department of the superior court possess the authority to determine the validity of an injunctive order issued by a superior court when challenged collaterally. In California, void injunctive orders cannot be the basis for a contempt conviction. California rejects the collateral bar doctrine and allows defendants to collaterally challenge the validity of the injunctive order in which they are charged. A collateral attack does not dissolve the injunctive order; rather, it only enjoins enforcement of the order in respect to the defendant at issue. Therefore, the defendant was entitled to a determination of the validity of the injunctive order by a lower court.

The supreme court further held that neither courts have jurisdiction in a direct attack to dissolve or overturn an injunction issued by a superior court.

IX. Public Utilities

California Public Utility Code section 453.5 prevents the Public Utilities Commission from assessing a rate refund against a public utility and using the funds for a purpose other than to reimburse ratepayers.

Assembly of the State of California v. Public Utilities Commission, Supreme Court of California, decided December 18, 1996, 12 Cal 4th 87, 906 P.2d 1209, 48 Cal. Rptr. 2d 54.

Facts. In 1982 the Federal Communications Commission ordered AT&T to reimburse its ratepayers for cellular research expenses. Pursuant to this order, Pacific Bell received \$7.9 million, but did not distribute the funds to ratepayers. In 1993, the California Public Utilities Commission decided that the reimbursement was intended to be distributed to ratepayers and ordered Pacific Telesis, Pacific Bell's parent corporation, to place \$50 million, \$7.9 million at 18% interest, in an account for future distribution. The Commission noted that the intended beneficiaries, ratepayers in the years 1974-1982, could not be identified, so the Commission directed \$7.9 million to be distributed to current ratepayers and the rest to be allotted for public school telecommunications infrastructure. On rehearing, the Commission modified the disbursement and ordered \$7.9 million plus 3.4% interest to be distributed to current ratepayers and allotted the remainder to public school telecommunications infrastructure. The State Assembly and ratepayers questioned the legality of the Commission's order and petitioned for review.

Holding. The California Supreme Court annulled the Commission's order and held that the Commission could not charge the utility company at one rate of interest and reimburse customers at a different rate. The court reasoned that section 453.5 of the California Public Utility Code restricted the Commission's discretion with respect to the use of ratepayer refunds. The court stated that section 453.5 prevents the Commission from refunding to ratepayers an amount which is less than what the Commission assessed against a utility company for reimbursement. Therefore, the court held that the California Public Utility Code precluded the Commission from exercising its discretion on the proper use of

refunds and remanded the matter to the Commission for further proceedings.

The following students contributed to the above summaries:

Christiane Cargill
Marisa Castagnet
Jeremy Dolnick
Joseph Foss
Kirsten Ink
Roland T. Kelly
Kelly Quinn
Monica Randazzo
Paul A. Rose
Terri Schallenkamp
Pamela Schleher
Roger H. Shaar, Jr.

