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## California Supreme Court Survey - A Review of Decisions: March 1993-May 1994

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# California Supreme Court Survey

March 1993 - May 1994

*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 the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.*

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*A postjudgment order denying an award of attorney fees under Code of Civil Procedure section 2033(o) is appealable; the plaintiff bears the burden of proving which portion of the total award represents damages for personal injury when the plaintiff claims prejudgment interest under Civil Code section 3291 on a judgment more favorable than the pretrial offer to compromise; and prejudgment interest on personal injury damages under Civil Code section 3291 may not be awarded on punitive damages:*

**Lakin v. Watkins Associated Industries. . . . . 787**

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## I. APPELLATE REVIEW

*A postjudgment order denying an award of attorney fees under Code of Civil Procedure section 2033(o) is appealable; the plaintiff bears the burden of proving which portion of the total award represents damages for personal injury when the plaintiff claims prejudgment interest under Civil Code section 3291 on a judgment more favorable than the pretrial offer to compromise; and prejudgment interest on personal injury damages under Civil Code section 3291 may not be awarded on punitive damages: Lakin v. Watkins Associated Industries.*

### I. INTRODUCTION

In *Lakin v. Watkins Associated Industries*,<sup>1</sup> the California Supreme Court addressed three issues. First, the court considered whether a postjudgment order denying an award of attorney fees under Code of Civil Procedure section 2033(o) is appealable.<sup>2</sup> Next, the court assessed which party should bear the burden of proof in establishing the portion

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1. 6 Cal. 4th 644, 863 P.2d 179, 25 Cal. Rptr. 2d 109 (1993). Justice Mosk authored the unanimous opinion, with Chief Justice Lucas and Justices Panelli, Kennard, Arabian, Baxter, and George concurring. *Id.* at 665, 863 P.2d at 192, 25 Cal. Rptr. 2d at 122.

2. *Id.* at 648, 863 P.2d at 181, 25 Cal. Rptr. 2d at 111. Section 2033(o) provides in relevant part:

If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision (1), (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that the other party would prevail on the matter, or (4) there was other good reason for the failure to admit.

CAL. CIV. PROC. CODE § 2033(o) (West 1994). See generally 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §§ 1553-1567 (3d ed. 1986 & Supp. 1994) (discussing requests for admissions); 27 CAL. JUR. 3D *Discovery and Depositions* §§ 225-252 (1987 & Supp. 1994) (discussing requests for admissions and the sanctions available for failure to comply).

of the total award representing damages for personal injury when the plaintiff claims prejudgment interest under Civil Code section 3291.<sup>3</sup> Finally, the court determined whether Civil Code section 3291 authorizes prejudgment interest on punitive damages.<sup>4</sup>

The trial court denied the plaintiff's motion for an award of attorney fees incurred in proving facts that the defendants refused to admit.<sup>4</sup> The trial court also denied the plaintiff's motion for an award of prejudgment

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3. *Lakin*, 6 Cal. 4th at 657-58, 863 P.2d at 187, 25 Cal. Rptr. 2d at 117. Section 3291 provides in relevant part:

In any action brought to recover damages for personal injury sustained by any person . . . it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section. If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 . . . .

CAL. CIV. CODE § 3291 (West 1994). See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1397, 1399-1400 (9th ed. 1988 & Supp. 1993) (discussing prejudgment interest on a judgment more favorable than the offer to settle); 16 CAL. JUR. 3D *Costs* § 17 (1983 & Supp. 1994) (discussing Civil Code § 3291 and its application when the judgment is more favorable than the offer to compromise made pursuant to Code of Civil Procedure § 998).

4. *Lakin*, 6 Cal. 4th at 662-63, 863 P.2d at 190-91, 25 Cal. Rptr. 2d at 120-21. The facts of this case may be summarized as follows: A truck driven by an employee of the defendant trucking company, struck the plaintiff's car. *Id.* at 649, 863 P.2d at 181, 25 Cal. Rptr. at 111. The driver falsely identified himself and gave false insurance information. *Id.* An official with the defendant trucking company denied the accident had occurred. *Id.* The plaintiff filed suit for negligence and intentional infliction of emotional distress. *Id.* The plaintiff requested that the defendants admit the occurrence of the collision pursuant to Code of Civil Procedure § 2033, which governs requests for admissions. *Id.* The defendant trucking company denied the request on the grounds that it had insufficient facts to either admit or deny that a collision had occurred. *Id.* The plaintiff made an offer to compromise in the amount of \$89,000 more than two years before trial. *Id.* The defendants did not accept the pretrial settlement offer. *Id.* At trial, the plaintiff established that the defendants had conducted an internal investigation of the accident before her request for admission and that the defendant trucking company knew the accident had occurred. *Id.* The jury found for the plaintiff, awarding \$100,000 in both compensatory and punitive damages. *Id.* The plaintiff moved for an award of attorney fees incurred in proving the fact of the collision which the defendants failed to admit. *Id.* at 649, 863 P.2d at 182, 25 Cal. Rptr. 2d at 112. The plaintiff also moved for an award of prejudgment interest under § 3291 since her pretrial offer to compromise was less than the final settlement. *Id.*

5. *Id.* at 649-50, 863 P.2d at 182, 25 Cal. Rptr. 2d at 112. The supreme court recognized that the wording of § 2033(o) mandates an award of attorney fees unless one of the four statutory exceptions are met. *Id.* at 650, 863 P.2d at 182, 25 Cal. Rptr. 2d at 112. The court pointed out that the trial court denied the motion because of its concern about the potential for double recovery, without reference to any of the statutory exceptions. *Id.*

interest allowed under Civil Code section 3291 on the ground that the plaintiff failed to demand such interest in her complaint.<sup>6</sup> The plaintiff appealed the denial of both motions.<sup>7</sup>

The court of appeal held that the postjudgment order denying attorney fees was not appealable.<sup>8</sup> The court of appeal also affirmed the trial court's denial of prejudgment interest on the ground that the plaintiff failed to demonstrate that the damages awarded were exclusively for personal injury.<sup>9</sup> The plaintiff appealed this decision, claiming (1) a postjudgment order denying attorney fees is appealable<sup>10</sup>; and (2) the court of appeal erred in affirming the denial of her motion for prejudgment interest.<sup>11</sup>

## II. TREATMENT

### A. *The Majority Opinion*

#### 1. A Postjudgment Order Denying Attorney Fees Is Appealable

The California Supreme Court, interpreting Code of Civil Procedure section 904.1, found that an order following an appealable judgment is itself appealable provided that two requirements are met,<sup>12</sup> and accompanying text.

The first requirement is that the issues raised by the appeal from the order must be different from those issues which would arise from an appeal of the judgment itself.<sup>13</sup> The supreme court, noting that the court

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* Disagreeing with the trial court, the court of appeal held that Civil Code § 3291 does not require a plaintiff to demand prejudgment interest in the complaint. *Id.*

10. *Id.*

11. *Id.* at 656, 863 P.2d at 186, 25 Cal. Rptr. 2d at 116.

12. *Id.* at 651, 863 P.2d at 183, 25 Cal. Rptr. 2d at 113. Section 904.1 provides in relevant part "(a) An appeal may be taken from a superior court in the following cases: (1) From a judgment . . . (2) From an order made after a judgment made appealable by paragraph (1)." CAL. CIV. PROC. CODE § 904.1 (West 1994). See generally 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* §§ 101-105 (3d ed. 1985 & Supp. 1994) (discussing appealability of orders made after the verdict or judgment).

13. *Lakin*, 6 Cal. 4th at 651, 863 P.2d at 183, 25 Cal. Rptr. 2d at 113. The court reasoned that without this requirement it would be possible to get around the time limitations for appealing the judgment by raising the same issues in the appeal of a postjudgment order. *Id.*



of appeal did not consider this requirement, found that an appeal from the order denying attorney fees clearly "raises issues different from those arising from the judgment itself."<sup>14</sup> Thus, in the instant case, the court held the first requirement was satisfied.<sup>15</sup>

The second requirement is that the order must either affect the judgment or relate to its enforcement.<sup>16</sup> The court of appeal found that this requirement was not met in the instant case, relying upon the "neither adds nor subtracts" standard set forth in *Redevelopment Agency v. Goodman*<sup>17</sup> to hold that the order did not affect the judgment or relate to its enforcement because it left the judgment intact.<sup>18</sup>

The supreme court recognized the utility of the "neither adds nor subtracts" standard, yet pointed out that it is not the exclusive method to determine whether the order affects the judgment or relates to its enforcement.<sup>19</sup> The court found that postjudgment orders that neither add to nor subtract from the judgment are still appealable provided they either affect or relate to the enforcement of the judgment.<sup>20</sup> The court reasoned that an order denying attorney fees either affects the judgment or relates to its enforcement because it determines with finality the rights of the parties.<sup>21</sup> Furthermore, the order denying attorney fees resembles orders the supreme court had previously found to be appealable.<sup>22</sup>

The supreme court reversed the decision of the court of appeal, concluding that an order denying attorney fees requested under Code of Civil Procedure section 2033(o) is appealable since it (1) raises issues different from those which would arise from an appeal of the judgment itself; (2) affects or relates to the enforcement of the judgment; (3) is not

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14. *Id.*

15. *Id.*

16. *Id.* at 651-52, 863 P.2d at 183, 25 Cal. Rptr. 2d at 113 (citing *Olson v. Cory*, 35 Cal. 3d 390, 400, 673 P.2d 720, 726, 197 Cal. Rptr. 843, 850 (1983) (stating that an order "must either affect the judgment or relate to it by enforcing it or staying its execution" to be appealable)).

17. 53 Cal. App. 3d 424, 429, 125 Cal. Rptr. 818, 820-21 (1975) (stating that if the order neither adds to nor subtracts from the judgment but instead leaves it intact, the order does not sufficiently affect the judgment and is not appealable).

18. *Lakin*, 6 Cal. 4th at 652, 863 P.2d at 183, 25 Cal. Rptr. 2d at 113.

19. *Id.* at 653, 863 P.2d at 184, 25 Cal. Rptr. 2d at 114.

20. *Id.* at 654, 863 P.2d at 185, 25 Cal. Rptr. 2d at 115.

21. *Id.* The court pointed out that this order would not be subject to appeal following some future proceeding. *Id.* The court reasoned that if an order is not preliminary to later proceedings or subject to appeal after some future judgment, it should be appealable because it "finally determines the rights of the parties." *Id.*

22. *Id.* The court pointed to a number of postjudgment orders previously found appealable and compared the order in question to those orders. *Id.* at 653-54, 863 P.2d at 184, 25 Cal. Rptr. 2d at 114.

preliminary to later proceedings; and (4) will not become subject to appeal in the future as a result of another judgment.<sup>23</sup>

2. The Plaintiff Bears the Burden of Proof in Establishing Which Portion of an Award Represents Damages for Personal Injury When Claiming Prejudgment Interest Under Civil Code Section 3291

The supreme court next considered where the burden of proof lies when the plaintiff claims prejudgment interest under section 3291. The court relied upon the holding in *Morin v. ABA Recovery Service, Inc.*<sup>24</sup> in concluding that section 3291 authorizes prejudgment interest only for that portion of a judgment that represents damages for personal injury.<sup>25</sup> The court reasoned that because the plaintiff's claims for negligence and intentional infliction of emotional distress sought recovery for personal injury, section 3291 applied.<sup>26</sup>

Next the court considered whether the court of appeal correctly dismissed the plaintiff's appeal of the order denying prejudgment interest on the ground that the plaintiff failed to prove the damages were awarded exclusively for personal injury.<sup>27</sup> The plaintiff contended that the initial burden of proof rested upon her to establish that any portion of the award is for personal injury damages; once this is met, the burden shifts to the defendant to establish that any portion of the award is not compensation for personal injury.<sup>28</sup> The supreme court rejected this idea, relying upon Evidence Code section 500<sup>29</sup> in reasoning that since the

23. *Id.* at 656, 863 P.2d at 186, 25 Cal. Rptr. 2d at 116.

24. 195 Cal. App. 3d 200, 208, 240 Cal. Rptr. 509, 513 (1987), *overruled by* *Lakin v. Watkins Associated Indus.*, 6 Cal. 4th 644, 863 P.2d 179, 25 Cal. Rptr. 2d 109 (1993) (holding that § 3291 mandates an award of prejudgment interest for personal injury damages when the plaintiff's offer to settle is refused and the plaintiff recovers a more favorable judgment at trial).

25. *Lakin*, 6 Cal. 4th at 658, 863 P.2d at 187-88, 25 Cal. Rptr. 2d at 117-18.

26. *Id.* at 657, 863 P.2d at 187, 25 Cal. Rptr. 2d at 117. The court contrasted the nature of the plaintiff's claims in this case to those in *Gourley v. State Farm Mut. Auto. Ins. Co.*, 53 Cal. 3d 121, 126-27, 822 P.2d 374, 377, 3 Cal. Rptr. 2d 666, 669 (1991) (holding that § 3291 is not applicable to insurance bad faith actions because such actions are for interference with a property right, not personal injury). The court found that in the instant case, the plaintiff's claims were not equivalent to an interference with a property right. *Lakin*, 6 Cal. 4th at 657, 863 P.2d at 187, 25 Cal. Rptr. 2d at 117.

27. *Id.* at 659-60, 863 P.2d at 188-89, 25 Cal. Rptr. 2d at 118-19.

28. *Id.* at 660, 863 P.2d at 189, 25 Cal. Rptr. 2d at 119.

29. Evidence Code § 500 reads as follows: "Except as otherwise provided by law,

plaintiff is the party claiming prejudgment interest, the plaintiff bears the burden of proving the amount of personal injury damages included in the judgment.<sup>30</sup> The supreme court ruled that the court of appeal incorrectly concluded that the plaintiff failed to meet this burden and stated that plaintiff never had the opportunity to carry her burden since the trial court barred this motion on procedural grounds.<sup>31</sup> The court remanded the case to the trial court to allow the plaintiff an opportunity to establish which portion of the total award represents compensatory damages for personal injury.<sup>32</sup>

### 3. Civil Code Section 3291 Does Not Authorize the Award of Prejudgment Interest on Punitive Damages

The court next considered whether section 3291 authorizes the award of prejudgment interest on punitive damages in personal injury cases.<sup>33</sup> The plaintiff cited *Greenfield v. Spectrum Investment Corp.*<sup>34</sup> and related cases to support her claim that section 3291 allows for the award of prejudgment interest on both compensatory and punitive damages attributable to personal injury.<sup>35</sup> The court, recognizing that section 3291 authorizes prejudgment interest for personal injury damages, considered whether punitive damages are damages for personal injury as covered under section 3291.<sup>36</sup>

The court noted that the purpose of section 3291 is to encourage settlement in personal injury cases.<sup>37</sup> Further, the purpose of allowing prejudgment interest is to make the plaintiff whole as of the date of the injury.<sup>38</sup> The court found that awarding prejudgment interest on punitive damages would not further either of these goals because the purpose of

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a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." CAL. EVID. CODE § 500 (West 1994).

30. *Lakin*, 6 Cal. 4th at 660-61, 863 P.2d at 189, 25 Cal. Rptr. 2d at 119.

31. *Id.* at 661, 863 P.2d at 189-90, 25 Cal. Rptr. 2d at 119-20.

32. *Id.* at 661-62, 863 P.2d at 190, 25 Cal. Rptr. 2d at 120.

33. *Id.* at 662-64, 863 P.2d at 190-92, 25 Cal. Rptr. at 120-22. See generally Baynard F. Berman, *Due Process, Punitive Damages and Civil Procedure: Does California Law Pass Constitutional Muster?*, 25 BEVERLY HILLS B. ASS'N J. 193 (1991) (discussing the policy behind punitive damage awards in California and the constitutionality of such awards).

34. 174 Cal. App. 3d 111, 124-25, 219 Cal. Rptr. 805, 813-14 (1985), *overruled by* *Lakin v. Watkins Associated Indus.*, 6 Cal. 4th 644, 863 P.2d 179, 25 Cal. Rptr. 2d 109 (1993) (finding that § 3291 allows the plaintiff to claim prejudgment interest on both compensatory and punitive damages).

35. *Lakin*, 6 Cal. 4th at 662-63, 863 P.2d at 191, 25 Cal. Rptr. 2d at 121.

36. *Id.* at 663, 863 P.2d at 191, 25 Cal. Rptr. 2d at 121.

37. *Id.*

38. *Id.*

punitive damages is to punish the defendant, as opposed to making the injured party whole.<sup>39</sup> Awarding prejudgment interest on these damages would not make the plaintiff whole, but would instead provide a windfall to the plaintiff.<sup>40</sup> The court reasoned that although punitive damages may arise from a personal injury claim, they are not damages for personal injury within the meaning of section 3291.<sup>41</sup> The court rejected the holding of *Greenfield* and held that section 3291 does not authorize the award of prejudgment interest on punitive damages.<sup>42</sup>

### III. IMPACT AND CONCLUSION

The California Supreme Court overruled an earlier line of cases which allowed prejudgment interest on punitive damages. The court found that the legislative intent of section 3291, which is to encourage settlements in personal injury cases as well as to make the plaintiff whole as of the date of the injury, would not be furthered by subjecting punitive damage awards to prejudgment interest. This case may be seen as an attempt to limit the impact of punitive damages to some degree by concluding that they are not damages for personal injury covered under section 3291. While it might be argued that a logical extension of this reasoning would hold that punitive damages should be subtracted from the total award when determining whether the judgment is more favorable than the offer to compromise, the court expressly rejected this argument.<sup>43</sup>

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39. *Id.* at 664, 863 P.2d at 192, 25 Cal. Rptr. 2d at 122. See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1327-1328 (9th ed. 1988 & Supp. 1994) (discussing the purposes and goals of punitive damages); 23 CAL. JUR. 3D *Damages* §§ 116-117 (contrasting the function of compensatory and punitive damages).

40. *Lakin*, 6 Cal. 4th at 664, 863 P.2d at 192, 25 Cal. Rptr. 2d at 122.

41. *Id.*

42. *Id.*

43. The defendant made this argument in *Lakin*, but the court found it unpersuasive. *Id.* at 662-63 & n.13, 863 P.2d at 190-91 & n.13, 25 Cal. Rptr. 2d at 120-21 & n.13.

## II. CONSTITUTIONAL LAW

*Although the NCAA, a nongovernmental entity, is governed by the Privacy Initiative of the California Constitution, its policy of drug testing collegiate athletes does not violate the constitutional right to privacy because it substantively furthers a countervailing interest:*

**Hill v. National Collegiate Athletic Ass'n.**

### I. INTRODUCTION

Drug abuse is one of the greatest problems facing today's society.<sup>1</sup> The battle against drugs is being fought on the streets, in the workplace, and in colleges and universities.<sup>2</sup> In 1986, the National Collegiate Athletic Association (NCAA) responded to college athletes' use of controlled substances and performance-enhancing drugs by enacting a mandatory drug testing program.<sup>3</sup> This program has sparked much debate regarding the constitutionality of mandatory drug testing,<sup>4</sup> generating challenges based on both federal and state constitutional protections.<sup>5</sup>

Federal challenges to the NCAA program have little chance of succeeding.<sup>6</sup> In order to prevail, plaintiffs must prove that the challenged con-

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1. See Annette Gibbs, *Drug Testing and College Athletes: Conflicts Among Institutions, Students, and the NCAA*, 67 ED. LAW REP. 1 (1991); Kerrie S. Covell & Annette Gibbs, *Drug Testing and the College Athlete*, 23 CREIGHTON L. REV. 1, 1 (1989/1990).

2. Covell & Gibbs, *supra* note 1, at 1.

3. *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 11, 865 P.2d 633, 638, 26 Cal. Rptr. 2d 834, 839 (1994).

4. See Covell & Gibbs, *supra* note 1 (discussing the courts' reactions to constitutional challenges to drug testing programs); Gibbs, *supra* note 1 (discussing recent challenges to mandatory drug testing); Ted O'Neal, *The Constitutionality of NCAA Drug Testing: A Fine Specimen for Examination*, 46 SMU L. REV. 513 (1992) (discussing the "fierce legal challenges" facing the NCAA's program). It is important to note that because the law review articles discussed in this Note were published prior to the supreme court's decision in *Hill*, many rely heavily on lower court opinions to support the theory that NCAA drug testing violates the state constitutional right to privacy. The California Supreme Court, however, overturned the lower courts' decisions. See *infra* notes 76-107 and accompanying text.

5. See *O'Halloran v. University of Washington*, 679 F. Supp. 997, 1005 (W.D. Wash) (claiming the NCAA drug testing program violates the Fourth Amendment), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988); *Hill*, 7 Cal. 4th at 9, 865 P.2d at 636, 26 Cal. Rptr. 2d at 837 (claiming the NCAA drug testing program violates the right to privacy secured by the California Constitution); see also, Annotation, *Requiring Submission to Physical Examination or Test as Violation of Constitutional Rights*, 25 A.L.R. 2d 1407 (1952) (compiling older cases dealing with the problem of whether constitutional rights are invaded by compulsory testing).

6. See *O'Halloran*, 679 F. Supp. at 1005; see also David R. Cochran, *The Privacy Expectation: A Comparison of Federal and California Constitutional Standards for*

duct constituted state action and that the "conduct deprived [the plaintiff] of rights, privileges or immunities secured by the Constitution or laws of the United States."<sup>7</sup> The United States Supreme Court has definitively stated that the NCAA is not a state actor.<sup>8</sup> Currently, student athletes have been unable to establish that the drug testing program has deprived them of a right guaranteed by the federal constitution.<sup>9</sup> Therefore, challenges to NCAA drug testing will fail both prongs of a successful federal constitutional challenge. The right to privacy provided in the United States Constitution, then, does not offer student athletes sufficient protection to prohibit the NCAA from testing athletes.

Because several state constitutions offer a greater level of protection than the federal constitution,<sup>10</sup> students have attempted to challenge the NCAA program on state grounds.<sup>11</sup> Recognizing the federal courts' inability to prohibit NCAA testing on federal Constitutional grounds, opponents hoped that these state challenges would be successful.<sup>12</sup> Many commentators looked toward *Hill v. National Collegiate Athletic Associ-*

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*Drug Testing in Amateur Athletics*, 17 HASTINGS CONST. L.Q. 533, 564 (1990) (stating "federal courts are defeating constitutional challenges").

7. *O'Halloran*, 679 F. Supp. at 1001 (citing *Parrat v. Taylor*, 451 U.S. 527, 535 (1981)).

8. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (holding that the NCAA is not a state actor).

9. See *O'Halloran*, 679 F. Supp. at 1007. For a detailed discussion of the federal courts' approach to the constitutionality of the NCAA's drug testing, see Cochran, *supra* note 6, at 536-45 (providing a detailed analysis of *O'Halloran* and its impact on the NCAA).

10. The California Constitution explicitly creates a right to privacy and provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1; see 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 454 (9th ed. 1988) (discussing the privacy rights enumerated in the California Constitution). Similarly, the Massachusetts Civil Rights Act grants a right to privacy which reaches both state and private actions. Covell & Gibbs, *supra* note 1, at 16-17 (discussing Massachusetts law and its effect on drug testing of athletes).

11. See, e.g., *Bally v. Northeastern Univ.*, 532 N.E.2d 49 (Mass. 1989) (challenging drug testing under Massachusetts Civil Rights Act); *Hill*, 7 Cal. 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (challenging drug testing under the California Constitution).

12. See, e.g., Covell & Gibbs, *supra* note 1, at 17-18 (stating "even though drug-testing cases continue to be litigated and hotly debated today, one can readily conclude that student athletes who want to protect their right to privacy ought to seek protection under their state constitutions"); O'Neal, *supra* note 4, at 554 (stating "new life has been given to challengers in the form of state constitutional provisions").

ation for a definitive statement that drug testing violates the right to privacy.<sup>13</sup>

In *Hill*,<sup>14</sup> the California Supreme Court analyzed the Privacy Initiative of the California Constitution in light of the NCAA's policy of testing collegiate athletes for drug use.<sup>15</sup> To determine whether the NCAA's policy violated the students' right to privacy, and to clarify privacy analysis for the lower courts, the court examined whether the right to privacy enumerated in the California Constitution governs nongovernmental entities.<sup>16</sup> Additionally, the court established the standards for determining when an invasion of privacy occurs.<sup>17</sup> The court applied these findings to the facts of *Hill*<sup>18</sup> and determined that the NCAA policy does not violate the California Constitution.<sup>19</sup>

## II. STATEMENT OF THE CASE

In 1973, the NCAA enacted a rule prohibiting drug use by NCAA athletes.<sup>20</sup> Although there were no provisions governing the testing of athletes, several college students tested positive for prohibited drugs at the Pan American Games.<sup>21</sup> In January, 1984, based on the threat drugs posed to the health of students and to the integrity of NCAA sporting events, the Pacific 10 Conference introduced a resolution requesting that the NCAA adopt mandatory drug testing.<sup>22</sup>

Responding to this resolution, the NCAA created a committee to study drug use and testing. The committee concluded that the NCAA had "a

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13. See, e.g., Cochran, *supra* note 6, at 564 (stating "*Hill* is an example of a success story in the student-athletes' war on drug testing"); O'Neal, *supra* note 4, at 514 (stating "[a] well-reasoned opinion in the *Hill* case could prove quite persuasive in other jurisdictions").

14. 7 Cal. 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994).

15. *Id.* at 9, 865 P.2d at 637, 26 Cal. Rptr. 2d at 838.

16. *Id.* at 15, 865 P.2d at 641, 26 Cal. Rptr. 2d at 842.

17. *Id.* at 20, 865 P.2d at 644, 26 Cal. Rptr. 2d at 845.

18. *Id.* at 40-55, 865 P.2d at 657-67, 26 Cal. Rptr. 2d at 859-69.

19. *Id.* at 9, 865 P.2d at 637, 26 Cal. Rptr. 2d at 838. Chief Justice Lucas authored the majority opinion in which Justices Panelli, Arabian, and Baxter joined. *Id.* at 57, 865 P.2d at 669, 26 Cal. Rptr. 2d at 871. Both Justice Kennard and Justice George wrote separately, concurring in part and dissenting in part. *Id.* at 58, 62, 865 P.2d at 669, 672, 26 Cal. Rptr. at 871, 874, respectively. Justice Mosk wrote a separate dissenting opinion. *Id.* at 73, 865 P.2d at 679, 26 Cal. Rptr. 2d at 882.

20. *Id.* at 10, 865 P.2d at 638, 26 Cal. Rptr. 2d at 839.

21. *Id.* Several students withdrew from the Pan American Games when they realized that drug testing was required. *Id.*

22. *Id.* Prior to this resolution, a Michigan State University study of drug use by college athletes revealed that 36% of the athletes in the study used marijuana or hashish, 17% used cocaine, 8% used amphetamines, and 4% used steroids. *Id.*

legitimate interest in maintaining the integrity of intercollegiate athletics, including insuring fair competition and protecting the health and safety of all participating student athletes."<sup>23</sup> In 1986, the various institutions within the NCAA overwhelmingly adopted the drug testing program.<sup>24</sup>

The NCAA's drug testing program prohibits the use of specific chemical substances by student athletes<sup>25</sup> and requires athletes participating in NCAA competition to sign a consent form whereby they agree to be tested for drugs.<sup>26</sup> Before testing, the student athlete is given written notice that he or she will be tested.<sup>27</sup> If the drug test, conducted by urinalysis,<sup>28</sup> reveals drug use, the institution is notified and the student loses postseason eligibility.<sup>29</sup> A student's refusal to follow drug testing procedure bars the athlete from competition.<sup>30</sup>

Student athletes attending Stanford University sued the NCAA, contending that the drug testing program violated their right to privacy under the California Constitution.<sup>31</sup> The superior court found that the NCAA program violated plaintiffs' privacy rights and permanently enjoined its enforcement against Stanford athletes.<sup>32</sup> The court of appeal affirmed this decision and upheld the injunction.<sup>33</sup>

23. *Id.* The committee also found:

The use of "performance-enhancing" drugs by individual student-athletes is a violation of the ethic of fair competition, [and] poses a potential health and safety hazard to those utilizing such drugs and a potential safety hazard to those competing with such individuals. The most effective method of ensuring that student-athletes are not utilizing "performance enhancing" drugs is through a consistent, national drug testing program.

*Id.* at 10-11, 865 P.2d at 638, 26 Cal. Rptr. 2d at 839.

24. *Id.* at 10-11, 865 P.2d at 638, 26 Cal. Rptr. 2d at 839.

25. *Id.* The following categories of chemical substances were prohibited: "(1) psychomotor and nervous system stimulants; (2) anabolic steroids; (3) alcohol and beta blockers (in rifle events only); (4) diuretics; and (5) street drugs." *Id.*

26. *Id.* Drug testing may occur before, during, or after participation in any NCAA championship or in any postseason football game. *Id.* at 12, 865 P.2d at 639, 26 Cal. Rptr. 2d at 840.

27. *Id.*

28. *Id.* at 11, 865 P.2d at 639, 26 Cal. Rptr. 2d at 840. The urinalysis is conducted in the presence of an official monitor of the same sex as the student. *Id.* The student may request a witness-observer of his or her choice to be present. *Id.*

29. *Id.* at 13, 865 P.2d at 639, 26 Cal. Rptr. 2d at 840.

30. *Id.*

31. *Id.* at 9, 865 P.2d at 637, 26 Cal. Rptr. 2d at 838.

32. *Id.*

33. *Id.* The court of appeal applied a "compelling state interest" test and required



### III. ANALYSIS

#### A. Scope of the Privacy Initiative

The Privacy Initiative governs the conduct of private, nongovernmental entities. To determine whether the NCAA's conduct violated the California Constitution, the court first had to determine whether the Privacy Initiative that created the right to privacy governs the conduct of private, nongovernmental entities.<sup>34</sup>

The court stated that, because the constitutional section does not define its terms, it must be "interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California."<sup>35</sup> In determining the voters' intent, the court relied heavily on the official ballot pamphlet that contained arguments for and against the initiative.<sup>36</sup>

The arguments favoring the initiative relied on the need for "effective restraints on the information activities of government *and business*."<sup>37</sup>

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the NCAA to prove that:

(1) the program furthered its stated purposes, i.e., to safeguard the integrity of athletic competition and to protect the health and safety of student athletes; (2) the utility of the program manifestly outweighed any resulting impairment of the privacy right; and (3) there were no alternatives to drug testing less offensive to privacy interests.

*Id.* at 13, 865 P.2d at 640, 26 Cal. Rptr. 2d at 841.

34. *Id.* at 15, 865 P.2d at 641, 26 Cal. Rptr. 2d at 842. The court was forced to determine this issue because the NCAA raised its private status as a bar against application of the Privacy Initiative. *Id.* at 16, 865 P.2d at 641, 26 Cal. Rptr. 2d at 842.

35. *Id.* at 16, 865 P.2d at 641, 26 Cal. Rptr. 2d at 843 (citing *Legislature v. Eu*, 54 Cal. 3d 492, 505, 816 P.2d 1309, 1315-16, 286 Cal. Rptr. 283, 289-90 (1991), *cert. denied*, 112 S. Ct. 1293 (1992); *In re Lance W.*, 37 Cal. 3d 873, 889, 694 P.2d 744, 754, 210 Cal. Rptr. 631, 641 (1985)).

36. *Hill*, 7 Cal. 4th at 16, 865 P.2d at 642, 26 Cal. Rptr. 2d at 843.

When, as here, the language of an initiative measure does not point to a definitive resolution of a question of interpretation, "it is appropriate to consider indicia of the voters' intent other than the language of the provision itself." . . . [S]uch indicia include the analysis and arguments contained in the official ballot pamphlet."

*Id.* (quoting *Eu*, 54 Cal. 3d at 504, 816 P.2d at 1315, 286 Cal. Rptr. at 289 (quoting *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245, 250, 806 P.2d 1360, 1363, 279 Cal. Rptr. 325, 328 (1991))).

37. *Hill*, 7 Cal. 4th at 17, 865 P.2d at 642, 26 Cal. Rptr. 2d at 843 (citing *Ballot Pamphlet, Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972)* p. 26) (hereinafter *Ballot Pamphlet*). The argument further stated:

This amendment creates a legal and enforceable right of privacy for every Californian. *The right of privacy . . . prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve*

Rather than contesting the impact of the initiative on business, however, the arguments against the initiative merely challenged the need for additional privacy safeguards.<sup>38</sup> Finding that these arguments supported the belief that the citizens of California intended the Privacy Initiative to reach private businesses, the court held that the Privacy Initiative "creates a right of action against private as well as government entities."<sup>39</sup>

*B. Standards for Determining an Invasion of Privacy Under the Privacy Initiative*

The court next focused on the standards to be applied in determining whether an invasion of privacy has occurred.<sup>40</sup> The court first analyzed the decisions of the trial court and the court of appeal.<sup>41</sup> The lower courts assumed that private entities were required to prove "(1) a 'compelling state interest' in support of drug testing; and (2) the absence of any alternative means of accomplishing that interest."<sup>42</sup> The court, however, determined that this standard does not apply to invasions of privacy by private entities.<sup>43</sup> In reaching this conclusion, the court traced the sources of the right to privacy to determine whether the right to privacy is a fundamental right worthy of utmost protection.<sup>44</sup>

Considering both common law<sup>45</sup> and federal constitutional privacy

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*other purposes or to embarrass us . . . . Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors.*

*Id.* (emphasis added).

38. *Id.* (citing Ballot Pamphlet, p. 27). This argument stated: "To say there are at present no effective restraints on the information activities of government *and business* is simply untrue." *Id.*

39. *Id.* at 20, 865 P.2d at 644, 26 Cal. Rptr. 2d at 845. The court noted that its holding was limited to the Privacy Initiative and that it did not create any other rights of action under either article I, section 1 or any other section of the California Constitution. *Id.*

40. *Id.* at 20, 865 P.2d at 644, 26 Cal. Rptr. 2d at 845-46.

41. *Id.*

42. *Id.*

43. *Id.* at 31, 865 P.2d at 651, 26 Cal. Rptr. 2d at 853.

44. *Id.* at 23-31, 865 P.2d at 646-52, 26 Cal. Rptr. 2d at 847-53.

45. *Id.* at 23-28, 865 P.2d at 646-49, 26 Cal. Rptr. 2d at 847-51. The court discussed the theory of the common law right to privacy originated by Samuel D. Warren and Louis D. Brandeis in their seminal law review article. *Id.* at 23, 865 P.2d at 646, 26 Cal. Rptr. 2d at 848 (citing Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)). The court discussed the four traditional privacy torts and concluded that

rights<sup>46</sup> the court concluded that “privacy interests and accompanying legal standards are best viewed flexibly and in context.”<sup>47</sup>

With this framework, the court proceeded to establish the elements of a cause of action for invasion of the state constitutional right to privacy.<sup>48</sup> Initially, the court reviewed its decision in *White v. Davis*,<sup>49</sup> which required a “compelling interest” standard to determine whether law enforcement authorities had violated the Privacy Initiative.<sup>50</sup> The court analyzed its decision and concluded that *White* “did not establish a blanket ‘compelling interest’ test for all state constitutional right-to-privacy cases.”<sup>51</sup> Accordingly, the court limited the *White* holding to those cases in which government action invades privacy interests “which overlap the

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“the common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized.” *Id.* at 26, 865 P.2d at 648, 26 Cal. Rptr. 2d at 850. Therefore, the common law right to privacy is not fundamental. *See id.*

46. *Hill*, 7 Cal. 4th at 28-32, 865 P.2d at 649-52, 26 Cal. Rptr. 2d at 851-53. The court discussed attempts to find a federal constitutional right to privacy in the First, Third, Fourth, and Ninth Amendments and in the “penumbras” of specific constitutional guarantees. *Id.* at 28, 865 P.2d at 649, 26 Cal. Rptr. 2d at 851 (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)). The court noted that federal cases have created two distinct privacy lines: the “individual interest in avoiding disclosure of personal matters” and the “interest in independence in making certain kinds of important decisions.” *Id.* at 30, 865 P.2d at 650, 26 Cal. Rptr. 2d at 852 (quoting *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977)). The court noted that in cases involving informational interests such as disclosure, federal courts have avoided applying a “compelling interest” standard and have applied balancing tests in determining violations. *Id.* at 30, 865 P.2d at 651, 26 Cal. Rptr. 2d at 851. The court concluded that because the Privacy Initiative was intended to protect these information interests, a “compelling interest” test was not required. *Id.* at 28-32, 865 P.2d at 649-52, 26 Cal. Rptr. 2d at 851-53.

47. *Hill*, 7 Cal. 4th at 31, 865 P.2d at 651, 26 Cal. Rptr. 2d at 853.

48. *Id.* at 32, 865 P.2d at 652, 26 Cal. Rptr. 2d at 853.

49. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

50. *Hill*, 7 Cal. 4th at 32, 865 P.2d at 652, 26 Cal. Rptr. 2d at 854. In *White*, a police department conducted covert surveillance of classes at the University of California at Los Angeles by police officers disguised as students. *Id.* The officers compiled information on individuals and reported on classroom discussions without any evidence of illegal activity. *Id.* (citing *White*, 13 Cal. 3d at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97). The plaintiff, a taxpayer, sought to enjoin expenditure of public funds for these actions. *Id.* The court, assuming the truth of the plaintiff’s statements, held that

the facts as alleged revealed government conduct “likely to pose a substantial restraint upon the exercise of First Amendment rights” and observed that “the challenged surveillance activities can only be sustained if defendant can demonstrate a ‘compelling’ state interest which justifies the resultant deterrence of First Amendment rights and which cannot be served by alternative means less intrusive on fundamental rights.

*Id.* (quoting *White*, 13 Cal. 3d at 772, 533 P.2d at 232, 120 Cal. Rptr. at 104).

51. *Hill*, 7 Cal. 4th at 33, 865 P.2d at 652, 26 Cal. Rptr. 2d at 854.

First Amendment.<sup>52</sup>

Finding that *White* does not apply to cases outside this limited scope, the court next defined what constitutes a cause of action for invasion of state constitutional privacy.

## 1. Plaintiff Must Assert a Legally Protected Privacy Interest

To establish a violation of the state constitutional right to privacy, a plaintiff must identify a "specific, legally protected privacy interest."<sup>53</sup> The court recognized two classes of privacy interests: "(1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')."<sup>54</sup>

The court noted that the focus of the Privacy Initiative was on informational privacy,<sup>55</sup> but concluded that the Privacy Initiative also protects autonomy privacy.<sup>56</sup> The court stated that identification of either privacy interest satisfies a plaintiff's initial burden.<sup>57</sup> Additionally, the court concluded that the determination of whether there exists a legally recognized privacy interest is a question of law.<sup>58</sup>

52. *Id.* The court further restricted this category to include only those areas which relate to "our expressions,' 'our freedom of communion,' and 'our freedom to associate with the people we choose.'" *Id.* (citing Ballot Pamphlet, p. 27).

53. *Hill*, 7 Cal. 4th at 35, 865 P.2d at 654, 26 Cal. Rptr. 2d at 856.

54. *Id.*

55. *Id.*; see also *supra* notes 37-38 and accompanying text. The court stressed that the "California constitutional right to privacy 'prevents government and business interests from [1] collecting and stockpiling unnecessary information from us and from [2] misusing information gathered for one purpose in order to serve other purposes or to embarrass us.'" *Id.* at 36, 865 P.2d at 654, 26 Cal. Rptr. 2d at 856 (citing Ballot Pamphlet, p. 27).

56. *Id.*

57. *Id.* The court noted that

[w]hether established social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy—common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.

*Id.* at 36, 865 P.2d at 654-55, 26 Cal. Rptr. 2d at 856.

58. *Id.* at 40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859 (citing *Gill v. Hearst Publishing Co., Inc.*, 40 Cal. 2d 224, 229, 253 P.2d 441, 444 (1953), *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370, 379 (1974)).

## 2. Plaintiff Must Assert a Reasonable Expectation of Privacy

Secondly, plaintiff must show a reasonable expectation of privacy based on the surrounding circumstances.<sup>60</sup> The court stated that a reasonable expectation of privacy depends on the “customs, practices, and physical settings surrounding particular activities.”<sup>60</sup> Additionally, the court determined that an objective standard is to be applied in determining whether such an expectation exists and that expectations must be “founded on broadly based and widely accepted community norms.”<sup>61</sup> Finally, the court noted that whether a reasonable expectation of privacy exists is a mixed question of law and fact.<sup>62</sup>

## 3. Plaintiff Must Assert a Serious Invasion of a Privacy Interest

Finally, the court held that an invasion of privacy must be “sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.”<sup>63</sup> The court reasoned that this requirement is necessary because society could not function if every invasion into privacy was actionable.<sup>64</sup> The court also noted that whether a serious invasion of privacy has occurred is a mixed question of law or fact.<sup>65</sup>

### C. *Defenses to a Privacy Cause of Action*

Once the plaintiff has established the three requisite elements, the defendant is entitled to present competing or countervailing privacy and

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59. *Id.* at 36, 865 P.2d at 655, 26 Cal. Rptr. 2d at 856. The court noted that because privacy interests are not independent of circumstances, actions such as advance notice may justify an intrusion. *Id.* (citing *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 1346, 743 P.2d 1299, 1316, 241 Cal. Rptr. 42, 59 (1987) (upholding the use of sobriety checkpoints)).

60. *Id.* at 36, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857.

61. *Id.* at 37, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857 (citing RESTATEMENT (SECOND) OF TORTS § 652D, cmt. c). The court also noted that the ability to voluntarily consent to potentially invasive activities affects the expectations of the participant. *Id.* at 37, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857.

62. *Id.* at 40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859. The court also indicated that when undisputed material facts exist which show no reasonable expectation of privacy, the question may be decided as a matter of law. *Id.*

63. *Id.* at 37, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857.

64. *Id.* The court stated: “[c]omplete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part.” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. c).

65. *Hill*, 7 Cal. 4th at 40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859. If undisputed material facts show no substantial invasion of privacy, the question of substantiality may be decided as a matter of law. *Id.*

nonprivacy interests in support of its actions.<sup>66</sup> In establishing defenses to a privacy claim, the court noted that, "[p]rivacy concerns are not absolute; they must be balanced against other important interests."<sup>67</sup> A defendant's conduct must be evaluated in light of legitimate and important competing interests.<sup>68</sup>

Once a defendant has established a competing interest, the plaintiff may prove that a defendant's conduct still constitutes a privacy violation by showing "the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests."<sup>69</sup> The court noted that whether a sufficient countervailing interest exists is a question of law while the strength of the interest and the feasibility of alternatives are mixed questions of law and fact.<sup>70</sup>

The court also asserted that, in weighing these competing interests, courts must distinguish between private organizations and governmental agencies<sup>71</sup> because government action generally poses a greater threat to individual freedom than actions by private individuals.<sup>72</sup> The court noted that, because individuals generally have greater personal freedom in dealing with private organizations, the need to regulate intrusions into individual privacy by these organizations is lessened.<sup>73</sup> Finally, the court acknowledged that private conduct itself is constitutionally protected by freedom of association under which individuals have the right "to com-

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66. *Id.* at 37-38, 865 P.2d at 655-56, 26 Cal. Rptr. 2d at 857.

67. *Id.* at 37, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857 (citing *Doyle v. State Bar*, 32 Cal. 3d 12, 20, 648 P.2d 942, 946, 184 Cal. Rptr. 720, 724 (1982)). The court noted that the process of balancing countervailing interests against the privacy interests was exercised in both common and constitutional law. *Id.*

68. *Id.* at 37-38, 865 P.2d at 655-56, 26 Cal. Rptr. 2d at 857.

69. *Id.* at 38, 865 P.2d at 655-56, 26 Cal. Rptr. 2d at 857-58 (citing *Whalen v. Roe*, 429 U.S. 589, 600-02 (1972); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 626 n.7 (1989)).

70. *Id.* at 40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859. If material facts are undisputed, all issues may be determined as a matter of law. *Id.*

71. *Id.* at 38, 865 P.2d at 656, 26 Cal. Rptr. 2d at 858.

72. *Id.*

73. *Id.* The court specifically discussed an individual's freedoms pertaining to landlords, employers, and vendors. *Id.* at 38-39, 865 P.2d at 656, 26 Cal. Rptr. 2d at 858. The court acknowledged that the competition in the marketplace tends to narrow the range of choices, but stressed that individuals still have the option to take their complaints to the legislature for redress. *Id.* at 39, 865 P.2d at 656, 26 Cal. Rptr. 2d at 858.

municate and associate with one another on mutually negotiated terms and conditions.”<sup>74</sup> Therefore, when balancing competing interests of private individuals and private organizations, courts must consider the individual’s ability to choose freely among competing private services.<sup>75</sup>

#### D. *Application of Privacy Right to NCAA Drug Testing*

After defining the elements of a cause of action for a violation of the state constitutional right to privacy, the court turned to the record and the findings made by the trial court to determine whether the facts of the case at bar constituted an invasion of privacy.<sup>76</sup> First, the court determined whether the plaintiffs had established a proper cause of action for invasion of privacy.<sup>77</sup>

##### 1. Elements of Invasion of Privacy

The court initially determined that the plaintiffs had set forth a legally protected autonomy privacy interest<sup>78</sup> because the monitoring of urination by the NCAA intrudes on a human bodily function that under social custom is private.<sup>79</sup> The court also noted that the collecting and testing urine and inquiring about an athlete’s medications allows the NCAA to obtain personal and confidential information regarding individuals, there-

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74. *Id.* at 39, 865 P.2d at 656, 26 Cal. Rptr. 2d at 858. The court noted that the freedom of association applies “to all legitimate private organizations, whether popular or unpopular.” *Id.* (citing *Britt v. Superior Court*, 20 Cal. 3d 844, 854, 574 P.2d 766, 772, 143 Cal. Rptr. 695, 701 (1978)).

75. *Id.* at 39, 865 P.2d at 657, 26 Cal. Rptr. 2d at 858. Conversely, if an organization, either public or private, controls access to a necessity, the impact on privacy rights may be much greater. *Id.* at 39, 865 P.2d at 657, 26 Cal. Rptr. 2d at 858-59.

76. *Id.* at 40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859. Justice Kennard concurred with the majority’s analysis regarding the application of the Privacy Initiative to private, non-governmental entities, as well as with their discussion of the elements of the state constitutional right to privacy cause of action. *Id.* at 58, 865 P.2d at 660, 26 Cal. Rptr. 2d at 871 (Kennard, J., concurring and dissenting). Justice Kennard, however, did not join in the majority’s application of these rules to the facts of this case. *Id.* (Kennard, J., concurring and dissenting). Rather, she stated that the case should have been remanded for further consideration by the trial court. *Id.* at 62, 865 P.2d at 672, 26 Cal. Rptr. 2d at 874 (Kennard, J., concurring and dissenting). The majority, on the other hand, concluded that, although they could remand the case to the lower court, there was no reason to do so because uncontradicted evidence demonstrated, as a matter of law, that the NCAA program was constitutionally valid. *Id.* at 47, 865 P.2d at 662, 26 Cal. Rptr. 2d at 864.

77. *Id.* at 40-43, 865 P.2d at 657-59, 26 Cal. Rptr. 2d at 859-61; *see supra* notes 53-65 and accompanying text for a discussion of the elements of a cause of action for invasion of privacy.

78. *Id.* at 40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859.

79. *Id.* at 40-41, 865 P.2d at 657-58, 26 Cal. Rptr. 2d at 859-60.

by implicating informational privacy.<sup>80</sup> Because the NCAA drug testing program implicated both autonomy privacy and informational privacy, the court concluded that the program impacted a legally protected privacy interest.<sup>81</sup>

Next, the court determined whether the plaintiffs had a reasonable expectation of privacy regarding urination.<sup>82</sup> Because the plaintiffs were college athletes, the court viewed plaintiffs' expectations within the context of intercollegiate athletic activity.<sup>83</sup> The court analyzed the nature of intercollegiate athletics and concluded that participation in these programs diminished the athletes' expectations of privacy in both internal and external conditions.<sup>84</sup> The court also stated that the NCAA's drug program involves advance notice and the opportunity to consent, diminishing the student athlete's reasonable expectation of privacy.<sup>85</sup> Howev-

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80. *Id.* at 41, 865 P.2d at 657-58, 26 Cal. Rptr. 2d at 859-60.

81. *Id.* at 41, 865 P.2d at 658, 26 Cal. Rptr. 2d at 859-60.

82. *Id.* at 41, 865 P.2d at 658, 26 Cal. Rptr. 2d at 860.

83. *Id.*

84. *Id.* at 41-42, 865 P.2d at 658, 26 Cal. Rptr. 2d at 860. The court focused on the "close regulation and scrutiny of the physical fitness and bodily condition of student athletes." *Id.* at 41, 865 P.2d at 658, 26 Cal. Rptr. 2d at 860.

Required physical examinations (including urinalysis), and special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete's life not shared by other students or the population at large. Athletes frequently disrobe in the presence of one another and their athletic mentors and assistants in locker room settings where private bodily parts are readily observable by others of the same sex. They also exchange information about their physical condition and medical treatment with coaches, trainers, and others who have a "need to know."

*Id.*

85. *Id.* at 42, 865 P.2d at 658-59, 26 Cal. Rptr. 2d at 860. The court acknowledged that an athlete who refuses to be tested for drugs may be disqualified from competition, but asserted that this consequence does not render the athlete's consent involuntary. *Id.* at 42, 865 P.2d at 659, 26 Cal. Rptr. 2d at 860-61. The court focused on the fact that participation in college athletics is not "a government benefit or an economic necessity" and that such participation "necessarily entails a willingness to forgo assertion of individual rights one might otherwise have in order to receive the benefits of communal association." *Id.* at 42-43, 865 P.2d at 659, 26 Cal. Rptr. 2d at 861.

Specifically addressing the NCAA and college athletics, the court stated:

The NCAA is democratically governed by its member institutions, including Stanford. Acting collectively, those institutions, including Stanford, make the rules, including those regarding drug use and testing. If, knowing the rules, plaintiffs and Stanford choose to play the game, they have, by social conven-



er, the court concluded that, although the student athlete's reasonable expectations of privacy are diminished, they are not "thereby rendered de minimis."<sup>86</sup>

The court next determined whether the invasion into these privacy interests was serious.<sup>87</sup> The court concluded that the method of specimen collection utilized by the NCAA was a serious invasion into the privacy of plaintiffs.<sup>88</sup> The court found that because the NCAA used a "particularly intrusive monitored urination procedure" which was "unique to the NCAA's program," the testing warranted further inquiry, regardless of the athlete's diminished expectation of privacy.<sup>89</sup>

## 2. Competing Interests Asserted by the NCAA

Next, the court considered the competing interests set forth by the NCAA in support of its drug testing program:<sup>90</sup> "(1) safeguarding the integrity of intercollegiate athletic competition; and (2) protecting the health and safety of student athletes."<sup>91</sup>

Initially, the court acknowledged that the NCAA's imposition of a drug testing program was reasonably calculated to further its interest in safeguarding the integrity of collegiate sports.<sup>92</sup> The court traced the implementation of the testing program and found that the benefits of the testing outweighed the intrusion into the privacy rights of the athletes.<sup>93</sup>

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tion and legal act, fully and voluntarily acquiesced in the application of those rules. To view the matter otherwise would impair the privacy and associational rights of all NCAA institutions and athletes.

*Id.* at 43, 865 P.2d at 659, 26 Cal. Rptr. 2d at 861 (footnotes omitted).

86. *Id.* at 43, 865 P.2d at 659, 26 Cal. Rptr. 2d at 861.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 43, 865 P.2d at 659, 26 Cal. Rptr. 2d at 861.

91. *Id.* at 43-44, 865 P.2d at 659, 26 Cal. Rptr. 2d at 861. Prior to discussing the validity of these interests, the court emphasized the importance of the NCAA, stating: "The NCAA is, without doubt, a highly visible and powerful institution, holding, as it does, a virtual monopoly on high-level intercollegiate athletic competition in the United States." *Id.* at 44, 865 P.2d at 660, 26 Cal. Rptr. 2d at 862. The court also noted that because neither Congress nor the legislature had interfered with the NCAA's rulemaking functions, the court would "regard the NCAA's stated motives and objectives, not with hostility or intense skepticism, but with a 'respectful presumption of validity.'" *Id.* (citing *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984)).

92. *Id.* at 44, 865 P.2d at 660, 26 Cal. Rptr. 2d at 862.

93. *Id.* at 44-46, 865 P.2d at 659-61, 26 Cal. Rptr. 2d at 861-63. The court initially noted that before implementing its program, the NCAA commissioned a study which showed extensive drug use by student athletes. *Id.* at 44, 865 P.2d at 660, 26 Cal. Rptr. 2d at 862. The court then examined the effect of the program on the students and

Because the NCAA set forth adequate countervailing interests to justify the invasion into the plaintiffs' privacy, the court then considered the plaintiffs' assertions that the NCAA failed to justify its conduct as the "least offensive alternative."<sup>94</sup> The plaintiffs argued that the NCAA could have utilized educational programs and suspicion-based drug testing to achieve its stated goals.<sup>95</sup> In a case involving diminished expectations of privacy, however, the court refused to impose, on the NCAA or any other private organization, the burden of proving that its conduct is the "least offensive alternative."<sup>96</sup>

The court expressed concern over the NCAA's method of monitoring urinalysis.<sup>97</sup> The court asserted that the athletes maintained a right of privacy regarding observation of their excretory functions, and therefore the NCAA had to justify its use of direct monitoring.<sup>98</sup> In response, the NCAA argued that direct monitoring of urination was the only accurate means to accomplish drug testing.<sup>99</sup> The plaintiffs, however, failed to offer any evidence on the availability of less invasive alternatives.<sup>100</sup>

concluded that "[a] drug testing program serves to minimize . . . pressure by providing at least some assurance that drug use will be detected and the user disqualified" resulting in "significant and direct benefits to the student athletes themselves, allowing them to concentrate on the merits of their athletic task without undue concern about loss of a competitive edge." *Id.* at 45, 865 P.2d at 660, 26 Cal. Rptr. 2d at 862.

The court also acknowledged the NCAA's role as a business, which offers athletic events as public entertainment. *Id.* at 46, 865 P.2d at 661, 26 Cal. Rptr. 2d at 863. Drug use in this arena impairs the NCAA's reputation in the eyes of its viewing customers. *Id.*

Finally, the court noted the importance of drug testing to the health and safety of college athletes. *Id.* Because the NCAA sponsors athletic events, it creates the potential for injuries which justifies protecting the athlete's safety. *Id.*

94. *Id.* at 50, 865 P.2d at 664, 26 Cal. Rptr. 2d at 866.

95. *Id.* The court analyzed these alternatives and concluded that neither option would adequately serve the NCAA's goals. *Id.*

96. *Id.*

97. *Id.* During the drug testing process, an NCAA official of the same sex as the athlete stands five to seven feet away while the urine sample is collected. *Id.*

98. *Id.* at 50, 865 P.2d at 664, 26 Cal. Rptr. 2d at 866.

99. *Id.* The NCAA presented evidence which indicated that detection could be evaded by altered or substituted urine samples. *Id.* The NCAA further argued that testing alone was not enough to achieve its goals; rather, "effective and accurate testing of unaltered and uncontaminated samples" was necessary. *Id.*

100. *Id.* at 51, 865 P.2d at 664, 26 Cal. Rptr. 2d at 866. The supreme court rejected the trial court's finding that direct monitoring of urination was not necessary to ensure a valid urine sample, claiming that this conclusion was not supported by substantial evidence. *Id.*

Therefore, because the plaintiffs failed to satisfy their burden, the court found direct monitoring valid.<sup>101</sup>

Finally, the court examined the plaintiffs' contentions that the drug testing program violated their information privacy rights.<sup>102</sup> The court looked to the plaintiffs' reasonable expectation of privacy concerning informational rights and concluded that student athletes have a diminished expectation of privacy.<sup>103</sup> The court found, however, that "[d]irect and specific inquiries about personal medications" constituted a serious invasion into the diminished privacy rights.<sup>104</sup>

The court then considered the competing interests set forth by the NCAA and determined that the information gathering procedure utilized by the NCAA adequately furthered its stated goals.<sup>105</sup> The court concluded that the plaintiffs "did not prove that the NCAA [was] 'collecting and stockpiling unnecessary information'" in violation of the Privacy Initiative.<sup>106</sup>

Because the NCAA adequately set forth justification for its intrusion into both the autonomy privacy and informational privacy of student athletes, and because the plaintiffs were unable to prove that less intrusive alternatives existed, the majority held that NCAA drug testing procedures do not violate the California constitutional right to privacy.<sup>107</sup>

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101. *Id.* at 51-52, 865 P.2d at 665, 26 Cal. Rptr. 2d at 867. The court, however, indicated that there may be less intrusive alternatives to direct monitoring, thereby leaving the door open for other athletes to challenge the NCAA's methods of implementing its drug testing program. *Id.* at 52, 865 P.2d at 665, 26 Cal. Rptr. 2d at 867. If such future litigation arises, plaintiffs must be able to demonstrate that less intrusive alternatives will adequately provide valid urine samples. *Id.*

102. *Id.* at 52, 865 P.2d at 665, 26 Cal. Rptr. 2d at 867.

103. *Id.* The court noted that the exchange of confidential information regarding the physical and medical condition of athletes is common in the athletic arena. *Id.* The court stated:

Coaches, trainers, and team physicians necessarily learn intimate details of student athletes' bodily condition, including illnesses, medical problems, and medications prescribed or taken. Plaintiffs do not demonstrate that sharing similar information with the NCAA, in its capacity as a regulator of athletic competition in which plaintiffs have voluntarily elected to participate, presents any greater risk to privacy.

*Id.* at 52-53, 865 P.2d at 665, 26 Cal. Rptr. 2d at 867-68.

104. *Id.* at 53, 865 P.2d at 666, 26 Cal. Rptr. 2d at 868.

105. *Id.* at 54, 865 P.2d at 666, 26 Cal. Rptr. 2d at 869. The court analyzed the protections offered by the NCAA to protect the student athletes' privacy rights such as "numbering of urine specimens, chain of custody procedures, and control of disclosures regarding disqualified athletes." *Id.* at 53, 865 P.2d at 666, 26 Cal. Rptr. 2d at 868. The court also noted that the plaintiffs did not criticize the NCAA's methods regarding these matters. *Id.*

106. *Id.* at 54, 865 P.2d at 666, 26 Cal. Rptr. 2d at 869.

107. *Id.* at 9, 865 P.2d at 637, 26 Cal. Rptr. 2d at 838. Justice George concurred in

*E. Justice Mosk's Dissent*

Justice Mosk wrote a scathing and lengthy dissent in which he charged the majority with abrogating the right of privacy. He wrote:

The majority all but abrogate the right of privacy. They plainly consider it "bad policy." What of their "policy" assessment? Is the right of privacy "good policy"? Is it "bad policy"? It simply does not matter. To be sure, the right of privacy reflects a choice of policy. But it is a choice that has already been made—by the people, in their capacity as sovereign, in the California Constitution. It is therefore a choice that we as judges must accept and respect, regardless of personal beliefs or predilections. Regrettably, in this case the majority have not so conducted themselves with regard to the people's constitutional policy declaring a right of privacy.<sup>108</sup>

Justice Mosk, like the majority, traced the passage of the Privacy Initiative, but concluded that the right to privacy is fundamental, compelling, and basic,<sup>109</sup> and as such "should be abridged only when there is compelling public need."<sup>110</sup> Justice Mosk argued that, once a plaintiff pleads that the defendant has interfered with a right of privacy, the defendant must plead and prove by a preponderance of the evidence that the conduct was justified by a compelling public need.<sup>111</sup>

the majority decision regarding the application of the privacy initiative to private, non-governmental entities and the majority decision that the NCAA drug testing program does not violate the privacy rights of plaintiffs. *Id.* at 62-63, 865 P.2d at 672-73, 26 Cal. Rptr. 2d at 874-75 (George, J., concurring and dissenting). However, Justice George dissented from the majority decision regarding the standard to be applied in privacy cases. *Id.* at 64-70, 865 P.2d at 673-77, 26 Cal. Rptr. 2d at 875-80 (George, J., concurring and dissenting). He argued that the defendant must prove a compelling state interest to justify conduct intruding upon constitutionally protected privacy interests. *Id.* He ultimately concluded that the NCAA had set forth such compelling interests. *Id.* at 70-73, 865 P.2d at 677-79, 26 Cal. Rptr. 2d at 880-82 (George, J., concurring and dissenting).

108. *Id.* at 73-74, 865 P.2d at 679-80, 26 Cal. Rptr. 2d at 882 (Mosk, J., dissenting) (footnotes omitted).

109. *Id.* at 74-77, 865 P.2d at 680-82, 26 Cal. Rptr. 2d at 882-85 (Mosk, J., dissenting). Like the majority, Justice Mosk relied on the Ballot Pamphlet in formulating his opinions. *Id.* (Mosk, J., dissenting).

110. *Id.* at 78, 865 P.2d at 682, 26 Cal. Rptr. 2d at 885 (Mosk, J., dissenting) (quoting Ballot Pamphlet, p. 27). Justice Mosk also made the following conclusions regarding the right to privacy: (1) "our traditional freedoms" and "American heritage" are the source of the right to privacy; (2) privacy is the "right to be left alone"; (3) privacy includes informational privacy, autonomy privacy, and the literal right to be left alone; (4) the right to privacy is broad in scope; (5) privacy is dynamic in nature; (6) the right to privacy provides unlimited coverage; and (7) the right to privacy is justiciable. *Id.* at 80-85, 865 P.2d at 684-88, 26 Cal. Rptr. 2d at 887-91 (Mosk, J., dissenting).

111. *Id.* at 85-86, 865 P.2d at 688, 26 Cal. Rptr. 2d at 891 (Mosk, J., dissenting).

Justice Mosk next considered the NCAA drug testing program.<sup>112</sup> Unlike the majority, Justice Mosk found that the lower court's findings of fact withstood appellate scrutiny.<sup>113</sup> Based on these findings, he concluded that the NCAA drug testing program violated the California Constitution because the NCAA did not prove a compelling public need to justify the intrusion on privacy rights.<sup>114</sup>

Finally, Justice Mosk attacked specific aspects of the majority opinion.<sup>115</sup> Justice Mosk concluded by expressing his thoughts on the impact of the majority decision:

Today, the majority take away from Stanford student athletes—and all other Californians—the right to privacy guaranteed by the California Constitution. At the same time, they grant to the NCAA—and any other intruding party—a “right of publicity” based upon nothing more than their own views of “good” and “bad” policy.<sup>116</sup>

#### IV. IMPACT

In the wake of rejected federal constitutional challenges, many commentators hoped that the California Supreme Court would use *Hill* to preserve the student athlete's right to privacy.<sup>117</sup> In what may be considered a major blow to the athletic community, the court instead further restricted athletes' rights by determining, as a matter of law, that athletes have a diminished expectation of privacy. Because the California Constitution offers one of the highest levels of privacy protections,<sup>118</sup> it is unlikely that any future challenges to the NCAA drug testing program will be successful.<sup>119</sup>

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112. *Id.* at 86, 865 P.2d at 688, 26 Cal. Rptr. 2d at 891 (Mosk, J., dissenting).

113. *Id.* at 88, 865 P.2d at 690, 26 Cal. Rptr. 2d at 893 (Mosk, J., dissenting). For a discussion of the majority's approach to the lower court decision, see *id.* at 51, 865 P.2d at 664, 26 Cal. Rptr. 2d at 866.

114. *Id.* at 88, 865 P.2d at 690, 26 Cal. Rptr. 2d at 893 (Mosk, J., dissenting). Specifically, Justice Mosk reviewed the findings of the superior court and determined that its conclusions were supported by the evidence. *Id.* (Mosk, J., dissenting). Accordingly, he agreed with the court of appeal that the lower court decision should be affirmed. *Id.* (Mosk, J., dissenting).

115. *Id.* at 103, 865 P.2d at 699-700, 26 Cal. Rptr. 2d at 903 (Mosk, J., dissenting). Justice Mosk wrote: “In conducting an analysis that is completely novel, the majority adopt what must be termed a balanced approach: they do equal violence to both the law and the facts.” *Id.* at 103, 865 P.2d at 699, 26 Cal. Rptr. 2d at 903 (Mosk, J., dissenting). For the majority response to Justice Mosk's criticisms, see *id.* at 56, 865 P.2d at 668, 26 Cal. Rptr. 2d at 870.

116. *Id.* at 110, 865 P.2d at 704, 26 Cal. Rptr. 2d at 907 (Mosk, J., dissenting).

117. See *supra* notes 10-13 and accompanying text.

118. See *supra* note 10 and accompanying text.

119. Although courts may be unlikely to find drug testing violative of the right to privacy in the NCAA setting, they may find that the NCAA's actual techniques are too

The specific outcome of this case appears to render hopeless the quest for privacy in the athletic context. However, the court maintained that each decision must be made on a case by case analysis. In fact, the court specifically stated that "we intimate no views about the legality of blanket or random drug testing conducted by employers."<sup>120</sup> Therefore, although commentators may suggest that the court has opened the door to extensive drug testing and invasions of privacy, this decision cannot be construed as giving the green light to private or public actors to begin random drug testing. Rather, the holding itself is limited in scope; although it does wield a heavy blow to the athletic community, its effects may not be widespread.

On a more positive note for privacy enthusiasts, the court has definitively stated that the Privacy Initiative does apply to private actors and has set forth guidelines for plaintiffs to follow.<sup>121</sup> The mere fact that NCAA athletes did not succeed under these guidelines does not preclude other injured plaintiffs from asserting valid invasion of privacy claims.<sup>122</sup>

Although *Hill* may appear to strip Californians of their right to privacy, it simply defines the law in the privacy arena.<sup>123</sup> *Hill* is not the final word on drug testing.<sup>124</sup> Because each privacy violation must be decided on a case by case analysis, each individual will have the opportunity to defend his privacy. Therefore, while *Hill* seems to take away the privacy

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intrusive. See *supra* note 101 and accompanying text.

120. *Hill*, 7 Cal. 4th at 54, 865 P.2d at 667, 26 Cal. Rptr. 2d at 869. The court stated: "Employment settings are diverse, complex, and very different from intercollegiate athletic competition. Reasonable expectations of privacy in those settings are generally not diminished by the emphasis on bodily condition, physical training, and extracurricular competition inherent in athletics." *Id.*

121. The privacy analysis set forth in *Hill* was applied by the First Appellate District Court when it found unconstitutional a law requiring parental or court consent before an unemancipated minor could undergo a therapeutic abortion. *American Academy of Pediatrics v. Lungren*, 94 Daily Journal D.A.R. 9477 (1994).

122. See, e.g., *id.*

123. *Hill* has and will continue to generate criticisms of the California Supreme Court. The court has chatized in the past for becoming too conservative, and this decision solidifies that title. Philip Hager, *State Supreme Court Sheds its Activist Role*, L.A. Times, Dec. 15, 1991, at A3. Whether this shift in the court is seen as a detriment or a benefit to the state of California depends upon each individual's viewpoint.

124. See *supra* note 101 and accompanying text.

rights embedded in the Constitution, it may in effect preserve these rights.

JENNIFER L. SPAZIANO

## III. COUNTIES

*The Operations Committee of the Retirement Board of the Orange County Employees Retirement System is not a "legislative body" within the meaning of the Ralph M. Brown Act and, therefore, is not subject to the open meeting requirements of the Act: Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors.*

## I. INTRODUCTION

In *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*,<sup>1</sup> the California Supreme Court addressed the issue of whether the Operations Committee of the Retirement Board of the Orange County Employees Retirement System (Board) is a "legislative body" within the meaning of the Ralph M. Brown Act (Act)<sup>2</sup> and, therefore, subject to the open meeting requirements of the Act.<sup>3</sup> Since

1. 6 Cal. 4th 821, 863 P.2d 218, 25 Cal. Rptr. 2d 148 (1993). Justice Panelli authored the majority opinion, in which Chief Justice Lucas and Justices Arabian, Baxter, and George concurred. *Id.* at 823-34, 863 P.2d at 219-27, 25 Cal. Rptr. 2d at 149-57. Justice Mosk filed a separate opinion, concurring in part and dissenting in part. *Id.* at 834, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157 (Mosk, J., concurring and dissenting). Justice Kennard filed a separate dissenting opinion. *Id.* at 835-40, 863 P.2d at 227-31, 25 Cal. Rptr. 2d at 157-61 (Kennard, J., dissenting).

2. CAL. GOV'T CODE §§ 54950-54962 (West 1983 & Supp. 1994). California enacted the Ralph M. Brown Act to insure that actions and deliberations of public agencies be conducted openly. *See id.* § 54950. "The people of this State do not yield their sovereignty to the agencies which serve them . . . [and] insist on remaining informed so that they may retain control over the instruments they have created." *Id.* *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 578-583 (9th ed. 1988 & Supp. 1994) (discussing open meeting acts).

3. *Freedom*, 6 Cal. 4th at 823-24, 863 P.2d at 220, 25 Cal. Rptr. 2d at 150. On June 18, 1991, Freedom Newspapers was denied permission to attend a meeting of the Operations Committee of the Retirement Board of the Orange County Employees Retirement System. *Id.* at 824, 863 P.2d at 220, 25 Cal. Rptr. 2d at 150. The meeting was held to prescribe recommended changes to the Board's travel policy. *Id.* The committee excluded Freedom Newspapers because it claimed that the session was not subject to the open meeting requirements of the Ralph M. Brown Act. *Id.* at 824-25, 863 P.2d at 220, 25 Cal. Rptr. 2d at 150.

On June 19, 1991, the Operations Committee, in a public session, read its recommendations to the full Board. *Id.* at 825, 863 P.2d at 220, 25 Cal. Rptr. 2d at 150. The Board voted to accept the recommendations of the Operations Committee. *Id.*

Freedom Newspapers unsuccessfully petitioned the trial court for a writ of man-



the Operations Committee is composed solely of members of the Board and constitutes less than a quorum of the governing body,<sup>4</sup> the court held that the Operations Committee is not a legislative body<sup>5</sup> under California Government Code section 54952.3.<sup>6</sup> Therefore, the Operations Committee is not subject to the open meeting requirements of the Act.<sup>7</sup>

## II. TREATMENT

### A. *Majority Opinion*

The court acknowledged that the Board itself is a legislative body under California Government Code section 54952<sup>8</sup> and is, therefore, subject to the open meeting requirements of the Act.<sup>9</sup> The court then considered the conflicting interpretations of the "less-than-a-quorum" excep-

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date alleging that the Operations Committee meeting was subject to the open meeting requirements of the Ralph M. Brown Act. *Id.* at 825, 863 P.2d at 221, 25 Cal. Rptr. 2d at 151. Freedom Newspapers appealed from the trial court's judgment and the court of appeal reversed. *Id.*

4. *Id.* at 834, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157. "The Orange County Employees Retirement System is governed by a nine-member Board. Five members of the Board constitute a quorum." *Id.* at 824, 863 P.2d at 220, 25 Cal. Rptr. 2d at 150. The Chairman created five advisory committees, each composed of four members of the Board, to review business matters of the Board and to make recommendations for action. *Id.* The full Board considers the committees' recommendations at public meetings. *Id.* None of the five committees (benefit, investment, liason, operations, and real estate) has any decision making authority. *Id.*

5. "[L]egislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members . . ." CAL. GOV'T CODE § 54952 (West 1983) (amended 1994).

"[L]egislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency." *Id.* § 54952.3 (repealed April 1, 1994).

The parties did not dispute that the Operations Committee was "advisory." *Freedom*, 6 Cal. 4th at 824 n.3, 863 P.2d at 220 n.3, 25 Cal. Rptr. 2d at 150 n.3.

6. *Freedom*, 6 Cal. 4th at 837, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157. "'Legislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." CAL. GOV'T CODE § 54952.3 (repealed April 1, 1994).

7. *Freedom*, 6 Cal. 4th at 834, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157.

8. *See supra* note 5 and accompanying text.

9. *Freedom*, 6 Cal. 4th at 824, 863 P.2d at 220, 25 Cal. Rptr. 2d at 150; *see* Peter G. Guthrie, *Validity Construction and Application of Statutes Making Public Proceedings Open to the Public*, 38 A.L.R. 3d 1070 (1993); Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165 (1993).

tion of Government Code section 54952.3.<sup>10</sup>

The court argued that the mere exemption of less-than-a-quorum advisory committees from the relaxed procedural requirements of section 54952.3 would "result in absurdity."<sup>11</sup> Under such an interpretation, the court reasoned that even temporary committees would be required to hold regular meetings under the Act's general procedural requirements, even though temporary committees, by definition, do not hold "regular" meetings.<sup>12</sup> The court concluded, therefore, that section 54952.3 exempted less-than-a-quorum advisory committees from the definition of legislative body for purposes of the Act.<sup>13</sup>

The court further reasoned that the intent and the purpose of the Act are retained even if less-than-a-quorum advisory committees are exempt from the open meeting requirements since a public meeting must be held for the Board to consider or act upon the committee's recommendations.<sup>14</sup> The court considered this a reasonable balance between the public's right to know and the "practical needs of governmental organizations."<sup>15</sup> Therefore, the court concluded that the Operations Committee meeting was not subject to the open meeting requirements of the Act.<sup>16</sup>

10. *Freedom*, 6 Cal. 4th at 826, 863 P.2d at 221, 25 Cal. Rptr. 2d at 151. The Board argued that the Operations Committee, as an advisory committee excluded from the definition of legislative body under § 54952.3, was exempt from all open meeting requirements in the Act. *Id.* *Freedom Newspapers* argued that the less-than-a-quorum exception merely exempted the Operations Committee from the relaxed procedural requirements of § 54952.3. *Id.*

11. *Id.* at 827, 863 P.2d at 222, 25 Cal. Rptr. 2d at 152; *see infra* note 22 and accompanying text.

12. *Freedom*, 6th Cal. 4th at 827-28, 863 P.2d at 222, 25 Cal. Rptr. 2d at 152. "The legislative body of a local agency shall provide . . . the time for holding regular meetings." CAL. GOV'T CODE § 54954 (West 1983) (amended 1994).

13. *Freedom*, 6 Cal. 4th at 833, 863 P.2d at 226, 25 Cal. Rptr. 2d at 156; *see also* *Henderson v. Board of Educ.*, 78 Cal. App. 3d 875, 144 Cal. Rptr. 568 (1978) (finding that § 54952.3 expressly exempted an advisory committee composed of less than a quorum of the governing body from the open meeting requirements of the Act).

14. *Freedom*, 6 Cal. 4th at 833-34, 863 P.2d at 226-27, 25 Cal. Rptr. 2d at 156-57.

15. *Id.*

16. *Id.* However, Justice Panelli expressed no opinion as to whether the Operations Committee would be a legislative body under the newly enacted § 54952(b). *Id.* at 832 n.11, 863 P.2d at 226 n.11, 25 Cal. Rptr. 2d at 156 n.11. Section 54952(b) provides in pertinent part:

However, advisory committees, composed solely of members of the legislative body which are less than a quorum of the legislative body are not legislative

### B. Justice Mosk's Concurring & Dissenting Opinion

Justice Mosk agreed with the result reached by the majority.<sup>17</sup> However, he dissented from the majority, finding that the repeal of California Government Code section 54952.3 by newly enacted 1993 legislation rendered the decision moot.<sup>18</sup> Justice Mosk pointed out that the court has no responsibility to offer advisory opinions on repealed statutes.<sup>19</sup> Justice Mosk concluded that he would have dismissed review since the new legislation answers the question the court sought to resolve.<sup>20</sup>

### C. Justice Kennard's Dissenting Opinion

Justice Kennard disagreed with the majority's conclusion and reasoning.<sup>21</sup> Justice Kennard reasoned that the less-than-a quorum provision of California Government Code section 54952.3 merely exempted advisory committees from the "relaxed" notice standards of section 54952.3.<sup>22</sup> Accordingly, such committees are subject to the more rigid, general requirements that govern legislative bodies.<sup>23</sup> Justice Kennard stated that the purpose of the Act was to insure that citizens of California are "fully informed about the legislative decisionmaking process of elected and appointed officials."<sup>24</sup>

Justice Kennard reasoned that the majority opinion provides a means by which a legislative body can shield its decisionmaking process from the public by dividing into committees constituting less than a quorum of

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bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

CAL. GOV'T CODE § 54952(b) (West Supp. 1994).

17. *Freedom*, 6 Cal. 4th at 834, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157 (Mosk, J., concurring and dissenting).

18. *Id.* (Mosk, J., concurring and dissenting); *see supra* note 16 and accompanying text.

19. *Freedom*, 6 Cal. 4th at 834, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157 (Mosk, J., concurring and dissenting).

20. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk interpreted amended § 54952(b) to exclude advisory committees from the definition of legislative body unless they qualify as "standing committees". *Id.* (Mosk, J., concurring and dissenting).

21. *Id.* at 835, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157 (Kennard, J., dissenting).

22. *Id.* at 838, 863 P.2d at 229, 25 Cal. Rptr. 2d at 159 (Kennard, J., dissenting).

23. *Id.* (Kennard, J., dissenting). Under § 54952.3, an advisory committee can elect to give 24-hour written notice of its meetings or to provide for regular meetings in its bylaws or rules. CAL. GOV'T CODE § 54952.3 (repealed April 1, 1994). "No other notice of regular meetings is required." *Id.*

24. *Freedom*, 6 Cal. 4th at 835, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157 (Kennard, J., dissenting).

the governing body and can, thereby, "contravene the goal" of the Act.<sup>25</sup> Justice Kennard concluded that the court should require the Operations Committee to hold open meetings to effectuate the clear intent of the Act.<sup>26</sup>

### III. IMPACT AND CONCLUSION

The supreme court's decision makes it clear that, at least prior to April 1, 1994, advisory committees composed solely of members of a governing body that constitute less than a quorum of the governing body are exempt from the open meeting requirements of the Ralph M. Brown Act.<sup>27</sup> However, with amendment of Government Code section 54952<sup>28</sup> and the repeal of section 54952.3,<sup>29</sup> the court has yet to decide whether such advisory committees will continue to enjoy their "exempt" status.<sup>30</sup> The court left for another day the question of whether the Operations Committee would qualify as a legislative body under the new legislation.<sup>31</sup>

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25. *Id.* (Kennard, J., dissenting). Justice Kennard noted that the purpose of the June 18, 1991, Operations Committee meeting was to re-evaluate the travel policy of the Board. *Id.* at 835, 863 P.2d at 228, 25 Cal. Rptr. 2d at 158 (Kennard, J., dissenting). The travel policy was the subject of controversy after reports stated that Board members used public funds for a European tour. *Id.* (Kennard, J., dissenting).

26. *Id.* at 840, 863 P.2d at 231, 25 Cal. Rptr. 2d at 161 (Kennard, J., dissenting). Justice Kennard noted that the majority opinion will be "short-lived" since § 54952(b) specifies that standing committees are legislative bodies. *Id.* at 839 n.5, 863 P.2d at 230 n.5, 25 Cal. Rptr. 2d at 160 n.5 (Kennard, J., dissenting).

27. *Id.* at 834, 863 P.2d at 227, 25 Cal. Rptr. 2d at 157.

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

29. CAL. GOV'T CODE § 54952.3 (repealed April 1, 1994).

30. *Freedom*, 6 Cal. 4th at 832 n.11, 863 P.2d at 226 n.11, 25 Cal. Rptr. 2d at 156 n.11.

31. *Id.*; *see supra* note 16 and accompanying text.

#### IV. CRIMINAL LAW

- A. *The term "clear proof" in section 26 of the California Penal Code places the burden on the prosecution to prove by clear and convincing evidence, not beyond a reasonable doubt, that a minor knew of the wrongfulness of the charged conduct for purposes of determining when a child becomes a ward of the state: In re Manuel L.*

In the case of *In re Manuel L.*,<sup>1</sup> the California Supreme Court analyzed and determined the meaning of the term clear proof used in section 26 of the California Penal Code.<sup>2</sup> A child under the age of fourteen is presumed incapable of committing a crime unless there is a showing of clear proof that the child knew of the wrongfulness of the act.<sup>3</sup> This standard of proof employed by section 26 of the Penal Code (section 26) applies to section 602 of the Welfare and Institutions Code (section 602) for purposes of determining when a child becomes a ward of the state.<sup>4</sup> Therefore, a child cannot be made a ward of the state unless the prosecution successfully presents clear proof that the child knew of the wrongfulness of the charged conduct prior to engaging in it.<sup>5</sup>

In *Manuel L.*, the state filed a section 602 petition alleging that Manuel, an eleven year old child, committed the crimes of receipt of stolen property<sup>6</sup> and assault with force likely to cause bodily injury.<sup>7</sup>

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1. 7 Cal. 4th 229, 865 P.2d 718, 27 Cal. Rptr. 2d 2 (1994). Justice Panelli wrote the opinion of the court, with Chief Justice Lucas and Justices Arabian, Baxter, and George concurring. *Id.* at 231-39, 865 P.2d at 719-24, 27 Cal. Rptr. 2d at 3-8. Justice Kennard wrote a dissenting opinion joined by Justice Mosk. *Id.* at 239-45, 865 P.2d at 724-28, 27 Cal. Rptr. 2d at 8-11 (Kennard, J., dissenting).

2. *Id.* at 232, 865 P.2d at 720, 27 Cal. Rptr. 2d at 3. Section 26 of the California Penal Code states in pertinent part:

All persons are capable of committing crimes except those belonging to the following classes: One - Children under the age of 14, in the absence of *clear proof* that at the time of committing the act charged against them, they knew of its wrongfulness.

CAL. PENAL CODE § 26 (West 1988) (emphasis added).

3. *Manuel L.*, 7 Cal. 4th at 231-32, 865 P.2d at 719, 27 Cal. Rptr. 2d at 3.

4. *Id.* at 232, 865 P.2d at 719, 27 Cal. Rptr. 2d at 3.

5. See CAL. PENAL CODE § 26 (West 1988); CAL. WELF. & INST. CODE § 602 (West 1984).

6. Manuel allegedly purchased stolen bicycle parts from another minor. *Manuel L.*, 7 Cal. 4th at 232-33, 865 P.2d at 720, 27 Cal. Rptr. 2d at 3. For a definition of the crime of receipt of stolen property, see CAL. PENAL CODE § 496 (West 1988 & Supp. 1994).

7. Manuel also allegedly shot sharp pieces of glass at another minor. *Manuel L.*, 7

Based on a psychiatric report, the trial court determined that Manuel knew of the wrongfulness of his conduct and ordered Manuel a ward of the state.<sup>8</sup> Manuel appealed the trial court decision, arguing that the court erred by not applying a reasonable doubt standard in determining whether he had knowledge of the wrongfulness of his conduct.<sup>9</sup>

The supreme court focused first on legislative intent with regard to section 26, noting that other code sections employed the reasonable doubt standard at the time section 26 was enacted.<sup>10</sup> The court viewed this as evidence of the legislature's intent to give clear proof a separate meaning independent from that of reasonable doubt.<sup>11</sup> Drawing on two court of appeal cases,<sup>12</sup> the *Manuel L.* court found the clear proof standard to require a showing by clear and convincing evidence.<sup>13</sup>

The court next responded to Manuel's contention that section 701 of the Welfare and Institutions Code (section 701)<sup>14</sup> requires use of the rea-

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Cal. 4th at 233, 865 P.2d at 720, 27 Cal. Rptr. 2d at 4. For a definition of the crime of assault with force likely to produce great bodily injury, see CAL. PENAL CODE § 245 (West 1988 & Supp. 1994).

8. *Manuel L.*, 7 Cal. 4th at 233, 865 P.2d at 720, 27 Cal. Rptr. 2d at 4.

9. *Id.*

10. California Penal Code § 1096, adopted in the same year as § 26, used the reasonable doubt standard for determining guilt. See CAL. PENAL CODE § 1096 (West 1985). In addition, former Penal Code § 262 specifically stated that in order to uphold a rape conviction involving a child under the age of 14, capability of penetration must be proved beyond a reasonable doubt. See CAL. PENAL CODE § 262, *repealed by* Stat. 1978, ch. 29, § 1. Therefore, the court contended that the differing language pertaining to minors under the age of 14 in § 26 and § 262 demonstrates the legislature's intent to have separate burdens in each of these sections. *Manuel*, 7 Cal. 4th at 234, 865 P.2d at 721, 27 Cal. Rptr. 2d at 4.

11. *Manuel L.*, 7 Cal. 4th at 234, 865 P.2d at 721, 27 Cal. Rptr. 2d at 4.

12. See *In re Michael B.*, 149 Cal. App. 3d 1073, 1087, 197 Cal. Rptr. 379, 388 (1983) (interpreting the clear proof language of § 26 as calling for clear and convincing evidence); *People v. Terry*, 180 Cal. App. 2d 48, 59, 4 Cal. Rptr. 597, 604 (1960) (same). For other appellate court decisions giving clear proof a beyond a reasonable doubt meaning, see *In re Billie Y.*, 220 Cal. App. 3d 127, 269 Cal. Rptr. 212 (1990); *In re Francisco N.*, 186 Cal. App. 3d 175, 230 Cal. Rptr. 475 (1986); *In re Richard T.*, 175 Cal. App. 3d 248, 220 Cal. Rptr. 573 (1985); *Shorridge v. Municipal Court*, 151 Cal. App. 3d 611, 198 Cal. Rptr. 749 (1984).

13. *Manuel L.*, 7 Cal. 4th at 234-35, 865 P.2d at 721, 27 Cal. Rptr. 2d at 5-6.

14. CAL. WELF. & INST. CODE § 701 (West 1984) (employing the reasonable doubt standard of proof to find a minor to be a ward of the state under § 602). The legislature changed the standard in § 701 from by a preponderance of the evidence to beyond a reasonable doubt after the United States Supreme Court mandate in *In re Winship*, 397 U.S. 358 (1970). *Manuel L.*, 7 Cal. 4th at 235, 865 P.2d at 721, 27 Cal.

sonable doubt standard.<sup>15</sup> The court rejected this argument, noting that section 701 pertains to the elements of the offense charged, while section 26 pertains to capacity.<sup>16</sup>

In response to Manuel's argument that due process requires the use of a reasonable doubt standard in light of the holding of *In re Winship*,<sup>17</sup> the court countered that due process only requires the reasonable doubt standard to be employed in proving the elements of a crime and not the capacity to commit a crime.<sup>18</sup> As a result, the court concluded that clear proof requires clear and convincing evidence which comports with the due process requirements of the state and federal constitutions.<sup>19</sup>

In a separate dissenting opinion, Justice Kennard, joined by Justice Mosk, opined that the clear proof standard calls for a showing beyond a reasonable doubt.<sup>20</sup> Justice Kennard denounced the majority's reliance on the two appellate court cases<sup>21</sup> asserting that those cases support the clear and convincing standard only in dicta.<sup>22</sup> In rejecting the majority approach, Justice Kennard traced the *clear proof* terminology to *M'Naghten's Case*<sup>23</sup>, an 1843 English court decision which interpreted

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Rptr. 2d at 5.

15. *Manuel L.*, 7 Cal. 4th at 236, 865 P.2d at 722, 27 Cal. Rptr. 2d at 5.

16. The court emphasized that a "juvenile's capacity remains, as historically it has been, subject to a distinct standard of proof." *Id.*

17. 397 U.S. 358 (1970).

18. *Manuel L.*, 7 Cal. 4th at 238, 865 P.2d at 723, 27 Cal. Rptr. 2d at 7. The court noted several United States Supreme Court cases that did not require the use of the reasonable doubt standard. *See* *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (stating that sentencing considerations do not have to be proven beyond a reasonable doubt); *Patterson v. New York*, 432 U.S. 197 (1977) (noting that a state determines the elements of a crime which must be proved by the reasonable doubt standard). In addition, the court cited several California cases rejecting due process claims. *See, e.g.*, *People v. Boyes*, 149 Cal. App. 3d 812, 197 Cal. Rptr. 105 (1983) (rejecting a due process claim to the presumption of consciousness because it was not an element of the crime). *See generally* *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 2d 275 (1978).

19. *Manuel L.*, 7 Cal. 4th at 239, 865 P.2d at 724, 27 Cal. Rptr. 2d at 7-8.

20. *Id.* at 240, 865 P.2d at 724-25, 27 Cal. Rptr. 2d at 8 (Kennard, J., dissenting).

21. *See supra* note 12 and accompanying text.

22. *Manuel L.*, 7 Cal. 4th at 240-41, 865 P.2d at 725, 27 Cal. Rptr. 2d at 8-9 (Kennard, J., dissenting). Justice Kennard also pointed out that both of the justices who authored the lower court opinions relied upon by the majority changed their view in subsequent decisions. *Id.* at 241, 865 P.2d at 725, 27 Cal. Rptr. 2d at 8-9.

23. 8 Eng. Rep. 718 (1843). Although *M'Naghten's Case* established the definition of insanity, Justice Kennard focused on the clearly proved language in the case. Justice Kennard relied on Professor Henry Weihofen, who interpreted clearly proved as equivalent to beyond a reasonable doubt. *Manuel L.*, 7 Cal. 4th at 242-43, 865 P.2d at 726-27, 27 Cal. Rptr. 2d at 10 (Kennard, J., dissenting); *see* HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, *The Burden of Proof* § 3 (1954).

"clearly proved" as equivalent to "beyond a reasonable doubt".<sup>24</sup> Finally, Justice Kennard noted that "clearly" is an ambiguous term<sup>25</sup> which should be adjudged in favor of the defendant, thereby affording the higher burden of proof.<sup>26</sup>

*In re Manuel L.* exemplifies the ambiguity of the language in section 26 of the California Penal Code, which has the effect of producing conflicting interpretations of clear proof. Although the majority in *Manuel L.* chose to rely on the dicta of two appellate court cases to define clear proof in section 26 as clear and convincing evidence, Justice Kennard articulated a strong argument for the adoption of the higher beyond a reasonable doubt standard of proof. Accordingly, the time is ripe for California legislators to amend section 26 to avoid further confusion surrounding the standard of proof.

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24. *Manuel L.*, 7 Cal. 4th at 242, 865 P.2d at 726, 27 Cal. Rptr. 2d at 9 (Kennard, J., dissenting). Many jurisdictions refused to adopt clearly proved as a standard for insanity because it was too harsh. *Id.* at 243, 865 P.2d at 727, 27 Cal. Rptr. 2d at 10 (Kennard, J., dissenting). In support of her conclusion, Justice Kennard cited *People v. Wreden*, in which the court held that "clearly established by satisfactory proof" was tantamount to . . . beyond a reasonable doubt." *Id.* (quoting *People v. Wreden*, 59 Cal. 392, 395 (1881)).

25. See WEIHOFEN, *supra* note 23, § 3.

26. *Manuel L.*, 7 Cal. 4th at 244, 865 P.2d at 727-28, 27 Cal. Rptr. 2d at 11. See generally *People v. Overstreet*, 42 Cal. 3d 891, 726 P.2d 1288, 231 Cal. Rptr. 213 (1986) (noting that a defendant should be given the benefit of the doubt in statutory interpretation).



- B. *Jury instructions stating that mens rea for assault is established when the state proves that a defendant willfully committed an act that by its nature will probably and directly result in an injury to another does not create an unconstitutional burden-shifting presumption: People v. Colantuono.*

## I. INTRODUCTION

In *People v. Colantuono*<sup>1</sup>, the California Supreme Court addressed the issue of whether the trial court properly instructed the jury on the charges of assault and assault with a deadly weapon. The supreme court held that the trial court did not err when it instructed the jury that the requisite mental intent for assault was presumed where “an act inherently dangerous to others is committed with a conscious disregard of human life and safety.”<sup>2</sup>

According to trial testimony of the only five percipient witnesses, including that of the victim and the defendant, the defendant withdrew a .357 magnum revolver from his waistband during a playful verbal exchange.<sup>3</sup> The defendant, the victim, and the other three witnesses, all young men, were engaged in a “certain amount of horseplay” which continued after the revolver was drawn.<sup>4</sup> Seconds later, the revolver discharged, shooting the victim in the neck and paralyzing him.<sup>5</sup> The defendant claimed that he did not intend to fire the weapon and was not even aware the gun was loaded.<sup>6</sup> Several other witnesses were called to testify to the defendant’s character for nonviolence.<sup>7</sup>

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1. 7 Cal. 4th 206, 865 P.2d 704, 26 Cal. Rptr. 2d 908 (1994). Justice Arabian authored the majority opinion in which Chief Justice Lucas and Justices Panelli, Baxter, and George joined. *Id.* at 210, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910. Justice Mosk filed a separate concurring opinion. *Id.* at 222, 865 P.2d at 715, 26 Cal. Rptr. 2d at 919. Justice Kennard wrote a separate concurring and dissenting opinion, agreeing only with the majority’s result. *Id.* at 225, 865 P.2d at 716, 26 Cal. Rptr. 2d at 920.

2. *Id.* at 221, 865 P.2d at 714, 26 Cal. Rptr. 2d at 918.

3. *Id.* at 211, 865 P.2d at 706-07, 26 Cal. Rptr. 2d at 910.

4. *Id.* at 211, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910.

5. *Id.* The testimony at trial reflected that the defendant was verbally taunted by his victim, that the defendant aimed the gun at the victim in anger, that the victim repeatedly attempted to push the gun away, but that the defendant continued to aim the gun at the victim. Testimony also showed that, either the defendant stated, “I’m going to shoot you” or that the victim asked, “Are you going to shoot me?” The defendant ran away after the gun discharged but later turned himself into the police. *Id.*

6. *Id.* at 211, 865 P.2d at 707, 26 Cal. Rptr. 2d at 910. The defendant had bullets for the revolver in his jacket pocket, but maintained that he carried the revolver for protection from gangs and never carried it loaded when he was out on the street. *Id.*

7. *Id.* at 211, 865 P.2d at 707, 26 Cal. Rptr. 2d at 910-11.

The trial court instructed the jury on assault and assault with a deadly weapon,<sup>8</sup> and added: "[W]hen an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit a battery is presumed."<sup>9</sup> The jury found the defendant guilty of assault with a deadly weapon.<sup>10</sup> The jury also found allegations true that the defendant intentionally inflicted great bodily injury<sup>11</sup> and personally used a firearm in the commission of the crimes.<sup>12</sup>

8. The court gave the standard jury instructions for assault provided in CALJIC No. 9.00:

Every person who [with general criminal intent] makes an unlawful attempt coupled with the present ability, to apply physical force upon the person of another, is guilty of the crime of assault.

In order to prove such crime, each of the following elements must be proved:

1. An unlawful attempt was made to apply physical force upon the person of another,
2. At the time of such attempt the person who made the attempt had the present ability to apply such physical force, [and]
- [3. The person making the attempt had a general criminal intent, which, in this case, means that such person intended to commit an act, the natural and probable consequences of which if successfully completed would be the application of physical force upon the person of another.]

CALJIC 9.00 (5th ed. 1988).

9. *Colantuono*, 7 Cal. 4th at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911. In its entirety, the supplemental instruction read as follows:

The requisite intent for the commission of an assault with a deadly weapon is the intent to commit a battery. Reckless conduct alone does not constitute a sufficient basis for assault or for battery even if the assault results in an injury to another. However, *when an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit a battery is presumed.*

*Id.* at 211-12, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911 (emphasis added).

10. *Id.* at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911. Specifically, the defendant was found to have violated § 245(a)(2) of the Penal Code:

Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

CAL. PENAL CODE § 245(a)(2) (West 1988 & Supp. 1994).

11. *Colantuono*, 7 Cal. 4th at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911; *see* CAL. PENAL CODE § 12022.7 (West 1992 & Supp. 1994).

12. *Colantuono*, 7 Cal. 4th at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911; *see* CAL.

The defendant appealed his conviction and argued that the stated jury instructions created a mandatory presumption with respect to the issue of intent which impermissibly relieved the prosecution of proving every element of the offense beyond a reasonable doubt.<sup>13</sup> The court of appeal affirmed the defendant's conviction and found that the jury instructions did not remove the question of intent from the jury's consideration.<sup>14</sup> The defendant petitioned the California Supreme Court for review<sup>15</sup> and the court granted his petition to "resolve a developing conflict in decisions of the Courts of Appeal."<sup>16</sup>

## II. TREATMENT

In a divided opinion, the California Supreme Court affirmed the defendant's conviction.<sup>17</sup> Justice Arabian, writing for the majority, intended for the present case to resolve the conflicts concerning the requisite mental intent for the crime of simple assault,<sup>18</sup> and the effects of jury instructions stating presumptions as to mental intent.<sup>19</sup> In *Colantuono*, the court attempted to enunciate the answer that "lies somewhere in between"<sup>20</sup> the two alternatives proposed by the defendant and the Attorney General. The defendant argued that the jury instructions allowed intent to be presumed, thereby relieving the prosecutor of his burden to prove all elements of the crime beyond a reasonable doubt.<sup>21</sup> Alternatively, the Attorney General argued that the jury instructions merely "defined those circumstances sufficient to establish the commission of an assault."<sup>22</sup> The court recognized that before it could properly judge the accuracy of the given jury instructions, it must first determine the status of the law relating to the requisite mental intent for the crime of assault.<sup>23</sup>

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PENAL CODE § 12022.5 (West 1992 & Supp. 1994).

13. *Colantuono*, 7 Cal. 4th at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911.

14. *Id.*; see *People v. Colantuono*, 20 Cal. App. 4th 702, 12 Cal. Rptr. 2d 134 (1992).

15. *People v. Colantuono*, 841 P.2d 143, 14 Cal. Rptr. 2d 158 (1992).

16. *Colantuono*, 7 Cal. 4th at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911.

17. *Id.* at 222, 865 P.2d at 715, 26 Cal. Rptr. 2d at 919.

18. The same general principles govern both assault and assault with a deadly weapon. Neither crime involves an assault coupled with a specific intent crime. *Id.* at 213, 865 P.2d at 708, 26 Cal. Rptr. 2d at 912.

19. *Id.* at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911.

20. *Id.* at 212, 865 P.2d at 708, 26 Cal. Rptr. 2d at 911.

21. *Id.*

22. *Id.*

23. *Id.*

## A. Intent

In *Colantuono*, the court held that the prosecution can establish the requisite mens rea for assault and assault with a deadly weapon upon proof that the defendant willfully committed an act that by its nature will probably and directly result in injury to another.<sup>24</sup> The court found that simple assault and assault with a deadly weapon are general intent crimes rather than specific intent crimes.<sup>25</sup>

This was not the first time the California Supreme Court discussed the mens rea element of assault.<sup>26</sup> The court cited to both *People v. Hood*<sup>27</sup> and *People v. Rocha*<sup>28</sup>, in stating that assault was a general intent crime.<sup>29</sup> These cases, however, involved situations when intoxication was pleaded as a defense, and it was not clear whether the general intent formulation would be applied to other contexts.<sup>30</sup>

24. *Id.* at 214, 865 P.2d at 709, 26 Cal. Rptr. 2d at 913. "Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm." *Id.*

25. *Id.* at 215, 865 P.2d at 710, 26 Cal. Rptr. 2d at 914. For an excellent discussion on the possibly inaccurate distinction between general and specific intent for the crime of assault, see William Roth, *General v. Specific Intent: A Time for Terminological Understanding in California*, 7 PEPP. L. REV. 67 (1979).

26. "Deciphering the requisite intent for assault and assault with a deadly weapon has been a recurring task for this court." *Colantuono*, 7 Cal. 4th at 206, 865 P.2d at 708, 26 Cal. Rptr. 2d at 911.

27. 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

28. 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971).

29. The court in *Colantuono* stated that the decision in *People v. Hood* "was consistent with the '[m]any cases' holding that neither offense is a specific intent crime." *Colantuono*, 7 Cal. 4th at 213, 865 P.2d at 708, 26 Cal. Rptr. 2d at 912 (quoting *People v. Hood*, 1 Cal. 3d at 452, 462 P.2d at 370, 82 Cal. Rptr. at 618). In *People v. Rocha*, the court held that the criminal intent required for assault with a deadly weapon is the "general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another . . . . The intent to cause any particular injury . . . is not necessary." *Rocha*, 3 Cal. 3d at 899, 479 P.2d at 376-77, 92 Cal. Rptr. at 176-77.

30. *Colantuono*, 7 Cal. 4th at 213, 865 P.2d at 708, 26 Cal. Rptr. 2d at 912. Here, the *Colantuono* court discussed the "other policy considerations" which decided the issue in *Hood*, that "an offense of this nature is not one which requires an intent that is susceptible to negation through a showing of voluntary intoxication." *Id.* (quoting *Hood*, 1 Cal. 3d at 458, 462 P.2d at 370, 82 Cal. Rptr. at 618); see also Roth, *supra* note 25, at 78 (discussing the voluntary intoxication defense in *Hood* and *Rocha*); Douglas R. Young, Comment, *Rethinking the Specific-General Intent Doctrine in California Criminal Law*, 63 CAL. L. REV. 1352, 1357 (1975) (discussing the general-specific intent dichotomy with reference to the crime of assault).

The *Colantuono* court conceded that "a certain measure of understandable analytical uncertainty continues."<sup>31</sup> In *People v. Carmen*,<sup>32</sup> the California Supreme Court indicated that the requisite mens rea for assault was the specific intent to commit a battery.<sup>33</sup> The *Colantuono* court stated that this interpretation was incorrect, and probably resulted from the commonly used technical misnomer of characterizing an assault as an attempted battery.<sup>34</sup> Assault is a separate crime, distinct from a failed battery attempt.<sup>35</sup> As a result, what is most important to the court is the defendant's present willful conduct, not an intent to cause further consequences.<sup>36</sup> "The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm."<sup>37</sup>

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31. *Colantuono*, 7 Cal. 4th at 215, 865 P.2d at 709, 26 Cal. Rptr. 2d at 913; see also 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* § 401 (2d ed. 1988) (discussing specific intent to commit a battery as an element of assault).

32. 36 Cal. 2d 768, 228 P.2d 281 (1951).

33. The *Colantuono* court found *Carmen* to impliedly assert that assault was a specific intent crime, arguing, "[o]ne could not very well "attempt" or try to "commit" an injury on the person of another if he had no intent to cause any injury to such other person." *Colantuono*, 7 Cal. 4th at 215, 865 P.2d at 709, 26 Cal. Rptr. 2d at 913 (quoting *People v. Flannel*, 25 Cal. 3d 668, 684 n.12, 603 P.2d 1, 10 n.12, 160 Cal. Rptr. 84, 93 n.12 (1979)).

34. *Id.* at 215, 865 P.2d at 710, 26 Cal. Rptr. 2d at 913-14; see also 17 CAL. JUR. 3D *Criminal Law* § 116 (1984) (finding that "[a]lthough the courts are inclined to minimize the distinction between assault and attempt, a definite distinction does exist"); cf. 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person*, § 401 (arguing that an assault is an attempt); CAL. PENAL CODE § 240 (West 1994) (finding "[a]n assault is an unlawful attempt . . . to commit a violent injury on the person of another").

The *Colantuono* court defined the word "attempt" by arguing that the legislature in 1872 merely "used the reference only in its ordinary sense, not as the term of art we currently conceptualize, i.e., a failed or ineffectual effort to commit a substantive offense." *Colantuono*, 7 Cal. 4th at 216, 865 P.2d at 710, 26 Cal. Rptr. 2d at 914.

35. *Id.* The court reasoned that, unless assault is seen as an independent offense in and of itself, it would be otherwise unnecessary to so distinguish it because the prosecution could charge all potential perpetrators with an "attempt" of the underlying substantive offense. *Id.*

Both Justice Mosk and Justice Kennard wrote separate concurring opinions, disagreeing with the majority's interpretation of assault as a separate offense from that of attempted battery, and also disagreeing with each other as to the requisite mental intent. *Id.* at 223, 224, 865 P.2d at 715, 716, 26 Cal. Rptr. 2d at 919, 920. Both justices concluded that the requisite mental intent for the crime of assault was the "intent to commit a battery." However, Justice Mosk believed the majority opinion implied that such an intent must be formulated, whereas Justice Kennard interpreted the majority opinion to find that the proper mens rea was a specific intent. *Id.*

36. *Id.* at 218, 865 P.2d at 711, 26 Cal. Rptr. 2d at 915.

37. *Id.* at 218, 865 P.2d at 712, 26 Cal. Rptr. 2d at 916. Thus, a general intent to

### B. Jury Instructions

Holding that assault is a general intent crime, the court found that jury instructions stating "when an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit a battery is presumed" did not create an unconstitutional burden-shifting presumption.<sup>38</sup>

In another arena, the 1979 United States Supreme Court case of *Sandstrom v. Montana*<sup>39</sup> held that a jury instruction stating that "the law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutionally shifted to the defense the burden of disproving the "purposely or knowingly" element of deliberate homicide.<sup>40</sup> In *People v. Burres*<sup>41</sup>, a California court of appeal applied similar logic in striking down a jury instruction which presumed an intent to commit a battery where "an act inherently dangerous to others is committed with a conscious disregard of human life and safety."<sup>42</sup>

The *Colantuono* court, however, distinguished the *Burres* conclusion.<sup>43</sup> Although both jury instructions were substantially similar, the court found no error in the *Colantuono* instructions because the language at issue merely addressed "conduct constituting an assault, includ-

"attempt to commit the violence" is sufficient to establish the crime. *Id.*

Justice Kennard, however, would disagree. Justice Kennard argued that assault is a specific intent crime that "requires that the defendant intend to injure the victim." *Id.* at 225, 865 P.2d at 717, 26 Cal. Rptr. 2d at 921 (Kennard, J., concurring and dissenting).

38. *Id.* at 224, 865 P.2d at 716, 26 Cal. Rptr. 2d at 920.

39. 442 U.S. 510 (1979).

40. *Id.* at 524. For an in-depth discussion of the *Sandstrom* analysis, see Laurie A. Briggs, Note, *Presumptive Mens Rea: An Analysis of the Federal Judiciary's Retreat from Sandstrom v. Montana*, 64 NOTRE DAME L. REV. 367 (1989).

41. 101 Cal. App. 3d 341, 161 Cal. Rptr. 593 (1980).

42. *Id.* at 353, 161 Cal. Rptr. at 599. The *Burres* court emphasized that it was not holding presumptions invalid per se, but rather this one in particular because the court failed to instruct the jury as to its effect. *Id.*

The jury instruction involved here was almost identical to that employed in an earlier case cited by the *Colantuono* court, *People v. Lathus*, 35 Cal. App. 3d 466, 110 Cal. Rptr. 921 (1973). In *Lathus*, however, the issue on appeal was the sufficiency of evidence, not the unconstitutionality of burden-shifting presumptions. Under *Lathus*, intent to commit a battery may be presumed when one commits an act inherently dangerous to others with conscious disregard of human life. *Id.* at 470, 110 Cal. Rptr. at 924.

43. *Colantuono*, 7 Cal. 4th at 220, 865 P.2d at 713, 26 Cal. Rptr. 2d at 917-18.

ing the element of general criminal intent.”<sup>44</sup> Intent, the court explained, always remains an issue of fact, and the “jury must clearly understand their responsibility to resolve that question beyond a reasonable doubt, uninfluenced and unassisted by any other principles of law.”<sup>45</sup> As a final caveat, the court noted that the use of the word “presumption” may be problematic and the lower courts are to avoid reference to that term.<sup>46</sup>

The court finally noted that since the jury specifically found that the defendant inflicted great bodily harm, there was no prejudicial error.<sup>47</sup>

### III. CONCLUSION

Although the California Supreme Court attempted to define the requisite mental intent necessary for the crime of assault, substantial uncertainty still remains.<sup>48</sup> According to the court’s analysis, the mens rea element of the crime appears to be subsumed, thereby dispensing with it altogether.<sup>49</sup>

Therefore, it is not altogether surprising that the court only superficially addresses defendant’s argument, and cautions the lower courts only against referring to the term presumption in jury instructions.<sup>50</sup> The jury found special allegations that the defendant inflicted great bodily harm. This ameliorated any prejudicial error arising from unconstitutional burden-shifting presumptions within the jury instructions.<sup>51</sup> This may be a partial explanation of the court’s decision. However, the court has

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44. *Id.*

45. *Id.* at 221, 865 P.2d at 714, 26 Cal. Rptr. 2d at 918.

46. *Id.*

47. *Id.* at 222, 865 P.2d at 715, 26 Cal. Rptr. 2d at 919.

This was also the basis for the concurring opinions of Justices Mosk and Kennard.

48. Justice Kennard, in her concurring and dissenting opinion, exemplifies the continuing confusion. Justice Kennard notes that Justice Mosk read the majority opinion as holding that the crime of assault requires an intent to injure, despite the majority position that assault is a general intent crime. *Id.* at 225 n.1, 865 P.2d at 716, n.1 26 Cal. Rptr. 2d at 921 n.1. (Kennard, J., concurring and dissenting)

49. For this apparent reason, the majority held that the trier of fact may “look to the completed battery” to determine if the defendant committed an assault. *Id.* at 218 n.9, 865 P.2d at 712 n.8, 26 Cal. Rptr. 2d at 916 n.9.

50. *Id.* at 221, 865 P.2d at 714, 26 Cal. Rptr. 2d at 918. The court’s casual analysis is further documented as it comments: “Assault being a general intent crime, once the jury find that the defendant willfully engaged in the conduct described in the instruction, they will necessarily have determined the question of intent independently of any legal presumption.” *Id.* at 221, 865 P.2d at 713, 26 Cal. Rptr. 2d at 917-18.

51. *Id.* at 222, 865 P.2d at 715, 26 Cal. Rptr. 2d at 919.

yet to formulate a clear approach to *Sandstrom/Burres* constitutional problems and the general-specific intent issue.

ALLISON L. HURST



- C. *To prove fear of immediate or unlawful bodily injury in rape cases, the prosecution must show that the victim subjectively feared immediate bodily injury, and that the fear was reasonable or that the defendant knew of the victim's unreasonable fear; the prosecution may establish those elements without showing resistance or an express statement of such fear by the victim if the circumstances support such an inference: People v. Iniguez.*

## I. INTRODUCTION

In *People v. Iniguez*,<sup>1</sup> the California Supreme Court addressed whether there was sufficient evidence of the element of "fear of immediate or unlawful bodily injury" to convict Iniguez of rape when the victim did not resist the defendant and was unable to express a fear of immediate bodily injury.<sup>2</sup> The court addressed this issue to clarify the relationship

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1. 7 Cal. 4th 847, 872 P.2d 1183, 30 Cal. Rptr. 2d 258 (1994). Justice Arabian authored the unanimous opinion of the court with Chief Justice Lucas, and Justices Mosk, Kennard, Baxter, George, and Spencer concurring in the opinion.

2. *Id.* at 851, 872 P.2d at 1184, 30 Cal. Rptr. 2d at 259.

On the eve of her wedding, the victim, Mercy P., spent the night at the home of a close family friend where she met the defendant, her friend's fiancée. *Id.* Mercy went to sleep in the living room at approximately midnight and awoke between 1:00 and 2:00 a.m. to find the defendant naked and approaching her. *Id.* at 851, 872 P.2d at 1184-85, 30 Cal. Rptr. 2d at 259-60. The defendant pulled down Mercy's pants, fondled her buttocks, and inserted his penis inside her. *Id.* at 851, 872 P.2d at 1185, 30 Cal. Rptr. 2d at 260. Mercy claimed that she did not resist because she was afraid. *Id.* at 852, 872 P.2d at 1185, 30 Cal. Rptr. 2d at 260. About a minute later, the defendant ejaculated and walked back to his bedroom. *Id.* at 851, 872 P.2d at 1185, 30 Cal. Rptr. 2d at 260.

Mercy immediately called her fiancé and left a message for him. *Id.* at 852, 872 P.2d at 1185, 30 Cal. Rptr. 2d at 260. She then called her best friend, who later testified that Mercy was so distraught that she was barely comprehensible. *Id.* Mercy hid in the bushes outside the house for about half an hour until her friend picked her up. *Id.*

Mercy's fiancé drove her to the hospital where Mercy underwent a rape examination. *Id.* The findings showed that intercourse had occurred within a few hours and that the semen came from a person with a blood type that was consistent with the defendant's blood type. *Id.*

When Officer Fagoso interviewed Mercy, Mercy said that she panicked and froze. *Id.* At trial an expert on "rape trauma syndrome" testified that victims respond to rape in many different ways, including being paralyzed by fear. *Id.* at 853, 872 P.2d at 1185, 30 Cal. Rptr. 2d at 260.

The defendant admitted that he had sexual intercourse with the victim and that the intercourse was nonconsensual. *Id.* The trial court found the defendant guilty of rape. *Id.* at 853, 872 P.2d at 1186, 30 Cal. Rptr. 2d at 261. The court of appeal found that there was insufficient evidence that the defendant used force or fear of immediate

between the actual evidence of fear and the requirement under California Penal Code section 261, subdivision (a)(2), that sexual intercourse be committed against a person's will.<sup>3</sup> The court held that if, considering the totality of the circumstances, the plaintiff genuinely and reasonably responded with fear of immediate and unlawful bodily injury, then the act of sexual intercourse was committed against the person's will.<sup>4</sup>

## II. TREATMENT

The court first noted that when a defendant challenges a verdict based on insufficiency of the evidence, the evidence supports a conviction if "a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt."<sup>5</sup> The evidence must be viewed in the light most favorable to the respondent.<sup>6</sup>

The court then compared the definitions of rape in California Penal Code section 261 prior to its amendment<sup>7</sup> and in its 1980 amended version.<sup>8</sup> The court explained that studies have shown that women react

and unlawful bodily injury to accomplish the sexual intercourse and, therefore, reversed. *Id.*

3. *Id.* at 851, 872 P.2d at 1184, 30 Cal. Rptr. 2d at 259.

4. *Id.* at 857, 872 P.2d at 1188, 30 Cal. Rptr. 2d at 263.

5. *Id.* at 854, 872 P.2d at 1186, 30 Cal. Rptr. 2d at 261 (citing *People v. Johnson*, 26 Cal. 3d 557, 576, 606 P.2d 738, 750, 162 Cal. Rptr. 431, 443 (1980)).

6. *Iniguez*, 7 Cal. 4th at 854, 872 P.2d at 1186, 30 Cal. Rptr. 2d at 261 (citing *Johnson*, 26 Cal. 3d at 576, 606 P.2d at 750, 162 Cal. Rptr. at 443).

7. Prior to 1980, California Penal Code § 261(a)(2)(3) defined rape as "an act of sexual intercourse under circumstances where the person resists, but where 'resistance is overcome by force or violence' or where 'a person is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution . . .'" *People v. Barnes*, 42 Cal. 3d 284, 292, 721 P.2d 110, 113, 228 Cal. Rptr. 2d 228, 232 (1986).

8. Rape was defined as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . (2) Where it is accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another." CAL. PENAL CODE § 261(a)(2) (West 1980). In 1990, California Penal Code § 261, subdivision (a)(2) was amended to add duress and menace. Section 261(a)(2) currently provides:

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: . . . (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another.

differently to sexual assaults: some women resist, while others become frozen with fear.<sup>9</sup> In response to these studies, the legislature amended section 261 to eliminate the requirement that the victim resist in order to show fear of immediate or unlawful bodily injury.<sup>10</sup> Now, evidence of fear is used to show that the act of sexual intercourse was committed against the person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another.<sup>11</sup>

The court then summarized its conclusions in *People v. Barnes* regarding the existence of force or fear of immediate and unlawful bodily injury.<sup>12</sup> The court stated that there is both an objective and a subjective component to the element of fear of immediate and unlawful bodily injury.<sup>13</sup> The subjective element is met if the woman submitted to sexual intercourse because she genuinely feared immediate and unlawful bodily injury.<sup>14</sup> The objective element is satisfied where either the victim's fear was reasonable, or the victim's fear was unreasonable, but the accused knew of the subjective fear and took advantage of it.<sup>15</sup>

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CAL. PENAL CODE § 261(a)(2) (West 1988 & Supp. 1994); see 17 CAL. JUR. 3D *Criminal Law* § 622 (1984 & Supp. 1994) (defining rape); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* § 768 (2d ed. 1989 & Supp. 1994).

9. *Iniguez*, 7 Cal. 4th at 854, 872 P.2d at 1186, 30 Cal. Rptr. 2d at 262; see *Barnes*, 42 Cal. 3d at 299, 721 P.2d at 118-19, 228 Cal. Rptr. at 237 (citing several different studies that deal with women's reactions to sexual assault).

10. *Iniguez*, 7 Cal. 4th at 854, 872 P.2d at 1186, 30 Cal. Rptr. 2d at 262; see 17 CAL. JUR. 3D *Criminal Law* § 625 (1984 & Supp. 1990) (stating that resistance by the victim is no longer required); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* § 775 (2d ed. 1988 & Supp. 1994) (same); see also Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A. L. REV. 567 (1983) (presenting reasons for the elimination of the resistance requirement from the definition of rape).

11. *Iniguez*, 7 Cal. 4th at 856, 872 P.2d at 1187, 30 Cal. Rptr. 2d at 262.

12. *Barnes*, 42 Cal. 2d at 304, 721 P.2d at 122, 228 Cal. Rptr. at 240-41. In *Barnes*, the court stated that it will still look to the overall circumstances of the case to determine if the victim's fears were genuine and reasonable. *Id.* A victim's unreasonable fear is sufficient if the accused knows of the victim's fear and takes advantage of it. *Id.* at 304 n.20, 721 P.2d at 122 n.20, 228 Cal. Rptr. at 241 n.20. The trier of fact should look at the acts of both the alleged attacker and the alleged victim when determining consent. *Id.* at 304, 721 P.2d at 122, 228 Cal. Rptr. at 241. Presently, and at the time of the crime in *Iniguez*, under California Penal Code § 261.6, "consent shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." CAL. PENAL CODE § 261.6 (West 1988 & Supp. 1994).

13. *Iniguez*, 7 Cal. 4th at 856, 872 P.2d at 1188, 30 Cal. Rptr. 2d at 263.

14. *Id.*; see *People v. Harris*, 108 Cal. App. 2d 84, 89, 238 P.2d 158, 161 (1951) (stating that the extent or seriousness of the injury feared is unimportant; the physical force only needs to induce fear in the mind of the woman).

15. *Iniguez*, 7 Cal. 4th at 857, 872 P.2d at 1188, 30 Cal. Rptr. 2d at 263.

Applying these rules to the present case, the court concluded that there was sufficient evidence to support a finding of both a subjective and an objective fear of immediate and unlawful bodily injury.<sup>16</sup> The court found that although the victim made no express statement that she feared immediate bodily injury, the totality of the circumstances supported such an inference.<sup>17</sup> Further, the difference in size between the defendant and victim, the alcohol defendant had consumed, and the location of the incident made it reasonable for the victim to fear immediate bodily injury.<sup>18</sup> The court rejected the court of appeal's suggestion that the victim could have stopped the sexual assault by screaming.<sup>19</sup>

### III. IMPACT AND CONCLUSION

In *Iniguez*, the court reaffirmed its position that the victim of a sexual assault does not need to resist in order to prove the element of force or fear.<sup>20</sup> The result in this case will strengthen the position of rape victims

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16. *Id.* at 857-58, 872 P.2d at 1188-89, 30 Cal. Rptr. 2d at 263-64. Subjective fear may be inferred from the circumstances. *Id.* at 857, 872 P.2d at 1188, 30 Cal. Rptr. 2d at 263; *see* *People v. Renteria*, 61 Cal. 2d 497, 499, 393 P.2d 413, 414, 39 Cal. Rptr. 213, 214 (1964) (holding that victim's fear could be inferred from other evidence even where victim testified that he was not afraid); *People v. Brew*, 2 Cal. App. 4th 99, 104, 2 Cal. Rptr. 851, 853 (1991) (holding that victim's fear could be inferred from other evidence); *People v. Franklin*, 200 Cal. App. 2d 797, 798, 19 Cal. Rptr. 645, 645 (1962) (same); *People v. Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984) (stating that evidence of emotional and psychological trauma may be used to show subjective fear, but not to prove that the victim was actually raped). The objective element may also be inferred from the facts. *See* *People v. Jackson*, 6 Cal. App. 4th 1185, 1190, 8 Cal. Rptr. 2d 239, 242 (1992) (stating that being attacked in a private home provides the perpetrator with the "advantages of shock and surprise which may incapacitate the victim(s)"); *People v. Bermudez*, 157 Cal. App. 3d 619, 625, 203 Cal. Rptr. 728, 731-32 (1984) (holding that fear was reasonable where victim was attacked in her home).

17. *Iniguez*, 7 Cal. 4th at 857, 872 P.2d at 1189, 30 Cal. Rptr. 2d at 263.

18. *Id.* at 858, 872 P.2d at 1189, 30 Cal. Rptr. 2d at 264.

19. *Id.* The court reasoned that screaming is an act of resistance and is unnecessary under both the amended penal code and *Barnes*. *Id.*

20. *Id.* at 858, 872 P.2d at 1187-88, 30 Cal. Rptr. 2d at 262-63. *See generally* Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2692 (1991) (stating that although the resistance requirement has been removed from most statutes, courts still frequently use resistance as evidence of force and consent).

in court and will help to insure that rape victims are not tried for their reaction to the rape.

**JILL ELIZABETH LUSHER**

D. *Evidence of a criminal defendant's voluntary intoxication is admissible at trial to establish that he lacked the requisite mental capacity to commit murder: People v. Whitfield.*

In *People v. Whitfield*,<sup>1</sup> the California Supreme Court determined whether evidence of voluntary intoxication is admissible to negate the required mental state of a defendant charged with second-degree murder.<sup>2</sup> The court granted review because of the conflicting lower court decisions concerning an ambiguity contained in section 22 of the California Penal Code.<sup>3</sup> After examining the past legislative history of the applicable statutory provision and applying standard principles of criminal law, the court held that a defendant can introduce such evidence of voluntary intoxication to the jury in an attempt to reduce his conviction from murder to manslaughter.<sup>4</sup>

The court based its holding on the correct interpretation of California

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1. 7 Cal. 4th 437, 868 P.2d 272, 27 Cal. Rptr. 2d 858 (1994).

2. *Id.* at 441, 868 P.2d at 272-73, 27 Cal. Rptr. 2d at 858-59. Justice George wrote the majority opinion, and Justices Kennard, Arabian, and Panelli concurred. *Id.* at 441, 868 P.2d at 272, 27 Cal. Rptr. 2d at 858. Justice Mosk, joined by Chief Justice Lucas, wrote separately, concurring in part and dissenting in part. *Id.* at 456, 868 P.2d at 282, 27 Cal. Rptr. 2d at 868. Justice Baxter also wrote separately, concurring in part and dissenting in part. *Id.* at 477, 868 P.2d at 296, 27 Cal. Rptr. 2d at 882. The defendant, Whitfield, had three prior convictions for driving under the influence of alcohol. On the afternoon in question, Whitfield drove his motor vehicle across a double yellow line and collided head-on with Ronald Kinsey, who died as a result of the accident. Whitfield was later found to have a blood alcohol content of .24 percent. At his trial for second-degree murder, Whitfield offered evidence of the degree of his intoxication to establish that he lacked the requisite mental state for murder. The trial court admitted the evidence. After the jury handed down a guilty verdict for second-degree murder, Whitfield appealed the conviction on the ground that the court improperly excluded certain jury instructions. *Id.* at 445, 868 P.2d at 275, 27 Cal. Rptr. 2d at 861. The court of appeal affirmed Whitfield's conviction, and further held that the trial court erred in allowing evidence of Whitfield's intoxication to prove he lacked the necessary mental state. *Id.* The California Supreme Court granted review. *Id.*

3. *Id.* at 446, 868 P.2d at 275-76, 27 Cal. Rptr. 2d at 861-62; see CAL. PENAL CODE § 22 (West 1988 & Supp. 1994).

4. *Whitfield*, 7 Cal. 4th at 455, 868 P.2d at 282, 27 Cal. Rptr. 2d at 868. For a detailed discussion on the relationship between voluntary intoxication and crimes involving a specific intent, see generally Matthew J. Boettcher, *Voluntary Intoxication: A Defense to Specific Intent Crimes*, 65 U. DET. L. REV. 33 (1987); Mark S. Levin, Note, *People v. Watson: Drunk Driving Homicide—Murder or Enhanced Manslaughter?*, 71 CAL. L. REV. 1298 (1983).

Penal Code section 22(b), which purportedly limits the admissibility of evidence of voluntary intoxication to crimes requiring specific intent.<sup>5</sup> As noted by the court, the purpose of the provision is to permit an accused to defend a murder charge by alleging that his self-induced intoxication prevented him from forming the requisite mental state.<sup>6</sup>

The court of appeal observed that second-degree murder required mere "implied malice," meaning that a specific intent was unnecessary to sustain a conviction.<sup>7</sup> The court maintained that second-degree murder only required the existence of a *general* mental state,<sup>8</sup> described by statute as a "conscious disregard for human life."<sup>9</sup> Therefore, the court of appeal held that evidence of voluntary intoxication was inadmissible because the crime of second-degree murder did not necessitate the specific intent required under section 22 of the California Penal Code.<sup>10</sup>

Notwithstanding the court of appeal's interpretation, the supreme court maintained that murder was a specific intent crime for the purpose of Penal Code section 22(b),<sup>11</sup> and that the trial court properly admitted evidence of the defendant's voluntary intoxication.<sup>12</sup> The court's rationale flowed from the following considerations: (1) courts consistently admit evidence of voluntary intoxication to nullify the existence of a specific intent;<sup>13</sup> (2) a murder charge based on an allegation of *express* malice constitutes a specific intent crime, so evidence of voluntary intoxication is admissible to prove lack of that intent;<sup>14</sup> (3) section 22 of the California Penal Code makes no distinction between the treatment of express and implied malice;<sup>15</sup> and (4) previous amendments to section 22

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5. Subdivision (b) of § 22 provides:

Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

CAL. PENAL CODE § 22 (West 1988 & Supp. 1994).

6. *Whitfield*, 7 Cal. 4th at 446, 868 P.2d at 275-76, 27 Cal. Rptr. 2d at 861-62.

7. *Id.* at 445-46, 868 P.2d at 275, 27 Cal. Rptr. 2d at 861. For a discussion of implied malice in the case of vehicular homicide, see generally 17 CAL. JUR. 3D *Criminal Law* § 247 (1984 & Supp. 1994).

8. *Whitfield*, 7 Cal. 4th at 445-46, 868 P.2d at 275, 27 Cal. Rptr. 2d at 861.

9. *Id.* at 444-45, 868 P.2d at 274-75, 27 Cal. Rptr. 2d at 860-61 (quoting CALJIC No. 8.51).

10. *Id.* at 445-46, 868 P.2d at 275, 27 Cal. Rptr. 2d at 861.

11. *Id.* at 450, 868 P.2d at 278, 27 Cal. Rptr. 2d at 864.

12. *Id.* at 454, 868 P.2d at 281, 27 Cal. Rptr. 2d at 867.

13. *Id.* at 446, 868 P.2d at 275, 27 Cal. Rptr. 2d at 861. For a discussion of intoxication as a defense to criminal homicide, see 17 CAL. JUR. 3D *Criminal Law* § 285 (1984); see also 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 212 (2d ed. 1988 & Supp. 1994).

14. *Whitfield*, 7 Cal. 4th at 447, 868 P.2d at 276, 27 Cal. Rptr. 2d at 862.

15. *Id.* at 448, 868 P.2d at 277, 27 Cal. Rptr. 2d at 863. For an analysis of mental

support the conclusion that the lawmakers did not intend to differentiate between these two categories of mental state.<sup>16</sup>

The majority further sought to justify its holding based on ordinary principles of criminal law.<sup>17</sup> The majority asserted that the defendant's degree of intoxication was a critical factor in deciding whether he was sufficiently criminally negligent to justify a finding of implied malice.<sup>18</sup> In light of the relevance of intoxication to the defendant's mental state, the court believed that excluding such evidence would be antithetical to the goals of judicial fairness in faithfully ascertaining the defendant's degree of culpability.<sup>19</sup>

Justice Mosk, in his separate opinion, expressed concern that the majority misinterpreted the clear manifestations of section 22,<sup>20</sup> and also that the court's precedent may permit self-induced intoxication as a justification for criminal activity.<sup>21</sup> Justice Mosk challenged the majority's decision as contrary to the promotion of increased penalties for criminal conduct.<sup>22</sup>

Nevertheless, the court's holding recognizes the practical difficulty in distinguishing between the requisite mental states for murder and, ac-

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states, other than specific intent, supporting murder convictions, see Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN'S L. REV. 429 (1990).

16. *Whitfield*, 7 Cal. 4th at 448, 868 P.2d at 277, 27 Cal. Rptr. 2d at 863. The court stated that if the legislature intended to distinguish between express and implied malice with respect to evidence of voluntary intoxication, it would have explicitly addressed this intention. Since no such legislative provision existed, the court was reluctant to judicially make the distinction. *Id.* at 448-49, 868 P.2d at 277, 27 Cal. Rptr. 2d at 863.

17. *Id.* at 451-54, 868 P.2d at 279-81, 27 Cal. Rptr. 2d at 865-67.

18. *Id.* at 452, 868 P.2d at 280, 27 Cal. Rptr. 2d at 866. For a general definition of malice, consult 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Elements of Crime* § 107 (2d ed. 1988). For a breakdown of evidence required for varying degrees of homicide, consult 41 C.J.S. *Homicide* §§ 317-320 (1991).

19. *Whitfield*, 7 Cal. 4th at 453, 868 P.2d at 280-81, 27 Cal. Rptr. 2d at 866-67. While noting that "drinking drivers exact an enormous toll on society," the majority indicated that juries are free to reject this proffered defense, and an accused may still be convicted of murder despite the admission of such evidence. *Id.* at 453-54, 868 P.2d at 280-81, 27 Cal. Rptr. 2d at 866-67.

20. *Id.* at 459, 868 P.2d at 284, 27 Cal. Rptr. 2d at 870 (Mosk, J., concurring and dissenting).

21. *Id.* at 461, 868 P.2d at 285-86, 27 Cal. Rptr. 2d at 871-72 (Mosk, J., concurring and dissenting).

22. *Id.*



cordingly, permits the benefit of this ambiguity to favor the accused.<sup>23</sup> The court's decision in *Whitfield* does not, however, relax the state's burden in proving a murder charge by excluding relevant evidence to the detriment of the criminal defendant.

MICHAEL G. OLEINIK

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23. *Id.* at 450, 868 P.2d at 278, 27 Cal. Rptr. 2d at 864.

## V. EMPLOYMENT LAW

*Misrepresentations made by employers in the course of a wrongful discharge do not create a separately actionable fraud: Hunter v. Up-Right, Inc.*

## I. INTRODUCTION

In *Hunter v. Up-Right, Inc.*,<sup>1</sup> a sharply divided California Supreme Court determined that misrepresentations<sup>2</sup> made during the course of an employee's wrongful dismissal do not create a separate cause of action for fraud.<sup>3</sup> The court held that to recover in tort, a plaintiff must establish the elements required to prove fraud<sup>4</sup> independent of any misrepresentation made to effect a wrongful termination.<sup>5</sup>

Charles Hunter resigned from his position as a welding supervisor for Up-Right, Inc. in 1987, after fourteen years of employment.<sup>6</sup> Hunter testified that he resigned after being told that there was "a corporate decision to eliminate his position, and that if he refused to resign, [he would be terminated]." After discovering that his position had not been eliminated, Hunter brought a cause of action for wrongful termination which was

1. 6 Cal. 4th 1174, 864 P.2d 88, 26 Cal. Rptr. 2d 8 (1993). Justice Panelli wrote the opinion of the court, joined by Chief Justice Lucas, and Justices Baxter and George. Justice Mosk wrote a dissenting opinion joined by Justice Arabian and Justice Kennard. *Id.* at 1187, 864 P.2d at 95, 26 Cal. Rptr. 2d at 15.

2. The Restatement of Torts notes that "words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist." RESTATEMENT (SECOND) OF TORTS § 525 (1977).

3. *Hunter*, 6 Cal. 4th at 1178, 864 P.2d at 89, 26 Cal. Rptr. 2d at 9.

4. In California, the elements to prove fraud or deceit are: (a) misrepresentation; (b) defendant's knowledge of falsity; (c) intent to defraud; (d) justifiable reliance; and (e) resulting damage. 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 676 (9th ed. 1988 & Supp. 1993); see also 34 CAL. JUR. 3D *Fraud and Deceit* § 6 (1977 & Supp. 1994); BAJI No. 12.31 (7th ed. Supp. 1991). See generally RESTATEMENT (SECOND) OF TORTS § 525 (1977) (defining liability for fraudulent misrepresentation).

5. *Hunter*, 6 Cal. 4th at 1178, 864 P.2d at 89, 26 Cal. Rptr. 2d at 9. Potential litigants frequently prefer to seek recovery in tort because tort damages, which include the possibility of punitive damages, often significantly exceed wrongful dismissal contract awards. Harriet Chiang, *State Court Rules Against Fired Workers: Firms Not Liable For Fraud—Only Wrongful Termination*, S.F. CHRON., Dec. 31, 1993, at A1; see also RESTATEMENT (SECOND) OF TORTS § 901 (noting that one policy basis for assessing damages in tort is "to punish wrongdoers and defer wrongful conduct").

6. *Hunter*, 6 Cal. 4th at 1179, 864 P.2d at 89, 26 Cal. Rptr. at 4.

7. *Id.* at 1178, 864 P.2d at 89, 26 Cal. Rptr. at 9.

subsequently amended to include allegations of fraud.<sup>8</sup> Although Hunter's depiction of the episode was disputed at trial, the jury found for the plaintiff on three grounds: breach of implied contract not to terminate employment without good cause, breach of implied covenant of good faith and fair dealing, and fraud.<sup>9</sup>

The court of appeal affirmed the trial court,<sup>10</sup> rejecting the argument that the California Supreme Court's decision in *Foley v. Interactive Data Corp.*<sup>11</sup> barred fraud claims arising out of a fundamentally contractual employment relationship.<sup>12</sup> The appellate court discussed the difference in policy between contract and tort remedies, finding that an employer "perpetuates two separate wrongs" by fraudulently breaching a contract and should not be shielded from tort liability because of the concurrent contract violation.<sup>13</sup> The court of appeal also noted that its decision would not prevent employers from dismissing employees, but rather, addressed only those terminations accomplished by fraud and deceit.<sup>14</sup>

The California Supreme Court granted review, expressly limiting the issue to whether *Foley* "precludes recovery of tort damages for fraud and deceit predicated on a misrepresentation made to effect termination of employment."<sup>15</sup>

## II. TREATMENT

The majority began its analysis with an examination of the *Foley* decision.<sup>16</sup> The court observed that *Foley* recognized that the "distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas."<sup>17</sup> Additionally, the court recognized that a discharge in violation of public policy can still sustain a tort recovery where the policy affects the public at large, and not merely the individual parties.<sup>18</sup>

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8. *Id.* The court noted that Hunter amended his complaint after the filing of the *Foley* decision. *Id.*; see *infra* notes 16-23 and accompanying text for a review of the majority's discussion of the *Foley* decision.

9. *Hunter*, 6 Cal. 4th at 1180, 864 P.2d 90, 26 Cal. Rptr. 2d 10.

10. *Hunter v. Up-Right, Inc.*, 20 Cal. App. 4th at 721, 12 Cal. Rptr. 2d at 193 (1992).

11. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

12. *Hunter*, 20 Cal. App. 4th at 727, 12 Cal. Rptr. 2d at 197.

13. *Id.* at 728, 12 Cal. Rptr. 2d at 197; see also RESTATEMENT (SECOND) OF TORTS § 901 (1977) (discussing differing policy goals of tort and contract remedies).

14. *Hunter*, 20 Cal. App. 4th at 728, 12 Cal. Rptr. 2d at 197.

15. *Hunter*, 6 Cal. 4th at 1178, 864 P.2d at 89, 26 Cal. Rptr. 2d at 9.

16. *Id.* at 1180, 864 P.2d at 90, 26 Cal. Rptr. 2d at 10.

17. *Id.* (quoting *Foley*, 47 Cal. 3d at 683, 765 P.2d at 388, 254 Cal. Rptr. at 227).

18. *Id.* (quoting *Foley*, 47 Cal. 3d at 665-71, 765 P.2d at 376-80, 254 Cal. Rptr. at

Although the *Foley* court noted that breaches of the covenant of good faith have traditionally been limited to contract damages, it noted that an exception, justified by "a variety of policy reasons," had been created to provide tort recovery for the breach of insurance contracts.<sup>19</sup> However, the court rejected extending the exception to the employment relationship.<sup>20</sup>

The *Foley* court also expressed its concern that "[v]irtually any termination could provide the basis for an allegation that the employee's discharge was in bad faith," and extending tort liability could impede the ability of an employer to dismiss an employee without fear of litigation.<sup>21</sup> Concern was also expressed by the court in *Foley* for "the stability of the business community."<sup>22</sup>

The *Hunter* majority affirmed the *Foley* court's analysis in declining "to extend tort remedies for breach of the good faith covenant in a contract of employment."<sup>23</sup> The court rejected the appellate court's conclusion that *Hunter* had established the elements of fraud,<sup>24</sup> specifically finding that he failed to prove the "justifiable reliance" element.<sup>25</sup> In the majority's opinion, the defendant had "simply employed a falsehood to

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214-18).

19. *Id.* at 1180-81, 864 P.2d at 90, 26 Cal. Rptr. 2d at 11.

20. The *Foley* court noted that the relative positions of a wrongfully terminated individual, and one who has had an insurance claim improperly denied, are greatly incongruous: whereas the employee can always seek other employment, the insured cannot find another insurance company to cover the pre-existing loss. *Hunter*, 6 Cal. 4th at 1181, 864 P.2d at 91, 26 Cal. Rptr. 2d at 11 (citing *Foley*, 47 Cal. 3d at 692-93, 765 P.2d at 395-96, 254 Cal. Rptr. at 234).

21. *Id.* at 1181, 864 P.2d at 91, 26 Cal. Rptr. 2d at 11 (citing *Foley*, 47 Cal. 3d at 697, 765 P.2d at 398, 254 Cal. Rptr. at 236-37). The court noted that "[f]raud is easily pleaded . . . Much harder, however, is the defense of such claims and their resolution at the summary judgment or demurrer stage of litigation." *Id.* at 1185, 864 P.2d at 93-94, 26 Cal. Rptr. 2d at 14.

22. *Id.* at 1181, 864 P.2d at 91, 26 Cal. Rptr. 2d at 11 (citing *Foley*, 47 Cal. 3d at 692-93, 765 P.2d at 395-96, 254 Cal. Rptr. at 233-35). The *Foley* court asserted, "[t]he expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community." *Foley*, 47 Cal. 3d at 699, 765 P.2d at 401, 254 Cal. Rptr. at 239.

23. *Hunter*, 6 Cal. 4th at 1181-82, 864 P.2d at 91, 26 Cal. Rptr. 2d at 11 (citing *Foley*, 47 Cal. 3d at 692-93, 765 P.2d at 395, 254 Cal. Rptr. at 233).

24. *Id.* at 1184, 864 P.2d at 93, 26 Cal. Rptr. 2d at 13; see also *supra* note 4 and accompanying text.

25. *Hunter*, 6 Cal. 4th at 1184, 864 P.2d at 93, 26 Cal. Rptr. 2d at 13. The court found that the result of the termination misrepresentation was "indistinguishable from an ordinary constructive wrongful termination." *Id.*

do what it otherwise could have accomplished directly.”<sup>26</sup> As a result, the court concluded that Hunter had not relied to his detriment on defendant Up-Right’s misrepresentation, and accordingly could not sustain a claim of fraud.<sup>27</sup> Underscoring its position, the *Hunter* majority declared that “it is difficult to conceive of a wrongful termination case in which a misrepresentation made by the employer to effect termination could ever rise to the level of a separately actionable fraud.”<sup>28</sup>

Three justices dissented from the majority in two separate dissenting opinions.<sup>29</sup> Justice Kennard’s dissent alleged that under the majority’s “troubling” holding, employers are effectively provided with an incentive to commit fraud.<sup>30</sup> She explained that an “employer has everything to gain—if the fraud succeeds, the employee will never discover the true reason for the termination, and will never trouble the employer with a wrongful termination action.”<sup>31</sup>

Justice Kennard also rejected the majority’s position that Hunter did not detrimentally rely on the defendant’s misrepresentation,<sup>32</sup> arguing that Hunter relied on the defendant’s misrepresentations in resigning voluntarily, and consequently impaired his ability to learn of and enforce his contractual rights.<sup>33</sup>

Justice Mosk’s dissenting opinion, which was joined by Justice Arabian, accused the majority of “inexplicably revis[ing] the law of fraud to exclude fraudulent termination of employment contracts.”<sup>34</sup> Mosk noted that the majority’s opinion stems from a belief that, in this case, fraud

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26. *Id.*

27. *Id.*

28. *Id.* at 1184-85, 864 P.2d at 93, 26 Cal. Rptr. 2d at 13. However, the majority noted that a misrepresentation in the employment context, which was not aimed at effecting termination of employment, could potentially give rise to tort liability for fraud. *Id.* at 1185, 864 P.2d at 94, 26 Cal. Rptr. 2d at 14 (noting that the United States Court of Appeals for the Ninth Circuit addressed such a situation in *Miller v. Fairchild Indus.*, 885 F.2d 498, 509-10 (9th Cir. 1989), *cert denied*, 494 U.S. 1056 (1990)). The court viewed its decisions in *Foley* and succeeding cases, including *Hunter*, as validating the availability of tort damages for wrongful termination in violation of public policy, so long as the action is “predicated on a fundamental, well-established, substantial policy that concerns society at large rather than the individual interests of the employer or employee.” *Hunter*, 6 Cal. 4th at 1186, 864 P.2d at 94, 26 Cal. Rptr. at 14-15.

29. See *supra* note 1 for a listing of the justices and their positions.

30. *Hunter*, 6 Cal. 4th at 1198, 864 P.2d at 102, 26 Cal. Rptr. 2d at 23 (Kennard, J., dissenting).

31. *Id.* (Kennard, J., dissenting).

32. *Id.* at 1196, 864 P.2d at 101, 26 Cal. Rptr. 2d at 22 (Kennard, J., dissenting); see *supra* notes 24-25 and accompanying text.

33. *Hunter*, 6 Cal. 4th at 1196-97, 864 P.2d at 101-02, 26 Cal. Rptr. 2d at 22-23 (Kennard, J., dissenting).

34. *Id.* at 1187, 864 P.2d at 95, 26 Cal. Rptr. 2d at 15 (Mosk, J., dissenting).

and breach of contract are "conceptually indistinguishable."<sup>35</sup> Rejecting the majority position, Justice Mosk argued that fraud and breach of contract are distinguishable because they address different injuries.<sup>36</sup>

Justice Mosk also rejected the majority's claim that a different ruling would potentially result in a flood of tort claims.<sup>37</sup> Justice Mosk explained that detriment is still a required element, and that claims that cannot prove detrimental reliance, including all employment situations which are terminable at will, are likely to be resolved by summary judgment.<sup>38</sup>

### III. CONCLUSION

The court's decision in *Hunter* clearly narrowed the remedies available to an employee who is deceived<sup>39</sup> by an employer in the process of being discharged.<sup>40</sup> At least one commentator has noted that *Hunter* fol-

35. *Id.* at 1189, 864 P.2d at 96, 26 Cal. Rptr. 2d at 16-17 (Mosk, J., dissenting).

36. *Id.* at 1190, 864 P.2d at 97, 26 Cal. Rptr. 2d at 17 (Mosk, J., dissenting). Justice Mosk stated that tort law is concerned with the vindication of social policy and the prevention of future wrongs, while contract law focuses on enforcing the intentions of the individual parties to the agreement. *Id.* at 1190-91, 864 P.2d at 97-98, 26 Cal. Rptr. 2d at 18 (Mosk, J., dissenting) (citing *Foley*, 47 Cal. 3d at 683, 765 P.2d at 389, 254 Cal. Rptr. at 227; see also WILLIAM L. PROSSER, THE LAW OF TORTS § 92, at 613 (4th ed. 1971); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984)).

37. *Hunter*, 6 Cal. 4th at 1194, 864 P.2d at 100, 26 Cal. Rptr. 2d at 20 (Mosk, J., dissenting); see *supra* notes 22-23 and accompanying text.

38. *Hunter*, 6 Cal. 4th at 1194-95, 864 P.2d at 100, 26 Cal. Rptr. 2d at 20-21 (Mosk, J., dissenting) (citing *Slivinsky v. Watkins-Johnson Co.*, 221 Cal. App. 3d 799, 805-06, 270 Cal. Rptr. 585, 588 (1990) (granting summary judgment in a wrongful termination claim where the employment contract was terminable at will)).

39. See Bill Mandel, *In Workplace, Lying is Just Good Business*, S.F. EXAMINER, Jan. 16, 1994, at B-2 (satirically criticizing the *Hunter* majority's position that "[a] company that dumps a worker by lying to him commits no fraud").

40. See *Divided California Supreme Court Rejects Fraud Remedy in Wrongful Discharge Cases*, DAILY LAB. REP., Jan. 10, 1994, at 6. *Hunter*'s attorney, Nicholas J.P. Wagner, called the decision "another example of a conservative majority on a political mission to narrow the legal remedies available to employees. *Id.* In contrast, the defendant's attorney, Armen L. George, characterized the opinion as increasing the rights of employees, "recognizing for the first time in California a cause of action for violation of implied-in-fact, 'good-cause only' termination provisions." *Id.*

lows a trend in recent supreme court cases in which nearly all relevant decisions during 1993 limited tort liability.<sup>41</sup>

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41. Daniel U. Smith, *Standing on SHAKY Ground; Examining the California Supreme Court's Opinions for the Past Year, an Appellate Specialist Details the Declining Power of the Plaintiff*, THE RECORDER, Feb. 8, 1994, at 8 (asserting that in tort cases, the California Supreme Court's decisions from the advance sheets of 1993 were almost uniform—only one ruling favored the plaintiff; every other decision either reaffirmed or expanded a defense to liability).

## VI. INSURANCE LAW

A. *A liability insurer has a duty to defend its insured against claims arising out of criminal, wilful, and other noncovered conduct if the complaint alleges potentially covered conduct; therefore, summary judgment is improper unless the insurer can prove that none of the claims asserted against the insured are covered under the policy:*

**Horace Mann Insurance Co. v. Barbara B.**

## I. INTRODUCTION

*Horace Mann Insurance Co. v. Barbara B.* involved a junior high-school teacher who was insured under an educator's liability policy and who had pled guilty to criminal sexual child molestation charges.<sup>1</sup> The California Supreme Court considered whether the insurer had a duty to defend the teacher against a civil negligent public embarrassment claim arising out of the sexual molestation<sup>2</sup> and other related misconduct.<sup>3</sup>

1. 4 Cal. 4th 1076, 846 P.2d 792, 17 Cal. Rptr. 2d 210 (1993). Justice Panelli authored the majority opinion, with Chief Justice Lucas and Justices Mosk, Kennard, and George concurring. *Id.* at 1078, 846 P.2d at 793, 17 Cal. Rptr. 2d at 211. Justice Baxter wrote a separate concurring opinion. *Id.* at 1087, 846 P.2d at 800, 17 Cal. Rptr. 2d at 218. Justice Arabian dissented. *Id.* at 1087, 846 P.2d at 800, 17 Cal. Rptr. 2d at 218.

The California Supreme Court granted review to resolve an apparent conflict in the courts of appeal: the conflict between the fourth district court of appeal's ruling in *Horace Mann* and the second district court of appeal's decision in *Ohio Casualty Insurance Co. v. Hubbard*, 208 Cal. Rptr. 806, 811-12, 162 Cal. App. 3d 939, 947 (1984) (holding "that if the reasonable expectations of an insured are that a defense will be provided for a claim, then the insurer cannot escape that obligation merely because public policy precludes it from indemnifying that claim."). *See also* CAL. R. CT. 29(a) (requiring the supreme court to review a court of appeal decision where it appears necessary to "secure uniformity of decision").

2. *Horace Mann*, 4 Cal. 4th at 1078-81, 846 P.2d at 793-95, 17 Cal. Rptr. 2d at 211-13; *see also* CAL. INS. CODE § 533 (West 1994) (excluding wilful conduct from liability coverage); *J.C. Penney Casualty Ins. Co. v. M.K.*, 52 Cal. 3d 1009, 1019-21, 804 P.2d 689, 693-95, 278 Cal. Rptr. 64, 68-70 (relying on the California Insurance Code, § 533 exclusion to affirm summary judgment in favor of a liability insurer where the complaint alleged injuries caused by sexual molestation), *cert. denied*, 112 S. Ct. 280 (1991).

3. *Horace Mann*, 4 Cal. 4th at 1078, 846 P.2d at 793, 17 Cal. Rptr. 2d at 211. Barbara B. and her parents both alleged injuries caused by her insured teacher's inten-



The trial court held that the insurer had no duty to defend the civil action and granted summary judgment to the teacher's liability insurer.<sup>4</sup> The court of appeal also found for the insurance company, concluding that the insurer had no duty to indemnify the teacher because the teacher's conduct was intentional and was unrelated to educational activities.<sup>5</sup>

The supreme court reversed both courts, holding that summary relief for an insurer is only proper if the insurer proves "that no potential for liability under its policy arose out of the underlying suit against its insured . . . ."<sup>6</sup>

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tional sexual molestation and "other negligent conduct," including the following acts that the supreme court noted might support the victim's negligent public embarrassment claim:

- (1) allowing Barbara B. to sit on his lap in front of other students;
- (2) kissing Barbara B. on the forehead in front of other students;
- (3) hugging Barbara B. in front of other students;
- (4) putting his arm around Barbara B. in front of other students;
- (5) regularly making sexual and sarcastic jokes in regard to Barbara B. in front of the band class, referencing the way a girl dressed, and making jokes offensive to females;
- (6) general discussions of sexual conduct in front of the class;
- (7) allowing and perpetuating common rumors among students of a relationship between him and Barbara B. as a joke;
- (8) the dollar dance and the insinuation that Barbara could be bought for a dollar;
- (9) joking about how female students came back to see him when they turned eighteen;
- (10) joking about female students in front of his friends;
- (11) referring to Barbara B. as Pebbles;
- (12) referring to Barbara B. as "jail bait," or "San Quentin jail bait" in front of students, his friends, band parents and student teachers;
- (13) telling Barbara's other teachers that Barbara was with him at all times and that they should assume that she was with him if she was late or absent from their classes;
- (14) Barbara B. was teased by students in front of adults as being the teacher's girlfriend and was also laughed at by the students, adults, and the teacher.

*Id.* at 1079, 846 P.2d at 794, 17 Cal. Rptr. 2d at 212.

4. *Id.* at 1080-1081, 846 P.2d at 795, 17 Cal. Rptr. 2d at 213.

5. *Id.* The supreme court held in *J.C. Penney Casualty Insurance Co. v. M.K.*, 52 Cal. 3d 1009, 1019, 804 P.2d 689, 693, 278 Cal. Rptr. 64, 68 (1991), that child molestation is wilful conduct and, therefore, excluded as a matter of law by Insurance Code § 533.

6. *Horace Mann*, 4 Cal. 4th at 1087, 846 P.2d at 800, 17 Cal. Rptr. 2d at 218; *accord State Farm Fire & Casualty Co. v. Nycum*, 943 F.2d 1100 (9th Cir. 1991) (holding that (1) an allegation that the insured sexually molested the plaintiff's daughter did not preclude coverage under a homeowner's policy, absent a showing that the insured's act was intentional, and (2) an allegation that the insured touched the child in the anal and vaginal area did not raise a conclusive presumption that the touching was intentional child molestation); *see also* Dietmar Grellmann, Comment, *Insurance Coverage*

## III. TREATMENT

A. *The Majority Opinion*

In his majority opinion, Justice Panelli explained that a possible duty to indemnify an insured for one covered claim translates into a duty to defend against all claims.<sup>7</sup> The duty to defend against all claims continues until the insurer provides undeniable evidence that a portion of its funds are being used to defend uncovered claims.<sup>8</sup> The court emphasized that an insurer must compare the insurance policy with the complaint and other extrinsic evidence to determine whether coverage might extend to any claim asserted against the insured.<sup>9</sup>

The court further stated that summary judgment is proper only if all the claims asserted against the insured are not covered by the policy or are excluded as a matter of law, resolving any doubt concerning the insurer's duty to defend in favor of the insured.<sup>10</sup> Accordingly, the supreme court concluded that summary judgment for an insurer is only appropriate when the insurer proves that the allegations in the complaint and any extrinsic facts reveal no potential for an ultimate indemnification duty.<sup>11</sup>

*for Child Sexual Abuse Under California Law: Should Intent to Harm be Specifically Proven or Imputed as a Matter of Law?*, 18 SW. U. L. REV. 171 (1988) (analyzing California's and other jurisdictions' treatment of intent to harm in child sexual abuse cases prior to *J.C. Penney* and concluding that an insurer must always specifically prove intent to harm under California law).

7. *Horace Mann*, 4 Cal. 4th at 1080-81, 846 P.2d at 795, 17 Cal. Rptr. 2d at 213.

8. *Id.* (citing *Hogan v. Midland National Ins. Co.*, 3 Cal. 3d 553, 564, 476 P.2d 825, 831-32, 91 Cal. Rptr. 153, 159-60 (1970)).

9. *Id.* at 1081, 846 P.2d at 795, 17 Cal. Rptr. 2d at 213. A trial court may consider evidence outside of the complaint to find possible policy coverage. *Id.* (citing *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276, 419 P.2d 168, 176-77, 54 Cal. Rptr. 104, 112-13 (1966)). It is unclear, however, whether an insurer may point to extrinsic evidence to negate its duty to defend.

Insurance Code § 533 excludes wilful conduct from coverage as a matter of law. CAL. INS. CODE § 533 (West 1994). In *Horace Mann*, contractual coverage extended to "damages 'which the insured shall become legally obligated to pay as a result of any claim arising out of an occurrence in the course of the insured's educational employment activities, and caused by any acts or omissions of the insured' . . . [and] contained a promise to defend [the insured] in 'any civil suit against [him] seeking damages which are payable under the terms of this policy even if such suit is groundless, false or fraudulent.'" 4 Cal. 4th at 1079-80, 846 P.2d at 794-95, 17 Cal. Rptr. 2d at 212-13.

10. *Horace Mann*, 4 Cal. 4th at 1081, 846 P.2d at 796, 17 Cal. Rptr. 2d at 214.

11. *Id.* For a complete discussion of relevant case law construing an insurer's de-

The majority clarified its holding in *J.C. Penney Casualty Insurance Co. v. M.K.* and explained how *Horace Mann Insurance* was distinguishable. The court stressed that *J.C. Penney* narrowly excused the duty to defend when *only* sexual molestation is alleged.<sup>12</sup> In light of this clarification, the court concluded that in the case at hand, the insurer's duty to defend survived summary judgment because the complaint alleged more than sexual molestation, and, therefore, the plaintiff might ultimately prove the existence of covered conduct.<sup>13</sup>

### B. Justice Baxter's Concurring Opinion

Justice Baxter concurred in the judgment, noting that it was uncertain whether or not Horace Mann's motion for summary judgment established that all of the alleged conduct was not covered by either the policy or Insurance Code section 533's wilful conduct exclusion.<sup>14</sup> Justice Baxter wrote separately, however, because of his disagreement with the majority's enumeration of the alleged acts which might support an indemnifiable claim.<sup>15</sup> Finally, Justice Baxter agreed with Justice

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fense obligation and rules for when an insurer must defend intentional and negligent torts, see 3 CAL. INSURANCE LAW & PRACTICE §§ 41.31-43 (1993); 1 CEB, LIABILITY INSURANCE PRACTICE: CLAIMS AND LITIGATION, *Defense Analysis* §§ 4.1-33 (1991); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1135-1142 (9th ed. 1988 & Supp. 1993); 39 CAL. JUR. 3D *Insurance Contracts and Coverage* §§ 414-418 (1977 & Supp. 1993); 15 MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS, *Insurance Contracts and Coverage* §§ 45, 80, 107 (3d ed. 1989 & Supp. 1993); James M. Fischer, *Broadening the Insurer's Duty to Defend: How Gray v. Zurich Insurance Co. Transformed Liability Insurance Into Litigation Insurance*, 25 U.C. DAVIS L. REV. 141 (1991) (analyzing the origin and scope of the duty to defend and examining rationales for and against the "extra-contractual" duty to defend); see also Frank Revere & Arthur J. Chapman, *Insurer's Duty to Defend*, 13 PAC. L.J. 889 (1982) (analyzing the duty to defend and delineating a procedure for insurers to minimize the costs of determining whether it must defend); James L. Rigelhaupt, Jr., Annotation, *Liability Insurance: Intoxication or Other Mental Incapacity Avoiding Application of Clause in Liability Policy Specifically Exempting Coverage of Injury of Damage Caused Intentionally by or at Direction of Insured*, 33 A.L.R. 4th 983 (1984) (discussing lack of mental capacity as a means for avoiding the "intentional act" exclusion).

12. *Horace Mann*, 4 Cal. 4th at 1082, 846 P.2d at 796, 17 Cal. Rptr. 2d at 214 (citing *J.C. Penney*, 52 Cal. 3d at 1028, 804 P.2d at 700, 278 Cal. Rptr. at 75).

13. *Id.* at 1083-84, 846 P.2d at 797, 17 Cal. Rptr. 2d at 215 (stating that "unlike the dissent, we cannot, at [the declaratory relief stage] and on this record, confidently conclude that no such duty existed"); see *supra* note 3 for a list of the evidence the court believed could ultimately lead to damages based on covered conduct. The court concluded with a warning that *Horace Mann* is not a license for plaintiffs to "plead around" *J.C. Penney*. *Horace Mann*, 4 Cal. 4th at 1086, 846 P.2d at 799, 17 Cal. Rptr. 2d at 217.

14. *Id.* at 1087, 846 P.2d at 800, 17 Cal. Rptr. 2d at 218 (Baxter, J., concurring).

15. *Id.* at 1088, 846 P.2d at 800-01, 17 Cal. Rptr. 2d at 218-19 (Baxter, J., concur-

Arabian's contention that although an insurer may use the litigation process to dispel frivolous claims from a lawsuit, the cost to defend might pressure the insurer into settling noncovered claims out of court.<sup>16</sup>

### C. Justice Arabian's Dissenting Opinion

Justice Arabian disagreed with the majority's premise that the continuous course of conduct alleged here, which culminated in the sexual molestation of a minor, could be divided into separate acts that are potentially insurable.<sup>17</sup> Justice Arabian emphasized that a child molester will often engage in separate acts preparing for the actual molestation which, considered individually, do not amount to criminal sexual molestation.<sup>18</sup> Justice Arabian concluded that because the cost of defending an entire lawsuit will often exceed an insurer's settlement costs, insurers will settle more often when the complainant "truthfully allege[s] pre- or postmolestation acts designed to facilitate or cover up the sexual misconduct, [effectively nullifying the court's] holding in *J.C. Penney* that the insurer owes no duty to pay for damages resulting from child molestation."<sup>19</sup>

## III. CONCLUSION

When a complaint against an insured child molester alleges acts that may have harmed an interest other than the harm done by the actual

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ring). Specifically, Justice Baxter maintained that the allegations of "public hugging, kissing, and lap sitting" concerned wilful acts, which are excluded from coverage as a matter of law. *Id.*

16. *Id.* at 1089, 846 P.2d at 801, 17 Cal. Rptr. 2d at 219 (Baxter, J., concurring).

17. *Id.* at 1090, 846 P.2d at 801-02, 17 Cal. Rptr. 2d at 219-20 (Arabian, J., dissenting).

18. *Id.* at 1091-92, 846 P.2d at 803, 17 Cal. Rptr. 2d at 221 (Arabian, J., dissenting). Justice Arabian stated that the facts surrounding the molestation should be viewed in their entirety to determine whether each act was performed for an inherently harmful purpose and whether the insurer must defend its insured. *Id.* at 1092, 846 P.2d at 803, 17 Cal. Rptr. 2d at 221 (Arabian, J., dissenting).

19. *Id.* at 1094, 846 P.2d at 804, 17 Cal. Rptr. 2d at 222 (Arabian, J., dissenting) (citations omitted). See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1143-1149 (9th ed. 1988 & Supp. 1993) (analyzing an insurer's implied duty to settle claims); Robert W. Bollard, Comment, *Termination of the Duty of an Insurance Carrier to Defend: Did the California Supreme Court Send the Wrong Signal?*, 17 PAC. L.J. 283 (1985) (advocating the position that, under California case law, the duty to defend should terminate when the insurer has exhausted the policy's indemnification limits).

molestation, the insurer's duty to defend attaches until the insurer proves that there exists "no potential for liability under its policy."<sup>20</sup>

As a result, an insurer must weigh the costs and benefits of settling with the plaintiff at the commencement of the lawsuit versus litigating against the insured and putting on a comprehensive summary judgment motion to relieve its duty to defend the insured.<sup>21</sup> The insurer must also consider the costs of defending the insured if it loses the expensive motion for summary judgment. Under *Horace Mann Insurance*, a strong-armed plaintiff gains leverage to hold out on a settlement until the offer approaches the cost of the insurer's summary judgment motion or potential litigation costs.<sup>22</sup> The insurer's duty to defend now effectively extends to groundless, false, or fraudulent claims against an insured in standard liability insurance policies.<sup>23</sup> The cost of litigation rises if a plaintiff alleges one potentially covered claim because the insurer will lose its motion for summary judgment on that claim and then must defend the insured until it can present "undeniable evidence supporting an allocation of a specific portion of the defense costs to a noncovered claim."<sup>24</sup>

A final consideration is that in the future, trial courts deciding motions for summary judgment based on the duty to defend may be faced with calculating a pre-trial award which roughly apportions the damages caused by intentional versus negligent conduct. Although this may invade the province of the jury, a jury determination of the damages caused by negligent and intentional acts of the insured would arrive too late for an insurer that is ultimately found not liable for indemnification under its policy.

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20. *Horace Mann*, 4 Cal. 4th at 1087, 846 P.2d at 800, 17 Cal. Rptr. 2d at 218.

21. See Fischer, *supra* note 11, at 144-45 (concluding that liability insurance is equivalent to litigation insurance because the duty to defend includes the duty to negotiate a settlement of noncovered claims); see also 3 CAL. INSURANCE LAW & PRACTICE § 41.31[9] (reporting that there are no California decisions holding that the duty to defend is terminated upon the exhaustion of policy limits by payment of judgments or settlements).

22. The prohibitive cost of putting on a full summary judgment motion combined with the burden the insurer must meet for summary relief from its duty to defend will effectively discourage insurers from taking this expensive route.

23. See 1 CEB, CAL. LIABILITY INSURANCE PRACTICE: CLAIMS AND LITIGATION, § 4.10 (1993) (discussing *Gray v. Zurich Insurance Co.* and *Horace Mann* and their impact on the insurer's duty to defend groundless, false, and fraudulent claims).

24. *Horace Mann*, 4 Cal. 4th at 1081, 846 P.2d at 795-96, 17 Cal. Rptr. 2d at 213-14.

B. *Voluntary ingestion of a known hazardous and illegal substance does not provide a basis for coverage within the terms of a life insurance policy affording coverage for death by accidental means:*

**Weil v. Federal Kemper Life Assurance Co.**

I. INTRODUCTION

California courts have generally upheld the distinction between "accidental means" and "accidental results" in insurance policy language.<sup>1</sup> In *Weil v. Federal Kemper Life Assurance Co.*,<sup>2</sup> the issue before the California Supreme Court was whether the distinction should be preserved, and if so, whether the voluntary ingestion of cocaine provided a basis for coverage where the life insurance policy afforded coverage for death by accidental means.<sup>3</sup> The supreme court held that the distinction should be preserved and that death resulting from the voluntary ingestion of cocaine was not death by accidental means.<sup>4</sup>

II. STATEMENT OF THE CASE

On April 14, 1975, the defendant issued a life insurance policy for Michael P. Weil<sup>5</sup> which included an "additional accidental death benefit" provision affording additional benefit in the event the insured's death occurred solely by accidental means.<sup>6</sup> On August 17, 1985, Michael Weil

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1. 3 HARNETT & LESNICK, *THE LAW OF LIFE AND HEALTH INSURANCE* § 7.02 (1993). *But see* Russell A. Thomson, *The Judicial Approach to "Accidental Means" Policies in California*, 13 HASTINGS L.J. 255, 264 (1961) (stating that California courts have not applied the distinction in practice); 1B APPLEMAN, *INSURANCE LAW AND PRACTICE* §360 (1981) (mentioning the distinction but finding that most courts merely give it "lip service").

2. 7 Cal. 4th 125, 866 P.2d 774, 27 Cal. Rptr. 2d 316 (1994). Justice George authored the court's opinion in which Chief Justice Lucas and Justices Panelli, Arabian, and Baxter concurred. Justice Mosk wrote a dissenting opinion in which Justice Kennard joined. *Id.* at 150, 866 P.2d at 789, 27 Cal. Rptr. 2d at 331 (Mosk, J., dissenting).

3. *Id.* at 129, 866 P.2d at 775, 27 Cal. Rptr. 2d at 317.

4. *Id.* at 129-30, 866 P.2d at 775, 27 Cal. Rptr. 2d at 317.

5. *Id.* at 130, 866 P.2d at 776, 27 Cal. Rptr. 2d at 318. The plaintiffs, Lola and Michelle Weil, were the policy's named beneficiaries. *Id.*

6. *Id.* The provision, termed a "supplemental rider," provided that payment would be made to the beneficiaries if the insured "suffered the loss of life as the direct result of bodily injury, independent of all other causes, effected solely through external,

died of "acute cocaine poisoning" in a San Francisco hotel room.<sup>7</sup> Although the defendant paid the basic benefit provided by the policy, the insurance company denied a claim by the decedent's beneficiaries (plaintiffs) for the additional benefit, claiming that Weil's death did not occur by "accidental means."<sup>8</sup>

On March 31, 1987, the plaintiffs brought an action against the defendant in the Superior Court of Orange County for declaratory relief and damages.<sup>9</sup> On June 30, 1989, the plaintiffs moved for summary judgment or summary adjudication of the issues.<sup>10</sup> The defendant filed an opposition and its own motion for summary judgment on the ground that, as a matter of law, Weil did not die from "accidental means."<sup>11</sup> The superior court summarily adjudicated that the plaintiffs were entitled to the additional proceeds under the accidental death provision.<sup>12</sup> On February 6, 1991, the superior court entered judgment in favor of the plaintiffs for \$100,000.<sup>13</sup> Kemper appealed, and the court of appeal affirmed the judgment.<sup>14</sup>

The California Supreme Court granted review.<sup>15</sup> The court reversed and directed the court of appeal to remand the case to the trial court to reconsider its ruling that Weil's death occurred by accidental means.<sup>16</sup>

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violent and accidental means." *Id.*

7. *Id.* at 130-31, 866 P.2d at 776, 27 Cal. Rptr. 2d at 318. Weil was accompanied by a prostitute who claimed to have seen him "put some white powder in his mouth" and shortly thereafter develop shortness of breath. *Id.* at 188, 866 P.2d at 814, 27 Cal. Rptr. 2d at 356 (Mosk, J., dissenting). A substantial amount of cocaine was found in Weil's system, and there was no external or internal trauma to his body other than that consistent with an overdose of cocaine. *Id.* at 149, 866 P.2d at 788, Cal. Rptr. 2d at 331.

8. *Id.* at 130, 866 P.2d at 776, 27 Cal. Rptr. 2d at 318. See generally, Robert L. Simpson, Annotation, *Death or Injury from Taking Illegal Drugs or Narcotics as Accidental or Result of Accidental Means Within Insurance Coverage*, 41 A.L.R.3d 654 (1972).

9. *Weil*, 7 Cal. 4th at 131, 866 P.2d at 776, 27 Cal. Rptr. 2d at 318. The plaintiffs sought damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of § 790.03(h) of California's Insurance Code (unfair claims settlement practices). *Id.*

10. *Id.* at 131, 866 P.2d at 776-77, 27 Cal. Rptr. 2d at 318-19.

11. *Id.* at 131, 866 P.2d at 777, 27 Cal. Rptr. 2d at 319.

12. *Id.* at 132, 866 P.2d at 777, 27 Cal. Rptr. 2d at 319. The superior court determined that, as a matter of law, an unintentional overdose of cocaine was an "accidental means" covered by the policy. *Id.*

13. *Id.*

14. *Id.* at 132-33, 866 P.2d at 777-78, 27 Cal. Rptr. 2d at 319-20. The decision of the court of appeal was divided and produced three separate opinions. *Id.* at 133, 866 P.2d at 778, 27 Cal. Rptr. 2d at 320.

15. *Id.*

16. *Id.* at 150, 866 P.2d at 789, 27 Cal. Rptr. 2d at 331.

## III. TREATMENT

## A. Justice George's Majority Opinion

Justice George, writing for the court, first noted that the distinction between accidental means and accidental results in insurance policy language was a valid distinction.<sup>17</sup> He pointed out that the distinction was well recognized by California's courts.<sup>18</sup> The court acknowledged that many other jurisdictions, including the federal courts, no longer recognize the distinction but argued that the reasons for doing so were not persuasive.<sup>19</sup>

Justice George found that the phrase "accidental means" as set forth in the insurance policy was not an ambiguous phrase.<sup>20</sup> Because the content of an insurance policy is normally within the control of the parties, it is for the insured to contract for extended coverage.<sup>21</sup> Justice George maintained that it is not appropriate for courts to reinterpret clear policy language to eradicate the distinction.<sup>22</sup>

17. *Id.* at 138-40, 866 P.2d at 781-82, 27 Cal. Rptr. 2d at 323-24.

18. *Id.* at 134, 866 P.2d at 778-79, 27 Cal. Rptr. 2d at 320-21. The first California case which upheld the distinction was *Rock v. Travelers' Insurance Co.*, 172 Cal. 462, 156 P. 1029 (1916). In *Rock*, the court found that an insured who collapsed and died after carrying a funeral casket down a flight of stairs did not die through "accidental means" because "there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death." *Weil*, 7 Cal. 4th at 136, 866 P.2d at 779, 27 Cal. Rptr. 2d at 321 (quoting *Rock*, 172 Cal. at 465, 156 P. at 1029). For a discussion of *Rock* and subsequent California cases upholding the distinction, see Thomson, *supra* note 1, at 257-71.

19. *Weil*, 7 Cal. 4th at 138-39, 866 P.2d at 781-82, 27 Cal. Rptr. 2d at 323-24. The court found support in the federal diversity case of *Landress v. Phoenix Insurance Co.*, which upheld the distinction over a vigorous dissent by Justice Cardozo. Cardozo claimed that "[t]he attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." *Id.* at 137, 866 P.2d at 780-81, 27 Cal. Rptr. at 322-23 (quoting *Landress v. Phoenix Ins. Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting)).

Since the *Landress* decision, however, 25 jurisdictions have expressly repudiated or rejected the distinction. *Id.* at 138, 866 P.2d at 781, 27 Cal. Rptr. 2d at 323; see, e.g., *Wickman v. Northwestern Nat'l. Ins. Co.*, 908 F.2d 1077, 1086 (1st Cir.), cert. denied 498 U.S. 1013 (1990); see also APPLEMAN, *supra* note 1, at 454.

20. *Weil*, 7 Cal. 4th at 139-40, 866 P.2d at 782, 27 Cal. Rptr. 2d at 324. Justice Mosk, however, stated that the contention of ambiguity is "plausible." *Id.* at 160 n.10, 866 P.2d at 796, n.10, 27 Cal. Rptr. 2d at 338 n.10 (Mosk, J., dissenting).

21. *Id.* at 139, 866 P.2d at 782, 27 Cal. Rptr. 2d at 324.

22. *Id.*



The court then attempted to define death through “accidental means.”<sup>23</sup> California courts have taken two approaches.<sup>24</sup> The first approach focuses on the circumstances surrounding the insured’s voluntary act for evidence of an accidental element or an intervening accident.<sup>25</sup> The second approach focuses on the insured’s voluntary act in terms of its foreseeable consequences.<sup>26</sup> The court held that both considerations may properly be invoked in a given case.<sup>27</sup>

The court then addressed whether death by voluntary ingestion of a known hazardous and illegal substance such as cocaine was death by “accidental means.”<sup>28</sup> In *Hargreaves v. Metropolitan Life Insurance Co.*,<sup>29</sup> the court of appeal synthesized both approaches and determined that death from a heroin overdose was not a death by “accidental means.”<sup>30</sup> Justice George rejected *Hargreaves*’ holding of a “high probability” standard and relied instead on “whether the insured knew or should have known that death or injury was common, natural, or substantially likely.”<sup>31</sup> Applying this standard, the court found that an insured who dies by a lethal overdose of a known hazardous and illegal substance “is not entitled to coverage for such a death . . . because he or she should know that death is a common, natural, or substantially likely result of such activity.”<sup>32</sup>

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23. *Id.* at 140-41, 866 P.2d at 782-83, 27 Cal. Rptr. 2d at 324-25.

24. *Id.*

25. *Id.*

26. *Id.* at 140, 866 P.2d at 783, 27 Cal. Rptr. 2d at 325; *see, e.g.*, *Harloe v. California State Life Ins. Co.*, 206 Cal. 141, 142, 273 P. 560, 561 (1928) (denying recovery to sun-stroke victim based on foreseeability of injury); *Losleben v. California State Life Ins. Co.*, 133 Cal. App. 550, 554-56, 24 P.2d 825, 827 (1933) (finding means were “accidental” where insured’s jump from a three-foot high bench resulted in a twisted small intestine, peritonitis, and death); *Davilla v. Liberty Life Ins. Co.*, 114 Cal. App. 308, 313-16, 299 P. 831, 838 (1931) (allowing recovery by beneficiaries of a policeman thrown from motorcycle when car suddenly stopped in front of him).

27. *Weil*, 7 Cal. 4th at 141, 866 P.2d at 783, 27 Cal. Rptr. 2d at 325.

28. *Id.* at 141-42, 866 P.2d at 783-84, 27 Cal. Rptr. 2d at 325-26.

29. 104 Cal. App. 3d 701, 163 Cal. Rptr. 857 (1980).

30. *Weil*, 7 Cal. 4th at 142, 866 P.2d at 784, 27 Cal. Rptr. 2d at 326 (citing *Hargreaves*, 104 Cal. App. 3d at 708, 163 Cal. Rptr. at 857). The *Hargreaves* court based its decision on: (1) the voluntariness of the act; (2) the absence of any unforeseen or unexpected acts; and (3) the instances in which the insured reasonably could expect death to result. *Id.*

31. *Id.* at 145, 866 P.2d at 786, 27 Cal. Rptr. 2d at 328. The *Weil* court rejected the specific language in *Hargreaves* that death or serious injury is a “probable result of ingestion of controlled substances.” *Id.* (emphasis added).

32. *Id.* at 148, 866 P.2d at 788, 27 Cal. Rptr. 2d at 330. Justice Mosk argued, with some persuasiveness, that the majority opinion was flawed because it failed to differentiate between types of illegal substances and their respective risks. *Id.* at 203, 866 P.2d at 824-25, 27 Cal. Rptr. 2d at 366-67 (Mosk, J., dissenting); *see also infra* note 42

As a result of the court's decision, the plaintiffs were not entitled to summary judgment because they failed to show that Weil's ingestion was the result of "unknown external forces."<sup>33</sup>

### B. Justice Mosk's Dissenting View

Justice Mosk wrote a separate dissenting opinion expressing his view that the distinction between accidental means and accidental results should be abolished.<sup>34</sup> In the alternative, Justice Mosk argued that, even under the majority's test for accidental means, Weil's death should be considered effectuated by accidental means.<sup>35</sup>

Under Justice Mosk's analysis, the distinction does not withstand scrutiny in light of standard contract construction.<sup>36</sup> He cites numerous au-

and accompanying text.

33. *Weil*, 7 Cal. 4th at 149, 866 P.2d at 788, 27 Cal. Rptr. 2d at 330.

34. *Id.* at 150, 866 P.2d at 789, 27 Cal. Rptr. 2d at 331 (Mosk, J., dissenting). Justice Mosk found the defendant's stare decisis argument "unpersuasive." *Id.* at 162, 866 P.2d at 797, 27 Cal. Rptr. 2d at 339 (Mosk, J., dissenting). He claimed that the distinction had not been used by the California courts for at least 60 years, and that the majority ruling "resurrected" a doctrine the efficacy of which had long been questioned by other jurisdictions. *Id.*; see also Thomson, *supra* note 1, at 263-64 (arguing that the distinction is "illusory" in practical application); but see *Weil*, 7 Cal. 4th at 162 n.11, 866 P.2d at 797 n.11, 27 Cal. Rptr. 2d at 339 n.11.

35. *Id.* at 203, 866 P.2d at 824-25, 27 Cal. Rptr. 2d at 366-67 (Mosk, J., dissenting). Justice Mosk cited extensively from government statistics to demonstrate that death could not be considered "a common, natural or substantially likely consequence of cocaine use." *Id.* at 203, 866 P.2d at 825, 27 Cal. Rptr. 2d at 367 (Mosk, J., dissenting); see also *infra* note 42.

36. *Weil*, 7 Cal. 4th at 151-52, 866 P.2d at 790, 27 Cal. Rptr. 2d at 332 (Mosk, J., dissenting). "While insurance contracts have special features, they are still contracts to which ordinary rules of contractual interpretation apply." *Id.* (Mosk, J., dissenting) (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264, 833 P.2d 545, 551-52, 10 Cal. Rptr. 2d 538, 544-45 (1992)).

Justice Mosk asserted that there are three basic rules for the interpretation of contracts, all of which support a finding that the distinction between accidental means and accidental results is "fanciful, if not downright bizarre." *Id.* at 151, 866 P.2d at 790, 27 Cal. Rptr. 2d at 332 (Mosk, J., dissenting). The first rule states that where the words of insurance policies are clear and unambiguous, they "are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning." *Id.* at 152, 866 P.2d at 790, 27 Cal. Rptr. 2d at 332 (Mosk, J., dissenting) (quoting CAL. CIV. CODE § 1644). The second rule states that, in cases of ambiguity, the language "must be interpreted in the sense in which the promisor [e.g., the insurer], believed, at the time of making it, that the promisee [e.g., the insured] understood it." *Id.* at 161, 866 P.2d at 796, 27 Cal. Rptr. 2d at 338 (Mosk, J., dissenting) (quoting CAL. CIV. CODE

thorities holding that a layperson would not distinguish coverage for death by accident from death by accidental means.<sup>37</sup> Justice Mosk argued that the “natural and probable consequences” test, derived from criminal and tort law, “defeat[ed] the very purpose of insurance by impairing the reasonable expectations of those who purchase the policies.”<sup>38</sup>

Justice Mosk proposed that the *Wickman* test<sup>39</sup> be adopted in California.<sup>40</sup> Applying the *Wickman* test to the facts of this case, Justice Mosk reasoned that Weil’s death should be covered under the insurance policy because Weil’s “subjective expectation that his conduct was not tantamount to suicide [was] objectively reasonable.”<sup>41</sup>

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§ 1649). The third rule of interpretation states that any remaining ambiguous language must be “interpreted most strongly against the party who caused the uncertainty to exist.” *Id.* at 161, 866 P.2d at 797, 27 Cal. Rptr. 2d at 339 (Mosk, J., dissenting) (quoting CAL. CIV. CODE § 1654).

37. *Id.* at 158-60, 866 P.2d at 794-96, 27 Cal. Rptr. 2d at 336-38 (Mosk, J., dissenting). “It is a distinction without a difference in so far as the average lay person is concerned.” *Id.* (Mosk, J., dissenting) (quoting *Murphy v. Travelers Ins. Co.*, 2 N.W.2d 576, 580 (1942)).

38. *Id.* at 168, 866 P.2d at 801-02, 27 Cal. Rptr. 2d at 343-44 (Mosk, J., dissenting). Appleman pointed out that the insured’s need for financial reimbursement is no less great in situations where an injury resulted from an voluntary act than in those situations where the injury was caused solely by external forces. See APPLEMAN, *supra* note 1, at 454 (“The act of a housewife in standing on the arm of a rocking chair to hang a picture may be careless, but it was such hazards that induced her husband to take out a policy to cover her acts.”).

39. *Wickman v. Northwestern Nat’l. Ins. Co.*, 908 F.2d 1077 (1st Cir.), *cert. denied* 498 U.S. 1013 (1990). In *Wickman*, the First Circuit Court of Appeals proposed a two-step test for determining when an insured’s act would be considered tantamount to suicide and not covered as accidental, and when the insured’s act resulting in death was merely “an accident.” *Weil*, 7 Cal. 4th at 180, 866 P.2d at 809, 27 Cal. Rptr. 2d at 351 (Mosk, J., dissenting). The factfinder must first determine “whether the insured actually expected that his conduct would be highly likely to result in injury or death.” *Id.* (Mosk, J., dissenting). If the factfinder so determines, he or she must then determine whether such expectation was objectively reasonable. *Id.* at 181, 866 P.2d at 811, 27 Cal. Rptr. 2d at 252 (Mosk, J., dissenting).

40. *Id.* at 187, 866 P.2d at 811, 27 Cal. Rptr. 2d at 353 (Mosk, J., dissenting).

41. *Id.* at 196, 866 P.2d at 820, 27 Cal. Rptr. 2d at 362 (Mosk, J., dissenting). Justice Mosk argued that Weil’s “recreational use of [cocaine],” as established by the facts, “fit into a well-established societal pattern.” *Id.* at 192, 866 P.2d at 817, 27 Cal. Rptr. 2d at 359 (Mosk, J., dissenting). Justice Mosk argued that it could be fairly concluded that Weil did not subjectively expect to be harmed when he ingested cocaine orally. *Id.* (Mosk, J., dissenting).

Justice Mosk cited several government statistics to support his finding that Weil’s subjective expectation was objectively reasonable. *Id.* at 194-96, 866 P.2d at 818-20, 27 Cal. Rptr. 2d at 360-62 (Mosk, J., dissenting). Based on these statistics, Justice Mosk argued that the risk of death for cocaine use was “extraordinarily low” in the year of Weil’s death, possibly much less than a mortality rate of fourteen ten-thousandths

Alternatively, under the majority's "natural and probable consequences" test, Justice Mosk argued that Weil's death occurred through accidental means.<sup>42</sup> Justice Mosk concluded that Weil's beneficiaries were entitled to recover and that the judgment of the court of appeal should be affirmed.<sup>43</sup>

#### IV. CONCLUSION

The California Supreme Court held in *Weil* that death resulting from the voluntary ingestion of a known hazardous and illegal substance is not death by accidental means.<sup>44</sup> Because of the broad formulation of "known hazardous and illegal substances," it does not appear that the majority adequately evaluated the risk involved.<sup>45</sup> The majority based its conclusion on its cursory analysis that cocaine was a known hazardous and illegal substance and that its ingestion would naturally and probably result in death.<sup>46</sup> In fact, the majority appeared to have placed more emphasis on the fact that cocaine is illegal than on its hazardous nature.<sup>47</sup>

There are two criticisms of this approach, both advanced by Justice Mosk in his dissenting opinion.<sup>48</sup> First, "the illegality of an insured's act

(O.OO14) of one percent. *Id.* at 195-96, 866 P.2d at 819-20, 27 Cal. Rptr. 2d at 361-62 (Mosk, J., dissenting).

42. *Weil*, 7 Cal. 4th at 203, 866 P.2d at 824-25, 27 Cal. Rptr. 2d at 366-67 (Mosk, J., dissenting). Justice Mosk questioned both the majority's reference to a "known hazardous and illegal substance" rather than the specific drug "cocaine" in its determination of "natural and probable consequences" and its application of the use in this case. *Id.* at 203, 866 P.2d at 825, 27 Cal. Rptr. 2d at 367 (Mosk, J., dissenting). Justice Mosk demonstrated the "reductio ad absurdum" in the majority's argument by pointing out that, under the majority's broad classification of "illegal substances," one who "smokes a joint" would be deemed "substantially likely" to die. *Id.* (Mosk, J., dissenting). Furthermore, the "airy assertion" that cocaine is likely to kill "evaporates in face of the cold reality of governmental statistics." *Id.* (Mosk, J., dissenting).

43. *Id.* at 204, 866 P.2d at 825, 27 Cal. Rptr. 2d at 367 (Mosk, J., dissenting).

44. *Weil*, 7 Cal. 4th at 150, 866 P.2d at 789, 27 Cal. Rptr. 2d at 331.

45. *See id.* at 198-99, 866 P.2d at 821-22, 27 Cal. Rptr. 2d 363-64 (Mosk, J., dissenting) ("The majority apparently find it easier to decide the broader question they have formulated, but it is the wrong question nonetheless and leads the majority to the wrong answer.")

46. *Id.* at 147-48, 866 P.2d at 788, 27 Cal. Rptr. 2d at 330.

47. *See id.* at 200, 866 P.2d at 823, 27 Cal. Rptr. 2d at 365 (Mosk, J., dissenting) (claiming the word "illegal" is a "leitmotif echoing throughout the majority opinion").

48. *See id.* at 200-01, 866 P.2d at 823-24, 27 Cal. Rptr. 2d at 365-66 (Mosk, J., dissenting).

is wholly irrelevant to the beneficiary's right to recover on the policy."<sup>49</sup> Unlike tort and criminal law, it is not the insured who benefits from illegal actions, but the innocent beneficiary.<sup>50</sup> Second, the insurance policy may be drafted in such a way to preclude coverage for death resulting from the commission of illegal acts.<sup>51</sup> Exclusions in the policy for such deaths would both protect the insurer and serve the reasonable expectations of the insured.

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49. *Weil*, 7 Cal. 4th at 201, 866 P.2d at 823, 27 Cal. Rptr. 2d at 365 (Mosk, J., dissenting). "The insurance company does not represent the public safety concerns of society but the commercial interests of its owners." *Id.* at 174, 866 P.2d at 806, 27 Cal. Rptr. 2d at 348 (Mosk, J., dissenting).

50. *Id.* at 201, 866 P.2d at 823, 27 Cal. Rptr. 2d at 365 (Mosk, J., dissenting). Justice Mosk criticized the majority for its adherence to outdated rationales and analyses: "But once again the train is leaving the station without the majority on board." *Id.* (Mosk, J., dissenting).

Justice Mosk claimed that the "public policy" rationale was "absurd on its face." *Id.* (Mosk, J., dissenting). "It is not to be presumed that policyholders as a class, or any appreciable number of them, will go out and seek death in unlawful pursuits in order to mature their policies." *Id.* (Mosk, J., dissenting) (quoting *Home State Life Ins. Co. v. Russell*, 53 P.2d 562, 563 (1936)).

51. *Weil*, 7 Cal. 4th at 175, 866 P.2d at 806, 27 Cal. Rptr. 2d at 348 (Mosk, J., dissenting). "An accident insurance policy may contain a clause generally excluding coverage for injury or death resulting from 'voluntary exposure to unnecessary danger.'" *Id.* (Mosk, J., dissenting). Alternatively, the "company may exclude any death resulting from the use or while under the influence of any narcotic or other controlled substance." *Id.* at 176, 866 P.2d at 806, 27 Cal. Rptr. 2d at 348 (Mosk, J., dissenting). In this case, the insurance policy included an exhaustive list of seven exclusions, including "committing an assault or felony." *Id.* at 130, 866 P.2d at 776, 27 Cal. Rptr. 2d at 318. The superior court ruled that this exclusion did not apply because death resulted from a "misdemeanor use of cocaine." *Id.* at 132, 866 P.2d at 777, 27 Cal. Rptr. 2d at 319; see also James M. 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).

## VII. JUVENILE LAW

*The juvenile court did not abuse its discretion in refusing a motion for change of placement where the moving party failed to show changed circumstances under which the requested placement would be in the best interest of the child: In re Stephanie M.*

## I. INTRODUCTION

In *In re Stephanie M.*,<sup>1</sup> the California Supreme Court reviewed a decision of the juvenile court denying a motion for custody modification seeking placement of a child with her maternal grandmother rather than with her foster parents.<sup>2</sup> As a preliminary determination, the court held that the juvenile court had jurisdiction over the case under the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>3</sup> The court then concluded that the juvenile court properly denied the motion for change of placement because the change would not serve the best interests of the child.<sup>4</sup>

Stephanie M. was born on January 26, 1989, in Guadalajara, Mexico. Stephanie M. and her mother illegally entered the United States to settle in San Diego County where Stephanie's father resided.<sup>5</sup> Five months later, Stephanie entered a hospital and was diagnosed with battered child

1. 7 Cal. 4th 295, 867 P.2d 706, 27 Cal. Rptr. 2d 595 (1994). Justice Mosk wrote the unanimous opinion of the court in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, George and Panelli concurred. *Id.* at 302, 867 P.2d at 708, 27 Cal. Rptr. 2d at 597.

2. *Id.* at 302-26, 867 P.2d at 708-24, 27 Cal. Rptr. 2d at 597-613; see 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 138-140 (9th ed. 1989) (discussing modifications of custody awards); 32 CAL. JUR. 3D *Family Law* §§ 933-938 (1994).

3. *Stephanie M.*, 7 Cal. 4th at 308-13, 867 P.2d at 712-15, 27 Cal. Rptr. 2d at 601-04; see CAL. FAM. CODE §§ 3400-3425 (West 1994); see also 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 39-42 (9th ed. 1989) (explaining the general provisions of the UCCJA); 32 CAL. JUR. 3D *Family Law* §§ 970-988 (1994) (providing a general discussion of the UCCJA); Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977) (stating the problems that arise in applying the UCCJA); Henry H. Foster & Doris J. Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011 (1977) (advocating the adoption of the UCCJA).

4. *Stephanie M.*, 7 Cal. 4th at 315-26, 867 P.2d at 717-24, 27 Cal. Rptr. 2d at 606-13.

5. *Id.* at 303, 867 P.2d at 709, 27 Cal. Rptr. 2d at 598.

syndrome.<sup>6</sup> The Department of Social Services filed an action under section 300 of the California Welfare and Institutions Code and the juvenile court, at the detention hearing, ordered foster care for Stephanie.<sup>7</sup> In later hearings, the court ordered continued placement with foster parents despite Stephanie's grandmother's expressed desire to take care of her grandchild.<sup>8</sup> In a motion for change of placement, Stephanie's parents asked the court to place Stephanie with either her grandmother or an aunt.<sup>9</sup> The juvenile court denied the motion in view of Stephanie's special emotional needs, her attachment with the foster mother and the lack of a substantial relationship with her grandmother.<sup>10</sup> Pursuant to this holding, the juvenile court terminated the parental rights of Stephanie's parents on January 15, 1992.<sup>11</sup> On March 17, 1992, the juvenile court received a letter from the Mexican government informing the court that a Mexican court had asserted jurisdiction over Stephanie.<sup>12</sup>

The court of appeal held that the juvenile court erred in refusing to grant the motion for change of placement and reversed the order of termination of parental rights.<sup>13</sup> The California Supreme Court reversed.<sup>14</sup>

## II. TREATMENT

### A. *Jurisdictional Issues*

Stephanie's mother argued that the juvenile court's failure to give notice to the Mexican consulate regarding the pendency of the action as required by the Multilateral Vienna Convention on Consular Relations and Optional Protocol on Disputes<sup>15</sup> (Convention) deprived the juvenile

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6. *Id.* Stephanie had three bone fractures, bruises, and signs that she had been suffocated. *Id.*; see CAL. WELF. & INST. CODE § 300(a), (b) (West 1984).

7. *Stephanie M.*, 7 Cal. 4th at 303, 867 P.2d at 709, 27 Cal. Rptr. 2d at 598. For an outline of the judicial procedure in child custody cases, see *Cynthia D. v. Superior Court*, 5 Cal. 4th 242, 247-50, 851 P.2d 1307, 1308-11, 19 Cal. Rptr. 2d 698, 699-702 (1993).

8. *Stephanie M.*, 7 Cal. 4th at 304-05, 867 P.2d at 710, 27 Cal. Rptr. 2d at 599. The juvenile court received evidence that Stephanie suffered from malnutrition while staying with her grandmother in Mexico. *Id.* at 305, 867 P.2d at 710, 27 Cal. Rptr. 2d at 599. Furthermore, the court recognized that because the grandmother refused to believe that Stephanie's parents could have abused their child, she would be unable to protect Stephanie from potential future mistreatment. *Id.*

9. *Id.* at 306, 867 P.2d at 711, 27 Cal. Rptr. 2d at 600.

10. *Id.* at 308, 867 P.2d at 712, 27 Cal. Rptr. 2d at 601.

11. *Id.*

12. *Id.* at 308, 867 P.2d at 712, 27 Cal. Rptr. 2d at 601.

13. *Id.*

14. *Id.* at 302, 867 P.2d at 709, 27 Cal. Rptr. 2d at 598.

15. Multilateral Vienna Convention on Consular Relations and Optional Protocol on

court of jurisdiction.<sup>16</sup> The court dismissed this claim because the Convention expressly states that its notice requirement is subject to the laws of the receiving state.<sup>17</sup> The court next determined that the juvenile court had jurisdiction over Stephanie's dependency hearing because a child facing potential or actual abuse is in an emergency situation which necessitates exercising jurisdiction pursuant to the UCCJA.<sup>18</sup>

The court then addressed whether the juvenile court should have relinquished this jurisdiction to Mexico based on forum non conveniens under the UCCJA.<sup>19</sup> To aid a court in this determination, the UCCJA presents several factors for consideration.<sup>20</sup> Upon review of these factors,

Disputes, Apr. 24, 1963, art. 37, 21 U.S.T. 77, 596 U.N.T.S. 262 [hereinafter Convention].

16. *Stephanie M.*, 7 Cal. 4th at 308, 867 P.2d at 712, 27 Cal. Rptr. 2d at 601. The Convention provides that authorities in member countries have the duty to "inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor . . . who is a national of the sending State." Convention, *supra* note 15, art. 37, 21 U.S.T. at 102, 596 U.N.T.S. at 294. However, this notice requirement is "without prejudice to the operation of the laws and regulations of the receiving State." *Id.*

17. *Stephanie M.*, 7 Cal. 4th at 309, 867 P.2d at 712-13, 27 Cal. Rptr. 2d at 601-02.

18. *Id.* at 309, 867 P.2d at 713-14, 27 Cal. Rptr. 2d at 602-03; see CAL. FAM. CODE § 3403(a)(3)(A) (West 1994). The court also stated that jurisdiction could be asserted under Family Code § 3403(a)(2) under which a court has jurisdiction if "[i]t is in the best interest of the child that a court of this state assume jurisdiction because (A) . . . the child and at least one contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's care." *Stephanie M.*, 7 Cal. 4th at 310, 867 P.2d at 714, 27 Cal. Rptr. 2d at 603 (quoting CAL. FAM. CODE § 3404(a)(2) (West 1994)). Stephanie and both her parents lived in California with significant connections to the state, and substantial evidence relating to Stephanie's personal relationships and the care she received could be found within the state. *Id.*; see 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 47 (9th ed. 1989) (discussing emergency jurisdiction).

19. *Stephanie M.*, 7 Cal. 4th at 310-11, 867 P.2d at 714, 27 Cal. Rptr. 2d at 603; see CAL. FAM. CODE § 3407(d) (West 1994). The UCCJA accords a court the discretion to decide sua sponte if it is an inconvenient forum to resolve a dependency matter. *Stephanie M.*, 7 Cal. 4th at 311, 867 P.2d at 714, 27 Cal. Rptr. 2d at 603. The UCCJA provides that when considering if the court is an inconvenient forum, it must ask if another forum would better serve the interest of the child. *Id.*; see CAL. FAM. CODE § 3407(c) (West 1994); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 50-52 (9th ed. 1989) (discussing the forum non conveniens doctrine).

20. *Stephanie M.*, 7 Cal. 4th at 311-12, 867 P.2d at 714-15, 27 Cal. Rptr. 2d at 603-04. The UCCJA states that in determining forum non conveniens, the court may look at the following factors:

- (1) If another state is or recently was the child's home state.
- (2) If another state has a closer connection with the child and the child's



the California Supreme Court determined that the juvenile court did not abuse its discretion<sup>21</sup> in assuming jurisdiction over the minor.<sup>22</sup>

The court also addressed the father's contention that, as a matter of comity, the court should honor the Mexican court's decree appointing a guardian to take custody of the child and return with her to Mexico.<sup>23</sup> In response, the court held that under its interpretation of Family Code section 3414, if a court enters a custody order with proper jurisdiction, it maintains continuing exclusive jurisdiction over any subsequent modification of the custody decree provided that the state retains "significant connection" jurisdiction under the UCCJA.<sup>24</sup> Thus, the court declined to give effect to the decree issued by the Mexican court.<sup>25</sup>

### B. Abuse of Discretion

After resolving the issues relating to jurisdiction, the court considered whether the juvenile court abused its discretion<sup>26</sup> in refusing to grant

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family or with the child and one or more of the contestants.

(3) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.

(4) If the parties have agreed on another forum which is no less appropriate.

(5) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 3401.

CAL. FAM. CODE § 3407(c) (West 1994).

21. Courts have applied the abuse of discretion standard in reviewing a court's decision to retain jurisdiction under the UCCJA. *See* CAL. FAM. CODE § 3407(d) (West 1994); *see also* *Pieri v. Superior Court*, 1 Cal. App. 4th 114, 1 Cal. Rptr. 2d 742 (1991) (using the abuse of discretion standard of review); *In re Marriage of Fox*, 180 Cal. App. 3d 862, 225 Cal. Rptr. 823 (1986) (same); *Plas v. Superior Court*, 155 Cal. App. 3d 1008, 202 Cal. Rptr. 490 (1984) (same).

22. *Stephanie M.*, 7 Cal. 4th at 312, 867 P.2d at 715, 27 Cal. Rptr. 2d at 604. The court observed that: (1) California had emergency jurisdiction over Stephanie; (2) the evidence regarding abuse, the possibility of reunification, and Stephanie's present and future care remained in the state; and (3) Stephanie and her parents all resided in California. *Id.*

23. *Id.* at 313, 867 P.2d at 716, 27 Cal. Rptr. 2d at 605.

24. *Id.* at 314-15, 867 P.2d at 716-17, 27 Cal. Rptr. 2d at 605 (citing *Kumar v. Superior Court*, 32 Cal. 3d 689, 696, 652 P.2d 1003, 1007, 186 Cal. Rptr. 772, 776 (1982)). The court noted that Mexico did not even request the enforcement of its decree. *Id.*

25. *Id.* Mexico also argued that the lack of notice given to the Mexican consulate regarding the case violated the due process rights of Stephanie, her parents, and her grandmother. *Id.* at 315, 867 P.2d at 717, 27 Cal. Rptr. 2d at 606. However, the court stated that although the due process right attaches to individuals, it does not belong to a foreign consulate. *Id.* at 315-16, 867 P.2d at 716, 27 Cal. Rptr. 2d at 606.

26. The determination of the juvenile court in a dependency hearing will not face review on appeal without a clear showing of abuse of discretion. *Id.* at 318, 867 P.2d at 718, 27 Cal. Rptr. 2d at 607 (citing *In re Michael B.*, 8 Cal. App. 4th 1698, 1704, 11

the motion for change of placement brought under section 388 of the Welfare and Institutions Code.<sup>27</sup> The court determined that the juvenile court did not abuse its discretion because the juvenile court carefully weighed the evidence in light of the Stephanie's best interest.<sup>28</sup> Therefore, the court disagreed with the court of appeal and proceeded to discuss the issues raised by that court.<sup>29</sup>

Cal. Rptr. 290, 294 (1992); *In re Corey*, 230 Cal. App. 2d 813, 832, 41 Cal. Rptr. 379, 391 (1964)). The test for abuse of discretion is "whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." *Id.* at 318, 867 P.2d at 719, 27 Cal. Rptr. 2d at 608 (quoting *Shamblin v. Brattain*, 44 Cal. 3d 474, 478-79, 749 P.2d 339, 341, 243 Cal. Rptr. 902, 905 (1988)).

27. *Id.* Section 388 provides in pertinent part:

Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.

CAL. WELF. & INST. CODE § 388 (West 1984). The most important concern in the best interest analysis is the "goal of assuring stability and continuity." *Stephanie M.*, 7 Cal. 4th at 316, 867 P.2d at 718, 27 Cal. Rptr. 2d at 607 (citing *Burchard v. Garay*, 42 Cal. 3d 531, 538 & n.6, 724 P.2d 486, 491 & n.6, 229 Cal. Rptr. 800, 804 & n.6 (1986)). The moving party bears the burden of showing by a preponderance of evidence that in light of changed circumstances or new evidence, a change of placement would be in the child's best interest. *Id.* at 317, 867 P.2d at 718, 27 Cal. Rptr. 2d at 607. In so doing, the moving party must rebut the presumption that foster care is in the best interest of the child. *Id.* (citing *In re Marilyn H.*, 5 Cal. 4th 295, 302, 851 P.2d 826, 830, 19 Cal. Rptr. 2d 544, 548 (1993)); see Nancy B. Shernow, Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677, 678-85 (1988) (discussing the standards for custody modification).

28. *Stephanie M.*, 7 Cal. 4th at 318-19, 867 P.2d at 719, 27 Cal. Rptr. 2d at 608. The juvenile court considered the following evidence: (1) the grandmother maintained little or no contact with the child during her stay with foster parents and had not written, seen or talked with the child in over a year; (2) lack of any substantial bond between Stephanie and her grandmother; (3) the language barrier between the two; (4) Stephanie's fragile emotional condition and the solid bond with her foster parents; and (5) Stephanie's manifested uneasiness during her grandmother's authorized visits. *Id.*; see 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 140 (9th ed. 1989) (same); 32 CAL. JUR. 3D *Family Law* § 937 (1994) (discussing the circumstances justifying modification).

29. *Stephanie M.*, 7 Cal. 4th at 319, 867 P.2d at 719, 27 Cal. Rptr. 2d at 608. The court of appeal held that the juvenile court abused its discretion by: (1) denying due deference to the relative placement preference stated in § 361.3 in force at time of the

First, the court stated that the relative placement preference of section 361.3 of the Welfare and Institutions Code is not a statutory presumption dictating automatic custody to a relative.<sup>30</sup> It reasoned that the "preferential consideration" accorded to a relative, as defined by the statute itself, merely means that the family member requesting custody will be considered and evaluated before any other potential parties.<sup>31</sup> Since the evidence indicated that Stephanie's placement with her grandmother would be contrary to her best interest, the court held that the juvenile court did not abuse its discretion by ordering foster care.<sup>32</sup>

Second, the court discussed the importance placed by the juvenile court on the suitability of the grandmother's home.<sup>33</sup> The court acknowledged that the juvenile court conclusively determined that the grandmother's home was suitable.<sup>34</sup> Nevertheless, the court agreed with the juvenile court that this option failed the best interest of the child test.<sup>35</sup>

Finally, the court reached a similar result regarding the grandmother's interest in preserving family relations with Stephanie.<sup>36</sup> The court ruled, as did the juvenile court, that this interest did not outweigh Stephanie's best interest.<sup>37</sup> The court, therefore, concluded that the juvenile court did not abuse its discretion in refusing a change of placement that would not promote Stephanie's best interest.

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hearing; (2) failing to give sufficient consideration to the suitability of placing the child under her grandmother's care; and (3) giving priority to the child's relationship with her foster parents over her bond with her grandmother. *Id.*; see CAL. WELF. & INST. CODE § 361.3 (West 1984).

30. *Stephanie M.*, 7 Cal. 4th at 320, 867 P.2d at 720, 27 Cal. Rptr. 2d at 609. Section 361.3 provided that "in any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative." CAL. WELF. & INST. CODE § 316(a) (West 1984).

31. *Stephanie M.*, 7 Cal. 4th at 320, 867 P.2d at 720, 27 Cal. Rptr. 2d at 609; see CAL. WELF. & INST. CODE § 361.3(c)(1) (West 1984).

32. *Stephanie M.*, 7 Cal. 4th at 321, 867 P.2d at 720-21, 27 Cal. Rptr. 2d at 609-10. The court observed that Stephanie's emotional vulnerability and the close bond developed with her foster parents militated against her placement with her grandmother. *Id.*

33. *Id.* at 321-23, 867 P.2d at 721-22, 27 Cal. Rptr. 2d at 610-11.

34. *Id.* at 322, 867 P.2d at 721, 27 Cal. Rptr. 2d at 610. The juvenile court considered an evaluation report by the Mexican social services of the grandmother's home stating that her home was suitable for the child. *Id.*

35. *Id.* at 323, 867 P.2d at 722, 27 Cal. Rptr. 2d at 611.

36. *Id.* at 324-25, 867 P.2d at 722-23, 27 Cal. Rptr. 2d at 611-12.

37. *Id.* at 325, 867 P.2d at 723, 27 Cal. Rptr. 2d at 612.

### III. CONCLUSION

In *Stephanie M.*, the California Supreme Court further bolstered the rule that the change of circumstances test is merely an adjunct of the best interest of the child standard. A mere showing of different circumstances will not suffice. Thus, the moving party has the burden of not only proving that there are changed circumstances, but also that these new developments shift the scale so that custody modification would be in the child's best interest. This rather heavy burden is justified where a child's welfare is at stake in which stability and continuity of care are paramount concerns.

ANNA HUR

## VIII. PROBATE LAW

*Enforcement of a "no contest clause" against a widow pursuing surviving spousal rights to community property assets included in the trust estate is consistent with California law and does not prevent her from obtaining all she is entitled to under community property or federal labor laws, but rather merely prevents her from obtaining those benefits in addition to the property conditionally left to her within the trust: Burch v. George.*

### I. INTRODUCTION

In *Burch v. George*,<sup>1</sup> the California Supreme Court considered three issues concerning "no contest" clauses.<sup>2</sup> First, the court examined

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1. 7 Cal. 4th 246, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994). Justice Baxter wrote the majority opinion, in which Chief Justice Lucas and Justices Panelli, Arabian, and George concurred. *Id.* at 251-74, 866 P.2d at 94-110, 27 Cal. Rptr. 2d at 167-82. Justice Kennard wrote a dissenting opinion. *Id.* at 274-94, 866 P.2d at 110-22, 27 Cal. Rptr. 2d at 183-95 (Kennard, J., dissenting). Justice Mosk also dissented from the majority opinion. *Id.* at 274, 866 P.2d at 109, 27 Cal. Rptr. 2d at 182 (Mosk, J., dissenting in part, abstaining in part).

2. *Id.* at 253, 866 P.2d at 96, 27 Cal. Rptr. 2d at 169.

In December 1985, Frank Burch and his fifth wife, Marlene, were married. *Id.* at 252, 866 P.2d at 95, 27 Cal. Rptr. 2d at 168. After their marriage, Frank became the sole shareholder of a prior investment interest known as Pacific Coast Ford. Shortly thereafter, Frank became a participant in the company's pension plan. *Id.* In 1988, Frank retained counsel to create a will and testamentary trust designating Frank's blood relatives as the primary beneficiaries. *Id.* During their marriage, and unbeknownst to Marlene, Frank transferred several assets to the trust including the stock and pension plan interests he held in Pacific Coast Ford. *Id.* The resulting Frank Burch Family Trust (FBFT) included a subsidiary marital trust for Marlene that did not contain any of Frank's interests from Pacific Coast Ford. *Id.*

Both the FBFT and will instruments contained a "no contest clause" providing that any beneficiary challenging the provisions of the FBFT or the trustor's last will, or seeking to set aside such instruments, be treated as if it had been determined that "such person had predeceased the execution of this . . . instrument without issue." *Id.* at 256, 866 P.2d at 98, 27 Cal. Rptr. 2d at 171. In addition, the FBFT recited that, "the property subject to this Trust is [the trustor's] separate property and that his interest therein . . . shall remain his separate property." *Id.* at 256, 866 P.2d at 97, 27 Cal. Rptr. 2d at 170.

When Frank died in March of 1989, the assets of his estate were valued at greater than \$7 million. *Id.* at 252, 866 P.2d at 95, 27 Cal. Rptr. 2d at 168. Marlene received \$800,000 in joint tenancy interests, and \$200,000 in life insurance proceeds outside of the trust. *Id.* Under the FBFT provisions, she received an additional \$60,000 in life insurance proceeds, Frank's Mercedes Benz, a 53-foot yacht, a \$1 million beach house still under construction, and a life estate providing approximately \$6,000 per month. *Id.* at 252-53, 866 P.2d at 95, 27 Cal. Rptr. 2d at 168. Under the remainder of the FBFT, the balance of Frank's interests, comprised of approximately \$4 million in

whether such a clause in a trust agreement is triggered when the surviving spouse seeks state and federal rights beyond the provisions of the trust instrument.<sup>3</sup> Second, the court analyzed whether California law provides a precedent for precluding such effects, once triggered, for claims involving community property rights.<sup>4</sup> Third, the court considered whether the pursuit of pension benefits granted by the federal Employee Retirement Income Security Act of 1974 (ERISA)<sup>5</sup> is exempt from the application of a no contest clause.<sup>6</sup>

The majority of the court concluded that the terms of the trust reflected the testator's specific intent to foreclose any opportunity for his surviving spouse to retain the trust distribution while pursuing alternative claims to the assets involved.<sup>7</sup> The court further determined that enforcement of the no contest clause did not preclude the surviving spouse's right to pursue state community property or federal pension benefit interests, and therefore, did not violate legal or public policy concerns.<sup>8</sup> Recognizing that the trust agreement forced the spouse to make an election as to the survivorship rights sought, the court articulated that its position was not an "endorsement" of marital duplicity", nor of a "trustor's alleged breach of trust", but merely an acknowledgment that the testator's intent to limit recovery of assets, either by will or by law, would prevail.<sup>9</sup>

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proceeds upon sale of Pacific Coast stock and the corresponding pension plan death benefit of \$169,000, would transfer to his blood relatives. *Id.* at 253, 866 P.2d at 95, 27 Cal. Rptr. 2d at 168.

Upon the death of her husband, Marlene petitioned the probate court to determine whether she could seek her community property rights in the assets held by the trust estate, and claim her rights under the Employee Retirement Income Security Act of 1974 (ERISA), without violating the no contest clause of the trust instrument. *Id.*

The probate court ruled that both proposed actions would trigger the no contest clause because they would thwart the intent of the trust. *Id.* The court of appeal affirmed. *Id.* at 253, 866 P.2d at 95-96, 27 Cal. Rptr. 2d at 168-69. Although the parties settled out of court, the supreme court granted review because the issues were "important and of continuing interest." *Id.* at 253 n.4, 866 P.2d at 96 n.4, 27 Cal. Rptr. 2d at 169 n.4.

3. *Id.* at 253-54, 866 P.2d at 96, 27 Cal. Rptr. 2d at 169.

4. *Id.* at 254, 866 P.2d at 96, 27 Cal. Rptr. 2d at 169.

5. See 29 U.S.C. § 1001-1461 (1988 & Supp. 1992).

6. *Burch*, 7 Cal. 4th at 254, 866 P.2d at 96, 27 Cal. Rptr. 2d at 169.

7. *Id.* at 273, 866 P.2d at 109, 27 Cal. Rptr. 2d at 182.

8. *Id.*

9. *Id.* at 273-74, 866 P.2d at 109, 27 Cal. Rptr. 2d at 182.

## II. TREATMENT

### A. Majority Opinion

The majority began its analysis by reviewing contemporary laws governing the enforcement of no contest clauses.<sup>10</sup> Probate Code sections 21303 and 21304 codify the general principle that a no contest clause is enforceable against a beneficiary who challenges the instrument within the terms of the clause, thereby triggering forfeiture.<sup>11</sup> Therefore, such clauses must be strictly construed to reflect the intent of the transferor. Surveying previous judicial inquiry, the court found that "contest" was a fact specific determination, dependent upon the individual circumstances involved, as well as the specific language employed.<sup>12</sup> Further, the court reasoned that because the testator's intentions are controlling, the court should avoid immunizing any legal proceeding designed to thwart such intentions.<sup>13</sup> Thus, it was necessary to evaluate whether filing the state community property complaint or the federal ERISA complaint would constitute contest within the meaning of the Frank Burch Family Trust (FBFT) no contest clause.<sup>14</sup>

#### 1. Would the No Contest Clause Be Triggered?

The proposed state complaint alleged that, under California community property laws, Marlene Burch was entitled to one half of the stock of Pacific Coast Ford and one half of the proceeds from various life insurance plans purchased by the Pacific Coast pension plan, assets which were improperly included in their entirety within the FBFT.<sup>15</sup> The com-

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10. *Id.* at 254-55, 866 P.2d 96-97, 27 Cal. Rptr. 2d at 169-70.

11. See CAL. PROB. CODE § 21303 (West 1991), (stating "[e]xcept to the extent otherwise provided in this part, a no contest clause is enforceable against a beneficiary who brings a contest within the terms of the no contest clause"); see also CAL. PROB. CODE § 21304 (West 1991), (providing "[i]n determining the intent of the transferor, a no contest clause shall be strictly construed").

12. *Burch*, 7 Cal. 4th at 254-55, 866 P.2d at 96-97, 27 Cal. Rptr. 2d at 169-70. The court cited to the following cases in its examination: *Estate of Lindstrom*, 191 Cal. App. 3d 375, 381, 236 Cal. Rptr. 376, 379 (1987) (finding that an in terrorem provision creates a condition on dispositions under the instrument); *Estate of Watson*, 177 Cal. App. 3d 569, 572, 236 Cal. Rptr. 14, 16 (1986) (following the rule of strict construction); *Estate of Black*, 160 Cal. App. 3d 582, 587, 206 Cal. Rptr. 663, 665-66 (1984) (finding that "contest" under a no contest clause is fact and language specific); *Estate of Kazian*, 59 Cal. App. 3d 797, 802, 130 Cal. Rptr. 908, 910 (1976) (examining the intent of the testator).

13. *Burch*, 7 Cal. 4th at 255, 866 P.2d at 97, 27 Cal. Rptr. 2d at 170.

14. *Id.*

15. *Id.*

plaint sought return of those assets through various causes of action directed at the trustees and other beneficiaries of the FBFT.<sup>16</sup>

The proposed federal complaint alleged that under ERISA, Marlene was entitled to 100 percent of the proceeds arising from the pension plan death benefits, which were improperly denied her by the plan's administrators, or alternatively, that under community property law, she was entitled to fifty percent of all the death benefits, and one-half of any benefits payable under the life insurance policies purchased by the plan.<sup>17</sup> The complaint sought further relief from the plan administrators for breach of fiduciary duty and unlawful conversion of said benefits.<sup>18</sup>

The court next examined the FBFT instrument, paying particular attention to the "preliminary recitals," the provision for the "division of the trust estate upon the trustor's death," and the no contest clause.<sup>19</sup> The recitals state that all of the property within the trust estate and subject to the trust, including all proceeds and income derived therefrom, were and would remain Frank Burch's separate property.<sup>20</sup> The FBFT distribution plan required, after certain distributions and payments, the creation of essentially six individual trusts. Twenty percent of the remaining estate was placed in marital trust for Marlene, and the other eighty percent was split among four other trusts for Frank's blood relatives, while a sixth trust provided life insurance proceeds for the benefit of his mother.<sup>21</sup> Lastly, the no contest clause stated that any beneficiary under the trust who sought to adjudicate the terms of the trust shall be treated as if they had predeceased the execution of the FBFT without issue.<sup>22</sup>

The task before the court was to determine whether it was Frank

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 256, 866 P.2d at 97, 27 Cal. Rptr. 2d at 170.

20. *Id.*

21. *Id.*

22. *Id.* at 256, 866 P.2d at 98, 27 Cal. Rptr. 2d at 171. The Trust reads in part:

In the event that any beneficiary under this Trust . . . seeks to obtain in any proceeding in any court an adjudication that this Trust or any of its provisions . . . is void, or seeks otherwise to void, nullify or set aside this Trust or any of its provisions, then the right of that person to take any interest given to him or her by this Trust shall be determined as it would have been determined had such person predeceased the execution of this trust instrument without issue.

*Id.*



Burch's "unequivocal intention" that his wife forfeit all her rights under the FBFT distribution plan if she pursued her rights as surviving spouse in the trust estate.<sup>23</sup> If the court determined clear intent, the no contest clause would be triggered.<sup>24</sup>

The court noted that Frank Burch clearly intended to dispose of the trust assets in aggregate and that such assets were his separate property. Citing Witkin, the court acknowledged that in circumstances where the trustor declared all of the property as separate, and intended to dispose of his entire estate, it was immaterial that he was mistaken in his belief that his spouse has no community property interests in the assets.<sup>25</sup> It is his "manifest intention" that is controlling.<sup>26</sup> Therefore, compliance with the testator's intentions required an election by the spouse either to acquiesce to the terms of the FBFT, or to pursue an alternative course.<sup>27</sup> As the court explained, "[t]he purpose of the election is to adjust the distribution of the property under the will to conform to the express or implied intention of the testator."<sup>28</sup>

Marlene Burch argued that the instrument did not specifically name the Pacific Coast Ford stock, "the pension plan benefits or the insurance policies" as assets of the FBFT, and therefore, pursuit of marital interests in the property should not trigger the no contest clause.<sup>29</sup> Unpersuaded by her position, the court accepted a declaration by a trustee of the FBFT, which indicated that Frank Burch had specifically added each of the disputed assets to the trust prior to death.<sup>30</sup> In addition, the court accepted the testimony offered by an attorney implementing the estate

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23. *Id.* See generally Jo Ann Engelhardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROP. & TRIAL J. 535 (1991) (providing an analysis of the impact of the in terrorem clauses contained in will and trust instruments).

24. *Id.* See generally 64 CAL. JUR. 3D *Wills* § 368 (1981) (providing "[w]here the action involved falls within the prohibition imposed by the contest clause, the good faith of one who asserts rights contrary to the prohibition does not prevent forfeiture under the contest clause").

25. *Burch*, 7 Cal. 4th at 257, 866 P.2d at 98, 27 Cal. Rptr. 2d at 171.

However, if the testator refers to the assets in general terms, "without identifying it as separate property," it may be fairly concluded that he intended to dispose of only his interests in the property, and no election is required. See 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 54 (9th ed. 1990).

26. *Burch*, 7 Cal. 4th at 257, 866 P.2d at 98, 27 Cal. Rptr. 2d at 171.

27. See, e.g., 64 CAL. JUR. 3D *Wills* § 364 (1981) (providing "[o]nce a legatee or devisee has presented a claim against the estate . . . he cannot, after an adverse judgement, fall back on his right as legatee or devisee, which he forfeited by bringing the action. It is immaterial whether the claim was or was not a just debt").

28. *Burch*, 7 Cal. 4th at 257, 866 P.2d at 98, 27 Cal. Rptr. 2d at 171 (quoting *In re Estate of Wolfe*, 48 Cal. 2d 570, 574, 311 P.2d 476, 478 (1957)).

29. *Id.* at 258, 866 P.2d at 99, 27 Cal. Rptr. 2d at 172.

30. *Id.*

plan which further demonstrated Frank's intent to include such assets in the FBFT.<sup>31</sup> According to the attorney, Frank was aware that Marlene would have the legal right to assert claims against the assets in the trust, and had therefore created "an elaborate estate plan" with a no contest clause to discourage her pursuit of more than the "generous benefits" conditionally provided by the trust.<sup>32</sup> The court noted that no controverted evidence had been presented.<sup>33</sup>

Marlene Burch also advanced the theory that her quest for federal benefits under ERISA should preclude activation of the no contest clause because she sought no relief directly from the FBFT.<sup>34</sup> The court declined the merits of this argument noting that, were Marlene successful in her pursuit of the federal complaint, it would thwart the trust's provisions for distributing all of the assets in the trust to the various mini trusts.<sup>35</sup>

Lastly, Marlene Burch contended that case law has held that in certain cases a creditor's claim for property based upon a source of right independent from the testamentary instruments is not a contest.<sup>36</sup> Stating that the established precedent does not indicate an absolute resolution concerning any proceeding outside the will or trust, the court distinguished the Frank Burch Family Trust from this line of cases because it included both an express declaration that all property added to the trust was subject to the trust, and that all such property was and would remain the trustor's separate property.<sup>37</sup> Therefore, Marlene's proposed actions would seek to defeat the terms of the trust.<sup>38</sup>

The court concluded that the language of the FBFT instrument coupled with Frank Burch's verbalized intentions at the time of its creation, served to "evinced an unequivocal intention" to arrest any attempt by Marlene Burch to take under the FBFT while simultaneously pursuing independent ownership claims against assets within the trust.<sup>39</sup> As each of Marlene's proposed causes of action were designed to frustrate Frank's clear intentions, the court concluded that each was a contest

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31. *Id.*

32. *Id.*

33. *Id.* at 259, 866 P.2d at 99-100, 27 Cal. Rptr. 2d at 172-73.

34. *Id.* at 260, 866 P.2d at 100, 27 Cal. Rptr. 2d at 173.

35. *Id.*

36. *Id.* at 261, 866 P.2d at 101, 27 Cal. Rptr. 2d at 174.

37. *Id.* at 262, 866 P.2d at 102, 27 Cal. Rptr. 2d at 174.

38. *Id.*

39. *Id.* at 263, 866 P.2d at 102, 27 Cal. Rptr. 2d at 175.

within the meaning of the no contest clause and would summarily trigger its affects.<sup>40</sup>

## 2. Does California Law Provide a Basis for Not Enforcing the Clause in this Case?

After establishing that the no contest clause would be triggered, the court sought a basis in California law for not enforcing the clause. The court reviewed the relevant probate code<sup>41</sup> and current case law, and failed to discover any authority for finding a no contest clause invalid or unenforceable against a beneficiary who alleges the trust instrument disposes of property to which he or she has an independent interest.<sup>42</sup> Concluding that California law does not provide for an exception, the court analyzed whether such an exception should be judicially recognized.<sup>43</sup>

Marlene Burch urged the court to acknowledge a strong public policy interest in encouraging fair dealing between spouses, a policy endorsed by the California Family Code,<sup>44</sup> which would be well served by formulation of such an exception.<sup>45</sup> She further asserted that allowing a decedent to “lawfully dispose of another’s property” interests by enforcement of the no contest clause encourages “intramarital theft and forfeiture of community property interests.”<sup>46</sup>

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40. *Id.*; see also 64 CAL. JUR. 3D *Wills* § 366 (1981).

The basic question in this respect is the meaning of the word “contest” as employed by the testator, and this, in turn, is to be arrived at from a consideration of the purpose the testator sought to attain by the clause. Ordinarily, it means any legal proceeding designed to result in the thwarting of the testator’s wishes as expressed . . . . It need not be a contest instituted in the probate court, but may consist of the institution of a proceeding in equity before another court to secure participation in the estate other than through or under the decedent’s will and at variance with the testamentary plan expressed therein.

*Id.*

41. See CAL. PROB. CODE § 21303 (West 1991) (enforceability of a no contest clause); CAL. PROB. CODE § 21306 (West 1991) (exempting clause enforceability against a beneficiary who brings a contest based on forgery or revocation); CAL. PROB. CODE § 21307 (West 1991) (exempting clause enforceability against a beneficiary who contests a provision that benefits a party involved with drafting or witnessing the instrument).

42. *Burch*, 7 Cal. 4th at 263-64, 866 P.2d at 102-03, 27 Cal. Rptr. 2d at 175-76.

43. *Id.* at 264, 866 P.2d at 103, 27 Cal. Rptr. 2d at 176.

44. See, e.g., CAL. FAM. CODE § 1100 (West 1994) (prohibiting disposal of community personal property without the spouse’s written consent); CAL. FAM. CODE § 1101 (West 1994) (providing a breach of fiduciary duty cause of action for nonconsenting spouse under § 1100).

45. *Burch*, 7 Cal. 4th at 264, 866 P.2d at 103, 27 Cal. Rptr. 2d at 176.

46. *Id.*

The court concluded that such clauses do not in fact cause potential "theft" of community property assets.<sup>47</sup> The court explained that surviving spouses with valid community property claims are not inhibited from asserting those interests because the spouse has a choice between exercising those rights or accepting the terms of the trust distribution.<sup>48</sup> The court further concluded that, "the act of the testator attempting to dispose of the property of another, and the act of the owner in accepting the benefit provided for him by the testator, united, complete the disposition," therefore implying ratification.<sup>49</sup>

The court also examined potential legislative support for the creation of such an exception.<sup>50</sup> Acknowledging the legislature's current and ongoing affirmation of no contest clauses as viable estate planning tools, the court determined that the burdens imposed by the creation of such an exception might run counter to current public policy.<sup>51</sup> The court noted that couples often have complex estates arising from asset acquisition at various points in life, and that testator error in calculating his or her separate property interests could lead to extensive and costly litigation, resulting in dramatic changes to intended testamentary distributions.<sup>52</sup>

The court also indicated its belief that such an exception might cause some settlors to forego alternative spousal provisions in reliance on the protected community property interests as a method of providing for the spouse, while insuring distributions to other intended beneficiaries remain undisturbed.<sup>53</sup> Finally, the court indicated that it was substantially unfair to allow a surviving spouse to accept the provisions of the instrument when beneficial, while challenging the same instrument when it was not.<sup>54</sup>

In conclusion, the court held that a no contest clause was enforceable against a surviving spouse who brings contest to a trust agreement by

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47. *Id.* at 265, 866 P.2d at 103, 27 Cal. Rptr. 2d at 176-77.

48. *Id.*

49. *Id.* at 265-66, 866 P.2d at 104, 27 Cal. Rptr. 2d at 177.

50. *Id.* at 266, 866 P.2d at 104, 27 Cal. Rptr. 2d at 177.

51. *Id.*

52. *Id.* The court also noted that the legislature did not intend the statutes governing no contest provisions to be a complete codification of the law. See CAL. PROB. CODE § 21301 (West 1991).

53. *Burch*, 7 Cal. 4th at 267, 866 P.2d at 105, 27 Cal. Rptr. 2d at 178.

54. *Id.*

seeking community property interests in the assets of the trust.<sup>55</sup>

### 3. Is California's No Contest Law Preempted to the Extent Pension Plan Benefits Are at Issue?

Marlene Burch alleged that the Pacific Coast Ford employees' pension plan qualified as an employee benefit plan under ERISA.<sup>56</sup> The terms of the pension plan dictated that all participants designate a beneficiary for death benefits, and that participant's with an eligible spouse designate that spouse as beneficiary unless formal waiver was obtained.<sup>57</sup> Failure to designate a beneficiary resulted in the payment of all death benefits to the surviving spouse. Marlene's proposed federal complaint indicated that she did not waive her rights as beneficiary under the plan and that the plan administrators breached their fiduciary duty by failing to pay her any death benefits and by refusing to supply requested documents regarding the plan.<sup>58</sup> Marlene further contended that application of the no contest clause is preempted by ERISA where she sought recovery of the pension plan benefits.<sup>59</sup>

ERISA contains an express preemption clause stating that the act "shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."<sup>60</sup> The United States Supreme Court has determined that a state law "relates" to employee benefit plans, for preemption purposes, if it is intentionally designed to affect directly ERISA benefit plans or specifically designates special treatment for such plans.<sup>61</sup> However, the California Supreme Court noted that preemption is less absolute when a state law is "a neutral law of general application" and incidentally affects an ERISA plan.<sup>62</sup> Therefore, the

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55. *Id.* at 267-68, 866 P.2d at 105, 27 Cal. Rptr. 2d at 178.

56. *Id.* at 268, 866 P.2d at 105, 27 Cal. Rptr. 2d at 178; *see* 29 U.S.C. § 1001-1461 (1988 & Supp. 1992).

57. *Burch*, 7 Cal. 4th at 268, 866 P.2d at 105, 27 Cal. Rptr. 2d at 178.

58. *Id.* at 268, 866 P.2d at 105-06, 27 Cal. Rptr. 2d at 179.

59. *Id.* ERISA was designed by Congress "to ensure that 'if a worker has been promised a defined benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit . . . he actually receives it.'" *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981).

Employee pension benefit plans are included in the definition of employee benefit plans defined by the act. *See* 29 U.S.C. § 1002(3) (1988).

60. 29 U.S.C. § 1144(a) (1988 & Supp. 1992)

61. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829, 838 n.12 (1988) (determining preemption of a state law which provided special protective treatment to ERISA plans under state garnishment procedures).

62. *Burch*, 7 Cal. 4th at 269, 866 P.2d at 106, 27 Cal. Rptr. 2d at 179. The court indicated there was established precedence for finding the effect of the law on the ERISA plan is "too tenuous, remote, or peripheral a manner to warrant a finding that

court sought to determine the effects of the no contest clause on employee benefit plans, and whether such an intrusion upon ERISA would mandate preemption.<sup>63</sup>

The court recognized four basic areas of law that were deemed to "relate" to ERISA benefit plans: (1) laws which regulate "benefits or terms"; (2) laws that "create reporting, disclosure, funding or vesting requirements"; (3) laws that regulate the calculation of benefit payment amounts; and (4) laws and "common law rules" that provide remedies for improper administration of the plan.<sup>64</sup> Marlene Burch argued that her proposed ERISA cause of action is preemptive because it seeks damages arising from the breach of a plan administrator's duty under ERISA, falls squarely within ERISA's enforcement provisions,<sup>65</sup> and that enforcement of the no contest clause would inhibit her ability to pursue damages for the administrator's misconduct.<sup>66</sup>

The court was not persuaded, countering that the no contest law would neither preclude her ability to pursue damages under ERISA's enforcement scheme nor serve to "shield" wrongful administrators guilty of breach.<sup>67</sup> Thus, the court determined that the no contest rule had no regulatory impact on ERISA plans.<sup>68</sup>

Marlene Burch contended that the no contest law was preempted because it created a "chilling effect" that renders her rights under the benefit plan "essentially worthless."<sup>69</sup> Again, the court was unmoved.<sup>70</sup> Acknowledging that if Marlene pursued her interests and prevailed, the no contest law would not bar her from gaining all she was entitled to, the court concluded such benefits were not "worthless."<sup>71</sup> Thus, there was no "chilling effect."<sup>72</sup>

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the law relates to the plan." *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)); see *Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1280-81 (9th Cir. 1990) (finding state tax levy procedure not preempted).

63. *Burch*, 7 Cal. 4th at 269, 866 P.2d at 106, 27 Cal. Rptr. 2d at 179.

64. *Id.* at 270, 866 P.2d at 106-07, 27 Cal. Rptr. 2d at 180.

65. See 29 U.S.C. § 1132(a) (1988 & Supp. 1992) (authorizing claims against plan administrators).

66. *Burch*, 7 Cal. 4th at 270, 866 P.2d at 107, 27 Cal. Rptr. 2d at 180.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 271, 866 P.2d at 107, 27 Cal. Rptr. 2d at 180.

71. *Id.* at 271, 866 P.2d at 107, 27 Cal. Rptr. 2d at 181.

72. The court further concluded that the operation of the no contest clause would

Lastly, Marlene Burch argued that the no contest law was an impermissible interference with attainment of her rights under ERISA.<sup>73</sup> The court declined to embrace this position, determining that there was no apparent authority supporting the proposition that state enforcement of “the conditional nature of a private gift” constituted “interference” under ERISA regulations.<sup>74</sup>

The court concluded that California’s no contest law is “a neutral state law of general application”, and therefore, would only marginally affect an ERISA benefit plan.<sup>75</sup> Consequently, the court held that there was no preemption concerning enforcement of the no contest clause.<sup>76</sup>

### *B. Justice Mosk's Dissenting Opinion*

Justice Mosk concurred in dissent with Parts I (Background) and II (No Contest Clauses) of Justice Kennard’s opinion. However, believing that these treatments adequately resolved the issue before the court, he declined to offer an opinion as to Part III of the Kennard dissent.<sup>77</sup>

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

Justice Kennard, in her dissent, expressed the belief that the majority decision served as an endorsement of marital breach of trust and confidence which arises from the act of taking a spouses’s property and, in effect, giving it to other relatives without the spouse’s knowledge or consent.<sup>78</sup> Justice Kennard found this an abhorrent departure from established community property laws and public policy principles designed

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only apply to Marlene’s participation in the distribution of non pension assets under the Trust. *Id.* at 272, 866 P.2d at 108, 27 Cal. Rptr. 2d at 181.

73. *See* 29 U.S.C. § 1140 (1988).

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or of the Welfare and Pension Plan Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under this plan, this subchapter, or the Welfare and Pension Plans Disclosure Act . . . . The provisions of section 1132 of this title shall be applicable to the enforcement of this section.

*Id.*

74. *Burch*, 7 Cal. 4th at 272-73, 866 P.2d at 108-09, 27 Cal. Rptr. 2d at 181-82.

75. *Id.* at 273, 866 P.2d at 109, 27 Cal. Rptr. 2d at 182.

76. *Id.*

77. *Id.* at 274, 866 P.2d at 109, 27 Cal. Rptr. 2d at 182 (Mosk, J., dissenting).

78. *Id.* at 274, 866 P.2d at 110, 27 Cal. Rptr. 2d at 183 (Kennard, J., dissenting).

to prevent a spouse from "unilaterally disposing" of community assets.<sup>79</sup>

Justice Kennard further noted that although California is one of a minority of jurisdictions finding no contest clauses effective, such clauses must be strictly construed.<sup>80</sup> The Justice noted that strict construction requires that forfeiture only apply in cases where the breach falls squarely within the strict parameters of the clause.<sup>81</sup> Having carefully reviewed the precise language of the FBFT, Justice Kennard sought to determine whether Marlene's proposed actions would trigger the no contest clause.<sup>82</sup>

### 1. No Contest Clauses

Acknowledging that it was undisputed among the parties that Marlene's federal and state complaints do not propose that the trust be set aside, Justice Kennard focused on whether the complaints seek "an adjudication that [the trust] is void, or seeks to otherwise void, nullify or set aside any provision."<sup>83</sup> Marlene's stated cause of action sought declaratory relief "to construe the trust instrument, conversion, breach of fiduciary duty and partition, and [sought] to impose a constructive trust and to set aside fraudulent conveyances."<sup>84</sup> The Justice pointed out that the proposed suit did not seek adjudication that any portion of the trust instrument be determined void, or be set aside, and therefore was not, "on its face," a contest that would trigger the no contest clause.<sup>85</sup> Justice Kennard demonstrated that the federal complaint set forth an action against the pension plan trustees for "breach of statutory obligations under ERISA, for conversion, for declaratory relief, and for breach of

79. *Id.* (Kennard, J., dissenting).

80. *Id.* (Kennard, J., dissenting)

81. *Id.* at 278, 866 P.2d at 112, 27 Cal. Rptr. 2d at 185 (Kennard, J., dissenting); see also Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 552 n.171 (1992) (citing THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 808-09 (2d ed. 1953)). "Whereas 'strict construction' of wills emphasizes the written word and confines interpretation to the 'plain meaning' of the words found 'the four corners of the instrument,' a more 'liberal construction' emphasizes the testator's intent as the primary determinant and thus allows extrinsic evidence of that intent." *Id.*

82. *Burch*, 7 Cal. 4th at 278, 866 P.2d at 112-13, 27 Cal. Rptr. 2d at 185 (Kennard, J., dissenting).

83. *Id.* at 278, 866 P.2d at 112, 27 Cal. Rptr. 2d at 185 (Kennard, J., dissenting). Justice Kennard quotes directly from the verbiage of the no contest clause of the trust instrument. See *supra* note 22.

84. *Burch*, 7 Cal. 4th at 278, 866 P.2d at 112, 27 Cal. Rptr. 2d at 185 (Kennard, J., dissenting).

85. *Id.* at 278-79, 866 P.2d at 112, 27 Cal. Rptr. 2d at 185 (Kennard, J., dissenting).



fiduciary duties," and did not seek to have any portion of the trust voided or set aside. Thus, it is not "on its face," an attack on a provision of the FBFT.<sup>86</sup>

Conversely, the trustees claimed that Marlene's actions challenged that portion of the FBFT instrument that provided, "[t]rustor states that the property subject to this trust is his separate property and that his interest therein, and in the proceeds and income therefrom, shall remain his separate property."<sup>87</sup> The trustees construed Marlene's position as an attack on this clause challenging that the FBFT is not indeed Frank's separate property but marital community property.<sup>88</sup> The trustees characterize the ERISA complaint as similarly challenging the separate property language in that it sought recovery pension benefits belonging only to Marlene.<sup>89</sup>

Justice Kennard found this construction unconvincing for two reasons. First, Frank did not, in fact, identify within the trust what property he considered separately his.<sup>90</sup> Second, Marlene was not attempting to set aside the provision but rather to have the court judicially interpret the provision so as not to include property that was rightfully hers.<sup>91</sup> Justice Kennard pointed out that much of Frank's acquisition of Pacific Coast Ford, and the purchase of certain life insurance policies at issue in this case, were events occurring during marriage and could be construed as community property.<sup>92</sup>

Justice Kennard took a similar approach regarding the ERISA claim, determining that ERISA generally requires that each plan provide "a qualified preretirement survivor annuity" to the surviving spouse.<sup>93</sup> In addition, she emphasized, "[n]o party other than the surviving spouse has any claim under federal law to this death benefit."<sup>94</sup> Justice Kennard further reasoned that the FBFT instrument specified distribution of Frank's separate property, and that property added to the trust must be added

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86. *Id.* at 279, 866 P.2d at 112-23, 27 Cal. Rptr. 2d at 185-86 (Kennard, J., dissenting).

87. *Id.* at 279, 866 P.2d at 113, 27 Cal. Rptr. 2d at 186 (Kennard, J., dissenting).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 279, 866 P.2d at 113-24, 27 Cal. Rptr. 2d at 186 (Kennard, J., dissenting); see CAL. FAM. CODE § 760 (West Supp. 1994) (stating "[e]xcept as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in the state is community property").

92. See *supra* note 91.

93. *Burch*, 7 Cal. 4th at 280, 866 P.2d at 113, 27 Cal. Rptr. 2d at 186 (Kennard, J., dissenting) (citing 29 U.S.C. § 1055(a)(2) (1988 & Supp. 1992)).

94. *Id.* (Kennard, J., dissenting)

“according to the terms of the Trust.”<sup>95</sup> It also did not specify intent to include the assets at issue.<sup>96</sup> She, therefore, concluded that in strictly construing the language of the FBFT, community property and Marlene’s separate property could not have been added after the trusts formation precisely because it was not Frank’s separate property.<sup>97</sup>

Justice Kennard criticized the majority’s assertion that their analysis of the no contest clause was “strictly construed.”<sup>98</sup> She contended that the majority inappropriately focused on the purpose Frank was trying to accomplish creating the provisions of the trust and whether the contest would thwart that intent, rather than examining the nature of the attack itself and determining whether it challenged the competency of the testator, or alleged the presence of fraud or undue influence.<sup>99</sup>

Lastly, Justice Kennard considered Marlene Burch’s argument for specifically exempting community property claims from the reach of the no contest laws where such claims trigger its effects.<sup>100</sup> Justice Kennard’s position would be to hold no contest clauses unenforceable against a beneficiary who claims that a trustor or testator has disposed of personal or real property that legally belongs to the beneficiary.<sup>101</sup> She provided several reasons for this conclusion: (1) public policy interests require that a no contest provision not be enforced where it protects the act of a trustor who disposes of the property that is not his; (2) enforcement of a no contest clause that bars assertion of community property rights is in direct opposition to the public policy concerns exemplified in California

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95. *Id.* (Kennard, J., dissenting)

96. *Id.* at 280, 866 P.2d at 113, 27 Cal. Rptr.2d at 187 (Kennard, J., dissenting).

97. *Id.* at 280-81, 866 P.2d at 113-14, 27 Cal. Rptr. 2d at 186-87 (Kennard, J., dissenting).

98. *See* CAL. PROB. CODE § 21304 (West 1991).

99. *Burch*, 7 Cal. 4th at 282, 866 P.2d at 115, 27 Cal. Rptr. at 188 (Kennard, J., dissenting); *see* Andrew S. Garb, *The In Terrorem Clause: Challenging California Wills*, 6 ORANGE COUNTY BAR J. 259, 262 (1979). Justice Kennard concurs with the author’s analysis regarding an emerging judicial tendency to interpret the rule of “strict construction” so broadly as to render the concept meaningless. *Burch*, 7 Cal. 4th at 281, 866 P.2d at 114, 27 Cal. Rptr. 2d at 187 (Kennard, J., dissenting). She further notes that the majority’s employment of this legal concept closely parallels this broad approach. *Id.* at 282-83, 866 P.2d at 114-15, 27 Cal. Rptr. 2d at 187-88 (Kennard, J., dissenting). She underscores her position by recognizing that the legislative intent behind enactment of California Probate Code § 21304 was specifically to avoid this type of application. *Id.*

100. *Id.* at 283, 866 P.2d at 116, 27 Cal. Rptr. 2d at 189 (Kennard, J., dissenting).

101. *Id.* at 283-84, 866 P.2d at 116, 27 Cal. Rptr. 2d at 189 (Kennard, J., dissenting).

Family Code sections 1100 and 1101; and (3) enforcement of the no contest clause to penalize a spouse's assertion of community property rights creates judicial endorsement of spousal breach of fiduciary duty.<sup>102</sup> Thus, Justice Kennard would hold the no contest clause unenforceable in this case.<sup>103</sup>

## 2. No Contest Clauses and ERISA Preemption

Justice Kennard argued that ERISA preempts California's no contest law where the law hinders access to federally endorsed pension rights.<sup>104</sup> She departed from the majority's conclusion that the no contest law is too "tenuous or remote" to the ERISA benefit plan for preemption to apply.<sup>105</sup> The Justice revealed that the no contest law would serve to "condition" Marlene's ability to exert her federally granted rights to receive benefits, or seek judicial interpretation of her entitlement under the act, upon forfeiture of her trust distribution.<sup>106</sup>

As support for this position she cited *MacLean v. Ford Motor Co.*,<sup>107</sup> in which the federal appellate court held that when "the terms of an employee pension plan under ERISA provide a valid method for determining the beneficiary, that mechanism cannot be displaced by the provisions of a will."<sup>108</sup> Justice Kennard asserted that Frank Burch sought to displace Marlene's ERISA rights by the terms of the FBFT. As a result, the effects of the no contest clause are "direct and substantial," because Marlene must abandon such federally protected benefits or relinquish her rights to assume under the trust.<sup>109</sup>

Additionally, Justice Kennard explained that even without express preemption under ERISA, the United States Supreme Court has endorsed the doctrine of implied preemption.<sup>110</sup> Under this doctrine the state law

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102. *Id.* at 284-87, 866 P.2d at 116-18, 27 Cal. Rptr. 2d at 189-91 (Kennard, J., dissenting).

103. *Id.* at 287, 866 P.2d at 118, 27 Cal. Rptr. 2d at 191 (Kennard, J., dissenting).

104. *Id.* at 288, 866 P.2d at 119, 27 Cal. Rptr. 2d at 192 (Kennard, J., dissenting); see 29 U.S.C. § 1056(d)(1) (1988) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.").

105. *Burch*, 7 Cal. 4th at 289, 866 P.2d at 120, 27 Cal. Rptr. 2d at 193 (Kennard, J., dissenting).

106. *Id.* (Kennard, J., dissenting).

107. 831 F.2d 723 (7th Cir. 1987).

108. *Id.* at 728.

109. *Burch*, 7 Cal. 4th at 291, 866 P.2d at 121, 27 Cal. Rptr. 2d at 194 (Kennard, J., dissenting).

110. *Id.*; see, e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-43, 145 (1990) (finding the doctrine of implied preemption applicable when a state law conflicts with an ERISA provision); *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (finding that the doctrine of implied preemption arises when the state law serves as an impediment

may be preempted when it is an obstacle to achieving the objectives behind the federal enactment.<sup>111</sup> Justice Kennard noted that the provisions of ERISA specifically anticipate a cause of action for recovery of benefits misappropriated from their rightful beneficiary.<sup>112</sup> Thus, she concluded that the no contest clause would serve as a barrier to accomplishing Congressional intent.<sup>113</sup>

In conclusion, Justice Kennard stated that it violated the fundamental principals of community property to allow a spouse to unilaterally dispose of assets through the trust estate without spousal consent or knowledge, and then shield such acts by incorporation of a no contest clause within the trust instrument. The Justice further concluded that the no contest clause is preempted by ERISA because it created a substantial obstacle to the pursuit of federally guaranteed benefits.<sup>114</sup>

### III. IMPACT

In *Burch v. George*, the California Supreme Court ruled that enforcement of a no contest clause in a trust agreement required the surviving spouse to pursue community property rights to the assets improperly included within the trust, forfeiting rights to inheritance under the trust, or, alternatively, to accept distribution as provided by the trust instrument, forgoing all community property interests. The court based its decision on what it deemed to be important policy considerations for promoting the testator's intent.<sup>115</sup> However, the court failed to give equal

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to the administration of congressional objectives).

111. *Ingersoll-Rand*, 498 U.S. at 133.

112. *Burch*, 7 Cal. 4th at 291-92, 866 P.2d at 121, 27 Cal. Rptr. 2d at 194 (Kennard, J., dissenting); see 29 U.S.C. §§ 1132(a), 1140 (1988 & Supp. 1992).

113. *Burch*, 4 Cal. 4th at 291-92, 866 P.2d at 122, 27 Cal. Rptr. 2d at 194-95 (Kennard, J., dissenting).

114. *Id.* at 293-94, 866 P.2d at 122, 27 Cal. Rptr. 2d at 195 (Kennard, J., dissenting).

115. *Id.* at 257-58, 866 P.2d at 98, 27 Cal. Rptr. at 171. The majority reiterated their position in previous decisions as follows:

We described the operative principle this way: "If the testator purported to dispose of both his and his spouse's share of the community property, and it appears that the intent of the testator will be thwarted by giving literal effect to the will while recognizing the community property rights of the surviving spouse, an election should be required. The purpose of the election is to adjust the distribution of the property under the will to conform to the express or implied intention of the testator."

*Id.* (citing *Estate of Wolfe*, 48 Cal. 2d 570, 311 P.2d 476, (1957)).

footing to well-established and competing policy concerns regarding spousal community property rights.<sup>116</sup> By enabling a spouse to distribute community property assets within a “personal property” trust, the court has effectively created a method in which to circumvent California community property laws.<sup>117</sup>

Thus, a spouse may incorporate all of the marital property interests in a trust instrument that provides less than fifty percent of the property will flow to surviving spouse. Inclusion of a no contest clause provision assures enforceability, effectively allowing distribution of the surviving spouse’s portion of the community property to third parties.

Under California law, where the decedent dies intestate or fails to provide for a surviving spouse, statutory provisions protect the surviving spouse by granting entitlement to fifty percent of the community property interests plus an amount of the decedent’s separate estate not to exceed fifty percent.<sup>118</sup> Presumably, legislative intent behind such enact-

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116. See CAL. FAM. CODE § 760 (West Supp. 1994). “All property acquired by a married person during marriage is presumed to be community property.” *Burch*, 7 Cal. 4th at 279, 866 P.2d at 113, 27 Cal. Rptr. 2d at 186 (Kennard, J., dissenting).

Additionally, in her *Burch* dissent, Justice Kennard concludes that, “enforcement of a no contest clause to prevent a beneficiary from challenging the trustor’s disposition of property that is not the trustor’s property, but is the property of another, would not aid the public policy favoring enforcement of such clauses.” *Id.* at 284, 866 P.2d at 116, 27 Cal. Rptr. 2d at 189.

117. *Id.* at 285, 866 P.2d at 117, 27 Cal. Rptr. 2d at 190 (Kennard, J., dissenting):

Allowing enforcement of a no contest clause to effectively prohibit assertion of statutorily guaranteed community property rights is contrary to the public policy embodied in Family Code sections 1100 and 1101. Those sections provide that a spouse may not convey or dispose of community personal property without the written consent of the other spouse, and grant the nonconsenting spouse a right of action against the other spouse for breach of that duty to obtain written consent.

*Id.*

118. See 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 40 (9th ed. 1990).

[I]f a testator fails to provide by will for his or her surviving spouse who married testator after execution of the will, the omitted spouse shall receive a share in the estate consisting of the following property in the estate: (a) The one-half of the community property that belongs to the testator . . . (b) The one-half of the quasi-community property that belongs to the testator . . . (c) A share of the separate property of the testator equal in value to that which the spouse would have received if the testator had died intestate, but in no event is the share to be more than one-half the value of the separate property in the estate.

*Id.*

Intestate shares to separate property are distributed by law as follows: (1) The entire estate will pass to surviving spouse if decedent did not leave any “surviving issue,” parent, sibling, or issue of deceased sibling; (2) One-half will pass to surviving

ments was a strong policy interest toward favoring spousal protection from undisclosed disinheritance by decedent. The *Burch* decision undermines such policy considerations by creating a method in which a decedent can "rob" the surviving spouse of his/her rights to community property by incorporating such interests within the trust.<sup>119</sup> As Justice Kennard argued, it violates the fundamental principals of community property to allow a spouse to unilaterally dispose of assets through the trust estate, without spousal consent or knowledge, and then shield such acts by incorporation of a no contest clause within the instrument.<sup>120</sup>

This decision is particularly harsh in its conclusion that Marlene Burch's pursuit of ERISA benefits triggered the no contest clause. Justice Kennard makes a very compelling argument that it does not.<sup>121</sup> Under the doctrine of implied preemption, a state law may be preempted if it serves as an obstacle to achieving the objectives of ERISA.<sup>122</sup> ERISA provisions require that a person wishing to designate a beneficiary other than a spouse for death benefits provided under the plan obtain a written waiver of rights from the spouse.<sup>123</sup> Presumably this requirement provides notice of intent to preclude spouse from a benefit they would normally receive under the plan. Therefore, this decision allows state law to thwart the provisions of ERISA.

Lastly, the *Burch* decision defeats the right of a married persons to establish a secure position for the future in the event that the unfortu-

spouse where decedent "leaves only one child" or where there are no children but decedent leaves parents or their issue; or (3) One-third will pass to surviving spouse where "decedent leaves more than one child living," one child living, and issue of at least one child living, or "issue of two or more deceased children" are living. See 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAWS, *Wills and Probate* § 130 (9th ed. 1990). California law requires a written and signed waiver by surviving spouse before any surviving spousal rights can be avoided, including, "intestate succession", "testamentary disposition" by will pre-existing waiver, "probate homestead", and "family allowance." See 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§ 47, 48 (9th ed. 1990).

119. *Id.* at 284, 866 P.2d at 116, 27 Cal. Rptr. 2d at 189 (Kennard, J., dissenting).

120. *Id.* "[I]f a testator or trustor lays claim to property that does not belong to him or her, and successfully insulates the disposition of such property from challenge by use of a no contest clause, theft is the result." *Id.*

121. See *supra* notes 102-11 and accompanying text.

122. See *supra* notes 108-09 and accompanying text.

123. The *Burch* majority acknowledged provisions of ERISA which specify that a participant "who has an eligible spouse must designate that spouse as the beneficiary unless the spouse waives in writing . . ." *Burch*, 7 Cal. 4th at 268, 866 P.2d at 105, 27 Cal. Rptr. 2d at 178.

nate loss of a spouse occurs. A spouse may remain completely unaware that the estate plans of their partner precludes recovery of community property interests and death benefits statutorily provided under federal and state law.

The court's decision seriously eroded trust and fiduciary duty within the marital relationship. Therefore, future California court decisions should interpret the *Burch* holding narrowly, on a very fact specific basis.

CATHERINE CONVY

## IX. SALES AND USE TAXES

*The assumption of a corporate division's liabilities by a wholly owned subsidiary as part of the transfer of division assets to the subsidiary constitutes consideration for sales tax purposes, even when the parent corporation remains the primary obligor:*

**Beatrice Co. v. State Board of Equalization.**

## I. INTRODUCTION

In *Beatrice Co. v. State Board of Equalization*,<sup>1</sup> the California Supreme Court addressed the issue of whether liabilities transferred by a corporation to its wholly owned subsidiary as part of the transfer of a division's assets to the subsidiary constitutes consideration for the purposes of sales tax, even when the parent corporation remains primarily liable on the debts.<sup>2</sup> The court sought to resolve the conflict regarding this issue<sup>3</sup> created by the decisions in *Macrodynne Industries, Inc. v. State Board of Equalization*,<sup>4</sup> and *Cal-Metal Corp. v. State Board of Equalization*.<sup>5</sup> The court held that regardless of whether the parent corporation remains the primary obligor on the debts, the subsidiary's assumption of liability for those debts and obligations constituted consideration and the transaction is therefore a retail sale and subject to the sales tax.<sup>6</sup>

## II. STATEMENT OF THE CASE

Beatrice created Standard Dry Wall in 1983,<sup>7</sup> and in 1984, Beatrice

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1. 6 Cal. 4th 767, 863 P.2d 683, 25 Cal. Rptr. 2d 438 (1993). Justice Baxter authored the unanimous opinion of the court. Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Arabian, and George concurred. *Id.* at 783, 863 P.2d at 694, 25 Cal. Rptr. 2d at 449.

2. *Beatrice*, 6 Cal. 4th at 770-71, 863 P.2d at 685, 25 Cal. Rptr. 2d at 440.

3. *Id.* at 770-71, 863 P.2d at 685, 25 Cal. Rptr. 2d at 440.

4. 192 Cal. App. 3d 579, 237 Cal. Rptr. 537 (1987) (finding a parent corporation's transfer of the assets and liability of its operating division to corporate subsidiary not consideration where parent remained jointly liable).

5. 161 Cal. App. 3d 759, 207 Cal. Rptr. 783 (1984) (finding transfer of assets to a commencing partnership in exchange for the assumption of indebtedness on the assets constitutes a sale for tax purposes, measured by the amount of the debt assumed).

6. *Beatrice*, 6 Cal. 4th at 771, 863 P.2d at 685, 25 Cal. Rptr. 2d at 440.

7. *Id.* On October 28, 1993, Beatrice incorporated Standard Dry Wall, which simul-



transferred all of the assets and liabilities of its "Standard Dry Wall Products Division" to Standard Dry Wall in exchange for 9,000 shares of Standard Dry Wall stock.<sup>8</sup> Standard Dry Wall "assumed and agreed to pay, perform and/or discharge in full, when and as the same become due, all of the debts, liabilities and obligations . . . of Beatrice's Standard Dry Wall Products Division"<sup>9</sup> except those that could not be assigned or transferred without the consent or authorization of the obligee, "unless such consent or authorization was obtained, or a novation agreed to."<sup>10</sup> Standard Dry Wall agreed to perform these obligations on behalf of Beatrice or to provide Beatrice the means of satisfying the obligation.<sup>11</sup> The State Board of Equalization determined that the transaction was a retail sale and required Beatrice to pay sales taxes.<sup>12</sup> The Board then denied Beatrice's claim for refund.<sup>13</sup>

Beatrice acknowledged that it had transferred the assets and liabilities of its Standard Dry Wall Products Division to Standard Dry Wall in exchange for Standard Dry Wall stock.<sup>14</sup> However, it maintained the transfer was part of a corporate restructuring and that it remained primarily liable for the obligations of its Standard Dry Wall Products Division.<sup>15</sup> Beatrice also claimed the transaction fell within Regulation 1595(b)(4),<sup>16</sup> which exempts the transfer of assets in exchange for first issue stock of a commercial corporation from sales tax.<sup>17</sup> Beatrice also argued that because it continued to be liable for the obligations under the "assumption agreement," the agreement was not consideration pursuant to *Macrodyn*.<sup>18</sup> The trial court granted summary judgment for Beatrice.<sup>19</sup>

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taneously issued 1,000 shares to Beatrice. *Id.* Standard Dry Wall remained inactive until July 31, 1984. *Id.*

8. *Id.* No written contract existed between Beatrice and Standard Dry Wall regarding the exchange, but the agreement was reflected in the Standard Dry Wall board of directors "Written Consent" to the issuance and sale of the stock to Beatrice. *Id.*

9. *Id.* (citations omitted).

10. *Id.* at 771, 863 P.2d at 686, 25 Cal. Rptr. 2d at 441.

11. *Id.*

12. *Id.* at 771-72, 863 P.2d at 686, 25 Cal. Rptr. 2d at 441.

13. *Id.* at 772, 863 P.2d at 686, 25 Cal. Rptr. 2d at 441.

14. *Id.*

15. *Id.*

16. CAL. CODE OF REGS. tit. 18, § 1595(b)(4) (1994). "Tax does not apply to a transfer of property to a commencing corporation . . . in exchange solely for first issue stock of the commencing corporation . . ." *Id.* "Tax does apply, however, if the transferor receives consideration such as cash, notes, or an assumption of indebtedness, and the transfer does not otherwise qualify for exemption." *Id.*

17. *Beatrice*, 6 Cal. 4th at 773, 863 P.2d at 687, 25 Cal. Rptr. 2d at 442. This sales tax would ordinarily apply to the exchange of personal property for stock. *Id.*

18. *Id.*

19. *Id.* at 774, 863 P.2d at 687, 25 Cal. Rptr. 2d at 442.

The court of appeal reversed, rejecting the conclusion of the *Macrodyme* court and re-affirming its decision in *Cal-Metal*.<sup>20</sup> The California Supreme Court affirmed the appellate court decision.<sup>21</sup>

### III. TREATMENT OF THE CASE

The state of California "has imposed a tax on 'the privilege of selling tangible personal property at retail.'"<sup>22</sup> The exchange of personal property for stock is ordinarily a taxable transaction, but Regulation 1595(b)(4) provides an exception for transfers to newly formed corporations in exchange for first issue stock.<sup>23</sup> However, tax will be assessed on the transfer if the transferor obtains consideration "such as cash, notes, or an assumption of indebtedness," in exchange for the property.<sup>24</sup> The court determined that Standard Dry Wall acquired the assets of the Standard Dry Wall Products Division in exchange for the first issue of stock and the assumption of indebtedness and thus the transaction was taxable to the value of the debt assumed.<sup>25</sup>

#### A. Consideration

Beatrice contended that because Standard Dry Wall was a wholly owned subsidiary, Beatrice had the power to require Standard Dry Wall to perform its duties under the agreement without having to rely on judicial recourse to obtain the performance.<sup>26</sup> Standard Dry Wall would then have a preexisting duty to perform any duty that Beatrice imposed upon it.<sup>27</sup> Therefore, the assumption agreement did not constitute additional

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20. *Id.* The *Cal-Metal* court found that an exchange of personal property for the assumption of the transferor's liabilities is a taxable transaction. *Id.*

21. *Id.* at 783, 863 P.2d at 694, 25 Cal. Rptr. 2d at 449.

22. *Id.* at 774, 863 P.2d at 688, 25 Cal. Rptr. 2d at 443 (citing CAL. REV. & TAX CODE § 6051 (West Supp. 1994)). For an in-depth discussion of what constitutes a "sale", see 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 297 (9th ed. 1989 & Supp. 1994); 56 CAL. JUR. 3D *Sales and Use Taxes* § 34 (1980 & Supp. 1994). See generally 68 AM. JUR. 2D *Sales and Use Taxes* § 65 (Supp. 1994).

23. *Beatrice*, 6 Cal. 4th at 774-75, 863 P.2d at 688, 25 Cal. Rptr. 2d at 443; see CAL. CODE OF REGS. tit. 18, § 1595(b)(4) (West 1994).

24. *Id.* at 775, 863 P.2d at 688, 25 Cal. Rptr. 2d at 443.

25. *Id.*

26. *Id.* at 775-76, 863 P.2d at 688, 25 Cal. Rptr. 2d at 443.

27. *Id.*

consideration.<sup>28</sup> The court flatly rejected Beatrice's argument, stating that no authority exists for the proposition that transactions between parent and subsidiary corporations should be exempt from sales tax if the only consideration from the subsidiary is a promise to pay the debts of the parent corporation.<sup>29</sup> Because Beatrice received both stock and a legally enforceable assumption agreement in exchange for the assets of its Standard Dry Wall Products Division a taxable sale occurred.<sup>30</sup> Regardless of their parent/subsidiary relationship, the two corporations are separate legal entities and are subject to the same rules that apply to all taxpayers.<sup>31</sup>

Beatrice also argued that the transaction was not taxable because it was part of a corporate reorganization.<sup>32</sup> The *Macrodyne* court stated that one determinative factor in evaluating whether it considers a parent and subsidiary as one entity is "whether distinct corporate identities have been maintained and whether the corporations have independent business purposes."<sup>33</sup> If the parent and subsidiary corporations do not act as one, then transactions between them are taxable.<sup>34</sup> The court concluded that Beatrice and Standard Dry Wall were separate corporate entities and that their transactions could not be characterized as a "corporate reorganization."<sup>35</sup>

Additionally, Beatrice argued that under *Ray v. Alad Corp.*,<sup>36</sup> Standard

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28. *Id.* at 776, 863 P.2d at 688, 25 Cal. Rptr. 2d at 443.

29. *Id.* at 776, 863 P.2d 688-89, 25 Cal. Rptr. 2d 443-44. The court also noted that the plaintiff's argument that a parent corporation retains control over the subsidiary assumes that the parent retains a controlling interest in the subsidiary until it satisfies the obligations. *Id.* at 776 n.7, 863 P.2d at 689 n.7, 25 Cal. Rptr. 2d at 444 n.7.

30. *Id.* at 776, 863 P.2d at 689, 25 Cal. Rptr. 2d at 444.

31. *Id.* The court noted that no statutory or regulatory exception was applicable in the present case. *Id.*

32. *Id.* at 776-77, 863 P.2d at 689, 25 Cal. Rptr. 2d at 444.

33. *Id.* at 777, 863 P.2d at 689, 25 Cal. Rptr. 2d at 444 (quoting *Macrodyne Indus., Inc. v. State Bd. of Equalization*, 192 Cal. App. 3d 479, 582, 237 Cal. Rptr. 537, 538 (1987)).

34. *Beatrice*, 6 Cal. 4th at 777, 863 P.2d at 689, 25 Cal. Rptr. 2d at 444.

35. *Id.*; see *Cal-Metal Corp. v. State Bd. of Equalization*, 161 Cal. App. 3d 759, 765-66, 207 Cal. Rptr. 783, 786-87, (1984) (finding general partner's transfer of equipment and attendant liability to the partnership a taxable transaction); see also *Mercedes-Benz v. State Bd. of Equalization*, 127 Cal. App. 3d 871, 874, 179 Cal. Rptr. 758, 760 (1982) ("The courts have long agreed there is a significant difference between wholly owned, but separate corporations, and divisions of a single corporation."). The court also noted that the law does not assume that a parent will necessarily retain a subsidiary which is a "spin off" of a division. *Beatrice*, 6 Cal. 4th at 777, 863 P.2d at 688, 25 Cal. Rptr. 2d at 444. The nature of the relationship between parent corporation and subsidiary at the time of the transaction determines how the entities are characterized for tax purposes. *Id.*

36. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977) (holding a ladder manufac-

Dry Wall was required by law to perform the division's obligations.<sup>37</sup> The court, however, limited *Ray's* holding to tort liability and stated that a "purchaser [of corporate assets] does not assume the seller's liability unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets . . . is for the fraudulent purpose of escaping liability from the seller's debts."<sup>38</sup> Unlike *Ray*, the liabilities assumed by Standard Dry Wall were contractual, not tort, liabilities.<sup>39</sup> Therefore, the court rejected the contention that Standard Dry Wall had obligations at law pursuant to *Ray*.<sup>40</sup>

### B. Joint Liability of Principal Obligor and Transferee of Liabilities

Beatrice argued that because it retained primary liability for the debts assumed by Standard Dry Wall, the assumption agreement was not consideration.<sup>41</sup> Beatrice relied on the appellate court's decision in *Macrodyne*, which found that since the transferor remained primarily liable on the obligations, it received no benefit from the subsidiary's assumption.<sup>42</sup> Without a benefit, there was no consideration and no taxable sale.<sup>43</sup> The trial and appellate courts in *Macrodyne* dismissed the plaintiff's contention that the transaction between parent and subsidiary

turer strictly liable for an injury caused by a defective ladder manufactured by a defunct corporation that had transferred all of its assets and liabilities to defendant corporation).

37. *Beatrice*, 6 Cal. 4th at 777, 863 P.2d at 689-90, 25 Cal. Rptr. 2d at 444-45.

38. *Id.* at 778, 863 P.2d at 690, 25 Cal. Rptr. 2d at 445 (quoting *Ray*, 19 Cal. 3d at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578). The latter three circumstances involve the dissolution or reformation of the transferor corporation such that its creditors could not reach it. See *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 P. 780 (1919) (holding that lease obligation passed from defunct corporation to new corporation continuing same business); *Higgins v. California Petroleum & Asphalt Co.*, 122 Cal. 373, 55 P. 155 (1898) (concluding that transfer of corporate assets to avoid obligations under a mining lease constituted constructive fraud).

39. *Beatrice*, 6 Cal. 4th at 779, 863 P.2d at 691, 25 Cal. Rptr. 2d at 446.

40. *Id.*

41. *Id.*

42. *Id.* at 779-80, 863 P.2d at 691-92, 25 Cal. Rptr. 2d at 446-47 (citing *Macrodyne Indus., Inc. v. State Bd. of Equalization*, 192 Cal. App. 3d 579, 583-83, 237 Cal. Rptr. 537, 539 (1987)).

43. *Beatrice*, 6 Cal. 4th at 779-80, 863 P.2d at 691-92, 25 Cal. Rptr. 2d at 446-47.

were part of a corporate restructuring.<sup>44</sup> The court of appeal stated, “[w]hen the choice is made to conduct business through corporate entities, parties assume both the privilege and burdens of that decision.”<sup>45</sup>

The *Macrodyne* court's finding that the subsidiary's assumption of the parent division's liability was not consideration conflicts with the holdings in *Cal-Metal* and *Industrial Asphalt, Inc. v. State Board of Equalization*.<sup>46</sup> In both *Cal-Metal* and *Industrial Asphalt*, the assumption of liability was adequate consideration and taxable.<sup>47</sup> The conflict created by these cases has resulted in uncertainty as to whether assumption agreements where the transferor remains primarily or jointly liable are consideration for the purposes of determining whether a transaction was a taxable sale.<sup>48</sup> While these decisions have attempted to justify their holdings in light of Regulation 1595(b)(4),<sup>49</sup> the inconsistency arises not from the relationship between the parties, but from a conflict over the nature of consideration.<sup>50</sup>

An assumption agreement is the contractual promise to satisfy the debts of another and is enforceable if supported by consideration.<sup>51</sup> The promisee benefits in that it can compel the promisor to perform, or pay damages.<sup>52</sup> Under Civil Code section 1605,<sup>53</sup> the promisee must only show that the promisor either suffered a detriment or promised to do so.<sup>54</sup>

Efforts to distinguish *Macrodyne* created unnecessary complexity in the law.<sup>55</sup> The *Beatrice* court agreed with *Cal-Metal* and *Industrial As-*

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44. *Id.* at 781, 863 P.2d at 692, 25 Cal. Rptr. 2d at 447.

45. *Id.* (quoting *Macrodyne*, 192 Cal. App. 3d at 582, 237 Cal. Rptr. at 539).

46. 5 Cal. App. 4th 1237, 7 Cal. Rptr. 2d 444 (1992) (holding that assumption of liabilities was consideration where partnership assumed liabilities of the two corporations that formed the partnership).

47. *Beatrice*, 6 Cal. 4th at 781, 863 P.2d at 692, 25 Cal. Rptr. 2d at 447; see *Newco Leasing, Inc. v. State Bd. of Equalization*, 143 Cal. App. 3d 120, 191 Cal. Rptr. 588 (1983) (holding that purchase of outstanding vehicle leases involved assuming seller's obligation to lending institutions and that those assumptions of liability were taxable consideration).

48. *Beatrice*, 6 Cal. 4th at 779, 863 P.2d at 691, 25 Cal. Rptr. 2d at 446.

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

50. *Beatrice*, 6 Cal. 4th at 782, 863 P.2d at 693, 25 Cal. Rptr. 2d at 448.

51. *Id.* at 782-83, 863 P.2d at 693, 25 Cal. Rptr. 2d at 448.

52. *Id.* at 783, 863 P.2d at 693, 25 Cal. Rptr. 2d at 448.

53. CAL. CIV. CODE § 1605 (West 1982).

54. *Id.*; see *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal. 3d 665, 673-74, 517 P.2d 1157, 1162, 111 Cal. Rptr. 693, 698 (1974) (concluding that the plaintiff suffered a detriment by finding a prospective buyer for the defendant's property and that this detriment was consideration); see also 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 663, 667 (9th ed. 1987 & Supp. 1994).

55. *Beatrice*, 6 Cal. 4th at 782, 863 P.2d at 693, 25 Cal. Rptr. 2d at 448.

*phalt* and, accordingly, disapproved *Macrodyne*.<sup>56</sup> The supreme court found that Standard Dry Wall's assumption of liabilities constituted consideration for the assets transferred by Beatrice.<sup>57</sup>

#### IV. IMPACT

*Beatrice* resolved the conflicts existing in the lower courts.<sup>58</sup> The court reaffirmed the appellate court's holdings that parent and subsidiary corporations are separate legal entities and transactions between them are subject to the same rules as transaction between any two separate entities.<sup>59</sup> Further, the court concluded that liabilities of the parent corporation assumed by a subsidiary constitute consideration for the assets received from the parent, and the transaction will be subject to sales tax.<sup>60</sup>

It might be possible for corporations wanting to "spin off" a division into a subsidiary corporation, to minimize tax liability by simply reducing or eliminating the liabilities transferred to the subsidiary. Assets exchanged solely for the first issue of stock from the subsidiary will be exempt from sales tax under Regulation 1595(b)(4).<sup>61</sup> If the parent's division satisfies preexisting obligations, no increased tax burden will arise. However, those liabilities transferred to the subsidiary will determine the extent to which the assets transferred are subject to the tax. Parent corporations may possibly transfer part of the division's assets and promise to transfer the division's remaining assets at a later time in exchange for the subsidiary's first issue of stock. This exchange of assets solely for first issue stock should qualify for the exemption under Regulation 1595(b)(4).<sup>62</sup> Such actions allow the parent corporation to retain enough

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56. *Id.* at 783, 863 P.2d at 694, 25 Cal. Rptr. 2d at 449.

57. *Id.*

58. *See supra* notes 54-55 and accompanying text.

59. *See supra* notes 33-35 and accompanying text.

60. *See supra* note 29 and accompanying text.

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

62. *See supra* note 6 and accompanying text.

assets to reduce or eliminate liabilities before transferring the remaining assets to the subsidiary, thereby reducing or eliminating sales tax liability.

VICTOR J. WENNER

## X. TORT LAW

### A. *A contracting party can not be held liable in tort for conspiracy to interfere with its own contract:*

#### **Applied Equipment Corp. v. Litton Saudi Arabia Ltd.**

### I. INTRODUCTION

*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*<sup>1</sup> presented the California Supreme Court with the question of whether a contracting party can be held liable in tort for conspiracy to interfere with its own contract.<sup>2</sup> The court held, as a matter of law, that a contracting party cannot be liable in tort for conspiracy to interfere with its own contract. The court reasoned that a contracting party is legally incapable of committing the tort when it is itself a party.<sup>3</sup> Additionally, the court found that to impose such liability would obliterate "vital and established dis-

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1. 7 Cal. 4th 503, 869 P.2d 454, 28 Cal. Rptr. 2d 475 (1994). Chief Justice Lucas authored the majority opinion. Justices Kennard, Arabian, Baxter, George, and Justice Pro Tem Ramirez concurred. *Id.* at 507, 869 P.2d at 455, 28 Cal. Rptr. 2d at 476. Justice Mosk wrote a separate dissenting opinion. *Id.* at 521, 869 P.2d at 464, 28 Cal. Rptr. 2d at 485.

2. In the facts of the case, the plaintiff, Applied Equipment Corporation, entered into a subcontract with the defendant, Litton, whereby the plaintiff would procure spare parts for the defendant as needed, to perform its general contract. As part of its performance under this subcontract, the plaintiff acquired spare parts from a second defendant, Varian, with defendant Litton's approval. Subsequently, defendant Litton contacted defendant Varian directly and induced Varian to bypass its subcontract with Applied and sell the parts directly to Litton. As a result, the plaintiff suffered damages of reduced commissions for transactions with Litton.

The plaintiff sued both Litton and Varian for breach of contract and tortious interference, including conspiracy to interfere. *Id.* at 508, 869 P.2d at 456, 28 Cal. Rptr. 2d at 477. The trial court entered judgment in favor of the plaintiff and awarded contract damages in the amount of \$112,531.25 and tort damages in the sum of \$2.5 million for conspiracy to interfere with the contract. *Id.* at 509, 869 P.2d at 456, 28 Cal. Rptr. 2d at 477. Additionally, defendant Litton was further assessed \$12.5 million in punitive damages. *Id.*

The court of appeal affirmed the contract awards but reversed the tort judgments due to inconsistencies in the jury's verdicts. *Id.* They also rejected defendant Varian's argument that it could not, as a matter of law, be held liable for conspiracy to interfere with its own contract. *Id.*

The Supreme Court of California granted review to decide the single issue, raised by defendant Varian, of whether a party to a contract can be liable in tort for conspiracy to interfere with its own contract. *Id.*

3. *Id.* at 510, 869 P.2d at 457, 28 Cal. Rptr. 2d at 478.



inctions between contract and tort theories of liability.”<sup>4</sup>

## II. ANALYSIS

The court rejected the well-established rule of *Wise v. Southern Pacific Co.*,<sup>5</sup> which states that an action for conspiracy to induce a breach of contract can lie against a contracting party.<sup>6</sup> The court articulated two reasons for its rejection, one based on logic and the other based on policy considerations.<sup>7</sup>

The court first explained that conspiracy is not a separate cause of action.<sup>8</sup> Rather, liability for conspiracy can only “be activated by the commission of an actual tort.”<sup>9</sup> The court reasoned that tort liability arising from conspiracy “presupposes that the coconspirator is legally capable of committing the tort.”<sup>10</sup> The court concluded that because parties to a contract owe no duty to refrain from interference with its performance, they “cannot be bootstrapped into tort liability by the pejorative plea of conspiracy.”<sup>11</sup>

The court then addressed the legal distinction between contract and

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4. *Id.*; see CAL. CIV. CODE § 3333 (West 1994) (compensation for breach of obligation other than breach of contract).

5. *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 71-72, 35 Cal. Rptr. 652, 664-65 (1963).

6. *Applied Equipment*, 7 Cal. 4th at 516, 869 P.2d at 456-57, 28 Cal. Rptr. 2d at 478. The court of appeal opinion observed that the Supreme Court of California had “never endorsed the rule of *Wise* in a manner that would constitute binding precedent.” *Id.* On the other hand, *Wise* had been “uncritically accepted and applied in several subsequent appellate decisions.” *Id.* at 516, 522-23, 869 P.2d at 456-57, 465, 28 Cal. Rptr. 2d at 478, 486 (Mosk, J., dissenting).

7. *Id.* at 510, 869 P.2d at 457, 28 Cal. Rptr. 2d at 478.

8. *Id.*

9. *Id.*; see also *Doctor's Co. v. Superior Court*, 49 Cal. 3d 39, 44, 775 P.2d 508, 510-11, 260 Cal. Rptr. 183, 185-86 (1989) (quoting *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 631, 498 P.2d 1063, 1073-74, 102 Cal. Rptr. 815, 825-26 (1972)); Note, *Civil Conspiracy and Interference with Contractual Relations*, 8 LOYOLA L.A. L. REV. 302, 308 n.28 (1975).

10. *Applied Equipment*, 7 Cal. 4th at 511, 869 P.2d at 457, 28 Cal. Rptr. 2d at 478. The court relied upon earlier California cases which refused to impose conspiracy liability either on the ground that the alleged conspirator “was not personally bound by the duty violated by the wrongdoing,” or that the alleged conspirator was not legally capable “of committing the actual tort because of a statutorily created immunity from suit.” *Id.* at 512, 869 P.2d at 458, 28 Cal. Rptr. 2d at 479 (quoting *Doctor's Co.*, 49 Cal. 3d at 44, 775 P.2d at 510-11, 260 Cal. Rptr. at 185-86; see *Hardy v. Vial*, 48 Cal. 2d 577, 582-83, 311 P.2d 494, 496-97 (1957) (holding school defendants in a malicious prosecution suit immune from conspiracy liability because they were performing official investigative duties).

11. *Id.* at 514, 869 P.2d at 549, 28 Cal. Rptr. 2d at 480.

tort theories of liability.<sup>12</sup> The court explained that different damage formulations are available because of the different policy goals motivated by the two branches of law.<sup>13</sup> Here, according to the court, defendant Varian "assumed only the obligation to perform the contract or pay damages for breach. It did not assume the independent tort obligation not to interfere with the performance of its own contract."<sup>14</sup>

Justice Mosk dissented, arguing that the *Wise* rule was more appropriate and fair because it recognized the liability of all parties to a conspiracy.<sup>15</sup>

### III. CONCLUSION

In holding that a contracting party may not be held liable in tort for conspiracy to interfere with its own contract, the court curtailed the use of punitive damage awards against parties breaching contracts to which they are a party. The liability of contracting parties is now limited to those damages foreseeable upon breach of contract. This ruling promotes better business policies by allowing parties to seek more profitable deals without relieving them of contractual liability under their existing con-

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12. *Id.* at 514-15, 869 P.2d at 460, 28 Cal. Rptr. 2d at 481.

13. *Id.* at 514-15, 869 P.2d at 459-60, 28 Cal. Rptr. at 480-81. For example, contract damages are "generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time." *Id.* Tort damages, on the other hand, are not limited by foreseeability, but are designed instead "to compensate the victim for injury suffered." *Id.* (citing 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1319 (9th ed. 1987)). Additionally, punitive and exemplary damages are not available under contract theories. *Id.* at 516, 869 P.2d at 460, 28 Cal. Rptr. 2d at 487.

14. *Id.* at 517-18, 869 P.2d at 461-62, 28 Cal. Rptr. 2d at 482-83. The court bolstered its argument by pointing out that a contracting party already has a legal incentive to perform the contract without the imposition of independent tort liability. *Id.* at 520, 869 P.2d at 463, 28 Cal. Rptr. 2d at 484.

15. *Id.* at 521-22, 869 P.2d at 464-65, 28 Cal. Rptr. 2d at 485-86 (Mosk, J., dissenting). Justice Mosk also argued that, because the Supreme Court of California had denied review of cases in which the *Wise* rule had been applied, reliance upon *Wise* created a precedent, even though the cases in circulation were opinions of the appellate courts. *Id.* at 523, 869 P.2d at 465, 28 Cal. Rptr. 2d at 486 (Mosk, J., dissenting).

tract. More efficient business practices are encouraged by rules, such as this, which limit liability to that which is foreseeable under the contract.

ALLISON L. HURST

- B. *Parents who unsuspectingly administer a medication overdose to an infant, due to incorrect dosage directions on the pharmacy label, cannot recover personally from the pharmacy for negligent infliction of emotional distress because the parents are not the direct victims of the pharmacy's negligence:*

**Huggins v. Longs Drug Stores California, Inc.**

## I. INTRODUCTION

In *Huggins v. Longs Drug Stores California, Inc.*,<sup>1</sup> the California Supreme Court examined whether parents can recover for negligent infliction of emotional distress when they unwittingly administer a harmful medication overdose to an infant, after following the dosage instructions as incorrectly labeled by the issuing pharmacy.<sup>2</sup> The court granted re-

1. 6 Cal. 4th 124, 862 P.2d 142, 24 Cal. Rptr. 2d 587 (1993). Justice Baxter delivered the majority opinion, joined by Chief Justice Lucas and Justices Panelli, Arabian, and George. Justice Mosk filed a dissenting opinion, in which Justice Kennard concurred. *Id.* at 133-35, 862 P.2d at 154-55, 24 Cal. Rptr. 2d at 593-94 (Mosk, J., dissenting). Justice Kennard also dissented separately, with Justice Mosk concurring. *Id.* at 135-39, 862 P.2d at 155-58, 24 Cal. Rptr. 2d at 594-97 (Kennard, J., dissenting).

2. *Id.* at 129-33, 862 P.2d at 151-54, 24 Cal. Rptr. 2d at 590-93. On October 9, 1989, a doctor prescribed Ceclor, a semisynthetic antibiotic, to treat the ear infection of Kodie Huggins, the two-month old son of the plaintiffs, Barbie and Robert Huggins. Mrs. Huggins promptly filled the prescription at Longs Drug Store.

The pharmacist incorrectly labeled the medication. The dosage directions on the label called for two and one-half teaspoons per eight hours. The doctor had prescribed only one-half teaspoon every eight hours. The defendant mistakenly instructed the plaintiffs to administer five times the proper dosage.

Mr. and Mrs. Huggins were not immediately aware that their child had been injured by an accidental overdose. When another pharmacy informed them of the dosage mistake, however, the plaintiffs became shocked, worried, grieved, and emotionally distressed.

The plaintiffs sued for negligent infliction of emotional distress and the trial court granted summary judgment, ruling that the plaintiffs could not recover: (1) under a "bystander" theory, due to a lack of contemporaneous connection between any negligent act and their suffering; and (2) under a "direct victim" theory, because the defendant only owed a duty of care to the infant, not his parents. *Id.* at 128, 862 P.2d at 150, 24 Cal. Rptr. 2d at 589. The court of appeal reversed as to the direct victim claim. *Id.* at 128, 862 P.2d at 150-51, 24 Cal. Rptr. 2d at 589-90. The court of appeal reasoned that, when a pharmacy knows or should know that a prescription is for an infant, who must rely upon another to receive the medication and proper dosage, the pharmacy's duty of care extends to the parent or caregiver expected to administer the medication. *Id.* The supreme court granted review and reversed. *Id.* at 127, 862 P.2d at

view to clarify a pharmacy's duty of care when filling prescriptions for patients, such as infants, who must rely upon others for administration of the medication.<sup>3</sup> The court held that the parents were not the "direct victims" of negligence, and thus they could not recover for negligent infliction of emotional distress.<sup>4</sup>

## II. TREATMENT OF CASE

### A. *Majority Opinion*

The majority rejected the plaintiffs' reliance upon a direct victim theory of recovery.<sup>5</sup> Asserting that direct victim coverage extends only to actual patients, or individuals directly affected by the doctor/patient relationship, the court declined to apply such protection to the infant's parents.<sup>6</sup> The law does not impose a legal duty upon pharmacists to protect a patient's parents from emotional distress, even if the patient must rely on the parents to dispense the medication.<sup>7</sup> Thus, because the Huggins were not patients themselves, they could not recover as direct victims of

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149, 24 Cal. Rptr. 2d at 588.

3. See *id.* at 130, 862 P.2d at 151, 24 Cal. Rptr. 2d at 590.

4. *Id.* at 133, 862 P.2d at 154, 24 Cal. Rptr. 2d at 593. See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 838-854 (9th ed. 1988 & Supp. 1993) (discussing cause of action for negligent infliction of emotional distress, noting the necessary relationship required under bystander and direct victim theories of recovery); Julie A. Greenberg, *Negligent Infliction of Emotional Distress: A Proposal for a Consistent Theory of Tort Recovery for Bystanders and Direct Victims*, 19 PEPP. L. REV. 1283 (1992).

5. *Huggins*, 6 Cal. 4th at 133, 862 P.2d at 148, 24 Cal. Rptr. 2d at 593.

6. *Id.* at 130-33, 862 P.2d at 145-48, 24 Cal. Rptr. 2d at 590-93; see also *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 48 Cal. 3d 583, 591, 770 P.2d 278, 283, 257 Cal. Rptr. 661, 670 (1989) (holding that parents could recover for emotional distress resulting from doctor's sexual abuse of their children because both the parents and children were patients of the doctor); *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 923, 616 P.2d 813, 817, 167 Cal. Rptr. 831, 835 (1980) (holding that hospital and doctor owed duty to patient's husband after doctor incorrectly diagnosed patient with syphilis and advised her to inform her husband of the diagnosis so he could receive testing). *But cf. Ochoa v. Superior Court*, 39 Cal. 3d 159, 172-73, 703 P.2d 1, 10, 216 Cal. Rptr. 661, 670 (1985) (rejecting direct victim recovery where parent was simply a witness to, but not an individual involved in, the doctor/patient relationship). See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 845, 852-854 (9th ed. 1988 & Supp. 1993) (discussing the impact of the *Molien*, *Marlene F.*, and *Ochoa* decisions).

7. *Huggins*, 6 Cal. 4th at 131-32, 862 P.2d at 153, 24 Cal. Rptr. 2d at 592. The court noted that the duty imposed by the court of appeal would have the undesirable effect of subjecting medical goods providers to an increased potential for liability. *Id.* at 133, 862 P.2d at 154, 24 Cal. Rptr. 2d at 593. In turn, this heightened potential for liability would increase medical malpractice insurance costs. *Id.* The quality of patient care might also decline as a result of a pharmacist's "self-protective reservations" caused by the increased risk of liability. *Id.*

the pharmacy's negligence.<sup>8</sup>

### B. Justice Mosk's Dissenting Opinion

Justice Mosk disagreed with the majority and argued in favor of the court of appeal decision.<sup>9</sup> Justice Mosk noted that pharmacists have a statutory duty to properly label medication containers.<sup>10</sup> In situations involving an infant, Justice Mosk argued, such a duty necessarily involves the child's parents or caregiver.<sup>11</sup> Accordingly, Justice Mosk recognized a sufficient relationship between the pharmacy and the parents to withstand a motion for summary judgment.<sup>12</sup>

### C. Justice Kennard's Dissenting Opinion

Justice Kennard wrote separately, asserting that the court should allow the plaintiffs to argue for recovery under a direct victim theory.<sup>13</sup> Justice Kennard noted that in direct victim cases, the situation warrants recovery if a party assumes a legal duty, there exists an imposed duty upon the party as a matter of law, or the duty "arises out of a relationship between the two."<sup>14</sup> Maintaining that the pharmacist has a legal duty to correctly label prescribed medication, Justice Kennard reasoned that such a duty must extend to the patient's parents when the recipient of the drug is an infant.<sup>15</sup> Justice Kennard would allow recovery if the parents suffer emotional distress when a pharmacist breaches this duty.<sup>16</sup>

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8. *Id.* at 133, 862 P.2d at 154, 24 Cal. Rptr. 2d at 593.

9. *Id.* at 134, 862 P.2d at 154, 24 Cal. Rptr. 2d at 593 (Mosk, J., dissenting).

10. *Id.* (Mosk, J., dissenting). Justice Mosk cited § 4047.5 of the California Business and Professions Code which states, in pertinent part: "A pharmacist shall not dispense any prescription except in a container correctly labeled with . . . [t]he directions for the use of the drug." CAL. BUS. & PROF. CODE § 4047.5 (West Supp. 1994).

11. *Huggins*, 6 Cal. 4th at 134, 862 P.2d at 155, 24 Cal. Rptr. 2d at 594 (Mosk, J., dissenting).

12. *Id.* at 135, 862 P.2d at 155, 24 Cal. Rptr. 2d at 594 (Mosk, J., dissenting).

13. *Id.* at 136, 862 P.2d at 156, 24 Cal. Rptr. 2d at 595 (Kennard, J., dissenting).

14. *Id.*

15. *Id.* at 137, 862 P.2d at 156-57, 24 Cal. Rptr. 2d at 596-97 (Kennard, J., dissenting).

16. *Id.* at 137-39, 862 P.2d at 157-58, 24 Cal. Rptr. 2d at 596-97 (Kennard, J., dissenting).

### III. CONCLUSION

The *Huggins* decision clarifies the class of individuals to which pharmacists owe a legal duty of care.<sup>17</sup> By refusing to extend the scope of a pharmacist's duty, the court attempts to curtail the increasing costs of medical malpractice insurance in order to assure affordable pharmaceutical services.<sup>18</sup> Although the court suggests that extending the scope of a pharmacist's duty would hinder the quality of care,<sup>19</sup> such reasoning seems questionable.<sup>20</sup> Rather this decision simply represents a cost/benefit determination of how far liability should extend for pharmacy services.

MICHAEL ALDEN MILLER

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17. *Id.* at 133, 862 P.2d at 154, 24 Cal. Rptr. 2d at 593.

18. *Id.*

19. *Id.*

20. *Id.* at 139, 862 P.2d at 152, 24 Cal. Rptr. 2d at 597 (Kennard, J., dissenting).

## XI. WORKERS' COMPENSATION

*The superior court lacks subject matter jurisdiction over an action to declare provisions of the Workers' Compensation Act invalid and enjoin enforcement of those provisions:*

**Greener v. Workers' Compensation Appeals Board.**

### I. INTRODUCTION

In *Greener v. Workers' Compensation Appeals Board*,<sup>1</sup> the California Supreme Court considered whether a superior court has personal jurisdiction over the Workers' Compensation Appeals Board and subject matter jurisdiction over an action to declare portions of the Workers' Compensation Act, which are not yet effective, invalid under provisions of the federal and state constitution.<sup>2</sup>

Appellants were law school graduates who had not yet been admitted to the State Bar, but who had been representing applicants seeking workers' compensation benefits. They sued in superior court to challenge the sections 4903 and 5710 of the Labor Code terminating the power of the board to award attorney fees "to applicant representatives who are not attorneys, and to award fees to unlicensed attorneys for representation of an applicant in a deposition taken by an employer or insurer."<sup>3</sup> The Board moved to quash service of the summons and to dismiss the claim for lack of personal and subject matter jurisdiction.<sup>4</sup> The superior

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1. 6 Cal. 4th 1028, 863 P.2d 784, 25 Cal. Rptr. 2d 539 (1993). Justice Baxter wrote the unanimous opinion, with Chief Justice Lucas, and Justices Mosk, Panelli, Kennard, Arabian, and George concurring.

2. *Id.* at 1032-33, 863 P.2d at 786, 25 Cal. Rptr. 2d at 541.

3. *Id.* at 1033, 863 P.2d at 786, 25 Cal. Rptr. 2d at 541. Specifically, the complaint sought:

a declaration that the bills were invalid because they had been adopted in violation of the open and public hearing requirements of Government Code section 9029 et seq.; denied equal protection in violation of the Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a) of the California Constitution; and violated the separation of powers provisions of article III, section 3 of the California Constitution.

*Id.* at 1033, 863 P.2d at 787, 25 Cal. Rptr. 2d at 542.

4. *Id.* at 1034, 863 P.2d at 787, 25 Cal. Rptr. 2d at 542. The board asserted that § 5955 of the Labor Code gave the court of appeal and the California Supreme Court exclusive jurisdiction over this action because it concerned claims regarding workers'



court denied appellants' motion for a preliminary injunction and granted the board's motion to quash service and dismiss. The court of appeal reversed this decision, and the supreme court agreed to rule on this issue.

## II. TREATMENT

The supreme court first considered whether the superior court had personal jurisdiction over the Board.<sup>5</sup> The court found the Board's argument that the Legislature "conferred exclusive jurisdiction over it on the [c]ourt of [a]ppeal and th[e] [supreme court]" misguided, holding that the superior court did have personal jurisdiction over the Board.<sup>6</sup>

The court also noted that a motion to quash a summons was an improper method of challenging subject matter jurisdiction.<sup>7</sup> Courts have only permitted motions to quash in challenges to the sufficiency of the complaint "in unlawful detainer, where a demurrer is unavailable."<sup>8</sup>

The court next considered whether the Legislature "intended to reserve solely to the court of appeal and [the supreme] court jurisdiction

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compensation benefits. *Greener*, 6 Cal. 4th at 1034, 863 P.2d at 787, 25 Cal. Rptr. 2d at 542.

5. *Id.*

6. *Id.* The court reasoned that the Board confused the issues of personal jurisdiction and subject matter jurisdiction by arguing that § 5955 of the Labor Code, which provides that "the superior court may not entertain an action which seeks to restrain, enjoin, or interfere with the Board in its performance of duties created under that law," conferred exclusive jurisdiction over the Board. *Id.*

The workers' compensation law nowhere states that the Board is not subject to suit in the superior court . . . . Personal jurisdiction is not determined by the nature of the action, but by the legal existence of the party and either its presence in the state or other conduct permitting the court to exercise jurisdiction over the party. Subject matter jurisdiction, by contrast, is the power of the court over a cause of action or to act in a particular way.

*Id.* at 1034-35, 863 P.2d at 787, 25 Cal. Rptr. 2d at 542; see 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 9 (3d ed. 1985) (discussing generally the nature of subject matter jurisdiction and the principle of personal jurisdiction).

7. *Greener*, 6 Cal. 4th at 1036, 863 P.2d at 788, 25 Cal. Rptr. 2d at 543. A motion to quash a summons is proper only when a court lacks personal jurisdiction, not subject matter jurisdiction. *Id.* To properly challenge subject matter jurisdiction, a party may bring a demurrer to the complaint, make a motion to strike or motion for judgment on the pleadings, make a motion for summary judgment, or raise the issue in an answer. *Id.*; see 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 161 (3d ed. 1985 & Supp. 1993) (generally discussing motion to quash a summons).

8. *Greener*, 6 Cal. 4th at 1036, 863 P.2d at 789, 25 Cal. Rptr. 2d at 544. The court made clear that it was not creating an exception for use of the motion to quash in unlawful detainer actions. That question was not before the court. *Id.* at 1036 n.5, 863 P.2d at 798 n.5, 25 Cal. Rptr. 2d at 544 n.5.

to entertain challenges to the constitutional validity of provisions of the workers' compensation law, and, if so, whether plaintiffs have any remedy prior to being denied an award of fees and a lien."<sup>9</sup>

In determining whether the court of appeal and supreme court had exclusive jurisdiction over the issue at bar, the court looked to article III, section 3.5 of the California Constitution, which "withholds from administrative agencies the power to determine the constitutional validity of any statute."<sup>10</sup> Based on this section, the court decided that the Board must comply with the challenged statutes until an appellate court instructs it otherwise.<sup>11</sup>

To decide whether the workers' compensation law "limits plaintiffs' remedy to a petition for review of an order of the Board," the court looked to the relevant statutory provisions, focusing on section 5300 of the California Labor Code.<sup>12</sup> The court determined that section 5300 does not allow the Board to hear cases involving the constitutionality of a legislative amendment to a workers' compensation law, and stated that plaintiffs' challenge "must come following exhaustion of the remedies available in the workers' compensation system, and must be made by petition for review of the order of the Board."<sup>13</sup>

The court noted that section 5955 allows a writ of mandate in "proper cases" where jurisdiction is "limit[ed] . . . to the appellate courts."<sup>14</sup> The

9. *Id.* at 1037, 863 P.2d at 789, 25 Cal. Rptr. 2d at 544.

10. *Id.* at 1038, 863 P.2d at 789, 25 Cal. Rptr. 2d at 544. The section provides:

An administrative agency . . . has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional; (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

CAL. CONST. art. III, § 3.5.

11. *Greener*, 6 Cal. 4th at 1038, 863 P.2d at 790, 25 Cal. Rptr. 2d at 545.

12. *Id.* at 1038-39, 863 P.2d at 790, 25 Cal. Rptr. 2d at 545. "The Board is given the power to adjudicate claims by employees for injury 'arising out of and in the course' of their employment." *Id.* at 1038, 863 P.2d at 790, 25 Cal. Rptr. 2d at 545. (quoting CAL. LAB. CODE § 3600(a)). "Proceedings which in any manner concern the recovery of compensation, or any right or liability 'arising out of or incidental thereto' are to be instituted solely before the Appeals Board." *Id.* at 1038-39, 863 P.2d at 790, 25 Cal. Rptr. 2d at 545 (quoting *Santiago v. Employee Benefits Servs.*, 168 Cal. App. 3d 898, 901, 214 Cal. Rptr. 679, 681 (1985) (citing CAL. LAB. CODE § 5300(a))).

13. *Id.* at 1040, 863 P.2d at 791, 25 Cal. Rptr. 2d at 546.

14. *Greener*, 6 Cal. 4th at 1040, 863 P.2d at 791, 25 Cal. Rptr. 2d at 546; see *infra*

court concluded, however, that this was not a "proper case" because "until the award is made and the lien denied, the Board has not failed to do an act required by law, and the review procedure provides an equally adequate remedy."<sup>16</sup> Therefore, the court decided whether "the superior court has subject matter jurisdiction over a declaratory relief action seeking an adjudication of the constitutional validity of a workers' compensation statute," and if not, "what criteria are to be applied in determining whether a claim related to workers' compensation legislation is a 'proper case' for decision by petition for writ of mandate in an appellate court."<sup>16</sup>

In deciding this issue, the court found guidance from *Loustalot v. Superior Court*.<sup>17</sup> In *Loustalot*, the court found that while the jurisdictional provisions of the workers' compensation law were limited in scope, "the superior court has not been denied jurisdiction over all actions related to a workers' compensation proceeding."<sup>18</sup> Furthermore, as noted in *Loustalot*, section 5955 is modeled after section 67 of the Public Utilities Act, which the court interpreted in *Sexton v. Atchison, Topeka and Santa Fe Railway Co.*<sup>19</sup> There, the court stated that the clear intent of section 67 "is to place the commission, insofar as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the act itself."<sup>20</sup> Relying on *Sexton*, the court concluded the

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note 21 and accompanying text; see also CAL. CIV. PROC. CODE § 1085 (West 1980) (providing for general application of writ of mandate).

15. *Greener*, 6 Cal. 4th at 1040, 863 P.2d at 791, 25 Cal. Rptr. 2d at 546. (citations omitted).

16. *Id.* at 1040-41, 863 P.2d at 791, 25 Cal. Rptr. 2d at 546.

17. 30 Cal. 2d 905, 186 P.2d 673 (1947) (holding that the court may review, under writ of habeas corpus, a decision of the Industrial Accident Commission to imprison a worker for contempt).

18. *Greener*, 6 Cal. 4th at 1041, 863 P.2d at 792, 25 Cal. Rptr. 2d at 547; see 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 436-437 (9th ed. 1987) (discussing review of a Board decision and jurisdiction over such an action); 65 CAL. JUR. 3D *Work Injury Compensation* § 343 (1981) (discussing judicial review of Board decisions).

19. 173 Cal. 760, 161 P. 748 (1916). In *Sexton*, which the court found to be analogous to the present case, the court "rejected an argument that the jurisdictional limitations of § 67 of the Public Utilities Act applied only to review of orders of the commission." *Greener*, 6 Cal. 4th at 1041, 863 P.2d at 792, 25 Cal. Rptr. 2d at 547. The court also rejected the argument that "granting the requested injunction against provision of free transportation to railroad commission members and employees would not interfere with the commission's performance of its duties because the commission had no duty to comply with an invalid statute." *Id.* at 1042, 863 P.2d at 792, 25 Cal. Rptr. 2d at 547.

20. *Id.* at 1042, 863 P.2d at 792, 25 Cal. Rptr. 2d at 547. The court further stated that "[t]he superior court has no power to enjoin the commissioners, or to render any

plaintiff's challenge was not within the superior court's subject matter jurisdiction.<sup>21</sup>

The court then considered whether the plaintiff's case could be considered a "proper case" for writ of mandate under section 5955.<sup>22</sup> They commented that the plaintiffs failed to allege that the Board denied them "a lien on an award . . . or threatened to do so."<sup>23</sup> Furthermore, the court recognized that if they denied the plaintiffs a lien, they would allow them to petition for appeal pursuant to section 5950 of the California Labor Code.<sup>24</sup> The court also concluded that because plaintiffs were challenging a statute prior to it being effective, the plaintiffs were actually seeking declaratory relief, an action over which appellate courts do not have original jurisdiction.<sup>25</sup> However, the court noted that they, along with the courts of appeal, have "entertained challenges to the legislation when brought by petition for writ of mandate, and have done so prior to the implementation of the measure."<sup>26</sup>

While the court recognized that mandamus may be available in "proper cases" under section 5955, they were unable to find a clear definition of

judgment herein that would 'interfere' with them in the performance of the official duties," and consequently, "[t]he judgment asked for . . . would necessarily be an interference with the commission in the performance of its official duties." *Id.* (quoting *Sexton*, 173 Cal. at 764-65, 161 P. at 750).

21. *Id.* at 1044, 863 P.2d at 793, 25 Cal. Rptr. 2d at 548.

22. *Id.* at 1044, 863 P.2d at 793-94, 25 Cal. Rptr. 2d at 548-49. Section 1085 of the California Code of Civil Procedure states that:

Mandamus 'may be issued . . . to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.'

*Id.* at 1044, 863 P.2d at 794, 25 Cal. Rptr. 2d at 549 (quoting CAL. CODE CIV. PROC. § 1085 (West 1980)). Furthermore, mandamus is only appropriate in "cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." CAL. CODE CIV. PROC. § 1086 (West 1980). For a general overview of mandamus, see 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 4 (3d ed. 1985).

23. *Greener*, 6 Cal. 4th at 1044-45, 863 P.2d at 794, 25 Cal. Rptr. 2d at 549.

24. *Id.* at 1045, 863 P.2d at 794, 25 Cal. Rptr. 2d at 549.

25. *Id.*; CAL. CONST. art. VI, § 10.

26. *Id.*; see *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991), cert. denied, 112 S. Ct. 1293 (1992); *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990); *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

what constitutes a "proper case." The court concluded that section 5955 authorizes mandamus against the Board in cases where section 1085 of the California Code of Civil Procedure allows it.<sup>27</sup> The court held the case at bar was not a "proper case" under section 5955, and upheld the superior court's dismissal of the plaintiffs' action.<sup>28</sup>

### III. CONCLUSION

The California Supreme Court has given the Workers' Compensation Appeals Board the power to decide cases regarding attorney fees and other matters of official duty. This is consistent with the legislative intent as expressed in the pertinent Labor Code provisions. Also, the court has clearly defined what constitutes a "proper case" for mandamus under section 5955 of the Labor Code, eliminating much of the confusion that persists in this area of the law.

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27. *Greener*, 6 Cal. 4th at 1045-46, 863 P.2d at 794-95, 25 Cal. Rptr. 2d at 549-50; see *Betancourt v. Workmen's Compensation Appeals Bd.*, 16 Cal. App. 3d 408, 412-13, 94 Cal. Rptr. 9, 12 (1971); *Fidelity & Gas. Co. of New York v. Workers' Compensation Appeals Bd.*, 103 Cal. App. 3d 1001, 1008-09, 163 Cal. Rptr. 339, 343 (1980).

28. *Greener*, 6 Cal. 4th at 1046, 863 P.2d at 795, 25 Cal. Rptr. 2d at 550. The court limited the plaintiffs' remedies in such cases to:

- (1) a petition for review if the Board fails to award fees for their representation of an applicant and/or a lien for such fees; or (2) if they are able to satisfy the Court of Appeal that mandamus is appropriate under Code of Civil Procedure section 1085, a petition for writ of mandate.

*Id.*