PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 21 | Issue 1 Article 7

12-15-1993

# California Supreme Court Survey - A Review of Decisions: August 1992 - September 1993

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# California Supreme Court Survey August 1992 - September 1993

*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 recently 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.*

# I. CIVIL PROCEDURE

*In a marriage dissolution proceeding, a spouse has the right to discover business records and tax returns of a closely held corporation where the other spouse is a shareholder and the stock is community property, while payroll tax returns that identify third persons remain privileged and may not be discovered:* **Schnabel v. Superior Court.**

## I. INTRODUCTION

In *Schnabel v. Superior Court*,[1] the California Supreme Court considered the scope of a spouse's right to discover[2] business records and tax returns of a closely held corporation in a marriage dissolution proceeding where the other spouse's stock was community property.[3] The court emphasized that the California Legislature has a strong policy favoring full disclosure of community property assets and liabilities in a marriage dissolution proceeding.[4] The court also acknowledged, however, that the legislature manifested a clear intent to create a privilege against forced disclosure of tax returns.[5] The *Schnabel* court reconciled these compet-

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1. 5 Cal. 4th 704, 854 P.2d .1117, 21 Cal. Rptr. 2d 200 (1993). Justice Arabian wrote the unanimous opinion, with Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Baxter, and George concurring.

2. *See generally* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961) (discovery of documents); 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §§ 1422, 1507 & 1511 (3d ed. 1986 & Supp. 1992) (discussing California discovery rules); 27 CAL. JUR. 3D *Discovery and Depositions* §§ 18-22 (9th ed. 1987 & Supp. 1993) (discussing the scope of discovery).

3. For a discussion on how other states have treated this issue, see Lee R. Russ, Annotation, *Spouse's Right to Discovery of Closely Held Corporation Records During Divorce Proceeding*, 38 A.L.R. 4th 145 (1983).

4. *Schnabel*, 5 Cal. 4th at 711, 854 P.2d at 1120, 21 Cal. Rptr. 2d at 203. Full and accurate disclosure of community and quasi-community property, separate assets, income and expenses is required by statute. CAL. CIV. CODE § 4800.11(a)(1) (Deering Supp. 1993).

5. *Schnabel*, 5 Cal. 4th at 719-20, 854 P.2d at 1126-27, 21 Cal. Rptr. 2d at 207-09. In *Webb v. Standard Oil Co.*, the court construed REVENUE AND TAXATION CODE § 19282 to imply a privilege against forced disclosure of personal tax returns in civil discovery proceedings. Webb v. Standard Oil Co., 49 Cal. 2d 509, 513, 319 P.2d 621, 624 (1957); *see* CAL. REV. & TAX. CODE § 19282 (Deering 1988) (providing that it is a misdemeanor to disclose information contained in an individual's personal tax return). The *Webb* court explained that the purpose of the statute was to "encourag[e] a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes." *Webb*, 49 Cal. 2d at 513, 319 P.2d at 624. The *Schnabel* court stated that the same privileges apply to

ing policies by carving out a narrow exception to the tax return privilege when the case involves community property in a marriage dissolution proceeding.[6]

The California Supreme Court affirmed the judgment of the trial court and court of appeal, holding that business records and quarterly payroll tax returns regarding the shareholder spouse were discoverable.[7] The court reversed the trial court and court of appeal, however, on the issue of payroll tax returns that identify third persons on the basis of privilege.[8]

## II. TREATMENT

### A. *Business Records*

In determining whether corporate business records were discoverable, the court balanced the spouse's interest in obtaining a fair division of community property with the rights of third parties in maintaining financial privacy.[9] The court concluded that the spouse's interest in obtaining discovery materials outweighed the privacy interests of the corporation.[10] The court reasoned that because the stock was community property, each spouse had an equal interest in that stock.[11] In addition, each

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corporate tax returns. *Schnabel*, 5 Cal. 4th at 720, 854 P.2d at 1126-27, 21 Cal. Rptr. 2d at 209-10; *see* CAL. REV. & TAX. CODE § 26451 (Deering 1988) (providing that it is a misdemeanor to disclose any information contained within the tax returns of a corporation).

6. *Schnabel*, 5 Cal. 4th at 722, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 211.

7. *Id.* at 708, 854 P.2d at 1118, 21 Cal. Rptr. 2d at 201.

8. *Id.*

9. *Id.* at 714-15, 854 P.2d at 1122-23, 21 Cal. Rptr. 2d at 205-06. *See* Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 657, 542 P.2d 977, 979, 125 Cal. Rptr. 553, 555 (1975) (balancing the right of bank customers to maintain privacy of their financial affairs with the right of litigants to discover relevant facts); Harris v. Superior Court, 3 Cal. App. 4th 661, 663, 4 Cal. Rptr. 2d 564, 565 (1992) (action to increase child support; balancing a former spouse's right to discover ex-husband's household income with new spouse's right to maintain financial privacy); Rifkind v. Superior Court, 123 Cal. App. 3d 1045, 1049, 177 Cal. Rptr. 82, 83 (1981), *partially overruled by* Schnabel v. Superior Court, 5 Cal. 4th 704, 723, 854 P.2d 1117, 1128, 21 Cal. Rptr. 2d 200, 211 (1993) (dismissing argument that fiduciary relationship between spouses justifies discovery). *See infra* note 18. *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.4 (2d ed. 1993) (discussing need to protect the privacy of third persons from discovery).

10. *Schnabel*, 5 Cal. 4th at 715, 854 P.2d at 1123, 21 Cal. Rptr. 2d at 206.

11. *Id.* at 715, 854 P.2d at 1123, 21 Cal. Rptr. 2d at 206. *See generally* 11 B.E.

spouse had a fiduciary duty to the other in managing the community property. The fiduciary duty requires full disclosure of all material facts regarding the value of the property and access to all information and records pertaining to the property.[12]

The court found the corporation's privacy interest weak when compared with the spouse's interest in obtaining a fair division of property.[13] Under Corporations Code section 1601, a shareholder may inspect accounting books and business records of the corporation.[14] The court explained that because the shareholder spouse had access to the business records, and because any information obtainable by the shareholder spouse was subject to inspection by the other spouse, the corporation had no expectation of privacy as to those business records.[15] Thus, the court held that the business records of the corporation were discoverable.[16]

### *B. Tax Returns*

The California Supreme Court's has consistently defended the privilege against forced disclosure of tax returns.[17] The *Schnabel* court asserted, however, that this privilege is *not* absolute.[18] An exception will apply if there is a public policy at stake greater than that of the confidentiality of tax returns.[19] The court concluded that the strong legislative policy for a

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WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 176 (9th ed. 1990) (discussing spouse's position as shareholder when the stock is community property).

12. *Schnabel*, 5 Cal. 4th at 715, 854 P.2d at 1123, 21 Cal. Rptr. 2d at 206; CAL. CIV. CODE § 5125(e) (Deering Supp. 1993).

13. *Schnabel*, 5 Cal. 4th at 718, 854 P.2d at 1125, 21 Cal. Rptr. 2d at 208.

14. *Id.* at 715, 854 P.2d at 1123, 21 Cal. Rptr. 2d at 206; CAL. CORP. CODE § 1601 (Deering 1977).

15. *Schnabel*, 5 Cal. 4th at 718, 854 P.2d at 1125, 21 Cal. Rptr. 2d at 208.

16. *Id.*

17. *See* Sav-On Drugs, Inc. v. Superior Court, 15 Cal. 3d 1, 6, 538 P.2d 739, 742, 123 Cal. Rptr. 283, 286 (1975) (holding that information related to sales tax returns is privileged); Crest Catering Co. v. Superior Court, 62 Cal. 2d 274, 277, 398 P.2d 150, 153, 42 Cal. Rptr. 110, 112 (1965) (concluding that employment tax returns are privileged); Rifkind v. Superior Court, 123 Cal. App. 3d 1045, 1049, 177 Cal. Rptr. 82, 84 (1981), *partially overruled by* Schnabel v. Superior Court, 5 Cal. 4th 704, 854 P.2d 1117, 21 Cal Rptr. 2d 200 (1993) (holding that tax returns of law corporation in marriage dissolution proceeding are privileged); Sammut v. Sammut, 103 Cal. App. 3d 557, 562, 163 Cal. Rptr. 524, 527 (1980) (finding income tax returns of former spouse in spousal support modification proceedings privileged). *See also supra* note 5.

18. *Schnabel*, 5 Cal. 4th at 721, 854 P.2d at 1127, 21 Cal. Rptr. 2d at 210. The court stated that *Rifkind* is disapproved to the extent that it holds that all tax returns absolutely privileged. *Id.* at 723, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 211.

19. *Id.* at 721, 854 P.2d at 1127, 21 Cal. Rptr. 2d at 210. In *Miller v. Superior Court*, the court of appeal found that the public policy of enforcing child support obligations mandated an exception to the tax return privilege. Miller v. Superior

fair division of community property warrants an exception to the general rule of privilege.[20] The court emphasized, however, that the exception was narrow and contingent on the specific facts of the case.[21] In this case, the court noted that the corporation was closely held, that it had only two shareholders, and that the shareholder spouse owned thirty percent of the stock. The court seemed to suggest that the outcome might have been different had the case involved a public corporation whose shares had an ascertainable market value.[22]

The court further emphasized that the exception to the privilege is "limited to those tax returns that are reasonably related to the purpose for which they are sought."[23] The court concluded that corporate and payroll tax returns regarding the shareholder spouse were clearly related to the spouse's interest in determining the value of the community property.[24] Therefore, those taxes were held to be discoverable under the exception.[25] Payroll tax information regarding employees other than the shareholder spouse, however, did not have a sufficient nexus to the community property interest to justify an exception to privilege.[26] Thus, payroll tax returns that identified third persons were found undiscoverable.[27]

## III. CONCLUSION

The court showed sensitivity toward the unfair division of community property in a marriage dissolution proceeding by carving out an exception to the general rule of privilege with respect to tax returns. In keep-

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Court, 71 Cal. App. 3d 145, 149, 139 Cal. Rptr. 521, 523 (1977). Until *Schnabel*, *Miller* was the only case concluding that public policy warranted an exception to the privilege. *Schnabel*, 5 Cal. 4th at 721, 854 P.2d at 1127, 21 Cal. Rptr. 2d at 211.

20. *Id.* at 722, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 210.

21. *Id.* at 722, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 211.

22. *Id. See generally* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 175 (9th ed. 1990) (discussing community property with respect to publicly held stock).

23. *Schnabel*, 5 Cal. 4th at 722, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 211.

24. *Id.* at 723, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 211.

25. *Id.*

26. *Id.* The court explained that the only effect of such production would be to "invade the privacy of those employees." *Id. See also Rifkind*, 123 Cal. App. 3d at 1049, 177 Cal. Rptr. at 84 (explaining that disclosure of corporate tax returns relating only to other shareholders and their families would unnecessarily invade the privacy of persons who had no part in the matrimonial dispute).

27. *Schnabel*, 5 Cal. 4th at 723, 854 P.2d at 1129, 21 Cal. Rptr. 2d at 212.

ing third party payroll tax returns privileged, the court managed to balance the privacy interests of those who were not parties to the action while simultaneously protecting the property interests of the spouse. The court emphasized, however, that the exception was narrowly tailored to the specific facts of this case.[28] Accordingly, one can expect that in future cases the exception will be triggered only if the spouse can show specific relevance or need for such discovery.[29]

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28. *Id.* at 722, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 210. *See supra* note 22 and accompanying text.

29. *Id.* at 723, 854 P.2d at 1128, 21 Cal. Rptr. 2d at 211. The court seemed to suggest that even the strong public policy favoring full disclosure in a marriage dissolution proceeding will not justify an exception to the tax return privilege if the specific facts of the case do not convince the court that the spouse has a legitimate need for such discovery.

# II. CIVIL RIGHTS

*Obesity alone, without further proof of underlying physiological disorder, is insufficient to establish a prima facie case of employment discrimination because the condition does not fall within the scope of "handicapped" or "disabled" as protected by the Fair Employment and Housing Act:* **Cassista v. Community Foods, Inc.**

## I. INTRODUCTION

In *Cassista v. Community Foods, Inc.*,[1] the California Supreme Court considered whether the provisions of the Fair Employment and Housing Act ("FEHA")[2] extend to people claiming employment discrimination based on weight.[3] The court carefully evaluated existing definitions of "physical handicap" to determine the scope and intent of the legislative

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1. 5 Cal. 4th 1050, 856 P.2d 1143, 22 Cal. Rptr. 2d 287 (1993). Justice Arabian authored the opinion for the unanimous court.

2. CAL. GOV'T CODE §§ 12900-12976 (West 1992 & Supp. 1993).

3. *Cassista*, 5 Cal. 4th at 1055, 856 P.2d at 1146, 22 Cal. Rptr. 2d at 290.

Cassista applied for cashier/stockperson position at Community Foods, a local health food collective. *Id.* at 1053, 856 P.2d at 1144, 22 Cal. Rptr. at 288. The position requried manual labor, included carrying 50 pound bags of grain and produce, and changing 55 gallon drums of honey. *Id.* Community Foods sought experienced candidates who could eventually become members of the collective, assuming management and ownership responsibilities. *Id.* At the time Cassista applied for the position, she was five feet four inches tall and weighed 305 pounds. *Id.*

Community Foods denied her the position. The collective considered her weight, among other factors, in assessing her ability to perform the job. *Id.* at 1053-54, 856 P.2d at 1145, 22 Cal. Rptr. 2d at 289. Cassista filed suit alleging FEHA violations. *Id.* at 1054, 856 P.2d at 1145, 22 Cal. Rptr. 2d at 289. A jury found in favor of Community Foods because Cassista failed to establish that her weight was the reason for denial of employment. *Id.* at 1054-55, 856 P.2d at 1145-46, 22 Cal. Rptr. 2d at 289-90.

The court of appeal reversed the decision and held that 1) Community Foods considered Cassista's obesity to be a physical handicap as defined by the FEHA, and 2) the lower court erred in instructing the jury that the plaintiff was required to demonstrate that but for her obesity, she would have been hired. *Id.* at 1055, 856 P.2d at 1146, 22 Cal. Rptr. 2d at 290. The court of appeal determined that once Cassista showed the employer considered her weight, the burden shifted to the employer to prove that it would have made the same decision if the plaintiff's weight had not been at issue. *Id.* Because the appellate court found that the jury instruction prejudiced the plaintiff's case, it remanded for a new trial. *Id.* The supreme court granted review to determine whether Cassista established a prima facie case of employment discrimination pursuant to the FEHA. *Id.*

language.[4] The court concluded that establishing a prima facie case of employment discrimination based on a "physical handicap or disability" requires a showing either an actual physiological disease or disorder affecting a body function or a perception that she suffered such an affliction.[5] The plaintiff did not meet the burden of providing clear and competent medical evidence establishing a handicap or perceived handicap, and thus, her claim failed as a matter of law.[6]

## II. TREATMENT

The court began its analysis by examining the history of the term "physical handicap" under the FEHA.[7] Concluding that the provisions of the current act were modeled after the American Disabilities Act of 1990,[8] the court determined that the FEHA distinguished three categories of disabilities: "(1) impairment of sight, hearing or speech; (2) impairment of physical ability because of amputation or loss of function or coordination; and (3) any other health impairment requiring special education or related services."[9] The court further noted that in 1992 the legislature dramatically modified these definitions to incorporate "any physiological disease, disorder, or condition, cosmetic disfigurement, or anatomical loss" which affected a body system and the ability to participate in major life activities.[10] Acknowledging legislative intent to synthesize

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4. *Id.* at 1056-57, 856 P.2d at 1146-47, 22 Cal. Rptr. 2d at 290-91.

5. *Id.* at 1065-66, 856 P.2d at 1153, 22 Cal. Rptr. 2d at 297. The California Government Code defines "physical disability" to include people suffering physiological disease or disorder, anatomical loss, and cosmetic disfigurement which affects one of the body systems and limits participation in major life activities. CAL. GOV'T CODE § 12926(k) (West Supp. 1993). *But see* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 306 (9th ed. 1987)(noting that an employer may refuse to hire an individual whose disability prevents performance of the required duties or endangers himself or others).

6. *Cassista*, 5 Cal. 4th at 1066, 856 P.2d at 1154, 22 Cal. Rptr. 2d at 298.

> [I]t is not enough to show that an employer's decision is based on the perception that an applicant is disqualified by his or her weight . . . the condition, as perceived by the employer, must still be in the nature of a physiological disorder within the meaning of the FEHA, even if it is not in fact disabling.

*Id.* at 1065-66, 856 P.2d at 1154, 22 Cal. Rptr. 2d at 297.

7. *Id.* at 1056-61, 856 P.2d at 1146-50, 22 Cal. Rptr. 2d at 290-94.

8. *Id.* at 1056 n.6, 856 P.2d at 1147 n.6, 22 Cal. Rptr. 2d at 291 n.6. *See* 42 U.S.C. §§ 12101-12213 (1993) (provisions of the American Disabilities Act); *see generally* Thomas H. Christopher & Charles M. Rice, *The Americans With Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759 (1992)(providing extensive interpretation of the parameters of the act, including detailed analysis of prerequisites to disability status).

9. *Cassista*, 5 Cal. 4th at 1056, 856 P.2d at 1147, 22 Cal. Rptr. 2d at 291.

10. *Id.* at 1058, 856 P.2d at 1148, 22 Cal. Rptr. 2d at 292. *See also* CAL. GOV'T

previous definitions of handicap with current definitions of disability,[11] the court applied the revised FEHA provisions for "disability" to the instant case.[12] Thus, the plaintiff was required to show that her obesity fell within one of the statutory categories of actual or perceived disability.[13]

The court looked to case law for guidance on the issue of obesity as a physiological disorder protected by FEHA.[14] Finding little adjudication

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CODE § 12926(k) (West Supp. 1993). The code provides in part:

> (k) 'physical disability' includes, but is not limited to, all of the following:
> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
> (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
> (B) Limits an individual's ability to participate in major life activities.
> (2) Any other health impairment not described in paragraph (1) that requires special education or related services.
> . . .
> (4) Being regarded as having, or having had, a disease disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

*Id.*

The statute specifically incorporated the definition of physical handicap developed in American Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n, 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982). *See* CAL. GOV'T CODE § 12926(k) (West Supp. 1993). *See also American Nat'l Ins.*, 32 Cal. 3d at 609-10, 651 P.2d at 1155-56, 186 Cal. Rptr. at 349-50 (expanding the definition of handicap to include conditions which will be disabilities at a future time).

11. *Cassista*, 5 Cal. 4th at 1059-61, 856 P.2d at 1149-50, 22 Cal. Rptr. 2d at 293-94. *See also* CALIFORNIA CON. ED. OF BAR, FAIR EMPLOYMENT & HOUSING COMMISSION: PRECEDENTIAL DECISIONS § 12955.3 (1993)(updating the definition of disability to reflect the language of Government Code § 12926).

12. *Cassista*, 5 Cal. 4th at 1061, 856 P.2d at 1150, 22 Cal. Rptr. 2d at 294.

13. *See id.*

14. *Id.* at 1061-62, 856 P.2d at 1150-51, 22 Cal. Rptr. 2d at 294-95. The court examined two appellate decisions, Hegwer v. Board of Civ. Serv. Comm'rs, 5 Cal. App. 4th 1011, 7 Cal. Rptr. 2d 389 (1992) and McMillen v. Civil Serv. Comm'n, 6 Cal. App. 4th 125, 8 Cal. Rptr. 2d 548 (1992). In *Hegwer*, the court found that although a thyroid condition caused the plaintiff's obesity, the Los Angeles City Fire Department did not improperly discriminate by enforcing weight requirements for paramedic positions. *Hegwer*, 5 Cal. 4th at 1015, 7 Cal. Rptr. 2d at 391 (1992). Due to Hegwer's obesity, she was not able to properly perform the physical demands required of a paramedic. *Id.* at 1022, 7 Cal. Rptr. 2d at 395.

on point in California, the court sought guidance from other jurisdictions.[15] Ultimately, the court concluded that most states have determined that obesity, without further medical complication, is insufficient to constitute a disability.[16] Further, the court found that the states accepting obesity as a disability had adopted broader statutory language than California's law.[17]

The court then examined case law discussing the Rehabilitation Act,[18] the pertinent federal act upon which the California statute was based.[19] As part of its analysis, the court made specific reference to two federal decisions.[20] In *Tudyman v. United Airlines*,[21] the district court determined that an airline employee, seeking damages for employment discrimination based on an inability to meet weight requirements, had a self-imposed condition arising from bodybuilding.[22] In *Cook v. Department of Mental Health, Retardation and Hospitals*,[23] a district court found that, among other deficiencies, the plaintiff failed to prove that her obesity was caused by "systematic or metabolic factors" creating an "immutable condition."[24] Therefore, her condition did not qualify as a

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*McMillen* also involved an employment discrimination suit against the Los Angeles City Fire Department. *McMillen*, 6 Cal. App. 4th at 127, 8 Cal. Rptr. 2d at 548. The court held that the Department properly suspended McMillen from his position as an ambulance driver: "[b]ecause sudden incapacitation of an ambulance driver could be life-threatening, [and] the standards governing this job call for employees who are not suspectible to injury and who are not overweight, as this could impair job performance." *Id.* at 128, 8 Cal. Rptr. 2d at 549.

15. *Cassista*, 5 Cal. 4th at 1061 n.11, 856 P.2d at 1150 n.11, 22 Cal. Rptr. 2d at 294 n.11.

16. *Id.*

17. *Id. See generally* Donald L. Bierman, Jr., Comment, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?*, 30 SANTA CLARA L. REV. 951 (1990) (providing an in-depth examination of case law on the subject).

18. 29 U.S.C. §§ 701-796 (1993).

19. *Cassista*, 5 Cal. 4th at 1063-65, 856 P.2d at 1152-53, 22 Cal. Rptr. 2d at 296-97. *See also* Paula B. Stolker, Note, *Weigh My Job Performance, Not My Body: Extending Title VII to Weight-Based Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 223 (1992) (providing extensive analysis of the current treatment of obesity on both federal and state levels).

20. *Cassista*, 5 Cal. 4th at 1063-64, 856 P.2d at 1152, 22 Cal. Rptr. 2d at 296.

21. 608 F. Supp. 739 (C.D. Cal. 1984).

22. *Id.* at 746. The plaintiff's bodybuilding did not cause a limitation in a major life activity. *Id.* Further, his weight was a self-imposed condition, and therefore, distinguishable from physiological disorder, disfigurement, and anatomical loss. *Id.*

23. 783 F. Supp. 1569 (D.R.I. 1992), *aff'd*, 1993 WL 470697 (1st Cir. Nov. 22, 1993). The California Supreme Court relied upon the district court decision. The First Circuit's opinion, which was subsequent to the *Cassista* decision, affirmed a jury award for damages resulting from discrimination based on a perceived handicap. *Cook*, 10 F.3d at 17, 28.

24. *Cook*, 783 F. Supp. at 1573.

physiological handicap subject to the provisions of the Rehabilitation Act.[25] However, the court stated that the plaintiff could prevail on the theory of a perceived handicap by proving that she was otherwise qualified for the job, and the perceived handicap was the sole basis for denying employment.[26]

Based on the foregoing analysis of judicial interpretation of "handicap" and "disability," the California Supreme Court concluded that an individual asserting a FEHA violation must provide convincing evidence that obesity is the result of an underlying physiological disorder and not merely self-imposed.[27]

In the instant case, the plaintiff argued that the court's failure to find her obesity to be an "actual" disability under FEHA guidelines did not bar statutory relief if the employer "perceived" her weight as a disability.[28] The court found her contention unpersuasive, concluding that the statutory language requires a perceived handicap to fall under one of the enumerated disabilities listed in the act itself.[29] Thus, the court determined that the plaintiff failed to establish a prima facie case of employment discrimination within the meaning of the FEHA.[30]

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25. *Id.* To the extent obesity is self-imposed, it is neither a physiological disorder nor a handicap. *Id.*

It should be noted that in *Cassista* the jury found insufficient evidence to support a finding that the plaintiff was denied employment solely on the basis of weight. *Cassista*, 5 Cal. 4th at 1055, 856 P.2d at 1146, 22 Cal. Rptr. 2d at 290.

26. *Cook*, 783 F. Supp. at 1575-76. The California Supreme Court, on the other hand, seemed to presume that the plaintiff would be unable to prevail on a perceived handicap claim. *Cassista*, 5 Cal. 4th at 1065-66, 856 P.2d at 1153-54, 22 Cal. Rptr. 2d at 297-98. However, the First Circuit reasoned, "[i]n a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them suffer the consequences." *Cook*, 10 F.3d at 28.

27. *Cassista*, 5 Cal. 4th at 1065, 856 P.2d at 1153, 22 Cal. Rptr. 2d at 297.

28. *Id.*

29. *Id.* at 1065-66, 856 P.2d at 1153-54, 22 Cal. Rptr. 2d at 297-98.

30. *Id.* at 1066, 856 P.2d at 1154, 22 Cal. Rptr. 2d at 298. The supreme court also determined that the matter had been fully presented before the trial court. *Id.* Therefore, it reversed the appellate court's order for a new trial, because a new trial was not necessary. *Id.*

## III. CONCLUSION

In *Cassista v. Community Foods, Inc.*,[31] the California Supreme Court ruled that to establish a prima facie case of employment discrimination pursuant to the FEHA, the plaintiff must provide medical evidence showing that the claimed disability has an underlying physiological condition or disorder affecting one of the body systems and that disability limits participation in a major life activity.[32] Therefore, in most instances, obesity will not qualify as a disability or handicap.[33]

*Cassista* reflects the traditional belief that a person does not have a "physical" or "mental" disability unless he or she suffers from an immutable, medically diagnosable condition.[34] Qualifications for disability status are of great concern to society, yet they are often obliquely defined in statutory language.[35] As a result, more classes of people have litigated and lobbied for disability designation.

Presently, disability status has been extended to persons with manic depressive syndrome, high blood pressure, epilepsy, nervous and heart conditions, AIDS, compulsive gambling, and drug addiction.[36] In contrast, conditions such as homosexuality, bisexuality, kleptomania, pyromania, and illegal drug abuse have been denied disability status.[37] The meaning of "disability" will be continually explored, both judicially and legislatively, and the term may come to include many classes of people whom are currently unprotected.

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31. 5 Cal. 4th 1050, 856 P.2d 1143, 22 Cal. Rptr. 2d 287 (1993).

32. *Id.* at 1066, 856 P.2d at 1154, 22 Cal. Rptr. 2d at 298.

33. *See supra* notes 15-26 and accompanying text.

34. *See supra* note 27 and accompanying text.

35. *See, e.g., Cassista*, 5 Cal. 4th at 1061 n.11, 856 P.2d at 1151 n.11, 22 Cal. Rptr. 2d at 295 n.11 (discussing "handicap" as it appears in several state statutes).

36. See Thomas H. Christopher & Charles M. Rice, *The American Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759, 765-68 (1992); Maureen O'Connor, Note, *Defining 'Handicap' for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633, 642-43 (1988); Jane Osborne Baker, Comment, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. REV. 947, 959-61 (1982) (providing in-depth analysis of judicial and legislative determinations of classes of persons qualifying for disability status).

37. Christopher & Rice, *supra* note 36, at 765-68; O'Connor, *supra* note 36, at 642-43; Baker, *supra* note 35, at 959-61.

# III. CONSTITUTIONAL LAW

## A. *Under the California Constitution, the State: (1) is required to provide uniform public education; (2) may be required to provide necessary funding for such education; (3) may suspend the existing school board and assume operations; and (4) may only use funds appropriated for purposes specifically prescribed by the legislature:* **Butt v. State.**

### I. INTRODUCTION

In *Butt v. State*,[1] the California Supreme Court found that a school district's inability to fund the remaining six weeks of public school education was an insufficient reason to justify the early closure of the Richmond Unified School District's ("the District") school system.[2] The su-

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1. 4 Cal. 4th 668, 842 P.2d 1240, 15 Cal. Rptr. 2d 480 (1992). Justice Baxter authored the majority opinion. Chief Justice Lucas and Justices Mosk and Kennard filed separate opinions concurring in part and dissenting in part.

2. *Id.* at 703-04, 842 P.2d at 1264, 15 Cal. Rptr. 2d at 504. *See generally* 56 CAL. JUR. 3D *Schools* §§ 84-97 (1980) (discussing district funds and proper methods of distribution). Due to a lack of funds, the District announced that it would be forced to terminate the 1990-91 school term six weeks early. *Butt*, 4 Cal. 4th at 674, 842 P.2d at 1243, 15 Cal. Rptr. 2d at 483. Subsequently, Thomas K. Butt and other parents filed a class action seeking temporary and permanent injunctions against the State and school board forbidding the premature closing of the schools. *Id.* A school board member declared that the District had a $23 million deficit for the school term and consequently only had enough money to pay its employees through April of 1991. *Id.* at 675, 842 P.2d at 1244, 15 Cal. Rptr. 2d at 484. The school board's attempts to obtain emergency funds were unsuccessful and the District was in the process of filing for bankruptcy. *Id.*

The trial court granted a preliminary injunction requiring the State to provide students with a full school term or education equivalent thereto. *Id.* At an evidentiary hearing, the plaintiffs' motions and declarations detailed the harmful effects of the school closure of upon the educational development of the affected students. *Id.* Afterward, the trial court declared that the students had a fundamental right to an education, and thus, the State must provide students with an educational opportunity equivalent to that provided elsewhere within the State. *Id.* The court ordered the state to act as "they deem appropriate" to ensure that the schools remained open for the entire school term or ensure the availability of an "equivalent educational opportunity."

The State submitted a proposal to the trial court detailing its plan to remedy the situation. *Id.* The State indicated that the legislature had designated $19 million in excess funds for use in the Greater Avenues for Independence program and for emergency assistance to the Oakland Unified School District ("OUSD"). *Id.* Neither organi-

preme court held that under the California State Constitution, the State: (1) is required to provide uniform public education;[3] (2) may be required to provide necessary funding for such education;[4] (3) may suspend the existing school board and assume operations;[5] and (4) may only use funds appropriated for purposes specifically prescribed by the legislature.[6]

## II. TREATMENT

### A. *Majority Opinion*

#### 1. Standard of Review

The California Supreme Court first discussed the factors for determining whether a trial court may issue a preliminary injunction and then determined whether the trial court exceeded its discretion in this particular case.[7] The court stated that the trial court must weigh two dependent factors before issuing a preliminary injunction: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from the issuance or nonissuance of the injunction."[8]

In considering the first factor, the trial court specifically found that the plaintiffs' case had a "reasonable probability" of success on the merits at

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zation objected to the State's submission that the excess funds be utilized as an emergency loan to the District. *Id.* at 676, 842 P.2d at 1245, 15 Cal. Rptr. 2d at 484. The trial court approved the plan and ordered disbursement of the excess funds. The court further declared that the State had the authority to relieve the school board of its duties and appoint a trustee. *Id.*

The State appealed, and in an attempt to escape the required intervention altogether, it requested transfer of the appeal to the supreme court and a stay of execution of the trial court's order pending the appeal. *Id.* at 676-77, 842 P.2d at 1245, 15 Cal. Rptr. at 485. The California Supreme Court granted a transfer but denied the requested stay. *Id.*

3. *Butt*, 4 Cal. 4th at 692, 842 P.2d at 1256, 15 Cal. Rptr. 2d at 496.

4. *Id.*

5. *Id.* at 694, 842 P.2d at 1258, 15 Cal. Rptr. 2d at 498.

6. *Id.* at 703, 842 P.2d at 1264, 15 Cal. Rptr. 2d at 504.

7. *See generally id.* at 677-93, 842 P.2d at 1246-57, 15 Cal. Rptr. 2d at 486-97.

8. *Id.* at 677-78, 842 P.2d at 1246, 15 Cal. Rptr. 2d at 486. The court explained that "the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *Id.* at 678, 842 P.2d at 1246, 15 Cal. Rptr. 2d at 486 (citing King v. Meese 43 Cal. 3d 1217, 1227-28, 743 P.2d 889, 895, 240 Cal. Rptr. 829, 835 (1987)). However, the court noted that for a preliminary injunction to be granted, there must be some possibility that the plaintiff may succeed on the merits, regardless of the degree of interim harm. *Id.* (citing Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 442-43, 777 P.2d 610, 615-16, 261 Cal. Rptr. 574, 579-80 (1989)).

trial.[9] In making this determination, the trial court evaluated the equal protection guaranties provided by the State Constitution,[10] and reasoned that Articles I and IV mandate state intervention to ensure the availability of an equal educational opportunity to all students, even in the event of fiscal shortages.[11] The State argued that it fulfilled its Constitutional duties by providing all school districts with an equalized revenue base.[12] The State further contended that in the absence of a specific constitutional violation, the State had no duty to ensure the prudent spending of such appropriated funds.[13] In addition, the State asserted that the resulting educational disparity does not involve a "suspect classification" and therefore does not trigger a "strict scrutiny" analysis.[14] Because strict scrutiny should not apply, the State insisted its policy of "local control and accountability" was rationally related to its desire not to intervene.[15]

The court rejected the State's contentions,[16] relying on numerous principles set forth in previous decisions: (1) the Constitution mandates state responsibility for public education;[17] (2) the public school system is a single, unified system despite its being administered through local districts;[18] (3) the State has the responsibility to provide an equal educational opportunity to all students;[19] (4) the State is ultimately responsible for the management and control of schools;[20] (5) within the

9. *Id.*

10. *Id.* at 678-79, 842 P.2d at 1246-67, 15 Cal. Rptr. 2d at 486-87. *See* CAL. CONST. art. I, § 7; CAL. CONST. art. IV, § 16; 56 CAL. JUR. 3D *Schools* §§ 291-301 (1980) (discussing the right to attend public school and unlawful discrimination).

11. *Butt*, 4 Cal. 4th at 678-79, 842 P.2d at 1247, 15 Cal. Rptr. 2d at 487. *See generally* 56 CAL. JUR. 3D *Schools* §§ 84-97, 310-27 (1980) (discussing school district funds and compulsory education law).

12. *Butt*, 4 Cal. 4th at 679, 842 P.2d at 1247, 15 Cal. Rptr. 2d at 487.

13. *Id.*

14. *Id.* at 679-80, 842 P.2d at 1247, 15 Cal. Rptr. 2d at 487.

15. *Id.* at 680, 842 P.2d at 1247, 15 Cal. Rptr. 2d at 487.

16. *Id.*

17. *Id.* at 680, 842 P.2d at 1248, 15 Cal. Rptr. 2d at 488. (citing San Francisco Unified Sch. Dist. v. Johnson, 3 Cal. 3d 937, 951-52 479 P.2d 669, 677 92 Cal. Rptr. 309, 317 *cert. denied*, 401 U.S. 1012 (1971)).

18. *Id.* (citing Kennedy v. Miller, 97 Cal. 429, 432, 32 P. 558, 559 (1893)).

19. *Id.* at 680-81, 842 P.2d at 1248, 15 Cal. Rptr. 2d at 488 (citing Jackson v. Pasadena City Sch. Dist., 59 Cal. 2d 876, 880, 382 P.2d 878, 881, 31 Cal. Rptr. 606, 609 (1963)).

20. *Id.* (citing *Kennedy*, 97 Cal. at 431, 32 P. at 558 (1893)).

school system, local districts act as agents of the State;[21] and (6) the ultimate responsibility of public education lies solely with the State and may not be delegated.[22]

In applying these principles, the court stated that although school districts are separate entities for some purposes, under the California Constitution, the State retains the responsibility to provide an equal educational opportunity to all students.[23] Furthermore, the court held that previous court decisions mandated heightened scrutiny in state-maintained discrimination cases which impact a fundamental interest.[24] Consequently, the State is required to intervene if the local school district does not provide educational equality, unless the State can show a compelling reason for relieving it of its duty to do so.[25]

After reviewing the trial court record, the supreme court held that ending the school term six weeks early would deprive the District's students of an equal educational opportunity.[26] Moreover, the court found the State did not identify a sufficient compelling interest to justify dismissing its duty to intervene.[27] Therefore, the court held that the trial court did not abuse its discretion by concluding that plaintiffs' could potentially prevail on the merits of their case.[28]

In considering the second factor, interim harm, the trial court concluded that if a preliminary injunction was not granted, the plaintiffs would suffer "substantial and irreparable harm."[29] That harm would outweigh the harm that defendants would suffer if the injunction were granted.[30] The trial court relied on the plaintiffs' evidence which detailed the severe

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21. *Id.* (citing Hall v. City of Taft, 47 Cal. 2d 177, 181, 302 P.2d 574, 577 (1956)).

22. *Id.*

23. *Id.* at 681, 842 P.2d at 1248-49, 15 Cal. Rptr. 2d at 488-89. *See generally* 56 CAL. JUR. 3D *Schools* §§ 310-27 (1980) (discussing compulsory education law).

24. *Butt*, 4 Cal. 4th at 685-86, 842 P.2d at 1251-52, 15 Cal. Rptr. 2d at 491-92. *See also* 56 CAL. JUR. 3D *Schools* §§ 291-301 (1980) (right to attend public school and unlawful discrimination). The court reiterated that public education is a "fundamental interest for purposes of equal protection analysis under the California Constitution." *Butt*, 4 Cal. 4th at 686, 842 P.2d at 1252, 15 Cal. Rptr. 2d at 492. The court noted that unplanned interruptions in the school term do not automatically constitute a denial of equal educational opportunity. *Id.* To violate the California Constitution, the school district's program must fall below statewide standards. *Id.* at 686-87, 842 P.2d at 1252, 15 Cal. Rptr. 2d at 492. *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 139-41 (9th ed. 1988) (fundamental rights).

25. *Butt*, 4 Cal. 4th at 692, 842 P.2d at 1256, 15 Cal. Rptr. 2d at 496. *See also* 56 CAL. JUR. 3D *Schools* § 4 (1980) (discussing state control and administration of educational system).

26. *Butt*, 5 Cal. 4th at 692, 842 P.2d at 1256, 15 Cal. Rptr. 2d at 496.

27. *Id.*

28. *Id.*

29. *Id.* at 692-93, 842 P.2d at 1256, 15 Cal. Rptr. 2d at 496.

30. *Id.*

and disruptive effects an early closure would have on students.[31] The State put forth no evidence indicating that the State would suffer comparable harm if it were required to provide emergency funding.[32]

Consequently, the California Supreme Court concluded that the record sufficiently supported the trial court's finding of interim harm to the plaintiffs.[33] After considering the two factors, the court ruled that the trial court had not abused its discretion by ordering a preliminary injunction against the State.[34] The supreme court determined that the trial court correctly found the plaintiffs' claim to have potential merit and the potential interim harm was sufficient to justify the issuance of a preliminary injunction.[35]

2. Scope of the Remedial Order

The trial court ordered the State to ensure an equal educational opportunity to the District students "by whatever means they deem appropriate."[36] The State subsequently submitted a proposal to the trial court for approval.[37] The proposal called for the superintendent of Public Instruction to relieve the school board of its duties, to appoint a trustee to be responsible for the operation of the schools through the end of the school term, and to impose a plan for the permanent financial recovery of the District.[38] The State contended that even if it had a responsibility to intervene to provide an equal educational opportunity, the trial court had no legal or equitable authority to displace the school board, to appoint a trustee, or to impose financial recovery plans.[39]

The supreme court rejected the State's contentions and found that the trial court had not exceeded its equitable power by authorizing such a

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31. *Id.* at 693, 842 P.2d at 1256, 15 Cal. Rptr. 2d at 496. The trial court relied on declarations made by various teachers, school officials, and specialists. *Id.*

32. *Id.* at 693, 842 P.2d at 1257, 15 Cal. Rptr. 2d at 497. The State had only made contentions that such additional funding would harm the State's policies of local control and accountability. *Id.*

33. *Id.*

34. *Id.* at 678, 842 P.2d at 1246, 15 Cal. Rptr. 2d at 486.

35. *Id.*

36. *Id.* at 694, 842 P.2d at 1257, 15 Cal. Rptr. 2d at 497. The trial court order went on to state "[h]ow these defendants accomplish this is up to the discretion of defendants." *Id.*

37. *Id.*

38. *Id. See generally* 56 CAL. JUR. 3D *Schools* §§ 149-65 (1980) (governing boards of school districts).

39. *Butt*, 4 Cal. 4th at 694, 842 P.2d at 1258, 15 Cal. Rptr. 2d at 498.

plan.[40] The court further explained that although the statutes failed to provide direct legal authority for such action, trial courts retain the equitable authority to enforce their decisions.[41] In this case, the court ultimately determined that the trial court's order had been "tailored to the harm at issue" and in response to "extreme and aggravated" conditions.[42] Consequently, the court held that it was within the trial court's inherent equitable power to order the temporary displacement of the school board and to appoint a trustee to implement a financial recovery plan.[43]

3. Source of Loan Funds

The proposal, which had been ordered and approved by the trial court, included the disbursement of unused funds which were designated for other programs.[44] The State argued that the trial court exceeded its power because the legislature appropriated these funds for their respective purposes, and the current financial difficulties of the District were not "reasonably related" to the intended purposes.[45] Because the legislature appropriated these funds to specific agencies with very narrow purposes, the court agreed with the State's contention and overruled the trial court's order.[46]

The supreme court noted that Article III of the California Constitution provides for separate legislative, executive, and judicial powers and specifically forbids any person to exercise two or more of these powers unless permitted within the Constitution.[47] The court explained that precedent has long established that such principles limit judicial authority over appropriations.[48] The legislature appropriated the funds at issue for

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40. *Id.*

41. *Id.* at 695, 842 P.2d at 1258, 15 Cal. Rptr. 2d at 498. See Crawford v. Board of Educ., 17 Cal. 3d 280, 309-10, 551 P.2d 28, 47-48, 130 Cal. Rptr. 724, 743-44 (1976) (finding that a court may order busing to accomplish desegregation if a school district fails to meet its constitutional obligation to desegregate).

42. *Butt*, 4 Cal. 4th at 695-97, 842 P.2d at 1258-59, 15 Cal. Rptr. 2d at 498-99. *See generally* Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (holding that a judicial remedy must be tailored to the harm at issue).

43. *Butt*, 4 Cal. 4th at 697, 842 P.2d at 1259-60, 15 Cal. Rptr. 2d at 499-500.

44. *Id.* at 697, 842 P.2d at 1260, 15 Cal. Rptr. 2d at 500. The excess funds included $19 million designated for use in the Greater Avenues for Independence program ($9 million) and for emergency assistance to the Oakland Unified School District ($10 million). *Id.*

45. *Id.* at 697-98, 842 P.2d at 1260, 15 Cal. Rptr. 2d at 500.

46. *Id.* at 698, 842 P.2d at 1260, 15 Cal. Rptr. 2d at 500.

47. *Id.*

48. *Id. See generally* Westinghouse Elec. & Mfg. Co. v. Chambers, 169 Cal. 131, 145 P. 1025 (1915); Myers v. English, 9 Cal. 341 (1858); California State Employees' Ass'n. v. Flournoy, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251, *cert. denied*, 414 U.S.

a clear and narrow purpose, and consequently, the supreme court held that such funds were not "generally related" to the trial court's purpose.[49] Hence, the court found that the trial court exceeded its judiciary authority by ordering the use of the funds to alleviate the District's financial problems.[50]

### *B. Concurring & Dissenting Opinion of Chief Justice Lucas*

Chief Justice Lucas agreed with the majority's analysis and conclusions regarding the State of California's constitutional obligation to provide an equal educational opportunity to all students.[51] However, he dissented with the majority's consideration of the trial court's appropriation of emergency funding.[52] Chief Justice Lucas reasoned that consideration of appropriate funding was unnecessary because the issue was moot at the time of the decision.[53] He pointed out that the emergency funds were loans to the District, a loan repayment plan had already been worked out by the parties, and the State was seeking no additional relief.[54] Consequently, Chief Justice Lucas contends that because the State only seeks future guidance by the majority's opinion, the majority inappropriately rendered an advisory opinion.[55]

### *C. Concurring & Dissenting Opinion of Justice Mosk*

Justice Mosk authored a concurring and dissenting opinion in general agreement with Justice Kennard's opinion.[56] However, Justice Mosk refused to participate in Justice Kennard's concession that the trial court's order posed "a potential for disruption of a function of the legislative

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1093 (1973).

49. *Butt*, 4 Cal. 4th at 699-70, 842 P.2d at 1261-62, 15 Cal. Rptr. 2d at 501-02. *See generally* Long Beach Unified Sch. Dist. v. State, 225 Cal. App. 3d 155, 275 Cal. Rptr. 449 (1990); Carmel Valley Fire Protection Dist. v. State, 190 Cal. App. 3d 521, 234 Cal. Rptr. 795 (1987).

50. *Butt*, 4 Cal. 4th at 703, 842 P.2d at 1264, 15 Cal. Rptr. 2d at 504.

51. *Id.* at 704, 842 P.2d at 1265, 15 Cal. Rptr. 2d at 505 (Lucas, C.J., concurring and dissenting).

52. *Id.* (Lucas, C.J., concurring and dissenting).

53. *Id.* (Lucas, C.J., concurring and dissenting).

54. *Id.* at 705, 842 P.2d at 1265, 15 Cal. Rptr. 2d at 505 (Lucas, C.J., concurring and dissenting).

55. *Id.* (Lucas, C.J., concurring and dissenting).

56. *Id.* at 705, 842 P.2d at 1265, 15 Cal. Rptr. 2d at 505 (Mosk, J., concurring and dissenting).

branch."[57] Justice Mosk contended that any recognized interference was inconsistent with concluding that the funds were "reasonably related" to the purposes served.[58]

### *D. Concurring & Dissenting Opinion of Justice Kennard*

Justice Kennard concurred with the part of the majority's opinion which held that the threatened closure of the District schools deprived students of their constitutional right to an equal educational opportunity and hence mandated state interference to protect those rights.[59] However, Justice Kennard dissented from the majority's characterization that the trial court violated the separation of powers doctrine when it ordered the disbursement of unused funds for purposes other than those specified by the legislature.[60] Justice Kennard argued that the practical effect of the majority's opinion might deprive students of their fundamental rights if no specified means of funding existed.[61] She further contended that the trial court's ordering the use of funds which were already appropriated for educational purposes was reasonably related to the needs of the District.[62]

Justice Kennard asserted that the majority opinion was based on a "fundamental misunderstanding of the separation of powers doctrine."[63] She explained that the majority's formalistic approach mandates that powers only be exercised by one branch of government; for instance, appropriations of funds may only be exercised by the legislature.[64] In practical effect, the majority approach limits funding to the specific uses contemplated by the legislature without regard to any fundamental rights which might be compromised if such specified funding is not appropriated.[65] Justice Kennard further pointed out that the United States Supreme Court has "squarely rejected" such a formalistic approach to the separation of powers.[66] The Supreme Court has instead adopted a more

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57. *Id.* (Mosk, J., concurring and dissenting).

58. *Id.* at 705-06, 842 P.2d at 1265-66, 15 Cal. Rptr. 2d at 505-06 (Mosk, J., concurring and dissenting).

59. *Id.* at 706, 842 P.2d at 1266, 15 Cal. Rptr. 2d at 506 (Kennard, J., concurring and dissenting).

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

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

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

63. *Id.* at 707, 842 P.2d at 1266, 15 Cal. Rptr. 2d at 506 (Kennard, J., concurring and dissenting).

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

65. *Id.* at 707, 842 P.2d at 1267, 15 Cal. Rptr. 2d at 507 (Kennard, J., concurring and dissenting).

66. *Id.* at 707-08, 842 P.2d at 1267, 15 Cal. Rptr. 2d at 507 (Kennard, J., concurring and dissenting) (citing Nixon v. Administrator of Gen. Ser., 433 U.S. 425 (1977)).

flexible approach which Justice Kennard deemed appropriate for our growing and complex society.[67]

Justice Kennard then focused on California legal principles which establish that a court does not violate the separation of powers doctrine when it orders funding from appropriated resources if such funds are "reasonably available."[68] She contended that the appropriate question at hand whether the funds could be considered "reasonably available."[69] In determining this, Justice Kennard explained that the amount of disruption among the branches must be considered.[70] If the disruption is slight, the funds must only further the court's objectives.[71] In the instant case, Justice Kennard opined that such a disruption was slight, that the source of the funds was reasonably related to the purposes served, and consequently, that the trial court had the authority to order disbursement of the funds which were already appropriated by the legislature.[72] In practical effect, Justice Kennard reasoned that if one branch of government protects some fundamental rights due to failure of the other branches to provide such protection, all fundamental rights should have that protection.[73] The majority opinion merely provides the means by

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67. *Id.* at 708, 842 P.2d at 1267, 15 Cal. Rptr. 2d at 507 (Kennard, J., concurring and dissenting).

Justice Kennard cited to Supreme Court precedent which holds that with respect to separation of powers, "'the proper inquiry focuses on the extent to which the act complained of prevents one of the three branches from accomplishing its constitutionally assigned functions.'" *Id.* (quoting *Nixon*, 433 U.S. at 443). Under this approach, if the possibility of disruption exists, the court must then determine whether the constitutional authority of the branch in question is a greater concern than the impact on separation of powers. *Id.* (citing *Nixon*, 433 U.S. at 443).

68. *Id.* at 709, 842 P.2d at 1268, 15 Cal. Rptr. 2d at 508 (Kennard, J., concurring and dissenting). *See generally* Mandel v. Myers, 29 Cal. 3d 531, 629 P.2d 935, 174 Cal. Rptr. 841 (1981); Long Beach Unified Sch. Dist. v. State, 225 Cal. App. 3d 155, 275 Cal. Rptr. 449 (1990); Carmel Valley Fire Protection Dist. v. State, 190 Cal. App. 3d 521, 234 Cal. Rptr. 795 (1987); Committee to Defend Reprod. Rights v. Cory, 132 Cal. App. 3d 852, 183 Cal. Rptr. 475 (1982).

69. *Butt* 4 Cal. 4th at 709, 842 P.2d at 1268, 15 Cal. Rptr. 2d at 508 (Kennard, J., concurring and dissenting).

70. *Id.* at 710, 842 P.2d at 1268, 15 Cal. Rptr. 2d at 508 (Kennard, J., concurring and dissenting).

71. *Id.* at 710, 842 P.2d at 1268, 15 Cal. Rptr. 2d at 508 (Kennard, J., concurring and dissenting).

72. *Id.* at 710-11, 842 P.2d at 1268-69, 15 Cal. Rptr. 2d at 508-09 (Kennard, J., concurring and dissenting).

73. *Id.* at 713, 842 P.2d at 1270, 15 Cal. Rptr. 2d at 510 (Kennard, J., concurring and dissenting).

which such a violation might be recognized, but may forbid that branch the power to remedy that violation.[74]

## III. CONCLUSION

The court found that the District's inability to fund the remaining six weeks of public school was an insufficient reason to justify the early closure of the District's school system.[75] The court affirmed every student's right to an equal educational opportunity in the State of California and concluded that this fundamental interest may only be thwarted by a necessary and compelling state interest.[76] The State's interest in maintaining the existing program of local management and control was not a sufficiently compelling interest to justify non-intervention.[77]

The court's holding recognized and protected each student's fundamental right to a state wide standard of education. The court concluded that local school boards may be displaced, trustees may be appointed, and emergency loan funds may be disbursed.[78] However, the court protected the legislature's appropriation powers by holding that funds earmarked for other programs may not be used to remedy situations not specifically contemplated by the legislature.[79]

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74. *Id.* at 713-14, 842 P.2d at 1271, 15 Cal. Rptr. 2d at 511 (Kennard, J., concurring and dissenting).
75. *Id.* at 703-04, 842 P.2d at 1264, 15 Cal. Rptr. 2d at 504.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

B. *The Regents of the University of California may impose a mandatory student activity fee; however, the Regents can not collect mandatory fees from students who object to subsidizing student groups that engage in political or ideological activities:* **Smith v. Regents of the University of California.**

## I. INTRODUCTION

In *Smith v. Regents of the University of California*,[1] the California Supreme Court addressed the issue of whether the Regents of the University of California ("Regents") have the authority to impose a mandatory student activity fee, and if so, whether the Regents may utilize that fee to support groups which engage in political or ideological activities.[2] The court held that the California Constitution authorizes the Regents to impose a mandatory student activity fee.[3] However, the court ruled that the Regents can not use the mandatory fee to force students to fund organizations whose primary purpose is to advance political or ideological agendas.[4] In order to protect the constitutional rights of dissenting students, the court concluded that the Regents must (1) identify those student groups which are not eligible for funding from mandatory fees and (2) allow objecting students the opportunity to deduct a corresponding amount from the mandatory fee.[5]

## II. STATEMENT OF THE CASE

Every student who attends the University of California ("University") is required to pay a mandatory, non-refundable student activity fee which is used to subsidize the Associated Students of the University of California ("ASUC").[6] The ASUC utilizes the mandatory fee to support the ASUC

1. 4 Cal. 4th 843, 844 P.2d 500, 16 Cal. Rptr. 2d 181 (1993), *cert. denied*, 114 S. Ct. 181 (1993). Justice Pannelli authored the majority opinion in which Chief Justice Lucas and Justices Kennard, Baxter, and George concurred. *Id.* at 847-69, 844 P.2d at 503-17, 16 Cal. Rptr. 2d at 184-98. *See infra* notes 19-71, 76-78 and accompanying text. Justice Arabian wrote a separate dissenting opinion in which Justice Mosk concurred. *Smith*, 4 Cal. 4th at 869-92, 844 P.2d at 518-33, 16 Cal. Rptr. 2d at 198-214 (Arabian, J., dissenting). *See infra* notes 72-75 and accompanying text.

2. *Smith*, 4 Cal. 4th at 847, 844 P.2d at 503, 16 Cal. Rptr. 2d at 184.

3. *Id.* at 851, 844 P.2d at 505, 16 Cal. Rptr. 2d at 186.

4. *Id.* at 860, 844 P.2d at 511, 16 Cal. Rptr. 2d at 192.

5. *Id.* at 862-63, 866, 844 P.2d at 513-14, 516, 16 Cal. Rptr. 2d at 194-95, 197.

6. *Id.* at 848, 844 P.2d at 504, 16 Cal. Rptr. 2d at 185. The University authorizes

Senate,[7] two lobbying groups,[8] and approximately 150 student activity organizations.[9] Although most of the student groups pursue academic, cultural, or recreational activities, many groups pursue purely political or ideological goals.[10] These groups include Campus National Organization for Women, Campus Abortion Rights Action League, Gay and Lesbian League, Progressive Student Organization, Spartacus Youth League, and Greenpeace Berkeley.[11]

In 1982, several students at the University of California at Berkeley filed suit against the Regents, the ASUC, and various University officers.[12] The plaintiffs asserted that the imposition and use of the mandatory fee violated the United States Constitution,[13] various provisions of the California Constitution,[14] and state statutory provisions. Despite the

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the ASUC to "administer student government and student extracurricular affairs." *Id.* at 848, 844 P.2d at 503, 16 Cal. Rptr. 2d at 184. In 1982, the year in which the present case was tried, the fee was $12.50 per student per academic quarter. *Id.* at 848, 844 P.2d at 504, 16 Cal. Rptr. 2d at 185. During the 1981-82 academic year, the ASUC collected $607,635. *Id.*

7. *Id.* at 849, 844 P.2d at 504, 16 Cal. Rptr. 2d at 185. The ASUC Senate is a governing body comprised of elected student representatives. *Id.* The ASUC Senate has debated and taken a position on various political issues such as "gay and lesbian rights, the proposed Equal Rights Amendment, gun control, the reelection of a particular United States Representative, a municipal initiative to legalize marijuana, and the treatment of political prisoners." *Id.*

8. The ASUC subsidizes the University of California Lobby and the ASUC Municipal Lobby. *Id.* The former group seeks to influence pending legislation and has lobbied the state legislature on such issues as abortion and rent discrimination. *Id.* The latter group has lobbied the City of Berkeley on issues such as nuclear weapons, public transportation, city investment policy, and has also endorsed student candidates for public office. *Id.*

9. *Id.*

10. *Id.* at 849-50, 844 P.2d at 504, 16 Cal. Rptr. 2d at 185.

11. *Id.* at 850, 844 P.2d at 504-05, 16 Cal. Rptr. 2d at 185-86. The remaining groups which were deemed to pursue political and ideological goals include: Amnesty International, Berkeley Students for Peace, Radical Education and Action Project, Students Against Intervention in El Salvador, Students for Economic Democracy, UC Berkeley Feminist Alliance and Women Organized Against Sexual Harassment, UC Sierra Club, and Conservation and Natural Resources Organization. *Id.*

12. *Id.* at 850, 844 P.2d at 505, 16 Cal. Rptr. 2d at 186.

13. *Id.* The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." U.S. CONST. amend I.; *see also Smith*, 4 Cal. 4th at 850 n.1, 844 P.2d at 505 n.1, 16 Cal. Rptr. 2d 186 n.1.

Specifically, the students claimed that the practice in question abridged their First Amendment right to free speech. *Id.* at 852, 844 P.2d at 506, 16 Cal. Rptr. 2d at 187. They alleged that contributions which support political or ideological causes are a form of speech, and "compelled speech offends the First Amendment." *Id.*

14. *Smith*, 4 Cal. 4th at 850, 844 P.2d at 505, 16 Cal. Rptr. 2d at 186.

fact that the trial court found that certain political activities violated the University and the ASUC Rules and Regulations, the lower court ruled in favor of the defendants.[15] The court of appeal affirmed.[16] The California Supreme Court affirmed that portion of the appellate court's decision which concluded that the Regents have the power to impose a mandatory student activity fee.[17] The supreme court, however, reversed the court of appeal in all other respects.[18]

## III. TREATMENT

### A. *The Majority Opinion*

#### 1. The Regents Have Sufficient Authority to Impose a Mandatory Student Activity Fee

The California Constitution vests the Regents with "full powers of organization and government" over the University.[19] In prior rulings, California courts have interpreted this grant of power as "giving the Regents 'virtual autonomy in self-governance.'"[20] On that basis, the court concluded that the constitutional grant of power clearly authorizes the Regents to impose and collect a mandatory student activity fee.[21]

#### 2. The Use of Mandatory Student Activity Fees to Subsidize Student Groups Devoted to Political or Ideological Causes Violated the Dissenting Students' First Amendment Rights to Freedom of Speech and Freedom of Association

In determining whether the use of the mandatory fee was constitutionally permissible, the court identified the competing interests at stake.[22] On the one hand, it is well established that the First Amendment of the United States Constitution prohibits the government from forcing an

15. *Id.* at 850-51, 844 P.2d at 505, 16 Cal. Rptr. 2d at 186.
16. *Id.* at 851, 844 P.2d at 505, 16 Cal. Rptr. 2d at 186.
17. *Id.* at 868, 844 P.2d at 517, 16 Cal. Rptr. 2d at 198.
18. *Id.*
19. CAL. CONST. art. IX, § 9(a).
20. *Smith*, 4 Cal. 4th at 851, 844 P.2d at 505, 16 Cal. Rptr. 2d at 186 (citing Regents of the Univ. of Cal. v. City of Santa Monica, 77 Cal. App. 3d 130, 135, 143 Cal. Rptr. 276, 279 (1978) (holding that the Regents are exempt from local building codes and zoning regulations)).
21. *Id.*
22. *See id.* at 852-53, 844 P.2d at 506-07, 16 Cal. Rptr. 2d at 187-88.

individual to contribute money for the support of political or ideological causes.[23] On that basis, the plaintiffs argued that the use of the student activity fees to support organizations engaged in political and ideological activities violated their constitutional right not to speak.[24] On the other hand, however, the court recognized that the Regents must be given broad discretion in determining "how best to carry out the University's educational mission."[25] As such, the defendants argued that the political and ideological goals inherent in certain student group activities provided educational benefits which warranted the burden on the dissenting students' rights.[26]

The court reasoned that the mandatory fee implicated the First Amendment freedom of association, and therefore, the strict scrutiny standard applied.[27] As such, the court emphasized that the use of the fee, to subsidize political and ideological activities, could be justified only if: (1) the fee served a compelling state interest unrelated to the suppression of ideas, (2) the state interest could not be achieved through less restrictive means,[28] and (3) the defendants' use of the mandatory fee was germane to the University's educational purpose.[29]

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23. *See* Keller v. State Bar of Cal., 496 U.S. 1, 9-10 (1990) (ruling that a state bar can not utilize mandatory dues to fund political or ideological activities which are unrelated to the bar's stated goal of improving the administration of justice); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (holding that a union must finance its ideological activities from dues paid by employees who do not object to the advancement of such causes); *see also* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-58 (1974) (striking down a state law guaranteeing political candidates the "right to reply" to criticism); Torcaso v. Watkins, 367 U.S. 488, 489-96 (1961) (overruling a state statute requiring public officers to declare a belief in God). In the Virginia Bill for Religious Liberty, Thomas Jefferson declared: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Everson v. Board of Educ., 330 U.S. 1, 13 (1947).

24. *Smith*, 4 Cal. 4th at 853, 844 P.2d at 507, 16 Cal. Rptr. 2d at 188.

25. *Id.* at 852, 844 P.2d at 506, 16 Cal. Rptr. 2d at 187.

26. *Id.* at 853, 844 P.2d at 507, 16 Cal. Rptr. 2d at 188.

27. *Id.* For a more detailed discussion of the First Amendment freedom of association, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.41 (4th ed. 1991); B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Freedom of Association* §§ 271-280 (9th ed. 1988).

28. *Smith*, 4 Cal. 4th at 853, 844 P.2d at 507, 16 Cal. Rptr. 2d at 188 (citing Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 & n.11 (1986) (striking down a union's procedural safeguards aimed at addressing the concerns of those members who disagreed with the union's political activities)). *See also* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (upholding a state statute requiring a men's group to accept female applicants).

29. *Smith*, 4 Cal. 4th at 854, 844 P.2d at 508, 16 Cal. Rptr. 2d at 189 (citing Keller v. State Bar of Cal., 496 U.S. 1, 13-14 (1990) (ruling that a state bar cannot utilize mandatory dues to fund political or ideological activities which are unrelated to the

In assessing the validity of the defendants' use of the mandatory student fee, the court focused on two related United States Supreme Court decisions.[30] In *Abood v. Detroit Board of Education*,[31] a group of public school teachers challenged the validity of a Michigan statute which compelled teachers to financially support a union's collective bargaining efforts.[32] Particularly, the teachers maintained that the union utilized mandatory union dues to support political and ideological views which were unrelated to collective bargaining.[33]

The Supreme Court ruled that a state may compel employees to support a union's collective bargaining efforts.[34] However, the Court noted that it is well established that an individual's right "to associate for the purpose of advancing ideas and beliefs is protected by the First and Fourteenth Amendments."[35] The Court emphasized that it is equally well established that a government cannot "require an individual to relinquish rights guaranteed him by the First Amendment."[36] On that basis, the Court ruled that the constitutional prohibition against compelled speech prevented the union from using the mandatory dues to fund political and ideological activities which were unrelated to collective bargaining.[37]

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bar's stated purpose); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217-23, 232-37 (1977) (holding that a union must finance its ideological activities from dues paid by employees who do not object to the advancement of such causes)).

30. *See generally id.* at 852-55, 844 P.2d at 506-08, 16 Cal. Rptr. 2d at 187-89.

31. 431 U.S. 209 (1977).

32. *Id.* at 211-13. *See* MICH. COMP. LAWS ANN. § 423.210(I) (West 1978). Section 423.210(I) permits employment to be conditioned upon the payment of union dues. *Id.*

33. *Abood*, 431 U.S. at 213.

34. *Id.* at 217-23.

35. *Id.* at 233 (citing Elrod v. Burns, 427 U.S. 347, 355-57 (1976) (enjoining a governmental entity from dismissing employees who would not affiliate with or sponsor the Democratic Party); Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (striking down a state law barring citizens from voting in a primary election of a political party if the citizen had voted in the primary election of any other political party within the preceding 23 months); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (holding that an organization's freedom of association rights protected the organization from being forced to disclose its membership lists)).

36. *Id.* at 234 (citing *Elrod*, 427 U.S. at 357-60; Perry v. Sindermann, 408 U.S. 593 (1972) (finding that a college's dismissal of a professor who criticized the college was violative of the professor's First Amendment rights); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (striking down a state law requiring teachers to affirm that they are not members of the Communist Party)).

37. *Id.* at 234. For additional analysis of *Abood*, see *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 188-98 (1977) (arguing that unions should be required to

In *Keller v. State Bar of California*,[38] the plaintiffs, members of the California State Bar, sued that organization alleging that its use of the plaintiffs' mandatory dues to finance political and ideological activities violated their First Amendment rights.[39] The Court noted that the State Bar's broad statutory mission is to "promote the improvement of the administration of justice."[40] However, the plaintiffs argued that the defendant engaged in various lobbying efforts which were unrelated to the practice of law and contrary the plaintiffs' views.[41] Specifically, the plaintiffs alleged that the defendants were actively involved in activities aimed at addressing such issues as employer's rights, gun control, air pollution, special education, senatorial elections, nuclear weapons, abortion, and public school prayer.[42]

The Supreme Court ruled that the State Bar may require its members to pay mandatory dues.[43] However, the Court also ruled that the Bar cannot fund political or ideological activities which are not pertinent to the purpose and function of the organization.[44] The Court rejected the defendant's argument that its lobbying efforts on matters of social interest were germane to the Bar's stated goal of regulating the legal profession.[45]

In light of *Abood* and *Keller*, the Regents in *Smith* argued that the University's purpose is to educate.[46] The Regents further asserted that the funding of politically oriented student groups provided important educational opportunities, and was therefore, germane to the University's

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prepare a schedule of estimated annual disbursements before collecting union dues); Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386 (1977) (analyzing the relationship between the First Amendment rights of unions and the First Amendment rights of union members).

38. 496 U.S. 1 (1990).

39. *Id.* at 4.

40. *Id.* at 5 (quoting Keller v. State Bar of Cal., 47 Cal. 3d 1152, 1156 (1989)). *See also* CAL. BUS. & PROF. CODE § 6031(a) (West Supp. 1990).

41. *Keller*, 496 U.S. at 5-6.

42. *Id.* at 5-6 n.2, 15.

43. *Id.* at 14.

44. *Id.*

45. *Id.* at 14-16. For additional analysis of *Keller*, see David F. Addicks, Note, *Renovating the Bar After* Keller v. State Bar of California: *A Proposal for Strict Limits on Compulsory Fee Expenditure*, 25 U.S.F. L. REV. 681 (1991) (asserting that as a result of the *Keller* decision bar expenditures should be strictly limited to activities which further the legal profession). For additional analysis of the California Supreme Court's treatment of *Keller*, see Katherine K. Freberg, California Supreme Court Survey, 17 PEPP. L. REV. 263 (1989).

46. Smith v. Regents of the Univ. of Cal., 4 Cal. 4th at 854-55, 844 P.2d at 508, 16 Cal. Rptr. 2d at 189.

purpose.[47] Specifically, the Regents maintained that the groups gave students the opportunity to express their views, provided self-education in government processes, developed social skills, and ensured freedom of expression and association.[48] However, the court rejected the Regent's position and stated that "a group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf."[49] On that basis, the court concluded that once a group's educational function becomes merely incidental to its political and ideological agenda, "the infringement of dissenting students' constitutional rights can no longer be justified."[50]

The ASUC attempted to justify its expenditures by arguing that its rules and procedures prohibit any funding related to partisan politics or ballot measures.[51] Nevertheless, the court found the ASUC standards to

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47. *Id.*

48. *Id.* at 855, 844 P.2d at 508, 16 Cal. Rptr. 2d at 189.

49. *Id.*

50. *Id.* at 862, 844 P.2d at 513, 16 Cal. Rptr. 2d at 194. The California Supreme Court was not the first judicial body to address the issues presented in this case. In Carroll v. Blinken, 957 F.2d 991 (2d. Cir.), *cert. denied*, 113 S. Ct. 300 (1992), students at the State University of New York ("SUNY") challenged the use of mandatory student activity fees to support the New York Public Interest Research Group ("NYPIRG"). *Id.* at 993-94. NYPIRG conducted both on-campus and off-campus activities aimed at lobbying state government on issues such as economic and social justice. *Id.* at 994. In regard to NYPIRG's on-campus activities, the court noted that the organization's activities infringed on the dissenting students' right to be free from compelled speech. *Id.* at 999. Nonetheless, the court found that the organization offered benefits which justified the infringement. *Id.* at 1001. However, the court reached a contrary conclusion in regard to NYPIRG's off-campus activities. The court reasoned that the group's educational benefits ceased when student funding was "spent in the halls of the state legislature." *Id.* at 1002.

In Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), students at Rutgers, The State University of New Jersey ("Rutgers"), objected to the use of a mandatory student fee to support the New Jersey Public Interest Research Group ("NJPIRG"). NJPIRG was active in lobbying governmental entities on issues such as equal rights, nuclear weapons, and the environment. *Id.* at 1061. In contrast to *Smith* and *Carroll*, students voted to support NJPIRG through a separate mandatory fee, rather than a general student activity fee. *Id.* at 1064. However, the court held that the educational benefits offered by NJPIRG did not justify the infringement on the dissenting students' speech and associational rights. *Id.* at 1065. The court concluded that the organization's educational benefits were only incidental to the group's principal objective of promoting political and ideological activities. *Id.* at 1065.

51. *Smith*, 4 Cal. 4th at 861, 844 P.2d at 512, 16 Cal. Rptr. 2d at 193.

be unconstitutional both on their face and as applied.[52] The court stressed that the ASUC rules and procedures actually permitted the funding of activities which were "indisputably political and even 'partisan' by any reasonable definition."[53] The ASUC's vice-president testified that the ASUC's standards had been interpreted as prohibiting funding for the Young Republicans and the Young Democrats.[54] However, the ASUC funded the Young Spartacus League, an organization which supported the former Soviet Union's invasion of Afghanistan and promotes a revolutionary socialist movement which can intervene in all social struggles based on Marxist philosophy.[55] The court stated that the distinction between the Young Spartacus League as "non-partisan" and the Young Republicans and the Young Democrats as "partisan" was practically "absurd."[56]

In order to protect the rights of dissenting students, the court ordered the Regents to identify those student groups which are ineligible for mandatory funding pursuant to the standards set forth in the court's decision and "offer students the option of deducting a corresponding amount from the mandatory fee."[57] The court further ordered that the Regents "provide a refund only to those students who object to the use of their fees for political and ideological activities."[58]

3. The Use of Mandatory Student Activity Fees to Subsidize the ASUC's Governmental Lobbying Efforts Violated the Dissenting Students' First Amendment Rights to Freedom of Speech and Freedom of Association

The plaintiffs also objected to the ASUC utilizing the mandatory student fee to lobby governmental entities.[59] The ASUC has lobbied the state and municipal governments on issues such as the nuclear weapons,

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 861-62, 844 P.2d at 513, 16 Cal. Rptr. 2d at 194. As an additional example, the court noted that "students who favor abortion rights must pay to support the political activities of Berkeley Right to Life, a group opposed to abortion, and students opposed to abortion must subsidize groups such as Campus N.O.W. and Campus Abortion Rights Action League, which favor abortion rights." *Id.* at 860, 844 P.2d at 512, 16 Cal. Rptr. 2d at 193. Further, despite the "partisan politics" rule, the ASUC also funded "organizations that [held] demonstrations against the policies of the Reagan administration." *Id.* at 861, 844 P.2d at 513, 16 Cal. Rptr. 2d at 193.

56. *Id.* at 862, 844 P.2d at 513, 16 Cal. Rptr. 2d at 194.

57. *Id.* at 862, 844 P.2d at 514, 16 Cal. Rptr. 2d at 194.

58. *Id.* at 863, 844 P.2d at 514, 16 Cal. Rptr. 2d at 195. The court noted, however, that the Regents are free to assess those students who do not object. *Id.*

59. *Id. See supra* note 8 and accompanying text.

public transportation, rent control, abortion, and, ironically, mandatory student fees.[60] The court found that no meaningful relationship existed between these activities and the students or the University.[61]

The court then ruled that the defendants cannot force unwilling students to finance the defendant's lobbying efforts.[62] The court emphasized that where "core" political freedoms are at issue, "the educational benefit to a few student lobbyists cannot justify the burden on all students' free speech and associational rights."[63] Therefore, the court ordered that the Regents must identify those students who object to the ASUC's governmental lobbying efforts and afford those students the opportunity to deduct a corresponding amount from the mandatory fee.[64]

4. If Mandatory Student Activity Fees Were Used to Subsidize the ASUC Senate's Political Activities, Such Action Violates the Dissenting Students' First Amendment Rights to Freedom of Speech and Freedom of Association

The court noted that "[f]or many years, the ASUC Senate has debated, adopted, and publicized resolutions on current political issues."[65] The ASUC has addressed such issues as homosexual rights, gun control, draft registration, the re-election of a United States Representative, and the legalization of marijuana.[66] The Plaintiffs argued that the University should not compel them to financially support these political activities.[67]

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60. *Smith*, 4 Cal. 4th at 863, 844 P.2d at 514, 16 Cal. Rptr. 2d at 195.
61. *Id.* at 864, 844 P.2d at 514, 16 Cal. Rptr. 2d at 195.
62. *Id.* at 866, 844 P.2d at 516, 16 Cal. Rptr. 2d at 197.
63. *Id.* The court's ruling was in accordance with the United States Supreme Court decision of Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991). In *Lehnert*, the Court ruled that the State can "not compel its employees to subsidize legislative lobbying or other political union activity." *Id.* at 1960-61. The Court reasoned that:

> By utilizing petitioners' funds for political lobbying and to garner the support of the public for its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion.

*Id.* at 1960 (citations omitted).
64. *Smith*, 4 Cal. 4th at 866, 844 P.2d at 516, 16 Cal. Rptr. 2d at 197.
65. *Id.* at 866, 844 P.2d at 516, 16 Cal. Rptr. 2d at 197.
66. *Id.*
67. *Id.*

On the other hand, the Regents asserted that they did not use the mandatory student activity fee to subsidize the alleged activities.[68]

The California Supreme Court recognized that the ASUC Senate's political activities may possess educational value for those students involved in the activities.[69] However, the court once again emphasized that if the student fee was being used for the purposes alleged by the plaintiffs, there would be an unconstitutional burden on the First Amendment rights of the dissenting students.[70] Therefore, the court remanded this issue for further evidentiary proceedings to determine whether the mandatory fee was being used to fund political activity conducted by the ASUC Senate.[71]

### *B. The Dissenting Opinion*

Writing for the dissent, Justice Arabian attacked the majority by asserting that the court's decision itself violated the United States Constitution by prohibiting the defendants from disseminating controversial ideas.[72] The dissent reasoned that student group political activity was germane to the University's educational mission.[73] The dissent stressed that "such speech is inherently educational. It is not the 'price' students pay for a university education, it is the very essence of that education."[74] As such, the dissent would affirm the court of appeal's decision in favor of the defendants.[75]

The majority was equally as strident in attacking the dissent's position. The majority noted that the First Amendment does not allow the government "to make speech a matter of compulsion and coercion."[76] The majority pointed out that "[a]t the heart of the dissenting opinion is a frank proposal to sacrifice students' constitutional right not to be compelled to support political causes in order to teach them about the 'fundamental

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68. *Id.* at 867, 844 P.2d at 516, 16 Cal. Rptr. 2d at 197. Unfortunately, the trial court did not address this issue in its decision. *Id.* The appellate court upheld the ASUC Senate's activities as a matter of law. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 868, 844 P.2d at 517, 16 Cal. Rptr. 2d at 198.

72. *Id.* at 869, 844 P.2d at 518, 16 Cal. Rptr. 2d at 199 (Arabian, J., dissenting).

73. *Id.* (Arabian, J., dissenting). In fact, Justice Arabian argued that "[t]he funding of on-campus activities groups engaged in a broad variety of speech—controversial, political, ideological, social, cultural—no matter how annoying or disagreeable to some, plays an integral role in the University's mission." *Id.* at 870, 844 P.2d at 518, 16 Cal. Rptr. 2d at 199 (Arabian, J., dissenting).

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

75. *Id.* at 892, 844 P.2d at 533, 16 Cal. Rptr. 2d at 214 (Arabian, J., dissenting).

76. *Id.* at 848, 844 P.2d at 503, 16 Cal. Rptr. 2d at 184.

republican virtues upon which this nation was founded."[77] The majority concluded that the "irony of that proposal speaks for itself."[78]

## IV. IMPACT

The supreme court's decision obviously impacts thousands of University of California students. The court definitively stated that the Regents are duly authorized to impose a mandatory student activity fee.[79] However, with equal emphasis, the court ruled that the Regents cannot utilize the mandatory fee to fund organizations whose primary purpose is to advance their own political or ideological agendas.[80] The constitutional rights of dissenting students takes clear precedence over any educational value which is inherent in such student activities.[81] In addition, dissenting students must be given the opportunity to deduct from the mandatory fee that portion which is allocated for political or ideological activities.[82]

On a larger scale, the court's decision represents a continuation of a long line of United States Supreme Court cases which have held that an individual may, under limited circumstances, be compelled to affiliate with and financially support an organization.[83] However, the individual does not have to financially support every activity which the organization chooses to undertake.[84] On that basis, state bar associations, labor unions, and now, public universities, may compel their constituents to pay

77. *Id.* (citation omitted).
78. *Id.*
79. *Id.* at 850, 844 P.2d at 505, 16 Cal. Rptr. 2d at 186.
80. *Id.* at 860, 844 P.2d at 511, 16 Cal. Rptr. 2d at 192.
81. *Id.* at 867-68, 844 P.2d at 516-17, 16 Cal. Rptr. 2d at 197-98.
82. *Id.* at 862-63, 866, 844 P.2d at 513-14, 516, 16 Cal. Rptr. 2d at 194-95, 197.
83. *See, e.g.*, Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1959 (1991) (concluding that a union may charge its collective bargaining activities to its member so long as the member's free speech rights are not infringed); Keller v. State Bar of Cal., 496 U.S. 1, 12-14 (1990) (allowing the California State Bar to require dues from its membership); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217-23 (holding that union members may be financially compelled to support a union's collective bargaining efforts); Lathrop v. Donahue, 367 U.S. 820, 842-43 (1961) (plurality opinion) (holding that the Wisconsin State Bar's requirement that attorneys pay annual dues does not violate an attorney's freedom of association).
84. *See, e.g., Lehnert*, 111 S. Ct. at 1960 (asserting that a union may not compel its members to support political lobbying outside the scope of the union's purpose); *Keller*, 496 U.S. at 13-14 (concluding that the California State Bar may not use mandatory dues to fund activities outside of the State Bar's stated purpose).

mandatory fees in support of the organization.[85] However, these organizations cannot compel their members to financially support political or ideological activities which are not germane to the purpose of the organization and to which the individual personally objects.[86]

Currently, great tension undeniably exists along partisan lines. Therefore, it should not be long before students across the country take to the courtrooms in attempts to prohibit our nation's universities from utilizing mandatory fees to support political or ideological groups which many students find offensive or "politically incorrect."

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85. *See Smith*, 4 Cal. 4th at 851, 844 P.2d at 505, 16 Cal. Rptr. at 186.
86. *See id.* at 862, 844 P.2d at 513, 16 Cal. Rptr. 2d at 194.

C. *Content-neutral zoning ordinances for adult entertainment establishments that are proper time, place, and manner regulations do not violate First Amendment guarantees if such ordinances serve a substantial governmental purpose and provide alternative avenues of communication:* **City of National City v. Wiener.**

## I. INTRODUCTION

In *City of National City v. Wiener*,[1] the California Supreme Court held that a municipal zoning ordinance which restricted the location of adult entertainment businesses, but which provided an exception for those businesses located within enclosed shopping malls, did not violate the First Amendment of the United States Constitution.[2] Due to redevelopment, the city of National City forced respondent, Steven D. Wiener, to close his adult bookstore.[3] In December 1986, Wiener, and his sister, Patricia Sanders, opened another adult entertainment establishment in the same area under the name of Chuck's Bookstore.[4] The city brought suit against the respondents, alleging that the establishment constituted both a common law public nuisance as well as a violation of section 18.69.030 of the city's municipal code.[5] Although the respondents admit-

1. 3 Cal. 4th 832, 838 P.2d 223, 12 Cal. Rptr. 2d 701 (1992). Justice Arabian wrote the majority opinion in which Chief Justice Lucas and Justices Panelli, Baxter, and George concurred. *Id.* at 835, 849, 838 P.2d at 225, 234, 12 Cal. Rptr. 2d at 703, 712. Justice Baxter wrote a separate concurring opinion. *Id.* at 849, 838 P.2d at 234, 12 Cal. Rptr. 2d at 712. In addition, Justice Mosk wrote a concurring and dissenting opinion in which Justice Kennard joined. Id. at 851, 859, 838 P.2d at 236, 241, 12 Cal. Rptr. 2d at 714, 719.

2. *Id.* at 835, 838 P.2d at 225, 12 Cal. Rptr. 2d at 703.

3. Id. at 836 n.1, 838 P.2d at 225 n.1, 12 Cal. Rptr. 2d at 703 n.1. *See generally* 83 AM. JUR. 2D *Zoning and Planning* § 463 (1992) (defining "adult entertainment establishments").

4. *Wiener*, 3 Cal. 4th at 835-36, 838 P.2d at 225, 12 Cal. Rptr. 2d at 703. The parties stipulated that Chuck's Bookstore was within the meaning of an adult entertainment establishment as intended by the ordinance. *Id.* at 836 n.3, 838 P.2d at 225-26 n.3, 12 Cal. Rptr. 2d at 703-04 n.3.

5. *Id.* at 836, 838 P.2d at 225, 12 Cal. Rptr. 2d at 703. Section 18.69.030 provides in pertinent part:

> A. No person or entity shall own, establish, operate, control or enlarge, or cause or permit the establishment, operation, enlargement or transfer of ownership or control, except pursuant to Section 18.69.060, of any of the following adult entertainment establishments if such adult entertainment establishment is within one thousand five hundred feet of another adult entertainment

ted that their business violated the requirements of the municipal code, they asserted that the code provision itself was an unconstitutional restriction on free speech.[6]

The superior court heard testimony from the city's planning director regarding the rationale for the restrictions on adult entertainment businesses enumerated in the city's municipal code.[7] The planning director testified that the restrictions were a part of an overall redevelopment plan which was enacted in response to both the city's high crime rate and increasing urban decay.[8] The superior court also heard testimony regarding the impact Chuck's Bookstore had on the surrounding neighborhood.[9] A woman who lived adjacent to the establishment testified that her son could no longer play in his own backyard due to the actions of respondent's customers.[10]

The court also admitted evidence indicating the existence of vacancies within enclosed shopping malls in National City.[11] These locations could escape the municipal code section's various distance requirements by falling within the specific allowable exception for enclosed shopping

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establishment or within one thousand feet of any school or public park within the city or within one thousand five hundred feet of any residentially zoned property in the city, measured along street frontages:

1. Adult bookstore; . . .

3. Adult mini-motion picture arcade (peep shows); . . .

C. Nothing in this chapter prohibits the location of adult entertainment establishments within retail shopping centers in all commercial zones wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, parks, schools, churches or residentially zoned property.

*Wiener*, 3 Cal. 4th at 836 n.3, 838 P.2d at 225-26 n.3, 12 Cal. Rptr. 2d at 703-04 n.3.

6. *See generally* David J. Christiansen, Note, *Zoning and the First Amendment Rights of Adult Entertainment*, 22 VAL. U. L. REV. 695 (1988); Alfred C. Yen, *Judicial Review of the Zoning of Adult Entertainment: A Search for the Purposeful Suppression of Protected Speech*, 12 PEPP. L. REV. 651 (1985).

7. *Wiener*, 3 Cal. 4th at 837, 838 P.2d at 226, 12 Cal. Rptr. 2d at 704.

8. *Id. See* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 834-36 (9th ed. 1988) (discussing local zoning regulations, scope of zoning power, and applicable zoning procedures); 83 AM. JUR. 2D *Zoning and Planning* § 465 (1992) (noting that total exclusion of adult entertainment establishments from within a municipality has not been permitted).

9. *Wiener*, 3 Cal. 4th at 837, 838 P.2d at 226, 12 Cal. Rptr. 2d at 704.

10. *Id.* at 837 n.4, 838 P.2d at 226 n.4, 12 Cal. Rptr. 2d at 704 n.4. She stated that men regularly urinated in her backyard and that her son often found both pornographic material and used condoms on her property. *Id.* In addition, a reporter for a local newspaper testified that he had personally witnessed both oral and anal sex being performed within the establishment, and anal sex being performed behind the respondent's business establishment. *Id.*

11. *Id.* at 838, 838 P.2d at 226-27, 12 Cal. Rptr. 2d at 704-05

malls.[12] However, evidence was also introduced that some leasing agents within the area might refuse to rent their locations to potential adult entertainment businesses.[13] Finally, evidence was presented regarding the possibility of either constructing new shopping malls or modifying existing ones in order to satisfy the municipal code provisions.[14]

Without addressing the common law nuisance allegation specifically, the superior court upheld the constitutionality of the ordinance.[15] The court of appeal determined that the municipal code provision was facially constitutional and that it sought to achieve a substantial governmental interest.[16] However, the court of appeal ultimately held that the provision as applied was an unconstitutional restriction on free speech due to the lack of available alternate sites for adult entertainment businesses.[17] The majority of the California Supreme Court overruled the

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12. *See supra* note 5.

13. *Wiener*, 3 Cal. 4th at 838, 838 P.2d at 227, 12 Cal. Rptr. 2d at 705.

14. *Id.* However, there was no evidence introduced to determine if such projects would be financially feasible, or whether the respondent's would be financially capable of undertaking such projects. *Id.*

15. *Id.* at 838-39, 838 P.2d at 227, 12 Cal. Rptr. 2d at 705. The court reasoned that the municipal code provision "was a reasonable time, place, and manner regulation designed to serve a substantial government interest." *Id.* at 838, 838 P.2d at 227, 12 Cal. Rptr. 2d at 705. Because the available shopping malls located within the area could satisfy the municipal code provision's exception, the superior court also held that the code provision allowed for other means of communication, thus providing the opportunity for free speech. *Id. See* 83 AM. JUR. 2D *Zoning and Planning* § 465 (1992) (stating that reasonable regulations on adult entertainment establishments are permissible if necessary to further significant governmental interests, content neutral, and do not necessarily limit alternative avenues of communication. *See generally* W.G. Roeseler, Comment, *Regulating Adult Entertainment Establishments Under Conventional Zoning*, 19 URB. 125 (1987); Jim Bobo, Recent Decisions, *Constitutional Law—First Amendment—Cities May Restrict Location of Adult Theaters Through Narrowly Tailored, Content-Neutral, Time, Place, and Manner Restrictions*, 56 MISS. L.J. 401 (1986).

Based on the court's determination that Chuck's Bookstore violated the municipal ordinance enacted by the city, the court held that the establishment was a public nuisance and prohibited its continued operation. *Wiener*, 3 Cal. 4th at 839, 838 P.2d at 227, 12 Cal. Rptr. 2d at 705.

16. *Wiener*, 3 Cal. 4th at 839, 838 P.2d at 227, 12 Cal. Rptr. 2d at 705.

17. *Id.* In reaching this conclusion, the court determined that the various shopping malls discussed were not realistic options and, in fact, were not of a sufficient number to provide ample opportunities to the respondents. *Id.* In addition, the court noted that the cost of developing available land into a conforming mall would prove to be impractical to businessmen of the respondent's stature and economic means. *Id.* The court relied upon evidence showing that within the city limits there was only

court of appeal and consequently upheld the superior court's ruling on the constitutionality of the municipal code.[18]

## II. TREATMENT

### A. *Majority Opinion*

Justice Arabian, writing for the majority, first considered the previous and directly on point decisions of the United States Supreme Court.[19] The Supreme Court case of *City of Renton v. Playtime Theaters, Inc.*[20] provided the guidelines on which the majority based its holding.[21] In *Renton*, the Court solidified a two part test to determine the constitutionality of certain zoning regulations.[22] The *Renton* test examined "(1) whether the ordinance is designed to serve a substantial government interest, and (2) whether the ordinance allows for reasonable alternative avenues of communication."[23]

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one other existing adult entertainment establishment as providing partial proof of the restrictive nature of the municipal code provision. *Id.*

18. *Id.* at 849, 838 P.2d at 234, 12 Cal. Rptr. 2d at 712.

19. *Id.* at 839, 838 P.2d at 228, 12 Cal. Rptr. 2d at 706. The court of appeal also cited the controlling Supreme Court decisions. Nevertheless, the California Supreme Court held that the court of appeal's application of the cases was superficial. *Id.*

20. 475 U.S. 41, 43-44 (1986). According to Justice Arabian, *Renton* involved a distance requirement which, as a practical matter, concentrated adult theaters in one location. *Id.* at 44. Reasoning that the regulations controlled only the location and not content of speech, the Court stated that such distance requirements should be viewed as time, place, and manner regulations. *Id.* at 46. The Court held the statute content-neutral, because it was concerned with the effect of communication on adjacent neighborhoods and simply not an attempt to control the content of the communication. *Id.* at 48.

21. *Wiener*, 4 Cal. 4th at 839, 838 P.2d at 228, 12 Cal. Rptr. 2d at 706. The court discussed Justice Powell's concurring opinion in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (Powell, J., concurring), in which he explained that an ordinance may result in loss of income to a party and still be held constitutional. *Wiener*, 3 Cal. 4th at 840, 838 P.2d at 228, 12 Cal. Rptr. 2d at 706. The court also highlighted the similarities that Justice Powell recognized between ordinary commercial land-use regulations which may have negative economic consequences on businesses and the adult entertainment establishment regulations which may have similar effects. *Id. See generally* Charles H. Clarke, *Freedom of Speech and the Problem of the Lawful Harmful Public Reaction: Adult Use Cases of Renton and Mini Theaters*, 20 AKRON L. REV. 187 (1986); Ronald M. Stein, *Regulation of Adult Businesses Through Zoning After Renton*, 18 PAC. L.J. 351 (1987); William M. Sunkel, Note, *City of Renton v. Playtime Theaters, Inc.: Court-Approved Censorship Through Zoning*, 7 PACE L. REV. 251 (1986).

22. *Id.* at 840-41, 838 P.2d at 228, 12 Cal. Rptr. 2d at 706 (citing *Renton*, 475 U.S. at 50).

23. *Id. See generally* 13 CAL. JUR. 3D *Constitutional Law* § 260 (1989) (discussing

Before applying the *Renton* test, the California Supreme Court first discussed whether the ordinance in question was a proper time, place, and manner regulation and whether it was content-neutral.[24] The court held that because the ordinance did not prohibit the operation of such establishments but merely regulated the permissible locations, the ordinance was a proper time, place, and manner regulation.[25] In addition, the court found the regulation to be content-neutral, since the legislature focused on the "secondary effects" of such businesses on adjacent neighborhoods rather than the specific content of the material.[26]

Applying the *Renton* precedent to the case at hand, the California Supreme Court held that the ordinance satisfied the first prong of the test.[27] The city enacted the ordinance to curb both the city's high crime rate and increasing urban decay.[28] The court found that these objectives served a substantial governmental interest.[29] The court also held that the enclosed shopping mall exception was narrowly tailored to achieve such governmental purposes.[30]

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time, place, and manner regulations). In upholding the *Renton* ordinance, the United States Supreme Court held that the first part of the two part test was satisfied because the ordinance was established to protect the quality of life within the community. *Renton*, 475 U.S. at 50. The Court held, therefore, that the restriction sought to achieve a substantial governmental interest. *Id.* The Court then considered the second prong of the *Renton* two part test, reasonable alternative avenues of communication. *Id.* at 53. The fact that commercial property was available to the respondents in *Renton* was critical in satisfying this requirement. *Id.* at 53-54. In concluding that the *Renton* ordinance was an allowable restriction under the First Amendment, the Court held that the ordinance did not seek to suppress expression but merely to control the location at which it was presented. *Id.* at 54.

24. *Wiener*, 3 Cal. 4th at 843, 838 P.2d at 230, 12 Cal. Rptr. 2d at 708.

25. *Id.* at 844, 838 P.2d at 231, 12 Cal. Rptr. 2d at 709. The California Supreme Court acknowledged that the ordinance in *Renton* had effectively forced all adult businesses into one area while the municipal code in the present case sought to spread such establishments throughout the community. *Id.* Without addressing the particular merits of either scheme, the court simply noted that either type of control was a constitutionally permissible restriction on time, place, and manner of communication. *Id. See* 83 AM. JUR. 2D *Zoning and Planning* § 464 (1992) (noting that the right to concentrate or disperse the location of such establishments is included in the right to regulate time, place, and manner).

26. *Wiener*, 3 Cal. 4th at 845, 838 P.2d at 231, 12 Cal. Rptr. 2d at 709.

27. *Id.* at 845, 838 P.2d at 233, 12 Cal. Rptr. 2d at 710.

28. *Id.* at 837, 838 P.2d at 226, 12 Cal. Rptr. 2d at 704. Evidence in the record demonstrated the effect of such urban decay on surrounding neighborhoods in National City. *Id.* at 846, 838 P.2d at 232, 12 Cal. Rptr. 2d at 710.

29. *Id.*

30. *Id. See generally* 13 CAL. JUR. 3D *Constitutional Law* § 263 (1989) (describing

In applying the second prong of the *Renton* test, the California Supreme Court concluded that sufficient possibilities for alternative avenues of communication existed for respondents to continue operation.[31] The court cited *Renton* to establish that they need not be concerned with the economic impact of the ordinance.[32] The court further indicated that the regulation provided for both sufficient alternative sites and construction options.[33] Thus, the court reasoned that sufficient alternative avenues of communication were available to the respondents.[34]

### *B. Concurring Opinion*

Justice Baxter wrote a separate concurring opinion in an effort to emphasize the procedural implications of the superior court's determinations.[35] Justice Baxter argued that the superior court did so only in considering the effects of adult businesses on surrounding neighborhoods.[36] Thus, in Justice Baxter's opinion the ultimate finding of whether Chuck's Bookstore did, in fact, constitute a common law public nuisance could not be substantiated by the evidence.[37] Consequently, Justice Baxter disagreed with Justice Mosk's dissenting assertion that the disposition of the case could be decided without constitutional considerations.[38]

### *C. Concurring & Dissenting Opinion*

Justice Mosk wrote an opinion concurring in the outcome but dissenting in substance with the majority.[39] Although Justice Mosk agreed that the court of appeal's decision was properly reversed, he believed that the

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the burden of showing that the statute is narrowly tailored and necessary to further a substantial governmental interest as borne by the government).

The court also noted that the United States Supreme Court's holding in *Renton* required that a statute be narrowly tailored to achieve the substantial governmental interest in order to satisfy the first prong of the test. *Wiener*, 3 Cal. 4th at 841, 838 P.2d at 229, 12 Cal. Rptr. 2d at 707. Although the regulations must be narrowly tailored, the court stated that the most narrow and least restrictive method need not be employed in order to satisfy such a requirement. *Id.*

31. *Id.* at 847, 838 P.2d at 233, 12 Cal. Rptr. 2d at 711.

32. *Id.* The court stated that "[w]hile a city may not suppress protected speech, neither is it compelled to act as a broker or leasing agent for those engaged in the sale of it." *Id.* at 848, 838 P.2d at 233, 12 Cal. Rptr. 2d at 711.

33. *Id.* at 847, 838 P.2d at 233, 12 Cal. Rptr. 2d at 711.

34. *Id.*

35. *Id.* at 850-51, 838 P.2d at 235, 12 Cal. Rptr. 2d at 713 (Baxter, J., concurring). *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 262 (3d ed. 1985).

36. *Id.* at 851, 838 P.2d at 235, 12 Cal. Rptr. 2d at 713 (Baxter, J., concurring).

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

38. *Id.* at 851, 838 P.2d at 236, 12 Cal. Rptr. 2d at 714 (Baxter, J., concurring).

39. *Id.* (Mosk, J., concurring and dissenting).

constitutional discussion by the majority was wholly unnecessary.[40] Along with the statutory claim, the city brought a common law public nuisance claim against Chuck's Bookstore.[41] Justice Mosk argued that the evidence presented to the superior court was adequate for the court to prohibit its operation solely on common law grounds of public nuisance.[42]

According to Justice Mosk, the majority's constitutional discussion amounted to mere dicta.[43] Furthermore, he felt that if the appropriate principles had been applied, the alternatives sanctioned by the majority would fail to meet the required standard of reasonableness.[44] In the case at hand, Justice Mosk viewed the city's ordinance as wholly unreasonable for the respondents, and thus, contrary to the First Amendment.[45]

## III. CONCLUSION

In *City of National City v. Wiener*, the California Supreme Court concluded that content-neutral time, place, and manner regulations did not violate the First Amendment, when such ordinances served a substantial governmental purpose and provided alternative avenues of communication.[46] Following the lead of the United States Supreme Court, the court held that the operation of adult entertainment establishments can legally be controlled under the First Amendment through municipal zoning ordinances.[47]

The practical effect for adult entertainment establishments may be higher rents and undesirable locations. In addition, sites recognized as alternative forms of communication by the court may not prove to be

40. *Id.* at 855, 838 P.2d at 238, 12 Cal. Rptr. 2d at 716 (Mosk, J., concurring and dissenting).

41. *Id.* at 853, 838 P.2d at 237, 12 Cal. Rptr. 2d at 715 (Mosk, J., concurring and dissenting).

42. *Id.* (Mosk, J., concurring and dissenting). While the superior court, did not make clear whether its holding was based on common law or statutory grounds, the court of appeal chose only to deal with the statutory infirmities. *Id.* (Mosk, J., concurring and dissenting).

43. *Id.* at 855, 838 P.2d at 238, 12 Cal. Rptr. 2d at 716 (Mosk, J., concurring and dissenting).

44. *Id.* at 857, 838 P.2d at 239, 12 Cal. Rptr. 2d at 717 (Mosk, J., concurring and dissenting).

45. *Id.* at 858, 838 P.2d at 241, 12 Cal. Rptr. 2d at 719 (Mosk, J., concurring and dissenting).

46. *Id.* at 849, 838 P.2d at 241, 12 Cal. Rptr. 2d at 712.

47. *Id.*

economically viable for an individual entrepreneur. In some instances an ordinance may effectively prohibit the establishment of such adult entertainment businesses by mere economic impact. However, a strict reading of *Wiener* renders such ordinances constitutional as long as the ordinance facially allows for alternative avenues of communication and satisfies a substantial governmental purpose.[48]

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48. *Id.* at 847-49, 838 P.2d at 233-34, 12 Cal. Rptr. 2d at 711-12.

# IV. CRIMINAL LAW

## A. *A county department of corrections' director may not bestow limited peace officer status on custodial officers because such action conflicts with the California Penal Code and is not authorized by the home rule provisions of the California Constitution:* **County of Santa Clara v. Deputy Sheriffs' Association of Santa Clara County.**

### I. INTRODUCTION

The home rule provisions of the California Constitution permit a county to make and enforce local ordinances and regulations which do not conflict with state law.[1] However, if local action conflicts with state law, the action is valid if it relates to a matter of strictly local concern.[2] In *County of Santa Clara v. Deputy Sheriffs' Ass'n of Santa Clara County*,[3] the California Supreme Court considered whether the bestowal of limited peace officer status on custodial officers by the Santa Clara County Department of Correction ("the department") conflicted with

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1. Article XI, § 7 of the California Constitution provides in part, "[a] county . . . may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. art. XI, § 7; *see* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 799 (9th ed. 1988) (discussing the home rule provisions of the California Constitution and examining the principle that chartered counties, such as Santa Clara County, have exclusive authority over matters of local concern); David S. McLeod, *The California Preemption Doctrine: Expanding the Regulatory Power of Local Governments*, 8 U.S.F. L. REV. 728, 728-29, 733-34, 750-51 (1974) (discussing the home rule provisions of the California Constitution, examining the various tests used to determine whether local action is preempted by state law, and suggesting methods for local entities to avoid preemption); 45 CAL. JUR. 3D *Municipalities* §§ 114-115 (1978) (providing background information regarding Constitutional limitations on state legislative control of counties).

2. County of Santa Clara v. Deputy Sheriffs' Ass'n of Santa Clara County, 3 Cal. 4th 873, 878, 838 P.2d 781, 784, 13 Cal. Rptr. 2d 53, 56 (1992) (citing Baggett v. Gates, 32 Cal. 3d 128, 136, 649 P.2d 874, 878, 185 236 (1982); Bishop v. City of San Jose, 1 Cal. 3d 56, 61-62, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969)); *see also* CAL. CONST. art. XI, § 4(f) (declaring that county charters must provide for "the prescribing and regulating by [county governing bodies] of the powers, duties, qualifications, and compensation" of county employees); 45 CAL. JUR. 3D *Municipalities* §§ 67-69 (1978) (discussing the ability of counties to adopt, amend, and repeal charters).

3. 3 Cal. 4th 873, 838 P.2d 781, 13 Cal. Rptr. 2d 53 (1992). Justice Mosk authored the unanimous opinion of the court.

state law, and if so, whether such action was nevertheless valid because it did not relate to a matter of statewide concern.[4] The court concluded that the department's bestowal of peace officer status on its employees conflicted with state law.[5] It held the department's action invalid reasoning that questions regarding whether or not government employees may act as peace officers and whether they may carry firearms in the performance of their duties are clearly matters of statewide concern.[6]

The department is responsible for Santa Clara County's five jail facilities and employs both "peace officers," who are correction deputies authorized to carry firearms,[7] and "custodial officers," who are expressly denied peace officer status and prohibited from carrying firearms.[8] The department director proposed to grant custodial officers limited peace officer status which would allow them to carry firearms in the performance of those duties thus requiring that the employee be armed.[9] Against opposition by the Deputy Sheriffs' Association of Santa Clara County, Inc. ("DSA"), the county and the director sought a declaratory judgment pronouncing the director's recommendation legal.[10] The trial court held that the department had an implied right to confer limited peace officer status on department employees because the county had transferred control of the county jail facilities from the sheriff to the department thereby removing the sheriff's responsibility to provide the county jails with peace officers.[11] The trial court further declared that custodial officers could replace peace officers at the county jails provid-

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4. *Id.* at 876, 838 P.2d at 782, 13 Cal. Rptr. 2d at 54.

5. *Id.* at 883, 838 P.2d at 787, 13 Cal. Rptr. 2d at 59.

6. *Id.*

7. *Id.* at 876-77, 838 P.2d at 782, 13 Cal. Rptr. 2d at 54. California Penal Code § 830.1 provides in relevant part that "[a]ny sheriff, undersheriff, or deputy sheriff, employed in that capacity . . . is a peace officer." CAL. PENAL CODE § 830.1(a) (West 1985 & Supp. 1993).

8. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 877, 838 P.2d at 782-83, 13 Cal. Rptr. 2d at 54-55. Penal Code § 831 provides in relevant part that "[a] custodial officer is a public officer, not a peace officer," and "shall have no right to carry or possess firearms in the performance of [his or her] prescribed duties." CAL. PENAL CODE § 831(a), (b) (West 1985).

9. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 877, 838 P.2d at 783, 13 Cal. Rptr. 2d at 55. The director's suggestion to arm certain custodial officers was in response to a decrease in the number of peace officers at the county jails, resulting in a total number of peace officers below that required by state law. *Id.* The decline was caused by peace officers exercising their contractual options to transfer to the sheriff's department as vacancies arose. *Id.*

10. *Id.* at 877-78, 838 P.2d at 783, 13 Cal. Rptr. 2d at 55.

11. *Id.* at 878, 838 P.2d at 783, 13 Cal. Rptr. 2d at 55; *see* CAL. GOV'T CODE § 23013 (West 1988) (providing for the establishment of a county department of corrections and the appointment of a department head to supersede the sheriff's jurisdiction over county jail facilities).

ed that the custodial officers complied with state law firearm training requirements.[12] The department director department subsequently granted limited peace officer status to qualified custodial officers while the DSA appealed the trial court's judgment.[13] The appellate court affirmed the trial court's ruling, with the California Supreme Court reversing here.[14]

## II. TREATMENT

The court's first level of inquiry was whether the department's bestowal of limited peace officer status on custodial officers conflicted with state law.[15] The court examined the legislature's intent in enacting Penal Code chapter 4.5.[16] It concluded that the legislature made its intent clear in Penal Code section 830 when it declared that only persons designated in chapter 4.5 are peace officers.[17] The court further acknowledged that Penal Code section 831 expressly denies custodial officers both peace officer status and the authority to carry firearms.[18] In addition, the court noted that Penal Code section 831.5 contains an exception to section 831 that allows custodial officers to carry firearms in the performance of certain duties, but only in certain counties and under the direction of the

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12. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 878, 838 P.2d at 783, 13 Cal. Rptr. 2d at 55.

13. *Id.* at 878, 838 P.2d at 783-84, 13 Cal. Rptr. 2d at 55-56. The duties that the director of the Department assigned to armed custodial officers were:

> (1) transporting and supervising inmates outside correctional facilities; (2) carrying out duties relating to facility entry and perimeter and internal security; (3) investigating crimes and pursuing escapees; (4) responding to emergency situations declared by the director or his designees; (5) operating emergency vehicles to carry out the functions described above; and (6) temporarily substituting for correction deputies on sick leave, vacation or other relief time.

*Id.* at 878 n.6, 838 P.2d at 784 n.6, 13 Cal. Rptr. 2d at 56 n.6.

14. *Id.* at 878, 838 P.2d at 784, 13 Cal. Rptr. 2d at 56.

15. *Id.* at 879-83, 838 P.2d 784-87, 13 Cal. Rptr. 2d 56-59. *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 794 (9th ed. 1988) (examining the various tests applied by the courts to determine whether local action conflicts with state law).

16. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 879, 838 P.2d at 784, 13 Cal. Rptr. 2d at 56.

17. *Id.* at 880, 838 P.2d at 785, 13 Cal. Rptr. 2d at 57; *see* CAL. PENAL CODE § 830 (West 1985) (defining who may be a peace officer).

18. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 880, 838 P.2d at 785, 13 Cal. Rptr. 2d at 57; *see supra* note 8 and accompanying text.

sheriff or the chief of police.[19] The court found that Santa Clara County did not fall within this exception and, even if it did, the department's action still conflicted with the statute because the county assigned duties not found in the exception to armed custodial officers, and neither the sheriff nor the chief of police supervised the custodial officers in Santa Clara County.[20] Finally, the court recognized that recent amendments to the Penal Code provide a procedure by which a county can request that the legislature grant peace officer status to persons not found in the peace officer provisions of the Penal Code.[21] The court explained that the statutory procedure impliedly prohibits the county from independently granting peace officer status to its employees.[22] Taking all of the foregoing Penal Code provisions into account, the court concluded that the legislature intended Penal Code chapter 4.5 to be the exclusive source of peace officer status and, therefore, the department's autonomous grant of peace officer status to custodial employees clearly conflicted with state law.[23]

The court began its second level of inquiry by stating that if the designation and qualifications of peace officers are matters of local concern, then despite conflicting state law, the department's action would nevertheless be valid.[24] The court further expressed that in matters of statewide concern, county charter provisions must be consistent with state law in order to be valid.[25] The court found that the duties which the

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19. *Deputy Sheriffs' Assn*, 3 Cal. 4th at 880-81 & n.9, 838 P.2d at 785 & n.9, 13 Cal. Rptr. 2d at 57 & n.9; *see* CAL. PENAL CODE § 831.5(a), (b) (West Supp. 1993) (excepting custodial officers in San Diego County, Fresno County, and counties with populations of 425,000 or less from the prohibition against carrying firearms while transporting prisoners, guarding hospitalized prisoners, suppressing jail riots, lynchings and escapes, or performing rescues in or around a jail facility, and only under the supervision of the sheriff or chief of police).

20. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 880-81, 838 P.2d at 785, 13 Cal. Rptr. 2d at 57. *Cf. supra* text accompanying note 12.

21. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 881, 838 P.2d at 786, 13 Cal. Rptr. 2d at 58; *see* CAL. PENAL CODE §§ 13540-13542 (West 1992) (providing a procedure for the county to request that a feasibility study be undertaken by the Commission on Peace Officer Standards and Training and further providing that the results be submitted to the legislature in order to designate persons not found in chapter 4.5 as peace officers).

22. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 881, 838 P.2d at 785, 13 Cal. Rptr. 2d at 57.

23. *Id.* at 879, 838 P.2d at 784, 13 Cal. Rptr. 2d at 56.

24. *Id.* at 883, 838 P.2d at 787, 13 Cal. Rptr. 2d at 59. *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 800-802 (9th ed. 1988) (stating that no test has emerged from case law to determine whether a matter is one of statewide or local concern, and further expressing that the legislative purpose is not determinative of statewide concern, whereas the purpose of the local regulation may be determinative of local concern).

25. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 883, 838 P.2d at 787, 13 Cal. Rptr. 2d at

armed custodial officers would perform if granted limited peace officer status would impact the public at large.[26] Accordingly, the court concluded that the designation and qualifications of peace officers are clearly matters of statewide concern.[27] Thus, the court held that the county's grant of peace officer status to custodial officers was invalid because it conflicted with state law and the matter was one of statewide concern.[28]

## III. CONCLUSION

In *County of Santa Clara v. Deputy Sheriffs' Ass'n of Santa Clara County*, the California Supreme Court determined that the director of the Santa Clara County Department of Correction could not bestow limited peace officer status on department employees because the director's action conflicted with state law in an area of statewide concern. The county wanted a ruling that would allow it to operate the prison system without having to depend on the sheriff's department to supply the county with correction deputies to serve as peace officers in the jail facilities.[29] However, the court's ruling makes it clear that only the state may confer peace officer status on state, city, and county employees.[30] Further litigation may follow if the sheriff refuses to assign deputized officers to the department, as it is unclear whether the department director can order the sheriff to do so.[31] Alternatively, the department may re-

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26. *Id.* at 883, 838 P.2d at 787, 13 Cal. Rptr. 2d at 59.

27. *Id.* The court placed great weight on the duties that would be performed by the armed custodial officers. *Id.* at 883-84, 838 P.2d at 787, 13 Cal. Rptr. 2d at 59; *see supra* note 13. Because the custodial officers would have a significant impact on the public when "pursuing escapees, transporting prisoners, operating emergency vehicles, and acting as substitute for correction deputies who are absent," the court concluded that the state has an important interest in designating who may perform such duties. *Id.*

28. *Id.* at 886, 838 P.2d at 789, 13 Cal. Rptr. 2d at 61.

29. *See* Mark Walsh, *Jail Official Can't Make Peace Officers*, THE RECORDER, Nov. 3, 1992, at 6. The cost of operating jail facilities would dramatically decrease if counties were permitted to confer peace officer status on their own employees. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 886 n.13, 838 P.2d at 789 n.13, 13 Cal. Rptr. 2d at 61 n.13.

30. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 886, 838 P.2d at 789, 13 Cal. Rptr. 2d at 61.

31. *Id.* at 885-86, 838 P.2d at 789, 13 Cal. Rptr. 2d at 61. The court also stated that there is uncertainty as to which agency, the sheriff or the department, would bear the employment cost of the corrections deputies if they were assigned by the sheriff, and further uncertainty exists as to which agency would be responsible for

quest the Commission on Peace Officer Standards and Training to undertake a feasibility study to determine whether department employees may be designated as peace officers.[32] The feasibility study would then be submitted to the legislature for the ultimate determination of whether to grant peace officer status to department employees.[33]

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overseeing those correction deputies. *Id.*

32. *Id.* at 881 & n.10, 838 P.2d at 786 & n.10, 13 Cal. Rptr. 2d at 58 & n.10. This course of action would result in the Commission making its recommendation to the legislature within a period of 18 months. *See* CAL. PENAL CODE § 13542 (West 1992); *supra* note 19 and accompanying text.

33. *Deputy Sheriffs' Ass'n*, 3 Cal. 4th at 881, 13 Cal. Rptr. 2d at 58, 838 P.2d at 786.

B. *A trial court retains jurisdiction to impose a more favorable sentence on a defendant from when the sentence is formally entered in the court record up until commencement of the execution of the sentence:* **People v. Karaman.**

## I. INTRODUCTION

In *People v. Karaman*,[1] the California Supreme Court addressed whether a trial court retains jurisdiction to grant a defendant a more favorable sentence after the initial sentencing has occurred and a stay of execution has been granted.[2] The California Supreme Court held that the

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1. 4 Cal. 4th 335, 842 P.2d 100, 14 Cal. Rptr. 2d 801 (1992). Justice George authored the majority opinion.

2. *Id.* at 345, 842 P.2d at 106, 14 Cal. Rptr. 2d at 807.

The defendant, Nabil Karaman, an immigrant from Israel who came to this country in 1965, owned and operated, unsuccessfully, several different businesses. Just prior to his arrest, the defendant failed to meet the payroll obligations of his latest venture. In order to meet his financial obligations, he robbed an Alpha Beta grocery store on December 7, 1989. Carrying an unloaded handgun, the defendant entered the grocery store and approached the store manager. He instructed the manager to go into the office and empty the safe. Another employee witnessed the exchange and was also shown the handgun. After obtaining less than $950 in cash from the safe, the defendant disabled the office telephone and left the store.

Once in the parking lot, the defendant was unable to locate his company vehicle even though it bore the company name on the side. The police apprehended the defendant walking in the opposite direction of his vehicle. The police conducted a curbside lineup in which the defendant was identified by witnesses. Upon seeing the manager of the store, the defendant requested that the police to express his apologies for what had occurred.

The defendant was subsequently charged with robbery, and upon a plea of not guilty, an enhancement was added for the use of a firearm. A second enhancement was added to the information for the infliction of great bodily injury to the store manager.

The parties reached a plea bargain agreement which provided that the allegation of great bodily injury would be dropped in exchange for the defendant's plea of guilty to the charges of robbery and personal use of a firearm. In addition, the plea agreement provided that the prosecutor would request a relatively light sentence (two years) for the robbery charge. The trial court accepted the agreement and, upon the recommendation of a probation officer, imposed consecutive sentences of two years for the robbery and an additional two years for the use of a firearm.

The trial court granted a seven day stay of execution of the sentence to allow the defendant to put his affairs in order. At the conclusion of the stay of execution, another hearing was held in which the trial court modified the sentence to a single two year term for the robbery charge. The district attorney appealed, stating that the trial court had relinquished jurisdiction over the defendant, and the court of appeal

trial court retains jurisdiction until execution of the sentence.[3] Thus, a lesser sentence may be imposed by a trial court even after entry of the sentence in a court record.[4]

## II. ANALYSIS

The court first considered the common law rule which provides that subsequent to the commencement of a sentence, a trial court relinquishes its jurisdiction over the defendant.[5] The court explained that in a criminal case, execution of the sentence begins when a certified copy of the order or judgment is provided to the officer responsible for its execution.[6] In the case at bar, the court further considered whether jurisdiction was relinquished when the clerk of the court entered the sentence in the record.[7]

The court distinguished prior decisions holding that the trial court lacks jurisdiction to modify any sentence imposed once the judgment has been entered in the court record.[8] In contrast to previous cases in which

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reversed the trial court's decision to modify the sentence.

3. *Id.* at 350, 842 P.2d at 110, 14 Cal. Rptr. 2d at 811.

4. *Id.*

5. *Id.* at 344, 842 P.2d at 105, 14 Cal. Rptr. 2d at 806. The court further stated that if "the trial court 'retains in itself the actual or constructive custody of the defendant and the execution of his sentence has not begun,' the court may" alter the sentence initially imposed. *Id.* (quoting *In re* Black, 66 Cal. 2d 881, 888, 428 P.2d 293, 298, 59 Cal. Rptr. 429, 433 (1967)); *see also* 6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Judgment and Attack in Trial Court* § 3131 (2d ed. 1989).

Section 12022.5(a) of the California Penal Code states in relevant part:

> [A]ny person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for three, four, or five years, unless use of a firearm is an element of the offense of which he or she was convicted. The court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation. The court shall state its reasons for its enhancement choice on the record at the time of sentencing.

CAL. PENAL CODE § 12022.5(a) (West 1992).

6. *Karaman*, 4 Cal. 4th at 345, 842 P.2d at 106, 14 Cal. Rptr. 2d at 807. The court specifically stated "[i]t is clear then that at least upon the receipt of the abstract of the judgment by the sheriff, the execution of the judgment is in progress." *Id.* (quoting *In re* Black, 66 Cal. 2d 881, 890, 428 P.2d 293, 298, 59 Cal. Rptr. 429, 434 (1967)); *see also* 6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Judgment and Attack in Trial Court* § 3115 (2d ed. 1989).

7. *Karaman*, 4 Cal. 4th at 345, 842 P.2d at 106, 14 Cal. Rptr. 2d at 807. *See generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3674-3683 (1985) (preparation, certification, and filing of the record).

8. *Karaman*, Cal. Rptr. 4th at 347-50, 842 P.2d at 107-11, 14 Cal. Rptr. 2d at

the trial court attempted to increase the severity of the original sentence, the court here sought to impose a more favorable sentence.[9] The court held that where the trial court seeks to modify a sentence in a manner favorable to the defendant, the trial court retains jurisdiction until execution of the sentence.[10]

The court reasoned that a trial court retains jurisdiction to impose a lesser sentence after the initial sentence is entered in the record on the grounds that: (1) the desire to provide finality to criminal proceedings is still satisfied;[11] (2) forbidding the trial court from exercising jurisdiction based on the actions of the clerk of the court would have inequitable results should the clerk not perform his or her duties;[12] and (3) denying the trial court jurisdiction to mitigate a sentence would not further the legislature's intent that the trial court retain the ability to resentence a defendant for any rational reason.[13]

## III. CONCLUSION

In granting the trial court discretion to modify a sentence in favor of the defendant, even after the sentence is entered in the record, the California Supreme Court has afforded a unique opportunity to a defendant who is granted a stay of execution to achieve the most favorable sen-

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808-12. *See generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3407-3410 (1985) (mitigating factors, multiple counts, and enhancements); 22 CAL. JUR. 3D *Criminal Law* § 3516 (1985) (jurisdiction to modify or correct an erroneous sentence); 22 CAL. JUR. 3D *Criminal Law* §§ 3674-3683 (1985) (modification of the judgment); 21 AM. JUR. 2D *Criminal Law* §§ 1-631 (1981).

9. *Karaman*, 4 Cal. 4th at 350, 842 P.2d at 110, 14 Cal. Rptr. 2d at 811.

10. *Id.* The court qualified its holding by stating that a modification to increase a sentence would not be permitted by the trial court after entry of the sentence in the minutes of the court record. *Id.* at 350 n.16, 842 P.2d at 110 n.16, 14 Cal. Rptr. 2d at 811 n.16.

11. *Id.* at 350-51, 842 P.2d at 110, 14 Cal. Rptr. 2d at 811.

12. *Id.* at 351, 842 P.2d at 110, 14 Cal. Rptr. 2d at 811.

13. *Id.* at 351, 842 P.2d at 110-11, 14 Cal. Rptr. 2d at 811-12.

Section 1170(d) of the California Penal Code states in relevant part:

> When a defendant . . . has been sentenced to be imprisoned in the state prison and has been committed to the custody of the Director of Corrections, the court may, within 120 days of the date of commitment on its own motion . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.

CAL. PENAL CODE § 1170(d) (West Supp. 1993).

tence possible in his or her situation.[14] This provides the defendant's attorney with the opportunity to seek out any relevant provisions in the California Penal Code which the trial judge may not have given full consideration or due deference during the initial sentencing hearing. Moreover, this provides the trial court with the discretion to reexamine the relevant provisions and award a lesser sentence on its own motion.[15]

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14. *Karaman*, 4 Cal. 4th at 350, 842 P.2d at 110, 14 Cal. Rptr. 2d at 811.
15. *Id.*

C. *A defendant's right to a public trial is not violated by locking the courtroom doors and posting a "do not enter" sign for ninety minutes:* **People v. Woodward.**

## I. INTRODUCTION

In *People v. Woodward*,[1] the California Supreme Court considered whether the right to a public trial[2] was violated when a criminal court locked its doors and posted a "do not enter" sign for ninety minutes.[3] The supreme court held that the temporary closure did not infringe upon the defendant's right to a public trial.[4]

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1. 4 Cal. 4th 376, 841 P.2d 954, 14 Cal. Rptr. 2d 434 (1992). Chief Justice Lucas wrote the majority opinion, in which Justices Panelli, Kennard, Arabian, Baxter, and George concurred. Justice Mosk wrote separately concurring in the judgment.

In *Woodward*, the trial court locked the courtroom doors and posted a "do not enter" sign for about ninety minutes while the prosecuting attorney delivered his closing argument. The courtroom observers who were present were not required to leave and others could enter during designated recesses or through the judge's chambers. The court did not notify the defendant before sealing the courtroom. Afterward, the court stated that the reasons for the temporary closure were to eliminate distractions during closing arguments and for security purposes. *Id.* at 380, 841 P.2d at 955, 14 Cal. Rptr. 2d at 435. The jury found the defendant guilty of second degree murder and other charges and enhancements. *Id.* at 379-80, 841 P.2d at 955, 14 Cal. Rptr. 2d at 435. On appeal, he argued that the temporary closure was an infringement on his right to a public trial. *Id.* at 380, 841 P.2d at 955, 14 Cal. Rptr. 2d at 435. The court of appeal agreed with the defendant and overturned the conviction. *Id.* This court reversed. *Id.*

2. The right to public trial is based upon the Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, § 15 of the California Constitution. *Woodward*, 4 Cal. 4th at 382, 841 P.2d at 956, 14 Cal. Rptr. 2d at 436. The right to a public trial requires that criminal proceedings be open to members of the public. *Id.* at 383, 841 P.2d at 957, 14 Cal. Rptr. 2d at 437 (citation omitted). *See generally* 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 61 (3d ed. 1985 & Supp. 1992); 19 CAL. JUR. 3D *Criminal Law* § 2077 (1984 & Supp. 1992); 21A AM. JUR. 2D *Criminal Law* § 666 (1981 & Supp. 1992) (discussing the right to a public trial and its use in criminal proceedings).

3. *Woodward*, 4 Cal. 4th at 379, 841 P.2d at 955, 14 Cal. Rptr. 2d at 435.

4. *Id.* at 386, 841 P.2d at 960, 14 Cal. Rptr. 2d at 440. *See* 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2616 (2d ed. 1989)(discussing a defendant's right to a public trial and whether a defendant has been denied that right).

## II. ANALYSIS

The court reasoned that closing the courtroom for a short period of time did not violate the defendant's right to public trial because: (1) the defendant's right to public trial was only partially and temporarily affected;[5] (2) the trial court was attempting to avoid interruptions and minimize distractions, as well as maintain security and orderly proceedings;[6] and (3) the trial court's failure to notify the defendant, although improper, was harmless error.[7]

## III. CONCLUSION

In *Woodward*, the court held that a temporary denial to spectators of access to the courtroom was not a denial of the right to public trial.[8] The court warned that in future cases, the trial court should explain the reasons for closing the courtroom and permit the defendant to object.[9] The court limited its holding to cases in where the infringement occurred

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5. *Woodward*, 4 Cal. 4th at 384-85, 841 P.2d at 958, 14 Cal. Rptr. 2d at 438. The court explained that the circumstances of this case did not violate the defendant's right to a public trial because the persons in the courtroom were not required to leave and the courtroom was sealed for only ninety minutes. *Id.* at 385-86, 841 P.2d at 959, 14 Cal. Rptr. 2d at 439. In addition, the closure occurred only during the prosecutor's closing argument and did not occur during any part of the evidentiary phase of the trial. *Id.*

6. *Id.* at 385, 841 P.2d at 958-59, 14 Cal. Rptr. at 438-39 (citing People v. Buck, 46 Cal. App. 2d 558, 116 P.2d 160 (1941) (holding that a defendant's right to a public trial is not denied when persons are forbidden to enter and leave the courtroom during jury instructions)). The court also noted that courts have been justified in denying admittance to spectators to prevent overcrowding. *Id.* at 385, 841 P.2d at 959, 14 Cal. Rptr. 2d at 439 (citing People v. Hartman, 103 Cal. 242, 37 P. 153 (1894)). *See* Roy H. Mann, Note, *Constitutional Law—Sixth Amendment—Right to Public Trial*, 23 S. CAL. L. REV. 91 (1949) (considering the nature of the Sixth Amendment right and its compatibility with a court's interest in orderly progress).

Justice Mosk, concurring in the judgment, noted that the trial court's statement about "court security" was made a day after it agreed to remove the sign. *Woodward*, 4 Cal. 4th at 387-88, 841 P.2d at 960, 14 Cal. Rptr. 2d at 440 (Mosk, J., concurring). Thus, he believed that the security risks were an afterthought and that the court could have used other methods of preventing interruptions. *Id.* at 388, 841 P.2d at 961, 14 Cal. Rptr. 2d at 441 (Mosk, J., concurring).

7. *Woodward*, 4 Cal. 4th at 386-87, 841 P.2d at 960, 14 Cal. Rptr. 2d at 440. The court held that even though lack of notice denied the defendant due process, such was harmless error. *Id.* Therefore, the defendant was required to prove specific prejudice. *Id.* The court concluded that the error did not affect the jury's determination and the failure to give notice was harmless beyond a reasonable doubt. *Id.* at 387, 841 P.2d at 960, 14 Cal. Rptr. 2d at 440. Therefore, the holding of the appellate court was reversed. *Id.*

8. *Id.* at 386, 841 P.2d at 960, 14 Cal. Rptr. 2d at 440.

9. *Id.*

at less critical stages of the proceedings and where a valid reason for the infringement existed. It is important to note, however, that the court remained firm in upholding the defendant's right to a public trial.

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# V. CRIMINAL PROCEDURE

## A. *Section 1054.3 of the California Penal Code mandates disclosure of the name and address of any potential defense trial witness, provided the defense has knowledge of, or reasonable access to, such information; failure to comply with a court order to produce such information may result in a contempt citation, pursuant to California Penal Code section 1054.5(b):* **In re Littlefield.**

### I. INTRODUCTION

*In re Littlefield*[1] addressed whether Proposition 115, the "Crime Victims Justice Reform Act,"[2] requires defense counsel to disclose to the prosecution the names and addresses of potential trial witnesses when the defense has access to, but not actual knowledge of, such information.[3] The court granted review in *Littlefield* to clarify the scope of a defense attorney's obligations under the reciprocal discovery provisions of

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1. 5 Cal. 4th 122, 851 P.2d 42, 19 Cal. Rptr. 2d 248 (1993). Justice George delivered the majority opinion of the court, in which Chief Justice Lucas and Justices Panelli, Kennard, Arabian, and Baxter concurred. Justice Mosk filed a separate concurring and dissenting opinion. *Id.* at 140, 851 P.2d at 54, 19 Cal. Rptr 2d at 260 (Mosk, J., concurring and dissenting).

2. Proposition 115 was enacted into law by voter initiative in June 1990. Section 5 of the act amended the California Constitution by adding § 30(c) to article I, which provides that "discovery in criminal cases shall be reciprocal in nature." CAL. CONST. art. I, § 30(c). *See generally* Deborah Glynn, *Proposition 115: The Crime Victims Justice Reform Act*, 22 PAC. L.J. 1010 (1991) (comprehensively reviewing Proposition 115 and its scope); Thomas Havlena, *Proposition 115 and the Rebirth of Prosecutorial Discovery in California*, 18 W. ST. L. REV. 3 (1990) (analyzing the history of prosecutorial discovery and the constitutionality of Proposition 115); 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* § 1678A (3d ed. Supp. 1993) (reiterating nature and purpose of Crime Victims Justice Reform Act); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* § 10A (2d ed. Supp. 1993) (discussing adoption of Proposition 115).

3. *Littlefield*, 5 Cal. 4th at 125, 851 P.2d at 44, 19 Cal. Rptr. 2d at 250. The prosecution requested that the defense disclose the address of a potential witness. The public defender's office, however, had deliberately failed to obtain such information, for fear that the witness would be intimidated by the police department or district attorney's office. In order to provide the prosecution with an opportunity to interview the witness prior to trial, the trial court ordered the defense to contact the witness and obtain her address. Nevertheless, the petitioner explicitly refused to comply with the discovery order. As a result, the trial court held the petitioner in contempt. The petitioner sought a writ of habeas corpus, but the court of appeal denied the writ. *In re* Littlefield, 9 Cal. App. 4th 329, 11 Cal. Rptr. 2d 703 (1992). Subsequently, the supreme court granted review. *In re* Littlefield, 839 P.2d 1019, 13 Cal. Rptr. 2d 511 (1992).

Proposition 115,[4] as codified by California Penal Code section 1054.3.[5] Additionally, the court examined whether failure to comply with a court order enforcing such a disclosure requirement may properly result in a sanction for contempt.[6]

In resolving these issues, the court held that Penal Code section 1054.3 requires the defense to disclose the names and addresses of all potential trial witnesses when the defense has knowledge of such information or such information remains "reasonably accessible."[7] Furthermore, failure to comply with a court order enforcing the reciprocal discovery requirements constitutes direct contempt, punishable under Penal Code section 1054.5(b).[8] An appropriate finding of contempt must, however, recite "facts with sufficient particularity" that demonstrate the attorney's failure to comply.[9] Otherwise, the judgment of contempt will fail to satisfy the

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4. *Littlefield*, 5 Cal. 4th at 129, 851 P.2d at 46-47, 19 Cal. Rptr. 2d at 252-53. *See generally* 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2498A (2d ed. Supp. 1993) (discussing reciprocal discovery provisions established by adoption of Proposition 115); 21 CAL. JUR. 3D *Criminal Law* § 2858 (Supp. 1993) (discussing limitations of prosecutorial discovery following the enactment of CAL. CONST. art. I, § 30).

5. Section 1054.3 provides, in pertinent part: "[t]he defendant and his or her attorney shall disclose to the prosecuting attorney . . . [t]he names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial." CAL. PENAL CODE § 1054.3 (West Supp. 1993). *See generally* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* § 1678C (3d ed. Supp. 1993) (denoting information subject to discovery by prosecution following enactment of § 1054.3); 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2498F (2d ed. Supp. 1993) (delineating defense disclosure obligations under § 1054.3).

6. *Littlefield*, 5 Cal. 4th at 137-39, 851 P.2d at 52-54, 19 Cal. Rptr. 2d at 258-60.

7. *Id.* at 135-36, 851 P.2d at 51, 19 Cal. Rptr. 2d at 257.

8. *Id.* at 137, 851 P.2d at 52, 19 Cal. Rptr. 2d at 258. Section 1054.5(b) provides in pertinent part:

> Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery provisions provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings . . . or any other lawful order.

CAL. PENAL CODE § 1054.5(b) (West Supp. 1993).

9. *Littlefield*, 5 Cal. 4th at 138, 851 P.2d at 53, 19 Cal. Rptr. 2d at 259 (quoting *In re* Buckley, 10 Cal. 3d. 237, 247, 514 P.2d 1201, 1207, 110 Cal. Rptr. 121, 127 (1973) (confirming criteria for valid contempt order)).

criteria of California Code of Civil Procedure section 1211,[10] and as a result, be reversed on appeal.[11]

## II. TREATMENT

### A. *Majority Opinion*

#### 1. Reciprocal Discovery Requirements of Proposition 115

To determine the scope of prosecutorial discovery authorized by section 1054.3, the court examined the voters' intentions behind Proposition 115.[12] The court recognized that, as expressly asserted in Penal Code section 1054(a), adoption of the initiative was intended "'[t]o promote the ascertainment of truth in [criminal] trials by requiring timely pre-trial discovery.'"[13] Furthermore, the court maintained that the specific objectives behind section 1054.3 included affording the prosecution an opportunity to properly investigate potential defense witnesses.[14] In other

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10. Section 1211 provides, in pertinent part:

> When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, *reciting the facts as occurring in such immediate view and presence*, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

CAL. CIV. PROC. CODE § 1211 (West 1982) (emphasis added).

11. *Littlefield*, 5 Cal. 4th at 139, 851 P.2d at 54, 19 Cal. Rptr. 2d at 260.

12. *Id.* at 130, 851 P.2d at 48, 19 Cal. Rptr. 2d at 254. The preamble to Proposition 115 states:

> We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and our State Legislature . . . and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system . . . In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statues have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby . . . diverting the judicial process from its function as a quest for truth.

Proposition 115 § 1(a)-(b) (1990), *reprinted in* CAL. CONST. art. I, § 14.1 (Deering Supp. 1993).

13. *Littlefield*, 5 Cal. 4th at 130, 851 P.2d at 48, 19 Cal. Rptr. 2d at 254 (citing CAL. PENAL CODE § 1054(a) (West Supp. 1993)). *See generally* 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2498C (2d ed. Supp. 1993) (asserting purposes of Proposition 115 as codified by California Penal Code § 1054).

14. *Littlefield*, 5 Cal. 4th at 131, 851 P.2d at 48, 19 Cal. Rptr. 2d at 254 (citing Hobbs v. Municipal Court, 233 Cal. App. 3d 670, 685-86, 284 Cal. Rptr. 655, 664-65 (1991) (holding that reciprocal discovery provisions do not violate a criminal defendant's right against self-incrimination)).

words, sections 1054.1 and 1054.3 create reciprocal discovery duties between the prosecution and defense.[15]

As a result, the court held that mere disclosure of a potential witness' name, without divulging information regarding where the individual could be contacted, fails to satisfy the reciprocal discovery objectives of Proposition 115.[16] The court reasoned, consistent with precedent regarding the discovery obligations of the prosecution, that a duty to disclose information within counsel's knowledge includes an obligation to provide "information 'reasonably accessible'" to the attorney.[17] To this extent, a defense attorney cannot attempt to elude reciprocal discovery obligations by deliberately refraining from discovering a potential witness' address.[18]

Therefore, the court concluded that sections 1054.3 and 1054.5 enable the trial court to compel defense counsel to contact a potential witness, and acquire that individual's address, in order to provide such information to the prosecution.[19] Thus, defense counsel's refusal to obey the court order constitutes direct contempt, punishable under section 1054.5(b).[20]

2. Procedural Requirements of Valid Contempt Judgment

Although the court acknowledged that refusal to obey a discovery order may result in a contempt sanction, the court nevertheless set aside the trial court's judgment of contempt for failure to comply with the requirements of section 1211 of the California Code of Civil Procedure.[21]

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15. *Id.* at 133-34, 851 P.2d at 50, 19 Cal. Rptr. 2d at 256 (citing Izazaga v. Superior Court, 54 Cal. 3d 356, 372-77, 815 P.2d 304, 315-18, 285 Cal. Rptr. 231, 242-45 (1991) (confirming constitutionality of reciprocal discovery provisions established by Proposition 115)). *See generally* Andrea L. Wilson, *California Supreme Court Survey*, 20 PEPP. L. REV. 308 (1992) (analyzing *Izazaga's* holding and impact of decision); Steve Holden, Note, *Izazaga v. Superior Court: Affirming the Public's Cry to Unshackle the Criminal Prosecution System*, 23 PAC. L.J. 1721 (1992).

16. *Littlefield*, 5 Cal. 4th at 132, 851 P.2d at 49, 19 Cal. Rptr. 2d at 255 (citing Eleazer v. Superior Court, 1 Cal. 3d 847, 851-53, 464 P.2d 42, 44-46, 83 Cal. Rptr. 586, 588-90 (1970) (outlining prosecutorial discovery duties in regard to potential trial witnesses)).

17. *Id.* at 135, 851 P.2d at 51, 19 Cal. Rptr. 2d at 257 (citing Pitchess v. Superior Court, 11 Cal. 3d 531, 535, 522 P.2d 305, 308, 113 Cal. Rptr. 897, 900 (1974) (establishing extent of prosecutorial discovery obligations)).

18. *Id.* at 132-33, 851 P.2d at 49, 19 Cal. Rptr. 2d at 255.

19. *Id.* at 137, 851 P.2d at 52, 19 Cal. Rptr. 2d at 258.

20. *Id.*

21. *Id.* at 137, 851 P.2d at 52, 19 Cal. Rptr. 2d at 258. *See supra* note 10.

The court reasoned that under section 1211, a contempt order must "recite[] facts with sufficient particularity to demonstrate . . . that petitioner's conduct constituted legal contempt."[22]

While the appellate record indicated that the petitioner refused to obey a court discovery order issued at a hearing on June 20, 1991, the written judgment of contempt referred only to a discovery order issued on June 17, 1991. In other words, the contempt order failed to "state *on its face* the specific act constituting the contempt."[23] Thus, the court declared the judgment of contempt invalid, setting aside the petitioner's sanction.[24]

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

Justice Mosk concurred in the judgment to set aside the facially defective contempt order.[25] He disagreed, however, with the majority's conclusion that section 1054.3 authorized the trial court to compel disclosure of a potential defense witness' address.[26] In fact, Mosk asserted that such an order would violate the criminal defendant's right against self-incrimination.[27] Specifically, Mosk argued that the criminal defendant retains a constitutional privilege to stand silent "at every stage of the proceeding against him"[28] even though the court had rejected this same contention in the *Izazaga* decision.[29] Consequently, Mosk simply reiterated his *Izazaga* dissenting opinion.[30]

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22. *Littlefield*, 5 Cal. 4th at 138, 851 P.2d at 53, 19 Cal. Rptr. 2d at 259 (quoting *In re* Buckley, 10 Cal. 3d 237, 247, 514 P.2d 1201, 1207, 110 Cal. Rptr. 121, 127 (1973) (confirming criteria for valid contempt order)).

23. *Id.* at 138-39 n.10, 851 P.2d at 53-54 n.10, 19 Cal. Rptr. 2d at 259-60 n.10.

24. *Id.* at 139, 851 P.2d at 54, 19 Cal. Rptr. 2d at 260.

25. *Id.* at 140, 851 P.2d at 54, 19 Cal. Rptr. 2d at 260 (Mosk, J., concurring and dissenting).

26. *Id.* (Mosk, J., concurring and dissenting).

27. *Id.* (Mosk, J., concurring and dissenting) (citing CAL. CONST. art. I, § 15).

28. *Id.* at 141, 851 P.2d at 55, 19 Cal. Rptr. 2d at 261 (Mosk, J., concurring and dissenting) (quoting Jones v. Superior Court, 58 Cal. 2d 56, 69, 372 P.2d 919, 927, 22 Cal. Rptr. 879, 887 (1962) (Dooling, J., concurring and dissenting) (arguing against reciprocal discovery in criminal cases on constitutional grounds)).

29. *Id.* at 141, 851 P.2d at 55, 19 Cal. Rptr. 2d at 261 (Mosk, J., concurring and dissenting). *See Izazaga*, 54 Cal. 3d at 369, 815 P.2d at 312, 285 Cal. Rptr. at 239. *See also supra*, note 15. *See generally* 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2498B (2d ed. Supp. 1993) (addressing case precedent regarding constitutionality of reciprocal discovery in criminal cases).

30. *Littlefield*, 5 Cal. 4th at 141, 851 P.2d at 55, 19 Cal. Rptr. 2d at 261 (Mosk, J., concurring and dissenting). *See Izazaga*, 54 Cal. 3d at 387-402, 815 P.2d at 325-35, 285 Cal. Rptr. at 252-62 (Mosk, J., dissenting). *See also supra* note 15.

## III. CONCLUSION

Following the precedent established in *Izazaga*, the majority opinion in *Littlefield* further defines the reciprocal discovery measures of Proposition 115. The decision curtails the overprotection previously afforded to the criminally accused, in favor of methods designed to provide "balance and fairness"[31] in the criminal justice system. Thus, section 1054.3 functions to advance a primary objective of the judicial process: "the quest for truth."[32]

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31. Proposition 115 § 1(a) (1990), *reprinted in* CAL. CONST. art. I, § 14.1 (Deering Supp. 1993). *See supra* note 12.

32. Proposition 115 § 1(b) (1990), *reprinted in* CAL. CONST. art. I, § 14.1 (Deering Supp. 1993). *See supra* note 12.

B. *When the prosecution has presented the jury with alternative theories of guilt, one of which lacked factual support, an appellate court should affirm the criminal conviction, absent positive evidence in the record that the jury's general verdict rested upon an insufficient ground:* **People v. Guiton.**

In *People v. Guiton*,[1] the California Supreme Court determined whether a conviction obtained by a general jury verdict should be reversed when the prosecution has presented to the jury alternative theories of guilt, one of which was not factually supported.[2] The court granted review in *Guiton* to reconcile the apparent discrepancy existing between the California Supreme Court decision of *People v. Green*[3] and the recent United States Supreme Court's decision in *Griffin v. United States*.[4]

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1. 4 Cal. 4th 1116, 847 P.2d 45, 17 Cal. Rptr. 2d 365 (1993). Justice Arabian delivered the majority opinion of the court, in which Chief Justice Lucas and Justices Panelli, Kennard, Baxter, and George concurred. Justice Mosk filed a separate, concurring opinion.

2. *Id.* at 1119, 847 P.2d at 46, 17 Cal. Rptr. 2d at 366. The defendant was charged on two counts: (1) *selling* or *transporting* cocaine, in violation of § 11352 of the California Health and Safety Code; and (2) possession of cocaine for sale, in violation of § 11351 of the California Health and Safety Code. *See* CAL. HEALTH & SAFETY CODE §§ 11351, 11352 (West 1991) (emphasis added). The prosecution presented the jury with both alternative elements of count one. *Guiton*, 4 Cal. 4th at 1120, 847 P.2d at 46, 17 Cal. Rptr. 2d at 366. Although the prosecution clearly established proof that the defendant *transported* cocaine, it failed to submit adequate factual evidence that the defendant *sold* cocaine. *Id.* Nevertheless, the jury returned a general verdict of guilty on both counts one and two. *Id.*

The court of appeal affirmed the conviction under count two, but reversed the conviction under count one. *Id.* at 1120, 847 P.2d at 46, 17 Cal. Rptr. 2d at 366. The court of appeal reasoned that the record did not clearly indicate which basis the jury utilized in reaching its verdict under the first count. *Id.* Given that the prosecution failed to present factual evidence in support of one alternative, the court of appeal reversed the defendant's conviction. *Id.* at 1120, 847 P.2d at 47, 17 Cal. Rptr. 2d at 367. In supporting its decision, the court of appeal relied on the rule asserted in People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980). Subsequently, the supreme court granted review. *People v. Guiton*, 832 P.2d 146, 9 Cal. Rptr. 2d 834.

3. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980) (holding that "[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand"). *See generally* 6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Appeal* § 3205 (2d ed. 1989) (discussing the constitutional standard for sufficiency of the evidence as recognized by California); 22 CAL. JUR. 3D *Criminal Law* §§ 3761, 3773 n.64 (1985) (discussing sufficiency of the evidence warranting appellate review, and "miscarriage[s] of justice" requiring reversal of conviction).

4. 112 S. Ct. 466 (1991) (holding that a general verdict in a criminal case should

Harmonizing the two rules, the court held that a general jury verdict should not be reversed, despite insufficient factual evidence to support one alternative theory, without an affirmative showing that the jury reached the verdict on the inadequate ground.[5]

In reconciling the conflicting state and federal rulings, the court individually addressed the standards adopted by both the California[6] and United States Supreme Courts,[7] respectively. On careful examination, the court concluded that the rules did not contradict one another, but instead applied to separate circumstances.[8] As a result, the court asserted

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not be reversed on error, when alternative theories of guilt are presented, provided that one of the theories introduced remains factually sufficient). *See generally* 6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Appeal* § 3205 (2d ed. Supp. 1993) (discussing constitutional standard for sufficiency of the evidence); 16C C.J.S. *Constitutional Law* § 1037 n.44.5 (Supp. 1993) (addressing constitutional analysis of convictions secured by presentation of multiple theories); 21A AM. JUR. 2D *Criminal Law* § 783 (1981) (examining due process implications of insufficiency of the evidence).

5. *Guiton*, 4 Cal. 4th at 1129, 847 P.2d at 52, 17 Cal. Rptr. 2d at 372.

6. *Id.* at 1121-22, 847 P.2d at 47-48, 17 Cal. Rptr. 2d at 367-68 (citing *Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1). In *Green*, the prosecution presented the jury with three alternative examples of asportation upon which a conviction of kidnapping could be reached. *Green*, 27 Cal. 3d at 62-63, 609 P.2d at 506, 164 Cal. Rptr. at 39. However, upon review, the California Supreme Court determined that two of the three theories involved legal error. *Id.* at 67, 609 P.2d at 509, 164 Cal. Rptr. at 42. The court reasoned that, on the facts presented, the jury could have logically reached a guilty verdict by means of a legally insufficient theory. *Id.* Absent any evidence in the record as to which alternative the jury utilized, the court reversed the defendant's conviction on the kidnapping charge. *Id.* at 74, 609 P.2d at 514, 164 Cal. Rptr. at 47.

7. *Guiton*, 4 Cal. 4th at 1122-26, 847 P.2d at 48-50, 17 Cal. Rptr. 2d at 368-70 (citing *Griffin*, 112 S. Ct. 466). In *Griffin*, the prosecution made two allegations in support of a charge of conspiracy: "(1) impairing the efforts of the Internal Revenue Service (IRS) to ascertain income taxes; and (2) impairing the efforts of the Drug Enforcement Administration (DEA) to ascertain forfeitable assets." *Griffin*, 112 S. Ct. at 468. Evidence presented at trial implicated the defendant in the first objective of the conspiracy. *Id.* However, after anticipated testimony from one government witness failed to materialize, the evidence remained factually insufficient to connect the defendant with the second objective. *Id.* Nevertheless, the Court reasoned that juries remain "well equipped to analyze the evidence," and dismiss factually insufficient theories. *Id.* at 474 (citing Duncan v. Louisiana, 391 U.S. 145, 157 (1968) (reaffirming the Court's faith in the jury's ability to properly determine questions of fact in criminal cases)). As a result, the Court affirmed the defendant's conviction, absent any specific evidence that the jury reached its verdict on the basis of the factually insufficient ground. *Id.*

8. *Guiton*, 4 Cal. 4th at 1121, 847 P.2d at 47, 17 Cal. Rptr. 2d at 367. *See also*

that California law should reflect both the federal and state principles, thus, further defining the extent to which insufficient proof affects reversible error.[9]

Therefore, the court held that in cases where the inadequacy of proof involves a mere factual insufficiency regarding an alternative theory, the appellate court should affirm the conviction when the record does not positively demonstrate that the verdict rested upon the improper ground.[10] However, in cases where an alternative theory remains legally insufficient, the appellate court should reverse the conviction, absent an affirmative indication in the record that the verdict rested upon the valid ground.[11]

The *Guiton* opinion clarifies criminal procedure in California by delineating when insufficiency of the evidence will result in reversible error. Furthermore, the decision fortifies the state's ability to prosecute criminal cases, by reducing the reversal rate of criminal appeals. Under the rule asserted in *Guiton*, the prosecution may present the jury with alternative theories on an individual charge, without concern that a factually insufficient theory will result in automatic reversal on appeal.[12]

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People v. Anderson, 63 Cal. 2d 351, 46 Cal. Rptr. 763, 406 P.2d 43 (discussing alternative theories; premeditation, murder in perpetration of mayhem, and murder by torture).

9. *Guiton*, 4 Cal. 4th at 1121, 1126-31, 847 P.2d at 47, 50-54, 17 Cal. Rptr. 2d at 367, 370-74. In a separate, concurring opinion, Justice Mosk objected to the majority's "harmonization" of the rules asserted in *Green* and *Griffin*. *Id.* at 1132-33, 847 P.2d at 50-54, 17 Cal. Rptr. 2d at 374-75 (Mosk, J., concurring). Mosk argued that the Court's reasoning in *Griffin* involved an unsupported assumption: that any empaneled jury can effectively distinguish insufficient evidence from substantiated evidence. *Id.* at 1132, 847 P.2d at 55, 17 Cal. Rptr. 2d at 375 (Mosk, J., concurring). Mosk recognized that juries remain "well equipped" to address "pure questions of fact." *Id.* (Mosk, J., concurring). Mosk noted, however, that challenges to the sufficiency of the evidence reflect "mixed questions of law and fact," which constitute appropriate inquiries for appellate review. *Id.* (Mosk, J., concurring).

10. *Guiton*, 4 Cal. 4th at 1129, 847 P.2d at 52, 17 Cal. Rptr. 2d at 372.

11. *Id.* Applying such principles to the instant case, the court concluded that the prosecution had merely presented a factually inadequate theory to the jury. *Id.* at 1131, 847 P.2d at 54, 17 Cal. Rptr. 2d at 374. The court reasoned that the jury remained "fully equipped to detect" such error, and, under *Griffin*, reversal was not required. *Id.*

12. *Id.* at 1129, 847 P.2d at 52, 17 Cal. Rptr. 2d at 372. The court cautioned, however, that the prosecution should not present completely unsubstantiated theories to the jury. *Id.* at 1131, 847 P.2d at 54, 17 Cal. Rptr. 2d at 374. In fact, trial courts maintain the responsibility of excluding such invalid theories by means of appropriate jury instructions. *Id.* Nevertheless, alternative theories, when ultimately presented to the jury, do not warrant automatic reversal. *Id.*

# VI. FAMILY LAW

## A. *The trial court at a permanency planning hearing must address only the statutory options for a child's placement and may not consider family reunification, unless the procedural safeguard of alleging changed circumstances has been met. Furthermore, such exclusive options do not violate due process:* **In re Marilyn H.**

*In re Marilyn H.*[1] addressed whether juvenile courts must examine the option of placing a dependent child with the child's parent(s) at the permanency planning hearing,[2] and, if not, whether such failure to examine denies due process. The California Supreme Court held that the permanency planning hearing should be devoted exclusively to developing one of the four plans dictated by the Welfare and Institutions Code section 366.26,[3] which does not include the option of family reunification.[4]

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1. 5 Cal. 4th 295, 851 P.2d 826, 19 Cal. Rptr. 2d 541 (1993). Justice Panelli authored the unanimous decision with Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and George concurring. In this case, a mother whose children were removed from her due to neglect failed to comply with the court ordered reunification services, and thus, after 17 months, was ordered to appear at a permanency planning hearing. At that hearing, she argued that her changed circumstances warranted modification of the court order even though she had not made such a petition to the court prior to the hearing.

2. The permanency planning hearing is ordered once the trial court has determined that returning the minor(s) to the parent(s) would create a substantial risk of detriment to the minor(s) and that reasonable services toward family reunification were offered. CAL. WELF. & INST. CODE §§ 361(b), 366.21(e)-(f), 366.25 (West Supp. 1993). *See generally* 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 196 (1987) (discussing procedural requirements of permanency planning hearings). Generally, this hearing occurs within 12 months of the original dispositional hearing, but the trial court has discretion to extend services up to an additional six months. CAL. WELF. & INST. CODE § 366.25 (West Supp. 1993).

3. Hereinafter, all references to code sections are to the California Welfare and Institutions Code. Section 366.26 states, in relevant part, that once the trial court has reviewed reports specified in the statute, it shall do one of the following:

> (1) Permanently sever the parent or parents' rights and order that the child be placed for adoption. (2) Without permanently terminating parental rights, identify adoption as the permanent placement goal . . . . (3) Without permanently terminating parental rights, appoint a legal guardian . . . . (4) Order that the minor be placed in long-term foster care . . . .

CAL. WELF. & INST. CODE § 366.26(b) (West Supp. 1993). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 717-20 (9th ed. 1987) (discussing

In addition, the court found that the statutory mandate did not violate due process.[5]

The court first addressed the contention that when section 366.26 is read in conjunction with section 366(a),[6] it permits the trial court to consider placing the children with the parent(s) before permanent placement is ordered.[7] The supreme court flatly denied this assertion, stating that section 366(a) is inapplicable to section 366.26 because section 366(a) speaks solely to periodic review hearings held *prior* to the permanency planning stage.[8] The court held that once the section 366.26 hearing was set, any efforts toward family reunification[9] should be terminated and the trial court should only implement one of the listed statutory plans.[10]

The court next examined the assertion that section 385[11] provides the trial court with the discretion, at a section 366.26 hearing, to reconsider the issue of returning the minor(s) to the parent(s), even without a properly filed section 388 petition.[12] The court noted that section 385 is part

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procedural aspects of permanency planning hearings).

4. *Marilyn H.*, 5 Cal. 4th at 304, 851 P.2d at 832, 19 Cal. Rptr. 2d at 550.

5. *Id.* at 309, 851 P.2d at 835, 19 Cal. Rptr. 2d at 553.

6. This section provides, in relevant part, "[t]he status of every dependent child in foster care shall be reviewed periodically . . . until the hearing described in Section 366.25 or 366.26 is completed." CAL. WELF. & INST. CODE § 366(a) (West Supp. 1993).

7. *Marilyn H.*, 5 Cal. 4th at 304, 851 P.2d at 831, 19 Cal. Rptr. 2d at 550.

8. *Id.* The court conducted a thorough discussion of the history and legislative purpose of § 366.26 and found that the "sole purpose" of the permanency planning hearing was to choose one of the listed plans. *Id. See also* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 717 (9th ed. 1987)(stating that the statutory procedures are exclusive).

9. The court made note of the statutory importance of the initial commitment to family reunification but stated that once those efforts have failed the focus shifts toward permanent placement. *Marilyn H.*, 5 Cal. 4th at 309, 851 P.2d at 835, 19 Cal. Rptr. 2d at 553. *See also In re* Michelle M., 4 Cal. App. 4th 1024, 6 Cal. Rptr. 2d 172 (1992)(finding that the statute demands reunification services be terminated prior to the section 366.26 hearing); 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 176 (Supp. 1993) (stating that reunification services should not exceed 18 months); Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223 (1989-90) (discussing the Congressionally enacted Adoption Assistance and Child Welfare Act, which requires reasonable efforts to reunite parents with their children).

10. *Marilyn H.*, 5 Cal. 4th at 304, 851 P.2d at 832, 19 Cal. Rptr. 2d at 550.

11. This section provides, in relevant part, "Any order made by the court . . . may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article." CAL. WELF. & INST. CODE § 385 (West 1984).

12. *Marilyn H.*, 5 Cal. 4th at 305, 851 P.2d at 832, 19 Cal. Rptr. 2d at 550. Section 388 allows interested parties to petition the court to modify its orders due to changed circumstances. CAL. WELF. & INST. CODE § 388 (West 1984). *See generally* 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 199 (1987) (discussing petitions

of Article 12, which provides that five procedural requirements must be met before a court can assert its discretion.[13] Significantly, the appellant failed to follow any of these procedures and, therefore, the court held that the trial court could not have employed its discretion.[14]

Finally, the court considered the argument that limiting the trial court's ability to reexamine family reunification at the permanency planning hearing is unconstitutional because it violates the due process rights of both parent(s) and minor(s).[15] Additionally, the court addressed the issue that section 388 does not provide due process because it places the burden of proof on the parent(s).[16] The court rejected both claims.[17]

First, the court reasoned that although the right to parent a child is fundamental, there is a compelling state interest in protecting a child from abusive and neglectful parents.[18] This interest requires the state to provide a minor with a permanent plan to ensure the child's well being once reunification with the parent(s) is proven unsuccessful.[19] The court found that the entire statutory scheme provides significant safeguards for both the parent(s) and child's rights.[20] Finally, requiring the parent(s) to file a petition showing prima facie evidence of changed circumstances is not unduly burdensome, and therefore, is not violative of due process.[21]

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for modification based on changed circumstances).

13. *Marilyn H.*, 5 Cal. 4th at 305, 851 P.2d at 832, 19 Cal. Rptr. 2d at 550. These requirements include notice of all proceedings and the procedures for dismissing petitions. CAL. WELF. & INST. CODE §§ 386, 387, 390 (West 1984 & Supp. 1993).

14. *Marilyn H.*, 5 Cal. 4th at 305, 851 P.2d at 832, 19 Cal. Rptr. 2d at 550. For a thorough discussion of evidentiary requirements in dependency cases, see *Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide*, 25 LOY. L.A. L. REV. 1009 (1992).

15. *Marilyn H.*, 5 Cal. 4th at 306-09, 851 P.2d at 833-35, 19 Cal. Rptr. 2d at 551-53.

16. *Id.*

17. *Id.* at 309, 851 P.2d at 835, 19 Cal. Rptr. 2d at 553.

18. *Id.* at 307, 851 P.2d at 833, 19 Cal. Rptr. 2d at 551. See also 39 AM. JUR. *Parent and Child* §§ 15-17 (1963) (stating that parental power is an "emanation from God"); Christian R. Van Deusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417 (1991) (providing an excellent overview of children's rights legislation); Michael Fine, Comment, *Where Have All the Children Gone? Due Process and Judicial Criteria for Removing Children from Their Parents' Homes in California*, 21 SW. U. L. REV. 125 (1992) (engaging in a thorough discussion of the due process issues of dependency law).

19. *Marilyn H.*, 5 Cal. 4th at 307, 851 P.2d at 833, 19 Cal. Rptr. 2d at 551.

20. *Id.* at 307-09, 851 P.2d at 834-36, 19 Cal. Rptr. 2d at 551-53. *See also In re* John B., 159 Cal. App. 3d 268, 205 Cal. Rptr. 321 (1984) (stating that the statutory scheme must be viewed in its entirety as initially supporting family reunification).

21. *Marilyn H.*, 5 Cal. 4th at 309, 851 P.2d at 835, 19 Cal. Rptr. 2d at 553.

The California Supreme Court in *In re Marilyn H.* made a clear statement that the options enumerated within section 366.26 are exclusive and any attempt to modify the court order directing them must be accommodated by a procedurally correct petition to the court.[22] The court has placed a high premium on the need to give a dependent child direction and constancy by limiting the inherent uncertainty caused by juvenile court proceedings.[23] Practitioners should take note of this priority and strictly comply with all procedural rules, while also advising parent clients that the time to comply with the law is limited and the consequences of their actions during that time are also final.

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22. *Id.* at 305, 851 P.2d at 832, 19 Cal. Rptr. 2d at 550.
23. *Id.* at 310, 851 P.2d at 835-36, 19 Cal. Rptr. 2d at 553-54.

B. *Under California Civil Code section 4801, in determining the amount of spousal and child support the court may only consider a supporting spouse's earnings acquired through a normal work regime, even if such spouse engaged in an extraordinarily rigorous work regime during the marriage:* **In re Marriage of Simpson.**

## I. INTRODUCTION

In the case of *In re Marriage of Simpson*,[1] the California Supreme Court addressed the effect of California Civil Code section 4801 on the amount of child and spousal support required upon dissolution of marriage.[2] Under section 4801, the potential earning capacity of a supporting

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1. 4 Cal. 4th 225, 841 P.2d 931, 14 Cal. Rptr. 2d 411 (1992). Justice George authored the unanimous opinion in which Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Arabian, and Baxter concurred. Richard and Barbara Simpson were married for over seven years. During their marriage the Simpsons had one daughter. Richard Simpson earned an hourly wage working as a stagehand for various theater companies and television studios. He contracted for overtime work requiring abnormally long workdays, evening work, and even weekend commitments. Mr. Simpson testified that he maintained this rigorous schedule to allow his wife to attend school to earn a teaching certificate. After the couple separated, Mr. Simpson accepted mostly television studio work requiring only an eight hour a day commitment and allowing him more time with to spend his daughter. Consequently, his earnings were less.

Upon the dissolution of the marriage, the superior court awarded joint custody of their daughter with Mrs. Simpson serving as the primary caretaker. The superior court required Mr. Simpson to provide child and spousal support. The superior court calculated the payments based on Mr. Simpson's earning capacity as determined by his gross income in the years prior to the divorce, rather than his earnings at the time of the action. Due to the overtime work, his average salary prior to the dissolution of the marriage was $60,000 a year.

Based on Mr. Simpson's average annual gross income of $60,000, the superior court awarded child and spousal support payments totaling $1,650 per month. The court then anticipated a contribution by Mrs. Simpson of $1,214 from her potential teaching career. Mr. Simpson appealed the decision of the superior court and the court of appeal affirmed. *Id.* at 228-30, 841 P.2d at 932-33, 14 Cal. Rptr. 2d at 412-13.

2. Section 4801(a)(3) provides in relevant part:

> [T]he court may order a party to pay for the support of the other party any amount . . . the court may deem just and reasonable . . . . In making the award, the court shall consider all of the following circumstances of the respective parties . . . [t]he ability to pay of the supporting spouse, taking into account the supporting spouse's earning capacity, earned and unearned income, assets, and standard of living.

spouse may be substituted for the actual earnings of a spouse if the evidence as a whole indicates that it would be just.[3] Applying this standard, the California Supreme Court concluded that a court only consider the earnings of a spouse acquired through a normal work regimen when determining potential earning capacity.[4]

## II. ANALYSIS

First, the court considered whether the potential earning capacity can properly be substituted for the spouse's actual earnings subsequent to the dissolution of the marriage.[5] The court recognized that spousal support statutes grant trial courts great discretion in determining whether actual earnings or earning capacity form the basis for determining support payments.[6] The court considered cases utilizing potential earning capacity in place of actual earnings in determining support payments.[7] These lower courts have held that evidence supporting the deliberate reduction of a spouse's income justified applying the earning capacity standard.[8] Upon reviewing the evidence before the trial court, the California Supreme Court concluded that the superior court did not abuse its discretion in finding that Mr. Simpson's reduction in hours was due to a desire to reduce support payments, and thus, subject to the potential earning capacity standard.[9]

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CAL. CIV. CODE § 4801(a)(3) (West Supp. 1993).

3. CAL. CIV. CODE § 4801(a)(3) (West Supp. 1993).

4. *Simpson*, 4 Cal. 4th at 236, 841 P.2d at 938, 14 Cal. Rptr. 2d at 418. The court described normal work regimen as one that is objectively reasonable within societal norms. *Id.* at 235-36, 841 P.2d at 937, 14 Cal. Rptr. 2d at 417.

5. *Id.* at 232-33, 841 P.2d at 934-35, 14 Cal. Rptr. 2d at 413-14. *See generally* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Husband and Wife* §§ 226-228 (9th ed. 1990) (supporting spouse's ability to pay, income and earning capacity as factors in awarding spousal support); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Parent and Child* §§ 260, 269 (9th ed. 1989) (parent's ability to pay as a factor in awarding child support); 32 CAL. JUR. 3D *Family Law* § 310 (factors to be considered in determining amount of allowance); 4 CAL. PRAC. *Family Law Practice* § 279 (Supp. 1992) (considerations in amount of support); 24 CAL. FAM. L. SERV. *Spousal Support* § 53 (1986) (earning capacity of the supporting spouse as a consideration in spousal support); 25 CAL. FAM. L. SERV. *Child Custody & Support* § 9 (1986) (earning capacity of spouse as a consideration in child support).

6. *Simpson*, 4 Cal. 4th at 232, 841 P.2d at 935, 14 Cal. Rptr. 2d at 415. *See supra* note 2 for the statutory text.

7. *Id.* at 232, 841 P.2d at 935, 14 Cal. Rptr. 2d at 415.

8. *Id.* The court noted, however, that when the supporting spouse's income is reduced because of circumstances beyond that spouse's control, the court should consider only the spouse's actual income in determining the amount of support. *Id.*

9. *Id.* at 233, 841 P.2d at 936, 14 Cal. Rptr. 2d at 416. The superior court found that Mr. Simpson's change in work regime was attributable to his desire to avoid support obligations. *Id.* at 233-34, 841 P.2d at 936, 14 Cal. Rptr. 2d at 416. Additional-

The court then examined whether the potential earning capacity of a spouse should be determined by the spouse's actual work schedule when extraordinary in nature.[10] The court determined that a spouse's earning capacity may be based only on prior earnings occurring within a normal work regime.[11] The court reasoned that it would be improper to penalize an individual for working in excess of a standard forty hour week by basing his support payments on those extended work hours.[12]

## III. CONCLUSION

Section 4801 effectively grants broad discretion to trial courts in determining whether or not to utilize earning capacity in lieu of actual earnings when determining the amount of child and spousal support.[13] In *Simpson*, the California Supreme Court decreed that a spouse's earning capacity may only be determined by considering income from a normal work regime.[14] Section 4801 originally sought to prevent supporting spouses from evading support payments by reducing their work hours or changing jobs after dissolution of marriage.[15] The *Simpson* decision, however, appears to circumvent the purpose behind section 4801 by allowing a supporting spouse to decrease support payments by merely reducing an extraordinary work schedule to the standard forty hour work week.[16] Based on the *Simpson* decision,[17] the supporting spouse may continue an extraordinary work schedule without the penalty of facing higher support payments.

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ly, the court noted that Mr. Simpson had paid only $100 in child or spousal support pursuant to temporary support awards through the date of trial. *Id.* at 234, 841 P.2d at 936, 14 Cal. Rptr. 2d at 416.

10. *Simpson*, 4 Cal. 4th at 234-36, 841 P.2d at 936-37, 14 Cal. Rptr. 2d at 416-17.

11. *Id.* Mr. Simpson's earning capacity must be viewed in light of societal norms regarding working hours, such as a standard forty hour work week. *Id.* at 235-36, 841 P.2d at 937, 14 Cal. Rptr. 2d at 417.

12. *Id.* at 228, 841 P.2d at 932, 14 Cal. Rptr. 2d at 412.

13. *See supra* note 2. The statutes do not impose any limitations or provide any specific guidelines for determining when and how to substitute earning capacity for actual earnings. *Simpson*, 4 Cal. 4th at 232, 841 P.2d at 935, 14 Cal. Rptr. 2d at 415.

14. *Simpson*, 4 Cal. 4th at 234-35, 841 P.2d at 936-37, 14 Cal. Rptr. 2d at 416-17.

15. *See supra* note 2.

16. *Simpson*, 4 Cal. 4th at 235-36, 841 P.2d at 937-38, 14 Cal. Rptr. 2d at 416-17.

17. *Id.*

# VII. INSURANCE LAW

## A. *Section 11580.2(c)(3), which requires an insured to obtain the insurance carrier's consent before settling with an uninsured driver, is inapplicable in the context of an underinsured motorist:* **Hartford Fire Insurance Co. v. Macri.**

### I. INTRODUCTION

In *Hartford Fire Insurance Co. v. Macri*,[1] the California Supreme Court addressed whether Insurance Code section 11580.2(c)(3),[2] requiring an insured to obtain the insurance carrier's written consent prior to reaching a settlement with an uninsured motorist, also applies to *under*-insured motorist coverage.[3] The court concluded that the section does not apply to claims involving underinsured motorists, and therefore, does not bar recovery of underinsured motorist benefits when the insured does not obtain the carrier's consent.[4]

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1. 4 Cal. 4th 318, 842 P.2d 112, 14 Cal. Rptr. 2d 813 (1992). In *Hartford*, Irene Macri suffered injuries as a result of an automobile accident caused by another's negligence. *Id.* at 322, 842 P.2d at 113, 14 Cal. Rptr. 2d at 814. Macri's injuries exceeded the $50,000 insurance policy held by the tortfeasor. *Id.* Hartford Fire Insurance Company ("Hartford") insured Macri with underinsured motorist coverage for an amount up to $100,000. *Id.* Macri's policy contained a clause stating that Hartford did not provide uninsured motorist coverage for any bodily injury sustained by the policyholder if that policyholder settles a third party bodily injury claim without Hartford's consent. *Id.* at 322, 842 P.2d at 114, 14 Cal. Rptr. 2d at 815. Two years after the accident, and without Hartford's consent, Macri settled with the tortfeasor's insurance carrier for the $50,000 policy limit. *Id.* at 323, 842 P.2d at 114, 14 Cal. Rptr. 2d at 815. Macri then filed a claim with Hartford for $50,000, the difference between the third party's policy limit and her underinsured motorist policy limit. *Id.* Hartford refused coverage, claiming that Macri failed to meet her obligation to acquire Hartford's consent prior to settlement. *Id.* In Hartford's action for declaratory relief, the court of appeal affirmed the trial court's grant of summary judgment in favor of Hartford, holding that the consent requirement applied to underinsured as well as uninsured motorist coverage. *Id.* The California Supreme Court granted review. Hartford Fire Insurance Co. v. Macri, 828 P.2d 671, 7 Cal. Rptr. 2d 530 (1992).

Chief Justice Lucas delivered the opinion of the court, in which Justices Mosk, Kennard, Arabian, Baxter, and George concurred. *Hartford*, 4 Cal. 4th at 321-32, 842 P.2d at 113-20, 14 Cal. Rptr. 2d at 814-21. Justice Panelli wrote a separate concurring opinion. *Id.* at 332-34, 842 P.2d at 120-21, 14 Cal. Rptr. 2d at 821-22.

2. All statutory references are to the Insurance Code unless otherwise specified. *See infra* notes 5, 6, and 12 for the applicable text of § 11580.2.

3. *Hartford*, 4 Cal. 4th at 321-22, 842 P.2d at 113, 14 Cal. Rptr. 2d at 814.

4. *Id.* at 322, 842 P.2d at 113, 14 Cal. Rptr. 2d at 814.

## II. ANALYSIS

In determining that section 11580.2(c)(3)[5] is inapplicable to underinsured motorist claims, the court recognized that section 11580.2(p),[6] which specifically governs underinsured motorist claims, does not contain a consent provision.[7] The court relied on the rules governing statutory interpretation[8] to find that the express language of subdivision (p) re-

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5. Section 11580.2(c)(3) states in pertinent part:

> The insurance coverage provided for in this section does *not* apply either as primary or as excess coverage . . . [t]o bodily injury of the insured with respect to which the insured or his or her representative shall, without the written consent of the insurer, make any settlement with or prosecute to judgment any action against any person who may be legally liable thereof.

CAL. INS. CODE § 11580.2(c)(3) (West 1988) (emphasis added).

6. Subdivision (p) states in pertinent part:

> This subdivision applies only when bodily injury . . . is caused by an underinsured motor vehicle. *If the provisions of this subdivision conflict with subdivisions (a) through (o)* [the uninsured motorist provisions], *the provisions of this subdivision shall prevail* . . .
>
> (3) This coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage.
>
> (4) When bodily injury is caused by one or more motor vehicles, . . . the maximum liability of the insurer providing the underinsured motorist coverage shall not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person . . . that may be held legally liable for the injury.
>
> (5) The insurer paying a claim under this subdivision shall, to the extent of the payment, be entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of the owner or operator.

CAL. INS. CODE § 11580.2(p) (West 1988) (emphasis added).

7. *Hartford*, 4 Cal. 4th at 322, 842 P.2d at 113, 14 Cal. Rptr. 2d at 814. *See generally* 8D JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 5132 (1981) (discussing CAL. INS. CODE § 11580.2 and the consent requirement).

8. *Hartford*, 4 Cal. 4th at 326, 842 P.2d at 116, 14 Cal. Rptr. 2d at 817. Chief Justice Lucas explains that in order to fully understand the legislature's intent in passing the underinsured motorist provisions of the code, "[the court] must first turn to the words of the statute itself." *Id.* (citing California Teachers Ass'n v. San Diego Community College, 28 Cal. 3d 692, 698, 621 P.2d 856, 858, 170 Cal. Rptr. 817, 820 (1981)). Further, the court maintained, "'A construction which makes sense of an apparent inconsistency is to be preferred to one which renders statutory language useless or meaningless.'" *Id.* (quoting Wells v. Marina City Properties, Inc., 29 Cal. 3d

quired that it prevail over subdivision (c)(3).[9] In addition, the court examined the legislative intent behind the enactment of subdivisions (p) and (c)(3)[10] and found two bases which supported its holding. First, there was no possibility of double recovery by the insured,[11] and second, there was no need to protect the subrogation[12] rights of the insurer.[13]

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781, 788, 632 P.2d 217, 221, 176 Cal. Rptr. 104, 108 (1981)). *See also* California Teachers Ass'n v. San Diego Community College, 28 Cal. 3d 692, 698, 621 P.2d 856, 858, 170 Cal. Rptr. 817, 820 (1981) (holding that the legislature's intent must be given deference when construing the language of a statute); Campbell v. State Farm Mut. Auto. Ins. Co., 209 Cal. App. 3d 871, 874-75, 257 Cal. Rptr. 542, 543 (1989) (concluding that if statutory language is clear, a liberal interpretation may not be applied to compel a specific construction of the statute); DeYoung v. City of San Diego, 147 Cal. App. 3d 11, 17, 194 Cal. Rptr. 722, 726 (1983) (emphasizing that in construing a statute, significance should be given to each and every word or phrase to ascertain the specific legislative purpose).

For a broad discussion of statutory interpretation and the general rules associated therewith, see generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 94 (9th ed. 1988); 58 CAL. JUR. 3D *Statutes* §§ 82-133 (1980); 82 C.J.S. *Statutes* §§ 311, 321 (1953 & Supp. 1992).

9. *Hartford*, 4 Cal. 4th at 324, 842 P.2d at 115, 14 Cal. Rptr. 2d at 816. Subdivision (p) explicitly states that if conflict arises between the subdivision which governs underinsured motorists (subdivision (p)), and the provisions governing uninsured motorists, (subdivisions (a) through (o)), subdivision (p) shall prevail. For applicable language of subdivision (p), see *supra* note 6.

10. *Id.* at 326-29, 842 P.2d at 116-18, 14 Cal. Rptr. 2d at 817-19.

11. *Id.* at 330, 842 P.2d at 119, 14 Cal. Rptr. 2d at 820. The court noted that the facts in this case precluded the possibility of double recovery for the insurer. *Id.* Chief Justice Lucas pointed out that Macri informed Hartford of her intention to pursue a claim against the tortfeasor, and that Hartford acknowledged that it is entitled to reimbursement from Macri, according to the policy, if Hartford pays her claim and she subsequently receives damages from the tortfeasor. *Id.* at 330-31, 842 P.2d at 119, 14 Cal. Rptr. 2d at 820. The court concluded that Macri never compromised Hartford's right to reimbursement, and thus, Macri's potential for double recovery was non-existent. *Id.* at 331, 842 P.2d at 119, 14 Cal. Rptr. 2d at 820.

12. The right of the insurer to subrogation is found in § 11580.2(g), which states:

> The insurer paying a claim under an uninsured motorist endorsement or coverage shall be entitled to be subrogated to the rights of the insured to whom the claim was paid against any person legally liable for the injury or death to the extent that payment was made. The action may be brought within three years from the date that payment was made hereunder.

CAL. INS. CODE § 11580.2(g) (West 1988 & Supp. 1993).

*See generally* 58 CAL. JUR. 3D *Subrogation* §§ 1, 22-24 (1980) (outlining subrogation and the rights and responsibilities attached thereto). For a detailed discussion of subrogation in the context of insurance claims, see 39 CAL. JUR. 3D *Insurance Contracts* §§ 510-11 (1977).

13. *Hartford*, 4 Cal. 4th at 329, 842 P.2d at 118, 14 Cal. Rptr. 2d at 819. *See also* Terzian v. California Casualty Indem. Exch., 3 Cal. App. 3d 90, 97, 83 Cal. Rptr. 255, 258 (1969) (finding that the legislative intent behind excluding uninsured motorist coverage when insured fails to obtain the consent of his carrier before prosecuting to judgment an action against the uninsured motorist was to protect the insurer's rights

## III. CONCLUSION

After *Hartford*, the California practitioner should note that in a claim for underinsured motorist benefits, the insured is not obligated to acquire the carrier's consent before settlement with the tortfeasor.[14] The *Hartford* holding effectively gives plaintiffs' attorneys "the green light" in their pursuit of underinsurance benefits even when settlements or judgments have been reached against the tortfeasor without the consent of the underinsured motor vehicle carrier.[15] This appears reasonable because the legislature's intent to avoid double recovery and not compromise subrogation rights has been upheld.[16]

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of subrogation against the uninsured motorist).

The *Hartford* court reasoned that because § 11580.2(p) (3) mandates that underinsurance coverage does not apply until the insured has exhausted the limits of the underinsured motorist's liability, the insurer's subrogation rights are essentially null and void. *Hartford*, 4 Cal. 4th at 329, 842 P.2d at 118, 14 Cal. Rptr. 2d at 819.

Justice Panelli concurred with the opinion of the court, but wrote separately to voice his concern with the legislature's failure to afford underinsurers their subrogation rights. *Id.* at 332, 842 P.2d at 120, 14 Cal. Rptr. 2d at 821 (Panelli, J., concurring). While the uninsured motorist's carrier will always have the right to seek recovery directly form the tortfeasor, Justice Panelli noted that the underinsured motorist carrier is "forced to depend on its insured to seek the tortfeasor's assets." *Id.* at 333, 842 P.2d at 121, 14 Cal. Rptr. 2d at 822 (Panelli, J., concurring). Therefore, Justice Panelli urged the legislature to re-think its position regarding the subrogation rights of the underinsurer. *Id.* at 334, 842 P.2d at 121, 14 Cal. Rptr. 2d at 822 (Panelli, J., concurring).

14. *Id.* at 332, 842 P.2d at 120, 14 Cal. Rptr. 2d at 821.

15. *Id.* at 321-32, 842 P.2d at 113-20, 14 Cal. Rptr. 2d at 814-21.

16. *See id.* at 328-30, 842 P.2d at 117-19, 14 Cal. Rptr. 2d at 818-20.

B. *Under section 1031 of the Insurance Code, reinsurers are entitled to setoff claims against insolvent insurers with priority over policyholders and other creditors:* **Prudential Reinsurance Company v. Superior Court.**

## I. INTRODUCTION

In *Prudential Reinsurance Company v. Superior Court*,[1] the California Supreme Court addressed whether, pursuant to section 1031 of the Insurance Code, reinsurance debts owed by an insurer to a reinsurer may be set off when the insurer becomes insolvent.[2] In this matter of first impression, the court decided that section 1031 permits the setoff of mutual debts and credits during the course of liquidation proceedings.[3] The court determined that this interpretation comported with the public policy of risk distribution while avoiding harm to the public in the form of increased insurance costs.[4]

In a reinsurance contract, an insurer procures a third party to insure against claims made under the original policy.[5] Typically, a portion of the premiums are "ceded" to the reinsurer in return for insuring a portion of the possible claims under a policy.[6] Essentially, reinsurance acts as risk distribution among insurance companies.[7]

In *Prudential*, Mission Insurance company was placed into conservatorship due to insolvency on February 2, 1982.[8] The Insurance Commissioner subsequently ordered liquidation pursuant to section 1016 of the Insurance Code.[9] Under this order, the Commissioner demanded that all

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1. 3 Cal. 4th 1118, 842 P.2d 48, 14 Cal. Rptr. 2d 749 (1992). Chief Justice Lucas delivered the majority opinion joined by Justices Panelli, Arabian, and Baxter. *Id.* at 1123-43, 842 P.2d at 50-63, 14 Cal. Rptr. 2d at 751-64. Justice Kennard delivered a separate dissenting opinion joined by Justice Mosk. *Id.* at 1143-44, 842 P.2d at 63-65, 14 Cal. Rptr. 2d at 764-66. Justice Kline also delivered a dissenting opinion with Justices Kennard and Mosk concurring. *Id.* at 1144-69, 842 P.2d at 65-82, 14 Cal. Rptr. at 766-83.

2. *Id.* at 1123, 842 P.2d at 50, 14 Cal. Rptr. 2d at 751.

3. *Id.* at 1124-25, 842 P.2d at 51, 14 Cal. Rptr. 2d at 752.

4. *Id.* at 1125, 842 P.2d at 51, 14 Cal. Rptr. 2d at 752.

5. *Id.* at 1123, 842 P.2d at 50, 14 Cal. Rptr. 2d at 7517. *See also* 39 CAL. JUR. 3D § 512 (1977) (explaining reinsurance).

6. *Prudential*, 3 Cal. 4th at 1123, 842 P.2d at 50, 14 Cal. Rptr. 2d at 751. *See* 39 CAL. JUR. 3D §§ 513-515 (1977) (describing operation of reinsurance between companies).

7. *Prudential*, 3 Cal. 4th at 1123, 842 P.2d at 50, 14 Cal. Rptr. 2d at 751. Because potential liability is spread among companies, any individual incident and resulting claim will not pose a substantial hardship to the company which created the policy. *See* 39 CAL. JUR. 3D § 512 (1977).

8. *Prudential*, 3 Cal. 4th at 1125, 842 P.2d at 51, 14 Cal. Rptr. 2d at 752-53.

9. *Id.* at 1125, 842 P.2d at 51-52, 14 Cal. Rptr. 2d at 752-53. Section 1016 reads:

reinsurers of Mission pay the amounts owed under their reinsurance contracts.[10] The reinsurers sought to offset these debts against amounts that Mission owed them under the contracts entered into prior to insolvency which would, in effect, place the reinsurers at a higher priority than other Mission creditors.[11] The Commissioner filed suit against the reinsurers to compel payment without the setoff.[12]

## II. ANALYSIS

### A. *The Majority Opinion*

The court first addressed the concept of setoff in section 1031.[13] The court noted that setoff requires mutuality in three respects.[14] First, the debts must be owed contemporaneously.[15] Second, the debts must exist

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> If at any time after the issuance of an order under section 1011, or if at the time of instituting any proceeding under this article, it shall appear to the commissioner that it would be futile to proceed as conservator with the conduct of the business of such person, he may apply to the court for an order to liquidate and wind up the business of said person. Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commissioner, as liquidator, for the purpose of carrying out the order to liquidate and wind up the business of such person.

CAL. INS. CODE § 1016 (West 1993).

10. *Prudential*, 3 Cal. 4th at 1125, 842 P.2d at 52, 14 Cal. Rptr. 2d at 753.

11. *Id.*

12. *Id.* The trial court granted the Commissioner's summary judgment motion. *Id.* at 1125-26, 842 P.2d at 52, 14 Cal. Rptr. 2d at 753. The court of appeal issued a peremptory writ of mandate ordering that the order be vacated. *Id.* at 1126, 842 P.2d at 52, 14 Cal. Rptr. 2d at 753. The Commissioner sought review of the court of appeal decision. *Id.*

13. Section 1031 reads in pertinent part:

> In all cases of mutual debts or mutual credits between the person in liquidation under Section 1016 and any other person, such credits and debts shall be set off and the balance only shall be allowed or paid, but no set off shall be allowed in favor of such other person where . . . : (a) The obligation of the person in liquidation to such other person does not entitle such other person claiming such set-off to share as a claimant in the assets of such person in liquidation.

CAL. INS. CODE § 1031 (West 1993).

14. *Prudential*, 3 Cal. 4th at 1127, 842 P.2d at 53, 14 Cal. Rptr. 2d at 754.

15. *Id.* 3 Cal. 4th at 1127, 842 P.2d at 53, 14 Cal. Rptr. 2d at 754. *See also* Stamp v. Insurance Co. of N. Am., 908 F.2d 1375, 1380 (7th Cir. 1990) (finding contempora-

between the same persons or entities.[16] Third, setoff may take place only between parties of equal capacity.[17]

The Insurance Commissioner argued that the debts owed to Mission, which were payments for losses by insureds, were incurred after the liquidation, while the premiums owed by Mission to the reinsurers occurred prior to liquidation.[18] The court cited precedent that stated mutuality depends on whether the debts were in existence before insolvency, not whether the claims arose after the date of the insolvency.[19] The court concluded that the reinsurance obligations constituted preliquidation debts and were subject to setoff.[20]

Next, the court examined the insolvency clause which section 922.2 of the Insurance Code requires to appear in all reinsurance contracts.[21] The Commissioner asserted that the presence of the clause destroyed contemporaneous mutuality.[22] Because section 1031 is modeled after a New York statute, the majority placed much emphasis on a New York decision which permitted setoff.[23] Following the reasoning in the New York decision, the court held that the function of the insolvency clause is to provide the liquidator with rights and obligations equal to that of the insol-

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neous mutuality among reinsurer and insurer when the debt arose before insolvency).

16. *Prudential*, 3 Cal. 4th at 1127, 842 P.2d at 53, 14 Cal. Rptr. 2d at 754.

17. *Id. See* Downey v. Humphreys, 102 Cal. App. 2d 323, 336, 227 P.2d 484, 491-92 (1951) (allowing setoff between insurance agent and insolvent insurer).

18. *Prudential*,3 Cal. 4th at 1128, 842 P.2d at 53, 14 Cal. Rptr. 2d at 754.

19. *Id.* at 1130, 842 P.2d at 55, 14 Cal. Rptr. 2d at 756 (citing O'Connor v. Insurance Co. of N. Am., 622 F. Supp. 611, 618 (N.D. Ill. 1985) (noting that reinsurer's debts following insolvency are provable because reinsurance contracts existed prior to the insolvency and hence can be considered preliquidation debts), *aff'd sub. nom.* Stamp v. Insurance Co. of N. Am., 908 F.2d 1375 (7th Cir. 1990)).

20. *Prudential*, 3 Cal. 4th at 1132, 842 P.2d at 56, 14 Cal. Rptr. 2d at 757.

21. *Id.* at 1133-36, 842 P.2d at 57-60, 14 Cal. Rptr. 2d at 758-61. Section 922.2 reads in pertinent part:

> No such deductions specified in Sections 922.1 and 922.15 shall be made or allowed unless the contract of reinsurance contains provision in substance as follows: . . . In the event of insolvency and the appointment of a conservator, liquidator or statutory successor of the ceding company, such portion shall be payable to such conservator, liquidator or statutory successor immediately upon demand . . . without diminution because of such insolvency.

CAL. INS. CODE § 922.2 (West 1993).

22. *Prudential*, 3 Cal. 4th at 1134, 842 P.2d at 57, 14 Cal. Rptr. 2d at 758. *See also* Melco System v. Receivers of Trans-America Ins. Co., 105 So. 2d 43, 46-47 (Ala. 1988) (holding that reinsurer may not setoff because the insolvency clause requires payment after insolvency).

23. *Prudential*, 3 Cal. 4th at 1133, 842 P.2d at 57, 14 Cal. Rptr. 2d at 758. *See* In re Midland Ins. Co., 590 N.E.2d 1186 (N.Y. 1992). The *Prudential* court agreed with the New York Court of Appeal's decision that the insolvency clause did not conflict with § 7427 of the New York Insurance Law. *Prudential*, 3 Cal. 4th at 1133, 842 P.2d at 57, 14 Cal. Rptr. 2d at 759.

vent insurer with respect to the reinsurance contract.[24]

The Commissioner also argued that the appointment of a liquidator destroyed the required mutuality of identity.[25] The court rejected this assertion, holding that section 1031 provided for a broad meaning of identity,[26] but limited the application of the statute to the principal insurers involved.[27] The court rejected Prudential's contention that its subsidiaries should also be allowed setoff with Mission.[28] The court held that only parties to the reinsurance contract would be allowed priority setoff.[29]

The court next looked to the language of section 1031(a) for further evidence that the legislature intended to allow setoff.[30] The court interpreted section 1031(a) as a restatement of the mutuality requirements discussed above.[31]

Finally, the majority opinion addressed the argument presented by the Commissioner and the dissenting opinion that public policy prohibits setoff.[32] The majority held that section 1031 represented the legislature's express intention to make an exception to the rules of preference favoring policyholders contained elsewhere in the Insurance Code.[33] Furthermore, the majority stated that allowing setoff would not result in harm to the public.[34] Instead, setoff would facilitate reinsurance for smaller firms who need risk distribution to survive.[35] Thus, the majority claimed that

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24. *Id.* at 1135, 842 P.2d at 58, 14 Cal. Rptr. 2d at 759.

25. *Id.* at 1136, 842 P.2d at 59, 14 Cal. Rptr. 2d at 760.

26. *Id.* at 1137-37, 842 P.2d at 60, 14 Cal. Rptr. 2d at 760.

27. *Id.* at 1137, 842 P.2d at 60, 14 Cal. Rptr. 2d at 760-61. The court was not inclined to extend setoff to companies that did not have express mutuality agreements with Mission. *Id.* at 1137, 842 P.2d at 61, 14 Cal. Rptr. 2d at 761.

28. *Id.*

29. *Id.*

30. *Id.* at 1137-38, 842 P.2d at 60, 14 Cal. Rptr. 2d at 761.

31. *Id.* at 1139, 842 P.2d at 61, 14 Cal. Rptr. 2d at 762. The majority believed that § 1031(a) was a restatement of the general rule because the legislature had shown no explicit intent to deny setoff in this instant case. *Id.*

32. *Id.* at 1139, 842 P.2d at 61-63, 14 Cal. Rptr. 2d at 762-64; *see infra* notes 36-44 and accompanying text for a discussion of the dissent's arguments.

33. *Prudential*, 3 Cal. 4th at 1140, 842 P.2d at 61-62, 14 Cal. Rptr. 2d at 762. Section 1033 of the Insurance Code gives preference to policyholders in the liquidation context. CAL. INS. CODE § 1033(a)(5) (West 1993 and Supp. 1994).

34. *Prudential*, 3 Cal. 4th at 1140, 842 P.2d at 62, 14 Cal. Rptr. 2d at 763.

35. *Id.* at 1142, 842 P.2d at 63, 14 Cal. Rptr. 2d at 764. The majority stated, "Offsetting debts not only spreads risk but also acts as mutual security for performance." *Id.* Quoting *Stamp*, they further declared, "Such security is especially important for

public policy actually favored their interpretation allowing setoff.

### *B. Dissenting Opinion*

Justice Kline's vigorous dissent, which was joined by Justices Mosk and Kennard, strongly disputed the majority's conclusions in many respects.[36] The dissenting justices argued that the majority had misconstrued section 1031(a).[37] According to the dissent, subdivision (a) bars setoff by those entities that do not actually share in the insurer's assets.[38] The dissent claimed that the majority's construction of the statute subverted the clear intention of the legislature that policyholders have priority over reinsurers as expressed in section 1033.[39] The dissenting opinion also disputed the view that the reinsurance contract could control the liquidation, stating that parties may not deprive a third party of statutory rights created by contract.[40]

The main thrust of the dissent involved equitable and public policy concerns.[41] Under this view, the application of the statute is of no consequence because statutory setoff has never been permitted to expand what is allowed under principles of equity.[42] The dissent argued that

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smaller insurers; if the large firms could not count on the netting of balances to satisfy obligations, they would be more likely to exclude smaller or tottering firms." *Id.* (quoting Stamp v. Insurance Co. of N. Am., 908 F.2d 1375, 1380 (7th Cir. 1990)).

36. Justice Kline was a presiding justice, Court of Appeal, First Appellate District, Division 2, assigned by the Acting Chairperson of the Judicial Council. *Id.* at 1144 n.*, 842 P.2d at 64 n.*, 14 Cal. Rptr. 2d at 766 n.*.

37. *Id.* at 1145-50, 842 P.2d at 65-68, 14 Cal. Rptr. 2d at 766-69 (Kline, J., dissenting). This view is best expressed in Justice Kennard's brief concurrence with the dissenting opinion. Justice Kennard wrote that the majority's interpretation failed to give independent meaning to section 1031(a). *Id.* at 1143, 842 P.2d at 63, 14 Cal. Rptr. 2d at 764 (Kennard, J., dissenting). Justice Kennard reasoned that the court's decision rendered § 1031 meaningless, and failed to harmonize the statutes at issue in the Insurance Code. *Id.* at 1143-44, 842 P.2d at 63-64, 14 Cal. Rptr. 2d at 764-65 (Kennard, J., dissenting). Accordingly, the court broke the three basic rules of statutory construction. *Id.* at 1144, 842 P.2d at 64, 14 Cal. Rptr. 2d at 765 (Kennard, J., dissenting).

38. *Id.* at 1148, 842 P.2d at 67, 14 Cal. Rptr. 2d at 768 (Kline, J., dissenting).

39. *Id.* (Kline, J. dissenting). Justice Kline opined that the majority's reasoning violated the principle that specific statutes should be given effect over general statutes. *Id.* at 1149, 842 P.2d at 68, 14 Cal. Rptr. 2d at 769 (Kline, J., dissenting). Section 1033 of the Insurance Code is directed specifically at creditor preference whereas § 1031 speaks only to general setoff principles. *Id.* (Kline, J., dissenting).

40. *Id.* (Kline, J., dissenting).

41. *See id.* at 1150-65, 842 P.2d at 69, 14 Cal. Rptr. 2d at 769-80 (Kline, J., dissenting).

42. *Id.* at 1150, 842 P.2d at 69, 14 Cal. Rptr. 2d at 770 (Kline, J., dissenting). Because the dissent believed that insolvency statutes should not be interpreted as creating creditor preferences when the legislature did not explicitly create such

allowing setoff would harm insurance policyholders who would otherwise be first among the creditors to collect from the insolvent insurer.[43] The dissent disagreed with the majority's counter argument that setoff facilitates reinsurance pools, and noted the lack of empirical evidence in support of that position.[44]

## III. CONCLUSION

Reinsurance companies hailed the court's decision.[45] The outcome however, stands in stark contrast to the position of the California Insurance Guarantee Association ("CIGA") on the setoff issue.[46] The *Prudential* ruling will likely have a significant impact on state regulator's policies in other states because many have not yet adopted either the CIGA position or the *Prudential* court's conclusion.[47] Meanwhile, the burgeoning insurance crisis is certain to produce many insolvencies in the near future.

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preference, the majority appeared to violate statutory construction rules. *See* 3A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 69.07, (5th ed. 1992)(discussing bankruptcy statutes).

43. *Prudential*, 3 Cal. 4th at 1152-54, 842 P.2d at 70-71, 14 Cal. Rptr. 2d at 771-72. The dissent relied heavily upon Federal Deposit Ins. Corp. v. Bank of Am., 701 F.2d 831 (9th Cir., *cert. denied*, 464 U.S. 935 (1983). The Ninth Circuit disapproved of a setoff under similar circumstances. That court stated that the creditor's right to setoff is subject to judicial limitations based upon public policy considerations or inequity. *Id.* at 836-37. Thus, the dissent in *Prudential* claimed that reinsurers were aware that they had the lowest creditor preference prior to the decision in the instant case. *Prudential*, 3 Cal. 4th at 1154, 842 P.2d at 71, 14 Cal. Rptr. 2d at 772 (Kline, J., dissenting).

44. *Prudential*, 3 Cal. 4th at 1159, 842 P.2d at 75, 14 Cal. Rptr. 2d at 776.

45. Dean Hansell, a partner with LeBoef, Lamb, Leiby & MacRae, which represents many major reinsures, claimed that insurance costs would have been driven up and many small insurance companies would have been forced out of business had the verdict gone the other way. Alfred G. Haggerty, *Reinsures Hail Decisions on Setoffs*, *Nat'l Underwriter, Prop. & Casualty Risk & Benefits Mgmt Edition*, Dec. 21, 1992, at 6. Steven Sletten, a partner with Gibson, Dunn & Crutcher, another major representative of reinsures claimed that the decision affected "billions" of dollars in claims. Rob Rossi, *High Court Rules for Reinsures on Setoffs*, THE RECORDER, Dec. 1, 1992, at 1.

46. The CIGA adopted a restrictive position on setoffs prior to the *Prudential* decision. *Prudential*, 3 Cal. 4th at 1139, 842 P.2d at 61, 14 Cal. Rptr. 2d at 763.

47. It appears that only the *Stamp* decision in the Seventh Circuit and the instant case have directly addressed this issue. *See generally* Stamp v. Insurance Co. of N. Am., 908 F.2d 1375 (7th Cir. 1990).

C. *Insurer did not breach its duty of good faith and fair dealing or violate statutory duties regarding unfair claim settlement practices by declining to pursue arbitration under policy until after resolution of workers compensation claim:*

**Rangel v. Interinsurance Exchange of the Automobile Club.**

## I. INTRODUCTION

In *Rangel v. Interins. Exch. of the Auto. Club of S. Cal.*,[1] the California Supreme Court addressed the issue of whether section 11580.2 subdivision (h) of the Insurance Code authorizes an insurer to withhold payment until pending workers' compensation claims are settled.[2] Section 11580.2 subdivision (h) authorizes an insurer to reduce the loss payable to the insured by "the amount paid and the present value of all amounts payable" under workers' compensation law.[3] The supreme court conclud-

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1. 4 Cal. 4th 1, 842 P.2d 82, 14 Cal. Rptr. 2d 783. Justice Panelli wrote the majority opinion, in which Chief Justice Lucas and Justices Arabian, Baxter, and George concurred. Justice Kennard wrote a separate dissenting opinion, in which Justice Mosk concurred.

In *Rangel*, the Interinsurance Exchange of the Automobile Club of Southern California ("Exchange") insured Alice Rangel, who was involved in an accident caused by an uninsured motorist in February 1978. *Id.* at 5, 842 P.2d at 83, 14 Cal. Rptr. 2d at 784. Rangel filed an uninsured motorist claim under her policy. *Id.* However, the Exchange refused to pay until Rangel had resolved her workers' compensation claim in which she sought medical expenses. *Id.* Six and one-half years after filing her claim, the Exchange agreed to pay Rangel the maximum amount under her uninsured motorist coverage. *Id.* at 6, 842 P.2d at 83, 14 Cal. Rptr. 2d at 784. Rangel did not receive benefits under her workers' compensation claim until 1986. *Id.*

In September 1985, Rangel sued the Exchange for breach of the duty of good faith and fair dealing and for unfair claims settlement practices in breach of statutory duties under California Insurance Code section 790.03 *Id.* at 6, 842 P.2d at 84, 14 Cal. Rptr. 2d at 785. The Exchange moved for summary judgment in January 1988, which was denied by a judge in the law and motion department. *Id.* at 7, 842 P.2d at 84, 14 Cal. Rptr. 2d at 785. A different judge was then appointed to determine pretrial matters and preside over the trial. Before this judge, the Exchange made a motion for judgment on the pleadings arguing that they had no duty to pay plaintiff any uninsured motorist benefits until after the workers' compensation claim was determined. *Id.* The motion for judgment on the pleadings, was granted. *Id.* Rangel appealed and the court of appeal reversed, holding that an insurer may have a duty to settle an uninsured motorist claim before the resolution of a workers' compensation claim when a lien is available. *Id.* The court of appeal determined that a lien was available in this case and thus, held that the complaint stated a cause of action for both a breach of the duty of good faith and fair dealing and for violations of section 790.03. *Id. See* Rangel v. Interinsurance Exch. of the Auto. Club of S. Cal., 10 Cal. App. 4th 472, 487, 285 Cal. Rptr. 131 (1991).

2. *Rangel*, 4 Cal. 4th at 7, 842 P.2d at 84, 14 Cal. Rptr. 2d at 785.

3. Section 11580.2 subdivision (h) provides, in pertinent part, that: "Any loss

ed that an insurer may delay payment of benefits pending the outcome of a workers' compensation claim.[4]

## II. ANALYSIS

The underlying issue was whether Interinsurance Exchange breached its duty of good faith and fair dealing or violated section 790.03[5] by holding Rangel's arbitration in abeyance while her workers' compensation proceeding was pending.[6] The court relied upon section 11580.2,[7] which expressly provided that arbitration could be delayed until worker's compensation claims were resolved.[8] The court noted that this practice of postponing arbitration until resolution of workers' compensation claims

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payable under the terms of the uninsured motorist endorsement or coverage . . . may be reduced: (1) By the amount paid and the present value of all amounts payable to him or her . . . under any workers' compensation law, exclusive of nonoccupational disability benefits."

CAL. INS. CODE § 11580.2(h) (West 1988 & Supp. 1993).

4. *Rangel*, 4 Cal. 4th at 17, 18 842 P.2d at 92, 14 Cal. Rptr. 2d at 793. *See generally* B.E. WITKIN, *Summary of California Law, Workers' Comp.* (9th ed. 1987).

5. Section 790.03 subsection (h) provides, in pertinent part, that:

> Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:
>
> (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.
>
> (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
>
> (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
>
> (4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.
>
> (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

CAL. INS. CODE § 790.03(h) (West Supp. 1992).

6. *Rangel*, 4 Cal. 4th at 5, 842 P.2d at 83, 14 Cal. Rptr. 2d at 784.

7. The court examined section 11580.2 and concluded that the legislature had expressly permitted the insurer to delay arbitration of uninsured motorist claims while a workers' compensation claim was pending, in the absence of a showing of good cause. *Rangel*, 4 Cal. 4th at 8, 842 P.2d at 85, 14 Cal. Rptr. 2d at 786.

8. *Id.* The court cited section 11580.2 subdivision (f), which states, in pertinent part, that: "If the insured has or may have rights to benefits, other than nonoccupational disability benefits, under any workers' compensation law, the arbitrator shall not proceed with the arbitration until the insured's physical condition is stationary and ratable." CAL. INS. CODE § 11580.2(f) (West 1988 & Supp. 1993).

was wholly consistent with the legislature's goal of avoiding double recovery.[9] Lastly, the court found that because the insurer could not place a lien on the workers' compensation benefits,[10] there was no guarantee that the insurer would recover benefits paid in excess of its liability after the workers' compensation benefits were paid.[11] Therefore, the court concluded that Interinsurance Exchange did not breach its covenant of good faith and fair dealing or its statutory duties under section 790.03 by delaying payment pending the outcome of the workers' compensation proceeding.[12]

## III. CONCLUSION

In allowing delayed payment in uninsured motorist cases, the court indirectly approved of an insurance company's withholding payment for more than six years by not labeling it an unfair business practice.[13] The court suggests that the insurance company had the *right* to make the

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9. *Rangel*, 4 Cal. 4th at 8, 842 P.2d at 85, 14 Cal. Rptr. 2d at 786 (citing *Interinsurance Exch. v. Marquez*, 116 Cal. App. 3d 652, 656-67, 172 Cal. Rptr. 263 (1981)); *Id.* at 16-17, 842 P.2d at 91, 14 Cal. Rptr. 2d at 792. The court also noted that the purpose of section 11580.2 was to "shift the cost of an industrial injury sustained by an employee, as the result of the negligence of an uninsured motorist, from the motoring public (who pay the premium for uninsured motorist coverage) to the employer or workmen's compensation carrier." *Id.* at 8, 842 P.2d at 85, 14 Cal. Rptr. 2d at 786. (citing *California State Auto. Assn. Inter-Ins. Bureau v. Jackson*, 9 Cal. 3d 859, 869, 512 P.2d 1201, 1208, 109 Cal. Rptr. 297, 304 (1973)(quotation omitted)). For a general discussion of California's uninsured motorist statute and the insurer's right to subrogation see John L. Antracoli, Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667, 680-95 (1986).

10. *Rangel*, 4 Cal. 4th at 14, 842 P.2d at 89, 14 Cal. Rptr. 2d at 790. "[T]here can be no lien against a workers' compensation award for any kind of debt except as the Labor Code specifically provides." *Id.* at 15, 842 P.2d at 90, 14 Cal. Rptr. 2d at 791 (citing CAL. LAB. CODE § 4901).

11. *Id.* at 16-17, 842 P.2d at 91, 14 Cal. Rptr. 2d at 792.

> In fact, that is what occurred in the present case. Rangel received $15,000 from the exchange in addition to her workers' compensation payment — $15,000 more than she was entitled to receive . . . . Under the statute, arbitration is delayed until the workers' compensation claim is resolved. Because the loss payable is subject to arbitration under the policy, payment may be delayed until the amount of the loss payable has been determined in arbitration. This result is wholly consistent with the Legislature's goal of avoiding double recovery.

*Id.*

12. *Id.* at 17, 842 P.2d at 92, 14 Cal. Rptr. 2d at 793.

13. Justice Kennard, in her dissenting opinion, noted that the Exchange "had no right to withhold payments to Rangel when liability and the extent of damages caused by the uninsured motorist were not disputed." *Id.* at 27, 842 P.2d at 98, 14 Cal. Rptr. 2d at 799 (Kennard, J., dissenting).

insured wait for as long as it takes to resolve the workers' compensation claim.[14] Furthermore, because arbitration is used to resolve not just disputes as to the amount owed but also the ultimate issue of the uninsured motorist's liability, an insurance company can essentially postpone determination of even the most crucial issues until after resolution of workers' compensation claims.[15]

The insurer should undoubtedly have the right to reduce uninsured motorist benefits by any amount recovered by the insured from another source. However, the court here is imposing on the insured the burden of a lengthy waiting period during which benefits are completely withheld — a burden that the legislature probably did not intend.[16] Most importantly, an insurance policy is a contract to pay a certain sum of money upon the occurrence of an event and, when that event occurs, the insured should not be required to wait an extended period of time for recovery without it being deemed an unfair business practice.[17]

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14. Justice Kennard noted that "This result does not make sense." *Id.* at 23, 842 P.2d at 95, 14 Cal. Rptr. 2d at 796 (Kennard, J., dissenting). In 1990, litigated workers' compensation claims in California took an average of 45 months from injury to resolution. Daniel Akst, *California & Co.: Workers' Comp: Can the New Chief Fix It?* L.A. TIMES, Oct. 15, 1991, at D1.

15. *Rangel*, 4 Cal. 4th at 13, 842 P.2d at 88, 14 Cal. Rptr. 2d at 789. "Even when the policy expands the scope of arbitration beyond the minimum statutory requirements, the provisions of section 11580.2 continue to apply." *Id.* (citing, *e.g.*, Freeman v. State Farm Mut. Auto. Ins. Co., 14 Cal. 3d 473, 486-87, 535 P.2d 341, 349, 121 Cal. Rptr. 477, 485 (1975)).

16. *Id.* at 24, 842 P.2d at 96, 14 Cal. Rptr. 2d at 797.

17. Would it not have been an unfair business practice if the Exchange could have anticipated that the workers' compensation claim would take 6½ years to settle?

# VIII. LABOR LAW

## A. *Section 1013 of the Code of Civil Procedure does not extend the forty-five day period allotted under section 5950 of the Labor Code for filing a petition for writ of review of a Workers' Compensation Appeals Board decision:* **Camper v. Workers' Compensation Appeals Board.**

### I. INTRODUCTION

In *Camper v. Workers' Compensation Appeals Board*,[1] the California Supreme Court resolved a conflict among the state's appellate courts.[2] The court concluded that Code of Civil Procedure section 1013[3] does not

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1. 3 Cal. 4th 679, 836 P.2d 888, 12 Cal. Rptr. 2d 101 (1992). In December of 1990, the workers' compensation judge ("WCJ") issued a judgment for Camper, finding specific, but not cumulative, injury. *Id.* at 681, 836 P.2d at 889, 12 Cal. Rptr. 2d at 102. On January 4, 1991, Camper made a timely motion to the Workers' Compensation Appeals Board for reconsideration of the decision. *Id.* at 682, 836 P.2d at 889, 12 Cal. Rptr. 2d at 102. On July 24, 1991, the Board filed its opinion, which upheld the decision of the WCJ. Camper received service by mail on the same date. *Id.* On September 12, 1991, Camper filed a petition for writ of review in the court of appeal, 50 days after the Board filed its opinion. *Id.* The court of appeal concluded that Camper's petition for writ of review was untimely. *Id.* at 683, 836 P.2d at 890, 12 Cal. Rptr. 2d at 103. The supreme court granted review. *Id.* at 684, 836 P.2d at 890, 12 Cal. Rptr. 2d at 103.

Justice Panelli delivered the majority opinion of the court, in which Chief Justice Lucas, and Justices Mosk, Kennard, Arabian, Baxter, and George concurred.

2. *Compare* Malloy v. Workers' Compensation Appeals Bd., 1 Cal. App. 4th 1658, 2 Cal. Rptr. 2d 820 (1991) (stating that petition for writ of review of the Board's decision was untimely and that Code of Civil Procedure section 1013, which extends the filing period by five days when service is by mail, did not apply) *and* Southwest Airlines v. Workers' Compensation Appeals Bd., 234 Cal. App. 3d 1421, 286 Cal. Rptr. 347 (1991) (holding that section 1013 is not applicable to extend the forty-five day time period prescribed by Labor Code section 5950 for filing a petition for writ of review) *with* Postural Therapeutics v. Workers' Compensation Appeals Bd., 179 Cal. App. 3d 551, 224 Cal. Rptr. 860 (1986) (finding that section 1013, applied to petitioner's writ of review despite Labor Code section 5950) *and* Hinkle v. Workers' Compensation Appeals Bd., 175 Cal. App. 3d 587, 221 Cal. Rptr. 40 (1985) (holding that section 1013 applied to petitioner's writ of review despite Labor Code section 5950) *and* Villa v. Workers' Compensation Appeals Bd., 156 Cal. App. 3d 1076, 203 Cal. Rptr. 26 (1984) (deciding that section 1013 applied to the filing of the petitions for writ of review).

3. Code of Civil Procedure section 1013 states in pertinent part:

> [a]ny prescribed period of notice and any right or duty to act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be extended five days if the place of address is within the State of California . . . .

extend the forty-five day period established by Labor Code section 5950[4] within which a petition for writ of review of a Workers' Compensation Board decision must be filed because the operative triggering event of the time period is the *filing* date of the decision rather than the date of service.[5]

## II. ANALYSIS

The court relied on the specific language of Labor Code section 5950 to find that Code of Civil Procedure section 1013 does not extend the time for filing a petition for a writ of review.[6] The court reasoned that the operative trigger of the forty-five day time limit is the filing date of the Board's order. Inasmuch as Camper's petition for writ of review was filed fifty days after that triggering date, the petition was untimely, notwithstanding that service of the order was by mail.[7] In so deciding, the

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CAL. CIV. PROC. CODE § 1013(a) (West 1980 & Supp. 1993).

4. California Labor Code § 5950 states:

> Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration. The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.

CAL. LAB. CODE § 5950 (West 1989).

5. *Camper*, 3 Cal. 4th at 684-85, 836 P.2d at 891, 12 Cal. Rptr. 2d at 104. *See also* Citicorp N. Am., Inc. v. Superior Court, 213 Cal. App. 3d 536, 261 Cal. Rptr. 665 (1989) (holding that § 1013 applies to extend the filing period following service by mail only when the prescribed time is triggered by service). For a general discussion of writs of review in workers' compensation cases, see 65 CAL. JUR. 3D *Work Injury Compensation* §§ 345, 346 (1981).

6. *Camper*, 3 Cal. 4th at 679, 836 P.2d at 888, 12 Cal. Rptr. 2d at 101. Justice Panelli noted that there is no reference in § 5950 to service, and "'any reasonable sense of semantics dictates that "a petition for reconsideration is denied" within the meaning of the statute when it is filed,'" not when it is served. *Id.* at 684 n.4, 836 P.2d at 891 n.4, 12 Cal. Rptr. 2d at 104 n.4 (quoting Southwest Airlines v. Workers' Compensation Appeals Bd., 234 Cal. App. 3d 1421, 1426, 286 Cal. Rptr. 347, 350 (1991)).

7. *Id.* at 682-84, 836 P.2d at 889-91, 12 Cal. Rptr. 2d at 102-04.

court expressly overruled *Villa v. Workers' Compensation Appeals Board*,[8] and its progeny.[9]

## III. CONCLUSION

The *Camper* decision eliminates the option of using Code of Civil Procedure section 1013 to extend the forty-five day time period specified in Labor Code section 5950 within which a petition for writ of review must be filed.[10] The rule under *Camper* is specific: To be considered timely, a petition for writ of review of a ruling must be filed within forty-five days from the *filing* date of the Board's order.[11]

Further, the practitioner should be aware that the *Camper* ruling may raise constitutional questions. Although the court declined to address the issue, due process requirements of notice may dictate that Labor Code section 5950 be interpreted to incorporate Code of Civil Procedure section 1013.[12] At the very least, however, *Camper* has effectively removed any ambiguity in the area of time requirements for filing a petition for writ of review in workers' compensation cases.

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8. 156 Cal. App. 3d 1076, 203 Cal. Rptr. 26 (1984).

9. *Camper*, 3 Cal. 4th at 688, 836 P.2d at 893, 12 Cal. Rptr. 2d at 106.

10. *Id.* at 681, 836 P.2d at 888, 12 Cal. Rptr. 2d at 101.

11. *Id.* The general rule is that when computing the period in which an act must be done, when the last day for the performance of the act falls on a holiday or Saturday, the period is extended to include the next day that is not a holiday or Saturday. CAL. CIV. PROC. CODE § 12(a) (West 1982 & Supp. 1993). *See also* Alford v. Industrial Accident Comm'n, 28 Cal. 2d 198, 169 P.2d 641 (1946).

12. *See Camper*, 3 Cal. 4th at 688 n.7, 836 P.2d at 893 n.7, 12 Cal. Rptr. 2d at 106 n.7. For a general discussion on the constitutional requirements of notice, see 16a AM. JUR. 2D *Const. Law* §§ 814, 827-38 (West 1979 & Supp. 1992).

B. *While the state's general authority to approve an apprenticeship program avoids ERISA preemption, the state's authority to deny approval of new apprenticeship programs that adversely affect existing ones is preempted:* **Southern California Chapter of Associated Builders & Contractors, Joint Apprenticeship Committee v. California Apprenticeship Council.**

## I. INTRODUCTION

In *Southern California Chapter of Associated Builders & Contractors, Joint Apprenticeship Committee v. California Apprenticeship Council*,[1] the California Supreme Court concluded that, with regard to apprenticeship programs, both (1) the state's general approval authority, and (2) Title 8, California Code of Regulations, section 212.2(a),[2] fall within the scope of the preemption clause of the Employee Retirement Income Security Act of 1974 ("ERISA").[3] In applying ERISA's general savings clause, the court found that although the state's approval authority was saved from federal preemption, section 212.2 specifically was not saved.[4]

In *Associated Builders*, the Southern California Chapter of the Association of Building Contractors, Inc. sought to sponsor an apprenticeship program and established a joint apprenticeship training committee ("ABC-JAC").[5] The ABC-JAC solicited state approval of its new program[6] which was to operate in at least three counties where existing programs were already in operation.[7]

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1. 4 Cal. 4th 422, 841 P.2d 1011, 14 Cal. Rptr. 2d 491 (1992). Justice Panelli wrote for the majority; Chief Justice Lucas and Justices Kennard, Arabian, Baxter, and George joined in the opinion. Justice Mosk concurred in the judgment.

2. Section 212.2(a) requires the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations to disapprove an apprenticeship program which will adversely impact an existing program. *Id.* at 434, 841 P.2d at 1017, 14 Cal. Rptr. 2d at 497.

3. *Id.* at 428, 841 P.2d at 1013, 14 Cal. Rptr. 2d at 493.

4. *Id.*

5. *Id.* The ABC-JAC established a trust fund through which the program was to be administered. *Id.*

6. Justice Panelli explained, "While neither federal nor state approval is *required* for a sponsor to operate an apprenticeship program, strong financial incentives exist at both the state and federal levels for sponsors to obtain approval." *Associated Builders*, 4 Cal. 4th at 428-29, 841 P.2d at 1013, 14 Cal. Rptr. 2d at 493 (emphasis in original).

7. *Id.* at 428, 841 P.2d at 1013, 14 Cal. Rptr. 2d at 493.

Initially, the Chief of the Division of Apprenticeship Standards reviewed and approved the proposed ABC-JAC program.[8] The existing apprenticeship programs objected to the Chief's approval, citing section 212.2(a) to support their claim that "the new program would adversely affect the existing prevailing conditions in the area."[9] The California Apprenticeship Council heard the appeal by the existing programs and reversed the Chief's decision.[10]

After more than a year of battle in superior court,[11] the court of appeal affirmed the ultimate decision of the lower court which approved the ABC-JAC program.[12] The court of appeal reasoned, in part, that the Council's disapproval of the ABC-JAC program, which was predicated on section 212.2(a), was preempted by ERISA.[13] Upon review, the supreme court affirmed the decision of the court of appeal, but based its holding on a slightly different theory.[14] While the state's general approval authority is preempted by ERISA, that authority is specifically saved from preemption by the savings clause.[15] Moreover, section 212.2(a) is also preempted by ERISA, but it is *not* saved by the clause, and thus, section 212.2(a) "cannot be relied upon by the state [the existing programs or the Council] to deny . . . approval to the ABC-JAC program or any other apprenticeship program."[16]

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8. *Id.* at 429, 841 P.2d at 1014, 14 Cal. Rptr. 2d at 494.
9. *Id.*
10. *Id.* The Council based its reversal on the ground that the disparity between the wages and benefits of the ABC-JAC and the existing programs would negatively impact the existing programs' ability to compete for private projects. *Id.*
11. In December 1988, the ABC-JAC sought a writ of mandate which asked the superior court to direct the Council to vacate its decision. *Id.* at 429, 841 P.2d at 1014, 14 Cal. Rptr. 2d at 494. The superior court agreed with ABC-JAC that the new program posed no real threat to the existing programs and granted the petition for writ. *Id.* In view of the superior court's findings, the Council approved the new program. Claiming the Council had misinterpreted the court's instruction, the existing programs subsequently sought a writ of mandate from the superior court. *Id.* at 430, 841 P.2d at 1014, 14 Cal. Rptr. 2d at 494. The court granted the petition and remanded the matter back to the Council. *Id.* The Council then issued a statement wherein it reverted back to its original position and disapproved the ABC-JAC program. *Id.* The ABC-JAC petitioned for a third writ of mandate which the superior court granted in March 1990 and again reversed the Council's decision. *Id.* The existing programs and the Council then appealed to the California Court of Appeal. *Associated Builders*, 4 Cal. 4th at 430, 841 P.2d at 1014, 14 Cal. Rptr. 2d at 494.
12. *Id.*
13. *Id.*
14. *Id.* at 428, 841 P.2d at 1013, 14 Cal. Rptr. 2d at 493.
15. *Id.*
16. *Id.*

## II. TREATMENT

The California Supreme Court began its assessment of the case by reviewing the applicable federal and state statutes that govern the approval process of apprenticeship programs.[17] The court noted that Congress enacted the Fitzgerald Act[18] to specifically administer the foundation of apprenticeship programs.[19] Congress set the specific federal standards of apprenticeship and implemented the Act through Title 29, Code of Federal Regulations, sections 29.1-29.13.[20] The court focused on section 29.12 which allows the federal government to delegate its authority to approve apprenticeship programs to a certified State Apprenticeship Council ("SAC").[21] The court indicated that California has been SAC certified since 1978.[22]

With this foundation, the court considered whether ABC-JAC was an employee benefit program for purposes of ERISA preemption.[23] The court relied primarily on *Hydrostorage v. Northern California Boiler-*

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17. *Id.* at 431-34, 841 P.2d at 1015-17, 14 Cal. Rptr. 2d at 495-97.

18. Known formally as the National Apprenticeship Act, the Fitzgerald Act was passed to encourage the creation of modern apprenticeship programs. *Associated Builders*, 4 Cal. 4th at 432, 841 P.2d at 1015, 14 Cal. Rptr. 2d at 495.

The Fitzgerald Act provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this chapter the term "State" shall include the District of Columbia.

29 U.S.C.A. § 50 (West Supp. 1992).

19. *Associated Builders*, 4 Cal. 4th at 432-33, 841 P.2d at 1015-16, 14 Cal. Rptr. 2d at 495-96.

20. *Id. See* 29 C.F.R. §§ 29.1-29.13 (1992). The federal standards for apprenticeship are specifically set forth in 29 C.F.R. § 29.5 (1992).

21. *Associated Builders*, 4 Cal. 4th at 432-33, 841 P.2d at 1016, 14 Cal. Rptr. 2d at 496. The Secretary of Labor confers upon the SAC the authority to approve an apprenticeship program as long as it "conforms with the Secretary's published standards." 29 C.F.R. § 29.12(a) (1992).

22. *Associated Builders*, 4 Cal. 4th at 433, 841 P.2d at 1016, 14 Cal. Rptr. 2d at 496.

23. *Id.* at 436, 841 P.2d at 1018-19, 14 Cal. Rptr. 2d at 498-99.

*makers Local Joint Apprenticeship Committee*[24] in finding that both the fund and the standards established by the ABC-JAC constituted an "employee welfare benefit plan" under the Code.[25] Therefore, the court concluded that ABC-JAC was governed by ERISA.[26]

Next, the court considered whether ERISA's preemption clause[27] applied to state SAC approval of apprenticeship programs.[28] The court considered the statute on its face and focused on the phrase, "relates to."[29] The court reasoned that because ERISA preempts state laws regarding employee benefit plans and the new apprenticeship program was an employee benefit plan, ERISA necessarily preempts any state law related to apprenticeship programs.[30] The court relied on the foregoing analysis

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24. 891 F.2d 719 (9th Cir. 1989).

25. *Associated Builders*, 4 Cal. 4th at 437, 841 P.2d at 1019, 14 Cal. Rptr. 2d at 499. *See also Hydrostorage*, 891 F.2d at 728.

Section 1002, paragraph (1) of Title 29 of the Code states in pertinent part:

> The terms "employee welfare benefit plan" . . . mean[s] any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . *apprenticeship or other training programs* . . . .

29 U.S.C.A. § 1002(1) (West 1985) (emphasis added).

26. *Associated Builders*, 4 Cal. 4th at 437, 841 P.2d at 1019, 14 Cal. Rptr. 2d at 499. The existing programs and the Council argued that the new program standards were not within the confines of ERISA under Massachusetts v. Morash, 490 U.S. 107 (1989). *Id.* at 438-40, 841 P.2d at 1019-20, 14 Cal. Rptr. 2d at 499-501. The court, however, distinguished *Morash* from the case at bar on several grounds. *Id.*

27. ERISA's preemption clause is found under Title 29, § 1144(a), which states in full:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this Title and not exempt under section 1003(b) of this Title. This section shall take effect on January 1, 1975.

29 U.S.C.A. § 1144(a) (West 1985).

28. *Associated Builders*, 4 Cal. 4th at 440-46, 841 P.2d at 1021-25, 14 Cal. Rptr. 2d at 501-05.

29. *Id.* at 441, 841 P.2d at 1021, 14 Cal. Rptr. 2d at 501. Under the court's interpretation of § 1144(a), a state law is preempted by ERISA if that law relates to, or is connected with, an employee benefit plan. *Id.* at 441, 841 P.2d at 1022, 14 Cal. Rptr. 2d at 502.

30. *Id.* at 440-41, 841 P.2d at 1021-22, 14 Cal. Rptr. 2d at 501-02. *Cf.* Tod A. Cochran, Note, *The Golden State of Labor Preemption: The Circuit Courts Have Gone Too Far*, 44 HASTINGS L.J. 131 (1992) (contending that federal preemption of state labor law has gone far enough).

in holding that the state's general approval power was, indeed, a state law "related to" the new apprenticeship program, and was therefore preempted by ERISA.[31]

Justice Panelli, writing for the majority, however, did not end his analysis there.[32] The court found that, although preempted on its face, the state law granting the state authority to approve the new program was saved by section 1144(d), the general savings clause.[33] The court noted that ERISA's preemption clause serves to "foreclose any *non-Federal* regulation of employee benefit plans."[34] The court cited cases recognizing that state laws may be saved from federal preemption if such preemption would "impair or modify" federal law.[35] The court reasoned that because federal preemption of the state's approval power would "have a negative effect on the functioning of, or standards set forth in, the federal law," the general savings clause saves the state's general approval power from federal preemption.[36]

Finally, the court analyzed the savings clause with respect to California Code of Regulations, Title 8, section 212.2(a).[37] The court noted that section 212.2 provides program standards that are not required by federal law.[38] The court ruled that, because section 212.2 represents a require-

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31. *Associated Builders*, 4 Cal. 4th at 441, 841 P.2d at 1022, 14 Cal. Rptr. 2d at 502.

32. *Id.* at 446, 841 P.2d at 1025, 14 Cal. Rptr. 2d at 505.

33. *Id.* ERISA's savings clause is found under Title 29, section 1144(d), which states in full: "Nothing in this chapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this Title) or any rule or regulation issued under any such law." 29 U.S.C.A. § 1144(d) (West 1985).

34. *Associated Builders*, 4 Cal. 4th at 446, 841 P.2d at 1025, 14 Cal. Rptr. 2d at 505 (quoting Shaw v. Delta Air Lines, 463 U.S. 85, 104 (1983)) (emphasis added).

35. *Id. See, e.g., Shaw*, 463 U.S. at 85, 102-05.

36. *Associated Builders*, 4 Cal. 4th at 448-50, 841 P.2d at 1026-28, 14 Cal. Rptr. 2d at 506-08. Justice Panelli focused on the language of Title 29 and found that the Secretary of Labor specifically intended state agencies to be recognized as the "appropriate agenc[ies] for registering local apprenticeship programs for certain Federal purposes." *Id.* at 449, 841 P.2d at 1027, 14 Cal. Rptr. 2d at 507 (citing 29 C.F.R. § 29.1(b) (1992)). The court concluded that preemption of the state's approval authority would prevent the state from doing exactly what the legislature intended and would thereby "impair" federal law. *Id.* at 449, 841 P.2d at 1027, 14 Cal. Rptr. 2d at 507.

37. *Id.* at 450, 841 P.2d at 1028, 14 Cal. Rptr. 2d at 508.

38. *Id.* The Regulation states in pertinent part: "Approval shall be denied when it is found that existing prevailing conditions (including training standards) in the area and industry would in any way be lowered or adversely affected." CAL. CODE REGS.

ment not present in federal legislation, preemption of this state law would not "impair or modify" federal law.[39] The court concluded that the portion of section 212.2(a) providing approval for apprenticeship programs which do not adversely affect existing programs is not saved by the savings clause of ERISA, and is therefore preempted.[40]

## III. CONCLUSION

*Associated Builders* stands for several propositions. First, state apprenticeship programs constitute employee benefit plans for purposes of ERISA.[41] Second, the state's approval authority is within the scope of ERISA's preemption clause, but that authority is saved from preemption by ERISA's general savings clause because preemption would specifically impair the intent of federal law.[42] Finally, Title 8, section 212.2 is likewise preempted by ERISA and is not saved by the savings clause because it contains requirements completely independent of those set forth in federal law, thus, preemption would not impair or hinder federal law.[43]

This case serves to warn existing state apprenticeship programs not to rely on section 212.2(a) in denying Fitzgerald Act approval of new programs. California practitioners should note that if new programs are to be denied approval, the denial must be predicated on an aspect of the new program which offends the federal standards as set out in Title 29 of the federal regulations.[44]

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tit. 8, § 212.2(a) (1993).

The court found that "[n]either the Fitzgerald Act nor the regulations promulgated under it contain" any requirement that approval of a program be contingent upon a finding that prevailing conditions in the area will not be adversely affected. *Associated Builders*, 4 Cal. 4th at 450, 841 P.2d at 1028, 14 Cal. Rptr. 2d at 508.

For the text of the Fitzgerald Act, *see supra* note 18.

39. *Associated Builders*, 4 Cal. 4th at 452, 841 P.2d at 1029, 14 Cal. Rptr. 2d at 509. The court recognized that preemption of § 212.2 could neither hinder nor impair federal law because the state law is recognized only so far as it has accomplished federal objectives. *Id.* at 451-52, 841 P.2d at 1029-30, 14 Cal. Rptr. 2d at 509-10. Because § 212.2 embodies policies outside the scope of the Fitzgerald Act and its regulations, it does not further federal objectives. *Id.*

40. *See supra* notes 35-38 and accompanying text.

41. *See supra* notes 23-26 and accompanying text.

42. *See supra* notes 27-36 and accompanying text.

43. *Id.* at 427-55, 841 P.2d at 1012-32, 14 Cal. Rptr. 2d at 492-512.

44. *See supra* notes 18-22 and accompanying text.

# IX. TAX LAW

*Title insurance companies do not receive taxable income when an underwritten title company pays a policyholder's claim pursuant to a contractual arrangement. Further, the State Board of Equalization must follow the statutorily required administrative proceedings before it may assert a deficiency assessment in superior court:* **Title Insurance Co. of Minnesota v. State Board of Equalization.**

## I. INTRODUCTION

In *Title Insurance Co. of Minnesota v. State Board of Equalization*,[1] the California Supreme Court rendered its interpretation of the portion of the California Tax Code[2] governing title insurance companies ("insurers"). The court concluded that when an underwritten title company fulfills its contractual obligation to an insurer by paying its portion of a policyholder's claim, the insurer does not realize a gain, and thus, receives no income.[3] The court further held that in order for the State Board of Equalization[4] ("the Board") to assert a deficiency in superior court, the Board must have first raised the issue in the statutorily required administrative proceedings.[5]

The background of this case indicated that the plaintiff insurers issue title insurance policies through underwritten title companies. The insurers and the title companies are bound by contractual agreement, whereby the title companies agree to perform certain duties[6] in return for retaining approximately ninety percent of the premium fees.[7] In addition,

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1. 4 Cal. 4th 715, 842 P.2d 121, 14 Cal. Rptr. 2d 822 (1993) [hereinafter *Title Insurance*]. Justice Panelli authored the majority opinion, with Chief Justice Lucas and Justices Arabian, Baxter, and George concurring. Justice Kennard filed a dissenting opinion in which Justice Mosk concurred.

2. *See infra* note 18 and accompanying text.

3. *Title Insurance*, 4 Cal. 4th at 728, 842 P.2d at 129, 14 Cal. Rptr. 2d at 830.

4. For a general discussion of the State Board of Equalization, see generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW TAXATION, § 205 (1989).

5. *Title Insurance*, 4 Cal. 4th at 730, 842 P.2d at 130, 14 Cal. Rptr. 2d at 831.

6. Pursuant to the underwriting agreements, the title companies "conduct title searches, prepare title reports, issue the title insurance policies to the policyholders using forms prepared by the insurers, determine the premiums from schedules supplied by the insurers, and collect premiums." *Id.* at 734, 842 P.2d at 133, 14 Cal. Rptr. 2d at 834 (Kennard, J., dissenting).

7. *Id.* at 720, 824 P.2d at 123, 14 Cal. Rptr. 2d at 824.

although the title companies are not parties to the title insurance policies, the contracts obligate the title companies to pay a portion of certain policyholders' claims.[8]

For the years in question, the insurers failed to report as income either: (1) the value of the claims paid by the title companies, or (2) the portions of the premiums retained by the title companies.[9] The Board issued a tax assessment against the insurers for the value of the claims paid by the title companies.[10] When the insurers unsuccessfully contested these assessments in the administrative proceedings they paid the assessments and filed separate actions for refunds.[11] After the actions were consolidated in superior court, the Board raised the second issue of the unpaid premiums as a defense to the refund claims of the insurers.[12]

The trial court found for the insurers, and the Board appealed.[13] In reversing the trial court's decision, the court of appeal held both that the claims paid by the title companies and the premiums retained by them represented taxable income to the insurers.[14] The title insurance companies appealed, and upon review, California's high court reversed the court of appeal, holding that an insurer does not receive taxable income when a title company pays a policyholder's claim pursuant to a contractual arrangement.[15] Secondly, the court held that the superior court lacked jurisdiction to resolve the issue of the retained premiums because

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8. *Id.* In certain circumstances, the title company pays the policyholder directly; in others, the insurer pays the policyholder, and then the title company reimburses the insurer. The court makes no distinction between the two forms of payment: "We agree that the distinction between direct and indirect payment of claims has no legal significance. To hold otherwise would exalt form over substance, a practice that courts strive to avoid when interpreting tax law." *Id.* at 723, 842 P.2d at 125, 14 Cal. Rptr. 2d at 826. *See also* Diedrich v. Commissioner, 457 U.S. 191 (1982) (stating that the "substance, not the form, of the agreed transaction controls); United States v. Hendler, 303 U.S. 564, 566 (1938) (holding that a "transaction . . . is to be regarded in substance," not form).

9. *Title Insurance*, 4 Cal. 4th at 720, 842 P.2d at 123, 14 Cal. Rptr. 2d at 824. It is important to note that the Board did not raise the second issue in any of the administrative proceedings, but rather, first mentioned that it would use the unclaimed premiums as a defense shortly before trial. *Id.* at 729, 842 P.2d at 129, 14 Cal. Rptr. 2d at 830.

10. For a comprehensive discussion of gross premiums tax levied upon insurance companies, see generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW TAXATION, § 293 (1989); 34 CAL. JUR. 3D *Franchise Taxes* § 24 (1977).

11. *Title Insurance*, 4 Cal. 4th at 721, 842 P.2d at 124, 14 Cal. Rptr. 2d at 825.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 729, 842 P.2d at 129, 14 Cal. Rptr. 2d at 830.

the Board failed to raise the issue during the initial administrative proceedings.[16]

## II. TREATMENT

### *A. Majority Opinion*

The majority began its appraisal of the present case with a brief synopsis of California taxation law for title insurers.[17] The California Constitution requires that insurance companies be taxed differently than all other California corporations.[18] This contrasts with the treatment accorded title companies which are taxed as ordinary corporations.[19] The foregoing established the foundation upon which the court built its analysis in addressing the two issues before the court.[20]

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16. *Id.* at 730, 842 P.2d at 130, 14 Cal. Rptr. 2d at 831.
17. *Id.*
18. Article XIII states in relevant part:

> (b) Annual tax. An annual tax is hereby imposed on each insurer doing business in this state on the base, at the rates, and subject to the deductions from the tax hereinafter specified.
> (c) Basis. In the case of an insurer not transacting title insurance in this state, the "basis of the annual tax" is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this state, other than premiums received for reinsurance and for ocean marine insurance.
> In the case of an insurer transacting title insurance in this state, the "basis of the annual tax" is in respect to each year, all income upon business done in this state, except:
> (1) Interest and dividends.
> (2) Rents from real property.
> (3) Profits from the sale or other disposition of investments.
> (4) Income from investments.
> . . . .
> (f) Other taxes and licenses. The tax imposed on insurers by this section is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property . . . .

CAL. CONST. art. XIII, § 28. *See also* CAL. REV. & TAX. CODE § 12204 (West 1970 & Supp. 1993).
19. *Title Insurance*, 4 Cal. 4th at 722, 842 P.2d at 124, 14 Cal. Rptr. 2d at 825.
20. *Id.* at 722-29, 842 P.2d at 124-29, 14 Cal. Rptr. 2d at 825-30.

1. The Claims Paid by the Underwritten Title Companies

The supreme court founded its reasoning of the first issue on the contract that existed between the insurers and the title companies.[21] The court began by noting that it was "appropriate to look to federal as well as state authorities for an understanding of the term 'income.'"[22] Accordingly, the court adopted the federal definition of "income," which is "the accrual of some gain . . . ."[23]

Applying this definition, the court emphasized that "the title insurer and the title company, through the underwriting agreement, . . . agreed to allocate the labor, risk, liability and premium[s]," between them by use of an "arm's-length contract."[24] Thus, the court reasoned that, because each party presumably knew the value of the other's performance, and because each paid consideration in return for the other's promised performance, the fulfillment of the contract by the title companies did not constitute an additional gain for the insurers.[25] Therefore, with the understanding that "there [was] no gain, it follows that there [was] no income."[26]

The court concluded by stressing that the insurers were not relieved of a tax liability for which they were the sole obligor because the obligation had been allocated between the title insurer and the title company.[27] Thus, the insurers did not receive a gain when the title companies paid the policyholder's claims.[28]

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21. *Id.* at 725, 842 P.2d at 126-27, 14 Cal. Rptr. 2d at 827-28.

22. *Id.* at 723, 842 P.2d at 125, 14 Cal. Rptr. 2d at 826. *See* CAL. REV. & TAX. CODE § 24271 (West 1970 & Supp. 1993) (directing the reader to § 61 of the Internal Revenue Code for the definition of gross income); 26 U.S.C. § 61 (1983) (gross income defined as "income from whatever source derived"); *see also* Spurgeon v. Franchise Tax Bd., 160 Cal. App. 3d 524, 528, 206 Cal. Rptr. 636, 638 (1984) (stating that "the federal and California definitions of 'income' are identical").

23. *Title Insurance*, 4 Cal. 4th at 724, 842 P.2d at 126, 14 Cal. Rptr. 2d at 827.

24. *Id.* at 725, 842 P.2d at 126, 14 Cal. Rptr. 2d at 827. On a side note the court commented that the underwriting agreement was not an insurance contract, which would be illegal, for two reasons: first, the contract does not distribute the risk of liability between "similarly situated persons;" and second, the main function of the contract is not to assign risk, but rather, to provide an incentive to title companies to perform accurate title searches. *Id.* at 726, 842 P.2d at 127-28, 14 Cal. Rptr. 2d at 828-29.

25. *Id.*

26. *Id.* at 728, 842 P.2d at 129, 14 Cal. Rptr. 2d at 830. The court noted that reliance must be placed on the federal definition of "income" to determine its meaning.

27. *Id.* at 727, 842 P.2d at 128, 14 Cal. Rptr. 2d at 829.

28. This argument was prompted by the Board's reliance on several cases in which the sole obligor of the tax was relieved of liability when the tax was paid by another. *See* Diedrich v. Commissioner, 457 U.S. 191 (1982); Old Colony Trust v. Commissioner, 279 U.S. 716 (1929). Such cases were promptly distinguished by the court. *Title Insurance*, 4 Cal. 4th at 727, 842 P.2d at 128, 14 Cal. Rptr. 2d at 829.

2. The Premiums Paid to the Underwritten Title Companies

Justice Panelli succinctly handled the second issue. The opinion focused on whether the Board was limited to those claims properly pursued at the administrative proceedings.[29] The court looked at the applicable statutes[30] and decided that the Board had attempted to charge a deficiency against the insurers without first following the "statutorily required administrative procedures."[31] Justice Panelli reasoned that "[j]ust as the taxpayer is limited to the claims it may assert in the superior court to those pursued in the administrative proceedings, the Board should be limited in its assertion of setoffs in the superior court action to those deficiency assessments formally pursued under [the Code]."[32]

*B. The Dissent*

Justice Kennard filed a dissenting opinion in order to voice her concern with the majority's concept of "income."[33] In her view, the rule was

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29. *Title Insurance*, 4 Cal. 4th at 729-30, 842 P.2d at 130, 14 Cal. Rptr. 2d at 831.

30. CAL. REV. & TAX. CODE §§ 12421-12435 (West 1970 & Supp. 1993).

31. *Title Insurance*, 4 Cal. 4th at 730, 842 P.2d at 130, 14 Cal. Rptr. 2d at 831.

32. *Id.* In citing the Code, the court noted the procedural steps binding the Board: (1) the commissioner must note the deficiencies in the taxpayers return, then submit to the Board a proposal for a deficiency assessment; (2) if the Board decides to make the deficiency assessment, the taxpayer must be notified; (3) the taxpayer is then allowed 30 days in which to petition for a redetermination; (4) if no petition is received within the 30-day time limit, the assessment becomes final; (5) if the taxpayer petitions for redetermination, the taxpayer is entitled to an oral hearing before the Board; (6) after the order of the Board regarding the taxpayers petition (if any) becomes final, and the deficiency assessment becomes payable, the taxpayer may file an action in superior court for a refund or credit. *Id. See supra* note 30.

The court specified that these procedural safeguards are for the protection of the taxpayer, and the government should be held to the same standards of procedural accuracy as the taxpayer. *Title Insurance*, 4 Cal. 4th at 730, 842 P.2d at 130, 14 Cal. Rptr. 2d at 831.

33. *Title Insurance*, 4 Cal. 4th at 733, 842 P.2d at 132, 14 Cal. Rptr. 2d at 833 (Kennard, J., dissenting). Justice Kennard argued that the concept of income is a broad concept, aptly defined by the United States Supreme Court. *See* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (Justice Warren authoring the oft-quoted language that income includes all "undeniable accessions to wealth, clearly realized, and over which the taxpayer has complete dominion and control").

Justice Kennard's dissent did not address whether the Board must first exhaust its administrative procedures before bringing an action in superior court. *Title Insurance*, 4 Cal. 4th at 733, 842 P.2d at 132, 14 Cal. Rptr. 2d at 833 (Kennard, J., dissenting).

clear: "title insurers must pay tax on 'all income upon business done in this state.'"[34]

Justice Kennard focused on whether the claims paid by the title companies constituted income to the insurers.[35] Justice Kennard noted that the indirect payments made by the title companies on policyholders' claims fit the classic definition of income because the insurer receive a benefit in return for services rendered.[36]

Moreover, Justice Kennard decided that the direct payments made by the title companies to the policyholders on behalf of the insurers constituted income to the insurers.[37] The dissent cited the rule governing discharge of indebtedness[38] in finding that "[w]hen a title company steps in and pays a policy claim on behalf of the insurer, it discharges a debt of the insurer resulting in income."[39]

Justice Kennard concluded by pointing out that, while the majority asserted that the "transfer of risk in a contractual context somehow negates the receipt of income," it disregarded the fact that the insurers were ultimately liable for the obligation, thus, no "risk" was actually transferred.[40] In her final analysis, Justice Kennard reasoned that when the title companies either directly or indirectly paid policyholders'

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34. *Title Insurance*, 4 Cal. 4th at 734-35, 842 P.2d at 133, 14 Cal. Rptr. 2d at 834 (quoting CAL. CONST. art. XIII, § 28 subd. (c)) (Kennard, J., dissenting). *See supra* note 18.

35. *Title Insurance*, 4 Cal. 4th at 734-41, 842 P.2d at 133-37, 14 Cal. Rptr. 2d at 834-38 (Kennard, J., dissenting). Justice Kennard broke her discussion into two subissues: (1) Whether the title companies' payments to the insurer as reimbursement for claims paid represent income to the insurer? and (2) whether the title companies' direct payments to the insured on behalf of the insurer represent income to the insurer? She answered both question in the affirmative. *Id.* (Kennard, J., dissenting).

36. *Id.* at 736, 842 P.2d at 134, 14 Cal. Rptr. 2d at 835 (Kennard, J., dissenting). The dissent noted that the insurers provided insurance to the title companies for use in the companies' package deal. In return for that service, the title companies obligated themselves to pay certain claims. The dissent stressed that this would amount to gross income in any other business context. *Id.* (Kennard, J., dissenting).

37. *Id.* at 737, 842 P.2d at 135, 14 Cal. Rptr. 2d at 836 (Kennard, J., dissenting).

38. *See* United States v. Hendler, 303 U.S. 564 (1983) (holding that discharge of a party's indebtedness will result in income to that party); Douglas v. Wilcuts, 296 U.S. 1 (1935) (stating in dicta that the discharge of a general obligation is income to the party whose obligation was discharged).

39. *Title Insurance*, 4 Cal. 4th at 738, 842 P.2d at 135, 14 Cal. Rptr. 2d at 836 (Kennard, J., dissenting).

40. *Id.* at 739 n.1, 842 P.2d at 136 n.1, 14 Cal. Rptr. 2d at 837 n.1 (Kennard, J., dissenting). *See also* California Supreme Court Survey, 10 PEPP. L. REV. 954 (1983) (providing an analysis of Metropolitan Life Insurance Co. v. State Board of Equalization, 32 Cal. 3d 649, 652 P.2d 426, 186 Cal. Rptr. 578 (1982) and stating that mere agents of an insurance company who collect premiums and distribute claims relieve the insurer of taxable income).

claims, the insurers in question received a gain subject to income taxation under article XIII of the California Constitution.[41]

## III. CONCLUSION

*Title Insurance* stands for the proposition that title insurance companies may not be taxed on claims paid by underwritten title companies pursuant to underwriting contracts.[42] Moreover, the majority ruled that the State Board of Equalization must follow the statutorily defined administrative proceedings before it may claim a deficiency assessment in superior court.[43]

The instant holding raises questions as to future interpretations of the tax code. In her dissent, Justice Kennard pointed out a very real and substantial possibility for a tax loophole.[44] In one poignant example, Justice Kennard illustrated that where a corporate employer pays an attorney's variable rate mortgage the attorney may reasonably claim that the risk was contractually transferred, thereby negating any income for which the attorney might otherwise be liable.[45]

In sum, the California practitioner should note that the door is now open for parties to claim that the payment by a third party of their debt, where there is some allocation of risk involved, is not income for tax purposes.

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41. *Title Insurance*, 4 Cal. 4th at 740-41, 842 P.2d at 137, 14 Cal. Rptr. 2d at 838 (Kennard, J., dissenting).
42. *Id.* at 728-29, 842 P.2d at 129, 14 Cal. Rptr. 2d at 830.
43. *Id.* at 732-33, 842 P.2d at 132, 14 Cal. Rptr. at 833.
44. *See id.* at 739 n.1, 842 P.2d at 136 n.1, 14 Cal. Rptr. 2d at 837 n.1.
45. *Id.*

# X. TORT LAW

## A. *In a libel action against a newspaper, the California Civil Code section 48a(1) notice requirement is satisfied by serving notice upon: (1) the publisher; (2) a person designated by the publisher to receive notice; or (3) another newspaper employee and the publisher acquires actual knowledge of the demand for correction within the twenty day period pursuant to the statute:* **Freedom Newspapers, Inc. v. Superior Court.**

### I. INTRODUCTION

In *Freedom Newspapers, Inc. v. Superior Court*,[1] the California Supreme Court addressed whether a plaintiff satisfied the notice requirement of Civil Code section 48a(1) by sending notice of a libelous statement to a newspaper editor.[2] Section 48a(1) requires that in a libel action[3] against a newspaper, if a plaintiff wishes to recover damages other than "special damages," the plaintiff must first notify the publisher of the allegedly libelous statements and demand a correction.[4] The court

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1. 4 Cal. 4th 652, 842 P.2d 138, 14 Cal. Rptr. 2d 839 (1992). Justice George wrote the majority opinion with Justices Mosk, Panelli, Arabian, and Baxter concurring. *Id.* at 654-59, 842 P.2d at 138-41, 14 Cal. Rptr. 2d at 839-42. Justice Kennard wrote a separate concurring opinion in which Chief Justice Lucas joined. *Id.* at 659-67, 842 P.2d at 141-47, 14 Cal. Rptr. 2d 842-48.

2. *Id.* at 654-55, 842 P.2d at 138-39, 14 Cal. Rptr. 2d at 839-40.

3. For a summary discussion on both libel and slander, see 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 471-72 (9th ed. 1988 & Supp. 1993).

4. CAL. CIV. CODE § 48a(1) (West 1992) provides:

> In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

*Id.*

For a general discussion of Civil Code § 48a, see 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 557-566 (9th ed. 1988 & Supp. 1993).

In a slander action against a radio station, the plaintiff may sue for general, special, or exemplary damages. *See generally* CAL. CIV. CODE § 48a (West 1992). The Civil Code defines "general damages" as "damages for loss of reputation, shame, mortification and hurt feelings." CAL. CIV. CODE § 48a(4)(a) (West 1992). In contrast, "special damages" are "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such

held that a plaintiff satisfied the notice requirement when the notice is:

> (1) served upon the publisher,[5] (2) served upon a person designated by the publisher to receive such notices, or (3) served upon someone employed at the newspaper other than the publisher or the publisher's designee and the publisher acquires actual knowledge of the request for correction within the time limit set forth in the statute.[6]

In *Freedom Newspapers*, Calvin Schmidt,[7] a municipal court judge, filed a libel action against Freedom Newspapers, the parent company of The Orange County Register ("The Register").[8] Judge Schmidt alleged that The Register published three articles which falsely accused him of rendering "favorable decisions in return for sexual favors from prostitutes."[9] After the newspaper published the third article, Judge Schmidt sent the editor of the newspaper a letter demanding a correction.[10] The editor received the letter, but failed to print a retraction or correction.[11]

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amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other." CAL. CIV. CODE § 48a(4)(b) (West 1992). Finally, "exemplary damages" are "for the sake of setting an example by way of punishing a defendant who has made the publication or broadcast." CAL. CIV. CODE § 48a(4)(c) (West 1992). For a detailed analysis of the three types of damages, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116A (5th ed. 1984).

5. The court previously interpreted the meaning of "publisher" in Field Research Corp. v. Superior Court, 71 Cal. 2d 110, 453 P.2d 747, 77 Cal. Rptr. 243 (1969). The supreme court concluded that the legislature intended that the word have its common and ordinary meaning which refers to the owner or operator of the newspaper or radio station rather than the originator of the defamatory statement. *Id.* at 114, 453 P.2d at 750, 77 Cal. Rptr. at 246.

6. *Freedom Newspapers*, 4 Cal. 4th at 658, 842 P.2d at 141, 14 Cal. Rptr. 2d at 842. In a discussion concerning the specific use of the word "publisher" as opposed to "editor," the court noted that the legislature has the prerogative to determine the proper means to carry out its goals. *Id.* at 657, 854 P.2d at 140, 14 Cal. Rptr. 2d at 841. The court reasoned that the legislature may have believed that the publisher, rather than a subordinate employee, would have a greater interest in defending the newspaper against a libel suit. *Id.* at 657, 842 P.2d at 140, 14 Cal. Rptr. 2d at 841.

7. Calvin Schmidt passed away before the case reached the supreme court, however, the court allowed the executor of his estate to continue as real party in interest. *Id.* at 655 n.1, 842 P.2d at 139 n.1, 14 Cal. Rptr. 2d at 840 n.1.

8. *Id.* at 655, 842 P.2d at 139, 14 Cal. Rptr. 2d at 840. Schmidt sought $200,000 in general and special damages as well as punitive damages. *Id. See supra* note 4 and accompanying text.

9. *Id.*

10. *Id.* The three articles in question were published on October 9, 1988, December 14, 1988, and on March 9, 1989. *Id.* Judge Schmidt sent his letter on March 13, 1989, within the twenty day time period required by section 48a(1). *Id. See also* CAL. CIV. CODE § 48a(1) (West 1992).

11. *Freedom Newspapers*, 4 Cal. 4th at 655, 842 P.2d at 139, 14 Cal. Rptr. 2d at

Because the plaintiff served notice on an editor and not the publisher, the court addressed whether the alternative form of notice satisfied section 48a(1).[12] Citing section 48a(1)'s requirement that "notice be served on the publisher," the defendants moved to strike the request for general and punitive damages.[13] In response, Judge Schmidt alleged that even though the letter was sent to the editor, the notice requirement was still satisfied because the publisher had knowledge of the letter and the editor had authority to print a retraction.[14] The supreme court determined that the section 48a(1) notice requirement should be loosely interpreted.[15] Thus, the court left open the possibility that notices served upon editors, rather than the actual publisher, may suffice.[16]

## II. TREATMENT

The California Supreme Court focused its analysis on the legislative purpose behind Civil Code section 48a(1).[17] The court noted that it had previously determined that the purpose of section 48a(1) was to bring the alleged libel to the attention of the newspaper in a timely manner.[18] Thus, this section provides newspapers with an opportunity to correct otherwise libelous statements before subjecting them to liability.[19]

In *Kapellas v. Kofman*,[20] the court liberally construed the notice requirement as it applied to the actual contents of the notice.[21] The *Kapellas* court noted that while still desiring to protect newspapers, the

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12. *Id.* at 655, 842 P.2d at 138-39, 14 Cal. Rptr. 2d at 839-40.

13. *Id.* at 655-56, 842 P.2d at 139, 14 Cal. Rptr. 2d at 840. The superior court denied the motion, and subsequently, on a writ of mandate, the court of appeal ordered the trial court to issue a new order granting the motion. *Id.*

14. *Id.* at 655, 842 P.2d at 139, 14 Cal. Rptr. at 840. Specifically, Judge Schmidt alleged that "although addressed to the editor, [the letter] was known to the publisher of the newspaper at or about the time it was written and [that] the editor . . . had actual authority by delegation from the publisher, or by a pattern or practice developed over a period of years" to act upon requests for correction. *Id.*

15. *Id.* at 658, 842 P.2d at 141, 14 Cal. Rptr. 2d at 842.

16. *Id.*

17. *Id.* at 656-58, 842 P.2d at 139-41, 14 Cal. Rptr. 2d at 840-42.

18. *Id.* at 657, 842 P.2d at 140, 14 Cal. Rptr. 2d at 841 (quoting Kapellas v. Kofman, 1 Cal. 3d 20, 30-31, 459 P.2d 912, 918, 81 Cal. Rptr. 360, 365-66 (1969) (arguing that the purpose of the statute was to foster a newspapers' efforts in ascertaining the truth of an article)).

19. *Id.* By allowing newspapers to correct themselves, § 48a(1) was expected to "facilitate the publisher's investigative efforts in determining whether statements in the initial article contained error and should be protected." *Kapellas*, 1 Cal. 3d at 30, 459 P.2d at 918, 81 Cal. Rptr. at 365-66.

20. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

21. *Id.* at 31, 459 P.2d at 918, 81 Cal. Rptr. at 366.

legislature did not want to erect "technical barriers" to recovery for a plaintiff who had given notice to the publisher.[22] Analogizing to *Kapellas*, the court in *Freedom Newspapers* determined that in using the word "serve," the legislature did not intend to protect a publisher by "erecting a technical barrier" when a plaintiff attempts to satisfy the purpose of section 48a(1).[23] Therefore, the court concluded that "notice on the publisher" was satisfied when the demand for correction was served upon: (1) the publisher; (2) a person designated by the publisher to receive notice; or (3) another newspaper employee and the publisher acquire actual knowledge of the demand for correction within the twenty day period pursuant to section 48a(1).[24]

## III. CONCLUSION

One of the legislative purposes in enacting Civil Code section 48a(1) was to protect one of our most precious commodities, the "free and rapid dissemination of the news."[25] The decision in *Freedom Newspapers*, by expanding the list of possible individuals who can be served notice, remains consistent with this goal.[26]

There are, however, a series of potential problems that may arise from the court's expansive interpretation, namely an increase in the potential cost, time, and overall congestion of our court system. It is now quite possible that a significant amount of pretrial discovery and trial time will be devoted to resolving: (1) if the publisher designated anyone to receive demands for correction; (2) whether a publisher actually knew of a demand given to an employee; (3) whether the publisher made an actual delegation of authority; and (4) whether the publisher delegated authority by pattern or practice.[27]

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22. *Id.* The *Kapellas* court stated that the "crucial issue in evaluating the adequacy of the notice turns on whether the publisher should reasonably have comprehended which statements plaintiff protested and wished corrected." *Id.*

23. *Freedom Newspapers*, 4 Cal. 4th at 658, 842 P.2d at 141, 14 Cal. Rptr. 2d at 842.

24. *Id.*

25. *See* Field Research Corp. v. Superior Court, 71 Cal. 2d 110, 115, 453 P.2d 747, 751, 77 Cal. Rptr. 243, 247 (1969).

26. *See* Kapellas v. Kofman, 1 Cal. 3d 20, 30, 459 P.2d 912, 917, 81 Cal. Rptr. 360, 365 (1969) (reasoning that § 48a encourages a more active press by insulating newspapers from liability for publishing erroneous statements).

27. *Freedom Newspapers*, 4 Cal. 4th 652, 665, 842 P.2d 138, 146, 14 Cal. Rptr. 2d 839, 847 (1992) (Kennard, J., concurring).

In a concurring opinion,[28] Justice Kennard propounded a much more narrow interpretation of Civil Code section 48a(1). Justice Kennard stated that the word "publisher" should be construed to include only "the owner of the newspaper, the person designated by the newspaper as its publisher and the newspaper's principle editor."[29] She reasoned that some editors may not have the authority to make the necessary corrections, and thus concluded that service on these individuals should not serve to satisfy the notice requirement of section 48a(1).[30]

In an effort to further limit litigation of pretrial issues Justice Kennard commented that the word "serve" should be narrowly defined.[31] Indicating that it "should have its usual ordinary meaning, that is, the delivery of a document, personally or by mail."[32]

Nevertheless, the court may have had these specific problems in mind because the court set forth a list encompassing only three groups of people.[33] While this list clearly expands the scope of the term "publisher," the objectives of Civil Code section 48a(1) are still met. The publisher or his designee must be given an opportunity to retract the libelous statement before subjecting the newspaper to liability.[34] The more ex-

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28. *Id.* at 659-67, 842 P.2d at 141-47, 14 Cal. Rptr. 2d at 842-48. (Kennard, J., concurring)

29. *Id.* at 659, 842 P.2d at 142, 14 Cal. Rptr. 2d at 843 (Kennard, J., concurring). Justice Kennard asserted, "[T]here is good reason for [§ 48a(1)] to designate the publisher or broadcaster as the party on whom notice to retract must be served . . . it is only the publisher or broadcaster who has the power effectively to correct or retract." *Id.* at 662, 842 P.2d at 143, 14 Cal. Rptr. 2d at 839 (alterations in original) (Kennard, J., concurring) (quoting *Field Research*, 71 Cal. 2d at 115, 453 P.2d at 747, 77 Cal. Rptr. at 243).

30. *Id.* at 663, 842 P.2d at 144, 18 Cal. Rptr. 2d at 845. (Kennard, J., concurring).

31. *Id.* at 659, 664-65, 842 P.2d at 141, 145, 14 Cal. Rptr. 2d at 843, 846 (Kennard, J., concurring).

32. *Id.* at 659, 842 P.2d at 141, 14 Cal. Rptr. 2d at 839 (Kennard, J., concurring). Justice Kennard gave the following as an example of the uncertain results that could arise from the court's decision:

> Assume newspaper A and newspaper B both publish the same defamatory statement about the plaintiff. Plaintiff serves a demand for correction on a reporter from each of the newspapers. The reporter for newspaper A promptly informs the publisher; the reporter for newspaper B loses or deliberately destroys the demand for correction. Neither newspaper makes a correction. Under the majority's holding, the plaintiff will recover general, special, and possibly punitive damages from newspaper A, but only special damages from newspaper B. Thus, under the majority's analysis, identical acts by the plaintiff will lead to completely different legal results because of circumstances entirely unrelated to the plaintiff's attempt to comply with the statute.

*Id.* at 665 n.3, 842 P.2d at 146 n.3, 14 Cal. Rptr. 2d at 847 n.3 (Kennard, J., concurring).

33. *See supra* notes 5-6 and accompanying text.

34. *See supra* note 4 and accompanying text.

pansive interpretation in *Freedom Newspapers* still requires that the publisher or his designee have actual notice of the alleged defamatory statement. Thus, the newspaper and its reporters continue to have the opportunity to correct the "errors of their ways."

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B. *Under the principles of comparative fault, where the defendant does not have a duty to protect the plaintiff from the risk that caused the injury because of the nature of the activity and the parties' relationship to the activity, the assumption of the risk doctrine continues to operate as a complete bar to the plaintiff's recovery; however, where the plaintiff assumes a known risk caused by a breach of the defendant's duty to the plaintiff, the assumption of the risk doctrine is merged with comparative fault principles, and any loss from the injury may be apportioned among the responsible parties:* **Knight v. Jewett.**

## I. INTRODUCTION

In *Knight v. Jewett*,[1] the California Supreme Court addressed the issue of what the "proper application of the 'assumption of the risk' doctrine" is under comparative fault principles.[2] The case involved an injury sustained in a touch football game when defendant (Jewett) knocked plaintiff (Knight) to the ground and then stepped on her hand.[3] Knight filed

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1. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992). Justice George wrote the plurality opinion in which Chief Justice Lucas and Justice Arabian concurred. Justice Mosk filed a separate opinion concurring in part and dissenting in part. Justice Panelli wrote a separate opinion concurring in part and dissenting in part, in which Justice Baxter concurred. *Id.* at 324, 834 P.2d at 714, 11 Cal. Rptr. 2d at 20. Justice Kennard wrote a separate dissenting opinion. *Id.*

2. *Id.* at 299-300, 834 P.2d at 697, 11 Cal. Rptr. 2d at 3; *see* Ford v. Gouin, 3 Cal. 4th 339, 874 P.2d 724 11 Cal. Rptr. 2d 30 (1992) (companion case). For a detailed analysis of the court's decision in *Knight v. Jewett* and *Ford v. Gouin* as they relate to assumption of risk in California, see Corey Y. Hoffman, *Does Implied Assumption of the Risk Exist in California's Comparative Fault Scheme? The [Not So] Definitive Answer of* Knight v. Jewett *and* Ford v. Gouin, 29 CAL. W. L. REV. 409 (1993); James J. Moloney, California Supreme Court Survey, *Ford v. Gouin*, 20 PEPP. L. REV. 1649 (1993). *See also* Li v. Yellow Cab Co., 13 Cal. 3d 804, 812-13, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975) (adopting comparative fault principles in California).

3. *Knight*, 3 Cal. 4th at 300, 834 P.2d at 697-98, 11 Cal. Rptr. 2d at 3-4. Knight and Jewett were among a group that gathered at a friend's home to watch the Super Bowl. *Id.* at 300, 834 P.2d at 697, 11 Cal. Rptr. 2d at 3. At half-time, several people decided to play touch football on a nearby dirt lot. *Id.* There were four or five players per team consisting of both women and men. *Id.* Knight and Jewett were on opposing sides. *Id.*

During the game Jewett ran into Knight. *Id.* Knight claimed that she told Jewett "not to play so rough or [she] was going to have to stop playing." *Id.* Jewett admitted that Knight asked him to "be careful," but did not recall Knight saying that she would quit. *Id.*

Knight was injured on the next play. *Id.* Jewett claimed that he jumped up to intercept a pass, knocked Knight to the ground on his way down and stepped back-

suit against Jewett based on negligence and other grounds.[4]

The plurality identified two distinct categories of the assumption of the risk doctrine:

> '[P]rimary assumption of the risk' [exists] where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm . . . . '[S]econdary assumption of the risk' [exists] where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty . . . .[5]

The plurality ruled that primary assumption of the risk continues to act as a complete bar to recovery.[6] Secondary assumption of the risk, on the other hand, is "merged into the comparative fault system" and any loss from the injury may be apportioned among the responsible parties.[7] Applying this analysis, the plurality held that Jewett's conduct did not constitute a breach of any duty owed to Knight and, therefore, Knight's action was barred by the primary assumption of the risk doctrine.[8]

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ward onto Knight's hand as he landed. *Id.* According to Knight and her teammate, Andrea Starr, Jewett was trying to run down Starr when he knocked Knight to the ground from behind and then stepped on her hand. *Id.* at 300-01, 834 P.2d at 697-98, 11 Cal. Rptr. 2d at 3-4.

After a series of unsuccessful operations, doctors amputated Knight's finger. *Id.* at 301, 834 P.2d at 698, 11 Cal. Rptr. 2d at 4. Knight filed suit on grounds of negligence, assault and battery. *Id.* Jewett filed an answer and moved for summary judgment. *Id.* Jewett relied on the court of appeal's decision in Ordway v. Superior Court, 198 Cal. App. 3d 98, 243 Cal. Rptr. 536 (1988), for the proposition that the reasonable implied assumption of risk remains a defense under comparative fault principles. *Knight*, 3 Cal. 4th at 301, 834 P.2d at 698, 11 Cal. Rptr. 2d at 4. Knight responded by relying on Segoviano v. Housing Authority, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983), which held that the reasonable implied assumption of risk doctrine cannot operate in a comparative fault system. *Knight*, 3 Cal. 4th at 301, 834 P.2d at 698, 11 Cal. Rptr. 2d at 4.

The trial court granted summary judgment in favor of Jewett. *Id.* at 303, 834 P.2d at 699, 11 Cal. Rptr. 2d 5. The court of appeal affirmed, holding that *Ordway* controlled. *Id.* The supreme court "granted review to resolve the conflict among Court of Appeal decisions as to the proper application of the assumption of the risk doctrine in light of the adoption of comparative fault principles," *id.*, and affirmed. *Id.* at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18.

4. *Knight*, 3 Cal. 4th at 301, 834 P.2d at 698, 11 Cal. Rptr. 2d at 4.

5. *Id.* at 314-15, 834 P.2d at 707-08, 11 Cal. Rptr. 2d at 13-14.

6. *Id.* at 315, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14.

7. *Id.*

8. *Id.* at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18. The three concurring justices agreed with the holding of the plurality, but disagreed with the plurality analysis. *See id.* at 321-24, 834 P.2d at 712-14, 11 Cal. Rptr. 2d at 18-20.

## II. TREATMENT

The court first examined the confusion that has surrounded the assumption of the risk doctrine since the adoption of comparative fault.[9] Under contributory negligence principles, assumption of the risk doctrine was "used in a number of very different factual settings involving analytically distinct legal concepts."[10] With the adoption of comparative fault, however, it became necessary to distinguish the various settings in which the assumption of the risk doctrine is applied.[11]

Before the adoption of comparative fault, the California rule provided that "'[e]xcept where the defendant has the last clear chance, the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.'"[12] With the adoption of comparative fault in *Li v. Yellow Cab Co.*,[13] the *Knight* court recognized that the last clear chance doctrine no longer had any relevant function and, therefore, was subsumed by comparative fault principles.[14] Likewise, the court recognized that comparative fault principles would profoundly affect the assumption of the risk doctrine.[15]

The *Li* court identified two situations in which assumption of the risk was applied by incorporating contributory negligence principles.[16] The first situation was "'where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence.'"[17] The second situation was "'where [a] plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him.'"[18] The *Li* court concluded that the assumption of the risk doctrine should be par-

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9. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984); 4 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 21 (2d ed. 1986); VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.1 (2d ed. 1986); 3 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS §§ 12:46-12:47 (1986); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 1104-1109 (9th ed. 1988).

10. Knight v. Jewett, 3 Cal. 4th 296, 303, 834 P.2d 696, 699, 11 Cal. Rptr. 2d 2, 5 (1992).

11. *Id.* at 304, 834 P.2d at 700, 11 Cal. Rptr. 2d at 6.

12. *Id.* at 304, 834 P.2d at 700, 11 Cal. Rptr. 2d at 6 (quoting Li. v. Yellow Cab Co., 13 Cal. 3d 804, 809-10, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975)).

13. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

14. *Knight*, 3 Cal. 4th at 305, 834 P.2d at 701, 11 Cal. Rptr. 2d at 7.

15. *Id.*

16. *Id.*

17. *Id.* at 305-06, 834 P.2d at 701, 11 Cal. Rptr. 2d at 7 (quoting *Li*, 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872).

18. *Id.* (quoting *Li*, 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872).

tially merged into comparative fault and partially retained as a complete bar to recovery in certain cases.[19]

Following the *Li* decision, appellate courts disagreed on which category of the assumption of the risk doctrine was to be merged and which was to be retained.[20] One line of appellate decisions construed the language in *Li* to create a distinction between cases where a plaintiff unreasonably encountered a known risk and where a plaintiff reasonably did so.[21] These decisions allowed the assumption of the risk to act as a complete bar to recovery only where the plaintiff acted reasonably.[22]

In *Knight*, the supreme court rejected this interpretation of *Li*, stating that nothing in the *Li* opinion indicated that a distinction should be drawn between cases where a plaintiff reasonably or unreasonably encounters a risk.[23] The court held, rather, that the distinction must be made between "primary" and "secondary" assumption of the risk."[24]

Primary assumption of the risk refers to the situation in which the court concludes as a matter of law that the defendant did not owe plaintiff a duty of protection from a particular risk.[25] Secondary assumption of the risk embodies more traditional notions of assumption of the risk, involving situations "in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty."[26] The distinction between primary and secondary assumption of the risk is not based on whether the plaintiff reasonably or unreasonably encountered the risk, but rather whether the defendant owed the plaintiff any legal duty.[27] In determin-

19. *Id.* at 306, 834 P. 2d at 701, 11 Cal. Rptr. 2d at 7.

20. *Id.*

21. *Id.* at 306, 834 P.2d at 701-02, 11 Cal. Rptr. 2d at 7-8. *See* Ordway v. Superior Court, 198 Cal. App. 3d 98, 103-05, 243 Cal. Rptr. 536, 538-40 (1988).

22. Knight v. Jewett, 3 Cal. 4th 296, 306, 834 P.2d 696, 701-02, 11 Cal. Rptr. 2d 2, 7-8 (1992).

23. *Id.* at 307, 834 P.2d at 702, 11 Cal. Rptr. 2d at 8.

24. *Id.* at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9. *See* 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 21.1 (2d ed. 1986); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984) (analogizing express assumption of risk to primary assumption of risk); 3 STUART M. SPEISER, ET AL., THE AMERICAN LAW OF TORT, § 12:47 (1986).

25. *Knight*, 3 Cal. 4th at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9.

26. *Id.*

27. *Id.* at 309, 834 P.2d at 704, 11 Cal. Rptr. 2d at 10.

ing whether a legal duty exists, the court will look to the nature of the defendant's activity and the relationship of both parties to that activity.[28]

Utilizing these principles, the court held that primary assumption of the risk does not merge into comparative fault and continues to operate as a complete bar to plaintiff's recovery, whereas, secondary assumption of the risk does merge with comparative fault principles.[29] The court reasoned that not only is this interpretation consistent with the *Li* opinion, but that it is also supported by the fundamental principles of comparative fault.[30] By definition, primary assumption of the risk cases involve a defendant who owes no legal duty to the plaintiff. Plaintiff is therefore properly barred from recovering on a negligence theory.[31] In secondary assumption of the risk cases, however, the defendant's breach of a legal duty *creates* the risk which the plaintiff knowingly encounters.[32] Therefore, the merger of secondary assumption of the risk with the principles of comparative fault is consistent with the theory behind comparative fault; it is the combination of the plaintiff's and the defendant's actions which caused the harm, and thus the loss should be apportioned accordingly.[33]

Applying this analytical framework to the present case, the court focused on "whether, in light of the nature of the sporting activity in which defendant and plaintiff were engaged, defendant's conduct breached a legal duty of care to plaintiff."[34] The court recognized that although "persons have a duty to use due care to avoid injury to others, the nature of a sport or activity is relevant in determining the duty of care owed by a particular defendant."[35] The general rule for sporting activities is that the participants "have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport."[36] There are situations, however, in which careless conduct of coparticipants is an inherent risk of the sport.[37] The court held that to determine whether careless conduct is an inherent risk of the sport, the focus must not be

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28. *Id.*
29. *Id.* at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9.
30. *Id.* at 310, 834 P.2d at 704, 11 Cal. Rptr. 2d at 10.
31. *Id.*
32. *Id.* at 310, 834 P.2d at 704-05, 11 Cal. Rptr. 2d at 10-11.
33. *Id.*
34. *Id.* at 315, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14.
35. *Id.*
36. *Id.* at 315-16, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14.
37. *Id.* at 316, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14. *See* Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955)(holding that a baseball player generally cannot recover for a carelessly thrown ball); Thomas v. Barlow, 5 N.J. Misc. 764, 138 A. 208 (Prerog. Ct. 1927)(holding that there can be no recovery for a carelessly thrown elbow in a basketball game).

on the subjective knowledge of the plaintiff, but rather on the nature of the sport itself and on the relationship of the defendant to that sport.[38]

Looking to cases both inside and outside of its jurisdiction, the court concluded that the majority rule regarding liability of coparticipants in a sporting event is that

> it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport . . . and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.[39]

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38. Knight v. Jewett, 3 Cal. 4th 296, 316-17, 834 P.2d 696, 709, 11 Cal. Rptr. 2d 2, 15 (1992). For examples of this form of duty analysis see Quinn v. Recreation Park Ass'n, 3 Cal. 2d 725, 730 46 P.2d 144, 146 (1935) (holding that a spectator at a baseball game assumed the risk of being struck by a baseball); Danieley v. Goldmine Ski Assocs., Inc., 218 Cal. App. 3d 111, 122 266 Cal. Rptr. 749, 755 (1990) (holding that ski resort had no duty to remove tree from ski area); Tavernier v. Maes, 242 Cal. App. 2d 532, 554 51 Cal. Rptr. 575, 589 (1966) (denying recovery for injury to a second baseman resulting from base runner's hard slide during family picnic softball game); Shurman v. Fresno Ice Rink, 91 Cal. App. 2d 469, 476 205 P.2d 77, 80 (1949) (finding that ice-rink operator must exercise reasonable care to protect spectators from flying pucks); Ratcliff v. San Diego Baseball Club, 27 Cal. App. 2d 733, 736 81 P.2d 625, 626-27 (1938) (holding stadium owner liable for failing to provide patrons protection from flying baseball bats).

39. *Knight*, 3 Cal. 4th at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16. *See Tavernier*, 242 Cal. App. 2d at 551, 51 Cal. Rptr. at 586; *See also* Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831 (La. Ct. App. 1961) (denying recovery for baseball player hit on the head by an accidentally thrown bat during a school game); Gauvin v. Clark, 404 Mass. 450, 537 N.E.2d 94 (1989) (holding that plaintiff hockey player must show reckless disregard by defendant to recover for injury resulting from being hit with a hockey stick); Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587 (1966) (denying recovery when an ice skater who was skating backwards tripped over a fallen skater); Ross v. Clouser, 637 S.W.2d 11 (Mo. 1982) (requiring plaintiff to show recklessness in order to recover for injury caused by collision with a base runner during a baseball game); Kabella v. Bouschelle, 100 N.M. 461, 672 P.2d 290 (Ct. App. 1983) (requiring plaintiff to show intentional or reckless conduct of defendant to recover for injury sustained in an informal tackle football game); Marchetti v. Kalish, 53 Ohio St. 3d 95, 559 N.E.2d 699 (1990)(requiring plaintiff to show intentional or reckless conduct of defendant to recover for injury sustained while playing "kick the can"); *cf.* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979) (allowing recovery when football player, in frustration and anger, struck the back of opponent's head, who was kneeling on the ground watching the end of a play), *cert. denied*, 444 U.S. 931 (1979); Griggas v. Clauson, 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955) (allowing recovery where plaintiff was wantonly assaulted by player on opposing team); Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976) (allowing recovery for injury sustained during baseball game when the base runner, apparently to break up a double play, ran into second baseman after the ball was thrown and

The rationale for such a rule is that in active sporting events, "a participant's normal energetic conduct often includes accidentally careless behavior."[40] Holding a participant legally liable for such conduct would discourage vigorous participation in such events.[41] The court adopted the majority rule stating that "a participant in an active sport breaches a legal duty of care to other participants . . . only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport."[42]

Applying this rule to the present case, the court held that the defendant's conduct was, at most, negligent.[43] The court stated that "the conduct alleged in those declarations is not even closely comparable to the kind of conduct . . . that is a prerequisite to the imposition of legal liability upon a participant in such a sport."[44]

The court concluded that, inasmuch as the defendant's conduct did not breach a legal duty owed to the plaintiff, this was a case of primary assumption of the risk.[45] Therefore, plaintiff's negligence action was barred, and comparative fault principles could not properly be applied.[46]

Justice Mosk wrote a separate opinion concurring in part and dissenting in part.[47] He generally agreed with the analysis of the plurality opinion, but would have gone further by eliminating the doctrine of assumption of the risk entirely, and instead, relying solely on the principles of comparative fault.[48]

Justice Panelli, joined by Justice Baxter, also wrote a separate opinion concurring in part and dissenting in part.[49] Justice Panelli agreed with the result of the plurality opinion,[50] but rejected the duty-based analysis

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when the second baseman was standing four to five feet from the bag); Overall v. Kadella, 138 Mich. App. 351, 361 N.W.2d 352 (1984) (allowing recovery where hockey player intentionally punched opposing player in the face after the conclusion of the game); Averill v. Lutrell, 44. Tenn. App. 56, 311 S.W.2d 812 (1957) (allowing recovery when baseball catcher deliberately hit a batter in the head with his fist).

40. *Knight*, 3 Cal. 4th at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16.
41. *Id.*
42. *Id.* at 320, 834 P.2d at 711, 11 Cal. Rptr. 2d at 17.
43. *Id.* at 320, 834 P.2d at 711, 11 Cal. Rptr. 2d at 18.
44. *Id.* at 320-21, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18.
45. *Id.* at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18.
46. *Id.*
47. *Id.* (Mosk, J., concurring and dissenting).
48. *Id.* (Mosk, J., concurring and dissenting).
49. *Id.* at 322, 834 P.2d at 713, 11 Cal. Rptr. 2d at 19 (Panelli, J., concurring and dissenting).
50. *Id.* (Panelli, J., concurring and dissenting).

adopted by the plurality, instead favoring the consent-based analysis presented by Justice Kennard's dissenting opinion.[51]

In a lengthy dissenting opinion, Justice Kennard disagreed with both the analysis and the result of the plurality opinion.[52] Justice Kennard argued that the traditional implied assumption of the risk analysis should have been applied.[53] Furthermore, she contended that under either her consent-based analysis or the plurality's duty-based analysis, Jewett had not presented sufficient evidence to warrant the granting of summary judgment in his favor.[54]

## III. CONCLUSION

The supreme court's decision marks a partial victory, albeit a tenuous one, for the defense bar and for proponents of tort reform.[55] Under the "new" assumption of the risk analysis, defendants will still be able to have cases dismissed on summary judgment motions prior to trial where the case involves primary assumption of the risk. Where the case involves secondary assumption of the risk, however, defendants will be forced to try their case under comparative negligence principles. Although *Knight* dealt specifically with assumption of the risk in the setting of sporting activities, it remains to be seen whether this court will be willing to apply the same analysis to other areas of tort law, such as strict products liability.[56]

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51. *Id.* (Panelli, J., concurring and dissenting).

52. *Id.* at 324, 834 P.2d at 714, 11 Cal. Rptr. 2d at 20. (Kennard, J., dissenting).

53. *Id.* (Kennard, J., dissenting). For a criticism of the plurality decision, see Armen L. George, *Assuming The Risk of Erroneous Precedent*, THE RECORDER, September 17, 1992, at 8.

54. *Id.* at 338, 834 P.2d at 724, 11 Cal. Rptr. 2d at 30 (Kennard, J., dissenting).

55. *See* John E. Morris, *Assumption of the risk Defense Kept Alive by Supreme Court*, THE RECORDER, August 25, 1992, at 1 (noting that eight separate opinions were written for this case and its companion case, Ford v. Gouin, 3 Cal. 4th 339, 834 P.2d 724, 11 Cal. Rptr. 2d 30 (1992)).

56. Alexander Peters, *Safe at Any Speed?*, THE RECORDER, December 21, 1992, at 1.