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California Supreme Court Survey - February 1992-July 1992

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The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. CIVIL PROCEDURE

Government Code section 815.6 does not provide the government with a cause of action against the awarding body of a public works contract that failed to comply with Labor Code wage requirements: **Aubry v. Tri-City Hospital District.**

I. INTRODUCTION

In *Aubry v. Tri-City Hospital District*,[1] the California Supreme Court considered two issues. The first was whether California Government Code section 815.6[2] provided a cause of action against a public entity that failed to comply with wage law duties under the Labor Code.[3] The court answered this question in the negative.[4] The second issue was whether the trial court should have allowed a second opportunity to amend a cross-complaint in order to allege a cause of action under another theory.[5] The court held that under the circumstances of this case the trial court should have granted leave to amend.[6]

A. Background

Under section 815.6, a public entity is liable for any injury arising proximately from its failure to discharge a statutory duty, where that duty is "designed to protect against the risk of a particular kind of injury."[7] With

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1. 2 Cal. 4th 962, 831 P.2d 317, 9 Cal. Rptr. 2d 92 (1992). Justice Panelli wrote the majority opinion, in which Chief Justice Lucas, and Justices Arabian, Baxter, and George concurred. Justice Kennard wrote a dissenting opinion, in which Justice Mosk concurred.

2. CAL. GOV'T CODE § 815.6 (West 1980 & Supp. 1992). *See infra* note 7 for statutory text.

3. *Aubry*, 2 Cal. 4th at 964, 831 P.2d at 318, 9 Cal. Rptr. 2d at 93. For references to such duties see CAL. LAB. CODE §§ 1720, 1726, 1770, 1771, 1773, 1773.2 & 1775 (West 1989 & Supp. 1992). *See also infra* notes 8-12 and accompanying text.

4. *Aubry*, 2 Cal. 4th at 964, 831 P.2d at 318, 9 Cal. Rptr. 2d at 93.

5. *Id.*

6. *Id.*

7. *Id.* at 968, 831 P.2d at 321, 9 Cal. Rptr. 2d at 96 (quoting CAL. GOV'T CODE § 815.6 (West 1980 & Supp. 1992)). Section 815.6 provides in relevant part:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the

regard to public works projects, the Labor Code imposes several mandatory duties upon public entities in awarding the contracts. For example, an awarding body must procure the prevailing wage[8] and specify such to potential contractors for the project.[9] The awarding body is also under a duty to assure that the contract provides for payment of the prevailing wage and for contractor liability for failure to pay such wage.[10] Finally, the awarding body must "take cognizance of violations,"[11] and must assist the Division of Labor Standards Enforcement (DLSE), a division of the Department of Industrial Relations, in any court actions necessary to mitigate violations.[12]

B. Statement of the Case

The respondent, Tri-City Hospital District (the District), entered into a contract with Imperial Municipal Services (Imperial) to purchase a "finished addition" to the District's existing hospital facility.[13] The contract provided that the District would act as Imperial's agent in hiring a gener-

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> public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

CAL. GOV'T CODE § 815.6 (West 1980 & Supp. 1992). *See also* 5 M. BENDER, CALIFORNIA TORTS, 60.42[3][a] (1992) (discussing the mandatory duty imposed by section 815.6).

8. *Aubry*, 2 Cal. 4th at 967, 831 P.2d at 320, 9 Cal. Rptr. 2d at 95 (citing CAL. LAB. CODE § 1773 (West 1989)). The awarding body should obtain from the director of the Department of Industrial Relations the local prevailing wage rate for each type of worker. *Id.* For a discussion of the prevailing wage requirement on public works projects, see 53 CAL. JUR. 3D *Public Works and Contracts* § 7 (1979 & Supp. 1992); 2 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 331 (1987 & Supp. 1992).

9. *Aubry*, 2 Cal. 4th at 967, 831 P.2d at 320, 9 Cal. Rptr. 2d at 95 (citing CAL. LAB. CODE § 1773.2 (West 1989)). The awarding body must specify the wage in the request for bids, in the bid specifications, and in the resulting contract. *Id.*; *see also supra* note 8.

10. *Aubry*, 2 Cal. 4th at 967, 831 P.2d at 320, 9 Cal. Rptr. 2d at 95 (citing CAL. LAB. CODE § 1775 (West 1989)); *see also supra* note 8.

11. *Aubry*, 2 Cal. 4th at 967, 831 P.2d at 320, 9 Cal. Rptr. 2d at 95 (quoting CAL. LAB. CODE § 1726 (West 1989)); *see also supra* note 8.

12. *Aubry*, 2 Cal. 4th at 967, 831 P.2d 320, 9 Cal. Rptr. 2d at 95 (citing CAL. LAB. CODE § 1775 (West 1989)); *see also supra* note 8. For a discussion of similar federal laws, see generally Lisa Morowitz, *Government Contracts, Social Legislation, and Prevailing Woes: Enforcing the Davis Bacon Act*, 9 INST. PUB. INT. 29 (1989). For discussions of similar laws in other jurisdictions, see generally Barbara J. Fick, *Labor and Employment Law*, 25 IND. L. REV. 131 (1992); Nicholas J. Taldone, *The New Prevailing Wage Law Problems for Public Contractors Prevail*, 57 N.Y. ST. B.J. 39 (1985); William C. Martucci & Mark P. Johnson, *Recent Developments in Missouri: Labor and Employment Law: The Curators of the University of Missouri*, 53 U. MO. K.C. L. REV. 509 (1985).

13. *Aubry*, 2 Cal. 4th at 965, 831 P.2d at 318-19, 9 Cal. Rptr. 2d at 93-94.

al contractor, monitoring construction, and ensuring that the general contractor's employees were paid the prevailing wage for public works projects, as required under the Labor Code.[14] Imperial, with the District as its agent, secured Lusardi as general contractor.[15] The contract between Imperial and Lusardi neither classified the project as a public work, nor provided for the wages required under the Labor Code.[16]

Subject to an investigation conducted several years later by the DLSE, Lusardi was ordered to comply with the Labor Code requirements regarding public works wages, but Lusardi refused.[17] In response, the DLSE requested that the District not pay Lusardi.[18]

Lusardi subsequently initiated an action against the DLSE, and the DLSE filed a cross-complaint against the District,[19] which is the subject of this supreme court decision.[20] The DLSE's cross-complaint alleged that the District's activities "were part of an overall scheme" designed to circumvent the Labor Code in order to reduce construction costs.[21] The District demurred to the cross-complaint, contending that the Labor Code did not support an action against a public awarding body.[22] The trial court granted the demurrer, but allowed the DLSE leave to amend its cross-complaint to allege a cause of action under California Government Code section 815.6.[23] In response to the DLSE's amended cross-complaint, the trial court sustained a second demurrer in which the District alleged that no cause of action existed under section 815.6.[24] The trial court denied the DLSE's request for leave to amend.[25] The DLSE ap-

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14. *Id.* at 965, 831 P.2d at 319, 9 Cal. Rptr. 2d at 94. For a discussion of the prevailing wage requirements in public works projects, see *supra* notes 8-12 and accompanying text.

15. *Aubry*, 2 Cal. 4th at 965, 831 P.2d at 319, 9 Cal. Rptr. 2d at 94.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 966, 831 P.2d at 319, 9 Cal. Rptr. 2d at 94. The first action was resolved in Lusardi Construction Co. v. Aubry, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837, 824 P.2d 643 (1992) (holding that the DLSE may seek remedies against a public works contractor where the contractor fails to pay the prevailing wage as required by the Labor Code).

21. *Aubry*, 2 Cal. 4th at 966, 831 P.2d at 319, 9 Cal. Rptr. 2d at 94.

22. *Id.*

23. *Id.*

24. *Id.* at 966, 831 P.2d at 319-20, 9 Cal. Rptr. 2d at 94-95.

25. *Id.* at 966, 831 P.2d at 320, 9 Cal. Rptr. 2d at 95.

pealed, and the appellate court affirmed.[26] The supreme court affirmed in part, and remanded in part.[27]

II. TREATMENT

A. Majority Opinion

The first issue on appeal was whether the DLSE had properly alleged a cause of action under Government Code section 815.6, which is part of the Tort Claims Act.[28] The court rejected the DLSE's argument that as the awarding body, the District breached its Labor Code duties,[29] thereby violating section 815.6 of the Government Code.[30] The court determined that the alleged injury is not protected by the statute because it does not comport with the Tort Claims Act's definition of "injury."[31] Furthermore, by examining the Law Revision Commission comment, the court determined that under the Tort Claims Act, the legislature intended only to protect against injuries that would be actionable between private persons.[32] The injury in this case was not actionable between private persons because the public works duties of the Labor Code did not apply to private entities.[33]

In order to determine the viability of the other arguments, the court examined the two cases the DLSE cited as authority.[34] One case involved a sheriff who falsely imprisoned the plaintiff,[35] and the other in-

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26. *Id.*

27. *Id.* at 972, 831 P.2d at 323, 9 Cal. Rptr. 2d at 98.

28. *Id.* at 967-68, 831 P.2d at 320-21, 9 Cal. Rptr. 2d at 95-96.

29. *See supra* notes 8-12 and accompanying text for some of the duties imposed under the Labor Code.

30. *Aubry*, 2 Cal. 4th at 968, 831 P.2d at 321, 9 Cal. Rptr. 2d at 96. *See supra* note 7 for statutory text.

31. *Aubry*, 2 Cal. 4th at 968, 831 P.2d at 321, 9 Cal. Rptr. 2d at 96. The Tort Claims Act defines injury as, "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person." *Id.* (quoting CAL. GOV'T CODE § 810.8 (West 1980 & Supp. 1992)). For a discussion of the Tort Claims Act definition of "injury" and other terms, see 5 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 131 (1988); 35 CAL. JUR. 3D *Government Tort Liability* § 4 (1988); 52 CAL. JUR. 3D *Public Officers, Etc.* § 196 (1979).

32. *Aubry*, 2 Cal. 4th at 968, 831 P.2d at 321, 9 Cal. Rptr. 2d at 96. "The California Law Revision Commission comment on this definition states that, '[t]he purpose of the definition is to make clear that public entities and public employees may be held liable only for injuries to the kind of interests that have been protected by the courts in actions between private persons.'" *Id.* (quoting CAL. GOV'T CODE § 810.8 (West 1980) (Cal. Law Rev. Comm'n Cmt.)).

33. *Id.*

34. *Id.* at 968-69, 831 P.2d at 321-22, 9 Cal. Rptr. 2d at 96-97.

35. Sullivan v. County of Los Angeles, 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr.

volved a county welfare department's violation of child welfare laws.[36] In distinguishing the present case from those decisions, the court pointed out that the DLSE's cases were of the nature that would be actionable between two private parties, while the case at bar was not.[37] The court concluded that because the present injury was not the type that would be actionable between two private parties, it was outside the scope of the Tort Claims Act and, thus, Government Code section 815.6 provided no means of recovery.[38]

In anticipation of the dissenting justices' argument that a worker has his own action against a contractor for depriving him of the prevailing wage, the majority emphasized, in a footnote, that this issue had not yet been decided by the court.[39] Furthermore, even if the individual worker did have such a claim, it would still be outside the scope of the Tort Claims Act because such an action would be based purely on a contractual relationship, not a tort.[40] Having determined that the DLSE's action was not proper under Government Code section 815.6, the court considered whether the DLSE should be granted leave to amend its complaint.[41] The court reasoned that because the trial court allowed the DLSE to amend its first complaint solely for the purpose of alleging a cause of action under Government Code section 815.6, the DLSE was not given a fair opportunity to amend its complaint to state other theories of recovery.[42] Furthermore, the court believed that the DLSE might have a cause of action based on a third party beneficiary theory.[43] Thus, the

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241 (1974).

36. Ramos v. County of Madera, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971). *See also* 5 M. BENDER, CALIFORNIA TORTS § 60.22[3][a] (1992) (discussing *Madera*).

37. *Aubry*, 2 Cal. 4th at 969, 831 P.2d at 322, 9 Cal. Rptr. 2d at 97.

38. *Id.*

39. *Id.* at 969 n.5, 831 P.2d at 322 n.5, 9 Cal. Rptr. 2d at 97 n.5. The court explained that in its prior decision, Lusardi Construction Co. v. Aubry, 1 Cal. 4th 976, 824 P.2d 643, 4 Cal. Rptr 2d 837 (1992), the court held that the DLSE may bring an action against the contractor under Labor Code section 1775; however, the court did not reach the issue of whether an individual worker may bring such an action. *Aubry*, 2 Cal. 4th at 969 n.5, 831 P.2d at 322 n.5, 9 Cal. Rptr. 2d at 97 n.5.

40. *Aubry*, 2 Cal. 4th at 969 n.5, 831 P.2d at 322 n.5, 9 Cal. Rptr. 2d at 97 n.5.

41. *Id.* at 970-71, 831 P.2d at 323, 9 Cal. Rptr. 2d at 98.

42. *Id.*

43. *Id.* at 971, 831 P.2d at 323, 9 Cal. Rptr. 2d at 98. The court asserted that because the contract between Imperial and the District guaranteed that Imperial would ensure that the workers received the prevailing wage, the workers might be considered third party beneficiaries of that contract. *Id.*

court remanded the case, allowing for a decision to be made on the merits of the amended complaint.[44]

B. Dissenting Opinion

Justice Kennard dissented from the majority opinion because she believed that the injury involved was actionable between private parties.[45] Justice Kennard reasoned that because of the court's holding in *Lusardi Construction Co. v. Aubry*[46] that a contractor's duty to pay the prevailing wage on public works projects arises separately from contract and from statute,[47] a construction worker on a public works project who is deprived of the prevailing wage has his own cause of action against the contractor.[48] Thus, Justice Kennard concluded that the present cause of action was of the type that could arise between private parties and therefore would fall within the scope of section 815.6.[49]

Justice Kennard went on to attack the majority's argument that an individual worker's claim for the prevailing wage was outside the scope of the Tort Claims Act because it arose solely from contract.[50] Analogizing the individual's claim against the contractor to the DLSE's claim, Justice Kennard reasoned that this argument was incorrect.[51] She explained that in *Lusardi*, the action was upheld solely on the basis of statute, not contract,[52] and that therefore an individual worker's action may be based solely on a statute as well.[53]

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44. *Id.* at 971-72, 831 P.2d at 323, 9 Cal. Rptr. 2d at 98.

45. *Id.* at 972, 831 P.2d at 324, 9 Cal. Rptr. 2d at 99 (Kennard, J., dissenting).

46. 1 Cal. 4th 976, 824 P.2d 643, 4 Cal. Rptr. 2d 837 (1992).

47. *Aubry*, 2 Cal. 4th at 974-75, 831 P.2d at 325, 9 Cal. Rptr. 2d at 100 (Kennard, J., dissenting) (citing *Lusardi*, 1 Cal. 4th at 986-88, 824 P.2d at 648-50, 4 Cal. Rptr. 2d at 842-44). According to Justice Kennard, the *Lusardi* court believed that "the Legislature intended remedies against the contractor for violation of the prevailing wage law to be cumulative and nonexclusive." *Id.* at 975, 831 P.2d at 325-26, 9 Cal. Rptr. 2d at 100-01 (Kennard, J., dissenting) (citing *Lusardi*, 1 Cal. 4th at 988 n.3, 824 P.2d at 650 n.3, 4 Cal. Rptr. 2d at 844 n.3).

48. *Id.* at 975, 831 P.2d at 325-26, 9 Cal. Rptr. 2d at 100-01 (Kennard, J., dissenting).

49. *Id.* at 974-76, 831 P.2d at 325-26, 9 Cal. Rptr. at 100-01 (Kennard, J., dissenting).

50. *Id.* at 975, 831 P.2d at 326, 9 Cal. Rptr. 2d at 101 (Kennard, J., dissenting).

51. *Id.* at 975-76, 831 P.2d at 326, 9 Cal. Rptr. 2d at 101 (Kennard, J., dissenting).

52. *Id.* at 975, 831 P.2d at 326, 9 Cal. Rptr. 2d at 101 (Kennard, J., dissenting) (citing *Lusardi*, 1 Cal. 4th at 986-87, 824 P.2d at 648-49, 4 Cal. Rptr. 2d at 842-43).

53. *Id.* at 975, 831 P.2d at 326, 9 Cal. Rptr. 2d at 101 (Kennard, J., dissenting). To illustrate her reasoning, Justice Kennard posited that if an employee and an employer entered into a contract providing for payment below the prevailing wage, and the employee later discovered the discrepancy, the employee would have only a statutory cause of action, since there would be no breach of the contract. *Id.* at 975-76, 831 P.2d at 326, 9 Cal. Rptr. 2d at 101 (Kennard, J., dissenting).

Finally, Justice Kennard argued that the question of whether the action arose from a contract or a statute was irrelevant since it had no bearing on the central issue of whether the injury affected an interest that the courts are willing to protect.[54] Believing that the majority was incorrect in determining that section 815.6 afforded no protection against the injury in this case, Justice Kennard would have reversed the judgment of the court of appeal and granted relief to the DLSE.[55]

III. IMPACT

In *Aubry*, the court held that the DLSE does not have a cause of action under section 815.6 against the awarding body of a public works contract for not providing the workers with wages at the prevailing rate.[56] Unfortunately, it is the innocent workers, not the two parties to this action, who become the victims of the decision because the workers are still left without the wages to which they are entitled under the statute. The DLSE has now tried to assert a claim against the District using two theories, and both to no avail.[57]

This decision sends many messages. It tells public works employees that they should be prepared to assert their own rights with respect to their wages. It tells the DLSE that it should regulate contractors and awarding bodies more stringently to ensure that workers on public works projects are paid the prevailing wage. Finally, the ruling tells awarding bodies and contractors that they might be able to escape liability, as long as they do not contract to pay their workers the required statutory wage. The DLSE now has one last chance to recover from Tri-City Hospital District by amending the cross-complaint to allege that the workers are third-party beneficiaries of the Imperial-District agreement.[58] We will soon see whether the Tri-City District has successfully escaped the law.

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54. *Id.* at 976, 831 P.2d at 326, 9 Cal. Rptr. 2d at 101 (Kennard, J., dissenting).
55. *Id.* at 977, 831 P.2d at 327, 9 Cal. Rptr. 2d at 102 (Kennard, J., dissenting).
56. *Id.* at 964, 831 P.2d at 318, 9 Cal. Rptr. 2d at 93.
57. *Id.* at 966, 831 P.2d at 319-20, 9 Cal. Rptr. 2d at 94-95.
58. *Id.* at 971-72, 831 P.2d at 323, 9 Cal. Rptr. 2d at 98.

II. CONSTITUTIONAL LAW

California Education Code section 39807.5, authorizing school districts to charge students transportation fees, violates neither the free school guarantee, nor the equal protection clause, of the state constitution: **Arcadia Unified School District v. State Department of Education.**

In *Arcadia Unified School District v. State Department of Education*,[1] the California Supreme Court determined the constitutionality of section 39807.5 of the Education Code.[2] The statute allows school districts to charge pupils for their transportation to and from school.[3] The court held that neither Article IX, section 5 (the free school provision), nor

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1. 2 Cal. 4th 251, 825 P.2d 438, 5 Cal. Rptr. 2d 545 (1992). Justice Panelli delivered the majority opinion of the court with Justices Lucas, Kennard, Arabian, Baxter and George concurring. Justice Mosk filed a dissenting opinion.

2. The California Department of Education (DOE) issued a legal advisory to the school districts, directing them to stop charging transportation fees because section 39807.5 violated the state constitution. *Id.* at 256, 825 P.2d at 440, 5 Cal. Rptr. 2d at 547. Twenty-five school districts instituted a suit against the DOE to determine the facial validity of the statute. *Id.* at 255, 825 P.2d at 439-40, 5 Cal. Rptr. 2d at 546-47. *Id.* The superior court granted judgment in favor of the DOE. *Id.* at 256, 825 P.2d at 440, 5 Cal. Rptr. 2d at 547. The Court of Appeal reversed, holding that section 39807.5 did not violate the state constitution. *Id.*

3. Section 39807.5 of the California Education Code provides:

> When the governing board of any school district provides for the transportation of pupils to and from schools in accordance with the provisions of Section 39800, or between the regular full-time day schools they would attend and the regular full-time occupational training classes attended by them as provided by a regional occupational center or program, the governing board of the district may require the parents and guardians of all or some of the pupils transported, to pay a portion of the cost of such transportation in an amount determined by the governing board.
>
> The amount determined by the board shall be no greater than the statewide average nonsubsidized cost of providing such transportation to a pupil on a publicly owned or operated transit system as determined by the Superintendent of Public Instruction, in cooperation with the Department of Transportation. For the purposes of this section, "nonsubsidized cost" means actual operating costs less federal subventions.
>
> The governing board shall exempt from these charges pupils of parents and guardians who are indigent as set forth in rules and regulations adopted by the board.
>
> No charge under this section shall be made for the transportation of handicapped children.
>
> Nothing in this section shall be construed to sanction, perpetuate, or promote the racial or ethnic segregation of pupils in the schools.

CAL. EDUC. CODE § 39807.5 (West Supp. 1992).

Article I, section 7 (the equal protection clause) of the California Constitution invalidated the measure.[4]

At the outset in *Arcadia*, the court faced a procedural challenge to this action. In 1985, a suit contesting the validity of section 39807.5 was instituted against the Fillmore school district and the Department of Education (DOE).[5] The court of appeal held that the law violated both the free school provision and the equal protection clause.[6] The Supreme Court of California denied review of this decision, but ordered it depublished.[7]

Twenty-five school districts then joined in this action to determine the facial validity of section 39807.5.[8] The victorious party in the original suit intervened and sought to have *Arcadia* dismissed on the basis of collateral estoppel.[9] The court refused to dismiss the suit, ruling that the public policy exception to collateral estoppel applied to this action.[10]

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4. *Arcadia*, 2 Cal. 4th at 255, 825 P.2d at 439, 5 Cal. Rptr. 2d at 546.

5. Salazar v. Honig, 246 Cal. Rptr. 837 (1988). *Salazar* was a taxpayers suit against the DOE, the State Superintendent of Public Instruction, and the Fillmore Unified School District. The suit claimed that the Fillmore district's implementation of section 39807.5 violated the state constitution. *Id.*

6. *Id.* at 842-43. After the filing of the suit, the Fillmore district stopped charging the transportation fees and was therefore dismissed from the suit. *Id.* at 838. The DOE then sought to have the 60 school districts that were still charging transportation fees named as indispensable parties. *Id.* at 839. The trial court, agreeing with the DOE, dismissed the suit because Salazar failed to join those districts. *Id.* The court of appeal declared that the dismissal was an abuse of discretion because the prohibitive costs in litigating the suit against 60 school districts unduly burdened Salazar's challenge to the constitutionality of the statute. *Id.* at 840-44.

7. *See id.* at 837. The court gave no explanation for denying review of precisely the same issue the court would later review in *Arcadia*. *See id.* at 842-43.

8. *Arcadia*, 2 Cal. 4th at 256, 825 P.2d at 440, 5 Cal. Rptr. 2d at 547.

9. *Id.* Collateral estoppel bars the party to a prior action, or one in privity with that party, from relitigating issues decided against the party in an earlier action. *See, e.g.*, City of Sacramento v. State, 50 Cal. 3d 51, 785 P.2d 522, 266 Cal. Rptr. 139 (1990) (holding that collateral estoppel applies unless the public interest requires that relitigation of a question of law not be foreclosed); 8 B. WITKIN, CALIFORNIA PROCEDURE, *Attack on Judgment in Trial Court* §§ 6-17 (3d ed. 1985) (discussing dismissal through collateral attacks).

10. *Arcadia*, 2 Cal. 4th at 259, 825 P.2d at 442, 5 Cal. Rptr. 2d at 549. The court declined to decide whether the school districts were in privity with the DOE, and thus bound by the *Salazar* ruling. It seems somewhat peculiar that the court decided that an exception to the collateral estoppel rules applied before determining whether collateral estoppel was applicable at all. The court cited *City of Sacramento*, 50 Cal. 3d 51, 785 P.2d 522, 266 Cal. Rptr. 139, in which the public policy exception to collateral estoppel was invoked in a suit involving the subversion of unemployment benefits. *Arcadia*, 2 Cal. 4th at 256, 825 P.2d at 440, 5 Cal. Rptr. 2d at 547.

The court noted that in the original suit, the DOE and the school districts had never presented evidence on the constitutionality of the statute.[11] Furthermore, the court reasoned that since the appellate court decision was depublished, it would be in the public interest for school districts to have a ruling that provided a uniform understanding of the issue.[12]

The majority opinion first addressed the facial validity of section 39807.5 against the free school guarantee contained in Article IX, section 5 of the California Constitution.[13] The free school provision states, in pertinent part, that "[t]he legislature shall provide for a system of common schools by which a free school shall be kept up and supported."[14] Initially, the court looked at the framers' intent.[15] Although the framers engaged in virtually no discussion of school transportation, the court reached the dubious conclusion that transportation was not included within the free school guarantee.[16]

The majority then sought to supplement this interpretation by looking to *Hartzell v. Connell*,[17] the leading case interpreting the free school provision.[18] The *Hartzell* court had determined that the guarantee ex-

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11. *Arcadia*, 2 Cal. 4th at 258, 825 P.2d at 441, 5 Cal. Rptr. 2d at 548. The court mentioned the "unusual history" of *Salazar* as a factor in applying the public policy exception, but did not address the court's own role in that history. *See supra* note 7.

12. *Arcadia*, 2 Cal. 4th at 285, 825 P.2d at 441, 5 Cal. Rptr. 2d at 548. Again, the court failed to acknowledge that its own decision to deny review, and to have *Salazar* depublished, created the very confusion that the court cited as justification for refusing collateral estoppel.

13. *Id.* at 259-60, 825 P.2d at 442-43, 5 Cal. Rptr. 2d at 549-50. The free school provision was adopted during the 1878-79 Constitutional Convention. The California electorate rejected its repeal at a general election in 1968. *Id.*

14. CAL. CONST. art. 9, § 5.

15. *Arcadia*, 2 Cal. 4th at 260, 825 P.2d at 443, 5 Cal. Rptr. 2d at 550.

16. *Id.* The court was able to find only one statement regarding transportation. One delegate told the convention about children who rode horses to and from school. The court claimed that this remark indicates that the framers did not consider transportation as part of the school system. *Id.* The court did not explain how the conclusion necessarily follows that the framers did not intend the free school guarantee to cover transportation.

17. 35 Cal. 3d 899, 679 P.2d 35, 201 Cal. Rptr. 601 (1984). Chief Justice Bird delivered the opinion of the court joined by Justices Broussard and Reynoso. Justices Mosk, Grodin, Kaus and Bird filed concurring opinions. Justice Richardson wrote a dissenting opinion. Since the current majority claimed that *Hartzell* provided the basis for *Arcadia*, it is worth noting that the only member of the court who participated in both decisions was Justice Mosk, who disputed the majority's interpretation of *Hartzell*.

18. *Arcadia*, 2 Cal. 4th at 261, 825 P.2d at 443, 5 Cal. Rptr. 2d at 550. In *Hartzell*, the Santa Barbara High School District sought to fund its extracurricular activities partly through participant fees. The court ruled that these fees violated the free school provision of the state constitution, because extracurricular activities were an

tended to "all activities which constitute an 'integral fundamental part of the elementary or secondary education' or which amount to 'necessary elements of any school's activity.'"[19] The *Arcadia* court adopted this test because it focuses on the educational character of the activity in question.[20] Thus, the essential determination becomes whether transportation is educational.[21] The majority found that it was not and, therefore, was not included within the free school guarantee.[22]

The court next addressed the equal protection claim. Because section 39807.5 exempts indigent students from the fee, the court rejected the contention that the statute discriminates against poor students.[23] In re-

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essential component of education. *Hartzell*, 35 Cal. 3d at 910, 679 P.2d at 42, 201 Cal. Rptr. at 608.

19. *Hartzell*, 35 Cal. 3d at 905, 679 P.2d at 39, 201 Cal. Rptr. at 605 (quoting Bond v. Ann Arbor Sch. Dist., 178 N.W.2d 484, 488 (Mich. 1970)). The court declined to adopt a test used by other states which restricts the free school guarantee to programs that are essential to the prescribed curriculum. *See, e.g.*, Smith v. Crim, 240 S.E.2d 884 (Ga. 1977).

20. *Arcadia*, 2 Cal. 4th at 262, 825 P.2d at 444, 5 Cal. Rptr. 2d at 551. It seems that this substantially narrows the test, or alters it altogether, since the inquiry becomes the educational nature of the activity, rather than its necessity to the school's activity. *See supra* note 19 and accompanying text.

21. *Arcadia*, 2 Cal. 4th at 263, 825 P.2d at 445, 5 Cal. Rptr. 2d at 552. Neither Salazar, nor the Board of Education, argued this point before the court. Rather, the City Terrace Coordinating Council, in an amicus brief, contended transportation was educational in nature. But the court rejected this argument, reasoning that enforcement of behavioral standards on buses did not make it an educational activity. *Id.* at 261, 825 P. 2d at 443-44, 5 Cal. Rptr. 2d at 550-51. The court distinguished the provision of textbooks on the basis that "transportation is not an expense peculiar to education." *Id.* at 264, 825 P.2d at 445, 5 Cal. Rptr. 2d at 552.

22. *Id.* The court then cited cases from other states upholding transportation fees based on school provisions in their state constitutions. *Id.* at 263-66, 825 P.2d at 445-46, 5 Cal. Rptr. 2d at 552-53. The *Hartzell* court relied heavily upon the Michigan Supreme Court's interpretation of their very similar provision. *See* Bond v. Ann Arbor Sch. Dist., 178 N.W.2d 484 (Mich. 1970). *See also* Sutton v. Cadillac Area Public Schools, 323 N.W.2d 582 (Mich. Ct. App. 1982) (holding that failure to provide free transportation to school did not violate free school provision); Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897 (N.D. 1987) (declaring that statute authorizing transportation fee was constitutional). It should be noted that the issue presented in *Sutton* is significantly different than the issue at stake in *Arcadia*. In *Sutton*, students were seeking the right to free transportation, whereas the challenge to section 39807.5 questions the imposition of fees where transportation is provided.

23. *Arcadia*, 2 Cal. 4th at 266, 825 P.2d at 447, 5 Cal. Rptr. 2d at 554. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 614, 487 P.2d 1241, 1262-63, 96 Cal. Rptr. 601, 622-23 (1971) (holding that based on equal protection, California must fund each public school equally because education is a fundamental right).

fusing to find section 39807.5 facially invalid, the court left open the possibility that its actual implementation could discriminate.[24]

Justice Mosk was the lone dissenter in *Arcadia*. He vigorously disputed the majority's interpretation of the free school guarantee.[25] In particular, he claimed that the majority had misinterpreted the test adopted in *Hartzell*.[26] Under Justice Mosk's application of the test, "[t]ransportation is essential to education because it is a prerequisite to it. For the student who cannot walk to school . . . a school bus is as essential to the process of education as the school building, the desk, the blackboard and the teacher."[27] Additionally, Justice Mosk was not convinced that the fee waiver provision of section 39807.5 saved the statute from violating the equal protection clause since the measure left the indigency determination to the individual school districts.[28]

The ruling in *Arcadia* is likely to produce a number of lawsuits challenging the school districts' individual plans for implementing section 39807.5.[29] The court provided little guidance as to how a transportation fee program could avoid constitutional problems.[30] *Arcadia* also indi-

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24. *Arcadia*, 2 Cal. 4th at 266, 825 P.2d at 447, 5 Cal. Rptr. 2d at 554.

25. *Id.* at 268, 825 P.2d at 448, 5 Cal. Rptr. 2d at 555 (Mosk, J., dissenting).

26. *Id.* (Mosk, J., dissenting). Justice Mosk focused solely on the essential nature of transportation, rather than its educational value. *Id.* (Mosk, J., dissenting). His opinion is buttressed by statements in *Hartzell* that the majority ignored, such as "[i]n guaranteeing free public schools, article IX, section 5 fixes the precise extent of the financial burden which may be imposed on the right to an education—none." *Hartzell*, 35 Cal. 3d at 911, 679 P.2d at 43, 201 Cal. Rptr. at 609. To Justice Mosk, the right to an education involves more than simply an education; it also requires satisfaction of the prerequisites necessary to obtain that education.

27. *Arcadia*, 2 Cal. 4th at 268, 825 P.2d at 449, 5 Cal. Rptr. 2d at 556 (Mosk, J., dissenting). Justice Mosk found the majority's distinction between textbooks and school buses unpersuasive. *Id.* (Mosk, J., dissenting). It seems that this debate is a continuation of the argument over how *Hartzell* should be interpreted. *See supra* note 26.

28. *Arcadia*, 2 Cal. 4th at 270, 825 P.2d at 449-50, 5 Cal. Rptr. 2d at 556-57 (Mosk, J., dissenting). Mosk's disagreement with the majority seems to revolve around practical considerations. The majority found no problem in allowing each district to define indigency and to set exemption procedures. *Id.* at 266, 825 P.2d at 447, 5 Cal. Rptr. 2d at 554. Justice Mosk was very concerned that those families left above the indigency line would still be faced with the choice of spending money on necessities or school transportation. *See infra* note 30.

29. Twenty-five school districts were joined as plaintiffs in *Arcadia*. These districts are likely to begin imposing transportation fees. At the time of the *Salazar* ruling, 1008 out of 1049 school districts provided transportation to their students, but only 60 were charging fees. *Salazar*, 246 Cal. Rptr. at 839. Thus, the *Arcadia* ruling creates the potential for a deluge of suits.

30. The court simply said that proper administration involves not denying transportation to any student on the basis of poverty. *Arcadia*, 2 Cal. 4th at 266, 825 P.2d at 447, 5 Cal. Rptr. 2d at 554. The court did not address the problems cited by

cates that the present court is unlikely to interfere with the legislature's choices regarding school finance.[31]

DAVID C. KNOBLOCK

III. CONSUMER PROTECTION

The regulatory scheme under Business and Professions Code section 5058 constitutionally prohibits unlicensed persons from using the terms "accountant" or "accounting," insofar as those terms are potentially misleading and are likely to confuse the general public as to the user's licensed or nonlicensed status: **Moore v. California State Board of Accountancy.**

I. INTRODUCTION

In *Moore v. California State Board of Accountancy*,[1] the California Supreme Court held that prohibiting the use of the terms "accountant" and "accounting" by persons not licensed by the State Board of Accountancy (the Board) is constitutional where those terms are likely to confuse or mislead the public as to the user's licensed or nonlicensed status.[2] These terms are defined in section two, title sixteen, of the California Code of Regulations (Regulation 2)[3] and enforced under the catch-all

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the court of appeal in *Salazar*. That court heard evidence that some families were not informed of the indigency exemption, that some families were not even permitted to apply because the school refused to accept the application, and that some families were forced to choose between buying food and buying a bus pass for their children. *Salazar*, 246 Cal. Rptr. at 839.

31. The court seemed to signal that Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), represented the highmark of judicial intervention in the area of school finance. *See supra* note 23. Despite indications that transportation fees would impose greater burdens on some families, the majority declined to overturn the statute. *See e.g.*, *Right to Meaningful Education in California*, 10 PACIFIC L.J. 991 (1979).

1. 2 Cal. 4th 999, 831 P.2d 798, 9 Cal. Rptr. 2d 358 (1992) (4-3 decision). Justice Baxter wrote the majority opinion for the court and was joined by Chief Justice Lucas and Justices Panelli and Arabian. Justice Mosk wrote a dissenting opinion. Justice George wrote a separate dissenting opinion in which Justice Mosk and Justice Kennard joined.

2. *Id.* at 1005, 831 P.2d at 800, 9 Cal. Rptr. 2d at 360.

3. CAL. CODE REGS. tit. 16, § 2 (1946). Section 2 states:

The following are titles or designations likely to be confused with the titles

provision in section 5058 of the Business and Professions Code[4] (all further references to statutes are to the Business and Professions Code unless otherwise specified). However, the court further held that the use of these terms in conjunction with modifiers that eliminate any confusion as to the user's status may not be prohibited.[5]

Through the Accountancy Act,[6] the California Legislature reserved the practice of public accountancy[7] solely for licensees of the Board.[8] Section 5058 expressly prohibits unlicensed persons from using terms that are "likely to be confused" with the names "certified public accountant" or "public accountant."[9] Pursuant to its rule-making authority, the Board adopted Regulation 2, which expressly prohibits unlicensed persons from using the terms "accountant" in describing themselves, or "accounting" in describing their services.[10]

II. STATEMENT OF THE CASE

Bonnie Moore, an unlicensed accountant, is president of Accounting Center, a California corporation.[11] She has a college degree with a major in accounting, but she has never taken the Certified Public Accountant examination and does not intend to do so.[12] Although Moore meets the educational requirements necessary to take the examination, she does not meet the experience requirement.[13] Accounting Center designs and installs basic accounting systems for small businesses. The firm also

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Certified Public Accountant and Public Accountant within the meaning of Section 5058 of the Business and Professions Code:

(a) "Accountant," "auditor," "accounting," or "auditing," when used either singly or collectively or in conjunction with other titles.

(b) Any other titles or designations which imply that the individual is engaged in the practice of public accountancy.

Id.

4. Section 5058 provides in pertinent part: "No person or partnership shall assume or use the title or designation 'chartered accountant,' 'certified accountant,' 'enrolled accountant,' 'registered accountant' or 'licensed accountant,' or any other title or designation likely to be confused with 'certified public accountant' or 'public accountant' . . . ." CAL. BUS. & PROF. CODE, § 5058 (West 1990).

5. *Moore*, 2 Cal. 4th at 1005, 831 P.2d at 800, 9 Cal. Rptr. 2d at 360.

6. CAL. BUS. & PROF. CODE §§ 5000-5173 et seq. (West 1990).

7. *See* CAL. BUS. & PROF. CODE § 5051 (West 1990) (defining the practice of public accountancy).

8. *Moore*, 2 Cal. 4th at 1004, 831 P.2d at 800, 9 Cal. Rptr. 2d at 360.

9. *Id.*

10. *Id.*

11. *Moore*, 2 Cal. 4th at 1005, 831 P.2d at 800-01, 9 Cal. Rptr. 2d at 360-61.

12. *Id.* at 1006, 831 P.2d at 801, 9 Cal. Rptr. 2d at 361.

13. *Id.*

performs internal audits of its clients' books.[14]

Moore uses the terms "accountant" and "accounting" to describe herself, her services, and the services of the firm in 90% of her advertising.[15] Furthermore, her business is referred to on building directories, in telephone directories, and in radio and television advertising as "Accounting Center." The Board issued a letter to Moore ordering her and Accounting Center to cease and desist from using the terms "accountant" and "accounting" to describe herself, her services, or the business of Accounting Center.[16]

Bonnie Moore, Accounting Center, and the California Association of Independent Accountants (CAIA)[17] filed this lawsuit seeking declaratory relief and a permanent injunction against the Board.[18] The plaintiffs claimed that section 5058 does not bar the use of generic terms such as accountant and accounting, and that Regulation 2 improperly expands the scope of section 5058.[19] The Board answered and filed a cross-complaint for injunctive relief against the plaintiffs and 2000 Doe defendants.[20]

The Board, through the Office of the Attorney General, conducted a poll through an independent research firm to determine whether the public perceived persons as being licensed when they represent themselves as accountants or when they offer to perform accounting services.[21] Two questions were included in the poll: (1) "Do you think that persons who refer to themselves as accountants in advertising to the public are required to be licensed by the State of California?" and (2) "Do you think persons who advertise accounting services to the public are required to be licensed by the State of California to offer such services?"[22] The results from the first question showed that fifty-five percent of those surveyed believed that a license was required, twenty-six percent did not believe a license was required and nineteen percent did not

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14. *Id.*
15. *Id.*
16. *Id.* at 1005, 831 P.2d at 801, 9 Cal. Rptr. 2d at 361.
17. CAIA is a non-profit membership organization representing approximately 700 individuals in California.
18. *Moore*, 2 Cal. 4th at 1005, 831 P.2d at 801, 9 Cal. Rptr. 2d at 361.
19. *Id.* at 1009, 831 P.2d at 803, 9 Cal. Rptr. 2d at 363.
20. *Id.* at 1005-06, 831 P.2d at 801, 9 Cal. Rptr. 2d at 361. Does 1-1000 were CAIA members and Does 1001-2000 were individuals who have, and continue to transact, business in California. *Id.*
21. *Id.* at 1007, 831 P.2d at 802, 9 Cal. Rptr. 2d at 362.
22. *Id.*

know. The results of the second question were fifty-three percent, twenty-nine percent and eighteen percent, respectively.[23]

The trial court granted the Board's request for permanent injunction against all plaintiffs, thereby prohibiting them from using the terms "accountant" and "accounting" when referring to themselves or their services.[24] The court of appeal affirmed the decision of the trial court but modified the injunction to prohibit the use of the terms only when used without a modifier, qualifier, disclaimer, or warning that would eliminate any possible confusion.[25] The supreme court affirmed, holding that the legislature intended section 5058 to apply to generic terms that may potentially mislead the public[26] and that Regulation 2 was within the Board's authority pursuant to the Accountancy Act.[27]

II. TREATMENT OF THE CASE

A. *Majority Opinion*

Justice Baxter, writing for the majority, began the opinion by providing a brief history of the regulation of public accountancy in California and a review of the authority granted to the Board.[28] He then confronted the principal issue of how section 5058 should be interpreted. The plaintiffs argued that the statute should be construed under the principle of *ejusdem generis* which would limit the catch-all provision to terms similar to those already enumerated in the section.[29] Since section 5058 expressly prohibits five titles containing the term "accountant" used with a modifier, the legislature would have included "accountant" without a modifier if it had intended to prohibit its use as well.[30] In rejecting this argument, the court ruled that application of the *ejusdem generis* doctrine is inap-

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23. *Id.*

24. *Id.* at 1008, 831 P.2d at 802, 9 Cal. Rptr. 2d at 362.

25. *Id.* at 1008, 831 P.2d at 803, 9 Cal. Rptr. 2d at 363.

26. *Id.* at 1017, 831 P.2d at 809, 9 Cal. Rptr. 2d at 369.

27. *Id.* at 1015, 831 P.2d at 807, 9 Cal. Rptr. 2d at 367.

28. *Id.* at 1010, 831 P.2d at 804, 9 Cal. Rptr. 2d at 364. For general information on regulating the use of titles and designations by accountants, see 1 AM. JUR. 2d *Accountants* § 2 (1962); 1 CAL. JUR. 3d *Accountants* §§ 14-15 (1972); 1 C.J.S. *Accountants* § 4 (1985).

29. *Moore*, 2 Cal. 4th at 1013, 831 P.2d at 806, 9 Cal. Rptr. 2d at 366. Under this principle, if a statute contains a list of items, the meaning of each item must be determined in relation to the others so that similar items will be treated uniformly. Accordingly, an item must be interpreted restrictively when a more expansive construction would make other items unnecessary or redundant. *Id.* at 1012, 831 P.2d at 805, 9 Cal. Rptr. 2d at 365. For general information on the doctrine of *ejusdem generis* see 73 AM. JUR. 2d *Statutes* §§ 214-216 (1974); 28 C.J.S. *Ejusdem* (1941); 82 C.J.S. *Statutes* § 332 (1953); 58 CAL. JUR. 3d *Statutes* § 130 (1980).

30. *Moore*, 2 Cal. 4th at 1012, 831 P.2d at 805, 9 Cal. Rptr. 2d at 365.

propriate when it would frustrate the underlying legislative intent.[31] Interpretating section 5058 under *ejusdem generis* would contradict the statute's purpose of protecting the public from being misled about the license status of a provider of accounting services, the court reasoned, because the legislature included a catch-all provision proscribing the use of "any other title or designation that is likely to be confused with 'certified public accountant' or 'public accountant.'"[32]

Turning to a discussion of the legality of Regulation 2, the court stated that it must determine only whether the regulation is "'within the scope of the authority conferred'" and "'reasonably necessary to effectuate the purpose of the statute.'"[33] This determination is made "with a strong presumption of regularity" and with deference to the agency's expertise.[34] The court ruled that Regulation 2 was within the Board's authority as granted in section 5010[35] and was reasonably necessary to effectuate the purpose of section 5058.[36] In support of its holding, the court referred to a California Poll survey[37] indicating that a majority of those polled believed that persons representing themselves as accountants or offering accounting services had to be licensed by the State of California.[38] The court also noted that the legislature has not tried to amend section 5058 to restrict the Board's authority since Regulation 2 was enacted almost forty-four years ago, even though section 5058 had twice been amended in that period of time.[39] Due to a California Attorney General Opinion[40] and an appellate court decision[41] published since the

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31. *Id.* at 1013, 831 P.2d at 806, 9 Cal. Rptr. 2d at 366.

32. *Id.* (quoting CAL. BUS. & PROF. CODE § 5058 (West 1990)).

33. *Id.* at 1015, 831 P.2d at 807, 9 Cal. Rptr. 2d at 367 (quoting CAL. GOV'T CODE §§ 11342.1-11342.2 (West 1992)).

34. *Id.*

35. Section 5010 provides in pertinent part: "The board may adopt, repeal, or amend such regulations as may be reasonably necessary and expedient for the orderly conduct of its affairs and for the administration of this chapter." CAL. BUS. PROF. CODE § 5010 (West 1990).

36. *Moore*, 2 Cal. 4th at 1015, 831 P.2d at 807, 9 Cal. Rptr. 2d at 367.

37. *Id.* at 1007, 831 P.2d at 802, Cal. Rptr. 2d at 362. *See supra* notes 21-23 and accompanying text.

38. *Moore*, 2 Cal. 4th at 1015-16, 831 P.2d at 807-08, 9 Cal. Rptr. 2d at 367-68.

39. *Id.* at 1017, 831 P.2d at 809, 9 Cal. Rptr. 2d at 369.

40. *Id.* at 1018, 831 P.2d at 809, 9 Cal. Rptr. 2d at 369. The Attorney General concluded:

> The use of the word "accounting" on a building directory and an office door by an unlicensed individual is a representation to the public that such individual is skilled in accounting and that the user is qualified and ready to

adoption of Regulation 2, the court presumed that the legislature had knowledge of the Board's actions and of Regulation 2.[42]

The First Amendment and the commercial speech doctrine formed the basis for the next argument. The defendant claimed that Regulation 2 actually prohibited "any and all use" of the terms "accountant" and "accounting" by unlicensed persons without regard to whether those terms are qualified so as to avoid confusion.[43] The commercial speech doctrine, as defined by the United States Supreme Court, allows states to prohibit misleading advertising but prevents an absolute ban on potentially misleading information that can be presented in a manner that eliminates the confusion.[44] In fact, the United States Supreme Court held in *In Re R.M.J.*[45] that "although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception."[46] Relying on this holding, Justice Baxter concluded that the plaintiffs have a First Amendment right to use the terms "accountant," "accounting," and "accounting services" as long as they are "qualified by an explanation, disclaimer or warning" that eliminates the potential for confusion about those terms or the user's true status as a licensed or unlicensed accountant.[47]

B. Dissenting Opinions

Justice Mosk wrote a dissenting opinion criticizing the majority's conclusions concerning the validity of Regulation 2, the meaning of section 5058, and the implications of the First Amendment.[48] He reasoned that

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perform professional services. Such a representation by an unlicensed individual is in violation of the Accountancy Act (division III, chapter 1, Business and Professions Code).

46 Op. Cal. Att'y Gen. 140, 141 (1965).

41. People v. Hill, 66 Cal. App. 3d 320, 136 Cal. Rptr. 30 (1977). This case concerned an unlicensed individual's business name "A-Accounting—Jack M. Hill Co." The *Hill* court recognized that unlicensed persons may offer certain basic accounting services but concluded that the risk of confusing the public as to whether the person is licensed justified barring unlicensed persons from using the terms "accounting" and "accounting services" when referring to themselves. *Id.* at 328-30, 136 Cal. Rptr. at 34-35.

42. *Moore*, 2 Cal. 4th at 1017-18, 831 P.2d at 809-10, 9 Cal. Rptr. 2d at 369-70.

43. *Id.* at 1020, 831 P.2d at 811, 9 Cal. Rptr. 2d at 371.

44. *Id. See* Peel v. Attorney Regulatory & Disciplinary Comm'n, 496 U.S. 91 (1990); In Re R.M.J., 455 U.S. 191 (1981); Bates v. State Bar 433 U.S. 350 (1977); Virginia Pharmacy Bd. v. Consumer Council, 425 U.S. 748 (1975).

45. 455 U.S. 191 (1981).

46. *Id.* at 203.

47. *Moore*, 2 Cal. 4th at 1023, 831 P.2d at 813, 9 Cal. Rptr. 2d at 373.

48. *Id.* at 1025, 831 P.2d at 814, 9 Cal. Rptr. 2d at 374 (Mosk, J., dissenting).

Regulation 2 must be invalid because it prohibits what the legislature already permitted by statute.[49] Section 5052[50] allows unlicensed persons to perform accounting services related to bookkeeping functions, thereby allowing them to perform accounting; by definition, therefore, they are accountants.[51] The result is that Regulation 2 directly contradicts section 5052 and must be invalid.[52]

Furthermore, Justice Mosk argued, Regulation 2 should be declared invalid because at the time of its adoption the Board consisted exclusively of licensed accountants.[53] Since a large part of accounting work may be performed by either licensed or unlicensed accountants, the Board had a pecuniary interest in preventing unlicensed persons from advertising accounting services.[54] Rules created by a regulatory body with a pecuniary interest in restricting competitors are looked upon with disfavor.[55]

As to interpretating section 5058, Justice Mosk argued that since the term "accountant" was commonly used at the time section 5058 was enacted, the legislature would have expressly included the term if it had intended to restrict its use.[56] He supported this position by noting that every jurisdiction that has considered this issue, except Texas, has allowed unlicensed persons to use the terms "accountant" and "accounting."[57]

Justice Mosk questioned the majority's holding by noting its possible noncompliance with the First Amendment. He argued that since section

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

50. Section 5052 provides in pertinent part:

> Nothing in this chapter shall apply to any person who as an employee, independent contractor, or otherwise, contracts with one or more persons, organizations, or entities, for the purpose of keeping books, making trial balances, statements, making audits or preparing reports, all as a part of bookkeeping operations, provided that such trial balances, statements, or reports are not issued over the name of such person as having been prepared by or examined by a certified public accountant or public accountant.

CAL. BUS. & PROF. CODE § 5052 (West 1990).

51. *Moore*, 2 Cal. 4th at 1025, 831 P.2d at 814, 9 Cal. Rptr. 2d at 374 (Mosk, J., dissenting).

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

53. *Id.* at 1026, 831 P.2d at 815, 9 Cal. Rptr. 2d at 375 (Mosk, J., dissenting).

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

55. *Id.* at 1026-27, 831 P.2d at 815, 9 Cal. Rptr. 2d at 375 (Mosk, J., dissenting).

56. *Id.* at 1025, 831 P.2d at 814-15, 9 Cal. Rptr. 2d at 374-75 (Mosk, J., dissenting).

57. *Id.* at 1025-26, 831 P.2d at 815, 9 Cal. Rptr. 2d at 375 (Mosk, J., dissenting).

5052 permits unlicensed persons to perform accounting services, the terms "accountant" and "accounting" are wholly accurate and, therefore, protected by the First Amendment and the commercial speech doctrine.[58]

Justice George wrote a dissenting opinion joined by Justices Kennard and Mosk.[59] The George dissent criticized the majority's dismissal of the *ejusdem generis* principle and the absence of foundation for the majority's interpretation of section 5058.[60] Justice George argued that the doctrine of *ejusdem generis* should apply to the present case.[61] Under this doctrine, since each item enumerated in section 5058 contains the term "accountant" coupled with a modifier, the catch-all phrase would not include the unmodified term "accountant."[62]

Disagreeing with the majority's determination that Regulation 2 was valid, Justice George based his argument on the rule of law that administrative regulations that expand the scope of a statute are void even where the statute is subsequently reenacted without change.[63] Thus, Regulation 2 is invalid because it expands the scope of section 5058.[64] Justice George also questioned the authority of the Board to adopt Regulation 2 because the regulation constituted a "significant alteration of the statutory scheme," and therefore any changes, whether beneficial or not, must be left to the legislature.[65]

Finally, Justice George disputed the poll survey upon which the majority relied. He pointed out that the real issue in this case is the prohibition against unlicensed persons using titles that might be confused with "public accountant" and "certified public accountant."[66] But the survey only revealed that the public believes all accountants must be licensed, a belief which is irrelevant to this issue.[67] Justice George concluded that nothing in the Accountancy Act prohibits unlicensed persons from using the terms "accountant" or "accounting" to describe themselves or their

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58. *Id.* at 1026, 831 P.2d at 815, 9 Cal. Rptr. 2d at 375 (Mosk, J., dissenting).

59. *Id.* at 1027, 831 P.2d 816, 9 Cal. Rptr. 2d at 376 (George, J., dissenting).

60. *Id.* at 1031, 831 P.2d at 818, 9 Cal. Rptr. 2d at 378 (George, J., dissenting). *See supra* notes 29-32 and accompanying text.

61. *Moore*, 2 Cal. 4th at 1030, 831 P.2d at 818, 9 Cal. Rptr. 2d at 378 (George, J., dissenting). The doctrine of *ejusdem generis* provides that "'where general words follow the enumeration of particular classes or persons or things, the general words will be construed as applicable only to those persons or things of the same general nature or class as those enumerated.'" *Id.* (George, J., dissenting) (quoting Harris v. Capital Growth Indus. XIV, 52 Cal. 3d 1142, 1160 (1991)).

62. *Id.* (George, J. dissenting).

63. *Id.* at 1031, 831 P.2d at 819, 9 Cal. Rptr. 2d at 379 (George, J., dissenting).

64. *Id.* at 1032, 831 P.2d at 819, 9 Cal. Rptr. 2d at 379 (George, J., dissenting).

65. *Id.* at 1032-33, 831 P.2d at 819, 9 Cal. Rptr. 2d at 379 (George, J., dissenting).

66. *Id.* at 1033, 831 P.2d at 820, 9 Cal. Rptr. 2d 380 (George, J., dissenting).

67. *Id.* (George, J., dissenting).

services.[68]

IV. CONCLUSION

The court concluded that the use of the terms "accountant" or "accounting" by unlicensed persons could mislead consumers when used without qualifiers indicating that the persons are not licensed accountants. The court ruled that the Board's regulation prohibiting unlicensed persons from using those terms was justified and in line with existing statutes.

The effect of this decision on the accounting profession is significant, considering that there are approximately 65,000 licensed accountants in the state along with 60,000 unlicensed persons performing limited accounting services.[69] The effect, however, is not limited to accountants alone. The ruling strengthens governmental regulations that already limit advertising by unlicensed professionals in a variety of practice areas who perform functions similar to those performed by licensed professionals.[70] Thus, licensed professionals in many fields will gain an advantage over their unlicensed competition. Consumers will receive the benefit of being protected from potentially deceptive and misleading advertisements of unlicensed persons offering professional services.

DAVID C. WRIGHT

IV. CRIMINAL LAW

In sex offense cases, a court may instruct the jury that the law does not require corroboration of witness testimony to support a conviction, while further instructing the jury to carefully review all testimony relating to a fact that is sought to be proved by the testimony of a single witness: **People v. Gammage.**

In *People v. Gammage*,[1] the California Supreme Court addressed

68. *Id.* at 1034, 831 P.2d at 820, 9 Cal. Rptr. 2d at 380 (George, J., dissenting).

69. Philip Hager, *Court Upholds Ad Restrictions on Accountants*, L.A. TIMES, July 3, 1992, at A3.

70. *Id.*

1. 2 Cal. 4th 693, 828 P.2d 682, 7 Cal. Rptr. 2d 541 (1992). Justice Arabian

whether it was proper for a trial court to charge the jury with the following combination of instructions: first, to carefully review all testimony related to a fact being proved by uncorroborated witness testimony[2], and second, that corroboration of witness testimony is not legally required to convict the defendant.[3] The supreme court held that the combination of instructions is appropriate in a sex offense case,[4] and thus resolved contradictory appellate decisions on the issue.[5]

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authored the majority opinion with Chief Justice Lucas and Justices Panelli, Baxter, and George concurring. Justice Mosk and Justice Kennard each delivered separate concurring opinions. *Id.* at 702-07, 828 P.2d at 688-91, 7 Cal. Rptr. 2d at 547-50.

In *Gammage*, a 16-year-old girl accompanied friends to the appellant's apartment where, she alleged, she was sexually assaulted for three to four hours by appellant and others. Appellant claimed that the alleged victim had orally copulated him of her own free will and that he had not raped her. *Id.* at 696, 828 P.2d at 684, 7 Cal. Rptr. 2d at 543.

2. *Id.* at 696, 828 P.2d at 684, 7 Cal. Rptr. 2d at 542; CALJIC No. 2.27 (5th ed. 1992). This instruction, as given by the trial court, provided:

> Testimony as to any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact *required to be established by the prosecution* to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.

Gammage, 2 Cal. 4th at 696, 828 P.2d at 684, 7 Cal. Rptr. 2d at 543 (quoting CALJIC No. 2.27 (4th ed. 1986 rev.)). *See generally* 17 CAL. JUR. 3D *Criminal Law* § 620 (3d ed. 1985 & Supp. 1992) (stating that the jury should be instructed as provided in CALJIC No. 2.27 in *every* criminal case in which no corroboration is required). The court in *Gammage* specifically stated that it expressed no opinion as to other cases, thus confining its holding to sex crimes. *Gammage*, 2 Cal. 4th at 702, 828 P.2d at 688, 7 Cal. Rptr. 2d at 547.

3. *Id.* at 696-97, 828 P.2d at 684, 7 Cal. Rptr. 2d at 543; CALJIC No. 10.60 (5th ed. 1992) (formerly CALJIC No. 10.21 (4th ed. 1970)) [hereinafter 10.60]. This instruction, as given by the trial court, provided that "[i]t is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence." *Gammage*, 2 Cal. 4th at 696-97, 828 P.2d at 684, 7 Cal. Rptr. 2d at 543. *See generally* Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4TH 120 (1984).

4. *Gammage*, 2 Cal. 4th at 702, 828 P.2d at 688, 7 Cal. Rptr. 2d at 547. *See generally* 4 R.E. ERWIN, ET AL., CALIFORNIA CRIMINAL DEFENSE PRACTICE, *Trial* §§ 85.02[1], 85.04[1][a] (1992) ("All judges and most counsel use *California Jury Instructions, Criminal* (CALJIC)."). *But see* 5 B.E. WITKIN & N.L. EPSTIEN, CALIFORNIA CRIMINAL LAW, *Trial* § 2934(e) (2d ed. 1989) (stating that instructions not authorized by CALJIC are not thereby called into question).

5. The supreme court first discussed the conflicting appellate court decisions. In *People v. McIntyre*, 115 Cal. App. 3d 899, 176 Cal. Rptr. 3 (Cal. Ct. App. 1981), the Fourth District stated that, due to the private nature of a sex offense case, the jury's decision often depends solely on the credibility of the accused versus the credibility of the accuser. *Id.* at 907, 176 Cal. Rptr. at 7-8. Thus, an instruction that corroboration is not required is proper. *Id. Accord People v. Jamison*, 150 Cal. App. 3d. 1167,

The supreme court stated that, independently, each of the jury instructions at issue is an accurate statement of the law.[6] The court concluded that together, the instructions are no less accurate or unfair to either side than when they are proferred separately.[7] In substantiating its conclusion, the court noted that each individual instruction concentrates on different jury functions.[8] The court stated that while *California Jury Instruction, Criminal* (CALJIC) number 2.27 causes the jury to be aware of the standard for evaluating a fact proved by uncorroborated testimony,[9] CALJIC number 10.60 expresses the substantive legal principle that the law does not require corroboration of witness testimony to support a

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1173, 198 Cal. Rptr. 407, 411 (Cal. Ct. App. 1989). However, in *People v. Pringle*, 177 Cal. App. 3d 785, 223 Cal. Rptr. 214 (Cal. Ct. App. 1986) (overruled by People v. Gammage, 2 Cal. 4th 693, 828 P.2d 682, 7 Cal. Rptr. 2d 541 (1992)), the same division suggested, in dicta, that the combination of CALJIC number 2.27 and CALJIC number 10.60 raises a fallacious inference "that witnesses other than the prosecuting witness need be viewed with caution." *Id.* at 790, 223 Cal. Rptr. at 217. *Accord People v. Adams*, 186 Cal. App. 3d 75, 79, 230 Cal. Rptr. 588, 590 (1986) (expressly finding "no need for CALJIC No. [10.60] when No. 2.27 is given"), *overruled by* People v. Gammage, 2 Cal. 4th 697, 828 P.2d 682, 7 Cal. Rptr. 2d 541 (1992).

This issue was also addressed again by the Fifth District in People v. Blassingill, 199 Cal. App. 3d 1413, 245 Cal. Rptr. 599 (1988). The *Blassingill* court found that it was proper to give both instructions because it makes clear to the jury that the prosecutrix testimony, which is often subject to aggressive denigration in both cross-examination and defense arguments, is not legally required to be corroborated by other evidence. *Id.* at 1422, 245 Cal. Rptr. at 605.

The Second District Court of Appeal in the present case rejected the appellant's contention that the combination of jury instructions caused the jury to scrutinize his testimony more rigorously than that of his accuser. People v. Gammage, 3 Cal. App. 4th 974, 988, 275 Cal. Rptr. 28, 36 (1990). *Accord People v. Hollis*, 235 Cal. App. 3d 1521, 1525-26, 1 Cal. Rptr. 2d 524, 527 (1991) (finding that issuing both instructions to the jury is proper because it strikes a balance "which protects the rights of both the defendant and the complaining witness"). However, the appellate court disapproved of the second sentence of CALJIC number 2.27 and implored the supreme court to reevaluate it. *Gammage*, 3 Cal. App. 4th at 988, 275 Cal. Rptr. at 36.

6. *Gammage*, 2 Cal. 4th 693, 700, 828 P.2d 682, 686, 7 Cal. Rptr. 2d 541, 545 (1992).

7. *Id.* at 701, 828 P.2d at 687, 7 Cal. Rptr. 2d at 546. *But see* 5 B.E. WITKIN & N.L. EPSTIEN, CALIFORNIA CRIMINAL LAW, *Trial* § 2946(3) (2d ed. 1989) (stating that CALJIC No. 2.27 must be given when the jury is instructed as provided in CALJIC No. 10.60). *See generally* Kristine C. Karnezis, Annotation, *Propriety of, or Prejudicial Effect of Omitting or Giving, Instruction to Jury, in Prosecution for Rape or Other Sexual Offense, as to Ease of Making or Difficulty of Defending Against Such a Charge*, 92 A.L.R.3D 866 (1978) (providing relevant source and background material).

8. *Gammage*, 2 Cal. 4th at 700, 828 P.2d at 687, 7 Cal. Rptr. 2d at 546.

9. *Id.*

conviction of the accused.[10] Moreover, the court noted that CALJIC number 10.60 does not unduly harm the defendant by expressly restating what the jury may glean from CALJIC number 2.27, that corroboration is not required.[11] The court stated that even if it were to make the over-reaching assumption that the jury knows that corroboration of witness testimony is not required based on CALJIC number 2.27, no harm would be done by specifically instructing the jury so as to eliminate any potential misunderstanding.[12] Finally, the court found that the combination of the instructions does not elevate the testimony of the accuser above that of the accused.[13] The court reasoned that because the trial court is required to instruct the jury that it must find the defendant guilty beyond a reasonable doubt, which places a heavy burden of persuasion on the uncorroborated testimony of the accuser, the no-corroboration instruction effectuates a balance between protecting the rights of the accused and the alleged victim.[14] The court concluded that the credibility contest nature of a sex offense trial makes the instruction that no-corroboration is required to convict, given in addition to the instruction that suggests careful review of all testimony on a fact that is sought to be proved by the testimony of a single witness, most appropriate.[15]

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10. *Id.* at 700-01, 828 P.2d at 687, 7 Cal. Rptr. 2d at 546. *See generally* 6 R.E. ERWIN, ET AL., CALIFORNIA CRIMINAL DEFENSE PRACTICE, *Crimes* § 142.13[2][a] (1992 Supp. 1991) (stating that the jury must be instructed *sua sponte* as to the instruction provided in CALJIC No. 2.27). *But see* 4 R.E. ERWIN, ET AL., CALIFORNIA CRIMINAL DEFENSE PRACTICE, *Trial* § 85.02[2][b] (1992) ("Cautionary instructions need not be given *sua sponte* when the evidence is being admitted against only one party.").

11. *Gammage*, 2 Cal. 4th at 701, 828 P.2d at 687, 7 Cal. Rptr. 2d at 546. *But see* 21 CAL. JUR. 3d *Criminal Law* § 3065 (3d ed. 1985) ("Instructions[,] . . . the subject matter of which is fully covered by other instructions that correctly state the law, though in a different phraseology, may . . . be refused, particularly where the substance of the instructions given is more favorable to the defendant than that of the accused.").

12. *Gammage*, 2 Cal. 4th 693, 701, 828 P.2d 682, 687, 7 Cal. Rptr. 2d 541, 546 (1992). *But see* 21 CAL. JUR. 3d *Criminal Law* § 3091 (3d ed. 1985) ("The instructions to the jury should be general and not confined to the testimony on one side of the case.").

13. *Gammage*, 2 Cal. 4th at 701, 828 P.2d at 687, 7 Cal. Rptr. at 546. *See also* 21 CAL. JUR. 3d *Criminal Law* § 3092 (3d ed. 1985) ("Where a cautionary instruction is necessary to ensure proper consideration of the evidence by the jury, the court should give it on its own motion."); *see generally* 17 CAL. JUR. 3d *Criminal Law* § 3091 (3d ed. 1985 & supp. 1992) (expressing that CALJIC No. 10.60 does not give the prosecutrix testimony undue prominence nor create an inference of guilt).

14. *Gammage*, 2 Cal. 4th at 701, 428 P.2d at 687, 7 Cal. Rptr. 2d at 546.

15. *Id.* at 702, 828 P.2d at 688, 7 Cal. Rptr. 2d at 547. Justice Mosk, concurring, reasoned that because of its impermissible focus, the no-corroboration instruction should be prohibited. *Id.* at 703, 828 P.2d at 688, 7 Cal. Rptr. 2d at 547 (Mosk, J., concurring). Justice Mosk declared that CALJIC No. 2.27 unambiguously makes it known to the jury that corroboration is not needed to support a conviction. *Id.* at

In *People v. Gammage*, the California Supreme Court resolved contradictory appellate court decisions regarding the propriety of a trial court instructing the jury to carefully review the testimony of all witnesses when a fact is sought to be proved by uncorroborated testimony, while further instructing the jury that corroboration is not legally required to support a conviction of the defendant.[16] The supreme court concluded that it is appropriate for the trial court to submit both instructions to the jury.[17]

The combination of CALJIC numbers 2.27 and 10.60 may give rise to an improper inference by the jury that it should view the accuser's testimony in a more favorable light than that of the accused.[18] In order to combat this inference, a trial attorney defending an alleged sexual offender would be well advised to request that the judge, in voir dire of prospective jurors, ask whether they would weigh the testimony of the alleged victim more heavily than that of the accused, if instructed that it is not essential that witness testimony be corroborated in order to support a conviction of a sexual offense. If the judge complies with the trial lawyer's request, improper interpretation of the jury instructions is effectively foreclosed at an early stage of the trial.

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704, 828 P.2d at 689, 7 Cal. Rptr. 2d at 548 (Mosk, J., concurring). Moreover, Justice Mosk concluded that continuing to instruct the jury that corroboration is not required to support a conviction may be prejudicial because the jury may misunderstand the instruction to mean that it should give more weight to the alleged victim's testimony, because her testimony is expressly pointed out in the second instruction. *Id.* at 705, 828 P.2d at 690, 7 Cal. Rptr. 2d at 549 (Mosk, J., concurring).

Justice Kennard, concurring in the court's final decision, wrote separately because she did not believe that use of the no-corroboration instruction should be promoted because it repeats the substance of instruction number 2.27. *Id.* at 706, 828 P.2d at 690, 7 Cal. Rptr. 2d at 549 (Kennard, J., concurring). Justice Kennard reasoned that because of the marginal value and repetitive nature of CALJIC number 10.60, it is unnecessary and should not be given in an effort to balance the accused and accuser's rights. *Id.* at 706, 828 P.2d at 690-91, 7 Cal. Rptr. 2d at 549-550 (Kennard, J., concurring).

16. *Id.* at 702, 828 P.2d at 688, 7 Cal. Rptr. at 547.

17. *Id.*

18. *See id.* at 705, 828 P.2d at 690, 7 Cal. Rptr. 2d at 549 (Mosk, J., concurring) (relating that because the alleged victim's testimony is expressly pointed out in CALJIC No. 10.60, the jury may draw an improper inference that her testimony should be accepted as true).

V. EMPLOYMENT LAW

Under California Government Code section 12926(c), an employer with five or more full- or part-time employees on its payroll is subject to the authority of the Fair Employment and Housing Commission, regardless of whether fewer than five employees work on any given day: **Robinson v. Fair Employment and Housing Commission.**

I. INTRODUCTION

California Government Code section 12926(c)[1] gives the Fair Employment and Housing Commission (FEHC) jurisdiction over employers who regularly employ five or more employees.[2] In *Robinson v. Fair Employment and Housing Commission*,[3] the California Supreme Court considered whether section 12926(c) granted the FEHC jurisdiction over an employer with six employees on its payroll, when five employees were not on the premises every working day.[4] The supreme court held that section 12926(c) applied to all employers with five or more individuals on their payroll, regardless of the number of days the employees worked.[5]

Section 12926(c) defines an "employer" for the purpose of establishing FEHC jurisdiction as "any person regularly employing five or more persons . . . ."[6] An FEHC regulation implementing section 12926(c) defines the phrase "regularly employing" as "employing five or more individuals *for each working day* . . . ."[7] In this case, the FEHC applied section 12926(c) to the number of employees on the employer's payroll, not to

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1. Section 12926(c) provides in relevant part, "'Employer,' except as hereinafter provided, includes any person regularly employing five or more persons." CAL. GOV'T CODE § 12926(c) (West 1992). All references to code sections are to the Government Code.

2. Robinson v. Fair Employment and Hous. Comm'n, 2 Cal. 4th 226, 231, 825 P.2d 767, 768-69, 5 Cal. Rptr. 2d 782, 784-85 (1992). For background information on the Fair Employment and Housing Commission and the Fair Employment and Housing Act see 2 M. KIRBY WILCOX, CALIFORNIA EMPLOYMENT LAW, § 40.10 (1992 & Supp. 1992).

3. 2 Cal. 4th 226, 825 P.2d 767, 5 Cal. Rptr. 2d 782. Justice Baxter authored the majority opinion, with Chief Justice Lucas and Justices Mosk, Panelli, Kennard, and George concurring. Justice Arabian wrote a dissenting opinion.

4. *Id.* at 230-31, 825 P.2d at 768-69, 5 Cal. Rptr. 2d at 783-84.

5. *Id.* at 231, 243, 825 P.2d at 769, 776-77, 5 Cal. Rptr. 2d at 784, 791-92.

6. CAL. GOV'T CODE § 12926(c) (West 1992).

7. *Robinson*, 2 Cal. 4th at 231, 825 P.2d at 768, 5 Cal. Rptr. 2d at 783 (citing CAL. CODE REGS. tit. 2, § 7286.5(a)(1) (1992) (emphasis added)).

the number of employees on the employer's premises.[8] However, this approach was clearly contrary to the language used in the FEHC's own administrative regulation.[9] Thus, in *Robinson*, the court was called upon to determine the legislature's intended definition of the phrase "regularly employing."[10]

The controversy in Robinson over the FEHC's application of section 12926(c) arose when Robinson, a dentist, failed to reinstate an employee when the employee returned from a six-week pregnancy leave. The employee filed a grievance with the FEHC accusing Robinson of unlawful discrimination in violation of section 12945(b)(2).[11] Robinson argued that he was exempt from the Fair Employment and Housing Act (FEHA)[12] because, although he had six employees on his payroll, he did not have five employees on the premises each working day[13] as the FEHC's own regulation required.[14] The FEHC, however, insisted that the

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8. *Id.* at 233, 825 P.2d at 769-70, 5 Cal. Rptr. 2d at 784-85. The court noted, "The FEHC has asserted jurisdiction when an employer has five or more persons on the payroll for each working day, and includes part-time employees—i.e., those who work less than a full shift and those who do not work each day." *Id.* (citations omitted).

9. *Id.* at 231, 825 P.2d at 768, 5 Cal. Rptr. 2d at 783 (citing CAL. CODE REGS. tit. 2, § 7286.5(a)(1) (1992)).

10. *Id.* at 234, 825 P.2d at 771, 5 Cal. Rptr. 2d at 786. With regard to the regulation, the court stated, "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute . . . ." *Id.* at 243-44, 825 P.2d at 777, 5 Cal. Rptr. 2d at 792 (citing CAL. GOV'T CODE § 11342.2 (West 1992)).

11. Section 12945(b)(2) provides in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification: . . . (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . (2) To take a leave on account of pregnancy for a reasonable period of time; provided, the period shall not exceed four months . . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

CAL. GOV'T CODE § 12945(b)(2) (West 1992).

12. *See* CAL. GOV'T CODE §§ 12900-12996.

13. *Robinson*, 2 Cal. 4th at 232, 825 P.2d at 769, 5 Cal. Rptr. 2d at 784. Employees were scheduled as follows: on Mondays and Tuesdays four employees were on the premises; on Wednesdays only one employee was on the premises; on Thursdays and Fridays, five employees were on the premises; finally, on Saturdays, three employees were on the premises. *Id.* at 232 n.2, 825 P.2d at 769 n.2, 5 Cal. Rptr. 2d at 784 n.2.

14. *Id.* at 233-34, 825 P.2d at 770, 5 Cal. Rptr. 2d at 785. *See also* 2 WILCOX, *supra* note 2, § 42.26[2] (explaining jurisdictional and other procedural defenses to FEHC

statute, and not the regulation, prescribed the FEHC's jurisdiction over employers accused of the unlawful discriminatory practices enumerated in section 12945.[15] On this basis, the FEHC determined that section 12926(c) applied to employers with five or more persons on their payroll.[16] Finding Robinson within its authority, the FEHC awarded the employee damages for Robinson's violation of section 12945(b)(2).[17] Robinson then obtained a writ of administrative mandamus from the superior court ordering the FEHC to dismiss the case for want of jurisdiction.[18] The court of appeal, granting the FEHC's petition for review, found that the aggregate number of employees on an employer's payroll was conclusive as to the number of workers a business regularly employs.[19] The California Supreme Court affirmed.[20]

II. TREATMENT

A. *The Majority Opinion*

The determinative question in this case was whether section 12926(c) supported the FEHC's avowal of authority over this particular employer.[21] As a preliminary matter, the court indicated that the FEHC regulation would be invalid to the extent that it conflicted with section 12926(c).[22] In addition, because the phrase "regularly employing" as used in section 12926(c) was ambiguous,[23] further analysis would be necessary to determine legislative intent.

First, the court considered the administrative interpretation of section 12926(c), but found that this did not conclusively establish its meaning.[24] Fair employment law used the phrase "regularly employing" to determine jurisdiction before the creation of the FEHC, section 12926(c), or the regulation purporting to define that phrase.[25] Thus, the FEHC's regulatory definition may be viewed as inconsistent with the legislature's under-

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actions).

15. *Robinson*, 2 Cal. 4th at 231, 825 P.2d at 768-69, 5 Cal. Rptr. 2d at 783-84.

16. *Id.*

17. *Id.* at 232, 825 P.2d at 769, 5 Cal. Rptr. 2d at 784.

18. *Id.* For information on the procedural aspects of judicial review of FEHC decisions, see generally 2 WILCOX, *supra* note 2, § 42.40.

19. Robinson v. Fair Employment and Hous. Comm'n, 275 Cal. Rptr. 656, 657-58 (1990), *aff'd*, 2 Cal. 4th 226, 825 P.2d 767, 5 Cal. Rptr. 2d 782 (1992). For a treatment of the appellate decision see 41 CAL. JUR. 3D *Labor* § 4 (Supp. 1992).

20. Robinson v. Fair Employment and Hous. Comm'n, 2 Cal. 4th at 245, 825 P.2d at 778, 5 Cal. Rptr. 2d at 793.

21. *Id.* at 234, 825 P.2d at 770, 5 Cal. Rptr. 2d at 785.

22. *Id.*

23. *Id.*

24. *Id.* at 234, 825 P.2d at 771, 5 Cal. Rptr. 2d at 785.

25. *Id.* at 235, 825 P.2d at 771, 5 Cal. Rptr. 2d at 786.

standing of the phrase at the time section 12926(c) was enacted.[26]

Next, the court analyzed the legislative history of the FEHA.[27] The court examined a fair employment bill,[28] an initiative measure and its ballot pamphlet,[29] and a law review article,[30] all of which came into existence contemporaneously with the enactment of the FEHA's predecessor, the Fair Employment Practices Act (FEPA).[31] These sources, however, did not provide a clear understanding of the phrase "regularly employing."

Finally, the court examined the legislature's intent in enacting the statute.[32] Noting that other states had enacted comparable fair employment laws prior to the enactment of section 12926(c),[33] the court found that

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26. *Id.*

27. *Id.*

28. *Id.* at 236, 825 P.2d at 772, 5 Cal. Rptr. 2d at 787. "Fair employment legislation was first proposed in California in 1943. The fair employment bill which is the forerunner of the present law was introduced on January 9, 1945 . . . and was reintroduced in each odd-numbered year thereafter until passage of the Fair Employment Practice Act in 1959 (FEPA)." *Id.* (citations omitted).

29. *Id.* at 236-37, 825 P.2d at 772, 5 Cal. Rptr. 2d at 787. The FEPA initiative read: "The term 'employer' . . . does not include any person regularly employing fewer than five (5) persons . . . ." *Id.* (citations omitted).

30. *Id.* at 237-38, 825 P.2d at 773, 5 Cal. Rptr. 2d at 788 (quoting Michael C. Tobriner, *California FEPC*, 16 HASTINGS L.J. 333, 342-43 (1965)). According to Tobriner's interviews with the FEPC, the phrase "regularly employing" . . . "mean[s] that [the employer] must have an 'average' or 'normal' couplement of five or more persons in his employ on a 'regular' basis." *Id.*

31. *Id.* at 236-37, 825 P.2d at 772-73, 5 Cal. Rptr. 2d at 787-88. The California Legislature adopted the FEPA in 1959. In 1980, the FEPA was repealed and substituted with the FEHA. *Id.* at 235, 825 P.2d at 771, 5 Cal. Rptr. 2d at 786. In effect, the FEHC inherited the powers and jurisdiction of the FEPC in 1980. *Id.* at 235 n.8, 825 P.2d at 771 n.8, 5 Cal. Rptr. 2d at 786 n.8. *See* 8 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 756, 758 (9th ed. 1988 & Supp. 1992) (discussing the FEHA's succession to the FEPA); 41 CAL. JUR. 3D *Labor* §§ 4-5 (1978 & Supp. 1992) (explaining the FEPA in detail and discussing the FEHA's succession of powers). *See also* Marjorie Gelb & JoAnne Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy For Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983) (providing an historical background of fair employment laws, the FEPA, and the FEHA in California).

32. *Robinson*, 2 Cal. 4th at 239-43, 825 P.2d at 773-77, 5 Cal. Rptr. 2d at 788-92. The court reasoned that because of its remedial nature, the FEHA requires an expansive interpretation in the event of ambiguity; thus, the FEHA should be interpreted to promote the authority of the FEHC. *Id.* at 243, 825 P.2d at 776, 5 Cal. Rptr. 2d at 791.

33. *Id.* at 239-40, 825 P.2d at 773-74, 5 Cal. Rptr. 2d at 788-89.

these statutes had objectives similar to that of the California statute.[34] The court determined that the legislative purpose behind exempting employers with fewer than five regular employees from FEHC jurisdiction was to allow the FEHC to concentrate its enforcement activities in the areas with the most job opportunities.[35] Interpreting "regularly employing" as the number of employees on an employer's payroll would advance that legislative purpose[36] because the number of employees on a payroll is more indicative of the number of job opportunities available than the number of employees working every business day.[37] Therefore, the FEHC had jurisdiction over the employer in the present case because he retained six employees on his payroll.[38]

B. The Dissenting Opinion

Justice Arabian's dissent criticized the majority's attempt to discern legislative history through unreliable secondary sources and unreliable precedent.[39] The first step in determining legislative intent, Arabian ar-

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34. *Id.* at 239, 825 P.2d at 773, 5 Cal. Rptr. 2d at 788.

35. *Id.* at 240, 825 P.2d at 774-75, 5 Cal. Rptr. 2d at 789-90. The court cited three law review articles published contemporaneously with the enactment of the FEPA in which the critics, examining the legislation, agreed that the objective of exempting employers of fewer than five persons was to "reliev[e] the administrative body of the burden of enforcement where few job opportunities are available." *Id.* Furthermore, all of the critics understood "regularly employing" to mean the aggregate number of workers on the employer's payroll. *Id.* at 240-41, 825 P.2d at 775, 5 Cal. Rptr. 2d at 790.

36. *Id.* at 242, 825 P.2d at 776, 5 Cal. Rptr. 2d at 791.

37. *Id.* at 241, 825 P.2d at 775, 5 Cal. Rptr. 2d at 790.

38. *Id.* at 243, 825 P.2d at 776-77, 5 Cal. Rptr. 2d at 791-92. The court rejected Robinson's estoppel argument that Regulation 7286.5, CAL. CODE REGS. tit. 2, § 7286.5 (1992), does not provide an employer with notice that part-time employees will be considered when determining the FEHC's authority over the employer. *Robinson*, 2 Cal. 4th at 243-44, 825 P.2d at 777, 5 Cal. Rptr. 2d at 792. The court reasoned that although the regulation defines employer as "employing five or more individuals for each working day," CAL. CODE REGS., tit. 2, § 7286.5 (1992), if it were read as the plaintiff suggested, the regulation would be inconsistent with section 12926(c) of the California Government Code and, thus, invalid. *Robinson*, 2 Cal. 4th at 243-44, 825 P.2d at 777, 5 Cal. Rptr. 2d at 792. A regulation with two possible meanings, one valid and one not, should be interpreted in favor of validity. *Id.* at 244, 825 P.2d at 777, 5 Cal. Rptr. 2d at 792. Furthermore, there is a presumption that employers know the law. *Id.* Therefore, the court concluded that the regulation gives employers notice. *Id.*

Robinson also argued that the FEHC should be estopped from sanctioning him because the regulation misled him. *Id.* The court found that although the doctrine of estoppel can be applied against the government for this reason, Robinson did not satisfy the necessary elements. *Id.* at 244-45, 825 P.2d at 777-78, 5 Cal. Rptr. 2d at 792-93.

39. *Robinson*, 2 Cal. 4th at 245, 248 n.5, 825 P.2d at 778, 780 n.5, 5 Cal. Rptr. 2d

gued, is to look at the plain meaning of the words used in the statute.[40] Because the majority did not examine the words themselves, the remainder of its analysis was critically flawed.[41] Moreover, the majority's interpretation of section 12926(c) caused the qualifier "regularly" to become meaningless surplusage.[42] For Justice Arabian, the FEHC regulation made it clear that the FEHC may exercise jurisdiction only as to those employers with five or more employees actually on the job every business day.[43]

IV. CONCLUSION

In *Robinson*, the California Supreme Court interpreted Government Code section 12926(c) to determine whether it included an employer with six employees on its payroll, when five employees worked at the same time only two days a week. The court concluded that a showing of five or more employees on an employer's payroll conclusively subjects the employer to the FEHC's authority. This interpretation of section 12926(c) makes the FEHA applicable to most employers.[44] Small businesses might try to avoid FEHC authority by not offering part-time employment.[45] Moreover, small businesses that cannot afford to comply

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at 793, 795 n.5 (Arabian, J., dissenting).

40. *Id.* at 246, 825 P.2d at 778, 5 Cal. Rptr. 2d at 793 (Arabian, J., dissenting).

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

42. *Id.* at 246, 825 P.2d at 778-79, 5 Cal. Rptr. 2d at 793-94 (Arabian, J., dissenting).

43. *Id.* at 250, 825 P.2d at 781, 5 Cal. Rptr. 2d at 796 (Arabian, J., dissenting).

44. It is estimated that 95% of the businesses in California employ fewer than 50 employees. Many of these businesses employ part-time workers and might have been exempted if the court had accepted Robinson's interpretation of section 12926(c). *Id.*; Stephen G. Hirsch, *Court Considers Challenge to State Bias Law; Ruling Could Reduce the Number of Small Businesses Covered*, THE RECORDER, Jan. 8, 1992, at 1.

45. *Robinson*, 2 Cal. 4th at 249, 825 P.2d at 781, 5 Cal. Rptr. 2d at 796 (Arabian, J., dissenting). Justice Arabian posited that the majority's construction of the statute will have the ultimate effect of decreasing the availability of part-time jobs. *Id.* (Arabian, J., dissenting). Justice Arabian believed that employers, who can feasibly employ four full-time workers instead of employing numerous people part-time, will now avoid employing part-timers in order to escape the authority of the FEHC. *Id.* (Arabian, J., dissenting). Furthermore, an employer falling within FEHC authority that changes its employment scheme in response to the court's decision may still be subject to FEHC authority. *See* CAL. CODE REGS. tit. 2, § 7286.5(a)(1) (1992) (defining "regularly employing" as "employing five or more individuals for each working day in any twenty consecutive calendar weeks in the current calendar year *or preceding calendar year*") (emphasis added). It is unclear whether the supreme court's decision

with FEHA pregnancy leave provisions may choose to go out of business or relocate outside of California.[46] On the other hand, the broad application of section 12926(c) will provide a remedy for small business employees who, in the past, have had no protection against the type of discriminatory employment practices listed in section 12945.[47]

MICHAEL EMMET MURPHY

VI. ENVIRONMENTAL LAW

State legislation concerning hazardous waste disposal facilities neither expressly nor impliedly preempts local governments from compelling compliance with a local land use permit that imposes a waste-free buffer zone: **IT Corporation v. Solano County Board of Supervisors.**

I. INTRODUCTION

In *IT Corp. v. Solano County Board of Supervisors*,[1] the California Supreme Court assessed the ability of local governments to enforce local land use regulations that affect hazardous waste disposal facilities (HWDFs).[2] On the state level, the Hazardous Waste Control Act (HWCA)[3] governs the operation of HWDFs primarily through the Department of Health Services.[4] Cities and counties, however, have historically

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has left the italicized portion of the regulation intact. *But see supra* note 10 (relating that the court may have invalidated the entire regulation).

46. Philip Hager, *Justices Refuse to Narrow Anti-Bias Law*, L.A. TIMES, Mar. 15, 1992, at A3. *See* Hirsch, *supra* note 44 (stating that this case takes on added significance, considering legislation proposed by Governor Pete Wilson which would provide the FEHC with the authority to award punitive and compensatory damages).

47. *See* Hirsch, *supra* note 44 (noting that a decision in Robinson's favor could have "hit minorities hard, since they make up the bulk of workers in transitory, seasonal jobs"); *see also* Hager, *supra* note 46 ("This is a major victory, not only for pregnant workers but all employees across California now subject to the [A]ct . . . .").

1. 1 Cal. 4th 81, 820 P.2d 1023, 2 Cal. Rptr. 2d 513 (1991) (en banc).

2. *See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 77 (9th ed. 1987); 61A AM. JUR. 2D *Pollution Control* §§ 247, 250, 253-255 (1981 & Supp. 1992); William B. Johnson, Annotation, *Validity of Local Regulation of Hazardous Waste*, 67 A.L.R. 4th 822 (1989).

3. CAL. HEALTH & SAFETY CODE §§ 25100-25250.25 (Deering 1988 & Supp. 1992). *See generally* Arthur D. Gunther, *Enforcement in Your Backyard: Implementation of California's Hazardous Waste Control Act by Local Prosecutors*, 17 ECOLOGY L.Q. 803 (1990); 1 JAMES LONGTIN, CAL. LAND USE § 5.33 (2d ed. 1987).

4. The Department of Health Services (DHS) is a state agency that issues permits of operation for HWDFs, establishes standards and regulations for both the operation

regulated land use through zoning ordinances and use permits.[5] In addition to holding that the HWCA neither impliedly nor expressly preempted local enforcement of a legitimate land use regulation,[6] the court held that the county's order in this case was valid because it did not conflict with state interests and required ultimate approval from all appropriate state agencies.[7] The dispute between IT Corporation and the county centered on the type of remedy for the buffer zone[8] violation: IT Corporation sought closure in place (partial closure)[9] and the county sought "clean closure" (complete closure).[10]

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and closure of HWDFs, and approves "'closure and post closure plans' . . . that compl[y] with all pertinent regulations." *IT Corp.*, 1 Cal. 4th at 91-92, 820 P.2d at 1029, 2 Cal. Rptr. 2d at 519. *See generally* 50 CAL. JUR. 3D *Pollution and Conservation Laws* §§ 146-156 (1979 & Supp. 1992) (describing the responsibilities of DHS); 2 KENNETH A. MANASTER & DANIEL P. SELMI, CAL. ENVIRONMENTAL LAW AND LAND USE PRACTICE § 50.10 (Mark H. Wasserman & Katherine Hardy eds., rev. 1991) (same). However, DHS is not the only agency authorized to enforce the HWCA. *See, e.g.*, Gunther, *supra* note 3, at 807-08.

5. *IT Corp.*, 1 Cal. 4th at 89, 820 P.2d at 1027, 2 Cal. Rptr. 2d at 517. Article XI of the California Constitution provides: "A county or city 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 generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 793 (9th ed. 1988 & Supp. 1992) (specifying common areas of local regulation, including the use of land); 3 MANASTER & SELMI, *supra* note 4, §§ 60.10-60.11 (discussing police power and the California Constitution as sources of zoning power); 1 LONGTIN, *supra* note 3, § 1.20 (same); DONALD G. HAGMAN ET AL., CAL. ZONING PRACTICE § 4.8 (Herbert Gross, ed., Continuing Educ. of the Bar, 1969 & Supp. 1992) (same).

6. See *infra* notes 25-31 and accompanying text for the court's reasoning on implied preemption and notes 32-43 and accompanying text for the court's reasoning on express preemption. *See generally* 8 B. WITKIN, *supra* note 5, § 794 (describing express and implied preemption of local law); LONGTIN, *supra* note 3, §§ 1.70-1.71 (same); 8 B. WITKIN, *supra* note 5, § 804 (giving examples of state laws that preempt local regulation); HAGMAN, *supra* note 5, §§ 4.9-4.12 (discussing possible areas of state-local conflict); Johnson, *supra* note 2, at 848-66 (comparing state legislation that did and did not preempt local regulation of hazardous waste).

7. *IT Corp.*, 1 Cal. 4th at 96, 820 P.2d at 1032, 2 Cal. Rptr. 2d at 522. For a description of the defenses to the enforcement of local land use regulations, including constitutional limitations (such as preemption), procedural defects, statute of limitations and laches, estoppel, and good faith, see Johnson, *supra* note 2, at 836-41 (comparing valid and invalid local hazardous waste ordinances); 1 LONGTIN, *supra* note 3, § 3.94; HAGMAN, *supra* note 5, §§ 11.13-11.19.

8. *See generally* David J. Lennett & Linda E. Greer, *State Regulation of Hazardous Waste*, 12 ECOLOGY L.Q. 183, 224-27 (1985) (discussing buffer zones). *See infra* text accompanying note 14 for the purpose of buffer zones.

9. *IT Corp.*, 1 Cal. 4th at 92-93, 820 P.2d at 1030, 2 Cal. Rptr. 2d at 520.

10. *Id.* at 93, 820 P.2d at 1030, 2 Cal. Rptr. 2d at 520. Clean closure requires

II. STATEMENT OF THE CASE

IT Corporation owns and operates a large HWDF in Solano County.[11] The county imposed a conditional use permit[12] on the facility barring the handling or storing of hazardous waste within 200 feet of the property line.[13] Such waste-free buffer zones protect the environment as well as public health and safety by catching migrating contaminants before they reach neighboring waters and lands that are zoned for incongruous purposes.[14] The 106-acre dumping facility abuts on the city of Benecia and is otherwise surrounded by agricultural land.[15]

Uncontroverted evidence revealed that in 1987 several liquid waste ponds, a surface solid waste pile, a landfill, and a drum burial site encroached upon the prescribed buffer zone.[16] The County Planning Commission (Commission) issued a "clean closure order"[17] requiring IT Corporation to promptly discontinue and close the encroachments; submit a plan for clean closure within 90 days to state and federal regulatory agencies; modify the plan as the agencies may require; and implement the plan immediately upon their assent thereto.[18]

IT's appeal to the county's Board of Supervisors (Board) led the Commission to reevaluate alternative solutions, including IT's suggestion to close and clean only the infringement abutting on the city and to assign a new 200-foot buffer zone.[19] Later, when the Board approved the Commission's original clean closure order, IT Corporation petitioned for a writ of mandamus.[20] The superior court granted the writ, reasoning that the Board had no jurisdiction to define the remedy because state law superseded local law in the handling, storage, and elimination of hazardous waste.[21] The court of appeal affirmed.[22] Granting review, the

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elimination of all contaminants from the buffer zone. *Id.* at 87, 820 P.2d at 1026, 2 Cal. Rptr. 2d at 516.

11. *Id.* at 85, 820 P.2d at 1025, 2 Cal. Rptr. 2d at 515.

12. *See* 3 MANASTER & SELMI, *supra* note 4, §§ 60.70-60.71 (discussing conditional use permits); LONGTIN, *supra* note 3, § 3.71 (same).

13. *IT Corp.*, 1 Cal. 4th at 85-86, 820 P.2d at 1025, 2 Cal. Rptr. 2d at 515.

14. *Id.* at 100 n.16, 820 P.2d at 1035 n.16, 2 Cal. Rptr. 2d at 525 n.16. This is a particularly realistic concern in this case because the City of Benicia is located downhill from the facility, which is nestled in the rolling hills of Solano County. *Id.* at 85, 820 P.2d at 1025, 2 Cal. Rptr. 2d at 515.

15. *Id.* at 85, 820 P.2d at 1025, 2 Cal. Rptr. 2d at 515.

16. *Id.* at 87, 820 P.2d at 1026, 2 Cal. Rptr. 2d at 516.

17. *Id. See supra* note 10 for the definition of "clean closure."

18. *IT Corp.*, 1 Cal. 4th at 87, 820 P.2d at 1026, 2 Cal. Rptr. 2d at 516. According to IT, compliance with the clean closure order would cost approximately $40.5 million. *Id.*

19. *Id.* at 87-88, 820 P.2d at 1026, 2 Cal. Rptr. 2d at 516.

20. *Id.* at 88, 820 P.2d at 1026, 2 Cal. Rptr. 2d at 516.

21. *Id.*

California Supreme Court addressed (1) whether state laws concerning hazardous waste management are so exhaustive as to supersede enforcement of local limitations on treatment and storage locations within an HWDF,[23] and (2) whether a local government can order an HWDF operator to abate the violation and restore the site to its initially authorized condition.[24]

III. THE COURT'S OPINION

A. *State Law Governing Hazardous Waste Management Does Not Impliedly Preempt Enforcement of a Local Regulation Controlling Treatment and Storage Location Within a Facility Because State Law is Not So Comprehensive as to Make It the Exclusive Means by which to Regulate Hazardous Waste*

One of the ways in which a state law can impliedly preempt local law is when state law is so pervasive in a particular area that it makes the whole area an exclusive state concern.[25] IT Corporation argued that state law concerning hazardous waste is so comprehensive that it is the only means of regulating and enforcing its proper storage, treatment, and disposal.[26] The court rejected IT's argument for two reasons. First, the HWCA specifically acknowledges local law,[27] which necessarily includes

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22. *Id.* at 88, 820 P.2d at 1027, 2 Cal. Rptr. 2d at 517.

23. *Id.* at 91, 820 P.2d at 1028, 2 Cal. Rptr. 2d at 518.

24. *Id.* at 97-98, 820 P.2d at 1033, 2 Cal. Rptr. 2d at 523.

25. *Id.* at 91, 820 P.2d at 1028, 2 Cal. Rptr. 2d at 518. There are three tests to determine whether the legislature has impliedly preempted local regulation:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of . . . local [regulation] on the transient citizens of the state outweighs the possible benefit to the [local government].

Id. (quoting People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 485, 204 Cal. Rptr. 897, 902, 683, P.2d 1150, 1156 (1984)).

26. *Id.* at 90, 820 P.2d at 1028, 2 Cal. Rptr. 2d at 518. IT also argued that the Board's order contradicted state law because the HWCA does not mandate restoration of an HWDF to its pre-violation condition. *Id.* at 92-93, 820 P.2d at 1030, 2 Cal. Rptr. 2d at 520.

27. *Id.* at 93, 820 P.2d at 1030, 2 Cal. Rptr. at 520. The HWCA provides: "No provision of this chapter shall limit the authority of any state or local agency in the

ordinances.[28] In addition, clear statutory language authorizing local regulation eradicates any implication of preemptive intent, therefore statutory recognition of local regulation must yield the same result.[29] Second, in the sensitive area of hazardous waste disposal, when the legislature has wanted to supplant local law, it has done so clearly and unequivocally.[30] As a result, the court concluded that state regulation does not impliedly preempt a local regulation that specifies where a facility operator may store contaminants within an HWDF.[31]

B. State Regulation of Hazardous Waste Facilities Does Not Expressly Preempt Enforcement of a Local "Clean Closure" Order Because Requiring Complete Abatement of a Local Land Uuse Violation is Neither an Unreasonable Nor Prohibitory Regulation of an Existing Facility

The HWCA authorizes local regulation of land use,[32] but expressly prohibits enforcement of any local permit that constitutes an unreasonable regulation of an existing HWDF.[33] IT's arguments centered on the

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enforcement or administration of any provision of law which it is specifically permitted or required to enforce and administer." *Id.* (quoting CAL. HEALTH & SAFETY CODE § 25105 (Deering 1988)).

28. *Id.* (citing *Mendocino*, 36 Cal. 3d at 486-87, 683 P.2d at 1156, 204 Cal. Rptr. at 903).

29. *Id.* at 94, 820 P.2d at 1031, 2 Cal. Rptr. 2d at 521 (citing *Mendocino*, 36 Cal. 3d at 485, 383 P.2d at 1156, 204 Cal. Rptr. at 903).

30. *Id. See, e.g.*, CAL. HEALTH & SAFETY CODE § 25149(a) (Deering 1988 & Supp. 1992) (expressly forbidding local governments from "prohibit[ing] or unreasonably regulat[ing]" the treatment of contaminants at "existing" HWDFs); CAL. HEALTH & SAFETY CODE § 25167.3 (Deering 1988) (preempting "all local regulations and all conflicting state regulations concerning the transportation of hazardous waste" and prohibiting any local agency from "adopt[ing] or enforc[ing] any ordinance or regulation . . . inconsistent with [state] regulations").

31. *IT Corp.*, 1 Cal. 4th at 96-97, 820 P.2d at 1032-33, 2 Cal. Rptr. 2d at 522-23.

32. *Id.* at 97, 820 P.2d at 1033, 2 Cal. Rptr. 2d at 523. Health and Safety Code section 25147 states that "[e]xcept as expressly provided in Section 25149, it is not the intent of this article to preempt local land use regulation of existing hazardous waste facilities." CAL. HEALTH & SAFETY CODE § 25147 (Deering 1988).

33. *IT Corp.*, 1 Cal. 4th at 97, 820 P.2d at 1033, 2 Cal. Rptr. 2d at 523. Health and Safety Code section 25149 provides in pertinent part that

> [n]otwithstanding any other provision of law [and certain exceptions not here applicable] no city or county . . . or district may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit relating to an existing hazardous waste facility so as to prohibit or unreasonably regulate the disposal, treatment, or recovery of resources from hazardous waste . . . at that facility.

CAL. HEALTH & SAFETY CODE § 25149(a) (Deering 1988 & Supp. 1992).

interpretation of the statutory terms "prohibit" and "unreasonable."[34] IT's attempts to construe the word "prohibit" as precluding any local regulation of IT's dump within the facility were unsuccessful.[35] The stated purpose of article 4.5 of the HWCA is to limit local land use prerogatives only as needed to further the statewide concern of preserving the current number of HWDFs.[36] The court reasoned that not only does the purpose itself belie IT's contention,[37] but the 200-foot buffer zone "cannot be considered part of the . . . 'existing' hazardous waste disposal capacity which the Legislature sought to 'retain.'"[38] Furthermore, nothing in the statute precludes compelled compliance with a permit geographically restricting the storage of waste.[39] IT then argued that the Board's order for complete cleanup was unreasonable because (1) costs were prohibitive and there was a lack of supporting evidence, and (2) the Board failed to explain the necessity of total clean-up, as opposed to IT's proposal for partial closure.[40] However, the court stated that the chosen remedies are not unreasonable simply because they are stricter than those that the transgressor suggests.[41] The court reasoned that by requiring complete clean-up, the Board is simply insisting that IT preserve the waste-free protection zone according to the original permit.[42] Thus, the

34. *IT Corp.*, 1 Cal. 4th at 98, 820 P.2d at 1033, 2 Cal. Rptr. 2d at 523.

35. *Id.* at 97, 820 P.2d at 1033, 2 Cal. Rptr. 2d at 523.

36. *Id.* at 98-99, 820 P.2d at 1033-34, 2 Cal. Rptr. 2d at 523-24. The legislature found that the decreasing statewide disposal capacity and the simultaneously increase in demand created a greater risk of illegal disposal because proper disposal would require that hazardous waste be transported farther. *See* CAL. HEALTH & SAFETY CODE §§ 25146, 25146.5 (Deering 1988) (outlining the legislative findings and declarations).

37. *IT Corp.*, 1 Cal. 4th at 98-99, 820 P.2d at 1034, 2 Cal. Rptr. 2d at 524.

38. *Id.* at 99, 820 P.2d at 1034, 2 Cal. Rptr. 2d at 524. The legislature's purpose was to prevent inhabitants from putting pressure on local governmental representatives to increase the restrictions on neighboring HWDFs, thereby indirectly forcing them to close, given that HWDFs are admittedly "unpopular neighbors." *Id.* However, this purpose has no application to the buffer zone, where dumping has never been permitted, and which has existed long before the statutes went into effect. *Id.* Thus, the setback zone cannot be deemed a part of the facility that the legislature wanted to protect. *Id.*

39. *Id.* at 100, 820 P.2d at 1034-35, 2 Cal. Rptr. 2d at 524.

40. *Id.* at 100, 820 P.2d at 1035, 2 Cal. Rptr. 2d at 525.

41. *Id.* at 101, 820 P.2d at 1035, 2 Cal. Rptr. 2d at 525. IT recommended dedicating "a new setback line, consistent with the current boundaries of IT's property, so as to enclose all but one of the current encroachments," a solution which would have "ratified IT's violations by simply expanding the permit boundaries to accommodate them." *Id.* at 101, 820 P.2d at 1035-36, 2 Cal. Rptr. 2d at 525-26.

42. *IT Corp.*, 1 Cal. 4th at 101, 820 P.2d at 1035, 2 Cal. Rptr. 2d at 525.

court concluded that the HWCA did not expressly supersede the Board's order because it was neither an unreasonable nor prohibitory regulation of an existing HWDF.[43]

IV. IMPACT

The California Supreme Court's decision in *IT Corp.* increased the power of local governments, despite the state's expanding authority in recent years.[44] The effect is to give the people living closest to the dump sites—those people most affected by the land use—more control over their operations.[45] The ruling also reaffirmed that when a land use violation occurs, the responsible agency, including a local government, may require (1) removal of whatever is causing the infringement and (2) restoration of property to a pre-violation condition, regardless of the cost.[46]

In making its ruling, the court relied heavily upon *People ex rel. Deukmejian v. County of Mendocino*.[47] Although the supreme court acknowledged that the legislature had overturned *Mendocino*'s fact-specific holding,[48] thereby declaring the state's exclusive control of agricultural poisons,[49] the court maintained the continued vitality of *Mendocino*'s broader holding "that preemption should not be implied when state regulation acknowledges local 'law.'"[50] Thus, a significant portion of *Mendocino* remains good law.

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43. *Id.* at 102, 820 P.2d at 1036, 2 Cal. Rptr. 2d at 526.

44. Harriet Chiang, *Solano Wins Toxic Cleanup Dispute*, S.F. CHRONICLE, Dec. 24, 1991, at A13.

45. *California in Brief; San Francisco; Ruling Allows Local Toxic Waste Control*, L.A. TIMES, Dec. 25, 1991, at A43. The facts of this case do not represent an isolated problem. Eighteen counties, some facing similar enforcement difficulties, supported Solano County's appeal in this case by joining in the court filings. *Id. See IT Corp.*, 1 Cal. 4th at 89 n.5, 820 P.2d at 1027 n.5, 2 Cal. Rptr. 2d at 517 n.5 for a list of the counties.

46. *See, e.g.*, County of San Diego v. McClurken, 37 Cal. 2d 683, 234 P.2d 972 (1951) (remove 48,000-gallon containers); People v. Gates, 41 Cal. App. 3d 590, 116 Cal. Rptr. 172 (1974) (remove vehicle junkyard); City and County of San Francisco v. Padilla, 23 Cal. App. 3d 388, 100 Cal. Rptr. 223 (1972) (remove two dwelling units); People v. Watkins, 175 Cal. App. 2d 182, 345 P.2d 960 (1959) (remove portion of building infringing upon setback line); Donovan v. City of Santa Monica, 88 Cal. App. 2d 386, 199 P.2d 51 (1948) (remove 24 apartments and reconvert principal building to a single-family residence). *See also* LONGTIN, *supra* note 3, § 3.90 (stating that the city or county is responsible for enforcing its land use regulations).

47. 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984).

48. *IT Corp.*, 1 Cal. 4th at 93 n.9, 820 P.2d at 1030 n.9, 2 Cal. Rptr. 2d at 520 n.9. Specifically, *Mendocino* held that an ordinance prohibiting the aerial application of phenoxyherbicides was valid because it was not preempted by state law. *Mendocino*, 36 Cal. 3d at 488, 683 P.2d at 1157, 204 Cal. Rptr. at 904.

49. *IT Corp.*, 1 Cal. 4th at 93 n.9, 820 P.2d at 1030 n.9, 2 Cal. Rptr. 2d at 520 n.9.

50. *Id. See Mendocino*, 36 Cal. 3d at 485, 683 P.2d at 1156, 204 Cal. Rptr. at 903.

V. CONCLUSION

Despite its breadth and specificity, the HWCA apparently only sets a minimum standard.[51] The HWCA implies no overall purpose to proscribe the traditional prerogative of local governments to impose and enforce restrictions on the use of land[52] and expressly overrides local land use regulations only to the extent necessary to satisfy the legislature's concern for maintaining existing HWDFs.[53] Having the authority to impose as well as enforce backs up the local government's legal bark with some regulatory bite.[54]

LORRAINE A. MUSKO

VII. INSURANCE LAW

A. *An employer establishes an ERISA-governed "employee welfare benefit plan," thereby preempting any state law cause of action relating to the plan, when it purchases an insurance policy on behalf of its employees, contributes toward premiums, and has the power to discontinue the policy or change its terms regardless of whether the employer is otherwise involved in the administration of the policy:* **Marshall v. Bankers Life and Casualty Co.**

The Employee Retirement Income Security Act of 1974 (ERISA)[1] pre-

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51. *IT Corp.*, 1 Cal. 4th at 95, 820 P.2d at 1032, 2 Cal. Rptr. 2d at 522.

52. *Id.*

53. *Id.* at 99, 820 P.2d at 1034, 2 Cal. Rptr. 2d at 524.

54. As one attorney commented, "If you don't have the right to enforce, then your authority to remedy the condition is meaningless." Harriet Chiang, *supra* note 44.

1. 29 U.S.C. §§ 1001-1461 (1988 & Supp. 1992). For excellent summaries of the major provisions of ERISA, see BARBARA J. COLEMAN, PRIMER ON EMPLOYEE RETIREMENT INCOME SECURITY ACT (3d ed. 1989); Joseph R. Simone, *Statutory Framework, Language and Fiduciary Responsibility Provisions of ERISA, in* UNDERSTANDING ERISA: AN INTRODUCTION TO BASIC EMPLOYEE BENEFITS 9 (PLI Tax Law & Practice Course Handbook Series No. 302, 1990). *See also*, MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS 3D, *Labor* § 78.5 (1990 & Supp. 1992) (providing case notes dealing with the purpose, preemption provision, and scope of ERISA); MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS 3D, *Pensions and Retirement Systems* §§ 10-13 (1992) (providing general reference materials and case notes dealing with the purpose, preemption provision, and scope of ERISA); 49 CAL. JUR. 3D *Pensions and Retirement Systems* §§ 1-3 (1979 Supp. & 1992) (same); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA

empts every state law cause of action that relates to an "employee welfare benefit plan"[2] unless the state law regulates insurance as ERISA construes the term.[3] In *Marshall v. Bankers Life & Casualty Co.*,[4] the California Supreme Court considered whether an employer that sponsored a group insurance policy established an ERISA-governed "employee welfare benefit plan" even though the employer maintained only a minor role in the plan's ongoing administrative scheme.[5] The supreme court held that an employer establishes an ERISA-governed plan, thereby pre-

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LAW *Agency and Employment* § 341 (9th ed. 1987 & Supp. 1992) (providing Congressional findings and policies of ERISA and listing numerous decisions and commentaries dealing with ERISA).

2. 29 U.S.C. § 1002(1) (1988). This section defines an "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits."

3. Marshall v. Bankers Life & Casualty Co., 2 Cal. 4th 1045, 1051, 832 P.2d 573, 576, 10 Cal. Rptr. 2d 72, 75, *cert. denied*, 113 S. Ct. 601 (1992) (citing FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990)). *See also*, 29 U.S.C. §§ 1144(a), 1003(a)(1) (1988) (ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan . . . established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce"); 29 U.S.C. § 1144(b)(2)(A) (1988) (ERISA does not preempt "any law of any state which regulates insurance"); 29 U.S.C. § 1144(b)(2)(B) (1988) ("[A]n employee benefit plan . . . shall [not] be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance"). 3 M. KIRBY WILCOX, CALIFORNIA EMPLOYMENT LAW §§ 60.03[3][e], 60.09[1][c] (1992) (suggesting that in a wrongful termination action, plaintiff's counsel should avoid any reference to an employer's motive to deprive the employee of ERISA regulated benefits because ERISA will then preempt the cause of action).

4. 2 Cal. 4th 1045, 832 P.2d 573, 10 Cal. Rptr. 2d 72, *cert. denied*, 113 S. Ct. 601 (1992). In *Marshall*, an employee's dependent brought several state law causes of action against both the issuer (Bankers Life and Casualty Co.) and the administrator (Frank B. Hall & Co. of California/MIA Administrators) of an employer-sponsored group insurance policy. The plaintiff alleged that both the issuer and administrator improperly denied medical benefits under the policy. The trial court held that federal law preempted the plaintiff's state law causes of action because the employer had established an ERISA-governed employee benefit plan. *Id.* at 1050, 832 P.2d at 575-76, 10 Cal. Rptr. 2d at 74-75. The appellate court reversed, finding that the employer-sponsored group insurance policy was not an ERISA-governed plan because the employer was not involved in the administration of the policy. The Supreme Court of California reinstated the trial court's ruling, finding that the employer had established an ERISA-governed employee benefit plan despite the employer's minimal involvement in administering the policy to employees. *Id.* at 1057, 832 P.2d at 580, 10 Cal. Rptr. 2d at 79. Justice Panelli authored the majority opinion, with Chief Justice Lucas and Justices Kennard, Arabian, Baxter and George concurring. Justice Mosk authored a separate dissenting opinion arguing that ERISA does not preempt state law where the employer has less than a substantial role in administering the plan. *Id.* at 1059-63, 832 P.2d at 582-85, 10 Cal. Rptr. 2d 81-84 (Mosk, J., dissenting).

5. *Id.* at 1049, 832 P.2d at 574-75, 10 Cal. Rptr. 2d at 73-74.

empting any state law cause of action relating to the plan, when the employer purchases an insurance policy on behalf of its employees, contributes toward premiums, and has the power to discontinue the policy or change its terms, regardless of whether the employer is otherwise involved in the administration of the policy.[6]

The court began by finding that the federal government's concern for protecting employee interests in benefit plans and the need for national uniformity in the regulation of such plans is present whenever there is any ongoing administrative activity, regardless of whether the employer is actively involved therein.[7] The court then proceeded to determine whether an ERISA-governed benefit plan existed and if so, whether the employer "established or maintained" the plan.[8] The court first determined that the employer-sponsored group insurance policy constituted a "plan" because a reasonable person viewing the surrounding circumstances could determine "the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits."[9] The court next determined that the plan was an "ERISA plan" because the employer established it in order to provide employees with one of ERISA's enumerated benefits.[10] Finally, the court determined that the employer "established or maintained" the ERISA plan because it purchased the insurance policy on behalf of its employees, contributed toward premiums, and had the power to discontinue the policy or change its terms.[11] In concluding that the employer established an ERISA plan, the court emphasized that the employer's actions constituted more than a "bare purchase" of insurance.[12] Furthermore, the court stated that the employer's noncompliance

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6. *Id.* at 1057, 832 P.2d at 580, 10 Cal. Rptr. 2d at 79. Miller Import was minimally involved in the administration of the insurance policy. Besides purchasing and paying the premiums under the policy for all its employees, Miller Import provided its employees with enrollment cards, change of beneficiary forms, and claim forms. Miller Import was an intermediary between its employees and the policy administrators only in the sense that the administrators would give Miller Import materials to distribute to its employees, which Miller Import did. Employees submitted claim forms directly to the policy administrators and Miller Import never reviewed them. Miller Import asked its employees to contact the policy administrators for any information regarding the policy. *Id.* at 1049-50, 832 P.2d at 575, 10 Cal. Rptr. 2d at 74.

7. *Id.* at 1052-54, 832 P.2d at 577-78, 10 Cal. Rptr. 2d at 76-77.

8. *Id.* at 1054-56, 832 P.2d at 578-79, 10 Cal. Rptr. 2d at 77-78.

9. *Id.* at 1054, 832 P.2d at 578-79, 10 Cal. Rptr. 2d at 77-78 (quoting Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982)).

10. *Id.* at 1054-55, 832 P.2d at 579, 10 Cal. Rptr. 2d at 78.

11. *Id.* at 1057, 832 P.2d at 580, 10 Cal. Rptr. 2d at 79.

12. *Id.* at 1056-57, 832 P.2d at 580, 10 Cal. Rptr. 2d at 79. The court stated that

with ERISA reporting requirements and the employer's lack of intent to create an ERISA plan were irrelevant in determining whether an ERISA plan had been established.[13] Moreover, the court concluded that the employer's delegation of the majority of administerial responsibilities did not prevent the establishment of an ERISA-governed plan.[14]

The supreme court's holding that the employer in Marshall established an ERISA-governed plan restricts the plaintiff's damages to the benefits

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an ERISA plan is not established by the "bare purchase" of a group insurance plan. *Id.* at 1055, 832 P.2d at 579, 10 Cal. Rptr. 2d at 78. A "bare purchase" of insurance occurs when:

> (1) the employer makes no contributions toward premiums;
> (2) participation is completely voluntary for employees;
> (3) the employer's sole functions are, without endorsing the program, to allow the insurer to publicize it to employees, to collect premiums through payroll deductions, and to remit them to the insurer; and
> (4) the employer receives no consideration in connection with the program other than reasonable compensation for administrative services rendered in connection with the payroll deductions.

Id. at 1055, 832 P.2d at 579, 10 Cal. Rptr. 2d at 78 (citing 29 C.F.R. § 2510.3-1(j)).

13. *Id.* at 1058-59, 832 P.2d at 581-82, 10 Cal. Rptr. 2d at 80-81. The court declined to hear the plaintiff's claim that the employer should be estopped from asserting ERISA preemption because the plaintiff did not raise the claim below. *Id.* An employer that fails to comply with the requirements of ERISA may be subject to penalties and other liability under ERISA, but the purposes of ERISA are still served by adjudicating benefits disputes under ERISA. *Id.* at 1059, 832 P.2d at 582, 10 Cal. Rptr. 2d at 81 (citing Blau v. Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985)); 29 U.S.C. § 1132(a)(1)(B)) (1988).

14. *Id.* at 1057, 832 P.2d at 580, 10 Cal. Rptr. 2d at 79. The court found that employers regularly delegate administration of a group plan and that ERISA envisioned such a delegation. *Id.* (citing Brundage-Peterson v. Compcare Health Servs. Ins., 877 F.2d 509, 511 (7th Cir. 1989)); 29 U.S.C. §§ 1002(16)(A), 1102(b)(2), 1105(c) (1989 & Supp. 1990); 29 C.F.R. § 2560.503-1(c), (g)(2)) (1992). Justice Mosk, in his dissenting opinion, urged that ERISA preempts state law "only if the employer takes a substantial role in administering an insurance policy." *Id.* at 1059-60, 832 P.2d at 582, 10 Cal. Rptr. 2d at 81 (Mosk, J., dissenting). Furthermore, Justice Mosk contended that the majority's reasoning that an employer establishes or maintains an ERISA plan whenever an employer purchases an insurance policy on behalf of its employees, contributes toward premiums, and has the power to discontinue the policy or change its terms was "inconsistent on its face." *Id.* at 1062, 832 P.2d at 584, 10 Cal. Rptr. 2d at 83 (Mosk, J., dissenting). Justice Mosk advanced the proposition that while the majority found that ERISA does not necessarily govern an employer's "bare purchase" of insurance, an employer could not make such a "bare purchase" without meeting the court's requirements for finding that an ERISA plan had been established or maintained. *Id.* at 1062-63, 832 P.2d at 584-85, 10 Cal. Rptr. 2d at 83-84 (Mosk, J., dissenting). Justice Mosk concluded that the irony of the majority's decision is "that a federal statute designed to defend the interests of insured employees is construed to . . . deprive [] countless Californians defrauded by insurers of the protection afforded by state law." *Id.* at 1063, 832 P.2d at 585, 10 Cal. Rptr. 2d at 84 (Mosk, J., dissenting).

the plaintiff would have originally received under the insurance policy.[15] Thus, insurance companies that are responsible for the administration of benefits under employer-sponsored group insurance plans may regard the court's ruling as an invitation to defraud employees and their dependents with little risk of state law punitive damages.[16] Most employer-sponsored group insurance policies delegate administrative responsibilities to either the insurer or a third party administrator.[17] Accordingly, the risk that insurance companies will abuse the administration of insurance benefits is high. If this risk manifests itself in the form of improper denial of insurance benefits, any solution will have to come from Congress since the United States Supreme Court has already denied review of the California Supreme Court's ruling.[18] Therefore, Congress may need to provide additional remedies under ERISA in order to preserve ERISA's objective of promoting the interests of employees and their dependents in employee pension and benefit plans.[19]

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15. *See* Stephen G. Hirsch, *High Court Limits Insurance Coverage Claims*, THE RECORDER, July 10, 1992, at 3.

16. *See id.*

17. *See Marshall*, 2 Cal. 4th at 1053, 832 P.2d at 577, 10 Cal. Rptr. 2d at 76 ("[H]olders of group insurance policies commonly do not bear primary responsibility for processing claims. That function is generally either retained by the insurer or delegated to a third party administrator, as in this case."); Hirsch, *supra* note 15, at 3 (The plaintiff's appellate lawyer stated that "almost all employee benefit plans are of the type at issue in this case—where the employer merely selects the plan and a third party administers it").

18. Marshall v. Bankers Life & Casualty Co., 113 S. Ct. 601 (1992).

19. *See High Court Rejects Employee Benefit Case*, JOURNAL OF COMMERCE, Dec. 1, 1992, at A9. *See also Marshall*, 2 Cal. 4th at 1050-51, 832 P.2d at 576, 10 Cal. Rptr. 2d at 75 (citing Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 90 (1983) ("ERISA is . . . designed to promote the interests of employees and their beneficiaries in employee pension and benefit plans."). *See generally* Laurie F. Hasencamp, Note, *ERISA and Preemption of State Fair Employment Laws*, 59 S. CAL. L. REV. 583 (1986) (suggesting that Congress should amend section 1144(a) to exempt state fair employment laws from preemption); Robert L. Aldisert, Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After* Pilot Life Insurance Co. v. Dedeaux, 21 LOY. L.A. L. REV. 1343 (1988) (asserting that Congress must amend ERISA to permit insured welfare benefit plan participants to sue for bad faith under state law); Karen L. Peterson, Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519 (1988) (same).

B. *Under Insurance Code section 11580.2, the statute of limitations for an insured's cause of action against an insurer to compel arbitration of an uninsured motorist claim begins to run when the insurer refuses to submit to arbitration:* Spear v. California State Automobile Association.

In *Spear v. California State Automobile Association*,[1] the California Supreme Court held that under contract law principles and under Code of Civil Procedure section 1281.2,[2] a plaintiff's cause of action to compel arbitration of an uninsured motorist's claim under Insurance Code section 11580.2[3] accrues upon the insurer's refusal to arbitrate.[4] The court noted that although section 11580.2 provides conditions precedent to the accrual of an insured's cause of action,[5] the statute does not provide for

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1. 2 Cal. 4th 1035, 831 P.2d 821, 9 Cal. Rptr. 2d 381 (1992). Justice Panelli wrote the court's unanimous opinion with Chief Justice Lucas, and Justices Mosk, Kennard, Arabian, Baxter and George concurring.

2. Section 1281.2 provides in relevant part, "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the [parties] . . . to arbitrate the controversy if it determines that an agreement to arbitrate . . . exists." CAL. CIV. PROC. CODE § 1281.2 (West 1982). *See also* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §§ 36, 37, 39 (9th ed. 1990) (discussing California statutory law regarding arbitration). *See generally* 6 CAL. JUR. 3D *Arbitration and Award* §§ 15-23 (1988 & Supp. 1992).

3. CAL. INS. CODE § 11580.2 (West 1988 & Supp. 1992).

4. *Spear*, 2 Cal. 4th at 1040, 831 P.2d at 824, 9 Cal. Rptr. 2d at 384. At present, California lacks statutory authority regarding the statute of limitations for an action to compel arbitration. *Id.* Courts, however, have generally agreed that because an arbitration clause is a contractual provision, actions to compel such arbitration are governed by the contract statute of limitations. *Id.*

Statutory authority is also lacking on the subject of accrual of a cause of action to compel arbitration. *Id.* Section 11580.2(i) does contain conditions precedent for accrual of such a claim, however, the statute does not indicate when accrual actually occurs once such conditions are satisfied. CAL. INS. CODE § 11580.2(i) (West 1988 & Supp. 1992). *See infra* note 5 setting forth the conditions precedent. However, in California State Auto. Ass'n v. Cohen, 44 Cal. App. 3d 387, 396, 118 Cal. Rptr. 890, 1895 (1975), the court held that such action accrues when any one of the section 11580.2(i) conditions are satisfied. The *Cohen* decision was relied upon by the appellate court in Spear v. California State Auto. Ass'n, 7 Cal. App. 4th 66, 286 Cal. Rptr. 662 (1991), *rev'd*, 2 Cal. 4th 1035, 831 P.2d 821, 9 Cal. Rptr. 2d 381 (1992). Several jurisdictions have held that an action to compel arbitration accrues only when the other party refuses to submit to arbitration. *See infra* note 16.

5. Section 11580.2(i) provides:

> No cause of action shall accrue to the insured under any policy or endorsement provision issued pursuant to this section unless one of the following actions have been taken within one year from the date of the accident: (1) Suit for bodily injury has been filed against the uninsured motorist, in a

an accrual time.[6] The court concluded that a cause of action to compel arbitration accrues when the insurer has refused to participate in arbitration.[7]

In determining that a cause of action to compel arbitration accrues when the defendant refuses to arbitrate, the supreme court reversed the court of appeal's holding.[8] Additionally, the supreme court undermined *California State Automobile Association v. Cohen*,[9] a prior appellate decision upon which the court of appeals based its decision.[10] The supreme court explained that although the appellate courts in both *Spear* and *Cohen* correctly determined that section 11580.2(i) provided conditions to accrual,[11] both courts erred in reasoning that such conditions were the final conditions to accrual.[12] Furthermore, the court posited

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court of competent jurisdiction. (2) Agreement as to the amount due under the policy has been concluded. (3) The insured has formally instituted arbitration proceedings.

CAL. INS. CODE § 11580.2(i). For a discussion of section 11580.2(i) and related provisions, see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1189 (9th ed. 1988 & Supp. 1992); 39 CAL. JUR. 3D *Insurance Contracts and Coverage* §§ 373, 452 (1977 & Supp. 1992).

6. *Spear*, 2 Cal. 4th at 1041, 831 P.2d at 824, 9 Cal. Rptr. 2d at 384.

7. *Id.* at 1037, 831 P.2d at 822, 9 Cal. Rptr. 2d at 382. In *Spear*, the plaintiff was injured in an automobile accident with an uninsured motorist during the course and scope of his employment. After unsuccessfully seeking redress from the uninsured motorist, the plaintiff pursued an action against his insurer pursuant to the uninsured motorist provisions of his policy. However, because the plaintiff had a worker's compensation claim pending, the insurer refused to settle the insurance claim. Subsequently, the plaintiff settled his worker's compensation claim; however, the insurer still refused to settle the insurance claim. The plaintiff then petitioned to compel arbitration, but the insurer asserted that the statute of limitations barred the plaintiff's claim. The trial court denied the plaintiff's petition, and the appellate court affirmed, holding that because the cause of action had accrued when the plaintiff filed suit against the uninsured motorist, the statute of limitation barred the plaintiff's petition. *Id.* at 1039, 831 P.2d at 823, 9 Cal. Rptr. 2d at 383.

8. *Id.* The court of appeal held that because the plaintiff, under section 11580(i)(1), filed suit for bodily injury against the uninsured motorist within one year after the accident, the plaintiff's cause of action to compel arbitration accrued as of the date of such filing. *Id. See also* Spear v. California State Auto. Ass'n, 7 Cal. App. 4th 66, 286 Cal. Rptr. 662 (1991).

9. 44 Cal. App. 3d 387, 118 Cal. Rptr. 890 (1975). The court held that a cause of action against an insurer accrues when any of the section 11580.2(i) conditions are met. *Id.* For the conditions set forth in section 11580.2(i), see *supra* note 5.

10. *Spear*, 2 Cal. 4th at 1039, 831 P.2d at 823, 9 Cal. Rptr. 2d at 383.

11. *Id. See* CAL. INS. CODE § 11580.2(i). For a more in-depth discussion of section 11580.2(i), see *supra* note 5.

12. *Spear*, 2 Cal. 4th at 1040, 831 P.2d at 823, 9 Cal. Rptr. 2d at 383. The *Cohen*

that since the arbitration clause was contractual, the action to compel arbitration was akin to an action for specific performance.[13] The court noted that the appropriate statute of limitations for a contractual specific performance claim is four years,[14] and that the claim does not accrue until the contract has been breached.[15] Moreover, the court noted that Civil Procedure section 1281.2 indicated that a plaintiff may only bring an action to compel arbitration after the defendant has refused to arbitrate.[16] Therefore, the court concluded that the plaintiff's cause of action accrued on the date he petitioned to compel arbitration.[17] By holding that a plaintiff's cause of action to compel arbitration does not accrue until the defendant refuses to submit to arbitration, the court has reaffirmed California's preference of arbitration over litigation as a dispute resolution process.[18] Furthermore, this decision illustrates the court's

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court reasoned that the satisfaction of at least one of the section 11580.2(i) conditions is an absolute prerequisite to the accrual of a cause of action. *Id.* at 1040, 831 P.2d at 824, 9 Cal. Rptr. 2d at 384 (citing *Cohen*, 44 Cal. App. 3d at 395, 118 Cal. Rptr. at 895). The supreme court in *Spear* explained that such reasoning was sound and based upon reliable authority. *Id.* However, the court believed that the *Cohen* court erred in its determination that accrual is automatic and immediate once any of the section 11580.2(i) conditions are satisfied. *Id.*

13. *Id.* at 1042, 831 P.2d at 825, 9 Cal. Rptr. 2d at 385 (citing Freeman v. State Farm Mut. Auto. Ins. Co., 14 Cal. 3d 473, 479, 535 P.2d 341, 344, 121 Cal. Rptr. 477, 480 (1975)).

14. *Id.* at 1040, 831 P.2d at 824, 9 Cal. Rptr. 2d at 384.

15. *Id.* at 1042, 831 P.2d at 825, 9 Cal. Rptr. 2d at 385 (citing 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Actions* § 375 (1985)). The court reasoned that unlike one party's refusal to arbitrate, good faith negotiations prior to arbitration and mutual agreement to delay arbitration do not constitute breach of the arbitration clause in a contract. *Id.*

16. *Id.* at 1041, 831 P.2d at 825, 9 Cal. Rptr. 2d at 385 (citing CAL. CIV. PROC. CODE § 1281.2; Meyer v. Carnow, 185 Cal. App. 3d 169, 174, 229 Cal. Rptr. 617, 619 (Cal. Ct. App. 1986)). For a more in-depth discussion of Code of Civil Procedure section 1281.2, see *supra* note 2.

17. *Spear*, 2 Cal. 4th at 1042-43, 831 P.2d at 825-26, 9 Cal. Rptr. 2d at 385-86. In a footnote, the court cited several cases from other jurisdictions which also held that a plaintiff's cause of action to compel arbitration accrues only when the defendant refuses to submit to arbitration upon the plaintiff's demand. *Id.* at 1043 n.7, 831 P.2d at 826 n.7, 9 Cal. Rptr. 2d at 386 n.7 (citing Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 300 Minn. 149, 218 N.W. 2d 751 (1974); Mitchell v. Alfred Hofmann, Inc., 48 N.J. Super. 396, 137 A.2d 569 (N.J. Super. Ct. App. Div. 1958)).

18. California has a long-standing public policy that favors arbitration because it avoids many disadvantages inherent to litigation. *Meyer*, 185 Cal. App. 3d at 173, 229 Cal. Rptr. at 618. This California public policy is further evidenced by a post-*Spear* opinion in which the court expressed its willingness to uphold arbitration decisions with very few exceptions. Moncharsh v. Heily, 3 Cal. 4th 1, 9, 832 P.2d 899, 903, 10 Cal Rptr. 2d 183, 187 (1992).

desire to spread costs among society by allowing the insured more latitude to bring actions against insurers.

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VIII. LANDLORD TENANT

A forfeiture restraint on alienation in a commercial lease restricting the lessee's right to assign or sublease is valid and does not constitute a breach of the implied covenant of good faith and fair dealing provided that it was bargained for at arm's length: **Carma Developers (California), Inc. v. Marathon Development California, Inc.**

I. INTRODUCTION

In *Carma Developers (California), Inc. v. Marathon Development California, Inc.*,[1] the California Supreme Court considered whether a provision in a commercial lease "allowing the lessor to terminate the lease and recapture the leasehold upon notice by the lessee of intent to sublease or assign" was reasonable and conformed with the implied covenant of good faith and fair dealing.[2] In a unanimous decision,[3] the court held that the recapture clause was reasonable under California law[4] and did not violate the implied covenant of good faith and fair dealing.[5]

A. Background

The general rule in California regarding alienation of commercial leaseholds is that a tenant's rights are freely alienable unless the lease pro-

1. 2 Cal. 4th 342, 826 P.2d 710, 6 Cal. Rptr. 2d 467 (1992).
2. *Id.* at 350, 826 P.2d at 712, 6 Cal. Rptr. 2d at 469.
3. Pursuant to a California Supreme Court order, this case was heard by the Third District Court of Appeal because the California Supreme Court, being a tenant of Marathon, was required to recuse itself. *Id.* at 350 n.1, 826 P.2d at 712 n.1, 6 Cal. Rptr. 2d at 469 n.1. Acting Chief Justice Puglia wrote the decision and Justices Blease, Sparks, Sims, Marler, Scotland, and Nicholson concurred.
4. *Id.* at 371, 826 P.2d at 726, 6 Cal. Rptr. at 483. The court also analyzed the clause's reasonableness under the law prior to the 1989-90 statutory enactment and determined that the clause was reasonable under prior law as well. *See infra* notes 28-53 and accompanying text.
5. *Carma*, 2 Cal. 4th at 376, 826 P.2d at 729, 6 Cal. Rptr. 2d at 486.

vides otherwise.[6] If the lease contains a restriction on alienation, the restriction must be reasonable,[7] and is valid unless it is repugnant to the interest created.[8] The general rule regarding a lease provision requiring the landlord's consent to an assignment or sublease is that such consent may not be unreasonably withheld.[9] Withholding consent means that "the lessor has a commercially reasonable objection to the assignee or proposed use."[10] The courts have used the balancing test set forth in *Wellenkamp v. Bank of America*[11] to assess the reasonableness of restraints on alienation:[12] the greater the restraint, the greater the need for justification of such restraint.[13] However, on January 1, 1990, a new chapter of the Civil Code[14] became effective. These code sections codified the general rules regarding transfer restrictions in commercial leases and expressly authorized several types of restrictions on transfer.[15]

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6. *Id.* at 355, 826 P.2d at 715, 6 Cal. Rptr. 2d at 472 (citing Kassan v. Stout, 9 Cal. 3d 39, 43, 507 P.2d 87, 89, 106 Cal. Rptr. 783, 785 (1973)). *See also* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 648 (9th ed. 1987); William G. Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 LOY. L.A. L. REV. 405, 427-47 (1989) (discussing the general rules regarding alienation of commercial leases).

7. Wellenkamp v. Bank of America, 21 Cal. 3d 943, 953, 582 P.2d 970, 976-77, 148 Cal. Rptr. 379, 385-86 (1978) (holding that a due-on-sale clause in a promissory note must be reasonably necessary). *See also* 27 CAL. JUR. 3D *Deeds of Trust* § 150 (1987); *Coskran, supra* note 6, at 454-59 (discussing the impact of *Wellenkamp*).

8. CAL. CIV. CODE § 711 (West 1982). *See also* 26 CAL. JUR. 3D *Deeds* § 214 (1978) (discussing the rules regarding repugnant conditions).

9. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 496, 709 P. 2d 837, 841-42, 220 Cal. Rptr. 818, 822-23 (1985). For general discussions of *Kendall* and the rules regarding withholding consent, see 42 CAL. JUR. 3D *Landlord and Tenant* §§ 202, 223 (Supp. 1992); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 649-650 (9th ed. 1987); RESTATEMENT (SECOND) OF PROPERTY § 15.2 cmt. h (1976).

10. *Kendall*, 40 Cal. 3d at 506-07, 709 P.2d at 849, 220 Cal. Rptr. at 830.

11. 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

12. The *Wellenkamp* court stated, "We recognize that a direct relationship exists between the Justification for enforcement of a particular restraint . . . and the Quantum of restraint [resulting] from enforcement . . . [t]hus, the greater the quantum of restraint [resulting] from enforcement . . . the greater must be the justification for that enforcement." *Wellenkamp*, 21 Cal. 3d at 948-49, 582 P.2d at 973, 148 Cal. Rptr. at 382. For a discussion of the *Wellenkamp* test, see 27 CAL. JUR. 3D *Deeds of Trust* § 150 (1987); 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* § 79 (1987); David Greenclay Crane, Note, Wellenkamp v. Bank of America: *A Victory for the Consumer?*, 31 HASTINGS L.J. 275, 286-87 (1979).

13. *See* Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 639, 526 P.2d 1169, 1175, 116 Cal. Rptr. 633, 639 (1974) (holding a high quantum of restraint was involved with the enforcement of a due-on-sale clause upon sale of the property, thus requiring a significant showing that enforcement was necessary). *See also* Crane, *supra* note 12, at 279-80 (discussing *Tucker*).

14. CAL. CIV. CODE §§ 1995.010-.270 (West Supp. 1992). *See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 650A, 650B (9th ed. Supp. 1992).

15. *Carma*, 2 Cal. 4th at 366, 826 P.2d at 722-23, 6 Cal. Rptr. 2d at 479-80. *See*

B. Statement of the Case

This controversy involved a provision in a ten-year lease between two commercial development companies: Marathon Development, Inc., the landlord, and Carma Developers, Inc., the tenant.[16] Paragraph 15(a) of the lease provided that the tenant must submit a written request and receive written permission from the landlord before assigning or subleasing the property.[17] Paragraph 15(b) provided that upon receipt of the tenant's written notice of intent to assign or sublease, the landlord could, within thirty days, terminate the lease, recapture the property, and enter into a new lease with any other party at a profit.[18] Upon such termination, the tenant would be relieved of all obligations under the lease and would not be entitled to future profits.[19]

Several years into the lease term, after having made improvements to the property, Carma submitted a written request to sublease eighty percent of the premises at an increased rental rate.[20] Marathon sent Carma a termination notice and unsuccessfully pursued a new lease with Carma's intended sublessee.[21] Carma sued Marathon for breach of paragraphs 15(a) and (b) of the lease, and for breach of the implied covenant of good faith and fair dealing.[22] The trial court granted the tenant's summary judgment, finding that the landlord had acted unreasonably in withholding consent to sublease, in terminating the lease to obtain profits, and in not allowing the tenant to recover the value of its improvements to the property.[23] Marathon appealed, arguing that the

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supra notes 6-9 and accompanying text for the general rules; *see also infra* notes 55, 60-63 and accompanying text for the statutory codifications. *See generally* 6 HARRY D. MILLER & MARVIN B. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE §§ 18.61-18.62 (2d ed. 1989 & Supp. 1992) (discussing the general rules before and after revision of the Code).

16. *Carma*, 2 Cal. 4th at 351, 826 P.2d at 712-13, 6 Cal. Rptr. 2d at 469-70.

17. *Id.* at 351, 826 P.2d at 713, 6 Cal. Rptr. 2d at 470. Paragraph 15(a) also stated that consent to assign or sublease would not be unreasonably withheld. *Id.*

18. *Id.* at 352, 826 P.2d at 713, 6 Cal. Rptr. 2d at 470. The provision stipulated that this "other party" could be the intended assignee or sublessee.

19. *Id.*

20. *Id.* at 352, 826 P.2d at 713, 6 Cal. Rptr. 2d at 470.

21. *Id.*

22. *Id.* The petitioner also sued for interference with prospective economic advantage. *Id.* Such action was not at issue on appeal to the supreme court.

23. *Id.* at 352-53, 826 P.2d 713-14, 6 Cal. Rptr. 2d at 470-71.

court erred in applying a reasonableness standard.[24] Carma also appealed, contesting cost and fee awards.[25] The court of appeal affirmed, finding "reasonableness" was the proper standard, and remanded the case to the trial court on the issue of costs.[26] The California Supreme Court granted Carma's petition for review and affirmed the court of appeal's holding that reasonableness was the proper standard, but reversed the holding that the provisions in the lease were unreasonable and that these provisions violated the implied covenant of good faith and fair dealing.[27]

II. TREATMENT

A. *Restraint on Alienation*

1. The Law Prior to 1990

After declaring that the language in the lease was unambiguous, and that the companies were at equal bargaining positions,[28] the court considered the question of whether paragraphs 15(a) and 15(b) constituted a valid restraint on alienation under the law prior to the 1990 statutory enactment.[29] The court analyzed this issue under two tests, the repugnancy test and the reasonableness test.[30]

First, the court applied Civil Code section 711, which provides that "'[c]onditions restraining alienation, when repugnant to the interest created, are void.'"[31] The court accepted the landlord's argument that because a condition could not be considered repugnant to an interest of which that interest is an integral part, repugnancy could be considered the same as reasonableness.[32]

Second, the court applied the reasonableness test set forth in *Wellenkamp v. Bank of America*.[33] *Wellenkamp* stated that a direct relationship exists between the extent of the restraint and the amount of

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24. *Id.* at 353, 826 P.2d at 714, 6 Cal. Rptr. 2d at 471.
25. *Id.*
26. *Id.*
27. *Id.* at 376, 826 P.2d at 730, 6 Cal. Rptr. 2d at 487.
28. *Id.* at 353-54, 826 P.2d at 714, 6 Cal. Rptr. 2d at 471.
29. *Id.* at 354, 826 P.2d at 714-15, 6 Cal. Rptr. 2d at 471-72.
30. *Id.* at 356, 826 P.2d at 716, 6 Cal. Rptr. 2d at 473.
31. *Carma*, 2 Cal. 4th at 355, 826 P.2d at 715, 6 Cal. Rptr. 2d at 472; CAL. CIV. CODE § 711 (West 1982). *See supra* note 8.
32. *Carma*, 2 Cal. 4th at 356, 826 P. 2d at 716, 6 Cal. Rptr. 2d at 473. "[T]he 'repugnancy' argument is nothing more than an inaccurate expression that public policy is opposed to such a restraint." *Id.* (quoting Merrill I. Schnebly, *Restraints Upon the Alienation of Legal Interests: I*, 44 YALE L.J. 961, 981 (1934)).
33. 21 Cal. 3d 943, 948-49, 582 P.2d 970, 973, 148 Cal. Rptr. 379, 382 (1978). *See supra* notes 7, 12 and accompanying text.

justification required for the restraint such that as the former increases so must the latter increase proportionally.[34] The court reasoned that because a leasehold interest, unlike a fee estate, is limited in duration and scope by its very definition, restraints on alienation of leasehold estates are less likely to be repugnant, and therefore less likely to be unreasonable.[35] Moreover, the court reasoned, since disabling restraints[36] are generally upheld in leases despite their binding effect on the lessee,[37] forfeiture restraints,[38] such as the one in the present case, are likely to be upheld as well.[39]

Turning to the facts of the case at hand, the court first determined that the court of appeal erred in its conclusion that the lease provisions constituted total restraint on alienation.[40] The court reasoned that because the instrument was a lease, the restraint was "limited both by the duration and scope of the leasehold interest."[41] The court further reasoned that a forfeiture restraint does not bind the lessee into an unfavorable lease.[42] Finally, the court reasoned that because the landlord is only likely to exercise the right to terminate when he or she will benefit, this

34. *Wellenkamp*, 21 Cal. 3d at 948-49, 582 P.2d at 973, 148 Cal. Rptr. at 382.

35. *Carma*, 2 Cal. 4th at 358, 826 P.2d at 717, 6 Cal. Rptr. 2d at 474. The court observed that "[t]he primary feature of th[e] emerging fee estate was the power of alienation." The court also noted, however, that "since very early times, the common law recognized the validity of restrictions on leasehold interests." *Id.* at 358-59, 826 P.2d at 717-18, 6 Cal. Rptr. 2d at 474-75 (citing GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY § 101 (2d ed. 1985)).

36. Disabling restraints are restrictions which void alienations. *Id.* at 359, 826 P.2d at 718, 6 Cal. Rptr. 2d at 475. Such a restraint binds the lessee to the lease. *Id. See generally* RESTATEMENT (SECOND) OF PROPERTY *Donative Transfers* § 3.1 (1981); RESTATEMENT (SECOND) OF PROPERTY *Landlord and Tenant* § 15.2 cmt. c (1976 and Supp. 1992).

37. *Carma*, 2 Cal. 4th at 359, 926 P.2d at 718, 6 Cal. Rptr. 2d at 475.

38. A forfeiture restraint allows a lessee to terminate his obligation by finding a suitable transference. Such a restraint merely accelerates exercise of the lessor's reversionary interest, thus letting the lessee out, and unlike a disabling restraint, does not bind the lessee. *Id.* at 359, 826 P.2d at 718, 6 Cal. Rptr. 2d at 475. For discussions of forfeiture clauses see generally RESTATEMENT (SECOND) OF PROPERTY *Donative Transfers* §§ 3.2, 4.2 (1981); RESTATEMENT (SECOND) OF PROPERTY *Landlord and Tenant* § 15.2 cmt. b (1977); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 405-408 (9th ed. 1987).

39. *Carma*, 2 Cal. 4th at 359-60, 826 P.2d at 718, 6 Cal. Rptr. at 475. *See also Coskran*, *supra* note 6, at 453 (discussing forfeiture restrictions).

40. *Carma*, 2 Cal. 4th at 361, 826 P.2d at 719, 6 Cal. Rptr. at 476.

41. *Id.*

42. *Id.*

will only occur in a rising market.[43]

The court next concluded that the court of appeal erred in finding inadequate justification for the restraint provision.[44] The court rejected Carma's argument that "termination for the purpose of appropriating increased rental value [was] per se unreasonable."[45] The court distinguished Carma's cases by pointing out that the restrictions on assignment and sublease in those cases were for the purpose of avoiding an unwanted tenant,[46] whereas the purpose of the restriction in the present case was to appropriate appreciated rental value.[47]

The court explained that disputes arise when one party, at the expense of the other, attempts to gain more from a bargain than it reasonably should expect.[48] The court found that in the case at hand, Carma was trying to obtain a better deal than the one for which it bargained.[49] According to the court, paragraphs 15(a) and (b) were included in the lease with the intent of allowing Marathon, as landlord, to terminate the lease and claim the increased rental value.[50] The court reasoned that Marathon's actions were consistent with these lease provisions, and thus Carma, as tenant, was left to suffer the consequences of its bargain.[51] Furthermore, the court reasoned that the recent trend in balancing the competing public policies of freedom of alienation and freedom of contract favors the freedom of contract.[52] The court concluded that in this case, the policy of freedom of contract outweighed the "marginal restraint on alienation" and, thus, the restriction here was both reasonable and lawful.[53]

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43. *Id.*

44. *Id.*

45. *Id.* at 361, 826 P.2d at 720, 6 Cal. Rptr. 2d at 477.

46. *Id.* at 361-62, 826 P.2d at 720, 6 Cal. Rptr. 2d at 477. *See* Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 709 P. 2d 837, 220 Cal. Rptr. 818 (1985). Such was clearly not the purpose of the restriction in the case at hand, as evidenced by the fact that the respondent here sought to enter into a lease with the petitioner's intended sublessee.

47. *Carma*, 2 Cal. 4th at 362, 826 P.2d at 720, 6 Cal. Rptr. 2d at 477.

48. *Id.*

49. *Id.*

50. *Id.* The court's finding was largely based on the lease provisions, which allowed the lessor to enter into a new lease with the intended sublessee. *Id.*

51. *Id.*

52. *Id.* at 363, 826 P.2d at 720-21, 6 Cal. Rptr. at 477-78. Civil Code section 1995.270, enacted in 1990, provides that "[i]t is the public policy of the state and fundamental to the commerce . . . of the state to enable and facilitate freedom of contract by the parties to commercial real property leases." CAL. CIV. CODE § 1995.270(a)(1) (Supp. 1992).

53. *Carma*, 2 Cal. 4th at 363, 826 P.2d at 721, 6 Cal. Rptr. 2d at 478.

2. Analysis Under Current Law

The court next considered whether paragraphs 15(a) and (b) of the lease were unreasonable restraints on alienability based on recent statutory enactment.[54] The court agreed with Carma that sections 1995.260 and 1995.270, which provide a reasonableness standard for withholding consent for transfer as to leases entered into after September 23 1983,[55] are inapplicable to the present case.[56] The court reasoned that since paragraph 15(a) contained an express reasonableness standard, application of these statutes was unnecessary.[57] Furthermore, the court reasoned that since paragraph 15(b) was a termination provision, not a consent provision, these code sections were inapplicable to that provision as well.[58]

The court next considered Marathon's argument that other sections of the statutory enactment applied:[59] section 1995.210(a), which authorizes transfer restrictions on a tenant's interest;[60] section 1995.230, which allows restrictions that prohibit transfers entirely;[61] section 1995.240, which permits restrictions that give the landlord "some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease";[62] and section 1995.250, which provides that "[a] restriction . . . may require the landlord's consent . . . subject to any express standard . . . including . . . [that] the landlord's consent may not be unreasonably withheld."[63] Furthermore, Marathon argued, the Code defines

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54. *Id.* at 366, 826 P.2d at 722, 6 Cal. Rptr. 2d at 479.

55. Civil Code Section 1995.260 provides in relevant part, "If a restriction on transfer . . . in a lease requires the landlord's consent . . . but provides no standard for giving or withholding consent, the restriction . . . shall be construed to include an implied standard that . . . consent may not be unreasonably withheld." CAL. CIV. CODE § 1995.260 (West Supp. 1992). Section 1995.270 provides in relevant part, "Section 1995.260 applies to a restriction on transfer executed on or after September 23, 1983." CAL. CIV. CODE § 1995.270(b) (West Supp. 1992).

56. *Carma*, 2 Cal. 4th at 367, 826 P.2d at 723, 6 Cal. Rptr. 2d at 480.

57. *Id.*

58. *Carma*, 2 Cal. 4th at 367, 826 P.2d at 723, 6 Cal. Rptr. 2d at 481. *See also supra* notes 18-20 and accompanying text.

59. *Carma*, 2 Cal. 4th at 367-68, 826 P.2d at 723-24, 6 Cal. Rptr. 2d at 480-81. *See* CAL. CIV. CODE §§ 1995.010-.250 (West Supp. 1992) (authorizing liberal use of transfer restrictions).

60. CAL. CIV. CODE § 1995.210(a) (West Supp. 1992).

61. CAL. CIV. CODE § 1995.230 (West Supp. 1992).

62. CAL. CIV. CODE § 1995.240 (West Supp. 1992).

63. CAL. CIV. CODE § 1995.250 (West Supp. 1992).

"'restriction on transfer' as 'a provision . . . that restricts the right of transfer of the tenant's interest,'" and "'[t]ransfer' [as] 'an assignment, sublease . . . of all or part of a tenant's interest . . . .'"[64] However, the court felt that the Code left construction of the words "restrict" and "restraint" somewhat open.[65] The court explained that a broad construction of the term "restraint" would include any restraint on alienation regardless of its purpose, whereas a narrow construction would include only "direct" restraints, whose primary purpose is to restrain alienation.[66]

The court examined the legislative intent to determine whether the legislative wanted to allow the type of restrictions at issue here.[67] Looking to the Law Revision Commission Report, the court concluded that the statute was applicable because the legislature intended to protect restrictions giving the landlord the right to recover possession and profits.[68]

In applying the statute to the present case, the court determined that the restrictions were reasonable because both the statute and paragraph 15(b) authorized the landlord's conduct of terminating the lease and entering into a new lease.[69]

B. Implied Covenant of Good Faith and Fair Dealing

The court next addressed the issue of whether the respondent's enforcement of the lease provisions constituted a breach of the implied covenant of good faith and fair dealing.[70] The court observed that "'ev-

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64. *Carma*, 2 Cal. 4th at 368, 826 P.2d at 724, 6 Cal. Rptr. 2d at 481 (quoting CAL. CIV. CODE § 1995.020 (West Supp. 1992)).

65. *Id.* at 369, 826 P.2d at 725, 6 Cal. Rptr. 2d at 482.

66. *Id.*

67. *Id.* at 369, 826 P.2d at 725, 6 Cal. Rptr. 2d at 482.

68. *Id.* at 370-71, 826 P.2d at 725-26, 6 Cal. Rptr. 2d at 482-83. According to the Law Revision Commission:

> The parties should be able to agree on standards . . . for transfer, and those standards . . . should be enforceable . . . [and] might include . . . that the landlord is entitled to recapture any consideration realized by the tenant as a result of a transfer . . . [provided that] the limitation satisfies the general restrictions on freedom of contract . . . .

Id. at 370, 826 P.2d at 725, 6 Cal. Rptr. 2d at 482 (quoting *Assignment and Sublease*, 20 CAL. L. REVISION COMM'N REP. 251, 258-59 (1990)). *See Coskran supra* note 6, at 417-18 (discussing the different categories of restrictions). *See also* CAL. CIV. CODE § 1995.270(a)(1) (West Supp. 1992) (providing that "[i]t is the public policy of the state and fundamental to the commerce and economic development of the state to enable and facilitate freedom of contract by the parties to commercial real property leases").

69. *Carma*, 2 Cal. 4th at 371, 826 P.2d at 726, 6 Cal. Rptr. 2d at 483.

70. *Id.*

ery contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement,'"[71] but that no single definition of this duty existed.[72] According to the general principles of this covenant, its breach does not require breach of a specific contract provision;[73] a party's conduct need not be dishonest;[74] and the covenant protects the express terms of the contract, not some general overriding public policy.[75]

The court rejected Carma's argument that the covenant prohibited enforcement of paragraph 15(b).[76] In surveying relevant California cases, the court observed a general rule that the implied covenant should not prohibit enforcement of express provisions of a contract, and in fact, implied terms should never be construed to alter express, bargained-for provisions.[77] The court reasoned that in the present case, construing the implied covenant of good faith to prohibit paragraph 15(b) would be contrary to the general rule.[78] Since Marathon's conduct, terminating the lease and re-leasing the property, was permitted by the express provisions of the lease, such conduct could be reasonably expected by both

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71. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683, 765 P.2d 373, 389, 254 Cal. Rptr. 211, 227 (1988) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979)). For explanations of the implied duty of good faith and fair dealing, see 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 926 (9th ed. 1987); *Coskran*, *supra* note 6, at 459-62.

72. *Carma*, 2 Cal. 4th at 372, 826 P.2d at 727, 6 Cal. Rptr. 2d at 484.

73. *Id.* at 373, 826 P.2d at 727, 6 Cal. Rptr. 2d at 484 (citing Conoco, Inc. v. Inman Oil Co., Inc., 774 F.2d 895, 908 (8th Cir. 1985)).

74. *Id.* at 373, 826 P.2d at 727, 6 Cal. Rptr. 2d at 484 (citing Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 204-06 (1968)).

75. "The implied covenant of good faith is read into contracts 'in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.'" *Id.* (quoting Foley v. Interactive Data Corp., 47 Cal. 3d 654, 690, 765 P.2d 373, 394, 254 Cal. Rptr. 211, 232 (1988)).

76. *Id.* at 373-74, 826 P.2d at 728, 6 Cal. Rptr. 2d at 485.

77. "'The general rule [regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant . . . . " VTR Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773, 777 (S.D.N.Y. 1969) (quoting 3 CORBIN, CONTRACTS § 564 (1980)). For holdings consistent with the general rule, see Balfour, Guthrie & Co. v. Gourmet Farms, 108 Cal. App. 3d 181, 166 Cal. Rptr. 422 (1980); Brandt v. Lockheed Missles & Space Co., 154 Cal. App. 3d 1124, 201 Cal. Rptr. 746 (1984); Gerdlund v. Elec. Dispensers Int'l, 190 Cal. App. 3d 263, 235 Cal. Rptr. 279 (1987).

78. *Carma*, 2 Cal. 4th at 374, 826 P.2d at 728, 6 Cal. Rptr. 2d at 485.

parties and, thus, did not violate the implied covenant of good faith and fair dealing.[79]

III. IMPACT

In *Carma*, the California Supreme Court upheld provisions in a commercial lease allowing the landlord to terminate the lease and recapture the premises upon the tenant's attempt to sublease or assign without the landlord's consent.[80] The events leading up to the dispute in *Carma* occurred in the early 1980s, during a positive economic swing. Based on the current recession, the real estate community has largely disregarded the case.[81] However, the decision has caused the legal community to take notice.[82] Commercial lessees in California will enter into leases only after carefully scrutinizing each term and its consequences. Lessors, on the other hand, will be more confident in the validity of the restrictions in their leases.

The *Carma* decision is part of a trend in California toward permitting forfeiture clauses in leases.[83] However, some scholars believe that *Carma* is fact specific, and that forfeiture restrictions for the purpose of appropriating increased rents may not always be upheld.[84]

NANCY GAYLE DRAGUTSKY

IX. TAX LAW

A. *California's use of a three-factor formula to apportion the income of a foreign-parent multi-national enterprise for state tax purposes does not violate the Foreign Commerce Clause of the Federal Constitution:* **Barclays v. Franchise Tax Board.**

In *Barclays v. Franchise Tax Board*,[1] the California Supreme Court was faced with the issue of whether California could apportion state taxes based upon a three-factor formula consistent with the Foreign

79. *Id.* at 376, 826 P.2d at 729, 6 Cal. Rptr. 2d at 486.

80. *Id.* at 376, 826 P.2d at 730, 6 Cal. Rptr. 2d at 487.

81. Morris Newman, *Real Estate; Los Angeles Inundated by Sublet Space*, N.Y. TIMES, June 24, 1992, at D19.

82. *Id.*

83. Cheryl B. Welborn, *Subleasing and Assignment Under Commercial Leases*, *in* C761 ALI-ABA 423 (Morrison & Foerster eds., 1992).

84. *Id.*

1. 2 Cal. 4th 708, 829 P.2d 279, 8 Cal. Rptr. 2d 31 (1992). Justice Arabian delivered the unanimous opinion of the court with Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Baxter, and George concurring.

Commerce Clause of the United States Constitution.[2] The court held that this type of apportionment was valid and that the inherent limitations of the Foreign Commerce Clause did not apply, given Congress' acquiescence in formula apportionment.[3]

The court first addressed the methodology of state taxation formulas.[4] States are permitted to tax corporations based upon their intrastate activities.[5] The contested issue involves how to properly identify the portion of a company's income which is attributable to those activities.[6] The court examined the two foremost accounting methods: the "arm's length/separate accounting" (AL/SA) method and the "unitary business/formula apportionment" method.[7] The AL/SA method calculates income by treating intercorporate transfers as arms length transactions.[8] Businesses tend to prefer this method of accounting.[9] The "unitary business/formula apportionment" method calculates the combined income of the entire business and then determines the percentage attributable to the state by an averaged ratio of property, payroll, and sales.[10] California and a majority of states use formula apportionment.[11] The court ana-

2. *Id.* at 712, 829 P.2d at 280, 8 Cal. Rptr. 2d at 32. In *Barclays*, the foreign-owned Barclays Bank International and the Barclays Bank of California were challenging tax assessments by the Franchise Tax Board of California in 1977. *Id.* The superior court held that formula apportionment was unconstitutional as applied to foreign owned corporations. *Id.* at 713, 829 P.2d at 280, 9 Cal. Rptr. at 32. The court of appeal affirmed the trial court's decision. *Id.* The California Supreme Court granted review. *Id.* at 714, 829 P.2d at 281, 8 Cal. Rptr. 2d at 33.

3. *Id.* at 738-39, 829 P.2d at 298, 8 Cal. Rptr. 2d at 50.

4. *Id.* at 714-15, 829 P.2d at 281-82, 8 Cal. Rptr. 2d at 33-34.

5. *Id.* The court recognized the proposition that "a State may not permissibly tax value earned outside its borders." *Id.* (quoting ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982) (defining proper "unitary business" principle for formula apportionment)).

6. *See, e.g.*, Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) (discussing problems with characterizing income of a business as having a single source); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (approving Iowa's single factor formula apportionment); Butler Bros. v. McColgan, 315 U.S. 501 (1942) (approving California's three factor formula apportionment plan for corporations).

7. *Barclays*, 2 Cal. 4th at 715, 829 P.2d at 282, 8 Cal. Rptr. 2d at 34.

8. *Id.* Under the AL/SA method, the income attributable to a state would depend upon the amount of the transactions made by the subsidiaries located in the state. *Id.*

9. *Id.*

10. *Id.* Under this method, the state calculates the combined income of all the corporation's subsidiaries. Then, the state calculates the ratio of property, payroll, and sales that was located in the state compared the total unitary business. That ratio is the taxable income for state tax purposes. *Id.*

11. *Id.* at 716, 829 P.2d at 282, 8 Cal. Rptr. 2d at 34. California Revenue and

lyzed the two methods and found neither to be technically superior[12] because each method only estimates the true income of a corporation which is attributable to a state.[13]

The United States Supreme Court has never imposed uniform rules for the division of income for state tax purposes.[14] The Court has decided that neither the Commerce Clause nor the Due Process Clause mandates the use of a particular method[15] and, thus, that any method is valid as long as it is not unreasonable or arbitrary.[16]

The Supreme Court had previously ruled that formula apportionment was constitutional when applied to a domestic company with foreign holdings.[17] The California Supreme Court noted that this decision was likely dispositive of the present case, but nevertheless addressed Barclay's argument as to whether the Foreign Commerce Clause may apply differently to foreign owned corporations.[18]

Taxation Code section 25101 (West 1992) states in pertinent part as follows:

> When the income of a taxpayer subject to the tax imposed under this part is derived from or attributable to sources both within and without the state the tax shall be measured by the net income derived from or attributable to sources within this state in accordance with the provision of Article 2 (commencing with section 25120).

Id. (citing CAL. REV. & TAX CODE § 25120 (West 1992)). Section 25120 spells out the particulars of the three factor formula apportionment used by California. CAL. REV. & TAX CODE § 25120 (West 1992). *See also California Taxes*, Franchise and Corporation Income Taxes, § 4.75 (May 1992) (explaining unitary business doctrine and factor formula apportionment applied to corporations).

12. *Barclays*, 2 Cal. 4th at 721, 829 P.2d at 286, 8 Cal. Rptr. 2d at 38.

13. *Id.* at 716, 289 P.2d at 283, 8 Cal. Rptr. 2d at 35. For critiques of both methods, see James F.X. Rudy, *The California Unitary Tax Concept as Applied to the Worldwide Activities of Foreign Corporations: A Modern Commerce Clause Analysis*, 15 U.S.F. L. REV. 371 (1980-81); Walter Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on Mobil, Exxon and H.R. 5076*, 79 MICH. L. REV. 113 (1978). In short, the criticism of AL/SA accounting is that there is administrative complexity caused by the need to analyze every transaction, and the fiction that these transfers resemble true competitive transactions. The criticism of formula apportionment usually centers on the fact that it is misleading to characterize the income of a business as having a single identifiable source.

14. *Barclays*, 2 Cal. 4th at 718, 829 P.2d at 284, 8 Cal. Rptr. 2d at 36. *See, e.g.*, Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 438 (1980).

15. *Barclays*, 2 Cal. 4th at 720, 829 P.2d at 285, 8 Cal. Rptr. 2d at 37. *See e.g.*, *Mobil Oil*, 445 U.S. at 438; Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978).

16. *Barclays*, 2 Cal. 4th at 718, 829 P.2d at 284, 8 Cal. Rptr. 2d at 36. *See also* Hans Rees' Sons v. North Carolina, 283 U.S. 123, 135 (1931) (tax may not be "out of all appropriate proportion to the business transacted by the [taxpayer] in that State").

17. Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 197 (1983).

18. *Barclays*, 2 Cal. 4th at 720-21, 829 P.2d at 286, 8 Cal. Rptr. 2d at 38. Barclays was claiming that the explicit rejection of challenges to formula apportionment in *Container* applied only to domestic corporations with foreign holdings and not to foreign-based corporations. The *Barclays* court thought this claim was semantic. *Id.* at

The court initially examined this dormant Foreign Commerce Clause issue.[19] The Commerce Clause of the United States Constitution imposes inherent limitations on the ability of the states to tax commerce.[20] The United States Supreme Court decided that one must consider the following when determining whether state taxes violate these limitations: 1) whether the tax applies to an activity with a substantial nexus to the state; 2) whether the tax is fairly apportioned; 3) whether the tax discriminates against interstate commerce; and 4) whether the tax is fairly related to the services provided by the state.[21] The Court also ruled that two additional considerations are required when examining a tax on foreign commerce.[22] First, the tax must not create a substantial risk of multiple international taxation and, second, it must not prevent the Federal Government from speaking with "one voice" on foreign commercial relations.[23] Barclays argued that California's use of formula apportionment breached this latter consideration.[24]

Although the court addressed this dormant Commerce Clause argument, it ultimately ruled that such an analysis was not applicable in the instant case.[25] It based this holding on the Supreme Court's decision in *Wardair Canada, Inc. v. Florida Department of Revenue*.[26] In *Wardair*, the Court decided that inherent Commerce Clause limitations were only relevant when Congress had not spoken on the issue.[27] Specifically, the Court held that when Congress has adopted certain measures and de-

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722, 829 P.2d at 286, 8 Cal. Rptr. 2d at 38.

19. *Id.* at 722, 829 P.2d at 286-87, 8 Cal. Rptr. 2d at 38-39.

20. Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977). The U.S. Constitution states that Congress shall have the power to "regulate commerce with foreign nations, and among the several states." U.S. CONST., art. I, § 8. The Court has held that this clause has self-executing powers since its decision in Gibbons v. Ogden, 22 U.S. 1 (1824).

21. *Complete Auto Transit Inc.*, 430 U.S. at 279.

22. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1978).

23. *Id.*

24. Barclays v. Franchise Tax Bd., 2 Cal. 4th 708, 724, 829 P.2d 279, 288, 8 Cal. Rptr. 2d 31, 40 (1992). The court noted that this factor was "essentially a species of preemption." *Id.* (quoting Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)). In other words, the crucial consideration was whether federal law should preempt the inconsistent state law.

25. *Id.* at 727, 829 P.2d at 290, 8 Cal. Rptr. 2d at 42.

26. 477 U.S. 1 (1986).

27. *Id.* at 8. In *Wardair*, a Canadian airline was challenging the constitutionality of a Florida state sales tax on aviation fuel. They claimed that the tax violated the inherent limitations of the Foreign Commerce Clause. *Id.* at 4.

clined others in a certain field, the inherent limitations of the Commerce Clause are not invoked.[28] In other words, the negative implications of not acting indicate that Congress would acquiesce rather than remain silent.[29]

The *Barclays* court found that Congress had explicitly refused to prevent states from using formula apportionment "in cases of this kind."[30] The court cited numerous bilateral tax treaties between the United States and other nations.[31] In every such treaty, formula apportionment by states was not barred, although the issue had often been raised in preliminary discussions.[32] Therefore, the court held that dormant Commerce Clause analysis was inappropriate in this case.[33] Because this was the only remaining challenge to formula apportionment at issue before the court, the supreme court remanded the case to the court of appeal.[34]

The court's decision in *Barclays* seems to foreclose any further challenges to formula apportionment within state taxation.[35] More importantly, the court's interpretation and approval of *Wardair* may practically

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28. *Id.* Wardair had pointed to the Chicago Convention on International Civil Aviation, approved by the United States, to demonstrate that there was a commitment to eliminate the type of tax that Florida had imposed. *Id.* at 9. The Court claimed that this showed only that there was an aspiration to dispense with these taxes. *Id.* at 9-10. The Court said that it stood in sharp contrast to the actual law which allowed for such a tax. *Id.* at 10. Thus, it could be assumed that Congress had considered the desired policy, but had rejected it by failing to implement it. *Id.* at 8-10.

29. *Id.* at 8-10.

30. Barclays v. Franchise Tax Bd., 2 Cal. 4th 708, 733, 829 P.2d 279, 294, 8 Cal. Rptr. 2d 31, 46 (1992).

31. *Id.* The court cited one particular example where the executive branch had negotiated an income tax treaty with the United Kingdom where states would be prohibited from using formula apportionment. The Senate rejected this provision, explicitly recognizing its negative implications. *Id.*

32. *Id.* The court noted the executive branch's attempt to change the policy on formula apportionment following the Senate rejection of the Great Britain treaty provision and the Supreme Court's decision in *Container*. However, the court ruled that this demonstrated only aspiration (as in *Wardair*), and not policy. *Id.* at 734, 829 P.2d at 295, 8 Cal. Rptr. 2d at 47.

33. *Id.* at 734, 829 P.2d at 295, 8 Cal. Rptr. 2d at 47. The court saw many parallels between the governmental silence on formula apportionment and the silence present in *Wardair*. *See supra* notes 26-29 and accompanying text (discussing *Wardair*).

34. *Barclays*, 2 Cal. 4th at 742-43, 829 P.2d at 300, 8 Cal. Rptr. 2d at 52. The trial court had found that the compliance burden on Barclays violated the Due Process Clause independent of the dormant Commerce Clause analysis. The court of appeals had only addressed the latter issue. Therefore, the California Supreme Court remanded the case to the court of appeal for a decision in light of its opinion. *Id.*

35. There appear to be no further avenues of facial challenge to formula apportionment in light of *Container* and *Barclays*. However, there remains the possibility that such a tax plan could prove to be burdensome in practice to some foreign corporations. *See supra* note 34.

dispense with dormant Commerce Clause analysis altogether. The challenging party must demonstrate that Congress has failed to consider an issue in order to show the type of silence which triggers the dormant Commerce Clause protections.[36]

DAVID C. KNOBLOCK

B. *A privately held leasehold interest in real property, owned by a state university and not used exclusively for public schools, is not exempt from property taxation under the "public schools" exemption in the California Constitution:* Connolly v. County of Orange.

I. INTRODUCTION

In *Connolly v. County of Orange*,[1] the California Supreme Court considered whether a county could assess a property tax on a leasehold interest in real property that is owned by a state university and improved with homes owned and occupied by university employees.[2] The court concluded that the exemption for property used exclusively for a public school[3] did not extend to the privately owned leasehold interests of state university employees.[4]

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36. This places new policy proponents in a difficult position. Proponents of new state policies may not want to bring their claim before Congress since the failure of Congress to act, for any reason, could subsequently be interpreted as rejection or a lack of silence on the issue. On the other hand, if Congress never has an opportunity to consider, then that silence might trigger the inherent limitations of the Commerce Clause. Ironically, the result would be that the only state laws that would be struck down are those Congress never addressed.

1. 1 Cal. 4th 1105, 824 P.2d 663, 4 Cal. Rptr. 2d 857 (1992). Justice Baxter, who wrote the majority opinion, was joined by Chief Justice Lucas and Justices Mosk, Panelli, Arabian, and George. Justice Kennard concurred in the judgment only.

2. *Id.* at 1115-16, 824 P.2d at 669, 4 Cal. Rptr. 2d at 863.

3. The following are exempt from property taxation:

(a) Property owned by the State.

(b) Property owned by a local government . . . .

(c) Bonds issued by the State or a local government in the State.

(d) Property used for libraries and museums that are free and open to the public and property used exclusively for public schools, community colleges, state colleges, and state universities.

CAL. CONST. art. XIII, § 3(d). *See generally* 51 CAL. JUR. 3D *Property Taxes* § 28 (1981 & Supp. 1992).

4. *Connolly*, 1 Cal. 4th at 1130, 824 P.2d at 679, 4 Cal. Rptr. 2d at 873.

The plaintiffs brought this action against the County of Orange for refusing to exempt some 260 homeowners from a property tax on their leasehold interests.[5] The trial court granted the plaintiff Connolly a writ exempting his leasehold interest from taxation, and the defendant then stipulated to a similar order for approximately 200 other similarly situated persons.[6] The defendant appealed from this judgment. The court of appeal found that the writ was improper because mandate could not issue against the County,[7] and that the proper defendant would have been the Assessor of the County of Orange.[8] However, the court of appeal also ruled on the merits, finding that the California Constitution entitled the plaintiffs to exemption.[9] Both parties appealed this decision. The supreme court agreed that the case involved grievous procedural violations requiring reversal.[10] The court of appeal had purportedly made a ruling upon the merits that would be binding authority, and therefore the supreme court felt that the constitutional issue needed clarification.[11]

II. TREATMENT

California has a long history of taxing possessory interests in property that would otherwise be exempt.[12] Property is normally exempt because

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5. The plaintiffs were the Board of Regents of the University of California, the Irvine Campus Housing Authority, and Professor Connolly. *Id.* at 1110, 824 P.2d at 665-66, 4 Cal. Rptr. 2d at 859-60.

6. These persons first had to submit claims for exemption and identify themselves as university employees. *Id.* at 1111, 824 P.2d at 666, 4 Cal. Rptr. 2d at 860.

7. This finding was based on the preemptive effect of California Revenue and Taxation Code section 4807, which states, "No injunction or writ of mandate or other legal or equitable process shall issue . . . to prevent or enjoin the collection of property taxes sought to be collected." *Id.* at 1113, 824 P.2d at 667-68, 4 Cal. Rptr. at 861-62.

8. California Code of Civil Procedure Section 1085 requires that mandates or injunctions be directed specifically to the office that has the legal duty to act. CAL CIV. PROC. CODE § 1085 (West 1983 & Supp. 1993).

9. Although the defendant had not briefed the merits of the exemption question, the court of appeal felt justified in examining the merits because granting an exemption is normally discretionary. *Connolly*, 1 Cal. 4th at 1113 n.7, 824 P.2d at 667 n.7, 4 Cal. Rptr. 2d at 861 n.7.

10. The supreme court found that California Revenue and Tax Code section 4807 barred the action and that the proper defendant was the county assessor. *Id.* at 1114, 824 P.2d at 668, 4 Cal. Rptr. 2d at 862. To cure these problems, the court found that the defendant had preserved the bar under section 4807 and could use it to prevent the trial court from issuing a writ in the future, and that the Orange County Assessor could intervene as a defendant. *Id.* at 1115-16, 824 P.2d at 669, 4 Cal. Rptr. 2d at 863.

11. *Id.* at 1115, 824 P.2d at 669, 4 Cal. Rptr. 2d at 863.

12. *See* Scott David McKinlay, Comment, *Recognizing the Limits of California's*

the fee simple title belongs to the government or because the state constitution so provides.[13] As in the present case, taxation becomes an issue when an exempt body has granted an interest in the property to a private entity that would be required to pay taxes if it possessed title.[14] The clearest case is a grant of an exclusive possessory interest. However, some courts have extended this to include even the grant of a license or easement.[15]

The practice of taxing the private possessory interests within an exempt property has been justified under the principle that an extension of the exemption would not serve the original purpose of the grant of exemption.[16] Further, when a government entity leases its land "[i]t creates valuable privately-held possessory interests, and there is no reason why the owners of such interests should not pay taxes on them just as lessees of private property do through increased rents."[17] Thus, all non-exempt residents must share the tax burden.[18]

The court examined the constitutional history of the state owned and public school property tax exemption. Even before the constitution contained an express statement, courts implied an exemption for government owned lands, including public schools on state owned property.[19]

Possessory Interest Tax, 19 U.S.F. L. REV. 159 (1985) (discussing the history of taxing possessory interests in tax exempt property in California); 9 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §§ 137-138 (1989) (discussing when a leasehold may be taxed).

13. For a list of exempted properties see CAL. CONST. art. XIII, §§ 3-4.

14. *See generally* 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §§ 129-130 (discussing when it is appropriate to tax a possessory interest).

15. *See, e.g.*, Wells Nat'l Servs. v. County of Santa Clara, 54 Cal. App. 3d 579, 126 Cal. Rptr. 715 (1976) (finding that the right to lease televisions to county hospital patients was a taxable interest); Stadium Concessions, Inc. v. City of Los Angeles, 60 Cal. App. 3d 215, 131 Cal. Rptr. 442 (1976) (finding that concession rights at city-owned stadiums were a valuable private benefit and taxable).

16. *Connolly*, 1 Cal. 4th at 1120, 824 P.2d at 672, 4 Cal. Rptr. 2d at 866 (citing State v. Moore, 12 Cal. 56 (1859) (finding that an individual's interest in a mining claim granted by the federal government is taxable)).

17. *Id.* at 1118, 824 P.2d at 671, 4 Cal. Rptr. 2d at 857 (citing Texas Co. v. County of Los Angeles, 52 Cal. 2d 55 (1959)).

18. It was also argued that to grant a transfer of the exemption would give the government an unfair advantage over private landlords who had to pay property tax. *Id.*

19. The earliest case on the subject was People v. McCreery, 34 Cal. 432 (1868). In *McCreery*, the court found that the legislature did not have the power to exempt non-profit organizations from taxation, but that there was an implied exemption for government owned property. *Id.* at 452.

This exemption was explicitly extended to privately owned property "used exclusively" for public schools.[20] However, the additional exemption did not have an effect on the tax status of privately owned possessory interests in property owned by schools or universities.[21]

In resolving whether residential use of university property was exclusive use for public schools, the court examined two cases upon which the court of appeal had relied.[22] The first was *English v. County of Alameda*,[23] which dealt with exemptions under sections 3(e) and 4(b) of article 13 of the California Constitution.[24] In *English*, citizen taxpayers brought an action to force the county to tax the possessory interest in properties belonging to charitable institutions but occupied by employees and beneficiaries of the institutions.[25] The *English* court construed the law to limit exemption to cases where the use is reasonably necessary to accomplish the purposes of the institution that owns the property.[26] For example, one legitimate purpose of a charity is to provide housing to those who would otherwise become a burden upon the state.[27] Thus, the use of the properties as residences was within the constitutional exemption and the possessory interest could not be taxed.[28]

The second case the supreme court examined was *Mann v. County of Alameda*,[29] which involved an exemption under section 3(d) of article 13.[30] In *Mann*, student families living in rental units owned by the University of California at Berkley brought an action seeking a refund of taxes assessed on their possessory interests and paid under protest.[31] The court of appeal applied the test used in *English* and found that the residency interests were reasonably necessary to accomplish the university's purposes.[32]

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20. After studying the legislative history of article XIII, section 3(d), the court determined that this was the purpose of the language, "used exclusively for." *Connolly*, 1 Cal. 4th at 1121-23, 824 P.2d at 673-75, 4 Cal. Rptr. 2d at 867-69.

21. *Id.* at 1123-24, 824 P.2d at 675, 4 Cal. Rptr. 2d at 869 (citing Ross v. City of Long Beach, 24 Cal. 2d 258, 148 P.2d 649 (1944)).

22. *Id.* at 1125-27, 824 P.2d at 663-77, 4 Cal. Rptr. 2d at 870-71.

23. 70 Cal. App. 3d 226, 138 Cal. Rptr. 634 (1977).

24. Sections 3(e) and 4(b) of article XIII of the California Constitution contain the language "used exclusively for" and are thus similar to the section 3(d) exemption at issue in this case. *See supra* note 3.

25. This group included hospital and college administrators, professors, doctors, nurses, and aged persons. *English*, 70 Cal. App. 3d at 231, 138 Cal. Rptr. at 637.

26. *Id.* at 237, 138 Cal. Rptr. at 641.

27. *Id.* at 239, 138 Cal. Rptr. at 642.

28. *Id.* at 244, 138 Cal. Rptr. at 645.

29. 85 Cal. App. 3d 505, 149 Cal. Rptr. 552 (1978).

30. This was the constitutional exemption under consideration in *Connolly*. *See supra* note 3 and accompanying text.

31. *Mann*, 85 Cal. App. 3d at 506-07, 149 Cal. Rptr. at 552-53.

32. *Id.* at 509, 149 Cal. Rptr. at 554. The County of Alameda also asserted that

The supreme court accepted the reasonably necessary standard of *English* and *Mann*, but distinguished between exemptions under sections 3(d) and 3(e).[33] In a claim arising under section 3(e), the phrase "used exclusively for educational purposes" applies to any "nonprofit institution of higher education."[34] Whereas, in a claim arising under section 3(d), the issue is whether the property interest of the private entity is reasonably necessary for the exclusive purpose of a public school.[35]

In *Connolly*, the possession of title by the university seemed incidental to the private leasehold. The faculty members had ninety-nine-year leases on the land and built their own homes on the soil.[36] They could assign their interest in the subleased property as security to a lender.[37] However, there were limitations on the resale price and the university had the right to repurchase the property if the owner's employment was terminated.[38]

The supreme court rejected the argument that providing low cost housing for employees was an "exclusive use of property for university purposes" within the meaning of section 3(d).[39] The court pointed out that this would produce the untenable result that even a faculty member's interest in a piece of private property would have to be exempt because private or public ownership is not an issue under section 3(d).[40] This made it fairly easy for the court to conclude that "[t]he leasehold interests of plaintiffs, which are privately owned interests used for the private owner's residences, are not property used exclusively for

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section 3(d) applied only to housing that was not state-owned and that any different construction of that statute would be surplusage because section 3(a) already exempted all state-owned property from taxation. Thus, the *Mann* court found that the county's construction of the statute would be anomalous, depending upon whether the state or the private entity leasing to the state held title. *Id.* at 509-10, 149 Cal. Rptr. at 554.

33. *Connolly*, 1 Cal. 4th at 1127, 824 P.2d at 677, 4 Cal. Rptr. 2d at 871.

34. CAL. CONST. art. 13, § 3.

35. *Connolly*, 1 Cal. 4th at 1127, 824 P.2d at 677-78, 4 Cal. Rptr. 2d at 871-72.

36. Technically, the Board of Regents of the University of California leased the land to the Irvine Campus Housing Authority, which in turn leased it to university employees. *Id.* at 1116, 824 P.2d at 670, 4 Cal. Rptr. 2d at 864.

37. *Id.* at 1116-17, 824 P.2d at 670, 4 Cal. Rptr. 2d at 864.

38. *Id.* The employees could continue to possess the property during retirement as well. *Id.*

39. "We do not agree, however, that all residential use of school-owned property by faculty and staff can be characterized as a use that is exclusively for school purposes." *Id.* at 1127, 824 P.2d at 677, 4 Cal. Rptr. 2d at 871.

40. *Id.* at 1129, 824 P.2d at 679, 4 Cal. Rptr. 2d at 873.

university purposes within the meaning of section 3(d)."[41]

III. CONCLUSION

The impact of this case upon more than 400 University of California Irvine employees is explicit:[42] they can add the ad valorem tax to their list of expenses. The university argued that being able to provide tax-free, affordable housing was part of their competitive advantage in gaining valuable employees.[43] If this is true, the university will have to either increase salaries or lower monthly lease rates in order to maintain the competitive edge. This might be difficult in the face of the tightest budget constraints in the history of the California university system.

Looking at the big picture, *Connolly* appears to be another case in the trend allowing cities and counties to collect as much tax revenue as possible.[44] The California courts have given great deference to the state to tax who and how it sees fit. This has recently caused controversy as courts have allowed taxing almost any license or right conferred by an exempt entity upon a private, taxable one.[45] Thus, if tax relief is to come, it will most likely be from the legislature.[46]

DAN O'DAY

X. TORT LAW

A. *Damages for negligently inflicted emotional distress may be recovered in the absence of physical injury and based upon "direct" liability, rather than "bystander" liability, when a duty arising from a preexisting relationship is negligently breached:* Burgess v. Superior Court.

I. INTRODUCTION

In *Burgess v. Superior Court*,[1] the California Supreme Court consid-

41. *Id.* at 1130, 824 P.2d at 679, 4 Cal. Rptr. 2d at 873.

42. By the time the case reached the supreme court there were over 400 homes in the project. *Id.* at 1116, 824 P.2d at 670, 4 Cal. Rptr. 2d at 864.

43. *Id.* at 1117, 824 P.2d at 670, 4 Cal. Rptr. 2d at 864.

44. For a discussion of this trend, see generally McKinlay, *supra* note 12.

45. *See supra* note 15; *see also* McKinlay, *supra* note 12 (criticizing recent trends to expand taxable interests).

46. In 1939, the legislatures responded to a similar situation by enacting section 107 of the California Revenue and Tax Code, defining a possessory interest in government property. *See* CAL. REV. & TAX CODE § 107 (West 1992).

1. 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal. Rptr. 2d 615 (1992). Justice Panelli wrote the majority opinion joined by Chief Justice Lucas, and Justices Kennard,

ered whether a mother could recover damages for negligently inflicted emotional distress arising from the injury to her child during delivery.[2] The court concluded that the mother was entitled to recover for emotional distress, but not for damages arising out of "loss of affection, society, companionship or similar harm" incurred due to the child's death.[3]

The plaintiff entered labor and was admitted to the hospital under the care of her obstetrician, the defendant.[4] While in labor, the defendant artificially ruptured the plaintiff's membranes, allegedly causing a prolapsed umbilical cord. The defendant told the plaintiff that the situation was an emergency and that she had to breathe deeply to get oxygen to the baby. The obstetrician performed an emergency Ceasarean section while the plaintiff was under general anesthesia.[5] The baby suffered permanent brain damage and died during the course of the litigation.

At trial, the defendant filed a motion for summary judgment, asserting that the plaintiff was not entitled to recover damages for emotional distress. The trial court considered the plaintiff as a "bystander" who did not contemporaneously observe the infant's injuries.[6] Thus, the plaintiff was barred from recovering damages for emotional distress under the precedent set forth in *Thing v. La Chusa*.[7] The plaintiff petitioned for a writ of mandamus.

Arabian, Baxter, and George. Justice Mosk wrote a concurring opinion.

2. *Id.* at 1069, 831 P.2d 1198, 9 Cal. Rptr. 2d at 616. The issue was whether a mother can "recover damages for negligently inflicted emotional distress against a physician who entered into a physician-patient relationship with her for care during labor and delivery if her child is injured during the course of the delivery?" *Id.*

3. *Id.* Thus, recovery is limited to emotional distress arising from the "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain" associated with the negligent delivery itself. *Id.* at 1085, 831 P.2d at 1209, 9 Cal. Rptr. 2d at 626 (quoting Deevy V. Tassi, 21 Cal. 2d 109, 120, 130 P.2d 389, 396 (1942)).

4. Narendra Gupta, M.D., was the real party in interest. West Covina Hospital was also named as a defendant, but did not participate in the appeal. *Id.* at 1069, 1069 n.1, 831 P.2d at 1198, 1198 n.1, 9 Cal. Rptr. 2d at 616, 616 n.1.

5. Because the plaintiff was not conscious during the procedure, the defendant argued that she was not entitled to damages for emotional distress because she was not aware at the time. *Id.* at 1091, 831 P.2d at 1199, 9 Cal. Rptr. at 617.

6. *Id.*

7. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989) (establishing that to recover for negligent infliction of emotional distress as a "bystander" to an accident, one must be (1) closely related to the victim, (2) present at the scene and aware of what is happening, and (3) suffer emotional distress beyond that of a disinterested witness).

In a cursory, unpublished opinion, the court of appeal found that *Thing* was not controlling because the mother was a "direct" victim of the alleged negligence.[8] The supreme court granted review to redress uncertainty surrounding claims for emotional distress in cases in which unique relationships exist.[9] The court found that the mother was entitled to damages for emotional distress based upon traditional professional negligence theories because the defendant owed a duty to her directly.[10]

II. TREATMENT

Justice Panelli's opinion began with a discussion of the two theories of recovery under California law for negligent infliction of emotional distress: the "bystander" theory or the "direct victim" theory.[11] This distinction has confused courts and commentators alike.[12] Analysis reveals that both theories are rooted in traditional common law negligence;[13] the primary difference between the two is the nature of the duty that the defendant owes the plaintiff.[14]

The "bystander" cases have their origin in *Dillon v. Legg*,[15] and culmi-

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8. *Burgess*, 2 Cal. 4th at 1071, 831 P.2d at 1199, 9 Cal. Rptr. 2d at 617. The supreme court reached substantially the same conclusion. *See infra* notes 34 - 37 and accompanying text.

9. For a discussion of the importance of a preexisting duty between the tortfeasor and the victim under California law, see Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH L. REV. 1 (1992).

10. *Burgess*, 2 Cal. 4th at 1071-72, 831 P.2d at 1199-1200, 9 Cal. Rptr. 2d at 617-18. Because the doctor was simultaneously operating on the mother and the infant, and owed a duty to protect the welfare of both, the mother could sue directly. *Id.*

11. *Id.* at 1071, 831 P.2d at 1199, 9 Cal. Rptr. 2d at 617.

12. The opinion cited many cases to demonstrate this confusion. *See, e.g.*, Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985); Hurlbut v. Sonora Community Hosp., 207 Cal. App. 3d 388, 254 Cal. Rptr. 840 (1989); Martinez v. County of Los Angeles, 186 Cal. App. 3d 884, 231 Cal. Rptr. 96 (1986); Newton v. Kaiser Found. Hosp., 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986); Andalon v. Superior Court, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984); Sesma v. Cueto, 129 Cal. App. 3d 108, 181 Cal. Rptr. 12 (1982); Johnson v. Superior Court, 123 Cal. App. 3d 1002, 177 Cal. Rptr. 63 (1981).

13. The court stated that it has "repeatedly recognized that '[t]he negligent causing of emotional distress is not an independent tort, but the tort of negligence.'" *Id.* at 1072, 831 P.2d at 1200, 9 Cal. Rptr. 2d at 618 (quoting Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc. 48 Cal. 3d 583, 588, 770 P.2d 278, 281, 257 Cal. Rptr. 98, 101 (1989)). *See also* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 838 (1988) (declaring that negligent infliction of emotional distress is the same tort as negligence).

14. For example, one difference is whether the duty was based on a preexisting relationship between the parties. *See infra* notes 22-28 and accompanying text.

15. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). For a discussion of *Dillon*, see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 841 (1988).

nated in *Thing v. La Chusa.*[16] Both *Dillon* and *Thing* involve plaintiffs seeking to recover for emotional distress arising from witnessing an injury to another. In *Thing*, the California Supreme Court considered whether a mother who did not witness an accident in which her child was injured, but arrived on the scene shortly thereafter, should recover damages for negligent infliction of emotional distress.[17] As viewed by the court in *Burgess*, the issue in *Thing* was to what extent does a tortfeasor owe a duty to a third part with whom she had no preexisting relationship.[18] In *Thing*, the court determined that this duty extends only to situations where the plaintiff

> (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.[19]

Thus, because the mother was not present at the scene, nor aware of the accident at the time it occurred, she could not recover as a "bystander."[20] This was the result because the defendant owed no duty to her and failure to establish duty is fatal to any claim for negligence whether or not the damages involve emotional distress.[21]

On the other hand, "direct" victim cases arise in scenarios in which the defendant and the plaintiff had a preexisting relationship which entailed a duty that the defendant breached. The supreme court had previously established this distinction in two cases: *Molien v. Kaiser Foundation Hospitals*[22] and *Marlene F. v. Affiliated Psychiatric Medical Clinic.*[23]

Molien was the first case in which the California Supreme Court used the "direct victim" label.[24] That case involved a doctor who misdiagnosed the plaintiff's wife as having syphilis. The doctor instructed the wife to notify her husband and have him undergo blood tests to deter-

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16. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

17. *Id.* at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866.

18. Burgess v. Superior Court, 2 Cal. 4th 1064, 1072-73, 831 P.2d 1197, 1200, 9 Cal. Rptr. 2d 615, 618 (1992).

19. *Thing*, 48 Cal. 3d at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866. *See also* 46 CAL. JUR. 3D *Negligence* § 76 (discussing recovery by accident witnesses).

20. *Thing*, 48 Cal. 3d at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881.

21. *See* Davies, *supra* note 9, at 1.

22. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

23. 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989).

24. Burgess v. Superior Court, 2 Cal. 4th 1064, 1073, 831 P.2d 1197, 1201, 9 Cal. Rptr. 2d 615, 619 (1992) (citing *Molien*, 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834).

mine whether he had been infected. The erroneous diagnosis made the plaintiff's wife suspicious that the plaintiff had engaged in extramarital activities and resulted in their eventual divorce.[25]

To distinguish this case from "bystander" actions the *Molien* court stated that

> [i]t must be remembered . . . that in *Dillon* the plaintiff sought recovery of damages she suffered as a percipient witness to the injury of a third person, and the three guidelines . . . served as a limitation on that particular cause of action. Here, by contrast, plaintiff was himself a *direct victim* of the assertedly negligent act.[26]

Hence, the duty that the doctor owed the plaintiff was direct. The only issue was that of foreseeability.[27] On this issue, the court found that it was reasonably foreseeable that a misdiagnosis of syphilis would produce emotional distress.[28]

In *Marlene F.*, the court faced the issue of whether a mother could collect damages for negligent infliction of emotional distress from a psychotherapist who sexually molested her son.[29] The therapist was treating a mother and son for intra-family problems.[30] The trial court granted, and the court of appeal sustained, the defendants' demurrer because the mother could not state a cause of action as either a "bystander" under *Dillon* or as a "direct victim" under *Molien*.[31] In reversing this decision, the supreme court made it clear that the therapist owed a duty to the mother directly. The court noted that the mother was the therapist's patient, which should have alerted the therapist to the emotional impact his actions would likely have on the mother.[32] Therefore, by molesting the son, the therapist breached his duty to both the son and the mother.[33]

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25. *Molien*, 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

26. *Id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834 (emphasis added) (citations omitted).

27. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

28. *Id.* The *Molien* court stated, "It is easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord and resultant emotional distress to a married patient's spouse." *Id.*

29. Marlene F. v. Affiliated Psychiatric Medical Clinic, 48 Cal. 3d 583, 585, 770 P.2d 278, 278-79, 257 Cal. Rptr. 98, 98-99 (1989).

30. *Id.*

31. *Id.* at 588, 770 P.2d at 280, 257 Cal. Rptr. at 100. The court of appeal reasoned (1) that the mother was not a witness and thus, not a "bystander"; and (2) the tortious conduct was committed upon the son, not the mother, and thus, she was not a "direct victim." The supreme court disagreed with the second point. *Id.*

32. As a professional psychologist, the defendant knew, or should have known, that the sexual molestation would cause direct emotional harm to the mother and strain the very family relations he was employed to mend. *Id.* at 591, 770 P.2d at 282, 257 Cal. Rptr. at 102.

33. The court emphasized that "the mothers here were the patients of the therapist along with their sons, and the therapist's tortious conduct was accordingly directed

Similarly, the doctor in *Burgess* owed a duty to both the infant *and* the mother. The physician-patient relationship makes the duty self-evident.[34] The court considered Burgess "a 'traditional' plaintiff with a professional negligence cause of action."[35] Even the defendant admitted that he owed a duty to the plaintiff.[36] However, because the mother was not physically harmed, the defendant argued that the duty which he breached was that owed to the infant and not to the mother.[37]

The supreme court rejected this argument because it "would require [the court] to ignore the realities of pregnancy and childbirth."[38] The court considered it axiomatic that any treatment for the fetus would implicate the mother because the only access to the fetus was through the mother. Furthermore, childbirth is an event with strong emotional implications, as any obstetrician should know.[39] Thus, any negligence

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against both." *Id.* at 591, 770 P.2d at 283, 257 Cal. Rptr. at 103. For further discussion of the concept of duty in *Marlene F.*, see Davies, *supra* note 9, at 1.

34. *See* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 776 (1988) (stating that liability for malpractice arises when a physician-patient relationship gives rise to a duty of care between the plaintiff and the defendant).

35. Burgess v. Superior Court, 2 Cal. 4th 1064, 1075, 831 P.2d 1197, 1202, 9 Cal. Rptr. 2d 615, 620 (1992).

36. *Id.*

37. The defendant wanted the court to treat the fetus as a separate entity who would be the only one harmed by a negligent delivery in which the mother was not physically injured. *Id.*

38. *Id.* at 1076, 831 P.2d at 1202, 9 Cal. Rptr. 2d at 620.

39. The court was particularly sensitive to this issue when it stated as followins:

> In addition to the physical connection between a woman and her fetus, there is an emotional relationship as well. The birth of a child is a miraculous occasion which is almost always eagerly anticipated and which is invested with hopes, dreams, anxiety, and fears. In our society a woman often elects to forego general anesthesia or even any anesthesia, which could ease or erase the pain of labor, because she is concerned for the well-being of her child and she anticipates that her conscious participation in and observance of the birth of her child will be a wonderful and joyous occasion. An obstetrician, who must discuss the decision regarding the use of anesthesia with the patient, surely recognizes the emotionally charged nature of pregnancy and childbirth and the concern of the pregnant woman for her future child's well-being. The obstetrician certainly knows that even when a woman chooses to or must undergo general anesthesia during delivery, the receiving of her child into her arms for the first time is eagerly anticipated as one of the most joyous occasions of the patient's lifetime. It is apparent to us, as it must be to an obstetrician, that for these reasons, the mother's emotional well-being and the health of the child are inextricably intertwined.

Id.

during delivery which injures the fetus and causes the mother emotional anguish is a breach of the duty owed directly to the mother.[40]

In upholding its finding that a duty existed, the court analyzed several factors traditionally used to establish a duty.[41] First, the court found that the foreseeability of emotional harm to the mother from negligent delivery is patently obvious. Second, the negligent delivery of a child is inextricably related to the emotional harm suffered by the mother. Third, because there will only be liability when there is professional malpractice, there is sufficient moral blame to hold a doctor liable.[42] Fourth, if mothers were forced to sue as "bystanders," it might encourage doctors to use general anesthesia to avoid potential liability.[43] Fifth, while acknowledging a medical malpractice insurance crisis, the court reasoned that the impact of this decision would be negligible and that the Legislature has already taken remedial measures.[44]

Finally, the court in *Burgess* addressed the defendant's argument that

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40. *Cf.* Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (noting that parents who witnessed physician's negligent care of child must state a cause of action based on "bystander" theory).

41. The factors include:

> (1) the foreseeability of harm to the plaintiff, the degree of certainty that Plaintiff suffered injury;
> (2) the closeness of the connection between the defendant's conduct and the injury suffered;
> (3) the moral blame attached to the defendant's conduct;
> (4) the policy of preventing future harm;
> (5) the consequences to the community of imposing a duty to exercise care with resulting liability for breach.

Burgess v. Superior Court, 2 Cal. 4th 1064, 1079-1080, 831 P.2d 1197, 1205, 9 Cal. Rptr. 2d 615, 623 (1992) (citing Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr.2d 79 (1991)).

42. With respect to moral blame, the court stated:

> Whether the negligent act is the result of a momentary lapse of concentration or gross disregard for the health of the patient, in order to prevail on a claim for medical malpractice, a plaintiff must convince the trier of fact that the physician's peers would consider his act to be blameworthy. Under such circumstances, we cannot conclude that this factor supports a public policy limitation of a physician's liability to his patient.

Id. at 1081, 831 P.2d at 1206, 9 Cal. Rptr. 2d at 624.

43. This is true because a "bystander" must contemporaneously observe the negligent act in order to recover for emotional distress. *See supra* note 19 and accompanying text.

44. The court made reference to the 1975 legislative enactment of Medical Injury Compensation Reform Act (MICRA), ch. 2, 1975 Cal. Stat. 3949-4007 (Second Ex. Sess.), which caps emotional distress damages at $250,000 and provided a three year maximum statute of limitations for adults. *Burgess*, 2 Cal. 4th at 1083, 831 P.2d at 1208, 9 Cal. Rptr. at 626. *See* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 778-786 (1988) (discussing the application of MICRA).

the plaintiff's claim must be barred because her damages for emotional distress are coextensive with damages for loss of filial consortium.[45] It is well established in California that parents are not entitled to damages for loss of filial consortium.[46] However, the court found that the emotional damage suffered from a negligent delivery can be distinguished from filial consortium.[47] Thus, the supreme court held that the plaintiff did not have to sue as a "bystander," but rather could state a claim directly for the emotional distress caused by the negligent delivery of her child.[48] However, the plaintiff's recovery could not include damages for emotional distress arising from loss of affection, society, companionship, love, and disruption of life to care for her son. Therefore, she was entitled to damages for the "abnormal event" of a negligent delivery and the associated emotional and physical pain.[49]

III. CONCLUSION

The *Burgess* case gave the California Supreme Court the opportunity to clarify its earlier decisions, particularly the relationship between "bystanders" and "direct victims."[50] This distinction, which the court established in *Molien* and *Marlene F.*, left the lower courts confused about the proper application and distinction.[51] *Burgess* expands the courts reason-

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45. *Burgess*, 2 Cal. 4th at 1083, 831 P.2d at 1208, 9 Cal. Rptr. at 626.

46. *See, e.g.*, Baxter v. Superior Court, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977) (finding that public policy demanded a limitation because damages for loss of filial consortium were too intangible and speculative).

47. *Burgess*, 2 Cal. 4th at 1085, 831 P.2d at 1209, 9 Cal. Rptr. at 627. The court emphasized that "Burgess's emotional distress is of the type for which we have previously recognized recovery should be provided and is distinguishable from the type of emotional distress for which recovery is prohibited by virtue of the policy considerations underlying the prohibition of filial consortium claims." *Id.*

48. *Id. Cf.* Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (permitting recovery by parents on "bystander" theory, rather than "direct victim" theory, as a result of parents' observation of defendants' failure to treat deathly ill child).

49. *Burgess*, 2 Cal. 4th at 1085, 831 P.2d at 1209, 9 Cal. Rptr. at 627. The court limited Burgess' recovery to "damages for . . . fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, physical pain, or other similar distress." *Id.*

50. *See supra* notes 15-33 and accompanying text. *See also* 46 CAL. JUR. 3D *Negligence* §§ 74-76 (discussing negligent infliction of emotional distress both directly and as a witness).

51. For a discussion of the issues raised by *Marlene F.*, see Davies, *supra* note 9, at 1.

ing in *Marlene F.* by emphasizing the importance of duty.[52] Its dependence on "traditional" elements for establishing a cause of action clearly demonstrates that there is no separate cause of action for negligent infliction of emotional distress. Rather, the cause of action is ordinary negligence where the damages are based on emotional injury.

Although the court decided that the mother was not a "bystander," the court clarified what "bystander" meant. "Bystander" status is used by those to whom no direct duty is owed because no preexisting relationship exists. Any duty owed to a "bystander" is derived by the duty owed to the direct victim. Thus, the court deems it proper to significantly limit the type of person to whom a duty is owed.

The *Burgess* decision seems to expand the law by allowing recovery when a preexisting duty can be established.[53] However, a proper analysis of case law demonstrates that this case merely fills in the grey areas by using historical guidelines for negligence.

DAN O'DAY

B. *When a plaintiff seeks punitive damages for an injury that is directly related to professional services dispensed by a health care provider, regardless of whether the cause of action is identified as an intentional tort or negligence, the plaintiff must comply with section 425.13(a) of the Code of Civil Procedure:* Central Pathology Service Medical Clinic, Inc. v. Superior Court.

I. INTRODUCTION

In *Central Pathology Service Medical Clinic, Inc. v. Superior Court*,[1] the California Supreme Court considered whether a plaintiff could request punitive damages for medical malpractice without complying with California Code of Civil Procedure section 425.13(a),[2] which requires a showing at the pleading stage that there is a "substantial probability" of prevailing on the claim.[3] The court concluded that the plaintiffs must

52. *See* Davies, *supra* note 9, at 29-52.

53. *See, e.g.*, Harriet Chiang, *State High Court Allows Childbirth Distress Suit*, SAN FRAN. CHRON., July 10, 1992, at A23.

1. 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992). Chief Justice Lucas wrote the majority opinion and was joined by Justices Panelli, Kennard, Arabian, Baxter, and George. Justice Mosk wrote a separate concurring and dissenting opinion.

2. CAL. CIV. PRO. CODE § 425.13(a) (West 1992).

3. *Central Pathology*, 3 Cal. 4th at 185, 832 P.2d at 926, 10 Cal. Rptr. 2d at 210. The court did not address the plaintiff's argument that section 425.13(a) unconstitutionally impinges on the right to a jury trial because the issue was not raised with

comply with the statute even though they requested punitive damages under an intentional tort theory of liability.[4]

The plaintiffs[5] sued the defendants[6] for failing to inform one plaintiff that her pap smear test revealed abnormal cells and failing to notify her that she should be retested despite a later order that the defendant clinic retest all patients who used the service in the previous five years.[7] Two months before the case was scheduled for trial, the plaintiffs moved for leave to amend the complaint to add causes of action for fraud and intentional infliction of emotional distress. The plaintiffs sought punitive damages under these causes of action. The defendants opposed the motion to amend on the grounds that section 425.13(a) required the plaintiffs to show a substantial probability they would prevail on a claim for punitive damages.[8] The plaintiffs argued that section 425.13(a) did not

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the trial court. *Id.* at 185 n.2, 832 P.2d at 926 n.2, 10 Cal. Rptr. 2d at 210 n.2.

4. *Id.* at 192-93, 832 P.2d at 931, 10 Cal. Rptr. 2d at 215. The plaintiffs had requested punitive damages under causes of actions for fraud and for intentional infliction of emotional distress. Because these claims arose out of the manner in which the defendants performed medical services, the court found that section 425.13(a) applied. *Id.* For a discusion of pleading damages in general, see 49 CAL. JUR. 3D *Pleading* § 89 (1979).

5. Constance and Michael Hull.

6. Central Pathology Service Medical Clinic, Inc., Central Pathology Services Medical Group, Inc. [hereinafter defendant clinic], Elizabeth Irwin, M.D., and Elizabeth Irwin, M.D., Inc. [hereinafter defendant doctor].

7. *Central Pathology*, 3 Cal. 4th at 185, 832 P.2d at 926, 10 Cal. Rptr. at 210. There were further allegations that the defendant doctor tried to cover the problem by denying that she used the defendant clinic to conduct the tests. *Id.*

8. California Code of Civil Procedure section 425.13 states in pertinent part:

> (a) In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier.

CAL. CIV. PROC. CODE § 425.13(a) (West 1992). *See* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1368 (9th ed. 1988) (discussing application of section 425.13).

apply to intentional torts and the trial court agreed.[9] The defendants petitioned for a writ of mandate, which the court of appeal summarily denied.[10] The supreme court granted review.[11]

II. TREATMENT

The California Supreme Court began by analyzing the trial court's reliance on the appellate court decision *Bommareddy v. Superior Court*.[12] In *Bommareddy*, a defendant doctor sought to strike a request for punitive damages under a battery action based on alleged medical malpractice.[13] The battery claim stemmed from the defendant's performing unconsented surgery on the plaintiff's right eye when the plaintiff had consented to surgery only on the left eye.[14] The court of appeal found that the term "professional negligence" in section 425.13(a) was not intended to apply to intentional torts and, therefore, that it was proper for the trial court to deny the defendant's motion to strike the punitive damages clause from the complaint.[15]

The supreme court disagreed with the reasoning and holding of *Bommareddy*, basing its criticism on the statutory language and legislative history of section 425.13(a).[16] The court felt that the statutory intent could be derived from an examination of the statutory language, keeping "in mind [that] the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible."[17] Furthermore, the court noted that "[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation."[18] In exam-

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9. *Central Pathology*, 3 Cal. 4th at 186, 832 P.2d at 927, 10 Cal. Rptr. 2d at 211. The trial court relied on Bommareddy v. Superior Court, 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246 (1990), which held that section 425.13(a) did not apply to intentional torts. For a detailed discussion of the supreme court's criticism of *Bommareddy*, see *infra* notes 16-35 and accompanying text.

10. *Central Pathology*, 3 Cal. 4th at 184, 832 P.2d at 926, 10 Cal. Rptr. 2d at 210.

11. *Id.*

12. 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246 (1990).

13. *Id.* at 1018-19, 272 Cal. Rptr. at 246-47.

14. *Id.*

15. *Id.* at 1024, 272 Cal. Rptr. at 250. "'Professional negligence' as used in Code of Civil Procedure section 425.13 is a term of art that does not include intentional torts, such as battery, even when occurring during the provision of medical services." *Id.*

16. Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, Cal. 4th 181, 186, 832 P.2d 924, 927, 10 Cal. Rptr. 2d 208, 211 (1992).

17. *Id.* at 187, 832 P.2d at 927, 10 Cal. Rptr. 2d at 211 (citing Walnut Creek Manor v. Fair Employment & Hous. Comm'n, 54 Cal. 3d 245, 268, 814 P.2d 704, 717-18, 284 Cal. Rptr. 718, 731-32 (1991)).

18. *Id.* (citing *Walnut Creek Manor*, 54 Cal. 3d at 268, 814 P.2d at 717-18, 284 Cal. Rptr. 731-32.

ining section 425.13(a), the court first considered the ambiguity in the phrase "professional negligence." Because section 425.13 contained no definition, the court turned to the Medical Injury Compensation Reform Act (MICRA),[19] which defines "professional negligence" in six sections as

> a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.[20]

While this definition was not used in section 425.13, the court assumed that the legislature must have been familiar with this definition and intended the same meaning for its use.[21]

The next ambiguous phrase of concern to the *Central Pathology* court was "arising out of," as section 425.13(a) applies to "any action for damages *arising out of* the professional negligence of a health care provider."[22] Neither section 425.13 nor the MICRA defines the term, but case law does.[23] Generally, the term "'is equated with origination, growth or flow from the event.'"[24] However, the court felt that "[i]n the context of section 425.13(a) it is unclear whether the intentional tort causes of action in this case may be said to originate, grow, or flow from 'professional negligence.'"[25] Moreover, because the words of the statute shed no light on the uncertainty, the court examined legislative history.[26]

Section 425.13 was created as part of the Brown-Lockyer Civil Liabilities Reform Act.[27] This Act limited the availability of exemplary damages

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19. Medical Injury Compensation Reform Act (MICRA), ch. 2, 1975 Cal. Stat. 3949-4007 (Second Ex. Sess.).

20. *Central Pathology*, 3 Cal. 4th at 187, 832 P.2d at 928, 10 Cal. Rptr. at 212 (citing CAL. CIV. PROC. CODE § 364(f)(2) (West 1982); CAL. CIV. PROC. CODE § 667.7(e)(4) (West 1987); CAL. CIV. PROC. CODE § 1295(g)(2) (West 1982); CAL. BUS. & PROF. CODE § 6146(c)(3) (West 1990); CAL. CIV. CODE § 3333.1(c)(2) (West Supp. 1993); CAL. CIV. PROC. CODE § 3333.2(c)(2) (West Supp. 1993).

21. *Id.* (citing Bailey v. Superior Court, 19 Cal. 3d 970, 977 n.10, 568 P.2d 394, 398 n.10, 140 Cal. Rptr. 669, 673 n.10 (1977)).

22. CAL. CIV. PROC. CODE § 425.13(a) (West 1992) (emphasis added).

23. *Central Pathology*, 3 Cal. 4th at 187, 832 P.2d at 928, 10 Cal. Rptr. at 212.

24. *Id.* (quoting Hartford Accident & Indem. Co. v. Civil Serv. Employee's Ins. Co., 33 Cal. App. 3d 26, 32, 108 Cal. Rptr. 737, 741 (1973)).

25. *Id.* at 188, 832 P.2d at 928, 10 Cal. Rptr. 2d at 212.

26. *Id.* (citing Walnut Creek Manor v. Fair Employment & Hous. Comm'n, 54 Cal. 3d 245, 268, 814 P.2d 704, 717-18, 284 Cal. Rptr. 718, 731-32 (1991)).

27. Brown-Lockyer Civil Liabilities Reform Act, 1987 Cal. Stat. 5777-5782.

in general and to health care providers in particular.[28] The original statute had no language requiring that the act arise out of professional negligence. However, a year later, the statute was amended to include this language for fear that in its original state, section 425.13 included acts of a health care provider unrelated to health care treatment.[29] In the court's view, the legislature enacted section 425.13 "because it was concerned that unsubstantiated claims for punitive damages were being included in complaints against health care providers."[30] Given this interpretation, the court found that emphasis should be placed on whether the lawsuit was brought against a health care provider in her professional capacity.[31]

The supreme court also criticized the *Bommareddy* court for focusing on the difference between intentional torts and professional negligence.[32] Rather, the emphasis should have been on whether the claim was one "'*arising out of* the professional negligence of a health care provider.'"[33] Further, the court noted that because of the few situations in which punitive damages are predicated on mere negligence, the *Bommareddy* interpretation would give section 425.13 virtually no effect.[34] Thus, it would be too easy to avoid the statute by including intentional torts as causes of actions in the complaint. This would clearly circumvent any intent the legislature had for the law.[35]

The court's opinion concluded that merely identifying an action as an "intentional tort" is not sufficient. The allegations regarding the nature and cause of the plaintiff's injury must be examined to determine whether it was "directly related to the manner in which professional services

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28. "The Act increased the evidentiary threshold that must be met to recover punitive damages to *clear and convincing* evidence of oppression, fraud, or malice. The definition of malice was changed to include '*despicable* conduct' done 'with a *willful* and conscious disregard of the rights or safety of others.'" *Central Pathology*, 3 Cal. 4th at 188, 832 P.2d at 928-29, 10 Cal. Rptr. at 212-13 (quoting Brown-Lockyer Civil Liabilities Reform Act, 1987 Cal. Stat. 5780).

29. *Id.*

30. *Id.* at 189, 832 P.2d at 929, 10 Cal. Rptr. 2d at 213. *But see* Bommareddy v. Superior Court, 222 Cal. App. 3d 1017, 1022, 272 Cal. Rptr. at 246, 249 (1990) (reaching a different conclusion from the same legislative history).

31. *Central Pathology*, 3 Cal. 4th at 190, 832 P.2d at 930, 10 Cal. Rptr. 2d at 213.

32. *Id.*

33. *Id.* at 191, 832 P.2d at 931, 10 Cal. Rptr. 2d at 214 (quoting CAL. CIV. PROC. CODE § 425.13(a) (West 1992)) (emphasis added).

34. *Id.* The court in *Bommareddy* also recognized this, but reasoned that the law was designed to limit collection of punitive damages under negligence theories in cases in which the conduct may also have been outrageous enough to collect punitive damages. *Bommareddy*, 222 Cal. App. 3d at 1022, 272 Cal. Rptr. at 249.

35. "Thus, the *Bommareddy* court's interpretation of section 425.13(a) effectively permits artful pleading to annul the protection afforded by that section." *Central Pathology*, 3 Cal. 4th at 191, 832 P.2d at 930, 10 Cal. Rptr. 2d at 214.

were provided."[36] Moreover, because the plaintiffs' causes of action for fraud and intentional infliction of emotional distress in this case were directly related to "the manner in which defendants performed and communicated the results of medical tests, a matter that is an ordinary and usual part of medical professional services,"[37] section 425.13(a) barred the amendment to the complaint.[38]

III. CONCLUSION

Clearly, *Central Pathology* represents a setback for plaintiffs in medical malpractice cases.[39] In order to claim punitive damages, they must first receive a preliminary ruling from the trial judge stating that a substantial probability exists of succeeding on the merits. Furthermore, any such requests must be made at least two years after filing or nine months before trial, whichever is earlier.[40] This means that critical facts must be clarified early in the discovery process. In this particular case, it meant that the plaintiffs would not be able to collect punitive damages despite egregious conduct on the part of the defendant clinic and doctor.[41]

However, section 425.13(a) appears to strike a balance between the needs of plaintiffs and the concern about unsubstantiated punitive damages claims against medical practitioners.[42] This is of particular concern to health care practitioners because punitive damages are not covered by malpractice insurance.[43] Without this protection, there is fear that many

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36. *Id.* at 192, 832 P.2d at 931, 10 Cal. Rptr. 2d at 215.

37. *Id.* at 193, 832 P.2d at 931, 10 Cal. Rptr. 2d at 215.

38. The plaintiffs were still allowed to pray for other types of damages. "Although [the plaintiff] said she was disappointed in the ruling, [she] said it would not deter her from pursuing the lawsuit." Amy Pyle, *Ruling Limits Damages in Malpractice Suit*, L.A. TIMES, Aug. 1, 1992, at 1.

39. *See* Harriet Chiang, *State Ruling Makes it Harder to Sue Doctors*, SAN FRANCISCO CHRON., August 1, 1992, at A14.

40. *See* CAL. CIV. PROC. CODE § 425.13(a) (West 1992). *See* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 1368 (9th ed. 1988) (discussing application of section 425.13).

41. The clinic had a 21% error rate and was shut down by the state. *See* Amy Pyle, *Cancer Lawsuits are Legacy Left by Pap Test Uncertainty*, L.A. TIMES, Aug. 18, at B1 (stating that there are at least five related suits in southern California and chronicling the history of the Central Pathology Medical Services Group).

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

43. Mike McKee, *MedMal Limits Face Challenge in Supreme Court*, THE RECORDER, May 13, 1992, at 1.

competent doctors would leave the health care profession.[44] Moreover, the *Central Pathology* decision offers some protection to health care providers who are suffering a new round of attacks based on AIDS-infected blood transfusions. In many cases, it is argued that the blood was given without consent and, therefore, the transfusion qualifies as a battery.[45] It is now clear that the plaintiffs in these cases will have to meet the requirements of section 425.13(a) in order to qualify for punitive damages.

The court's broad interpretation of the statute does offer some assurance against frivolous claims for punitive damages. Because of this, it will require plaintiffs' attorneys to be more cautious in pleading. Moreover, plaintiffs will have to gather evidence of conduct that may entitle them to punitive damages early in the discovery process. However, a competent, effective plaintiff's attorney should not be unduly burdened with what is essentially a procedural rule.

DAN O'DAY

C. *When neither the mishandling of a decedent's remains nor its consequences are observed, (1) close family members may recover for negligent infliction of emotional distress if they were both (a) aware that funeral and/or crematory services were being performed, and (b) recipients of the benefit of or contractors for the services rendered, and (2) in order to recover on a theory of intentional infliction of emotional distress, the defendant must have directed the misconduct primarily at the plaintiff either (a) intentionally, (b) with knowledge to a substantial certainty that injury would result, or (c) recklessly and with knowledge of the plaintiff's presence:* **Christensen v. Los Angeles Superior Court.**

I. INTRODUCTION

The California Supreme Court's ruling in *Christensen v. Los Angeles Superior Court*[1] determined who has standing to sue for emotional dis-

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44. *Id.*

45. *See* Mike McKee, *Doctors Hit by Awards That Blood Banks Avoid*, THE RECORDER, May 26, 1992, at 1 (citing Ashcraft v. King, 228 Cal. App. 3d 604, 278 Cal. Rptr. 900, 902 (1991) (ruling that the trial court committed prejudicial error in granting a motion for nonsuit as to a patient's battery claim for failure to use family-donated blood as had been requested)).

1. 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991). Justice Baxter wrote the majority opinion in which Justices Lucas, Panelli, George and Turner concurred. Justices Mosk and Kennard concurred in part and dissented in part. Justice Mosk disagreed with the majority's intentional infliction of emotional distress (IIED) analysis. *See infra* notes 52-53. Justice Kennard disagreed with the majority's negligent

tress caused by the negligent or intentional mishandling of a decedent's remains when neither the actual misconduct nor its consequences are observed.[2] Considering the standing issue as if it had been raised on a demurrer,[3] the court considered the allegations in the complaint as true and then assessed whether the plaintiffs (individually and as a class) had stated causes of action which allowed recovery for emotional distress.[4] The elements in controversy with regard to the negligent infliction of emotional distress (NIED) claim were duty and causation.[5] As to the intentional infliction of emotional distress (IIED) claim, the disagreement between the parties and among the members of the court focused exclusively on the element of intent.[6]

II. STATEMENT OF THE CASE

In February 1987, the plaintiffs discovered through the mass media that the defendants had mishandled, mutilated, and commingled the remains of dead bodies between 1980 and 1987.[7] Thereafter, the plaintiffs

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infliction of emotional distress (NIED) analysis. *See infra* notes 26 and 39.

As the successor of Justice Allen E. Broussard, who retired in August 1991, Justice Ronald M. George represents Governor Pete Wilson's first appointee to the California Supreme Court. Philip Hager & Jerry Gillam, *Wilson Names L.A. Justice to High Court*, L.A. TIMES, July 30, 1991, at A1. Justice George is considered a conservative, thereby bringing the total number of conservatives on the California Supreme Court to five (the other four conservatives are Lucas, Panelli, Arabian and Baxter; Kennard is considered a moderate conservative who is liberal at times). *Id.*

Paul A. Turner, currently a justice for the California Court of Appeal, participated in the ruling by special assignment. *Christensen*, 54 Cal. 3d at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102.

2. *Id.* at 875, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81.

3. Because this appeal arose from a decision governing a coordination proceeding, each plaintiff had to assert a claim for emotional distress by alleging facts that satisfied all elements of the tort. *Id.* at 876, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81. Even if the case were later certified as a class action, which seems likely, each member of the plaintiff class as well as the named representatives would still have to show standing to sue. *Id.* at 876 & n.3, 820 P.2d at 184 & n.3, 2 Cal. Rptr. 2d at 82 & n.3. *See generally* CAL. R. CT. 1505 (West 1992) (authorizing review of writs issued in coordination proceedings); CAL. R. CT. 1521 (West 1992) (describing petition procedure for determining the appropriateness of coordinating separate actions); CAL. CIV. PROC. CODE § 404.1 (West 1973 & Supp. 1992) (stating that efficient use of judicial resources is one purpose of coordination proceedings).

4. *Christensen*, 54 Cal. 3d at 876, 820 P.2d at 183-84, 2 Cal. Rptr. 2d at 81-82.

5. *See infra* notes 24-49.

6. *See infra* notes 50-55.

7. *Christensen*, 54 Cal. 3d at 879, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

filed a law suit alleging that the defendants had harvested and sold for their own profit countless human organs and body parts without the plaintiffs' consent;[8] cremated several bodies at one time in the same pottery kiln, sometimes with nonhuman residue;[9] failed to preserve the individual character or identity of the cremated remains when placing them in receptacles;[10] and removed gold and silver from the corpses' mouths, later selling the precious metals for a profit.[11]

All of the original plaintiffs had either contracted for the funeral-related services and/or were related to the decedents whose remains the defendants allegedly deprecated.[12] The proposed named representatives of the class were either statutory right holders and/or contracting parties.[13] The term "statutory right holder" refers to a person who controls the disposition of the decedent's remains pursuant to section 7100 of the Health and Safety Code.[14] The plaintiffs brought suit against three categories of defendants: the mortuary defendants,[15] the crematory defendants[16] and a biological supply company.[17]

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8. According to the plaintiffs' complaint, the items stolen and sold included hearts, lungs, corneas, eyes—even bones. *Id.* at 879, 820 P.2d at 185-86, 2 Cal. Rptr. 2d at 83-84.

9. *Id.* at 879-80, 820 P.2d at 185-86, 2 Cal. Rptr. 2d at 83-84.

10. *Id.* The plaintiffs claimed that the cremations involved as many as 40 bodies at once and that before being distributed to the relatives, the ashes were commingled in 55-gallon drums. Philip Hager, *High Court Limits Suits Over Corpse Desecration*, L.A. TIMES, Dec. 3, 1991, at B1.

11. *Christensen*, 54 Cal. 3d at 879, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

12. *Id.* at 877, 820 P.2d at 184, 2 Cal. Rptr. 2d at 82. The issue of whether a decedent's friend also has standing arose when the plaintiffs sought to amend the complaint to include, as an additional plaintiff, a decedent's aggrieved friend. *Id.* at 877 n.6, 820 P.2d at 184 n.6, 2 Cal. Rptr. 2d at 82 n.6.

13. *Id.* at 876-77 & n.4, 820 P.2d at 184 & n.4, 2 Cal. Rptr. 2d at 82 & n.4.

14. Absent instructions to the contrary from the person now deceased, section 7100 gives to the following persons in the following order the right and duty to inter the decedent:

> (a) The surviving spouse.
> (b) The surviving child or children of the decedent.
> (c) The surviving parent or parents of the decedent.
> (d) The person or persons respectively in the next degrees of kindred in the order named by the laws of California as entitled to succeed to the estate of the decedent.
> (e) The public administrator when the deceased has sufficient assets.

CAL. HEALTH & SAFETY CODE § 7100 (West Supp. 1993).

15. Contracts existed between the mortuary defendants and certain plaintiffs to provide services connected with the funerals. *Christensen*, 54 Cal. 3d at 877, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83. The mortuary defendants, in turn, contracted with the crematory defendants, thus creating a third-party beneficiary situation. *Id.* at 877, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

16. The crematory defendants were responsible for performing the actual crema-

The plaintiffs alleged that the relationship between the mortuary and crematory defendants was such that the mortuary defendants knew or should have known of the crematory defendants' illegal operations.[18] In addition, the plaintiffs alleged that the circumstances under which the biological supply company bought human organs and body parts from the crematory defendants were such that the biological supply company knew or should have known of the inevitable adulteration of the corpses.[19]

The trial court ruled that only two types of plaintiffs had standing: section 7100 statutory right holders[20] and those who had contracted with the defendants.[21] However, the appellate court disagreed, holding that *close* family members had standing to sue for NIED and in a suit for IIED, *all* members of each decedent's family as well as a decedent's *close* friends had standing.[22] Granting review, the supreme court narrowed the class of persons who had the right to sue under both NIED and IIED theories.[23]

III. THE COURT'S OPINION

A. *NIED Requires Pleading and Proving Duty, Breach, Causation and Damages*

1. Standing to sue for NIED is limited to those plaintiffs to whom the defendants owed a duty

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tions and provided the mortuary defendants with authorization forms to obtain consent from the next of kin. *Id.* at 877-78, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

17. The biological supply company solicited and purchased large quantities of human organs from the crematory defendants. *Id.* at 878, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

18. *Id.* at 879, 820 P.2d at 186, 2 Cal. Rptr. 2d at 84.

19. *Id.* at 878, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

20. *See supra* note 14 for statutory text.

21. *Christensen*, 54 Cal. 3d at 880, 820 P.2d at 186, 2 Cal. Rptr. 2d at 84.

22. *Id.* at 875-76, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81. In reaching its conclusion on NIED, the court of appeal reasoned that a mortuary's duty is not limited to contracting parties because the mortuary has a "special relationship" with all close family members created by the delicate nature of mortuary activities; therefore, any negligence on the part of the mortuary would foreseeably injure such close family members. *Id.* at 882-83, 820 P.2d at 188, 2 Cal. Rptr. 2d at 86. The court of appeal conferred standing to a larger class of persons for the IIED claim, reasoning that intentional torts are designed to punish and deter and, thus, do not involve a concern for disproportionate liability. *Id.* at 883, 820 P.2d at 188, 2 Cal. Rptr. 2d at 86.

23. *Id.* at 875-76, 820 P.2d at 183-84, 2 Cal. Rptr. 2d at 81-82.

a. The rules governing bystander recovery only apply when the defendant did not owe a duty directly to the bystander

The defendants argued that the law governing bystander recovery, which limits recovery for NIED to relatives who contemporaneously observe the defendant's negligence cause harm to a closely related family member,[24] should control the outcome in cases involving the mishandling of corpses because of the danger of disproportionate liability.[25] But the court rejected this argument, stating that the percipient witness rule applies only when the negligent defendant owes the injured person no distinct duty other than that owed to the general public.[26] Such was not

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24. Thing v. La Chusa, 48 Cal. 3d 644, 647, 771 P.2d 814, 815, 257 Cal. Rptr. 865, 866 (1989). Recovery for percipient witnesses developed gradually through the *Dillon-Ochoa-Thing* line of cases. *See Thing*, 48 Cal. 3d at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866 (1989); Ochoa v. Superior Court, 39 Cal. 3d 159, 166, 703 P.2d 1, 5, 216 Cal. Rptr. 661, 665 (1985); Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920-21, 69 Cal. Rptr. 72, 80-81 (1968). *See generally*, James Duff McGinley, *California Supreme Court Survey*, Thing v. La Chusa, 17 PEPP. L. REV. 523, 588 (1990) (discussing *Thing* and *Dillon*); James B. Bristol, *California Supreme Court Survey*, Ochoa v. Superior Court, 13 PEPP. L. REV. 427, 561 (1986) (discussing *Ochoa*).

25. *Christensen*, 54 Cal. 3d at 883-84, 820 P.2d at 188-89, 2 Cal. Rptr. 2d at 86-87. Sometimes referred to as the "percipient witness rule," bystander recovery is triggered when a witness neither sustains, nor was in danger of sustaining, a physical injury due to the defendant's negligent conduct, but who nevertheless suffers emotional distress as a result of observing the defendant's negligence cause physical harm to a third person. *Id.* at 884, 820 P.2d at 189, 2 Cal. Rptr. 2d at 87. The court reasoned that despite the foreseeability of a bystander's suffering emotional distress, it was also foreseeable that anyone who witnessed the injury-producing event would suffer some emotional distress, and that because the class of potential plaintiffs was therefore unlimited, the class to whom the defendant owed a duty needed to be clearly defined and circumscribed. *Id.* at 884-85, 820 P.2d at 189, 2 Cal. Rptr. 2d at 87 (citing *Thing*, 48 Cal. 3d 644, 653-54, 771 P.2d 814, 819, 257 Cal. Rptr. 865, 870 *and Dillon*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919-20, 69 Cal. Rptr. 72, 79-80). Thus, the percipient witness rule represents a public policy exception to the general rule, embodied in Civil Code section 1714(a), which holds everyone liable for their negligent acts. *Id.* at 885, 820 P.2d at 189, 2 Cal. Rptr. 2d at 87 (citing CAL. CIV. CODE § 1714(a) (West 1985 & Supp. 1993)).

26. *Id.* at 884, 820 P.2d at 189, 2 Cal. Rptr. 2d at 87. When the negligent defendant owes the plaintiff a duty directly, as here, the cause of action is simply negligence, not NIED, with emotional distress damages as the relief sought. *See* Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 590, 770 P.2d 278, 282, 257 Cal. Rptr. 98, 102 (1989). *See generally*, 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 838 (9th ed. 1988) (distinguishing common negligence from NIED); Mark A. Clayton, *California Supreme Court Survey*, Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 17 PEPP. L. REV. 523, 584 (1990) (discussing *Marlene F.*).

According to Justice Kennard, emotional distress claims in the funeral-related context do raise a concern for disproportionate liability. *Christensen*, 54 Cal. 3d at 911, 820 P.2d at 207, 2 Cal. Rptr. 2d 105 (Kennard, J., dissenting). Justice Kennard would have limited the class to statutory right holders. *Id.* at 910, 820 P.2d at 206-07,

the case here.[27]

b. By accepting responsibility for the care, custody and control of the dead bodies, the mortuary and crematory defendants created an affirmative duty to eschew injury to the decedents' close family members

Although the defendants argued that because the complaint centered on the existence of a contractual duty, which could not extend to non-contracting parties or to non-statutory right holders,[28] the court took note of the distinctive circumstances surrounding the need for mortuary or crematory services.[29] The death of a close family member leaves the survivors emotionally vulnerable. Grieving family members reasonably expect that funeral professionals will be sensitive to this vulnerability. In addition, both law review articles and past California decisions acknowledge that mortuaries perform their services for the benefit of family members other than the contracting party or statutory right holder.[30] Thus, the *pre-existing relationship* between the plaintiffs and both the mortuary and crematory defendants gave rise to a duty to treat the plaintiffs' decedents' remains in a respectful and dignified manner.[31]

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2 Cal. Rptr. 2d 105 (Kennard, J., dissenting). The only exception would be non-statutory right holders who (1) are close members of the decedent's family, (2) directly observe the mishandling or its consequences (i.e., a presence requirement) and (3) suffer severe emotional distress. *Id.* 914, 820 P.2d at 209, 2 Cal. Rptr. 2d 107 (Kennard, J., dissenting).

27. *Id.*

28. *Christensen*, 54 Cal. 3d at 887, 820 P.2d at 190-91, 2 Cal. Rptr. 2d at 90. In making this argument, the defendants relied upon Cohen v. Groman Mortuary, Inc., 231 Cal. App. 2d 1, 4-5, 41 Cal. Rptr. 481, 483-84 (Cal. Ct. App. 1964) (holding that the decedent's siblings lacked standing to sue for negligence because the mortuary owed them no duty to conduct the funeral ceremony properly unless they had contracted with the mortuary for the burial services), *overruled by Christensen*, 54 Cal. 3d at 889, 820 P.2d at 193, 2 Cal. Rptr. 2d at 91. Although the court stated that it "disapproved" of *Cohen*, the effect is to overrule it; the California Supreme Court specifically "overrules" only its own decisions, but "disapproves" of lower court decisions. B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 100 (1977).

29. *Christensen*, 54 Cal. 3d at 886-87, 820 P.2d at 190-91, 2 Cal. Rptr. 2d at 88.

30. *Id.* at 887-88, 820 P.2d at 191, 2 Cal. Rptr. 2d at 89. *See, e.g.*, Draper Mortuary v. Superior Court, 135 Cal. App. 3d 533, 185 Cal. Rptr. 396 (1982); Jack Leavitt, *The Funeral Director's Liability for Mental Anguish*, 15 HASTINGS L.J. 464, 466 (1964).

31. *Christensen*, 54 Cal. 3d at 887-88, 820 P.2d at 191, 2 Cal. Rptr. 2d at 89.

c. The biological supply company owed the plaintiffs a duty not to induce others to harm them

Because the court found that the bystander recovery limitations did not apply in this case, the biological supply company argued that "the statutory right holders lack[ed] standing to seek damages from it on a negligence theory because no special relationship existed between them."[32] However, the court noted two theories under which the biological supply company could owe the plaintiffs a duty to prevent the type of harm described,[33] without the need for a contract or special relationship.[34] The first theory is third-person procuration of harm, where foreseeability of harm is essential.[35] The second theory is joint enterprise liability, which requires a mutual undertaking and shared control.[36] Based on the first theory, the court reasoned that given the biological supply company's willingness to purchase *substantial* quantities of human body parts and internal organs, it was foreseeable that, in order to obtain the valuable items, the crematories would engage in unscrupulous

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32. *Id.* at 891, 820 P.2d at 194, 2 Cal. Rptr. 2d at 92.

33. Section 7051 of the Health and Safety Code provides:

> Every person who removes any part of any human remains from any place where it has been interred, or from any place where it is deposited while awaiting interment or cremation, with intent to sell it or to dissect it, without authority of law, or written permission of the person or persons having the right to control the remains under Section 7100, or with malice or wantonness, is punishable by imprisonment in the state prison.

CAL. HEALTH & SAFETY CODE § 7051 (West Supp. 1992).

34. *Christensen*, 54 Cal. 3d at 894, 820 P.2d at 195, 2 Cal. Rptr. 2d at 93. *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts*, §§ 820, 833 (9th ed. 1988 and Supp. 1992) (discussing violation of a statute as a breach of the duty of due care toward the class of persons protected under the statute); 86 C.J.S. *Torts* §§ 15, 31 (1954) (stating that violation of a statute generally makes the actor liable to the persons the statute was designed to protect).

35. *Christensen*, 54 Cal. 3d at 892, 820 P.2d at 194-95, 2 Cal. Rptr. 2d at 92-93. *See generally* 5 HARPER ET AL., THE LAW OF TORTS § 26.1 (2d ed. 1986); RESTATEMENT (SECOND) OF TORTS § 302A (1965). For cases imposing liability on a third person for inducing unlawful conduct that harmed another see Pool v. City of Oakland, 42 Cal. 3d 1051, 728 P.2d 1163, 232 Cal. Rptr. 528 (1986); Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

36. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 72 (5th ed. 1984); 5 HARPER ET AL., *supra* note 34, § 26.13; 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts*, § 1008 (9th ed 1988). For cases imposing joint enterprise liability see Holtz v. United Plumbing & Heating Co., 49 Cal. 2d 501, 319 P.2d 617 (Cal. Ct. App. 1957); Leming v. Oilfields Trucking Co., 44 Cal. 2d 343, 282 P.2d 23 (Cal. Ct. App. 1955); Shook v. Beals, 96 Cal. App. 2d 963, 103 P.2d 175 (Cal. Ct. App. 1950).

behavior likely to cause the plaintiffs' emotional distress.[37]

d. The policy considerations of foreseeability, moral blame, disproportionate liability, and the ultimate cost to society also support a duty in the funeral services context

In addition to the specific legal theories under which the defendants could be liable,[38] the majority considered four policy grounds that would also support imposing a duty.[39] Analogizing to the recovery of emotional distress damages for breach of a funeral-services contract, the court first reasoned that the class of foreseeable victims consisted of close family relatives who were aware that the services were being performed, and who either received the benefit of or contracted for those services. The court determined that unborn children, infants, or others who did not know of the death or the type of disposition chosen were not foreseeable victims.[40] Second, California statutes acknowledge that all survivors—not just contracting parties and statutory right holders—deserve protection from the morally reprehensible conduct alleged in this case.[41] Third, the court indicated that it is unlikely that imposing liability would require society to ultimately carry the burden through increased costs for services because the defendants have the ability to prevent such misconduct.[42] Finally, there is no danger of disproportionate liability because the plaintiffs' claim does not rest on their witnessing harm inflicted on a close relative, but on the breach of a specific duty owed to each plaintiff individually.[43]

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37. *Christensen*, 54 Cal. 3d at 893, 820 P.2d at 195, 2 Cal. Rptr. 2d at 93.

38. *See supra* notes 28-37 and accompanying text.

39. Justice Kennard, in her dissenting opinion, criticized the majority's analysis of these four factors. *See Christensen*, 54 Cal. 3d at 917-19, 820 P.2d at 211-13, 2 Cal. Rptr. 2d at 109-11 (Kennard, J., dissenting).

40. *Id.* at 894-96, 820 P.2d at 196-97, 2 Cal. Rptr. 2d at 94-95.

41. *Id.* at 896-98, 820 P.2d at 197-98, 2 Cal. Rptr. 2d at 95-96. *See* CAL. HEALTH & SAFETY CODE § 7054.7 (prohibiting commingling or cremation of multiple remains), § 7050.5 (providing special handling for the remains of Native Americans found during excavation in order to respect the delicate treatment that Native Americans afford such remains), § 7152 (respecting religious beliefs by restricting donation of organs), § 8115 (seeking to ensure that human remains are treated appropriately and respectfully), § 8101 (prohibiting anyone from obstructing funeral-related activity) (West 1970 & Supp. 1992).

42. *Christensen*, 54 Cal. 3d at 898, 820 P.2d at 198, 2 Cal. Rptr. 2d at 96.

43. *Id.* at 899-900, 820 P.2d at 199-200, 2 Cal. Rptr. 2d at 97-98.

2. The Complaint Satisfies the Element of Causation by Stating That the Plaintiffs Knew, Upon Learning of the Misconduct, That Their Decedents Were Among Those Victimized

In a complaint, causation is usually established by *inferring* that the wrongful conduct caused the harm;[44] but when the facts pleaded do not establish the implication, specific facts supporting direct causation are required.[45] Consequently, the defendants argued for a lack of a causal connection because *generalized media reports* of the wrongful conduct precipitated the plaintiffs' professed anguish.[46] Defendants also argued that "permitting recovery in this case [would] create tort liability for the impact of [mentally and emotionally devastating events aired] on the evening news."[47] The court agreed that learning of the mishandling of dead bodies from a secondhand source is insufficient to establish a direct causal connection because a period of misconduct in general does not demonstrate the desecration of each plaintiff's decedent in particular.[48] However, the court found that the complaint satisfied the element of causation by alleging that the plaintiffs discovered from the reports that the remains of *their* decedents were mishandled.[49] The court reasoned that it is not until later that the plaintiffs must actually prove that they either knew or had a substantial certainty that the mistreatment involved their decedents' remains which, in turn, resulted in severe emotional distress.[50] At the complaint stage, a plaintiff need only plead, not prove. Therefore, the plaintiffs' complaint met this standard.

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44. *Id.* at 900, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98. *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE *Pleading* §§ 561-566 (3d ed. 1985 & Supp. 1992) (discussing the pleading requirements for causation).

45. *Christensen*, 54 Cal. 3d at 900-01, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98 (citation omitted). The causal connection required is that between a breach of duty owed to and the injury sustained by a plaintiff. *Id.* at 901, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98.

46. *Id.* at 900, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98.

47. *Id.* at 901-02, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

48. *Id.* at 901, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98.

49. *Id.*

50. *Id.* at 901, 820 P.2d at 200-01, 2 Cal. Rptr. 2d at 98-99. "A generalized concern that the remains of a relative *may* have been involved, arising out of a media report of a pattern of misconduct, is insufficient to satisfy the requirement that there be a direct connection between a defendant's conduct and the injury suffered by the plaintiff." *Id.* at 902, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99. The court even left it to the trial court's discretion to allow amendment of the complaint to allege that for several plaintiffs, part of their distress is due to their never knowing whether the desecration included their decedents. *Id.* at 901 n.27, 820 P.2d at 201 n.27, 2 Cal. Rptr. 2d at 99 n.27.

B. In Order to Support a Cause of Action for IIED, the Defendant's Misconduct Must Be Directed Primarily at the Plaintiff

When a plaintiff seeks to recover for IIED, there are three methods of establishing the requisite intent: (1) subjective intent, (2) knowledge to a substantial certainty or (3) reckless disregard in and with knowledge of the plaintiff's presence.[51] The *Christensen* court limited a plaintiff's ability to satisfy the element of intent by ruling that with any of these methods, the defendant's outrageous conduct must be directed at the plaintiff.[52] In reaching this conclusion, the court reasoned that "requiring defendants to perform the acts in plaintiffs' presence ensures the high de-

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51. *Id.* at 903, 820 P.2d at 202, 2 Cal. Rptr. 2d at 100; *id.* at 907, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., dissenting). *See, e.g.*, Ledger v. Tippett, 164 Cal. App. 3d 625, 640-42, 210 Cal. Rptr. 814, 822-24 (1985) (stating "IIED calls for intentional or at least reckless conduct intended to inflict injury or engaged in with the realization that injury will result."); Taylor v. Vallelunga, 171 Cal. App. 2d 107, 109, 339 P.2d 910, 911 (1959) (holding that cause of action failed because there was "no allegation that defendants knew that appellant was present and witnessed the beating that was administered to her father; nor [was] there any allegation that the beating was administered for the purpose of causing her to suffer emotional distress or, in the alternative, that defendants knew that severe emotional distress was substantially certain to be produced by their conduct"). *See generally* William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 56-59 (1956) (discussing the presence requirement for outrageous conduct directed at a third person, but through which the defendant intentionally or recklessly caused another to suffer severe emotional distress).

52. *Christensen*, 54 Cal. 3d at 903, 820 P.2d at 202, 2 Cal. Rptr. 2d at 100. In so ruling, the supreme court specifically disapproved part of a California Court of Appeal case which allowed a husband to recover for IIED when a close family friend raped his wife. Delia S. v. Torres, 134 Cal. App. 3d 471, 484, 184 Cal. Rptr. 787, 795 (1982) (refusing to characterize the rape as a wrong only against the wife and not the husband because it was logical to infer that a husband would suffer extreme emotional distress over the rape of his wife, particularly one committed by a close family friend), *overruled by Christensen*, 54 Cal. 3d at 906 n.28, 820 P.2d at 204 n.28, 2 Cal. Rptr. 2d at 102 n.28.

For cases where the defendant's acts were directed at the plaintiff see State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 595 P.2d 975, 156 Cal. Rptr. 198 (1979); Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979); Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987).

For cases where the defendant's acts were not directed at the plaintiff see Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985); Davidson v. City of Westminster, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

gree of culpability necessary to justify" an award of damages greater than those for negligent behavior.[53] The plaintiffs' critical errors in this law suit were their failure to allege in the complaint that any particular plaintiff was present at the time of the misconduct, and that the defendants intended to injure the plaintiffs or that the defendants knew to a substantial certainty that harm was sure to follow.[54] By failing to plead all of the elements of IIED,[55] the plaintiffs failed to state a cause of action for which relief could be granted.[56]

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53. *Christensen*, 54 Cal. 3d at 905-06, 820 P.2d at 203-04, 2 Cal. Rptr. 2d at 101-02.

Justice Mosk disagreed, arguing that requiring defendants to deliberately direct their scandalous conduct at the plaintiffs renders the "recklessness" prong and the "subjective intent" prong indistinguishable. *Id.* at 908, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., dissenting).

The majority noted that although "[r]ecovery on an IIED theory and based on reckless conduct has been allowed in the funeral-related services context," *id.* at 905, 820 P.2d at 203, 2 Cal. Rptr. 2d at 101 (citing 2 HARPER ET AL., *supra* note 34, § 9.4, these cases "presuppose[] action directed at the plaintiff or undertaken with knowledge of the likelihood that the plaintiff will suffer emotional distress." *Id.* at 905, 820 P.2d at 203, 2 Cal. Rptr. 2d at 101 (citing KEETON ET AL., *supra* note 35, § 12 at 63). According to Dean Prosser, "to justify recovery the action must be directed to the plaintiff, and if reckless conduct is the basis for recovery, the plaintiff is usually present at the time of the conduct and is known by the defendant to be present." *Id.* (citing William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 58-59 (1956)).

54. *Christensen*, 54 Cal. 3d at 903, 820 P.2d at 201-02, 2 Cal. Rptr. 2d at 99-100. The complaint simply alleged "that the conduct was intentional, . . . outrageous, and . . . substantially certain to cause extreme emotional distress to relatives and close friends of the deceased." *Id.* at 903, 820 P.2d at 202, 2 Cal. Rptr. 2d at 100. The key is that alleging intentional or outrageous conduct is insufficient to satisfy the element of intent without some showing that the conduct is directed at the plaintiff. *Id.* Justice Mosk, in his dissent, argued that although the "defendants may have been motivated by profit rather than by a subjective desire to distress these plaintiffs, the trier of fact could still hold the defendants liable on a reckless conduct theory." Furthermore, as a practical matter, the decedents' survivors are the only persons who could possibly be hurt by the defendants' outrageous conduct; mortuaries, crematoriums and biological supply companies must necessarily perceive this probability. *Id.* at 907, 909, 820 P.2d at 205-06, 2 Cal. Rptr. 2d at 103-04 (Mosk, J., dissenting).

55. The elements of IIED are (1) extreme and outrageous conduct on the part of the defendant, (2) with the intent, knowledge to a substantial certainty, or reckless disregard for the probability of causing the plaintiff emotional distress, (3) severe emotional distress suffered by the plaintiff and (4) actual and proximate causation. *Id.* at 903, 820 P.2d at 202, 2 Cal. Rptr. 2d at 100. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §§ 402-406 (9th ed. 1988 & Supp. 1992).

56. *Christensen*, 54 Cal. 3d at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102. However, the supreme court stated that the trial court retained discretion to allow amendment of the complaint under the laws governing coordination proceedings. *Id.* *See supra* note 3 for court rules governing coordination proceedings.

IV. IMPACT

The effect of the majority's opinion is to limit plaintiffs who sue for the mishandling of their decedents' remains to the weaker legal theory of NIED[57] because it would be highly unusual for a funeral home to "mutilate a decedent's body in the presence of the grieving family or display the mutilated body to them."[58] Mutilation of dead bodies is quintessential clandestine conduct. In the funeral services setting, it is impractical to require the plaintiff's presence "at the scene of the outrageous conduct," unfairly restricting his or her ability to recover the larger damages, including punitives, generally associated with IIED.[59]

The decision is also expected to limit emotional distress claims in general and affect a widely publicized case currently pending before the state supreme court in particular.[60] That case, *Potter v. Firestone Tire and Rubber Co.*,[61] involves residents of Salinas who are seeking damages for their fear that a nearby disposal site for toxic waste has caused them to develop cancer.[62] To prove a direct causal connection between the alleged source and the harm, at least one attorney believes the "plaintiffs will now have to prove they actually drank contaminated water."[63]

V. CONCLUSION

According to one commentator, 1991 was a year in which the supreme court favored tort defendants.[64] Those rulings endorsing plaintiffs divid-

57. *Christensen*, 54 Cal. 3d at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102.
58. *Id.* at 908, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., dissenting).
59. *Id.* (Mosk, J., dissenting).
60. Hager, *supra* note 10.
61. 3 Cal. App. 4th 994, 274 Cal. Rptr. 885 (1990), *review granted*, 806 P.2d 308, 278 Cal. Rptr. 836 (1991).
62. Hager, *supra* note 10.
63. *Id.*
64. Daniel U. Smith, *A Year of Pain And Suffering; The Plaintiffs' Bar Took a Beating from Courts in 1991. Issues of Liability and Damages Became More Clear; Unfortunately*, THE RECORDER, Jan. 10, 1992, at 8. *See* Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 814 P.2d 1341, 285 Cal. Rptr. 99 (1991) (Lucas, C.J. and Baxter, J., dissenting) (holding the city liable under respondeat superior for an on-duty police officer's rape of a female detainee). *See generally*, Lorraine A. Musko, *California Supreme Court Survey*, Mary M. v. City of Los Angeles, 20 PEPP. L. REV. 394 (1992) (discussing *Mary M.*).

ed the court.[65] The court also clarified "substantive grey areas," limiting the imposition of liability and the recovery of damages.[66] Consistent with the supreme court's other 1991 opinions, *Christensen* represents yet another limitation on a plaintiff's ability to recover damages.[67] Now, when neither the actual misconduct nor its consequences are observed, only close family members who knew of the rendering of funeral and/or crematory services, and who received the benefit of the services, may state a cause of action for NIED. As for IIED, a plaintiff must show outrageous conduct directed at her in particular.

Yet the decision may also be framed as one that takes a middle ground approach, finding defendants acted negligently, but not intentionally; holding funeral professionals responsible for clandestine desecration yet limiting the class of potential plaintiffs to close family members.[68] By restricting liability for IIED, the court avoided the risk of a potential plaintiff class of more than 100,000 relatives and close friends, the economic burden on society of larger damage awards often associated with intentional torts, as well as the possibility of punitive damages.[69]

LORRAINE A. MUSKO

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65. Smith, *supra* note 63.

66. *Id.*

67. *See also*, Gourley v. State Farm Mut. Auto. Ins. Co., 53 Cal. 3d 121, 806 P.2d 1342, 279 Cal. Rptr. 307 (1991) (denying prejudgment interest for emotional distress damages because the emotional distress was based on the insurer's bad faith, not personal injury, as mandated under California Civil Code § 3291); Walnut Creek v. Fair Employment & Housing Comm'n, 54 Cal. 3d 245, 814 P.2d 704, 284 Cal. Rptr. 718 (1991) (prohibiting a state regulatory agency award for emotional distress damages); Adams v. Murakami, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991) (holding that before court can award punitive damages, plaintiff must produce evidence of the defendant's financial status); Anderson v. Owens-Corning Fiberglas Corp., 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991) (holding that before imposing "strict liability for failure to warn of a product defect," defendant must be allowed "to introduce state-of-the-art evidence that the particular risk was neither known nor knowable from scientific knowledge at the time of manufacture or distribution"). *See generally* Susan Leigh Sparks, *California Supreme Court Survey*, Gourley v. State Farm Mutual Automobile Insurance Company, 19 PEPP. L. REV. 276 (1991); Kurt M. Langkow, *California Supreme Court Survey*, Walnut Creek v. Fair Employment and Housing Commission, 19 PEPP. L. REV. 741 (1992); Richard John Bergstrom III, *California Supreme Court Survey*, Adams v. Murakami, 19 PEPP. L. REV. 842 (1992); Dean Thomas Triggs, *California Supreme Court Survey*, Anderson v. Owens-Corning Fiberglass Corporation, 19 PEPP. L. REV. 846 (1992).

68. Hager, *supra* note 10.

69. *See id.*

D. *Under the exclusive remedy provisions of the Workers' Compensation Act, an employee is barred from bringing a civil action for intentional or negligent infliction of emotional distress against the employer, even when no physical injury or disability has been alleged, provided the employer's conduct does not contravene fundamental public policy or exceed the inherent risks of the employment relationship:* **Livitsanos v. Superior Court.**

In *Livitsanos v. Superior Court*,[1] the California Supreme Court addressed the issue of whether an employee's claims of negligent and intentional infliction of emotional distress are limited by the exclusive remedy provisions of the Workers' Compensation Act[2] to a recovery under the

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1. 2 Cal. 4th 744, 828 P.2d 1195, 7 Cal. Rptr. 2d 808 (1992). In 1976, Continental Culture Specialists, Inc. [Continental], a yogurt manufacturer, hired Apostol Livitsanos to work in the company's shipping department. Vasa Cubaleski, Continental's owner, assured Livitsanos on several occasions that his employment would not be terminated without good cause and eventually promoted him to general manager in 1982. Livitsanos worked long hours, participated in an employee profit-sharing plan, and in 1984, he and one other Continental employee formed a company known as ABA to replace Continental's former distributor which had gone out of business. Livitsanos was continually praised for his work by Cubaleski until 1989, when, for an undetermined reason, Cubaleski engaged in a campaign of harassment against Livitsanos.

Cubaleski falsely accused Livitsanos of writing bad checks, diverting funds from Continental, and failing to repay a personal loan. The charges were communicated to Continental employees as well as others. Finally, in August 1989, Cubaleski demanded that Livitsanos sell ABA to another distributorship that Continental desired to hire. Cubaleski offered to assume a $100,000 debt owed by one of ABA's clients, provided that Livitsanos sell ABA to the other distributor. Livitsanos submitted to Cubaleski's offer and further complied with Cubaleski's demand that he sign a promissory note for $100,000, only to be terminated two weeks later without notice or severance pay.

Livitsanos sued both Continental and Cubaleski for breach of contract, defamation, intentional infliction of emotional distress, and money lent, alleging that Cubaleski's campaign of harassment climaxed with the wrongful termination of his employment. The defendants demurred and the trial court sustained the demurrer. The court of appeal summarily denied the plaintiff's petition for writ of mandate. The California Supreme Court granted review in order to determine whether or not the exclusive remedy provision of the Workers' Compensation Act barred the instant suit. Justice Arabian authored the unanimous opinion of the court in which Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Baxter, and George joined. *Id.*

2. Labor Code 3602 states in relevant part that:

> [w]here the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer, and . . . the

workers' compensation laws.[3] The court declared that an employee may not subvert the workers' compensation scheme simply by failing to allege a physical disability.[4] In recognizing that emotional injury lies within the scope of the workers' compensation laws,[5] the court reasoned that the exclusive remedy provisions of the Workers' Compensation Act may not be abrogated by the fact that an injury is noncompensable.[6]

The supreme court examined the plaintiff's causes of action for negligent and intentional infliction of emotional distress under the reasoning set forth in *Renteria v. Orange County*.[7] In *Renteria*, an employee was

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employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

CAL. LAB. CODE § 3602 (West 1989). *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 25-28 (9th ed. 1987) (detailing the exclusive remedy provisions under the Act).

3. *Livitsanos*, 2 Cal. 4th at 750, 828 P.2d at 1199, 7 Cal. Rptr. 2d at 812. The court characterized this issue as one of first impression. *Id.* at 750, 828 P.2d at 1199, 7 Cal. Rptr. 2d at 812.

The theory underlying the workers' compensation scheme is to place upon the industry the burden of its industrial accidents. Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935). In California, an employee's right to compensation for injury is statutory. Carrigan v. California State Legislature, 263 F.2d 560 (9th Cir. 1959), *cert. denied*, 359 U.S. 980 (1959). When the employee's injury falls within the scope of the Workers' Compensation Act the proceeding thereunder will constitute the exclusive remedy of the employee. Peterson v. Moran, 111 Cal. App. 2d 766, 245 P.2d 540 (1952). *See generally* Denise M. Alter, *The Relationship Between California's Exclusivity Rule and an Employee's Claim for Emotional Distress*, 21 U.S.F. L. REV. 141, 144-150 (1986) (discussing the legislative history behind the exclusive remedy provisions and their general applicability).

4. *Livitsanos*, 2 Cal. 4th at 756, 828 P.2d at 1203, 7 Cal. Rptr. 2d at 816. *See generally* 65 CAL. JUR. 3D *Work Injury Compensation* § 22 (1981 & Supp. 1992) (discussing the exclusive character of an employee's remedy under the workers' compensation laws).

5. *Livitsanos*, 2 Cal. 4th at 754, 828 P.2d at 1202, 7 Cal. Rptr. 2d at 815 (quoting Renteria v. Orange County, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 451 (1978)). *See* Williams v. State Compensation Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).

6. *Livitsanos*, 2 Cal. 4th at 754, 828 P.2d at 1202, 7 Cal. Rptr. 2d at 815. A compensable injury is one that causes either disability or a need for medical treatment. Coca-Cola Bottling Co. v. Superior Court, 233 Cal. App. 3d 1273, 1284, 286 Cal. Rptr. 855, 860 (1991). "The mere fact that a defendant in a tort action is also the plaintiff's employer is not sufficient to raise the exclusivity provisions of the act as an affirmative defense." Id. at 1285, 286 Cal. Rptr. at 861. *See generally* CAL. LABOR CODE §§ 3208, 3208.3 (West 1989 & Supp 1992) (defining injury generally and psychiatric injury specifically).

7. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978). *See generally* Joseph H. Fagundes, *Intentional Employer Torts and Workers' Compensation: A Legal Morass*, 11 PAC. L.J. 187, 202-11 (1979) (analyzing the complications arising under *Renteria* as pleading technicalities which are, in essence, outcome determinative and suggesting that the judiciary permit civil actions where the injury suffered is nonphysical and

not barred from bringing a civil action where the employer intentionally caused the employee to suffer emotional injury without any accompanying physical injury.[8] The court here assumed the difficult task of reconciling *Renteria*, where the cause of action for intentional infliction of emotional distress was found to constitute an implied exception to the exclusivity provisions, with the principles established in *Cole v. Fair Oaks Fire Protection District*.[9]

In *Cole*, an employee suffered emotional injury resulting in a physical disability caused by the employer's intentional conduct that was deemed a normal part of the employment relationship.[10] The court in *Cole* held that the employee could not circumvent the exclusive remedy provisions of the Workers' Compensation Act by characterizing the employer's misconduct as manifestly unfair, outrageous, harassing or intentional, be-

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intentional and limit employees incurring nonintentional, work-related injuries to a remedy under the workers' compensation laws).

8. *Id.* at 842, 147 Cal. Rptr. at 452 (holding an employee's cause of action for *intentional* infliction of emotional distress to constitute an implied exception to the exclusive remedy provisions where the injury was purely emotional and no physical injury was alleged). The *Renteria* court reasoned that an employee suffering a pure emotional injury with no accompanying physical injury or disability would be left with no remedy if limited by the exclusive remedy provisions of the Workers' Compensation Act. *Id.* at 841, 147 Cal. Rptr. at 452. The court further reasoned that the cause of action for intentional infliction of emotional distress, like defamation, was part of an entire class of civil wrongs falling outside the contemplation of the workers' compensation system. *Id.* at 841, 147 Cal. Rptr. at 451; *accord* McGee v. McNally, 199 Cal. App. 3d 891, 895, 174 Cal. Rptr. 253, (1981) (finding civil claim permissible when no actual claim of disability is made); *see also* Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 156, 729 P.2d 743, 747, 233 Cal. Rptr. 308, 312 (1987).

9. 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987) (finding that the exclusive remedy provisions limited the remedy for an employer's misconduct that is a normal part of the employment relationship which causes an employee to suffer emotional distress resulting in physical injury). *See* Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. W.L. REV. 1, 11-13 (1975) (discussing the general proposition that when a physical injury is sustained during the course of employment the exclusive remedy provisions bar civil action).

10. *Livitsanos*, 2 Cal. 4th at 750, 828 P.2d at 1199, 7 Cal. Rptr. 2d at 812. Under *Renteria*, a plaintiff claiming intentional infliction of emotional distress, who had suffered no physical injury or disability, would be free to bring a civil suit against his employer. Under *Cole*, however, a plaintiff claiming intentional infliction of emotional distress arising from employer conduct that was a normal part of the employment relationship would be limited to a recovery under the workers' compensation laws. Id. *See generally* Warren L. Hanna, CAL. LAW OF EMP. INJ. §§ 11.05(1)(b), 21.05(3)(f) (rev. 2d ed. 1992).

cause the conduct was a normal part of the employment relationship.[11]

The decision in *Renteria* presented an anomaly that the courts have acknowledged, but up to now have failed to address.[12] The anomaly was specifically recognized in *Cole*, but the court made no attempt to resolve it.[13] The California Supreme Court in *Livitsanos*, did turn its attention towards this anomaly, but failed to do more than provide a rationale for its occurence.[14] First, the court recognized that while certain wrongs lie completely outside the workers' compensation scheme,[15] an employer's

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11. *Cole*, 43 Cal. 3d at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315. *See generally* 65 CAL. JUR. 3D *Work Injury Compensation* § 27 (1981 & Supp. 1992) (discussing the right to bring an action for an employer's intentional injury).

12. *Livitsanos*, 2 Cal. 4th at 752, 828 P.2d at 812, 7 Cal. Rptr. 2d at 1199. The court specifically addressed the anomaly found in *Renteria* and recognized by *Cole*. 43 Cal. 3d at 156, 729 P.2d at 747, 233 Cal. Rptr. at 313. The reasoning of *Renteria*, if taken to its fullest logical extent, would ultimately lead to absurd results. For instance, under *Renteria*, when an employer's misconduct results in emotional distress alone, without physical injury, the employee may bring a civil action in tort, whereas when the employer's conduct is so outrageous as to result in actual physical disability, the employee is limited by the exclusive remedy provisions to a recovery under the workers' compensation laws. *Livitsanos*, 2 Cal. 4th at 752, 828 P.2d at 1200-01, 7 Cal. Rptr. 2d at 813. Such a rule might tend to incline an employer who acts egregiously to make the employee's working conditions so intolerable as to cause the employee to suffer a physical injury in order to avoid the more excessive civil liability. *Id.*

13. *Cole*, 43 Cal. 3d at 156-57, 729 P.2d at 747-48, 233 Cal. Rptr. at 313 (recognizing intentional infliction of emotional distress resulting in physical injury or disability as generally more reprehensible than that which does not result in disability, but continuing to limit civil actions to situations involving no physical injury or disability). In arriving at its decision that the exclusive remedy provisions applied, the *Cole* court distinguished several cases involving intentional infliction of emotional distress where there was substantial physical injury or disabiliy and relied primarily on the fact that the misconduct at issue was a normal part of the employment relationship. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.

14. *Livitsanos*, 2 Cal. 4th at 755, 828 P.2d at 1203, 7 Cal. Rptr. 2d at 816 (noting the potential existence of a narrow theoretical class of cases where the employee would be unable to recover under the compensation laws or by way of civil suit, but falling short of any attempt to eliminate the class).

15. *Id.* at 752, 828 P.2d at 1200, 7 Cal. Rptr. 2d at 813. *See* Gantt v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992) (holding exclusive remedy provisions inapplicable under a contravention of fundamental public policy exception where the employee was terminated in retaliation for testifying truthfully concerning a coworker's sexual harassment claim); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (recognizing the propriety of a tort remedy when employee's discharge contravenes fundamental public policy). *See generally* 2 STANFORD D. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW PRACTICE, § 12.20(D) (4th ed. 1991) (reviewing the general exceptions to the exclusive remedy provisions, typically, suits based upon violations of the federal Civil Rights Act, 42 U.S.C. § 1983, actions brought under the California "whistleblower" law, Cal. Gov't Code § 19683, and suits alleging defamation, sex discrimination, or harassment under

misconduct, even when intentional or egregious, will not necessarily exceed the scope of the workers' compensation laws.[16] The court then expanded upon its initial conclusion that a pure emotional injury lies within the scope of the workers' compensation laws.[17]

The court noted that workers' compensation laws compensate for only industrial injuries.[18] The court explained that while it was possible for an employee to sustain a work-related injury for which no compensation was available under the workers' compensation laws,[19] such non-compensable injury, by itself, was not sufficient to avoid the exclusive remedy provisions of the Workers' Compensation Act.[20]

Lastly, the court spoke to the plaintiff's cause of action for defamation.[21] The court expressly declined any invitation to decide whether such a claim was barred by the exclusive remedy provisions of the Workers' Compensation Act, instead leaving the question for the court of appeal to decide on remand.[22]

FEHA, Cal. Gov't Code § 12900, are considered outside the scope of the Workers' Compensation Act).

16. *Livitsanos*, 2 Cal. 4th at 752, 828 P.2d at 1200, 7 Cal. Rptr. 2d at 813 (citing Shoemaker v. Myers, 52 Cal. 3d 1, 801 P.2d 1054, 276 Cal. Rptr. 303 (1990)). In *Shoemaker*, the court held that where an employer's conduct, (i.e. discipline or criticism), causes physical or mental injury, which ultimately results in the termination of employment, the exclusive remedy provisions generally bar the bringing of a separate civil action for wrongful termination. *Shoemaker*, 52 Cal. 3d at 7, 801 P.2d at 1056, 276 Cal. Rptr. at 305.

17. *Livitsanos*, 2 Cal. 4th at 754, 828 P.2d at 1202, 7 Cal. Rptr. at 815.

18. *Id.* (citing Coca-Cola Bottling Co. v. Superior Court, 233 Cal. App. 3d 1273, 1284, 286 Cal. Rptr. 855, 860 (1991).

19. *Livitsanos*, 2 Cal. 4th at 754-55, 828 P.2d at 1202, 7 Cal. Rptr. 2d at 815. The court, in attempting to rationalize the possibility of a seemingly unconscionable result where an employee suffers a noncompensable injury, referenced the theory underlying out-of-state authority concluding that "*a failure of the compensation law to include some elements of damage recoverable at common law is a legislative and not a judicial problem.*" *Id.* at 755, 828 P.2d at 1202, 7 Cal. Rptr. 2d at 815 (quoting Williams v. State, 50 Cal. App. 3d 116, 122, 123 Cal. Rptr. 812, 815 (1975)).

20. *Id.* at 744, 828 P.2d at 1202, 7 Cal. Rptr. 2d at 815 (quoting *Renteria*, 82 Cal. App. 3d at 840, 147 Cal. Rptr. at 451). In recognizing the narrow possibility that the plaintiff could have no remedy all, the court alluded to the potential number of such cases as de minimis and inadequate to abrogate the exclusive remedy provisions. *Id.*

21. *Id.* at 756, 828 P.2d at 1204, 7 Cal. Rptr. 2d at 817.

22. *Id.* at 757, 828 P.2d at 1204, 7 Cal. Rptr. 2d at 817. The court recognized as unsettled the issue of whether or not a cause of action for defamation was encompassed within the scope of the workers' compensation laws, deeming it one which the court of appeal should address. *Id.* Courts in other jurisdictions are split on whether defamation falls within the workers' compensation scheme. *Id.*

While the *Livitsanos* decision clarifies the extent to which the exclusivity provisions of the Workers' Compensation Act apply when an employee's emotional injury results from an employer's intentional misconduct in the normal course of the employment relationship, it does little to resolve the anomaly presented by *Renteria*.[23] It appears, however, that an employee will no longer be able to manuever around the limitations imposed by the exclusive remedy provisions simply by claiming emotional injury without any accompanying physical injury.[24] Under *Livitsanos*, it is incumbent upon the employee sustaining a pure emotional injury to show, prior to bringing a civil claim for remedies other than those available under the workers' compensation laws,[25] that the injury sustained exceeded the inherent risks of the employment.

JAMES J. MOLONEY

E. *"But for" jury instruction for proximate cause eliminated; instructional error is prejudicial when it is reasonably probable that without the error the jury would have reached a contrary conclusion:* Mitchell v. Gonzales.

I. INTRODUCTION

For the cause-in-fact element of negligence, there are two standard jury instructions in California. Trial courts generally can choose to use

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23. *Id.* at 756, 828 P.2d at 1203, 7 Cal. Rptr. 2d at 816 (continuing to acknowledge the existence of the *Renteria* issue as an anomaly in accord with *Cole*).

24. *See* Lanouette v. Ciba-Geigy Corp., 832 P.2d 585, 10 Cal. Rptr. 2d 84 (1992) (transferring the case back to the court of appeal with directions to vacate in light of *Livitsanos*). In *Lanouette*, the appellate court had permitted an employee's action against his employer for intentional infliction of emotional distress finding the action not foreclosed by the exclusive remedy provisions of the Workers' Compensation Act. Lanouette v. Ciba-Geigy Corp., 1 Cal. App. 4th 1317, 272 Cal. Rptr. 428 (1990). The appellate court reasoned that contract damages were insufficient to compensate the employee where the employer's conduct in terminating the employment relationship was "outrageous." *Id.* at 1329, 272 Cal. Rptr. at 436 ("[A]llowing intentional infliction of emotional distress claims will not unduly deprive employers of discretion to dismiss an employee. While every termination is necessarily painful for the terminated employee, every termination is not accompanied by outrageous conduct. The difficulty in establishing outrageous conduct and intent assures that only 'deserving cases' will give rise to tort relief.").

25. *Livitsanos*, 2 Cal. 4th at 755, 828 P.2d at 1203, 7 Cal. Rptr. 2d at 816 ("In sum, where the employee suffers annoyance or upset on account of the employer's conduct but is not disabled . . . and the employer's conduct neither contravenes fundamental public policy nor exceeds the inherent risks of the employment, the injury will simply not have resulted in any occupational impairment compensable under the workers' compensation law or by way of a civil action.").

one or the other.[1] The two cause-in-fact instructions are contained in BAJI 3.75, i.e., the "but for" test, and BAJI 3.76, i.e., the "substantial factor" test.[2] The issue presented in *Mitchell v. Gonzales*[3] was whether courts should instruct juries on cause-in-fact in negligence actions using BAJI 3.75.[4] After the California Supreme Court disapproved of BAJI 3.75 in general, the court held that the use of BAJI 3.75 in this case resulted in instructional error.[5] Moreover, this error was held prejudicial because it was reasonably probable that the verdict would have been different had BAJI 3.76 been used.[6]

II. STATEMENT OF THE CASE

This case involved the drowning death of a twelve-year-old boy, Damechie Mitchell, during a Fourth of July outing with his fourteen-year-old friend, Luis Gonzalez, and Luis' parents.[7] Luis took Damechie out to the middle of a lake on a paddleboard, even though Luis knew Damechie could not swim.[8] Luis admitted that he was acting rowdy and rocked the

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1. Mitchell v. Gonzalez, 54 Cal. 3d 1041, 1049, 819 P.2d 872, 876, 1 Cal. Rptr. 2d 913, 917 (1991) (citing Maupin v. Widling, 192 Cal. App. 3d 568, 575-78, 237 Cal. Rptr. 521, 525-27 (1987)).

2. BAJI No. 3.75 provides that "[a] proximate cause of [injury, damage, loss, or harm] is a cause which, in natural and continuous sequence, produces the [injury, damage, loss, or harm] and without which the [injury, damage, loss, or harm] would not have occurred." BAJI No. 3.75 (7th ed. 1986).

BAJI No. 3.76 provides that "[a] legal cause of [injury, damage, loss, or harm] is a cause which is a substantial factor in bringing about the [injury, damage, loss, or harm]." BAJI No. 3.76 (7th ed. 1986).

See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265-68 (5th ed. 1984) (discussing the but for and substantial factor tests) [hereinafter THE LAW OF TORTS]; William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 377-81 (1950) (discussing the "but for" and substantial factor tests) [hereinafter *Proximate Cause*].

The court was careful to note that BAJI 3.75 and 3.76 are instructions on cause-in-fact, even though they contain the terms "proximate cause" and "legal cause." *Mitchell*, 54 Cal. 3d at 1044 n.2, 819 P.2d at 873 n.2, 1 Cal. Rptr. 2d at 914 n.2.

3. 54 Cal. 3d 1041, 819 P.2d 872, 1 Cal. Rptr. 2d 913 (1991). Justice Lucas wrote the majority opinion in which Justices Mosk, Panelli, Arabian, Baxter and George concurred. Justice Kennard dissented and filed a separate opinion.

4. *Id.* at 1044-45, 819 P.2d at 873, 1 Cal. Rptr. 2d at 915.

5. *See infra* notes 19-33 and accompanying text.

6. *See infra* notes 34-42 and accompanying text.

7. *Mitchell*, 54 Cal. 3d at 1044, 819 P.2d at 873, 1 Cal. Rptr. 2d at 914.

8. *Id.* at 1046, 819 P.2d at 874, 1 Cal. Rptr. 2d at 916.

float such that it tipped over, and they both fell into the lake.[9] Damechie grabbed Luis' shorts and then his ankles, but Luis broke free to avoid being pulled underwater.[10] After climbing onto the board, Luis looked into the water, saw Damechie's fingers, and tried unsuccessfully to grab them.[11] Although three women were nearby, some time elapsed before Luis called for help.[12] Even though Luis had disobeyed his parents on prior occasions, neither of Luis' parents watched the children to make sure they did not go into deep water as instructed.[13] Damechie's parents sued Luis and his parents for negligence and wrongful death.[14]

At trial, the plaintiffs requested BAJI 3.76 for the causation element, which uses the substantial factor test, while the defendants requested BAJI 3.75, which uses the "but for" test.[15] The trial court decided to use the "but for" test, and the jury returned a verdict in favor of the defendants.[16] The court of appeal reversed, holding that the trial court erred in using BAJI 3.75.[17] The supreme court granted review to determine whether instructional error occurred and if so, whether the error prejudiced the outcome of the case.[18]

III. THE COURT'S OPINION

A. *Use of the "But For" Test Resulted in Instructional Error by Misleading and Confusing Jurors to Focus on the Force Operating Closest in Time to the Harm*

The majority identified several ways in which BAJI 3.75 can mislead a jury. First, the terminology of BAJI 3.75 is conceptually inaccurate because the term "proximate cause" implies proximity in time and space.[19]

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9. *Id.* at 1047, 819 P.2d at 875, 1 Cal. Rptr. 2d at 916.
10. *Id.*
11. *Id.*
12. *Id.* at 1046-47, 819 P.2d at 874-75, 1 Cal. Rptr. 2d at 916.
13. *Id.* at 1045-46, 819 P.2d at 874, 1 Cal. Rptr. 2d at 915.
14. *Id.* at 1047-48, 819 P.2d at 875, 1 Cal. Rptr. 2d at 916.
15. *Id.* at 1048, 819 P.2d at 875, 1 Cal. Rptr. 2d at 916-17.
16. *Id.* at 1048, 819 P.2d at 875, 1 Cal. Rptr. 2d at 917.
17. *Id.* at 1044-45, 819 P.2d at 873, 1 Cal. Rptr. 2d at 915.
18. *Id.* at 1048, 819 P.2d at 875, 1 Cal. Rptr. 2d at 917.
19. *Id.* at 1050, 819 P.2d at 877, 1 Cal. Rptr. 2d at 918. *See also* THE LAW OF TORTS, *supra* note 2, § 42, at 273 (stating that the term proximate cause improperly emphasizes temporal and spatial proximity).

The use of the term "proximate cause" in BAJI 3.75 is unfortunate because theoretically proximate cause consists of numerous issues, including foreseeability, shifting responsibility, and superseding causes. *Mitchell*, 54 Cal. 3d at 1049 n.3, 819 P.2d at 876 n.3, 1 Cal. Rptr. 2d at 917 n.3 (citing *Proximate Cause*, *supra* note 2 at 374). The concept of proximate cause is an attempt to limit cause and effect relationships which logically extend into eternity and date back until the beginning of

Also, laypersons misinterpret proximate cause to mean approximate or estimated cause.[20] A grammatical problem involving a dangling modifier[21] leads jurors to believe that the cause itself must be in "a natural and continuous sequence," which is impossible.[22] It is the chain of events triggering the cause that must remain uninterrupted, not the cause itself. This means that no intervening event may break the chain of causation. In a psycholinguistic study of fourteen jury instructions, BAJI No. 3.75 produced the highest percentage of misunderstanding.[23]

The majority recommended the use of BAJI 3.76 over BAJI 3.75 because the substantial factor test encompasses the "but for" test[24] and, in most cases, reaches the same legal conclusion.[25] Furthermore, the substantial factor test addresses more problem situations than the "but for" test, such as independent causes[26] and actions that contribute insignifi-

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time; without proximate cause, unlimited liability would follow all wrongful conduct. THE LAW OF TORTS, *supra* note 2, § 41, at 263-64 (stating that in order to limit the causes and consequences of negligent acts, causation requires some reasonable connection between the act or omission and the damage suffered). However, for purposes of BAJI 3.75, the term "proximate cause" only relates to cause-in-fact. *Mitchell*, 54 Cal. 3d at 1049 & nn.3-4, 819 P.2d at 876 & nn.3-4, 1 Cal. Rptr. 2d at 917 & nn. 3-4.

20. *Mitchell*, 54 Cal. 3d at 1051, 819 P.2d at 877-88, 1 Cal. Rptr. 2d at 919 (citing Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1353 (1979) (finding 23% of the subjects surveyed misunderstood the term "proximate cause")).

21. "The phrase 'natural and continuous sequence' "precedes the verb it is intended to modify." Charrow & Charrow, *supra* note 20, at 1323. *See supra* note 2 for the text of BAJI 3.75.

22. *Mitchell*, 54 Cal. 3d at 1051, 819 P.2d at 877, 1 Cal. Rptr. 2d at 919.

23. *Id.* (citing Charrow & Charrow, *supra* note 20, at 1353).

24. *Id.* at 1052, 819 P.2d at 878, 1 Cal. Rptr. 2d at 920.

25. That is, if the conduct was a substantial factor in causing the harm, the harm certainly would not have occurred but for that act; and if the conduct was not a substantial factor, it cannot be said with certainty that the harm still would have occurred without it. *Id.* at 1052-53, 819 P.2d at 878-79, 1 Cal. Rptr. 2d at 920.

26. *Id.* at 1052, 819 P.2d at 878, 1 Cal. Rptr. 2d at 920. As a general rule, the substantial factor test should be used when there are concurrent independent causes, because in California, a tortfeasor is liable even though the same harm would have occurred anyway as long as her negligence was a material factor in causing the injury. *Id.* at 1049, 819 P.2d at 876, 1 Cal. Rptr. 2d at 917-18. *See generally* THE LAW OF TORTS, *supra* note 2, § 41, at 266-68 (advocating use of the substantial factor rather than the but for test for cases involving independent causes). The term "concurrent independent causes" means that at least "two causes concur to bring about an event and either one of them, operating alone, could have been sufficient to cause the result." *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 970 (9th

cantly to the harm suffered.[27]

The majority acknowledged complications in BAJI 3.76 over the terms "legal cause" and "substantial."[28] Results of the same psycholinguistic study that the majority relied on in criticizing BAJI 3.75 showed that twenty-five percent of the subjects believed that legal cause meant the opposite of illegal cause.[29] And in comparative negligence actions, the substantial factor test can hinder a finding of partial liability by undermining California's comparative negligence principle that each defendant is responsible for her proportionate share of the harm caused.[30] Nevertheless, a six-justice majority preferred BAJI 3.76 over BAJI 3.75,[31] recommending that the Committee on Standard Jury Instructions[32] revise the latter.[33]

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ed. 1988 & Supp. 1992) (discussing causes involving "concurrent independent causes").

27. *Mitchell*, 54 Cal. 3d at 1053, 819 P.2d at 879, 1 Cal. Rptr. 2d at 920. The majority used the illustration of throwing a lighted match into a forest fire. *Id.*

28. *Id.* at 1053-54, 819 P.2d at 879, 1 Cal. Rptr. 2d at 920-21.

29. Charrow & Charrow, *supra* note 20, at 1353.

30. *Mitchell*, 54 Cal. 3d at 1053, 819 P.2d at 879, 1 Cal. Rptr. 2d at 920-21.

31. *Id.* at 1054, 819 P.2d at 879, 1 Cal. Rptr. 2d at 921. *See generally Proximate Cause*, *supra* note 2, at 421 (favoring the substantial factor test as the standard for cause-in-fact).

According to Justice Kennard, proximate cause actually consists of two separate and distinct elements: cause-in-fact and policy considerations. *Mitchell*, 54 Cal. 3d at 1056, 819 P.2d at 881, 1 Cal. Rptr. 2d at 923 (Kennard, J., dissenting). Justice Kennard argued that temporal and spatial proximity, as provided in BAJI 3.75, are relevant policy and fairness considerations and thus are important factors that BAJI 3.76's substantial factor test fails to consider. *Id.* at 1059, 819 P.2d at 883, 1 Cal. Rptr. 2d at 924 (Kennard, J., dissenting). Though not perfect, Justice Kennard felt that BAJI 3.75 was the only instruction that adequately addressed both elements of proximate cause. *Id.* at 1059-60, 819 P.2d at 883, 1 Cal. Rptr. 2d at 925 (Kennard, J., dissenting).

32. The Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California prepares these instructions. The committee recommends, but no statute requires, the use of these instructions.

33. *Mitchell*, 54 Cal. 3d at 1054 n.10, 819 P.2d at 879 n.10, 1 Cal. Rptr. 2d at 921 n.10. Justice Kennard criticized the majority's failure to suggest a satisfactory replacement for the proximate cause instruction or how to fix BAJI 3.75 and that in so doing, the majority failed to fulfill its duty of providing guidance to lower courts. *Id.* at 1061-62, 819 P.2d at 884-85, 1 Cal. Rptr. 2d at 926 (Kennard, J., dissenting). She argued that because no alternative instructions consider the policy factors of time, space, and foreseeability as does BAJI 3.75, it should be kept as an acceptable alternative instruction on proximate cause. *Id.* at 1059-60, 819 P.2d at 883, 1 Cal. Rptr. 2d at 925 (Kennard, J., dissenting). *See generally* THE LAW OF TORTS, *supra* note 2, § 43, at 282-83 (asserting that remoteness in time and space makes it more likely that other intervening causes have broken the chain of causation).

B. Prejudicial Error Occurred Because It Was Reasonably Probable That Had the Court Given the "Substantial Factor" Instruction, the Jurors Would Have Found That the Defendants' Breach of Duty Was a Proximate Cause of the Child's Death

As a general rule, a reviewing court will reverse a judgment only when the alleged error precluded a fair outcome at trial.[34] The test asks whether it is reasonably probable that the appellant would have obtained a more propitious verdict in the absence of error.[35] Five factors govern this determination: (1) the extent of controverted evidence on the critical issue; (2) whether the jury requested a reiteration of the erroneous instruction; (3) the closeness of the jury's determination; (4) whether the defense attorney's closing argument reinforced the instructional defects, and (5) the curative effect of other instructions.[36] In applying these factors, the court found that there was not much conflicting evidence relating to cause-in-fact.[37] The repetition of the erroneous instruction was unnecessary because the court gave a copy of the instruction to the jury.[38] Because the verdict on causation was nearly unanimous, the jury was most likely misled by the flaws in BAJI 3.75, stressing its "but for" standard and focusing on the condition temporally closest to the death, Damechie's inability to swim.[39] The defendants' closing argument em-

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34. *Mitchell*, 54 Cal. 3d at 1054, 819 P.2d at 880, 1 Cal. Rptr. 2d at 921. See Article VI, section 13 of the California Constitution, which provides, in pertinent part, that

> [n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CAL. CONST. art. VI, § 13.

35. *Mitchell*, 54 Cal. 3d at 1054, 819 P.2d at 880, 1 Cal. Rptr. 2d at 921 (citing People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 254 (1956)).

36. *See* LeMons v. Regents of Univ., 21 Cal. 3d 869, 876, 582 P.2d 946, 950, 148 Cal. Rptr. 355, 359 (1978).

37. *Mitchell*, 54 Cal. 3d at 1054-55, 819 P.2d at 880, 1 Cal. Rptr. 2d at 921. That is, cause-in-fact was evidenced by the relationship between Damechie's death and the other relevant factors, i.e., Damechie's inability to swim; lack of parental supervision, and Luis' failure to call for help from nearby adults after capsizing the float. *Id.*

38. *Id.* at 1055, 819 P.2d at 880, 1 Cal. Rptr. 2d at 921.

39. *Id.* at 1055, 819 P.2d at 880, 1 Cal. Rptr. 2d at 921-22. With regard to Mr. Gonzales and his son, the jury split 9-3 on the issue of negligence, and ruled 12-0 on the issue of cause-in-fact. With regard to Mrs. Gonzales, the jury voted 11-1 on the issue of negligence and 10-2 on the cause-in-fact of the death. *Id.*

phasized Damechie's inability to swim as the factor operating closest in time to the death.[40] Furthermore, another instruction containing the term "proximate cause" and requiring that the cause operate at the "moment of injury" amplified the time and place misconceptions intrinsic in the word proximate.[41] The court concluded that after finding a breach of duty, it was illogical for the jurors not to find that the breach of duty was a cause-in-fact of the boy's death and that the use of BAJI 3.76 probably would have led to a different verdict.[42]

IV. IMPACT

Although the language of the court indicates that it "disapproved" of BAJI 3.75, the effect of the ruling is to eliminate its use entirely. In California, unlike other jurisdictions, the state supreme court "overrules" its own decisions, but "disapproves" of others.[43] Merely a semantic complexity, either term leads to an eradication of former precedent or authority.

Attorneys differ over the ruling's impact. Some believe it will lead to more plaintiff verdicts; others do not.[44] Whether the elimination of the "but for" test will result in greater liability for defendants because the cause must now be a substantial factor of the injury will depend on the circumstances causing injury.[45] In cases involving multiple concurring causes, there will probably be more plaintiff verdicts, but more defense verdicts where the defendant's actions contributed insignificantly to the injuries.[46]

One question the opinion leaves open is how to remedy the problems in the "but for" jury instruction BAJI 3.75.[47] Both the drafter of the standard jury instructions and a consultant to the Committee are unsure how to proceed.[48] Especially confusing is that although the *Mitchell* ruling demanded the use of BAJI 3.76 in place of BAJI 3.75, the majority recom-

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40. *Id.* In the defense's closing argument, they emphasized that the drowning would not have occurred but for Damechie's decision to venture into deep water despite his inability to swim. *Id.*

41. *Id.* at 1055-56, 819 P.2d at 881, 1 Cal. Rptr. 2d at 922.

42. *Id.* at 1056, 819 P.2d at 881, 1 Cal. Rptr. 2d at 922.

43. B. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 100 (1977).

44. Joanne Wojcik, *Attorneys Split Over Ruling's Impact*, BUS. INS., Dec. 16, 1991, at 17.

45. *Id.*

46. *Id.*

47. This was a main point of criticism in Justice Kennard's dissent. Mitchell v. Gonzalez, 54 Cal. 3d 1041, 1059, 819 P.2d 872, 883, 1 Cal. Rptr. 2d 913, 924-25 (1991) (Kennard, J., dissenting). *See supra* note 33.

48. Susan Orenstein, *Ruling is Proximate Cause of a Lot of Confusion*, THE RECORDER, Dec. 24, 1991, at 2.

mended improvement of the substantial factor instruction, without providing further guidance.[49] Another question the court did not address is whether the "but for" instruction should still be given in products liability or fraud cases.[50] Some attorneys believe that the ruling will have a wide impact on *all* tort cases, including products liability and misrepresentation.[51]

V. CONCLUSION

Despite its use as an acceptable cause-in-fact instruction for nearly fifty years,[52] the supreme court has proscribed the use of BAJI 3.75 unless and until the Committee on Standard Jury Instructions remedies its substance and structure problems. Causation and proximate cause are difficult concepts, even for the legal profession.[53] The result is that juries will most likely throw the baby out with the bathwater, deciding the more manageable question of whether the defendant should pay for the plaintiff's injuries.[54]

Prosser and Keeton, however, identify five clearly identifiable turns in the "causation maze" as follows: (1) cause-in-fact; (2) apportionment of damages among causes; (3) unforeseeable consequences; (4) intervening causes, and (5) shifting responsibility.[55] Breaking jury instructions into

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49. *Mitchell*, 54 Cal. 3d at 1053 n.9, 819 P.2d at 879 n.9, 1 Cal. Rptr. 2d at 920 n.9.

50. *See supra* note 48. *See generally* THE LAW OF TORTS, *supra* note 2, § 102, at 711 and § 110, at 767 (discussing the causation element in products liability and misrepresentation cases).

51. *See supra* note 44.

52. The instruction used prior to the inception of BAJI 3.75 in 1969 was nearly identical in its terms and had been used since 1943. *Mitchell*, 54 Cal. 3d at 1059, 819 P.2d at 883, 1 Cal. Rptr. 2d at 924-25 (Kennard J., dissenting).

53. *Id.* at 1050, 819 P.2d at 876-77, 1 Cal. Rptr. 2d at 918. It is no surprise that laypersons are baffled by the meaning of proximate cause, given the long-standing struggle with the term among legal scholars. *See generally Proximate Cause*, *supra* note 2, at 369 ("Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze."); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911).

Witkin discusses causation as a composition of two elements, cause-in-fact and proximate cause, using proximate cause as a synonym for foreseeability and other policy factors. *See* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 968 (9th ed. 1988 & Supp. 1992). However, Dean Prosser uses the term "proximate cause" to describe the entire element of causation which includes cause-in-fact, apportionment of damages and foreseeability. *See Proximate Cause*, *supra* note 2, at 374.

54. *Proximate Cause*, *supra* note 2, at 420, 424.

55. THE LAW OF TORTS, *supra* note 2, § 42, at 279. *See also Proximate Cause*,

more manageable pieces, similar to Prosser and Keeton's five-step approach, would help eliminate juror confusion over the term "proximate cause."[56] Another way to make the element of causation clearer to jurors is to break it down into two jury instructions, one addressing cause-in-fact and another addressing proximate cause.[57] Under this solution, BAJI 3.75 and 3.76 could still be used as alternate cause-in-fact instructions and the proximate cause instruction could contain policy considerations, such as foreseeability and fairness.

One solution to the problems in BAJI 3.75 and 3.76 is to replace the terms "proximate cause" and "legal cause" with "cause-in-fact." Another solution is to follow the suggestion of the psycholinguistic study to modify BAJI 3.75 to read as follows: "The law defines 'cause' in its own particular way. A cause of an injury is something that triggers a natural chain of events that ultimately produces the injury. Without the cause, the injury would not occur."[58]

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supra note 2, at 374 (discussing a seven-step approach to proximate cause).

56. *See Proximate Cause*, *supra* note 2, at 420 (stating that proximate cause consists of numerous complex unrelated issues).

57. Witkin describes "legal cause" as containing the following two elements: (1) cause-in-fact, which uses either the but for or the substantial factor test to show that the defendant's negligence somehow contributed to the injury, and (2) proximate cause, which limits liability when it would be unfair to hold the defendant liable because of the way in which the injury occurred. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 968 (9th ed. 1988 & Supp. 1992). *See generally* THE LAW OF TORTS, *supra* note 2, § 42, at 278 (criticizing the use of the substantial factor test for both cause-in-fact and proximate cause, including policy considerations).

58. Charrow & Charrow, *supra* note 20, at 1352-53.