PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 19 | Issue 1 Article 6

12-15-1991

California Supreme Court Survey - A Review of Decisions: January 1991-June 1991

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California Supreme Court Survey
January 1991-June 1991

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. ADMINISTRATIVE LAW

***The Fair Employment and Housing Commission lacks the authority to award compensatory damages in employer harassment actions:* Peralta Community College District v. Fair Employment and Housing Commission.**

I. INTRODUCTION

In 1959, the California Legislature introduced the Fair Employment Practice Act[1] and in 1980 combined it with the Rumford Fair Housing Act[2] to produce the Fair Employment and Housing Act[3] (hereinafter FEHA). The FEHA states that harassment of an employee is unlawful.[4] An employee who is harassed by an employer has three options. First, the employee may file an action in state court under a common law cause of action.[5] Second, the employee may file an action in state court under the FEHA.[6] Third, the employee may file a complaint with the Fair Employment and Housing Department (hereinafter Department)[7] pursuant to the FEHA.

Where an employee files a complaint, the Department must investigate the claim[8] and determine whether the complaint should be heard by the Fair Employment and Housing Commission (hereinafter Commission).[9] When hearing a claim, the Commission has the authority to assess fault and order any corrective measures *including, but not limited to* those remedies expressly authorized by section

1. 1959 Cal. Stat. 1999-2005 (repealed 1980).

2. 1963 Cal. Stat. 3823-24 (repealed 1980).

3. 1980 Cal. Stat. 3140 (codified at CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1991)). *See* Marjorie Gelb & JoAnne Frankfurt, *California's Fair Employment Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983) (discussing the history and application of the FEHA). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 756-58, 763, 766-67 (9th ed. 1988); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1363-64 (9th ed. 1988); 41 CAL. JUR. 3D *Labor* § 405 (1978 & Supp. 1991); 50 AM. JUR. PROOF OF FACTS 2D 127, *Sex Discrimination: Sexual Harassment Creating a Hostile Work Environment* §§ 4 & 9 (1988); Andrea G. Nadel, Annotation, *On-The-Job Sexual Harassment as Violation of State Civil Rights Law*, 18 A.L.R. 4TH 328 (1982).

4. CAL. GOV'T CODE § 12940(h) (West Supp. 1991).

5. Rojo v. Klinger, 52 Cal. 3d 65, 82, 801 P.2d 373, 383, 276 Cal. Rptr. 130, 140 (1990) (common law actions not precluded by FEHA).

6. *See, e.g.*, Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 214, 649 P.2d 912, 914, 185 Cal. Rptr. 270, 272 (1982) (after obtaining "right to sue" letters, employees filed state court action pursuant to FEHA).

7. CAL. GOV'T CODE § 12960 (West Supp. 1991).

8. CAL. GOV'T CODE § 12963 (West 1980).

9. CAL. GOV'T CODE §§ 12965(a), 12969 (West 1980 & Supp. 1991).

12970 of the California Government Code.[10]

In *Peralta Community College District v. Fair Employment and Housing Commission*,[11] a district employee filed a complaint with the Department against her employer alleging sexual harassment. Following a Department investigation, the Commission heard the complaint and held in the employee's favor. In addition to other remedies, the Commission awarded her $20,000 in compensatory damages for her emotional distress.[12] The Commission's decision was reviewed by the trial court pursuant to an administrative writ of mandamus.[13] The trial court held that the Commission did not have the authority to award compensatory damages and ordered that the award of $20,000 be stricken.[14] The court of appeal reversed.[15]

The issue before the California Supreme Court in *Peralta*[16] was whether section 12970[17] empowered the Commission to impose compensatory damages[18] in a complaint alleging employer harassment.[19] The supreme court held that section 12970 does not authorize the Commission to impose compensatory damages in an action for harassment against an employer.[20]

II. TREATMENT

A. *Majority Opinion*

In its decision, the supreme court analyzed the pertinent statutory

10. CAL. GOV'T CODE § 12970 (West Supp. 1991). *See infra* note 17.

11. 52 Cal. 3d 40, 801 P.2d 357, 276 Cal. Rptr. 114 (1990).

12. *Id.* at 44, 801 P.2d at 359, 276 Cal. Rptr. at 116. The Commission also ordered Peralta to stop discriminating, to enact a written policy pertaining to sexual harassment, to inform all employees of the policy against sexual harassment, and report to the Commission on its compliance. *Id.* at 53 n.10, 801 P.2d at 365 n.10, 276 Cal. Rptr. at 122 n.10.

13. *Id.* at 44, 801 P.2d at 359, 276 Cal. Rptr. at 116.

14. *Id.*

15. *Id.*

16. Justice Panelli wrote the majority opinion with Chief Justice Lucas and Justices Mosk, Eagleson, and Arabian concurring. Justice Broussard dissented in a separate opinion in which Justice Kennard joined.

17. Section 12970(a) states, in pertinent part:

> If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall . . . requir[e] such respondent to cease and desist from such unlawful practice and to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration of membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance.

CAL. GOV'T CODE § 12970(a) (West Supp. 1991) (emphasis added).

18. *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1319-26 (9th ed. 1988); 23 CAL. JUR. 3D *Damages* §§ 12-16 (1975); 22 AM. JUR. 2D *Damages* §§ 23-35 (1988).

19. *Peralta*, 52 Cal. 3d at 48, 801 P.2d at 362, 276 Cal. Rptr. at 119. The court clearly stated that compensatory damages might be available under a tort action. *Id.*

20. *Id.* at 60, 801 P.2d at 370, 276 Cal. Rptr. at 127.

language of the FEHA.[21] The court noted that the purpose of the FEHA is "to provide effective remedies which will eliminate . . . discriminatory practices."[22] This purpose is to be accomplished by remedies "included, but not limited to" those in section 12970.[23] The court stated that the remedies expressly authorized in section 12970 are "corrective measures," and are to be implemented in the *workplace*.[24] Further, the court determined that compensatory damages were *not* designed to eliminate discrimination in the *workplace*, but rather serve to make the *victim* of the discrimination whole.[25] Following the doctrine of *ejusdem generis*,[26] therefore, the court held that compensatory damages are not within the scope of section 12970 because they are not sufficiently similar to the "corrective measures" expressly provided.[27]

The supreme court stated that the legislative intent behind the FEHA was to provide an "efficient and expeditious" option to the state court system.[28] Moreover, the court noted that the complexities associated with awarding compensatory damages[29] would force the Commission to act more like a traditional court.[30] Therefore, authorizing the Commission to award compensatory damages would defeat the legislative intent of the FEHA.[31]

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21. *Id.* at 48-51, 801 P.2d at 362-64, 276 Cal. Rptr. at 119-21.

22. CAL. GOV'T CODE § 12920 (West 1980). *See* Dyna-Med, Inc. v. Fair Employment and Hous. Comm'n, 43 Cal. 3d 1379, 1387, 743 P.2d 1323, 1326, 241 Cal. Rptr. 67, 70 (1987) (punitive damages allowed where it serves FEHA purposes).

23. *See supra* note 17.

24. *Peralta*, 52 Cal. 3d at 49, 801 P.2d at 362, 276 Cal. Rptr. at 119.

25. *Id.* (citation omitted). *See supra* note 19.

26. *See generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 94, 96 (9th ed. 1988); 73 AM. JUR. 2D *Statutes* §§ 155-60 (1974); Athena Mueller, Annotation, *Supreme Court's Views on Weight to be Accorded to Pronouncements of Legislature, or Members of Legislature, Respecting Meaning or Intent of Previously Enacted Statute*, 56 L. ED. 2D 918 (1979); Romualdo P. Eclaveva, Annotation, *Supreme Court's Application of the Rules of Ejusdem Generis and Noscitur A Sociis*, 46 L. ED. 2D 879 (1977).

27. *Peralta*, 52 Cal. 3d at 49-50, 801 P.2d at 3362-63, 276 Cal. Rptr. at 119-20.

28. *Id.* at 55, 801 P.2d at 366, 276 Cal. Rptr. at 123 (citing Sterns v. Fair Employment Practice Comm'n, 6 Cal. 3d 205, 214, 490 P.2d 1115, 1120-21, 98 Cal. Rptr. 467, 472-73 (1971)).

29. *See* W. PAGE KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54-55 (5th ed. 1984) (discussing the complex nature of awarding damages for emotional distress).

30. *Peralta*, 52 Cal. 3d at 55-56, 801 P.2d at 367, 276 Cal. Rptr. at 124.

31. *Id.*

B. *Dissenting Opinion*

Justice Broussard dissented for several reasons. Broussard argued that the legislature's intent was to provide remedies that would *make the employee whole.*[32] One basis for this conclusion was that section 12970 provides for back pay damages, which directly serve to make the employee whole.[33] The focus of Justice Broussard's concern was that the awarding of compensatory damages is often the only redress that may serve to make the employee whole when harassment occurs during employment.[34]

III. CONCLUSION

In *Peralta*, the court concluded that the legislative intent and the language of section 12970 did not authorize the Commission to award compensatory damages in an employer harassment action.[35] The court did *not* rule whether an agency's power to award unlimited compensatory damages violates the judicial powers clause[36] or the right to a trial by jury.[37] Therefore, should the legislature amend section 12970 and empower the Commission to award compensatory damages, an employer could still prevail on a state constitutional challenge. The court's narrow construction of section 12970 decreases the motivation for an employee to seek restoration from the Commission.[38] Moreover, as a result of the ruling in the instant case and other recent supreme court decisions,[39] the number of harassment actions filed in California courts should increase.[40]

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32. *Id.* at 61, 801 P.2d at 371, 276 Cal. Rptr. at 128 (Broussard, J., dissenting) (citation omitted).

33. *Id.* at 63, 801 P.2d at 372, 276 Cal. Rptr. 129 (Broussard, J., dissenting).

34. *Id.* at 62, 801 P.2d at 371, 276 Cal. Rptr. 128 (Broussard, J., dissenting). The *majority* noted that an employee may receive both compensatory and punitive damages where the action is filed in superior court. *Id.* at 45, 801 P.2d at 360, 276 Cal. Rptr. at 117. *See supra* notes 5-7 and accompanying text.

35. *Id.* at 60, 801 P.2d at 370, 276 Cal. Rptr. at 127.

36. *Id.* at 54-56, 801 P.2d at 365-67, 276 Cal. Rptr. at 122-24.

37. *Id.* at 57, 801 P.2d at 368, 276 Cal. Rptr. at 125. *See* CAL. CONST. art. I, § 6; CAL. CONST. art. VI, § 1.

38. James P. Hargarten & Daniel P. Westman, *Employees Find New Friends in a Surprising Place; State's High Court is Once Again Welcoming Wrongful Termination Suits*, THE RECORDER, Sept. 5, 1991, at 4.

39. *See* Dyna-Med, Inc. v. Fair Employment and Hous. Comm'n, 43 Cal. 3d 1379, 1404, 743 P.2d 1323, 1338, 241 Cal. Rptr. 67, 82 (1987) (the Commission lacks authority to award punitive damages in employer harassment action); Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 221, 649 P.2d 912, 918, 185 Cal. Rptr. 270, 276 (court may award punitive and compensatory damages under FEHA).

40. *See* Hargartem & Westman, *supra* note 38, at 4.

II. CIVIL PROCEDURE

A. *Under California Code of Civil Procedure sections 425.10 and 425.11, a defendant must receive actual notice of damages sought before a default judgment may be entered:* Schwab v. Rondel Homes, Inc.

In *Schwab v. Rondel Homes, Inc.*,[1] the California Supreme Court held that under California statutory law, a plaintiff must give a defaulting defendant notice of damages sought.[2] The court found that in an action for personal injury or wrongful death, under Sections 425.10[3] and 425.11[4] of the California Code of Civil Procedure, a defendant must be notified of both general and specific damages sought

1. 53 Cal. 3d 428, 808 P.2d 226, 280 Cal. Rptr. 83 (1991) (en banc). Justice Broussard delivered the opinion of the court with Justices Lucas, Panelli, Kennard, Arabian, and Baxter concurring. Justice Mosk dissented in a separate opinion. In his dissent, Justice Mosk stated that California Code of Civil Procedure sections 425.10 and 425.11 are "bad law and bad policy, they are an ineffective means of implementing the Legislature's apparent intent." *Id.* at 440, 808 P.2d at 234, 280 Cal. Rptr. at 91.

2. *Id.* at 435, 808 P.2d at 230, 280 Cal. Rptr. at 87. In *Schwab*, defendants refused to rent an apartment unit to plaintiffs because of a signal dog. Plaintiffs' housing discrimination action under CAL. CIV. CODE § 54.1(b)(5) sought damages under CAL. CIV. CODE § 54.3. The complaint requested "damages for each plaintiff for mental and emotional distress and for 'further monetary and pecuniary losses and damages' in amounts according to proof, treble statutory damages in amounts according to proof 'but in a sum no less than $250,' attorney fees, and punitive damages of $500,000." *Id.* at 430, 808 P.2d at 227, 280 Cal. Rptr. at 84.

3. Section 425.10 provides:

> A complaint or cross-complaint shall contain both of the following:
>
> a) A statement of the facts constituting the cause of action, in ordinary and concise language.
>
> b) A demand for judgment for the relief to which the pleader claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover actual *or punitive* damages for personal injury or wrongful death, in which case the amount thereof shall not be stated.

CAL. CIV. PROC. CODE § 425.10 (West Supp. 1991). *See generally* 23 CAL. JUR. 3D *Damages* §§ 155-162 (1975); 4 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 332, 423-425, 447-448, 463 (3d ed. 1985).

4. Section 425.11 provides:

> When a complaint or cross-complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the party against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the plaintiff or cross-complainant, who shall serve a responsive statement as to the damages within 15 days thereafter. In the event that a response is not served, the party, on notice to the plaintiff or cross-complainant, may petition the court in which the action is pending to order the plaintiff or cross-complainant to serve a responsive statement.
>
> If no request is made for such a statement setting forth the nature and amount of damages being sought, the plaintiff shall give notice to the defendant of the amount of special and general damages sought to be recovered (1)

before he or she may be subject to a default judgment.[5]

In its determination that notice of damages must be served on a defendant, the court looked to its prior holding in *Greenup v. Rodman*[6] and to previous appellate decisions where default judgments were

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before a default may be taken; or (2) in the event an answer is filed, at least 60 days prior to date set for trial.

CAL. CIV. PROC. CODE § 425.11 (West 1991). *See also* 4 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 463 (3d ed. 1985); 5 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 1113 (3d ed. 1985); 23 CAL. JUR. 3D *Damages* § 155 (1975).

5. *Schwab*, 53 Cal. 3d at 435, 808 P.2d at 230, 280 Cal. Rptr. at 87. A court may enter a default judgment in favor of the plaintiff if the defendant fails to answer the complaint pursuant to California Code of Civil Procedure § 585. Section 585 provides:

> Judgment may be had, if the defendant fails to answer the complaint, as follows:
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> a) Contract action; personal service. In an action arising upon contract or judgment for the recovery of money or damages only, if the defendant has . . . been served, other than by publication, and no answer . . . has been filed with the clerk or judge of the court within the time specified in the summons . . . the clerk, or the judge . . . shall enter the default of the defendant or defendants, so served, and immediately thereafter enter judgment for the principal amount demanded in the complaint or a lesser amount if credit has been acknowledged, together with interest allowed by law . . . .
>
> b) Other actions; personal service; hearing. In other actions, if the defendant has been served, other than by publication, and no answer . . . has been filed with the clerk or judge of the court within the time specified in the summons . . . the clerk, or the judge if there is no clerk, upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not exceeding the amount stated in the complaint), as appears by such evidence to be just . . . .

CAL. CIV. PROC. CODE § 585 (a)&(b) (West Supp. 1991).

In addition, section 580 of the Civil Code limits a plaintiff's default judgment (where the defendant has failed to answer) to the amount stated in the complaint. Section 580 provides: "[t]he relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." CAL. CIV. PROC. CODE § 580 (West 1976). *See also* 4 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 449 (3d ed. 1985); Craig H. Millet & Tina I. Waine, *Securities Law*, 8 PEPP. L. REV. 617 (1981).

6. 42 Cal. 3d 822, 726 P.2d 1295, 231 Cal. Rptr. 220 (1986). In *Greenup*, involving a minority shareholder's action against a majority shareholder, the minority shareholder's complaint sought compensatory damages "in a sum that exceeds the jurisdictional requirements of [the superior court]." *Id.* at 825, 726 P.2d at 1296, 231 Cal. Rptr. at 221. The only specific amount sought in the complaint was $100,000 in exemplary and punitive damages. *Id.* The trial court sanctioned the majority shareholder for intentionally refusing to comply with discovery and awarded a default judgment of $338,000 in compensatory and $338,000 in punitive damages. *Id.* at 826, 726 P.2d at 1297, 231 Cal. Rptr. at 222.

The California Supreme Court reversed, reiterating the general rule that a default judgment is limited to the amount demanded. *Id.* at 831, 726 P.2d at 1300, 231 Cal. Rptr. at 225. The court further stated that although the trial court's judgment was based in part on sanctions for discovery violations, the sanctions did not except the judgment from the limit imposed by the damage amounts requested by the plaintiff. *Id.* at 828, 726 P.2d at 1299, 231 Cal. Rptr. at 224. Thus, the plaintiff was limited to a recovery of $15,000 in compensatory damages (the jurisdictional minimum of the superior court) and $100,000 in punitive damages. *Id.* at 829, 726 P.2d at 1300, 231 Cal. Rptr. at 225.

disallowed when they exceeded the damage amounts of which the defendant had knowledge.[7] The court rejected plaintiff's argument that the defendant should be on notice that a default judgment at a minimum involves an amount equal to the jurisdictional minimum of the trial court.[8] The court reasoned that such an assumption was in conflict with other California appellate decisions, [9] as well as the statutory language of section 425.11.[10] The court also relied upon its holding in *Greenup*, stating that the amount sought in the complaint would provide "sufficient notice" if sections 425.11 and 425.10 were not satisfied.[11] Further, the court refused to find that notice given to a defendant of punitive and statutory damages would satisfy the special and general damage notice requirements of section 425.11.[12]

By requiring that a plaintiff give notice of damages sought before a default judgment may be entered, the court reaffirms two principles. First, liability may not be imposed upon a defaulting defendant if the statutory notice requirements have not been satisfied. Second, a defendant is "entitled" to notice of his or her potential liability in deter-

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7. The court reiterated that "a default judgment is . . . limited to the damages of which the defendants had notice." *Schwab*, 53 Cal. 3d at 433, 808 P.2d at 229, 280 Cal. Rptr. at 86.

See Hamm v. Elkin, 196 Cal. App. 3d 1343, 242 Cal. Rptr. 545 (1987) (notice of damages is required before default will be allowed); Engebretson & Co. v. Harrison, 125 Cal. App. 3d 436, 178 Cal. Rptr. 77 (1981) (plaintiff who sought damages "in excess of $5,000" was limited to default judgment of $5,000); Twine v. Compton Supermarket, 179 Cal. App. 3d 514, 224 Cal. Rptr. 562 (1986) (interpreting § 425.11).

See generally, 4 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 450 (3d ed. 1985); CAL. CIV. PROC. CODE § 580 (West 1976) (section 580 prohibits a default judgment in excess of the complaint's prayer).

The amount of the complaint's prayer also generally determines the court's jurisdiction. *See generally*, 2 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 19 (3d ed. 1985 & Supp. 1991).

8. *Schwab*, 53 Cal. 3d at 434, 808 P.2d at 229, 280 Cal. Rptr. at 86.

9. These cases stand for the proposition that notice of the minimum jurisdictional requirement of the court is not presumed as actual notice is required. *See* Petty v. Manpower, Inc., 94 Cal. App. 3d 794, 156 Cal. Rptr. 622 (1979); Hamm v. Elkin, 196 Cal. App. 3d 1343, 242 Cal. Rptr. 545 (1987); Plotitsa v. Superior Court, 140 Cal. App. 3d 755, 189 Cal. Rptr. 769 (1983).

10. *Schwab*, 53 Cal. 3d at 435, 808 P.2d at 230, 280 Cal. Rptr. at 87.

11. *Id.*

12. *Id.* California Code of Civil Procedure § 425.11 provides in pertinent part: "the plaintiff shall give notice to the defendant of the amount of special and general damages sought to be recovered (1) before a default may be taken . . . . " CAL. CIV. PROC. CODE § 425.11 (West Supp. 1991).

See also Plotitsa v. Superior Court, 140 Cal. App. 3d 755, 189 Cal. Rptr. 769 (1983) (special and general damages must be specified and such requirement mandates that a specific accounting of the damages sought rather than a general total of damages).

mining whether to allow a default judgment to be entered.[13]

AUGUSTINE GERARD YEE

B. *The California superior courts have discretion to reconsider amount-in-controversy jurisdiction even after good faith pleadings initially establish such jurisdiction, but in order to properly transfer a case to municipal court, the superior court must establish that the matter will "necessarily" fail to result in a verdict exceeding $25,000:* Walker v. Superior Court.

I. INTRODUCTION

In *Walker v. Superior Court*,[1] the California Supreme Court[2] resolved a conflict among the courts of appeal:[3] whether section 396 of the Code of Civil Procedure[4] permits a superior court to transfer a case for failure to meet the amount-in-controversy requirement when

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13. *Schwab*, 53 Cal. 3d at 435, 808 P.2d at 230, 280 Cal. Rptr. at 87. *See also* Hamm v. Elkin, 196 Cal. App. 3d 1343, 242 Cal. Rptr. 545 (1987) ("knowledge of the alleged amount of damages may be crucial to a defendant's decision whether to permit a clerk's default").

1. 53 Cal. 3d 257, 807 P.2d 418, 279 Cal. Rptr. 576 (1991).

2. Chief Justice Lucas authored the majority opinion in which Justices Panelli, Kennard, Arabian, and Baxter concurred. Justice Broussard wrote a concurring and dissenting opinion in which Justice Mosk joined.

3. *Compare* Davis v. Superior Court, 25 Cal. App. 3d 596, 599-601, 102 Cal. Rptr. 238, 240-41 (1972) (holding that where a prayer for relief does not appear fraudulent on its face, section 396 precludes transfer) *with* Williams v. Superior Court, 216 Cal. App. 3d 378, 387, 264 Cal. Rptr. 677, 682 (1989) [hereafter *Williams (RD Instruments)*] (holding that trial courts may look beyond the face value of a case and transfer the case if the true value fails to satisfy the amount-in-controversy requirement) *and* Williams v. Superior Court, 219 Cal. App. 3d 171, 178, 268 Cal. Rptr. 61, 65 (1990) [hereinafter *Williams (Gemco)*] (holding that a superior court has discretion to transfer a case if the jurisdictional limit could not realistically be met) *and* Campbell v. Superior Court, 213 Cal. App. 3d 147, 155, 261 Cal. Rptr. 509, 515 (1989) (same).

4. CAL. CIV. PROC. CODE § 396 (West 1982 & Supp. 1991). Section 396 governs the transfer of superior court cases. The court noted that the first, second, and fifth paragraphs of section 396 are especially relevant in determining whether the transfer of a case from a superior court is proper. *Walker*, 53 Cal. 3d at 264, 807 P.2d at 422, 279 Cal. Rptr. at 580. The first paragraph of section 396 directs that "[i]f an action or proceeding is commenced in a court which lacks jurisdiction of the subject matter thereof, as determined by the complaint or petition, . . . the action . . . shall . . . be transferred to a court having jurisdiction." CAL. CIV. PROC. CODE § 396 (West 1982 & Supp. 1991). The second paragraph of section 396 states that

> [i]f an action . . . is commenced in . . . a court which has jurisdiction of the subject matter thereof as determined by the complaint or petition, and it thereafter appears from the verified pleadings, or at the trial, or hearing, that the determination of the action . . . *will necessarily involve the determination of questions not within the jurisdiction of the court*, in which the action or proceeding is pending, *the court*, whenever such lack of jurisdiction appears, *must suspend all further proceedings therein and transfer the action* . . . to a court having jurisdiction thereof.

Id. (emphasis added). The fifth paragraph of section 396 concludes that superior courts are not required to transfer cases "because the judgment to be rendered, as deter-

good faith pleadings pray for a proper jurisdictional value. The court held that section 396 grants the superior courts discretion to reconsider the jurisdictional amount question and requires the courts to transfer those cases which will "necessarily" result in a verdict below the jurisdictional amount, even where good faith pleadings initially satisfied the jurisdictional amount requirement.[5]

In *Walker*, the petitioners argued that superior court orders transferring their consolidated personal injury cases to municipal court for failure to exceed the superior court's $25,000 jurisdictional constraint[6] should be set aside because the petitioners' prayers had requested relief in the proper jurisdictional amounts.[7] The petitioners relied on a line of decisions holding that if a plaintiff prays for a proper amount in the complaint, and the prayer is neither fraudulent

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mined at the trial or hearing, is one which might have been rendered by a municipal or justice court." *Id.*

5. *Walker*, 53 Cal. 3d at 267-68, 807 P.2d at 424-25, 279 Cal. Rptr. at 582-83. The court focused on the word "necessarily" in section 396 as the statutory standard for determining whether a plaintiff will be able to obtain a verdict within the jurisdictional range. *Id.* at 268-69, 807 P.2d at 425, 279 Cal. Rptr. at 583. *See supra* note 4.

6. Section 86(a)(1) of the California Code of Civil Procedure directs that jurisdiction is conferred to municipal courts "[i]n all cases at law in which the demand . . . amounts to twenty-five thousand dollars ($25,000) or less." CAL. CIV. PROC. CODE § 86(a)(1) (West 1982 & Supp. 1991). Read in conjunction with section 396, *see supra* note 4, this section directs that superior court actions failing to exceed the $25,000 amount-in-controversy requirement should be transferred to municipal court.

7. *Walker*, 53 Cal. 3d at 262-63, 807 P.2d at 420-21, 279 Cal. Rptr. at 578-79. The appellate court in *Walker* consolidated the actions of two plaintiffs injured in automobile accidents, both of whom petitioned the appellate court for writs of mandate directing the superior courts to set aside transfer orders requiring their cases to be removed to municipal court. *See* Walker v. Superior Court, 227 Cal. App. 3d 1154, 1156, 266 Cal. Rptr. 569, 569 (1990). The supreme court reviewed the facts and settlement negotiations in both matters. The first petitioner, Walker, was struck by a car while riding a motorcycle. *Walker*, 53 Cal. 3d at 262, 807 P.2d at 420, 279 Cal. Rptr. at 578. Walker sued the driver's employer, claiming total damages of over $1 million. *Id.* at 262, 807 P.2d at 421, 279 Cal. Rptr. at 579. Subsequently, the court referred the matter to arbitration where Walker revised his claim for general damages to $250,000 and was eventually awarded a $15,000 settlement. *Id.* After both parties requested a trial de novo, the superior court judge ordered a "voluntary" settlement conference, at which a $25,000 settlement was recommended. *Id.* at 263, 807 P.2d at 421, 279 Cal. Rptr. at 579. Finally, at a later status conference, the judge expressed skepticism that the value of the claim exceeded the $25,000 superior court jurisdictional requirement, and without holding a hearing or allowing the parties to argue the issue, transferred the matter to municipal court. *Walker*, 53 Cal. 3d at 263, 807 P.2d at 421, 279 Cal. Rptr. at 579. Similarly, the second petitioner, who was struck by a car while crossing a street, claimed damages in excess of $25,000. *Id.* The second petitioner received a $25,000 arbitration award, but upon request for trial de novo, the superior court judge ordered the case transferred to municipal court for failure to meet the jurisdictional amount-in-controversy requirement, without setting a separate hearing to argue the issue. *Id.*

nor fictitious on its face, section 396 precludes transfer.[8] The supreme court agreed to set aside the transfer orders,[9] but disagreed with the petitioners' assertion that section 396 precludes transfer whenever good faith pleadings pray for a proper jurisdictional amount.[10] Instead, the court found that the superior court had abused its discretion[11] by ordering transfer, because the underlying facts did not support the conclusion that the ultimate relief granted would "necessarily" be less than the jurisdictional amount.[12]

II. TREATMENT OF THE CASE

The California Supreme Court rejected as too narrow the view that pleadings are the sole determinant of jurisdictional value.[13] However, the court dismissed as too broad the idea that superior courts have latitude to transfer cases any time a proper damage award appears

8. *Id.* at 261, 807 P.2d at 420, 279 Cal. Rptr. at 578. *See, e.g.*, Davis v. Superior Court, 25 Cal. App. 3d 596, 600, 102 Cal. Rptr. 238, 240 (1972) (quoting Rodley v. Curry, 120 Cal. 541, 543, 52 P. 999, 1000 (1898) (" '[i]t is so well settled that the amount for which judgment is demanded in the complaint determines the jurisdiction that no authorities need be cited' ")); Depretto v. Superior Court, 116 Cal. App. 3d 36, 39, 171 Cal. Rptr. 810, 812 (1981). The *Walker* court labeled the rule delineated in *Davis* as the "traditional" rule. *Walker*, 53 Cal. 3d at 266, 807 P.2d at 423, 279 Cal. Rptr. at 581. *See also* 2 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 19 (3d ed. 1985 & Supp. 1990) (prayer for relief in complaint is determinative of jurisdiction where not fictitious or fraudulent); 20 AM. JUR. 2D *Courts* § 154 (1965 & Supp. 1991); 76 C.J.S *Removal of Causes* § 29 (1952 & Supp. 1991).

9. *Walker*, 53 Cal. 3d at 273-74, 807 P.2d at 428, 279 Cal. Rptr. at 586.

10. *Id.* at 270, 807 P.2d at 426, 279 Cal. Rptr. at 584 (stating that section 396 permits transfer during the course of litigation). *See also* 16 CAL. JUR. 3D *Courts* § 92 (1983 & Supp. 1991) (noting that *Campbell, Williams (RD Instruments)*, and *Williams (Gemco)* permit the trial court to evaluate the facts of a case in determining jurisdictional amount); 20 AM. JUR. 2D *Courts* § 154 (1965 & Supp. 1991) (stating the traditional rule that the complaint is determinative of amount-in-controversy jurisdiction, but also acknowledging recent California interpretations of section 396).

11. The abuse of discretion standard of review hinges upon whether the trial court's decision exceeded the bounds of reason in an area where but one inference may be drawn from the relevant facts. Shamblin v. Brattain, 44 Cal. 3d 474, 478-79, 749 P.2d 339, 342, 243 Cal. Rptr. 902, 905 (1988). *See generally* 5 CAL. JUR. 3D *Appellate Review* § 522 (1973 & Supp. 1991) (discussing the abuse of discretion doctrine).

12. *Walker*, 53 Cal. 3d at 273, 807 P.2d at 428, 279 Cal. Rptr. at 586. The court noted that the facts and negotiations in the two underlying personal injury suits, *see supra* note 7, gave the superior court no reasonable grounds for determining in its discretion that the ultimate damages would necessarily fail to meet jurisdictional requirements. Instead the court emphasized that "[i]n *Walker*, court-ordered settlement negotiations resulted in a $25,000 settlement recommendation, and in *White*, court-ordered arbitration resulted in a $25,000 award—both figures but one cent below the minimum jurisdictional amount for the superior court." *Id.* at 273, 807 P.2d at 428, 279 Cal. Rptr. at 586. *See* 16 CAL. JUR. 3D *Courts* § 124 (1983 & Supp. 1991) (stating that "[w]here a court has jurisdiction over an action, it has no authority to transfer the case to a lesser court"). *Cf.* E.H. Schopler, Annotation, *Jurisdictional Amount for Appellate Review as Affected by Payment or Tender, or by Settlement*, 58 A.L.R. 2D 166 (1958) (discussing effect of settlement negotiations on amount-in-controversy evaluation).

13. *Walker*, 53 Cal. 3d at 262, 807 P.2d at 420, 279 Cal. Rptr. at 578.

"unlikely" or "not reasonably probable."[14] The court explained that the older line of decisions cited in support of a narrow interpretation were largely uninstructive because they either focused solely on the first paragraph of section 396, they predated enactment of the section, or they failed to cite section 396.[15] However, while the court acknowledged that three recent court of appeal decisions that interpreted section 396 more broadly were essentially correct,[16] the supreme court admonished the superior courts to not abuse their discretion.[17] Interpreting the first, second, and fifth paragraphs of section 396, the court ruled that superior courts may transfer a case based on pretrial hearings and other information only if " 'the action . . . will *necessarily* involve the determination of questions not within the jurisdiction of the court.' "[18] Finally, the supreme court enumerated four prerequisites which superior courts should satisfy before transferring a case, cautioning that: (1) parties must be afforded proper notice and an opportunity to resist transfer; (2) information from settlement negotiations must not be divulged; (3) transfer must not be used for the "unfettered" purpose of clearing crowded court calendars; and (4) records must be made of any transfer hearing.[19]

14. The *Walker* court noted that the appellate court in *Williams (RD Instruments)* had not itself adopted the broad standards used by the trial court in that case. It was the trial court that stated it was "not reasonably probable" or it was "unlikely" that the claim at issue would result in a proper jurisdictional award. *Walker*, 53 Cal. 3d at 262, 269, 807 P.2d at 420, 425, 279 Cal. Rptr. at 578, 583 (citing *Williams (RD Instruments)*, 216 Cal. App. 3d at 385, 386, 264 Cal. Rptr. at 680, 681). The *Williams (RD Instruments)* appellate court had relied on a higher standard which comported with the section 396 standard: whether the requisite award "could be proven" or "could not be obtained." *Id.* Thus, the *Williams (RD Instruments)* court did not embrace the incorrectly broad standards, as the respondent tried to convince the supreme court. *Id.*

15. *Id.* at 265-66, 807 P.2d at 422-23, 279 Cal. Rptr. 580-81. *See, e.g.*, Davis v. Superior Court, 25 Cal. App. 3d 596, 599, 102 Cal. Rptr. 238, 240 (focusing solely on the first paragraph of section 396); Becker v. Superior Court, 151 Cal. 313, 90 P. 689 (1907) (predating section 396); Depretto v. Superior Court, 116 Cal. App. 3d 36, 39, 171 Cal. Rptr. 810, 812 (1981) (failing to cite section 396); Montalvo v. Zamora, 7 Cal. App. 3d 69, 76-77, 86 Cal. Rptr. 401, 405 (1970) (not involving, nor citing section 396).

16. *Walker*, 53 Cal. App. 3d at 268-69, 807 P.2d at 425, 279 Cal. Rptr. at 583 (holding that properly construed, the articulations of *Campbell*, *Williams (RD Instruments)*, and *Williams (Gemco)* comport with section 396 requirements).

17. *Id.* at 270-71, 807 P.2d at 426, 279 Cal. Rptr. at 584. The court noted that the *Williams (RD Instruments)*, *Campbell*, and *Williams (Gemco)* courts had proceeded with caution in analyzing the propriety of transfer, and indicated that it endorsed the courts' circumspection. *Id.*

18. *Id.* at 269, 807 P.2d at 425, 279 Cal. Rptr. at 583 (emphasis added) (quoting CAL. CIV. PROC. CODE § 396 (West 1982 & Supp. 1991)). *See supra* notes 11 and 12. *See generally* 16 CAL. JUR. 3D *Courts* §§ 124, 125 (1983 & Supp. 1991) (discussing the transfer of causes brought in the wrong court).

19. *Walker*, 53 Cal. 3d at 271-72, 807 P.2d at 426-27, 279 Cal. Rptr. at 584-85.

Justice Broussard concurred in the result, but dissented from the majority's reasoning on the grounds that the majority departed from fifty years of precedent in holding that pleadings made in good faith alone determine amount-in-controversy jurisdiction.[20] He criticized as unprecedented the recent line of cases allowing transfers based upon pretrial hearing information.[21] Furthermore, he questioned whether superior courts should transfer cases in which they have already invested time and resources.[22] Finally, Justice Broussard maintained that a mechanism sufficient to discourage plaintiffs from inflating claims exists in California Code of Civil Procedure section 1033(a)[23] which forces plaintiffs who fail to recover the jurisdictional amount to carry costs.[24]

III. CONCLUSION

Walker clarifies the transfer mechanism so that superior court judges will be more likely to hold pretrial hearings to investigate cases where attaining the jurisdictional amount is not expected. This result raises fears that judges may decide "the value" of a matter

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20. *Id.* at 274-76, 807 P.2d at 428-30, 279 Cal. Rptr. at 586-88 (Broussard, J., concurring and dissenting).

21. *Id.* at 276, 807 P.2d at 430, 279 Cal. Rptr. at 588 (Broussard, J., concurring and dissenting). Justice Broussard came to his conclusion by attacking the *Campbell* decision as misinterpreting section 396 and asserting that it was the only case cited by the majority as precedent. *Id.* (Broussard, J., concurring and dissenting). Justice Broussard also argued that the majority's misreading of section 396 enlarged a court's ability to transfer cases and, thus, infringed upon the legislature's ability to make policy decisions regarding where cases should be heard. *Id.* at 280, 807 P.2d at 433, 279 Cal. Rptr. at 591 (Broussard, J., concurring and dissenting). *Accord* 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 135 (3d ed. 1985 & Supp. 1990) (noting that legislature has broad powers to prescribe the procedure under which courts exercise jurisdiction).

22. *Walker*, 53 Cal. 3d at 278, 807 P.2d at 432, 279 Cal. Rptr. at 590 (Broussard, J., concurring and dissenting). Justice Broussard predicted an additional drain on resources would accompany the majority's rule, warning that "[p]olicing unwarranted transfers will simply add to the appellate courts' burden." *Id.* at 280, 807 P.2d at 433, 279 Cal. Rptr. at 591 (Broussard, J., concurring and dissenting).

23. CAL. CIV. PROC. CODE § 1033(a) (West 1980 & Supp. 1991). Section 1033(a) reads: "In the superior court, costs or any portion of claimed costs shall be as determined by the court in its discretion in accordance with [the applicable procedure] where the prevailing party recovers a judgment that could have been rendered in a court of lesser jurisdiction." *Id.*

24. *Walker*, 53 Cal. 3d at 275, 807 P.2d at 429-30, 279 Cal. Rptr. at 587-88 (Broussard, J., concurring and dissenting). Justice Broussard quoted Greenbaum v. Martinez, 86 Cal. 459, 25 P. 12 (1890), that even though the rule of determining jurisdiction by the face of the pleadings may encourage inflation of claims, the "inevitable consequence of not being able to recover the jurisdictional sum [is that the plaintiff must] carry costs" and this will "be sufficient to prevent such a practice from becoming common." *Walker*, 53 Cal. 3d at 275, 807 P.2d at 429, 279 Cal. Rptr. at 587 (Broussard, J., concurring and dissenting) (quoting *Greenbaum*, 86 Cal. at 459, 25 P. at 13 (1890)). Justice Broussard asserted that the *Greenbaum* rationale maintains its vitality modernly. *Id.* (Broussard, J., concurring and dissenting). *See supra* note 23.

before a litigant has the opportunity to fully argue his case.[25] Realistically, however, courts must have the power to direct cases to the proper forum to promote judicial efficiency.[26]

Furthermore, the *Walker* interpretation of section 396 strictly prescribes the superior court's transfer powers.[27] Indeed, in order to avoid having an appellate court set aside transfer orders, not only must a superior court determine that a verdict will "necessarily" fall short of the jurisdictional amount, but also it must carefully document the transfer hearings, give the parties notice and opportunity to oppose the transfer, and resist the temptation to transfer solely for the purpose of paring down a crowded docket.[28] Under these constraints, it seems unlikely that superior court judges will perceive that the *Walker* decision grants them any significant new license to transfer cases which they previously would have retained.

KURT M. LANGKOW

C. *In malpractice actions, section 364(d) of the California Code of Civil Procedure tolls the one-year statute of limitations for ninety days when notice of intent to sue is served in the last ninety days of the one-year period:* **Woods v. Young.**

I. INTRODUCTION

In *Woods v. Young*,[1] a unanimous California Supreme Court[2] held

25. The majority noted that this fear is legitimate. *Walker*, 53 Cal. 3d at 269-70, 807 P.2d at 425-26, 279 Cal. Rptr. at 583-84. Furthermore, the court noted that the California Constitution grants plaintiffs a right to a jury trial. *Id. See* CAL. CONST. art. I, § 16. However, the court argued that this concern is addressed first by an inherent limitation in the application of section 396, which "does not permit a trial judge to determine the merits of a claim," and second by a judicial safeguard, which places a high standard on a trial court's determination that a matter fails to meet minimum amount-in-controversy requirements. *Walker*, 53 Cal. 3d at 269-70, 807 P.2d at 426, 279 Cal. Rptr. at 584.

26. California's superior courts transfer over 3,000 matters to the municipal courts each year after pretrial hearings. *Walker*, 53 Cal. 3d at 267, 807 P.2d at 424, 279 Cal. Rptr. at 582. Curtailing the superior courts' authority to distribute these cases based upon anything but the face value of their prayers for relief would create significant backlogs and impair the courts' ability to concentrate on the kind of issues meant to fall within the superior courts' jurisdictional domain. *But see supra* note 21 and accompanying text.

27. *See supra* notes 17-19 and accompanying text.

28. *Id.*

1. 53 Cal. 3d 315, 807 P.2d 455, 279 Cal. Rptr. 613 (1991).

2. The majority opinion was written by Justice Kennard with Chief Justice Lucas and Justices Panelli, Arabian, Baxter and Kremer, Presiding Justice of the Court

that when a plaintiff files a notice of intent to sue for malpractice[3] during the last ninety days of the one-year statutory limitation period,[4] section 364(d)[5] of the California Code of Civil Procedure acts to toll the statute for a period of ninety days from the date of the notice.[6]

The court interpreted section 364(d)[7] in this manner to resolve the conflicting approaches that had resulted from appellate court opinions in *Gomez v. Valley View Sanitorium*[8] and *Braham v. Sorenson*.[9] The court's interpretation also attempted to harmonize the language of the statute with the legislative intent behind the enactment of the Medical Injury Compensation Reform Act (MICRA).[10]

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of Appeal, Fourth Appellate District, Division One, sitting by assignment of the Chairperson of the Judicial Council, concurring. Justices Mosk and Baxter wrote separate concurring opinions.

3. CAL. CIV. PROC. CODE § 364(a) (Deering Supp. 1991) states: "No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days prior notice of the intention to commence the action." *Id. See also* 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 165, 501 (3d ed. 1985 & Supp. 1991); 36 CAL. JUR. 3D *Healing Arts & Institutions* § 179 (1977 & Supp. 1991).

4. The statute of limitations for medical malpractice claims is contained in section 340.5, and reads, in pertinent part:

> In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.

CAL. CIV. PROC. CODE § 340.5 (Deering Supp. 1991).

5. This section reads: "If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice." CAL. CIV. PROC. CODE § 364(d) (Deering Supp. 1991).

6. *Woods*, 53 Cal. 3d at 328, 807 P.2d at 462, 279 Cal. Rptr. at 620. In the interest of fairness to plaintiffs with pending actions who had relied on the previous opinions of the courts of appeal, the holding was given prospective effect and applies only to complaints filed more than 90 days after the decision became final. *Id.* at 330, 807 P.2d at 464, 279 Cal. Rptr. at 622.

7. All references to statutory sections in this article are to the California Code of Civil Procedure unless otherwise specified.

8. 87 Cal. App. 3d 507, 151 Cal. Rptr. 97 (1978). The court noted that it had knowledge of at least two other cases which had followed the *Gomez* approach: Estrella v. Brandt, 682 F.2d 814 (9th Cir. 1982) and Paxton v. Chapman General Hosp., Inc., 186 Cal. App. 3d 110, 230 Cal. Rptr. 355 (1986). *Woods*, 53 Cal. 3d at 322, 807 P.2d at 458, 279 Cal. Rptr. at 616.

9. 119 Cal. App. 3d 367, 174 Cal. Rptr. 39 (1981). The following cases were listed by the court as having followed the *Braham* approach: Grimm v. Thayer, 188 Cal. App. 3d 866, 233 Cal. Rptr. 687 (1987); Gilbertson v. Osman, 185 Cal. App. 3d 308, 229 Cal. Rptr. 627 (1986); Hilburger v. Madsen, 177 Cal. App. 3d 45, 222 Cal. Rptr. 713 (1986); Banfield v. Sierra View Local Dist. Hosp., 124 Cal. App. 3d 444, 177 Cal. Rptr. 290 (1981). *Woods*, 53 Cal. 3d at 323, 807 P.2d at 459, 279 Cal. Rptr. at 617.

10. 1975 CAL. STAT. 25.5 (amended by 1975 CAL. STAT. 1.193) (effective Sept. 24, 1975, operative Dec. 12, 1975).

II. TREATMENT

In *Woods*, the plaintiff properly served the defendant with the ninety-day notice of intent to sue for malpractice but filed the action one-year and three weeks after she had discovered her injury.[11] The trial court dismissed the action, citing expiration of the statute of limitations, but the appellate court reversed, finding that previous cases allowed for a tolling of the statute of limitations.[12] The supreme court began its analysis by giving a short history of the statute and by demonstrating the incongruity created by the interplay between sections 364(a), 364(d) and 365.[13] It then analyzed the prior appellate court holdings in *Gomez* and *Braham*.

The *Gomez* court had applied section 356[14] to toll the statute of limitations for ninety days from the service of the intent to sue and, where applicable, the extension afforded by section 364(d).[15] The majority disapproved of this construction saying it ignored the statute's plain language.[16] To further support its position, the court in-

11. *Woods*, 51 Cal. 3d at 329, 807 P.2d at 463, 279 Cal. Rptr. at 621.

12. *Id.*

13. *Id.* at 320-21, 807 P.2d at 457-58, 279 Cal. Rptr. at 615-16. Section 365 reads:

> Failure to comply with this chapter shall not invalidate any proceedings of any court of this state, nor shall it affect the jurisdiction of the court to render a judgment therein. However, failure to comply with such provisions by any attorney at law shall be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such cases brought to its attention.

CAL. CIV. PROC. CODE § 365 (Deering Supp. 1991). *See also*, 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 786 (9th ed. 1988 & Supp. 1991).

The court noted that because section 365 placed the attorney in jeopardy of discipline for failure to comply with the 90-day notice requirement of section 364(a), these two sections acted to effectively shorten the statute of limitations to nine months. In order to restore the full one-year statutory period, the legislature enacted section 364(d). However, the court posited the following hypothethical to demonstrate how section 364(d) failed to remedy the situation: The plaintiff files the notice of intent to sue 50 days before the expiration of the statutory period. After extending the statutory period by 90 days, the plaintiff now has one year and 40 days to file. However, the plaintiff is statutorily precluded from filing his action during the 90-day "waiting" period. Thus, when this period is over, one year and 41 days have elapsed and the plaintiff is now time-barred from bringing his action. *Id.*

14. This section reads: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." CAL. CIV. PROC. CODE § 356 (Deering Supp. 1991).

15. *Gomez v. Valley View Sanitorium*, 87 Cal. App. 3d 507, 510, 151 Cal. Rptr. 97, 98 (1978). The majority noted that the *Gomez* opinion gave consecutive treatment to the plaintiff to lengthen the statute of limitations for a period of 90 to 180 days, depending on when the section 364(a) notice of intent to sue was served. *Woods*, 53 Cal. 3d at 322, 807 P.2d at 458, 279 Cal. Rptr. at 616.

16. *Woods*, 53 Cal. 3d at 323-24, 807 P.2d at 459, 279 Cal. Rptr. at 617. The court

voked the rule of statutory construction which states that "a later, more specific statute controls over an earlier, general statute."[17]

The appellate court in *Braham* also tolled the statute of limitations using section 356, but concluded that the tolling period and the section 364(d) extension would both be triggered by service of the notice of intent to sue, and would therefore run concurrently.[18] Although the majority found this approach more faithful to the language of section 364(d), it rejected this interpretation stating "it violate[d] the rule that every provision of a statute is assumed to have meaning and to perform a useful function."[19]

The court then turned to the task of giving the statute an interpretation which would accomplish the legislative intent behind MICRA.[20] The court noted that the intent in imposing the section 364(a) ninety-day waiting period was to encourage settlement negotiations between the parties,[21] and that such settlements would promote the greater goal of MICRA to "reduce the cost and increase the efficiency of medical malpractice litigation."[22]

The court found that the legislative purpose of MICRA would "be best effectuated by construing section 364(d) as tolling the one-year statute of limitations when section 364(a)'s ninety-day notice of intent to sue is served during, but not before, the last ninety days of

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found the requirement in section 364(d), that the 90-day extension must be measured "from the service of the notice," could not be reconciled with the *Gomez* court's finding that the extension would run only after the section 356 tolling period had ended. *Id.*

17. *Id.* at 324-25, 807 P.2d at 460, 279 Cal. Rptr. at 618. The court noted that sections 364 and 365 "were enacted in 1975 as part of MICRA, 'an interrelated legislative scheme enacted to deal specifically with all medical malpractice claims' " (citing Young v. Haimes, 41 Cal. 3d 883, 718 P.2d 909, 226 Cal. Rptr. 547 (1986)), while section 356 was a general tolling provision enacted in 1872. *Id.*

18. Braham v. Sorenson, 119 Cal. App. 3d 367, 372, 174 Cal. Rptr. 39, 42 (1981).

19. *Woods*, 53 Cal. 3d at 324, 807 P.2d at 459, 279 Cal. Rptr. at 617 (citing White v. County of Sacramento, 31 Cal. 3d 676, 681, 646 P.2d 191, 195, 183 Cal. Rptr. 520, 524 (1982); J.R. Norton Co. v. Agricultural Labor Relations Bd., 26 Cal. 3d 1, 36, 603 P.2d 1306, 1327, 160 Cal. Rptr. 710, 731 (1979)). The court held that because the section 356 tolling period ran concurrently with the section 364(d) extension, the extension was "wholly subsumed within, and thus redundant of, the 90-day tolling attributable to sections 364(a) and 356," thus depriving section 364(d) of any independent function or significance. *Id.*

20. *Id.* at 323, 807 P.2d at 459, 279 Cal. Rptr. at 617. The court found that " '[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.' " *Id.* (citing California Mfrs. Ass'n v. Fair Employment & Hous. Comm'n, 24 Cal. 3d 836, 844, 598 P.2d 836, 840, 157 Cal. Rptr. 676, 680 (1979)).

21. *See* Grimm v. Thayer, 188 Cal. App. 3d at 871, 233 Cal. Rptr. at 689. For a more extensive treatment of the intent behind MICRA, see Jenkins & Scheinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829 (1979).

22. *See* American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 363-64, 683 P.2d 670, 672, 204 Cal. Rptr. 671, 673 (1984).

the one-year statute of limitations period."[23] The majority also proclaimed that this construction harmonized the sections at issue.[24]

The unanimous majority concluded by stating that although their interpretation of section 364(d) appeared to reward the dilatory plaintiff,[25] there was no equal protection violation because it is the plaintiff who controls when notice of intent to sue is served and the legislature had a rational basis for preserving the ninety-day waiting period without forfeiting the cause of action.[26]

III. CONCLUSION

The majority claimed that it harmonized the sections in question and gave each of them meaning and substance. However, as Justice Mosk pointed out in his concurrence, the majority ignored the actual language of section 364(d) by holding that it tolled the statute of limitation rather than extending it from the date of notice.[27] The effect of the holding is that the court completely rewrote the statute. Justice Mosk recognized this, but could determine no other way to harmonize the conflicting statutes.[28] Although superlegislation by the courts is widely decried by both liberals and conservatives alike, diffi-

23. *Woods*, 53 Cal. 3d at 325, 807 P.2d at 460, 279 Cal. Rptr. at 618. The court found that the 90-day tolling period would serve the purpose of promoting settlement, while at the same time resolving the dilemma sections 364(a) and 365 posed to attorneys who file cases in the last 90 days of the statutory period. *Id.*

24. *Id.* The court claimed that the legislative mandate of section 364(a) was preserved because the plaintiff was still required to wait 90 days before filing suit, thus encouraging settlement. It also maintained that the purpose of section 364(d) was given effect by allowing time for filing suit after the tolling period had expired if the plaintiff had served notice of intent to sue during the last 90 days of the limitations period. Finally, the court found that its approach harmonized the intent of section 365 to avoid forfeiting plaintiff's claim if the attorney had not complied with section 364(a). *Id.*

25. *Id.* at 326, 807 P.2d at 461, 279 Cal. Rptr. at 619. The majority explained that if this apparent inequity exists, it is because the legislature inserted it and therefore intended it. *Id.* *See* Mutual Life Ins. Co. v. City of Los Angeles, 50 Cal. 3d 402, 412, 787 P.2d 996, 1002, 267 Cal. Rptr. 589, 595 (1990).

26. *Woods*, 53 Cal. 3d at 327-28, 807 P.2d at 462, 279 Cal. Rptr. at 620. The court found that the rational basis was satisfied because its interpretation of these sections preserved the intent of MICRA to ensure that settlement negotiations would occur, thereby potentially decreasing the number of malpractice actions filed.

27. *Id.* at 332, 807 P.2d at 465, 279 Cal. Rptr. at 623 (Mosk, J., concurring).

28. *Id.* at 333, 807 P.2d at 465, 279 Cal. Rptr. at 623 (Mosk, J., concurring). Justice Mosk stated that even though he found the majority's approach "obviously unsatisfactory," he "reluctantly conclude[d] that in this instance it may be the best way to resolve the anomalies caused by the contradictory and ineffectual statutory scheme." *Id.* (Mosk, J., concurring).

cult cases such as this clearly exhibit the difficult tasks the courts must undertake when faced with poorly written laws.

BRUCE C. YOUNG

III. CONSTITUTIONAL LAW

A. *The Legislature correctly defined "costs" as not including expenditures paid from sources other than tax revenues when it implemented article XIIIB, section 6 of the California Constitution which requires the state to reimburse local governments for the costs of new state programs:* County of Fresno v. State.

In *County of Fresno v. State*,[1] the California Supreme Court addressed whether California Government Code section 17556(d) is enforceable under article XIIIB, section 6 of the California Constitution.[2] Article XIIIB, section 6 requires that the state pay local governments for the costs of new or increased programs enacted by state government.[3] Section 17556(d) states there are no state imposed costs if the local government pays for the program through user fees.[4] The issue raised was whether the legislature had the

1. 53 Cal. 3d 482, 808 P.2d 235, 280 Cal. Rptr. 92 (1991). Justice Mosk wrote the opinion for the court which consisted of Chief Justice Lucas and Justices Broussard, Panelli, Kennard, and Best. Justice Best, Presiding Justice of the Court of Appeal, Fifth Appellate District, was assigned by the Chairperson of the Judicial Council. Justice Arabian concurred in a separate opinion.

2. Health and Safety Code section 25513 authorizes local governments to collect user fees for hazardous materials expenses arising from Code section 25502. CAL. HEALTH & SAFETY CODE § 25513 (West Supp. 1991). Rather than impose the fees, the County of Fresno sought state reimbursement. The Commission on State Mandates rejected the county's claim and the trial court denied the county's petition for mandate. The court of appeal affirmed, *County of Fresno v. State*, 229 Cal. App. 3d 875, 268 Cal. Rptr. 266 (1990) and the supreme court granted review, 53 Cal. 3d 482, 808 P.2d 235, 280 Cal. Rptr. 92 (1991).

3. Article XIIIB, Section 6, of the California Constitution provides:

> SEC. 6. Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:
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> (a) Legislative mandates requested by the local agency affected;
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> (b) Legislation defining a new crime or changing an existing definition of a crime; or
>
> (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

CAL. CONST. art. XIIIB, § 6. *See* 53 Cal. 3d at 484, 808 P.2d at 236, 280 Cal. Rptr. at 93.

4. Section 17556 of the California Government Code provides:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in a claim submitted by a local agency or school district, if, after a hearing, the commission finds that . . .
>
> (d) The local agency or school district has the authority to levy service

power to define the terms of a constitutional amendment enacted by initiative.[5] The court held that section 17556(d) is constitutional on its face and does not usurp article XIIIB, section 6.[6]

The court easily resolved the constitutionality question once it framed the issue. The court noted that articles XIIIA[7] and XIIIB of the constitution must be interpreted together,[8] as both restrict the state's taxing power.[9] User fees do not qualify as tax revenues unless they exceed the government program's costs.[10] A local government's costs do not include amounts raised from non-tax sources.[11] The court interpreted the amendment's intent by examining the ballot pamphlet.[12]

The court held that the actions of the legislature and the courts in interpreting "costs" were reasonable in light of the clear language of article XIIIB, section 8, subdivision (c).[13] The court refused to rule on other possible challenges to section 17556.[14] The state might pos-

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charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

CAL. GOV'T CODE § 17756 (West Supp. 1991). *See* 53 Cal. 3d at 484, 808 P.2d at 235, 280 Cal. Rptr. at 93.

5. Article XIIIB was added to the California Constitution on November 6, 1979 as an amendment by initiative in Proposition 4. *County of Fresno*, 53 Cal. 3d at 486, 808 P.2d at 237, 280 Cal. Rptr. at 94.

6. *Id.* at 484, 808 P.2d at 236, 280 Cal. Rptr. at 93.

7. CAL. CONST. art. XIIIA.

8. *County of Fresno*, 53 Cal. 3d at 486, 808 P.2d at 237, 280 Cal. Rptr. at 94 (citing City of Sacramento v. State, 50 Cal. 3d 51, 59 n.1, 785 P.2d 522, 525 n.1, 266 Cal. Rptr. 139, 142 n.1 (1990)).

9. *Id.*

10. *Id.* at 486-87, 808 P.2d at 237-38, 280 Cal. Rptr. at 94-95 (quoting CAL. CONST. art. XIIIB, § 8(c)).

11. *Id.* at 487, 808 P.2d at 238, 280 Cal. Rptr. at 95. Justice Arabian's concurring opinion places the majority on firmer ground stating that the state constitution limits the state's lawmaking power. *Id.* at 490-91, 808 P.2d at 240, 280 Cal. Rptr. at 97 (Arabian, J., concurring). The constitution and legislation should be interpreted to coincide rather than conflict. *Id.* at 490, 808 P.2d at 240, 280 Cal. Rptr. at 97 (Arabian, J., concurring) (citing Rose v. State, 19 Cal. 2d 713, 723, 123 P.2d 505, 512 (1942)).

12. *Id.* at 488, 808 P.2d at 239, 280 Cal. Rptr. at 96. The court was not swayed by the County's assertion of the drafter's intent. The court determined "what is crucial here is the intent of those who voted for the measure." *Id.* (citing County of Los Angeles v. State, 43 Cal. 3d 46, 56, 729 P.2d 202, 207, 233 Cal. Rptr. 38, 43 (1987)). "Ballot arguments may be considered where a constitutional amendment is subject to varying interpretations." County of Fresno v. State, 228 Cal. App. 3d 875, 883 n.1, 268 Cal. Rptr. 266, 271 n.1 (1990) (citing California Hous. Fin. Agency v. Patitucci, 22 Cal. 3d 171, 177, 583 P.2d 729, 733, 148 Cal. Rptr. 875, 879 (1978)).

13. CAL. CONST. art. XIIIB, § 8(c).

14. The court declined to rule on whether section 17556 was being implemented within the bounds of the constitution or whether the user fees were insufficient to pay for the program. *Id.* at 489, 808 P.2d at 239, 280 Cal. Rptr. at 96.

sibly expand the use of this user fee "disclaimer"[15] should its financial picture worsen.

BRANDON D. MIZNER

B. *A landlord's policy requiring a minimum income level to qualify for rental housing is not economic discrimination under the Unruh Act because the requirement is applied uniformly to all persons without distinctions as to the Act's classifications and because the Act is not subject to a disparate impact analysis:* Harris v. Capital Growth Investors XIV.

I. INTRODUCTION

In *Harris v. Capital Growth Investors XIV*,[1] a prospective tenant challenged a landlord's policy requiring tenants to have a minimum income level of three times the rent by asserting that the policy violated the Unruh Civil Rights Act ("the Act")[2] and had a disparate

15. San Francisco Chron., April 23, 1991, at A1.

1. 52 Cal. 3d 1142, 805 P.2d 873, 278 Cal. Rptr. 614 (1991) (en banc). Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Kennard, Arabian and Eagleson concurred. Both Justice Mosk and Justice Broussard filed separate dissenting opinions.

2. The Unruh Act is codified at sections 51 and 52 of the California Civil Code. Section 51 provides in pertinent part:

> This section shall be known, and may be cited, as the Unruh Civil Rights Act.
>
> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.
>
> This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability . . . .

CAL. CIV. CODE § 51 (West 1991). Section 52 provides in pertinent part:

> (a) Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, national origin, or blindness or other physical disability contrary to the provisions of Section 51 or 51.5, is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars ($250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 or 51.5 . . . .

CAL. CIV. CODE § 52 (West 1991).

For a general discussion of the Unruh Civil Rights Act, see 12 CAL. JUR. 3D *Civil Rights* §§ 3-16 (1974). *See also* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 747-49, 754-55 (9th ed. 1988); 13 CAL. JUR. 3D (rev. part 1) *Constitutional Law* § 269 (1989); 58 Op. Att'y Gen. 608 (1975) (Act prohibits arbitrary discrimination in sale or rental of real property).

For law review articles on the Act, see Mohr and Weber, *The Unruh Civil Rights Act: Just How Far Does It Reach?* 11 BEV. HILLS B.A.J. 32 (1977); Steven B. Arbuss,

impact on women.[3] The case presented the California Supreme Court with the opportunity to reexamine prior relevant case law and legislative history relating to the Unruh Act in determining its scope and limitations.

In *Harris*, the plaintiffs brought their representative action against the defendant real estate partnership, management company, and individual managers. The trial court sustained the defendants' general demurrers and dismissed the plaintiffs' complaint.[4] The court of appeal reversed the trial court's dismissal of the economic discrimination claim and affirmed the trial court's dismissal of the disparate impact claim.[5] Displeased with the outcome of the appellate court ruling, the petitioners appealed to the California Supreme Court. The court reversed the appellate decision with respect to the economic discrimination claim and affirmed the dismissal of the disparate impact claim, stating that the landlord's minimum income policy did not violate the Act's statutory classifications and that intentional discrimination under the Act had not been demonstrated.[6]

II. TREATMENT OF THE CASE

The court began its analysis by reexamining the development of the legislative history and case law surrounding of the Act.[7] The

Comment, *The Unruh Civil Rights Act — An Uncertain Guarantee*, 31 UCLA L. REV. 443 (1983).

The Act has been expanded to include "all business establishments of every kind." *See* Marina Point Ltd. v. Wolfson, 30 Cal. 3d 721, 731, 640 P.2d 115, 120, 180 Cal. Rptr. 496, 502 (1982) (en banc) and Isbister v. Boys' Club, 40 Cal. 3d 72, 78, 707 P.2d 212, 215, 219 Cal. Rptr. 150, 153 (1985) ("the phrase 'business establishments' [should] be interpreted 'in the broadest sense reasonably possible' ").

3. Plaintiffs Tamela Harris and Muriel Jordan had applied for rental housing from defendants. The defendants refused to provide apartments to the plaintiffs based upon defendants' minimum monthly income policy.

The policy stated that rental applicants must have a minimum monthly income of at least three times the monthly rent to qualify for housing. Although they could afford to pay the monthly rent charged, plaintiffs were refused housing because their monthly incomes did not satisfy the minimum income criteria. Plaintiffs challenged the minimum income policy as being "both arbitrary economic discrimination and sex discrimination based on its alleged adverse statistical impact on women." *Harris*, 52 Cal. 3d at 1149, 805 P.2d at 875, 278 Cal. Rptr. at 616.

4. *Id.* Other remaining claims were disposed of through stipulations by both sides. *Id.*

5. 224 Cal. App. 3d 367, 259 Cal. Rptr. 586 (1989).

6. *Harris*, 52 Cal. 3d at 1175, 805 P.2d at 893, 278 Cal. Rptr. at 634.

7. *Id.* at 1150, 805 P.2d at 875, 278 Cal. Rptr. at 616. The court traced the development and scope of the Unruh Act, noting that through legislative revision, the Act has gradually expanded to encompass many categories of discrimination by business establishments. *See supra* note 2.

court specifically noted that its broad holdings in the *In re Cox*[8] line of cases implied that the Act prohibited not only the stated classifications of discrimination found within the Act but also "arbitrary discrimination."[9]

A. Economic Discrimination

The court found support for the defendants' argument that the Act's wording was not so broad as to encompass all arbitrary discrimination due to the Act's specific designation of discriminatory classes.[10] However, the court disagreed with the defendants' contentions that *In re Cox* and its progeny should be overruled, citing to specific instances where the Act had been interpreted to encompass classifications not listed within the Act.[11] In addition, the court noted that the legislature had revised the Act several times since *In re Cox*, this, the court argued, implied without disturbing the holdings of the *In re Cox* line of cases that the Legislature had acquiesced to the holdings of these cases.[12]

However, the court also rejected plaintiffs' argument that legisla-

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8. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970). In *In re Cox*, the court held that the Unruh Act encompassed a category of discrimination not specifically defined within the Act. *Id.* at 216, 474 P.2d at 999, 90 Cal. Rptr. at 31.

A business patron was asked to leave a shopping center's grounds because he associated with an individual "who wore long hair and dressed in an unconventional manner." *Id.* at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26. When the patron refused to leave, he was arrested under a trespass ordinance. The court held that the Unruh Act prohibited "arbitrary discrimination by a business enterprise." *Id.* at 212, 474 P.2d at 995, 90 Cal. Rptr. at 27. However, the court stated that "reasonable regulations that are rationally related to the services performed and facilities provided" would be permitted by businesses. *Id.*

9. *Harris*, 52 Cal. 3d at 1158, 805 P.2d at 881, 278 Cal. Rptr. at 622. The *In re Cox* line of cases basically rejected the view that the Unruh Act was limited to categories of discrimination contained in the Act. *Id.* at 1155, 805 P.2d at 879, 278 Cal. Rptr. at 620.

10. *Id.* at 1154-55, 805 P.2d at 879-80, 278 Cal. Rptr. at 619-20.

11. *Id.* at 1155, 805 P.2d at 879, 278 Cal. Rptr. at 620. The court undertook a reexamination of its prior cases and concluded that the specific designation of discriminatory classes in the Unruh Act did not bar the recognition of other categories of discrimination not mentioned within the Act. *Id. See In re Cox*, 3 Cal. 3d at 217-18, 474 P.2d at 1000, 90 Cal. Rptr. at 32 (Act encompasses physical appearance); Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982) (Act encompasses age discrimination against children, however a discrimination exemption exists for retirement communities with older citizens); Rolon v. Kulwitzky, 153 Cal. App. 3d 289, 292, 200 Cal. Rptr. 217, 218-19 (1984) (Act applies to homosexuals).

12. *Harris*, 52 Cal. 3d at 1155-56, 805 P.2d at 879, 278 Cal. Rptr. at 620. The court stated that the legislature is presumed to be aware of the existence of prior case law and noted that the legislature had not attempted to overrule the court's prior cases. *Id. See* Viking Pools, Inc. v. Maloney, 48 Cal. 3d 602, 609, 770 P.2d 732, 736, 257 Cal. Rptr. 320, 324 (1989) (presumption that legislature is cognizant of prior appellate case law). The court also cited to Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 734, 640 P.2d 115, 123, 180 Cal. Rptr. 496, 504 (1982), in quoting:

> [W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial

tive silence was determinative of legislative intent.[13] The court identified two factors that discounted a finding of legislative acquiescence: 1) the factual specificity of its prior holdings in *In re Cox* and its progeny,[14] and 2) the Legislature's continued emphasis on the Act's discriminatory classifications.[15]

To bolster its interpretation, the court undertook an analysis of the Act's language, using the legal maxim *ejusdem generis* as a guide to interpretation.[16] The court reasoned that the Act's emphasis on personal characteristics and the absence of language referring to economic discrimination denoted a legislative intent to limit the Act's application.[17] Further, the court cited to *In re Cox* and its progeny, again pointing to the absence of financial discriminatory characteristics and the presence of personal discriminatory characteristics.[18]

Next, the court reasoned that the minimum income policy satisfied a legitimate business interest of the defendants and was not " 'arbitrary' in the same way that race and sex discrimination are arbitrary," but rather, was evidence of an intent to satisfy a landlord's interest in remaining solvent.[19] The court ended its economic dis-

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> construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment.

Harris, 52 Cal. 3d at 1156, 805 P.2d at 879, 278 Cal. Rptr. at 620. Thus, the court rejected the proposition that the legislature had overturned the prior holdings in the *In re Cox* line of cases.

13. The court reiterated that the legislature's silence is not absolutely conclusive in determining agreement with prior judicial holdings and that "legislative inaction is a weak reed upon which to lean." *Harris*, 52 Cal. 3d at 1156, 805 P.2d at 880, 278 Cal. Rptr. at 621 (quoting Troy Gold Indus., Ltd. v. Occupational Safety and Health Appeals Bd., 187 Cal. App. 3d 379, 391 n.6, 231 Cal. Rptr. 861, 868-69 n.6 (1986)). However, legislative inaction can lead to "an arguable inference of acquiescence or passive approval." *Harris*, 52 Cal. 3d at 1156, 805 P.2d at 880, 278 Cal. Rptr. at 621. (quoting Cianci v. Superior Court, 40 Cal. 3d 903, 923, 710 P.2d 375, 386, 221 Cal. Rptr. 575, 586 (1985)).

14. *Harris*, 52 Cal. 3d at 1156, 805 P.2d at 880, 278 Cal. Rptr. at 621.

15. *Id.* The court noted that the legislature in subsequent legislation, had placed "continued emphasis on the specified categories of discrimination in the Act." *Id.* at 1159, 805 P.2d at 882, 278 Cal. Rptr. at 623.

16. [W]here general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. [It] is based on the obvious reason that if the [writer] had intended the general words to be used in their unrestricted sense, [he or she] would not have mentioned the particular things or classes of things which would in that event become mere surplusage.

Id. at 1160, 805 P.2d at 882, 278 Cal. Rptr. at 623 (quoting Scally v. Pacific Gas & Elec. Co., 23 Cal. App. 3d 806, 819, 100 Cal. Rptr. 501, 509 (1972).

17. *Harris*, 52 Cal. 3d at 1160, 805 P.2d at 882, 278 Cal. Rptr. at 623.

18. *Id.* at 1161, 805 P.2d at 883, 278 Cal. Rptr. at 624.

19. *Id.* at 1164, 805 P.2d at 886, 278 Cal. Rptr. at 627.

crimination analysis with a discussion of the negative impact that judicial recognition of economic discrimination claims would have upon the judiciary, upon business, and upon the goals of the Act itself.[20] Thus, the court concluded that the defendant landlord's rental income policy did not violate the "language, policy or purpose" of the Unruh Act.[21]

B. Disparate Impact

Turning to the plaintiffs' argument that the disparate impact test should be applied to the Unruh Act, the court explained that this test allows "plaintiff[s] in certain contexts to establish a prima facie case of discrimination by showing that a defendant's policies or practices have an adverse impact on a statutorily protected class of persons such as women, Blacks, Hispanics, etc."[22] The court reviewed the history of the disparate impact test, both at the federal and California state levels.[23] The court summarized that in California, the test had been used in employment discrimination cases, but its use had not been extended to the area of the Unruh Act.[24]

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20. *Id.* at 1166, 805 P.2d at 887, 278 Cal. Rptr. at 628. The court noted three areas in which a recognition of economic discrimination would be felt. First, the court believed that the judiciary would be affected by "a multitude of microeconomic decisions" which would drastically increase costs and promote uncertainty with regard to judicial outcomes. *Id.* In this regard, the court predicted that trials concerning economic discrimination would involve arguments as to which criteria would be the most accurate indicators of economic ability to pay or the "best predictors of default." *Id.*

Second, the court felt that banks, retailers, and numerous other businesses which operate on credit would be in the difficult position of defending each of their credit policies. This would further increase costs and promote uncertainty in the courts. *Id.* at 1167, 805 P.2d at 887, 278 Cal. Rptr. at 628.

Finally, the majority speculated that economic discrimination claims could "have [a] pernicious effect[] on the antidiscrimination policy of the Unruh Act itself" because landlords and business operators would replace their race and sex neutral minimum income policies with subjective policies. *Id.* at 1168, 805 P.2d at 888, 278 Cal. Rptr. at 629. The majority believed that an "objective" minimum income policy was more desirable than gambling upon the possible establishment of inconsistent subjective criteria. *Id.*

21. *Id.* at 1169, 805 P.2d at 889, 278 Cal. Rptr. at 630.

22. *Id.* at 1170, 805 P.2d at 890, 278 Cal. Rptr. at 631.

23. The court began with a discussion of Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e, noting that the United States Supreme Court has adopted the disparate impact test in its analysis of Title VII discrimination cases. *Id.* at 1171, 805 P.2d at 890, 278 Cal. Rptr. at 631. *See generally* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-46 (1989) (the disparate impact test provides that "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate").

The court noted that the Fair Employment and Housing Act (FEHA) has also been analyzed under a disparate impact test. The FEHA is codified at California Government Code § 12900 (West 1980). *See also* Ibarbia v. Regents of Univ. of Cal., 191 Cal. App. 3d 1318, 237 Cal. Rptr. 92 (1987); City and County of San Francisco v. Fair Employment and Hous. Comm'n., 191 Cal. App. 3d 976, 985-86, 236 Cal. Rptr. 716, 721-22 (1987).

24. *Harris*, 52 Cal. 3d at 1172, 805 P.2d at 891, 278 Cal. Rptr. at 632.

The court rejected plaintiffs' arguments, citing to the Act's language prohibiting intentional discrimination[25] and to a lack of "statutory language, history, or relevant authority" supporting plaintiffs' position.[26] The court concluded that a showing of intentional discrimination would be required to support a claim under the Unruh Act and further held that a disparate impact analysis was inappropriate for claims under the Act.[27] However, the court stated that in the future it would allow the future use of disparate impact evidence to support claims of intentional discrimination under the Unruh Act.[28]

C. *Justice Mosk's Dissent*

In his dissent, Justice Mosk concurred with Justice Broussard's dissenting opinion in arguing that economic discrimination should be a cognizable claim under the Unruh Act.[29] He also discussed the inappropriateness of sustaining a demurrer under conditions where it was essential to conduct a factual inquiry into whether the minimum income policy was arbitrary.[30]

D. *Justice Broussard's Dissent*

Justice Broussard, in his dissent, argued that the court of appeal's decision was correct, and that *In re Cox* and its progeny stood for the proposition that the Unruh Act prohibited "*all* arbitrary discrimination" among businesses.[31] He further contended that the majority improperly ignored the principles of *stare decisis* by disregarding the legislature's adoption of prior holdings of the court.[32]

Justice Broussard asserted that the majority's emphasis on the principle of *ejusdem generis* and its "personal characteristics" guide-

25. *Id.*

26. *Id.* at 1173-74, 805 P.2d at 892, 278 Cal. Rptr. at 633. The court also noted that although the California Fair Employment and Housing Commission *has* employed a disparate impact analysis under Unruh Act claims as well as FEHA claims, the commission's decision was based on a Title VII analysis and did "not analyze the language or history of the Unruh Act." *Id.* at 1175, 805 P.2d at 893, 278 Cal. Rptr. at 634. *Cf.* Department of Fair Employment and Hous. v. Merribrook Apartments, FEHC Dec. No. 88-19 (1988) (using a disparate impact analysis, policy of two occupant maximum in two bedroom apartment qualified as age discrimination as prohibited by California Government Code § 12948 which incorporates the Unruh Act).

27. *Harris*, 52 Cal. 3d at 1175, 805 P.2d at 893, 278 Cal. Rptr. at 634.

28. *Id.*

29. *Id.* at 1176, 805 P.2d at 898-99, 278 Cal. Rptr. at 635 (Mosk, J., dissenting).

30. *Id.* at 1176, 805 P.2d at 899, 278 Cal. Rptr. at 635 (Mosk, J., dissenting).

31. *Id.* at 1177, 805 P.2d at 895, 278 Cal. Rptr. at 636 (Broussard, J., dissenting).

32. *Id.* at 1178, 805 P.2d at 895, 278 Cal. Rptr. at 636 (Broussard, J., dissenting).

lines leads directly to uncertainty in the Act's application.[33] He referred to the established *In re Cox* decision in stating, "poverty is [not] any less a personal characteristic than long hair or unconventional dress."[34] He also argued that minimum income policies would open the door to "legitimate[]" forms of discrimination against the poor.[35] Justice Broussard further contended that the majority's holding might lead to abuse by businesses which will "undoubtedly be able to suggest economic reasons for their [discriminatory] policies."[36] Concluding his dissent, Justice Broussard stated that discrimination by businesses has existed and will continue to exist, especially after the majority's dilution of the protections afforded by the Unruh Act.[37]

AUGUSTINE GERARD YEE

IV. CONSTRUCTION LAW

Section 7031 of the California Business & Professions Code prohibits unlicensed contractors and subcontractors from bringing either contract or tort actions to recover the value of work performed: **Hydrotech Systems, Ltd. v. Oasis Waterpark.**

I. INTRODUCTION

In *Hydrotech Systems, Ltd. v. Oasis Waterpark*,[1] the California Supreme Court dealt with two issues regarding section 7031 of the California Business & Professions Code:[2] (1) whether section 7031 permits an unlicensed nonresident contractor or subcontractor to sue upon an "isolated transaction" where "exceptional circumstances" exist;[3] and (2) whether section 7031 bars fraud actions by unlicensed

33. *Id.* at 1180, 805 P.2d at 896, 278 Cal. Rptr. at 638 (Broussard, J., dissenting).
34. *Id.* at 1182, 805 P.2d at 898, 278 Cal. Rptr. at 639 (Broussard, J., dissenting).
35. *Id.*
36. *Id.*
37. *Id.* at 1182-83, 805 P.2d at 898, 278 Cal. Rptr. at 640 (Broussard, J., dissenting).

1. 52 Cal. 3d 988, 803 P.2d 370, 277 Cal. Rptr. 517 (1991). For a discussion of this case, see 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 494A (9th ed. Supp. 1991).

2. The version of section 7031 applicable to this case reads:

> No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract, except that such prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

CAL. BUS. & PROF. CODE § 7031 (Deering 1987). All further statutory references are to the Business and Professions Code, unless otherwise specified.

3. *Hydrotech*, 52 Cal. 3d at 992, 803 P.2d at 372, 277 Cal. Rptr. at 519. Although it

contractors or subcontractors against the person for whom the work was performed.[4] In dealing with the first issue, the court affirmed the court of appeal by unanimously[5] holding that, though harsh results may occur, the deterrent purpose of section 7031[6] precludes recovery for work performed regardless of whether exceptional circumstances exist.[7] On the second issue, a majority[8] of the court reversed the court of appeal by finding that the same deterrent purpose bars a plaintiff from recovery even where fraud is alleged.[9]

II. TREATMENT

The court stated that the purpose of the licensing law in California

> is to protect the public from incompetence and dishonesty in those who provide building and construction services . . . [by] provid[ing] minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business.[10]

The court noted that the section 7031 bar of recovery advanced this purpose[11] even though it sometimes works injustice to the unlicensed

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conceded that it had no California license, Hydrotech argued that it provided its services on a one-time basis only and that the specialized nature of those services, performed only at the insistence of Oasis, should exempt the transaction from the requirements of section 7031. *Id.* at 994-95, 803 P.2d at 373-74, 277 Cal. Rptr. at 520-21. The court of appeal rejected this argument. *Hydrotech Systems, Ltd. v. Oasis Waterpark*, 218 Cal. App. 3d 1507, 1512, 267 Cal. Rptr. 874, 877 (1990).

4. *Hydrotech*, 52 Cal. 3d at 992, 803 P.2d at 372, 277 Cal. Rptr. at 519.

5. Retired Associate Justice Eagleson, sitting under assignment by the Chairperson of the Judicial Council, wrote the opinion joined by Chief Justice Lucas and Justices Mosk and Kennard. Justice Arabian concurred separately. Justice Broussard, joined by Justice Panelli, concurred on this issue only.

6. *See infra* note 10 and accompanying text.

7. *Hydrotech*, 52 Cal. 3d at 997, 803 P.2d at 375, 277 Cal. Rptr. at 522. *See* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 495 (9th ed. 1987 & Supp. 1991); 11 CAL. JUR. 3D *Business & Occupation Licenses* § 60 (1974). Hydrotech sued Oasis for breach of implied contract and for money due and owing to recover more than $110,000 for equipment and materials used in the construction of a wave pool. 52 Cal. 3d at 992, 803 P.2d at 372, 277 Cal. Rptr. at 519.

8. Justice Broussard's dissent, in which he was joined by Justice Panelli, addressed only the fraud issue. *Hydrotech*, 52 Cal. 3d at 1003-08, 803 P.2d at 379-83, 277 Cal. Rptr. at 526-30 (Broussard, J., concurring and dissenting).

9. *Id.* at 1002, 803 P.2d at 379, 277 Cal. Rptr. at 526. Hydrotech's fraud count alleged that Oasis insisted that Hydrotech perform the work, all the while knowing that it never intended to honor the contract and that it could refuse to pay under section 7031. *Id.* at 993-94, 803 P.2d at 372-73, 277 Cal. Rptr. at 519-20.

10. *Id.* at 995, 803 P.2d at 374, 277 Cal. Rptr. at 521 (citing Lewis & Queen v. N. M. Ball Sons, 48 Cal. 2d 141, 149-50, 308 P.2d 713, 718 (1957)). *See* 11 CAL. JUR. 3D *Building & Construction Contracts* § 35 (1974 & Supp. 1991).

11. *Hydrotech*, 52 Cal. 3d at 995, 803 P.2d at 374, 277 Cal. Rptr. at 521. The court noted that because the "obvious statutory intent is to discourage persons who have

contractor.[12]

The court unanimously rejected Hydrotech's argument that its isolated performance of specialized services for Oasis should be exempt from section 7031, finding neither an express nor an implied exception for "isolated" transactions.[13] Furthermore, the court found that the protective purpose of the licensing law is accomplished "by requiring that a contractor's competence and qualifications, *however unique*, be examined and certified by the expert agency charged with the law's enforcement."[14] Finally, the court rejected Hydrotech's claim that the protective purpose of the licensing law applied only to contractors and not to subcontractors who did not hold themselves out to the public, finding that "an unlicensed subcontractor may not recover compensation for his work from either the owner or the general contractor."[15]

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failed to comply with the licensing law from offering or providing their unlicensed services for pay," the protective purpose of the law would be served "by withholding judicial aid from those who seek compensation for unlicensed contract work." *Id.*

12. *Id.* The court found that "[b]ecause of the strength and clarity of this [protective] policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor." *Id.* The court held that "[s]ection 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that . . . such deterrance [sic] can best be realized by denying violators the right to maintain any action for compensation in the courts of this state." *Id.* (quoting *Lewis & Queen*, 48 Cal. 2d at 151, 308 P.2d at 719) (emphasis in original); *see also* Brown v. Solano County Business Dev., Inc., 92 Cal. App. 3d 192, 198, 154 Cal. Rptr. 700, 703 (1979); Rushing v. Powell, 61 Cal. App. 3d 597, 605, 130 Cal. Rptr. 110, 115 (1976).

13. The court first noted that "[t]he numerous *express* exemptions from the licensing law (§ 7040 et seq.) do not include foreign contractors, isolated transactions, or 'unique' building services and capabilities." *Hydrotech*, 52 Cal. 3d at 995, 803 P.2d at 374, 277 Cal. Rptr. at 521 (emphasis added). The court then rejected Hydrotech's argument for an *implied* exception, finding that "there is no implied exception for 'isolated' transactions by foreign contractors." *Id.* at 996, 803 P.2d at 375, 277 Cal. Rptr. at 522 (citing Power City Communications, Inc. v. Calaveras Tel. Co., 280 F. Supp. 808 (E.D. Cal. 1968)).

14. *Id.* at 996, 803 P.2d at 375, 277 Cal. Rptr. at 522 (emphasis added). The court noted that the cases upon which Hydrotech attempted to rely in order to urge a recognition of an exceptional circumstances exemption all dealt with some form of substantial compliance. These cases state that an unlicensed contractor will not be barred from recovery "if his licensure was defective *only in form* and the defendant had received the 'full measure' of protection intended by the Legislature." *Id.* at 995-96, 803 P.2d at 374, 277 Cal. Rptr. at 521 (emphasis in original); *see e.g.*, Asdourian v. Araj, 38 Cal. 3d 276, 282-89, 696 P.2d 95, 99, 211 Cal. Rptr. 703, 707 (1985); Latipac, Inc. v. Superior Court, 64 Cal. 2d 278, 411 P.2d 564, 49 Cal. Rptr. 676 (1966); Gatti v. Highland Park Builders, Inc., 27 Cal. 2d 687, 166 P.2d 265 (1946); *see also* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 500 (9th ed. 1987 & Supp. 1991). However, since Hydrotech had made no attempt to obtain a license, the court found no substantial compliance. *Hydrotech*, 52 Cal. 3d at 996, 803 P.2d at 375, 277 Cal. Rptr. at 521. Further, the court noted that, although not applicable to the contract in dispute, the legislature had amended section 7031 to provide that the substantial compliance rule "shall not apply to this section." *Id.* at 996 n.5, 803 P.2d at 375 n.5, 277 Cal. Rptr. at 522 n.5. *See* CAL. BUS. & PROF. CODE § 7031(d) (Deering Supp. 1991); 1989 Cal. Stat. ch. 368, § 1.

15. *Hydrotech*, 52 Cal. 3d at 997, 803 P.2d at 375, 277 Cal. Rptr. at 522. *See Lewis & Queen*, 48 Cal. 2d at 152-54, 308 P.2d at 720-22; Pickens v. American Mortgage Exch.,

Next, a majority of the justices found that the appellate court erred in holding that section 7031 did not bar Hydrotech's recovery of tort damages from the alleged fraud by Oasis, stating that "[r]egardless of the equities, section 7031 bars *all actions, however they are characterized*, which effectively seek 'compensation' for illegal unlicensed contract work."[16] Although the majority acknowledged the possibility of abuse by general contractors and owners,[17] it reiterated its prior position that the deterrent purpose of section 7031 should "preclude recovery even when the person who solicited the unlicensed work *did* act in bad faith."[18] The majority did, however, limit its decision somewhat by holding that fraud was irrelevant only

269 Cal. App. 2d 299, 302, 74 Cal. Rptr. 788, 791 (1969). Section 7026 states, in pertinent part, that "[t]he term contractor includes subcontractor and specialty contractor." CAL. BUS. & PROF. CODE § 7026 (Deering 1987). *See* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 494 (9th ed. 1987 & Supp. 1991); 11 CAL. JUR. 3D *Building & Construction Contracts* § 22 (1974). For a criticism of this policy, see James A. Brennan, Note, *Contracts: Interpretation of Statute Barring Action of Unlicensed Contractor*, 10 HASTINGS L.J. 89 (1958).

16. *Hydrotech*, 52 Cal. 3d at 997, 803 P.2d at 376, 277 Cal. Rptr. at 523 (emphasis added) (citing *Lewis & Queen*, 48 Cal. 2d at 150-52, 308 P.2d at 721).

17. The majority recognized the concern expressed by the appellate court and justices Broussard and Panelli that contractors might "seek out unlicensed subcontractors, secure in the knowledge that the work obtained would not have to be compensated." *Id.* at 998, 803 P.2d at 376, 277 Cal. Rptr. at 523; *see id.* at 1003, 803 P.2d at 380, 277 Cal. Rptr. at 526 (Broussard, J., concurring and dissenting). However, the majority, noting that section 7118 provides for penalties to general contractors who knowingly engage unlicensed subcontractors, was unpersuaded that this type of abuse would result, stating that "it is unlikely that a rational general contractor would intentionally risk liability for claims that his unlicensed subcontractor had performed substandard work." *Id.* at 998, 803 P.2d at 376, 277 Cal. Rptr. at 523.

18. *Id.* at 999, 803 P.2d at 376-77, 277 Cal. Rptr. at 523-24 (emphasis in original). In arriving at this finding, the majority distinguished three court of appeal decisions cited by Hydrotech: Grant v. Weatherholt, 123 Cal. App. 2d 34, 266 P.2d 185 (1954); Brunzell Constr. Co. v. Barton Dev. Co., 240 Cal. App. 2d 442, 49 Cal. Rptr. 667 (1966); and Pickens v. American Mortgage Exch., 269 Cal. App. 2d 299, 74 Cal. Rptr. 788 (1969). Noting that the legislature had not made specific reference to these cases in any subsequent amendments to section 7031, the majority chose not to disapprove of these cases, holding rather that they were inapposite because the primary fraud alleged in those cases was "external to the arrangement for construction work as such, and was thus unrelated to any protective concern of the licensing law." *Hydrotech*, 52 Cal. 3d at 1001, 803 P.2d at 378-79, 277 Cal. Rptr. at 525-26. In his separate concurrence, Justice Arabian wrote that he would overrule *Grant*, *Brunzell*, and *Pickens* "as patently inconsistent with the statutory language and intent," citing court decisions finding that "something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation." *Id.* at 1002, 803 P.2d at 379, 277 Cal. Rptr. at 526 (Arabian, J., concurring) (citing People v. Daniels, 71 Cal. 2d 1119, 1127-28, 459 P.2d 225, 229-30, 80 Cal. Rptr. 897, 901-02 (1969); *accord* Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 300-01, 758 P.2d 58, 66, 250 Cal. Rptr. 116, 124 (1988); Cianci v. Superior Court, 40 Cal. 3d 903, 923, 710 P.2d 375, 386, 221 Cal. Rptr. 575, 586 (1985)).

in garden-variety disputes over money owed to unlicensed contractors for work they had performed.[19]

In dissent, Justice Broussard argued that a cause of action for fraud should not be barred by section 7031 because of the reenactment rule[20] and also due to policy considerations against unjust enrichment.[21] He disagreed with the majority's distinction that Oasis's alleged fraud was not actionable because the fraud was not external to the construction work performed.[22] Finally, he concluded that the majority's decision was flawed because it served to reward fraudulent parties.[23]

III. IMPACT

Explicit in this decision is the court's determination that the legislature's desire to protect owners from the potentially shoddy work of unlicensed contractors and subcontractors in the state of California is

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19. *Hydrotech*, 52 Cal. 3d at 1002, 803 P.2d at 379, 277 Cal. Rptr. at 526. This limitation is evidenced by the court's reluctance to disapprove *Grant*, *Brunzell* and *Pickens*. *See supra* note 18. As the majority noted, "if the primary fraud alleged is a false promise to pay for unlicensed construction work, and the primary relief sought is compensation for the work, section 7031 bars the action." *Id.* To strengthen this finding, the majority noted the recent amendment to section 7031 is to operate "regardless of the form of action attempted, and 'regardless of the merits of the [unlicensed contractor's] cause of action.'" *Id.* at 1002 n.10, 803 P.2d at 379 n.10, 277 Cal. Rptr. at 526 n.10 (citing CAL. BUS. & PROF. CODE § 7031(a) (Deering Supp. 1991); 1989 Cal. Stats. ch. 368, § 1).

20. The reenactment rule states that "[w]here a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." *Hydrotech*, 52 Cal. 3d at 1004, 803 P.2d at 381, 277 Cal. Rptr. at 528 (Broussard, J., concurring and dissenting) (citing People v. Hallner, 43 Cal. 2d 715, 719, 277 P.2d 393, 396 (1954); People v. Fox, 73 Cal. App. 3d 178, 181, 140 Cal. Rptr. 615, 617 (1977); Wilkoff v. Superior Court, 38 Cal. 3d 345, 353, 696 P.2d 134, 140, 211 Cal. Rptr. 742, 748 (1985)). For an informative look at the reenactment rule, see William N. Eskridge Jr., *Patterson v. McLean: Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988). Thus, because *Grant*, *Brunzell* and *Pickens* specifically allowed a cause of action for fraud by an unlicensed contractor, and the legislature had amended section 7031 subsequent to those decisions without specifically forbidding causes of action for fraud, Justice Broussard concluded that the judicial construction of section 7031 had been approved and was not subject to application to specific facts. *Hydrotech*, 52 Cal. 3d at 1004, 803 P.2d at 381, 277 Cal. Rptr. at 528 (Broussard, J., concurring and dissenting).

21. *Id.* at 1005, 803 P.2d at 381, 277 Cal. Rptr. at 528 (Broussard, J., concurring and dissenting).

22. *Id.* at 1007-08, 803 P.2d at 383, 277 Cal. Rptr. at 530 (Broussard, J., concurring and dissenting).

23. Justice Broussard felt that the distinction made by the majority was untenable, stating that "[a]s between fraudulent wrongdoers who seek to take advantage of their victims on the basis of section 7031 and those who indulge in other fraudulent conduct, the law should be most concerned with those whose fraudulent schemes seek to take advantage of the statute." *Id.* (Broussard, J., concurring and dissenting). Justice Broussard concluded that the majority misapplied its own rule because the basic contractual agreement between Hydrotech and Oasis was for the sale of equipment, not for construction services or supervision, thus making them collateral to the contract. *Id.* (Broussard, J., concurring and dissenting).

more compelling than any equitable misfortunes which may befall those who perform the work. In upholding the protective policy behind this legislation, the court chose to place the rights of the owners above those of the unlicensed contractors and subcontractors.

In reaching this conclusion, the majority assumed that a combination of the contractor's good faith and the fear of potential statutory reprisal for shoddy work performed by unlicensed subcontractors will be sufficient to compensate for the loss of a cause of action for fraud.[24] However, the court's prohibition of fraud actions does cover the unscrupulous contractor with a seemingly impenetrable umbrella of security.[25] Nevertheless, regardless of the underlying equities or social responsibilities the court's decision potentially affects, the message concerning section 7031 is clear: if you do not have a license, do not do the work.

BRUCE C. YOUNG

V. CRIMINAL PROCEDURE

A. *Private parties lack standing to challenge criminal prosecutions; recall and resentencing under California Penal Code section 1170(d) allow consideration of events subsequent to the imposition of the initial sentence; resentencing need not occur within the 120-day limit for recall:* Dix v. Superior Court of Humboldt County.

I. INTRODUCTION

In *Dix v. Superior Court of Humboldt County*[1] the California Supreme Court addressed two areas of criminal procedure: (1) the right of a crime victim to seek a writ of mandate or prohibition and (2) the availability of the post-commitment recall and resentencing process. The court held that neither crime victims nor members of the general public have a beneficial interest, a public interest, or a statutory right to intervene in the commencement, conduct, or con-

24. *Id.* at 998, 803 P.2d at 376, 277 Cal. Rptr. at 523.

25. For example, the contractor, secure in the knowledge that section 7031 will prevent the unlicensed subcontractor from recovering, may fraudulently induce the subcontractor to engage in the work, receive work that will pass building code standards, and then refuse to pay.

1. 53 Cal. 3d 442, 807 P.2d 1063, 279 Cal. Rptr. 834 (1991). Justice Baxter wrote the unanimous opinion of the court. Justice Mosk added a separate concurring opinion.

clusion of criminal prosecutions.[2] Such proceedings are the exclusive domain of the public prosecutor.[3] Thus, prosecutors exercise complete discretion in pursuing criminal justice, subject only to " 'the general rules of law and professional ethics that bind all counsel.' "[4] As a result, no matter how dissatisfied they may be with a judge's or prosecutor's decision, citizens lack standing to petition for mandamus or prohibition.[5]

In order to provide guidance to lower courts, the supreme court also ruled on the merits of the issue pertaining to recall and resentencing.[6] The court held that although resentencing must "eliminate disparity" and "promote conformity," these requirements do not apply to recall.[7] The court also upheld the judge's consideration of events subsequent to the initial sentencing in making his recall decision.[8] Finally, the court ruled that although the recall must take place within 120 days of sentencing, the actual resentencing need not occur within this period.[9]

II. STATEMENT OF THE CASE

The district attorney brought charges against respondent for aggravated assault after he shot petitioner in the head with a pistol for failure to pay off a drug deal.[10] Respondent admitted his intent to cause petitioner great bodily harm and pled guilty to assault with a firearm. The court sentenced respondent to seven years in state prison,[11] but recalled the sentence on its own motion 118 days later.[12]

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2. *See infra* notes 19-42 and accompanying text.

3. Dix v. Superior Court, 53 Cal. 3d at 451, 807 P.2d at 1066, 279 Cal. Rptr. at 837 (citing CAL. GOV'T CODE §§ 26500-26501 (West 1988)).

4. *Id.* at 452, 807 P.2d at 1067, 279 Cal. Rptr. at 838 (quoting Taliaferro v. Locke, 182 Cal. App. 2d 752, 6 Cal. Rptr. 813 (1960)).

5. *Id.* at 451, 454, 807 P.2d at 1066, 1068, 279 Cal. Rptr. at 837, 839.

6. *Id.* at 454, 807 P.2d at 1068, 279 Cal. Rptr. at 839; CAL. CONST. art. VI, § 12(b).

7. *Dix*, 53 Cal. 3d at 459, 807 P.2d at 1072, 279 Cal. Rptr. at 843. For an explanation of the court's reasoning, see *infra* notes 43-60 and accompanying text.

8. *Dix*, 53 Cal. 3d at 463, 807 P.2d at 1074, 279 Cal. Rptr. at 845.

9. *Id.* at 464, 807 P.2d at 1075, 279 Cal. Rptr. at 846.

10. *Id.* at 448, 807 P.2d at 1064, 279 Cal. Rptr. at 835.

11. *Id.* The seven-year sentence, the maximum allowed, consisted of a four-year base term for aggravated assault and a three-year enhancement for the great bodily injury. *Id.* "Base term" means the determinate prison term prescribed by statute or law. An "enhancement" is an additional period of incarceration added to the base term. CAL. R. CT. 405(b) & (c) (West 1991).

12. *Dix*, 53 Cal. 3d at 448, 807 P.2d at 1064, 279 Cal. Rptr. at 835. Section 1170(d) of the Penal Code authorizes such a motion within 120 days of sentencing. See infra note 45 for statutory text.

The court recalled petitioner's sentence at the request of a district attorney interested in prosecuting a notorious drug lord, Kellotat, for allegedly paying a hit man for a murder. *Dix*, 53 Cal. 3d at 449, 807 P.2d at 1065, 279 Cal. Rptr. at 836. The district attorney argued that petitioner's statement was critical to the proceeding against Kellotat. The court had originally dismissed the case against Kellotat because the actual

Apparently, respondent had agreed, subsequent to his imprisonment, to provide crucial testimony in a "hitman-for-hire" prosecution if the court would resentence him to county jail instead of state prison.

Thereafter, the authorities transferred respondent to county jail. At one point respondent was released on his own recognizance, but was subsequently returned to custody.[13] In a letter to the court, petitioner conveyed his distress over the recall and release, citing respondent's substantial felony record and a threatening note displayed by respondent during the trial on the assault charges.[14] Due to various court orders postponing the resentencing hearing, respondent has never been resentenced.[15]

Retaining a lawyer on his own, petitioner sought a writ of prohibition and/or mandamus to prevent further continuances and to compel respondent's prompt return to prison.[16] The court of appeal issued a writ of mandate.[17] The People and respondent, real parties in interest, requested supreme court review.[18]

III. THE COURT'S OPINION

A. Standing to Challenge Criminal Proceedings

A writ of mandate compels performance of an official duty[19] and a writ of prohibition curbs court action in excess of its jurisdictional power.[20] Both require that the party seeking the writ be otherwise faced with an inadequate legal remedy.[21] As a general rule, courts may only issue these writs to persons with a "beneficial interest" in

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assassin refused to take the witness stand. Respondent asserted that he would testify that Kellotat had tried to hire him to do the killing. *Id.*

13. *Dix*, 53 Cal. 3d at 448-49, 807 P.2d at 1065, 279 Cal. Rptr. at 836.

14. *Id.* at 449, 807 P.2d at 1065, 279 Cal. Rptr. at 836.

15. *Id.*

16. *Id.* at 449-50, 807 P.2d at 1065, 279 Cal. Rptr. at 836. For a distinction between mandamus and prohibition and the requirements of each, see *infra* notes 19-24 and accompanying text.

17. *Dix*, 53 Cal. 3d at 450, 807 P.2d at 1065, 279 Cal. Rptr. at 836. In granting the writ, the court of appeal held that a victim of criminal assault had "public interest" standing. The appellate court also ruled that the superior court violated section 1170(d) of the Penal Code by considering events subsequent to commitment. *Id.*

18. *Id.* at 450, 807 P.2d at 1066, 279 Cal. Rptr. at 837.

19. CAL. CIV. PROC. CODE § 1085 (West 1980).

20. CAL. CIV. PROC. CODE § 1102 (West 1980). For an overview of the use of prohibition in criminal actions, as well as specific examples of when prohibition is and is not proper, see generally 22 CAL. JUR. 3D *Criminal Law* § 3888-98 (1985).

21. CAL. CIV. PROC. CODE §§ 1086, 1103 (West 1980). *See generally* 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §§ 3-4, 15 (3d ed. 1985).

the case.[22] There are two ways to circumvent the general rule: (1) the public interest exception for mandamus[23] or (2) through a finding of independent statutory authority.[24]

1. Crime Victims Do Not Have a "Beneficial Interest" in Criminal Cases.

One argument dealt with the meaning of the term "beneficial interest" found within California Code of Civil Procedure sections 1086 and 1103.[25] Petitioner claimed that his status as the victim of the assault, combined with respondent's threat to inflict further harm, established a beneficial interest in having respondent appropriately confined.[26] The court rejected this argument, finding that responsibility for the prosecution of criminal violations rests solely with the public prosecutor.[27] The court noted that it is the prosecutor alone who decides "whom to charge, what charges to file and pursue, and what punishment to seek."[28] Thus, regardless of how personally offended members of the public may be, they cannot initiate their own criminal proceedings.[29] The court then reasoned that due to important policy considerations, "exclusive prosecutorial discretion may also extend to the conduct of a criminal action once [it has been] commenced."[30]

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22. CAL. CIV. PROC. CODE §§ 1086, 1103 (West 1980). For explanatory material on the nature of beneficial interests, see generally, 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §§ 65-68 (3d ed. 1985) (must be a substantial practical benefit to petitioner); 55 C.J.S. *Mandamus* §§ 43, 49 (1948 & Supp. 1991) (outlining nature of interest necessary and giving examples of sufficient and insufficient beneficial interests).

23. *See generally*, 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 74 (3d ed. 1985 & Supp. 1990); 55 C.J.S. *Mandamus* § 47 (1948).

24. *Dix*, 53 Cal. 3d at 451, 807 P.2d at 1066, 279 Cal. Rptr. at 837. *See generally*, 55 C.J.S. *Mandamus* § 43 (1948) (noting that access to mandamus may be statutuorily granted to particular interested parties).

25. CAL. CIV. PROC. CODE §§ 1086, 1103 (West 1980). *See supra* note 22.

26. *Dix*, 53 Cal. 3d at 451, 807 P.2d at 1066, 279 Cal. Rptr. at 837.

27. *Id.* Section 26500 of the California Government Code states that "[t]he public prosecutor shall . . . within his or her *discretion* . . . initiate and conduct on behalf of the people *all* prosecutions for public offenses." CAL. GOV'T CODE § 26500 (West 1988)(emphasis added).

28. *Dix*, 53 Cal. 3d at 451, 807 P.2d at 1066, 279 Cal. Rptr. at 837. *See, e.g.*, People v. Sidener, 58 Cal. 2d 645, 375 P.2d 641, 25 Cal. Rptr. 697 (1962) (holding that district attorney has primary responsibility for determining punitive consequences of recidivism in narcotics cases and discretion to dismiss all charges), *overruled on other grounds by* People v. Hucks, 217 Cal. App. 3d 260, 266 Cal. Rptr. 169 (1990).

29. *Dix*, 53 Cal. 3d at 451, 807 P.2d at 1066, 279 Cal. Rptr. at 837. *See, e.g.*, Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976) (only district attorney can authorize institution of criminal proceedings). *But see* J. J. Monticelli, Annotation, *Private Citizen's Right to Institute Mandamus to Compel a Magistrate or Other Appropriate Official to Issue a Warrant, or the Like, for an Arrest*, 49 A.L.R. 2D 1285 (1956) (noting that a private citizen need not have a special or legal interest other than an interest in having the law executed).

30. *Dix*, 53 Cal. 3d at 452, 807 P.2d at 1066-67, 279 Cal. Rptr. at 837-38. The court noted that discretionary decisions to pursue prosecution are " 'legitimately founded on

2. Members of the Public, Including Crime Victims, Do Not Have "Public Interest Standing."

The public interest doctrine allows a private citizen to enforce a public right by seeking mandamus to compel the fulfillment of a public duty.[31] However, public prosecutors have no enforceable "duty" to conduct criminal proceedings in any particular manner; their only obligation is to exercise sound professional judgment over their prosecutorial role.[32] The court held that citizen intervention in criminal prosecutions would be inimical to public policy because it "would undermine the People's status as exclusive party plaintiff in criminal actions,[33] interfere with the prosecutor's broad discretion in criminal matters, and disrupt the orderly administration of justice."[34]

3. The "Victim's Bill of Rights" Does Not Provide Standing to Intervene in Criminal Prosecutions.

If a person has neither a beneficial interest nor a public interest in

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the complex considerations necessary for the effective and efficient administration of law enforcement.' " *Id.* at 451, 807 P.2d at 1066, 279 Cal. Rptr. at 837 (quoting People v. Keenan, 46 Cal. 3d 478, 506, 758 P.2d 1081, 1098, 250 Cal. Rptr. 550, 567 (1988)). The court reasoned that the complex considerations involved in exercising prosecutorial discretion created a public interest which outweighed the personal interests of victims. *Id.* at 452, 807 P.2d at 1067, 279 Cal. Rptr. at 838. Due to this important public interest, the court found that prosecutorial discretion should also apply to decisions which "seek, oppose, accept or challenge judicial actions or rulings." *Id.*

31. *See* Green v. Obledo, 29 Cal. 3d 126, 624 P.2d 256, 172 Cal. Rptr. 206 (1981) (holding citizen had standing to compel proper calculation of welfare benefits); Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 777 P.2d 610, 261 Cal. Rptr. 574 (1989) (finding taxpayer had standing to enforce statute regarding voter outreach program). *But see* Carsten v. Psychology Examining Comm., 27 Cal. 3d 793, 614 P.2d 276, 166 Cal. Rptr. 844 (1980) (denying citizen-taxpayer standing to challenge rulings of administrative agency because of overriding public policy).

32. *Dix*, 53 Cal. 3d at 453, 807 P.2d at 1068, 279 Cal. Rptr. at 839.

33. Individual citizens are never parties to criminal proceedings. Section 100(b) of the California Government Code provides that "all prosecutions shall be conducted in [the name of the People] and by their authority." CAL. GOV'T CODE § 100(b) (West 1980). Thus, according to the court, members of the public are, in essence, "strangers" to criminal proceedings. *Dix*, 53 Cal. 3d at 453, 807 P.2d at 1068, 279 Cal. Rptr. at 839. *Cf.* 55 C.J.S. *Mandamus* § 49 (1948).

34. *Dix*, 53 Cal. 3d at 454, 807 P.2d at 1068, 279 Cal. Rptr. at 839. However, the court preserved the right of citizen-taxpayers to bring other actions raising criminal justice issues. *Id.* at 454 n.7, 807 P.2d at 1068 n.7, 279 Cal. Rptr. at 839 n.7. *See, e.g.*, Van Atta v. Scott, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980) (allowing taxpayer to bring an action to enjoin use of public funds to sustain operation of bail and "own recognizance release" systems). For more examples of valid independent actions, see generally Annotation, *Standing of Media Representatives or Organizations to Seek Review of, or to Intervene to Oppose, Order Closing Criminal Proceedings to Public*, 74 A.L.R. 4TH 476 (1989).

the case, standing may be obtained pursuant to statutory or constitutional authority.[35] In this regard, petitioner pointed out that the California Constitution, in a section commonly known as the "Victim's Bill of Rights,"[36] declares "that felony victims have the 'right' to expect the appropriate detention, trial, and punishment of those who injured them."[37] The petitioners then inferred that corresponding remedies must likewise exist to enforce these rights; otherwise, citizens would have a right without a remedy.[38] However, the court felt that these constitutional provisions, rather then creating enforceable rights in felony victims, simply expressed moral and philosophical support for a substantive reformation of criminal law.[39] The court reasoned that, in enacting the Victim's Bill of Rights, the Legislature could not possibly have intended to drastically change standard criminal practice,[40] especially when there are constitutional and statutory provisions that create *specific* rights in felony victims.[41] As a result, the supreme court found that the appellate court had erred in finding that the petitioner had standing to challenge the recall of respondent's sentence.[42]

B. Recall and Resentencing Under California Penal Code Section 1170(d)

Although the resolution of the standing issue made it unnecessary to address the merits of the recall and resentencing issue, the court exercised its discretion to do so.[43] Contained within the Determinate

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35. *See supra* note 24.

36. The "Victim's Bill of Rights" is found in Article I, section 28 of the California Constitution. CAL. CONST. art I, § 28(a).

37. *Dix*, 53 Cal. 3d at 452, 807 P.2d at 1067, 279 Cal. Rptr. at 838 (citing CAL. CONST. art. I, § 28(a)).

38. *Id.*

39. *Id.*

40. *Id.*

41. Examples include: The right to attend the sentencing hearing and to state views regarding sentencing, CAL. PENAL CODE § 1191.1 (West Supp. 1991); the right to introduce a written or videotaped statement if in lieu of personal attendance, CAL. PENAL CODE § 1191.15 (West Supp. 1991); and the right to notification that the state intends to seek a sentence modification or reduction, case dismissal or early parole in exchange for the in-custody informant's testimony in another case, CAL. PENAL CODE § 1191.25 (West Supp. 1991). Another example is the right to restitution in certain circumstances, *e.g.*, CAL. CONST. art. I, § 28(b) (all victims of criminal activity have the right to restitution). *See also* CAL. PENAL CODE § 1203.1 (authorizing labor in camps, farms or other public work to cover restitution, parole supervision costs, and fines); § 1203.1g (authorizing court to require restitution for medical expenses for treatment of sexual assault victims); § 1203.1*l* (authorizing restitution for cost of emergency response) (West Supp. 1991).

42. *Dix*, 53 Cal. 3d at 454, 807 P.2d at 1069, 279 Cal. Rptr. at 839.

43. *Id.* Because it found the sentencing issues "significant" and both sides had fully briefed the issues in anticipation of a ruling on the merits, the court agreed to exercise its discretion to rule on the merits in order to guide the lower courts. *Id. See, e.g.*, DiGiorgio Fruit Corp. v. Department of Employment, 56 Cal. 2d 54, 362 P.2d 487,

Sentencing Act,[44] section 1170(d) of the California Penal Code provides a sentencing court with recall and resentencing authority.[45] Under section 1170(d), there are two limitations on a sentencing court's ability to cancel sentence once it goes into effect: (1) the recall must occur within 120 days of the commitment date and (2) the recall must be pursuant to the court's own motion, the advice of the Director of Corrections or the recommendation of the Board of Prison Terms.[46] Once rescinded, the sentence can be reinstated or revised, as long as the new sentence (1) is not greater than the original sentence and (2) includes credit for time served.[47]

1. The Sentencing Court Can Recall For Any Reason Logically Related to Lawful Sentencing.

Petitioner argued that post-commitment recall and resentencing authority under section 1170(d) exists *only* to eliminate disparity and

13 Cal. Rptr. 663 (1961) (court heard merits even though appeal was moot); People v. West Coast Shows, Inc., 10 Cal. App. 3d 462, 89 Cal. Rptr. 290 (1970) (same).

44. 1976 Cal. Stat. 5140 (codified at CAL. PENAL CODE §§ 1170-70.95 (West 1985 & Supp. 1991)). The purpose of the Act is to eliminate disparity and promote uniformity in punishment by limiting the possible prison term to a statutorily-fixed period, depending upon the seriousness of the crime. CAL. PENAL CODE § 1170(a)(1) (West 1985). Further statutory references will be to the California Penal Code unless otherwise indicated.

45. Section 1170(d) provides, in pertinent part:

> When a defendant . . . has been sentenced to be imprisoned in the state prison . . . the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Director of Corrections or the Board of Prison Terms, recall the sentence . . . and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

CAL. PENAL CODE § 1170(d) (West Supp. 1991). *See generally* 24 C.J.S. *Criminal Law* § 1544 (1989) (recognizing statutory and constitutional guidance in controlling judicial exercise of resentencing power); 22 CAL. JUR. 3D *Criminal Law* §§ 3413, 3426 (1985) (discussing recall process in both determinate and indeterminate sentencing settings).

46. *Dix*, 53 Cal. 3d at 456, 807 P.2d at 1069, 279 Cal. Rptr. at 840.

47. *Id.* at 456, 807 P.2d at 1070, 279 Cal. Rptr. at 841. *See generally* R.D. Hursh, Annotation, *Right to Credit for Time Served Under Erroneous or Void Sentence or Invalid Judgment of Conviction Necessitating New Trial*, 35 A.L.R. 2D 1283 (1954). Section 1170(d) of the California Penal Code is a statutory exception to the common law rule that a court loses resentencing jurisdiction when the original sentence goes into effect. *Dix*, 53 Cal. 3d at 445, 807 P.2d at 1068, 279 Cal. Rptr. at 839 (citing Holder v. Superior Court, 1 Cal. 3d 779, 783, 463 P.2d 705, 707, 83 Cal. Rptr. 353, 355 (1970)); People v. Delson, 161 Cal. App. 3d 56, 62, 207 Cal. Rptr. 244, 248 (1984); People v. Calhoun, 72 Cal. App. 3d 494, 497, 140 Cal. Rptr. 225, 226 (1977)). Thus, a court does not exceed its sentencing jurisdiction when acting within the scope of section 1170(d).

promote uniformity.[48] After examining the statutory predecessor to section 1170(d) and noting the changes the Legislature made,[49] the court concluded that the Legislature intended to retain the judicial power to consider *individual grounds* for vacating sentences.[50] Furthermore, the court noted that section 1170(f)(1), not 1170(d), contains the procedure for actually correcting disparate sentences. The court reasoned that because section 1170(f) already "assures careful and orderly disparity review of every determinate prison sentence, there is little reason for a separate, discretionary procedure under section 1170(d)."[51] Thus, the court held that it is only when ultimately imposing the new sentence that the court must comply with the "anti-disparity" and "pro-conformity" provision.[52]

2. In Making Its Decision to Recall a Sentence, The Court Can Consider Events Subsequent to Commitment.

Petitioner also argued that when evaluating the availability of recall, the court can consider *only* those circumstances present at the time of original sentencing.[53] In response, the court noted that section 1170(d) does not contain any such express limitation.[54] Moreover, the statutory language provides that the court may resentence "as if" no previous sentence ever occurred, thus allowing an inference that the facts the court may consider are the same "as if" the

48. *Dix*, 53 Cal. 3d at 455, 807 P.2d at 1068, 279 Cal. Rptr. at 839. Although petitioner perceived recall as subject to the same limitations as resentencing, because recall is a necessary precursor to resentencing, the court rejected this inference since "the statutory language does not link recall with disparity at all." *Id.* at 456, 807 P.2d at 1070, 279 Cal. Rptr. at 841.

49. *Id.* at 457-58, 807 P.2d at 1070-71, 279 Cal. Rptr. at 841-42. The former *indeterminate* sentencing provision contained a parallel provision authorizing recall either upon a court's own motion or upon recommendation of the Director, if the Director's diagnostic study, which focused on the prisoner's *individual circumstances and characteristics*, warranted such action. The court observed that the Legislature removed the limiting reference to the Director's diagnostic study, but made no changes that "suggest a new and exclusive focus on sentence uniformity and disparity." *Id.* at 458, 807 P.2d at 1071, 279 Cal. Rptr. at 842.

50. *Id.* at 458, 807 P.2d at 1071, 279 Cal. Rptr. at 842.

51. *Id.* at 459, 807 P.2d at 1072, 279 Cal. Rptr. at 843. This interpretation also comports with the 1985 Classification Manual and the 1990 Department Operations Manual of the California Department of Corrections. Moreover, the court stated that if it accepted petitioner's interpretation, "the statute would contain two separate, inconsistent, and confusing mechanisms for the sole purpose of correcting disparate sentences." *Id.* Thus in keeping with the general rule of statutory construction that courts should avoid rendering certain provisions useless or superfluous whenever possible, the court rejected petitioner's interpretation. *Id.* (citing People v. Olsen, 36 Cal. 3d 638, 647, 685 P.2d 52, 58, 205 Cal. Rptr. 492, 498 (1984); Bowland v. Municipal Court, 18 Cal. 3d 479, 489, 556 P.2d 1081, 1086, 134 Cal. Rptr. 630, 635 (1976)).

52. *Id.* at 456, 807 P.2d at 1070, 279 Cal. Rptr. at 841.

53. *Id.* at 455, 807 P.2d at 1069, 279 Cal. Rptr. at 840.

54. *Id.* at 460, 807 P.2d at 1072, 279 Cal. Rptr. at 843.

resentencing were the original sentencing.[55] As a result, the court held that events occurring after the initial sentencing that impact the recall-resentencing decision deserve consideration.[56]

3. Resentencing Need Not Take Place Within the 120-day Time Limit for Recall.

Petitioner contended that, by failing to impose a new sentence within the 120-day period of section 1170(d), the court had lost its resentencing jurisdiction.[57] Although the court acknowledged the value of this interpretation, it found the statutory language to be more readily understood as *preserving* the court's jurisdiction when recall occurs within 120 days.[58] Support for this interpretation stems from the fact that the statute imposes no jurisdictional requirement of immediate resentencing when the recall recommendation originates from the Board or Director.[59] The court reasoned that it would not make sense for the Legislature to create a more rigid resentencing rule after a timely recall upon the court's own motion

55. *Id.* For text of Penal Code section 1170(d), see *supra* note 45. As support for this proposition, the court analogized to established resentencing law for cases remanded for resentencing after an appeal. The court noted that in those situations, the defendant is entitled to all of the usual rights and procedures accessible at the original sentencing. *Id.* (citing People v. Foley, 170 Cal. App. 3d 1039, 1047, 216 Cal. Rptr. 865, 868 (1985); Van Velzer v. Superior Court, 152 Cal. App. 3d 742, 744, 199 Cal. Rptr. 695, 696 (1984)). This includes consideration of any relevant circumstances arising after the imposition of the prior sentence. *See* People v. Flores, 198 Cal. App. 3d 1156, 1160-62, 244 Cal. Rptr. 322, 324-25 (1988).

56. *Dix*, 53 Cal. 3d at 460, 807 P.2d at 1072-73, 279 Cal. Rptr. at 843-44. This approach agrees with the Federal Rules of Criminal Procedure which permit a federal court to reduce a sentence to reflect the accused's substantial assistance "*subsequent* to imposition of the sentence in the investigation or prosecution of another person." FED. R. CRIM. P. § 35(b) (emphasis added). *See generally* 24 C.J.S. *Criminal Law* § 1544 (1989).

57. *Dix*, 53 Cal. 3d at 464, 807 P.2d at 1075, 279 Cal. Rptr. at 846. The court acknowledged that there are cases which hold that *recall* must occur within the 120-day limit or the court loses "own-motion" jurisdiction. *Id. See, e.g.*, People v. Roe, 148 Cal. App. 3d 112, 195 Cal. Rptr. 802 (1983) (jurisdiction lost for failure to recall within 120 days); *see also* People v. Calhoun, 72 Cal. App. 3d 494, 140 Cal. Rptr. 225 (1977) (holding that court cannot reinvoke recall power in successive 120-day periods). However, the court pointed out that no decision had held that "both recall *and* resentencing must occur within the statutory [120-day] limit." 53 Cal. 3d at 464, 807 P.2d at 1075, 279 Cal. Rptr. at 846 (emphasis in original) (footnote omitted).

58. *Dix*, 53 Cal. 3d at 464, 807 P.2d at 1075, 279 Cal. Rptr. at 846.

59. "[T]he court may, *within 120 days* of the date of commitment on its own motion, or *at any time* upon the recommendation of the Director of Corrections or the Board of Prison Terms, recall the sentence." CAL. PENAL CODE § 1170(d) (West 1985) (emphasis added).

than a recall upon Board advice or Director recommendation.[60]

IV. IMPACT

If ever there was a perfect fact scenario to justify a judicial decision allowing a crime victim standing to intervene in the prosecution of his aggressor, this would have been it. Petitioner, having been shot in the head over an unpaid drug deal, had a justifiable fear that his life was in danger when respondent was released on his own recognizance after having been sentenced to seven years in prison.[61] Instead, the court created a clear-cut rule that members of the public, including crime victims, cannot challenge the judge's or the prosecutor's decisions in criminal proceedings.[62] The only way this rule will change is through the enactment of a statute which clearly grants crime victims rights in criminal proceedings under specific circumstances.[63]

The court's decision with regard to the recall and resentencing provisions of section 1170(d) enables criminal prosecutors to bargain for testimony needed in other cases.[64] The decision may be subject to some abuse, however, as criminals learn of their new-found leverage to bargain for lighter sentences after conviction.[65] It seems the only check on such abuse is the judge's ability, when resentencing, to consider all facts available at that time. Thus, if a convict lied about the truth of his testimony in order to manipulate the system and procure a lighter sentence, the court could consider this factor when imposing a new sentence.[66]

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60. *Dix*, 53 Cal. 3d at 464, 807 P.2d at 1075, 279 Cal. Rptr. at 846.

61. *See supra* notes 10-14 and accompanying text.

62. *Dix*, 53 Cal. 3d at 454 n.7, 807 P.2d at 1068 n.7, 279 Cal. Rptr. at 839 n.7. For further clarity, the court expressly limited its decision by stating that this decision would not jeopardize citizen-taxpayer suits that raise criminal justice issues. *Id.* *See supra* note 34. From a policy standpoint, the ruling makes sense. The job of the public prosecutor would be much more difficult if she had to contend with the victim as well as the offender. Moreover, criminal activity is a violation against all members of society and the public prosecutor has more objectivity than the person injured.

63. Since the statutory and public interest exceptions are the only two ways around the beneficial interest requirement of the standing rule, and the court found no public interest, it would appear that the rights of future crime victims have been left in the hands of the legislature. It is only through the enactment of a statutory exception that victim standing could be granted. *See supra* notes 19-24 and accompanying text.

64. Lisa Stansky, *Crime Defendants Get a Rare Break From High Court; Victims Not Permitted to Interfere With Resentencings*, THE RECORDER, Apr. 19, 1991 at 1.

65. The case represents a rare break for criminals in light of the court's recent tough attitude toward crime. Harriet Chiang, *Victim Gets No Say In Attacker's Sentence Ruling in Bizarre Humbolt County Case*, S.F. CHRON., Apr. 19, 1991, at A26.

66. One problem here is that a lie may be difficult to prove. Also, the convict's help may not result in a conviction in the other case. Kellotat, the drug kingpin against whom respondent testified, was ultimately acquitted of the hitman employment charges. *Id.* In an attempt to lessen this problem, the federal rules require *sub-*

V. CONCLUSION

Faced with a choice between appeasing popular sentiment or maintaining control over prosecutorial procedure, the California Supreme Court chose the latter. The unfortunate effect of this decision is that it tends to elevate the rights of criminal defendants over the rights of the victim. The unanimous decision thus leaves it to the Legislature to decide whether to create a statutory exception that establishes standing in individual victims. In the meantime, the judge, public prosecutor and defense counsel alone control a criminal's fate.

LORRAINE A. MUSKO

B. *A defendant charged under section 666 of the Penal Code for petty theft with a prior theft conviction may stipulate to a prior conviction and thus preclude the jury from learning of that conviction:* People v. Bouzas

In *People v. Bouzas*,[1] the California Supreme Court resolved a conflict between the courts of appeal regarding the correct interpretation of the "prior theft conviction" provision of Penal Code section 666[2] under article I, section 28, subdivision (f) of the California Constitution.[3] The court held that the prior conviction requirement of

stantial assistance in another's prosecution in order to qualify for a reduced sentence. FED. R. CRIM. P. § 35(b).

1. 53 Cal. 3d 467, 807 P.2d 1076, 279 Cal. Rptr. 847 (1991). Defendant Bouzas was suspected of stealing ten syringes from a pharmacy after acting suspiciously and refusing to pay for the syringes. Although the police never recovered the syringes, defendant was charged with petty theft with a prior theft-related conviction. The court rejected the defendant's request to stipulate to the prior felony conviction and thus preclude the jury from hearing about it. Instead, the court permitted the prosecutor to prove the prior conviction and the jury found the defendant guilty of petty theft with a prior conviction of theft. *Id.* at 470, 807 P.2d at 1078, 279 Cal. Rptr. at 849. The court of appeal affirmed the trial court's rejection of defendant's request to stipulate to the prior felony conviction allegation under section 666. *Id.* The California Supreme Court granted review to resolve a conflict on this issue in the courts of appeal. *Id.* at 469, 807 P.2d at 1077, 279 Cal. Rptr. at 848.

2. CAL. PENAL CODE § 666 (West 1988). Until 1976, § 666 addressed only misdemeanor, theft-related prior convictions resulting in incarceration. However, later in 1976, the Legislature rewrote § 666 and merged it with former § 667. Former § 667 made a current conviction for petty theft punishable as either a misdemeanor or a felony if the defendant had been convicted earlier and served time for "any felony." *Bouzas*, 53 Cal. 3d at 470-71, 807 P.2d at 1078, 279 Cal. Rptr. at 849. Present § 666 combines the two former sections and provides that a defendant who has been convicted and imprisoned for theft-related crimes and who is subsequently convicted of petty theft "is punishable by imprisonment in the county jail not exceeding one year, or in state prison." CAL. PENAL CODE § 666 (West 1988).

3. CAL. CONST. art. I, § 28(f). This section provides in pertinent part: "When a

section 666 is a sentencing matter for the trial court and not an "element" of a section 666 "offense" that must be determined by a jury.[4] Because the defendant's prior theft-related conviction was not determined to be an element of his later offense, the court concluded that the defendant may stipulate to his prior felony conviction and thus preclude the jury from learning of that conviction.[5]

In *Bouzas*, the court stressed that since the original adoption of section 666 in 1872, courts treated the prior theft conviction provision as a sentencing factor only.[6] Further, the court reasoned that because the legislature showed no intent to alter the judicial interpretation of previous versions of section 666, the present revised version of section 666 should receive a like interpretation.[7] The court also criticized an alternate line of cases which failed to distinguish statutes defining substantive crimes from section 666 which merely establishes penalties and regulates sentencing.[8] Finally, the court asserted that a jury

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prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court." *See also* 22 CAL. JUR. *Punishment* §§ 3378-33 (1985 & Supp. 1991).

4. Bouzas v. People, 53 Cal. 3d 467, 473-74, 807 P.2d 1076, 1080, 279 Cal. Rptr. 847, 851 (1991). Numerous cases have treated the prior conviction provision under § 666 as a sentencing factor. *See, e.g.*, People v. Hall, 28 Cal. 3d 143, 155-56 n.7, 616 P.2d 826, 833 n.7, 167 Cal. Rptr. 844, 851 n.7 (1980) (approving defense stipulation to a prior conviction of petty theft to keep such information from the jury); People v. Pierson, 273 Cal. App. 2d 130, 132, 77 Cal. Rptr. 888, 889 (1969) (stating "it is well settled in this state that in a prosecution for petty theft with a prior conviction of a felony, the fact of the former conviction is not an element of the crime, but merely a penalty-increasing device"); People v. Gallinger, 212 Cal. App. 2d 851, 855, 28 Cal. Rptr. 472, 474 (1963) (stating "[t]he fact of a former conviction is not an element of the crime").

5. *Bouzas*, 53 Cal. 3d 467, 480, 807 P.2d 1076, 1085, 279 Cal. Rptr. 847, 856. Chief Justice Lucas authored the unanimous decision of the court. *Id.* at 469, 807 P.2d at 1077, 279 Cal. Rptr. at 848. Defendant requested to stipulate to his prior conviction based upon § 1025 of the Penal Code. *Id.* at 471, 807 P.2d at 1079, 279 Cal. Rptr. at 850. *See also* CAL. PENAL CODE § 1025 (West 1985). Section 1025 provides that the defendant must be asked whether he admits or denies the prior conviction, and if he admits it, the matter may not be heard by the jury. CAL. PENAL CODE § 1025 (West 1985).

6. *Id.* at 471, 807 P.2d at 1081, 279 Cal. Rptr. at 849. *See supra* note 4.

7. *Bouzas*, 53 Cal. 3d at 475, 807 P.2d at 1081, 279 Cal. Rptr. at 852. The *Bouzas* court stated that the legislature had "amended former sections 666 and 667 at least 10 times between 1903 and 1976." *Id.* Therefore, the court concluded that "the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." *Id.* (citing Wilkoff v. Superior Court, 38 Cal. 3d 345, 353, 696 P.2d 134, 141, 211 Cal. Rptr. 742, 750 (1985)).

8. *Id.* at 477, 807 P.2d at 1083, 279 Cal. Rptr. at 854. The court distinguished the instant case from situations where the former conviction is an element of the offense for which the defendant is being tried. The court cited a prosecution under § 12021 of the Penal Code, which makes it illegal for an ex-felon to be in possession of a firearm. *Id.* at 497, 807 P.2d at 1084, 279 Cal. Rptr. at 855. The prior conviction as well as the possession of the firearm must be proved, and thus the prior conviction is an element of the crime. *Id. See, e.g.*, People v. Hall, 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844 (1980) (stating in dicta that a prior felony conviction in the context of a § 12021 trial is indistinguishable from a § 666 trial); People v. Sherren, 89 Cal. App. 3d 752, 152 Cal. Rptr. 828 (1977) (stating that a prior conviction under § 666 was just as much an "element" of that statute as is an ex-felon statute under § 12021).

did not need to be made cognizant of a defendant's prior theft conviction in order to resolve whether that defendant has committed the requisite elements of the substantive crime of petty theft.[9]

By defining the phrase "prior theft conviction" under Penal Code section 666 to be applicable as a sentencing factor only, the court has enunciated a bright-line standard by which lower courts may now uniformly interpret section 666.[10] This statutory interpretation preserves the fundamental fairness of the trial process by preventing a jury from becoming unduly prejudiced by a defendant's prior theft conviction and ensuring that the specific charge against the defendant will be decided on the merits.[11]

ANDREA WILSON

C. *The provisions of Proposition 115 that benefit the criminal defendant and which modify the conduct of trials and preliminary hearings apply to the prosecution of crimes that occurred prior to the measure's effective date:* Tapia v. Superior Court.

I. INTRODUCTION

In *Tapia v. Superior Court*,[1] the California Supreme Court addressed whether the provisions of Proposition 115, the "Crime Victims Justice Reform Initiative,"[2] apply retrospectively to events that

9. *Bouzas*, 53 Cal. 3d at 479, 807 P.2d at 1084, 279 Cal. Rptr. at 855. The court recognizes that a jury that does not hear evidence of a past conviction under a § 12021 situation may acquit a defendant because they do "not believe that possessing a concealable firearm should be criminal." *Id.* (quoting People v. Hall, 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844 (1989)).

10. *Id.* (stating "that, on its face, section 666 is a sentence-enhancing statute, not a substantive 'offense' statute").

11. *Id.* The court concluded that " 'section 1025 represents a fundamental declaration of public policy.' " *Id.* at 480, 807 P.2d at 1085, 279 Cal. Rptr. at 856 (quoting People v. Rolon, 66 Cal. 2d 690, 693, 427 P.2d 196, 199, 58 Cal. Rptr. 596, 597 (1967)).

1. 53 Cal. 3d 282, 807 P.2d 434, 279 Cal. Rptr. 592 (1991). Justice Panelli wrote the majority opinion in which Chief Justice Lucas and Justices Kennard, Arabian and Baxter concurred. Justice Mosk wrote a dissenting opinion in which Justice Broussard joined. Justice Broussard also wrote a separate dissent.

2. On June 5, 1990, California adopted Proposition 115 by referendum. It became effective the following day, June 6, 1990. *Tapia*, 53 Cal. 3d at 286, 807 P.2d at 435, 279 Cal. Rptr. at 593. Proposition 115 was adopted by California voters pursuant to their power to create reform though the use of initiatives and referenda. "The people reserve to themselves the powers of initiative and referendum." CAL. CONST. art. IV, § 1.

The California Constitution states, "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." CAL. CONST. art. II, § 8. This constitutional limitation on initiatives is known as the "single subject" rule.

occurred prior to the effective date of the measure. Relying on *Collins v. Youngblood*,[3] in which the United States Supreme Court refined its definition of *ex post facto* laws,[4] the California Supreme Court held that the provisions of Proposition 115 which accrue to the benefit of a criminal defendant, and the provisions which modify the conduct of trials and preliminary hearings, apply to cases where the alleged crime occurred before the effective date of the law.[5]

Robert Allen Tapia was accused of committing first degree murder with special circumstances on February 12, 1990. When Proposition 115 took effect on June 6, 1990, Tapia's case was pending before the superior court in Tulare County. The superior court adopted the new procedural provisions of Proposition 115 and announced that the court would conduct voir dire.[6] Tapia petitioned the court of appeal for a writ of mandate vacating the superior court order. He argued that since his alleged crime occurred before the enactment of Proposition 115, application of the law would be retrospective and in violation of state and federal constitutional *ex post facto* provisions. The court of appeal denied the writ. The California Supreme Court granted review, directed a writ vacating the trial court order, and stayed the lower court proceeding.[7]

II. TREATMENT OF THE CASE

A. Majority Opinion

From the outset, the supreme court acknowledged the well settled rule that new statutes are presumed to apply prospectively,[8] unless an express declaration of retrospective application is found in the body of the statute, or legislative or electoral intent clearly establishes that the new law is to have retrospective application.[9] Proposi-

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Raven v. Deukmejian, 52 Cal. 3d 336, 347, 801 P.2d 1077, 1083, 276 Cal. Rptr. 326, 332 (1990). Although Proposition 115 is a multi-faceted compendium of reforms, the California Supreme Court held that it did not violate the "single subject" rule. *Id.* at 349, 801 P.2d at 1085, 276 Cal. Rptr. at 334.

3. 110 S. Ct. 2715 (1990).

4. *Id.* at 2718-20. For a discussion of *ex post facto* laws, see generally 16A C.J.S. *Constitutional Law* §§ 414-416 (1984 & Supp. 1991) and 16A AM. JUR. 2D *Constitutional Law* §§ 634-654 (1979 & Supp. 1991).

5. *Tapia*, 53 Cal. 3d at 297-301, 807 P.2d at 443-46, 279 Cal. Rptr. at 601-04.

6. Under Proposition 115, "the court rather than the attorneys 'shall conduct the examination of prospective jurors' and . . . the examination 'shall be conducted only in the aid of the exercises of challenges for cause.' " *Id.* at 286-87, 807 P.2d at 435-36, 279 Cal. Rptr. at 593-94.

7. *Id.* at 286-87, 807 P.2d at 435-36, 279 Cal. Rptr. at 593-94.

8. *Id.* at 287, 807 P.2d at 436, 279 Cal. Rptr. at 594. *See* 13 CAL. JUR. 3D *Constitutional Law* § 341 (1989 & Supp. 1991); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §§ 495-496 (9th ed. 1988 & Supp. 1991).

9. *Tapia*, 53 Cal. 3d at 287, 807 P.2d at 436, 279 Cal. Rptr. at 594. *See* People v. Hayes, 49 Cal. 3d 1260, 1274, 783 P.2d 719, 728, 265 Cal. Rptr. 132, 141 (1989); Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1206-09, 753 P.2d 585, 596-98, 246 Cal. Rptr. 629,

tion 115 is silent as to retrospectivity, thus the court found that it was designed to be implemented prospectively.[10] Working from this foundation, the supreme court addressed the more difficult issue whether the proposed application of Proposition 115 in this case was in fact retrospective.[11]

Tapia argued that applying any statute passed after the crime was committed is prohibited by the *ex post facto* provisions of both the federal and state constitutions.[12] The supreme court agreed, but cautioned that an *ex post facto* limitation can be invoked only when the new law changes the legal consequences of the defendant's criminal act after the date of the alleged crime.[13] Noting that laws which guide the conduct of pending trials would not change "the legal consequences of past conduct,"[14] the supreme court reasoned that an *ex post facto* analysis was inappropriate in this case.[15]

The supreme court rejected Tapia's contention that precedent for interpretation of Proposition 115 was found in *People v. Smith*,[16] a case decided by the same court in 1983.[17] In *Smith*, the supreme court held that Proposition 8, the "Victims Bill of Rights," applied only to crimes committed after the effective date of the initiative.[18] In that case, the supreme court looked to electoral intent and found language supporting prospectivity.[19] The court, however, found no such specific language in Proposition 115.[20]

Moreover, the court noted that the concern expressed in *Smith* about possible *ex post facto* constitutional claims had been allayed by the United States Supreme Court's explicit holding in *Collins v. Youngblood*.[21] In *Collins*, the Supreme Court adopted an earlier formulation of *ex post facto* law and delineated the types of laws which

639-42 (1988); *see generally* CAL. CIV. PROC. CODE § 3 (West 1982); CAL. PENAL CODE § 3 (West 1988).

10. *Tapia*, 53 Cal. 3d at 287, 807 P.2d at 436, 279 Cal. Rptr. at 594.

11. *Id.* at 288-97, 807 P.2d at 436-43, 279 Cal. Rptr. at 594-601.

12. *Id.* at 288, 807 P.2d at 436, 279 Cal. Rptr. at 594. U.S. CONST. art. I, § 10, cl. 1; CAL. CONST. art. I, § 9. *See* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 419-422 (9th ed. 1988 & Supp. 1991).

13. *Tapia*, 53 Cal. 3d at 288-89, 807 P.2d at 436-38, 279 Cal. Rptr. at 594-96.

14. *Id.* at 289-91, 807 P.2d at 437-39, 279 Cal. Rptr. at 595-97.

15. *Id.* at 288, 807 P.2d at 436-37, 279 Cal. Rptr. at 594-95.

16. 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983).

17. *Tapia*, 53 Cal. 3d at 292-93, 807 P.2d at 439-40, 279 Cal. Rptr. at 597-98.

18. *Smith*, 34 Cal. 3d at 251, 667 P.2d at 149, 193 Cal. Rptr. at 692.

19. *Tapia*, 53 Cal. 3d at 293, 807 P.2d at 440, 279 Cal. Rptr. at 598.

20. *Id.* at 293, 807 P.2d at 440, 279 Cal. Rptr. at 598.

21. *Id.* at 293-94, 807 P.2d at 440-41, 279 Cal. Rptr. at 598-99.

could be considered *ex post facto*.[22] The Court declared:

> [A]ny statute [1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.[23]

Since the proposed application of Proposition 115 in Tapia's case did not fall into any of these categories, the California Supreme Court reiterated its belief that operation of the new law would not be an *ex post facto* violation.[24]

The supreme court also rejected Tapia's reliance on the definition of "retrospective law" enunciated in *Evangelatos v. Superior Court*.[25] This definition incorporated the doctrine of "substantial protections"[26] which the United States Supreme Court had repudiated in *Collins*.[27] Thus, the California Supreme Court was able to revisit its own construction of retrospective law and redefine its current position.[28]

In so doing, the supreme court rejected the petitioner's contention that the California Supreme Court should adopt the "substantial protection" doctrine as state law.[29] Reviewing the history of both the California Constitutional Convention and state case law, the supreme court found that the "substantial protection" analysis was imposed under the Supremacy Clause[30] by United States Supreme Court decisions and had never been adopted as a valid interpretation of the state constitution.[31]

After clarifying its views on retrospectivity and *ex post facto* laws,

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22. Collins v. Youngblood, 110 S. Ct. 2715, 2719 (1990).

23. *Id.* (quoting Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)). *See also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 632-41 (2d ed. 1988).

24. *Tapia*, 53 Cal. 3d at 296, 807 P.2d at 443, 279 Cal. Rptr. at 601.

25. *Id.* at 290-91, 807 P.2d at 438-39, 279 Cal. Rptr. at 596-97. *See* Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1206, 753 P.2d 585, 596, 246 Cal. Rptr. 629, 639-40 (1988).

26. The doctrine of "substantial protection" was first outlined by the United States Supreme Court in *Duncan v. Missouri*:

> [A]n ex post facto law is one which . . . in relation to the offence or its consequences, alters the situation of a party to his disadvantage; but the prescribing of different modes of procedure and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition.

Duncan v. Missouri, 152 U.S. 377, 382-83 (1894) (quoting THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 329 (5th ed. 1883) (citations and emphasis omitted)). In *Collins*, the Court stated that this doctrine was created to prevent legislators from skirting *ex post facto* scrutiny by labeling a law "procedural." *Collins*, 110 S. Ct. at 2721.

27. *Collins*, 110 S. Ct. at 2721.

28. *Tapia*, 53 Cal. 3d at 292-94, 807 P.2d at 439-41, 279 Cal. Rptr. at 597-99.

29. *Id.* at 295, 807 P.2d at 441, 279 Cal. Rptr. at 599.

30. *Id.* at 296, 807 P.2d at 443, 279 Cal. Rptr. at 600 (citing U.S. CONST. art. VI).

31. *Id.* at 296, 807 P.2d at 442, 279 Cal. Rptr. at 600 (citing People v. Ward, 50 Cal. 2d 702, 707, 328 P.2d 777, 779-80 (1958)).

the supreme court determined which of Proposition 115's provisions could be applied to the prosecution of a crime that occurred prior to the law's enactment. The court separated the provisions of Proposition 115 into four separate categories: (1) those which have a detrimental effect on the legal consequences of criminal behavior; (2) those which clearly benefit the defendant; (3) procedural changes which affect the conduct of trials and preliminary hearings; and (4) a provision which codifies existing law.[32]

The court held retrospective application of the first category of provisions to be a clear violation of *ex post facto* laws.[33] However, prior case law supports the immediate implementation of the second category which benefits criminal defendants.[34] Finally, the supreme court concluded that the voir dire and reciprocal discovery provisions were not retrospective and could be incorporated in Tapia's trial.[35] Thus, the court affirmed the judgment of the court of appeal.

B. Dissenting Opinions

In dissent, Justice Mosk took issue with the majority's interpretation of electoral intent.[36] Invoking considerations of fairness,[37] he stated that "the general rule [of *ex post facto*] is that there is no general rule."[38] Thus, in this instance, Justice Mosk found *People v. Smith* controlling.[39] He dismissed the difference in electoral intent between Proposition 8 and Proposition 115 as contrived.[40] Justice Mosk distinguished *Smith* from *Collins* by pointing out that the California Supreme Court grounded its argument in *Smith* on the *ex post*

32. *Id.* at 297, 807 P.2d at 443, 279 Cal. Rptr. at 601.

33. *Id.* at 297-98, 807 P.2d at 443-44, 279 Cal. Rptr. at 601-02.

34. *Id.* at 300-01, 807 P.2d at 445-46, 279 Cal. Rptr. at 603-04. *See, e.g., In re* Estrada, 63 Cal. 2d 740, 745-48, 408 P.2d 948, 952-53, 48 Cal. Rptr. 172, 175-77 (1965).

35. *Tapia*, 53 Cal. 3d at 299-300, 807 P.2d at 444-45, 279 Cal. Rptr. at 602-03.

36. *Id.* at 302, 807 P.2d at 446-47, 279 Cal. Rptr. at 604-05 (Mosk, J., dissenting).

37. "The presumption of prospectivity is . . . based on policy considerations involving fairness." *Id.* at 304-05, 807 P.2d at 448, 279 Cal. Rptr. at 606 (Mosk, J., dissenting).

38. *Id.* at 306, 807 P.2d at 449-50, 279 Cal. Rptr. at 607-08 (Mosk, J., dissenting) (quoting People v. Smith, 34 Cal. 3d 251, 260, 667 P.2d 149, 153, 193 Cal. Rptr. 692, 696 (1983)). *See* Russell v. Superior Court, 185 Cal. App. 3d 810, 230 Cal. Rptr. 102 (1986).

39. *Tapia*, 53 Cal. 3d at 307, 807 P.2d at 450, 279 Cal. Rptr. at 608 (Mosk, J., dissenting). *Smith* held that all the provisions of Proposition 8, the "Victims Bill of Rights," would apply prospectively. *Smith*, 34 Cal. 3d at 258, 667 P.2d at 152, 193 Cal. Rptr. at 695.

40. *Tapia*, 53 Cal. 3d at 307-08, 807 P.2d at 450-51, 279 Cal. Rptr. at 608-09 (Mosk, J., dissenting).

facto clause of the California Constitution alone.[41] Finally, Justice Mosk indicated that the framers of Proposition 115 had, at a minimum, constructive notice of the recent reaffirmation of prospectivity in *Evangelatos* and the prospective application of Proposition 8 in *Smith*.[42] If the drafters had intended the measure to apply to crimes alleged to have occurred prior to the initiative's passage, said Mosk, they would have specified that intent.[43]

Justice Mosk would not accept the majority's premise that prospectivity is mandated only when a change in the law modifies the legal consequences of the past act.[44] He noted that the distinction between procedural and substantive law must be judged by its effect rather than by its statutory form.[45] Justice Mosk posited that when substantial procedural changes are made, the effect must be retroactive because it changes the legal effect of past events.[46]

Justice Broussard joined Justice Mosk in his dissent, and wrote a brief dissenting opinion of his own. He reiterated the position that all parties in the Proposition 115 process labored under the common assumption that every provision of the criminal law reform initiative would be applied prospectively.[47] This assumption, he believed, dispelled any voter concern about the fairness of possible retroactive application.[48] Thus, Justice Broussard declared that the majority's peremptory redefinition of retrospectivity flew in the face of electoral intent.[49]

III. IMPACT

It is only in that gray area of "procedural *cum* substantive" law that the interpretation of Proposition 115 generates any controversy. In the pursuit of the voters' professed desire to "create a system in which justice is swift and fair,"[50] there is concern that swift and mechanical justice may outstrip fair and equitable justice. If a crimi-

41. *Id.* at 309, 807 P.2d at 451, 279 Cal. Rptr. at 609 (Mosk, J., dissenting). *See Smith*, 34 Cal. 3d at 259, 667 P.2d at 152, 193 Cal. Rptr. at 695.

42. *Tapia*, 53 Cal. 3d at 309, 807 P.2d at 451, 279 Cal. Rptr. at 609 (Mosk, J. dissenting).

43. *Id.* at 310, 807 P.2d at 452, 279 Cal. Rptr. at 610 (Mosk, J., dissenting).

44. *Id.* at 311, 807 P.2d at 452-53, 279 Cal. Rptr. at 610-11 (Mosk, J., dissenting).

45. *Id.* at 312, 807 P.2d at 453, 279 Cal. Rptr. at 611 (Mosk, J., dissenting) (citing Aetna Casualty and Surety Co. v. Industrial Accident Comm'n, 30 Cal. 2d 388, 393-94, 182 P.2d 159, 161-62 (1947)).

46. *Id.* at 312, 807 P.2d at 453, 279 Cal. Rptr. at 611 (Mosk, J., dissenting).

47. *Tapia*, 53 Cal. 3d at 313-14, 807 P.2d at 454, 279 Cal. Rptr. at 612 (Broussard, J., dissenting). *See supra* note 39 and accompanying text.

48. *Tapia*, 53 Cal. 3d at 314, 807 P.2d at 454, 279 Cal. Rptr. at 612 (Broussard, J., dissenting).

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

50. *Id.* at 293, 807 P.2d at 440, 279 Cal. Rptr. at 598 (quoting Proposition 115, § 1(b), (c)).

nal defendant is to be properly represented, all parties must play by the same set of rules. In *Tapia*, the judge conducted voir dire and the People waived reciprocal discovery.[51] In addition, the supreme court failed to recognize any injury to the defendant. A district attorney in another case may attempt to employ a different provision of Proposition 115. The resulting case by case adjudication of discovery, in chambers if necessary,[52] will only add to the courts' caseload. Until the backlog of criminal cases arrives at the point where commission of the alleged crime occurred after the effective date of Proposition 115, added litigation over the implementation of the procedural aspects of Proposition 115 may further crowd already congested court calendars.

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VI. ELECTION LAW

Proposition 99, a voter approved initiative which establishes a fund to help alleviate tobacco-related problems, is constitutionally valid and does not violate the single-purpose rule imposed upon initiatives: **Kennedy Wholesale, Incorporated v. State Board of Equalization.**

I. INTRODUCTION

In *Kennedy Wholesale, Inc. v. State Board of Equalization*,[1] a tobacco products distributor challenged the constitutionality of Proposition 99, a voter approved initiative which taxed tobacco products to fund programs associated with tobacco-related problems.[2] The California Supreme Court was presented with the opportunity to evaluate initiative tax increases such as Proposition 99, in light of article XIII A, sections 3 and 4 of the California Constitution[3] and the sin-

51. *Id.* at 286, 807 P.2d at 435, 279 Cal. Rptr. at 593.

52. *Id.* at 300, 807 P.2d at 445, 279 Cal. Rptr. at 603.

1. 53 Cal. 3d 245, 806 P.2d 1360, 279 Cal. Rptr. 325 (1991) (en banc). Justice Panelli wrote the opinion of the court with Chief Justice Lucas and Justices Broussard, Kennard, Arabian and Baxter concurring. Justice Mosk concurred in a separate opinion.

2. In *Kennedy*, the petitioner Kennedy Wholesale, Inc. was engaged in the business of tobacco distribution. In 1988, Kennedy paid $50,510.49 in increased taxes due to Proposition 99. *Id.* at 248, 806 P.2d 1362, 279 Cal. Rptr. at 327. Proposition 99 is codified under the California Revenue and Taxation Code § 30121 *et seq.* (West 1991). Proposition 99 was enacted on November 8, 1988 by initiative.

3. Section 3 provides:

gle-purpose rule of article II, section 8.[4]

In *Kennedy*, the petitioner protested the increased tobacco taxes it had paid under Proposition 99 and requested a refund from the State Board of Equalization ("the Board").[5] The Board rejected Kennedy's claim and Kennedy filed an action in superior court.[6] The Board's motion for judgment on the pleadings was granted. Displeased with the outcome, Kennedy appealed to the appellate court which affirmed the trial court's judgment.[7]

II. TREATMENT OF THE CASE

The California Supreme Court began its analysis by examining Kennedy's claim that Proposition 99 violated provisions of the Cali-

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> From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

CAL. CONST. art. XIII A, § 3. Section 4 provides:

> Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

CAL. CONST. art. XIII A, § 4.

4. Section 8 provides:

> (a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.
>
> (b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.
>
> (c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.
>
> (d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.

CAL. CONST. art. 2, § 8. *See also* Tinsley v. Superior Court of San Mateo, 150 Cal. App. 3d 90, 197 Cal. Rptr. 643 (1983) (single-subject rule discussed).

For a discussion of the initiative procedure, see 38 CAL. JUR. 3D *Initiative and Referendum* §§ 1-9 (1989). *See generally* 13 CAL. JUR. 3D *Constitutional Law* §§ 10-11 (1989); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 103 (1988) (single subject rule). For law review articles on the single-subject rule see Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988); Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983); Steven W. Ray, Comment, *California Initiative Process: The Demise of the Single-Subject Rule*, 14 PAC. L.J. 1095 (1983).

5. *Kennedy*, 53 Cal. 3d at 248, 806 P.2d at 1362, 279 Cal. Rptr. at 327.

6. *Id.*

7. *Kennedy Wholesale, Inc. v. Board of Equalization*, 227 Cal. App. 3d 228, 265 Cal. Rptr. 195 (1989).

fornia Constitution. The court emphasized that article XIII A, section 3, allows tax increases to be instituted by a two-thirds vote of the Legislative members and, as the petitioner argued, the plain meaning of the article was prone to an interpretation that only the Legislature may increase taxes.[8]

However, the court stated that such an interpretation would conflict with article IV, section 1, which provides for the people's powers of initiative and referendum.[9] The court acknowledged the petitioner's argument that the subsequent enactment of section 3 to section 4 created conflict and ambiguity because section 3 is silent as to the people's initiative and referendum powers contained in section 4.[10] The court rejected this argument and stated that although section 3 was enacted subsequent to section 4, section 3 did not supersede or otherwise repeal section 4. To find otherwise would be contrary to the voter's intent[11] and the underlying policy against repeals by implication.[12] The court concluded that the voters had not intended to limit their power of initiative and rejected both the petitioner's proposition that section 3 impliedly repealed section 4, as well as other arguments.[13]

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8. *Kennedy*, 53 Cal. 3d at 249, 806 P.2d at 1362, 279 Cal. Rptr. at 327.

9. The court referred to article IV, section 1 of the California Constitution which provides: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." The court stated that the petitioner's interpretation of section 3 would interfere with the people's initiative power. *Id.* at 249 n.1, 806 P.2d at 1362 n.1, 279 Cal. Rptr. at 327 n.1. *See also* Arvin Union School Dist. v. Ross, 176 Cal. App. 3d 189, 221 Cal. Rptr. 720 (1985) (the people reserve the right of initiative and referendum). *See generally* 13 CAL. JUR. 3D *Constitutional Law* §§ 110-113, 117, 122 (1989); 38 CAL. JUR. 3D *Initiative and Referendum* §§ 1-9 (1977); Greg M. Salvato, *New Limits on the California Initiative: An Analysis and Critique*, 19 LOY. L.A.L. REV. 1045 (1986).

10. *Kennedy*, 53 Cal. 3d at 249, 806 P.2d at 1362, 279 Cal. Rptr. at 327.

11. Noting that the power of initiative is "one of the most precious rights of our democratic process," the court reasoned that the voters had not intended to restrict their ability to increase taxes through statutory initiatives. *Id.* at 250, 608 P.2d at 1363, 279 Cal. Rptr. at 328 (quoting Associated Home Builders Inc. v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) (en banc)).

12. *Id.* at 249, 806 P.2d at 1363, 279 Cal. Rptr. at 327-28. The court quoted Board of Supervisors v. Longergan in stating "the law shuns repeals by implication." *Id.* (quoting Board of Supervisors v. Longergan, 27 Cal. 3d 855, 868, 616 P.2d 802, 810, 167 Cal. Rptr. 820, 828 (1980)). The court further reasoned that a prior measure would only be repealed by a subsequent measure if the latter "constitut[ed] a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first." *Id.* (quoting Penziner v. West Am. Fin. Co., 10 Cal. 2d 160, 176, 74 P.2d 252, 260 (1937)).

13. Kennedy also argued that the two-thirds voting passage requirement of article XIII A, section 3, should apply to the electorate as well as the legislative body. However, the court cited to the "majority" language of article II, section 10 in rejecting ar-

Asserting that Proposition 99 does not violate section 3, the court then examined Kennedy's argument that Proposition 99 violated the single-subject rule of article II, section 8 of the California Constitution because the initiative permits expenditures towards areas which are not directly tobacco-related.[14] The court reasoned that although tax revenues were used for programs such as wildlife habitat preserves and recreation area enhancement, the initiative did not fail the single-purpose test because initiatives "may have collateral effects."[15] The court also rejected further arguments that Proposition 99 "log-roll[ed] or exploit[ed] the initiative process" because it intentionally grouped together provisions which would not have had adequate

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guments that section 3's two-third voting requirement was imposed upon the electorate. *Id.*

Article II, section 10 of the California Constitution provides in pertinent part: (a) An initiative statute or referendum *approved by a majority of votes* thereon takes effect the day after the election unless the measure provides otherwise . . . ." CAL. CONST. art. II, § 10 (emphasis added).

In addition, Kennedy argued that article XIII A, section 4 "set[s] out the exclusive means for raising taxes," thereby effectively eliminating the voters' ability to raise taxes through a majority vote. *Kennedy*, 53 Cal. 3d at 252, 806 P.2d at 1364, 279 Cal. Rptr. at 329. The court disagreed, reaffirming that the voters have the "power to raise taxes by statutory initiative." *Id.*

Finally, it should be noted that a recurring argument utilized by Kennedy was that the adoption of Proposition 13 affected the voters' powers of initiative and referendum. This argument was also rejected by the court. *Id.* at 253, 608 P.2d at 1365, 279 Cal. Rptr. at 330.

14. For a discussion of the single-subject rule, see *supra* note 4.

The plaintiff argued that Proposition 99 violated the single-subject rule because not every expenditure of the measure is related to tobacco problems. Proposition 99 utilizes tax revenue from tobacco products to support a surtax fund which may be used for the following purposes:

> (1) Tobacco-related school and community health education programs.
> (2) Tobacco-related disease research.
> (3) Medical and hospital care and treatment of patients who cannot afford to pay for those services, and for whom payment will not be made through any private coverage or by any program funded in whole or in part by the federal government.
> (4) Programs for fire prevention; environmental conservation; protection, restoration, enhancement, and maintenance of fish, waterfowl, and wildlife habitat areas; and enhancement of state and local park and recreation purposes . . . .

CAL. REV. & TAX. CODE § 30122 (West 1991).

15. *Kennedy*, 53 Cal. 3d at 253, 806 P.2d at 1365, 279 Cal. Rptr. at 330 (citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 230, 583 P.2d 1281, 1290, 149 Cal. Rptr. 239, 248 (1978)). In Raven v. Deukmejian, 52 Cal. 3d 336, 346, 801 P.2d 1077, 1083, 276 Cal. Rptr. 326, 332 (1990), the court summarized "well settled" principles regarding the single-subject rule. The court reiterated that "an initiative measure does not violate the single-subject requirement 'if, despite varied collateral effects, *all of its parts are "reasonably germane"* to each other,' and to the general purpose or object of the initiative." *Id.* (citations omitted, emphasis added). For the same proposition, see also Brosnahan v. Brown, 32 Cal. 3d 236, 245, 651 P.2d 274, 279, 186 Cal. Rptr. 30, 35 (1982) (en banc); Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 841-42, 771 P.2d 1247, 1270, 258 Cal. Rptr. 161, 184 (1989) (en banc); Harbor v. Deukmejian, 43 Cal. 3d 1078, 1098-99, 742 P.2d 1290, 1302, 240 Cal. Rptr. 569, 581 (1987) (en banc).

voter support if presented separately.[16]

In his concurrence, Justice Mosk agreed with the majority's holding, but expressed concern over the potential use of voter initiatives to repeal various state income taxes. Justice Mosk questioned whether a ballot initiative to reduce taxes could gain adequate support and warned that if passed, such an initiative "would render state government virtually impotent."[17] However, his comment was not intended as a warning, but as a suggestion for future legislative inquiry.[18]

III. IMPACT

Kennedy affirms the initiative and referendum power of the people to enact tax increases via Proposition 99, an initiative declared constitutional by the California Supreme Court. The court examined the legislative and statutory history of article XIII A, sections 3 and 4 in its analysis. Allowing voters the right to enact tax increases by initiative is justified because the voters have preserved this right by their intent. This right permits the collection of revenue for necessary programs and future needed services. However, as foreshadowed by the dissent, an amendment to the constitution may be necessary to prevent a catastrophic situation resulting from an initiative designed to reduce or eliminate taxes by means of the initiative power.

AUGUSTINE GERARD YEE

16. *Kennedy*, 53 Cal. 3d at 255, 806 P.2d at 1366, 279 Cal. Rptr. at 331. The court reasoned that Proposition 99 did not violate the single-subject rule of article II, section 8 of the California Constitution, thus a claim of "logrolling" was meritless. *Id.* Article II, section 8 is designed to guard against the misuse of the initiative process.

See generally, Raven v. Deukmejian, 52 Cal. 3d 336, 348-49, 801 P.2d 1077, 1083, 276 Cal. Rptr. 326, 333 (1990) (the single-subject rule does not "contemplate[] some functional interrelationship or interdependence, or 'require[ ] a showing that each one of a measure's several provisions was capable of gaining voter approval independently of the other provisions.' " (citations omitted)).

17. *Kennedy*, 53 Cal. 3d at 256, 608 P.2d at 1367, 279 Cal. Rptr. at 332 (Mosk, J., concurring).

18. *Id.* (Mosk, J., concurring).

VII. EMPLOYMENT LAW

The state of California must, before treating an employee's unexcused absence as a resignation under the AWOL statute, give the employee notice of the facts supporting resignation and an opportunity to respond. The employee does not have a due process right to a post-severance evidentiary hearing: **Coleman v. Department of Personnel Administration.**

I. INTRODUCTION

In *Coleman v. Department of Personnel Administration*,[1] the California Supreme Court considered whether removing an employee by "automatic resignation" requires the same procedural protection for the employee as a dismissal for cause. Section 19996.2(a)[2] of the Government Code [hereinafter the AWOL statute] provides that a state employee is deemed to have resigned upon being absent without leave for five consecutive days. Under this statute, petitioner Coleman was found to have automatically resigned. He sought to overturn his dismissal by having the AWOL statute declared unconstitutional.[3] The trial court found that the due process clause of the United States Constitution was not violated when Coleman's state employer decided not to allow Coleman to return to work.[4]

The appellate court determined that the AWOL statute was constitutional as written and that it had been applied in a manner which

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1. 52 Cal. 3d 1102, 805 P.2d 300, 278 Cal. Rptr. 346 (1991). Justice Kennard wrote the majority opinion in which Justices Mosk, Panelli and Chief Justice Lucas concurred. Justice Eagleson, assigned in the place of Justice Baxter, concurred in the judgment only. Justices Broussard and Arabian each wrote separate concurring and dissenting opinions.

2. Government Code section 19996.2 provides:

> (a) Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked.
>
> A permanent or probationary employee may within 90 days of the effective date of such separation, file a written request with the department for reinstatement; provided, that if the appointing power has notified the employee of his or her automatic resignation, any request for reinstatement must be made in writing and filed within 15 days of the service of notice of separation. Service of notice shall be made as provided in Section 18575 and is complete on mailing. Reinstatement may be granted only if the employee makes a satisfactory explanation to the department as to the cause of his or her absence and his or her failure to obtain leave therefor, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position or, if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement.
>
> An employee so reinstated shall not be paid salary for the period of his or her absence or separation or for any portion thereof.

CAL. GOV'T CODE § 19996.2(a) (West 1991).

3. *Coleman*, 52 Cal. 3d at 1110, 805 P.2d at 303, 278 Cal. Rptr. at 349.

4. *Id.* at 1124, 805 P.2d at 313, 278 Cal. Rptr. at 359.

satisfied due process.[5] The supreme court affirmed the appellate decision, but added the requirement that the employer must give the employee written notice and an opportunity to respond before termination.[6] The court noted this additional requirement would place "no undue administrative or financial burden on the state."[7] The supreme court quickly disposed of Coleman's contention that he was entitled to a hearing after being removed from his job. The court indicated that a post-severance hearing would not serve any purpose given the pre-termination requirements.[8]

The California Supreme Court granted review in this case to resolve inconsistent appellate court decisions.[9] The court recognized that the due process clause of the United States Constitution controlled this decision.[10] The United States Supreme Court has held that a legislature can define a property right but once that right is created, it cannot be taken away without due process.[11] The California Supreme Court, therefore, had to determine whether the state was actually depriving the employee of a property right. Because the

5. Coleman v. Department of Personnel Admin., 223 Cal. App. 3d 1016, 1033, 242 Cal. Rptr. 839, 850 (1987).

6. *Coleman*, 52 Cal. 3d at 1122-23, 805 P.2d at 312, 278 Cal. Rptr. at 358.

7. *Id.* at 1122, 805 P.2d at 312, 278 Cal. Rptr. at 358.

8. *Id.* at 1122, 805 P.2d at 311, 278 Cal. Rptr. at 357.

9. *Id.* at 1109, 805 P.2d at 302-03, 278 Cal. Rptr. at 348-49. A number of cases seemed to favor upholding the AWOL statute: Willson v. State Personnel Bd., 113 Cal. App. 3d 312, 169 Cal. Rptr. 823 (1981) (resignation was automatic and not the result of state action); Armistead v. California State Personnel Bd., 124 Cal. App. 3d 61, 177 Cal. Rptr. 7 (1981) (automatic resignation did not violate due process); Bidwell v. State, 164 Cal. App. 3d 213, 210 Cal. Rptr. 381 (1985) (state employee loses disability benefits upon resigning); Goggin v. California State Personnel Bd., 156 Cal. App. 3d 96, 202 Cal. Rptr. 587 (1984) (automatic resignation did not violate substantive due process); Kirkpatrick v. Civil Service Comm'n, 77 Cal. App. 3d 940, 144 Cal. Rptr. 51 (1978) (probation officer not entitled to reinstatement); Phillips v. Civil Service Comm'n, 192 Cal. App. 3d 996, 237 Cal. Rptr. 751 (1987) (employee not reinstated or given back pay).

Other cases indicated the AWOL statute was deficient: Phillips v. California State Personnel Bd., 184 Cal. App. 3d 651, 229 Cal. Rptr. 502 (1986) (due process requires notice, opportunity to respond and post-termination hearing); Zike v. State Personnel Bd., 145 Cal. App. 3d 817, 193 Cal. Rptr. 766 (1983) (due process was lacking for an employee who disputed the facts); Curia v. Los Angeles County Civil Service Comm'n, 126 Cal. App. 3d 994, 179 Cal. Rptr. 476 (1981) (burden of proof on employer at evidentiary hearing); Allen v. Department of Personnel Admin., 193 Cal. App. 3d 355, 238 Cal. Rptr. 317 (1987) (automatic termination only available when employee admits he is AWOL or employer reasonably believes employee abandoned job); Harris v. State Personnel Bd., 170 Cal. App. 3d 639, 216 Cal. Rptr. 274 (1985) (automatic termination requires procedural due process).

10. *Coleman*, 52 Cal. 3d at 1108, 805 P.2d at 302, 278 Cal. Rptr. at 348.

11. *Id.* at 1114, 805 P.2d at 306, 278 Cal. Rptr. at 352 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)).

employee's resignation was not voluntary, the court determined there was state action.[12] Once that was determined, it was a simple matter to discern the procedure the United States Constitution required.[13]

II. BACKGROUND

Coleman was a civil servant with a statutory property right[14] in his continued employment.[15] As a "permanent employee" of the state, Coleman could not be deprived of his property right without due process.[16] " 'While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' "[17]

Deprivation of a property interest requires procedural due process only if the state is responsible for the loss.[18] The initial inquiry is whether the state has taken any action at all where it accepts an "automatic resignation."[19] After painstaking analysis, the majority grudgingly concluded that there was, indeed, state action.[20] However, Justice Broussard pointed out in his dissent that the state cannot forego due process by simply changing the name of the procedure it uses to dismiss an employee.[21]

Ultimately, the question is how much due process is necessary. The court weighed the employee's interest, the risk of a wrongful termination, the value of procedural safeguards, and the govern-

12. *Id.* at 1117-18, 805 P.2d at 308-09, 278 Cal. Rptr. at 354-55.

13. *Id.* at 1118, 805 P.2d at 309, 278 Cal. Rptr. at 355.

14. *Coleman*, 52 Cal. 3d at 1112, 805 P.2d at 304-05, 278 Cal. Rptr. at 350-51. *See also* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Agency and Employment* §§ 192-93 (9th ed. 1987); 52 CAL. JUR. 3D *Public Officers* §§ 123, 130 (Supp. 1991); 16D C. J. S. §§ 1239, 1294 (1985 & Supp. 1991).

15. *Coleman*, 52 Cal. 3d at 1109, 1112, 805 P.2d at 302, 305, 278 Cal. Rptr. at 348, 351, (citing Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975) (a "permanent employee" has a property right in his employment which cannot be removed without due process)).

16. *Id.* at 1112, 805 P.2d at 304-05, 278 Cal. Rptr. at 350-51 (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (teacher had no property right, as defined by state law, in a nontenured position)). *See also* Paul v. Davis, 424 U.S. 693, 709 (1976) (respondent was not deprived of a property interest in his reputation when police distributed a flyer showing him to be a shoplifter).

17. *Coleman*, 52 Cal. 3d at 1114, 805 P.2d at 306, 278 Cal. Rptr. at 352 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (alteration in original)).

18. *Coleman*, 52 Cal. 3d at 1112, 805 P.2d at 305, 278 Cal. Rptr. at 351 (citations omitted). The court noted that "constructive resignation under the AWOL statute implicates due process only if, in invoking the statute, the state acts to effect a property deprivation." *Id.* (citations omitted).

19. *Id.*

20. *Id.* at 1118, 805 P.2d at 309, 278 Cal. Rptr. at 355. The court's finding was based, in part, on the fact that the state could not invoke the AWOL statute without making "factual determinations." *Id.*

21. *Id.* at 1129, 805 P.2d at 316, 278 Cal. Rptr. at 362 (Broussard, J., dissenting).

ment's interests.[22] *Cleveland Board of Education v. Loudermill*[23] serves as a useful guide in determining the level of due process required. The United States Supreme Court made it clear that pre-termination notice and a hearing are required.[24] However, the Court also required a post-termination hearing for Loudermill as set out in applicable Ohio law.[25] The dilemma for the California Supreme Court was whether the post-termination hearing was required because it was essential or only because it was part of the state law defining the property right. Eventually the court compromised.[26] It rejected the extremes of not requiring any notice[27] or mandating a post-termination hearing.[28] An employee must be given notice and an opportunity to respond.[29] The court established a reasonable guideline.[30]

III. STATEMENT OF THE CASE

The California Department of General Services employed appellant Stanley Coleman, Jr. as a full-time telecommunications assistant for about eighteen months. On April 18, 1984, after an argument with his supervisor, Coleman became sick and fainted. After seeking medical treatment, Coleman received disability benefits until June 15, 1984. On July 3, 1984, Coleman spoke with his supervisor by telephone. They discussed whether Coleman could continue to receive disability benefits. Coleman indicated he felt he was still entitled to the benefits. On July 19, 1984, Coleman's supervisor tried to contact him by telephone but was unable to reach him. On July 19, Coleman

22. *Id.* at 1119, 805 P.2d at 309, 278 Cal. Rptr. at 355 (quoting Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)).

23. 470 U.S. 532, 541 (1985).

24. *Id.* at 541-42.

25. *Id.* at 546-47.

26. *See* Gerald F. Uelmen, *The Disappearing Dissenters*, CALIFORNIA LAWYER, June 1991, at 34 (discussing a trend in the California Supreme Court to arrive at consensus rather than leave the law in flux).

27. Coleman v. Department of Personnel Admin., 53 Cal. 3d 1102, 1136, 805 P.2d 300, 321, 278 Cal. Rptr. 346, 367 (Arabian, J., dissenting).

28. *Id.* at 1126, 805 P.2d at 314, 278 Cal. Rptr. at 360 (Broussard, J., dissenting).

29. *Id.* at 1122, 805 P.2d at 312, 278 Cal. Rptr. at 357.

30. *See* Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 60. As for the private sector, West states that "state legislatures could keep the procedure and administrative costs to a minimum by providing for one hearing rather than two. The most meaningful time for such a hearing would be prior to the effective date of the termination. This proposed procedure would require an employer to give written notice to an employee of the proposed termination and the reasons supporting it." *Id.*

was notified in writing that his failure to report to work was an "automatic resignation" under California Government Code section 19996.2(a).[31]

Pursuant to section 19996.2(a), Coleman attempted to return to his job. At an administrative hearing, it was determined that Coleman did not have an acceptable reason for missing work and that he was not "ready, able, and willing"[32] to return to work. Coleman sought a writ of administrative mandamus to declare the AWOL statute unconstitutional for lack of due process. He also requested a reversal of the hearing officer's finding in order to return to work. The superior court ruled against Coleman.[33]

The court of appeal affirmed the superior court, stating that the statute itself provided adequate notice to employees.[34] The appellate court held that since the state had complied with the statute, Coleman had received due process.[35] The supreme court superseded this holding with an analysis that identified what the constitution, not merely the legislature, required.

IV. TREATMENT

A. The Majority Opinion

The state must give an employee written notice of the decision to invoke the AWOL statute as well as an opportunity to dispute the facts, all of which must be contained in the notice.[36] In deciding what procedures must be followed, the court examined three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[37]

To begin with, the supreme court compared the private interest of an employee automatically resigning with an employee being removed for cause and concluded that the employee in both cases lost the property right in a job.[38] The court felt, however, that it was not as harmful to the employee to resign automatically as it was to be re-

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31. *See supra* note 2 (text of section 19996.2).

32. *Coleman*, 52 Cal. 3d at 1110, 805 P.2d at 303, 278 Cal. Rptr. at 349.

33. *Id.*

34. Coleman v. Department of Personnel Admin., 223 Cal. App. 3d 1016, 1029, 242 Cal. Rptr. 839, 849 (1987).

35. *Id.* at 1030, 242 Cal. Rptr. at 848. "[T]he employee has no constitutional entitlement to any more process than that which the statute provides." *Id.*

36. *Coleman*, 52 Cal. 3d at 1122-23, 805 P.2d at 312, 278 Cal. Rptr. at 358.

37. *Id.* at 1119, 805 P.2d at 309, 278 Cal. Rptr. at 355 (quoting Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)).

38. *Id.* at 1119, 805 P.2d at 310, 278 Cal. Rptr. at 355-56.

moved for cause[39] because "a resignation . . . carries no stigma."[40] Also, an employee who has "automatically resigned " can return to work if she convinces a hearing officer that she is worthy.[41]

Second, the court felt that there was little risk of employees being erroneously deprived of their jobs.[42] The number of days missed could be determined simply by looking at the records.[43]

The third factor considered was the government's interest in promptly removing truant employees.[44] The court concluded that a few extra days for notice and allowing an employee to respond "places no undue administrative or financial burden on the state."[45]

The court went to great lengths to distinguish the present case from *Loudermill*.[46] While the court conceded that the state had not given Coleman proper procedural protection,[47] it also indicated that notice makes very little difference. The court found Coleman was not entitled to reinstatement even though it would never be known if he could have convinced an impartial panel that he should retain his

39. *Id.* at 1120-21, 805 P.2d at 310-11, 278 Cal. Rptr. at 356-57.

40. *Id.* at 1120, 805 P.2d at 310, 278 Cal. Rptr. at 356.

41. *Id.* at 1120-21, 805 P.2d at 310, 278 Cal. Rptr. at 356-57 (citing CAL. GOV'T CODE § 19996.2(a)). This provision of the AWOL statute was of little help to Coleman.

42. *Coleman*, 52 Cal. 3d at 1121, 805 P.2d at 311, 278 Cal. Rptr. at 357.

43. *Id.*

44. *Id.* at 1122, 805 P.2d at 311-12, 278 Cal. Rptr. at 357-58.

45. *Id.* at 1122, 805 P.2d at 312, 278 Cal. Rptr. at 358.

46. "Unlike the Ohio statutory scheme considered in *Loudermill*, the AWOL statute at issue here does not prescribe any procedures that the state must follow before it can terminate an employee. The AWOL statute merely defines when an unauthorized absence constitutes an 'automatic resignation.' " *Coleman*, 52 Cal. 3d at 1114, 805 P.2d at 306, 278 Cal. Rptr. at 352. The AWOL statute does not prescribe procedures as does the Ohio statute because it is more severe than the Ohio statute. *Id.* at 1114, 805 P.2d at 306, 278 Cal. Rptr. at 352.

In *Loudermill*, the United States Supreme Court described what was essentially the California Supreme Court's position in *Coleman*. "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540 (1985) (quoting Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974)). In the instant case, the California Supreme Court justified its "bitter with the sweet" position, stating that "[t]he statutory terms that define a particular right to employment determine its dimensions and scope." *Coleman*, 52 Cal. 3d at 1114, 805 P.2d at 306, 278 Cal. Rptr. at 352 (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). "This [bitter with the sweet] view garnered three votes in *Arnett*, but was specifically rejected by the other six justices." *Loudermill*, 470 U.S. at 540 (citing Arnett v. Kennedy, 416 U.S. at 166-67 (Powell, J., joined by Blackmun, J.)); *id.* at 177-78 (White, J.); *id.* at 211 (Marshall, J., joined by Douglas and Brennan, JJ.). "More recently, however, the Court has clearly rejected it." *Id.* at 541 (citing Vitek v. Jones, 445 U.S. 480, 490-91 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982)).

47. *Coleman*, 52 Cal. 3d at 1124, 805 P.2d at 313, 278 Cal. Rptr. at 359.

job.[48]

Coleman contended he did not receive the same protection as would an employee dismissed for cause. The court concluded, however, that Coleman was not similarly situated.[49] The court also declined to decide whether the reinstatement denial should be reviewed under the "independent judgment test."[50] Because the trial court exercised "independent judgment," the fact that the reinstatement board's power arose from statutory rather than constitutional sources was irrelevant.[51]

B. Justice Broussard's Concurring and Dissenting Opinion

Justice Broussard agreed that notice and an opportunity to respond are necessary procedural protections that the state must apply to the AWOL statute.[52] He would also require a "post-termination hearing at which the state employer bears the burden" of showing the AWOL statute was properly invoked.[53] Justice Broussard believed *Cleveland Board of Education v. Loudermill*[54] and *Skelly v. State Personnel Board*,[55] which both required post-termination hearings, controlled this case.[56]

What the state calls its dismissal procedures should make little difference. "It is the state's act in terminating the employment, not the suspected conduct of the employee, that constitutes the state action that brings the procedural due process protections into play."[57] Justice Broussard attacked the majority's painstaking efforts to analogize this case to *Texaco* and *Locke*, pointing out the difference between procedural and substantive due process.[58] The statute itself can serve as substantive notice of its existence but mere knowledge of the statute is insufficient for procedural due process.[59]

Broussard dispensed with the majority's three step test in his own extensive analysis of the necessary procedural protection.[60] Instead,

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48. *Id.* at 1124, 805 P.2d at 313, 278 Cal. Rptr. at 360.

49. *Id.* at 1125, 805 P.2d at 314, 278 Cal. Rptr. at 360. Justice Broussard pointed out that the more serious offender has more opportunity to be heard. *Id.* at 1136, 805 P.2d at 321, 278 Cal. Rptr. at 367 (Broussard, J., dissenting).

50. *Id.* at 1126, 805 P.2d at 314, 278 Cal. Rptr. at 360.

51. *Id.*

52. *Id.* at 1126, 805 P.2d at 314, 278 Cal. Rptr. at 360 (Broussard, J., concurring).

53. *Id.* at 1136, 805 P.2d at 321, 278 Cal. Rptr. at 367 (Broussard, J., dissenting).

54. 470 U.S. 532 (1985).

55. 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975).

56. *Coleman*, 52 Cal. 3d at 1127, 805 P.2d at 314-15, 278 Cal. Rptr. at 360-61 (Broussard, J., dissenting).

57. *Id.* at 1128, 805 P.2d at 316, 278 Cal. Rptr. at 362 (Broussard, J., dissenting).

58. *Id.* at 1129-30, 805 P.2d at 316-17, 278 Cal. Rptr. at 362-63 (Broussard, J., dissenting). *See* Texaco, Inc. v. Short, 452 U.S. 516 (1982); United States v. Locke, 471 U.S. 84 (1985).

59. *Id.* at 1130, 805 P.2d at 317, 278 Cal. Rptr. at 363 (Broussard, J., dissenting).

60. *Id.* at 1131-32, 805 P.2d at 318, 278 Cal. Rptr. at 364 (Broussard, J., dissenting).

he focused on the state's depriving a citizen of his property right.[61] In this respect, his analysis may be more realistic than the majority's in determining the effect an "automatic resignation" has on the employee.[62] Broussard's analysis of employment as a property right raises the question whether the government's interest should even be considered.

C. Justice Arabian's Concurring and Dissenting Opinion

Justice Arabian's opinion, on the other hand, considers more practical issues, such as "fiscal constraints."[63] His opinion would effectively overrule *Skelly v. State Personnel Board*[64] by making an employee's property right in employment secondary to the interests of the government employer.

Justice Arabian's overriding concern was the state's ability to define property.[65] "Authority to define a property interest according to state law necessarily contemplates the ability to restrict or qualify it as the Legislature reasonably deems appropriate to its purpose."[66] Arabian viewed Coleman's "automatic resignation" as resulting solely from his unilateral conduct.[67] In any event, Arabian asserted, due process does not require "error-free determinations."[68]

V. IMPACT

The requirements of notice and an opportunity to respond increase procedural protection for employees who "automatically resign."[69] The court's decision should also insure consistent decisions in the lower courts.[70] The portion of the decision that may draw closer scrutiny may be the absence of a "post-severance evidentiary hearing"[71] requirement since the omission of a hearing following dismis-

61. *Id.* at 1133, 805 P.2d at 319, 278 Cal. Rptr. at 365 (Broussard, J., dissenting).
62. *Id.* at 1135, 805 P.2d at 321, 278 Cal. Rptr. at 367 (Broussard, J., dissenting).
63. *Id.* (Arabian, J., dissenting).
64. 15 Cal. 3d 194, 219, 539 P.2d 774, 788-89, 124 Cal. Rptr. 14, 28-29 (1975) (before removal, an employee shall receive notice, be informed why removal is sought, be told of the charges and facts, and be allowed to respond to the party seeking removal).
65. *Coleman*, 52 Cal. 3d at 1138, 805 P.2d at 322, 278 Cal. Rptr. at 368 (Arabian, J., dissenting) (citing Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 538 (1985)).
66. *Id.* (citations omitted).
67. *Id.* at 1141, 805 P.2d at 325, 278 Cal. Rptr. at 370-71 (Arabian, J., dissenting).
68. *Id.* at 1141, 805 P.2d at 324, 278 Cal. Rptr. at 370 (Arabian, J., dissenting) (quoting Mackey v. Montrym, 443 U.S. 1, 13 (1979)).
69. *See id.* at 1119, 805 P.2d at 309, 278 Cal. Rptr. at 355.
70. *See id.* at 1109, 805 P.2d at 302-03, 278 Cal. Rptr. at 348-49.
71. *See id.* at 1119, 805 P.2d at 309, 278 Cal. Rptr. at 355.

sal may not be consistent with *Loudermill*.[72]

California courts must now use the Supreme Court's three prong test[73] which differs from the pure due process approach Broussard advocates,[74] as well as the efficiency of labor theory Arabian advanced.[75] The court's shift[76] to less stringent requirements expands the state's ability to define employment property rights.[77]

VI. CONCLUSION

It is the employee's responsibility to obtain supervisor authorization to be absent from work for five consecutive days, thus it is appropriate that the burden in "automatic resignations" should fall on the employee. This is unlike other employee dismissals where the employer has the burden of proof. The supreme court proceeded on the belief that Coleman's absence was voluntary, and therefore it reached the appropriate result.[78]

BRANDON D. MIZNER

VIII. HEALTH CARE LAW

The State of California may penalize a health care entity for violating the provisions of Health and Safety Code section 1424. Government Code section 818 was not intended to prevent statutory civil penalties from being imposed against government entities but was intended to apply primarily to torts: **Kizer v. County of San Mateo.**

I. INTRODUCTION

In *Kizer v. County of San Mateo*,[1] the California Supreme Court unanimously heeded the call of the court of appeal[2] and found that statutory penalties could be imposed on a government operated health care facility.[3] The court considered whether statutory penal-

72. *Id.* at 1128, 805 P.2d at 315, 278 Cal. Rptr. at 361 (Broussard, J., dissenting).

73. *Id.* at 1119, 805 P.2d at 309, 278 Cal. Rptr. at 355 (citing Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

74. *Id.* at 1127, 805 P.2d at 315, 278 Cal. Rptr. at 361 (Broussard, J., dissenting).

75. *Id.* at 1137, 805 P.2d at 322, 278 Cal. Rptr. at 368 (Arabian, J., dissenting).

76. *Cf.* Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975) (the State Personnel Board was ordered to reconsider a doctor's appeal when he was terminated and the statute did not provide for notice in advance of the effective date).

77. *Coleman*, 52 Cal. 3d at 1114, 805 P.2d at 306, 278 Cal. Rptr. at 352.

78. *Id.* at 1111 n.4, 805 P.2d at 304 n.4, 278 Cal. Rptr. at 350 n.4.

1. 53 Cal. 3d 139, 806 P.2d 1353, 279 Cal. Rptr. 318 (1991).

2. Kizer v. County of San Mateo, 227 Cal. App. 3d 1164, 1171, 266 Cal. Rptr. 704, 708 (1990) (urging the supreme court or the legislature to change the law).

3. Kizer v County of San Mateo, 53 Cal. 3d at 141, 806 P.2d at 1354, 279 Cal. Rptr. at 319. The County of San Mateo operates Crystal Springs Rehabilitation Center, a

ties imposed to enforce safety regulations were punitive, and thus, unenforceable under the Tort Claims Act.[4] The supreme court decided that the Tort Claims Act does not shield government run health facilities from state imposed civil penalties.[5]

The Tort Claims Act[6] bars recovery of punitive damages from government organizations.[7] The Long-Term Care, Health, Safety and Security Act of 1973[8] provides for supervising and penalizing health care facilities.[9] The penalties provided for in enforcing safety standards could not be imposed if they were punitive as defined in the Tort Claims Act.[10] In *People ex rel. Younger v. Superior Court*,[11] the supreme court upheld civil penalties against the publicly owned Port of Oakland;[12] however, the civil penalties were held to be compensatory rather than punitive.[13] Applying the *Younger* analysis, the appellate court found that the civil penalties were punitive since they did not serve to compensate the patients who might be injured by the unsafe conditions.[14] The supreme court disagreed, finding that the penalties were not punitive.[15]

In *Kizer*,[16] Crystal Springs Rehabilitation Center, run by the County of San Mateo,[17] was fined $27,750 by the State Department of Health Services.[18] The Attorney General brought suit to enforce the

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health care entity. The State Department of Health Services cited Crystal Springs for violations that ended in the death of one patient and put two others in "imminent danger or substantial probability of harm." *Id.* at 141-142, 143-144, 806 P.2d at 1354, 1355 279 Cal. Rptr. at 319-320. Justice Panelli wrote the decision in which Justices Mosk, Broussard, Kennard, Arabian, Baxter and Chief Justice Lucas concurred.

4. CAL. GOV'T CODE §§ 810-997.6 (West 1980 & Supp. 1991).

5. *Kizer*, 53 Cal. 3d at 144, 806 P.2d at 1356, 279 Cal. Rptr. at 320.

6. CAL. GOV'T CODE §§ 810-997.6 (West 1980 & Supp. 1991).

7. "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant." *Kizer*, 53 Cal. 3d at 141 n.1, 806 P.2d at 1354 n.1, 279 Cal. Rptr. at 319 n.1 (citing CAL. GOV'T CODE § 818) (West 1980 & Supp. 1991)).

8. CAL. HEALTH & SAFETY CODE § 1417-1439.8 (West 1990 & Supp. 1991).

9. *See Id.*

10. *See* CAL. GOV'T CODE § 810-997.6 (West 1980 & Supp. 1991).

11. 19 Cal. 3d 30, 544 P.2d 1322, 127 Cal Rptr. 122 (1976)

12. *Id.* at 37-39, 544 P.2d at 1326-27, 127 Cal. Rptr. at 126-27 (1976).

13. *Id.*

14. *Kizer*, 227 Cal. App. 3d at 1171, 266 Cal. Rptr. at 708.

15. *Kizer*, 53 Cal. 3d at 146, 806 P.2d 1357, 279 Cal. Rptr. at 322.

16. 53 Cal. 3d 139, 806 P.2d 1353, 279 Cal. Rptr. 318 (1991).

17. "12 counties statewide provide a total of 2,200 nursing home beds." Stansky, *Death Penalty Stands Despite Mistyped Instruction*, THE RECORDER, Mar. 29, 1991, at 3.

18. Crystal Springs was cited for one class AA violation and two class A violations.

penalties[19] and the County demurred. The trial court sustained the demurrer, and the appellate court affirmed.[20] The appellate court labored under the presumption that "civil penalties are punitive in nature. . . ."[21] The court believed civil penalties were not punitive only when they were also compensatory.[22] The damages paid by Crystal Springs were to go to the State Department of Health Services to be used to pay enforcement costs.[23] In *Younger*, the supreme court found that damage caused by an oil spill resulted in actual damage to the people of the state, and civil penalties served to compensate them by going into the cleanup fund.[24] Similarly, in *Kizer*, the state argued that the dangerous conditions at the health care facility also damaged the people of the state.[25] However, the court of appeal refused to accept this reasoning, instead stating that "a principled analysis which detects a compensatory function in those penalties is impossible."[26]

II. TREATMENT

Although the supreme court responded to the appellate court's urging, the high court stated that the appellate court was not as bound by precedent as it believed.[27] The supreme court did not try to say that the damages in the present case were compensatory,[28] thereby avoiding the questionable "proposition that the public is entitled to compensatory damages for some intangible or abstract harm

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> Among the criteria that define a class AA violation, the most serious class is a determination by the Department that the violation was 'a direct proximate cause of death of a patient.' The penalty for a class AA violation is not less than $5,000 and not more than $25,000. Class A violations are those that present either an imminent danger or a substantial probability that death or serious harm to patients would result. The penalty for a class A violation is not less than $1,000 and not more than $10,000 (citations omitted).

Kizer, 53 Cal. 3d at 142, 806 P.2d at 1354, 279 Cal. Rptr. at 319 (citing CAL. HEALTH & SAFETY CODE § 1424(b) - (c) (West 1990 & Supp. 1991)).

19. The County contested the imposition of penalties by the State Department of Health Services. *Kizer*, 53 Cal. 3d at 144, 806 P.2d at 1355, 279 Cal. Rptr. at 320. "When a licensee contests a class AA or a class A citation after the administrative review, the Attorney General must 'promptly take all appropriate action to enforce the citation and recover the penalty. . . .' " *Id.* at 142, 806 P.2d at 1354, 279 Cal. Rptr. at 319 (citing CAL. HEALTH & SAFETY CODE § 1428(a) - (b) (West 1990 & Supp. 1991)).

20. *Kizer*, 227 Cal. App. 3d at 1164, 266 Cal. Rptr. at 704.

21. *Id.* at 1170, 266 Cal. Rptr. at 707.

22. *Id.*

23. *Kizer* 53 Cal. 3d at 142, 806 P.2d at 1354, 279 Cal. Rptr. at 319.

24. People ex rel. Younger v. Superior Court, 16 Cal. 3d 30, 37-39, 544 P.2d 1322, 1326-27, 127 Cal. Rptr. 122, 126-27 (1976).

25. *Kizer*, 227 Cal. App. 3d at 1170, 266 Cal. Rptr. at 708.

26. *Id.* at 1171, 266 Cal. Rptr. at 708.

27. *Kizer*, 53 Cal. 3d at 144, 806 P.2d at 1355-56, 279 Cal. Rptr. at 320. An incorrect reading of *Younger* led the court of appeal to the faulty conclusion that the law would not support the penalties the state sought. *See Kizer*, 227 Cal. App. 3d at 1170-71, 266 Cal. Rptr. at 707-08.

28. *Kizer*, 53 Cal. 3d at 145, 806 P.2d at 1356, 279 Cal. Rptr. at 321.

which may result when its laws are violated."[29] Instead, the court looked at the legislature's intent and determined that the Tort Claims Act applies to torts and not to state regulation of enforcement methods.[30]

The civil penalties here were not intended to be punitive in the same sense as punitive damages in a tort cause of action.[31] The supreme court looked at basic tort law which requires an actual injury before punitive damages can be awarded.[32] However, civil penalties can be imposed even if no actual injury occurred.[33] "While the civil penalties may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives."[34] Public policy favors an enforcement system that allows the state to maintain minimum standards by fining health care facilities.[35]

III. CONCLUSION

The California Supreme Court used a common sense approach in deciding *Kizer*.[36] "Clearly, the emphasis of the Tort Claims Act is on torts."[37] Moreover, penalties enforcing minimum standards may be the only way to catch the attention of some institutions.[38] Since the court limited its discussion of *Younger*, it is not clear how far punitive damages may be subsumed in compensatory damages. The court showed little concern for the taxpayer who will ultimately pay the

29. *Kizer*, 227 Cal. App. 3d at 1171, 266 Cal. Rptr. at 708.

30. *Kizer*, 53 Cal. 3d at 146, 806 P.2d at 1357, 279 Cal. Rptr. at 322.

31. *Id.*

32. *Id.* at 146-47, 806 P.2d at 1357-58, 279 Cal. Rptr. at 322-23. *See generally* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 2.7 (1980); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §§ 138, 241-62 (9th ed. 1988 & Supp. 1990).

33. *Kizer*, 53 Cal. 3d at 147, 806 P.2d at 1358, 279 Cal. Rptr. at 323.

34. *Id.* at 147-48, 806 P.2d at 1358, 279 Cal. Rptr. at 323 (citing Hale v. Morgan, 22 Cal. 3d 388, 398, 584 P.2d 512, 518, 149 Cal. Rptr. 375, 381 (1978)).

35. *Kizer*, 53 Cal. 3d at 148, 806 P.2d at 1358, 279 Cal. Rptr. at 323.

36. In a similar decision, the California Attorney General found that Government Code section 818 did not prevent publicly operated health care entities from paying penalties under Health and Safety Code section 442.3. The Attorney General (John K. Van de Kamp) decided "the penalty provisions of section 442.3 have an additional, nonpunitive purpose and do not come within the grant of immunity found in Government Code section 818; thus, publicly owned health facilities are subject to such penalty provisions." 68 Op. Att'y Gen. 55 (Mar. 15, 1985).

37. *Kizer*, 53 Cal. 3d at 145 n.4, 806 P.2d at 1356 n.4, 279 Cal. Rptr. at 321 n.4 (emphasis omitted).

38. *Id.* at 150, 806 P.2d at 1359-60, 279 Cal. Rptr. at 324-25.

civil penalty.[39]

BRANDON D. MIZNER

IX. INSURANCE LAW

A. *Prejudgment interest under Civil Code section 3291 is unavailable to an insured who prevails in an action against his insurer for breach of the implied covenant of good faith and fair dealing because such action is not "brought to recover damages for personal injury": Gourley v. State Farm Mutual Automobile Insurance Company.*

I. INTRODUCTION

On April 6, 1982, the California legislature enacted section 3291 of the Civil Code[1] to promote pre-trial settlements of personal injury litigation.[2] Section 3291 permits a plaintiff to recover prejudgment interest on the damages awarded in "any [tort] action brought to recover damages for personal injury"[3] if (1) the plaintiff makes a pre-trial settlement offer pursuant to section 998 of the Code of Civil Procedure,[4] (2) the defendant fails to accept the offer within the statutory time limit, and (3) the plaintiff procures a judgment in excess of the section 998 offer to compromise.[5] The California Supreme

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39. "The high court's decision may wind up depriving counties of services that could be bought with those dollars. . . ." Stansky, *supra* note 17, at 3.

1. CAL. CIV. CODE § 3291 (West Supp. 1991) (added by 1982 Cal. Stat. 493).

2. Gourley v. State Farm Mut. Auto. Ins. Co., 53 Cal. 3d 121, 126, 806 P.2d 1342, 1345, 279 Cal. Rptr. 307, 310 (citing Morin v. ABA Recovery Serv., Inc., 195 Cal. App. 3d 200, 206-07 & n.1, 240 Cal. Rptr. 509, 512 & n.1 (1987)); Woodard v. Southern Cal. Permanente Medical Group, 171 Cal. App. 3d 656, 666, 217 Cal. Rptr. 514, 521 (1985); Op. Cal. Legis. Counsel No. 17984 (Nov. 2, 1982) (judgment and prejudgment interest)), *modified*, 53 Cal. 3d 1040a (1991). *See also* Gutierrez v. State Ranch Serv., 150 Cal. App. 3d 83, 88, 198 Cal. Rptr. 16, 20 (1983).

3. CAL. CIV. CODE § 3291 (West Supp. 1991).

4. CAL. CIV. PROC. CODE § 998 (West Supp. 1991). Section 998, subdivision (b), provides: "Not less than 10 days prior to commencement of trial, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time."

5. CAL. CIV. CODE § 3291. The relevant language of section 3291 states:

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

Id. *See generally* Christopher J. Day, *Prejudgment Interest in Personal Injury Litigation; California's Long-Awaited Remedy in Civil Code Section 3291*, 11 WEST. ST. U. L.

Court in *Gourley v. State Farm Mutual Automobile Insurance Co.*[6] limited the application of section 3291 to causes of action which by their nature seek recovery for personal injury.[7] Declaring that an action against an insurer for breach of the implied covenant of good faith and fair dealing primarily pursues recovery for economic loss,[8] the court held that an insurance bad faith action is not a personal injury action within the scope of section 3291.[9]

II. TREATMENT

A. Majority Opinion

After examining the nature of the insurance bad faith action and its allowance of damages for emotional distress, the court determined that an insurance company found liable in a bad faith action cannot be required to pay prejudgment interest under section 3291.[10] As a

REV. 85 (1983) (discussing legislative history behind section 3291); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §§ 1399-1400 (9th ed. & Supp. 1991) (overview of section 3291); William L. Winslow, *Prejudgment Interest: A Settling Effect*, 7 L.A. LAW. March 1984, at 42 (discussing impact of section 3291 on pre-trial settlements).

6. 53 Cal. 3d 121, 806 P.2d 1342, 279 Cal. Rptr. 307 (1991). After being struck by an uninsured drunk driver, Gourley filed a claim under her automobile policy with State Farm, seeking to invoke her uninsured motorist coverage. The parties submitted a series of extremely diverse settlement offers to each other. State Farm's low offers stemmed from the belief that Gourley's injuries would have been substantially reduced if she had been wearing a seat belt. Nevertheless, Gourley ultimately prevailed at the arbitration proceedings. Gourley then sued State Farm for breach of the implied covenant of good faith and fair dealing, claiming that she suffered mental and emotional distress as a result of State Farm's inadequate provision of benefits under the policy. Gourley also filed a settlement offer of $249,099 under section 998 of the Code of Civil Procedure, which State Farm rejected. The jury returned a verdict in Gourley's favor, awarding $15,765 in actual damages and $1,576,500 in punitive damages. The trial court subsequently awarded an additional $300,000 in prejudgment interest under Civil Code section 3291. *Id.* at 124-25, 806 P.2d at 343-44, 279 Cal. Rptr. at 308-09. The court of appeal affirmed, finding that an insurance bad faith action is properly classified as a personal injury action within section 3291. Gourley v. State Farm Mut. Auto. Ins. Co., 227 Cal. App. 3d 1099, 1113-14, 265 Cal. Rptr. 634, 643 (1990), *rev'd*, 53 Cal. 3d 121, 806 P.2d 1342, 279 Cal. Rptr. 307 (1991). The California Supreme Court granted review in Gourley v. State Farm Mut. Auto. Ins. Co., 789 P.2d 341, 268 Cal. Rptr. 541 (1990). Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Kennard, Arabian, and Baxter concurred. Justice Broussard dissented separately, joined by Justice Mosk.

7. *Gourley*, 53 Cal. 3d at 123, 129-30, 806 P.2d at 1343, 1347, 279 Cal. Rptr. at 308, 312.

8. *Id.* at 123, 129, 806 P.2d at 1343, 1347, 279 Cal. Rptr. at 308, 312.

9. *Id.* at 123, 130, 806 P.2d at 1343, 1348, 279 Cal. Rptr. at 308, 313. *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 1400 (Supp. 1991) (summary of the California Supreme Court's ruling in *Gourley*).

10. *Gourley*, 53 Cal. 3d at 126-29, 806 P.2d at 1345-47, 279 Cal. Rptr. at 310-12. *See infra* notes 13-17 and accompanying text.

preliminary matter, the court noted that insurance bad faith actions arise out of the recognition that an insurer owes a duty of good faith and fair dealing to the insured.[11] This duty requires an insurer to accept reasonable settlement offers by a third party who has a claim against the insured and to pay benefits to the insured for losses covered by the policy.[12]

The court has historically allowed recovery for mental and emotional distress caused by an insurer's breach of the implied covenant.[13] However, the court emphasized that the allowance for these types of personal injury damages does not cause the action to be classified as a personal injury suit.[14] The court viewed the emotional distress damages as *incidentally flowing* from the insurer's breach.[15] As such, an insurance bad faith action does not hinge on the emo-

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11. *Gourley*, 53 Cal. 3d at 127, 806 P.2d at 1345-46, 279 Cal. Rptr. at 310-11. *See generally* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* § 749 (9th ed. 1987 & Supp. 1991); 39 CAL. JUR. 3D *Insurance Contracts and Coverage* § 410 (1977 & Supp. 1991).

12. *Gourley*, 53 Cal. 3d at 127, 806 P.2d at 1345, 279 Cal. Rptr. at 310-11. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 656 (9th ed. 1988 & Supp. 1991); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 1143 (9th ed. 1988); 39 CAL. JUR. 3D *Insurance Contracts and Coverage* §§ 411-412 (1977 & Supp. 1991); Annotation, *Duty of Liability Insurer to Settle or Compromise*, 40 A.L.R. 2D 168 (1955 & later case serv. 1980).

The cause of action resulting from the first type of situation is commonly referred to as a "third party" case and the cause of action deriving from the second is referred to as a "first party" case. *See* Austero v. National Casualty Co., 84 Cal. App. 3d 1, 26-27, 148 Cal. Rptr. 653, 670 (1978). *See generally* Glenn L. Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833 (1982) (tracing the history of third and first party insurance bad faith litigation). For examples of third party insurance bad faith litigation, see Johansen v. California State Auto. Assoc. Inter-Insurance Bureau, 15 Cal. 3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (1975); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Kelly v. Farmers Ins. Exch., 194 Cal. App. 3d 1, 239 Cal. Rptr. 259 (1987); Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 203 Cal. Rptr. 524 (1984); Miller v. Elite Ins. Co., 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 (1980); Cain v. State Farm Mut. Auto. Ins. Co., 47 Cal. App. 3d 783, 121 Cal. Rptr. 200 (1975). For examples of first party bad faith litigation, *see* Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482, *reprinted as modified*, 620 P.2d 141, 169 Cal. Rptr. 691 (1979), *cert. denied*, 445 U.S. 912 (1980); Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Richardson v. Allstate Ins. Co., 117 Cal. App. 3d 8, 172 Cal. Rptr. 423 (1981); *Austero*, 84 Cal. App. 3d 1, 148 Cal. Rptr. 653 (1978); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). *Gourley* is a first party case.

13. *Gourley*, 53 Cal. 3d at 127-28, 806 P.2d at 1346, 279 Cal. Rptr. at 311. *See generally* Annotation, *Emotional or Mental Distress as Element of Damages for Liability Insurer's Wrongful Refusal to Settle*, 57 A.L.R. 4TH 801 (1987 & Supp. 1990).

14. *See Gourley*, 53 Cal. 3d at 128, 806 P.2d at 1346, 279 Cal. Rptr. at 311. The court found that the court of appeals misinterpreted prior case law on this point, which led it to reach a contrary result. *Id.* at 127, 806 P.2d at 1345, 279 Cal. Rptr. at 310.

15. *Id.* at 128, 806 P.2d at 1346, 279 Cal. Rptr. at 311 (citing and quoting *Gruenberg*, 9 Cal. 3d at 580, 510 P.2d at 1041, 108 Cal. Rptr. at 490). *See also Richardson*, 117 Cal. App. 3d at 13, 172 Cal. Rptr. at 426.

tional distress suffered by the insured.[16] Rather, the court maintained that the purpose of an insurance bad faith action is to recover for economic loss caused by the tortious interference with the insured's property rights — i.e., the financial loss suffered as a result of the insurer's bad faith handling of the insured's claim.[17]

The court employed a California court of appeal case, *Richardson v. Allstate Insurance Co.*,[18] to support its conclusion that an action against an insurer for breach of the implied covenant of good faith and fair dealing is an action based on interference with a property right, not personal injury.[19] In *Richardson*, the court found that "[b]reach of the implied covenant of good faith is actionable because such conduct causes financial loss to the insured, and it is the financial loss or risk of financial loss [that] defines the cause of action [to which mental distress damages are appended] as an aggravation of the financial damages, not as a separate cause of action."[20] The majority in *Gourley* agreed with the *Richardson* court's concentration on the nature of the interest sued upon instead of the nature of the damages sought when classifying an insurance bad faith action.[21] The supreme court thus held that an insurance bad faith suit is not a personal injury action and therefore is not subject to the provision for prejudgment interest in section 3291 of the Civil Code.[22]

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16. *Gourley*, 53 Cal. 3d at 128, 806 P.2d at 1346, 279 Cal. Rptr. at 311.

17. *Id.* at 128-29, 806 P.2d at 1346-47, 279 Cal. Rptr. at 311-12 (citing and quoting *Gruenberg*, 9 Cal. 3d at 580, 510 P.2d at 1041, 108 Cal. Rptr. at 490; *Crisci*, 66 Cal. 2d at 433-34, 426 P.2d at 178-79, 58 Cal. Rptr. at 18-19; *Richardson*, 117 Cal. App. 3d at 13, 172 Cal. Rptr. at 426).

18. 117 Cal. App. 3d 8, 172 Cal. Rptr. 423 (1981). In Richardson, the court of appeal held that insurance bad faith actions are governed by the two year statute of limitations applicable to infringement of property right cases. *Id.* at 13, 172 Cal. Rptr. at 426.

19. *Gourley*, 53 Cal. 3d at 129, 806 P.2d at 1347, 279 Cal. Rptr. at 312. The court of appeal disregarded *Richardson* because it dealt with a statute of limitations defense instead of an award of prejudgment interest under section 3291. *Id.* The California Supreme Court deemed the distinction irrelevant. *Id.*

20. *Richardson*, 117 Cal. App. 3d at 13, 172 Cal. Rptr. at 426 (footnote omitted).

21. *Gourley*, 53 Cal. 3d at 129, 806 P.2d at 1347, 279 Cal. Rptr. at 3112.

22. *Id.* at 130, 806 P.2d at 1348, 279 Cal. Rptr. at 313. The court subsequently modified the opinion after the Supreme Court's decision in Pacific Mutual Life Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991), which set forth factors for determining the constitutionality of a state's method for awarding punitive damages. Gourley v. State Farm Mut. Auto. Ins. Co., 53 Cal. 3d 1040a (1991). The modification thus allowed the court of appeal to review the constitutionality of Gourley's $1.5 million punitive damage award. *Id.*

B. *Dissenting Opinion*

Justice Broussard dissented on the basis that the majority's failure to consider "the related prejudgment interest code provisions, the literal meaning of the language of section 3291, and the basic policies underlying the award of prejudgment interest" led the court to erroneously deny prejudgment interest in insurance bad faith actions.[23] Although Justice Broussard did not dispute the court's conclusion that the nature of an insurance bad faith action arises from interference with property interests, he felt that the related provisions for prejudgment interest clearly establish the legislature's intent to allow recovery for prejudgment interest in property cases.[24] In addition, Justice Broussard thought that since section 3291 provides for "*any action* brought to recover damages for personal injury,"[25] the section is broad enough to encompass any tort action, whether based on a property right or personal injury, that seeks recovery for personal injury damages.[26] Finally, Justice Broussard indicated that the court's decision conflicts with the legislative policy behind section 3291[27] in that it effectively discourages insurers from settling bad faith claims.[28]

III. CONCLUSION

The effect of *Gourley v. State Farm Mutual Automobile Insurance Co.* on the willingness of insurers to settle bad faith claims has yet to be seen. Although the decision does not conform to the legislature's desire to provide incentives for early settlement, jury sentiment against insurers,[29] as traditionally reflected in high punitive damage awards,[30] may prevent insurance companies from feeling free to disregard legitimate settlement offers due to the non-threat of a prejudgment interest award.

The *Gourley* decision illustrates the California Supreme Court's reluctance to broaden insurance bad faith recoveries. This reluctance is evident in recent supreme court rulings in favor of insurance compa-

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23. *Gourley*, 53 Cal. 3d at 131, 806 P.2d at 1348, 279 Cal. Rptr. at 313 (Broussard, J., dissenting) (footnote omitted). Justice Mosk joined in the dissent.

24. *Id.* at 131-34, 806 P.2d at 1348-50, 279 Cal. Rptr. at 313-15 (Broussard, J., dissenting). Justice Broussard discussed at length the prejudgment interest provisions governing property cases. *Id.* *See* CAL. CIV. CODE §§ 3287-3288 (West 1980).

25. CAL. CIV. CODE § 3291 (West Supp. 1991) (emphasis added).

26. *Gourley*, 53 Cal. 3d at 134-38, 806 P.2d at 1351-53, 279 Cal. Rptr. at 316-18 (Broussard, J., dissenting).

27. *See supra* note 2 and accompanying text.

28. *Gourley*, 53 Cal. 3d at 131, 133-34 & 137, 806 P.2d at 1348, 1350 & 1353, 279 Cal. Rptr. at 313, 315 & 318 (Broussard, J., dissenting).

29. *See* Allen, *supra* note 12, at 853.

30. For example, the jury's punitive damages award to Mrs. Gourley was 100 times the amount of her actual damage award. *See supra* note 6.

nies involved in bad faith litigation[31] and may stem from the fear that insurance bad faith law is approaching strict liability status.

SUSAN LEIGH SPARKS

B. *Section 533 of the California Insurance Code excludes liability coverage for an insured's sexual molestation of a child, regardless of the molester's subjective intent to harm:* J.C. Penney Casualty Insurance Co. v. M. K.

I. INTRODUCTION

In *J.C. Penney Casualty Insurance Co. v. M. K.*,[1] the California Supreme Court considered whether an insurer that issues a homeowner's policy to an insured who sexually molests a child should be obligated under the policy to pay damages from a civil judgment against the insured.[2] To do so, the court limited the scope of intent necessary to prove molestation as a "wilful act" under section 533 of the California Insurance Code.[3] The court also considered whether an underlying judgment should collaterally estop an insurer from litigating the issue of noncoverage in a subsequent declaratory judgment action.[4]

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31. Meg Fletcher, *Prejudgment Interest Denied in Bad-Faith Case*, BUS. INS., Apr. 8, 1991, at 2 (discussing the California Supreme Court's pro-insurer trend and citing Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), and the decertification of Beatty v. State Farm Mut. Auto Inx. Co., 213 Cal. App. 3d 379, 262 Cal. Rptr. 79 (1989) (ordered not published Nov. 16, 1989), as examples).

1. 52 Cal. 3d 1009, 804 P.2d 689, 278 Cal, Rptr. 64 (1991), *cert. denied*, No. 90-8495 (U.S. Oct. 7, 1991).

2. *Id.* at 1014, 804 P.2d at 690, 278 Cal. Rptr. at 65.

3. Section 533 of the California Insurance Code reads: "Wilful act of insured — An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." CAL. INS. CODE § 533 (Deering 1988). *See also* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* § 632 (9th ed. 1988 & Supp. 1991); 39 CAL. JUR. 3D *Insurance Contracts and Coverage* § 245 (1977 & Supp. 1991). All further statutory references are to the California Insurance Code unless otherwise specified.

4. *J. C. Penney*, 52 Cal. 3d at 1014, 804 P.2d at 692, 278 Cal. Rptr. at 65. *See also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 1142 (9th ed. 1988). After J. C. Penney appealed the trial court's decision on the declaratory judgment, M. K. and her mother raised the collateral estoppel issue in their answer. *J.C. Penney*, 52 Cal. 3d at 1014, 804 P.2d at 692, 278 Cal. Rptr. at 65. *See* CAL. RULES OF COURT 28(e)(5) (requiring additional issues be raised in answer). As in the court's opinion, the parties will be referred to in this article by their initials, with R. H. occasionally being referred to as "the insured" and S. K. as "the mother." *See J.C. Penney*, 52 Cal. 3d at 1009 n.1, 804 P.2d at 690 n.1, 278 Cal. Rptr. at 65 n.1.

II. BACKGROUND

The section 533 exclusion for insurance coverage of wilful acts has existed in one form or another for over one hundred years.[5] The public policy behind section 533 is to discourage wilful torts by disallowing parties to contract for coverage of such acts.[6] However, to prevent insurers from denying coverage for accidental loss under section 533, the court has been careful to stress the distinction between wilful acts, which are excluded from coverage, and negligent or reckless acts, which are not.[7] Thus, the pivotal determination to be made in such cases is whether the particular act was indeed "wilful."

In *Clemmer v. Hartford Insurance Co.*,[8] a case involving a conviction for second degree murder, the California Supreme Court stated "that even an act which is 'intentional' or 'willful' within the meaning of traditional tort principles will not exonerate the insurer from liability under Insurance Code section 533 unless it is done with a 'preconceived design to inflict injury.' "[9] However, in *Allstate Insurance Co. v. Kim W.*,[10] a case of child molestation where the insured had admitted violating Penal Code section 288,[11] an appellate court held as a matter of law that "a violation of Penal Code section 288 is a wilful act within the meaning of Insurance Code section 533."[12] The court in *Kim W.*, believing that the violation of Penal Code section 288 was sufficient in itself to show intentional harm under section 533,[13] refused to apply the *Clemmer* "preconceived design"

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5. Section 533 has remained unchanged since its passage in 1935. *See* 1935 Cal. Stat. 510. Before 1935, a virtually identical exclusion existed in former Civil Code section 2629 following its amendment in 1873. 1873-74 Cal. Stat. 256.

6. *See* Tomerlin v. Canadian Indem. Co., 61 Cal. 2d 638, 648, 394 P.2d 571, 577, 39 Cal. Rptr. 731, 737 (1964).

7. As noted in a case construing the exclusion contained in former Civil Code section 2629, "[N]o form of negligence on the part of the insured, or his agents or others, leading to a loss avoids the policy, unless it amounts to a wilful act on the part of the insured." McKenzie v. Scottish U. & N. Ins. Co., 112 Cal. 548, 557-58, 44 P. 922, 925 (1896). *See also* Peterson v. Superior Court, 31 Cal. 3d 147, 55, 642 P.2d 1305, 1311, 181 Cal. Rptr. 784, 790 (1982) (noting that reckless conduct such as drunk driving was not wilful under section 533).

8. 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978).

9. *Clemmer*, 22 Cal. 3d at 887, 587 P.2d at 1110, 151 Cal. Rptr. at 297 (quoting Walters v. American Ins. Co., 185 Cal. App. 2d 776, 783, 8 Cal. Rptr. 665, 670 (1960)).

10. 160 Cal. App. 3d 326, 206 Cal. Rptr. 609 (1984).

11. This section states:

> Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part I of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years.

CAL. PENAL CODE § 288(a) (Deering 1988).

12. *Kim W.*, 160 Cal. App. 3d at 333, 206 Cal. Rptr. at 613.

13. *Id.*

test.[14] When facts essentially identical to those in *Kim W.* arose in the instant case, the supreme court agreed to resolve the issue of requisite intent necessary to show wilfulness under section 533 in sexual molestation cases.

III. STATEMENT OF THE CASE

In 1984, M. K., a five-year-old girl, informed her mother, S. K., that she had been sexually molested[15] by their neighbor, R. H., a male friend of S. K.[16] R. H. pleaded guilty to one count of intentionally committing lewd or lascivious acts with a child under the age of fourteen, a violation of California Penal Code section 288,[17], and was sentenced to six years in prison.[18] M. K. and S. K. then filed a civil action against R. H., seeking damages for the child under a negligence cause of action and for the mother under the theory of negligent infliction of emotional distress.[19] The jury awarded $400,000 in damages to M. K. and $100,000 to S. K.[20]

After the trial on liability and damages had concluded, the trial court heard J. C. Penney's declaratory relief action. The court held that section 533 precluded recovery for M. K.[21] but that S. K. could

14. *Id.* at 333-34, 206 Cal. Rptr. at 613-14.

15. R. H. admitted fondling M. K.'s genitals, holding her over his head with his thumb inserted in her vagina, and orally copulating her. *J. C. Penney*, 52 Cal. 3d at 1015, 804 P.2d at 691, 278 Cal. Rptr. at 66.

16. *J. C. Penney*, 52 Cal. 3d at 1014, 804 P.2d at 690, 278 Cal. Rptr. at 65.

17. For the text of Penal Code section 288, see supra note 11.

18. *J. C. Penney*, 52 Cal. 3d at 1014, 804 P.2d at 690, 278 Cal. Rptr. at 65.

19. *Id.* at 1015, 804 P.2d at 691, 278 Cal. Rptr. at 66. The original action sought damages under causes of action for negligence and intentional tort, but the intentional tort causes of action were dropped before trial and the trial proceeded on only the negligence and emotional distress theories. *Id.*

20. After R. H. stipulated to his negligence regarding the child, the trial court entered a directed verdict against him as to M. K.'s negligence action. The jury also found that R. H. was negligent as to S. K. and that she had suffered compensable damage as a result of that negligence. *Id.*

Regarding the jury award to S. K. based on negligent infliction of emotional distress, the supreme court noted that the decisions in Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989) (establishing the requirement of presence at the scene for bystander recovery under a theory of negligent infliction of emotional distress) and Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989) (rejecting the theory that parents can generally recover for emotional distress where their children are sexually molested), would appear to preclude the award. However, the court noted, that because these cases were decided after the judgment against R. H. was final, he would be unable to collaterally attack on these bases. *J. C. Penney*, 52 Cal. 3d at 1016 n.3, 804 P.2d at 691 n.3, 278 Cal. Rptr. at 66 n.3.

21. The trial court found that because R. H.'s negligence as to M. K. was stipulated

still recover under the policy.[22] Both J. C. Penney and M. K. appealed.[23]

The appellate court reversed on the collateral estoppel issue, holding that J. C. Penney's timely reservation of rights precluded the use of collateral estoppel to prevent litigating the issue of coverage.[24] The appellate court also reversed on the coverage issue, holding that the court needed to explore whether R. H. had a "preconceived design" to injure M. K.[25]

The supreme court agreed to hear the section 533 exclusion issue as well as the collateral estoppel issue.[26] As to collateral estoppel, a majority[27] of the court agreed with the appellate court that the judgment of the trial court should not estop J. C. Penney from denying coverage in the subsequent declaratory relief action because it had made a timely reservation of rights.[28] On the main issue, the majority reversed the appellate court and held that section 533 of the California Insurance Code excluded coverage under homeowners' policies for damages caused by an insured's sexual molestation of a child.[29]

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rather than litigated, J. C. Penney should be allowed to overcome the presumption of negligence by offering sufficient proof. The trial court then determined that R.H.'s violation of Penal Code section 288 was sufficient proof that he willfully molested M. K. as a matter of law under Insurance Code section 533, thereby precluding liability under the policy. *J.C. Penney*, 52 Cal. 3d at 1016, 804 P.2d at 692, 278 Cal. Rptr. at 67.

22. The trial court found that because the parties fully litigated the issue of negligence as to the mother, J. C. Penney was collaterally estopped from arguing in its declaratory relief action that section 533 precluded coverage as to the mother. *Id.*

23. J. C. Penney argued it should not be collaterally estopped from arguing noncoverage as to the mother. J. C. Penney Casualty Ins. Co. v. M. K., 209 Cal. App. 3d 1208, 257 Cal. Rptr. 801, 802 (1989). J. C. Penney also argued that the decision in *Kim W.* precluded coverage for an insured's acts of child molestation. *Id.* at 486-87, 257 Cal. Rptr. at 802.

M. K. argued that collateral estoppel should also apply in her case to preclude J. C. Penney from denying coverage and that the trial court erred in relying on *Kim W.* to prevent her recovery. *Id.* at 487, 257 Cal. Rptr. at 802.

24. *Id.* at 492, 257 Cal. Rptr. at 806.

25. *Id.* at 499, 257 Cal. Rptr. at 810. The appellate court held that the trial court's reliance on *Kim W.* was inappropriate since there was no factual determination concerning R. H.'s subjective intent to harm. The court therefore concluded that this issue should be retried as to both M. K. and S. K. *Id.*

26. J.C. Penney Casualty Ins. Co. v. M.K., 52 Cal. 3d 1009, 1117, 804 P.2d 689, 692, 278 Cal. Rptr. 64, 67 (1991), *cert. denied*, No. 90-8495 (U.S. Oct. 7, 1991).

27. Retired Associate Justice Eagleson, sitting under assignment by the Chairperson of the Judicial Council, wrote the majority opinion, and was joined by Chief Justice Lucas and Justices Mosk, Panelli, Kennard and Arabian. Justice Broussard wrote a separate dissent.

28. *J. C. Penney*, 52 Cal. 3d at 1017, 804 P.2d at 692, 278 Cal. Rptr. at 67. J. C. Penney sent R. H. a letter reserving its right to contest coverage in December of 1984. *Id.* at 1015, 804 P.2d at 690-91, 278 Cal. Rptr. at 65-66.

29. *Id.* at 1028, 804 P.2d at 700, 278 Cal. Rptr. at 75.

IV. TREATMENT

A. Majority Opinion

1. Collateral Estoppel

M. K. and her mother challenged the appellate court's finding that J. C. Penney was not collaterally estopped from arguing that section 533 precluded coverage.[30] They alleged that J. C. Penney "wrongfully interfered with R. H.'s right 'to control his defense' of the underlying action" by interfering with his *Cumis*[31] counsel's attempts to settle the case.[32] The majority noted that, absent evidence that J. C. Penney had waived its reservation of rights,[33] or that it had assigned those rights to M. K. or her mother,[34] J. C. Penney's reservation of rights was adequate to allow it to argue that section 533 precluded coverage.[35]

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30. *Id.* at 1017, 804 P.2d at 692, 278 Cal. Rptr. at 67. *See supra* notes 21 & 22 and accompanying text.

31. *See* San Diego Federal Credit Union v. Cumis Ins. Society, Inc., 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984). *See also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 1139 (9th ed. 1988); 50 A.L.R. 4TH 913 (1986).

32. *J. C. Penney*, 52 Cal. 3d at 1018, 804 P.2d at 693, 278 Cal. Rptr. at 68. As per the rule in *Cumis*, J. C. Penney provided counsel for R. H. in the damages action. The attorney was the same attorney who had represented him in the criminal proceeding. However, a dispute arose between J. C. Penney, R. H. and the original attorney resulting in J. C. Penney's hiring replacement counsel. M. K. and her mother argued that the removal of the first attorney deprived R. H. of *Cumis* counsel. *Id.* at 1018 n.4, 804 P.2d at 693 n.4, 278 Cal. Rptr. at 68 n.4.

33. The majority cited the rule that, after a proper reservation of rights, for the insurer to waive the right to deny coverage the insured must show that "the insurer either intentionally relinquished a known right, or acted in such a manner as to cause the insured to reasonably believe the insurer had relinquished such right, and that the insured relied upon such conduct to his detriment." *Id.* at 1018-19, 804 P.2d at 692, 278 Cal. Rptr. at 67 (quoting Val's Painting & Drywall, Inc. v. Allstate Ins. Co., 53 Cal. App. 3d 576, 587, 126 Cal. Rptr. 267, 273 (1975)). Because M. K. and her mother did not assert such a waiver, and the record did not support such a finding, the court found that J. C. Penney had not waived its reservation of rights. *Id.* at 1018, 804 P.2d at 692-93, 278 Cal. Rptr. at 67-68.

34. The majority stated that because the policy behind requiring *Cumis* counsel was to protect the rights of the insured, if any dispute arose concerning an interference with *Cumis* counsel, the dispute would be between R. H. and J. C. Penney. *Id.* at 1018, 804 P.2d at 693, 278 Cal. Rptr. at 68. R. H. had made no such claim. Noting that R.H. made no assignment of his *Cumis* counsel rights to M. K. or S. K., the majority ruled that "in the absence of an assignment a third party claimant cannot bring an action upon a duty owed to the insured by the insurer." *Id.* at 1019, 804 P.2d at 693, 278 Cal. Rptr. at 69 (quoting Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 889, 587 P.2d 1098, 1111-12, 151 Cal. Rptr. 285, 288-89 (1978); Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 943-44, 553 P.2d 584, 588, 132 Cal. Rptr. 424, 428 (1976)).

35. The court quoted the general rule as follows:

> [I]f the insurer adequately reserves its right to assert the noncoverage defense later, it will not be bound by the judgment. If the injured party prevails, that

2. Sexual Molestation as an Intentional Act

J. C. Penney's primary argument was that section 533 precluded coverage for sexually molesting children because such acts are wilful.[36] Conversely, M. K. and several *amici curiae*[37] argued that section 533 should not preclude coverage because an act is not intentional or wilful unless the insured acted "with a preconceived design to inflict injury."[38]

a. Wilful vs. Negligent Act Under Section 533

The majority began its analysis by attempting to ascertain the legislative intent behind the statute.[39] After determining that the language of section 533 was "internally inconsistent"[40] and that there

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party or the insured will assert his claim against the insurer. (Footnote omitted.) At this time the insurer can raise the noncoverage defense previously reserved.

Id. at 1017, 804 P.2d at 692, 278 Cal. Rptr. at 67 (quoting Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 279, 419 P.2d 168, 178, 54 Cal. Rptr. 104, 114 (1966)). Although the quoted statement from *Gray* was dictum, it "has long been the established law of California." *Id.* (citing Insurance Co. of the West v. Haralambos Beverage Co., 195 Cal. App. 3d 1308, 1319, 241 Cal. Rptr. 427, 432 (1987); Val's Painting & Drywall, Inc. v. Allstate Ins. Co., 53 Cal. App. 3d 576, 585-86, 126 Cal. Rptr. 267, 272 (1975)).

36. *J.C. Penney*, 52 Cal. 3d at 1019, 804 P.2d at 693, 278 Cal. Rptr. at 68. The Association for California Tort Reform, the Association of California Insurance Companies, the National Association of Independent Insurers, the Alliance of American Insurers, and several other liability insurers appeared as *amici curiae* for J.C. Penney. *Id.* at 1019 n.6, 804 P.2d at 693 n.6, 278 Cal. Rptr. at 68 n.6.

37. The Children's Advocacy Institute, California Trial Lawyer's Association, and the Crime Victim's Legal Clinic appeared in support of M.K.. *Id.* at 1019 n.6, 804 P.2d at 693 n.6, 278 Cal. Rptr. at 68 n.6.

38. *Id.* at 1019, 804 P.2d at 693, 278 Cal. Rptr. at 68. M. K. and the *amici* argued that psychiatric testimony established that certain sexual molesters like R. H. intend no harm by their acts, asserting that "the molestation is often a misguided attempt to display love and affection." *Id.* The supreme court originally used the "preconceived design to inflict injury" language in Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 887, 587 P.2d 1098, 1110, 151 Cal. Rptr. 285, 297 (1978). *See supra* note 9 and accompanying text.

39. *J.C. Penney*, 52 Cal. 3d at 1020, 804 P.2d at 694, 278 Cal. Rptr. at 69 (citing Delaney v. Superior Court, 50 Cal. 3d 785, 798, 789 P.2d 934, 940, 268 Cal. Rptr. 753, 759 (1990)). The court of appeal found that section 533 was subject to the rule of strict construction against the insurer. *J. C. Penney*, 220 Cal. App. 3d 484, 493, 257 Cal. Rptr. 801, 806 (1989) (citing Congregation of Rodef Sholom v. American Motorists Ins. Co., 93 Cal. App. 3d 690, 697, 154 Cal. Rptr. 348, 352 (1979)). The majority noted that the court of appeal was incorrect because section 533 is a statute, and therefore "is subject to the rules of statutory construction, not the rules of contract interpretation." *J. C. Penney*, 52 Cal. 3d at 1020 n.9, 804 P.2d, at 694 n.9, 278 Cal. Rptr. at 69 n.9. Thus, the majority disapproved *Rodef* to the extent that it held that section 533 was subject to strict construction against the insurer. *Id.*

40. *J. C. Penney*, 52 Cal. 3d at 1020, 804 P.2d at 694, 278 Cal. Rptr. at 69. The majority noted that the first sentence of the statute excludes coverage for all wilful acts, yet the second sentence declared that negligence on the insured's behalf would not exclude coverage. The majority felt that this was internally inconsistent because "[n]egligence is often, perhaps generally, the result of a 'willful act.' " *Id.* (footnote omitted).

was no legislative history to clarify the language,[41] the majority deferred to prior precedent to help define the scope of "wilful" under section 533. The court stated that "[i]t is settled that 'wilful act' in section 533 means 'something more than the mere intentional doing of an act constituting [ordinary] negligence.'"[42] Thus, as noted above, ordinarily negligent or reckless acts are not precluded by section 533.[43] The majority then ruled as a matter of law that sexual molestation of children could never be negligent or reckless because the nature of sexual molestation was such that "the intent to molest is, by itself, the same as the intent to harm."[44]

b. Clemmer Test

M. K.'s strongest argument was that *Clemmer* supported coverage, unless the insured acted with a "preconceived design to inflict injury."[45] M. K. argued that this language should allow her to present psychiatric testimony to establish that R. H. had acted without such "preconceived design."[46] The majority rejected this argument, holding that the *Clemmer* "preconceived design" language applied only where the insured's mental capacity to commit the wrongful act was at issue.[47] The majority then concurred with the reasoning of the dissenting judge from the court of appeal who stated that "the only question in *Clemmer* was the *mental capacity* of [the defendant] to intend the act; there was no holding by the supreme court in *Clemmer* that intent to injure, standing alone, was a dispositive issue."[48]

41. *Id.*

42. *Id.* at 1021, 804 P.2d at 695, 278 Cal. Rptr. at 70 (quoting Fire Ins. Exch. v. Abbott, 204, Cal. App. 3d 1012, 1019, 251 Cal. Rptr. 620, 624 (1988) (bracketed material in original quotation)).

43. *See supra* note 7 and accompanying text.

44. *J. C. Penney*, 52 Cal. 3d at 1021, 804 P.2d at 695, 278 Cal. Rptr. at 70.

45. *See supra* note 9 and accompanying text.

46. *J. C. Penney*, 52 Cal. 3d at 1021, 804 P.2d at 695, 278 Cal. Rptr. at 70. In fact, two experts, one a board-certified psychologist and the other a psychiatrist specializing in sexual abuse of children, testified that R. H. lacked intent to harm when he molested M. K. *J. C. Penney*, 220 Cal. App. 3d at 499 n.4, 257 Cal. Rptr. at 809, n.4.

47. *J.C. Pennney*, 52 Cal. 3d at 1023, 804 P.2d at 696, 278 Cal. Rptr. at 71. In *Clemmer*, the murder defendant claimed insanity, and thus that he lacked the "mental capacity necessary to deliberate or premeditate or to form the specific intent to shoot and harm the victim." *Clemmer*, 22 Cal. 3d at 878, 587 P.2d at 1104, 151 Cal. Rptr. at 291 (citing testimony of psychiatric expert).

48. *J. C. Penney*, 52 Cal. 3d at 1023, 804 P.2d at 696, 278 Cal. Rptr. at 71 (quoting *J. C. Penney*, 220 Cal. App. 3d at 504 257 Cal. Rptr. at 811 (Nares, J., dissenting)). (Emphasis in original).

c. Kim W.

The majority then looked to the decision in *Kim W.* to determine whether child molestation was wilful under section 533. The majority agreed with the reasoning in *Kim W.* that if the molester has admitted that his conduct violated Penal Code section 288, he has admitted that he "intended to arouse, appeal to, or gratify sexual desire with a child."[49] The court also adopted the finding in *Kim W.* that "[i]mplicit in the [Legislature's] determination that children must be protected from such acts is a determination that at least some harm is inherent in and inevitably results from those acts."[50] Combining its rationales of *Clemmer* and *Kim W.*, the court held that since the harm is inherent in the act itself, a determination whether the insured had a "preconceived design" to injure was irrelevant.[51] To further support its conclusion, the majority noted that all

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49. *J. C. Penney*, 52 Cal. 3d at 1025, 804 P.2d at 698, 278 Cal. Rptr. at 73.

50. *Id.* (quoting Allstate Ins. Co. v. Kim W., 160 Cal. App. 3d 326, 332-33, 206 Cal. Rptr. 609, 613) (bracketed information in original). While the majority adopted this position, it rejected the alternate ground for denial of coverage proposed by *Kim W.*, *i.e.*, that the intentional nature of the act could be shown merely by an admission of the insured in his answer to the complaint. *J.C. Penney*, 52 Cal. 3d at 1025 n.13, 804 P.2d at 698 n.13, 278 Cal. Rptr. at 73 n.13. The majority stated that because it felt that "child molestation is willful as a matter of law under section 533, we do not base our decision on the insured's admissions of wrongdoing." *Id.* This language tends to show that the court requires more than a mere admission of wrongdoing in a pleading before it will deny coverage, *i.e*, the fact of molestation must be shown before the insurer can deny coverage. However, the majority then stated that "[n]either an admission by the insured nor a criminal conviction is necessary to give rise to the exclusion under section 533." *Id.* This statement appears to cast doubt on what type of proof, if any, is necessary to give rise to the exclusion.

This dilemma was recently faced by the Ninth Circuit in State Farm Fire & Casualty Co. v. Nycum, 1991 No. 90-15706 (9th Cir. Aug. 29, 1991). In that case, State Farm argued that the language in *J. C. Penney* asserting that neither an admission nor a conviction is necessary to invoke the section 533 exclusion actually means that the insurer has no duty "to indemnify or even defend suits alleging child molestation." *Id.* The Ninth Circuit rejected this interpretation, asserting that the "passage from *J. C. Penney* means only that allegations of child molestation that are accompanied by proof of willfulness — whether by criminal conviction, stipulation or otherwise — are presumed to be willful as a matter of law, and hence are excluded from coverage by section 533." *Id.* To interpret otherwise would mean that beyond the mere allegation of molestation, no proof would be necessary to exclude.

51. *J.C. Penney*, 52 Cal. 3d at 1026, 804 P.2d at 699, 278 Cal. Rptr. at 73. To illustrate why subjective intent was irrelevant in molestation cases, the majority analyzed the opinion upon which *Clemmer* relied in creating the "preconceived design" requirement, Walters v. American Ins. Co., 185 Cal. App. 2d 776, 8 Cal. Rptr. 665 (1960). In *Walters*, an insured sought reimbursement of a settlement paid to a third party battered by the insured. The insured admitted that the battery was intentional, but claimed self-defense justified the act and made it unintentional for purposes of coverage. The court found that when the insured acted in self-defense, "although he 'intended the act,' [he] acted by chance and without a preconceived design to inflict injury." *Id.* at 783, 8 Cal. Rptr. at 670. The majority in *J.C. Penney* noted that in *Walters*, "[t]he insured's motive (self-defense) was relevant only to the question of whether he acted wrongfully in the first instance." *J. C. Penney*, 52 Cal. 3d at 1024, 804 P.2d at 697, 278 Cal. Rptr. at 71. Because the court's reading of *Kim W.* assumes child

other court decisions interpreting California law[52] and the majority of courts in other jurisdictions had also disallowed insurance recovery in sexual molestation cases.[53]

B. Justice Broussard's Dissent

Justice Broussard argued that the "preconceived design" test in *Clemmer* should be applied in all cases involving a claim of exclusion under section 533.[54] He decried the majority's "repudiation" of *Clemmer*, stating that the "inherently harmful" standard created by the court had no support in the language of section 533 and should be rejected on that basis alone.[55] He also argued that the plain language of the statute should determine the case.[56] Justice Broussard suggested that even if the language could be interpreted to exclude inherently harmful conduct,[57] concern for the rights of victims of such crimes should preclude such an exclusion.[58] Thus, according to Justice Broussard, "[c]oncern for the innocent victims of crime out-

molestation is always wrongful as a matter of law, the *Walters* question of motive or intent is irrelevant. *Id.*

52. *J. C. Penney*, 52 Cal. 3d at 1026, 804 P.2d at 699, 278 Cal. Rptr. at 74 (citing *Kim W.*, 160 Cal. App. 3d 326, 206 Cal. Rptr. 609 (1984); Fire Ins. Exch. v. Abbott, 204 Cal. App. 3d 1012, 251 Cal. Rptr. 620 (1988); Allstate Ins. Co. v. Gilbert, 852 F.2d 449 (9th Cir. 1988), State Farm Fire & Casualty Co. v. Estate of Jenner, 874 F.2d 604 (9th Cir. 1989); State Farm Fire & Casualty Co. v. Abraio, 874 F.2d 619 (9th Cir. 1989)).

53. The majority noted that the decision in *Abbott*, 204 Cal. App. 3d at 1025-26, 251 Cal. Rptr. at 628-30 gives an extensive review of out-of-state authority. *J.C. Penney*, 52 Cal. 3d at 1027, 804 P.2d at 699, 278 Cal. Rptr. at 74. *See also* 11 INS. LIT. REP. 289, 290-91 (1989).

54. *J. C. Penney*, 52 Cal. 3d at 1029, 804 P.2d at 701, 278 Cal. Rptr. at 76 (Broussard, J., dissenting). Justice Broussard cited the language from *Clemmer* and interpreted it to mean that all cases involving section 533 should satisfy this test. *Id.*

55. *Id.* at 1032, 804 P.2d at 703, 278 Cal. Rptr. at 78 (Broussard, J., dissenting). Justice Broussard argued that "[t]o read 'inherently harmful' into this straightforward statute can only be categorized as judicial legislation." *Id.* (footnote omitted).

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

57. *Id.* (Broussard, J., dissenting). By proposing at least two possible constructions of the language in section 533, Justice Broussard as much as admits that the section is ambiguous. However, according to Justice Broussard, the only plausible and acceptable construction of section 533 "is that the word 'wilful' in the second section relates to the caused loss or that the 'act' referred to as a 'wilful act' is an act intended to cause the loss. *Id.* at 1030, 804 P.2d at 701, 278 Cal. Rptr. at 76 (Broussard, J., dissenting). In his opinion, this was the construction given the code section in *Clemmer*. *Id.* at 1030, 804 P.2d at 701-02, 278 Cal. Rptr. at 76-77 (Broussard, J., dissenting).

58. *Id.* at 1032, 804 P.2d at 703, 278 Cal. Rptr. at 78 (Broussard, J., dissenting). Justice Broussard also stated that the "inherently harmful" construction espoused by the majority "flies in the face of our constitutional command for the 'enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime . . .'" *Id.* at 1029, 804 P.2d at 701, 278 Cal. Rptr. at 76 (Broussard, J., dissenting) (citing CAL. CONST. art. I, § 28(a)).

weighs the policy of deterrence or penalizing the wrongdoer and strongly militates against an interpretation expanding section 533's prohibition of insurance coverage."[59] Justice Broussard concluded by stating that where there is expert testimony to the contrary the jury should be allowed to reject the inference that child molestation inherently carries an intent to harm.[60]

V. IMPACT

Insurers in future coverage denials must show that the conduct of the insured constituted sexual molestation of the child. Thus, the definition of sexual molestation contained in Penal Code section 288, becomes the crucial element of proof.[61] Although subjective intent to harm is irrelevant because the harm is inherent in the act, the insurer must still establish that the insured had the "intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either [himself] or the child."[62]

Justice Broussard argued that an "inherently harmful" standard creates the danger that insurers will "deny coverage in substantially all cases involving criminal conduct"[63] However, the majority was very careful to emphasize that it was deciding only whether sexual molestation of a child was precluded under section 533.[64] This state-

59. *Id.* at 1032-33, 804 P.2d at 703, 278 Cal. Rptr. at 78 (Broussard, J., dissenting) (citing James M. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 96-99 (1990); Dietmar Grellman, *Insurance Coverage for Child Sexual Abuse Under California Law: Should Intent to Harm be Specifically Proven or Imputed as a Matter of Law?*, 18 SW. U. L. REV. 171, 173-79 (1988)).

60. *J.C. Penney*, 52 Cal. 3d at 1035, 804 P.2d at 705, 278 Cal. Rptr. at 80 (Broussard, J., dissenting). The reference to expert testimony was in response to the majority's rejection of the use of psychiatric testimony to establish that the molester intended no harm. *See id.* at 1028, 804 P.2d at 700, 278 Cal. Rptr. at 75 (majority stating that such testimony "flies 'in the face of all reason, common sense, and experience.' ") (citations omitted). According to Justice Broussard, this view was "a shocking attack on the science of psychiatry" and constituted a poor attempt by the majority to practice psychiatry on its own. *Id.* at 1034, 804 P.2d at 704, 278 Cal. Rptr. at 79 (Broussard, J., dissenting).

61. *See supra* note 11 and accompanying text. *See also* State Farm Fire & Casualty Co. v. Nycum, No. 90-15706 (9th Cir. Aug. 29, 1991). In *Nycum*, the Ninth Circuit held that the decision in *J. C. Penney* did not "relieve the insurer of its initial burden of showing that the act was intentional molestation." *Id.* The court in *Nycum* held that if there is no conviction for a violation of Penal Code 288 and the insurer fails to prove that the touching was intentional molestation, recovery for a negligent touching was possible. *Id.*

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

63. *J. C. Penney*, 52 Cal. 3d at 1032 n.1, 804 P.2d at 703 n.1, 278 Cal. Rptr. at 78 n.1 (Broussard, J., dissenting). Justice Broussard reasoned that because "[a]ll criminal conduct is 'repugnant and reprehensible,' " the burden would be on the courts to make determinations of levels of repugnancy in choosing whether to deny coverage. *Id.* (Broussard, J., dissenting).

64. *Id.* at 1028, 804 P.2d at 700, 278 Cal. Rptr. at 75.

ment was in direct response to the concerns of Justice Broussard and the various *amici*, and appears to show that the majority was aware of the importance of keeping the issue narrow.[65]

VI. CONCLUSION

The court determined that the policy of deterring indemnification for intentional wrongs was more important than providing coverage for the victims' damages. However, the majority noted that because both the majority and the dissent recognized that section 533 was susceptible to more than one construction, the duty to resolve the conflict might very well rest with the Legislature.[66]

BRUCE C. YOUNG

X. LABOR LAW

The Federal Housing and Employment Act does not supersede common law or state law causes of action for employment discrimination, nor does it require exhaustion of administrative remedies under the Act before an aggrieved employee pursues such nonstatutory claims, which may include a claim for tortious discharge in contravention of public policy due to sexual harassment: **Rojo v. Kliger.**

I. INTRODUCTION

In *Rojo v. Kliger*,[1] the California Supreme Court considered whether sexually harassed employees may seek judicial relief by asserting common law causes of action, including wrongful discharge in contravention of public policy, notwithstanding the Fair Employment and Housing Act[2] (hereinafter "FEHA" or "Act") and before ex-

65. *Id.* The majority stated that "[w]e cannot emphasize too strongly to the bench and bar the narrowness of the issue before us. The only wrongdoing we assess is the sexual molestation of a child. Whether other types of wrongdoing are also excluded as a matter of law by section 533 is not before us." *Id.* (footnote omitted).

66. *See id.*

1. 52 Cal. 3d 65, 801 P.2d 373, 276 Cal. Rptr. 130 (1990). Justice Panelli wrote the opinion for the court, in which Chief Justice Lucas and Justices Mosk, Eagleson, and Anderson concurred. Justice Broussard concurred separately, joined by Justice Kennard.

2. CAL. GOV'T CODE §§ 12900-12999 (West 1980). *See infra* notes 16-28 and accompanying text for an overview of the Act as it relates to employment discrimination claims.

hausting administrative remedies under the Act.[3] After a comprehensive examination of the Act's provisions,[4] the Act's legislative history,[5] California procedural law,[6] and public policy as it relates to sexual harassment in the workplace,[7] the court delivered a three part ruling.[8] First, the court held that common law and state law claims for employment discrimination are not preempted by the Fair Housing and Employment Act.[9] Second, the court explained that although a plaintiff employee is required to exhaust administrative remedies for claims brought under the Act before initiating a civil action, the employee may immediately seek judicial relief for the nonstatutory claims.[10] Lastly, the court held that allegations of sexual harassment, if properly pled, could sustain a claim for tortious discharge in contravention of public policy.[11]

II. BACKGROUND

The California legislature enacted the California Fair Employment and Housing Act[12] in 1980. The Act served to combine the provisions of two former acts, the Fair Employment Practice Act[13] and the Rumford Fair Housing Act,[14] in order to provide a statutory framework for eliminating discrimination in employment and housing.[15]

The Act identifies freedom from employment discrimination on the basis of sex as a "civil right."[16] In addition, the Act proclaims that discrimination on the basis of sex is against public policy[17] and

3. *Rojo*, 52 Cal. 3d at 70-71, 801 P.2d at 375, 276 Cal. Rptr. at 132.

4. *See id.* at 72-73, 801 P.2d at 376, 276 Cal. Rptr. at 133.

5. *See id.* at 75-79, 801 P.2d at 378-81, 276 Cal. Rptr. at 135-38.

6. *See id.* at 80-82, 801 P.2d at 381-83, 276 Cal. Rptr. at 138-40 (discussion of exclusive remedy); *id.* at 82-88, 801 P.2d at 384-87, 276 Cal. Rptr. at 140-45 (discussion of exhaustion doctrine).

7. *See id.* at 89-91, 801 P.2d at 389, 276 Cal. Rptr. at 145-46.

8. *See id.* at 70-71, 801 P.2d at 375, 276 Cal. Rptr. at 132-33.

9. *Id.* at 82, 801 P.2d at 383, 276 Cal. Rptr. at 140.

10. *Id.* at 88, 801 P.2d at 387, 276 Cal. Rptr. at 144.

11. *Id.* at 90-91, 801 P.2d at 389-90, 276 Cal. Rptr. at 146-47.

12. CAL. GOV'T CODE §§ 12900-12999 (West 1980) (added by 1980 Cal. Stat. 3140, ch. 992, § 4).

13. 1959 Cal. Stat. 1999, ch. 121, § 1 (repealed 1980).

14. 1963 Cal. Stat. 3823, ch. 1853, §§ 2-4 (repealed 1980).

15. *See* Rojo v. Kliger, 52 Cal. 3d 65, 77, 801 P.2d 373, 379, 276 Cal. Rptr. 130, 136 (1990); CAL. GOV'T CODE § 12920. *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §§ 756-757 (9th ed. 1988) (discussing the nature, purpose, and scope of FEHA).

16. CAL. GOV'T CODE § 12921 (West 1980). *See generally* Andrea G. Nadel, Annotation, *On-The-Job Sexual Harassment as Violation of State Civil Rights Law*, 18 A.L.R. 4TH 328 (1982 and Supp. 1991). Sexual harassment is viewed as a type of sex discrimination. *See* Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1990) (interpreting sex discrimination to include sexual harassment). *See also Rojo*, 52 Cal. 3d at 73 n.4, 801 P.2d at 376 n.4, 276 Cal. Rptr. at 133 n.4.

17. CAL. GOV'T CODE § 12920 (West 1980).

constitutes an unlawful[18] employment practice.[19] Consequently, the espoused objective of the Act is "to provide effective remedies which will eliminate such discriminatory practices."[20] To achieve this end, the Act requires the Department of Fair Employment and Housing to investigate a complaint filed with it.[21] The Act further provides that if the Department decides that the complaint has merit, it must attempt to eradicate the unlawful practice "by conference, conciliation, and persuasion."[22] If the Department's efforts prove unsuccessful or if the Department determines that "circumstances warrant," the Department may issue a written accusation.[23] It is at this point that the Department assumes the role of a prosecutor and presents the case against the employer before the Fair Employment and Housing Commission.[24] If the Commission finds that the employer is guilty of a discriminatory practice, the Commission will issue a "cease and desist" order, requiring the employer to take numerous measures to remedy the situation.[25] The Commission, however, may not provide relief in the form of compensatory or punitive damages to a complainant in a sexual harassment case.[26]

An aggrieved employee may bring a civil action pursuant to the Act only if he or she obtains a "right to sue" letter from the Depart-

18. CAL. GOV'T CODE § 12940 (West 1980).

19. *Rojo*, 52 Cal. 3d at 72, 801 P.2d at 376, 276 Cal. Rptr. at 133 (citing Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 213, 649 P.2d 912, 913, 185 Cal. Rptr. 270, 271 (1982)). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 760 (9th ed. 1988) (discussing sex discrimination under the Act).

20. CAL. GOV'T CODE § 12920 (West 1980).

21. CAL. GOV'T CODE § 12963 (West 1980). The Department's powers, functions and duties are set forth in Government Code section 12930. *See* CAL. GOV'T CODE § 12930 (West 1980). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 758 (9th ed. 1988).

22. CAL. GOV'T CODE § 12963.7 (West 1980). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 767 (9th ed. 1988) (summary of investigatory and conciliatory procedures).

23. CAL. GOV'T CODE § 12965 (West 1980).

24. CAL. GOV'T CODE § 12969 (West 1980); Rojo v. Kliger, 52 Cal. 3d 65, 72, 801 P.2d 373, 376, 276 Cal. Rptr. 130, 133 (1990).

25. CAL. GOV'T CODE § 12970(a) (West 1980). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §§ 768-769 (9th ed. 1988) (summary of accusation, hearing, order, and judicial enforcement stages).

26. *See* Peralta Community College Dist. v. Fair Employment & Hous. Comm'n, 52 Cal. 3d 40, 801 P.2d 357, 276 Cal. Rptr. 114 (1990) (prohibiting compensatory damage awards); Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987) (prohibiting punitive damage awards). *See also Rojo*, 52 Cal. 3d at 80, 801 P.2d at 382, 276 Cal. Rptr. at 139.

ment.[27] The Act requires the Department to issue a "right to sue" letter if it decides not to prosecute the case or if 150 days have passed since the filing of the complaint and the Department has not yet issued an accusation.[28]

III. STATEMENT OF THE CASE

In August, 1986, plaintiffs Emma Rojo and Teresa Maloney filed a complaint in the superior court for "Violation of Civil Rights and Intentional Infliction of Emotional Distress."[29] The complaint alleged that their employer, Erwin Kliger,[30] subjected them to sexual advances, verbal sexual harassment, and demands for sexual favors. The plaintiffs claimed that these acts constituted a violation of section 12940 of the Fair Employment and Housing Act[31] and caused them to suffer emotional distress.

Kliger moved for summary judgment, arguing that the plaintiffs were precluded from bringing the civil action because the plaintiffs neglected to pursue and exhaust their administrative remedies under the Act. In addition to opposing the motion, the plaintiffs expressed a desire to amend their complaint to include claims for assault, battery, and tortious discharge in contravention of public policy.[32] Nevertheless, the trial court granted Kliger's motion on the grounds that sexual discrimination suits may be filed in superior court only after they have been filed with the Fair Employment and Housing Department and only after all administrative remedies have been exhausted.

The court of appeal reversed.[33] Although the court agreed that the section 12940 claim must proceed under the Act, the court held that the plaintiffs could bring common law and state law claims directly to court, finding that the FEHA does not provide the exclusive remedy for sex discrimination claims.[34] The court also held that the plaintiffs could amend their complaint to allege tortious discharge in

27. *Rojo*, 52 Cal. 3d at 72, 801 P.2d at 376, 276 Cal. Rptr. at 133 (citing CAL. GOV'T CODE § 12965(b) (West 1980)).

28. CAL. GOV'T CODE § 12965(b) (West 1980).

29. *See* Rojo v. Kliger, 220 Cal. App. 3d 412, 417, 257 Cal. Rptr. 158, 160-61 (1989), *aff'd*, 52 Cal. 3d 65, 801 P.2d 373, 276 Cal. Rptr. 130 (1990).

30. *Id.* at 417, 257 Cal. Rptr. at 161. The complaint actually named two defendants: Erwin Kliger, a physician, and Erwin H. Kliger, M.D., a corporation. *Id.*

31. CAL. GOV'T CODE § 12940 (West 1980). *See supra* note 18 and accompanying text.

32. *Rojo*, 220 Cal. App. 3d at 416-17, 257 Cal. Rptr. at 160. The facts underlying a claim for tortious discharge in contravention of public policy included assertions that Kliger's sexual harassment and the plaintiffs' unwillingness to comply with his demands led to the wrongful discharge of Maloney, and the constructive wrongful discharge of Rojo. *Id.* at 430, 257 Cal. Rptr. at 169.

33. *Id.* at 432, 257 Cal. Rptr. at 171.

34. *Id.* at 432, 257 Cal. Rptr. at 170.

contravention of public policy.[35] The California Supreme Court granted review.[36]

IV. TREATMENT

A. The Majority Opinion

1. The Fair Employment and Housing Act is Not The Exclusive Remedy

The court pointed to the express language in section 12993, subdivision (a) of the Fair Employment and Housing Act[37] as proof that the Act does not supplant any remedies existing under common law or state law for damages caused by employment related discrimination.[38] This provision states: "Nothing contained in this part shall be deemed to *repeal* any of the provisions of the Civil Rights Law or of any other *law of this state relating to discrimination* because of . . . sex . . . ."[39] The court made three comments regarding the savings clause. First, the court noted that the " 'law' of this state includes the common law as well as the Constitution and the codes."[40] Second, the court explained[41] that California common law furnishes a number of theories upon which a person may seek relief for injuries "relating to discrimination."[42] The court cited common law theories

35. *Id.* at 432, 257 Cal. Rptr. at 170-71.

36. Rojo v. Kliger, 775 P.2d 1035, 260 Cal. Rptr. 266 (1989).

37. CAL. GOV'T CODE § 12993(a) (West 1980).

38. Rojo v. Kliger, 52 Cal. 3d 65, 73, 801 P.2d 373, 377, 276 Cal. Rptr. 130, 134 (1990).

39. CAL. GOV'T CODE § 12993(a) (emphasis added).

40. *Rojo*, 52 Cal. 3d at 74, 801 P.2d at 377, 276 Cal. Rptr. at 134 (citing CAL. CIV. PROC. CODE §§ 1895, 1899 (West 1983); Victory Oil Co. v. Hancock Oil Co., 125 Cal. App. 2d 222, 229, 270 P.2d 604, 609 (1954)).

41. *Rojo*, 52 Cal. 3d at 74, 801 P.2d at 377, 276 Cal. Rptr. at 134. Moreover, the court indicated that an attorney representing an employee in a discrimination case has a duty to plead as many causes of action as necessary "to fully protect the interests of his or her client," whether based on constructions of statutory or common law. *Id.* (quoting Brown v. Superior Ct., 37 Cal. 3d 477, 486, 691 P.2d 272, 277, 208 Cal. Rptr. 724, 729 (1984); citing Alice Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879 (1980)). *See generally* Dave Linn, *Sex Discrimination: Sexual Harassment Creating A Hostile Work Environment*, 50 AM. JUR. PROOF OF FACTS 2D 127 (1988) (indicating that sexual harassment at the workplace may give rise to common law tort actions of battery, intentional infliction of emotional distress, breach of covenant of good faith and fair dealing, and interference with employment relationship); John F. Major, *Wrongful Discharge of At-Will Employee—Sexual Harassment*, 29 AM. JUR. PROOF OF FACTS 2D 335 (1982) (discussing conduct in employment that may constitute sexual harassment leading to a cause of action for wrongful discharge).

42. CAL. GOV'T CODE § 12993(a) (West 1980).

of emotional distress and wrongful discharge as examples,[43] pointing out that it had indicated in previous cases that victims of employment discrimination may pursue such causes of action in court.[44] Third, the court related that the term "repeal," as used in statutes, encompasses both statutory and common law.[45] Therefore, the court concluded that the plain language of section 12993, subdivision (a)[46] expresses the legislative intent to preserve an employee's common law and state law causes of action for employment discrimination.[47]

The defendant claimed[48] that, based on the language in section 12993, subdivision (c),[49] of the Act, the legislature designed the FEHA to override all state law relating to discrimination in employment and housing, including common law, with the specific exception of section 51 of the Civil Code.[50] This provision of the FEHA states:

> While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county or other political subdivision of this state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code.[51]

In response to the defendant's argument, the court initially observed the ambiguous nature of section 12993, subdivision (c).[52] The court

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43. *Rojo*, 52 Cal. 3d at 74, 801 P.2d at 377, 276 Cal. Rptr. at 134 (citing *Brown*, 37 Cal. 3d at 481, 691 P.2d at 273, 208 Cal. Rptr. at 725). In *Brown*, the plaintiff, a victim of race discrimination, filed a final amended complaint asserting common law causes of action for emotional distress and wrongful discharge, as well as an FEHA cause of action. *Brown*, 37 Cal. 3d at 481, 691 P.2d at 273, 208 Cal. Rptr. at 725.

44. *Rojo*, 52 Cal. 3d at 74, 801 P.2d at 378, 276 Cal. Rptr. at 135 (citing Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 43 Cal. 3d 1379, 1403, 743 P.2d 1323, 1338, 241 Cal. Rptr. 67, 81 (1987); Commodore Home Systems, Inc. v. Superior Ct., 32 Cal. 3d 211, 220, 649 P.2d 912, 917, 185 Cal. Rptr. 270, 275 (1982); Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 498, 468 P.2d 216, 218-19, 86 Cal. Rptr. 88, 90 (1970)).

45. *Id.* at 75, 801 P.2d at 378, 276 Cal. Rptr. at 135 (citations omitted).

46. CAL. GOV'T CODE § 12993(a) (West 1980).

47. *Rojo*, 52 Cal. 3d at 75, 801 P.2d at 378, 276 Cal. Rptr. at 135.

48. *Id.* at 76, 801 P.2d at 279, 276 Cal. Rptr. at 136.

49. CAL. GOV'T CODE § 12993(c) (West 1980). *See infra* text accompanying note 51 (text of provision).

50. CAL. CIV. CODE § 51 (West 1982 & Supp. 1991). Civil Code section 51, commonly referred to as the Unruh Civil Rights Act, provides in pertinent part: "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id. See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 748 (9th ed. 1988).

51. CAL. GOV'T CODE § 12993(c).

52. *Rojo*, 52 Cal. 3d at 76, 801 P.2d at 379, 276 Cal. Rptr. at 136. The court considered that three phrases of subdivision (c) may be subject to more than one interpretation. The first phrase was "occupy the field." *Id.* (comparing Pacific Scene, Inc. v. Penasquitos, Inc., 46 Cal. 3d 407, 411-13, 758 P.2d 1182, 1185, 250 Cal. Rptr. 651, 653-55 (1988) and Justus v. Atchison, 19 Cal. 3d 564, 574-75, 565 P.2d 122, 128, 139 Cal. Rptr. 97, 103-04 (1977), *disapproved on other grounds in* Ochoa v. Superior Ct., 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) *with* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, *rev'd*, Rice v. Board of Trade, 331 U.S. 247 (1947) and Cohen v. Board of Su-

then turned to the legislative history for guidance on how to construe the provision.[53] The court's examination revealed that because section 51 of the Civil Code bans discrimination in housing and grants enforcement authority to local law divisions,[54] the legislature intended for the FEHA to eliminate local *laws* relating to housing discrimination but did not intend to alter the power of local communities to *enforce* state laws banning housing discrimination.[55] Hence, because the FEHA only preempts local law, statutory and common law remain intact.[56]

The court then addressed the defendant's assertion that the FEHA should be applied to the exclusion of all other state law relating to employment discrimination under the "new right — exclusive remedy" doctrine of statutory construction.[57] The court responded by declaring that such "artificial canons of construction" are inapplicable in situations where, as in the case at bar, the statutory language clearly states the degree of exclusivity possessed by the Act.[58] How-

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pervisors, 40 Cal. 3d 277, 290-91, 707 P.2d 840, 847-48, 219 Cal. Rptr. 467, 474 (1985)). The second ambiguous phrase was "*exclusive of* all other laws . . . " *Id.* (emphasis added by court) (comparing definition contained in WEBSTER'S NEW INTERNATIONAL DICTIONARY 890 (2d ed. 1935) with the parties' interpretation). The third area of ambiguity was the word "by" preceding "any city, city and county . . . " *Id.* at 76-77, 801 P.2d at 379, 276 Cal. Rptr. at 136.

53. *Id.* at 77, 801 P.2d at 379, 276 Cal. Rptr. at 136. The court had stated earlier that it would be improper to construe a statute unless an ambiguity revealed itself. *See id.* at 73, 801 P.2d at 377, 276 Cal. Rptr. at 134 (citing Solberg v. Superior Ct., 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977)). *See also* Caminetti v. Pacific Mut. Life Ins. Co., 22 Cal. 2d 344, 353-54, 139 P.2d 908, 913, *cert. denied*, Neblett v. Caminetti, 320 U.S. 802 (1944).

54. *See* CAL. CIV. CODE §§ 51, 52(c)-(d) (West 1982 & Supp. 1991). *See also supra* note 49. *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 755 (discussing enforcement of enumerated rights in section 51).

55. *Rojo*, 52 Cal. 3d at 78-79, 801 P.2d at 380-81, 276 Cal. Rptr. at 137-38. In tracing the legislative history, the court primarily relied upon David B. Oppenheimer & Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?*, 23 U.S.F. L. REV. 145, 174-77 (1989) and the N.A.A.C.P. Legal Defense and Educational Fund, Inc.'s amicus curiae brief. *See Rojo*, 52 Cal. 3d at 77 n.6, 801 P.2d at 379 n.6, 276 Cal. Rptr. at 136 n.6.

56. *Id.* at 78-79, 801 P.2d at 380-81, 276 Cal. Rptr. at 137-38.

57. *Id.* at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138. The "new right — exclusive remedy" rule provides that "where a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive." *Id.* (citing Flores v. Los Angeles Turf Club, 55 Cal. 2d 736, 746-47, 361 P.2d 921, 927-28, 13 Cal. Rptr. 201, 207-08 (1961)). *See* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 301, 188 Cal. Rptr. 159, 166 (1982). *See generally* 3 B. WITKIN, CALIFORNIA PROCEDURE *Actions* § 7 (3d. ed. 1985 & Supp. 1990) (explaining the general rule for exclusiveness of statutory remedy).

58. *Rojo*, 52 Cal. 3d at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138. *See supra* note 52

ever, the court implied that if a rule of construction applied to the FEHA, it would undoubtedly be the "pre-existing right — cumulative remedies" doctrine because a number of common law theories supply avenues for redress for employees who have suffered discrimination.[59]

The court easily dispelled the defendant's final claim that references to the FEHA as a "comprehensive scheme" indicate judicial recognition of the Act's complete dominion over employment and housing discrimination actions.[60] The court explained that the context in which courts made such statements alluded to an expansion of the aggrieved employee's rights under the Act, rather than to a limitation of the employee's remedies provided by the Act.[61] The court further stressed that the FEHA falls short of demonstrating the level of comprehensive coverage needed to deduce a legislative intent to exclude all other state law relating to employment discrimination.[62] Therefore, the court concluded that the FEHA does not

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(discussing the impropriety of construing explicit statute). *See also supra* notes 37-39 and accompanying text (court's indication of the statute's clarity with regard to section 12993(a)). The court rejected the defendant's reliance on Strauss v. A.L. Randall Co., 144 Cal. App. 3d 514, 194 Cal. Rptr. 520 (1983), and several federal decisions. *Rojo*, 52 Cal. 3d at 82 n.9, 801 P.2d at 383 n.9, 276 Cal. Rptr. at 140 n.9. This was because the court in those cases erroneously applied the "new right — exclusive remedy" rule of construction. *Id.* at 82, 801 P.2d at 383, 276 Cal. Rptr. at 140.

59. *Rojo*, 52 Cal. 3d at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138 (citing Brown v. Superior Court, 37 Cal. 3d 477, 486, 691 P.2d 272, 277, 208 Cal. Rptr. 724, 729 (1984); Commodore Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 220, 649 P.2d 912, 917, 185 Cal. Rptr. 270, 275 (1982); Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 498-500, 468 P.2d 216, 218-20, 86 Cal. Rptr. 88, 90-92 (1970)). The "preexisting right — cumulative remedy" doctrine provides that if a common law right existed before the creation of the new statutory remedy, the new remedy is merely cumulative, giving the plaintiff the option to pursue an additional course of action. *See id.*; 3 B. WITKIN, CALIFORNIA PROCEDURE *Actions* § 8 (3d ed. 1985 & Supp. 1990). *See also supra* note 41 (listing common law theories available to victims of sexual harassment in employment).

60. *Rojo*, 52 Cal. 3d at 80-81, 801 P.2d at 381-82, 276 Cal. Rptr. at 138-39.

61. *Id.* at 80, 801 P.2d at 382, 276 Cal. Rptr. at 139 (citing *Brown*, 37 Cal. 3d at 487, 691 P.2d at 277-78, 208 Cal. Rptr. at 729-30; State Personnel Bd. v. Fair Employment & Hous. Comm'n, 39 Cal. 3d 422, 431, 703 P.2d 354, 359, 217 Cal. Rptr. 16, 21 (1985); Snipes v. City of Bakersfield, 145 Cal. App. 3d 861, 868-69, 193 Cal. Rptr. 760, 762 (1983)). The court similarly declined to follow a line of cases which relied upon the phrase in Government Code section 12993, subdivision (c), indicating the legislature's intent to "occupy the field." *Rojo*, 52 Cal. 3d at 81, 801 P.2d at 382-83, 276 Cal. Rptr. at 139-40 (citing Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 492, 238 Cal. Rptr. 360, 361-62 (1987); Robinson v. Hewlett-Packard Corp., 183 Cal. App. 3d 1108, 1124-25, 228 Cal. Rptr. 591, 600-01 (1986)). The court reasoned that the phrase, when read in context, referred to the Act's preemption of local law, not state law. *Id.* at 81, 801 P.2d at 383, 276 Cal. Rptr. at 140. *See also supra* notes 54-55 and accompanying text.

62. *Rojo*, 52 Cal. 3d at 80, 801 P.2d at 382, 276 Cal. Rptr. at 139. As examples, the court pointed to the Act's application to "employers" of not less than five persons, *id.* (citing CAL. GOV'T CODE §§ 12926(c), 12940(h) (West 1980 & Supp. 1991)), the inapplicability of the Act to religious associations or nonprofit corporations, *id.* (citing CAL. GOV'T CODE § 12926(c) (West 1980 & Supp. 1991)), the denial of protection to people who have been discriminated against based on their sexual orientation, *id.* (citing Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal.

prevent an employee's pursuit of causes of action for employment discrimination based upon statutory or common law theories of recovery.[63]

2. The Exhaustion of Administrative Remedies Doctrine Does Not Apply to Nonstatutory Claims

The supreme court rejected the argument that the FEHA administrative process must be exhausted before an aggrieved employee may file a civil action seeking damages based upon causes of action outside of the Act.[64] Although the court agreed that an employee bringing a civil suit under the FEHA must first obtain a "right to sue" letter by completing the administrative procedure,[65] it posited that the exhaustion requirement should not extend to causes of action beyond the legislative scheme.[66]

Rptr. 14 (1979)), and the inability of the Fair Employment and Housing Commission to award either compensatory or punitive damages, *id.* (citing Peralta Community College Dist. v. Fair Employment & Hous. Comm'n, 52 Cal. 3d 40, 56, 801 P.2d 357, 367, 276 Cal. Rptr. 114, 124 (1990) (compensatory damages); Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 43 Cal. 3d 1379, 1404, 743 P.2d 1323, 1338, 241 Cal. Rptr. 67, 82 (1987) (punitive damages)).

63. *Rojo*, 52 Cal. 3d at 82, 801 P.2d at 383, 276 Cal. Rptr. at 140.

64. *Id.* at 88, 801 P.2d at 387, 276 Cal. Rptr. at 144.

65. *Id.* at 83-84, 801 P.2d at 384, 276 Cal. Rptr. at 141. The court noted that the Act itself, as well as a considerable amount of case law, supported this viewpoint. *Id.* (citing CAL. GOV'T CODE § 12965(b) (West 1980 & Supp. 1991); State Personnel Bd. v. Fair Employment & Hous. Comm'n, 39 Cal. 3d 422, 433 n.11, 703 P.2d 354, 360 n.11, 217 Cal. Rptr. 16, 22 n.11 (1985); Commodore Home Sys. v. Superior Court, 32 Cal. 3d 211, 218, 649 P.2d 912, 916, 185 Cal. Rptr. 270, 274 (1982); Yurick v. Superior Ct., 209 Cal. App. 3d 1116, 1123, 257 Cal. Rptr. 665, 668 (1989); Robinson v. Department of Fair Employment & Hous. Comm'n, 192 Cal. App. 3d 1414, 1416, 239 Cal. Rptr. 908, 909 (1987); Miller v. United Airlines, Inc., 174 Cal. App. 3d 878, 890, 220 Cal. Rptr. 684, 691-92 (1985); Myers v. Mobil Oil Corp., 172 Cal. App. 3d 1059, 1063, 218 Cal. Rptr. 630, 632 (1985); Snipes v. City of Bakersfield, 145 Cal. App. 3d 861, 866, 193 Cal. Rptr. 760, 762-63 (1983)). *See supra* notes 27-28 and accompanying text (explaining necessity of "right to sue" letter prior to commencement of civil action alleging statutory claims under Act and how plaintiff obtains "right to sue" letter).

66. *Rojo*, 52 Cal. 3d at 88, 801 P.2d at 387, 276 Cal. Rptr. at 144. To this end, the court declined to apply the general rule that a complainant must first exhaust the statutory relief available from the administrative framework, created to supply the remedy, before resorting to the courts. *Id.* at 84-85, 801 P.2d at 385, 276 Cal. Rptr. at 142. The court referenced George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd., 40 Cal. 3d 654, 710 P.2d 288, 221 Cal. Rptr. 488 (1985), and Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P.2d 942 (1941), as demonstrative of judicial adherence to the exhaustion requirement based upon the rule. *Rojo*, 52 Cal. 3d at 84-85, 801 P.2d at 835, 276 Cal. Rptr. at 142. However, the court pointed out that the general rule only applies to the relief supplied for a statutory right through administrative processes and, consequently, the rule has no application to the availability of remedies independent of the statute. *Id.* at 84, 801 P.2d at 385, 276 Cal. Rptr. at 142. *See gener-*

The court distinguished those cases that have expanded the exhaustion requirement to causes of action outside the particular administrative scheme on two grounds.[67] First, it noted that in those prior cases, the subject matter required a "pervasive and self-contained system of administrative procedure" to deal with the problem,[68] whereas the FEHA lacks such a system for evaluating and controlling discrimination in employment.[69] Second, the court emphasized that, unlike the factually complex issues involved in other cases,[70] the issues involved in an employment discrimination case do not require a special technical competence or particular expertise which would make the administrative agency's determination indispensable to the judge or jury.[71]

In addition, the court reasoned that the policy considerations normally furthered by the exhaustion requirement[72] would not be advanced by requiring exhaustion of the FEHA administrative

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ally 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 234 (3d ed. 1985 & Supp. 1991) (discussing exhaustion requirement).

67. *See Rojo*, 52 Cal. 3d at 87-88, 801 P.2d at 387, 276 Cal. Rptr. at 144. The court briefly traced the expansion of the exhaustion requirement to encompass nonstatutory causes of action. *Id.* at 87, 801 P.2d at 386, 276 Cal. Rptr. at 143. Courts appropriated the justification for application of the exhaustion requirement in the context of private associations, which provided an internal remedy to administrative agencies in the public context, where an external remedy was possible in reasoning that administrative agencies, like private associations, "possess[] a specialized and specific body of expertise in a field that particularly equips it to handle the subject matter of the dispute." *Id.* The court then selected a court of appeal case indicative of the expansion of the doctrine, Karlin v. Zalta, 154 Cal. App. 3d 953, 201 Cal. Rptr. 379 (1984), and distinguished the applicability of the reasoning in such cases from cases involving the administrative procedure set up by the FEHA for matters dealing with employment related discrimination. *See id.* at 87-88, 801 P.2d at 386-87, 276 Cal. Rptr. at 143-44.

68. *Id.* at 87, 801 P.2d at 387, 276 Cal. Rptr. at 144 (citing and quoting *Karlin*, 154 Cal. App. 3d at 983, 201 Cal. Rptr. at 397). In *Karlin*, the court of appeal found that the "pervasive and self-contained system of administrative procedure" set up by the McBride Act "for the monitoring both of insurance rates and the anticompetitive conditions that might produce such rates" evidenced a particular competency of the agency in dealing with highly technical and complex excessive-rate issues. *Karlin*, 154 Cal. App. 3d at 983, 201 Cal. Rptr. at 397. Based upon this finding, the *Karlin* court determined that the administrative agency's proficiency in making the essential factual determinations justified requiring exhaustion of the administrative process under the McBride Act. *Id.* at 986-87, 201 Cal. Rptr. at 399-400.

69. *Rojo*, 52 Cal. 3d at 87-88, 801 P.2d at 387, 276 Cal. Rptr. at 144.

70. *Id.* at 88, 801 P.2d at 387, 276 Cal. Rptr. at 144 (citing *Karlin*, 154 Cal. App. 3d at 983, 201 Cal. Rptr. at 397 (insurance rates); Yamaha Motor Corp. v. Superior Court, 185 Cal. App. 3d 1232, 1242, 230 Cal. Rptr. 383, 387 (1986) (modification of franchises for good cause); Morton v. Hollywood Park, Inc., 73 Cal. App. 3d 248, 139 Cal. Rptr. 584 (1977) (interpretation of Horse Racing Board's rules governing ejection)).

71. *Id.* at 88, 801 P.2d at 387, 276 Cal. Rptr. at 144.

72. The court specifically listed four beneficial characteristics of the exhaustion requirement: "(1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; (3) mitigating damages; and (4) promoting judicial economy." *Id.* at 86, 801 P.2d at 386, 276 Cal. Rptr. at 143 (citing Westlake Community Hosp. v. Superior Ct., 17 Cal. 3d 465, 476, 551 P.2d 410, 416, 131 Cal. Rptr. 90, 96 (1976)).

remedies prior to commencing a civil action of any kind.[73] Rather, the court observed that requiring exhaustion of the FEHA procedure before allowing an employee to pursue nonstatutory claims in court

> would either lead to routine issuance of right-to-sue letters, thus nullifying the requirement, or alternatively, burden the Department and Commission with the investigation and determination of issues beyond their jurisdiction and special expertise, limit the resources available for the resolution of cases within the scope of the [A]ct, raise complex issues of collateral estoppel or res judicata, and ultimately have no beneficial impact on the judicial system, in that the case in any event must still enter the "judicial pipeline," a result the exhaustion doctrine was in part intended to avert.[74]

Therefore, the court held that a victim of employment discrimination can bypass the FEHA and go straight to court to seek damages from an employer based upon non-FEHA claims.[75] However, an employee desiring remedies from both forums has the option of initiating the process in each forum either concurrently[76] or consecutively.[77]

3. Sexual Harassment May Give Rise to Tortious Discharge in Contravention of Public Policy Claim

In addressing whether to include the common law tort action of "wrongful discharge in contravention of public policy" in an employee's arsenal of claims against a sexually harassing employer, the court examined[78] the nature and possible boundaries of the cause of action as set forth in *Foley v. Interactive Data Corp.*[79] and *Tameny v. Atlantic Richfield Co.*[80] The court found that a cause of action for

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73. *See id.* at 88, 801 P.2d at 387, 276 Cal. Rptr. at 144.

74. *Id.* (citing Cathy McKee v. Bell-Carter Olive Co., 186 Cal. App. 3d 1230, 1245, 231 Cal. Rptr. 304, 314 (1986)).

75. *Id.* at 88, 801 P.2d at 387-88, 276 Cal. Rptr. at 144-45 (citing Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 500 n.7, 468 P.2d 216, 220 n.7, 86 Cal. Rptr. 88, 92 n.7 (1970)).

76. *Id.* at 88, 801 P.2d at 388, 276 Cal. Rptr. at 145 (citing Brown v. Superior Court, 37 Cal. 3d 477, 481, 691 P.2d 272, 273, 208 Cal. Rptr. 724, 725 (1984)). If the plaintiff chooses this option, she can amend her complaint to include the claims under the FEHA as soon as she obtains a "right to sue" letter. *Id.*

77. *Id.* (citing Watson v. Department of Rehabilitation, 212 Cal. App. 3d 1271, 1277-78, 261 Cal. Rptr. 204, 206-07 (1989); Monge v. Superior Court, 176 Cal. App. 3d 503, 507, 222 Cal. Rptr. 64, 65 (1986)).

78. *Rojo*, 52 Cal. 3d at 88-91, 801 P.2d at 388-89, 276 Cal. Rptr. at 145-46.

79. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). The *Foley* court determined that the termination of an employee for reporting an on-going criminal investigation of a co-employee to his employer does not amount to wrongful discharge in contravention of public policy, because the interests involved are not "public." *Id.* at 670-71, 765 P.2d at 380, 254 Cal. Rptr. at 218.

80. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). The *Tameny* court found that an employee's dismissal for refusing to commit an illegal act in the course of employment gave rise to a claim for tortious discharge in contravention of public policy because the claim implicated the public policy against conditioning employment

wrongful discharge in contravention of public policy must be based upon a policy that is both " 'fundamental' and 'public' in nature, i.e., 'one which inures to the benefit of the public at large rather than to a particular employer or employee.' "[81]

The court espoused the plaintiffs' argument that article I, section 8 of the California Constitution[82] promulgates freedom from sexual discrimination in employment as a fundamental public policy.[83] The court further maintained that the public policy against sexual harassment in the workplace is based on the widespread public interest in eliminating the negative effects that employment-related sex discrimination has on society as a whole, thus satisfying the requirement that the policy "inure to the benefit of the public."[84] Consequently, the court concluded that allegations of sexual harassment in employment may sustain a claim for tortious discharge in contravention of public policy.[85]

B. The Concurring Opinion

Justice Broussard concurred separately[86] only to reiterate that he disagreed with the court's holding in *Peralta Community College District v. Fair Employment and Housing Commission*,[87] which pro-

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upon the commission of criminal acts. *Id.* at 178, 610 P.2d at 1336-37, 164 Cal. Rptr. at 846.

81. *Id.* at 89, 801 P.2d at 388, 276 Cal. Rptr. at 145 (quoting *Foley*, 47 Cal. 3d at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217).

82. CAL. CONST. art. I, § 8. Article I, section 8 provides as follows: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

83. *Rojo*, 52 Cal. 3d at 90, 801 P.2d at 389, 276 Cal. Rptr. at 146. The court interpreted the constitutional provision as applying to both public and private sector employers. *Id.* at 89-90, 801 P.2d at 388-89, 276 Cal. Rptr. at 145-46 (citing CAL. BUS. & PROF. CODE § 16721 (West 1987); Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 220, 649 P.2d 912, 917, 185 Cal. Rptr. 270, 275 (1982); Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 19, 267 Cal. Rptr. 618, 627-28, *cert. denied*, 111 S. Ct. 344 (1990); Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1040-44, 264 Cal. Rptr. 194, 198-200 (1989)).

84. *Id.* at 90, 801 P.2d at 389, 276 Cal. Rptr. at 146. The court noted that the Act itself speaks to the fundamental public interest in eliminating discrimination in employment by stating that such discrimination " 'foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially adversely affects the interest of employees, employers, and the public in general.' " *Id.* (quoting CAL. GOV'T CODE § 12920 (West 1980)).

85. *Id.* at 91, 801 P.2d at 389-90, 276 Cal. Rptr. at 146-47. In addition, the court refused to confine the tort to situations where "the employer 'coerces' an employee to commit an act that violates public policy, or 'restrains' an employee from exercising a fundamental right, privilege, or obligation." *Id.* at 91, 801 P.2d at 389, 276 Cal. Rptr. at 146. Although the court indiciated that the plaintiffs' allegations could satisfy either category, it found that neither *Foley* nor *Tameny* supported such a restriction on the scope of the tort. *Id.* at 91, 801 P.2d at 389-90, 276 Cal. Rptr. at 146-47.

86. Rojo v. Kliger, 52 Cal. 3d 65, 91-92, 801 P.2d 373, 390, 276 Cal. Rptr. 130, 147 (1990) (Broussard, J., concurring). Justice Kennard joined the concurrence. *Id.*

87. 52 Cal. 3d 40, 801 P.2d 357, 276 Cal. Rptr. 114 (1990).

scribed compensatory damage awards as beyond the authority of the Fair Housing and Employment Commission.[88] Thus, Justice Broussard merely stated that he did not subscribe to the part of the court's opinion that referenced the *Peralta* holding.[89]

V. IMPACT

The California Supreme Court's three part ruling in *Rojo v. Kliger* increases the number of remedies that a victim of employment discrimination may pursue. Not suprisingly, the court's decision will have a substantial impact on employers charged with discrimination in employment, injured employees, and the future of the FEHA.

Although the court's holding with regard to the FEHA's lack of preemption was entirely predictable, given the plain language of the Act[90] and the numerous opinions supporting such a notion,[91] the decision officially opens up a host of remedies that a victim of employment discrimination may pursue. An aggrieved employee now has the right to seek out common law remedies, statutory remedies, and remedies under the FEHA. Should an employee choose to pursue all three avenues of relief, the employer's liability for employment discrimination will be enormous. This evidences a substantial defeat for employers who had hoped to limit the employee's scope of recovery to remedies provided by the Act, where compensatory and punitive damages are unavailable and the remedies are mainly limited to curing the discriminatory behavior.[92] In addition, the availability of the common law tort action of wrongful discharge in contravention of public policy to an employee will increase an employee's damage award and an employer's liability.

Despite the foregoing, the crux of the court's opinion lies with the decision that an employee need not exhaust the administrative remedies under the FEHA before bringing a civil action for the non-FEHA claims.[93] While this is beneficial to an employee wanting immediate relief and compensation for her injuries in the form of damages, the ruling may prove to be crippling to the utility of the FEHA.

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88. *Id.* at 56, 801 P.2d at 367, 276 Cal. Rptr. at 124.

89. *Rojo*, 52 Cal. 3d at 91-92, 801 P.2d at 390, 276 Cal. Rptr. at 147 (Broussard, J., concurring). *See supra* note 26.

90. *See supra* notes 37-39 and accompanying text.

91. *See supra* note 41 and accompanying text.

92. *See supra* notes 25-26 and accompanying text.

93. *See Sexual Harassment Plaintiffs May Bypass Adminstrative Process, California Court Rules*, DAILY LABOR REPORT (BNA), Dec. 27, 1990, No. 249, at A-6.

This is because an employee who has been discriminated against will probably find the monetary relief available from the courts more desirable than the FEHA remedial scheme, which focuses on curing discriminatory acts in the work place. Such situations occur when the discrimination resulted in the termination or constructive discharge of an employee who has no desire to return to her employment, even after the discrimination has been eliminated or otherwise resolved.

However, an employee seeking the maximum relief available should be advised to file his or her claims under the FEHA with the Fair Employment and Housing Commission in addition to filing a civil suit for the common law and non-FEHA statutory claims, and then amend that complaint to add the FEHA claims once the remedies have been exhausted under the Act.[94] This approach will enable the court to award compensatory and punitive damages under all three categories of claims, will subject the employer to the utmost liability, and will force the employer to cease the discriminatory practice and mitigate the damages as much as possible. Therefore, the FEHA's future role in eliminating discrimination in employment depends primarily on how useful the aggrieved employee views the administrative procedure in relation to the remedies immediately available in court.

VI. CONCLUSION

The holding in *Rojo v. Kliger* greatly increases an employer's liability for sexually harassing an employee. The decision represents the next logical step to take in light of the recent supreme court decisions limiting the type of remedies available under the FEHA for victims of employment discrimination.[95] The probability of increased litigation did not dissuade the court from granting employees the right to pursue remedies from all facets of California law in both administrative and judicial tribunals. Thus, the court sent the clear message that it will endorse nearly any method available to combat sex discrimination in employment.

SUSAN L. SPARKS

94. *See supra* notes 41-42.
95. *See supra* note 26 and accompanying text.

XI. PROPERTY LAW

Upon completion of all necessary requirements for conversion of apartments to condominiums, a California developer need not comply with subsequent land planning regulations even if they have failed to convey title to a single unit: **City of West Hollywood v. Beverly Towers.**

I. INTRODUCTION

The California legislature has enacted extensive legislation regarding the conversion of apartment buildings to condominiums. The two primary statutory frameworks developers must follow when converting these buildings are the Subdivision Map Act[1] and the Davis-Sterling Common Interest Development Act.[2] Additionally, the Department of Real Estate must publicly file a report granting the subdivision under the Subdivided Lands Act.[3] A problem arises, however, where local zoning ordinances, enacted subsequent to the developer meeting all other conditions, take effect. In *City of West Hollywood v. Beverly Towers*,[4] the California Supreme Court addressed whether a municipality can create additional conversion requirements even after the developer has met state requirements.[5]

Nine months after the City of West Hollywood incorporated,[6] the newly elected city council adopted ordinance 114U.[7] This ordinance established local requirements for a conditional use permit for condo-

1. CAL. GOV'T CODE, §§ 66410-99.58 (West 1983). The Map Act specifies certain requirements regarding design, improvement and transfer of subdivisions or condominiums. *See e.g.*, CAL. GOV'T CODE §§ 66418 & 66419. The Act also sets standards and procedure for approving subdivision maps. *See e.g.*, CAL. GOV'T CODE 66474 & 66474.5.

2. CAL. CIV. CODE, §§ 1350-70 (West 1982 & Supp. 1990). The Common Interest Development Act regulates common interest developments (condominiums) by requiring developers to follow a uniform set of laws.

3. CAL. BUS. & PROF. CODE, §§ 11000-200. Pursuant to the Subdivided Lands Act, whenever there is a sale of five or more units, the Department of Real Estate must file a report.

4. 52 Cal. 3d 1184, 805 P.2d 329, 278 Cal. Rptr. 375 (1991).

5. *Id.* at 1189-90, 805 P.2d at 332, 278 Cal. Rptr. at 378. Justice Mosk wrote the majority opinion with Chief Justice Lucas and Justices Panelli, Arabian and Baxter concurring. Justice Broussard dissented with Justice Kennard concurring in the dissent.

6. On November 29, 1984, the citizens of the city voted to incorporate. *Id.* at 1187, 805 P.2d at 330, 287 Cal. Rptr. at 376. The city council then suspended regulations on converting apartments to condominiums until they could create a permanent system. *Id.*

7. WEST HOLLYWOOD, CAL., ORDINANCES, 114U (1985) (hereinafter Ordinance 114U). The ordinance altered the previous city zoning regulation "by adding compre-

minium conversions.[8] Beverly Towers complied with all state and local requirements before the council enacted Ordinance 114U but had not sold an interest in any of the condominiums. The City claimed that a failure to sell rendered the conversion incomplete, and, therefore, Ordinance 114U applied.[9]

II. THE COURT'S DECISION

A. *Majority Opinion*

The majority held that the failure to sell was "purely technical"[10] and that the Map Act protected owners from subsequent conversion regulations.[11] The court noted that setting a definite date from which an owner can proceed regardless of subsequent regulations furthers the Map Act's intent.[12] The court then determined that Beverly Towers need not comply with the additional burdens of Ordinance 114U. The court observed that its decision in *Youngblood v. Board of Supervisors*[13] supported this proposition.[14]

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hensive regulations governing the conversion of multiple family rental units into condominiums." *Id.*

8. Examples of the new requirements were that 1) converting the apartment building would not decrease the supply of rental housing in the city, 2) certain percentages of vacant rental housing in the city must be present unless a) new rental units would be added for each one converted, b) the developer provides "inclusionary units or in lieu fees," or c) no major dislocation of the existing tenants occurs. *Id.*

9. *Id.* at 1188, 805 P.2d at 330-31, 278 Cal. Rptr. at 376-77. Beverly Towers obtained final and tentative subdivision tract map approvals and the public report of the Department of Real Estate necessary for sale of the condominiums. *Id.* at 1187, 805 P.2d at 330, 278 Cal. Rptr. at 376.

10. *Id.* at 1190, 805 P.2d at 332, 278 Cal. Rptr. at 378. The city argued that the sale of a unit was essential because Section 1352 of the California Civil Code states that a condominium is "created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed." Furthermore, a declaration, a condominium plan and a final map (if required by the Map Act) must be recorded. CAL. CIV. CODE § 1352 (West 1982). The city asserted, therefore, that under the statutory definition, conversion is not complete until at least one unit is sold, even though the developer received all final governmental approvals. *See* County of Los Angeles v. Hartford Acc. & Indem. Co., 3 Cal. App. 3d 809, 814, 83 Cal. Rptr. 740, 743 (1970). The court determined, however, that the sale of a unit is merely a "definitional element of a condominium . . . It is not an element that must be satisfied before an owner's right to sell is immune from conditions imposed by a city on the exercise of that right." *Beverly Towers*, 52 Cal. 3d at 1190, 805 P.2d at 332, 278 Cal. Rptr. at 378.

11. *Id.* The Map Act protects developers. California Government Code section 66474.1, for example, prevents a legislative body from denying approval of a final parcel map if it is substantially similar to an already approved tentative map. CAL. GOV'T CODE § 66474.1 (West 1983). *See also* CAL. GOV'T CODE §§ 66474.2 & 65961 (West 1983).

12. *Beverly Towers*, 52 Cal. 3d at 1190, 805 P.2d at 332, 278 Cal. Rptr. at 378. The court found that "some of the Map Act's provisions are designed to safeguard the investments and expectations of developers involved in conversion projects." *Id. See, e.g.*, CAL. GOV'T CODE §§ 66474.1, 66474.2 & 65961 (West 1983).

13. 22 Cal. 3d 644, 586 P.2d 556, 150 Cal. Rptr. 242 (1978).

14. *Beverly Towers*, 52 Cal. 3d at 1191, 805 P.2d at 333, 278 Cal. Rptr. at 379.

In *Youngblood*, the court held that the tentative map approval date was the critical date in the conversion process.[15] At that point, essentially all conditions of approval should be settled.[16] In *Santa Monica Pines, Ltd. v. Rent Control Board*,[17] the court "expressed doubt" that *Youngblood* applied to condominium conversions.[18] In *Beverly Towers*, however, the court asserted that once a developer acquires the final map and Department of Real Estate approval, the city council cannot retroactively enforce subsequent regulations simply because "the only remaining act required to complete the conversion is to convey title to a single unit."[19]

The court further determined that its decision in *Santa Monica Pines* "attributed an inappropriately minor role to the Map Act as it relates to condominium conversion."[20] *Santa Monica Pines* is not applicable, therefore, where municipalities attempt to force further conditions upon developers *after* they have followed the procedures prescribed by the Map Act.[21]

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15. *Youngblood*, 22 Cal. 3d at 655-56, 586 P.2d at 562, 150 Cal. Rptr. at 248. More specifically, the court stated, "The purpose . . . was to confirm that the date when the tentative map comes before the governing body for approval is the crucial date when that body should decide whether to permit the proposed subdivision." *Id.* at 655, 586 P.2d at 562, 150 Cal. Rptr. at 248.

16. In *Youngblood*, the court determined that the county could not deny a substantially similar final map if they had previously approved the tentative map upon which the final map was based. *Id.* Once the county approves the tentative map, the developer may rely on that approval.

> Once the tentative map is approved, the developer often must expend substantial sums to comply with the conditions attached to that approval. These expenditures will result in the construction of improvements consistent with the proposed subdivision . . . . [I]t is only fair to the developer and to the public interest to require the governing body to render its discretionary decision whether and upon what conditions to approve the proposed subdivision when it acts on the tentative map.

Id. at 655-56, 150 Cal. Rptr. at 248, 586 P.2d at 562. *See also*, *Beverly Towers*, 52 Cal. 3d at 1191, 805 P.2d at 332, 278 Cal. Rptr. at 378.

17. 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984).

18. *Id.* at 866, 679 P.2d at 32, 201 Cal. Rptr. at 598. The court exempted condominiums because developers seldom perform "substantial new construction" in condominium conversions. *Id.*

19. *Beverly Towers*, 52 Cal. 3d at 1191, 805 P.2d at 333, 278 Cal. Rptr. at 379.

20. *Id.* at 1192, 805 P.2d at 333, 278 Cal. Rptr. at 379. In *Santa Monica Pines*, the court reasoned that the purpose of the Map Act was distinct from that of the rent control law. The Map Act was implemented to regulate subdivision layout and upgrading while protecting the public from fraud and exploitation. *Santa Monica Pines*, 35 Cal. 3d at 869, 679 P.2d at 34, 201 Cal.Rptr. at 600. "[T]he opinion overlooks the fact that the Map Act details the procedure by which a developer secures approval to proceed with a conversion." *Beverly Towers*, 52 Cal. 3d at 1192, 805 P.2d at 333, 278 Cal. Rptr. at 379.

21. *Id.*

The court also held that neither *Griffin Development Co. v. City of Oxnard*[22] nor *Avco Community Developers, Inc. v. South Coast Regional Commission*[23] were controlling.[24] In *Griffin*, unlike *Beverly Towers*, the developer did not have tentative or final subdivision map approval.[25] In *Avco*, the developer had no vested right to continue because he had failed to comply with certain requirements.[26] In *Beverly Towers*, on the other hand, the developer had complied with all requirements necessary to convey title.[27] Furthermore, the government's ability to control land use planning, a concern in *Avco*,[28] was determined to be a non-issue in the present case.[29]

The court rejected the city's contention that Beverly Towers needed a vesting tentative map[30] because "no further discretionary permits were required in order for them to proceed."[31] Lastly, the court determined that Beverly Towers' contention that the city failed to give it notice of Ordinance 114U was moot.[32] Thus, because all necessary requirements were completed, the fact that Beverly Towers had "yet to sell a unit [was] determined to be a trivial factor."[33]

B. Dissenting Opinion

Justice Broussard argued that the majority's opinion destroyed the

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22. 39 Cal. 3d 259, 703 P.2d 339, 217 Cal. Rptr. 1 (1985).

23. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

24. *Beverly Towers*, 52 Cal. 3d at 1192, 805 P.2d at 333, 278 Cal. Rptr. at 379.

25. *Griffin* dealt with whether a city could regulate conversions of apartments into condominiums at all. In *Griffin*, the developer had been denied a special use permit, a variance, *and* a tentative subdivision map. *Griffin*, 39 Cal. 3d at 261, 703 P.2d at 340, 217 Cal. Rptr. at 2.

26. In *Avco*, the court held there was no vested right to continue because the developer had "not even applied for a [building] permit." *Avco*, 17 Cal. 3d at 795, 553 P.2d at 553, 132 Cal. Rptr. at 392. The developer, therefore, had to comply with subsequently enacted legislation.

27. *Beverly Towers*, 52 Cal. 3d at 1192, 805 P.2d at 334, 278 Cal. Rptr. at 380.

28. In *Avco*, the court feared that allowing the developer to continue upon approval of a map would exempt property lots already subdivided from government regulations for an unspecified period. *Avco*, 17 Cal. 3d at 797-98, 553 P.2d at 554, 132 Cal. Rptr. at 394.

29. *Beverly Towers*, 52 Cal. 3d at 1193, 805 P.2d at 334, 278 Cal. Rptr. at 380.

30. *Id.* at 1193-94, 805 P.2d at 334-35, 278 Cal. Rptr. at 380-81. A vesting tentative map (pursuant to section 66498.1 of the Map Act) gives the developer a vested right to proceed "in accordance with the local ordinances, policies and standards in effect when the application for the vesting tentative map [is] complete." *Id.* at 1193 n.6, 805 P.2d at 334 n.6, 278 Cal. Rptr. at 380 n.6.

31. *Id.* at 1194, 805 P.2d 335, 278 Cal. Rptr. 381. The city was misguided in its argument because the only reason to acquire a vesting tentative map is "to allow a developer who needs additional discretionary approvals to complete a long term development project as approved, regardless of any intervening changes in local regulations." *Id.* at 1194, 805 P.2d at 334-35, 278 Cal. Rptr. at 380-81. *See also*, Donatas Januta & William M. Boyd, *Development Agreements and Uncertainties in the Development Approval Process*, 5 REAL PROP. L. RPTR., Apr. 1982 at 49.

32. *Beverly Towers*, 52 Cal. 3d at 1194, 805 P.2d at 335, 278 Cal. Rptr. at 381.

33. *Id.* at 1193-94, 805 P.2d at 334, 278 Cal. Rptr. at 380.

government's ability to regulate condominium conversions in circumstances where the vested rights doctrine[34] is inapplicable for lack of detrimental reliance.[35] Moreover, "the approval of a map has never conferred a vested right to proceed with the development."[36] A developer must meet California's vested rights doctrine, which calls for "substantial improvements in good faith reliance on the permit"[37] before he is immune to subsequent state or city regulations.[38] Additionally, the legislative intent of the Map Act was not to protect developers in cases such as this.[39] Finally, the dissent distinguished *Youngblood* stating that *Santa Monica Pines* controls in that a developer must show detrimental reliance to have a vested right.[40]

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34. *Id.* at 1195, 805 P.2d at 336, 278 Cal. Rptr. at 382 (Broussard, J., dissenting). The vested rights doctrine allows developers to continue the conversion process without complying with subsequently enacted regulations and "is not to be applied against the government 'except in unusual cases where necessary to avoid grave or manifest injustice' and with due consideration for any effect on the estoppel on the achievement of public policy goals." *Id.* at 1196-97, 805 P.2d at 336-37, 278 Cal. Rptr. at 382-83 (Broussard, J., dissenting) (quoting Hock Investment Co. v. City and County of San Francisco, 215 Cal. App. 3d 438, 449, 263 Cal. Rptr. 665, 671 (1989)).

35. *Id.* at 1200, 805 P.2d at 339, 278 Cal. Rptr. at 385 (Broussard, J., dissenting). Justice Broussard argued that the developer demonstrated no reliance upon the approval of the map but merely planned changes that were not implemented. *Id.*

36. *Id.* at 1197, 805 P.2d at 337, 278 Cal. Rptr. at 383. (Broussard, J., dissenting). Justice Broussard relied on Kappadahl v. Alcan Pacific Co., 222 Cal. App. 2d 626, 35 Cal. Rptr. 354 (1963), which held that a municipality could not be estopped from implementing zoning regulations simply because a map had been filed and approved. If this were the case, the government would lose its power to permit different uses for the land than those specified by the map. *Id.* at 633-34, 35 Cal. Rptr. at 359.

37. *Beverly Towers*, 52 Cal. 3d at 1197, 805 P.2d at 337, 278 Cal. Rptr. at 383 (Broussard, J., dissenting) (citing Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

38. *Id.* at 1197, 805 P.2d at 337, 278 Cal. Rptr. at 383. *See supra*, notes 36-37 and accompanying text (detrimental reliance is necessary for a developer to have a vested right to proceed).

39. *Id.* at 1199, 805 P.2d at 338, 278 Cal. Rptr. at 384 (Broussard, J., dissenting). Justice Broussard agreed with the city's argument regarding the vested subdivision map. *See supra* note 30 and accompanying text. Invoking section 66498.9(b) of the Map Act, the developer was not entitled to protection from subsequently enacted regulations because he failed to apply for a vesting map. *Id.* at 1199, 805 P.2d at 338-39, 278 Cal. Rptr. at 384-85 (Broussard, J., dissenting).

40. *Id.* at 1199-1200, 805 P.2d at 339, 278 Cal. Rptr. at 385 (Broussard, J., dissenting). According to Justice Broussard, the fairness to the developer discussed in *Youngblood* should be viewed in light of "the developers' expenditures in reliance on Map Act approval." *Id.* at 1200, 805 P.2d at 339, 278 Cal. Rptr. at 385 (Broussard, J., dissenting). *Youngblood* did not apply because the developer had made no expenditures.

III. CONCLUSION

The *Beverly Towers* decision will boost condominium development in California. Developers now have assurance that once all Map Act and other requirements have been met, they can proceed with conversion without the need to comply with subsequently enacted state or local regulations. With this protection, the supply of condominiums should increase, driving down the price of condominium ownership. Although government power to control land use may be somewhat impaired, condominium affordability will be enhanced at a time when "the American dream of home ownership has become a nightmare."[41]

STUART E. FRANK

XII. WORKERS COMPENSATION

The exclusive remedy provision of the California worker's compensation law does not bar a damage action for injuries, either physical or mental, arising from the alleged wrongful termination of an employee when the employer's conduct in question lies well outside the "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury in exchange for limitations on the amount of this liability: **Shoemaker v. Myers.**

I. INTRODUCTION

In *Shoemaker v. Myers*[1], the California Supreme Court addressed the issue of whether an employee, who has been the victim of wrongful employment termination, may sue for damages when the complaint alleges that physical injuries resulted from the termination process, notwithstanding the exclusive remedy provisions[2] of the

41. Griffin Dev. Co. v. City of Oxnard, 39 Cal. 3d 259, 268, 703 P.2d at 345, 217 Cal. Rptr. at 7 (Mosk, J., dissenting). In *Griffin*, Justice Mosk was concerned with the ability of lower income families to purchase stakes in equity due to the restraints the majority opinion had placed on condominium development. "[T]he city has placed unreasonable barriers in the way of those frugal families who prefer at the end of the year to have an enhanced equity in a piece of real property instead of 12 rent receipts." *Id.* Of the Justices on the bench at the time *Griffin* was decided, only Justices Mosk and Broussard, and Chief Justice Lucas remain. The change of justices on the court enabled Justice Mosk to write the majority instead of the dissent in *Beverly Towers*.

1. 52 Cal. 3d 1, 801 P.2d 1054, 276 Cal. Rptr. 303 (1990).

2. Former Labor Code section 3601 provided in pertinent part:

a) "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy for injury or death of an employee

worker's compensation law.[3] The court determined that generally, either physical or mental disabilities which arise from termination of employment occur within the scope of employment[4] and are thus limited by the exclusive remedy provisions.[5] Employee disabilities, however, are not subject to the exclusive remedy provisions if an express or implied statutory exception can be invoked,[6] if the employee's termination results from employer conduct which can be seen as having a " 'questionable' relationship to the employment,"[7] or is not an anticipated risk of employment.[8]

II. HISTORICAL BACKGROUND

At common law, an employment contract of indefinite term was generally terminable at will by either party.[9] Modernly, however, throughout the United States and in California, the employer's absolute right to terminate an employee has been limited.[10] Recent case law in California has explored the issue of whether employees may maintain actions in tort against their former employers for wrongful termination or for injuries resulting therefrom, even though the Workers Compensation Act[11] provides an exclusive remedy.

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against the employer or against any other employee of the employer acting within the scope of his employment. . ."

Stats. 1971, c. 1751, p. 3780, § 1, operative April 1, 1972.

3. *Shoemaker*, 52 Cal. 3d at 7, 801 P.2d at 1056, 276 Cal Rptr. at 305.

4. *Id.* at 20, 801 P.2d at 1065, 276 Cal. Rptr. at 314.

5. *Id.* at 7, 801 P.2d at 1056, 276 Cal. Rptr. at 305.

6. An example is Government Code Section 19683 which is commonly referred to as the "whistle-blower" statute. The statute states that an employee may bring a civil action for damages against the employer when the employer either disciplines or discharges an employee who reports violations of law to the authorities. For more discussion on Government Code Section 19683, *see infra* notes 94-104 and accompanying text.

7. *Shoemaker*, 52 Cal. 3d at 16, 801 P.2d at 1063, 276 Cal. Rptr. at 312 (quoting *Cole v. Fair Oaks Fire Protection District*, 43 Cal. 3d 148, 161, 729 P.2d 743, 751, 233 Cal. Rptr. 308, 316 (1987)).

8. *Shoemaker*, 52 Cal. 3d at 16, 801 P.2d at 1063, 276 Cal. Rptr. at 312.

9. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 448, 168 Cal. Rptr. 722, 725 (1980). The common law rule is codified in Labor Code section 2922. Stats. 1971, ch 1580, § 1, p. 3186; Stats. 1971, Ch. 1607, § 2, p. 3459.

10. Where employers terminated employees in violation of a statute or a fundamental public policy, the right to terminate at will has been limited. *See eg., Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); *Nees v. Hocks*, 272 Ore. 210, 536 P.2d 512 (1975); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973).

11. CAL. LABOR CODE § 3200 *et. seq.* [hereinafter "the Act"].

In *Renteria v. County of Orange*[12] the court faced the issue of whether the exclusive remedy provision barred an employee's suit for intentional infliction of emotional distress.[13] The plaintiff did not allege any physical injuries and therefore was precluded from recovery under the Act. The defendant argued that Labor Code Section 4553[14] provided adequate recovery, but the court rejected this assertion and held that an employee's suit for intentional infliction of emotional disstress was an implied exception to the exclusive remedy.[15]

The case of *Johns-Manville Products Corp. v. Superior Ct.*[16] resolved the issue of whether the exclusive remedy provisions barred a suit for fraud and conspiracy against the employer.[17] The defendant raised the argument that section 4553 provided for recovery for intentional acts of the employer. Here, the court accepted the argument and held that injuries resulting from intentional misconduct are compensable under section 4553.[18] In certain situations, however, employer conduct will enable an employee to bring an action at law, and therefore the employee will be able to sue for aggravation of his injuries due to the employer's fraud.[19]

In *Cole v. Fair Oaks Fire Protection District*,[20] the court again confronted whether an employee may bring a civil action for intentional

12. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

13. In *Renteria*, plaintiff alleged his employers discriminated against him due to his Mexican heritage, "with the object and intent to force or cause plaintiff to suffer humiliation, mental anguish and emotional and physical distress, and to cause plaintiff to resign his position of employment or to be fired or dismissed therefrom." *Id.* at 835, 147 Cal. Rptr. at 447.

14. Stats. 1972, c. 1029, p. 1907, § 1. This section states that the amount of compensation will be increased by 50% if the employee is injured by an employer's serious and willful misconduct.

15. *Id.* at 842, 147 Cal. Rptr. at 452. The court reasoned that since plaintiff's injuries were noncompensable a "fifty percent increase of nothing is still nothing." *Id.* at 841, 147 Cal. Rptr. at 452.

16. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

17. In *Johns-Manville*, the employer fraudulently concealed from plaintiff that he had been exposed to and had contracted industrial disease due to asbestos poisoning. Furthermore, plaintiff claimed that while defendant knew all along that asbestos was hazardous, upon finding out that plaintiff had become ill, the employer concealed the information which further aggravated the condition. *Id.*

18. *Id.* at 473, 612 P.2d at 954, 165 Cal. Rptr. at 863. The court reasoned that often times, an employer will recognize a danger but will fail to correct it. *Id.* at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863. Even though such conduct is intentional, if employees were allowed to sue, injuries compensable under the Act would also be sued for outside the system. This would undermine a process which "balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments." *Id.* at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.

19. *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866. Inherent in this conclusion was the fact that the concealment from the plaintiff was behavior which fell outside the parameters of the balancing system.

20. 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987).

infliction of emotional distress, notwithstanding the exclusive remedy provision.[21] The court opined that the exclusive remedy provision preempted the plaintiff's action at law for intentional infliction of emotional distress.[22] The court reasoned that holding otherwise would enable employees to maintain an action at law "merely by alleging an ulterior purpose of causing injury."[23] Such an exception would not promote the purpose of the compensation bargain.[24] Thus, a separate action could only be brought in special cases, where the conduct had a "questionable relationship" to the employment.[25] In *Shoemaker*, the court clarified these somewhat conflicting interpretations of the compensation bargain, and determined whether the exclusive remedy provision barred actions for injuries alleged as the result of employment termination.

II. STATEMENT OF THE CASE

Former Labor Code § 3600[26] states that employers are liable for injuries occurring in the course of employment[27] as long as specified conditions of compensation occur.[28] Former Labor Code § 3601[29] pro-

21. *Id.* at 151, 729 P.2d at 744, 233 Cal. Rptr. at 309. In *Cole*, a fire department supervisor continually harassed the plaintiff. The plaintiff was a union representative and management had punished him for his activities. He was the victim of constant harassment by his supervisors, including unique personnel evaluations, disciplinary actions, demotions, and assignments to menial duties. As a result of the harassment, plaintiff suffered a massive stroke. *Id.* at 152-153, 729 P.2d at 744-45, 233 Cal. Rptr. at 309-310.

22. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.

23. *Id.*

24. *Id.*

25. *Id.* at 161, 729 P.2d at 751, 233 Cal. Rptr. at 316. The court's decision placed the bulk of employer conduct within the parameters of the compensation bargain (the policy underlying the Act), thus the exclusive remedy provision was applicable.

26. Ch. 1303, § 5, 1978 Cal. Stat. 4262.

27. In 1978, section 3600 of the Labor Code stated in pertinent part:

> Liability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of employment . . . in those cases where the . . . conditions of compensation occur.

Id.

28. The pertinent conditions for compensation necessary under the former code provided as follows:

> (1) the employer and employee are subject to the Act,
> (2) that at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment,
> (3) the injury is proximately caused by the employment . . . and
> (4) the injury is not caused by the employee's intoxication, the injury or death is not intentionally self-inflicted, the injury does not arise out of an alterca-

vided that compensation available to employees under the act would be the exclusive remedy.[30] This exclusive remedy provision has been challenged by employees who were terminated due to employer conduct not seen as a reasonable risk of employment.[31]

Plaintiff Shoemaker maintained an exemplary employment record for twenty-two years in the Department of Health Services[32] (hereinafter "the Department"). However, on January 11th, 1982, Shoemaker was terminated.[33] In 1980, after receiving a letter from the Attorney General stating that certain health centers were operating illegally,[34] the Department assigned Shoemaker to investigate. Shoemaker filed a report confirming the allegations and stating that Beverle A. Myers, the director of the Department, and other important officials, had approved of funding for the centers with knowledge of the illegal activity.[35] After the report's filing, Charles Shuttleworth, the plaintiff's supervisor, prevented Shoemaker from continuing his investigation.[36] When Shoemaker complained, he was harassed and was subjected to disciplinary procedures.

In May 1981, a magazine article publicized the practices which the plaintiff had previously reported. In November of the same year, Shoemaker was mistakenly identified as an investigator who had harassed two patients.[37] The plaintiff was interrogated and when he demanded representation, he was terminated for insubordination. The State Personnel Board reinstated Shoemaker. Subsequently,

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tion in which the employee is the initial physical aggressor and the injury does not arise out of voluntary participation in recreational activities not reasonably required as part of the employment.

Shoemaker, 52 Cal. 3d at 13-14, 801 P.2d at 1060-61, 276 Cal. Rptr. at 309-10 (citing Ch. 1303, § 5, 1978 Cal. Stat. 4262 (formerly Labor Code § 3600)).

29. Ch. 1751, § 1, 1971, Cal. Stat. 3780, (operative April 1, 1972).

30. Section 3601 provided in pertinent part:

Where the conditions of compensation exist, the right to recover such compensation . . . is . . . the exclusive remedy for injury or death of an employee against the employer . . .

Ch. 1751, § 1, 1971 Cal. Stat. 3780 (operative April 1, 1972).

31. *See, e.g., Cole*, 43 Cal. 3d at 148, 729 P.2d at 743, 233 Cal. Rptr. at 308. *See supra* note 21.

32. 52 Cal. 3d at 7, 801 P.2d at 1056-57, 276 Cal. Rptr. at 305-06. For the nine years previous to his termination, he worked as an investigator at the Department. *Id.* at 7, 801 P.2d at 1056, 276 Cal. Rptr. at 305.

33. *Shoemaker*, 52 Cal. 3d at 8, 801 P.2d at 1057, 276 Cal Rptr. at 306.

34. The letter alleged that workers were "performing services required to be performed by licensed medical professionals." *Id.* at 7, 801 P.2d at 1057, 276 Cal. Rptr. at 305-306.

35. Included among the officials was Beverle A. Myers, the director of the Department of Health Services. *Id.* at 8, 801 P.2d at 1057, 276 Cal. Rptr. at 306.

36. Charles Shuttleworth, chief of the division, basically prevented plaintiff from continuing in the investigation. *Id.*

37. A psychiatrist reported that investigators had harassed two of his patients while conducting an investigation unrelated to the health centers. The psychiatrist wrongly named Shoemaker as one of the investigators. *Id.*

Shoemaker's supervisors stated that they "wanted to cause plaintiff as much trouble as possible," even though they knew he was fired improperly.[38]

On December 9, 1982, plaintiff filed his first complaint. On June 8, 1983 he amended the complaint including claims for: 1) wrongful termination; 2) wrongful termination due to former Government Code § 19683[39]; 3) wrongful termination in violation of public policy; 4) breach of contract and the implied covenant of good faith and fair dealing; 5) wrongful interference with business relationship and inducement of breach of contract; 6) intentional infliction of emotional distress; 7) fraud; 8) civil rights violation; 9) injunctive relief; and 10) attorney's fees. The defendant's demurrer to the complaint was sustained with leave to amend.[40]

In his second amended complaint, plaintiff omitted all allegations of physical disabilities, except in the civil rights action. Defendants again demurred, arguing that the exclusive remedy provision applied. The trial court sustained with leave to amend.[41] In the third amended complaint the plaintiff claimed only mental and emotional injury and the court sustained defendant's demurrer without leave to amend.[42]

The appeals court noted that where compensable (physical) disability was caused, case law had mandated that the exclusive remedy provision of the Workers Compensation Act controlled.[43] The court stated that the physical injury allegations in plaintiff's first com-

38. *Id.* at 9, 801 P.2d at 1057, 276 Cal. Rptr. at 306. Shuttleworth, along with other senior officers, also stated that "if it had been anyone other than plaintiff, he would not have been fired." *Id.*

39. Ch. 1259, § 1, 1971 Cal. Stat. 2473 (Amended by Ch. 584, § 2, 1979 Cal. Stat. 1831). Section 19683 is the "whistle-blower" statute which protects employees who report violations by their superiors. For further analysis, see *infra* notes 94-104 and accompanying text.

40. *Id.* at 10, 801 P.2d at 1058, 276 Cal. Rptr. at 307. The demurrer was sustained with leave to amend as to the first, second, third, and sixth causes of action because such actions were barred by the Act's exclusive remedy provisions. In addition, the court sustained the demurrer as to the seventh, eighth, and eleventh causes of action. *Id.*

41. *Id.* The court informed plaintiff that he needed to include a good explanation for deleting the physical injury allegations within his amended complaint. Moreover, the court sustained the defendant's demurrer without leave to amend as to the eighth, ninth, and tenth causes of action.

42. *Id.* at 10, 801 P.2d at 1059, 276 Cal. Rptr. at 308. Plaintiff's failure to explain his deletion of physical injury allegations from the complaint caused the court to rule that the exclusive remedy provisions barred the action. *Id.* at 10-11, 801 P.2d at 1059, 276 Cal. Rptr. at 308.

43. *Id.* at 11, 801 P.2d at 1059, 276 Cal. Rptr. at 308 (citing *Cole v. Fair Oaks Fire*

plaint were controlling and all causes of action in the third amended complaint were therefore barred.[44] Moreover, intentional misconduct by the employer alone could not justify an action outside of the exclusive remedy since disciplinary and supervisory conduct in termination is a normal risk of employment.[45] The court also rejected assertions that the plaintiff could maintain an action under the "whistle-blower" statute because the Act was the more specific and, therefore, the controlling statute.[46] Finally, the appellate court held that the civil rights cause of action had been properly pled.[47]

III. TREATMENT

A. Majority Opinion

The California Supreme Court held that the termination of employment is a normal part of the employment relationship.[48] Therefore, either physical or mental disabilities which arise therefrom fall under the umbrella of worker's compensation coverage and are subject to the exclusive remedy provisions.[49] However, the court further held that employees may escape from the shackles of the Act when their injuries result from behavior that would not be considered a reasonable risk of employment.[50]

B. Considerations of Allegations of Physical Injuries

By including significant allegations of physical injuries in his original complaint, the plaintiff could not simply omit them later in the hopes that the appellate court would not take them into account.[51] The Court stated, "[m]aterial factual allegations in a verified pleading that are omitted in a subsequent amended pleading without adequate explanation will be considered by the court in ruling on a demurrer to the later pleading."[52] Plaintiff relied on *McGee v. McNally*,[53] but

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Protection Dist., 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987) in reaching that decision).

44. *Shoemaker*, 52 Cal. 3d at 11, 801 P.2d at 1059, 276 Cal. Rptr. at 308.

45. *Id.*

46. *Id.* at 12, 801 P.2d at 1059-60, 276 Cal. Rptr. at 308-09.

47. The civil rights which may have been violated were plaintiff's freedom of speech and freedom of association.

48. *Id.* at 20, 801 P.2d at 1065, 276 Cal. Rptr. at 314.

49. *Id.* at 7, 801 P.2d at 1056, 276 Cal. Rptr. at 305. Justice Arabian delivered the opinion of the court in which the Chief Justice, Justice Broussard, Justice Panelli, Justice Eagleson and Justice Kennard joined. Justice Mosk concurred in the judgment.

50. *Id.*

51. Plaintiff's original complaint alleged "that his injuries caused him to lose time from work and that he believed he would suffer some permanent disability." *Id.* at 12, 801 P.2d at 1060, 276 Cal. Rptr. at 309.

52. *Id.* (citation omitted).

53. 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981).

because his allegations of physical injury were so substantial,[54] *McGee* was inapplicable and the third amended complaint could not be analyzed without considering the first complaint's allegations.[55]

Although the Court of Appeal correctly took into account these allegations, its subsequent reliance on *Cole v. Fair Oaks Fire Protection*[56] in banning the majority of plaintiff's claims[57] was inappropriate.[58] When considering whether the exclusive remedy provision bars a cause of action, any alleged physical injury must be viewed in "relation to the scope and purposes of the workers' compensation statutory scheme."[59]

C. *The Statutory Exclusive Remedy Provisions*

The Court noted that since plaintiff's injuries occurred in 1981, the Act would be applied in pre-1982 Amendment form.[60] Former Labor Code section 3600[61] held employers liable for any injury to employees as long as certain "conditions of compensation"[62] occurred. Former Labor Code section 3601[63] stated that if such conditions occurred, the right to recover compensation was "the exclusive remedy for injuries or death of an employee against the employer . . . ."[64] Former Labor Code section 3602[65] provided that an employer's liability would not be subject to the limitations of the Act if the conditions of compensa-

54. As previously stated, plaintiff made substantial allegations of physical injury. *See supra*, note 51. In *McGee*, plaintiff alleged intentional infliction of emotional distress against his employer and made reference to physical harm. The court stated that the allegations of physical injury were "makeweight" and no actual claim for disability was made. *Id.* at 895, 174 Cal. Rptr. at 255. Because the claim was essentially based on emotional and mental injuries, the court held that compensation outside the Act would be allowed. *Id.* The court relied on *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (compensation outside the worker's compensation system may be sought in an action for intentional infliction of emotional distress) and *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (outside cause of action may be allowed for deliberate employer conduct).

55. *Shoemaker*, 52 Cal. 3d at 12, 801 P.2d at 1060, 276 Cal. Rptr. at 309.

56. 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987).

57. The Court of Appeals sustained defendant's demurrer without leave to amend for most of the causes of action. *See supra* notes 42-43 and accompanying text. Only the civil rights cause of action was not barred. *Shoemaker*, 52 Cal. 3d at 12, 801 P.2d at 1060, 276 Cal. Rptr. at 309.

58. *Id.* at 13, 801 P.2d at 1060, 276 Cal. Rptr. at 309.

59. *Id.*

60. *Id.*

61. Ch. 1303, § 5, 1978 Cal. Stat. 4258, 4262.

62. *Id. See supra* notes 27-28 and accompanying text.

63. Ch. 1751, § 1, 1971 Cal. Stat. 3779, 3780.

64. *Id. See supra* notes 29-30 and accompanying text.

65. Ch. 90, § 3602, 1937 Cal. Stat. 185, 269.

tion failed to occur.[66] Noting that the scope of the exclusive remedy provisions had been a major issue over the years,[67] the Court then reviewed its earlier decisions.

The issue had reached its peak in *Cole*, and in that decision, the Court had clarified certain principles. First, the exclusive remedy provisions hinge upon an injury arising out of and in the course of employment.[68] Second, if the employee is injured in the course of employment, then the exclusive remedy applies regardless of how the employer behaved.[69] Employers assume limited, no fault liability, while employees receive swift compensation without the availability of additional tort damages.[70]

In *Cole*, however, situations were indicated and described where the exclusive remedy would not act as a bar.[71] For example, the exclusive remedy only applies when there is "personal physical injury or death."[72] Furthermore, when the employer has "stepped out of [his] proper role(s)"[73] or engaged in conduct which bears a "questionable relationship to the employment,"[74] the employee is not barred by the exclusive remedy due to exposure to a risk which did not necessarily reflect the purposes of the compensation bargain.[75] Having clarified these principles, the court next turned to the alleged causes of action.

D. Applying the Exclusive Remedy

1. Wrongful Termination Causes of Action

Shoemaker primarily argued that due to *Georgia-Pacific Corp. v.*

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66. The statute read, "In all cases where the conditions of compensation do not concur, the liability of the employer is the same as if this division had not been enacted." *Id.*

67. *Shoemaker*, 52 Cal. 3d at 15, 801 P.2d at 1062, 276 Cal. Rptr. at 311.

68. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

69. *Id.* Even though in *Cole* the employee's supervisor had seemingly embarked on a campaign to destroy plaintiff's life, the court held that the actions were within the business relationship, and that, "[A]n employee . . . may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability." *Id.*

70. *Cole*, 43 Cal. 3d at 158, 729 P.2d at 749, 233 Cal. Rptr. at 314. Each party gives up some of their rights in exchange for valuable concessions in return. For other cases which discuss the compensation bargain, *see Johns-Manville Products Corp. v. Superior Ct.*, 27 Cal. 3d 465, 474, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980); *Riley v. Southwest Marine, Inc.*, 203 Cal. App. 3d 1242, 1258, 250 Cal. Rptr. 718, 727 (4 Dist. 1988).

71. *Cole*, 43 Cal. 3d at 161, 729 P.2d at 751, 233 Cal. Rptr. at 316.

72. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.

73. *Id.* at 161, 729 P.2d at 751, 233 Cal. Rptr. at 316.

74. *Id.*

75. *Id.*

Workers Compensation Appeals Bd.,[76] the Act did not apply to his allegations.[77] Injuries that arise from the termination of employment do not arise in the course of employment[78] as required under Labor Code § 3600.

In *Georgia-Pacific*, an employer sought review of an award of compensation on the grounds that the injuries resulted from termination of employment not a result of the employment itself.[79] The appellate court stated, in dictum, that if termination were the cause of the injury, then the injury would not be compensable because it did not arise out of the course of employment.[80]

In *Shoemaker*, the California Supreme Court held that this conclusion was inapposite to its recent decision in *Cole*.[81] The court held that certain employer actions,[82] indistinguishable from "non-consensual termination of an employment relationship,"[83] were covered under the Act's exclusive remedy provisions.[84] Furthermore, the Court's decision in *Traub v. Board of Retirement*[85] supported the proposition that injuries resulting from termination fall under the jurisdiction of the Act.[86] Although the statutory language at issue in *Traub* was from a different source,[87] the Court stated that it was

76. 144 Cal. App. 3d 72, 192 Cal. Rptr. 643 (1983).

77. *Shoemaker*, 52 Cal. 3d at 17, 801 P.2d at 1064, 276 Cal. Rptr. at 313.

78. *Id.* at 17, 801 P.2d at 1063, 276 Cal. Rptr. at 312.

79. 144 Cal. App. 3d 72, 192 Cal. Rptr. 643 (2 Dist. 1983). In *Georgia-Pacific*, the employee suffered injuries when he was told he would either have to accept either lower pay or termination. *Id.* at 74, 192 Cal. Rptr. at 644. Plaintiff was awarded compensation and the employer appealed, arguing that the conditions of compensation did not exist because the injuries did not arise out of the course of employment. *Id.*

80. *Id.* at 75, 192 Cal. Rptr. at 645.

81. *Shoemaker*, 52 Cal. 3d at 18, 801 P.2d at 1064, 276 Cal. Rptr. at 313.

82. The certain actions enumerated in *Cole* included employer conduct such as, "demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances." *Cole*, 43 Cal. 3d at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315. Basically, the conduct in *Cole* was analogized to the conduct in the present case. Since such conduct is a risk which falls within the compensation bargain, the conduct is covered under the Act. *Shoemaker* 52 Cal. 3d at 18, 801 P.2d at 1064, 276 Cal. Rptr. at 313.

83. *Id.*

84. Since such conduct is seen as a risk falling within the compensation bargain, it is necessarily subject to the Act's jurisdiction and is the exclusive remedy. *Id.*

85. 34 Cal. 3d 793, 670 P.2d 335, 195 Cal. Rptr. 681 (1983).

86. *Id.* at 801, 670 P.2d at 340, 195 Cal. Rptr. at 686.

87. In *Traub*, the statute requiring the injury to arise out of the course of employment was Government Code § 31720 which called for retirement if an employee was disabled in the course of employment. *Id.* at 795 n.1, 670 P.2d at 336 n.1, 195 Cal. Rptr. at 682 n.1. The trial court held the injuries arose out of termination of employment and therefore plaintiff was not "entitled to a service-connected disability retirement allowance." *Id.* at 797, 670 P.2d at 337, 195 Cal. Rptr. at 683. The Supreme Court later reversed this decision. *Id.* at 802, 670 P.2d at 340, 195 Cal. Rptr. at 686.

"virtually identical to Labor Code section 3600"[88] and therefore analogous to the present case.

Moreover, the Act must be given a liberal construction.[89] In *Peterson v. Moran*,[90] the court held that an employee who was injured after he had been discharged was still protected under the Act.[91] Applying this rule, the language of the statute must be interpreted broadly. Therefore, termination can be considered as part of employment.[92] The determination that injuries arising from termination are covered under the act will avoid "evidentiary nightmare(s)."[93] However, even with this determination, the issue of whether the exclusive remedy would be a bar to civil actions from injuries arising out of termination was left unresolved.

a. Government Code Section 19683

Plaintiff's second claim was based on section 19683 which bans the use of official authority to impede a state employee from reporting suspected criminal violations occurring on the job.[94] The Court of Appeal held that this cause of action was barred because section 19683 was in conflict with the Act, and the Act controlled, since it was the more specific statute.[95] The Court disagreed, first noting that the "general statute, specific statute" rule might not be applicable.[96] However, even if the rule applied, section 19683 was the more specific statute.[97] The Court also looked to the policy behind the

88. *Shoemaker*, 52 Cal. 3d at 18, 801 P.2d at 1064, 276 Cal. Rptr. at 313.

89. *Id.* at 19, 801 P.2d at 1064, 276 Cal. Rptr. at 313. Labor Code Section 3202 provides that the act "shall be liberally construed by the courts with the purpose of extending [its] benefits for the protection of persons injured in the course of their employment." *Id.*

90. 111 Cal. App. 2d 766, 245 P.2d 540 (1952).

91. In *Peterson*, after asking his employer why he had been discharged, the employee was injured. Even though he had been technically terminated, the court held that he was still an "employee" and thereby protected by the Act. *Id.* at 769, 245 P.2d at 541. *See also, Mitchell v. Hizer*, 73 Cal. App. 3d 499, 140 Cal. Rptr. 790 (Dist. 1, 1977) (injured while retrieving tools); *Argonaut Ins. Co. v. Industrial Acc. Comm.*, 221 Cal. App. 2d 140, 34 Cal. Rptr. 206 (1963) (injured picking up final paycheck).

92. *Shoemaker*, 52 Cal. 3d at 19, 801 P.2d at 1065, 276 Cal. Rptr. at 314. The court reasoned that since post termination accidents are covered, then accidents or injuries resulting from termination must be covered as well. *Id.*

93. *Id.* at 19-20, 801 P.2d at 1065, 276 Cal. Rptr. at 314. The court opined that if termination were not found to be in the course of employment there would be the painstaking task of having to differentiate between injuries (notably psychological ones) caused by actions preparing for termination and those caused by the discharge itself. *Id.* at 20, 801 P.2d at 1065, 276 Cal. Rptr. at 314 (citing *Georgia-Pacific Corp. v. Worker's Compensation Appeals Bd.*, 144 Cal. App. 3d 72, 75, 192 Cal. Rptr. 643, 645 (1983)).

94. CAL. GOV. CODE § 19683 (West 1980).

95. *Shoemaker*, 52 Cal. 3d at 21, 801 P.2d at 1066, 276 Cal. Rptr. at 315.

96. *Id.*

97. *Id.*

statutes to determine which would control.[98] The court determined that the policies and goals behind the "whistle-blower" statute were more specific than those supporting the Act,[99] thus the Court determined that section 19683 was controlling.[100]

Defendant argued that recovery under section 19683 could not include damages which would be otherwise provided for (such as physical injuries under the Act).[101] The Court rejected this contention, holding that such an interpretation "would provide virtually no protection to the very category of employees it was designed to protect."[102] In addition, the legislature "clearly intended to afford an additional remedy to those already granted under other provisions of the law."[103] Employing this reasoning, the Court held that the specific legislative protection provided by section 19683, including a right to sue for damages for retaliatory behavior, created a specific statutory exception to the exclusive remedy provisions.[104]

b. Additional Causes of Action for Wrongful Termination

Plaintiff argued that his termination was in violation of public policy and hence was not subject to the exclusive remedy because such conduct "falls outside the compensation bargain."[105] Because the

98. *Id.*

99. *Id.* at 21-22, 801 P.2d at 1066-67, 276 Cal. Rptr. at 315-16. The purpose embodied by the Workers Compensation Act is to enable employees to receive efficient recovery for injuries on the job. The purpose behind the whistle-blower statute, however, "is to provide redress to a certain limited class of employees (state employees), for damages suffered as a consequence of the specific use of official power to deter a particular protected activity . . . . [T]he goals and the subject matter governed by the whistle-blower protection statutes are far more narrowly circumscribed, more specific, than the Act." *Id.*

100. *Id.* at 22, 801 P.2d at 1067, 276 Cal. Rptr. at 316.

101. *Id.* Defendants argued that the only recovery available under 19683 would be for that "not otherwise already provided [for] under other laws . . ." *Id.*

102. *Id.* This interpretation would place plaintiffs in a virtual procrustean bed. The beneficiaries of section 19683 are civil servants. The only protection provided under defendant's interpretation would be to public employees exempt from civil service who suffered no injuries from the harassment. *Id.* If compensation under the Act was enough, the Legislature would not have added section 19683 "expressly 'relating to the state civil service'" *Id.* (citing Preface to Ch. 1259, § 1, 1971 Cal. Stat. 2473).

103. *Shoemaker*, 52 Cal. 3d at 22, 801 P.2d at 1067, 276 Cal. Rptr. at 316.

104. *Id.* at 23, 801 P.2d at 1067, 276 Cal. Rptr. at 316. Such retaliatory acts are not encompassed within the compensation bargain. *Id.*

105. *Id.* Plaintiff relied extensively on *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). In *Tameny*, Arco terminated the plaintiff after 15 years of employment because he refused to join in a pricing scheme which was in violation of antitrust law. The Court extensively reviewed other jurisdictions regarding the issue and held that when an employee is wrongfully discharged as against

plaintiff failed to argue this beforehand, the issue was remanded to the Court of Appeal for its determination. The Court barred the plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing because the plaintiff was a civil servant.[106] The Court reasoned that public employees hold office under statute and, therefore, have no contractual rights.[107] Furthermore, a breach of the implied covenant of good faith and fair dealing "cannot support an award of tort damages."[108]

2. Other Causes of Action

a. Interference with Business Relationship and Inducement of Breach of Contract.

The claim for "interference with employment relations"[109] is only applicable in certain situations[110] and a business employee may not sue for the tort. Furthermore, since his pleadings identified no "prospective economic advantage,"[111] plaintiff's claim was really for inducement of breach of contract.[112] Under *Dryden v. Tri-Valley Growers*,[113] parties to a contract cannot sue each other for induce-

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fundamental public policy (for example, his refusal to participate in a criminal act), then a tort action against the employer will lie. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844. In *Tameny* the court relied on *Petterman v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), stating, "To hold that one's continued employment could be made contingent upon his commission of a felonious act at the insistance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. . ." *Id.* at 173, 610 P.2d at 1333, 164 Cal. Rptr. at 842 (quoting *Petterman*, 174 Cal. App. 2d at 188-89, 344 P.2d at 27. Obviously plaintiff was arguing that by preventing him from reporting the violations of the Department officials, a criminal act itself was being perpetrated.

106. *Shoemaker*, 52 Cal. 3d at 23, 801 P.2d at 1068, 276 Cal. Rptr. at 317.

107. *Id.* at 23-24, 801 P.2d at 1068, 276 Cal. Rptr. at 317. The Court stated, "[I]t is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." *Id.* (quoting *Miller v. State of California*, 18 Cal. 3d 808, 813-814, 557 P.2d 970, 973, 135 Cal. Rptr. 386, 389 (1977)).

108. *Id.* at 24, 801 P.2d at 1068, 276 Cal. Rptr. at 317 (citing *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988)).

109. *Shoemaker*, 52 Cal. 3d at 24, 801 P.2d at 1068, 276 Cal. Rptr. at 317. The Court was unsure what course of action the plaintiff was trying to allege here. The court determined that the Plaintiff was invoking California Civil Code § 49, involving interference with employment relations.

110. The tort is primarily applicable where an employer brings an action for the loss of a domestic servant. *See I.J. Weinrot & Son, Inc. v. Jackson*, 40 Cal. 3d 327, 708 P.2d 682, 220 Cal. Rptr. 103 (1985). In *Weinrot*, an employer attempted to sue for the injuries of a lay employee caused by a third party. The court held that California Civil Code § 49 could not be expanded to compensate business employers for losses to key employees. *Id.* at 341, 708 P.2d at 691, 220 Cal. Rptr. at 112.

111. *Shoemaker*, 52 Cal. 3d at 24, 801 P.2d at 1068, 276 Cal. Rptr. at 317.

112. *Id.* The Court stated that simply continuing in employment was not a good enough case for prospective economic advantage. *Id.*

113. *Dryden v. Tri-Valley Growers*, 65 Cal. App. 3d 990, 135 Cal. Rptr. 720 (1977).

ment to breach.[114] Additionally, since the plaintiff's supervisors were agents of the employer, the action was barred because agents acting under corporate authority cannot be liable for inducing a breach of a corporate contract.[115] Therefore, since this cause of action was essentially the same as a cause of action for breach of contract, the plaintiff had no course of recovery.[116]

b. Intentional Infliction of Emotional Distress

The Court held that plaintiff's cause of action for intentional infliction of emotional distress was governed by its decision in *Cole*.[117] In *Cole*, the Court held that employer conduct similar to the type at hand was a normal part of the employment relationship.[118] Although the conduct may be "intentional, unfair, or outrageous it is nevertheless covered by the workers compensation exclusivity provisions."[119]

c. Violation of Civil Rights and Additional Issues

Since neither plaintiff nor defendant challenged the decision of the appellate court on the civil rights violation issue, the judgment was affirmed and the cause of action was reinstated.[120] The defendants raised additional issues,[121] but because both lower courts failed to address them due to their application of the exclusive remedy provisions, these issues were remanded for consideration.[122]

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114. *Id.* at 998-999, 135 Cal. Rptr. at 726.

115. *Shoemaker*, 52 Cal. 3d at 24-25, 801 P.2d at 1068-69, 276 Cal. Rptr. at 317-18 (citing *Greenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 576, 510 P.2d 1032, 1039, 108 Cal. Rptr. 480, 487 (1973)).

116. *Shoemaker*, 52 Cal. 3d at 25, 801 P.2d at 1069, 276 Cal. Rptr. at 318. The court basically reclassified plaintiff's claim as a breach of contract action. Since state employees have no contractual rights (*see supra* notes 101-103 and accompanying text), the action was barred.

117. *Shoemaker*, 52 Cal. 3d at 25, 801 P.2d at 1069, 276 Cal. Rptr. at 318.

118. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d at 148, 160, 729 P.2d 743, 751, 233 Cal. Rptr. at 308, 316 (1987).

119. *Shoemaker*, 52 Cal. 3d at 25, 801 P.2d at 1069, 276 Cal. Rptr. at 318. In *Cole*, the court determined that any supervisory or disciplinary action taken by employers is inherently intentional and therefore, allowing claims for intentional infliction of emotional distress would be contrary to prior precedent and would open the floodgates of litigation. *Cole*, 43 Cal. 3d at 159, 729 P.2d at 749-50, 233 Cal. Rptr. at 314-15.

120. *Shoemaker*, 52 Cal. 3d at 26, 801 P.2d at 1069, 276 Cal. Rptr. at 318.

121. *Id.* Included were claims that under California Government Code §§ 821.6 and 815.2, they were immune from malicious prosecution, and that because there were inadequacies in the original administrative claim, the cause of action was barred under Government Code § 911.2 and 910.

122. *Id.* at 26, 801 P.2d at 1069, 276 Cal. Rptr. at 318-19.

IV. IMPACT

At first glance, the Court's decision may seem harsh to employers. The costs and frequency of stress related claims brought under the Workers Compensation Act have skyrocketed over the recent years.[123] Employers have received no help with the holding in *Shoemaker* that indemnity from workers compensation is available for stress injuries which result solely from discharge. Employers must still tread softly in management policies regarding discipline of employees for fear of costly workers compensation litigation.[124]

In 1989, Labor Code 3208.3 was established to raise the level of proof necessary to establish a causal connection between injuries and employment.[125] Some suggest that the employee is required to establish some physical symptom of the mental injury.[126] Perhaps the system would be better served by installing a more objective standard.[127] Moreover, since there is the possibility of fraud in these cases, disciplinary procedures have to be tightened.[128]

Employers, however, should take some solace in the fact that their liability is limited. Under the Court's decision in *Shoemaker*, the vast majority of employer conduct will be seen as falling under the umbrella of the "compensation bargain" and hence subject to the exclusive remedy. Only truly outrageous behavior may be sued upon separately, thus allowing employers to avoid being punished for conduct which would normally be actionable but for the arena in which it occurred. Even so, the Court's decision will lead to more claims under workers compensation with a corresponding increase in insurance costs. Thus, the public at large will probably bear the costs, a result which appears contrary to the intention of the system.[129]

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123. The number of claims for mental stress rose from 1,178 to 9,368 between 1978 and 1988, a 700 percent increase. *The Recorder*, commentary section, July 9, 1991. Moreover there has been a 60 percent increase in the costs related to stress claims with the cost of resolving a suit ranging from $10,000 to $13,000. *Id.* *See also* Ronald Grover, *Say, Does Workers' Comp. Cover Wretched Excess?*, *Business Week*, July 22, 1991, at 23.

124. *Id.*

125. Ch. 892, § 25, 1989 Cal. Stat. 2683. Amended Ch. 1550, § 20, 1990 Cal. Stat. 6183. Section 3208.3 requires that employees must establish by a preponderance of the evidence that "actual events of employment were responsible for at least 10 percent of the total causation from all sources contributing to the psychiatric injury." *Id.* Some argue that the standard should be raised because doctors testify simply in order to meet this standard. *The Recorder*, *supra* note 123. Moreover, Governor Wilson is proposing a plan that would "make workers prove that their jobs contributed to 50% of their mental stress." *See Business Week*, *supra* note 123.

126. *See The Recorder*, *supra* note 123.

127. For example, no recovery is allowed if, under the same facts, a reasonable man would not suffer such mental trauma.

128. Fraud occurs on the part of employees, lawyers, and doctors alike. *See The Recorder*, supra note 123. Hidden cameras recently exposed fraudulent practices being solicited in unemployment lines.

129. *See generally*, *Business Week*, supra note 123.

V. CONCLUSION

California employees collected $5.3 billion in disability payments in 1989.[130] Insurance rates in California are second only to Montana as a result of our liberal workers compensation system.[131] California is one of only four states to allow claims for stress[132] and under *Shoemaker*, the Court has extended this protection to stress arising from discharge. In a system where fraud runs rampant,[133] and the market for workers compensation claims grows steadily,[134] drastic reform is needed. By allowing employees to invoke the protection of the Workers Compensation Act for the vast majority of employer conduct, the Court has greatly increased the cost of doing business in California during a time when corporate America needs all the help it can get.

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130. *See Business Week*, *supra* note 123.
131. *Id.*
132. *Id.*
133. *See supra* note 128.
134. For instance, there has been a recent flood of attorney advertising encouraging people to seek redress for their employers' alleged violations.