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California Supreme Court Survey: March 1985–May 1985

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The California Supreme Court Survey is 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 cases have been omitted from the survey.

I. ADMINISTRATIVE LAW

Spending directives which attempt to control the operations of regional centers are beyond the Department of Developmental Services' authority under the Lanterman Act: **Association for Retarded Citizens v. Deptartment of Developmental Services.**

I. INTRODUCTION

In *Association for Retarded Citizens v. Department of Developmental Services,*[1] the supreme court held that the Department of Developmental Services (DDS) was without authority under the applicable enabling statute to issue spending directives which would control both the manner in which certain regional centers provided services and their operations in general. The case arose when a number of organizations and individuals sought declaratory and injunctive relief against the Department and its director, alleging that spending priorities issued therefrom were void. The supreme court affirmed a trial court ruling in favor of these particular organizations.

II. FACTUAL BACKGROUND

The Lanterman Developmental Disabilities Services Act[2] was enacted by the legislature to provide various facilities and services suffi-

1. 38 Cal. 3d 384, 696 P.2d 150, 211 Cal. Rptr. 758 (1985). The opinion was written by Justice Mosk, which expressed the unanimous view of the court.
2. CAL. WELF. & INST. CODE §§ 4500-4846 (West 1984 & Supp. 1985).

cient to meet the needs of the developmentally disabled[3] at all stages of life.[4] The underlying policy of this comprehensive scheme is two-fold: to minimize the institutionalization of these people and their separation from family and community;[5] and to allow them to live more in harmony with the nondisabled of a similar age, leading to more independent and productive lives.[6]

To implement this statutory scheme, the legislature created a system in which DDS "[has] jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons."[7] Private entities contract with DDS to provide the disabled persons with "access to the facilities and services best suited to them throughout their lifetime."[8] The private entities are solely responsible for providing the necessary services, and the responsibility of the DDS is essentially limited to promoting uniformity and cost-effectiveness of the entities' operations.[9] Further, the regional centers implement the state's obligation to the developmentally disabled under the Individual Program Plan (IPP) procedure.[10]

Forecasting a shortage of funds for the 1982-83 fiscal year, the director issued "Priorities for Regional Center Expenditures" (hereinafter "the Priorities") to insure an adequate appropriation for that year. The Priorities disregarded all IPP's and designated a few catagories as "basic and essential." These categories were to be provided for only to the extent which funds were available.

When Plaintiff's filed this action to challenge the validity of the Priorities, the trial court granted a preliminary injunction and ruled that the Priorities were void. Although the Priorities were no longer in effect at the time the case came before the supreme court,[11] the

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3. "Developmental disability" is defined in the Code as:

> A disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. . . . This term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

Id. § 4512(a).

4. *Id.* § 4501.

5. *Id.* §§ 4501, 4509, 4685.

6. *Id.* §§ 4501, 4750-51.

7. *Id.* § 4416.

8. *Id.* § 4620. The private entities are referred to as "regional centers," and are nonprofit community agencies.

9. For the Attorney General's opinion on this matter, see 64 Ops. Cal. Att'y Gen. 910, 916 (1981); 62 Ops. Cal. Att'y Gen. 229, 230-231 (1979).

10. CAL. WELF. & INST. CODE § 4647 (West 1984). Each IPP includes an assessment of the client's present status, objectives for improvement, a corresponding schedule of necessary services, and a schedule of periodic review. *Id.* § 4646.

11. The directives were only in effect until June 30, 1983. Also, an emergency appropriation under compulsion of the trial court's injunction superseded the directives.

court decided the case was not moot.[12] The supreme court held the order granting preliminary injunction should be affirmed.[13]

III. THE COURT'S ANALYSIS

A. Scope of Judicial Review

The court recognized that the scope of judicial review of "quasi-legislative administrative action" is established.[14] "To be valid, such administrative action must be within the scope of authority conferred by the enabling statute."[15] If, according to that statute, the administrative action has changed, enlarged, or narrowed its scope, the action must be found void.[16] To be upheld, the action must be authorized through the acts of the legislature. Thus, if the court believes that the administrative action transgresses the agency's statutory authority there would be no need for further judicial review as there would be no discretion to abuse.[17]

B. The Priorities Were Void

The court concluded that the Priorities were neither authorized by, nor consistent with, the Lanterman Act.[18] First, DDS had no authority to control the manner in which the regional centers provided services. Their district's sole responsibility concerned promoting the cost-effectiveness of the center.[19] Second, the state's obligation to provide services, which would give the developmentally disabled more independence, could not be impaired. Thus, so long as funds remain the DDS must provide full services to meet that obligation.[20]

The court also found the defendant's contention that the Priorities were authorized by the Budget Act of 1982 to be untenable. The Di-

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Association for Retarded Citizens, 38 Cal. 3d at 388 n.1, 696 P.2d at 151 n.1, 211 Cal. Rptr. at 759 n.1.

12. The court adressed the issue since it was "one of conceded public importance and interest — has arisen in the past and is likely to arise in the future . . . ." *Id.*

13. *Id.* at 396, 696 P.2d at 156, 211 Cal. Rptr. at 764.

14. *Id.* at 390-91, 696 P.2d at 153, 211 Cal. Rptr. at 761 (citations omitted).

15. *Id.* at 392, 696 P.2d at 153, 211 Cal. Rptr. at 761 (citing CAL. GOV'T. CODE §§ 11342.1, 11342.2 (West 1980)).

16. *See* Morris v. Williams, 67 Cal. 2d 733, 748, 433 P.2d 697, 707, 63 Cal. Rptr. 689, 699 (1967) (regulations held invalid as narrowing Welfare and Institution Code §§ 14000-14026).

17. *Association for Retarded Citizens*, 38 Cal. 3d at 391, 696 P.2d at 153, 211 Cal. Rptr. at 761.

18. *Id.* at 391, 696 P.2d at 154, 211 Cal. Rptr. at 762.

19. *Id.*

20. *Id.* at 392, 696 P.2d at 154, 211 Cal. Rptr. at 762.

rector of the DDS should only offer the regional centers "guidance in determining how they may spend the funds appropriated to them in the most cost-effective manner" rather than guidelines to which the centers must adhere.[21]

Finally, the court analogized the instant case to the facts of *California Welfare Rights Organization v. Carleson.*[22] In that case, recipients of "Aid for Dependent Children" grants, and an association alleging it acted on behalf of welfare recipients generally, sought to enjoin the State Director of Social Welfare from implementing or enforcing certain regulations he had issued. There, the court "held that the Social Welfare Director could not prevent a shortfall by in effect altering the statute to give recipients anything less than the Legislature had granted."[23] Likewise, in the instant case, the Director could not attempt to prevent any "shortfall by administratively altering the [Lanterman] Act to give developmentally disabled persons anything less than the Legislature provided."[24] Therefore, the issuance of the preliminary injunction was affirmed.[25]

IV. CONCLUSION

The court's decision will limit the authority of the Department of Developmental Services. Its holding will insure and protect the rights of the disabled under the Lanterman Act, as the DDS's priorities policy was an improper attempt at bureaucratic legislation.

DAVID A. VAN RIPER

II. ATTORNEY MALPRACTICE

Triable issue of legal malpractice is present when attorney erroneously interprets a single case: **Aloy v. Mash**

In *Aloy v. Mash,* 38 Cal. 3d 413, 696 P.2d 656, 212 Cal. Rptr. 162 (1985), the court considered whether a triable issue of an attorney's negligence was presented when the attorney failed to assert a community property interest in a spouse's pension. The attorney based his decision not to assert the client's interest in the pension on an incomplete reading of one case.

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21. *Id.*

22. 4 Cal. 3d 445, 482 P.2d 670, 93 Cal. Rptr. 758 (1971).

23. *Association for Retarded Citizens,* 38 Cal. 3d at 395, 696 P.2d at 156, 211 Cal. Rptr. at 764.

24. *Id.*

25. *Id.* Since the court decided the Priorities were void pursuant to the Lanterman Act, there was no reason to determine their validity as per DDS's own regulations, the California Constutution, or the Administrative Procedure Act. *Id.* at 395 n.5, 696 P.2d at 156 n.5, 211 Cal. Rptr. at 764 n.5.

The defendant, an attorney, represented the plaintiff in a 1971 dissolution action against the plaintiff's husband. The husband had been in the armed forces for twenty years. He was eligible to retire and receive a pension although he was on active duty. During the dissolution proceedings, the attorney failed to assert any community property interest in the husband's pension. The plaintiff was prevented from receiving any share of the pension.

During the malpractice action the defendant argued that his failure to assert the wife's interest in the husband's pension was based upon the reading of a single case, *French v. French,* 17 Cal. 2d 775, 112 P.2d 235 (1941). The defendant's contention that a non-matured military pension was not subject to division upon dissolution was based solely on his incomplete reading of *French.*

The court held that a triable issue of negligence was presented by the plaintiff. It closely scrutinized the amount of research done by the defendant. The court noted that in 1971, at the time the dissolution took place, California law regarding the characterization of vested federal military retirement pensions as community or separate property was unsettled. Furthermore, an attorney assumes an obligation to his client to undertake reasonable research, even in unsettled areas of the law, in order to ascertain relevant legal principles. This research enables the attorney to make informed decisions regarding the conduct of a case.

In the present case, the defendant based his decision not to assert his client's community property interest in the spouse's pension with no more research or preparation than an incomplete reading of a single case. The court held that the defendant acted without considering most of the major issues presented in the dissolution case. The court reversed the trial court's summary judgment order in favor of the defendant. It stated that a holding which immunized an attorney, who had never researched the main issues of his client's case, from legal malpractice would be contrary to past precedent. Therefore, the court held that the trial court had erroneously determined that there were no triable issues of fact presented by the plaintiff's legal malpractice case. Accordingly the summary judgment order was reversed.

JESSICA L. LEMOINE

III. ATTORNEYS

In the absence of client ratification, an attorney lacks authority to bind his client to arbitration without first obtaining consent: **Blanton v. Womancare Clinic, Inc.**

In *Blanton v. Womancare Clinic, Inc.*, 38 Cal. 3d 396, 696 P.2d 645, 212 Cal. Rptr. 151 (1985), the plaintiff's cause of action was based on injuries received from a surgical abortion. The plaintiff sued the clinic where the abortion was performed, the medical student who performed the operation and the supervising physician for medical malpractice. Two days before the trial, the plaintiff's attorney submitted the case to binding arbitration, without the consent of his client. This stipulation to arbitrate was approved by the court, and an order was issued. The plaintiff did not learn of the stipulation until three months after the arbitration. She then dismissed her attorney and retained new counsel who attempted to invalidate the stipulation.

The issues presented to the court were whether the attorney had the authority to bind the plaintiff to arbitration, and whether the plaintiff had ratified the stipulation. The court answered both questions in the negative.

Justice Grodin, writing for the majority, held that the attorney's authority to bind his client by stipulation was governed by agency principles. Therefore the client was bound only by acts within the attorney's actual or apparent authority, or by unauthorized acts she had ratified.

Under the apparent authority doctrine, an attorney is authorized to bind the client in procedural matters that arise during the course of litigation. Examples of this would be procedural stipulations incidental to the management of the suit. In addition, an attorney possesses authority implied in law. This arises in tactical matters such as deciding whether to call a particular witness. *See* 1 B. WITKIN, CALIFORNIA PROCEDURE, Attorneys, § 112 (2d ed. 1970). The court held that an attorney may not impair the client's cause of action or substantial rights. *See also Linsk v. Linsk*, 70 Cal. 2d 272, 449 P.2d 760, 74 Cal. Rptr. 544 (1969).

The attorney's decision making which effects substantial rights differs from procedural or tactical decision making. The attorney's decision-making on substantive matters affects the client's interest and involves matters of judgment beyond technical competence. The stipulation to arbitrate in this case was held to be one affecting the substantial rights of the client.

The court stated that an attorney does not have the implied authority to enter into contracts on behalf of his client. *See also Wilson v. Eddy*, 2 Cal. App. 3d 613, 82 Cal. Rptr. 826 (1969). The arbitration

stipulation constituted a contract because it diverted the dispute from the judicial arena into the arbitral one. The court noted that while it may be the practice in the legal community to rely upon representations made by other attorneys, such representations cannot create authority where none exists. It is therefore up to the person dealing with the attorney to ascertain the extent of his authority.

Although unauthorized acts of the attorney may be ratified by the client and become binding, the court determined that no such ratification existed here. The plaintiff immediately fired her attorney upon learning of the arbitration agreement and hired new counsel to seek to invalidate it. Therefore, the attorney lacked the authority to bind the plaintiff to arbitration, and no subsequent ratification occurred.

KEITH F. MILLHOUSE

IV. BUSINESS AND PROFESSIONS

A contractor may bring an action for compensation where he has substantially complied with section 7031 of the Business and Professions Code, and a literal application of Business and Professions Code section 7159 is inequitable where it allows unjust enrichment: **Asdourian v. Araj.**

I. INTRODUCTION

In *Asdourian v. Araj*,[1] the supreme court equitably applied sections 7031[2] and 7159[3] of the Business and Professions Code instead of applying them literally. The case arose from an action brought by a contractor against a real estate investor to recover compensation for services rendered under three remodeling contracts. The supreme court, in ruling for the contractor, held that substantial compliance is sufficient to meet contractors' licensing requirements.

1. 38 Cal. 3d 276, 696 P.2d 95, 211 Cal. Rptr. 703 (1985). The opinion was written by Chief Justice Bird, with Justices Broussard, Reynoso, Lucas, and Stephens concurring. A separate concurring opinion was written by Justice Kaus, and a dissenting opinion was authored by Justice Mosk.

2. CAL. BUS. & PROF. CODE § 7031 (West 1975), essentially denies unlicensed contractors access to the courts to collect unpaid compensation and will be discussed in more detail *infra* at notes 12-28 and accompanying text.

3. CAL. BUS. & PROF. CODE § 7159 (West Supp. 1985), requires contracts for home improvements in excess of $500 to be in writing, and is discussed in more detail *infra* at notes 29-41 and accompanying text.

II. FACTUAL BACKGROUND

In 1970, plaintiff Krikor Asdourian[4] applied for a contractor's license with the Contractor's State License Board, as required by Business and Professions Code section 7028. The license was issued to Artko Remodeling and Construction, the plaintiff's name and signature appearing thereupon as the "responsible managing party." Although the plaintiff intended to incorporate under the Artko name, the business remained a sole proprietorship. Asdourian even did work under his own name on occasion, but never obtained a separate license in his own name nor had the existing license changed.[5]

In 1976, Asdourian was introduced to defendant Ibrahim Araj by a mutual acquaintance.[6] Shortly thereafter, the two parties entered into three contracts for the purpose of remodeling properties owned by the defendant in San Francisco. The contracts consisted of the following: (1) a written agreement to convert a garage on Lombard Street into a restaurant;[7] (2) an oral agreement to remodel two flats within the same building;[8] and (3) an oral agreement to perform repairs on a single family residence on San Fernando Way.[9] When the defendant refused to pay the plaintiff for a substantial portion of the work done, Asdourian obtained a mechanic's lien on the Lombard Street property. Actions filed by Asdourian to enforce the lien and to recover the balance due on the remodeling of the San Fernando Way property were consolidated into one action.[10]

At trial, the court found that the defendant had agreed to compen-

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4. Asdourian was the plaintiff in this case. He came to the United States in 1970 from Lebanon, where he had worked as a contractor for the last twenty years. *Asdourian*, 38 Cal. 3d at 279, 696 P.2d at 96, 211 Cal. Rptr. at 704.

5. The plaintiff believed that, since he had taken the examination and received the license, he was subject to no further requirements. *Id.* at 280, 696 P.2d at 97, 211 Cal. Rptr. at 705.

6. Araj, the defendant, was a grocer who bought and sold real estate for investment purposes. He could not read or write English. *Id.*

7. This agreement took place in or around late September of 1976. The contract described the work to be done and established a price of $21,500. In order to meet Bureau of Building Inspection specifications, the defendant agreed to a cost increase of approximately $30,000. When the job had been substantially completed, the plaintiff stopped working when the defendant refused to make any further payment. *Id.*

8. The plaintiff had already remodeled two similar flats for the defendant in 1976 for a price of $11,000. Although no price was discussed concerning the next two, the plaintiff performed the remodeling. Subsequently, he was not fully paid. *Id.* at 280-81, 696 P.2d at 97, 211 Cal. Rptr. at 705.

9. The parties entered into this contract in May of 1977. After the plaintiff began repairs, the defendant made additional remodeling requests. It is unclear whether the parties orally agreed upon a price. The plaintiff completed the remodeling in July of 1977. Thereafter, the defendant refused to pay the full amount of the reasonable value of the plaintiff's services. *Id.* at 281, 696 P.2d at 97, 211 Cal. Rptr. at 705.

10. In the defendant's answer, these allegations were denied, and a cross-complaint was filed claiming the plaintiff had not completed the work and had been overpaid. *Id.* at 281, 696 P.2d at 98, 211 Cal. Rptr. at 706.

sate the plaintiff for the reasonable value of his work performed on all three contracts, and judgments were entered accordingly.[11] The defendant appealed, contending that: (1) the plaintiff could not recover compensation for his work since he was not properly licensed as required by section 7031 of the Business and Professions Code; and (2) the oral agreements violated Business and Professions Code section 7159, which requires all home improvement contracts involving amounts in excess of $500 to be in writing.

III. THE COURT'S ANALYSIS

A. Substantial Compliance With Section 7031

The court began its analysis by discussing the issue of substantial compliance with section 7031. This section provides, in pertinent part:

> 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 . . . ."[12]

This section enforces the Contractors License Law[13] by denying a contractor access to the courts when he has not complied with all licensing requirements.[14] In view of the harshness of a literal application of section 7031, the courts have in certain instances been wary of strictly enforcing it. As the supreme court stated in *Latipac, Inc., v.*

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11. The reasonable value of the work performed on the Lombard Street property was equated to $83,812.45. Of this amount, the defendant had paid only $45,223.47. With regard to the San Fernando Way property, the reasonable value of the services rendered was found to be $19,278.15. Of this amount, the defendant had paid only $12,824.30. Based on these figures, separate judgments of $38,588.98 and $6,453.85 were entered, respectively, on plaintiff's two claims. *Id.*

12. CAL. BUS. & PROF. CODE § 7031 (West 1975).

13. The Contractors License Law (CAL. BUS. & PROF. CODE §§ 7000-7173 (West 1975 & Supp. 1985)) provides a comprehensive scheme governing contractors who do business in California. Its general purpose is to protect the public from the inevitable consequences of incompetent labor, imposition, and fraud. Although the court mentions Conderback, Inc. v. Standard Oil Co., 239 Cal. App. 2d 664, 48 Cal. Rptr. 901 (1966), in support of this proposition, the most often cited case is Howard v. State, 85 Cal. App. 2d 361, 193 P.2d 11 (1948), where the court applied the act to an unlicensed painter.

14. *See* Jackson v. Pancake, 266 Cal. App. 2d 307, 72 Cal. Rptr. 111 (1968), where the court upheld a trial court's judgment allowing an unlicensed contractor to recover the reasonable value of work performed, notwithstanding the harsh language of section 7031.

Superior Court:[15]

> In view of the severity of this sanction and of the forfeitures which it necessarily entails, our decisions record our reluctance to construe [section 7031] . . . more broadly than requisite to the achievement of its manifest purpose. We have not insisted on literal compliance in the situation in which the party seeking to escape his obligation has received the full protection which the statute contemplates.[16]

The court has instead employed the doctrine of "substantial compliance" where equitable.[17]

The court analogized this case to the earlier case of *Gatti v. Highland Park Builders, Inc.,*[18] where two individually licensed parties performed work together as a partnership. Even though they did not obtain a separate license for the partnership, the court found substantial compliance with section 7031 and did not strictly interpret the statute. As the *Gatti* court stated, "[i]f defendant is allowed to defeat plaintiffs' legitimate claim on this technical ground, resting on an unnecessarily strict construction of the statutory provision . . . the legislative scheme in relation to the licensing of contractors . . . would become an unwarranted shield for the avoidance of a just obligation."[19] In analogizing the instant case to *Gatti,* the court found the facts in the present case even more persuasive. "[H]ere, the form of plaintiff's business did not change at all. It remained a sole proprietorship. Plaintiff simply used a different *name* for the business."[20]

The court had most recently applied the "substantial compliance" doctrine in *Latipac.* Although the plaintiff in *Latipac* possessed a valid contractor's license upon execution of a contract, the license expired during the contract's execution. Since the plaintiff did not renew the license, the defendant sought to avoid compensating him on the grounds that there had not been strict compliance with section 7031. In denying the defendant's appeal, the *Latipac* court said that where "the facts clearly indicate that the contractor has 'substantially' complied with the statute and that such compliance has afforded to the obligor the protection contemplated by the statute, we

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15. 64 Cal. 2d 278, 411 P.2d 564, 49 Cal. Rptr. 676 (1966). For a detailed discussion of this case, see *infra* notes 21-23 and accompanying text.

16. 64 Cal. 2d at 279-80, 411 P.2d at 566, 49 Cal. Rptr. at 678.

17. The three most common situations where the "substantial compliance" doctrine has been applied are: (1) where, following a change in the form of the contractor's business, there was a slight difference between the entity performing the contract and the one named on the contract (*see* Gatti v. Highland Park Builders, Inc., 27 Cal. 2d 687, 166 P.2d 265 (1946)); (2) where the contractor's license expired before completion of a project (*see* Latipac, Inc. v. Superior Court, 64 Cal. 2d 278, 411 P.2d 564, 49 Cal. Rptr. 676 (1966)); and (3) where the contractor's license was not obtained until after execution of the contract (*see* Gaines v. Eastern Pacific, Santa Maria, 136 Cal. App. 3d 679, 186 Cal. Rptr. 421 (1982)).

18. 27 Cal. 2d 687, 166 P.2d 265 (1946).

19. *Id.* at 690, 166 P.2d at 266. In 1961, the legislature expressly incorporated the *Gatti* exception into statute by amending section 7031.

20. 38 Cal. 3d at 284, 696 P.2d at 99, 211 Cal. Rptr. at 707 (emphasis in the original).

have rejected the obligor's attempt to escape liability."[21] The court further set forth three factual requirements which would warrant application of the substantial compliance doctrine: "(1) the fact that plaintiff held a valid license at the time of contracting, (2) that plaintiff readily secured a renewal of that license and (3) that the responsibility and competence of plaintiff's managing officer were officially confirmed throughout the period of performance of the contract."[22]

In applying the *Latipac* test to the case before them, the majority found the third requirement to be met, since the competence and experience of Asdourian formed the basis of the license issued to Artko. Because the other two requirements were also met, Asdourian therefore passed the *Latipac* "substantial compliance" test.[23]

The court also found the policy considerations of *Schantz v. Ellsworth*[24] to be indistinguishable. In *Schantz*, a regulation required real estate brokers doing business under a fictitious name to be licensed under the fictitious name; its purpose was "to protect the public from the perils incident to dealing with incompetent or untrustworthy real estate practitioners."[25] The court in *Schantz* acknowledged that failure to meet this requirement may be grounds for disciplinary action by the Real Estate Commissioner, but should not bar a valid cause of action where plaintiff has satisfied the statutory purpose by being licensed himself.[26] In connection with the license issued to Artko, Asdourian's individual qualifications were also examined and approved. The *Asdourian* court therefore held that:

> Although he used a different name and should have obtained a separate license to comply with section 7028.5, his qualifications did not change, nor did the status or form of his business. He was simply using a different name for the same sole proprietorship. . . . As in *Schantz*, the plaintiff here has substantially complied with the licensing statute.[27]

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21. *Latipac*, 64 Cal. 2d at 281, 411 P.2d at 567, 49 Cal. Rptr. at 679.

22. *Id.* at 281-82, 411 P.2d at 567, 49 Cal. Rptr. at 679.

23. *Asdourian*, 38 Cal. 3d at 286, 696 P.2d at 101, 211 Cal. Rptr. at 709. The main focus of this test is whether the contractor's "substantial compliance with the licensing requirements satisfies the policy of the statute." 64 Cal. 2d at 281, 411 P.2d at 567, 49 Cal. Rtpr. at 679 (quoting Lewis and Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 149, 308 P.2d 713, 718 (1957)).

24. 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971). In *Schantz*, a personally licensed real estate broker also did business under the fictitious name "Investment Trends." Although he had not complied with a regulation requiring him to also obtain a license under the fictitious name, presently codified at CAL. ADMIN. CODE tit. 10, R. 2731 (1985), the court still allowed him to bring an action under a contract made and performed under the fictitious name. *Schantz*, 19 Cal. App. 3d at 293, 96 Cal. Rptr. at 775.

25. *Schantz*, 19 Cal. App. 3d at 293, 96 Cal. Rptr. at 785.

26. *Id.*

27. *Asdourian*, 38 Cal. 3d at 288-89, 696 P.2d at 103, 211 Cal. Rptr. at 711.

Finally, the court disapproved the application of any decisions where courts continued to insist on strict compliance with section 7031.[28]

B. Equitable Application of Section 7159

The court next considered the application of section 7159. The pertinent part of this section provides as follows:

> This section shall apply only to home improvement contracts, . . . between a contractor, . . . who contracts with an owner or tenant for work upon a building or structure . . . and where the aggregate contract price . . . exceeds five hundred dollars ($500). Every home improvement contract and any changes in the contract subject to the provisions of this section shall be evidenced by a writing and shall be signed by all the parties to the contract thereto.[29]

Discussing the primary purpose behind the statute, an appellate court stated that "the statute is intended as a protection for consumers in an economic area which otherwise might well provide opportunity for abuse by contractors."[30] The court found, however, that the protection offered by the statute extended even to experienced real estate investors.[31] Since section 7159 is considered a regulatory statute, the court had to decide whether contracts not conforming to its requirements are illegal and unenforceable as being against public policy.[32]

The general rule regarding contracts made in violation of a regulatory statute is that they are "void even though the statute does not pronounce the fact."[33] However, many exceptions to this general rule have been recognized, for it "is not an inflexible one to be applied in its fullest rigor under any and all circumstances."[34] In *Southfield v. Barrett*,[35] the court created one such exception where it enforced an illegal contract to prevent the defendant from becoming

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28. *Id.* at 286-88, 696 P.2d at 101-02, 211 Cal. Rptr. at 709-10. The court stated, "[i]t has now been almost *five* decades since the [substantial compliance] doctrine was first applied. The Legislature has manifested no disapproval. In the limited and extraordinary circumstances in which it is applied, the policies underlying the doctrine remain compelling". *Id.* at 287-88, 696 P.2d at 102, 211 Cal. Rptr. at 710 (emphasis in the original).

29. CAL. BUS. & PROF. CODE § 7159 (West Supp. 1985).

30. Calwood Structures, Inc. v. Herskovic, 105 Cal. App. 3d 519, 522, 164 Cal. Rptr. 463, 464-65 (1980). The *Calwood* court found a literal application of section 7159 to be unjust where the contract was between social acquaintances who were in constant communication concerning the work performed.

31. *Asdourian*, 38 Cal. 3d at 290, 696 P.2d at 104, 211 Cal. Rptr. at 712. The court added that "[c]ontractors should be encouraged to utilize written contracts for *all* home improvement jobs, precisely to avoid the kind of dispute which arose here." *Id.* at 290-91, 696 P.2d at 104, 211 Cal. Rptr. at 712.

32. A violation of section 7159 is punishable as a misdemeanor. *See* CAL. BUS. & PROF. CODE § 7159 (West Supp. 1985).

33. Vitek, Inc. v. Alvarado Ice Palace, Inc., 34 Cal. App. 3d 586, 591, 110 Cal. Rptr. 86, 90 (1973) (citing Berka v. Woodward, 125 Cal. 119, 57 P. 777 (1899), and Holm v. Bramwell, 20 Cal. App. 2d 332, 67 P.2d 114 (1937)).

34. Southfield v. Barrett, 13 Cal. App. 3d 290, 294, 91 Cal. Rptr. 514, 516 (1970).

35. 13 Cal. App. 3d 290, 91 Cal. Rptr. 514 (1970).

unjustly enriched at the expense of the plaintiff.[36] One of the main justifications behind this exception was that "[t]he violation of law was one which did not involve serious moral turpitude."[37]

In applying this type of rationale to the instant case, the majority felt a violation of section 7159 was also not the kind of illegality which renders a contract void. The court stated, "[t]he contracts at issue here were not *malum in se.* They were not immoral in character, inherently inequitable or designed to further a crime or obstruct justice. . . . Rather, the contracts were *malum prohibitum,* and hence only *voidable* depending on the factual context and the public policies involved."[38] The court also considered the policy of the statute as it had changed over the years.[39] Even though the penalties of section 7159 were no longer exclusive, there was no indication that legislative intent required all contracts made in violation thereof to be void. The court added that "[i]t will not defeat the statutory policy to allow plaintiff to recover for the reasonable value of the work performed."[40] Finally, the court believed that the facts of the case, regardless of any section 7159 violation, required the defendant to compensate the plaintiff to avoid allowing the defendant to be unjustly enriched.[41]

IV. THE CONCURRING AND DISSENTING OPINIONS

Justice Kaus registered a concurring opinion merely to express his doubt that the plaintiff was guilty of even a technical violation of section 7028.5 of the Business and Professions Code,[42] which prohibits the managing officer of any licensed organization from engaging in business as an individual. He believed that since the plaintiff was

36. In *Southfield,* the court of appeals overturned a trial court finding that a contract was illegal and void where the plaintiff was acting as a commission merchant without a license, in violation of CAL. AGRIC. CODE § 1263 (West Supp. 1964), then in effect.

37. *Southfield,* 13 Cal. App. 3d at 294, 91 Cal. Rptr. at 516.

38. *Asdourian,* 38 Cal. 3d at 293, 696 P.2d at 106, 211 Cal. Rptr. at 714.

39. The original version of section 7159 expressly provided that contracts not in compliance therewith were not immediately void. When the statute was amended in 1975, this language was deleted. *Id.* at 292, 696 P.2d at 105, 211 Cal. Rptr. at 713.

40. *Id.* at 292, 696 P.2d at 106, 211 Cal. Rptr. at 714.

41. *Id.* The defendant was a real estate investor and not an unsophisticated homeowner or tenant. The parties were friends with a history of past dealings. Furthermore, the plaintiff fully performed according to the oral agreements. The court analogized this case to Calwood Structures, Inc. v. Herskovic, 105 Cal App. 3d 519, 164 Cal. Rptr. 463 (1980).

42. CAL. BUS. & PROF. CODE § 7028 (West 1975).

never an organization, but always an individual, he therefore could not have violated this statute. Thus, Justice Kaus would have resolved the "substantial compliance" issue in an instant.[43]

Justice Mosk dissented, arguing that section 7031 deserved a literal application. In his own words, "the majority employ[ed] equity in a simple contract action and in doing so they emasculate[d] a legislative enactment that is clear and unambiguous."[44] Justice Mosk believed that the license issued to Artko was of no use to the plaintiff in maintaining his cause of action as an individual. Thus, ignoring the requirement that individuals must be personally licensed undermines the purpose of the Contractors License Law. Finally, he found that the only exception to this requirement existed where a partnership failed to obtain a separate license, but each of the partners were individually licensed.[45] The creation of any other exception is "a matter for the legislature, not the courts."[46] Therefore, Justice Mosk agreed with the court of appeal, which held that Asdourian should not have been allowed to recover.[47]

V. CONCLUSION

The court's determination to move away from a literal application of section 7031 is evidenced by its application of the substantial compliance doctrine. Contractors may therefore have access to the courts if they have substantially complied with licensing requirements.

Furthermore, the court liberally interpreted section 7159's writing requirement to prevent defendants from becoming unjustly enriched. The fact that section 7159's requirements were not met will not render a contract void where unjust enrichment results.

DAVID A. VAN RIPER

43. *Asdourian*, 38 Cal. 3d at 295, 696 P.2d at 107, 211 Cal. Rptr. at 715 (Kaus, J., concurring).

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

45. *See* General Ins. Co. of Am. v. Superior Court, 26 Cal. App. 176, 102 Cal. Rptr. 541 (1972), where the plaintiff corporation was not licensed, but the individual worker was. Although the court held that the plaintiff satisfied the three requirements of *Latipac*, it nevertheless held the doctrine of substantial compliance to be inapplicable.

46. *Id.* at 185, 102 Cal. Rptr. at 547.

47. *Asdourian*, 38 Cal. 3d at 295, 696 P.2d at 108, 211 Cal. Rptr. at 716 (Mosk, J., dissenting). Justice Mosk adopted as his own the relevant parts of the opinion of the court of appeal. *Id.*

V. CIVIL PROCEDURE

A. *The interests of substantial justice and the policy in favor of trial on the merits provide for a liberal application of section 473 of the California Code of Civil Procedure:* Elston v. City of Turlock.

In *Elston v. City of Turlock*, 38 Cal. 3d 227, 695 P.2d 713, 211 Cal. Rptr. 416 (1985), the plaintiffs' attorney failed to respond to a request for admission within the thirty days provided by section 2033 of the California Code of Civil Procedure. CAL. CIV. PROC. CODE § 2033 (West 1983). Receiving notice from one of the defendants that the alleged facts were deemed admitted, the plaintiffs' attorney moved to set aside the admissions under section 473 of the same code. *Id.* § 473. The attorney alleged that he first learned of the request for admissions upon receipt of the defendant's notice since, due to an understaffed office, the original had been misplaced. The trial court denied the plaintiffs' request for relief, whereupon all defendants made successful motions for summary judgment.

The supreme court ruled that the trial court had not exercised its discretion in conformity with the spirit of the law and in a manner to promote, rather than impede or impair, the ends of substantial justice. Since the law strongly favors trial on the merits, any doubts regarding section 473 must be resolved in favor of the moving party. *Carli v. Superior Court*, 152 Cal. App. 3d 1095, 1099, 199 Cal. Rptr. 583, 585 (1984). The court then reviewed a number of cases in which attorneys had failed to appear or answer because their employees had either misplaced papers or misinformed them as to the proper date.

The case of *Toon v. Pickwick Stages, Northern Division, Inc.*, 66 Cal. App. 450, 226 P. 628 (1924), was found to be analogous. In *Toon*, even though the attorney could not identify the negligent employee nor describe the office procedures followed, the fact that the attorney had no personal knowledge of the service until after the default had been entered was ruled excusable neglect. Therefore, absent prejudice to the opposing party, the court in *Toon* reversed the trial court's denial of relief from default. *Id.* at 455-56, 226 P. at 630. Likewise, absent allegations of prejudice by the defendants in *Elston*, the court reversed the judgments in favor of the defendants and remanded the cause to the trial court for further proceedings. *But see Carroll v. Ab-*

bot Laboratories, Inc., 32 Cal. 3d 892, 654 P.2d 775, 187 Cal. Rptr. 592 (1982) (construing section 473 of the Civil Code).

DAVID A. VAN RIPER

B. *Former section 581a of the Code of Civil Procedure held not to require return receipt within three year limitation period if summons and complaint are timely filed:* **Johnson & Johnson v. Superior Court.**

Section 581a of the California Code of Civil Procedure requires an action be dismissed "unless the summons on the complaint is served and return made within three years after the commencement of said action." CAL. CIV. PROC. CODE § 581a (West 1976). (This provision has since been repealed, but is substantively continued in CAL. CIV. PROC. CODE §§ 583.210, 583.250 (West Supp. 1985).) In *Johnson & Johnson v. Superior Court*, 38 Cal. 3d 243, 695 P.2d 1058, 211 Cal. Rptr. 517 (1985), the California Supreme Court was called upon to resolve the issue of whether a return receipt was required to be obtained and filed within three years where the summons and complaint were served by mail within the three year period. Chief Justice Bird, writing for a unanimous court, held that the filing of the return receipt was not required within three years in order to satisfy the statute.

The case arose in DES litigation (cancer resulting from the drug diethylstilbestrol) when several real parties in interest mailed summonses and complaints to the defendant's corporate headquarters. In each case this was done one day before the three year limitation period had run. Later, the trial court permitted the real parties in interest to amend their returns to include the return receipts, which they had received after the three year time period. The court of appeal consolidated the parties' petitions seeking writs to vacate the lower court's order and granted the requested relief. The defendant appealed to the supreme court.

The real parties employed the method of service provided under section 415.40 of the Code of Civil Procedure which requires sending a copy of the summons and complaint by first-class mail, postage prepaid, and obtaining a return receipt. CAL. CIV. PROC. CODE § 415.40 (West Supp. 1985). The section declares that service is complete ten days after mailing. The supreme court held that the parties met these requirements and that the summonses were effective on the date of mailing, even though the return receipts were received at a later date.

The petitioner argued that the service was not effective until the statutory requirements for proof of service had been met. The court

dismissed this argument since the cases cited by the petitioner did not address when service was effective under section 581a.

The petitioner also argued that service was only effective on the date the summonses were actually received, citing section 415.30 of the California Civil Procedure Code as support. CAL. CIV. PROC. CODE § 415.30 (West 1973). The court distinguished section 415.30 from section 415.40, as section 415.40 contains no language requiring receipt of the summons. Had the legislature intended service not to be effective until receipt of a summons under section 415.40, it could have stated this fact as it did in section 415.30.

Finally, the petitioner argued that service was not effective until ten days after the summonses were mailed. However, after some consideration, the court concluded that the ten days was a grace period designed to give the defendant ample time before he was required to answer.

The supreme court next had to decide whether return was made within three years of the commencement of the actions as required under section 581a. The petitioner argued "return" as required under sction 581a must include everything required for proof of service. The real parties in interest said "return" and "proof of service" were not the same thing. "Returned" had previously been defined two ways: (1) "[f]iled in the office of the county clerk with a statement of the service within that time," *Highlands Inn, Inc. v. Gurries*, 276 Cal. App. 2d 694, 697, 81 Cal. Rptr. 273, 275 (1969), and (2) filing of the summons "together with a statement of what was done in connection with the service thereof." *Frohman v. Bonelli*, 91 Cal. App. 2d 285, 288, 204 P.2d 890, 892 (1949). In the court's opinion the returns filed by the real parties satisfied these definitions.

The court reasoned that California Evidence Code section 641 establishes a presumption that a "letter correctly addressed and properly mailed is presumed to have been received." CAL. EVID. CODE § 641 (West 1966). This presumption and the affidavits filed by the parties were enough to satisfy section 581a, though not section 417.20, requiring proof of service.

The court held that the trial court's ruling, which allowed the real parties to amend their returns to include return receipts, was erroneous. However, the error did not effect the returns' sufficiency under section 581a, and since that section's requirements of 581 were met, service was effective when mailed.

KEITH F. MILLHOUSE

An individual is not susceptible to multiple charges for one instance of driving under the influence, even where several persons are injured: **Wilkoff v. Superior Court.**

Can an individual be charged with multiple counts of driving under the influence when several people are injured? The court, in *Wilkoff v. Superior Court,* 38 Cal. 3d 345, 696 P.2d 134, 211 Cal. Rptr. 742 (1985), answered this question in the negative. The court held that one instance of driving under the influence, which causes injury to one or several persons, results in only one count of driving under the influence.

The defendant in this case had made an improper lane change that caused a four-car collision which killed one individual and injured five others. Shortly after the accident, a blood sample was taken from the defendant revealing a blood alcohol level of .19 percent. *See* CAL. VEH. CODE § 23153(b) (West Supp. 1985) (when blood-alcohol level exceeds .10 percent, driving under influence is chargeable).

In reaching its holding, the supreme court relied upon section 23153 of the Vehicle Code. A driver violates section 23153 when he operates a vehicle while under the influence of alcohol, violates a driving law and causes physical injury to another. *Id.* § 23153(a). In analyzing this code section, the court affirmed the holding of *People v. Lobaugh,* 18 Cal. App. 3d 75, 95 Cal. Rptr. 547 (1971), which looked to the actual act prohibited by the statute to determine the number of times a violation of the statute should be charged.

The court reasoned that muliple counts can only be charged if the actus reus is committed more than once. It emphazised that the actus reus of section 23153 is the act of driving a vehicle while intoxicated and does not include the act of "causing" bodily injury while driving intoxicated. This emphasis, however, seems inimical to the language of the statute which requires an act that "proximately causes . . . bodily injury." CAL. VEH. CODE § 23153 (West Supp. 1985). Nonetheless, the court held only one count of driving under the influence was chargeable. It added that where bodily injury *"proximately results"* from the prohibited act, the offense is elevated from a misdemeanor to a felony. *Wilkoff,* 38 Cal. 3d at 353, 696 P.2d at 139, 211 Cal. Rptr. at 747. *But see People v. Young,* 224 Cal. App. 2d 420, 36 Cal. Rptr. 672 (1974) (multiple counts allowed).

To bolster its decision, the court pointed out that prior judicial interpretation of section 23153 resulted in the same conclusion, and the legislature had made no changes regarding this particular code sec-

tion. This indicated the legislature had adopted that judicial interpretation.

JESSICA L. LEMOINE

VII. CRIMINAL PROCEDURE

A. *California Penal Code section 1102.5, which allows a prosecutor access to prior statements of defense witnesses, held unconstitutional as violative of the privilege against self-incrimination: In re* Misener.

I. INTRODUCTION

In the case of *In re Misener*,[1] the court held section 1102.5 of the California Penal Code unconstitutional.[2] The court based its conclusion of unconstitutionality on the grounds that the statute violated the self-incrimination privilege afforded all defendants under article 1, section 15 of the California Constitution,[3] and that the prosecution has the entire burden of proving a defendant is guilty.

Section 1102.5 allowed prosecutors to obtain from the defendant prior statements made by a defense witness, other than the defendant himself, after that witness has testified on direct examination. Its effect is to aid the prosecution in impeaching the testimony of any defense witnesses.[4] The court found the defendant in *Misener* to be incriminating himself by providing the prosecution with potential impeachment evidence. Therefore, the court held the statute to be inconsistent with the self-incrimination protections provided criminal

1. 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985).

2. Section 1102.5 provides, in pertinent part,

> Upon motion, the prosecution shall be entitled to obtain from the defendant or his or her counsel, all statements, oral or however preserved, by any defense witness other than the defendant, after that witness has testified on direct examination at trial. At the request of the defendant or his or her counsel, the court shall review the statement in camera and limit discovery to those matters within the scope of the direct testimony of the witness.

CAL. PENAL CODE § 1102.5(a) (West Supp. 1985). The term "in camera" is defined as a hearing held "before the judge in his private chambers or when all spectators are excluded from the courtroom." BLACKS LAW DICTIONARY 684 (5th ed. 1979).

3. The California Constitution provides that "[p]ersons may not . . . be compelled in a criminal cause to be a witness against themselves . . . ." CAL. CONST. art. I, § 15.

4. If the witness' testimony under direct examination conflicts with his prior statements, which were obtained by the prosecution through discovery pursuant to section 1102.5, the witness' credibility would then be in question.

defendants by the California Constitution.[5]

II. FACTS

William Misener was an attorney acting as the public defender in a robbery case. He was being held in contempt of court for not releasing to the prosecuting attorney prior statements made by witnesses called by the defense after the witnesses had testified on direct examination. Such "prosecutorial discovery" was required pursuant to section 1102.5.

Prosecutorial discovery was first instituted in California with Justice Traynor's opinion[6] in *Jones v. Superior Court.*[7] In *Jones,* the court held that the prosecuting attorney in a rape case was entitled to receive from defense counsel any reports and x-rays intended to be brought into evidence by the defendant, as well as the names and addresses of witnesses intended to testify on defendant's behalf to prove his affirmative defense of impotency. The court allowed this discovery because the defendant would merely be disclosing information that he would be revealing at trial anyway. This discovery was therefore held not to be self-incriminating.[8]

After the decision in *Jones,* it appeared that the California Supreme Court was receptive to the idea of prosecutorial discovery. However, in *Prudhomme v. Superior Court,*[9] the supreme court limited such discovery to the specific facts of *Jones.* Even though the United States Supreme Court has adopted a broader view of prosecutorial discovery under the federal constitution,[10] the court has retained its narrow view of prosecutorial discovery up to its recent decision of in *Misener.*

The narrow test adopted in *Prudhomme* is whether the information sought relates to a defense, or whether disclosure conceivably lessens the prosecution's burden of proving its case in chief."[11]

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5. *Misener,* 38 Cal. 3d at 546, 698 P.2d at 639, 213 Cal. Rptr. at 571.

6. Justice Traynor was an advocate of prosecutorial discovery. *See* Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma,* 53 CALIF. L. REV. 89 (1965); Traynor, *Ground Lost and Found In Criminal Discovery,* 39 N.Y.U. L. REV. 228, 243, 250 (1964).

7. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

8. *Id.* at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

9. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

10. In United States v. Nobles, 422 U.S. 225 (1975), the United States Supreme Court espoused a broader view of prosecutorial discovery than California had in *Prudhomme.* In *Nobles,* the Court required the defendant to turn over his investigators' written reports regarding interviews with the prosecution's eyewitnesses before the defendant's investigators had even testified. The court concluded "that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial." *Id.* at 234.

11. *Prudhomme,* 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

Thus, California has retained a more stringent prosecutorial discovery standard than the United States Supreme Court.[12]

More recently, the California Supreme Court continued its refusal to expand prosecutorial discovery in *People v. Collie.*[13] In *Collie,* the court reiterated its unwillingness to expand prosecutorial discovery, leaving the issue to the legislature.[14] The court even went so far as to strongly hint that a prosecutorial discovery statute, if enacted by the legislature, would not be valid.[15]

III. ANALYSIS

A. Majority Opinion

In analyzing the validity of section 1102.5, the court concluded that the sole effect of the statute as written was to impeach the testimony of defense witnesses. It has this effect because the statute allows discovery of prior statements of defense witnesses pertaining to their direct testimony. If these statements are conflicting, the witness' credibility could thereby be impeached.[16] By supplying the prosecution with evidence that impeaches defense witnesses, the defendant is aiding the prosecution.

In *Prudhomme,* the court held that the constitutionally recognized self-incrimination privilege is violated when the matters to be disclosed "conceivably might lighten the prosecution's burden of proving

12. In Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976), the California Supreme Court admitted that the federal standard was not wholly consistent with the California standard of protection against self-incrimination. "It is established that [the California] Constitution is a document of independent force . . . whose construction is left to this court, informed but untrammeled by the United States Supreme Court's reading of parallel federal provisions." *Id.* at 525, 557 P.2d at 67, 134 Cal. Rptr. at 776. The California Supreme Court "maintain[ed] that solicitude and affirm the continued vitality of the stringent standards set forth in *Prudhomme* for the protection of the privilege against self-incrimination as embodied in article I, section 15 [of the California Constitution]." *Id. See also supra* note 3. For a complete case analysis of *Allen,* see Note, *Prosecutorial Discovery and the Privilege Against Self-Incrimination,* 66 CALIF. L. REV. 332 (1978).

13. 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981).

14. *See* Comment, *Prosecutorial Discovery in California After People v. Collie: The Need for Legislation,* 23 SANTA CLARA L. REV. 543 (1983).

15. The *Collie* court expressed foresight by stating: "[w]e have grave doubts that a valid discovery rule affecting criminal defendants can be devised. But if the Legislature undertakes to formulate a comprehensive solution that purports to be practical in application and consistent with the public interest any legislative error would be subject to judicial review. Ours is likely to be the last word on the subject; for that reason, it should not also be the first." *Collie,* 30 Cal. 3d at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465 (footnote omitted).

16. *Misener,* 38 Cal. 3d at 554, 698 P.2d at 644, 213 Cal. Rptr. at 576.

its case in chief."[17] The prosecution's burden is unquestionably lightened when he is handed evidence pursuant to section 1102.5; as a result, the prosecution is strengthening its own case with aid of the defense counsel. The court concluded that "[t]here is no doubt that the evisceration of a defense 'incriminates' the defendant."[18]

The court found the invalidity of section 1102.5 to be based solely on its inconsistency with the self-incrimination privilege and the interpretation of this privilege in *Prudhomme.* The majority concluded by stating that "[t]he privilege forbids compelled disclosures from the defendant that will aid the prosecution. To the extent they are useful to the prosecution the disclosures required by section 1102.5 violate the defendant's privilege against self-incrimination. Section 1102.5 is therefore unconstitutional."[19]

B. Dissenting Opinion

Justice Lucas, believing that section 1102.5 was constitutional, filed a dissenting opinion. In finding the criminal discovery statute valid, Lucas relied upon the United States Supreme Court's holding in *United States v. Nobles,*[20] asserting that the statute would aid in achieving the ultimate goal of the criminal justice system: the "search for truth."[21] Disagreeing with the majority's contention that such discovery violated the self-incrimination privilege of the defendant, Lucas asserted that the statements of third parties (defendant's witnesses) would in no way compel self-incrimination; the third party's statements are not personal to a defendant.

Lucas went on to accuse the majority of making prosecutorial discovery unavailable in California, pointing out that this was a minority position.[22] Precluding such valuable discovery, according to Justice Lucas, "creat[es] a devastating 'roadblock' in the search for the truth."[23] As a result, Lucas believes perjury will remain unnoticed in California criminal proceedings, whereas section 1102.5 could help detect it.

IV. CONCLUSION

In holding 1102.5 unconstitutional, the court retained its very nar-

17. *Prudhomme,* 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.
18. *Misener,* 38 Cal. 2d at 556, 698 P.2d at 646, 213 Cal. Rptr. at 578.
19. *Id.* at 558, 698 P.2d at 648, 213 Cal. Rptr. at 580.
20. 422 U.S. 225 (1975). *See supra* note 10.
21. *Misener,* 38 Cal. 3d at 559, 698 P.2d at 648, 213 Cal. Rptr. at 580. (Lucas, J., dissenting).
22. *Id.* at 562, 698 P.2d at 650, 213 Cal. Rptr. at 582. Lucas brought to the court's attention that a majority of the states as well as federal courts have recognized a right of prosecutorial discovery.
23. *Id.*

row view of prosecutorial discovery adopted in *Prudhomme*. The *Prudhomme* standard affords defendants a higher standard of protection under the self-incrimination privilege than does the federal standard. Thus, in California, the only incident where prosecutorial discovery will be allowed is in cases analagous to *Jones*: where the evidence attained through such discovery pertains merely to a particular affirmative defense asserted by the defendant that would not lessen the prosecution's burden. This standard is so limited that prosecutorial discovery in California appears to be a lost cause.

MISSY K. BANKHEAD

B. *Newly enacted driving under the influence statute to be applied prospectively:* Fox v. Alexis.

In *Fox v. Alexis*, 38 Cal. 3d 621, 699 P.2d 309, 214 Cal. Rptr. 132 (1985), the court held that a statute in effect when the offense of driving under the influence of alcohol took place, controls actions taken by the Department of Motor Vehicles. The court held that the law which was in effect at the time of the offense controls, not the law in effect at the time of conviction of the offense. The court based its holding on the belief that the legislature had not intented to deviate from the general rule that new statutes should be applied prospectively as opposed to retroactively.

On February 25, 1982, after admitting to prior drunk driving convictions, the petitioner was found guilty of driving under the influence of alcohol or drugs on December 19, 1981. At the time of the arrest, section 13352.5 of the Vehicle Code prevented the revocation of a drivers license when the court ordered the offender to participate in an approved alcohol rehabilitation program. On January 1, 1982, Sections 13352 and 13352.5 of the Vehicle Code went into effect thereby superseding the prior statute. *See* CAL. VEH. CODE §§ 13352, 13352.5 (West Supp. 1985). Pursuant to the new statute, the Department of Motor Vehicles revoked the petitioner's license for a three year period, even though the court ordered petitioner to participate in an alcohol treatment program.

The court affirmed the trial court's order granting petition for a writ of mandate directing the Department of Motor Vehicles to set aside the revocation of the petitioner's license. The court stated that the Department of Motor Vehicles had used petitioner's two prior offenses as a basis for the revocation of petitioner's license, thereby applying the new statute retroactively. At the time of the arrest,

however, the petitioner's participation in an alcohol rehabilitation program would have prohibited the D.M.V.'s revocation of his license. The court stated that this retroactive application was contrary to the intent of the legislature and therefore, could not stand.

JESSICA L. LEMOINE

C. *Section 28 of article I of the California Constitution held not to bar judicial discretion in the admission of prior felony convictions:* People v. Castro.

I. INTRODUCTION

In *People v. Castro,*[1] the court considered the question of whether a witness' prior felony convictions are admissible into evidence in light of article I, section 28(f), of the California Constitution.[2] The case arose when the defendant, Maria Castro, was convicted for receiving stolen property. The trial court had allowed impeachment of the defendant with prior convictions for the possession of heroin and possession of heroin for sale.[3] The defendant argued that section 28(f) left Evidence Code section 352 intact, thereby excluding evidence of convictions in certain cases.[4] The Attorney General claimed that subdivision (f) eliminated judicial discretion in restricting the admission of prior convictions for impeachment purposes.[5] In a plurality opinion in which only three justices joined, the court affirmed the defendant's convictions.[6]

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1. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985). The majority opinion was written by Justice Kaus with Justices Mosk and Broussard concurring. There was a separate concurring and dissenting opinion by Justice Grodin. Justice Lucas filed a separate concurring and dissenting opinion. Finally, there was a separate concurring and dissenting opinion by Chief Justice Bird, with Justice Reynoso concurring.

2. Section 28, subdivision (f) provides:

> Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

CAL. CONST. art. I, § 28(f). For a more in-depth analysis of the effects of this case on this constitutional provision, see Comment, Proposition 8: California Law After In Re Lance W. And People v. Castro, 12 Pepperdine L. Rev. 1059 (1985).

3. *Castro,* 38 Cal. 3d at 305, 696 P.2d at 112-13, 211 Cal. Rptr. at 720-21.

4. *Id.* at 305-06, 696 P.2d at 113, 211 Cal. Rptr. at 721. Section 352 reads: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1966).

5. *Castro,* 38 Cal. 3d at 306, 696 P.2d at 113, 211 Cal. Rptr. at 721.

6. *Id.* at 319, 696 P.2d at 122, 211 Cal. Rptr. at 730.

II. THE COURT'S DECISION

A. The Majority Opinion

Justice Kaus, writing for the majority, held that section 28 was not intended to eliminate the trial court's discretion in controlling the admission of prejudicial evidence.[7] Justice Kaus pointed out that section 352 of the Evidence Code gives the trial judge discretion to exclude evidence of prior felony convictions when its probative value is outweighed by the risk of undue prejudice.[8] However, this discretion is not unlimited. In a line of cases beginning with *People v. Antick*[9], the supreme court recognized that such discretion could be abused.[10] These cases involved instances where the lower courts admitted evidence the supreme court felt should have been excluded. The court's refusal to admit the evidence in those cases was part of the backdrop behind the framing of article I, section 28.[11]

Sections (d) and (f) of article I, section 28 are the focus of the *Castro* decision. The case involved a matter of statutory interpretation. The court pointed out that subdivision (f) applies to *all* witnesses in criminal cases.[12] Asking rhetorical questions, it stated that the framers could not have intended the trial court to have no discretion in determining which prior convictions should be admitted.[13]

The court then turned to the text of the constitutional amendment to resolve the controversy. In interpreting a statute, the words themselves should be examined and given their ordinary meaning.[14] The court noted the clarity of subdivision (f) which is absolute in its language as to the admission of prior felony convictions. Subdivision (d), however, states that nothing in the *section* shall affect Evidence Code sections 352, 782 or 1103.[15] The word "section" was held to refer to

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7. *Id.* at 306, 696 P.2d at 113, 211 Cal. Rptr. at 721.

8. *Id. See* CAL. EVID. CODE § 352 (West 1966).

9. 15 Cal.2d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975).

10. *Castro,* 38 Cal. 3d at 307-08, 696 P.2d at 114-15, 211 Cal. Rptr. at 722. These cases involved situations where the trial court had allowed a prior felony conviction of one kind or another to come into evidence. The decisions to allow these convictions into evidence were later held to constitute an abuse of the trial courts' discretion.

11. *Id.* at 308, 696 P.2d at 115, 211 Cal. Rptr. at 723.

12. *Id.* at 309, 696 P.2d at 115, 211 Cal. Rptr. at 723.

13. *Id.* For example, the court questioned whether the voters had intended that "an elderly victim of a mugging [could not] avoid being impeached by a conviction for conspiracy to disturb the peace (Penal Code §§ 182, 415) suffered in her youth?" *Id.*

14. *Id.* at 309-10, 696 P.2d at 115, 211 Cal. Rptr. at 723 (citing People v. Black, 32 Cal. 3d 1, 5, 648 P.2d 104, 105, 184 Cal. Rptr. 454, 454-55 (1982)).

15. Subdivision (d), entitled "Right to Truth-in Evidence" provides:

Except as provided by statute hereafter enacted by a two-third vote of the

all of section 28, not just to subdivision (d). This interpretation of subdivision (d) defeated the Attorney General's argument that subdivision (f) was not controlled by this language.[16]

Gleaning nothing from the words themselves, the court examined the ballot summary, that is, the arguments and analysis presented to the electorate.[17] After an examination of the voter information, the court concluded that neither the framers' nor the voters' intention as to the trial court's discretion under section 352 was ascertainable.[18] Further, there were no legislative or administrative constructions of the section to aid in interpreting the statute.[19] The court finally decided that the initiative meant to preserve the trial court's discretion as it is stated in the Evidence Code, but it meant to reject the "black letter" rules of exclusion which were grafted into the code by the *Antick* line of decisions.[20]

The court then addressed the issue of what felonies should be admissible to affect the credibility of a witness. That question was answered with another question: "Can it be said with substantial assurance that the credibility of a witness is adversely affected by his having suffered this conviction?"[21] When the answer is no, impeachment is prohibited by the due process clause of the fourteenth amendment.[22] In determining what convictions would adversely affect a witness' credibility, the court revived the standard enunciated by Justice Holmes.[23] The conviction must show a "general readiness to do evil" which supports the proposition that the witness is of "bad character" and unworthy of credit.[24]

The court concluded that only past felony convictions which in-

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membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. *Nothing in this section shall affect* any existing statutory rule of evidence relating to privilege or hearsay, or *Evidence Code, Sections 352,* 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

CAL. CONST. art. I, § 28(d) (emphasis added).

16. *Castro,* 38 Cal. 3d at 310, 696 P.2d at 115-16, 211 Cal. Rptr. at 723-24.

17. *Id.* (citing Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 245-46, 583 P.2d 1281, 1300, 149 Cal. Rtpr. 239, 258 (1978) (ballot summaries are helpful in determining the meaning of uncertain terms in an enactment approved by the voters).

18. *Castro,* 38 Cal. 3d at 311, 696 P.2d at 116, 211 Cal. Rptr. at 724.

19. *Id.* at 311, 696 P.2d at 116-17, 211 Cal. Rptr. at 724-25.

20. *Id.* at 312, 696 P.2d at 117, 211 Cal. Rptr. at 725.

21. *Id.* at 313, 696 P.2d at 118, 211 Cal. Rptr. at 726.

22. *Id.* This is because " '[a]n important element of a fair trial is that only a jury consider relevant and competent evidence bearing on the issue of guilt or innocence.' " *Id.* at 313-14, 696 P.2d at 118, 211 Cal. Rptr. at 726 (citing Bruton v. United States, 391 U.S. 123, 131 n.6 (1968)).

23. *Castro,* 38 Cal. 3d at 314, 696 P.2d at 118, 211 Cal. Rptr. at 726 (citing Gertz v. Fitchburg Railroad, 137 Mass. 77, 78 (1884)).

24. *Gertz,* 134 Mass. at 78.

volve "moral turpitude" satisfy the requirements of the due process clause of the fourteenth amendment. Such felonies need not involve dishonesty, though felonies involving dishonesty more readily prove a "bad character" and "general readiness to do evil."[25] The lower courts must therefore determine whether or not a particular defendant's prior felony conviction was one involving moral turpitude. In making that determination the court decided that only the least adjudicated elements of the conviction could be looked at.[26]

In the present case the court decided that simple possession of heroin does not necessarily involve moral turpitude, though possession for sale does.[27] Thus, the defendant should not have been impeached with the conviction for simple possession, and the trial court erred in not exercising its discretion to exclude evidence of the conviction. Nonetheless, because of the strength of the state's case, the court found the error not to be prejudicial and upheld the conviction.[28]

B. Concurring and Dissenting Opinions

Justice Grodin dissented from the plurality's interpretation of subdivision (f).[29] Grodin pointed out, as the plurality had, that the language of subdivision (f) was as clear and concise as it could possibly be.[30] However, rather than relying on subdivision (d) to interpret (f), Justice Grodin construed the two provisions against one another. He concluded that subdivision (d) was a general provision, and that subdivision (f) was a particular provision. Thus in accordance with statutory rules of construction, the particular provision would govern the general.[31]

Justice Grodin also pointed out that the incongruity between the two subdivisions could be avoided by reading the word "section" in subdivision (d) to mean "subdivision." This interpretation would limit the effect on section 352 to subdivision (d), and the clarity of (f)

25. *Castro*, 38 Cal. 3d at 314-15, 696 P.2d at 119, 211 Cal. Rptr. at 727.

26. *Id.* at 317, 696 P.2d at 120, 211 Cal. Rptr. at 728 (citing 3A J. WIGMORE, EVIDENCE §§ 879, 880 (Chadbourne rev. ed. 1970)).

27. *Castro*, 38 Cal. 3d at 317, 696 P.2d at 121, 211 Cal. Rptr. at 729.

28. *Id.* at 318-19, 696 P.2d at 121-22, 211 Cal. Rptr. at 729-30.

29. *Id.* at 319, 696 P.2d at 122, 211 Cal. Rptr. at 730 (Grodin, J., concurring and dissenting.)

30. *Id.*

31. *Id.* (citing CAL. CIV. PROC. CODE § 1859 (West 1983)). Section 1859 states in pertinent part : "When a general and a particular provision are inconsistent, the latter is paramount to the former. . . ." CAL. CIV. PROC. CODE § 1859 (West 1983).

would be unimpinged;[32] the trial court's discretion would be removed.

To further support his interpretation Grodin stated that the California Supreme Court, in *People v. Beagle,*[33] had interpreted a conflict between Evidence Code section 788 and 352 to give the trial courts "discretion to exclude proof of prior felony convictions offered in impeachment."[34] He noted that the support for that case rested in *Luck v. United States.*[35] Following the *Luck* decision, Congress amended the applicable statute to allow prior convictions into evidence with certain exceptions.[36] A subsequent court of appeals decision held that Congress had overruled *Luck* and the trial courts' discretion concerning the admissibility of prior convictions had been eliminated.[37] Justice Grodin argued that passage of article I, section 28 should be given a similar effect.

Justice Lucas concurred in the judgment affirming the conviction. He agreed with Justice Grodin that subdivision (f) was intended to completely eliminate any judicially created restrictions which would bar the admission of prior felony convictions.[38]

Justice Lucas disagreed with Justice Grodin and with the majority as to the "moral turpitude" exception to the admissibility of prior convictions.[39] He argued the language "without limitation" of the section should be construed literally. The proposed standard would cause confusion and uncertainty, which could be avoided if *all* prior convictions were admissible.[40]

Chief Justice Bird concurred with the plurality decision in its determination that the trial court has the discretion to exclude evidence where its probative value is outweighed by the risk of undue prejudice.[41] The Chief Justice used relevance as the cornerstone of her argument,[42] that is, evidence must be relevant to be admissible.[43]

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32. *Castro*, 38 Cal. 3d at 320, 696 P.2d at 123, 211 Cal. Rptr. at 131 (Grodin, J., concurring and dissenting). See note 2 for text of section 352.

33. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rtpr. 313 (1972).

34. *Id.* at 452, 492 P.2d at 7, 99 Cal. Rptr. at 319.

35. 348 F.2d 763 (D.C. Cir. 1965).

36. District of Columbia Court Reform and Criminal Procedures Act of 1970, PUB. L. NO. 91-358, 84 Stat. 473 (1970).

37. Taylor v. United States, 280 A.2d 79 (D.C. 1971).

38. *Castro*, 38 Cal. 3d at 322-23, 696 P.2d at 124-25, 211 Cal. Rptr. at 732-33. (Lucas, J., concurring and dissenting.)

39. *Id.* at 323, 696 P.2d at 125, 211 Cal. Rptr. at 733.

40. *Id.*

41. *Id.* (Bird, C.J., concurring and dissenting).

42. The Chief Justice's argument was adopted from a decision originally penned by Judge Work in the appellate court decision of *People v. Hoffman*, later depublished by the supreme court on February 14, 1985.

43. The Chief Justice relied on Evidence Code section 350 for this rule. It states, "No evidence is admissible except relevant evidence." CAL. EVID. CODE § 350 (West 1966).

The relevance of prior felony convictions has been controlled by section 788,[44] as construed by *People v.Beagle*[45] and its progeny.

Evidence of prior convictions to be relevant to impreaching a witness' credibility must address his truthfulness. The trial courts are to determine whether the prior felony conviction demonstrates past untruthfulness or just creates an impression of bad character, which is an improper basis for decision. It is " 'only a conviction which has as a necessary element an intent to deceive, defraud, lie, steal, etc., [that] impacts on the credibility of a witness.' "[46] Thus, violent or assaultive crimes would have little or no bearing on one's credibility.[47]

The Chief Justice's argument would not be persuasive unless relevance were held to be compatible with and not excluded by the constitutional amendment. Using the same rules of statutory interpretation as the plurality,[48] the Chief Justice construed subdivision (f) so as not to "preclude the assessment of relevance in determining prior conviction evidence for impeachment."[49]

The People's argument that admission of prior felony convictions for impeachment purposes is free from judicial restraint is defective because it eliminates the second inferential step required for impeachment. The first step is the linking of the commission of the

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44. CAL. EVID. CODE § 788 states

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

(a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

(b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.

(d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

CAL. EVID. CODE § 788 (West 1966).

45. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

46. *Castro*, 38 Cal. 3d at 325, 696 P.2d at 126, 211 Cal. Rptr. at 734 (citing People v. Barrick, 33 Cal. 3d 115, 123-24, 654 P.2d 1243, 1247, 187 Cal. Rptr. 716, 720-21 (1982) (citations omitted)).

47. *Id.* at 325, 696 P.2d at 127, 211 Cal. Rptr. at 734. *See also* People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

48. *See supra* note 11.

49. *Castro*, 38 Cal. 3d at 327, 696 P.2d at 128, 211 Cal. Rptr. at 736 (Bird, C.J., concurring and dissenting).

prior felony to a propensity in the witness to lie. The second step is the fact-finder's inference that the witness is dishonest or untruthful.[50]

Looking at the legislative analysis of subdivision (f) and the language of the constitutional amendment, the Chief Justice found relevance to be a prerequisite for admitting prior felony convictions for impeachment.[51] Such an interpretation of the amendment would avoid due process problems. Due process requires a fundamentally fair trial, of which the control of evidence is a part.[52] While California courts have previously found no due process infringements in the impeachment of an accused with his prior felony convictions, the dictum and the dissenting opinion in *Spencer v. Texas*[53] indicates that removal of relevance as a standard might violate due process.[54]

The Chief Justice dissented from the plurality's adoption of "moral turpitude" as the standard for admissibility of evidence of prior felony convictions used to impeach.[55] Such a standard has been subject to various judicial interpretations which one commentator has said are "so imprecise that it is only a matter of conjecture whether a particular crime involves it."[56] In addition to lacking a definition, the "moral turpitude" standard opens the way for judges to apply their own personal views as to what this phrase encompasses, again leading to inconsistent results. Finally, the Chief Justice noted that a vast number of noncriminal decisions have used the moral turpitude language with varying and inconsistent results. This only adds to the confusion courts face as they attempt to apply the standard in criminal cases.[57]

III. CONCLUSION

The statutory principle of construction which requires that words be given their ordinary and generally accepted meaning was applied by the plurality, and the Chief Justice in her concurring and dissenting opinion, to interpret article I, section 28. Each application resulted in a different interpretation, illustrating the confusion that

50. *Id.*

51. *Id.* at 329-30, 696 P.2d at 129-30, 211 Cal. Rptr. at 737-38.

52. *Id.* at 331, 696 P.2d at 131, 211 Cal. Rptr. at 739 (citing Blackburn v. Alabama, 361 U.S. 199 (1960); Lisenba v. California, 314 U.S. 219 (1941)).

53. 385 U.S. 554 (1967).

54. *Id.* at 570-71 (Warren, C.J., dissenting). Chief Justice Warren stated, "[E]vidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." *Id.* at 574.

55. *Castro*, 38 Cal. 3d at 332-33, 696 P.2d at 132, 211 Cal. Rptr. at 740 (Bird, C.J., concurring and dissenting).

56. Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533, 542 (1962).

57. *Castro*, 38 Cal. 3d at 334-36, 696 P.2d at 133-34, 211 Cal. Rptr. at 741-42 (Bird, C.J., concurring and dissenting).

will likely result from the court's decision. Various prior felonies may be viewed as involving moral turpitude by one court and not by another. Inconsistent applications will abound, creating judicial chaos. One can only hope Justice Grodin's sound advice will be heeded and the legislature will quickly act to expressly set forth the felonies that, in its opinion, involve moral turpitude.

KEITH F. MILLHOUSE

D. *The Department of Motor Vehicles may suspend a license of a twice convicted drunk driving offender under Vehicle Code section 13352 without alleging or proving the prior conviction in a second criminal proceeding:* **Pollack v. Deptartment of Motor Vehicles.**

In *Pollack v. Department of Motor Vehicles,* 38 Cal. 3d 367, 696 P.2d 141, 211 Cal. Rptr. 748 (1985), the court was called upon to interpret the ambiguous wording of Vehicle Code section 13352, as amended in 1981. CAL. VEH. CODE § 13352 (West Supp. 1985). The Department of Motor Vehicles (DMV) suspended the defendant's driver's license for one year under section 13352(a)(3) after he had been convicted of drunk driving for the second time in five years. The superior court vacated the order because the prosecutor did not plead and prove the prior conviction in the defendant's second hearing. The supreme court reversed the judgment, finding that the legislature did not intend to impose a "plead and prove" requirement on the administrative process for suspending a license when it amended section 13352.

The supreme court relied on the well-established principle of statutory interpretation, which calls for " 'the ascertainment of legislative intent so that the purpose of the law may be effectuated . . . .' " *Pollack,* 38 Cal. 3d at 372, 696 P.2d at 143, 211 Cal. Rptr at 751 (quoting *People ex rel. Younger v. Superior Court,* 16 Cal. 3d 30, 40, 544 P.2d 1322, 1328, 127 Cal. Rptr. 122, 128 (1976)). In determining the objective of the legislature, the court looked to the intent and meaning expressed in the Legislative Counsel's Digest. As to the 1981 amendment, the digest stated, "[t]he bill would require the department to suspend the privilege [to operate a motor vehicle] for 1 year for a second conviction of [driving while under the influence of intoxicating liquor or drugs or the combined influence thereof] . . . ." *Pollack,* 38 Cal. 3d at 376, 696 P.2d at 146, 211 Cal. Rptr. at 753 (quoting Legis. Counsel's Dig. of Assembly Bill. No. 541 (1981 Reg. Sess.)).

The court held that the language of the digest clearly expressed the intent of the legislature not to require the pleading and proof of the prior conviction.

As further justification for its finding, the court stated the legislature had provided that the law would also apply to out-of-state convictions even if the DMV had no way to ascertain whether the prior convictions had been alleged and proven in the out-of-state proceedings. The court reasoned it was unlikely that the legislature would provide special procedural protections for California proceedings and not provide similar protections for out-of-state proceedings if it intended to impose the requirement on the DMV.

Finally, the court determined that its holding would not be contrary to the due process clause under the fourteenth amendment of the United States Constitution or article I, sections 7 and 15 of the California Constitution.

DAVID A. VAN RIPER

VIII. GOVERNMENT

Government Code section 1090, which prohibits city officials from having any financial interest in contracts entered into in their official capacity, held to require harsh remedy for violation: **Thomson v. Call.**

Thomson v. Call, 38 Cal. 3d 633, 699 P.2d 316, 214 Cal. Rptr. 139 (1985), arose out of a complex local transaction. IGC Corporation owned land in the city of Albany, which it sought to have rezoned. The Albany City Council agreed to the rezoning and the issuance of a conditional use permit only if the IGC would acquire parkland for the city. Part of the land ICG was to acquire was owned by an Albany City Council member, but that fact was not revealed to the other council members. The corporation purchased the land for $258,000 and then turned it over to the city. The interested councilman, on several occasions prior to closing the deal, had sought and obtained advice from the city attorney as to the propriety of the transactions.

The trial court found the councilman had not committed fraud, nor had he conspired with the other council members to violate section 1090, which prohibits city officials from having a financial interest in contracts entered into in their official capacity. CAL. GOV'T CODE § 1090 (West 1980). Nonetheless, the trial court did decide that the councilman had violated the statute. The court required him to return the purchase price of the land plus interest. Additionally, the city was to retain title to the land. The court denied the Plaintiff's claim that the corporate defendants had breached the contract be-

cause they failed to transfer the parkland to the city. The plaintiff and defendants appealed.

The supreme court found that the purchase of the property from the councilman and its subsequent conveyance to the city constituted a single contract. The court noted that the goals of section 1090 support the rule that public officers cannot make contracts in their official capacity, nor become interested in such contracts. *See also City of Oakland v. California Construction Co.*, 15 Cal. 2d 573, 104 P.2d 30 (1940) (conflict of interest must occur at time contract is awarded). The court further decided that section 1090 was violated despite the absence of fraud or the presence of a good faith mistake.

The court then focused on the appropriate remedy for the situation in which a fully executed and performed contract has been found to violate Section 1090. The court noted that the city was entitled under case law to recover the consideration it had paid without restoring the benefits received. Since the contract violated public policy, there was no ground for any equitable consideration on the defendants' behalf (such as quantum meruit recovery).

Justice Kaus, writing for the majority, recognized that the remedy was a harsh one, but he noted that it was necessary to eliminate any temptation of future impropriety. The remedy also provided a strong incentive to public officials to avoid conflicts of interest. Considerations of fairness or of the advantage of the contract to the city would weaken the remedy's deterrent effect. The court illustrated this by suggesting an intermediate approach and then proceeded to show how it would compromise the statute. Due to the significant public policy goals mandating strict enforcement of the conflict of interest statute, the court affirmed the rather harsh remedy.

KEITH F. MILLHOUSE

IX. INDIAN LAW

State regulation of outdoor advertising on Indian reservations preempted by federal law: **People ex rel. Department of Transportation v. Naegele Outdoor Advertising Co. of California.**

In *People ex rel. v. Naegele Outdoor Advertising Co. of California*, 38 Cal. 3d 509, 698 P.2d 150, 213 Cal. Rptr. 247 (1985), the California Supreme Court was faced with the question of whether billboards on Indian reservations were subject to state regulation.

Naegele Outdoor Advertising Co. (Naegele) was actively involved in the business of operating billboards on leased land located next to highways. Naegele became interested in leasing land at the Morango Indian Reservation (Reservation), which was land held in trust by the United States, for the purpose of operating billboards on that land. A lease agreement was obtained by Naegele shortly thereafter. However, approval of the lease was denied by the United States Department of the Interior (Interior). The beneficial owners of the reservation appealed the decision to the Board of Indian Affairs, and the decision was reversed. The Interior appealed, but during the pendency of the appeal, the beneficial owners of the reservation entered into an agency agreement with Naegele for the operation of billboards on the Reservation. The Deparment of Transporation of the State of California notified Naegele that the state had the power to enforce state regulations dealing with the operation of the billboards. Hence, the issue that arose was whether billboards on the Indian reservation were subject to regulation by the State of California.

The Court set the proper foundation for discussion on the case by explaining that both the United States and California have statutes which regulate outdoor advertising. The federal act, entitled the Highway Beautification Act of 1965, 23 U.S.C. §§ 131, 135, 136, 319 (1982), forbids outdoor advertising displays within 660 feet of any federal primary system highway or interstate. Any state failing to comply with the Highway Beautification Act may lose ten percent of its highway funds. The act contemplates state compliance through the use of the state's inherent powers of zoning and condemnation. California has enacted regulations seeking to comply with the federal act. The Outdoor Advertising Act, CAL. BUS. & PROF. CODE §§ 5200-5231 (West Supp. 1985) places restrictions similar to those of the federal act upon outdoor advertising.

The court held that Congress had not authorized state regulation of outdoor advertising on Indian reservations. It also decided that even if the federal act was intended to apply to Indian reservations, Congress did not necessarily intend for the states to enforce the act. The court noted that the Highway Beautification Act reserved the enforcement procedure of the Act to the federal government. Additionally, the court noted that two state enforcement mechanisms recognized as zoning and eminent domain cannot be used by the states where Indian reservations are involved.

The court rejected the argument that state laws are effective in Indian reservations under Public Law 280, Pub. L. No. 83-280, 67 Stat. 589 (1953). This law only gives states jurisdiction over private civil litigation involving Indian reservations in state court. Public Law 280 was not meant to cover general civil/regulatory laws on Indian reser-

vations. *See generally Bryan v. Itasca County*, 426 U.S. 373 (1976) (regarding the legislative intent of Public Law 280).

While in some cases a state may assert authority over activities on an Indian reservation, the court did not feel this was such a case. Since the California state law would conflict with the purposes of the federal legislation by subjecting the reservations to state regulation where they would otherwise be exempt from control under the federal act, or by "imposing inconsistent state regulations in an area reserved for federal oversight," *Naegele*, 38 Cal. 3d at 522, 698 P.2d at 158, 213 Cal. Rptr. at 255, it was held to be preempted by the federal law.

KEITH F. MILLHOUSE

X. INSURANCE LAW

Burden of proving suicidal intent is on Insurer when Life Insurance benefits have been denied under suicide exculpatory clause: **Searle v. Allstate Life Insurance Co.**

I. INTRODUCTION

Life insurance policies commonly contain clauses which exclude coverage for suicide during a certain time period. In *Searle v. Allstate Life Insurance Co.*,[1] the California Supreme Court struggled to decide the meaning and effect of such a clause. In an opinion authored by Justice Reynoso the court held that the clause as it was worded was unambiguous, and that the burden of proving suicidal intent rested on the insurer.[2]

Petitioner's decedent purchased a $50,000 life insurance policy from Allstate in May of 1975. The policy contained a clause which excluded coverage for "suicide, whether sane or insane," within two years of the issuance of the policy. The decedent had fully paid his premiums at the time of his death on March 13, 1976. The decedent's death was caused by a self-inflicted gunshot wound to the head. Alice Searle, the decedent's wife, filed a claim for payment on the pol-

1. 38 Cal. 3d 425, 696 P.2d 1308, 212 Cal. Rptr. 466 (1985). Justice Reynoso delivered the majority opinion with Justices Kaus, Broussard, Grodin and Ackerman joining. Chief Justice Bird wrote a separate concurring and dissenting opinion. Justice Mosk dissented. Justice Ackerman was sitting under assignment by the chairperson of the Judicial Council.

2. *Id.* at 435, 696 P.2d at 1313, 212 Cal. Rptr. at 471.

icy but was denied the benefits. She then filed this action.[3]

Allstate moved for summary judgment which the trial court granted.[4] The court of appeal reversed that decision and remanded the case for trial. At trial the court instructed the jury that Searle had the burden of proof as to the decedent's intent to take his own life. Under that instruction the jury returned special findings on which the court entered judgment for the defendant.[5]

II. MAJORITY OPINION

A. "Law of the Case"

The supreme court began its discussion by justifying its review of the case. It recognized that multiple appellate review of the same issue in a single case is generally precluded by the "law-of-the-case" doctrine, even in instances where the prior appeal was heard in the court of appeal.[6] The court noted, however, that the doctrine is not inflexible;[7] when the lower court's decision is manifestly unjust, the issue may be heard again on appeal.[8] An unjust decision does not include mere disagreement with the prior appellate court's ruling, but requires a "manifest misapplication of existing principles."[9]

The court further noted that the primary purpose behind the rule is judicial economy.[10] Where a court decides that the decision should be reversed on a different ground than was used in the prior appeal, the reasoning behind the rule is not served.[11] In this case the prior court of appeal did not make a determinative ruling on the issue of the burden of proof; it only decided whether there existed any issue of material facts in the summary judgment. The supreme court's review of the case was therefore proper.[12]

B. Meaning of "Suicide, Whether Sane or Insane"

The court of appeal held that the clause excluding coverage for sui-

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3. *Id.* at 430, 696 P.2d at 1310, 212 Cal. Rptr. at 468.

4. The motion was granted because the undisputed evidence showed the death occurred ten months after the issuance of the policy.

5. *Searle*, 38 Cal. 3d at 430, 434, 696 P.2d at 1311, 1313, 212 Cal. Rptr. at 469, 471.

6. *Id.* at 434, 696 P.2d at 1313, 212 Cal. Rptr. at 471 (citing United Dredging Co. v. Industrial Accident Comm'n, 208 Cal. 705, 284 P. 922 (1930)).

7. *Searle*, 38 Cal. 3d at 434, 696 P.2d at 1314, 212 Cal. Rptr. at 472 (quoting Davies v. Krasna, 14 Cal. 3d 502, 535 P.2d 1161, 121 Cal. Rptr. 705 (1975)).

8. *See* England v. Hospital of Good Samaritan, 14 Cal. 2d 791, 97 P.2d 813 (1939) (even a third appeal to the California Supreme Court was accepted).

9. *Searle*, 38 Cal. 3d at 435, 696 P.2d at 1314, 212 Cal. Rptr. at 472 (quoting People v. Shuey, 13 Cal. 3d 835, 846, 533 P.2d 211, 219, 120 Cal. Rptr. 83, 91 (1975)).

10. *Searle*, 38 Cal. 3d at 435, 696 P.2d at 1314, 212 Cal. Rptr. at 472.

11. *Id. See* State v. Zimmerman, 175 Mont. 179, 573 P.2d 174 (1977); State v. Hale, 129 Mont. 449, 291 P.2d 229 (1955).

12. *Searle*, 38 Cal. 3d at 435, 696 P.2d at 1314, 212 Cal. Rptr. at 472.

cide, whether sane or insane, was ambiguous because insanity precluded forming the intent to commit suicide. The supreme court disagreed.[13] It stated that the phrase has been used in accident and life insurance policies for nearly one hundred years.[14] Interpreting a similar clause, the United States Supreme Court stated, "[n]othing can be clearer than that the words, 'sane or insane,' were introduced for the purpose of excepting from the operation of the policy *any* intended self-destruction."[15]

In other jurisdictions, courts addressing the meaning of similar phrases have also held them to include any intentional self-destruction.[16] Thus, the California Supreme Court concluded that the clause would exempt the insurer from liability regardless of the victim's sanity, if the act of self-destruction was committed with suicidal intent.[17] Nonetheless, such intent could be negated by showing that the insured did not understand the physical nature and consequences of his act.[18]

C. The Burden of Proof for Suicidal Intent

As to the burden of proof, the trial court instructed the jury that the plaintiff had the burden of proving her husband did not intend to commit suicide. The supreme court, however, held that the instruction was erroneous. The burden of proving suicidal intent should properly be placed on the insurance company before it may deny coverage.[19] Traditionally, the insurance company has always had the "burden of bringing itself within any exculpatory clause contained in the policy . . . ."[20] Though the claimant must show a loss from a peril covered by the life insurance policy, he "need not aver the performance of conditions subsequent, nor negative prohibited acts, nor

13. *Id.* at 436-37, 696 P.2d at 1315, 212 Cal. Rptr. at 473.

14. *Id. See, e.g.*, Bigelow v. Berkshire Life Ins. Co., 93 U.S. 284 (1876)(upheld a similar clause after giving it a "reasonable construction").

15. *Bigelow*, 93 U.S. at 297 (emphasis added).

16. *Searle*, 38 Cal. 3d at 436, 696 P.2d at 1315, 212 Cal. Rptr. at 473. *See, e.g.*, Johnson v. Metropolitan Life Ins. Co., 404 F.2d 1202 (3d Cir. 1968); Strasberg v. Equitable Life Assur. Soc. of U.S., 281 A.D. 9, 117 N.Y.S.2d 236 (1952).

17. *Searle*, 38 Cal. 3d at 437, 696 P.2d at 1315, 212 Cal. Rptr. at 473.

18. *Id.*

19. *Id.* The court equated suicidal intent with the purposeful or intentional causing of death.

20. *Id.* at 438, 696 P.2d at 1316, 212 Cal. Rptr. at 474 (quoting Executive Aviation Inc. v. National Ins. Underwriters, 16 Cal. App. 3d 799, 806, 94 Cal. Rptr. 347, 351 (1971)). *See also* CAL. EVID. CODE § 500 (West 1966).

deny that the loss occurred from the excepted risks."[21] A claimant therefore only has to prove self-destruction by the insured to shift the burden of proof. The insurer must then prove suicidal intent to exclude coverage.

Allstate contended that self-destruction and suicide were synonymous.[22] However, the case it offered in support of that contention merely mentioned the argument in the form of dicta.[23] Additionally, the dictionary definition of suicide that Allstate offered was an abbreviated one;[24] the full definition supported the court's view.

Since Allstate had the burden of proving suicidal intent, the lower court's decision would be reversed if the erroneous instruction was likely to have misled the jury.[25] The court held that the instruction imposed an improper burden on the plaintiff and constituted reversible error.

D. Relevance of Evidence of Mental Capacity and Irresistible Impulse

The supreme court's definition of suicidal intent requires the cause of death to be purposeful or intentional.[26] The court stated that if a person did not understand the physical nature and consequences of his act at the time, whether he was sane or insane, he could not be considered to have intentionally killed himself. Therefore, evidence of mental capacity is relevant and admissible to negate a showing of suicidal intent.[27]

Allstate argued, however, that the clause "sane or insane" negated the issue of the insured's state of mind.[28] The court recognized the split of authority as to that assertion, and even though Allstate's position represented the majority of jurisdictions,[29] the court rejected the argument.[30] It found the minority view persuasive: where an insured "is so utterly insane that he does not realize what he is doing, or that the act will cause death, then a recovery may be allowed."[31] Under

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21. *Searle,* 38 Cal. 3d at 438, 696 P.2d at 1316, 212 Cal. Rptr. at 474 (quoting Dennis v. Union Mutual Life Ins. Co., 84 Cal. 570, 572, 24 P. 120, 121 (1890)).

22. *Searle,* 38 Cal. 3d at 438, 696 P.2d at 1316, 212 Cal. Rptr. at 474.

23. *Dennis,* 84 Cal. at 571-72, 24 P. at 120-21.

24. BLACK'S LAW DICTIONARY 1602 (4th ed. 1968) defines suicide as "[s]elf destruction; the deliberate termination of one's existence, while in possession and enjoyment of his mental faculties."

25. *Searle,* 38 Cal. 3d at 439, 696 P.2d at 1317, 212 Cal. Rptr. at 475 (citing Henderson v. Harnischfeger Corp., 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974)).

26. *See supra* note 19.

27. *Searle,* 38 Cal. 3d at 439, 696 P.2d at 1317, 212 Cal. Rptr. at 475.

28. *Id.*

29. *Id.* at 440, 696 P.2d at 1317, 212 Cal. Rptr. at 475.

30. *See* IB J. APPLEMAN, INSURANCE LAW AND PRACTICE § 493 pp. 348-55 (rev. ed. 1981).

31. *Id.* at 351.

this rule inquiry into the deceased's ability to understand the nature and consequences of his acts is relevant and permissible at trial.[32] The court also held that a showing of suicidal intent could not be negated by proof of a killing under an irresistible impulse.[33]

III. SEPARATE OPINIONS

A. Concurring and Dissenting Opinion of Chief Justice Bird

The Chief Justice concurred in the majority's decision as to the burden of proof,[34] but she disagreed with the majority's interpretation of the language of the suicide exemption.[35] She stated that insurance contracts are contracts of adhesion. Where an ambiguity exists in one of those contracts it must be read against the insurer.[36] Using common dictionary definitions,[37] the Chief Justice concluded that the phrase "suicide, whether sane or insane" was ambiguous. As the terms were defined, one could not commit suicide and be insane at the same time since insanity precluded the necessary intent in suicide. She resolved the ambiguity by construing the phrase against the insurer, making it ineffective.[38]

The Chief Justice then noted that in contracts that do not have that language, the majority of jurisdictions hold the insurer liable "unless the insured was able to comprehend not only the physical nature and consequences of his act, but also its moral character and general nature."[39] The Chief Justice would adopt this approach, with a modification that the beneficiary have the opportunity to prove the insured was incapable of understanding the moral character and general nature of his act.[40]

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32. *Searle*, 38 Cal. 3d at 440, 696 P.2d at 1317-18, 212 Cal. Rptr. at 475.

33. *Id.* at 440-41, 696 P.2d at 1318, 212 Cal. Rptr. at 476.

34. *Id.* (Bird, C.J., concurring and dissenting).

35. *Id.*

36. *Id.* at 441-42, 696 P.2d at 1319, 212 Cal. Rptr. at 477. *See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rtpr. 711 (1974); CAL. CIV. PROC. CODE § 1644 (West 1984).

37. Suicide is defined as "the act or an instance of taking one's own life voluntarily and intentionally, . . . the deliberate and intentional destruction of his own life by a person of years of discretion *and of sound mind* . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2286 (1961) (emphasis added). Insane is defined as "exhibiting unsoundness or disorder of mind." *Id.* at 1167.

38. *Searle*, 38 Cal. 3d at 444, 696 P.2d at 1320, 212 Cal. Rptr. at 478. (Bird, C.J., concurring and dissenting).

39. *Id.* at 444-45, 696 P.2d at 1321, 212 Cal. Rptr. at 479 (Mosk, J., dissenting).

40. *Id.*

B. *Dissenting Opinion of Justice Mosk*

Justice Mosk agreed with the majority that the phrase "suicide, whether sane or insane" was not ambiguous.[41] He relied on the fact, as the majority did, that for over one hundred years the courts had been interpreting and enforcing contracts containing such clauses.[42] Additionally, he pointed out that the statutes of several states permitted the use of that very phrase.[43]

Justice Mosk disagreed with the majority ruling that the insurer could only be exempt from liability by proving the decedent had committed the act with suicidal intent. The better standard, he suggested, would be one that looked to whether the act was intentional or unintentional. The plain meaning of the clause in Justice Mosk's opinion is that all nonaccidental self-destructions are outside of the coverage of the policy.

The Justice states that his interpretation would promote the goals of broad coverage and low premiums.[44] Coverage would be increased since the insurer agrees to "regard suicide after that length of time as one of the hazards covered by the policy."[45] Premiums are reduced because (1) the clause would exempt payment of benefits for suicide within a two year period;[46] (2) the clause would avoid the costs of proving fraud when the suicide is designed to provide money for a family;[47] and (3) it would avoid derivative costs otherwise imposed on insurers, such as the legal costs and fees required to determine the decedent's state of mind under the majority's holding.[48]

Justice Mosk also pointed out that the great majority of courts that have interpreted the clause agree that it excludes coverage of all intentional suicides.[49] The rule adopted by the court in this case is the minority view[50] and is incorrect in Mosk's eyes.[51] The court's interpretation of the phrase is not in accord with popular understanding,[52]

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41. *Id.*

42. *Id.* at 447, 696 P.2d at 1322, 212 Cal. Rptr. at 480.

43. *Id.* The states are Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Kentucky, Maine, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, Washington, West Virginia and Wyoming. *Id.*

44. *Id.* at 447, 696 P.2d at 1323, 212 Cal. Rptr. at 481.

45. *Id.* (quoting Longerberger v. Prudential Ins. Co. of America, 121 Pa. Super. 225, 183 A. 422 (1936).

46. *Searle,* 38 Cal. 3d at 448, 696 P.2d at 1323, 212 Cal. Rptr. at 481 (Mosk, J., dissenting).

47. *Id.*

48. *Id.*

49. *Id.* at 449-50, 696 P.2d at 1324, 212 Cal. Rptr. at 482.

50. *Id.* at 450-51, 696 P.2d at 1325, 212 Cal. Rptr. at 483.

51. *Id.* at 450, 696 P.2d at 1325, 212 Cal. Rptr. at 483.

52. *Id.*

and is antithetical to the purpose of the clause.[53]

IV. CONCLUSION

This decision places a new burden of proof on insurance companies denying life insurance benefits under policies that exclude coverage of suicide, "whether sane or insane." Claimants no longer need to prove the insured's death from self-inflicted injuries was not a suicide. Insurance companies, in order to successfully deny payment, must now prove that the insured's self-destruction was intentional and that he understood the nature and consequences of his act. Undoubtedly, this decision will prompt insurance companies to redraft the suicide exclusions of their policies as they attempt to shrug off this rather substantial burden, and it may even cause a rise in premium payments.

KEITH F. MILLHOUSE

XI. LABOR LAW

Where a work stoppage does not pose an imminent threat to public health or safety, public employees can engage in a concerted work stoppage for the purposes of improving wages or conditions of employment: **County Sanitation District No. 2 v. Los Angeles County Employees Association, Local 660.**

I. INTRODUCTION

In *County Sanitation District No. 2 v. Los Angeles County Employee's Association Local 660*,[1] the California Supreme Court was presented with the question of whether the common law prohibition against public sector strikes should still be recognized. In a landmark decision, the court held that it is not unlawful for public employees to engage in a concerted work stoppage done for the purpose of improving the employees' wages or conditions of employment.[2] The

53. *Id.* The purpose of the clause is to make the insured's state of mind immaterial and thereby avoid unnecessary and costly litigation.

1. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985). The opinion was written by Justice Broussard, with Justices Mosk and Grodin concurring. A separate concurring opinion was written by Justice Kaus with Justice Reynoso concurring. There were also separate concurring opinions by Chief Justice Bird and Justice Grodin. Finally, there was a separate dissenting opinion by Justice Lucas.

2. *Id.* at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443.

court limited its holding in that public sector strikes will still be subject to the common law prohibition where it has been determined that concerted work stoppage poses an imminent threat to public health or safety.[3]

On July 5, 1976, after negotiations between the plaintiff[4] and the defendant union[5] failed to produce an acceptable wage and benefit agreement, seventy-five percent of the employees went on strike.[6] The County Sanitation District, upon filing a complaint for injunctive relief and damages, was granted a temporary restraining order.[7] Eleven days after the strike began, the employees accepted a tentative agreement which contained terms identical to those initially offered by the district.[8] The trial court found the strike to be unlawful and in violation of the public policy of California.[9]

II. HISTORICAL BACKGROUND

Before the turn of the century, a majority of jurisdictions in the United States held that no employee had a right to strike in concert with any other fellow employee.[10] This common law prohibition applied to both public and private employees.[11] While this prohibition no longer applies to private sector employees,[12] the court pointed out that a strike by United States government employees may be treated as a crime.[13] Furthermore, only ten states[14] have explicitly allowed

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3. *Id.*

4. Plaintiff is one of twenty-seven sanitation districts in Los Angeles County. The plaintiff operates facilities which provide sanitation services to approximately four million residents of Los Angeles County. The district employs approximately five hundred employees, who are members of or are represented by defendant union. *Id.* at 567, 699 P.2d at 837, 214 Cal. Rptr. at 426.

5. Defendant is a local labor organization which is affiliated with the Service Employees International Union, AFL-CIO. Since 1973, defendant has been the certified bargaining representative of all the blue collar employees of the Los Angeles Sanitation District. From the time of its certification to the present, defendant has bargained with plaintiff regarding wages, hours, and working conditions. These negotiations have consistently resulted in binding labor contracts or memoranda of understanding, until 1976. *Id.*

6. The strike lasted for eleven days. During the strike, plaintiff continued to operate through the use of management personnel and union employees who chose not to strike. *Id.* at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

7. *Id.*

8. *Id.*

9. *Id.* The trial court awarded plaintiff $246,904 in compensatory (strike-related) damages, prejudgment interest in the amount of $87,615.22, and costs of $874.65. *Id.*

10. *Id.* at 569, 699 P.2d at 837, 214 Cal. Rptr. at 426.

11. *Id.*

12. Modernly, the right to strike is viewed as being indispensable to collective bargaining and negotiation in the private sector. *Id.* at 569, 699 P.2d at 838, 214 Cal. Rptr. at 427.

13. *Id.*

14. These states are as follows: Alaska, Hawaii, Idaho, Illinois, Minnesota, Mon-

strikes by state and local employees.[15]

The majority stated that the California courts have continually left the issue of the legality of strikes by public employees unanswered.[16] The legislature has also remained silent on the issue.[17] The present case arose under the Meyers-Milias-Brown Act [hereinafter MMBA],[18] which neither denies nor grants the right to strike to municipal and county employees in California.[19] The court stated that the MMBA "establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector."[20]

III. MAJORITY OPINION

The majority began its analysis by stating that there have been four prevailing justifications to the common law prohibition against public employee strikes: first, that such strikes are equivalent to a denial of governmental sovereignty;[21] second, that the terms of public employment contracts are not subject to bilateral collective bargaining because they are set unilaterally by the legislature;[22] third, that

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tana, Oregon, Pennsylvania, Vermont, and Wisconsin. *Id.* at 569 n.8, 699 P.2d at 838 n.8, 214 Cal. Rptr. at 427 n.8.

15. These states have permitted this type of strike by statute. *Id.* at 569, 699 P.2d at 838, 214 Cal. Rptr. at 427.

16. The court stated that in the cases of In re Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968), City of San Francisco v. Cooper, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975), and International Bhd. of Elec. Workers, Local Union 1245 v. City of Gridley, 34 Cal. 3d 191, 666 P.2d 960, 193 Cal. Rptr. 518 (1983), the courts left this issue unanswered by either expressly reserving opinion on the issue or by stating that they did not have the occasion to resolve the issue in the action. *County Sanitation*, 38 Cal. 3d at 570, 699 P.2d at 838-39, 214 Cal. Rptr. at 427-28.

17. *Id.* at 571, 699 P.2d at 839, 214 Cal. Rptr. at 428. The court stated that the only statutory prohibition against strikes by public employees applies to firefighters under California Labor Code section 1962.

18. The Meyers-Milias-Brown Act, [hereinafter MMBA], is contained within sections 3500-11 of the California Government Code. The MMBA allows municipal and county employees to join and participate in employee organizations and requires public employers to meet and confer in good faith with employee representatives on all issues which are within the scope of representation. *Id.* at 571, 699 P.2d at 839-40, 214 Cal. Rptr. at 428-29.

19. *Id.* at 572, 699 P.2d at 840, 214 Cal. Rptr. at 429. *See also* Note, *Collective Bargaining Under the Meyers-Milias-Brown Act—Should Local Public Employees Have the Right to Strike*, 35 HASTINGS L.J. 523 (1984).

20. *County Sanitation*, 38 Cal. 3d at 573, 699 P.2d at 841, 214 Cal. Rptr. at 430. As a result of the legislature's silence on the legality of strikes by public employees, the court stated that it was the judiciary's task to finally resolve this issue. *Id.*

21. *Id.* at 574, 699 P.2d at 841, 214 Cal. Rptr. at 430.

22. *Id.*

public strikes would result in a distortion of the political process;[23] and fourth, that strikes by public employees threaten the public welfare.[24]

The sovereignty justification, simply stated, means that "the government is "the embodiment of the people, and hence those entrusted to carry out its function may not impede it."[25] In recent years, this argument has lost a great deal of support and its rejection by the courts has been a justification for denying governmental immunity from tort liability.[26] In rejecting the sovereignty argument as a justification of a per se prohibition against public employee strikes, the court pointed out that the application of the argument is inconsistent with "modern social reality. . . ."[27]

As to the second justification, the court stated that its premise is in the belief that "public employers are virtually powerless to respond to strike pressure . . ."[28] because the terms of public employment are determined by the legislature. The court pointed out that this view is no longer valued modernly since a majority of the terms and conditions of public employment contracts are arrived at through collective bargaining.[29]

The third argument draws upon the idea that since government services are essential and the public's demand is inflexible, the ability to strike would give public employees a great deal of bargaining power.[30] However, there is little empirical evidence, if any, which effectively demonstrates that governments, in an effort to resolve strikes, generally surrender to unreasonable demands by public employees.[31]

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23. *Id.*

24. *Id.*

25. *Id.* at 574, 699 P.2d at 842, 214 Cal. Rptr. at 431. The court stated that this argument received a great deal of support from several American presidents in the first half of the twentieth century. *Id.* at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431. *See generally* Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 741 (1946) (a case which relied on the sovereignty argument).

26. The court stated that the California Supreme Court quashed this sovereignty argument in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). *County Sanitation*, 38 Cal. 3d at 576, 699 P.2d at 842, 214 Cal. Rptr. at 431.

27. *Id.* As a result, the court stated that this argument should be permanently "laid to rest." *Id.*

28. *Id.* at 576, 699 P.2d at 843, 214 Cal. Rptr. at 432.

29. *Id.* The court stated that public employment collective bargaining occurs under a variety of statutes, such as the MMBA. *Id. See also* El Rancho Unified School Dist. v. National Educ. Ass'n, 33 Cal. 3d 946, 963, 663 P.2d 893, 904, 192 Cal. Rptr. 123, 134 (1983) (Grodin, J., concurring).

30. 38 Cal. 3d at 577, 699 P.2d at 843, 214 Cal. Rptr. at 432.

31. *Id.* at 579, 699 P.2d at 845, 214 Cal. Rptr. at 434. The court, citing Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth., 685 F.2d 547 (D.C. Cir. 1982) (air traffic controllers' strike), stated that governments in fact have the authority to hold firm against a strike without capitulating to striking workers demands. *County Sanitation*, 38 Cal. 3d at 578, 699 P.2d at 844, 214 Cal. Rptr. at 433. The court further

In analyzing the final argument used to support the common law prohibition against strikes, the court stated that there is little correlation between the essential nature of the government services and the source and management of most service enterprises.[32] The type of the service provided is determinative of its essential nature and of the impact of its disruption on the public welfare.[33]

To begin its analysis on the main issue, the court viewed the employees ability to strike as a means of equalizing bargaining positions. It stated that where there is an absence of some means of equalizing bargaining positions, both sides are less likely to engage in good faith bargaining. This leads eventually to more and longer strikes.[34]

The plantiff's argument that only the legislature can change the common law doctrine prohibiting public employees from striking was rejected. The court "has long recognized the need to redefine, modify or even abolish a common law rule 'when reason or equity demand it' or when its underlying principles are no longer justifiable in light of modern society."[35]

The court concluded that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment.[36] However, it limited the

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listed four factors that serve to effectively reduce the potential bargaining power of striking public employees: first, lost wages due to a strike are as important to a public employee as they are to a private employee; second, economic considerations, such as public concern over rising tax rates, will prevent domination of the decision-making process by political considerations; third, in areas where there is a charge for services, there are economic implications of bargaining, leading to higher prices which are visible to the public; and fourth, in areas where subcontracting to the private sector is a viable alternative, an increase in price allows many government agencies to eliminate public services. *Id.*

32. *Id.* at 579, 699 P.2d at 845, 214 Cal. Rptr. at 434.

33. *Id.* at 580, 699 P.2d at 846, 214 Cal. Rptr. at 435. See also United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982), which adopts this conclusion.

34. 38 Cal. 3d at 583, 699 P.2d at 847, 214 Cal. Rptr. at 436.

35. *Id.* at 584, 699 P.2d at 848, 214 Cal. Rptr. at 437 (quoting Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 394, 525 P.2d 669, 676, 115 Cal. Rptr. 765, 772 (1974)). The court enumerated two examples of past rulings modifying common law rules. In Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), the court adopted the rule of comparative negligence, thereby rejecting the rule of contributory negligence. In Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974), the court recognized a spousal action for loss of consortium without any sort of legislative action. 38 Cal. 3d at 584, 699 P.2d at 848-49, 214 Cal. Rptr. at 437-38.

36. While the court held that the common law prohibition against strikes by public employees should no longer be recognized in California, it stated that it was necessary to reach the issue of the ability of public employees to strike in constitutional terms. However, the court did state that the argument that the personal freedoms

right of public employees to strike[37] to those situations where the work stoppage does not pose an imminent threat to public health or safety.[38]

IV. SEPARATE OPINIONS

Separate concurring opinions were filed by Chief Justice Bird and Justices Kaus and Grodin. Justice Kaus limited his concurrence to the portion of the judgment holding that a peaceful strike does not give rise to a tort action for damages against the union. He stated that the judiciary should not usurp the legislature's authority to decide whether a tort action is the appropriate method of dealing with strikes by public employees.[39]

Chief Justice Bird stated that the purpose of her opinion was to give the legislature guidance in this area.[40] The basis of her guidance was that "[t]he constitutional right to strike rests on a number of bedrock principles",[41] and that withdrawing the right to strike deprives the worker of his only effective bargaining power.[42]

Responding to Justice Kaus' concern about creating damage actions against unions, Justice Grodin stated that no distinction existed "between the availability of an injunction at common law and the availability of a damage action . . . ."[43] A proceeding in contempt, for which monetary sanctions may be imposed, can arise where an injunction is violated.[44]

In the only dissenting opinion filed, Justice Lucas stated that public employees never had and should not be granted the right to strike.[45] Public strikes may "devastate a city within a matter of days, or even hours . . . ."[46] Justice Lucas felt that this issue was best left to the wisdom of the legislature, and until the legislature acted, past precedent should not be overturned.[47]

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guaranteed by the United States and California Constitutions confer an absolute right to strike would possibly merit consideration in the future. *Id.* at 590-91, 699 P.2d at 853-54, 214 Cal. Rptr. at 441-43.

37. The court stated that "[p]rudence and concern for the general public welfare require certain restrictions," such as a complete prohibition on firefighters' rights to strike. *Id.* at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438.

38. *Id.* at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443.

39. *Id.* (Kaus, J., concurring).

40. *Id.* at 593, 699 P.2d at 855, 214 Cal. Rptr. at 444 (Bird, C.J. concurring).

41. Chief Justice Bird stated three main principles: "(1) the basic personal liberty to pursue happiness and economic security through productive labor. . . ; (2) the absolute prohibition against involuntary servitude. . . ; and (3) the fundamental freedoms of association and expression." *Id.* at 594, 699 P.2d at 855-56, 214 Cal. Rptr. at 444-45.

42. *Id.* at 599, 699 P.2d at 859, 214 Cal. Rptr. at 448.

43. *Id.* at 609, 699 P.2d at 859, 214 Cal. Rptr. at 448.

44. *Id.*

45. *Id.* (Lucas, J., dissenting).

46. *Id.* at 610, 699 P.2d at 867, 214 Cal. Rptr. at 456.

47. *Id.* at 609-13, 699 P.2d at 866-69, 214 Cal Rptr. at 455-58.

V. CONCLUSION

The full impact of the court's landmark decision is unclear in the absence of potential legislative statements. If the court's opinion receives support from the legislature, it will, in the short run, result in a series of strikes by public employees. However, in the long run this decision will result in more effective negotiations between unions and governmental agencies and increased harmony in the public workplace.

JESSICA L. LEMOINE

XII. PRIVACY

The monitoring of telephone conversations on an extension held to be a violation of the Invasion of Privacy Act: **Ribas v. Clark.**

I. INTRODUCTION

In the case of *Ribas v. Clark*,[1] the California Supreme Court announced a significant interpretation of the Invasion of Privacy Act.[2] The primary issue facing the court was whether the Invasion of Privacy Act should be interpreted to prohibit monitoring of conversations by means of an extension telephone. The court held that the use of an extension telephone to monitor another's confidential communications was actionable under Penal Code section 631(a)[3] and that it did not fall within the statutory exception of Penal Code sec-

1. 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985). Opinion by Justice Mosk, with Chief Justice Bird and Justices Reynoso and Grodin concurring. A separate concurring and dissenting opinion was authored by Justice Kaus, with Justices Broussard and Lucas concurring therein.

2. CAL. PENAL CODE §§ 630-637.2 (West Supp. 1985). *See also* Decker & Handler, *Electronic Surveillance: Standards, Restrictions & Remedies*, 12 CAL. W.L. REV. 60 (1975); Karbian, *Case Against Wiretapping*, 1 Pac. L.J. 133 (1970). For federal law on wiretapping, see the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 2510 (1983).

3. California Penal Code section 631(a) in pertinent part states:

> Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line cable, or instrument of any internal telephonic communication system, . . . is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the County jail not exceeding one year, or by imprisonment in the state prison . . . , or by both such fine and imprisonment in the county jail or in the state prison.

CAL. PENAL CODE § 631(a) (West Supp. 1985).

tion 631(b).[4] The court's opinion focused on an analysis of Penal Code section 631 and the legislative intent behind it.

II. FACTUAL BACKGROUND

The case arose when the plaintiff's wife consulted an attorney regarding the tax ramifications of a court approved settlement in a divorce proceeding.[5] The consultation revealed allegedly adverse tax consequences, prompting the plaintiff's wife to inform the plaintiff that she had retained counsel.[6] Immediately thereafter, the plaintiff had a heated telephone conversation with his wife's attorney.[7]

Approximately one hour later, the plaintiff's wife went to the defendant's place of business, requesting to use the telephone to call her husband. She asked the defendant to listen to the conversation on an extension telephone.[8] Based on the conversation, the plaintiff's wife filed an action to set aside the divorce settlement, alleging that it had been procured by the plaintiff's fraudulent conduct.[9]

Testifying at an arbitration hearing, the defendant stated that she had heard[10] the plaintiff say that he had not allowed his wife to retain counsel in the divorce proceeding.[11] As a result, the plaintiff filed the present action even though the arbitrator in his wife's suit had ruled in his favor.[12] The trial court sustained a demurrer to the amended complaint without leave to amend, and the plaintiff ap-

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4. California Penal Code section 631(b) in pertinent part states:

> This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

CAL. PENAL CODE § 631(b) (West Supp. 1985).

5. *Ribas*, 38 Cal. 3d at 358, 696 P.2d at 639, 212 Cal. Rptr. at 145. The plaintiff's wife had not been represented by counsel throughout the divorce proceedings. *Id.*

6. *Id.*

7. *Id.*

8. During this telephone conversation, the defendant heard the plaintiff, due to his wife's prompting, discuss the details of his conversation with his wife's attorney. *Id.*

9. *Id.*

10. The defendant had admitted that she was able to hear the conversation as a result of eavesdropping via the use of the extension telephone. *Id.*

11. *Id.*

12. The defendant's testimony caused the plaintiff to file the case at bar seeking damages under California Penal Code sections 631(a) and 637, and for invasion of privacy, intentional infliction of emotional distress, and outrage. *Id.* The California Supreme Court reviewed the act of eavesdropping only in light of section 631. 38 Cal. 3d at 359-65, 696 P.2d at 639-44, 212 Cal. Rptr. at 145-50. *See supra* notes 4-5 and accompanying text.

pealed to the supreme court.[13]

III. MAJORITY OPINION

The plaintiff's primary contention was that the defendant's monitoring of the conversation between the plaintiff and his wife constituted a breach of the Invasion of Privacy Act. In accepting this contention,[14] the court focused on the legislative intent of section 631 which is "to protect the right of privacy of the people of this state" from what is perceived as "a serious threat to the free exercise of personal liberties [that] cannot be tolerated in a free and civilized society."[15] The court pointed out that section 631 of the Penal Code[16] was aimed at preventing eavesdropping or secret monitoring of conversations by third parties.[17]

The court rejected the defendant's contention that the Invasion of Privacy Act prohibited only the unauthorized monitoring of conversations before the phone message reaches its place of destination. The court stated that the plain language of section 631 applies to all communications while *"in transit"* or while the communication *"is being sent from, or received at* any place within this state . . . ."[18]

The defendant's next argument claimed that section 631 of the California Penal Code only prohibited wiretaps.[19] The court quickly dis-

13. *Ribas,* 38 Cal. 3d at 358, 696 P.2d at 639, 212 Cal. Rptr. at 145.

14. Rejecting the defendant's counterargument that the Invasion of Privacy Act has never been construed to prohibit eavesdropping by means of an extension telephone, the court relied upon a strict statutory interpretation of Penal Code section 631(a). *Ribas,* 38 Cal. 3d at 359, 696 P.2d at 639-40, 212 Cal. Rptr. at 145-46.

15. *Id.* (quoting CAL. PENAL CODE § 630 (1982)). The court further stated that this policy was at the heart of almost all of the California court decisions which have construed the Invasion of Privacy Act. *Ribas,* 38 Cal. 3d at 359, 696 P.2d at 639-40, 212 Cal. Rptr. at 145-46 (citing Warden v. Kahn, 99 Cal. App. 3d 805, 810, 160 Cal. Rptr. 471, 474 (1979)).

16. *See supra* notes 4-5.

17. 38 Cal. 3d at 359, 696 P.2d at 640, 212 Cal. Rptr. at 146 (citing Roger v. Ulrich, 52 Cal. App. 3d 894, 899, 125 Cal. Rptr. 306, 309 (1975)).

18. *Ribas,* 38 Cal. 3d at 360, 696 P.2d at 640, 212 Cal. Rptr. at 146 (emphasis in original). The court stated that as a result of the plain language of section 631 of the California Penal Code, the plaintiff's telephone conversation with his wife fell squarely within the parameters of the statute, thereby establishing a prima facie violation of section 631. *Id.*

19. The defendant based her argument on People v. Soles, 68 Cal. App. 3d 418, 420, 136 Cal. Rptr. 328, 330 (1977), in which the court held that section 631 of the California Penal Code was inapplicable where a motel manager had listened to the defendant's telephone conversations concerning narcotics transactions through the use of a motel switchboard. The court held that tenants of the motel were precluded from having a reasonable expectation of privacy in their conversations due to the motel manager's continuing interest in preventing criminal activity from occurring on his premises. *Id.*

missed this argument by viewing past California cases construing the Invasion of Privacy Act, as well as reviewing how other state courts have construed the eavesdropping statutes in their jurisdictions. It concluded that the objective of the Invasion of Privacy Act was to prevent the type of conduct which occurred in the present case.[20]

Once the court had determined that the defendant's eavesdropping fell within the purview of section 631(a), the court had to determine whether the defendant's act fell within any of the exceptions enumerated within section 631(b).[21] The defendant contended that her conduct fell within one of the exceptions because the telephone extension, which she had used to eavesdrop, had been provided, installed, and serviced by the telephone company.[22] Finding that the defendant's contention was without merit, the court stated that the defendant had not met her burden of proof; she had not established that her conduct was in compliance with any relevant tariffs mentioned in section 631(b).[23] Further, even if the defendant had met her burden of proof, the court stated that the defendant's conduct would not fall within the purview of the exception as her interpretation of section 631 was contrary to the express legislative objective.[24]

The defendant's final argument related to the privilege which is accorded to statements that are first published in judicial proceedings.[25] The court accepted this argument. The privilege was a complete bar to the portion of the plaintiff's action that was based on outrage and on a common law right to privacy.[26]

In discussing the remaining cause of action for eavesdropping, the court held that the privilege accorded to statements which are published in judicial proceedings would not bar the plaintiff's recovery under California Penal Code section 637.2.[27] Plaintiff was therefore

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20. *Ribas,* 38 Cal. 3d at 361, 696 P.2d at 641, 212 Cal. Rptr. at 147. *See* People v. Newton, 42 Cal. App. 3d 292, 116 Cal. Rptr. 690 (1974), *cert. denied,* 420 U.S. 937 (1975) (reasonable expectation of privacy requirement).

21. See *supra* note 5 for the text of section 631(b).

22. *Ribas,* 38 Cal. 3d at 362, 696 P.2d at 641-42, 212 Cal. Rptr. at 147-48.

23. *Id.* The court stated that the defendant had not demonstrated that her extension telephone had in fact been furnished by the telephone company nor had she submitted copies of the tariffs. *Id.*

24. The court stated that section 631 was designed to " 'protect a person placing or receiving a call from a situation where the person on the other end of the line permits an outsider to tap his telephone or *listen in* on the call.' " 38 Cal. 3d at 363, 696 P.2d at 652, 212 Cal. Rptr. at 148 (quoting Comment, *Electronic Surveillance in California: A Study in State Legislative Control,* 57 CAL. L. REV. 1182, 1202 (1969)) (emphasis in original).

25. *Ribas,* 38 Cal. 3d at 363-64, 696 P.2d at 642, 212 Cal. Rptr. at 148. The defendant's argument was primarily based upon California Civil Code section 47, which deals with publication of defamatory matter and states in pertinent part: "A privileged publication or broadcast is one made — . . . In any . . . judicial proceeding or . . . other official proceeding authorized by law . . . ." CAL. CIV. CODE §47 (West 1982).

26. *Ribas,* 38 Cal. 3d at 364, 696 P.2d at 643, 212 Cal. Rptr. at 149.

27. Section 637.2 of the Penal Code states in pertinent part:

allowed to pursue the statutory remedy of a civil lawsuit.[28]

IV. SEPARATE OPINION

In the only separate opinion filed, Justice Kaus both concurred and dissented.[29] While he agreed with the majority's holding that the complaint alleged a violation of section 631 of the Penal Code, but he took exception to the majority's interpretation of the application of the tariff exception.[30]

V. CONCLUSION

In *Ribas v. Clark,* the court determined that the use of an extension telephone to monitor another's confidential communications would constitute a violation of the Invasion of Privacy Act. Thus, the defendant's act of eavesdropping on a telephone conversation between the plaintiff and his wife through the use of an extension telephone violated section 631(a) of the Penal Code. The court further stated that this type of activity would not fall within the purview of the exception of section 631(b) of the Penal Code.

The impact of this decision appears to be very limited as the court seemed to limit its holding to situations involving the monitoring of telephone conversations through the use of extension telephones. Throughout the whole opinion, the court expressed strong policy considerations behind their holding and behind the enactment of the Invasion of Privacy Act. The policy primarily is to protect the right of privacy of the people of California from any invasion in regard to their telephone communications.

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(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
(1) Three thousand dollars ($3,000).
(2) Three times the amount of actual damages, if any, sustained by the plaintiff.
(b) Any person may, in accordance with the provisions of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).
(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

CAL. PENAL CODE § 637.2 (West 1970).

28. *Ribas,* 38 Cal. 3d at 365, 696 P.2d at 644, 212 Cal. Rptr. at 150.
29. *Id.* (Kaus, J., concurring and dissenting).
30. *Id.*

XIII. TORTS

A. *Landlord is strictly liable for injuries that result from a preexisting latent defect in demised premises:* Becker v. IRM Corp.

I. INTRODUCTION

In *Becker v. IRM Corp.*,[1] the California Supreme Court held that a landlord engaged in the business of leasing dwellings is strictly liable in tort for a tenant's injuries resulting from a latent defect in a rented apartment complex. The defect existed at the time the apartment was initially rented.[2] The plaintiff, a tenant in the defendant's apartment complex,[3] slipped and fell against a glass shower door in his apartment, severely lacerating his arm when the door shattered.[4] The shower door was made of frosted untempered glass.[5] Prior to purchasing the complex, the defandant examined most of the apartments. He observed that all the shower doors were made of the same frosted glass.[6]

The trial court granted the defendant's motion for summary judgment and dismissed the plaintiff's strict liability and negligence causes of action.[7] The supreme court reversed. It held that there was a triable issue of fact as to whether a visual inspection of the shower door would have disclosed the danger.[8] Thus, the trial court's order granting summary judgment for the defendant was erroneous.

II. DISCUSSION

The majority began its analysis of the case by reviewing prior case law concerning strict liabilty in tort and the development of landlord liability for tenant injuries.[9] The court began its review with the landmark case of *Greenman v. Yuba Power Products*,[10] in which the

1. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), Justice Broussard for the majority. Justices Kaus, Reynoso, and Grodin concurred. Chief Justice Bird concurred separately. Justice Lucas concurred and dissented. Justice Mosk concurred with Justice Lucas. For a more plenary discussion of *Becker* see Note, *The Landlord as a Retailer? Strict Products Liability and the Landlord-Tenant Relationship in California: Becker v. JRMR Corp.* 21 CAL. W.L. REV. 524 (1985).

2. 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

3. The apartment complex was built in 1962-63. The defendant had purchased it in 1974. *Id.* at 457-58, 698 P.2d at 117-18, 213 Cal. Rptr. at 214-15.

4. *Id.*

5. *Id.* The court stated it was undisputed that had the door been made of tempered glass, the risk of serious injury would have been substantially reduced. *Id.*

6. *Id.* The only visible difference between tempered and untempered glass is that tempered glass contains a very small mark in the corner of each piece of glass. *Id.*

7. *Id.*

8. *Id.* at 469, 698 P.2d at 126, 213 Cal. Rptr. at 223.

9. *Id.* at 458-64, 698 P.2d at 118-22, 213 Cal. Rptr. at 215-19.

10. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman*, the plaintiff

court held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[11] In *Greenman,* the court expressed that the intent and purpose behind strict liability in tort is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[12]

The court traced the development of strict liability in tort since *Greenman.* Strict tort liability has been applied to both manufacturers of products as well as to various members in the commercial marketing chain.[13] It has also been applied to individuals involved in the real estate business, and in that application has been called the warranty doctrine.[14] Moreover, the California courts have recognized that construction contracts contain a warranty of merchantability and suitability for ordinary use.[15] The main policy consideration for this type of warranty is that the builder usually possesses greater knowledge than the purchaser and can fully examine and inspect a completed building without disturbing the finished product.[16] Thus, the court pointed out that "public interest dictates that the cost of injury from defects should be borne by the developer who created the danger and who is in a better economic position to bear the loss . . . ."[17]

After reviewing the recent trends in strict tort liability, the court focused on current developments in landlord liability.[18] It recognized that in the absence of a contrary agreement between parties there has been a strong trend toward increasing the landlord's re-

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was injured while using a combination power tool manufactured and sold by the defendants. *Id.*

11. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

12. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

13. *Becker,* 38 Cal. 3d at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216. The court explained that strict liability in tort has been applied to a wholesale-retail distributor, personal property lessors and bailors, and a licensor of personalty. *Id.*

14. *Id.* at 460, 698 P.2d at 119, 213 Cal. Rptr. at 216.

15. *Id. See* Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

16. 38 Cal. 3d at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216. *See generally* Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 379, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974).

17. *Becker,* 38 Cal. 3d at 460-61, 698 P.2d at 120, 213 Cal. Rptr. at 217. The *Greenman* view of strict liability in tort appears to have permeated the area of real estate, including landlord liability for tenant injuries.

18. *Becker,* 38 Cal. 3d at 461, 698 P.2d at 120, 213 Cal. Rptr. at 217.

sponsibility to provide premises suitable for the tenants' intended use.[19]

Furthermore, the court emphasized that the California courts have recognized an implied warranty of habitability contained within a lease for a dwelling.[20] In viewing all of the policy considerations behind the prevailing view in California, the majority relied heavily upon *Green v. Superior Court,*[21] in which the court likened the leasing of a dwelling to the act of purchasing a good or service.[22] The court in *Green* held that a breach of the implied warranty of habitability may be set forth as a defense in an unlawful detainer proceeding.[23]

The court indicated that the extension of strict liability for injuries suffered by tenants resulting from the defective condition of premises was due to the court's previous holdings that leases contain an implied warranty of habitability.[24] The court discussed the traditional common law rule of landlord nonliability and its derivation from the concept of caveat emptor, traditional property law and the landlord's lack of possession and control.[25] It noted that a number of exceptions have developed to this nonliability rule.[26]

The case presented three main issues which were addressed by the court. First, whether a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were leased to the tenant.[27] Second, whether the absence of a

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19. *Id.* The court recognized that "no one should be allowed or forced to live in unsafe and unhealthy housing." *Id.* (quoting RESTATEMENT (SECOND) OF PROPERTY ch. 5, introductory note (1976)). Concerning landlord-tenant relationships, the court reviewed California Civil Code sections 1941 (fitness of buildings for human occupancy); 1941.2 (tenant's affirmative obligations), 1942 (repairs by tenant, tenant's remedies to recover expenses); and 1942 (validity of waiver of tenants rights). *Id.* at 462, 698 P.2d at 120, 213 Cal. Rptr.at 217.

20. *Id.*

21. *Green v. Superior Court,* 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

22. In *Green,* the plaintiff/landlord sued to compel the defendant to pay $300 in back rent and for possession of the leased premises. Defendant contended that the plaintiff had failed to maintain the premises in a habitable condition. *Id.*

23. *Id.* at 631, 517 P.2d at 1178, 111 Cal. Rptr. at 714.

24. *Becker,* 38 Cal. 3d at 463, 698 P.2d at 121, 213 Cal. Rptr. at 218. The court stated that under the common law rule a landlord was not liable to the tenant for injuries resulting from a defective condition or faulty construction of premises in the absence of fraud, concealment or a covenant in the lease. *Id.*

25. *Id.*

26. The court enumerated five exceptions to the common law rule of landlord nonliability: 1) where the landlord voluntarily undertakes to repair; 2) where the landlord had knowledge of the defects; 3) where a safety law was violated; 4) where the landlord retained part of the premises for common use; and 5) where the leased premises were semipublic. *Id.* (quoting 3 WITKIN, SUMMARY OF CALIFORNIA LAW, § 453, (8th ed. 1973)).

27. *Becker,* 38 Cal. 3d at 463-64, 698 P.2d at 121-22, 213 Cal. Rptr. at 218-19.

continuing business relationship between the builder and the landlord precludes application of strict liability in tort for latent defects existing at the time of the lease.[28] Third, whether a duty to inspect for a dangerous condition existed in the case at bar. Finally, as a subissue, the court considered whether the landlord's lack of awareness of the dangerous condition precludes liability.[29]

The court's analysis of the first issue focused on *Greenman* as a starting point for the development of strict tort liability for defective premises.[30] The court pointed out that prior to *Greenman* most cases limited liability to conditions which existed at the time when the tenant took possession of the premises.[31] Cases decided subsequent to *Greenman,* specifically, *Fakhoury v. Magner*[32] and *Golden v. Conway,*[33] developed the rule that a landlord, when engaged in the business of leasing property, is strictly liable in tort when he equips the premises with a defective appliance which causes injury.[34]

The court concluded that a landlord is strictly liable in tort for injuries which result from latent defects in the premises existing at the time the premises are leased to the tenant.[35] The court indicated that its holding on this issue was the result of its satisfaction with the rationale previously developed in the *Fakhoury*[36] and the *Golden*[37] cases. It stated that the main reason for the application of strict liability to landlords for latent defects existing at the time of rental was to insure that landlords bear the cost of injuries resulting from such defects.[38]

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28. *Id.* at 464-67, 698 P.2d at 122-24, 213 Cal. Rptr. at 219-21.

29. *Id.* at 467-69, 698 P.2d at 124-26, 213 Cal. Rptr. at 219-23.

30. *Greenman,* 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

31. *Becker,* 38 Cal. 3d at 463-64, 698 P.2d at 121-22, 213 Cal. Rptr. at 218-19.

32. 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

33. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

34. *Becker,* 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. *See* Golden v. Conway, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976); Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

35. *Becker,* 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. The court stated in a footnote that its holding did not resolve whether strict liability in tort would apply to a disclosed defect. *Id.* at 464 n.4, 698 P.2d at 122 n.4, 213 Cal. Rptr. at 219 n.4. *See* Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

36. 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

37. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

38. To further support its holding the court discussed five policy considerations for imposing strict liability. First, the landlord, absent disclosure of defects to the tenant, makes an implied representation that the premises are fit for their intended use. Further, this representation is usually indispensible to the lease. *See* Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

Second, a tenant is in no position to inspect for latent defects nor is he in the finan-

The court then addressed the defendant's argument that a landlord when purchasing an existing building should be exempt from strict liability for latent defects. The defendant argued that a landlord is not a part of the marketing and manufacturing enterprise[39] and therefore had neither a continuing business relationship with the builder nor control of construction of the premises. The court recognized exceptions to the application of strict liabilty in tort exempting sellers of used machinery. However, it rejected the defendant's argument stating that "[t]he paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects."[40] The court held that the absence of a continuing business relationship between the builder and the landlord does not preclude the application of strict liability in tort for latent defects existing prior to the lease.[41]

The majority began its analysis of the third issue by reviewing the realities confronting an individual purchasing rental property. An individual exercising due care will normally examine the condition of the rental property before purchasing.[42] Examination is usually twofold: first, to determine if the premises are aesthetically pleasing; and second, to determine if the premises meet bare living standards.[43]

The court held that the landlord had a duty to exercise due care by inspecting for dangerous conditions. The defendant's lack of awareness of the dangerous condition did not necessarily preclude liability. The landlord's duty to inspect extends only to knowledge of those items which would have been disclosed as a result of a reasonable inspection.[44]

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cial position to repair them when contracting to purchase housing for a limited period of time. *See* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

Third, the tenant's ability to inspect the premises is usually substantially less than that of the purchaser of the property. Fourth, the tenant is usually forced to rely upon the implied assurance of safety made by the landlord. Finally, the landlord is in a better position, due to rentals and insurance, to bear the cost of injuries due to defects in the premises. *Becker*, 38 Cal. 3d at 464-65, 698 P.2d at 122-23, 213 Cal. Rptr. at 219-220.

39. *Becker*, 38 Cal. 3d at 465, 698 P.2d at 219, 213 Cal. Rptr. at 220. The court stated that defendant's reliance on Vandemark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), was misplaced since the primary rationale for strict liability is cost spreading capability. *Becker*, 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.

40. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.

41. *Id.* at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221.

42. *Id.* at 468, 698 P.2d at 125, 213 Cal. Rptr. at 222.

43. The court stated the determination of the premises' safety is included in finding "bare living standards."

44. *Id.* at 469, 698 P.2d at 126, 213 Cal. Rptr. at 223.

III. CONCURRING AND DISSENTING OPINIONS

Chief Justice Bird restricted her concurring opinion to two areas:[45] whether the trial court erred in granting summary judgment for the defendant, and whether strict liability should be applied to landlords.[46] Concerning the order of summary judgment for the defendant, Chief Justice Bird stated that the defendant did not meet his burden of proof as the foreseeability of risk involved with this type of shower door presented a triable issue of fact.[47] Chief Justice Bird limited her analysis of the issue of strict liability to an overview of the past application of strict liability to landlords.[48] She reviewed the general rules governing the area of strict liability, but she did not apply these rules to the case at bar.[49]

Justice Lucas concurred and dissented, agreeing that a landlord should be held liable for dangerous conditions of which he had actual or constructive knowledge. However, the Justice did not agree with the application of this rule for latent defects in any component of a landlord's property regardless of who built or installed the defective item.[50]

Justice Lucas advocated limiting the application of strict liability in tort to those individuals who manufacture, install, or alter a defective product and who have actual or constructive knowledge of the defect.[51] As to subsequent-purchaser landlords who have not created the defective condition or item and who do not have actual or constructive knowledge, Justice Lucas stated that the imposition of strict liability places too great a burden on the landlord; he has no way of adjusting potential costs of the manufacturer's business.[52] Justice Lucas concluded by stating that the majority's opinion operates as a form of insurance for tenants, yet does nothing to promote the goals of deterrence and product safety.[53]

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45. Chief Justice Bird adopted Justice Newsom's opinion of the California Court of Appeal. *Id.* at 470, 698 P.2d at 126, 213 Cal. Rptr. at 223.

46. *Id.* at 470-79, 698 P.2d at 126-33, 213 Cal. Rptr. at 223-30.

47. *Id.* at 470-74, 698 P.2d at 126-29, 213 Cal. Rptr. at 223-26.

48. *Id.* at 475-79, 698 P.2d at 130-33, 213 Cal. Rptr. at 227-30.

49. *Id.*

50. *Id.* at 479, 698 P.2d at 133, 213 Cal. Rptr. at 230 (Lucas, J., concurring and dissenting).

51. *Id.* at 479-87, 698 P.2d at 133-39, 213 Cal. Rptr. at 230-36.

52. *Id.* at 487, 698 P.2d at 139, 213 Cal. Rptr. at 236.

53. *Id.*

IV. CONCLUSION

The court's opinion will have a broad effect. The decision will benefit tenants, especially those in lower income brackets who are unable to repair or insure against defects. The decision also places a burden on landlords to keep their premises free from defective products. The imposition of strict liability may also have some effect on the rental market. This effect, however, will probably be minimized by the landlord's ability to receive indemnification from the manufacturer of the defective product. In summary, this decision broadens the application of California products liability law to defective premises.

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B. *A tortfeasor who settles in good faith is insulated from indemnity claims of co-defendants:* Tech-Bilt, Inc. v. Woodward-Clyde & Associates

I. INTRODUCTION

In *Tech-Bilt, Inc., v. Woodward-Clyde & Associates,*[1] the court considered whether a tortfeasor who settles with a plaintiff should be insulated from claims of indemnity made by nonsettling co-defendants. The majority held that the settling defendant would be protected only where the settlement is made in "good faith" under sections 877[2] and 877.6[3] of the Code of Civil Procedure.[4] The court then had

1. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal Rptr. 256 (1985). The majority opinion was written by Justice Grodin, with Justices Mosk, Kaus, Broussard, Reynoso, and Lucas concurring. A separate dissenting opinion was written by Chief Justice Bird.

2. CAL. CIV. PROC. CODE § 877 (West 1980) provides:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort
>
> (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and
>
> (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

3. CAL. CIV. PROC. CODE § 877.6(b)-(d) (West Supp. 1985) provides:

> (b) The issue of the good faith of a settlement may be determined by the court on the basis of affadavits served with the notice of hearing, and any counterafadavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing.
>
> (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor from any further claims against the settling tortfesor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.
>
> (d) The party asserting the lack of good faith shall have the burden of proof on that issue.

4. 38 Cal. 3d at 493, 698 P.2d at 162, 213 Cal. Rptr. at 259.

to decide what constituted good faith.

The action arose in the Superior Court of San Diego County when the plaintiffs, Mr. and Mrs. Andrew, brought suit to recover damages for structural defects against the developer of their residence (Tech-Bilt) and the soil engineers who had performed services on their residential property (Woodward-Clyde). Plaintiffs' action against Woodward-Clyde was, however, barred by the ten year statue of limitations. An agreement was reached between Woodward-Clyde and the plaintiffs whereby the plaintiffs dismissed their claim against Woodward-Clyde with prejudice in return for assurances that no action for costs incurred in defending the action would be brought against the plaintiffs.[5]

Tech-Bilt later filed an amended cross-complaint and named Woodward-Clyde as a cross-defendant. Woodward-Clyde successfully moved the court for summary judgment based upon a claim of good faith settlement under section 877.6 of the Code of Civil Procedure.[6] Tech-Bilt appealed this ruling to the supreme court.

II. CASE ANALYSIS

A. The Majority Opinion

Section 877 of the Code of Civil Procedure provides that a release, dismissal, or covenant not to sue or enforce a judgment given to one party in an action involving multiple tortfeasors discharges that party from liability to any other defendant for contribution. The state further provides that such release must be made in good faith.[7]

Section 877.6 of the Code of Civil Procedure allows a joint tortfeasor who is not released from liability to challenge the good faith of any settlement. The party challenging the good faith of the settlement has the burden of proof on that issue.[8] The key to deciding cases involving the statute lies in ascertaining a meaning to the term "good faith."[9]

Justice Grodin, writing for the majority, first reviewed the legislative and case history prior to the enactment of section 877.6.[10] In

5. *Id.* at 492, 698 P.2d at 161, 213 Cal. Rptr. at 258.
6. *Id.*
7. CAL. CIV. PROC. CODE § 877 (West 1980).
8. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1985)
9. 38 Cal. 3d at 491, 698 P.2d at 161, 213 Cal Rptr. at 258. This is because only good faith settlements will relieve the tortfeasors from liability for contribution as to the other nonsettling tortfeasors. *See* CAL. CIV. PROC. CODE § 877 (West 1980).
10. 38 Cal. 3d at 493, 698 P.2d at 162, 213 Cal. Rptr. at 259. The court first ex-

looking at tort contribution legislation, [11] which spawned sections 877 and 877.6,[12] the court noted two major goals. The initial goal was the equitable sharing of costs among the parties at fault. The second goal was the encouragement of settlement.[13] Ascertaining what constitutes good faith requires a balancing of these two objectives. Section 877 originally only released a settling tortfeasor from liability for contribution and not partial indemnity; this changed when the court articulated a remedial theory of partial indemnity in *American Motorcycle Association v. Superior Court.*[14] This theory provided that a settling tortfeasor who enters into a good faith settlement must also be discharged from any claim of partial indemnity.[15] The legislature codified the holding of *American Motorcycle* by enacting section 877.6 in 1980.[16]

The *Tech-Bilt* court felt this background suggested that "good faith" as used in section 877.6 would have the same meaning ascribed to the same term in *American Mototcycle.*[17] A similar conclusion was reached by the Ninth Circuit Court of Appeals in *Commercial Union Insurance Co. v. Ford Motor Co.,*[18] which held that a settlement must be made in good faith before another party can be prevented from seeking indemnification from the settling party. That court did not find good faith where the plaintiff's attorney dismissed Ford as a tactical maneuver.[19]

The *Tech-Bilt* court also considered a competing interpretation of the good faith requirement as espoused in *Dompeling v. Superior Court.*[20] That court held the "settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct."[21] The *Tech-Bilt* court rejected this interpretation as producing

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amined the common law, which held that there was no right to contribution among tortfeasors. The theory behind this rule was that there was one wrong and that each joint tortfeasor was responsible for the whole damage. Thus, payment by any of the tortfeasors would satisfy plaintiff's claim against all others. *Id.*

11. The California State Bar sponsored the legislation, which was originally introduced in 1955. The bill's purpose was to change the rule denying contribution among joint tortfeasors. The original bill did not address the effect of a covenant or release given to a joint tortfeasor. At the suggestion of the Senate Committee on the Judiciary, section 877 was added to the Code of Civil Procedure. *Id.* at 493-94, 698 P.2d at 162-63, 213 Cal. Rptr. at 259-60.

12. Section 877.6 was enacted by the legislature in 1980. *Id.* at 494-96, 698 P.2d at 163-64, 213 Cal Rptr. at 260-61.

13. *Id.* at 494, 698 P.2d at 163, 213 Cal. Rptr. at 260 (citing River Garden Farms Inc. v. Superior Court, 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972).

14. 20 Cal. 3d 578, 604, 578 P.2d 899, 915, 146 Cal. Rptr. 182, 198 (1978).

15. *Id.*

16. 38 Cal. 3d at 498, 698 P.2d at 164, 213 Cal. Rptr. at 261.

17. *Id.* at 496, 698 P.2d at 164, 213 Cal. Rptr. at 261.

18. 640 F.2d 210 (9th Cir. 1981).

19. *Id.* at 213.

20. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).

21. *Id.* at 809-10, 173 Cal. Rptr. at 45.

too harsh a result.[22] The court additionally noted that the legislature did not intend the term to have the narrow meaning ascribed to it in *Dompeling* in light of the court's decision in *American Motorcycle.* Such an interpretation would allow the trial court to look at a number of factors in determining whether the settlement was made in good faith;[23] an especially important factor is "whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of the comparative liability for the plaintiff's injuries."[24]

The court noted that the burden of proving the absence of good faith is on the party asserting it.[25] That a party should be allowed to show that the settlement was "so far out of the ballpark in relation to these [previously mentioned] factors as to be inconsistent with the equitable objectives of the statute."[26]

In assessing the impact of its decision, the court did not believe the new rule would be detrimental to the settlement process, nor that it would unduly burden the parties or the trial court.[27] The settlement incentive would be at least as great, and possibly even greater, because the defendant would be induced to offer more money to bring the settlement within the good faith requirements. The trial court would still have the discretion to decide whether the good faith requirement had been met, and the defendants would still have the incentive to get out of the litigation for a reduced amount.[28]

Furthermore, there would be no undue burden on the trial courts because the determination of good faith may be made on the basis of affidavits.[29] The court noted that negotiations should show whether the settlements are within the reasonable range permitted by the good faith requirement. The court may also use its personal experi-

22. 38 Cal. 3d at 498, 698 P.2d at 165, 213 Cal. Rptr. at 262.

23. These include the following: a rough approximation of the plaintiff's total recovery and the settlor's proportionate liability; allocation of settlement proceeds among plaintiffs; the amount paid in settlement; recognition that a settlor should pay less in settlement than he would if found liable after trial; financial conditions and insurance policy limits of settling defendants; and the existence of collusion, fraud, or other tortuous conduct aimed at injuring the interests of nonsettling defendants. *Id.* at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

24. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

25. *See* CAL. CIV. PROC. CODE § 877.6(d) (West Supp. 1985).

26. 38 Cal. 3d at 499-500, 698 P.2d at 167, 213 Cal. Rptr. at 264.

27. *Id.*

28. *Id. See also* Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals,* 17 LOY. L.A.L. REV., 841, 928-929 (1984).

29. Subdivision (b) of section 877.6 specifically provides for this. CAL. CIV. PROC. CODE § 877.6(b) (West Supp. 1985).

ence in making such a determination.[30] The *Tech-Bilt* court noted that several recent court of appeal opinions had engaged in this type of analysis. Applying the good faith criterion mentioned above to the settlement in the case at hand, the *Tech-Bilt* court found that the settlement was not made in good faith because the plaintiffs did not receive adequate consideration for releasing Woodward-Clyde.[31] The judgment was therefore reversed.[32]

B. Chief Justice Bird's Dissent

The Chief Justice believed the majority's test of good faith, which originated in *River Garden Farms, Inc. v. Superior Court*,[33] was not the proper standard to apply. The Chief Justice pointed out that the discussion in *River Garden* concerning the danger of a low settlement was merely dicta.[34] The court in *River Garden* also derived its "fair share" good faith test from analogy to contract law.[35] She argued that the flaw with an analogy to contract law is that the relationship between nonsettling and settling parties is not contractual. Therefore, they do not have a duty to protect each other's interests. The settling parties only have a duty to settle in good faith with an " 'honest, lawful intent.' "[36]

The Chief Justice felt that the rule would discourage settlements, since there is the possibility of an expensive and lengthy hearing on the good faith issue.[37] Settlement is dependent on assurances to the settling defendant of its finality.[38] She argued the majority's standard would not promote finality, since it would be difficult for the defendant to predict whether his settlement will be found to be in good faith by the trial court. Furthermore, there is the possibility that a favorable good faith determination could be reversed on appeal.[39]

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30. 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264. The problem with a judge using his own expertise is that good faith to one judge might not be the same to another. Defendants would be well-advised to do extensive research on what type of settlements have satisfied their particular judge in the past before coming forward with a settlement offer.

31. The court noted that Woodward-Clyde had not given the plaintiffs anything in return for the dismissal, with the exception of the waiver of costs amounting to only $55. 38 Cal. 3d at 492 n.2, 502, 698 P.2d. at 161 n.2, 168, 213 Cal Rptr. at 258 n.2, 265.

32. *Id.* at 501-02, 698 P.2d at 168, 213 Cal. Rptr. at 265.

33. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

34. 38 Cal. 3d at 503, 698 P.2d at 169, 213 Cal. Rptr. at 266 (Bird, C.J., dissenting).

35. *See River Garden*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

36. 38 Cal. 3d at 505, 698 P.2d at 170, 213 Cal. Rptr. at 267 (quoting People v. Nunn, 46 Cal. 2d 460, 468, 296 P.2d 813, 818 (1956)).

37. 38 Cal. 3d at 506, 698 P.2d at 171, 213 Cal. Rptr. 268.

38. *Id.* at 506-07, 698 P.2d at 172, 213 Cal. Rptr. at 269 (discussing *River Garden*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503). *See* Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 488-89 (1966).

39. 38 Cal. 3d at 507, 698 P.2d at 172, 213 Cal. Rptr. at 269.

Chief Justice Bird went on to argue that the trial court will be burdened under the majority rule because they will have to make a pretrial determination of the plaintiff's potential recovery, as well as determine the comparative fault of any party wishing to settle in relation to all the parties.[40] The Chief Justice would only find a settlement to be in bad-faith if it is "collusive, fraudulent, dishonest, or involves tortious conduct."[41]

III. CONCLUSION

It is difficult to determine the impact this case will have at this point. While more settlements will be subjected to appellate review, and hence be less certain as to finality, it seems unlikely many would be reversed. This is because trial courts have the discretion to determine whether the settlement was made in good faith.

Actions involving many defendants and large claims of damages (such as asbestos and DES cases) will be likely to encounter challenges concerning a lack of good faith in settlements. In these types of cases, potential liability is so large that the joinder of one or two previously settling defendants could decrease the other tortfeasors' monetary responsibilities substantially.

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40. *Id.* at 506, 698 P.2d at 171, 213 Cal. Rptr. at 268. Indeed, the court almost has to conduct its own trial to determine if settlement was within the "reasonable range." This will be especially true if later decisions require trial courts to spell out those factors upon which they based their decisions.

41. *Id.* at 502-03, 698 P.2d at 169, 213 Cal. Rptr. at 266.