NINTH CIRCUIT COURT OF APPEALS

Garza, et al. v. County of Los Angeles, et al.,

___ F.2d ___, 90 D.A.R. 12547, Nos. 90-55944, 90-55945, 90-56024 (Nov. 2, 1990).

Los Angeles County's Reapportionment Plan Discriminates Against Hispanic Voters

Hispanics in Los Angeles County, joined by the federal government, filed this voting rights action in 1988 seeking a redrawing of the districts for the Los Angeles County Board of Supervisors. Plaintiffs alleged that the existing boundaries, which had been drawn after the 1980 census, were gerrymandered boundaries which diluted Hispanic voting strength, and sought redistricting in order to create a district with a Hispanic majority for the 1990 Board of Supervisors election in which two board members were to be elected.

The Voting Rights Act, 42 U.S.C. § 1973, forbids the imposition or application of any practice that would deny or abridge, on grounds of race or color, the right of any citizen to vote. As amended by Congress in 1982, the Act forbids not only intentional discrimination, but also any practice shown to have a disparate impact on minority voting strength. Plaintiffs claimed that the County engaged in intentional discrimination in the drawing of the district lines; the resulting boundaries violated both the Voting Rights Act and the equal protection clause of the fourteenth amendment of the federal Constitution; and that, whether or not the vote dilution was intentional, the effect of the County's redistricting plan was the reduction of Hispanic electoral power in violation of the Voting Rights Act. Further, plaintiffs contended that in 1981, as part of a course of conduct that began decades earlier, the County intentionally fragmented the Hispanic population among the various districts in order to dilute the effect of the Hispanic vote in future elections.

Following a three-month trial, the district court concluded that the County had engaged in intentional discrimination in redistricting during 1959, 1965, 1971, and 1981, and that the reapportionment plan violated the Voting Rights Act; the district court ordered the County to propose a redistricting which would include a district with a Hispanic voting majority.

In its appeal to the Ninth Circuit, the County argued that the 1981 redistricting was lawful, regardless of any intentional or unintentional dilution of minority voting strength, because at that time there could be no single-member district with a majority of minority voters. The plaintiffs-appellees countered that this requirement should not be imposed where, as here, there has been previous intentional dilution of minority voting strength.

The Ninth Circuit agreed with plaintiff-appellees, and affirmed the district court's holding that the County engaged in intentional discrimination at the time the challenged districts were drawn. Further, the Ninth Circuit was satisfied that the "intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and to elect legislators of their choice." As a result, the court found that this intentional discrimination violated both the Voting Rights Act and the equal protection clause.

The County also asserted that the district court erred in requiring it to redistrict at a time between regularly scheduled decennial reapportionments; in considering any data other than data from the 1980 census; and in employing statistics based upon the total County population rather than the voting population. The court rejected each of these arguments, responding that more frequent apportionment, though "not constitutionally required," is "constitutionally permissible" and even "practicably desirable"; because redistricting between censuses is permissible, post-census data may be used as a basis for such redistricting; and California Elections Code section 35000 requires districting to be accomplished on the basis of total population.

The Oregonian Publishing Co. v. United States District Court; Frank Riley Wolsky and United States of America, Real Parties in Interest,

___ F.2d ___, 90 D.A.R. 13860, No. 90-70275 (Dec. 6, 1990).

Press Has Access to Plea Agreements Under Qualified First Amendment Right

In this proceeding, the Ninth Circuit Court of Appeals granted The Oregonian Publishing Company's petition for a writ of mandamus to obtain access to various documents relating to a plea agreement filed under seal in the district court. In 1989, Frank Riley Wolsky was indicted for various federal drug and firearm offenses. Wolsky entered into a plea agreement with the government, the terms of which were set forth in a letter from the government dated November 29, 1989. Following Wolsky's filing, under seal, of a motion to seal the plea agreement, The Oregonian filed a motion to intervene for the purpose of opposing the motion to seal the plea agreement. After hearing argument on the motion to seal, the district court granted Wolsky's motion and ordered the plea agreement sealed; it also ordered certain portions of its opinion and order sealed.

The Oregonian then sought a writ of mandamus from the Ninth Circuit. Upon review, the court observed that "plea agreements have typically been open to the public" and that "[a]n order denying access to a plea agreement must satisfy both the procedural and substantive requirements of the first amendment." In determining that the district court complied with the applicable procedural prerequisites, the Ninth Circuit determined that (1) those excluded from the proceeding were afforded a reasonable opportunity to state their objections; and (2) the reasons supporting closure were articulated in the findings.

The court reiterated the rule that "criminal proceedings and documents may be closed to the public without violating the first amendment only if three substantive requirements are satisfied: (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." The Ninth Circuit determined that because The Oregonian properly relied upon a qualified right of access under the first amendment to obtain disclosure of the plea agreement and related documents, it enjoyed the benefit of a presumption that disclosure should be made; and the district court should have imposed the burden on Wolsky to present facts supporting closure and to demonstrate that any available alternatives would not protect his interests. The court ruled that Wolsky failed to carry that burden; thus "the press has a right of access under the first amendment to the plea agreement and related documents."

UNITED STATES DISTRICT COURTS

United States of America, ex rel. Guy D. McCoy and Frank Hellum v. California Medical Review, Inc., et al.,

___ F.Supp ____, 90 D.A.R. 14240, No. C-88-3659-MHP (N.D. Cal., Dec. 5, 1990).

False Claims Act Settlement Hearings Must be Open and Include All Plaintiffs

Acting as qui tam plaintiffs under the False Claims Amendments Act of 1986 (Act), 31 U.S.C. §§ 3729-3733, plaintiffs/relators McCoy and Hellum (plaintiffs) filed this action in September 1988, alleging fraudulent practices by the defendants in violation of the Act. Pursuant to 31 U.S.C. section 3730-(b)(4)(A), the United States filed its first amended complaint on March 22, 1989, seeking damages and civil penalties arising from false claims and reports allegedly submitted by the defendants to the Health Care Financing Administration. The United States and defendants reached agreement on a proposed settlement of the civil action; plaintiffs opposed the proposed settlement, claiming that it was "grossly inadequate," and requested discovery on the matter. The United States and defendants then moved that the hearing on the proposed settlement be held *in camera* and that all briefs filed in connection with the hearing be sealed; McCoy and Hellum opposed this motion.

The court reviewed the language and legislative history of the False Claims Act, and determined that "there is a presumption in favor of open settlement hearings." Although 31 U.S.C. section 3730(c)(2)(B) provides that, upon a showing of good cause, settlement hearings may be held *in camera*, the court noted that the term "good cause" is not defined in the Act. Therefore, the court looked for guidance to other statutes and authority, and found that the term, as used in Federal Rule of Civil Procedure 26(c), requires "a showing that disclosure will work a clearly defined, specific and serious injury." The court found that defendants and the United States failed to make a showing of good cause under that standard or any other of which the court could conceive. Further, the court determined that defendants and the United States failed to identify any "overriding interest" which would mandate the closure of judicial proceedings.

Finally, the court granted plaintiffs' request for a hearing and discovery on the proposed settlement agreement. According to the court, qui tam plaintiffs may raise objections to the proposed settlement at the fairness hearing; the right to limited discovery is a corollary to that right to object. (See CRLR Vol. 9, No. 4 (Fall 1989) pp. 139-40 and Vol. 9, No. 3 (Summer 1989) pp. 131-32 for information on other False Claims Act cases.)

CALIFORNIA SUPREME COURT

Taxpayers to Limit Campaign Spendingv. Fair Political Practices Commission,

___ Cal. 3d ___, 90 D.A.R. 12502, No. S012016 (November 1, 1990).

Provisions of Proposition 73 Overrule Those of Proposition 68

At the June 7, 1988 primary election, California voters approved two initiative statutes, Propositions 68 and 73, both of which sought to regulate political campaign contributions and spending by amending and supplementing the Political Reform Act of 1974; Proposition 73 received more votes than Proposition 68. Article II, section 10(b) of the California Constitution provides that "[i]f provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." The Fair Political Practices Commission (FPPC), having concluded that section 10(b) applied only where an irreconcilable conflict existed, compared the two measures provision by provision, and found that most of Proposition 68's provisions conflicted with provisions of Proposition 73 or were not severable from other provisions which did conflict. However, the FPPC also identified several provisions of Proposition 68 which it determined were not in direct conflict with Proposition 73, and ruled that those provisions should become operative. (See CRLR Vol. 10, No. 4 (Fall 1990) pp. 189-90; Vol. 9, No. 4 (Fall 1989) pp. 140-41; and Vol. 8, No. 2 (Spring 1988) p. 1 for extensive background information on Propositions 68 and 73.)

Petitioner, an association which sponsored Proposition 68, filed a writ of mandamus in the Second District Court of Appeal, seeking to compel the FPPC to enforce additional provisions of Proposition 68. The court concluded that it too was obligated to attempt to reconcile and give effect to the provisions of both measures to the maximum extent possible, and held that several additional provisions of Proposition 68 were not irreconcilable with Proposition 73, and directed that they be enforced.

The California Supreme Court granted review to consider the FPPC's argument that these additional provisions of Proposition 68 were in irreconcilable conflict with Proposition 73, advising the parties that it would also consider whether the FPPC and appellate court had properly applied section 10(b) in their efforts to give effect to those provisions of Proposition 68 which they concluded did not conflict with provisions of Proposition 73.

The court reviewed the previous four attempts which had been made to determine the effect of the voters' simultaneous approval of both initiative measures, noting that in each, the agency or court assumed that section 10(b) mandated a provision-by-provision analysis of the two measures and enforcement of each provision of Proposition 68 which did not conflict with Proposition 73, was severable from the remainder of Proposition 68, and was intended by the voters to become effective regardless of the invalidity of the remainder. In rejecting this assumption, the court stated that section 10(b) does not "contemplate enforcement of any provisions of an initiative that receives a majority of the votes cast when another initiative on the same ballot, directed to the same subject and offered as a competing regulatory scheme, receives a greater majority." The court held that the interpretation of section 10(b) adopted by Petitioner, the FPPC, and the court of appeal—that nonconflicting, severable provisions of the initiative(s) receiving the lesser affirmative vote are operable—"is not the only reasonable understanding of the section." Instead, the court created its own interpretation of section 10(b), holding that "when initiatives with provisions that are in fundamental conflict receive affirmative votes at the same election, only the provisions of the measure receiving the highest affirmative vote are operative." Further, the court reviewed the contents of both measures and the manner in which they were drafted and presented to the voters, and decided that Propositions 68 and 73 "were competing initiative measures offering alternative regulatory schemes," thereby establishing a fundamental conflict. As a result, despite receiving the approval of the California voters, none of Proposition 68's provisions will be given effect.

Both Propositions 68 and 73 were ill-fated. Shortly before the California

Supreme Court issued this decision invalidating Proposition 68, the U.S. District Court for the Eastern District of California struck down Proposition 73's contribution limits under the first amendment. (See CRLR Vol. 10, No. 4 (Fall 1990) pp. 189-90 for background information.) Thus, at this writing, and contrary to the clear intent of the electorate in enacting both Propositions 68 and 73, there are no campaign contribution limits applicable to state legislative or statewide office races in California.

Robert D. Raven, et al. v. George Deukmejian, et al.,

52 Cal. 3d 336, 90 D.A.R. 14642, No. S016137 (Dec. 24, 1990).

California Supreme Court Upholds Validity of Proposition 115 While Eliminating Key Provision

In this proceeding instituted by a group of taxpayers and voters, the California Supreme Court reviewed two challenges to the constitutionality of Proposition 115, the "Crime Victims Justice Reform Act" passed in June 1990. Although first filed as a writ of mandate or prohibition in the court of appeal, the Supreme Court exercised its original jurisdiction and granted respondent's motion to transfer the proceeding to the high court.

Proposition 115 limits various pretrial procedural rights for criminal defendants and expands the Penal Code by creating new offenses, increasing penalties, and providing for speedier trials. The petitioners challenged Proposition 115 by claiming that (1) the measure violates the state constitution's "single subject" rule (Article II, section 8(d)); and (2) a constitutional "revision" such as that sought by Proposition 115 is beyond the scope of the initiative process, and must be accomplished by more formal procedures than are contemplated for mere constitutional "amendments" (Article XVIII).

In rejecting Petitioner's argument that Proposition 115 violates the "single subject" rule, which limits each proposition to only one issue, the court noted that "an initiative measure does not violate the single-subject requirement `if, despite its varied collateral effects, all of its parts are "reasonably germane" to each other,' and to the general purpose or object of the initiative." The court held that "the various elements of Proposition 115 unite to form a comprehensive criminal justice reform package" and that they "reflect a consistent theme or purpose to nullify particular decisions of our court affecting various aspects of the criminal justice system."

Petitioner's second argument, that Proposition 115 in effect achieved a constitutional revision rather than a mere amendment, focused primarily on Proposition 115's amendment to article I, section 24 of the constitution, relating to the independent nature of certain rights guaranteed by the state constitution; this amendment limited the rights of criminal defendants to those expressed in the federal Constitution. The court agreed with the petitioners that this limitation constituted a revision rather than an amendment of the state constitution, by in effect "vest[ing] all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court." The court stated that this limitation would substantially alter the integrity and independent effect of California court decisions. Thus, by vesting the ultimate protection of criminal defendants from deprivation of constitutional rights exclusively in the U.S. Supreme Court, the court found that this provision accomplishes "such far reaching changes in the nature of our basic governmental plan as to amount to a revision." Although acknowledging a general principle of deference to Supreme Court decisions, the court rejected the notion of "blind obedience" to that court's decisions.

Although the court found that article I, section 24 represents an invalid revision of the state constitution, it upheld the remaining provisions of Proposition 115 as "clearly severable from the invalid portion." However, challenges to other individual provisions are pending in lower courts.

AIU Insurance Company v. Superior Court of Santa Clara County; FMC Corporation, Real Party in Interest,

___ Cal. 3d. ___, 90 D.A.R. 12891, No. S012525 (Nov. 15, 1990).

Insurers May Be Obligated to Pay For CERCLA "Response" Costs

In this proceeding, the California Supreme Court was asked to decide whether, under comprehensive general liability (CGL) insurance policies issued by insurers to FMC Corporation, the insurers are obligated to provide coverage to FMC for clean-up and other "response" costs incurred pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, and related state and federal environmental laws. On November 15, a unanimous court declared that the cost of government-ordered clean-up of toxic wastes does constitute "damages" that are covered under the CGL policies issued to thousands of businesses over the past fifty years.

The insurance industry argued that CGL policies do not cover costs incurred pursuant to a governmental clean-up injunction; that is, the standard CGL policy—which covers "all sums which the insured becomes legally obligated to pay *as damages* because of bodily injury or property damage"—does not cover costs incurred due to injunctions issued in equity. Applying traditional rules of interpretation to the insurance policies, and using the "ordinary and popular sense" of words to resolve any ambiguities in favor of the policyholder, the court determined that some of the adverse orders issued in CERCLA suits will "legally obligate" FMC to pay such costs; the costs will constitute "damages" or "ultimate net loss," and such costs will be incurred because of "property damage."

Peralta Community College District v. Fair Employment and Housing Commission;Rose Brown, Real Party in Interest,

52 Cal. 3d 40, 276 Cal. Rptr. 114, No. S009487 (Dec. 20, 1990).

Job Discrimination Victims May No Longer Seek Compensation For Emotional Distress From State Commission

In this proceeding, the California Supreme Court considered whether the Fair Employment and Housing Commission (Commission) is statutorily authorized by the California Fair Employment and Housing Act (Act) to award compensatory damages to victims of job discrimination. The Commission had awarded $20,000 to a former Peralta Community College District (Peralta) employee, finding that the employee had been subjected to various acts of sexual harassment. Specifically, the Commission stated that the $20,000 award was "to compensate [the employee] for the damage to her dignity and esteem, and [for] her humiliation, embarrassment, emotional pain and distress."

Peralta sought a writ of administrative mandamus from the superior court;

the court denied the petition as to the Commission's findings of sexual harassment, but ordered stricken that part of the decision awarding the former employee compensatory damages, as not within the Commission's authority. The appellate court reversed, finding that the Commission is authorized by the Act to award compensatory damages.

In *Dyna-Med, Inc. v. Fair Employment and Housing Commission*, 43 Cal. 3d 1379, 241 Cal. Rptr. 67 (1987), the California Supreme Court rejected the argument that the expansive language of the Act, taken together with the legislative statement of purpose and directive that the Act should be liberally construed, authorized the Commission to award punitive damages. As in *Dyna-Med*, the *Peralta* court primarily focused its discussion on the statute itself. The court acknowledged that the "stated purpose of the [Act] is to provide effective remedies that will eliminate discriminatory practices" and that compensatory damages may "deter the respondent and other employers from future discriminatory practices." However, the court stated that an award of compensatory damages "goes beyond the context of employment" and "serve[s] to recompense the victim of discrimination not just for the tangible detriment to the victim's employment situation, but also for the intangible injury to his or her psyche suffered as a result of the unlawful action of another and, as such, [is] designed to make the victim whole in relation to the offender in the manner of traditional tort damages awarded by a jury in private action in a court of law." According to the court, this effect is beyond the scope of the Act's intended purpose to prevent and eliminate discrimination in the workplace.

As a result, the court concluded that in view of the failure of the Act to "expressly authorize an award of general compensatory damages, the existence in other civil rights statutes of express authorization for such awards, [and] the unlikelihood of a legislative grant by implication of unbridled power to an administrative agency to make monetary awards without guidelines or limitations," the Commission is not authorized to award compensatory damages.

Citizens of Goleta Valley, et al. v. Board of Supervisors of the County of Santa Barbara, et al.; Wallover, Inc., et al. Real Parties in Interest,
___ Cal. 3d ___, 90 D.A.R. 129,
Nos. S013629, B037615
(Dec. 31, 1990).

Environmental Impact Report for Project Must Consider Reasonable Alternatives

Culminating a decade-long effort by real parties in interest Wallover, Inc., and Hyatt Corporation (collectively Hyatt) to build a resort hotel on 73 acres of undeveloped oceanfront land in Santa Barbara County (County), the California Supreme Court determined that the environmental impact report (EIR) prepared by the project proponents adequately considered a reasonable range of alternatives to the project, including alternative locations as required under the California Environmental Quality Act (CEQA). In 1983, Hyatt filed an application with the County for development of the property; an EIR analyzing the project was certified as complete in September 1984, and rezoning and local coastal program amendments designating the land for visitor-serving commercial development were approved. The California Coastal Commission subsequently granted a coastal development permit subject to certain conditions.

The EIR examined four development alternatives: no project; clustered high-density residential development; a smaller, 340-unit resort hotel and conference center south of Highway 101; and the alternative ultimately approved, a 400-unit hotel, with the potential for second-phase development of an additional 100 hotel rooms and 24 villas. There was no in-depth consideration of any alternative location for the project. In *Goleta I*, 197 Cal. App. 3d 1167 (1988), the Second District Court of Appeal set aside the EIR certification, finding that "the omission from the EIR of consideration of whether there was a feasible alternate site or sites was unreasonable and rendered the EIR inadequate...." As a result, a supplemental EIR was prepared to address some of the concerns raised in the first appeal; the final EIR released in November 1987 contained an expanded discussion of an alternative location for the project. Following a number of public hearings, the County Board of Supervisors (Board) approved Hyatt's final development plan. The Citizens of Goleta Valley, a coalition of groups opposed to the project, appealed on the sole ground that the Board failed to comply with the judicial directive concerning alternative sites. The trial court found in favor of Hyatt, but the appellate court again held that the EIR failed to delineate facts sufficient to explain its rejection of a sufficient number of alternative sites, and therefore was still inadequate.

The California Supreme Court reversed. In reviewing agency actions under CEQA, Public Resources Code section 21168.5 provides that a court's inquiry "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Further, the court noted that "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR...," and that the "EIR here considered a full range of project alternatives, including at least one reasonable off-site alternative." Thus, the court concluded that the "record evidence substantially supports the Board's conclusion that none of the additional sites represented a feasible project alternative or merited extended discussion in the EIR" and that it could not "classify the Board's decision to issue the final EIR as an abuse of discretion."

Lesher Communications, Inc., et al. v. City of Walnut Creek,

___ Cal. 3d ___, 91 D.A.R. 135,
No. S012604 (Dec. 31, 1990).

Initiative Limiting Municipal Growth Is Not a General Plan Amendment

In this proceeding, the California Supreme Court considered whether a Walnut Creek initiative measure limiting municipal growth which conflicts with the city's general plan amends that plan, and, if it is not an amendment, whether it is invalid. The state's Planning and Zoning Law, Government Code section 65000 *et seq.*, mandates the adoption of a general plan by every city and every county in this state; once a city has adopted a general plan, all zoning ordinances must be consistent with that plan, and to be consistent must be "compatible with the objectives, policies, general land uses, and programs specified in such a plan."

As of November 5, 1985, the date on which Measure H, the initiative ordinance in issue here, was adopted, the general plan of the City of Walnut Creek was growth-oriented. The general plan anticipated and acknowledged that

"[c]ommute-hour congestion experienced along [certain roadways] will continue to increase as new development occurs. Although some minor improvements can be made to these roadways, drivers will have to adjust to an increased level of congestion." Measure H, designated as the "Traffic Control Initiative," creates a building moratorium triggered by traffic congestion on many of the city's roadways.

Plaintiffs challenged the validity of Measure H, asserting that (1) Measure H was a land use ordinance which operated as a zoning ordinance and was inconsistent with the city's general plan, and (2) the general plan itself was invalid. After trial, the court directed issuance of a peremptory writ of mandate commanding Walnut Creek to void Measure H and to cease enforcing it, ruling that Measure H was invalid because it conflicted with the general plan's goals and policy of growth. Walnut Creek appealed, arguing that Measure H was consistent with the city's general plan because it was compatible with the pro-growth policies expressed in the general plan; the city argued in the alternative that Measure H was valid as an amendment of the general plan. The First District Court of Appeal rejected the argument that Measure H was consistent with the general plan, but held that the initiative must be construed as an amendment to the general plan.

The California Supreme Court reversed, holding that Measure H does not identify an existing provision of the general plan that is to be amended by adoption of the measure, nor does it state that it is an addition to the plan. According to the court, "[a]bsent some basis in the title, the ballot summary, or elsewhere in the ballot materials to support a conclusion that the voters both understood that the purpose of Measure H was to amend the Walnut Creek general plan and that they intended to do so, Measure H cannot be deemed a general plan amendment." Because it conflicted with, and was not an amendment to, Walnut Creek's general plan, the court concluded that Measure H was invalid at the time it was passed.

Draper v. City of Los Angeles,

___ Cal. 3d ___, 91 D.A.R. 265, No. S011881 (Dec. 31, 1990).

Physical and Mental Injuries Allow Late Filing of Claim Against Government

In this proceeding, the California Supreme Court considered whether a plaintiff physically unable to file a claim against a governmental entity within 100 days of an accident may be denied relief from the Government Code's claim-filing requirements on the ground that an attorney, purporting to act on her behalf, filed a timely claim against a governmental entity different from the entity plaintiff now seeks to hold liable. Plaintiff was injured on June 11, 1987, when she was struck by a car driven by a high school student in a crosswalk in the Panorama City district of Los Angeles. At the time of plaintiff's accident, Government Code section 911.2 required that a personal injury claim against a governmental entity must be filed within 100 days of the accrual of a cause of action; sections 911.4 and 911.6 set forth the procedures for filing a late claim.

During the 100-day claim-filing period, an attorney acting on plaintiff's behalf filed a claim against Los Angeles Unified School District; that claim was rejected on September 11, 1987.

On November 4, 1987, almost two months after the 100-day claim-filing period had elapsed, plaintiff applied for permission to file a late claim with the City of Los Angeles, the Los Angeles Unified School District, and several governmental units, alleging that the accident had been caused by defects in the design of the intersection. Plaintiff claimed that she had not filed a timely claim because she was severely injured in the accident, suffered permanent brain damage, was unconscious and hospitalized for a long time, and did not have the assistance of counsel. The petitions were denied by operation of law.

Plaintiff then sought relief from the claim-filing requirement in superior court; however, the court ruled that the claim filed by the attorney acting on plaintiff's behalf during the 100-day claim-filing period against the Los Angeles Unified School District demonstrated that any failure to file a claim against the city and other governmental units within that time was not cause by plaintiff's disability. The appellate court affirmed, even though it found that plaintiff had presented "powerful evidence" that she was serious disabled during the 100 days following the accident.

The California Supreme Court rejected the lower courts' finding that the attorney in question was acting as plaintiff's attorney when he filed the claim, and that because plaintiff had not repudiated his actions she was bound by them. The court noted that under Government Code section 946.6(c)(3), it is the incapacity of the person who failed to file a claim that is in issue, and ruled that plaintiff's incapacity during the 100-day claim-filing period prevented her from ensuring that a timely claim was filed.

CALIFORNIA COURTS OF APPEAL

R.H. Macy & Company, Inc. v. Contra Costa County,

___ Cal. App. 3d ___, 90 D.A.R. 14600, No. A049789 (Dec. 19, 1990).

Nordlinger v. Lynch, et al.,

___ Cal. App. 3d ___, 90 D.A.R. 13895, No. B048719 (Dec. 3, 1990).

In these proceedings, the First District Court of Appeal and the Second District Court of Appeal, respectively, each upheld the constitutionality of Proposition 13, which was adopted by the California voters on June 6, 1978, despite a recent U.S. Supreme Court decision, *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336 (1989), rejecting a similar tax assessment scheme. (See CRLR Vol. 9, No. 1 (Winter 1989) p. 111 for background information on *Allegheny*.)

In *Macy*, appellants challenged Proposition 13's change in ownership provisions which allow the property tax assessment to be based upon the fair market value of the property at the time of ownership change rather than at its 1975 (base year) value. Appellants argued that as far as commercial property is concerned, the change in ownership provision, commonly known as the "welcome stranger" provision, violates the equal protection and commerce clauses of the federal Constitution and impairs the interstate right to travel. The First District noted that the "California Supreme Court long ago laid to rest the equal protection challenge to Proposition 13's change in ownership provisions" in *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208 (1978); further, the court noted that *Amador* does not distinguish between commercial and residential property. The court distinguished the *Allegheny* decision, stating that *Allegheny* "grew out of a different legal and factual background" and "expressly refused to pass upon the constitutionalityof [Proposition 13], and, hence, left the precedential force of *Amador* unaffected." Finally, the First District determined that Proposition 13 "does not impose direct

restrictions on interstate travel, nor does it discriminate against non-California property owners, nor does it impose durational/residence requirements on interstate mobility."

In *Nordlinger*, plaintiff also attacked Proposition 13's "welcome stranger" provision, alleging that the dramatic disparities created by this tax assessment method had been rendered unconstitutional by *Allegheny*. The Second District Court of Appeal relied on *Amador* in rejecting each of plaintiff's arguments, and found the *Allegheny* decision inapposite. The court determined that *Allegheny* does not stand for the general proposition that a welcome stranger approach which bases assessed value on acquisition cost violates equal protection; nor does *Allegheny* hold that large disparities in the assessments of properties with similar current market values are unconstitutional *per se*.

Plaintiffs in both cases have sought review by the California Supreme Court.

Farnow v. Superior Court of the State of California, In and For the County of San Mateo; San Mateo County Grand Jury, Real Party in Interest,

226 Cal. App. 3d 481, 276 Cal. Rptr. 275, No. A050322 (Dec. 18, 1990).

Civil Grand Jury Proceedings Remain Closed To the Public and Lawyers for Witnesses

Petitioner Raymond Farnow, Commissioner of the San Mateo County Harbor District, was served with a subpoena requiring him to appear at a civil session of the San Mateo County Grand Jury; the grand jury refused petitioner's request to have an attorney present during his testimony. The superior court denied petitioner's ex parte application for an order staying his appearance pending a hearing on an order to show cause why his attorney should not be allowed to attend the session. The First District Court of Appeal issued an order prohibiting the grand jury from compelling petitioner's appearance and testimony without the presence of his attorney pending the appellate court's determination of petitioner's petition for writ of prohibition.

On the merits, the First District considered the effect of a 1988 amendment to Penal Code Section 939, which appears on its face to have transformed the statute preserving the privacy of all sessions of the grand jury (by allowing only specified persons to be present) into a statute ensuring such privacy only for criminal sessions of the grand jury. Prior to its amendment in 1988, section 939 provided that "[n]o person other than those specified in Article 3 (commencing with Section 934), and in Sections 939.1 and 939.11 is permitted to be present during the session of the grand jury except the members and witnesses actually under examination. No person other than those specified in Section 939.11 shall be permitted to be present during the expression of the opinions of the grand jurors, or the giving of their votes upon any matter before them." However, 1988 amendments to this section provide for the exclusion of all but the specified persons from "criminal sessions" rather than all sessions of the grand jury.

In rejecting petitioner's arguments, the court stated that "[d]espite the apparent import of the addition of the word 'riminal' to section 939,...the effect of a literal interpretation of this statute—to make civil sessions of the grand jury open to the public—would work so profound a change in the nature of grand jury proceedings that we must hesitate to adopt it." The court concluded that such an interpretation "would render the statute inconsistent with other provisions of law governing grand jury proceedings." Further, the court noted that "the legislative history of the 1988 amendment contains no indication of any intent to depart from the long history of secrecy in grand jury proceedings."