UNITED STATES SUPREME COURT

Renne v. Geary,

___U.S.___, 91 D.A.R. 7050,
No. 90-709 (June 17, 1991).

Controversy Over Candidate Law Is Not Ripe for Federal Resolution

In January 1991, the U.S. Supreme Court granted certiorari in this proceeding to determine whether Article II, section 6(b) of the California constitution, which provides that no political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office, violates the first and fourteenth amendments of the federal constitution. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 185; Vol. 10, No. 4 (Fall 1990) p. 189; and Vol. 9, No. 4 (Fall 1989) p. 139 for extensive background information on this case.) Respondents filed suit in the U.S. District Court for the Northern District of California; their third cause of action challenged section 6(b) on constitutional grounds. The District Court granted summary judgment in favor of respondents on their third cause of action. Although a Ninth Circuit Court of Appeals panel reversed, the *en banc* Court of Appeals affirmed the District Court's decision.

Following oral argument, the Supreme Court determined that "respondents have not demonstrated a live controversy ripe for resolution by the federal courts," vacated the Ninth Circuit's judgment, and remanded with instructions to dismiss respondents' third cause of action. In support of its finding of nonjusticiability, the Court found that respondents failed to demonstrate a live dispute involving the actual or threatened application of section 6(b) to bar particular speech. The Court held that respondents' generalized claims involved disputes that had become moot by the time respondents filed suit. Although the Court acknowledged that "the mootness exception for disputes capable of repetition yet evading review has been applied in the election context," it held that "that doctrine will not revive a dispute which became moot before the action commenced." The Court added that "[p]ostponing consideration of the questions presented, until a more concrete controversy arises, . . . has the advantage of permitting the state courts further opportunity to construe section 6(b), and perhaps in the process to 'materially alter the question to be decided.'"

NINTH CIRCUIT COURT OF APPEALS

United States v. Montoya,

___ F.2d ___, 91 D.A.R. 11552,
No. 90-10248 (Sept. 20, 1991).

Former State Senator's Hobbs Act Convictions Reversed

In 1990, former state Senator Joseph B. Montoya was convicted of five counts of extortion and attempted extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. section 1951, one count of racketeering, and one count of money laundering. Following his appeal, the U.S. Ninth Circuit Court of Appeals reversed Montoya's Hobbs Act convictions, and affirmed his convictions for racketeering and money laundering.

The Hobbs Act provides that a person is guilty of a crime if he/she "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires to do so. . . ." 18 U.S.C. section 1951(a). In reversing Montoya's Hobbs Act convictions, the Ninth Circuit relied on the U.S. Supreme Court's recent decision in *McCormick v. United States*, 111 S.Ct. 1807 (1991), which held that, in order to establish a Hobbs Act violation, the prosecution must prove that extortionate payments were "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act"—in other words, the prosecution must prove an explicit "quid pro quo." (See CRLR Vol. 11, No. 3 (Summer 1991) pp. 204–05 for a summary of the *McCormick* case.)

Because of this requirement, the Ninth Circuit determined that the jury instructions provided in Montoya's trial were deficient, noting that a "'new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct appeal.'" The court acknowledged that although the jury instructions provided by the trial court "adequately took into account existing circuit law at the time relating to the required element of inducement," the instructions lacked *McCormick*'s requirement that the jury find a "quid pro quo," defined as "'an explicit promise or undertaking by the official to perform or not to perform an official act.'"

However, the Ninth Circuit upheld Montoya's racketeering and money laundering convictions, rejecting Montoya's assertion that the "spill-over effect" of his erroneous Hobbs Act convictions necessarily requires reversal of the other two convictions.

Commercial Builders of Northern California v. City of Sacramento,

___ F.2d ___, 91 D.A.R. 9609,
No. 89-16398 (Aug. 7, 1991).

Conditioning Permits on Fee Payment Is Not an Unconstitutional Taking

In this proceeding, the Ninth Circuit Court of Appeals upheld the constitutionality of a Sacramento city ordinance which conditions certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low-income workers who move there to fill jobs created by the project in question.

In 1987, the City and County of Sacramento commissioned a firm to study the need for low-income housing, the effect of nonresidential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such development to pay for such housing. Among other things, the study revealed that nonresidential development is "a major factor in attracting new employees to the region" and that the influx of new employees "create[s] a need for additional housing in the City." As a result, the City of Sacramento enacted the Housing Trust Fund Ordinance in 1989, which imposes a fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs; the fees are paid into a fund to assist in the financing of low-income housing.

Commercial Builders challenged the ordinance, arguing that it constitutes an unlawful taking and an impermissible means to advance the legitimate interest of expanding low-income housing, by placing the burden of paying for low-income housing on nonresidential development without a sufficient showing that nonresidential development contributes to the need for low-income housing in proportion to that burden. In rejecting this contention, the Ninth Circuit found that the ordinance "was enacted after a careful study revealed the amount of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development." The court found that the "burden assessed against the developers thus bears a rational relationship to a public cost closely associated with such development."

In dissent, Judge Robert Beezer argued that "Sacramento's ordinance is a transparent attempt to force commercial developers to underwrite social policy . . . The Takings Clause prohibits singling out developers to bear this burden." According to Judge Beezer, "[i]f Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health-care delivery systems."

In Re Insurance Antitrust Litigation,

___F.2d___, 91 D.A.R. 7172,
Nos. 89-16405, 89-16513-31
(June 18, 1991).

McCarran Act Immunity Unavailable To U.S. Insurers Conspiring to Boycott

The Ninth Circuit Court of Appeals has ruled that McCarran Act (15 U.S.C. section 1011 *et seq.*) immunity is not available to American insurers, reinsurers, and insurance brokers who agreed to boycott nonconforming insurers and engaged in acts of coercion. The McCarran Act provides that no act of Congress "shall be construed to invalidate" any state law enacted "for the purpose of regulating the business of insurance." The Act further provides that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law" and "[n]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Thus, for McCarran Act immunity to apply, "the defendants must be in the business of insurance; that business must be regulated by state law; and the defendants must not have agreed to boycott, coerce, or intimidate or performed an act of boycott, coercion, or intimidation."

In 1984, led by Hartford Fire Insurance Company, a number of primary insurers and reinsurers exerted pressure on the Insurance Service Office (ISO)—an association of over 1,400 property and casualty insurers which, among other things, develops standard policy forms—to change the standard form for commercial general liability (CGL) insurance. Specifically, the insurers and reinsurers sought to eliminate ISO's "occurrence" form, which insured against occurrences of liability during the life of a policy, and replace it with a "claims made" form, under which only claims made during the life of a policy would be paid. ISO subsequently approved a claims made form with a date after which claims could not be filed; ISO also continued to offer a CGL occurrence form. The reinsurer defendants continued to exert pressure on ISO to eliminate the occurrence form by announcing that there would be no reinsurance for primary insurers writing on the occurrence form and refusing to renew long-standing reinsurance treaties with primary insurers unless they agreed to abandon the occurrence form.

Among other things, the plaintiffs in this 1988 action (including nineteen states and a number of private individuals) alleged that defendants (including a number of foreign firms) conspired in violation of the Sherman Act, 15 U.S.C. section 1, to restrict the terms on which reinsurance would be offered for CGL risks and to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its forms. The U.S. District Court for the Northern District of California dismissed plaintiffs' claims because of the McCarran Act immunity of the defendants.

In reviewing the standards required for immunity to attach, the Ninth Circuit determined that the defendants are in the business of insurance. However, the court found that because state insurance schemes "do not, and could not, purport to regulate the bulk of international insurance transactions," McCarran Act immunity does not attach to the foreign defendants. Thus, domestic defendants who are subject to state regulation lost their immunity when they conspired with the foreign defendants, under the principle that the "[m]embership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable." Finally, the Ninth Circuit found that the plaintiffs clearly alleged that defendants attempted to boycott nonconforming insurers and acts of boycott and coercion. (*See supra* agency report on DEPARTMENT OF INSURANCE for related discussion.)

Oregon Natural Resources Council v. Mohla, et al.,

___ F.2d ___, 91 D.A.R. 11103,
No. 90-35401 (Sept. 11, 1991).

Claim of Abuse of Administrative and Judicial Process Is Dismissed

In 1988, the Oregon Natural Resources Council (ONRC) filed suit against the U.S. Forest Service, seeking to enjoin bidding on a timber contract for a tract of land in the Mt. Hood National Forest. When ONRC learned that the contract had been awarded to Avison Timber Company, ONRC amended its complaint, adding Avison as an indispensable party and seeking to enjoin logging of the land. In February 1989, Avison filed counterclaims against ONRC, alleging abuse of administrative and judicial process and interference with business relations. The district court dismissed the counterclaims, finding that ONRC's claims "involve the exercise of ONRC's right to petition the courts for redress against the government and are therefore protected by the First Amendment" under the *Noerr-Pennington* doctrine.

Avison appealed this decision, arguing that *Noerr-Pennington* protection is inappropriate, and alleging that ONRC's suit was part of a pattern of baseless, repetitive claims and that ONRC made knowing misrepresentations to the court. Avison contended that ONRC's actions fell within the "mere sham" exception to *Noerr-Pennington* protection, which is appropriate where "persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."

The Ninth Circuit affirmed the dismissal, noting that where a claim involves the right to petition governmental bodies under *Noerr-Pennington*, courts will apply a heightened pleading standard; conclusory allegations are not sufficient to strip a defendant's activities of *Noerr-Pennington* protection. The court also found that "*Noerr-Pennington* protection is appropriate so long as ONRC was genuinely seeking governmental action." Here, the court held that, in order to accomplish its goal of preventing anyone from cutting down the trees on the land in question, ONRC needed the actual relief it was requesting from the courts; "ONRC . . . was genuinely seeking judicial relief."

Also, the court rejected Avison's bald allegations that ONRC "knowingly presented misrepresentations to the court," holding that the heightened pleading standard involved "would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as 'misrepresentations' by the other party." The court thus concluded that "Avison's allegations of misrepresentation are therefore insufficient to overcome *Noerr-Pennington* protection."

CALIFORNIA SUPREME COURT

Times Mirror Co. v. Superior Court of Sacramento County (State of California, et al., Real Parties In Interest),

___Cal. 3d___, 91 D.A.R. 8952, No. S014461 (July 22, 1991).

Governor's Schedules and Calendars Are Exempt from Public Disclosure

In a 4–3 decision, the California Supreme Court held that former Governor George Deukmejian's daily, weekly, and monthly appointment calendars and schedules are exempt from public disclosure under the California Public Records Act, Government Code section 6250 *et seq.*

In 1988, a *Los Angeles Times* reporter made a Public Records Act request, seeking the Governor's "appointment schedules, calendars, notebooks and any other documents that would list [the Governor's] daily activities as governor from [his] inauguration in 1983 to the present." The Governor's legal affairs secretary responded that the records requested were exempt from disclosure under Government Code section 6254(l), which provides that "[c]orrespondence of and to the governor or employees of the governor's office" is exempt from public disclosure.

The *Times* filed suit, seeking injunctive and declaratory relief to obtain disclosure of the materials requested. In opposition, the Governor claimed that (1) the records came within the correspondence exemption of section 6254(l); (2) release of his appointment calendars and schedules would inhibit the free and candid exchange of ideas necessary to the decisionmaking process; and (3) release of his appointment calendars and schedules would create a risk to his personal security.

The California Supreme Court rejected the Governor's first argument, holding that the term "correspondence," as used in section 6254(l), refers to "communication by letters" and that the "Governor's appointment calendars and schedules plainly do not meet this definition."

However, the court found merit in the Governor's second argument, finding that "[d]isclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." Although the court acknowledged that disclosure of the Governor's itinerary would have positive public benefits, such as revealing "whether the Governor was, in fact, receiving a broad range of opinions, and ultimately whether the state's highest elected officer was attending diligently to the public business," it determined that disclosure of such information was impractical in light of the nature of the deliberative process, and found that "the public interest in nondisclosure clearly outweighs the public interest in disclosure."

Further, the court found merit in the Governor's final argument relating to personal safety, noting that "it is plausible to believe that an individual intent on doing harm could use such information to discern activity patterns of the Governor and identify areas of particular vulnerability."

CALIFORNIA COURTS OF APPEAL

Yoshisato v. Superior Court of Orange County,

___Cal. App. 3d___, 91 D.A.R. 9594, No. G010832 (Aug. 5, 1991).

Proposition 114 Cancels Proposition 115's "Special Circumstances" Amendments

The Fourth District Court of Appeal has determined that section 10 of Proposition 115, the omnibus Crime Victims initiative approved by the voters at the June 1990 election, conflicts with section 16 of Proposition 114, a measure receiving a greater number of votes at the same election. The court found that those sections of the two initiatives sought to amend Penal Code section 190.2, which enumerates the special circumstances which may subject a defendant convicted of first degree murder to capital punishment. Specifically relevant to the *Yoshisato* trial, Proposition 115 made rape with a foreign instrument a special circumstance mandating either the death penalty or life imprisonment without the possibility of parole; Proposition 114 did not contain this provision in its amendments to section 190.2. Proposition 115 also contained a number of other amendments to section 190.2 which were not contained in Proposition 114's amendments to section 190.2.

The court resolved the conflict between the two provisions by noting that article II, section 10(b) of the California constitution provides that "[i]f the provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." The court concluded that because Proposition 114 received more votes than Proposition 115, "[n]one of Proposition 115's proposed amendments to section 190.2 ever took effect."

Montez v. Superior Court of Los Angeles County,

___Cal. App. 3d___, 91 D.A.R. 10559, No. B052892 (Aug. 27, 1991).

Proposition 115's Preliminary Hearing Hearsay Provision Does Not Prevent Fair Trial

The Second District Court of Appeal has upheld a provision of Proposition 115 which authorizes the use of hearsay evidence at preliminary hearings. Under Proposition 115, hearsay evidence is admissible at a preliminary hearing when a properly qualified law enforcement officer testifies concerning "statements of declarants made out of court offered for the truth of the matter asserted."

In this proceeding, the defendant was accused of burglary. At the preliminary hearing, the accusations were read by a police detective, based on information supplied by another officer at the scene of the crime and two neighbors who saw the defendant loitering in the area. In this appeal, the defendant contended that the use of hearsay violates the federal and state constitutions, and that the use of "multiple level hearsay" is not sanctioned by Proposition 115 or any other law.

The Second District rejected the defendant's constitutional challenges to the provision, declaring that the U.S. Supreme Court "has repeatedly emphasized that the right to cross-examine is principally a trial right and has never found a violation of the Sixth Amendment outside of the context of a criminal trial or a juvenile delinquency proceeding which was the functional equivalent of a trial. Moreover, recent decisions of the United States Supreme Court have emphasized that so long as the trier of fact has an opportunity to see the witnesses subjected to cross-examination, that the minimum requirements of the Sixth Amendment are satisfied." The court also found that "on no occasion has [the California] Supreme Court held that the Sixth Amendment right of confrontation is applicable to a preliminary examination." Accordingly, the court concluded that "the use of hearsay evidence in defendant's preliminary examination does not violate defendant's right to confront the witnesses against him."

Regarding defendant's objection to the use of "multiple level hearsay," the court acknowledged that the testimony in question did constitute "multiple level hearsay," but found that "[d]efendant's argument that such hearsay is inadmissible is without merit." The court held that no applicable law indicates that only so-called "first level hearsay" is admissible at the preliminary examination, and that the "voters did not approve an initiative containing language which contains the limitations on the use of hearsay defendant argues exists."

Rebney, et al., v. Wells Fargo Bank,

___Cal. App. 3d___, 91 D.A.R. 9429, No. A041869 (July 31, 1991).

Formal Findings Are Not Required For Order Allocating Attorney Fees

In this proceeding, the First District Court of Appeal held that on a motion for attorney fees in a class action litigation, the trial court need not issue a statement of decision under Code of Civil Procedure section 632; the record need only indicate that fees were awarded under the "lodestar" or "touchstone" method. The issue arose following the allocation of attorney fees upon settlement of a class action litigation arising from the assessment of various checking account fees by Wells Fargo Bank and Crocker National Bank. Under the terms of the settlement, $3.4 million was to be divided among numerous attorneys, including counsel for the class representatives ("class counsel") and appellant Manuel Abascal, who represented a group of objectors to the settlement. A court-appointed referee denied Abascal's request for an evidentiary hearing on the fee question and for discovery of a variety of documents. The referee subsequently awarded approximately $2.28 million to class counsel, $170,000 to Abascal, and the remainder to other attorneys.

Following a motion by Abascal for judicial review of the referee's order, the trial court issued a statement of decision and order, in which the court reduced class counsel's award to $2.197 million, increased Abascal's award to $188,000, and adjusted several of the awards to other counsel. The statement of decision explained that the attorney fees were awarded according to the "lodestar" or "touchstone" approach, in which the court calculates base amounts from a compilation of time spent and reasonable hourly compensation of each attorney and then may adjust the base amounts in light of various factors. The court also approved the referee's denial of further discovery and an evidentiary hearing, concluding that those measures were unnecessary.

On appeal, Abascal argued that the court's statement of decision was inadequate because it did not address disputed legal and factual issues, and contended that Code of Civil Procedure section 632 requires that "upon the trial of a question of fact by the court," and on party request, the court "shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." In rejecting Abascal's arguments, the First District stated that the record need only show that attorney fees were awarded according to the "lodestar" or "touchstone" approach. The court found that the trial court's statement of decision satisfied this minimal requirement, as it expressly stated that the court had awarded fees based on the lodestar approach.

The court further noted that "[e]ven if Code of Civil Procedure section 632 did apply, Abascal waived any error by failing to bring the claimed defects to the attention of the trial court after issuance of the statement of decision," based on the principle that "it would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial."

Finally, Abascal contended that the referee and trial judge erred in denying discovery on the attorney fee question. The First District found merit in this argument as it related to Abascal's contentions that class counsel were double-billing (being compensated for the same work in both the present case and a similar proceeding involving the Bank of America). The court noted that class counsel convinced the referee to "take our word for it" that there would be no double-billing, and found that "[w]ithin the context of this litigation, it would have been unreasonable for the referee to do so." The court thus ruled that the referee erred to the extent he denied discovery to investigate the possibility of double-billing. However, the court concluded that the error was shown to be harmless in light of the time records ultimately produced in the Bank of America attorney fee proceeding, which indicated that almost none of the time billed in the Wells Fargo litigation was later billed again to the Bank of America case. As a result, the First District affirmed the trial court's order allocating attorney fees.

Angelheart v. City of Burbank,

___Cal. App. 3d___, 91 D.A.R. 8754, No. B046173 (July 18, 1991).

Fee Award Is Rejected for Case Conferring Private Benefits

In this proceeding, plaintiffs successfully challenged the City of Burbank's former regulation of large family day care homes, which violated the California Child Day Care Facilities Act, Health and Safety Code section 1596.70 *et seq.* As a result of plaintiffs' action, the trial court issued a peremptory writ of mandate commanding the city to establish a procedure for regulating large family day care homes which complies with the Act; Burbank subsequently enacted such an ordinance pursuant to the writ. Pursuant to Code of Civil Procedure section 1021.5, plaintiffs filed motion for attorneys' fees and costs totalling $71,286.62; after hearing on the motion, the trial court awarded plaintiffs attorneys' fees in the amount of $18,700. Both parties appealed this order.

The California Child Day Care Facilities Act states that "[i]t is the public policy of this state to provide children in a family day care home the same home environment as provided in a traditional setting." The legislature further declared "this policy to be of statewide concern with the purpose of occupying the field to the exclusion of municipal zoning, building and fire codes and regulations governing the use or occupancy of family day care homes for children. . . ." Based on this language, the Second District found that "the trial court reasonably could have determined that the action involved an important right affecting the public interest."

However, section 1021.5 also requires that "a significant benefit, whether pecuniary or nonpecuniary, [be] conferred on the general public or a large class of persons" as a result of the underlying action. Regarding this element, the Second District found "no evidence in the record to support the trial court's conclusion that all of the residents of Burbank seeking child care benefitted from the action. . . .There is no evidence that the Angelhearts' action, although successful and involving an important public policy, affected a large class of persons." Because the court found that "the trial court abused its discretion in finding the existence of one of the necessary statutory elements under section 1021.5," it determined that there was no basis for an award of fees and reversed the trial court's order.

In dissent, Judge Johnson wrote that "it would place an intolerable burden on plaintiffs to require them to 'prove' how many people will take advantage of the legal change they have brought about at a time shortly after the change has occurred. . . . It was entirely reasonable for the trial court to predict there would be enough 'large' home child care facilities created in Burbank in future years to estimate plaintiffs' legal action eventually will confer 'significant benefits' on a large number of Burbank citizens—children, parents, employers, and other citizens." Further, Judge Johnson wrote that "[t]his is a particularly appropriate case in which to require a local government to pay the plaintiffs' full attorney fees," noting that "by its very nature, the home child care field has no large 'chain' operations" which could bear the financial burden of challenging the city's regulation. "What this means, of course," wrote Judge Johnson, "is that were it not for the private attorney general doctrine codified in section 1021.5 city governments like Burbank could ignore state laws when the only ones affected by those laws are small businesses or modest income citizens like the Angelhearts."

On October 25, the California Supreme Court denied the Angelhearts' petition for review.

Huening v. Eu,

___Cal. App. 3d___, 91 D.A.R. 7768, No. C008543 (June 25, 1991).

Enactment Without Two-Thirds Vote Renders Ballot Argument Law Invalid

The Third District Court of Appeal has determined that Elections Code section 3564.1 "is invalid and of no force or effect because its enactment did not comply with the procedure specified in the Political Reform Act of 1974 (Government Code section 81000 *et seq.*)." Section 3564.1, which was added to the Elections Code in 1978, provides that "[a] ballot argument or a rebuttal argument which includes in its text the name or title of a person, other than the author of the argument, who is represented as being for or against a measure, shall not be accepted unless the argument is accompanied by a signed consent of that person." Opponents to Proposition 119, which appeared on the June 5, 1990 primary election ballot, attempted to include in the ballot pamphlet a statement reflecting the fact that the Chevron Corporation had contributed $25,000 to the committee supporting Proposition 119. Because the opponents had not obtained written consent to use Chevron's name, Proposition 119 proponents obtained a writ of mandamus ordering that the challenged portion of the rebuttal argument be deleted from the ballot pamphlet.

In this appeal, opponents argued that section 3564.1 purports to amend the Political Reform Act by restricting what may be included in a ballot argument, and that the Act requires that its provisions be amended by two-thirds vote of the legislature or by a vote of the electorate. The Attorney General acknowledged that section 3564.1 was enacted by the legislature but not with the concurrence of at least two-thirds of the membership of each house; however, the Attorney General contended that section 3564.1 was not an amendment to the Political Reform Act because the Act does not regulate the content of ballot arguments.

The court rejected the Attorney General's contentions, finding that "[a]lthough section 3564.1 is not contained within the provisions of the Political Reform Act itself, it is effectively an addition to it. Its effect on ballot arguments and hence the content of ballot pamphlets is the same as if it had been so included." Thus, the court held that because section 3564.1 was not enacted by a vote of two-thirds of each house or by the voters, as required by the Political Reform Act, it is invalid and of no force or effect.

Szkorla v. Vecchione,

231 Cal. App. 3d 1541, 283 Cal. Rptr. 219 No. D010412 (June 17, 1991).

MICRA Limit's Tort Exception Upheld

In this proceeding, the Fourth District Court of Appeal affirmed the decision of the San Diego County Superior Court that a battery verdict against a surgeon is not subject to a limit on damages.

Helen Szkorla sued Dr. Thomas Vecchione, a plastic surgeon, after he performed the third of three breast reduction surgeries on her in May 1982. The jury returned special verdicts against Dr. Vecchione on theories of professional negligence, lack of informed consent, and battery. The jury awarded Szkorla $600,000 in general damages for pain and suffering and $17,430 in special damages for the cost of future medical care. Dr. Vecchione appealed, contending, among other things, that Civil Code section 3333.2, one of the provisions of the Medical Injury Compensation Reform Act of 1975 (MICRA), limits general or noneconomic damages in any case against a health care provider to $250,000. On this point, Vecchione was joined in the appeal by several health care associations, including the California Medical Association, which filed amicus curiae briefs in support of Vecchione's position.

The Fourth District disagreed, citing *Waters v. Bourhis*, 40 Cal. 3d 424, 431-37 (1985), for the proposition that MICRA statutes apply only to actions "based upon [the provider's] alleged professional negligence. . . . In a non-MICRA action the plaintiff is not subject to (1) the $250,000 limit on noneconomic damages (Civ. Code section 3333.2). . . ." The Fourth District noted that the *Waters* court held that in hybrid actions of this type, where both viable MICRA (*i.e.*, negligence) and non-MICRA (*e.g.*, battery) theories are pursued and recovery could have been based on the non-MICRA theory, MICRA limitations would not apply. The Fourth District further concluded that the legislature did not intend the damage cap of section 3333.2 to apply to cases involving battery.

CALIFORNIA SUPERIOR COURTS

Tirapelle v. Davis,

No. 368220 (Sacramento County Superior Court).

Governor Wilson's 5% Pay Cut Challenged

In late September, the Wilson administration's Department of Personnel Administration (DPA) filed this action against state Controller Gray Davis, seeking to enforce Governor Wilson's order cutting the salaries of 27,000 state employees who are managers, supervisors, and political appointees by 5%. On September 23, Davis announced his refusal to cut the salaries on grounds the action taken by Wilson and DPA was illegal. Governor Wilson and DPA Director David Tirapelle contend that the cuts will save $35 million or 750 state jobs over the course of the year. The court was expected to rule on the administration's motion for preliminary injunction on October 9.