

UNITED STATES SUPREME COURT

California v. American Stores Co.,

___ U.S. ___, 90 D.A.R. 4678
No. 89-258 (April 30, 1990).

Section 16 of the Clayton Act Authorizes Divestiture in Private Actions

The U.S. Supreme Court held that the State of California could sue for divestiture under section 16 of the federal Clayton Act. In this case, the California Attorney General sought a preliminary injunction of the merger of American Stores and Lucky Stores, claiming that it violated federal antitrust laws and would harm consumers in 62 California cities.

Previously, the Ninth Circuit had ruled that section 16, which authorizes suits by private parties "threatened by loss or damage," did not provide for divestiture as a remedy. This ruling conflicted with the First Circuit's holding in *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404 (1985).

Reversing the Ninth Circuit, the Supreme Court held that section's 16 language permitting "injunctive relief...against threatened loss or damage by a violation of the antitrust laws" is expansive enough to encompass divestiture. The Court also examined the legislative history and found nothing that foreclosed a private divestiture remedy. Instead, the Court found that "[p]rivate enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." The Court further found that "[s]ection 16, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger."

NINTH CIRCUIT COURT OF APPEALS

Six Mexican Workers v. Arizona Citrus Growers,

904 F.2d 1301, 90 D.A.R. 5438,
Nos. 89-15269 and 89-15622 (9th Cir.,
May 21, 1990).

Ninth Circuit Endorses Use of Cy Pres Distribution of Unclaimed Class Action Damages

The Ninth Circuit approved the use of *cy pres* distribution of unclaimed

damages in a class action brought under the Farm Labor Contractor Registration Act. The plaintiff class consisted of 1,349 undocumented Mexican workers who were employed by defendants during the 1976-77 picking season.

Approving certification of the class, the Ninth Circuit found that the large number of unlocatable class members does not prevent certification. According to the court, "[w]here the goals of the underlying statute are strictly compensatory, a class action resulting in substantial unclaimed funds will not further that goal. But where the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the 'superior' and only viable method to achieve those objectives, even despite the prospect of unclaimed funds."

The court endorsed the use of a *cy pres* recovery to distribute unclaimed funds, and stated that federal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds. However, the court set aside the *cy pres* remedy adopted by the trial court, finding that it did not "adequately target the plaintiff class" and failed "to provide adequate supervision over distribution."

White v. City of Norwalk,

___ F.2d ___, 90 D.A.R. 4211,
No. 88-6430 (9th Cir., April 18, 1990).

Restricting Speakers at City Council Meeting Does Not Violate the First Amendment

The Ninth Circuit held that a Norwalk city ordinance which provides for the removal of any speaker who "make[s] personal, impertinent, slanderous or profane remarks to any member of the Council, staff or general public" during a city council meeting does not violate the U.S. Constitution. Although the plaintiffs challenged this ordinance as imprecise, content-oriented, fatally vague, and overbroad, the court accepted Norwalk's argument that the ordinance can be interpreted as stating that removal may be ordered only when someone making a proscribed remark is acting in a way that actually disturbs or impedes the meeting.

The court stated that while such meetings have been regarded as limited public forums, "[p]ublic forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact." The court noted that there are other valid restrictions on a speaker's right to be heard, such as restricting

speakers to the subject at hand at a meeting and stopping a speaker when his/her speech becomes irrelevant or repetitious. Likewise, the court held, prohibiting speech which disrupts, disturbs, or otherwise impedes the orderly conduct of the Council meeting is a valid restraint and does not violate the federal Constitution.

CALIFORNIA SUPREME COURT

Delaney v. Superior Court,

___ Cal.3d ___, 90 D.A.R. 4870,
No. S006866 (May 3, 1990).

Unpublished, Non-Confidential Observations Protected by Shield Law

The California Supreme Court held that California's "shield law" protects unpublished, non-confidential observations by reporters. In *Delaney, Los Angeles Times* reporters Kopetman and Bertero were called to testify by a criminal defendant to show that the defendant did not consent to a search by police. At the time of the search, the reporters were accompanying members of the Long Beach Police Department on patrol. The *Times* subsequently published a story about the incident, but did not refer to whether the defendant had consented to the search. In a subsequent municipal court proceeding, the reporters refused to answer any questions relating to whether Delaney had consented. The municipal court found that the need for the reporters' testimony outweighed their claim of immunity under the shield law, and cited both reporters for contempt. The Superior Court of Los Angeles County found that the shield law provided the reporters with immunity from contempt. On appeal, the court of appeal held that the shield law does not give a newsperson the right to refuse to testify as to his/her observations of a public event.

The Supreme Court held that Article I, section 2(b) of the California Constitution protects reporters from being adjudged in contempt for refusing to disclose "any unpublished information," including non-confidential, eyewitness observations of an occurrence in a public place.

However, the court also held that courts could still require reporters to disclose such information in cases where nondisclosure would deprive the defendant of his/her federal constitutional right to a fair trial. In determining whether disclosure is warranted, the



court developed a test which accommodates conflicting constitutional rights. As a threshold matter, the criminal defendant must show "a reasonable possibility [that] the information will materially assist his defense." Next, the court must consider the importance of protecting the unpublished information in light of the following factors: (a) whether the unpublished information is confidential or sensitive; (b) the interests sought to be protected by the shield law; (c) the importance of the information to the criminal defendant; and (d) whether there is an alternative source of the unpublished information. The court also noted that these factors must be balanced on a case-by-case basis, according to their relative importance, and that an in camera hearing might be required.

Applying the test, the court found that the trial court struck the correct balance in requiring the reporters to testify. The court concluded that because Delaney's personal freedom was at stake, and the reporters were not being asked to breach a confidence or to disclose sensitive information that would in any way restrict their news-gathering ability, Delaney was entitled to the reporters' testimony.

CALIFORNIA COURTS OF APPEAL

Grier v. Kizer,

___ Cal.App.3d ___, 90 D.A.R. 3641, No. B036081 (April 2, 1990).

Medi-Cal Audit Method Must Comply with Administrative Procedure Act

The Second District Court of Appeal held that an in-house method used by the California Department of Health Services (DHS) to audit Medi-Cal providers should have been promulgated as a regulation in accordance with the Administrative Procedure Act (APA). At issue was a random sampling plan used by DHS which selected a sample size of 100 pages from a 9,711-page record of all claims for services rendered to Medi-Cal beneficiaries by the Petitioner. Based on an audit of the sample and an extrapolation of the audit results, DHS estimated an overpayment to Petitioner of \$654,592. Petitioner challenged the auditing method adopted by DHS as violative of the APA and thus void and unenforceable.

In finding for the Petitioner, the court rejected DHS' argument that the audit method was exempt from the APA's rulemaking requirements as an internal management rule. Reviewing relevant

caselaw, the court concluded that "the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow."

The court noted that the APA, to which the Department is subject, was enacted to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations promulgated by the state's many administrative agencies. The APA requires an agency to give notice of a specified proposed action, issue a statement of the specific purpose of the action, and afford interested persons the opportunity to present comments on the proposed action. Furthermore, the court noted that the Office of Administrative Law (OAL) is responsible with the orderly review of administrative regulations, and may make determinations as to whether a rule which has not been adopted pursuant to the APA is in fact a regulation subject to APA rulemaking procedures.

During the pendency of the court proceeding, OAL determined that the Department's audit procedure is a regulation for purposes of the APA. Since the audit technique was not duly adopted as a regulation pursuant to the APA, OAL deemed it an invalid and unenforceable "underground" regulation. The court noted that "OAL's determination in this regard is entitled to due deference."

Watson et al. v. California Fair Political Practices Commission,

Watson et al. v. The Rules Committee of the Senate of the State of California,

___ Cal. App. 3d ___, 90 D.A.R. 1312, No. B042250/B041680 and No. B041680/B042250 (February 2, 1990).

Proposition 73's Restriction on Newsletters Upheld

The Second District Court of Appeal upheld Proposition 73's ban on the use of public funds for newsletters or other mass mailings by a legislator after he/she has filed nomination documents for local, state, or federal office. (See CRLR 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.)

In two cases brought by legislators, the court rejected the argument that the ban interferes with the legislature's authority to govern its internal affairs

and make its own rules. On this point, the court stated: "[w]hile there can be no question that both the Senate and the Assembly possess the power to create and administer their own internal affairs, it does not strike us that the newsletter program in either house falls within the exclusive sway of the rule making process. These programs extend far beyond the halls of the Legislature and impact virtually every citizen of this state."

The court also found that the rule making authority is limited to the internal workings of the Senate and Assembly and does not encompass matters which are addressed to the world outside the legislature. The court rejected plaintiffs' argument that this provision constitutes an impermissible attempt at rule making by the electorate. The court found it to be, instead, a valid effort by which the electorate seeks to control the allotment of limited state revenues and reform the electoral process.

The court also rejected the argument that the ban violates a legislator's right to communicate with the electorate, freedom of association, the right to vote, to petition government for the redress of grievances, and to instruct and recall elected representatives. According to the court, the federal Constitution simply bars governmental interference with those rights; it contains no guarantee that the government will monetarily subsidize the exercise of that right.

Finally, the court rejected arguments that the prohibition on the use of public funds for legislative newsletters is unrelated to any legitimate state purpose and that the ban violates the single subject rule. It found that the ban is directed at removing some of the substantial advantages enjoyed by incumbent officeholders over their challengers, and is reasonably related to Proposition 73's overall goal of reforming the political process.

California Common Cause v. Fair Political Practices Commission,

___ Cal. App. 3d ___, 90 D.A.R. 6021, No. C005458 (May 30, 1990).

Proposition 73's Ban on Public Financing of Campaigns Upheld

The Third District Court of Appeal upheld Proposition 73's prohibition on the use of public monies for political campaigns. The court unanimously rejected Common Cause's argument that Government Code section 81000 *et seq.* impermissibly binds future legislatures from enacting any legislation regarding



the public funding of political campaigns. The court concluded that section 85300 does not conflict with any constitutional provision and that it "merely forbids the expenditure or use of public monies for the purpose of seeking elective office."

The court found Common Cause's argument necessarily implied that section 85300 is an absolute, inflexible provision beyond the power of the legislature to change. However, as the court noted, section 85300 may be amended by a two-thirds vote of the legislature and approval by the Governor.

Times Mirror Co. v. Superior Court,

Cal. App. 3d ____, 90 D.A.R. 946,
No. C005750 (January 23, 1990).

*Governor's Appointment Schedules
Subject to Public Disclosure*

The Third Appellate District held that the Governor's appointment schedules and calendars are public records which must be disclosed to persons seeking access to those materials under the California Public Records Act (Government Code section 6250 et seq.). The court rejected the Governor's claim that the materials are exempt from disclosure under Government Code section 6254 ("correspondence of and to the Governor or employees of the Governor's office"). The court concluded that "correspondence" does not include "all written communications," but is limited solely to "communication by letter."

The court also rejected the Governor's claim that disclosure of the schedules is contrary to the public interest. It found that disclosure would not intrude on either the Governor's privacy or the deliberative process, and that any legitimate security concerns could be adequately addressed by disclosure of non-exempt material following an *in camera* review.