UNITED STATES COURT OF APPEALS

State of California v. U.S. Department of the Navy,

___F. 2d___, 88 D.A.R. 5258, No. 86-1972 (9th Cir. Apr. 27, 1988).

Federal Court Has No Jurisdiction for Suit Brought by State to Enforce Clean Water Act

The Ninth Circuit Court of Appeals has held that the State of California may not bring a suit under 33 U.S.C. section 1319(d) to enforce the Clean Water Act, by seeking civil damages in federal court. The state's sole remedy is a suit in state court under state law, using the state's delegated authority to enforce the Act.

The state brought suit against the Navy for violating its discharge permit in San Francisco Bay. It sought recovery of civil penalties under sections 505 and 309 of the Clean Water Act, and under state Water Code sections 13385 and 13386. The district court granted defendant's motion to dismiss, holding that the state is not a "citizen" entitled to bring suit under section 505; that section 309's enforcement powers are vested solely in the Administrator of the Environmental Protection Agency (EPA); and that the Act creates no independent jurisdictional basis to allow a federal suit against a federal agency by a state.

The Ninth Circuit, per Judges Choy, Goodwin, and Tang, affirmed on appeal. The issue of section 505 coverage was dropped after the U.S. Supreme Court's decision limiting that section to ongoing, as opposed to wholly past, violations in *Gwaltney v. Chesapeake Bay Foundation*, ___U.S.___, 108 S.Ct. 376, 384-85 (1987). The court held that section 309, which permits up to $10,000 per day in civil penalties, may be invoked only by the EPA Administrator. In addition, the court rejected the argument that the state's delegated authority to enforce the Clean Water Act in lieu of the EPA if it has an enforcement plan approved by the EPA, provides an independent basis for federal jurisdiction. The court held that the state was limited to bringing suit in state court for violations of the state law and regulations.

UNITED STATES DISTRICT COURT

Badham v. Eu,

88 D.A.R. 5216, No. C-83-1126 RHS (N.D. Cal. Apr. 21, 1988).

California Congressional Redistricting Does Not Violate Equal Protection

A three-judge panel of the U.S. District Court for the Northern District of California has held that the congressional districts created by the California legislature in 1982 do not violate the equal protection clause and that the plaintiffs (Republican congressional representatives and certain registered California Republicans) could not allege facts to support their claims.

Following the 1980 census results, the California legislature passed AB 301 in September 1981, which redistricted the state in order to accommodate an increase in congressional seats in the U.S. House of Representatives. The Republicans immediately began a petition drive to subject the legislation to referendum. They were successful and the matter was placed on the June 1982 ballot. In collateral litigation, the California Supreme Court ordered that the challenged districts be used for the June 1982 and November 1982 elections because they were the only practical alternative. The referendum was approved by the voters in June, and the redistricting was nullified.

In the November 1982 general election, 28 Democrats and 17 Republicans were elected to Congress under the AB 301 districts. In that same election, Republican George Deukmejian was elected Governor, defeating Democrat Tom Bradley. The Democrats called a special session in December 1982, drafted reapportionment legislation which was essentially identical to the districts drawn in AB 301, and had the law (AB 2X) signed by the departing Governor Brown.

This action challenging AB 2X was filed shortly thereafter, alleging both federal constitutional and state grounds. A three-judge panel was convened for the federal constitutional challenge. The panel immediately invoked abstention to allow the state courts to determine the state issues, which might obviate the need for a decision on the federal grounds. Procedural battles ensued without conclusive result.

In the meantime, the U.S. Supreme Court issued its opinion in *Davis v. Bandemer*, ___U.S.___, 106 S.Ct. 2797 (1986), in which it held that a constitutional equal protection claim alleging partisan gerrymandering was justiciable, with certain standards for determining what constituted a violation.

The three-judge panel then took up this case on an amended complaint and a motion to dismiss by defendants. The panel, per Judges Poole and Zirpoli, held that the challenged redistricting did not meet the "threshold effects" test of *Davis v. Bandemer*, and on the facts as alleged could not do so. Although the Supreme Court in *Davis* issued no majority opinion, the panel was able to discern the following test from the plurality. A plaintiff in an equal protection challenge to alleged gerrymandering must show: (1) discriminatory intent; and (2) a threshold showing of discriminatory effect including both (a) an actual or projected history of disproportionate results, and (b) strong indicia of a lack of political power and denial of fair representation. The threshold showing requires more than mere failure to meet mathematical expectations, or differential difficulty in winning elections.

The panel found sufficient allegations of discriminatory intent. The panel found that there was some disproportionate impact, by comparing the number of votes received by each party to the number of resulting representatives. However, each side hotly contested whether receiving 40% of the seats while receiving 47-50% of the votes case rose to the level of seriousness to require judicial intervention.

The panel avoided the question by holding that regardless of the seriousness, the Republicans could not meet their burden on the second prong of the effects test: lack of political power. The court held that there were not, and could not be, any allegations that the Republican party had been "'shut out' of the political process" or that the political process had been inhibited in any way or that any limitations had been placed on Republican participation. Although disproportionate representation might suffice for the first prong, a higher showing is required for the second prong.

The panel dismissed with prejudice and denied leave to amend, and noted that the Republicans could not allege an utter failure of the political process or total lack of political power. The panel cited, *inter alia*, the Republicans' success in capturing 40% of the seats,

which prevents their being ignored in Congress; the fact that Republicans hold the Governor's chair, one of the two U.S. Senate seats, and have for seven years controlled the White House; and their success in swiftly overturning the first redistricting at the polls. The panel held that, under these facts, "California Republicans represent so potent a political force that it is unnecessary for the judiciary to intervene...to protect the rights of a disadvantaged political or racial minority."

In addition, the court rejected causes of action alleging that the redistricting plan violated the one-person, one-vote requirement, the Republicans' first amendment rights, or the constitutional guarantee of a "Republican Form of Government." The court found no precedent or facts to support the averments made.

The case has been appealed, and the U.S. Supreme Court has denied a petition for expedited proceedings.

CALIFORNIA SUPREME COURT

Walters v. Weed,

___Cal.3d___, 88 D.A.R. 5369, No. S.F. 25130 (April 28, 1988).

Students May Vote According to Prior Address Where That Address Has Been Abandoned as Domicile, But No New Domicile is Established

The California Supreme Court has turned down a challenge to the 1983 Santa Cruz City Council election based on alleged illegal votes cased by students. The court held that although a student may have left a domicile without any intention of returning, that address remains the voter's lawful address for voting purposes, until a new, permanent domicile is established.

In the 1983 election for four seats on the Santa Cruz City Council, Jane Weed received the fourth highest number of votes. The sixth-place finisher had 145 fewer votes than Weed. (The fifth-place finisher was, for mathematical reasons, irrelevant to the case.) Based on a Santa Cruz County Grant Jury report that found voting irregularities in the four on-campus precincts at the University of California at Santa Cruz (UC Santa Cruz), plaintiffs, a group of individual citizens, contested Weed's election, alleging that 472 voters, all students at UC Santa Cruz, cast illegal votes. They produced 292 voters at trial, 193 of whom testified that although they had formerly been domiciled and registered to vote at on-campus address and precincts, they had returned in the fall of 1983 with the intention of seeking new, off-campus housing. Under Election Code section 200(b), a person's domicile is defined as that place in which the person's habitation is fixed, where the person intends to stay, and to which the person intends to return when away. Alleging the voters no longer met the third part of the test, plaintiffs sought to invalidate the votes, and declare the sixth-place finisher the true winner.

Pursuant to a stipulation between the parties which was not at issue on appeal, the trial court determined that 182 illegal votes were necessary to set aside the election results and declare the sixth-place finisher the winner. The trial court found that of the 193 who testified they returned to school with the intention of finding off-campus housing, 113 had acquired new domiciles the month before the election, and had voted illegally at their old domiciles. However, that was insufficient to swing the election. The other 80 were found not to have established new domiciles and so to have lawfully voted according to their old addresses.

The appellate court reversed, holding that everyone who had left their old domiciles was ineligible to vote at the old address, regardless of whether or not they had established new domiciles for voting purposes. The court held that the failure to meet all of the standards in section 200(b) rendered the votes illegal.

The Supreme Court, per Justices Panelli, Mosk, Broussard and Arguelles, reversed. The court held that although the precise terms of section 200(b) would seem to invalidate the domiciles and hence the votes, that was the beginning and not the end of the analysis. In particular, the court looked also to sections 243 and 244 of the Government Code, which define legal residence, and, according to the court, "rest on the well established principle that every person has in law a domicile or...'everybody belongs somewhere.'" The court reasoned that the statutory scheme contained a gap, in that persons who had left a prior residence but had not yet established a new permanent domicile would be without a domicile under the Election Code, but would necessarily have one under the Government Code. The court held that to adopt the appellate court's reasoning would effectively disenfranchise those who were in the process of moving, and so adopted a different alternative to fill the gap: a person may vote at his/her prior residence, even if it has been abandoned without the intent to return, if the person has not yet established a new residence in which he/she intends to remain.

The court buttressed its reasoning by noting that this solution was less likely to permit voter fraud or "precinct shopping" than the appellate court's alternative, because a person could not set up a residence shortly before the election solely for the purpose of voting. Moreover, the court pointed out that the lower court's decision would heavily impact upon students, who generally are between domiciles in the summer months and early fall when voter registration takes place. Prior cases establish that voting requirements which fall disproportionately upon and disenfranchise young adults or students are unconstitutional.

Evangelatos v. Superior Court,

___Cal.3d___, 88 D.A.R. 4984, No. S000194 (April 21, 1988).

Proposition 51 Is Constitutional and Operates Only Prospectively

The California Supreme Court has upheld Proposition 51, which limits joint and several liability for noneconomic damages, against a facial constitutional challenge based on due process and equal protection. At the same time, the court limited the measure's effect only to those causes of action which accrue after its passage, holding it has no impact on pending cases.

Proposition 51 was passed by the voters at the June 6, 1986 primary election. It alters the common law rule that joint tortfeasors are jointly and severally liable for all damages regardless of fault. Under Proposition 51, codified at Civil Code sections 1431-1431.5, defendants are jointly liable for all economic damages suffered by the plaintiff, but severally liable for noneconomic damages, as determined by the degree of fault found by the jury. (For a full explanation of Proposition 51 and the facts of the *Evangelatos* case, see CRLR Vol. 7, No. 3 (Summer 1987) p. 137.)

The Supreme Court, per Justices Arguelles, Mosk, Broussard and Panelli, joined in concurrence by Justices Kaufman, Eagleson and Anderson sitting by designation, held that the law does not violate either the due process or equal protection clauses of the state or federal constitutions. Briefly, the law is not unconstitutionally vague; ambiguities exist in every statute and it is the province of the appellate courts to re-

solve problems on a case-by-case basis. The distinctions the law draws—between economic and noneconomic damages, and between plaintiffs injured by solvent versus insolvent joint tortfeasors—are not impermissible under the equal protection clause. There is a rational basis for distinguishing economic from noneconomic damages, and for providing more protection for the former. The distinction between solvent and insolvent tortfeasors is not one that the state draws at all, but is simply fate in which the state plays no role. The court's analysis in both issues draws heavily from prior cases rejecting constitutional challenges to the Medical Injury Compensation Reform Act of 1975 (MICRA), the medical liability tort limitations passed in 1975.

On the issue of retroactivity, the court was sharply split. Justices Arguelles, Mosk, Broussard and Panelli held that the act did not apply to any cause of action which accrued before the effective date of the act. In so doing, the court resolved a dispute between the districts. The First District Court of Appeal, in *Russell v. Superior Court*, 185 Cal.App.3d 810 (1986), held that the law had no retroactive effect. In the instant case, the Second District disagreed, holding that it applied to all cases which had not yet gone to trial as of the election date. The Supreme Court examined in detail the language of the measure, the supporting and opposing ballot arguments, and the retroactivity of similar limitations passed in other states. The court found nothing in the statute intended to make it retroactive; under Civil Code section 3, and well established caselaw, a statute is prospective only unless its plain language declares otherwise. The court also found no reference by the sponsors or in the ballot arguments read by the voters to suggest a retroactive intent.

The court also rejected policy arguments that because the initiative was designed to address a perceived "crisis" in liability insurance cost and availability, it must apply immediately to all cases. The court noted that insurance coverage for accidents that occurred before the passage of the act was already bought and paid for on the basis of joint and several liability; retroactive application would do nothing but create a "windfall" for insurance companies. To the extent that the statute was intended to bring down premium costs or increase liability insurance availability, prospective application of the law provided all the protection that was needed to have these effects; retroactive application would have no impact whatsoever on prospective insurance projections.

The court also relied on its prior decision holding MICRA to be prospective only in effect, and decisions on statutes from other states, all of which were prospective in effect.

Citizens for Public Accountability v. Desert Health Systems, Inc., et al.,

___Cal.3d___, 88 D.A.R. 6620,
No. S004970 (May 5, 1988).

Supreme Court Declines to Hear Case to Resolve Conflict in Applicability of Brown Act to Private Corporations

The California Supreme Court has denied the petition for review filed by private corporations that were ordered to comply with the Brown Act after they took over the operations of a public hospital district. The Fourth District's decision in the instance case is in direct conflict with the First District Court of Appeal's decision in a similar case. (See CRLR Vol. 8, No. 2 (Spring 1988) p. 128 and Vol. 7, No. 4 (Fall 1987) p. 112 for complete background information.)

The Supreme Court, in the same order denying the hearing, ordered the Fourth District's decision decertified for publication under California Rule of Court 976.

CALIFORNIA COURTS OF APPEAL

California Trial Lawyers Association v. March Fong Eu,

___Cal.App.3d___, 88 D.A.R. 4887,
No. C003936
(3d Dist., Apr. 15, 1988).

Insurance Industry Initiative Violates the Single Subject Rule

The Court of Appeal for the Third District held that an insurance initiative sponsored by the Association of California Insurance Companies violates the single subject rule in Article II, Section 8, subdivision (d) of the California Constitution. Calling the initiative "a paradigm of potentially deceptive... provisions," the court issued a writ prohibiting the Secretary of State from putting the initiative on the November 1988 ballot.

The California Trial Lawyers Association (CTLA) sought a writ of mandamus to prevent the Secretary of State and Registrar of Voters from placing the proposed insurance initiative on the ballot. The initiative, which is over 120 pages long and contains 67 sections, called for the establishment of no-fault insurance for auto accident injuries. The proclaimed purpose of the initiative under Section 3 is "'to control the cost of insurance in California.'" CTLA claimed that an "inconspicuously" placed section of the initiative was not germane to the initiative's stated purpose. Section 8 of the initiative would: (1) allow insurers to make unlimited campaign contributions to public officials; and (2) exempt public officials from complying with laws that prohibit them from participating in any decision affecting their contributors.

The insurance companies requested that the court defer consideration of the merits until after the November 1988 election, citing *Brosnahan v. Eu*, a single subject rule challenge to the 1982 "Victims' Bill of Rights." The court distinguished *Brosnahan*, wherein the Secretary of State had begun verifying signatures and the Superior Court had ordered the initiative placed on the ballot before the Supreme Court rendered its decision, from the instant case where the initiative was still in the signature gathering stage. Also, the court ruled that because the initiative presented such a "palpable transgression of the single-subject rule," its validity should be determined before the November election.

The court held that an initiative's "singleness may be determined by the extent to which its provisions are germane to the general subject." The insurance companies argued that the section could be tied to the stated purpose of the initiative (reducing the costs of insurance) because it would guarantee the insurance companies' right to participate in the political process, thus reducing costs to consumers. The court dismissed this contention, stating that it is just as likely that the insurance companies' political participation will increase costs to the consumer. The section which would exempt public officials from disqualifying themselves from acting in matters concerning their contributors could not be explained as germane to the stated purpose of the initiative by the insurance companies or the court.

Finally, the court refused to delete the section from the initiative, citing Article II, Section 8(d) of the California Constitution, which states that single-subject violations cannot be cured by severing them. The court ordered a writ of mandate directing the Secretary of State to disqualify the initiative.

CALIFORNIA SUPERIOR COURTS

American Federation of Labor and Congress of Industrial Organizations, et al. v. Deukmejian, et al.,

No. 88-C-11393
(Sacramento Superior Court).

Labor Unions and Environmental Groups Challenge Exemptions to Proposition 65 for Food, Drugs, and Cosmetics

A coalition of labor and environmental groups has filed suit challenging Governor Deukmejian's grant of a wholesale exemption from compliance with Proposition 65's warning requirements for all food, drugs, and cosmetics sold in California.

Proposition 65 was passed by the voters at the November 1986 general election. It requires, *inter alia*, that consumers be provided with warnings whenever a product contains a chemical known to the state to cause cancer, birth defects, or other reproductive harm. The Governor appointed the Health and Welfare Agency as the lead agency to implement the law, including issuing interpretive regulations.

The Agency did so, effective February 27, 1988. Included among them is a "temporary" blanket exemption for all food, drugs, and cosmetics from Proposition 65's warning requirements. According to the Deukmejian administration, so long as those products are regulated by the federal government and in compliance with federal regulations, there is no need for Proposition 65 warnings. Proponents of the law counter that Proposition 65 already exempts any product from the warning requirement, if the manufacturer can establish that the chemical is safe or is present in amounts so small that the product is safe. Therefore, they argue, if the product is safe, it is already exempt and needs no blanket exemption; conversely, if the federal standards are too lax—federal regulations do not cover the full range of chemicals addressed under Proposition 65 and those that are covered are under different standards—then Proposition 65 is needed because it provides a higher level of protection.

The suit seeks declaratory and injunctive relief to establish there is no authority for a blanket exemption. At this writing, the matter has not been set for hearing.