UNITED STATES SUPREME COURT

Wright v. Roanoke Redevelopment and Housing Authority,
___U.S.___, No. 85-5915, 87 D.A.R. 367 (Jan. 14, 1987).

Tenants Have Private Right Of Action To Enforce Federal Law On Rent Ceiling

The United States Supreme Court held that tenants have a private right of action under 42 U.S.C. section 1983 against a public housing authority which violates a federal law limiting rents in public housing to a specified percentage of the tenants' income. The case is a potentially important one in interpreting the area of law currently in flux on when a private plaintiff may maintain a private right of action under section 1983 for state violations of federal law.

The Housing Act of 1937, 42 U.S.C. section 1401 *et seq.*, as amended by the Brooke Amendment, specifies that public housing tenants pay rent set at a formula determined by their monthly incomes. The federal agency charged with enforcement, the Department of Housing and Urban Development (HUD), has consistently interpreted "rent" to include a reasonable amount for use of utilities. *See* 24 C.F.R. section 685.740 *et seq.*

Plaintiff tenants alleged that defendant public housing authority did not establish the reasonable utility services pursuant to HUD regulations, and so was illegally charging the tenants for "excess" utilities which should have been part of the rent. They sued under 42 U.S.C. section 1983, alleging a deprivation of their civil rights.

The district court granted summary judgment for defendants, holding that the Brooke Amendment did not provide any private right of action for enforcement. Rather, the court reasoned, rights conferred by the Brooke Amendment were enforceable only by HUD. 605 F.Supp. 532 (W.D.Va. 1984). The Fourth Circuit affirmed, drawing the analogy that HUD was the trustee for the tenants, and therefore only it could bring suit. 771 F.2d 833 (4th Cir. 1985).

The Supreme Court, per Justices White, Brennan, Marshall, Blackmun and Stevens, reversed. The Court held that (1) an enforceable right is created by the statute; and (2) Congress evinced no intent to vest enforcement exclusively in HUD. On the first point, there was no substantial dispute that the statute and the regulations created enforceable rights; even the Fourth Circuit had so held. Thus the case fell outside the ambit of the landmark *Pennhurst* case, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), which sharply limited the private causes of action available to plaintiffs seeking to enforce federal law.

The case turned on the second point, with the Supreme Court overturning the appellate court's determination that Congress had created a scheme of administrative enforcement which foreclosed a private right of action under section 1983. Unlike earlier cases, *see, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984), there is no specific judicial or administrative remedy that would preclude a private right of action under section 1983. Although there is an administrative grievance procedure, that procedure does not contemplate adjudicating disputes dealing with the Brooke Amendment, or class actions; moreover, it is at bottom a state procedure, which generally does not preclude section 1983 suits.

Justices Rehnquist, Scalia, O'Connor and Powell dissented, and would have held that no enforceable rights were created by the Brooke Amendment or its implementing regulations.

CALIFORNIA SUPERIOR COURTS

Rebney v. Wells Fargo Bank, Abascal v. Crocker National Bank,
San Francisco Superior Court, Nos. 720307, 720309 (Feb. 15, 1987).

Class Action Settlement Against Banks For Overdraft Charges Disapproved

In a surprise decision on a proposed class action settlement involving, *inter alia*, excessive bank charges for bounced checks, the San Francisco Superior Court ruled that the settlement could not be approved because the class representatives could not represent all the class members affected by the settlement.

For several years, many suits have been pending against almost every major bank in California for excessive fees charged on checking accounts for, among other things, checks returned for Nonsufficient Funds (NSF, or bounced checks) or for Uncollected Funds (UCF, or where the deposit against which the check is written has not yet cleared); stop payment orders; counter checks; wiring funds; and a host of other service charges. Generally speaking, all of the suits are class actions, each distinguishable by classes charged for particularized fees for services against particular banks during particular time periods. The gravamen of the suits is, for example, that banks charge $10 or more for NSF checks which allegedly cost the banks no more than $1 to process.

The suits had been wending their way through the court system, with many stayed until the various legal theories were tested. The legal theories —usually breach of contract, unconscionability and violations of the Unfair Business Practices Act—were unsettled until the California Supreme Court decided *Perdue v. Crocker National Bank*, 38 Cal. 3d 913 (1985). The court held that the signature card for checking accounts did constitute a contract, but that it was a contract of adhesion, imposing on the banks a duty of good faith and fair dealing with their customers in regard to imposing and changing fees and service charges.

Following this widely-publicized decision, the cases began to move again toward trial. In September 1986, the first of the cases slated for trial were announced as settled. Following lengthy negotiations in which former U.S. Attorney General Benjamin Civiletti served as mediator, attorneys for two of the plaintiff classes—those against Crocker and Wells Fargo, which had merged in March 1986 for NSF charges incurred during the 1970s and early 1980s—announced a comprehensive settlement.

The settlement purported to compromise all claims for all charges against the defendant banks. The settlement included an amended complaint that expanded the class to include all bank consumers—checking account holders as well as savings and other account holders—back to the date of the original class and all future account holders, for not only NSF charges, but an additional twenty distinct service charges. Monetary relief was accorded only to those who no longer had accounts at the banks, for 30% of each NSF charge the depositor could document back to 1973. Those who still held accounts were given the choice of choosing one of two services the banks were marketing—overdraft protection or a credit card—free for one year. NSF charges were rolled back for one year, but an increased fee of $15 thereafter was ratified. All future suits were barred. There were also minor changes mandated in notice to consumers and the handling of NSF checks

for small amounts. In essence, the settlement adopted the banks' contention that each account carried a "bundle" of services that could not be segregated.

The proposed settlement evoked protests from consumer advocates other than the settling attorneys. In presentations to the court, as well as an advertisement signed by the class representatives and Ralph Nader, the settlement was criticized for reaching out to settle other cases, for providing a "blueprint" for other banks' suits which was disadvantageous to consumers, and for the magnitude of the $3.65 million attorneys' fees included in the settlement. The class attorneys defended the settlement on the grounds that it was the best that could be achieved in the face of difficult proof problems and adverse decisions on the merits in other jurisdictions, and that the settlement was worth as much as $100 million to the class. The banks did not verify the cost to them, but did assert that it was rational way to settle all the suits at once, and comported with their "bundle of services" theory.

San Francisco Superior Court Judge Isabella Grant gave preliminary approval to the settlement, allowing it to be sent as notification to all class members for objection and opting out. Following a hearing, Judge Grant reversed position and disapproved the settlement, holding that the class could not be certified for settlement because it was expanded to include fees other than NSF charges. She pointed out that until the final stages of negotiations, the ten-year history of the litigation had focused solely on NSF items. She specifically rejected the banks' contention that banks provide a bundle of services that must be considered in the context of the entirety of the bank-customer relationship. NSF charges are imposed on less than 10% of all checking accounts, and only half of checking account customers also have savings accounts. In particular, the class representatives had only checking accounts, and incurred only NSF charges.

The court therefore held that there were potentially antagonistic divergencies within the expanded group of all bank customers that prevented approval of the proposed class for settlement. The court took special aim at the banks' preference for the "bundle of services" theory as the very source of the divergencies since, if true, charges for one service might well subsidize another. Moreover, the services traditionally had separate charges based not only on cost but also deterrence. Putting all charges into a single monthly service fee would force some customers to pay for services they never in fact use. Given these facts, the court held there was not a sufficiently well-defined community of interest among the plaintiff class members. This lack of community was evidenced by, on the one hand, the lack of any benefit afforded the NSF class for agreeing to expand the class to achieve settlement and, on the other hand, no monetary benefit at all for the other class members pulled into the expanded class.

According to all sides, the decision has eliminated any further possibility of settlement, and the cases will move to trial.

AFL-CIO, et al. v. Deukmejian,
Sacramento Superior Court,
No. 348195A2

Suit Filed To Challenge Governor's Interpretation of Proposition 65

A coalition of labor, environmental and political groups have filed suit against Governor Deukmejian for his failure to include on the list of cancer-causing chemicals all of the substances allegedly required by Proposition 65.

Proposition 65, passed by California voters by a nearly two-to-one margin at the November 1986 general election, requires, *inter alia*, that the Governor on or before March 1, 1987 publish a list of "those chemicals known to the state to cause cancer or reproductive toxicity." Following publication, those chemicals will be subject to strict standards regarding exposure to the public or introduction into drinking water sources. The list is to be updated annually, as chemicals are identified as causing cancer and reproductive toxicity in the opinion of the state's qualified experts appointed by the Governor. The law requires that the first list "shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and ... Section 6382(d)." Those Labor Code sections identify the lists of carcinogenic chemicals published by the National Toxicology Project (NTP) and the United Nations International Agency for Research on Cancer (IARC). Discarding overlapping items, the combined NTP and IARC lists include 264 chemicals.

On February 27, the Governor published a list of only 29 chemicals, interpreting the initiative to require only the listing of chemicals shown to cause cancer in humans, to the exclusion of those established by scientific protocol in laboratory tests to be carcinogens or reproductive hazards.

A petition for a peremptory writ of mandate and injunctive relief was immediately filed by the AFL-CIO, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Campaign California, Citizens for a Better Environment, Silicon Valley Toxics Coalition, and farmworker Bernardo Huerto. The suit seeks a writ directing the Governor to immediately issue an amended list adding the remaining chemicals listed by NTP and IARC. The suit is pending in Sacramento Superior Court.