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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Database Printout	[Lexis Nexus - State Justices Apply Privacy Rule to Searches Article] [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	2	02/28/2001	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Binder - [Brown, Janice LexisNexis Reports] [Binder 2] [2]

FRC ID:

9118

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Sacramento Bee

September 7, 2000, Thursday METRO FINAL EDITION

SECTION: MAIN NEWS; Pg. A1

LENGTH: 813 words

HEADLINE: State justices cool to outreach program

BYLINE: Claire Cooper Bee Legal Affairs Writer

DATELINE: SAN FRANCISCO

BODY:

San Jose found no sympathy in the California Supreme Court on Wednesday as it tried to argue that reaching out to female and minority contractors still is legal four years after passage of Proposition 209.

In a watershed case over the scope of the initiative's ban on race and gender preferences, the city government urged an interpretation of Proposition 209 that would permit targeted efforts to draw under-represented groups into the applicant pool for public jobs, contracts and education.

A form of affirmative action, the San Jose program requires prime contractors on public works projects to hire women and minorities or to solicit bids from members of those groups. The city sets minimum percentages for each project, based on factors such as the number of qualified subcontractors available.

"What we are saying is, 'Give them an opportunity to compete,' " said San Jose City Attorney Joan Gallo.

She went before the court with the backing of the U.S. and state Justice Departments and dozens of local governments, including Sacramento city and county.

She left, after an hour of oral arguments, without an expression of support from any of the seven justices.

Justice Joyce Kennard called the city's program an unconstitutional "quota" system.

Chief Justice Ronald George voiced concern about the burden it placed on contractors.

Justice Marvin Baxter described it in terms of its difference from "unfocused" outreach to members of the majority as well as the minority, which was upheld in a 1994 opinion that he wrote.

Justice Kathryn Mickle Werdegard pointed to a legislative analyst's interpretation, part of the official ballot materials, that said Proposition 209 would end programs with similar features.

The court has 90 days to issue its opinion. So far, San Jose has lost in the two lower courts that have heard the case.

Making an unusual appearance before the Supreme Court to support the city, state Attorney General Bill Lockyer likened its bidding process to a foot race, in which steps must be taken to get everybody to the starting line, or a lecture hall, where the instructor must speak loudly for the benefit of those in the back of the room.

He argued that "inclusive" outreach should be distinguished from "exclusive" programs that harm the majority. In practice, the distinction would allow recruitment through ads in Spanish and Chinese newspapers, for example.

On the other side of the case, Pacific Legal Foundation lawyer Sharon Browne denied that the San Jose program makes all groups of applicants equal. Rather, she said, it gives women and minorities "a competitive advantage" by narrowing the field of eligible white male bidders, and it coerces contractors to hire with an eye toward meeting quotas.

The foundation represents Hi-Voltage Wire Works Inc. of Rancho Cordova, whose low bid on an electrical upgrade project was rejected for failure to comply with the outreach program. Hi-Voltage President Walt Zacharias said Wednesday he would have no comment on the case until it is decided.

Browne said the foundation doesn't object to outreach that "encompasses the entire universe of people as long as it is not targeted at one race or sex" - an approach that also was endorsed in a brief submitted by Proposition 209 proponents Ward Connerly and former Gov. Pete Wilson.

In practice, that would mean governments could address discrimination by advertising only in "newspapers of general circulation" and through other "neutral outreach tools," Browne said.

In response to a question from George, she said contractors could be required to use such tools.

Browne also answered affirmatively when Kennard, addressing an argument that mandatory outreach is needed to break the grip of an old-boy network, asked whether contractors could be required to solicit bids from subcontractors they never have used before.

Justice **Janice Rogers Brown** suggested that one answer to discrimination may be a technical assistance program open to all subcontractors who want to take advantage of it.

Brown and other justices explored the relevance of a 1989 U.S. Supreme Court ruling, known as the Croson decision, authorizing race-conscious affirmative action that's tailored to remedy a history of discrimination.

The U.S. Department of Justice said in its brief that the Croson decision means some state and local governments have a duty under the U.S. Constitution to pursue race-conscious remedies. One of those places is San Jose, where a 1990 study showed a "significant disparity" in the value of subcontracts awarded to minority business enterprises, the brief said.

But Browne, citing a federal appeals court's opinion, argued that the Croson ruling means the U.S. Constitution merely permits - but doesn't require - race and gender-conscious remedies, an option California could reject by passing Proposition 209.

GRAPHIC: Bill Lockyer The attorney general's appearance before the state Supreme Court in support of San Jose's outreach program was unusual.

LOAD-DATE: October 15, 2000

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The Recorder

September 6, 2000, Wednesday

SECTION: NEWS; PG. 1

HEADLINE: WITH ALL DELIBERATE SPEED

BYLINE: Kevin Livingston

BODY:

Antonio Robles spent more than four years in Ione's Mule Creek State Prison after the police found a stolen car in his garage.

Then last month the evidence against him was thrown out when California Supreme Court Justice Marvin Baxter found the warrantless search violated the man's Fourth Amendment rights.

While that should have been good news for Robles, his attorney Stephen Gilbert points out that by the time Baxter finished wrestling with the legal theories that led to Roble's freedom, the Anaheim man had already served his full sentence and been back home for nearly a year.

"I would like there to be a practical aspect to this," Gilbert says about the court's not-so-speedy resolution of his client's case.

The Santa Monica lawyer says it's not the first time one of his clients has served a full sentence only to later have his conviction tossed by the state's highest court.

While justice at the Supreme Court can be swift, a study by The Recorder finds that whose desk your fully briefed case lands on can mean the difference between waiting eight months or almost two years for a decision.

A study of 100 consecutive cases decided in the last year reveals that between full briefing and opinion, the seven justices of the Supreme Court produce majority opinions with various degrees of speed and efficiency.

The fastest justice on the court was Ming Chin, with an average time per majority opinion of 227 days. Close on his heels was Justice **Janice Rogers Brown**, who issued her opinions in an average time of just 234 days.

At the other end of the spectrum, Justice Joyce Kennard took nearly three times as long as Brown and Chin with 622 days per opinion. Baxter took almost as much time -- 553 days -- putting out his opinions.

To be sure, factors outside the control of the justices can cause delays at the court. Cases sometimes get reassigned when one justice can't garner a majority opinion, skewing the numbers for the judge on the receiving end. And because the justices must issue their opinions within 90 days of oral argument, sometimes proposed opinions languish as the author attempts to secure three other votes.

But Chief Justice Ronald George acknowledges that some cases have lingered long past what he considers reasonable. "Not withstanding the fact that there are reasons, whether it's reassignment or difficulty arriving at a consensus, there have been cases that took longer than I would have liked and it's been a topic that I have brought up," he says.

Some lawyers argue that the slower justices take more time than is needed to issue a quality opinion

and are too intellectual in their approach. Those attorneys also say it's time for George to apply his Judicial Council administrative talents to his own court.

"It's a great intellectual playground that gives you more and more time to do less and less," says former Supreme Court staff attorney Tony Tanke, who left the court in 1994.

Other appellate lawyers say being fast often equates with being sloppy. Justice, they say, can't be measured with a stop watch.

Santa Barbara lawyer Gilbert Gaynor, a one-time staff attorney for Justice Joyce Kennard, says quality decision making takes time. He says it's impossible to rate justice on a quantitative scale.

"Would we rate brain surgeons on the number of surgeries they perform?" he asks. "It's not easy to quantify the value of an appellate court judge."

The newest justices, Chin and Brown, are well below the court's overall average of 366 days from briefing to opinion. And both issued 18 opinions in the time surveyed, almost twice as many as the two slowest justices.

Justice Stanley Mosk also beat the court's average, finishing third at 295 days. Then it was Justice Kathryn Mickle Werdegard at 385, and George at 461.

While it's not entirely clear why Chin and Brown are so fast while more senior judges like Baxter and Kennard are so slow, the theories abound.

One Supreme Court staff attorney said management style could have a lot to do with how fast a justice can issue opinions.

He said some justices take a much more hands-on approach to draft opinions while others leave it largely up to the research attorney who's working on the matter. If one justice requires a few-paragraph synopsis of a proposed opinion, another may ask a staff attorney for a 20-page analysis.

A justice's decision to micromanage staff or delegate much of the work can seriously affect the speed in which opinions are delivered.

Most appellate attorneys agree that some of the slower justices have a reputation for being much more meticulous than their quicker colleagues.

"You can make a lot of decisions if they're really sloppy," says a former staff attorney.

Chin says he doesn't decide cases with an eye on the calendar. But Chin -- unlike Kennard and Brown -- is a very hands-off manager, giving his staff a wide berth when it comes to crafting opinions.

Chin also writes the shortest opinions. George and Baxter give their attorneys wide latitude, too, but they tend to issue the longest opinions, according to research by Boalt Hall School of Law Professor Stephen Barnett.

Lawyers who follow the court closely say Chin's opinions, although fast, don't reveal any carelessness on his part.

"Chin's opinions don't seem to reflect any shortcuts in the analysis or writing of the opinions," says appellate attorney Lisa Perrochet of Encino's Horvitz & Levy. "To suggest that Chin is anything but thorough would be silly. "

Instead, lawyers say Chin just might be more adept at securing votes than some of the other justices.

Justices who are more willing to compromise to get a consensus aren't going to take as long. Other

justices may not be as willing to bend and are more likely to risk alienating their colleagues by exploring new and perhaps controversial approaches to the law.

"Some are more willing to run down blind alleys," Perrochet says.

But that theory doesn't explain how Brown can be so fast.

Citing her busy schedule, Brown wasn't available for comment, but Barnett says that like Kennard, Brown is less willing to change her views to gain support, which should cost her time, but doesn't.

"It may be that she's better at managing her staff," he says.

Baxter shies away from specifics when asked about his average of 553 days, but he says it really comes down to the complexity of the case load and the luck of the assignment draw.

He adds that unforeseen factors, such as strong opposition from other justices, can put the brakes on any case.

"It really hinges on the nature of the cases," he says. "There will be certain years when one's production is much higher."

Baxter says it all evens out over the long haul. "If you look over a long period of time you are going to see some variation" from year to year, he says.

Although Kennard, who did not return telephone calls for this story, is the slowest on the court, many lawyers are quick to defend her as being the smartest and the most involved of all the justices.

"I like to think of Kennard as deliberate, not slow," says Santa Clara University School of Law Professor Gerald Uelmen.

He says it's the job of the Supreme Court to weigh cases carefully and get them right. Kennard has a reputation for being laborious, he says, and he wishes all the justices were as thorough.

A former court attorney says the time Kennard's staff pours into opinions is reflected in the weight they're accorded in other courts.

"People pay attention to what she says," the attorney contends.

And Kennard is not only laboring over her own opinions, she is also spending a great deal of time addressing the work of her colleagues. According to data compiled by Uelmen, Kennard wrote 21 dissents during the court's most recent term -- more than any other justice.

Former research attorney Tanke credits Kennard for being careful, but says there's such a thing as being too meticulous.

While Brown is prone to criticize her colleagues for not taking the shortest route to a decision, Kennard takes a more comprehensive approach to legal questions.

The difference is evident during argument. While Kennard asks the majority of the court's questions, Brown is more apt to sit quietly, her mind presumably made up.

Tanke says Kennard's fast track to the Supreme Court provided her with little time to develop what he calls a practical, common-sense approach to judging cases, particularly knowing how to get them out the door. He also says Kennard is constantly searching for an intellectually perfect solution to all the world's ills.

Tanke adds that justices like Kennard are the type who agonize over every period and comma and

tend to forget that there's no final answer to anything. "Everyone is going to misinterpret what they say anyway," he says.

"If I read 50 books to get an answer and you read 100, is your answer better?" he asks.

To illustrate how the California Supreme Court has changed its approach to opinions over the years, Chief Justice George likes to pull an 1855 California Supreme Court opinion from his library shelf.

The opinion, which is only one paragraph long, deals with whether a drunken man contributed to his own injury when he fell down a hole in a San Francisco sidewalk.

The court's decision: "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it."

George says it's the rare case today that can be dispatched in such a pithy manner.

"Our function is to establish precedent and lay out guidelines," he says. "We feel that we need to get into the theory behind our decisions and set forth a rationale."

He says the court should never be divorced from the practical realities involved in its decisions, but at the same time little is accomplished from a thumbs up, thumbs down ruling.

And although George says many factors can slow down the process, cases are not intentionally moved to the bottom of the pile. "Nothing falls into a black hole," he says.

George says lengthy death penalty appeals take up much of the court's time and resources. But an attorney at the court says they constitute roughly 10 percent of a judge's workload. During the one-year period reviewed for this story, Chin dispatched four death penalty cases while Kennard decided none.

Reassignment -- although rare -- can double the length of time a case sits before the court. George says cases that are slow to be resolved can also be a reflection of how involved a justice is in the process, as opposed to being satisfied with what's presented by a research attorney.

And when the court is called upon to set precedent in evolving areas of law, such as employment, securing a majority can take time.

Case in point is George's opinion last year in *Aguilar v. Avis Rent-a-car*, 21 Cal.4th 121, a controversial ruling pitting First Amendment protections against the rights of workers not to be harassed.

It took George 909 days -- 2 1/2 years -- to produce his plurality opinion finding that an Avis shop steward could be enjoined from using racial epithets at work. Four of his colleagues wrote separate opinions.

"It's always a careful balance to have a quality product that reflects as much consensus as possible," George says. "There's no formula because we're not turning out widgets. We can't say there should be a certain amount of time spent on each case, but I think we all need to be mindful of the fact to avoid these delays."

But there's probably little he can do to speed things up.

Santa Clara's Uelmen says it's like when U.S. Supreme Court Justice James Clark McReynolds was criticized by Chief Justice Charles Evans Hughes for being late to oral argument.

McReynolds' reply: "Tell the chief justice I don't work for him."

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: September 6, 2000

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Scripps Howard News Service

September 06, 2000, Wednesday

SECTION: DOMESTIC NEWS

LENGTH: 686 words

HEADLINE: San Jose program called unconstitutional 'quota' system

SOURCE: Scripps-McClatchy Western Service

BYLINE: CLAIRE COOPER

DATELINE: SAN FRANCISCO

BODY:

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(Contact Claire Cooper of the Sacramento Bee in California at <http://www.sacbee.com>.)

LOAD-DATE: September 7, 2000

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August 29, 2000, Tuesday

SECTION: Pg. 1

LENGTH: 980 words

HEADLINE: Supreme Court, Over George Dissent, Upholds Death Sentence

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: The state Supreme Court, over a rare dissent by Chief Justice Ronald M. George, yesterday affirmed the death sentence of a suspected member of the "Mexican Mafia" for the 1985 murders of three men in a San Diego garage.

The defendant, Juan Ayala, is the brother of Ronaldo Ayala, whose death sentence for the same killings was unanimously affirmed by the high court in June.

Prosecutors accused the Ayala brothers and Juan Moreno of killing the three men and trying to kill a fourth—who escaped and later testified after an intended drug-related robbery went awry. Moreno was tried separately and acquitted.

The prosecution theory was that the garage was robbed because the defendants had been told that one of the victims had recently returned from Mexico with a large quantity of drugs or money. In fact, it turned out, the man was serving time on minor charges and had been released from jail the day before he was killed.

The defense argued that the Ayalas were innocent. They theorized that surviving victim Pedro Castillo had been in league with the actual killers in a drug business conducted from the garage and had testified against the Ayalas for fear of retaliation by the real killers.

The issue that split the justices was whether Juan Ayala was denied a fair trial because San Diego Superior Court Judge Napoleon A. Jones held a series of ex parte hearings to determine whether prosecutors William Woodward and Gloria Michaels were making racially biased peremptory challenges.

Wheeler Motions

Jones held the hearings in response to three separate defense motions under *People v. Wheeler* (1978) 22 Cal.3d 258, involving a total of seven jurors, all of whom the judge found to have been excused for legitimate reasons. He held the hearings after Woodward complained that he would have to reveal prosecution strategy if compelled to state the reasons for the challenges in open court.

The defense objected that ex parte hearings would prevent the defense from responding to any "misstatement of the facts."

All seven justices of the high court agreed that the judge erred in holding the ex parte hearings.

Surveying cases in other states and in federal courts, Justice Stanley Mosk wrote that "it seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them."

Harmless Error

But Mosk, joined by Justices Marvin Baxter, Ming Chin, Kathryn M. Werdegar, and **Janice Rogers Brown**, said the error was harmless because there was no reasonable doubt that the seven jurors were excused for reasons other than race.

One juror, Mosk noted, had expressed reservations about the death penalty and seemed unresponsive as to some of the questions asked on voir dire at the 1989 trial. Another had had several arrests, including some he didn't disclose on the jury questionnaire.

Another juror had been quite slow and unresponsive in answering questions, possibly indicating drug use, the justice explained; another seemed to have difficulty with English and seemed aloof from other jurors; and another had been a holdout juror in another case and had once been rejected for a police officer's position.

Of the two remaining jurors, Mosk noted, both seemed to have reservations about the death penalty and one had investigated the case on his own, speaking to people who knew the defendant.

"On these facts," the jurist wrote, "we are confident that the prosecutor was not violating Wheeler, and that defense counsel's presence could not have affected the outcome of the Wheeler hearings."

Mosk rejected the contention that the lack of opportunity to rebut the prosecution's factual assertions with regard to the challenged venire members was prejudicial because it rendered the record incomplete. There was no showing, Mosk said, that such was the case.

But the chief justice, joined by Justice Joyce L. Kennard, took issue with the majority's "unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless."

George said the exclusion of the defense lawyers violated the defendant's rights to be present and to be represented by counsel.

The courts have, in some cases, applied the harmless error rule to affirm convictions in cases where the defense was improperly excluded from a portion of the proceedings, the chief justice acknowledged.

But none of those cases, he argued, "concerned a situation, like this one, in which the erroneous absence of a defendant and his or her counsel created an incomplete record of a critical and contested trial hearing."

Those cases, he said, "do not stand for the proposition that a defect such as we address here can be found harmless beyond a reasonable doubt."

The justices rejected several other defense contentions, including an argument that the trial judge "enhanced the prosecution's stature" by informing jurors of Woodward's appointment to a municipal court judgeship between the guilt and penalty phases.

The judge, over defense objection, told the lawyers that he was taking the step in order to maintain the court's credibility, rather than possibly upset jurors by giving a vague explanation for Woodward's absence from the penalty phase.

It was "purely speculative," Mosk said, for the defense to argue that Woodward's appointment a matter of public record, the justice noted influenced the penalty determination. The jury had already convicted, and knew the prosecution was seeking the death penalty, Mosk pointed out, and the prosecutor's "clean break" from the case meant that he did not argue the penalty issues

The case is *People v. Ayala*, 00 S.O.S. 5014.

LOAD-DATE: September 13, 2000

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The Legal Intelligencer

View Related Topics

August 28, 2000 Monday

SECTION: NATIONAL NEWS ; man; Pg. 4

LENGTH: 1060 words

HEADLINE: California Supremes Uphold Mandatory Arbitration

BYLINE: By Kevin Livingston, American Lawyer Media

BODY:

San Francisco The California Supreme Court attempted to strike a balance last week between an employer's right to use mandatory arbitration contracts and a worker's right to sue for civil rights abuses.

Taking a comprehensive look at a controversial issue of employment law, Justice Stanley Mosk said California businesses can continue to require workers to sign away their right to have workplace disputes settled in court. In doing so, Mosk threw out a San Rafael company's arbitration contract on the ground it was so one-sided it was unconscionable. The justice then laid out a list of guidelines that businesses must follow to ensure they are not forcing employees to give up their civil rights. The unanimous decision received mixed reactions from both sides of the employment bar. While defense lawyers cheered the opinion for what it didn't do outlaw the popular practice altogether plaintiffs lawyers said although the court instituted safeguards, it didn't go far enough to protect the state's employees, who are often forced to sign arbitration agreements to get a job. While upset that Mosk invalidated the arbitration contract that was the heart of *Armendariz v. Foundation Health Psychcare Services Inc.*, Paul Cane Jr., a partner in the San Francisco office of Paul Hastings Janofsky & Walker, said the decision as a whole was a victory for California employers. "Arbitration agreements that are fair will be held valid and enforceable," said Cane, who filed an amicus curiae brief on behalf of Foundation Health. But Cane said the court wasn't clear about when offending contract provisions can be taken out or when an entire agreement had to be jettisoned. Mosk agreed with a trial court's finding that the contract in *Armendariz* was too one-sided to stand. The contract only allowed Marybeth Armendariz and Dolores Olague-Rodgers, who claimed they were fired because they are heterosexual, to receive an award equal to the wages they would have earned between discharge and the date of the arbitration ruling. California's 1st District Court of Appeal let the contract stand, but removed the illegal restrictions. Plaintiffs' lawyers praised Mosk for nullifying the contract in question and for taking steps to guarantee a level playing field for workers bringing claims against their employers. But after more than a decade of watching courts side with employers on mandatory arbitration, some plaintiffs lawyers still argue that the court is missing the ultimate point that mandatory arbitration deprives workers of basic statutory rights. Cliff Palefsky, who filed an amicus brief in support of the plaintiffs, said the court took a big step but still had a long way to go. "The opinion accepts that arbitration has fewer remedies and pretends it's an equal forum," the partner at San Francisco's McGuinn, Hillsman & Palefsky said. "It splits the baby the way an arbitrator would." Mosk refused to follow the lead of the U.S. 9th Circuit Court of Appeals, which in 1998 outlawed altogether the use of mandatory arbitration of statutory civil rights claims brought by nonunion employees. Mosk said the 9th Circuit's reasoning in *Duffield v. Robertson Stephens*, 144 F.3d 1182 that legislative language in the 1991 Civil Rights Act was indicative of an intent to ban compulsory arbitration was not persuasive. He added that nothing in the act prohibits mandatory employment arbitration agreements that encompass state and federal anti-discrimination claims. "It is difficult to

believe that Congress would have chosen to ban mandatory arbitration by means of a clause that encourages the use of arbitration and has no explicit prohibitory language, when it could have simply and straightforwardly proscribed mandatory arbitration of Title VII claims," Mosk wrote. Paul Hastings' Cane emphasized that the court's rejection of Duffield brings it in line with every other federal court that has looked at the issue. "Duffield's days are numbered," he said. Instead of ditching mandatory arbitration altogether, Mosk laid out a series of rules intended to make arbitration fair for all sides. Among them, he said workers can't be forced to pay the costs of the arbitration, which can run into thousands of dollars. Relying heavily on a 1997 ruling from the District of Columbia Circuit *Cole v. Burns Intern Security Services* Mosk said doing so would clearly undermine the remedial and deterrent functions of anti-discrimination laws. "This rule will ensure that employees bringing [Fair Employment and Housing Act] claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed upon an employee by an employer," Mosk wrote. That reasoning was called oversimplistic by concurring Justice **Janice Rogers Brown**, who wrote that there was no reason to adopt such a pre-emptive approach or to assume that all arbitration proceedings are expensive. "The majority's approach ignores the unique circumstances of each case," Brown wrote. "Not all arbitrations are costly, and not all employees are unable to afford the unique costs of arbitration." In addition to fees, Mosk also said an arbitration agreement is only fair if it provides for neutral arbitrators, provides more than minimal discovery, requires a written award and provides for all the types of relief that would be available in court. "Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and a more as a means of maximizing employer advantage," Mosk wrote. "Arbitration wasn't intended for this purpose." Robert Meade, senior vice president of the American Arbitration Association, said Foundation Health's contract was so broken it couldn't be fixed. But he said the court's ruling will guarantee that employers can't again stack the deck against their workers. "You can't have a program that takes remedies away from people," he said. Palefsky wasn't reassured by Meade's optimism. He said it's the big corporations that make up AAA's client list, and he isn't confident that the world's largest alternative dispute resolution provider can remain neutral under that pressure. "Market forces are incapable of securing fairness," he said. This story originally appeared in The Recorder.

LOAD-DATE: August 28, 2000

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The Recorder

August 25, 2000, Friday

SECTION: NEWS; PG. 1

HEADLINE: COURT UPHOLDS

BYLINE: Kevin Livingston

BODY:

The California Supreme Court attempted to strike a balance Thursday between an employer's right to use mandatory arbitration contracts and a worker's right to sue for civil rights abuses.

Taking a comprehensive look at a controversial issue of employment law, Justice Stanley Mosk said California businesses can continue to require workers to sign away their right to have workplace disputes settled in court.

In doing so, Mosk threw out a San Rafael company's arbitration contract on the ground it was so one-sided it was unconscionable. The justice then laid out a list of guidelines that businesses must follow to ensure they are not forcing employees to give up their civil rights.

The unanimous decision received mixed reactions from both sides of the employment bar. While defense lawyers cheered the opinion for what it didn't do -- outlaw the popular practice altogether -- plaintiffs lawyers said although the court instituted safeguards, it didn't go far enough to protect the state's employees, who are often forced to sign arbitration agreements to get a job.

While upset that Mosk invalidated the arbitration contract that was the heart of *Armendariz v. Foundation Health Psychcare Services Inc.*, 00 C.D.O.S. 7127, Paul, Hastings, Janofsky & Walker partner Paul Cane Jr. said the decision as a whole was a victory for California employers.

"Arbitration agreements that are fair will be held valid and enforceable," said Cane, who filed an amicus curiae brief on behalf of Foundation Health.

But Cane said the court wasn't clear about when offending contract provisions can be taken out or when an entire agreement had to be jettisoned.

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Plaintiffs lawyers Thursday praised Mosk for nullifying the contract in question and for taking steps to guarantee a level playing field for workers bringing claims against their employers.

But after more than a decade of watching courts side with employers on mandatory arbitration, some plaintiffs lawyers still argue that the court is missing the ultimate point -- that mandatory arbitration deprives workers of basic statutory rights.

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"This rule will ensure that employees bringing Fair Employment and Housing Act claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed upon an employee by an employer," Mosk wrote.

That reasoning was called oversimplistic by concurring Justice **Janice Rogers Brown**, who wrote that there was no reason to adopt such a pre-emptive approach or to assume that all arbitration proceedings are expensive.

"The majority's approach ignores the unique circumstances of each case," Brown wrote. "Not all arbitrations are costly, and not all employees are unable to afford the unique costs of arbitration."

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But he said the court's ruling will guarantee that employers can't again stack the deck against their workers. "You can't have a program that takes remedies away from people," he said.

Palefsky wasn't reassured by Meade's optimism. He said it's the big corporations that make up AAA's client list, and he isn't confident that the world's largest alternative dispute resolution provider can

remain neutral under that pressure.

"Market forces are incapable of securing fairness," he said.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: August 25, 2000

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August 18, 2000, Friday

SECTION: Pg. 1

LENGTH: 732 words

HEADLINE: High Court Upholds Death Penalty in Grisly San Diego Murders

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: A college student convicted of murdering a San Diego woman along with her 3-year-old son and a house guest was properly sentenced to death, the state Supreme Court unanimously ruled yesterday.

Justice **Janice Rogers Brown** said the trial judge who sentenced Christopher Clark Box to death had fairly concluded that the horrific circumstances surrounding the killings outweighed the mitigating circumstances, including Box's lack of prior criminal violence.

Gilhousen, the justice noted, "died as a result of blunt head injuries and a stab wound that completely penetrated her heart."

In addition, Brown said, the 24-year-old woman's "ear was nearly ripped in half, her forehead split open and skull fractured, and a pattern abrasion appeared on her forearm, cheek, and neck" while she had injuries on her arm and hand that probably came from trying to defend herself.

Her son was strangled, and also had blunt force head injuries that contributed to his death, according to the medical testimony. There were numerous other wounds on the body.

Kevin Chandler, the house guest, had his skull crushed and a deep incised throat wound. Box was convicted of the murders, along with the attempted murder of a visitor to the house, and of robbery, conspiracy to rob, and residential burglary.

Prosecutors suggested that Gilhousen was killed for drug proceeds.

Box was tried shortly after the enactment of Proposition 115, the criminal justice initiative approved by voters in 1990. Two of the provisions of the measure eliminated the right of attorney voir dire and the right to an individually sequestered voir dire in capital cases.

Box's appellate counsel, Alan Yockelson, argued that Box had a Constitutional right to individually sequestered voir dire on certain specific issues.

Among those issues were the jurors' attitudes towards the death penalty and any specific feelings of ill will that jurors might have because the case involved the death of a small child.

San Diego Superior Court Judge J. Perry Langford, Brown said, conducted a full and fair voir dire, questioning jurors in chambers on "sensitive matters." Prospective jurors, the justice noted, were told that they were going to see a "pathetic" photo of the dead little boy, and were told that the verdict had to be based on "reason, not any kind of emotion that you feel."

Jurors who responded that they had strong emotional feelings about the murder of a child were then questioned in chambers, Brown pointed out.

"Contrary to defendant's assertion, a prospective juror would not reasonably interpret the trial court's comments to mean a biased response 'was expected and therefore not worth mentioning to the judge,'" Brown said.

"Nor does the fact that some prospective jurors came forward mean that others were too intimidated or embarrassed to do so. Indeed, it is difficult to imagine a prospective juror not having a strong emotional reaction to a three-year-old's murder, or feeling shame or embarrassment at revealing in front of others the depth of that reaction."

Nor did the judge err in permitting testimony that the boy was killed on his third birthday, Brown concluded. The evidence was relevant to provide a context for other evidence, the jurist reasoned, including the testimony of a witness who said that she knew Gilhousen had lots of money in her purse which police found empty after the murders because they had shopped for birthday presents the day before.

The evidence was also relevant, Brown said, because the defendant admitted to police that he knew that it was the little boy's birthday, a fact that tended to show the extent of his moral culpability for sentencing purposes.

The justice went on to say that the defendant was not entitled to a new trial based on a claim of juror misconduct. The claim was based on a deputy clerk's statement that she had heard jurors' voices through the door of the room where they were deliberating, and that they sounded as if they were discussing a newspaper article about possible sentences of "27 years to life."

The deputy clerk's statement was hearsay, Brown noted, and the comments she said she overheard were so ambiguous they might not even have applied to that case. The justice also pointed out that the defense could have contacted jurors to inquire as to the specifics, but didn't.

The case is *People v. Box*, 00 S.O.S. 4769.

LOAD-DATE: September 13, 2000

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August 15, 2000, Tuesday

SECTION: Pg. 3

LENGTH: 524 words

HEADLINE: Bar Court Judge Who Challenged Appointment Law Seeks New Term--Report

BYLINE: By a MetNews Staff Writer

BODY: A State Bar Court judge who challenged the new state law allowing the governor and legislative leaders to appoint three of the court's five hearing judges has told a legal newspaper that she applied for another term.

But Judge Nancy Lonsdale told the Recorder of San Francisco that while she applied before Friday's deadline, she wasn't "harboring any illusions" of reappointment by the state Senate Rules Committee.

The committee is chaired by Senate President Pro Tempore John Burton, D-San Francisco, who sponsored the law challenged by Lonsdale, Presiding Judge James Obrien, and Review Department Judge H. Kenneth Norian.

The Supreme Court rejected their challenge on June 1, holding 4-3 that the Supreme Court's loss of its current, exclusive power to appoint the judges who hear and rule on attorney disciplinary actions does not violate separation-of-powers principles.

The new scheme does not undermine the court's "ultimate" regulatory power over attorney admission and discipline, Chief Justice Ronald George wrote for the majority. Justice **Janice Rogers Brown** vigorously dissented, saying the majority was surrendering to a "wanton powwer grab" by the Legislature.

Of the three petitioners, Lonsdale is the only one seeking reappointment for the term commencing Nov. 1. Obrien has said he will not seek a new term once his current tenure expires in November of next year, and Norian, a businessman, is ineligible because the Burton legislation eliminates the lay review judge position and requires that Norian be replaced by a lawyer.

Lonsdale applied for a four-year term as a hearing judge, a position based in San Francisco, and also for a Los Angeles-based position as Norian's successor. Two Los Angeles-based hearing judges will be appointed this year, one by the governor for a six-year term and one by the speaker of the Assembly for a two-year term, while Norian's successor will be appointed by the Supreme Court and serve two years.

The two Los Angeles-based hearing judges whose terms expire this year are Carlos Velarde and Madge Watai, both former Los Angeles Superior Court judges. The Recorder said that Watai has applied for reappointment but Velarde chose not to, feeling that the Burton law had "politicized the process."

Also up for appointment this year is the Review Department seat of Judge Ronald Stovitz of San Francisco. Stovitz reportedly applied for reappointment to his seat, which will carry a four-year term.

All terms will be six years after initial staggering.

All applicants will be evaluated by an advisory committee appointed by the Supreme Court, which consists of Court of Appeal Justices Rebecca Wiseman of the Fifth District and James Marchiano of the First District; attorneys R. Scott Wylie of Costa Mesa, Maria Villa of Los Angeles, Edward George Jr. of Long Beach, and Victoria DeGoff of Berkeley; and Janet Green of San Bernardino, a public member.

The law provides that the committee "shall screen and rate" all applicants and recommend at least three for each position. The law does not require that the appointing authority choose a recommended candidate.

LOAD-DATE: September 13, 2000

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The Recorder

August 14, 2000, Monday

SECTION: NEWS; PG. 1

HEADLINE: YOU WANNA BE A BAR COURT JUDGE?

BYLINE: Mike McKee

BODY:

State Bar Court Judge Carlos Velarde was waffling awhile back about whether to seek another term after 10 years on the bench. Then the California Supreme Court indirectly made the decision for him.

On June 1, the high court changed the lawyer-discipline court's appointment process, giving the governor, Assembly speaker and Senate president pro tempore the right to nominate three of the court's eight judges.

"That pretty much decided it for me," said Velarde, a hearing judge in Los Angeles. "It politicizes the process. It's time to move on."

On Friday, Velarde made it official by not seeking reappointment on the last day applications could be filed for five openings on the court. Hearing Judges Nancy Lonsdale of San Francisco and Madge Watai of L.A. filed for reappointment, as did Ronald Stovitz, a State Bar Court appellate judge based in San Francisco.

Another appellate judge, H. Kenneth Norian of L.A., was given no choice. His lay person position on the court was eliminated by the underlying legislation, upheld by the Supreme Court in June, and will be refilled with a lawyer.

"I have enjoyed my experience with the State Bar Court," said Norian, who hopes to land a new job in mediation or arbitration. "This is just another bump in the road."

Just how many people filed for the five openings by Friday's deadline couldn't be learned. Citing confidentiality requirements, San Francisco-based State Bar Court administrative officer Scott Drexel wouldn't say who applied or how many.

But L.A.-based State Bar Court Presiding Judge James Obrien, who has already announced he won't seek reappointment when his term expires next year, said it was his impression "that the number of applicants is down from the last time appointments were made."

The legislation that changed the appointing process was pushed through last year by Senate President Pro Tempore John Burton, D-San Francisco, who many observers contend was exacting political payback for a friend who was denied a law license. The new law gives the politicians the right to nominate -- or reappoint -- individuals to three of the five seats up for renewal on Nov. 1.

The California Supreme Court, which previously made all eight appointments, makes nominations for the two remaining seats, as well as for three judges whose terms expire on Nov. 1, 2001.

Norian, Lonsdale and Obrien challenged the law in court, claiming that it violated the constitutional separation of powers. But the Supreme Court upheld the law 4-3, despite a scathing dissent by Justice **Janice Rogers Brown**, who accused the majority of abdicating the court's authority to appoint judges.

Although her participation in the lawsuit may hurt her chances, Lonsdale said Friday that she filed for reappointment. Burton will be making the appointment for her position.

"I'm not harboring any illusions that I'll be reappointed," she said.

Lonsdale said she's also applied for Norian's appellate spot -- appointed by the Supreme Court -- but has also applied for positions as a federal magistrate judge and an Alameda County commissioner. At worst, she said, she could return to her former career as a labor and civil law arbitrator.

"I really love to be a judge," Lonsdale said. "I hate to lose this job."

Drexel, who's also the State Bar Court's chief counsel, said Friday that the names of all applicants will be forwarded for review to a seven-member applicant evaluation and nomination committee established by the Supreme Court in June.

The members are Fifth District Court of Appeal Justice Rebecca Wiseman; First District Justice James Marchiano; State Bar governors R. Scott Wylie, director of the children's rights clinic at Costa Mesa's Whittier Law School; and Maria Villa, a partner at L.A.'s Lathrop & Villa; Long Beach solo practitioner Edward George Jr.; Berkeley solo Victoria DeGoff; and public member Janet Green, director of health at San Bernardino Valley College.

Committee members are expected to rate each applicant and nominate three people for each post no later than Oct. 1.

"Everybody has to go through the process," Drexel said. "And the only limitation on the appointing authorities is that they cannot appoint someone who is rated 'not qualified.'"

The initial terms of the governor's, Senate president's and Assembly speaker's appointees will be six, four and two years respectively, with six- year terms beginning upon reappointment.

Associate editor Mike McKee's e-mail address is mmckee@therecorder.

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August 11, 2000, Friday

SECTION: Pg. 1

LENGTH: 1142 words

HEADLINE: Judge May Break Preliminary Hearing to Attend Conference--S.C.Deck: Split 4-3
Decision Says Interruption in Narrow Circumstances Does Not Violate Defendant's Rights

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: The statutory right to a continuous preliminary hearing wasn't violated when the judge interrupted the proceedings for a full day in order to attend an out-of-town meeting of a Judicial Council Task Force, the state Supreme Court ruled yesterday.

In a 4-3 decision, the court held that such an interruption, when viewed in the context of the surrounding circumstances, may be supportable under the "good cause" exception to Penal Code Sec. 861(a)'s requirement that the hearing be "substantially continuous."

The court majority disagreed with Div. Four of this district's Court of Appeal, which had held that a full-day recess over the defendants' objection violated the statute. It requires dismissal if the preliminary hearing is not "completed at one session" unless the defendant waives the right or the magistrate grants a postponement of up to 10 days "for good cause shown by affidavit."

The lower panel had ordered dismissal of the murder charges against Todd Russell Stroud and Tyrone Franklin Swain, alleged members of the Crips gang charged with the murder of a man who allegedly tried to intervene while the pair were robbing a rap music studio in South-Central Los Angeles.

No Waiver

The preliminary hearing for Stroud and Swain took place before then-Los Angeles Municipal Court Judge Stephen Marcus in July and August last year. The hearing began on Wednesday, July 22, with Stroud's lawyer, Daniel G. Davis, announcing at the outset that his client would not waive the right to a continuous hearing.

The hearing was recessed early on July 23 and 24 under an agreement of counsel, with the judge's approval. When court resumed on Monday, July 27, Marcus who oversees his court's Drug Court program announced that he would not be present the following Friday because a task force of which he was a member was meeting in San Francisco.

Two days later, a discussion took place regarding availability of witnesses. When Davis said that a particular witness could be available Friday, Marcus again iterated that he would be in San Francisco and pointed out that the hearing had gone well past its day-and-a-half estimate.

Davis responded that he "never gave that estimate" and objected to the court being "dark" on Friday as a violation of the continuous-hearing or "single-session" rule of Sec. 861(a). Marcus overruled the objection, noting that the meeting had been scheduled months earlier and that he was "not going to have some kind of vacation."

When court resumed on Monday, both defendants moved to dismiss for lack of a continuous preliminary hearing, and the motion was denied. The hearing concluded two days later, and both

defendants were held to answer.

Motions Denied

Los Angeles Superior Court Judge Robert J. Perry denied the defendants' motions to dismiss under Penal Code Sec. 995. Since Marcus had devoted "a substantial majority of the court's time" to the preliminary hearing from its commencement to conclusion, and since the defendants "were not deprived of a substantial right," Perry reasoned, Sec. 861(a) was complied with.

Justice Marvin Baxter, writing for the high court majority, agreed with the Court of Appeal that the defendants had not by agreeing to a truncated schedule on July 23 and 24 waived any objection to the judge's absence the following Friday.

"[I]t is clear that neither the magistrate, the defendants, nor their counsel intended such a broad waiver," the justice said. Baxter said he was "not persuaded" that, as a matter of law, once the continuous nature of the preliminary hearing is broken with the defendant's consent, the defense cannot object to subsequent interruptions.

But Baxter disagreed with the Court of Appeal on the good-cause issue. The justice concluded that Marcus had not abused his discretion in determining that his need to attend the task force meeting was good cause for the one-day interruption.

A schedule conflict isn't necessarily good cause for interrupting a preliminary hearing, Baxter said. But judges may, on a case-by-case basis, find good cause for delay by taking into consideration "the reason for the conflict, the length of the delay, the extent to which it could have been avoided by proper planning and allocation of judicial resources, the frequency, duration, and cause of any prior interruptions, and any evidence, available to the presiding court at the time it ordered the postponement, that the delay would work against the defendant's litigation interests."

In the case of Stroud and Swain, the justice noted, the judge announced his intended absence well in advance, the conflict would not have arisen had the hearing not substantially exceeded its original time estimate,.

"Moreover, though the magistrate announced his meeting plans once the conflict became apparent, defendants substantially delayed their objection," the justice wrote. "These facts, not improper planning, made it impracticable to accommodate defendants, such as by reassigning the case or holding extended sessions to complete the examination before the magistrate's departure."

Baxter was joined by Chief Justice Ronald George and Justices Joyce L. Kennard and Ming Chin.

Justice Kathryn M. Werdegarr, joined by Justices Stanley Mosk and **Janice Rogers Brown**, dissented.

"Before today, it was understood that a judge's desire to attend meetings, seminars, and conferences did not afford good cause to delay a trial," the dissenting justice argued. "...A fortiori, such events cannot afford good cause to postpone a preliminary hearing."

Such delays, she said, are inconsistent with the notion that a defendant at the preliminary hearing level "is held on suspicion only."

Werdegarr declared:

"[T]he Legislature and the courts have jealously protected such a person's right not to be imprisoned longer than necessary before cause has been found; thus the single-session rule set out in Penal Code section 861 and the requirement, absolute on its face, that the complaint be dismissed when the rule is violated."

The appellate attorney for the defendants, Dennis A. Fischer, said the high court had carved the exception out "as narrowly as you can imagine."

He said he was glad the high court took the case, even though it cost him the victory he won in the Court of Appeal.

"It's all to the good that the Supreme Court is now willing to periodically review somewhat obscure issues like this one," he told the MetNews. He added that because the ruling was so narrow, "the likelihood of this ever happening again will be very remote."

Fischer explained that "a judge will think long and hard before going to...a meeting again" in the middle of a preliminary hearing, absent an explicit waiver from the defendants. "Anyone of several factors could have changed the result" of his case, he said, "especially given the 4-3 vote."

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Fulton County Daily Report

August 3, 2000, Thursday

LENGTH: 884 words

HEADLINE: Friends in High Places;
Should Convicted Killers Be Admitted to the Bar?

BODY:

George M. Kraw is an attorney in San Jose, Calif. His e-mail address is gkraw@aol.com. Provided by American Lawyer News Service.

Just when you think that there's nothing more that the State Bar of California and the Legislature could do to insult California lawyers and fuel public cynicism about the legal system, along comes convicted killer Eben Gossage's California Bar admission brouhaha.

Gossage, the son of a one-time prominent San Francisco family, wants a bar card in spite of what bar lawyers claim is a record of 17 convictions and a signed-under-penalty-of-perjury bar application that officials maintain omitted more than half the offenses.

He says he's turned his life around. After the State Bar's Committee of Bar Examiners refused to certify Gossage as "morally fit" to practice, a bar trial court and a review panel found 2-1 in Gossage's favor.

They must have been impressed by the fact that he hadn't killed anyone recently. And maybe they also were impressed by the support he's receiving from local politicians. More about them in a moment.

If the decision stands, it will further undercut public support for the legal system. This matter is not simply a question of whether Gossage has rehabilitated himself; it's a question of public confidence in the profession.

Convicted of Killing Sister

Gossage's precocious criminal career landed him in state prison for forgery by the time he was 20, and eventually included convictions for heroin possession and homicide.

In 1975 he smashed his sister Amelia's skull 17 times with a hammer and then stabbed her corpse 45 times with a pair of scissors. At trial, he claimed that he was acting in self-defense. The jury convicted him of manslaughter, and he was locked up for two and a half years.

After still more trouble with drugs and more time in state prison, he changed his career path.

Later he started his own construction business and graduated from Golden Gate University School of Law. In 1993, he passed the bar examination.

A history of multiple serious felonies isn't by itself a permanent disqualification from admission to the Bar. Several of Gossage's convictions are for minor offenses. But some resulted from bench warrants for failures to appear while he was in law school. That type of crime on a State Bar application could quickly have sunk any other candidate.

Gossage is now a successful real estate entrepreneur with good social and political connections.

Heavyweight Support

At the bar trial on his admission, state Senate head John Burton, San Francisco District Attorney Terence Hallinan, San Francisco Supervisor Sue Bierman and San Francisco Public Defender Jeff Brown appeared as witnesses on his behalf. The DA told the court that he'd be willing to consider Gossage for a job as a prosecutor.

Even under the State Bar Court's standard-clear and convincing evidence of present good moral character-the court's decision was a bad mistake.

The bar routinely suspends lawyers who don't pay their dues or take required MCLE courses. It's not too much to require full and accurate disclosure from an admissions candidate with multiple felony convictions.

The same standard should apply for anyone with Gossage's criminal record. Nobody is trying to prevent Gossage from rehabilitating himself. But that doesn't mean that he's qualified for admission to a profession whose core responsibility is to uphold and interpret the law.

Dissenter Chastised

The greatest outrage in this sorry mess is what happened to H. Kenneth Norian, the only judge on the State Bar Court to vote against Gossage. He was part of the review panel that heard the Committee on Bar Examiners' appeal.

Norian is also the Bar Court's only nonlawyer judge. After his dissent in the Gossage case, Senate president Burton introduced legislation, SB 143, that abolished Norian's nonlawyer post on the review panel and allowed the Legislature and the governor to appoint three of the hearing judges. All judges had previously been appointed by the state Supreme Court.

SB 143 had a direct, unsubtle message: Don't antagonize important legislators. The Supreme Court last month upheld the constitutionality of the new law, in spite of its affront to the court's authority. **Janice Rogers Brown's** dissent acidly noted that separation of powers "is not a task for wimps."

Burton has introduced new measures this legislative session to monitor the bar's disciplinary process. Increased public scrutiny of State Bar operations is generally a good idea, but it shouldn't be used as a tool by peeved legislators to intimidate regulators.

And unless the Supreme Court assumes direct control over regulation of lawyers, admissions and discipline will be increasingly vulnerable to political pressure.

Two years ago, the Committee on Bar Examiners asked the Supreme Court to block Gossage's admission. The justices seemed skeptical about the Bar Court's decision during oral arguments in May. They are due to rule any day now.

Assuming Eben Gossage is ultimately denied admission, the bar, the Supreme Court and California lawyers will still be left with Burton's SB 143 as a distasteful reminder of the episode.

One way or another, Gossage is going to make legal history, even without a bar card.

LOAD-DATE: August 2, 2000

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Government Contract Litigation Reporter

August 3, 2000

SECTION: Vol. 14; No. 1; Pg. 3

LENGTH: 731 words

CASE: Bid Protest:Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.

HEADLINE: Losing Bidder Asks for Rehearing On Lost Profits Case

BODY:

A joint venture formed to pursue a public contract has asked the California Supreme Court to revisit its recent ruling holding that the losing bidder on a municipal contract cannot recover lost profits under a promissory estoppel theory when successfully challenging a contract award. *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 96 Cal. Rptr. 2d 747, (Cal., 2000), petition for rehearing filed (Cal., June 27, 2000)(No. S077461); see Government Contract LR, July 7, 2000, P. 4.

The Los Angeles County Metropolitan Transportation Authority (MTA) solicited bids for the construction of a subway station and tunnels in 1994. Tutor-Saliba-Perini submitted the lowest bid, but Kajima/Ray Wilson protested the award on the grounds that TSP failed to meet the MTA's minority business enterprise participation goals. The MTA subsequently rejected all of the bids and held another round of bidding. KRW's bid was the lowest, but the MTA awarded the contract to TSP, even though its bid was \$1 million higher. The MTA stated that TSP had met the minority participation goals, while KRW had not.

KRW sued the MTA in the Superior Court for Los Angeles County, claiming that the MTA improperly evaluated its minority participation. If the MTA had conducted a proper rating, KRW's minority participation would have exceeded that of TSP, the suit alleged. KRW sought an injunction and damages of over \$3 million, which included \$1.5 million in lost profits on the subway contract.

The superior court awarded KRW its bid and protest expenses, sums for unabsorbed overhead and \$350,000 in lost profits, plus interest. The California Court of Appeal, Second Appellate District, affirmed in *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 69 Cal. App. 4th 1458 (Cal. Ct. App., 1999). The appellate court ruled that the trial court was within its discretion to give KRW lost profits under a promissory estoppel theory. The MTA appealed to the California Supreme Court, arguing that a disappointed bidder has no cause of action against a public entity for damages arising from the erroneous award of a contract.

The supreme court issued its ruling on June 12, 2000. Justice **Janice Rogers Brown**, writing for the court, stated that the appellate decision was reversed. The court explained that the parties agreed that if relief was available it was available under a theory of promissory estoppel. At the time it submitted its bid, KRW had incurred bid preparation costs in reliance on the MTA's representation that the contract would go to the lowest bidder.

Bid preparation costs were the only costs reasonably incurred, because there are many uncertainties inherent in competitive bidding and KRW did not know if the contract would be awarded, Justice Brown elaborated. Further, the allowance of lost profits would harm the public because the chosen bidder would be paid to do the contract work and the losing bidder would be paid as well. The remedy of lost profits would cause the public to pay twice, the court said. The courts are also hesitant to award lost profits when the party requesting them is not a party to a contract, Justice Brown added.

Unhappy with this decision, KRW filed a petition for rehearing with the supreme court on June 27, 2000. The petition argues that the supreme court's ruling denying relief on the grounds that the public would have to pay twice is based on the idea that one who enters into an illegally formed public contract can keep the payments received.

However, California's "void contract rule" prohibits a public entity from paying for an unlawfully awarded contract, KRW argues. The theory that the public would have to pay twice when a losing bidder gains lost profits is contradicted by the rule, the petition asserts. The rationale that the recipient of an illegally formed contract can retain the proceeds without impunity while the person who rightfully should have won the contract is deprived of a full measure of damages is contrary to public policy, KRW says.

The petition is currently pending.

Kajima/Ray Wilson is represented by Bernard S. Kamine of Kamine, Steiner & Ungerer in Los Angeles.

(Call 877-595-0449 for the 14-page petition.)

LOAD-DATE: August 23, 2000

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Gun Industry

August 2000

SECTION: Vol. 2; No. 1; Pg. 3

LENGTH: 796 words

CASE: Regulation: Kasler v. Lungren

HEADLINE: Assault Weapons Act Affirmed By California Supreme Court

BODY:

Ruling 6--1, the California Supreme Court has rejected claims that the state's Roberti-Roos Assault Weapons Control Act violates the citizenry's equal protection rights because it prohibits certain semiautomatic assault weapons by name while not covering mechanically identical firearms. Kasler et al. v. Lungren, No. S069522 (Cal., June 29, 2000); see Gun Industry LR, June 2000, P. 11.

In addition, the panel reversed a state appellate court's 1998 finding that the "add on" provision of the law (Cal. Penal Code § 12276.5) violated separation-of-powers standards by allowing courts to approve the addition of new model weapons subsequent to the passage of the law. Such additions would be made at the recommendation of the state's attorney general.

Plaintiff Peter Alan Kasler, a firearms instructor, has argued that the Assault Weapons Control Act should be invalidated not only because it is underinclusive, but because it has failed to rid the market of semiautomatic assault weapons in the decade it has been on the books.

"Doubtless, 10 years after the AWCA became law in California many semiautomatic weapons potentially classifiable as assault weapons remain on the market here," conceded the high court in an opinion written by Justice **Janice Rogers Brown**. "That may or may not be regrettable, depending upon one's views on this highly charged public policy question, but it does not amount to a constitutionally fatal flaw in the AWCA."

The panel praised the legislature for carefully crafting the law while balancing the interests of public safety with the rights of those interested in such weapons for hunting, target or other recreational uses.

"The Legislature was under no illusion that the AWCA would rid the streets of assault weapons in one fell swoop," said the majority. "Instead, the Legislature intended that the approach it finally settled upon -- designating certain assault weapons by type, series, and model, while providing a mechanism for adding others -- would make California a safer place, even if only marginally and incrementally. We are not prepared to say that the Legislature's expectation was irrational or that, to pass constitutional muster, its ambitions had to be grander."

The majority rejected the plaintiffs' effort to identify what it called a "rational relationship" between the selected legislative ends and the means chosen to further them. Any such a connection, it declared, cannot always be "so exacting."

"To declare murder a crime will not prevent murder," it said. "Prohibiting the possession of weapons by convicted felons will not stop criminals from obtaining guns. Assessing ever greater penalties has not eliminated the scourge of drug abuse. Means scrutiny assumes the law will have some effect and compares that effect with the means the Legislature has chosen."

Dissent on Equal Protection Claim

Although concurring with the majority's rejection of the plaintiffs' separation of powers and due process claims, Justice Joyce Kennard parted company on the issue of equal protection. The justice felt the plaintiffs had alleged sufficient facts permitting them to go forward on the cause. By holding that the prohibition and regulation of semiautomatic firearms could take place one step at a time with later decisions to ban others, Justice Kennard said the majority had "wholly misapplied the rule it invokes."

Rather than banning weapons "marginally and incrementally," as the majority suggests, Justice Kennard opined that the legislature must have a "rational basis for drawing the lines it does and may not arbitrarily choose whom to regulate and to leave untouched."

"Not only must the legislative objective (here, a reduction in gun violence) be rational, but the classifications drawn to advance that objective (here, the division between the weapons prohibited by the Act and those it permits) must also be rational."

Kasler is represented by Don B. Kates of Benenson & Kates in Novato, Calif.; Stephen P. Halbrook of Fairfax, Va.; C.D. Michel of Michel & Associates in San Pedro, Calif.; and Donald Kilmer Jr. of San Jose, Calif.

In addition to Attorney General Bill Lockyer, the state is represented by Chief Assistant Attorney General George H. Williamson, Special Assistant Attorney General Kevin Holsclaw, Deputy Attorney General Timothy L. Rieger and Senior Assistant Attorney General John A. Gordnier. All are located in Sacramento, Calif.

(See Document Section C for the opinion. Call 877-595-0449 for the petition for review, including attachments, 68 pages; the opening brief on the merits, 41 pages; the answer brief on the merits, 53 pages; and the reply brief on the merits, 16 pages.)

LOAD-DATE: September 18, 2000

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August 1, 2000, Tuesday

SECTION: Pg. 1

LENGTH: 865 words

HEADLINE: Scienter Not Element of Assault Weapons Charge, High Court Rules

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: A defendant may be convicted of possessing an assault weapon if he or she knew, or reasonably should have known, that the gun possessed characteristics bringing it within the statutory definition, the Supreme Court ruled yesterday.

In a 5-2 decision, the court reversed a contrary ruling by Div. Four of this district's Court of Appeal.

That panel held that actual knowledge of the qualifying characteristics was required to convict someone of violating the Assault Weapons Control Act. But the high court majority rejected both that conclusion and the argument of the attorney general that possession of a qualifying weapon is sufficient for a conviction, regardless of the defendant's mental state.

Law's Purpose

California law disfavors strict liability for violation of criminal statutes with significant penalties, Justice Kathryn M. Werdegar wrote for the court. But a strict scienter requirement would be inconsistent with the law's purpose, she said.

"We [note] the seriousness of the public safety threat the Legislature perceived and sought to alleviate by the AWCA and the corresponding unsuitability, to the legislative intent, of any statutory construction that would likely impair the law's effective enforcement," the justice wrote. "It follows we should not read [the act] as containing any mental state requirement the prosecution would foreseeably and routinely have special difficulty proving."

Yesterday's ruling reinstates a Los Angeles Superior Court commissioner's order remanding a juvenile to a youth camp for possessing a Russian-made SKS-45 assault rifle.

The youth, identified as Jorge M., had been declared a ward of the court in November 1996 after he admitted that he had been in possession of a controlled substance. Three weeks later, a probation search of Jorge's residence resulted in seizure of the SKS-45 and three other guns.

Jorge's brother testified that the bedroom where the guns were found was his, and that he owned all four of the guns. Jorge, he said, slept in another bedroom which he shared with their sisters.

Jorge also testified that he shared a room with his sisters. He said he had never used the weapons, which he claimed belonged to his father.

Commissioner Thomas Grodin sustained the petition, ruling that Jorge had violated the 1989 AWCA. The law defines an assault weapon as being any weapon which is listed as such in the act, or which is found by a court in a declaratory action brought by the attorney general to be substantially identical to a listed weapon.

Amendments enacted last year expanded the definition to include any weapon possessing certain

characteristics, such as one with the capacity to accept a detachable magazine along with a flash suppressor, a folding stock, or a forward pistol grip.

The Div. Four panel said there was insufficient evidence to show that Jorge knew that the SKS-45 was one of the weapons banned by the act. But Werdegar said it would be difficult to prove, even with circumstantial evidence, that any defendant actually knew of the characteristics rendering a weapon's possession unlawful.

"A scienter requirement satisfied by proof the defendant should have known the characteristics of the weapon bringing it within the AWCA, however, would have little or no potential to impede effective enforcement," the justice wrote. "In most instances the fact a firearm is of a make and model listed in [Penal Code] section 12276, or added [by court order] pursuant to section 12276.5, can be expected to be sufficiently plain on examination of the weapon so that evidence of the markings, together with evidence the accused possessor had sufficient opportunity to examine the firearm, will satisfy a knew-or-should-have-known requirement."

Werdegar was joined by Chief Justice Ronald George and Justices Stanley Mosk, Ming Chin, and **Janice Rogers Brown**.

Justice Joyce L. Kennard, joined by Justice Marvin Baxter, dissented.

Knowledge Requirement

Kennard cited *Staples v. United States*, 511 U.S. 600, a 1994 case dealing with the National Firearms Act. The court held that a defendant who possessed an AR-15 assault rifle which had been modified to be capable of fully automatic firing could not be convicted of possessing an unregistered machinegun absent proof of knowledge of the characteristics bringing the modified weapon under the statutory definition.

The majority's insistence that a negligence standard is essential to effective enforcement of the law "is both legally and factually dubious," Kennard argued.

"Facilitating prosecution is not the goal of statutory interpretation, nor will requiring proof of actual knowledge unduly hamper prosecutions for unlawful assault weapons possession," she wrote.

Since evidence of a defendant's familiarity with firearms may be used as circumstantial proof of knowledge, she wrote, "[t]he only prosecutions that are likely to be aided by the majority's 'should have known' standard are those of novice firearm owners, such as a widow who inherits her husband's rifle that she has never fired or even handled."

The case is *In re Jorge M.*, 00 S.O.S. 4393.

LOAD-DATE: September 13, 2000

The Associated Press State & Local Wire

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July 31, 2000, Monday, BC cycle

SECTION: State and Regional

LENGTH: 429 words

HEADLINE: State high court says possessing banned assault weapon is not a crime in some cases

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Merely possessing an outlawed assault weapon is not necessarily a crime, the California Supreme Court ruled Monday.

In a 5-2 ruling, the justices said that to successfully prosecute someone for possessing an assault weapon, prosecutors must demonstrate that the person "reasonably" should have known that the weapon was among dozens banned under the Assault Weapons Control Act.

The court gave prosecutors some leeway in that they aren't required to prove that a person actually knew a weapon was banned, but only that the person "reasonably" should have known.

In that vein, the court reinstated a 16-year-old boy's assault-weapons conviction, throwing out a Los Angeles-based appellate panel's ruling which said the boy could not be convicted of possessing a SKS-45 semiautomatic rifle because he claimed he did not know it was illegal.

"An actual knowledge element has significant potential to impair effective enforcement," Justice Kathryn Mickle Werdegard wrote for the majority.

The decision came weeks after the high court upheld California's 1989 assault weapons ban. The Legislature adopted the nation's first such law after a man fired a semiautomatic weapon into a Stockton schoolyard, killing five children and injuring 30.

The boy's attorney, J. Courtney Shevelson, said he was not surprised by the decision. Shevelson said that if the child's conviction not been reinstated, it would have been almost impossible for prosecutors to show that a person charged under the act actually knew the gun they possessed was illegal.

Attorney general prosecutors had argued a "strict liability" standard, meaning that simply possessing an outlawed weapon was good enough evidence to successfully prosecute. But Werdegard outlined the "reasonable" knowledge standard in her ruling, and said that each case "depends heavily on the individual facts" establishing possession.

Werdegard said there was a "general principle" that all persons are obligated to learn of and comply with the law, and that those who possess such firearms should have investigated whether the gun was banned.

"The exceptional cases in which the salient characteristics of the firearm are extraordinary obscure or the defendant's possession of the gun was so fleeting ... would appear to be instances of largely innocent possession," she wrote.

Werdegar was joined by Chief Justice Ronald M. George, Justice Stanley Mosk, Justice Ming W. Chin and Justice **Janice Rogers Brown**. Dissenting were Justice Joyce L. Kennard and Justice Marvin R. Baxter.

The case number is S074270.

LOAD-DATE: August 1, 2000

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The Recorder

July 31, 2000, Monday

SECTION: NEWS; PG. 1

HEADLINE: RETIRED JUSTICE

BYLINE: Kevin Livingston

BODY:

Gov. Gray Davis is expected to announce today that former First District Court of Appeal Justice Harry Low will take over as California's insurance commissioner.

The governor's press office said Davis will appoint a successor to former Commissioner Chuck Quackenbush today, and sources close to Low and the governor say it's the judge who will be tapped.

Low, who is a private judge with the ADR provider JAMS in San Francisco, is said to have all the right credentials to lead the embattled Department of Insurance. Low has a close relationship with Davis, respect within the Legislature and no ties to the insurance industry.

"He's one of the few people in politics who everyone has a high regard for," said former First District Justice Donald King. "He has no enemies."

First District Court of Appeal Justice Paul Haerle had no knowledge of Low's appointment, but the Republican insider called Low "a very solid guy."

Haerle described Low as a moderate democrat -- a centrist in the Gray Davis image.

"He's well-respected and has friends on both sides of the aisle," Haerle said.

Low, 69, started his career in the California attorney general's office and was appointed to the San Francisco Municipal Court by Gov. Edmund "Pat" Brown in 1966. He was bumped to the superior court by Gov. Ronald Reagan in 1974, and in 1982 Gov. Jerry Brown elevated Low to the First District, where he served until retiring in 1992. He has worked at JAMS ever since.

Low has served as the president of the California Judges Association and as president of the San Francisco Police Commission. He has also served on the California Judicial Council and the Appellate Judge Conference of the American Bar.

Low headed a three-member committee in 1996 that investigated leaks from the Judicial Nominations Evaluations Committee about the qualification rating of then-California Supreme Court nominee **Janice Rogers Brown**.

If Low's nomination is confirmed by the Legislature, as expected, he will take over for interim Commissioner J. Clark Kelso.

Kelso, who took the post temporarily July 5, was in Los Angeles Friday and could not be reached for comment.

The McGeorge School of Law professor was appointed interim commissioner a week after Quackenbush -- facing almost certain impeachment -- announced he would resign.

Quackenbush came under fire in April after allegations surfaced that his office let insurance companies avoid paying as much as \$3.7 billion in fines for allegedly mishandling policyholder claims after the 1994 Northridge earthquake.

Instead, the insurance companies paid \$13 million to a Quackenbush-created foundation, which allegedly used the money to bankroll Quackenbush's political ads and events.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: July 31, 2000

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July 28, 2000, Friday, Home Edition

troubling

SECTION: Part A; Part 1; Page 1; Metro Desk

LENGTH: 715 words

HEADLINE: STATE JUSTICES APPLY PRIVACY RULE TO SEARCHES

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

A person has a reasonable expectation of privacy in his home, even while bagging cocaine in front of an open side-yard window, the California Supreme Court decided Thursday.

In a 4-3 ruling, the court said police violated a drug defendant's rights by walking into an open side yard late at night and observing the resident through his bedroom window as he placed white powder in bags. The 4th Amendment to the Constitution forbids unreasonable searches by police.

The court majority contended that the ruling will discourage police from "engaging in warrantless nighttime intrusions into the yards of citizens."

Justice Kathryn Mickle Werdegarr, writing for the majority, said it was reasonable for the defendant in the case, Cayetano Camacho, to expect that no one would trespass on his property late at night and look into his bedroom window, which could not be seen from the street.

"The line we draw today lets an unquestionably guilty man go free," Werdegarr wrote. But, she continued, quoting U.S. Supreme Court Justice David Souter, "constitutional lines are the price of constitutional government."

The three justices who dissented complained that the court was imposing a "narrow and rigid restraint on police" in California.

The ruling "sets a bright-line rule" that if police do not have a warrant, they must stay in locations where the public is implicitly invited except in an emergency, said Deputy Atty. Gen. Gary Lieberman.

The state is considering appealing the decision, People vs. Camacho, S075720, to the U.S. Supreme Court, Lieberman added.

The ruling came in an Oxnard case in which police testified that they received an anonymous complaint about a loud party and went to the address at 11 p.m. to investigate.

The officers heard no noise. But instead of knocking on the front door, they walked across the grass into a side yard to look into a bedroom window of the single-story home.

There they saw Camacho, sitting with his back to the window, handling clear plastic bags. On a bed and dresser were several bags containing white powder.

The two officers called for a backup, entered Camacho's bedroom window and arrested him.

"There was never any dispute as far as the good faith of the police," Lieberman said. "They got a complaint about a loud music disturbance, and the window they looked through was where the defendant's stereo speakers were facing."

The decision will overturn the conviction of Camacho, who had pleaded guilty to possession of drugs for sale after a trial court refused to suppress the evidence against him. He has been on probation, pending his appeal.

In evaluating the officers' conduct during the June 1997 search, the court based its decision on the lateness of the hour, the relative lack of seriousness of the phoned-in complaint and the officers' failure to first knock on the defendant's door.

Ventura County Judge Bruce A. Clark heard the case and ruled at the trial that the police had acted legally because the window had no blinds and anyone outside could easily peer in.

But the Supreme Court disagreed, saying that the absence of blinds did not mean a person could not reasonably expect privacy.

"Most persons, we believe, would be surprised, indeed startled, to look out their bedroom window at such an hour to find police officers standing in their yard looking back at them," wrote Werdegarr, who was joined by Justices Stanley Mosk, Joyce Kennard and **Janice Rogers Brown**.

Chief Justice Ronald M. George, writing the dissent, said Camacho's failure to "take even minimal measures" to shield the window with blinds, curtains or some other cover meant that he could not truly expect to be private.

To make his point, George attached color photographs of Camacho's modest home. They show that the side yard was easily accessible from the street, and, in George's view, "a location where other persons reasonably may be anticipated to be present."

"The brief time spent by officers in the open side yard of the residence, not for the purpose of surveillance but simply to attempt to identify the location of the noise that had prompted the complaint to the police, was not unreasonable under the circumstances," George wrote. Justices Marvin Baxter and Ming W. Chin joined him.

LOAD-DATE: July 28, 2000

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July 28, 2000, Friday

SECTION: Pg. 1

LENGTH: 576 words

HEADLINE: Deck: State Supreme Court Rules: Crossing Private Property to Look in Window Was Unlawful Search

BYLINE: From Staff and Wire Service Reports

BODY: Police officers who walked across the grass of a residence in response to a noise complaint and peered in through a side window and saw the occupant sitting on his bed with several baggies of cocaine in his possession committed an illegal search, the state Supreme Court ruled yesterday.

In a 4-3 decision, the high court threw out Cayetano C. Camacho's conviction of possession of cocaine with intent to sell. The ruling upholds a decision by a divided panel in the Court of Appeal's Div. Six.

The justices held that Ventura Superior Court Judge Bruce Clark should have suppressed the evidence obtained by looking into the bedroom, which was 40 feet from the street.

Justice Kathryn M. Werdegar, writing for the court, cited 1973's *Lorenzana v. Superior Court*, 9 Cal.3d 626, in which the court held that the police had illegally crossed a strip of land abutting a residence prior to observing illegal activity through a partially drawn window. The six-to-10 foot strip was covered with grass and dirt and had no doors or pathways.

Core Holding

"Although we find slight factual differences between *Lorenzana* and the instant case, none implicates the core holding of *Lorenzana*, to wit, that observations by law enforcement officers intrude on a person's reasonable expectation of privacy if made from private property onto which neither the public nor the police has been invited, and in circumstances wherein police lack a legal justification for being on the property," Werdegar wrote.

She was joined by Justices Stanley Mosk, Joyce L. Kennard, and **Janice Rogers Brown**.

Chief Justice Ronald M. George dissented, arguing:

"In view of the location and configuration of defendant's residence, the open and easily accessible nature of the side yard, the large (eight-by-four-foot) uncovered window facing the side yard, and defendant's failure to take even minimal measures such as shielding the window with curtains, blinds, or even a makeshift cover that would have been taken by a reasonable person concerned with protecting his or her privacy, I believe the trial court properly found that defendant lacked a reasonable expectation of privacy with regard to activities that were plainly visible through the uncovered window."

George, who was joined by Justices Ming Chin and Marvin Baxter, also argued that it was reasonable for the officers to traverse the grass in order to determine the origin of the noise they had been sent to investigate.

Noise Complaints

Werdegar disagreed, saying there was no evidence they heard any such noise. Police do not normally investigate late-night noise complaints by bypassing the front door and going to a side window, she said.

The defendant's lawyer praised the decision, saying a contrary ruling would have been open to abuse.

"It would have expanded the horizons for police to basically come up with reasons why they ought to go snooping around people's houses," said J. Courtney Shevelson, who defended Camacho before the justices. "My civil rights sensibilities are offended to think that the police should be able to do that."

Deputy Attorney General Gary Lieberman said his office is mulling whether to petition the U.S. Supreme Court to review the case.

"He took no effort to cover the window and the yard was open and accessible. That's our position, that he was in plain view," Lieberman said.

The case is *People v. Camacho*, 00 S.O.S. 4329.

LOAD-DATE: September 13, 2000

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The Recorder

July 28, 2000, Friday

SECTION: NEWS; PG. 1

HEADLINE: POLICE OFFICERS CAN'T

BYLINE: Kevin Livingston

BODY:

A divided California Supreme Court threw out a man's drug conviction Thursday because police officers discovered the narcotics only after they crossed into his side yard and peered through his open window.

Justice Kathryn Mickle Werdegard's majority opinion in *People v. Camacho*, 00 C. D.O.S. 6235, expands the court's 1973 landmark privacy ruling in *Lorenzana v. Superior Court*, 9 Cal.3d 626, and is the latest in a string of cases the court has used to bolster Fourth Amendment rights.

But the 4-3 opinion only served to rankle more conservative members of the court -- particularly Chief Justice Ronald George, who appended photographs of the man's house to his dissent to illustrate his opinion that Camacho could not have had a reasonable expectation of privacy.

Werdegard said although Camacho was spotted bagging cocaine in front of an uncovered 4- by 8-foot window by officers responding to a noise complaint, he still had a reasonable expectation of privacy because his activity could not be viewed from the street.

There is no "'unshuttered window' exception to the Fourth Amendment's warrant requirement that supersedes *Lorenzana's* reliance on the fact that police were not entitled to be in the defendant's side yard," Werdegard wrote.

Justices Stanley Mosk and Joyce Kennard joined Werdegard's opinion.

Justice **Janice Rogers Brown** wrote a separate concurrence.

But George, who has voted to uphold strict interpretations of the Fourth Amendment in the past, said the majority went too far when it said the police had no legal right to be on Camacho's property.

"Because defendant failed to take even minimal steps to shield his actions from being viewed from an area where he could reasonably anticipate that a neighbor or other member of the public might venture, the police conduct here did not infringe upon a reasonable expectation of privacy," George wrote. Justices Ming Chin and Marvin Baxter sided with George.

The chief justice backed up his dissent with photos of the house, which he said showed that the side yard in question wasn't hindered by a fence, bushes or other shrubbery that would have deterred entry from the sidewalk.

"The photographs contained in the record make clear that the side yard in question was not designed to, and did not in fact, provide any significant degree of privacy," he wrote.

He also pointed out to the majority that because of the passage of 1982's Proposition 8, the state courts must look to the federal courts for constitutional guidance when suppressing evidence in criminal trials.

Although the U.S. Supreme Court has yet to address the scenario presented in Camacho, George said, lower federal courts have said that officers responding to a call are not required to limit their observations to the front entranceway.

The straightforward nature of the facts might present the U.S. Supreme Court with an opportunity to clarify the relationship between trespass principles and the reasonable-expectation-of-privacy test, George added.

Deputy Attorney General Gary Lieberman said his office is evaluating whether to petition the U.S. Supreme Court for review.

"That carries a lot of weight," he said of George's dissent.

Lieberman didn't think the decision would have a huge impact on law enforcement efforts around the state. He said it simply imposes a bright-line rule that tells police officers that, unless they're invited, they are restricted to certain parts of a property.

J. Courtney Shevelson, a Carmel attorney who argued on behalf of Camacho before the court, said the ruling was very much in line with what the U.S. Supreme Court has done in similar situations. He disagreed with George's argument that federal law allows officers to tread on someone's property without a warrant.

"It's a reasonable application of a rule that's been on the books for a long time," he said about the majority's opinion. "I don't see anything in federal case law that says what these officers did was correct."

Camacho is the second case the court has overturned on Fourth Amendment grounds this month.

Last week all seven justices said police officers can't validate an otherwise illegal search just because they later discover that another person residing in the house is on probation. That case was People v. Robles, 00 C.D.O.S. 5894.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com

LOAD-DATE: July 28, 2000

The Associated Press State & Local Wire

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July 27, 2000, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 491 words

HEADLINE: Supreme Court: Police should not have gone into yard to spy on alleged drug seller

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATeline: SAN FRANCISCO

BODY:

Police violated the reasonable expectation of privacy by spying on a suspected drug dealer through an open window, a divided California Supreme Court ruled Thursday.

The 4-3 decision overturns an accused Oxnard drug dealer's conviction. Chief Justice Ronald M. George issued a blistering dissent, arguing that the civil rights issue may better be resolved by the nation's highest court.

"This case might well provide the United States Supreme Court with an appropriate opportunity to clarify the proper relationship between trespass principles and the reasonable-expectation-of-privacy test under the Fourth Amendment of the United States Constitution," George wrote, in a dissent signed by Justice Marvin R. Baxter and Justice Ming W. Chin.

The decision upholds a 1998 Ventura-based appellate court decision saying that an Oxnard Police Department officer violated the reasonable expectation of privacy by walking into a grassy side yard to look through a bedroom window, where he allegedly saw Cayetano Camacho measuring cocaine.

The decision overturns Ventura County Superior Court Judge Bruce Clark's 1997 decision not to suppress the small amount of cocaine.

Defense attorneys familiar with the Oxnard case said a contrary ruling would have been a blow to Californian's privacy rights.

"It would have expanded the horizons for police to basically come up with reasons why they ought to go snooping around people's houses," said J. Courtney Shevelson, who defended Camacho before the justices. "My civil rights sensibilities are offended to think that the police should be able to do that."

Deputy Attorney General Gary Lieberman said his office is mulling whether to petition the U.S. Supreme Court to review the case.

"He took no effort to cover the window and the yard was open and accessible. That's our position, that he was in plain view," Lieberman said.

The majority opinion of Justice Kathryn Mickle Werdegard and signed by Justices Stanley Mosk, Joyce L. Kennard and **Janice Rogers Brown**, noted that police may intrude onto private property, such as somebody's lawn, if they believed there is an emergency. During Camacho's 1997 arrest,

Werdegarr said, police were responding to an anonymous tip of loud music, not an emergency.

Most important, while police did not hear loud music, the officers never knocked on the door during their 11 p.m. investigation, Werdegarr wrote. Instead, an officer went to the side yard where Camacho was seen through an open window.

"Most persons, we believe, would be surprised, indeed startled, to look out their bedroom window at such an hour to find police officers standing in their yard looking back at them," Werdegarr wrote.

George, however, said Camacho forfeited his privacy expectations because he did not erect a fence around the property, which left the area open to a child chasing a ball. The window was 40 feet from the street and at the side of the house.

LOAD-DATE: July 28, 2000

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The Recorder

July 27, 2000, Thursday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES TAKE

BYLINE: Kevin Livingston

BODY:

The California Supreme Court is set to take a second look at one of its most famous cases.

Four justices voted Wednesday to review an unpublished opinion that petitioners say weakens the court's landmark 1976 ruling in *Marvin v. Marvin*, 18 Cal.3d 660 -- a decision that allowed live-in lovers to assert contractual claims once their relationships come to an end.

The ruling, from the Fourth District Court of Appeal in San Diego, said a woman couldn't enforce promises made to her while she and her boyfriend lived together because the couple later became engaged to marry.

In urging the court to review the ruling, the woman's attorney argued that the decision clashes with the longstanding precedent won by celebrity divorce lawyer Marvin Mitchelson.

"Marvin stands for the proposition that cohabitation is not a bar to a legally enforceable contract between cohabitants," San Francisco attorney Robert Kligman wrote in his petition to the court. "By refusing to sever the palimony promises from the promise to marry, the court of appeal holds that an otherwise valid palimony contract, coupled with a promise to marry, becomes unenforceable in its entirety."

Tisch Alexander lived with Howard Birndorf from 1993 to 1997 and claims that Birndorf made a variety of promises -- including paying her \$125,000 for every year they remained together -- to induce her to move from her home in Colorado to his home in California.

Although Alexander said she wanted to marry Birndorf, she said the promises were made six months before the couple was engaged.

Alexander asserted that the financial agreements were severable from any unenforceable promises to marry. But in his unpublished opinion, Fourth District Justice Gilbert Nares said her claim was barred by California's anti-heart-balm statutes, which preclude recovery for "promises of love."

The statute provides that a fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages.

"Love has been known to last a lifetime, but it has also been known to be notoriously evanescent," Nares wrote for the unanimous court. "These are matters better left to advice columnists than to judges and juries."

Kligman, who could not be reached for comment Wednesday, said in his petition that the appellate court's ruling ignored the court's holding in *Marvin*. He said the fact that the parties were engaged is completely irrelevant.

"Marvin does not hold or even suggest in any considered fashion that agreements between parties who choose to live together without marriage become unenforceable if there are related promises of

marriage," Kligman wrote.

Chief Justice Ronald George, along with Justices Joyce Kennard, Kathryn Mickle Werdegar and **Janice Rogers Brown**, voted to review *Birndorf v. San Diego County Superior Court*, S088525.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: July 27, 2000

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The Recorder

July 26, 2000, Wednesday

SECTION: COMMENT; PG. 4

HEADLINE: FRIENDS IN HIGH PLACES

BYLINE: GEORGE M. KRAW

BODY:

Just when you think that there's nothing more that the State Bar and the Legislature could do to insult California lawyers, humiliate the Supreme Court and fuel public cynicism about the legal system, along comes convicted killer Eben Gossage's Bar admission brouhaha.

Gossage, the son of a one-time prominent San Francisco family, wants a Bar card in spite of what Bar lawyers claim is a record of 17 convictions and a signed-under-penalty-of-perjury Bar application that officials maintain omitted more than half the offenses.

He says he's turned his life around. After the State Bar's committee of Bar examiners refused to certify Gossage as "morally fit" to practice, a Bar trial court and a review panel found 2-1 in Gossage's favor.

They must have been impressed by the fact that he hadn't killed anyone recently. And maybe they were also impressed by the support he's receiving from local politicians. More about them in a moment.

If the decision stands, it will further undercut public support for the legal system. This matter is not simply a question of whether Gossage has rehabilitated himself; it's a question of public confidence in the profession. Gossage's precocious criminal career landed him in state prison for forgery by the time he was 20, and eventually included convictions for heroin possession and homicide. In 1975 he smashed his sister Amelia's skull 17 times with a hammer and then stabbed her corpse 45 times with a pair of scissors. At trial, he claimed that he was acting in self-defense. The jury convicted him of manslaughter, and he was locked up for two and a half years.

After still more trouble with drugs and more time in state prison, he changed his career path. Later he started his own construction business and graduated from Golden Gate University School of Law. In 1993, he passed the Bar examination.

A history of multiple serious felonies isn't by itself a permanent disqualification from admission to the Bar. Several of Gossage's convictions are for minor offenses. But some resulted from bench warrants for failures to appear -- while he was in law school. That type of criminal record and an incomplete criminal rsum on a State Bar application could quickly have sunk any other candidate.

Gossage is now a successful real estate entrepreneur with good social and political connections. At the Bar trial on his admission, state Senate head John Burton, S.F. District Attorney Terence Hallinan, S.F. Supervisor Sue Bierman and S.F. Public Defender Jeff Brown appeared as witnesses on his behalf. The DA told the court that he'd be willing to consider Gossage for a job as a prosecutor.

Even under the State Bar Court's standard -- clear and convincing evidence of present good moral character -- the court's decision was a bad mistake.

The Bar routinely suspends lawyers who don't pay their dues or take required MCLE courses. It's not

too much to require full and accurate disclosure from an admissions candidate with multiple felony convictions.

The same standard should apply for anyone with Gossage's criminal record, whether his background is Bayview-Hunters Point or the Town School for Boys in Pacific Heights. Nobody is trying to prevent Gossage from rehabilitating himself. But that doesn't mean that he's qualified for admission to a profession whose core responsibility is to uphold and interpret the law.

The greatest outrage in this sorry mess is what happened to H. Kenneth Norian, the only judge to vote against Gossage. He was part of the review panel that heard the committee on Bar examiners' appeal.

Norian is also the Bar Court's only non-lawyer judge. After his dissent in the Gossage case, Senate president Burton introduced legislation, SB 143, that abolished Norian's non-lawyer post on the review panel and allowed the Legislature and the governor to appoint three of the hearing judges. All judges had previously been appointed by the state Supreme Court.

SB 143 had a direct, unsubtle message: Don't antagonize important legislators. The Supreme Court last month upheld the constitutionality of the new law, in spite of its affront to the court's authority. **Janice Rogers Brown's** dissent acidly noted that separation of powers "is not a task for wimps."

Burton has introduced new legislation this legislative session to monitor the Bar's disciplinary process. Increased public scrutiny of State Bar operations is generally a good idea, but it shouldn't be used as a tool by peeved legislators to intimidate regulators. And unless the Supreme Court assumes direct control over regulation of lawyers, admissions and discipline will be increasingly vulnerable to political pressure.

Two years ago, the committee on Bar examiners asked the Supreme Court to block Gossage's admission. The justices seemed skeptical about the Bar Court's decision during oral arguments in May. They are due to rule any day now.

Assuming Eben Gossage is ultimately denied admission, the Bar, the Supreme Court and California lawyers will still be left with Burton's SB 143 as a distasteful reminder of the episode. One way or another, Gossage is going to make legal history, even without a Bar card.

LOAD-DATE: July 26, 2000

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The Recorder

July 20, 2000, Thursday

SECTION: NEWS; PG. 1

HEADLINE: CAN ONE BULLET EQUAL TWO MURDERS?

BYLINE: Kevin Livingston

BODY:

The California Supreme Court agreed Wednesday to decide if two men can be charged for the same murder when it's unclear who actually fired the fatal bullet.

The case involves two opposing gang members who, while shooting at each other on a busy street, killed a bystander.

The question for the court is if both men can be guilty of first-degree murder -- one as the actual killer and the other under the provocative act murder doctrine.

In petitioning the court to take the case, Deputy Attorney General Warren Robinson likened the situation to a case where a court of appeal found in 1957 that two contestants in a drag race could both be held responsible for a bystander's death. "Like drag racers, both appellant and co-defendant share responsibility for the victim's death," he wrote.

In an unpublished opinion released in March, the Fourth District Court of Appeal found that the men couldn't be "simultaneous provocateurs."

Robinson said the Fourth District erred when it held that the trial court misapplied the provocative act murder doctrine -- a theory that states a defendant may be found guilty of murder when, in the commission of a felony, he commits an act that provokes someone to kill another person.

Julio Cesar Sanchez and Ramon Gonzalez were rival gang members who started shooting at each other after Sanchez drove by a house and spotted Gonzalez standing out front. Neither was hurt, but one of the bullets struck Reynaldo Estrada, a bystander.

Since the absence of the guns and bullet casings made pinpointing the actual killer impossible, both men were prosecuted. In 1998, a San Bernadino County Superior Court jury convicted both of first-degree murder.

But the Fourth District overturned Sanchez's conviction on the grounds that the prosecution relied on inconsistent first-degree murder theories. Justice Art McKinster said if the actual shooter acted with premeditation, the provocateur can only be guilty of attempted murder of the shooter.

"We hold as a matter of law that the jury in this case could not find one defendant guilty of provocative act murder and the other defendant guilty of premeditated and deliberate murder under the facts of this case," he wrote for the unanimous court.

Chief Justice Ronald George and Justices Marvin Baxter, Kathryn Mickle Werdegarr and **Janice Rogers Brown** voted to take up *People v. Sanchez*, S088025.

In other action Wednesday, the Supreme Court refused to review another Fourth District decision that concluded that a man could be tried for solicitation of a minor over the Internet, even though the alleged victim was a 21-year-old news investigator posing as a 13-year-old. The 2-1 decision

rejected the defendant's contention that a state law prohibiting the use of the Internet to transmit sexually explicit material to minors is unconstitutional.

That case is Hatch v. Superior Court, S088324.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: July 20, 2000

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July 18, 2000, Tuesday

SECTION: Pg. 1

LENGTH: 854 words

HEADLINE: S.C. Rejects Use of Evidence Seized From Probationer's Residence

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: Evidence seized from a residence shared by two persons, one of whom was on probation and subject to a search condition, is inadmissible against the other if the officers were unaware of the search condition, the state Supreme Court ruled yesterday.

The court was unanimous in overturning Antonio Robles' Orange Superior Court conviction and seven-year prison term for auto theft.

In doing so, it rejected the trial judge's reliance on prior rulings upholding the admission of evidence obtained from a probationer whose search condition was unknown, as well as the use of evidence against a person who shared a residence with a probationer but was unaware of the search condition.

Robles was convicted of stealing Rolando Sanchez's car. Sanchez called police about 10 days after the car was taken and told them he had seen someone whom he later identified as Robles driving the car and had later found it parked in an alley.

Police said they responded to the scene and detained Robles but couldn't find the car. One of the officers testified that he went to the nearby apartment complex where Robles lived, saw the car through a rip in the door of one of the garages connected to the complex, and entered through the unlocked door.

Besides Sanchez's testimony, Robles was linked to the car through a palm print lifted from the interior. The ignition and steering column had been damaged, apparently in an effort to enable the car to be started without a key.

The day after Robles was arrested, police learned that he shared his apartment with his brother, a probationer subject to a search condition.

Motion Denied

Judge Richard L. Weatherspoon denied the defendant's motion to suppress. The jury found Robles guilty of auto theft, and Weatherspoon sentenced him to five years in prison, plus two one-year prior-prison-term enhancements.

The Court of Appeal reversed, however, finding that all of the evidence from the garage had been obtained illegally.

Justice Marvin Baxter, writing for the high court, agreed. He distinguished *In re Tyrell J.* (1994) 8 Cal.4th 68, and *People v. Woods* (1999) 21 Cal.4th 668.

In *Tyrell*, the court held that even though the police officer who searched the accused and found marijuana on his person didn't know he was subject to a search condition, the search was lawful because being subject to search by the police at any time meant he lacked a reasonable expectation of

privacy.

In Woods, the justices ruled that two defendants on whose premises drugs were found were lawfully convicted based on the probation status of their roommate. This was true, the court held, even if the roommate's status was a pretext to obtain evidence against a friend of the roommate who didn't reside on the premises.

But the "common area" theory of consent relied on in Woods doesn't apply when the police don't know of the search condition, Baxter said, because such a search isn't reasonably related to the purposes of probation.

"Moreover, if officers lack knowledge of a probationer's advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority," the justice wrote.

Privacy Expectations

Nor may Tyrell's reasoning "be stretched to vitiate the illegality of the police action here," Baxter said. "Even though a person subject to a search condition has a severely diminished expectation of privacy over his or her person and property, there is no doubt that those who reside with such a person enjoy measurably greater privacy expectations in the eyes of society."

Baxter emphasized the heightened level of privacy in one's residence, and said that allowing the police to conduct warrantless searches of residences and justify them after the fact by finding that one of the residents was on probation had too great a potential for abuse.

"Thus, while society generally has an interest in having all probative evidence before the court, in circumstances such as these, a knowledge-first requirement is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches and seizures," the justice said.

Chief Justice Ronald George concurred in the opinion, as did Justices Kathryn M. Werdegar and Ming Chin. The other three justices wrote separate concurrences.

Justice Stanley Mosk said the court should have rejected the search on the ground that it exceeded the scope of consent under state probation law, without regard to the Fourth Amendment.

Justices Joyce L. Kennard and **Janice Rogers Brown** reiterated their dissenting views in Woods, Kennard noting that she also dissented in Tyrell. Brown, who was not on the court at the time of Tyrell, said that decision was flawed and unprecedented in giving police an incentive to make searches without probable cause, and criticized the majority for "perpetuating...its dubious reasoning."

The case is *People v. Robles*, 00 S.O.S. 4121.

LOAD-DATE: September 13, 2000

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The Recorder

July 18, 2000, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: AG LOSES ON PROBATION SEARCHES

BYLINE: Kevin Livingston

BODY:

The California Supreme Court has once again attempted to define the constitutional interplay between the Fourth Amendment and search conditions agreed to by probationers.

All seven justices agreed Monday that police officers can't validate an otherwise illegal search just because they later discover that another person residing in the house is on probation.

In a separate opinion Monday, the court also gave the business bar a breather when it held that a single corporate officer can sign valid contracts on behalf of a company so long as he holds more than one corporate office.

In *People v. Robles*, 00 C.D.O.S. 5894, Justice Marvin Baxter found that because the police didn't know Antonio Robles' brother was on probation when they searched his garage for a stolen vehicle, the later discovery of that information didn't validate the warrantless search.

While all the justices agreed that evidence against a man who was sentenced to seven years in prison for car theft should be tossed, not all the justices were happy with the way the court reached its conclusion.

Baxter held that allowing a search to be validated after the fact would encourage police to engage in invalid searches with no limitation or justification.

"Searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation," Baxter wrote.

Baxter wasn't swayed by the attorney general's argument that the issue in *Robles* was governed by the court's 4-3 ruling last year in *People v. Woods*, 21 Cal.4th 681. In that case, the court said evidence obtained during a warrantless search of a residence occupied by a probationer and two others could be used against those two.

"Contrary to the people's argument, *People v. Woods* does not support the proposition that police officers may lawfully enter a residential premises, without a warrant and without any awareness of a resident's probation search condition, to indiscriminately search for and seize evidence of suspected criminal wrongdoing," Baxter wrote.

Antonio -- who has since served his time -- was sharing an apartment with his brother Armando when he was arrested for car theft in 1995.

Antonio was spotted driving the stolen car by the vehicle's owner and was later arrested in an alley near his home after the car's owner identified him. Officers at the scene then spotted the car through a hole in the garage door, opened the door and removed the evidence. Only later did the officers discover that Antonio's brother was on probation.

Orange County Superior Court Judge Richard Weatherspoon relied on Armando's probationary status

in denying his brother's motion to suppress the evidence found in the garage. But the Fourth District Court of Appeal reversed, saying Robles's Fourth Amendment rights had been violated.

In a separate concurring opinion, Justice Stanley Mosk said the majority should have avoided tinkering with the Fourth Amendment and instead concluded that a probationer's consent to a search is limited to searches meant to ensure compliance with the conditions of probation.

Relying on past dissents in *Woods* and 1994's *In re Tyrell J.*, 8 Cal.4th 68, Justice Joyce Kennard separately concurred.

Kennard agreed that allowing officers to rely on a probation search condition which they were unaware of at the time of the arrest would encourage them to "search first and ask questions later." But she went a step further and said the search was illegal anyway because the police were there to gather evidence against the defendant and not his brother.

Justice **Janice Rogers Brown** also concurred separately, arguing that the majority's suggestion that advance consent from Armando Robles might have furnished a legitimate basis for the search sent the wrong message. She also criticized the court's earlier rulings for not going far enough to rein in police misuse of probation searches. "The attorney general's assessment of the confluence of *People v. Woods* and *Tyrell J.* is as syllogistically accurate as it is constitutionally shocking," Brown wrote. "It also speaks volumes to how far this court's Fourth Amendment methodology has strayed from the core rationale of the guarantee against unreasonable searches and seizures."

The court has at least two other search-and-seizure cases before it. In *People v. Camacho*, S075720, the justices must soon decide whether a police officer can cross a lawn and peak into a window to witness illegal activity.

And last month the court voted to decide another probation case -- *People v. Moss*, S087478 -- a case in which the justices are expected to overturn the ruling in *Tyrell J.*

Deputy Attorney General Ronald Niver said Robles is likely the first step in overruling *Tyrell J.*

"It's not entirely clear where they want to go in terms of the Fourth Amendment," Niver said.

In a separate opinion released Monday a unanimous court said that a single signature is enough to validate a corporate contract if the signer holds more than one corporate office.

Snukal v. Flightways Manufacturing Inc., 00 C.D.O.S. 5988, attracted amicus briefs from several large San Francisco firms concerned that an appellate court ruling, if upheld, could throw the validity of many corporate contracts in doubt.

But in a unanimous opinion, Chief Justice Ronald George said that even though the contract was signed by only one corporate officer, his signature was enough because he held more than one corporate office.

His opinion also concluded that the court of appeal is not authorized to decide selected issues that are not dispositive of the appeal and then remand the case.

Snukal rose out of a dispute over a lease on a Malibu beach house. The house was rented to Kirt Lyle, the president, chief financial officer and secretary of Flightways Manufacturing.

After a dispute over unpaid rent, *Snukal* sued for breach of contract. Flightways argued that the contract was invalid because it hadn't been signed by two corporate officers as required by California Corporations Code 313.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: July 18, 2000

The Associated Press State & Local Wire

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July 13, 2000, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 447 words

HEADLINE: Governor to have final say if convicted murder gets paroled

DATELINE: SACRAMENTO

BODY:

A gay man convicted of shooting his neighbor who was taunting him could be paroled next year after spending 16 years in prison, if Gov. Gray Davis approves the parole date.

The Board of Prison Terms had appealed a ruling that required the board to set a release date for Robert Rosenkrantz who was 19 years old when he shot and killed Steven Redman. On Wednesday, the state Supreme Court denied review of the appeal.

Justice **Janice Rogers Brown** cast the only vote to review the case.

The board voted June 30 to release Rosenkrantz after an appellate court in Los Angeles accused the board of ignoring the evidence and defying the law. The board voted to release Rosenkrantz in March 2001.

It was the first time a California appellate court had overturned a parole board decision that a prisoner was unsuitable for release.

If another board committee approves, the case could be before Davis by September.

The governor has the power to block parole of any life prisoner, but has vetoed every release approved by the board since taking office and kept Rosenkrantz behind bars last year after board members set a release date.

Davis was quoted as saying last year that he believed murderers should never be released, but aides have insisted recently that Davis has no rigid policy against parole.

Rosenkrantz, a college-bound student in the Los Angeles suburb of Calabasas, had no criminal record when he killed Redman in June 1985. According to an appellate court, Redman "outed" Rosenkrantz to Rosenkrantz's father, who kicked him out of the house.

Rosenkrantz bought a gun, confronted Redman a week later and demanded that he take back the statements to his father. Redman laughed and called him a "faggot." Rosenkrantz then shot him 10 times.

A jury convicted him of second-degree murder - an unplanned but deliberate killing. He was sentenced to 17 years to life.

In prison, Rosenkrantz has earned a college degree, tutored other inmates, become a computer expert

and learned to deal with his violent impulses with the help of therapy, according to the appellate court.

A panel of the parole board found him suitable for release at his first hearing in 1996, but a review panel overruled the decision.

A Superior Court judge ruled in March 1999 that there was no evidence to support the board's findings and found two panel members to be biased against Rosenkrantz.

After Davis vetoed his parole, the 2nd District Court of Appeal found no evidence to support the board's findings that Rosenkrantz was unfit for release. The court said it expected the board to find Rosenkrantz suitable for parole, a conclusion the board unwillingly adopted.

LOAD-DATE: July 14, 2000

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July 13, 2000, Thursday

SECTION: Pg. 1

LENGTH: 578 words

HEADLINE: S.C. Won't Review Ruling That Ordered Parole Date in Politically Charged Case of Gay Who Killed Neighbor

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: The state Supreme Court yesterday let stand lower court rulings that required the Board of Prison Terms to set a parole release date for a gay man convicted of killing a neighbor who disclosed his homosexuality to his father.

Only Justice **Janice Rogers Brown** voted to review the April 27 ruling by Div. One of this district's Court of Appeal, which granted Robert Rosenkrantz' habeas corpus petition, a court official said. The court also denied the attorney general's request that the opinion be depublished.

The case of Rosenkrantz, who has served 15 years of a 17-year-to-life sentence for second degree murder, has taken on political overtones.

Gay activists, backed by Assemblywoman Carol Migden, D-San Francisco, Senate President Pro Tem John Burton, D-San Francisco, and Sen. John Vasconcellos, D-Santa Clara, have lobbied for Rosenkrantz's release.

On the other hand, supporters of district attorney candidate Steve Cooley have charged that District Attorney Gil Garcetti's decision on which he later reversed himself not to oppose parole was based on political considerations. Rosenkrantz's attorney, Rowan K. Klein, in turn told reporters that Garcetti changed his position because he's in a tough race for reelection.

Rosenkrantz was 18 years old when he shot Steven Redman 10 times with an assault weapon. The assault came after Redman and Rosenkrantz's brother had broken into the Rosenkrantz family beach house, caught Rosenkrantz with another man, and assaulted him while yelling anti-gay epithets.

Prosecutors, who charged Rosenkrantz with first degree murder, said he waited all night in his car for Redman to come out of his Malibu condo. He then threatened to kill Redman unless he told Rosenkrantz's father Calabasas attorney Herbert Rosenkrantz that the claim that Robert Rosenkrantz was gay was really a joke, and shot him after Redman allegedly laughed.

Klein sought relief for his client from the courts after the Board of Prison Terms found Rosenkrantz by accounts a model prisoner unsuitable for parole. In April of last year, Los Angeles Superior Court Judge Kathryn M. Stoltz ordered the board to set a release date unless it found changed circumstances since the defendant's 1998 parole hearing.

While the setting of parole dates is normally within the discretion of the board, subject to the governor's constitutional veto power, Stoltz said the board could not deny release when there was no evidence to support its finding that Rosenkrantz's release would endanger the public.

The board set a release date, saying it was doing so only in response to the order. But the state appealed, and Gov. Gray Davis who has denied parole in every case presented to him by the board vetoed the release last November.

In April, however, Div. One agreed with Stoltz, saying the defendant had a right to "a fair hearing at which three unbiased commissioners actually read the reports and other documents in Rosenkrantz's file and then make a reasoned decision based on the appropriate factors." The board last month again set a release date under compulsion of the court.

Rosenkrantz's fate is now again in the hands of the governor. Neither Klein nor Deputy Attorney General Robert D. Wilson, who argued the appeal for the board, were available yesterday, but Klein has been quoted as saying that he believes the governor has no choice other than to approve the release and that he intends to return to court if Davis doesn't.

LOAD-DATE: September 13, 2000

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The Recorder

July 13, 2000, Thursday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES TAKE

BYLINE: Kevin Livingston

BODY:

The California Supreme Court on Wednesday voted to decide whether residents of the city of Redlands can be certified as a class for the purpose of a toxic tort suit.

The court will also decide if the California Highway Patrol is immune from liability if an officer's actions put a driver in harm's way.

All but vacationing Justice Stanley Mosk voted to review the Fourth District Court of Appeal's decision in Lockheed Martin v. San Bernardino Superior Court, S088458 -- a case which could establish the legal remedies available for communities that are the victims of toxic pollution.

"It's time for California courts to address the right to medical monitoring from exposure to chemicals in peoples' drinking water," said Gary Praglin, a partner at Los Angeles' Engstrom, Lipscomb & Lack, one of the firms acting as class counsel.

In April the court of appeal ruled that city residents __ could not sue as a class for exposure to contaminated groundwater. Decertifying the 50,000- person class, Justice Thomas Hollenhorst ruled that proposed damages in the form of a court-certified medical monitoring program relied too heavily upon factors unique to each individual.

"Man_y courts, both California and federal, have found that mass tort actions for personal injuries are not appropriate for class treatment due to the plethora of individual factual issues regarding liability, causation and damages," Hollenhorst wrote in his unanimous opinion.

Plaintiffs had sought the medical monitoring program as well as punitive damages for claimed exposure to a laundry list of solvents, including rocket fuel components and rocket fuel decomposition products.

Residents allege that as early as 1954, Lockheed and other defendants conducted manufacturing operations in San Bernardino County that resulted in the discharge of dangerous chemicals into the Redlands groundwater.

In another case from the Fourth District, four justices agreed to decide if the Highway Patrol is liable for a 1996 accident that killed one man and severely injured another.

In a case that could extend immunity for California law enforcement agencies, the court must decide in Lugtu v. California Highway Patrol, S088116, whether an officer owed a duty of __ care to the driver of a Toyota Camry who was instructed to pull over in the highway median and was then hit by a passing truck.

The California Attorney General's office won summary judgment after it argued that the accident was not foreseeable and, in any event, the officer was immune from liability.

But the court of appeal disagreed, holding that a triable issue of fact existed and no immunity applied.

The appellate court ruling came one day after the California Supreme Court held that police officers involved in vehicle pursuits are immune from liability even if they are negligent_.

That case was Cruz v. Briseno, 00 C.D.O.S. 2299.

Chief Justice Ronald George and Justices Ming Chin, Joyce Kennard and **Janice Rogers Brown** voted to review Lugtu.

Reporter Kevin Livingston's e-mail address is klivingston<@>therecorder.com_. _

LOAD-DATE: July 13, 2000

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July 13, 2000, Thursday

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"Man_y courts, both California and federal, have found that mass tort actions for personal injuries are not appropriate for class treatment due to the plethora of individual factual issues regarding liability, causation and damages," Hollenhorst wrote in his unanimous opinion.

Plaintiffs had sought the medical monitoring program as well as punitive damages for claimed exposure to a laundry list of solvents, including rocket fuel components and rocket fuel decomposition products.

Residents allege that as early as 1954, Lockheed and other defendants conducted manufacturing operations in San Bernardino County that resulted in the discharge of dangerous chemicals into the Redlands groundwater.

In another case from the Fourth District, four justices agreed to decide if the Highway Patrol is liable for a 1996 accident that killed one man and severely injured another.

In a case that could extend immunity for California law enforcement agencies, the court must decide in *Lugtu v. California Highway Patrol*, S088116, whether an officer owed a duty of__care to the driver of a Toyota Camry who was instructed to pull over in the highway median and was then hit by a passing truck.

The California Attorney General's office won summary judgment after it argued that the accident was not foreseeable and, in any event, the officer was immune from liability.

But the court of appeal disagreed, holding that a triable issue of fact existed and no immunity applied.

The appellate court ruling came one day after the California Supreme Court held that police officers involved in vehicle pursuits are immune from liability even if they are negligent_.

That case was Cruz v. Briseno, 00 C.D.O.S. 2299.

Chief Justice Ronald George and Justices Ming Chin, Joyce Kennard and **Janice Rogers Brown** voted to review Lugtu.

Reporter Kevin Livingston's e-mail address is klivingston<@>therecorder.com_ _

LOAD-DATE: July 14, 2000

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Sacramento Bee

July 13, 2000, Thursday METRO FINAL EDITION

SECTION: MAIN NEWS; Pg. A4

LENGTH: 524 words

HEADLINE: STATE SUPREME COURT REJECTS PAROLE REVIEW INMATE'S RELEASE
SEEN AS TEST OF DAVIS' PLEDGE

BYLINE: Claire Cooper Bee Legal Affairs Writer

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court on Wednesday refused to review a case that has become the acid test for Gov. Gray Davis' practice of blocking parole for all killers.

With only Justice **Janice Rogers Brown** dissenting, the justices shut down the last legal route around a Court of Appeal decision requiring the parole of Robert Rosenkrantz, 33.

The Calabasas man has been a model inmate at the medium-security California Men's Colony in San Luis Obispo for 15 years. His first and last crime was second-degree murder for slaying a friend who exposed him to his father as a homosexual.

Last year Davis revoked each of the board's decisions to parole Rosenkrantz and 15 other prisoners, saying no killers would be set free on his watch.

More recently, however, the governor's deputy press secretary has called that remark "political-speak," and the administration has refused to say what will be done when the Rosenkrantz case is back on Davis' desk in about six weeks.

"It would be inappropriate to comment on what he might do until he has had a chance to review the case," administration spokesman Steve Green said Wednesday. Davis "is required to consider every aspect," Green said.

But Rowan Klein, Rosenkrantz's lawyer, said he will sue if Davis fails to release his client. The governor must follow the same laws as the parole board, Klein said.

The justices also turned down an administration bid to remove the Court of Appeal's April opinion from the law books to prevent its use as a precedent in future cases.

Klein said he has at least 10 other clients who could sue to be released. He said there probably have been many other strong cases among the 2,000 reviewed by the parole board each year.

The Court of Appeal said parole decisions must be based on the factors spelled out in the state's statutes, such as potential for risk to the community, and not on false information or subjective reasoning. The court also threatened the parole board with contempt of court if Rosenkrantz were not released.

In an interview about two weeks ago, Clark Kelso, a professor at McGeorge School of Law, called the Court of Appeal's decision "an extremely strong message," reflecting "frustration the courts are feeling at the way Gov. Davis is managing his responsibility in parole."

Whatever position the governor may or may not articulate, Kelso said, the courts sense that he is adhering to an "across-the-board policy that violates the statute. The results speak rather clearly. . . . They're still not paroling anyone convicted of homicide."

Kelso's comments came shortly before a panel of three parole commissioners, acting under the shadow of the Court of Appeal's opinion, reluctantly voted two weeks ago to release Rosenkrantz in March 2001.

The vote was the third time a parole panel agreed to send Rosenkrantz home. The first such vote came several years ago and was revoked by the board itself. The second came last year when, faced with a Superior Court order to free Rosenkrantz, the board decided to comply, but Davis reversed the decision.

Klein also said he may challenge the March 2001 date as being too late.

LOAD-DATE: July 14, 2000

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View Related Topics

July 13, 2000, Thursday FIRST EDITION

SECTION: NEWS; Pg. A-7

LENGTH: 603 words

HEADLINE: Prison board sets murderer's release date;
Governor to have final say if man who killed in 1985 gets out

BYLINE: Bob Egelko

SOURCE: OF THE EXAMINER STAFF

BODY:

A parole case that has become a political hot potato, involving a gay teenager who shot a neighbor who was taunting him, is heading for Gov. Davis' lap.

The state Supreme Court denied review Wednesday of the Board of Prison Terms' appeal of a ruling that required the board to set a release date for Robert Rosenkrantz. Justice **Janice Rogers Brown** cast the only vote to review the case.

Accused by an appellate court in Los Angeles of ignoring the evidence and defying the law, the board reluctantly voted June 30 to free Rosenkrantz next March after almost 16 years in prison for a murder he committed at age 19.

It was the first time a California appellate court had overturned a parole board decision that a prisoner was unsuitable for release.

If another board committee approves, the case could be before Davis by September.

The governor, who has the power to block parole of any life prisoner, has vetoed every release approved by the board since taking office and kept Rosenkrantz behind bars last year after board members bowed to a Superior Court judge's order and set a release date. Davis was quoted as saying last year that he believed murderers should never be released, but aides have insisted recently that Davis has no rigid policy against parole.

"If he has such a policy, it hasn't been communicated to us," said the administration's designated spokesman on the case, Stephen Green, assistant secretary of the Youth and Adult Correctional Agency. "It would be inappropriate to comment on what the governor might do until he has reviewed the case and made a decision."

State Senate leaders cited the Rosenkrantz case in May when they delayed a confirmation vote on a Davis appointee to the parole board. Senate President pro tem John Burton, D-San Francisco, has threatened to block all appointees to the board, which now approves release dates in only a handful of cases each year and was upbraided by a federal judge recently for its treatment of disabled prisoners.

Rosenkrantz, a college-bound student in the Los Angeles suburb of Calabasas with no criminal record, killed Steven Redman, a friend of his brother's, in June 1985. According to an appellate court, Redman had punched him at a high school graduation party, then "outed" Rosenkrantz to

Rosenkrantz's father, who kicked him out of the house.

Rosenkrantz bought an Uzi, confronted Redman a week later and demanded that he take back the statements to his father. Redman laughed and called him a "faggot." Rosenkrantz then shot him 10 times.

A jury rejected a charge of premeditated first-degree murder but convicted him of second-degree murder, an unplanned but deliberate killing. He was sentenced to 17 years to life.

In prison, Rosenkrantz has earned a college degree, tutored other inmates, become a computer expert and, according to the appellate court, learned to deal with his violent impulses with the help of therapy.

A panel of the parole board found him suitable for release at his first hearing in 1996, but a review panel overruled the decision, likening the killing to an execution. After a series of rejections, a Superior Court judge ruled in March 1999 that there was no evidence to support the board's findings and found two panel members to be biased against Rosenkrantz.

After Davis vetoed his parole, the 2nd District Court of Appeal weighed in with a ruling that found no evidence to support the board's findings that Rosenkrantz was unfit for release. Describing the prospect of further hearings as a "charade," the court said it expected the board to find Rosenkrantz suitable for parole.

LOAD-DATE: July 14, 2000

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Government Contract Litigation Reporter

July 7, 2000

SECTION: Vol. 13; No. 23; Pg. 4

LENGTH: 594 words

CASE: Bid Protest:Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.

HEADLINE: Losing Bidder Cannot Win Lost Profits, California Supreme Court Says

BODY:

The losing bidder on a public contract cannot recover lost profits under a promissory estoppel theory when successfully challenging the contract award, the California Supreme Court has ruled.

Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority, 96 Cal. Rptr. 2d 747 (Cal., June 12, 2000).

The Los Angeles County Metropolitan Transportation Authority (MTA) solicited bids for the construction of a subway station and tunnels in 1994. Tutor-Saliba-Perini submitted the lowest bid but Kajima/Ray Wilson protested the award on the grounds that TSP failed to meet the MTA's minority business enterprise participation goals. The MTA subsequently rejected all of the bids and held another round of bidding. KRW's bid was the lowest, but the MTA awarded the contract to TSP, even though its bid was \$1 million higher. The MTA stated that TSP had met the minority participation goals, while KRW had not.

KRW sued the MTA in the Superior Court for Los Angeles County, claiming that the MTA improperly evaluated its minority participation. If the MTA had conducted a proper rating, KRW's minority participation would have exceeded that of TSP, the suit alleged. KRW sought an injunction and damages of over \$3 million, which included \$1.5 million in lost profits on the subway contract.

The superior court awarded KRW its bid and protest expenses, sums for unabsorbed overhead and \$350,000 in lost profits, plus interest. The California Court of Appeal, Second Appellate District, affirmed in Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority, 69 Cal. App. 4th 1458 (Cal. Ct. App., 1999). The appellate court ruled that the trial court was within its discretion to give KRW lost profits under a promissory estoppel theory. The MTA appealed to the California Supreme Court, arguing that a disappointed bidder has no cause of action against a public entity for damages arising from the erroneous award of a contract.

The supreme court issued its ruling on June 12, 2000. Justice **Janice Rogers Brown**, writing for the court, stated that the appellate decision was reversed. The court explained that the parties agreed that if relief was available it was available under a theory of promissory estoppel. At the time it submitted its bid, KRW had incurred bid preparation costs in reliance on the MTA's representation that the contract would go to the lowest bidder. Bid preparation costs were the only costs reasonably incurred, because there are many uncertainties inherent in competitive bidding and KRW did not know if the contract would be awarded, Justice Brown elaborated. Further, the allowance of lost profits would harm the public because the chosen bidder would be paid to do the contract work and the losing bidder would be paid as well. The remedy of lost profits would cause the public to pay twice, the court said. The courts are also hesitant to award lost profits when the party requesting them is not a party to a contract, Justice Brown added.

(See Document Section D for the opinion. Call 877-595-0449 for the 40-page amicus brief of Associated General Contractors of California in support of KRW; the seven-page amicus brief of Southern California Contractors Association, also in support; the MTA's 15-page brief in response to

the amicus brief of Southern California Contractors; and the 36-page amicus brief of 99 California Cities and the California State Association of Counties in support of the MTA.)

LOAD-DATE: July 21, 2000

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View Related Topics

July 6, 2000 Thursday MORNING EDITION

SECTION: EDITORIAL; Pg. B06

LENGTH: 606 words

HEADLINE: Give us a Bill of Gun Rights

BYLINE: The Orange County Register

BODY:

The day after the opening of 'The Patriot,' in which American colonists take up arms against a distant tyranny, the California Supreme Court saw fit last Thursday to hack away at the right to keep and bear arms that the revolutionaries ultimately enshrined in the Bill of Rights of their new nation.

At issue was the 1989 Roberti-Roos Assault Weapons Control Act, which outlawed 75 models of rifles and allowed the state attorney general great latitude in expanding the list.

In 1998, the California Third Appellate Court found Roberti-Roos unconstitutional because it 'defies rationality' and 'violates equal protection' of the laws because it banned some 'assault weapons' but allowed others that were mechanically the same.

(Because of the vagueness problem, a new 1999 assault-weapons law was passed to clarify the Roberti-Roos law by defining an assault weapon as having certain characteristics, such as 'a second handgrip' or 'a folding or telescoping stock.')

The state Supreme Court voided the Third Appellate Court decision and restored Roberti-Roos. The ruling, we believe, is wrong legally, semantically and practically.

In her majority opinion, Justice **Janice Rogers Brown** wrote that, in the California Constitution, 'No mention is made of a right to bear arms.'

Although wording similar to the U.S. Constitution's Second Amendment right 'to keep and bear arms' is not present, the state constitution stipulates that 'the United States Constitution is the supreme law of the land.'

Are Ms. Rogers Brown and the other five justices who joined her in the majority saying that the Bill of Rights can be repealed by state law?

As to the target of the law, 'basically, there is no such thing as an assault weapon,' John Lott told us; the Yale University Law

School professor is one of the country's foremost experts on gun laws, whose popular book, 'More Guns, Less Crime,' just came out in a second edition. 'The type of bullets fired and the rapidity of bullets fired are the same as for other weapons.'

Contrary to common perception, 'assault weapons' are not machine guns or fully automatic weapons, which are already illegal, but fire one bullet at a time.

Roberti-Roos is a vague law that gives a great deal of discretion to the attorney general of the state,' Mr. Lott said. 'We have the rule of law. You just can't make things up.' The Legislature is supposed to be specific in its law-making, otherwise executive offices such as that of the attorney general gain too much power.

Similar reasoning came from Justice Joyce Kennard, who wrote in her lone dissent, 'Californians who are divided on the need for strict gun control are generally united in supporting the constitutional principle of equal protection - that the government should treat similar cases alike, free of arbitrary or invidious distinctions.'

And practically, these laws also have virtually no effect on crime. Mr. Lott explained, 'Even using the fairly broad definition of assault weapons used by the federal government, assault weapons are involved in just a tenth of 1 percent of murders in the United States. "

He also pointed out that, after the appeals court struck down Roberti-Roos in 1998, 'Nobody has claimed there was an increase in crime - an increase in murders during the time the law elapsed' before the more specific law was passed in 1999.

Chuck Michel, a lawyer for gun owners who brought the legal challenge, said the decision probably will be appealed to the U.S. Supreme Court. Let us hope there, at least, the Bill of Rights still is respected.

LOAD-DATE: July 14, 2000

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July 5, 2000, Wednesday

SECTION: Pg. 1

LENGTH: 432 words

HEADLINE: S.C. Acknowledges Error but Upholds Death Sentence

BYLINE: By a MetNews Staff Writer

BODY: A divided state Supreme Court on Monday upheld a death sentence against Herbert James Coddington after finding that several mistakes by the trial court and misconduct by prosecutors did not taint a jury's finding that the defendant was sane.

Coddington was convicted of murder, rape, and other sexual assaults by an El Dorado Superior Court jury after the 1987 killings near Lake Tahoe of two elderly women who chaperoned two girls, 14 and 12, to what Coddington had said would be the filming of an anti-drug video.

Coddington killed the women and stuffed their bodies in plastic bags in his trailer, then subjected the girls to several days of sexual molestation before federal agents raided and arrested the defendant.

Justice Marvin Baxter, writing for the court, acknowledged that the trial judge may have improperly vouched for the credibility of a psychiatrist who testified for the prosecution, but said any error was harmless.

The trial judge's statements came as a defense expert objected to the prosecutor's assertion that other experts were impartial, since they were retained by the court. In fact, they were retained at the request of prosecutors.

"The doctors explained that he's not for sale, but certainly you know as well as I do that there are certain people this court wouldn't employ," the judge said. He added that the doctors who were selected to testify for the prosecution were picked "through a process of talking and exploring," and that the defense was part of that process.

"I know these people's credentials, I've had them testify as experts before, and I think [the prosecutor's] characterization is a correct one," the judge said.

It was reasonably likely that the statement could have led a juror to give special credence to the prosecution witness, Baxter said, but that wasn't enough.

"The jurors were instructed that they were the sole judges of the believability of a witness and the weight to be given the testimony of witnesses," the justice said. "Nothing in the court's explanation of the appointment of the two court-appointed psychiatrists implied that credibility of defendant's experts was in question."

Baxter was joined by Chief Justice Ronald George and Justices Kathryn Werdegar, Ming Chin, and **Janice Rogers Brown**.

Justice Stanley Mosk, joined by Justice Joyce Kennard, dissented.

There was plenty of evidence to suggest that Coddington was insane, Mosk said, and the errors by the court and prosecutors may have contributed to an improper jury finding on the issue.

The case is People v. Coddington, 00 S.O.S. 3861.

LOAD-DATE: July 10, 2000

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The Bulletin's Frontrunner

June 30, 2000

LENGTH: 253 words

HEADLINE: CA: State Court Upholds Assault Weapons Ban.

BODY:

The Los Angeles Times (6/30, Dolan) reported, "The California Supreme Court on Thursday upheld the state's 1989 assault weapons ban, the first such prohibition of semiautomatic assault weapons in the nation. The ruling, which overturned a lower court decision, will reduce the number of assault weapons allowed in California and make it easier for the attorney general to restrict newer varieties of the guns. The strongest weapons ban in the nation, the law bars about 75 models of firearms and allows judges to add new ones to the list as makers design modifications. A Court of Appeal in Sacramento decided two years ago that the add-on provision violated separation of powers between the Legislature and the judiciary. But none of the state's seven high court justices agreed. 'For good or ill,' wrote Justice **Janice Rogers Brown** for the court, 'the Legislature stood up and was counted on this issue, one of the most contentious in modern society.'" The San Francisco Chronicle (6/30, Chiang) reported, "By a 6-to-1 vote, the high court said the law, which bans more than 60 types of semiautomatic assault weapons, does not violate the constitutional rights of gun owners. Justice Joyce Kennard filed the sole dissent." State Attorney General Bill Lockyer "called yesterday's decision 'a major victory for gun safety and public safety in California.' As a result of the ruling, he said, at least 120 types of weapons, known as AR-15 or AK "series" weapons, will be added to the list of banned firearms."

LOAD-DATE: June 30, 2000

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View Related Topics

June 30, 2000, Friday, Home Edition

SECTION: Part A; Part 1; Page 1; Metro Desk

LENGTH: 1042 words

HEADLINE: JUSTICES UPHOLD STATE'S ASSAULT WEAPONS BAN

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court on Thursday upheld the state's 1989 assault weapons ban, the first such prohibition of semiautomatic assault weapons in the nation.

The ruling, which overturned a lower court decision, will reduce the number of assault weapons allowed in California and make it easier for the attorney general to restrict newer varieties of the guns.

The strongest weapons ban in the nation, the law bars about 75 models of firearms and allows judges to add new ones to the list as makers design modifications. A Court of Appeal in Sacramento decided two years ago that the add-on provision violated separation of powers between the Legislature and the judiciary.

But none of the state's seven high court justices agreed. "For good or ill," wrote Justice **Janice Rogers Brown** for the court, "the Legislature stood up and was counted on this issue, one of the most contentious in modern society."

State lawmakers approved the ban six months after a gunman with an AK-47 sprayed bullets into a Stockton school playground, killing five children and wounding 29 others and a teacher. Several other states followed California's lead, using the state's law as a model for weapons bans.

Because the lower court had struck down key provisions of the law, the Legislature last year passed new restrictions aimed at prohibiting weapons according to their characteristics, rather than by name and model.

With Thursday's court ruling, a wide ban of assault weapons is now in place. Courts will be able to add new weapons to the banned list at the behest of the attorney general.

"This gives the attorney general the authority to just keep creating an ever-expanding list of firearms . . . that he deems to be illegal assault weapons," complained Chuck Michel, a lawyer for a group of gun collectors and a gun manufacturer who challenged the law.

The ruling was the first of a handful of gun cases the high court has agreed to review, and supporters of gun control hailed it as a major victory.

Atty. Gen. Bill Lockyer said that at least 120 types of weapons, known as AR-15 or AK series weapons, will be added to the banned list as a result of Thursday's ruling.

The court decision "represents a major victory for gun safety and public safety in California," Lockyer said.

If the court had ruled against the law, "it would have opened a huge gun trafficking loophole," said Luis Tolley, western director of Handgun Control, the largest gun control group in the country.

"The tragedy is that, for 10 years, illegal copycat assault weapons, like the TEC-DC-9 and the Colt Sporter, flooded California streets because the gun lobby's phony legal arguments prevented this law from being enforced," Tolley said.

The California Supreme Court examined three constitutional challenges to the gun law: whether it violated equal protection guarantees because it banned some weapons and left similar guns untouched; whether it improperly delegated legislative authority to the courts; and whether it violated due process rights because it was vague about which guns were banned.

The court rejected each of those challenges in an opinion written by Brown and signed by Chief Justice Ronald M. George and Justices Marvin Baxter, Kathryn Mickle Werdegard and Ming W. Chin.

Justice Stanley Mosk supported the court's conclusions but wrote a separate opinion because he disagreed with some of Brown's legal analysis. Werdegard also joined Mosk's opinion.

Justice Joyce Kennard filed the only dissent--solely on the equal protection challenge. She said the plaintiffs should be given the opportunity to prove their claims that the law banned some weapons while leaving nearly identical guns unregulated.

"Californians who are divided on the need for strict gun control are generally united in supporting the constitutional principle of equal protection--that the government should treat similar cases alike, free of arbitrary or invidious distinctions," Kennard wrote.

In her opinion for the court majority, Brown strongly rejected any suggestion that the state Constitution protects the rights of Californians to own weapons.

"No mention is made in the state Constitution of a right to bear arms," Brown wrote.

The court majority also rejected the challenge that the law was invalid because it failed to ban all similar weapons.

"Doubtless, 10 years after Roberti-Roos Assault Weapons Control Act became law in California, many semiautomatic weapons potentially classifiable as assault weapons remain on the market here," Brown wrote.

"That may or may not be regrettable, depending upon one's view of this highly charged public policy question," Brown added, "but it does not amount to a constitutionally fatal flaw."

The court defended the law's provision that allows the attorney general to ask Superior Courts to add new weapons to the outlawed list. The role of courts in this is "a very narrow, essentially adjudicatory one," Brown said.

Gun owners, however, found some comfort in the court's comments on the due process challenge. Although the court rejected arguments that the law was too vague, the majority also indicated that the state has responsibility for ensuring that owners know which guns are banned.

If a Superior Court decides a certain weapon is an assault weapon, then the attorney general must within 90 days add it to the banned list, the court said.

"Concerned citizens need not struggle with the question whether, for example, a particular firearm is identical to one of the listed assault weapons except for slight modifications," Brown wrote. "The citizens may simply consult the amended list."

Michel, the lawyer for the gun owners, said dozens of Californians have become "accidental felons" because they possessed guns they did not know were banned.

"If there is any silver lining in this decision, it is that the confusion about what is and what is not an assault weapon is now thrown squarely into the attorney general's lap," Michel said.

He said gun supporters will eventually file another lawsuit to challenge the law on other grounds. They also are considering appealing Thursday's decision to the U.S. Supreme Court, he said.

"We're not giving up," Michel said.

LOAD-DATE: June 30, 2000

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June 30, 2000, Friday

SECTION: Pg. 1

LENGTH: 1032 words

HEADLINE: S.C. Rejects Constitutional Challenge to Assault Weapons Ban

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: The California Supreme Court yesterday rejected a multifaceted constitutional challenge to the state's 1989 ban on assault weapons.

The justices reversed a decision by the Third District Court of Appeal, which had sided with the National Rifle Association, the California Rifle and Pistol Association, and related groups in a November 1998 ruling.

The lower panel said the law violates the separation of powers by leaving it up to the attorney general and ultimately to the courts to determine which weapons, beyond those explicitly named in the Roberti-Roos Assault Weapons Control Act, are subject to the ban.

The Sacramento-based appeals court also concluded that the statute violates due process by allowing the attorney general to temporarily ban a weapon without effective public notice pending a judicial hearing, and that the plaintiffs were entitled to present evidence to support their claim that the act irrationally discriminates among various models of weapons.

All three of those holdings were overturned yesterday by the highest court.

All seven justices agreed with Attorney General Bill Lockyer that the role of the courts in determining which weapons are banned under the law is a judicial, not a legislative one. The court was also unanimous in rejecting the due process challenge, and concluded 6-1 that the law's classifications meet the rational-basis test.

Weapon Definition

The AWCA defines an assault weapon as being any weapon which is listed as such in the act, or which is found by a court in a declaratory action brought by the attorney general to be substantially identical to a listed weapon. The attorney general may temporarily add a weapon to the banned list while seeking court approval to make the ban permanent.

Amendments enacted last year expanded the definition to include any weapon possessing certain characteristics, such as one with the capacity to accept a detachable magazine along with a flash suppressor, a folding stock, or a forward pistol grip. The validity of those amendments was not at issue yesterday.

Lockyer, speaking to the Associated Press, called the decision a "major victory for gun safety and public safety in California."

He said the Justice Department will likely add 120 additional weapons, including the "AK" series, to the list of outlawed guns as a result of the court's decision.

Justice **Janice Rogers Brown**, writing for the court, acknowledged that the law may result in some

very dangerous weapons remaining legal for use, while equally or less-dangerous firearms are banned. But that doesn't render the ban irrational under equal-protection principles, the justice said.

Legislative History

The legislative history, Brown explained, showed that the list-plus-add-on approach was settled on after extensive discussions among lawmakers and then-Gov. George Deukmejian, and after it became clear that it was the only approach that would attract the necessary support to become law on the politically charged subject.

"The perfect can be the enemy of the good," she wrote. "The Legislature was convinced that 'the proliferation and use of assault weapons poses a threat to the health, safety and security of all citizens of this state.'... Given that conviction, the Legislature was not constitutionally compelled to throw up its hands just because a perfectly comprehensive regulatory scheme was not politically achievable."

She added:

"The Legislature here was under no illusion that the AWCA would rid the streets of assault weapons in one fell swoop. Instead, the Legislature intended that the approach it finally settled upon in the AWCA designating certain assault weapons by type, series, and model, while providing a mechanism for adding others... would make California a safer place, even if only marginally and incrementally. We are not prepared to say that the Legislature's expectation was irrational or that, to pass constitutional muster, its ambitions had to be grander."

Brown also rejected the argument that the law required courts to play a legislative role in determining whether a weapon was sufficiently similar to a listed weapon to be added to the banned list.

"Actually, the role that the courts play in implementing the add-on procedure is a very narrow, essentially adjudicatory one," the jurist said.

ing the add-on procedure is a very narrow, essentially adjudicatory one," the jurist said.

The Legislature has established criteria, Brown said, leaving it up to the courts to determine whether they have been met. She analogized to the federal Sentencing Commission, a body within the judicial branch on which judges and non-judges serve and which periodically revises the Sentencing Guidelines pursuant to congressional authorization.

Brown also rejected the contention that allowing the attorney general to temporarily ban a weapon without giving notice to every person who might potentially violate the ban is a due process violation on its face.

She cited prior rulings in which the court has held that a facial due process challenge requires a showing that the law would present due process issues in the "vast majority of its applications" or "in the generality of cases."

Justice Joyce L. Kennard, dissenting in part, argued that the plaintiffs should have been allowed to present evidence that the act would allow some people to own guns that were "functionally indistinguishable" from the banned weapons.

"The majority cites no United States Supreme Court authority upholding any similar legislative scheme, much less authority for doing so at the pleading stage without conducting any evidentiary proceedings to resolve the merits of the issue," Kennard wrote.

C.D. "Chuck" Michel of San Pedro, co-counsel for the plaintiffs, said he would probably seek review in the U.S. Supreme Court. The nation's highest court, which has historically declined to resolve claims that gun control laws violate the Second Amendment, needs to decide whether Americans have a "fundamental right...to use firearms for self-defense," Michel told the MetNews.

Yesterday's ruling, he added, gives the attorney general "tremendous discretion which could be politicized."

LOAD-DATE: July 10, 2000

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The Recorder

June 30, 2000, Friday

SECTION: NEWS; PG. 3

HEADLINE: JUSTICES UPHOLD STATE'S ASSAULT WEAPONS BAN

BYLINE: Kevin Livingston

BODY:

California's decade-old assault weapons ban was reinstated Thursday by the state Supreme Court.

In the most significant gun case to go before the court, the justices in a 6- 1 decision said the 1989 Roberti-Roos Assault Weapons Control Act is constitutional.

Writing for the majority, Justice **Janice Rogers Brown** said the law does not violate the equal protection clause of the state constitution even though it bans certain weapons but not others that are identical.

Brown also held that allowing judges to add new guns to the list of banned weapons does not violate the separation of powers doctrine.

Chief Justice Ronald George and Justices Marvin Baxter, Kathryn Mickle Werdegarr and Ming Chin joined Brown in *Kasler v. Lockyer*, 00 C.D.O.S. 5321.

"Ten years after the AWCA became law in California many semiautomatic weapons potentially classifiable as assault weapons remain on the market here," Brown wrote. "That may or may not be regrettable depending upon one's view of this highly charged public policy question, but it does not amount to a constitutionally fatal flaw in the AWCA."

Brown said that by designating assault weapons by type, series and model and by providing a mechanism to add others, the Legislature intended to make the state a safer place, even if only incrementally.

"We are not prepared to say that the Legislature's expectation was irrational, or that, to pass constitutional muster, its ambitions had to be grander," Brown wrote.

Justice Joyce Kennard agreed that judges may add new weapons to the list, but she broke with the majority on the equal protection issue.

Kennard said the plaintiffs alleged sufficient facts to go forward on their equal protection claim.

"The act treats manufacturers and owners of semiautomatic firearms classified by make and model in the list of assault weapons differently from those who manufacture and own other semiautomatic firearms," she wrote.

Justice Stanley Mosk wrote a separate opinion concurring in the result.

The Roberti-Roos Act -- the first assault weapons ban in the country -- was signed into law by Gov. George Deukmejian six months after a man opened fire on a Stockton school yard, killing five children.

Under the 1989 law, an estimated 65 rifles, shotguns and pistols were banned in California, including

the AK-47 and Uzi. The law also called for similar "copy-cat" weapons to be banned through a controversial add-on procedure, but no guns have been added while the law was being challenged.

Roberti-Roos was amended last year to define assault weapons by characteristics instead of by name. The Legislature acted after the Third District Court of Appeal shelved the law on the grounds that it violated the separation of powers doctrine and the due process of law.

Following the court's decision Thursday, Attorney General Bill Lockyer issued a statement saying his office will immediately take steps to ensure that California's assault weapons laws will be "vigorously enforced."

He also said his office estimates that 120 types of weapons known as AR-15 or AK series weapons will be added to the list of illegal firearms because of the court's decision.

Don Kates, the Novato attorney who argued Kasler at the Third District and Supreme Court, wasn't able to say if he would appeal to the U.S. Supreme Court. But he said challenges will be filed to the amended version of Roberti-Roos.

Kasler is just the first of several gun cases the court has agreed to decide. The justices are also scheduled to determine the legality of so-called knockoff assault rifle brands and whether a buyer needs to be aware he is purchasing an illegal assault rifle to be convicted under the ban.

Last January the court also agreed to decide whether a gun manufacturer can be held responsible for Gian Luigi Ferri's 1993 shooting spree at the 101 California Street building in San Francisco, which left eight dead and six wounded.

While careful not to wade into Second Amendment waters, Brown made it clear Thursday that gun ownership is not an absolute right as far as state law is concerned.

"If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of rights, they are simply wrong," Brown wrote. "No mention is made of a right to bear arms."

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: June 30, 2000

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View Related Topics

June 30, 2000, Friday FIRST EDITION

SECTION: NEWS; Pg. A-3

LENGTH: 626 words

HEADLINE: State high court upholds assault-gun ban;
120 military-style weapons will be illegal under ruling

BYLINE: Bob Egelko

SOURCE: OF THE EXAMINER STAFF

BODY:

In a resounding victory for gun control advocates, the state Supreme Court has upheld California's 1989 ban on military-style assault weapons, the first law of its kind in the nation.

Overturning a lower-court decision, the high court ruled 6-1 Thursday that the law did not discriminate unconstitutionally by outlawing some weapons while allowing others that are arguably just as dangerous. The justices also upheld a provision that allowed the state attorney general to ask a Superior Court judge to add copycat guns, those identical to outlawed models in all but name, to the list of banned weapons.

The Legislature passed a new law last year, also the first in the nation, that banned the sale of guns based on their characteristics, such as bullet capacity and design, rather than by model name.

That law, which was not at issue in Thursday's case, prohibits more guns than the earlier law. But some provisions of the 1989 law remain in effect, and their survival in court was crucial, said Luis Tolley, western regional director of Handgun Control, a group that lobbied for passage of both laws.

"This law was a model for the country," using an approach that was later followed in a federal law and state laws in Hawaii, New York and New Jersey, Tolley said. He said the ruling should be influential when courts decided challenges to those laws.

In addition, Tolley said, at least one gun that was banned by the old law may not be prohibited by the new law, because it lacks a pistol grip: the SKS semiautomatic rifle, which a man named Patrick Purdy used to kill five children and wound 29 other students and a teacher in a Stockton schoolyard in 1989. The slaughter stirred the Legislature into an urgent session to pass the assault weapons ban after years of deadlock on gun control.

120 types of guns affected

In all, at least 120 types of guns, known as AR-15 or AK series weapons, will be definitively banned as a result of the ruling, Attorney General Bill Lockyer said in a statement. He called the ruling "a major victory for gun safety and public safety in California."

Tolley said another effect of the ruling was to maintain the state's ban on guns covered by the 1989 law that were not registered by a 1992 deadline. The law allowed

owners to keep guns they had previously bought if they registered the weapons by the deadline, but

otherwise made possession illegal. Those rules would have fallen if the law were struck down, Tolley said.

The new law forbids sales of prohibited weapons but gives owners until the end of this year to register guns they had previously bought that the law redefined as assault weapons.

The 1989 law had been ruled unconstitutional by a state appeal court in Sacramento, which said a ban on certain weapons that did not apply to others with the same firepower or dangerous characteristics violated equal protection of the laws. The court also said allowing a judge to approve additions of copycat weapons to the list violated the constitutional separation of powers.

Constitutionality upheld

The state high court disagreed on both points.

The Legislature was entitled to conclude that banning specific guns "would make California a safer place, even if only marginally and incrementally," and did not have to pass a broader ban to satisfy the Constitution, said the opinion by Justice **Janice Rogers Brown**.

She also said judges acted within their powers when they reviewed a claim by the executive branch that a particular gun was so similar to an outlawed gun that it should also be banned.

Justice Joyce Kennard dissented, saying opponents of the law should have the chance to prove the state had acted discriminatorily by "irrationally banning some but not all similar firearms."

LOAD-DATE: July 1, 2000

Copyright 2000 The San Diego Union-Tribune
The San Diego Union-Tribune

June 30, 2000, Friday

SECTION: NEWS;Pg. A-1

LENGTH: 742 words

HEADLINE: State high court upholds ban on assault weapons

BYLINE: Bill Ainsworth; STAFF WRITER

BODY:

SACRAMENTO -- The California Supreme Court upheld the state's landmark 1989 assault weapons ban yesterday, giving the attorney general new powers to outlaw copycat guns and making it easier for future gun laws to survive legal challenges.

The decision reverses an appellate court ruling that key parts of the ban were unconstitutional, which inspired lawmakers to pass a broader ban last year.

Attorney General Bill Lockyer, in a written statement, called the decision a "major victory for gun safety and public safety in California."

He also promised to use his new power immediately in seeking to ban 120 types of weapons, known as AR-15 or AK series weapons.

A previous court had ruled that the Attorney General's Office could not use the copycat provisions of the law while those provisions were being challenged. Such provisions were intended to prevent gun makers from getting around the list of about 70 banned weapons by making slightly different weapons that were legal.

The 6-1 ruling, written by perhaps the court's most conservative justice, **Janice Rogers Brown**, signaled that future gun-control laws will have an easier time passing constitutional muster. She noted that the right to own weapons -- enshrined in the Second Amendment of the U.S. Constitution - is not part of the California Constitution.

"If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of rights, they are simply wrong," wrote Brown, an appointee of former Republican Gov. Pete Wilson.

Luis Tolley, director of Handgun Control, called Brown's statement a "strong decision" that should give legal protection to gun-control laws passed last year. Such laws, including a ban on cheap handguns and limits on the purchase of handguns, are likely to face a court challenge from gun owners.

But perhaps the most significant gun-control legislation passed last year added new strength to the assault weapons ban. The amended law bans large ammunition clips and weapons with a list of characteristics, including vertical handguns and folding stocks.

The new law, which covers some of the weapons on the original list of banned weapons, would still have been in effect if the 1989 law had been struck down. But the new law has later deadlines for registering outlawed guns, which would have allowed a flood of guns into the state, Tolley said.

"It could have created enormous problems with gun trafficking," he said. "People could have

smuggled assault weapons from other states and then had a year to legally register them."

Tolley said he hopes the court decision will inspire other states to follow California's lead by enacting strict gun-control laws.

Chuck Michel, co-counsel for the plaintiffs, said he was "disappointed but not surprised by the decision" because of the justices' tough questioning during oral arguments.

Michel said that plaintiffs in the case, including gun owners and gun makers, might ask the U.S. Supreme Court to review the decision.

He criticized the court's ruling that the state's constitution doesn't contain the right to bear arms, calling it "completely incorrect" and arguing that it went beyond the issues in front of the court. And he expressed fears that Lockyer, a Democrat elected on a platform of strong gun control, would abuse his new power to add guns to the list of banned weapons.

"Now the entire process is subject to politicization," he said. "Now it's going to be: What kind of headlines can we make if we add another gun to the list."

The court decision overturns an appellate court ruling in 1998 that struck down the copycat provision of the law, saying it violated the equal protection provisions of the constitution because in many cases guns banned under the law are no different than guns sold legally.

The high court's lone dissenter, Associate Justice Joyce Kennard, said that plaintiffs should be allowed to try to present evidence to a lower court that the law violates equal protection guarantees.

California became the first state in the nation to pass an assault weapons ban in 1989, a few months after a mentally disturbed young man fired 105 bullets into a Stockton schoolyard, killing five children before turning the gun on himself.

The ban was seen as a turning point in the nationwide battle over gun control. Many other states, as well as the federal government, passed their own bans.

LOAD-DATE: July 3, 2000

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The San Francisco Chronicle

JUNE 30, 2000, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A1

LENGTH: 729 words

HEADLINE: State Ban On Assault Weapons Upheld;

Ruling could affect 200 types of firearms

BYLINE: Harriet Chiang, Chronicle Legal Affairs Writer

BODY:

The California Supreme Court upheld the state's 1989 assault-weapons ban yesterday, a stinging defeat for the gun industry that could lead to the prohibition of nearly 200 types of firearms.

By a 6-to-1 vote, the high court said the law, which bans more than 60 types of semiautomatic assault weapons, does not violate the constitutional rights of gun owners. Justice Joyce Kennard filed the sole dissent.

The 1989 law, known as the Roberti-Roos Assault Weapons Control Act, was the nation's first ban on assault weapons and served as the model for regulations in other cities and states as well as a federal ban in 1994.

Last year, Gov. Gray Davis signed an amendment to the law banning so-called "copycat weapons," firearms designed with slight modifications to skirt the original law. The addition made the law the nation's most comprehensive gun regulation.

State Attorney General Bill Lockyer called yesterday's decision "a major victory for gun safety and public safety in California."

As a result of the ruling, he said, at least 120 types of weapons, known as AR-15 or AK "series" weapons, will be added to the list of banned firearms.

"It's a huge setback for the gun industry," said Luis Tolley, western director of the Center to Prevent Handgun Violence, which filed a brief supporting the law on behalf of the California Police Chiefs Association and several other law enforcement groups.

He said the 1989 law and its 1999 amendment "work very effectively together to really close down loopholes to try to get around the language." The amendment outlaws guns if they have certain features, such as a detachable magazine and a pistol grip.

Tolley said that a gunmaker could remove the offending feature to get around the 1999 law, but the gun would still be subject to the ban if it had been on the 1989 list.

Chuck Michel, one of the lawyers for the plaintiffs challenging the law -- a group of taxpayers, gun collectors as well as gunmaker Colt Industries -- said they might appeal the decision to the U.S. Supreme Court.

The ruling, he said, may create consumer uncertainty over which weapons are legal and which ones are not. Further, it may not be clear whether a weapon is covered by the 1989 ban or the 1999 amendment. "There's already a tremendous amount of confusion among police, lawyers and judges

over what is or what is not an assault weapon," Michel said.

The 1989 law was passed by the Legislature after a crazed gunman armed with an assault rifle sprayed a Stockton schoolyard with bullets, killing five children and wounding 30 others.

In addition to the banned weapons, the law allows the state attorney general to add to the list by getting the approval of a Superior Court judge.

The law was challenged after former state Attorney General Dan Lungren attempted to add the Colt Sporter to the list.

The gun manufacturer Colt Industries sued to overturn the law, but a trial judge threw out the suit. In a dramatic move, a state appeals court in 1998 struck down the law, ruling that it was unconstitutional.

The appeals court in Sacramento said that the law violated the equal protection laws because it arbitrarily singled out those gun owners who owned a firearm that was on the list.

In its decision, the state Supreme Court said states have broad powers in regulating the gun industry. They rejected the argument that gun owners are protected by a fundamental state constitutional right.

"If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of rights, they are simply wrong," wrote Justice **Janice Rogers Brown** in the court opinion. "No mention is made in it of a right to bear arms."

She also dismissed the notion that the 1989 ban by singling out some gun owners and not others violates their to equal protection.

"The Legislature here was under no illusion that the AWCA would rid the streets of assault weapons in one fell swoop," she said. "The step-by-step approach adopted here -- the list plus the add-on provision -- does not violate principles of equal protection."

The court also rejected the argument that the law violated the separation of powers requirement of the constitution by giving a judge the final say on what firearms can be added to the list.

E-mail Harriet Chiang at hchiang@sfgate.com.

LOAD-DATE: June 30, 2000

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The Seattle Times

June 30, 2000, Friday Final Edition

SECTION: NEWS; Pg. A4; ACROSS THE NATION

LENGTH: 657 words

HEADLINE: Big HMOs to cut off about 700,000 Medicare patients

BODY:

WASHINGTON - Health-maintenance organizations (HMOs), complaining that payments from the federal government are inadequate, are expected to cancel coverage next year for more than 700,000 people enrolled in Medicare HMOs.

Many of these older Americans will lose the extra benefits provided by the HMOs, including low-cost coverage for prescription drugs, which are not included in the regular Medicare program.

Aetna US Health Care will be making the biggest cuts, canceling coverage for more than 355,000 people in 14 states. Foundation Health Systems will jettison 19,000 members. Oxford Health Plans, which serves New York, Connecticut and New Jersey, will exit eight mostly suburban counties and drop 7,200 members. Earlier this month, Cigna said it was leaving several markets nationwide affecting more than 100,000 enrollees.

The changes would take effect Jan. 1. Beneficiaries whose HMOs pull out of Medicare would not lose insurance coverage. They could select another HMO or return to the traditional Medicare system.

The projection that more than 700,000 people will lose coverage is an indication that many executives in the managed-care industry no longer believe they can make profits in the Medicare business.

California high court upholds
state's assault-weapons ban

SAN FRANCISCO - The California Supreme Court yesterday upheld the state's 1989 assault-weapons ban, the first such prohibition of semiautomatic assault weapons in the nation.

The ruling, which overturned a lower-court decision, will reduce the number of assault weapons allowed in California and make it easier for the state attorney general to restrict newer varieties of the guns.

The law bars about 75 models of firearms and allows judges to add new ones to the list as makers design modifications. A Court of Appeal in Sacramento decided two years ago that the add-on provision violated separation of powers between the Legislature and the judiciary.

But none of the state's seven high-court justices agreed. "For good or ill," wrote Justice **Janice Rogers Brown** for the court, "the Legislature stood up and was counted on this issue, one of the most contentious in modern society."

State Attorney General Bill Lockyer said that at least 120 types of weapons, known as AR-15 or AK "series" weapons, will be added to the banned list as a result of yesterday's ruling.

Nevada judge allows protest
over federal control of lands

LAS VEGAS - Plans for a July Fourth protest over federal control of rural lands gathered momentum yesterday after a judge in Las Vegas refused to stop a rally in rugged northern Nevada.

U.S. District Judge Philip Pro rejected a request by the U.S. Attorney's Office for a restraining order to halt the protest over a closed Forest Service road, saying he feared it would stifle free-speech rights.

Besides, he said, plans for the rally are too far along to effectively block it, with anti-government protesters from Florida and Maine already on the way to Jarbidge, near the Idaho border.

Pro instructed organizers of the protest group, known as the Shovel Brigade, to use "common sense" in carrying out their protest against the U.S. Forest Service.

The rally's purpose, its organizers say, is to dismantle an earthen roadblock at the top of a narrow Forest Service dirt road that leads to the bottom of a canyon wilderness area and a river that carries bull trout, listed as a threatened species.

Nebraska man, free on bail,
kills girlfriend, sons, himself

OMAHA, Neb. - A man free on bail on charges he beat and terrorized his live-in girlfriend shot her to death along with his two sons and then killed himself.

Justin Jensen, 20, who had been due to appear in court today, carried out the slayings Wednesday night at the couple's apartment.

Crystal Granholm, 21, and Jensen's sons, Austin, 3, and Christian, 2, all were shot once in the head, police said.

LOAD-DATE: July 1, 2000

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The San Francisco Examiner

View Related Topics

June 29, 2000, Thursday FOURTH EDITION

SECTION: NEWS; Pg. A-1

LENGTH: 565 words

HEADLINE: Assault gun ban upheld;
State's top court backs curb on military-style weapons and copycats; law hailed as 'model for the country'

BYLINE: Bob Egelko

SOURCE: OF THE EXAMINER STAFF

BODY:

In a resounding victory for gun control advocates, the state Supreme Court upheld on Thursday California's 1989 ban on military-style assault weapons, the first law of its kind in the nation.

Overturning a lower-court ruling, the high court ruled 6-1 that the law did not discriminate unconstitutionally by outlawing some weapons while allowing others, arguably just as dangerous, to remain legal. The justices also upheld a provision that allowed the state attorney general to ask a Superior Court judge to add copycat guns, those identical in all but name to outlawed models, to the list of banned weapons.

The Legislature passed a new law last year, also the first in the nation, that banned the sale of guns based on their characteristics, such as bullet capacity and design, rather than by model name.

That law, which was not at issue in Thursday's case, prohibits more guns than the earlier law. But some provisions of the 1989 law remain in effect, and their survival in court was crucial, said Luis Tolley, western regional director of Handgun Control, a group that lobbied for passage of both laws.

"This law was a model for the country," using an approach that was later followed in a federal law and state laws in Hawaii, New York and New Jersey, Tolley said. He said the ruling should be influential when courts decide challenges to those laws.

In addition, Tolley said, at least one gun that was banned by the old law may not be prohibited by the new law, because it lacks a pistol grip: the SKS semiautomatic rifle, which a man named Patrick Purdy used to kill five children and wound 29 other students and a teacher in a Stockton schoolyard in 1989. The slaughter stirred the Legislature into an urgent session to pass the assault weapons ban after years of deadlock on gun control.

Tolley said another effect of the ruling is to maintain the state's ban on guns covered by the 1989 law that were not registered by a 1992 deadline. The law allowed owners to keep guns they had previously bought if they registered the weapons by the deadline, but otherwise made possession illegal. Those rules would have fallen if the law were struck down, Tolley said.

The new law forbids sales of prohibited weapons but gives owners until the end of this year to register guns they had previously bought that the law redefined as assault weapons.

The 1989 law had been ruled unconstitutional by a state appeal court in Sacramento, which said a ban on certain weapons that did not apply to others with the same firepower or dangerous characteristics violated equal protection of the laws. The court also said allowing a judge to approve additions of copycat weapons to the list violated the constitutional separation of powers.

The state high court disagreed on both points.

The Legislature was entitled to conclude that banning specific guns "would make California a safer place, even if only marginally and incrementally," and did not have to pass a broader ban to satisfy the Constitution, said the opinion by Justice **Janice Rogers Brown**.

She also said judges act within their powers when they review a claim by the executive branch that a particular gun was so similar to an outlawed gun that it should also be banned.

Don B. Kates, lawyer for gun owners who challenged the law, said no decision has been made on whether to appeal to the U.S. Supreme Court.

LOAD-DATE: June 30, 2000

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San Jose Mercury News

June 29, 2000, Thursday

SECTION: STATE AND REGIONAL NEWS

KR-ACC-NO: K5850

LENGTH: 1106 words

HEADLINE: California Supreme Court upholds '89 assault weapons ban

BYLINE: By Howard Mintz

BODY:

Providing strong legal insulation to California's sweeping gun-control laws, the state Supreme Court on Thursday upheld the constitutionality of a 1989 assault weapons ban and left little room for the gun lobby to challenge broader restrictions enacted by the Legislature last year.

The justices, by a 6-1 vote, concluded that the Roberti-Roos Assault Weapons Control Act _ enacted in the months following a Stockton schoolyard massacre 11 years ago _ does not violate the rights of gun owners and manufacturers and is a legal legislative response to gun violence. The ruling upholds on the strongest gun-control measures in the nation.

"We reject any suggestion that the regulations at issue here impermissibly infringe on the right to defend life or protect property guaranteed by the California Constitution," Justice **Janice Rogers Brown** wrote for the majority.

The ruling reversed a previous decision by the Sacramento-based 3rd District Court of Appeal. The appeals court had struck down the assault-weapons ban on the grounds that it was vague, violated equal protection laws because it focused on a narrow group of weapons, and improperly vested power in the courts to decide which guns fall under the scope of the law.

But the California Supreme Court disagreed on all arguments, sending a symbolic message to gun enthusiasts that restrictions on certain weapons in the state may be here to stay. As a result of the ruling, dozens of versions of military-style semiautomatic rifles, pistols and shotguns will be outlawed in the state under the 1989 law, as well as copycat assault weapons banned under related legislation that went into effect Jan. 1 of this year.

While gun backers vowed to keep pressing their cause in the courts, gun-control advocates were claiming complete victory.

"I think that this will solidify the position we've taken, and that is: Reasonable gun control is not only rational, but it is constitutional," said State Sen. Don Perata, D-Oakland, a leader in legislative gun-control efforts.

Added David Roberti, a former Democratic Senate leader and co-author of the 1989 ban, "This has been an 11-year battle. It just shows you the litigiousness of the gun lobby in order to fight gun-control legislation."

Gun groups behind the legal challenge to the weapons ban indicated they may seek review of the ruling in the U.S. Supreme Court, in part relying on the argument that the law infringes on the Second Amendment right to bear arms. In the meantime, lawyers for gun groups say there will be a

host of individual court fights when the state attorney general's office invokes provisions in the newer copycat-weapon legislation and tries to add guns to the list of banned weapons.

"There are going to be all these court cases if the attorney general tries to add guns," said Los Angeles attorney Chuck Michel, one of the lawyers who challenged the 1989 law. "The ruling resolved some issues, but there are a whole lot of issues that are going to be subject to more litigation."

Gerald Upholt, lobbyist for the California Rifle and Pistol Association, said the ruling should not result in efforts to push more gun-control legislation in California, even though, as he put it, "extremist, left-wing liberals" in the Legislature are backing a bill to require new gun owners to register their weapons.

In fact, Gov. Gray Davis earlier this year made it clear he would frown on any more gun-control measures sent to his desk, hoping to give the existing laws an opportunity to work.

Attorney General Bill Lockyer, who called Thursday's ruling a "major victory for gun safety and public safety in California," predicted that law enforcement officials would add 120 weapons to the list of outlawed guns as a result of the Supreme Court decision. Lockyer dismissed any concerns about fighting that issue in court.

As for a possible appeal of Thursday's ruling to the U.S. Supreme Court, Lockyer, whose office defended the law, added, "I suspect it's a losing battle for them."

The Supreme Court's ruling is the latest twist in a battle over gun control that has been gaining momentum in the state since 1989, when a gunman opened fire with an AK-47 semiautomatic rifle and killed five children outside a Stockton elementary school.

The 1989 weapons ban outlawed the sale, manufacture, import and in many instances possession of about 50 military-style weapons. But supporters of the ban say gun manufacturers skirted the intent of the law by making simple alterations to the high-powered firearms, allowing scores of assault guns to remain on the market.

Last year, following of the school shooting in Littleton, Colo., the Legislature pushed through modifications to the assault-weapons ban that outlawed copycat weapons. The gun-control showdowns now may center on how those weapons are defined under the law because gun groups say the law forbids some assault weapons, but leaves other, more powerful guns on the market.

Gun-control advocates disagree.

"The tragedy is that for 10 years, illegal copycat assault weapons, like the TEC-DC-9 and the Colt Sporter, flooded California streets because the gun lobby's phony legal arguments prevented this law from being enforced," said Luis Tolley, western director for Handgun Control. "The Supreme Court has recognized that reasonable restrictions on assault weapons are entirely constitutional and appropriate."

In its ruling, the Supreme Court rejected the argument that the assault-weapons ban is unfair to gun owners because it singles out a class of weapons. The court also rejected the suggestion that the law is irrational because it will have no impact on violent crime.

"To declare murder a crime will not prevent murder," the court observed. "Were the courts to overturn every legislative action that is likely to be ineffective, few laws would survive."

Justice Joyce Kennard dissented from one key part of the ruling, saying she believes the weapons ban is flawed on equal protection grounds and that the lawsuit should be allowed to go forward to prove the law focuses on certain weapons arbitrarily.

"Because of all-too-frequent tragic instances of gun violence ... many in our society see the need for strict gun control," Kennard wrote. "Others oppose all firearm regulation. That public debate on gun policy is not before us here."

Mercury News staff writer Hallye Jordan contributed to this report.

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June 23, 2000, Friday

SECTION: Pg. 1

LENGTH: 855 words

HEADLINE: S.C. Won't Extend Comparative Fault to Insurance Bad-Faith Cases

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: A liability insurer cannot assert the comparative bad faith of the insured as an affirmative defense to the insured's bad-faith suit, the state Supreme Court ruled yesterday.

A five-justice majority upheld lower court rulings in favor of Kransco, maker of the backyard water toy Slip 'N Slide, and its excess insurers.

Kransco and its fellow plaintiffs were awarded more than \$ 13.6 million in damages against American Empire Surplus Lines Insurance Company. A San Francisco Superior Court jury found that American Empire acted in bad faith when it rejected efforts to settle a Wisconsin products-liability suit against California-based Kransco.

Michael Hubert, a then-35-year-old Wisconsin resident who broke his neck when he jumped on his neighbor's Slip 'N Slide in 1987, won a verdict for more than \$ 12 million, including a Wisconsin-record \$ 10 million punitive-damage award.

At the time of the accident, Kransco had a \$ 1 million primary policy with American Empire subject to a \$ 100,000 self-insured retention and \$ 4 million in excess coverage with three other companies and syndicates.

Settlement Reached

While post-verdict motions were pending, Hubert agreed to settle for \$ 7.5 million plus one-half the net proceeds of Kransco's bad-faith suit against American Empire. Of the \$ 7.5 million, \$ 3.1 million came from Kransco, \$ 900,000 from American Empire which agreed to contribute while continuing to maintain that the settlement was unreasonable and the rest from the excess carriers.

In support of its bad-faith claim, Kransco presented evidence that the case could have been settled before trial for \$ 1.75 million, and could have been settled during trial for \$ 750,000, but that American's highest offer was \$ 450,000 including the self-insured retention and contributions by the excess carriers.

American's defenses included a claim that Kransco's own misconduct responding falsely and incorrectly to interrogatories caused the punitive damage verdict.

Bad Faith

San Francisco Superior Court Judge Carlos Bea instructed the jury on comparative bad faith, saying that Kransco acted in bad faith if it did "anything [to] injure [American's] rights to receive the benefits of their agreement."

The jury found that Kransco violated the implied covenant of good faith and fair dealing in its handling of Hubert's case, but was not unreasonable in agreeing to the post-verdict settlement. It also

found that Kransco was 90 percent at fault and American only 10 percent at fault.

Bea, however, concluded that the comparative bad faith instruction was incorrect and granted Kransco judgment notwithstanding the verdict for the full amount of damages found by the jury. A divided panel of the First District Court of Appeal's Div. One affirmed.

Justice Marvin Baxter, writing yesterday for the high court, rejected the reasoning of California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274, which held that since insurance bad-faith is a tort, an insurer sued by its insured for failure to pay a claim could allege the insured's comparative bad faith as an affirmative defense.

"What the California Casualty court overlooked, however, is that it is an insurer's breach of the covenant of good faith and fair dealing that is governed by tort principles," Baxter reasoned. "....An insured's breach of the covenant is not a tort, and hence does not give rise to tort damages recoverable by the insurer."

The jurist noted that rejection of the comparative bad-faith theory does not leave the insurer without redress. An insurer, he said, may claim that the insured's breach of its obligations voided coverage, may rely on evidence of such breach to prove that it acted reasonably rather than in bad faith, or may sue for breach of contract or for tort damages for fraud.

Baxter was joined by Justices Stanley Mosk, Kathryn M. Werdegar, Ming Chin, and **Janice Rogers Brown**.

Chief Justice Ronald M. George concurred in the result but said it was unnecessary to overrule California Casualty.

"Instead, I believe the court should rest its decision in this case solely upon the narrower, and fully dispositive, ground that the insured's conduct here at issue negligently providing incorrect answers to a discovery request does not represent a breach of the implied covenant of good faith and fair dealing and does not constitute the type of misconduct that properly may reduce an insurer's liability for damages resulting from its failure to accept a reasonable settlement offer," the chief justice wrote.

Justice Joyce L. Kennard dissented. It would be a "commonsense" approach, she argued, to allow juries "to equitably apportion the policyholder's loss according to the respective fault of all parties responsible for that loss."

The case was argued in the Supreme Court by Thomas W. Johnson, Jr. of Irell & Manella for Kransco, New York lawyer Thomas R. Newman for American, and Jeffrey T. Bolson of Hahn Bolson & Mendelson for the excess carriers.

The case is Kransco v. American Empire Surplus Lines Insurance Co., 00 S.O.S. 3666.

LOAD-DATE: July 10, 2000

Copyright 2000 American Lawyer Media, L.P.
The Recorder

June 23, 2000, Friday

SECTION: NEWS; PG. 1

HEADLINE: COURT KILLS COMPARATIVE BAD FAITH

BYLINE: Kevin Livingston

BODY:

A divided California Supreme Court Thursday struck down "comparative bad faith" as a defense for insurance companies sued by an insured.

In a rare bolstering of policyholder rights, Justice Marvin Baxter and four other justices said an insurance company cannot shield itself from a damage award simply by asserting that its insured -- through alleged bad faith actions -- shares the blame for losing the case.

The majority then went further and said that an insured's breach of the covenant of good faith and fair dealing does not constitute a tort and thus can't be raised as a defense.

"The insured is purchasing insurance in exchange for its own negligent or fault-based conduct causing injury to others, and to further insure against the inherent risks of litigation," Baxter wrote.

Baxter was joined in *Kransco v. American Empire Surplus Lines Insurance Company*, 00 C.D.O.S. 4997, by Justices Stanley Mosk, Kathryn Mickle Werdegar, Ming Chin and **Janice Rogers Brown**. They agreed that American Empire Insurance couldn't try to reduce the amount of damages it had to pay an injured Wisconsin man simply by asserting that *Kransco's* misstatement during discovery led to a \$12 million verdict against the California toy company.

Chief Justice Ronald George issued a partial dissent in the case. He agreed that the facts in *Kransco* did not support an instruction on comparative bad faith, but George rejected the notion that the doctrine should be done away with entirely.

"To add this extra load to the carrier's burden is, in essence, to judicially enlarge the carrier's obligation without its consent," the chief justice wrote.

Justice Joyce Kennard dissented completely, writing: "Refusing to recognize comparative fault in this context sanctions the harsh, one-sided, all-or- nothing verdicts this court has frequently criticized."

Lawyers on both sides said the majority's opinion marked a break from precedent.

James Linford, a San Francisco appellate attorney who filed an amicus brief supporting *Kransco*, said the court was essentially distinguishing between the rights of the insured and the insurer. "The majority went whole hog to give more scope of remedy to the insured," Linford said.

Richard Seabolt, who filed an amicus brief on behalf of the insurer, called the decision disappointing.

"If you have a tort remedy you ought to have tort defenses," the Hancock Rothert & Bunshoft partner said. "I still believe that ought to be the law."

In 1987, 35-year-old Michael Hubert dove headfirst onto his Wisconsin neighbor's Slip 'N Slide and broke his neck. Left a partial quadriplegic by the water slide accident, Hubert sued *Kransco*, the

maker of the toy. AES was Kransco's primary insurance company.

In the discovery phase of the trial, Kransco's general counsel denied any knowledge of prior accidents resulting in cervical injuries to adults. The company later retracted that statement and admitted that two previous accidents had occurred.

During trial, the plaintiff offered to settle the case for \$750,000, but AES would only pony up \$250,000 for a settlement. Hubert rejected the lower offer, and the jury returned a verdict of \$2.3 million in compensatory damages and \$10 million in punitive damages -- the largest punitive damage award in Wisconsin history.

Kransco and its other insurers settled with Hubert for \$7.5 million, and in 1992 the company brought a bad faith action against AES, alleging that the company breached the implied covenant of good faith and fair dealing by refusing to settle. Kransco sought to recover \$11.6 million, the amount by which the jury verdict exceeded AES's policy.

At the bad faith trial, conducted before San Francisco Superior Court Judge Carlos Bea, AES contended that Kransco was largely at fault for the large verdict because its false answers during pretrial discovery incited the jury to punish the company.

The jury apparently agreed, assessing 90 percent of the fault for the Wisconsin jury award to Kransco. But Bea decided that he'd erred in giving the comparative fault instruction and entered judgment notwithstanding the verdict in favor of Kransco.

The First District Court of Appeal affirmed, and _ on Thursday the Supreme Court agreed.

"Because an insured's breach of the covenant does not sound in tort, the insured's contractual breach of an express policy provision cannot be raised by the insurer as a defense in a bad faith action brought against it by an insured," Baxter wrote.

Reporter Kevin Livingston's e-mail address is klivingston<@>therecorder.com _ . _

LOAD-DATE: June 23, 2000

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June 22, 2000, Thursday

SECTION: Pg. 3

LENGTH: 548 words

HEADLINE: State High Court Agrees to Hear Case on Nike Asian Labor Controversy

BYLINE: By a MetNews Staff Writer

BODY: The state Supreme Court yesterday agreed to decide whether athletic shoe and apparel giant Nike, Inc. can be held liable for alleged misrepresentations of its labor practices in the Asian countries where its products are made.

A San Francisco Superior Court judge and a First District Court of Appeal panel had rejected a private attorney-general suit brought under the unfair competition law, Business and Professions Code Sec. 17200.

The lower courts rejected Marc Kasky's suit on First Amendment grounds. They said the company's effort to persuade consumers that it was acting responsibly on the issue shouldn't be judged by the same rules that govern advertisements generally.

But Chief Justice Ronald George and Justices Stanley Mosk, Joyce L. Kennard, Kathryn M. Werdegar, and **Janice Rogers Brown** voted to grant review, a court official said.

Oregon-based Nike's products are largely manufactured by South Korean and Taiwanese firms at factories in those countries and in China, Thailand, Indonesia and Vietnam. Those companies reportedly employ between 300,000 and 500,000 employees to manufacture the shoes and other athletic gear.

Although a Nike-hired consulting firm reported favorable working conditions at the factories, other investigators reported poor health conditions, 11- to 12-hour work days, compulsory overtime, violation of minimum wage laws, exposure to dangerous levels of dust and toxic fumes, and employment of workers under the age of 16.

A series of newspaper and television reports in 1996 and 1997 put additional pressure on the company for its overseas labor record.

Nike fought back with a costly public relations campaign that characterized the company as a leader in the fight to improve working conditions in the hot countries. Press releases detailed answers to the allegations, as did a series of letters to collegiate athletic directors.

Kasky sued over those releases and letters, alleging that Nike misrepresented the facts when it asserted that workers are not subjected to corporal punishment or sexual abuse, that the laws and regulations on wages, hours, health and safety were observed, that pay averaged double the minimum wage in Southeast Asia, and that employees receive free meals and health care and a "living wage."

Kasky's action was dismissed on demurrer, and the First District's Div. One affirmed.

Justice Donald Swager said the statements at issue for Nike were intended to promote a favorable corporate image and demand a different analysis than that applying to product advertisements.

"The press releases and letters at issue here cross the boundary between political and private decisionmaking," the justice said. "The citizen may want to translate personal discontent over Nike's labor practices into political action or may merely wish to refrain from purchasing its products manufactured by undesired labor practices, just as he or she may wish to buy products with a union identification."

The analysis isn't changed by the fact that Nike has an economic motivation in defending its corporate image from criticism, he said. The communications were still part of a "public dialogue on a matter of public concern within the core area of expression protected by the First Amendment," he said.

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The Recorder

June 22, 2000, Thursday

SECTION: IN BRIEF; PG. 7

HEADLINE: JUSTICES LACE UP FOR NIKE CASE

BYLINE: Kevin Livingston

BODY:

The California Supreme Court will decide for the first time whether the state's sweeping unfair business practices statute can be used to challenge an American company's labor practices abroad.

Five justices Wednesday voted to hear a San Francisco man's claim that Nike Inc. violated Business and Professions Code 17200 when the sneaker company allegedly made false statements in order to dupe customers into buying products manufactured by exploited Asian workers_.

Chief Justice Ronald George, along with Justices Stanley Mosk, Joyce Kennard, Kathryn Mickle Werdegar and **Janice Rogers Brown** voted to take up Kasky v. Nike, Inc., S087859. _At stake in the case is how far companies can go to defend themselves through public relations against attacks on their business practices, and any decision will likely effect similar suits against other clothing manufacturers.

Lawyers on both sides say the court's decision will likely hinge on whether Nike's denial of labor abuses was constitutionally protected speech or a deception of consumers that may be covered under _17200.

"Nike was making a lot of misrepresentations_," said plaintiff's lawyer Alan Caplan, a partner at San Francisco's Bushnell, Caplan & Fielding. "It's a classic case of an unfair business practice."

Caplan, whose firm is joined in the case by San Francisco solo Paul Hoeber and by Milberg Weiss Bershad Hynes & Lerach, said he was ecstatic about Wednesday's news. _Nike attorney David Brown, a business litigation partner with Brobeck, Phleger & Harrison, said he was surprised the court granted review, but said he was confident Nike will prevail in the matter.

"We thought the trial court and court of appeal decisions were correct," he said. "The facts of the case bring Nike well into First Amend_ment protections."

Marc Kasky_ brought his claim against Nike in San Francisco Superior Court last year alleging that the sports apparel company engaged in false advertising to mislead customers about working conditions in its Asian factories.

Kasky sought an injunction ordering Nike to "disgorge all monies" it acquired through its alleged unfair practices. _He also wanted the Beaverton, Ore.-based company to "cease misrepresenting its working conditions and undertake a court-approved public information campaign," according to court documents.

But San Francisco Judge David Garcia dismissed the action, and a First District Court of Appeal panel later slammed the plaintiff's claim on the grounds that Nike's campaign constituted free speech.

In a unanimous opinion, Justice Douglas Swager wrote: "We see no merit to appellant's scattershot argument that he might be able to state a cause of action on some theory allowing content-related abridgement of noncommercial speech."

In their petition to the Supreme Court, the plaintiff's lawyers argue that the court of appeal erred when it tossed the case last March.

"The court simply assumed that a company cannot be engaged in commercial speech when its false statements are 'intended to promote a favorable corporate image,'" attorney Paul Hoeber wrote in his brief.

Defense attorneys claim that, if successful, the case could unleash a flood of new California actions against companies operating outside the United States. __ Since Kasky's suit, a similar claim has been brought in San Francisco against The Gap, J. Crew, Tommy Hilfiger and other clothing manufacturers accused of deceiving customers about the conditions under which their clothes are made in Saipan.

_ In Union of Needletrades Industrial and Textile Employees v. The Gap Inc., 300474, 18 U.S. clothing manufacturers are _accused of misleading the public about labor abuses and mislabling their clothing.

Caplan, who is also involved in that litigation, said a decision by the court in Kasky will have no impact on the Gap case, which accuses manufacturers of more than just misinformation.

But Brobeck's Brown has said Kasky is directly applicable to the false advertising claims in the other suits.

Reporter Kevin Livingston's e-mail address is klivingston<@>therecorder.com

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June 22, 2000, Thursday FIRST EDITION

SECTION: NEWS; Pg. A-7

LENGTH: 468 words

HEADLINE: High court takes Nike case;
City activist seeks to sue company over allegedly lying about its Asian factories

BYLINE: Bob Egelko

SOURCE: OF THE EXAMINER STAFF

BODY:

The state Supreme Court has agreed to decide whether a San Francisco activist can sue Nike Inc. for allegedly lying about conditions in its Asian factories.

The suit by Marc Kasky, executive director of the Fort Mason Foundation, was dismissed by a lower court on free-speech grounds. But the state's high court voted to take up Kasky's appeal and decide whether his claims, if proved, would show that the world's largest athletic shoe maker violated a broad California law against unfair business practices.

Chief Justice Ronald George and Justices Stanley Mosk, Joyce Kennard, Kathryn Mickle Werdegar and **Janice Rogers Brown** voted Wednesday to review the case.

The suit attacks Nike's statements to the public and its stockholders about its treatment of hundreds of thousands of workers, mostly women, in contractors' Asian factories that make the company's shoes and other apparel.

After reports in the news media and elsewhere that the women were working for low pay in dangerous conditions, Nike commissioned a study led by Andrew Young, former U.S. ambassador to the United Nations, and declared its workers were well-treated. The company said the factories complied with their home countries' laws on pay and safety and that workers were provided health care, paid an average of twice the local minimum wage and protected from physical abuse.

Kasky, represented by some of the same lawyers who successfully challenged the Joe Camel advertising campaign, likened Nike's statements to deceptive advertising and said they were intended to lure customers by whitewashing factory conditions. He sought to require the company to return illegally obtained profits to customers and the state and conduct a corrective public information campaign.

Superior Court Judge David Garcia dismissed the suit without a trial and was upheld last March by the 1st District Court of Appeal, which said Nike's statements were more like political speech than commercial advertising.

The company's campaign did not focus on any of its products, but was intended to "promote a favorable corporate image" and influence the public debate over global corporate practices, said Justice Douglas Swager in the 3-0 ruling. He said the suit "seeks judicial intervention in a public debate" that was constitutionally shielded from government regulation.

Kasky's attorneys urged the state Supreme Court to intervene, arguing that public relations campaigns could amount to false advertising. Attorney Alan M. Caplan said reinstatement of the suit would allow the lawyers to gather evidence from Nike and determine the truth about factory conditions.

Nike spokesman Vada Manager said the company considered Kasky's suit "a case without merit, and we'll defend it vigorously in whatever legal forum is necessary."

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June 20, 2000, Tuesday

SECTION: Pg. 3

LENGTH: 451 words

HEADLINE: State's Double Jeopardy Rule Applies to Mandatory Restitution Fine--S.C.

BYLINE: By a MetNews Staff Writer

BODY: The Double Jeopardy Clause of the California Constitution bars the judge from increasing a defendant's restitution fine after a successful appeal of the underlying conviction, the Supreme Court unanimously ruled yesterday.

Restitution fines, Justice **Janice Rogers Brown** wrote for the court, are a form of criminal punishment and thus cannot be increased as, in effect, a penalty for a successful challenge to a conviction.

California, Brown noted, does not follow the federal rule of *North Carolina v. Pearce* (1969) 395 U.S. 711. There, the high court said that a sentence may be increased following a successful appeal, provided that there is a showing that the increase was not vindictive.

The reasoning of *Pearce* was rejected, as a matter of California constitutional law, in *People v. Collins* (1978) 21 Cal.3d 208.

Collins involved a defendant who plea-bargained for the dismissal of 14 felony counts and pled guilty to one count, resulting in a three-year sentence. On appeal, the conviction was thrown out on the ground that the proscribed conduct had been decriminalized.

The high court ruled that the defendant could be tried on the 14 dismissed counts, but that the sentence could not exceed the previously imposed three-year term.

Yesterday's ruling adds a postscript to an unusual case that has been making its way through the courts for over a decade.

The defendant, Melvin Eugene Hanson, is a former Ohio businessman who was the subject of a life insurance claim in 1988. A Glendale physician, Dr. Richard P. Boggs, said that Hanson was his former patient and identified a homicide victim as Hanson.

The victim was actually a tax preparer who was killed sometime after leaving a bar on the night of April 15, 1988. Prosecutors theorized that Boggs and Hanson had schemed to collect the proceeds of a \$ 1.5 million insurance policy on Hanson's life, of which a business partner of Hanson's was the beneficiary.

Hanson, who was arrested in Texas in January 1989, was convicted of first degree murder with special circumstances, as was Boggs, as well as insurance fraud, grand theft, and conspiracy. Hanson was sentenced to life imprisonment without possibility of parole, along with a restitution fine of \$ 1,000.

On appeal, the homicide conviction was reduced to one of second degree murder. On remand, Hanson was sentenced to 25 years to life imprisonment on the conspiracy count, sentence on the other counts was stayed, and the restitution fine was increased to \$ 10,000.

The Court of Appeal affirmed, but the high court ruled yesterday that the restitution fine must remain at \$ 1,000.

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June 13, 2000, Tuesday

SECTION: Pg. 5

LENGTH: 754 words

HEADLINE: Lost Profits Not Recoverable in Wrongful Denial of Public Contract--S.C.

BYLINE: By a MetNews Staff Writer

BODY: The lowest responsible bidder wrongfully denied a public contract may recover its bid preparation costs, but not lost profits, the state Supreme Court unanimously ruled yesterday.

Allowing a disappointed bidder to sue for lost profits, Justice **Janice Rogers Brown** said, would be directly contrary to the purpose of the competitive-bidding laws. Instead of saving money, she said, governments would have to pay damages to unsuccessful bidders, on top of the payments made under the contract, and might become targets of frivolous litigation.

The justices overturned lower court rulings that would have required the Los Angeles County Metropolitan Transportation Authority to pay nearly \$ 1 million, including \$ 350,000 in lost profits, to construction firm Kajima/Ray Wilson.

Kajima sued after MTA awarded a contract to build the Red Line Hollywood/Highland station and tunnels to rival Tutor-Saliba-Perini.

MTA had first bid the contract in April 1994. Tutor-Saliba was the low bidder, but MTA exercised its statutory right to rebid the contract after Kajima protested that the agency's Disadvantaged Business Enterprise goal had not been met.

Kajima was the low bidder in the second round at \$ 68.9 million, \$ 1 million under the figure submitted by the next-lowest bidder, Tutor-Saliba. MTA, however, awarded the contract to Tutor-Saliba finding that, this time, it was Kajima that hadn't met the DBE goal.

Kajima sued, challenging what it was said was a previously unknown, unwritten policy of crediting only 5 percent of the bid amount designated for "brokers," while giving 100 percent credit for work to be done by "subcontractors."

Kajima noted that Manuel Tejeda Trucking had been listed as a broker in its bid, but as a subcontractor in Tutor-Saliba's, and that had Kajima received full credit for work to be performed by Tejeda as its competitor had it would have met the 30 percent DBE goal for the project.

Los Angeles Superior Court Judge Victor Chavez tried the case without a jury. He ordered MTA to cease using the 5 percent broker policy and awarded Kajima \$ 924,000 in damages, including \$ 45,000 for expenses incurred in preparing the second bid, \$ 89,000 in bid protest costs, \$ 300,000 for unabsorbed overhead, \$ 350,00 for lost profits, and \$ 140,000 in prejudgment interest.

The Court of Appeal affirmed, finding the 5 percent policy to be arbitrary and contrary to federal law, as applied to Kajima's bid. The lower panel also concluded that lost profits were recoverable on a promissory estoppel theory, and that the issue of overhead costs had been waived on appeal.

MTA's petition for Supreme Court review challenged only the award of bid preparation costs and lost profits.

Brown noted that the preferred method of enforcing a competitive-bidding law is the setting aside of an improper contract award to a party which is not the lowest responsible bidder. Cases like this, she explained, arise because a contract may be largely or fully performed before the disappointed bidder establishes a right to relief.

The justice also noted that unlike the federal government, California hasn't codified remedies for the misaward of a public contract.

This could be taken to mean that the Legislature intended to preclude such remedies, Brown mused. But precedent and a Government Code provision allowing claims for money damages against MTA when provided by law, including decisional law, indicate that courts may fashion remedies in the circumstances, she said.

But recovery of lost profits is not appropriate, the justice said, given the "uncertainties which are inherent in competitive bidding," including the possibility that all bids will be rejected, the secrecy of the bidding process, and the fact that a contract may turn out to be unprofitable.

"Any miscalculation or unanticipated rise in costs may erode or even extinguish the bidder's profit margin," Brown reasoned. "Thus, awarding plaintiff the profits it would have earned on the contract appears vastly disproportionate to the losses actually sustained as a result of its detrimental reliance and necessarily speculative. Indeed, such an award arguably places Kajima in a better position than if it had actually performed the contract."

Attorneys who argued before the Supreme Court were Deputy County Counsel Richard P. Chastang for MTA and Bernard S. Kamine of Kamine, Steiner & Ungerer for Kajima.

The case is *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 00 S.O.S. 3473.

LOAD-DATE: July 10, 2000

The Associated Press State & Local Wire

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June 12, 2000, Monday, BC cycle

SECTION: State and Regional

LENGTH: 334 words

HEADLINE: Supreme Court rules against companies that lose public contracts despite lowest bids

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court ruled unanimously Monday that companies that lose public contracts despite having the lowest bid cannot sue for lost profits.

In doing so, the court reversed a lower Court of Appeals decision in favor of verdict that gave a construction firm \$350,000 for lost potential profits.

The company, Kajima-Ray Wilson, submitted the lowest bid to build the Red Line Hollywood-Highland station and tunnels in the Los Angeles subway system. But a bid-evaluation rule that was later thrown out by the court resulted in the \$69 million job being improperly awarded to another firm, Tutor-Saliba-Perini.

Kajima appealed the decision but, while the issue was pending, Tutor-Saliba substantially completed construction, according to the Supreme Court. Because it was too late for a court to have Kajima do the work, the company sought to win in court the profits it claimed it would have made.

But the Supreme Court said that amount was speculative and would hurt the public by forcing it to pay twice for the same project - once to the company that actually does the work, and once to the company that should have won the contract.

"Permitting a recovery of lost profits 'unduly punishes the taxpaying public,' while providing an unfair windfall to bidders like Kajima 'for effort they did not make and risks they did not take,'" said Justice **Janice Rogers Brown** in the court's opinion, in which she quotes from another appellate court ruling.

The court said, however, the firm could win \$44,869 in costs associated with preparing the bid. That money will be paid by the Los Angeles County Metropolitan Transportation Authority.

Brown wrote that allowing that limited form of damages would provide important leverage on public officials to award contracts properly.

The case is Kajima-Ray Wilson v. Los Angeles County Metropolitan Transportation Authority, S077461.

On the Net:

The opinion can be read at <http://www.courtinfo.ca.gov/opinions/>

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June 9, 2000, Friday

SECTION: Pg. 1

LENGTH: 791 words

HEADLINE: Contempt Order Requires Record of Warning, High Court Rules

BYLINE: By ROBERT GREENE, Staff Writer

BODY: The state Supreme Court yesterday struck down a contempt order lodged by Los Angeles Superior Court Judge Kathryne A. Stoltz against a deputy public defender because the judge failed to specifically recite that she warned Stephen Boysaw about his tone of voice.

In an opinion by Justice **Janice Rogers Brown**, a unanimous court said it wasn't enough that the transcript of the April 1999 trial in question showed that the judge twice told Boysaw to address his cross-examination questions to a police officer "in a professional tone of voice," or that after she sustained an objection he continued to argue with her.

Transcripts aren't always on hand, leaving contempt orders "the only record immediately available on review," Brown said.

Stoltz did say in her order that Boysaw yelled at her "in an extremely rude, hostile and disrespectful tone of voice" in front of a jury. But it did not recite her warnings.

Judges Benchbook

No statute actually requires judges to recite warnings in their contempt orders. But Brown cited the California Judges Benchbook, a state Center for Judicial Education and Research publication that guides judges on proper courtroom procedures. The book states that a warning "should be made on the record, and any contempt order should indicate that a warning was given."

Brown said the book correctly drew the rule from caselaw.

In another part of the opinion the court rejected as "empty formalism" a requirement gleaned from other caselaw that the contempt order recite that the conduct occurred "in the immediate view and presence of the court."

It was enough for Stoltz to recite that Boysaw yelled at the judge in front of the jury, Brown said, "thereby making it clear beyond any cavil that the cited conduct did in fact occur in the immediate view and presence of the court."

The contempt order that was the subject of the Supreme Court ruling involved a \$ 50 fine levied by Stoltz against Boysaw, a deputy public defender who graduated from UCLA law school and was admitted to practice in 1994.

Stoltz had an 11-year career in the U.S. Attorney's Office before her appointment to the bench in 1985.

No Big Deal

Deputy Public Defender John Hamilton Scott, who argued the case before the justices on behalf of

Boysaw on April 5, said the tiff between the judge and the lawyer was no big deal.

"I think they both just got a little annoyed at each other," Scott said. "He apologized. It's not like there's any continuing problem on either side."

Scott downplayed the high court's rejection of his argument that the contempt order had to fall because it didn't recite that the contemptuous conduct occurred in the presence of the court.

"Certainly the substantive issue is more important than the technical issue," Scott said. He added that it was "worrisome" that the Court of Appeal summarily denied a petition for writ of certiorari, making the Supreme Court petition necessary.

Principal Deputy County Counsel Gordon Trask, who argued the case for the respondent Superior Court, said the justices' attention to what might appear to be tedious detail on both issues was crucial.

"Orders in direct contempt matters are pretty technical," Trask said. "Most judges aren't sitting there waiting to hold someone in contempt. They tend not to have [the rules] at their fingertips."

Boysaw was cross-examining LAPD Officer Ramon Martinez when Stoltz told him he had to give the officer time to answer and had to use "a professional tone of voice."

Boysaw said he was being professional, and Stoltz repeated that he had to address the witness in a professional tone. Later, the prosecutor said Boysaw's tone was uncalled for, and Boysaw responded that he didn't think the other lawyer had the right to tell him what tone to use.

"No," Stoltz said, "but the court does."

Stoltz later sustained an objection to a Boysaw question, Boysaw argued with her about it, and Stoltz told him not to argue. The lawyer replied:

"I am arguing."

The judge then excused the jury to talk to the lawyer.

"You do not stand at the podium and yell at me in front of the jury," the judge said. "That is contempt of court. We will have a hearing on the matter."

She added:

"We'll set a hearing date at the end of this trial, but I'm issuing an order and I'll put it in writing to show cause why you should not be held in contempt because that was about as extreme an example of unprofessional behavior as I've seen in my 12 years on the bench."

Brown, in her opinion, said a contempt order was warranted and could be upheld if only Stoltz had based it on the disrespectful content of Boysaw's statement, "I am arguing," rather than his tone of voice.

The case is Boysaw v. Superior Court, 00 S.O.S. 3397.

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June 9, 2000, Friday

SECTION: NEWS; PG. 2

HEADLINE: COURT ISSUES NEW RULE

BYLINE: Kevin Livingston

BODY:

A Los Angeles public defender who yelled at a judge while the jury was present had his contempt citation tossed by the California Supreme Court on a technicality Thursday.

It just wasn't the technicality his lawyer had relied on in his argument.

The court concluded that Stephen Boysaw had not been properly warned that his tone of voice could lead to a citation, but the justices carved out new law when they dismissed Boysaw's argument that a contempt order is invalid when it fails to contain the words: "immediate view and presence of the jury."

In a unanimous opinion, Justice **Janice Rogers Brown** wrote that requiring judges to use those words exalts "form over substance."

Her ruling in Boysaw v. Superior Court, 00 C.D.O.S. 4487, overrides earlier precedents, including 1966's Morales v. Superior Court, 239 Cal.App.2d 947, which held that a contempt order must be annulled if it doesn't contain that specific language.

"If the underlying facts recited in an order of contempt sufficiently demonstrate that the contumacious conduct occurred in the immediate view and presence of the court, the order need not recite the statutory formula," Brown wrote.

Those "magic words" were the back bone of Boysaw's defense when his attorney, John Hamilton Scott, appeared before the court in April. Scott told the justices that his argument was backed by a "blazed trail" of California case law.

But the court did not adopt what Justice Kathryn Mickle Werdegard described as Scott's "hypertechnical" argument. The panel instead said the order must be annulled because the trial judge, Los Angeles Superior Court Judge Kathryn Stoltz, simply failed to warn Boysaw about his tone of voice.

"Unless the conduct is outrageous and immediately recognizable as an act of contempt, the judge should warn the person that further similar conduct will result in a citation for contempt," Brown wrote.

According to the order, Boysaw was held in contempt when "he began yelling at the court in an extremely rude, hostile and disrespectful tone of voice." But Brown wrote that Boysaw hadn't been warned about his tone -- he'd only been told to stop arguing an evidentiary ruling.

"We wish to emphasize that had the trial court rested its findings of contempt upon petitioner's direct refusal to obey the court's order not to continue arguing its evidentiary ruling, or upon the rude, hostile and disrespectful content of petitioner's response, such a finding would have supported an order of contempt," Brown wrote.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com_

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June 6, 2000, Tuesday

SECTION: Pg. 1

LENGTH: 790 words

HEADLINE: S.C. Limits Right to Withdraw Plea Due to Lack of Advisement of Immigration Consequence

BYLINE: By a MetNews Staff Writer

BODY: An alien who pleads guilty or no contest to a criminal charge without being advised that he or she may be deported or excluded from the United States or denied citizenship as a result doesn't have the automatic right to withdraw the plea, the state Supreme Court ruled yesterday.

In a 5-2 decision, the high court ruled that when such advisements which are not constitutionally mandated but are required by a state statute are not given, the defendant may withdraw the plea only upon a showing that he or she would have gone to trial rather than accept the consequences of the plea.

The high court overturned an order allowing Jose F. Zamudio to withdraw his plea of no contest to a charge of taking a vehicle, and remanded for further proceedings.

Zamudio entered his felony plea in the former Stockton Municipal Court in 1992 pursuant to negotiations. He had previously been advised that if he was not a citizen, he was possibly subject to "deportation or...refusal of naturalization, citizenship or amnesty at a later point in time" on the basis of the plea.

Zamudio was sentenced to eight months in jail, and placed on probation for five years. Before completing probation he was arrested again, and charged with taking a vehicle, drunk or drugged driving, and drug possession.

He agreed to admit violating probation and to plead no contest to drug possession and second-offense drunk driving. He received a two-year prison sentence, but received various credits and was only required to serve another 90 days.

In 1998, after immigration officials placed a hold on his release, he moved to vacate the 1992 plea on the ground he had not been advised of his possible exclusion from the United States.

The motion was based on Penal Code Sec. 1016.5, which requires that a defendant be advised that if not a citizen, his or her plea "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

The statute also provides that if the admonition is not given and the defendant shows that he or she faces deportation, exclusion, or denial of naturalization, "the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea."

San Joaquin Superior Court Judge James E. Hammerstone Jr. granted the motion. While Zamudio was advised of the possibility of deportation or denial of citizenship, the judge agreed, he didn't receive the third immigration-related advisement, that he could be excluded.

Because the defendant was not advised of the possibility of exclusion, the judge said, he was entitled

to withdraw the plea without any further showing.

After the Third District Court of Appeal summarily denied prosecutors' petition for writ relief, the Supreme Court granted review.

Justice Kathryn M. Werdegar, writing for the high court, agreed with prosecutors that Zamudio was not entitled to withdraw the plea absent a showing of prejudice. She rejected the defense contention that the statutory language establishes a per se rule allowing withdrawal of the plea.

Werdegar cited Art. VI. Sec. 13, the state constitutional version of the harmless error rule. The section provides, among other things, that a judgment shall not be set aside, or new trial granted, "for any error as to any matter of procedure" unless "the error complained of has resulted in a miscarriage of justice."

A lack of advisement concerning immigration consequences, or other warnings regarding potential collateral consequences, isn't fundamental error, Werdegar said. In addition to the constitutional provision, she cited Penal Code Sec. 1404, which says that judicial error doesn't render a criminal proceeding invalid unless the error "has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right."

Werdegar was joined by Chief Justice Ronald George and Justices Marvin Baxter, Ming Chin, and **Janice Rogers Brown**.

Justice Stanley Mosk, joined by Justice Joyce L. Kennard, dissented.

"Unlike the majority, I do not find any requirement in the Penal Code that a noncitizen convicted criminal seeking to vacate the judgment under Penal Code section 1016.5...must show that he or she would have proceeded to trial if he or she had known about the possible immigration and nationality consequences of pleading guilty or no contest," Mosk wrote.

Sec. 1404 does not apply to a motion under Sec. 1016.5, Mosk argued, because the Legislature has found the right to withdraw a plea where one faces a negative immigration consequence of which he or she was not warned to be a "substantial right."

The case is *People v. Superior Court, Zamudio RPI, 00 S.O.S. 3320*.

LOAD-DATE: June 8, 2000

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June 6, 2000, Tuesday

SECTION: NEWS; PG. 2

HEADLINE: JUSTICES PUT BRAKES ON

BYLINE: Mike McKee

BODY:

The California Supreme Court ruled Monday in two separate cases that the state's unfair competition law can't be used to force businesses to disgorge ill-gotten gain into a fund to benefit all potential victims.

Such broad-based relief is available only through the filing of a class action, the court said, holding that the unfair competition law -- Business & Professions Code '17200 -- only requires that restitution be made to each identifiable individual that suffered financial loss.

"Plaintiffs have directed us to nothing, and we have found nothing in the legislative history of the unfair competition law to suggest that the Legislature intended to authorize fluid recovery in representative UCL actions when it made the power to order restitution statutory," Justice Marvin Baxter wrote for the court in Kraus v. Trinity Management Services Inc., 00 C.D.O.S. 4369.

He was joined by Chief Justice Ronald George and Justices Stanley Mosk, Ming Chin and **Janice Rogers Brown**. Justice Joyce Kennard issued a separate concurring opinion, and Justice Kathryn Mickle Werdegard wrote a separate concurring and dissenting opinion.

The justices reached a similar conclusion in a companion case, Cortez v. Purolator Air Filtration Products Co., 00 C.D.O.S. 4382.

Both Kraus and Cortez involved attempts by alleged victims of wrongdoing to have businesses disgorge unfairly gained profit into funds that could be used to repay and benefit all potential victims, known or unknown. Kraus was brought by San Francisco tenants who said a landlord's security and administrative fees were unfair, while Cortez involved claims of unpaid overtime.

But the defendants had argued that such broad relief was available only through the filing of a class action.

The court agreed.

"Absent class certification the defendant in such an action remains subject to countless future lawsuits based on the same conduct and raising the same issues even if the defendant has prevailed in the UCL action," Baxter wrote in Kraus.

In both cases, though, the court ruled that direct restitution could be made through the unfair competition law to people "from whom money or property has been unfairly or unlawfully obtained."

In her partial dissent in Kraus, Werdegard called the majority's reasoning "fallacious" and said that it "flies in the face" of the court's own previous pronouncements.

"With its decision, the majority today permits the landlord defendants in this case to retain nearly half a million dollars in illegal gains from unfair competition, while significantly diminishing consumers'

equitable and statutory protections against unfair business practices," she wrote.

The cases had attracted several groups as amicus curiae, seven siding with the defendants in Kraus and four with the plaintiffs. Representatives of two of the groups on opposing sides were upbeat about the ruling.

"The court here was making a distinction between a 17200 action and a class action," said Sharon Arkin, a partner at Newport Beach's Robinson, Calcagnie & Robinson, whose brief on behalf of the Consumer Attorneys of California backed the plaintiffs. "People had been using 17200s the same way as class actions and the justices are saying you can't really do this."

Lisa Perrochet, a partner at Encino's Horvitz & Levy, which authored a defense-side amicus brief for the Truck Insurance Exchange, sounded a similar note.

"The majority did say that if you are going to bring one of these representative actions, the remedy you can get is cash in pocket back to the person from whom the cash is taken," she said. "By saying that you have to have identifiable people to get the money, the Supreme Court may have put the brakes on these loosey-goosey kind of cases."

Associate editor Mike McKee's e-mail address is mmckee@therecorder.com

LOAD-DATE: June 20, 2000

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View Related Topics

June 5, 2000, Monday

SECTION: Pg. B5

LENGTH: 657 words

HEADLINE: Can courts ban racial slurs at work?

BYLINE: BY KEVIN LIVINGSTON, AMERICAN LAWYER MEDIA NEWS SERVICE

HIGHLIGHT:

Justice Thomas chastises his colleagues for refusing to answer question in *Avis* case.

BODY:

U.S. SUPREME COURT Justice Clarence Thomas issued a cautionary dissent on May 22 after the court refused to review a California decision that prohibits a car rental shop steward from using racial epithets at work.

Saying that last year's decision from the California Supreme Court likely repressed protected speech, Justice Thomas said his colleagues should have overlooked problems with the record and voted to take the controversial case.

"Though the record may disable us from resolving here and now every detail of the interaction between the First Amendment and workplace harassment law, an incremental approach to this area would seem wise in any event," Justice Thomas wrote.

The California Supreme Court's opinion in *Aguilar v. Avis Rent A Car System Inc.*, 21 Cal.4th 121, has been watched closely by employment and First Amendment lawyers because it enjoined an employee from using certain language on the job. The U.S. Supreme Court would have had to decide whether such an injunction constituted a prior restraint on speech. But because of a quirk in the way the case was tried, they would have done so without any evidence in the record as to the epithets the employee used.

Justice Thomas said that the California ruling forbidding Avis employee John Lawrence from uttering words deemed offensive to Latino employees was unnecessary and probably unconstitutional. He also said that the U.S. Supreme Court could not apply anti-discrimination laws to pure speech in the workplace without first overhauling its First Amendment body of law.

"Even if some types of harassing speech in the workplace do not enjoy First Amendment protection," Justice Thomas wrote, "there has been no showing that a prior restraint, rather than the less severe remedy of money damages for any future violations, is necessary to regulate Lawrence's speech."

In 1993, Mr. Lawrence was an Avis shop steward working at the company's San Francisco International Airport location. According to the plaintiffs' complaint, he routinely harassed Latino workers, calling them derogatory names, such as "wetback," and snapping towels at them. A group of Latino workers sued Avis and Mr. Lawrence under California's Fair Employment and Housing Act, and a jury awarded them damages.

San Francisco Superior Court Judge Carlos Bea then enjoined Avis and Mr. Lawrence from using racial epithets in the future. By declining certiorari, the U.S. Supreme Court allowed that injunction

to remain in place.

In his dissent, Justice Thomas said that the court should have taken the case because prior restraint bears a heavy presumption against its constitutional validity. The justice also wrote that the thorough treatment of the issue in the California opinions makes it unnecessary to await a split in the lower courts.

Although a divided 1st District Court of Appeal panel upheld the injunction, it did so with the directions that the injunction must include a list of the banned words and could only cover Mr. Lawrence at work.

Last August, the California Supreme Court -- in five separate opinions -- let Judge Bea's order stand. Although the state and federal constitutions frown on prior restraints on speech, Chief Justice Ronald George's plurality opinion said that the injunction wasn't a prior restraint because a jury had already found that Mr. Lawrence's speech had created a hostile work environment.

"Once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation or continuation of that practice is not a prohibited prior restraint," he wrote.

That conclusion met with dissents from justices Stanley Mosk, Joyce Kennard and **Janice Rogers Brown**. "I can think of no circumstance in which this court has brushed aside such an important constitutional protection as the right to free speech on the basis of so little analysis or authority," Justice Brown wrote.

GRAPHIC: Photo, Clarence Thomas: Says that an employee's First Amendment rights likely were violated. AP/WIDE WORLD PHOTOS

LOAD-DATE: June 8, 2000

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June 2, 2000, Friday

SECTION: Pg. 3

LENGTH: 692 words

HEADLINE: No-Layoff Policy Did Not Give Employees Vested Rights, S.C. Rules

BYLINE: By a MetNews Staff Writer

BODY: Employers may unilaterally scrap their own no-layoff policies without infringing any vested rights of their employees, the state Supreme Court ruled yesterday.

In a 4-3 decision, responding to a certified question from the Ninth U.S. Circuit Court of Appeals, the state justices ruled Pacific Bell could jettison its policy of retraining and reassigning managers, rather than laying them off.

Since the telecommunications giant instituted its "management employment security policy" on its own, and not as part of any give-and-take bargaining, Justice Ming W. Chin said, it was a unilateral contract and could be terminated without consideration. If the employees did not accept their new employment situation, he said, they did not have to stay.

"When Pacific Bell terminated its original MESP and then offered continuing employment to employees who received notice and signed an acknowledgment to that effect, the employees accepted the new terms, and the subsequent modified contract, by continuing to work," Chin said. "Continuing to work after the policy termination and subsequent modification constituted acceptance of the new employment terms."

The ruling handed a major victory to employers, finding that unilateral employment security provisions did not confer vested benefits on workers.

Chief Justice Ronald George filed a lengthy and strongly worded dissent in which he called the majority opinion unsupportable.

"The majority endorses a patently unfair, indeed unconscionable, result permitting an employer that made a promise of continuing job security to its employees in order to retain their services during a period of good job prospects, to repudiate that promise with impunity several years later when the employer determined that it was no longer in its interest to honor the earlier commitment," George wrote.

Pacific Bell implemented its no-layoff policy for managers in 1986. By its terms, the policy was to remain in effect "so long as there is no change that will materially affect Pacific Bell's business plan achievement."

But the company's CEO advised employees in 1990 that "the prospects for continuing this policy are diminishing" in light of changing demographics and market conditions. The company gave notice in October 1991 that it would discontinue the policy six months later, then adopted a new severance program and, for managers who stayed, a new pension benefits.

Sixty employees later sued in federal court for breach of contract. The district court granted Pacific Bell summary judgment as to 52 employees who had signed releases waiving their right to assert claims under the policy, and the Ninth Circuit affirmed.

As to the other eight, the district court granted them summary judgment and concluded that Pacific Bell could not terminate the policy without demonstrating the explicit conditiona change "that will materially affect Pacific Bell's business plan achievement."

The parties then entered into a stipulation that included the court certifying for interlocutory appeal the question on breach of the policy.

In his dissent, George said the majority improperly assumed that the condition didn't describe an "ascertainable" event and chose to answer a question other than the one certified to it.

"...Pacific Bell repeatedly has conceded that the condition has not occurred," George said. "Because a contract setting forth an express condition for its termination may not be terminated unilaterally before the condition occurs, pacific Bell may not terminate the MESP."

Chin said the condition in the policy did not restrict the company's ability to terminate or modify the policy, "as long as the company made the change after a reasonable time, on reasonable notice, and in a manner that did not interfere with employees' vested benefits."

Chin was joined by Justices Marvin Baxter and **Janice Rogers Brown**, and Fourth District Court of Appeal Justice Judith Lynette Haller of Div. One, sitting on assignment in place of Justice Kathryn Werdegar.

George's dissent was joined by Justices Stanley Mosk and Joyce Kennard.

The case is Asmus v. Pacific Bell, 00 S.O.S. 3212.

LOAD-DATE: June 8, 2000

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June 2, 2000, Friday

SECTION: Pg. 1

LENGTH: 627 words

HEADLINE: High Court Upholds Law on Appointments to State Bar CourtDeck: No Separation of Powers Problem, George Says in 4-3 Ruling

BYLINE: By a MetNews Staff Writer

BODY: A sharply divided state Supreme Court yesterday upheld a controversial overhaul of the State Bar Court, under which hearing judges are to be appointed by the governor and leaders of the Legislature as well as the high court itself.

The Supreme Court's loss of its current, exclusive power to appoint the judges who hear and rule on attorney disciplinary actions does not violate separation-of-powers principles because the new scheme does not undermine the court's "ultimate" regulatory power over attorney admission and discipline, Chief Justice Ronald George wrote.

The appointment process, signed into law last year and due to take effect in November, includes sufficient "safeguards and procedures" to ensure that new State Bar Court judges are qualified, George said.

As if to underscore its continuing supremacy over attorney discipline, the high court issued concurrently with its opinion an order setting forth the initial terms, the location of service and the order of appointment of the State Bar Court appointments to be made by the governor, the Senate Rules Committee chair, and the Assembly Speaker. The order is reproduced on page 3201 of the Slip Opinion Supplement to today's MetNews.

Six-Year Terms

Two of the State Bar Court's hearing judges will continue to be appointed to six-year terms by the Supreme Court, which has appointed all five judges under a statutory scheme begun in 1988 and continued until last year's legislation by state Senate President Pro Tem John Burton, D-San Francisco.

The new law also will replace a non-lawyer who currently sits on the three-judge Review Department with a State Bar member. Each of those judges will continue to be appointed by the Supreme Court.

The measure was challenged by three current State Bar Court judges who were appointed by the Supreme Court and whose current terms end in November. James W. Obrien, H. Kenneth Norian and Nancy R. Lonsdale petitioned the court for a writ in January to block new appointments from outside the judicial branch. Burton and then-speaker Antonio Villaraigosa filed opposition papers.

The chief justice took care to note that the Legislature could not constitutionally take over the oversight of the legal profession in California.

Burton and the other respondents "mischaracterize the State Bar Court to the extent they contend that, because it was legislatively created, it is not an arm of this court and its composition and administration are within the exclusive power of the Legislature," George said.

But the chief justice went on to note that the criteria and screening process that the Burton legislation imposes on the new appointing powers are virtually identical to those the court used. He also detailed numerous examples of jurisdiction the court has in the past exercised, and presumably would feel free to continue to exercise, over attorney discipline.

The court's authority, he concluded, "is not defeated or materially impaired" by the new appointment scheme.

Justice Joyce Kennard disagreed.

"Although the law here challenged poses no immediate threat to liberty, it is an impermissible weakening of structural protections, and therefore a violation of the separation of powers doctrine," Kennard said in a dissent joined by Justice Kathryn Werdegar.

Dissenting Opinion

In a far more blistering dissent, Justice **Janice Rogers Brown** labeled the majority's position "abdication."

"The preservation of a viable constitutional government is not a task for wimps," Brown said. "We cannot, as the majority seems to suppose, simply defer to the violation of the Constitution."

George's majority opinion was joined by Justices Stanley Mosk, Marvin Baxter, and Ming W. Chin.

The case is *Obrien v. Jones*, 00 S.O.S. 3195.

LOAD-DATE: June 8, 2000

Copyright 2000 American Lawyer Media, L.P.
The Recorder

June 2, 2000, Friday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES OK POLITICAL PICKS FOR BAR COURT

BYLINE: Mike McKee

BODY:

A slim majority of the California Supreme Court Thursday upheld the constitutionality of a state law that lets the Legislature and governor make political appointments to the State Bar Court.

Voting 4-3, the court ruled that the 10-month-old law, which reduces the high court's role in choosing judges for the lawyer-disciplining body, does not violate the constitutional separation of powers.

However, Justice **Janice Rogers Brown**, in an unusually strong dissent, accused the majority of wimping out and abdicating one of the high court's crucial roles to the legislative and executive branches.

"Who can doubt that, by upholding the law at issue here," she blisteringly wrote, "the majority blithely welcomes into the judiciary's own household the specter of 'political entanglement' in one of its core functions -- the appointment and reappointment of judicial officers; of, in a word .-. judges."

Brown was responding to a ruling that gives the legislative and executive branches authority to appoint a majority of the hearing judges on the State Bar Court, the administrative body that handles attorney discipline.

Historically, all five judges have been appointed by the Supreme Court, but last year legislators passed a bill, which becomes effective on Nov. 1, that lets the governor, Senate president and Assembly speaker appoint one judge each. The legislation -- authored by Sen. President Pro Tempore John Burton, D-San Francisco -- also replaced the one lay judge position on the court's three-member appellate panel with a lawyer.

Three of the State Bar Court's judges, including Los Angeles-based Presiding Judge James Obrien, had challenged the new statute, arguing that it improperly politicizes the court and violates the constitutional separation-of-powers doctrine by weakening the Supreme Court's control over judicial appointments. The high court majority disagreed.

"We conclude that the legislation here at issue .-. does not defeat or materially impair our authority over the practice of law, and thus does not violate the separation-of-powers provision," Chief Justice Ronald George wrote in Obrien v. Jones, 00 C.D.O.S. 4257.

He was joined by Justices Stanley Mosk, Marvin Baxter and Ming Chin.

All four agreed that the court still retains control over the appointment process by requiring all judge candidates to meet certain qualifications and be screened by a seven-member, court-appointed evaluation committee. In addition, they said, hearing judges' decisions are subject to review by the State Bar Court's appellate judges, all still appointed by the Supreme Court.

"Our reserved power over the appointment (and reappointment) process and the structural and procedural safeguards in both that process and the disciplinary system," George wrote, "guard against

any risk or perception that the process may become politicized."

However, while yielding on the legislative and executive appointments, the majority made it clear that the Supreme Court maintains control over the overall composition, procedures and functions of the State Bar Court. The justices even took the rare step of issuing an order, in conjunction with the ruling, that laid out when and where the governor, Assembly speaker and Senate president would make their appointments, the first this November.

"That's extraordinarily unusual," said attorney James Wagstaffe, who represented O'Brien and two other State Bar Court judges. "But the court does have the inherent authority to promulgate rules."

Even so, Justice Joyce Kennard, who issued a separate dissent, joined by Justice Kathryn Mickle Werdegar, insisted that the new statute weakens "structural protections," and pointed out how it could have political ramifications.

"The speaker of the Assembly, for example, could decline to reappoint a hearing judge who failed a political litmus test or who exercised judicial powers in a fashion unsatisfactory to the speaker," Kennard wrote. "This kind of political influence over the performance of judicial duties is constitutionally impermissible."

Justice Brown, meanwhile, went for the majority's jugular, stating that the preservation of a viable constitutional government "is not a task for wimps."

"The challenged legislation not only invades a subject which, in both substance and history, has belonged wholly to the judiciary," Brown wrote, "it sweeps aside -- 'vacates' -- the rule we have adopted for conducting our own business. It is equivalent to this court appointing the membership of legislative committees."

"The majority's abject acceptance of such legislative impudence goes far beyond comity and cooperation," she snapped. "This is abdication."

Brown also argued that the ruling is the third in three months in which the majority had willingly ceded constitutional ground. The others, she said, were *In re Rose*, 22 Cal.4th 430, upholding the constitutionality of summary denial of judicial review in discipline cases, and *Leone v. Medical Board*, 22 Cal.4th 660, letting the Legislature limit appellate review of discipline by writ of mandate rather than direct appeal.

"With the decisions of this term," Brown wrote, "the ceaseless struggle to preserve the independence of the judiciary -- a struggle that is a constitutional obligation of this court -- has been placed at risk."

Sacramento-based Assistant Attorney General Manuel Medeiros, who represented Secretary of State Bill Jones in the case, could not be reached for comment. Plaintiffs' lawyer Wagstaffe, a partner at S.F.'s Kerr & Wagstaffe, said he wasn't sure whether he will seek a rehearing or try to appeal to the U.S. Supreme Court, but he took some satisfaction in the court's order laying out the appointment procedure.

"No matter what happens," he said, "they have contributed, at least in some way, to limiting the incursion by the Legislature."

Associate editor Mike McKee's e-mail address is mmckee@therecorder.com

LOAD-DATE: June 2, 2000

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View Related Topics

May 29, 2000, Monday

SECTION: Pg. A13

LENGTH: 416 words

HEADLINE: Plaintiff gets a second chance in California

BYLINE: BY KEVIN LIVINGSTON, AMERICAN LAWYER MEDIA NEWS SERVICE

DATELINE: SAN FRANCISCO

HIGHLIGHT:

One lawsuit for asbestosis won't time-bar a later suit for mesothelioma, a cancer.

BODY:

In a win for the plaintiffs' asbestos bar, the California Supreme Court on May 15 said that plaintiffs can get a second bite at the apple when suing companies for asbestos-related illnesses. In a unanimous ruling, the court said that the filing of one claim for an asbestos-related injury doesn't trigger the running of the statute of limitations on future causes of action.

In *Hamilton v. Asbestos Corp.*, 00 C.D.O.S. 3809, Justice Stanley Mosk said that Arthur Mitchell's prior lawsuit for asbestosis did not render time-barred a later suit that Mr. Mitchell filed after he developed mesothelioma, a fatal cancer.

Justice Mosk and five other justices then went further and disapproved two long-standing court of appeal decisions that barred plaintiffs from suing asbestos companies twice for the same disease.

The court ruled that even if a second claim violates the rule against splitting a cause of action, that doesn't mean it violates the special statute of limitations that governs asbestos suits. "The court appears to have confused the rule against splitting a cause of action with the statute of limitations," Justice Mosk wrote.

In a separate concurrence, Justice **Janice Rogers Brown** said it wasn't necessary to overturn 1995's *Darden v. General Motors Corp.*, 40 Cal.App 4th 349, and 1997's *Barr v. ACandS Inc.*, 57 Cal.App 4th 1038, two court of appeal decisions that upheld a one-year statute of limitations for plaintiffs who bring a separate cause of action based on essentially the same illness.

"Because the Legislature -- which clearly intended to place some limits on asbestos-related lawsuits - surely did not intend to give plaintiffs indefinite leave to file multiple lawsuits, I believe *Darden* and *Barr* were correctly decided," Justice Brown wrote.

Peace of mind for plaintiffs

Plaintiffs' attorney Philip Harley, of counsel at Oakland, Calif.'s Kazan, McClain, Edises, Simon & Abrams, said that the opinion overturns "two horrific decisions."

Mr. Harley said that the decision won't lead to more suits but that it will give plaintiffs peace of mind.

On the defense side, James Sinunu, of San Francisco's Adams Nye Sinunu Walker, said that he was surprised the court went as far as it did.

"People shouldn't be allowed to bring another suit for the same disease," he said.

Mr. Sinunu criticized the court for reading a liberal 20-year-old statute much too literally. "They didn't apply a practical approach to this," he said.

LOAD-DATE: May 31, 2000

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May 23, 2000, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: CALIFORNIA SPEECH CASE GETS THOMAS' ATTENTION

BYLINE: Kevin Livingston

BODY:

U.S. Supreme Court Justice Clarence Thomas issued a cautionary dissent Monday after the court refused to review a California decision that prohibits a car rental shop steward from using racial epithets at work.

Saying last year's decision from the California Supreme Court likely repressed protected speech, Thomas said his colleagues should have overlooked problems with the record and voted to take the controversial case.

"Though the record may disable us from resolving here and now every detail of the interaction between the First Amendment and workplace harassment law, an incremental approach to this area would seem wise in any event," Thomas wrote.

The California Supreme Court's opinion in *Aguilar v. Avis Rent A Car System Inc.*, 21 Cal.4th 121, has been watched closely by employment and First Amendment lawyers because it enjoined an employee from using certain language on the job.

The U.S. Supreme Court would have had to decide whether such an injunction constituted a prior restraint on speech. But because of a quirk in the way the case was tried, they would have done so without any evidence in the record as to the epithets the employee used.

Thomas said the California ruling, forbidding Avis employee John Lawrence from uttering words deemed offensive to Latino employees, was unnecessary and probably unconstitutional.

He also said the U.S. Supreme Court could not apply anti-discrimination laws to pure speech in the workplace without first overhauling its First Amendment body of law.

"Even if some types of harassing speech in the workplace do not enjoy First Amendment protection," Thomas wrote, "there has been no showing that a prior restraint, rather than the less severe remedy of money damages for any future violations, is necessary to regulate Lawrence's speech."

In 1993, Lawrence was an Avis shop steward working at the company's San Francisco International Airport location. According to the plaintiffs' complaint, he routinely harassed Latino workers, calling them derogatory names, like "wetback," and snapping towels at them.

A group of Latino workers sued Avis and Lawrence under California's Fair Employment and Housing Act and a jury awarded them damages. San Francisco Superior Court Judge Carlos Bea then enjoined Avis and Lawrence from using racial epithets in the future.

By declining *certiorari* on Monday, the U.S. Supreme court allowed that injunction to remain in place.

In his dissent, Thomas said the court should have taken the case because prior restraint bears a heavy presumption against its constitutional validity.

The justice also wrote that the thorough treatment of the issue in the California opinions makes it unnecessary to await a split in the lower courts.

Although a divided First District Court of Appeal panel upheld the injunction, it did so with the directions that the injunction must include a list of the banned words and could only cover Lawrence at work.

Last August, the California Supreme Court -- in five separate opinions -- let Bea's order stand.

Although the state and federal constitutions frown on prior restraints on speech, Chief Justice Ronald George's plurality opinion said the injunction wasn't a prior restraint because a jury had already found that Lawrence's speech had created a hostile work environment.

"Once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation or continuation of that practice is not a prohibited prior restraint," George wrote.

That conclusion met with dissents from Justices Stanley Mosk, Joyce Kennard and **Janice Rogers Brown**.

"I can think of no circumstance in which this court has brushed aside such an important constitutional protection as the right to free speech on the basis of so little analysis or authority," Brown wrote.

In a concurring opinion, Justice Kathryn Mickle Werdegar said the plurality was "sailing into uncharted First Amendment waters."

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: May 23, 2000

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May 16, 2000, Tuesday

SECTION: NEWS; PG. 3

HEADLINE: ASBESTOS VICTIMS CAN SUE FOR SUCCESSIVE ILLNESSES

BYLINE: Kevin Livingston

BODY:

In a win for the plaintiffs asbestos bar, the California Supreme Court on Monday said plaintiffs can get a second bite at the apple when suing companies for asbestos-related illnesses. In a unanimous ruling the court said the filing of one claim for an asbestos-related injury doesn't trigger the running of the statute of limitations on future causes of action.

In Hamilton v. Asbestos Corp., 00 C.D.O.S. 3809, Justice Stanley Mosk said that Arthur Mitchell's prior lawsuit for asbestosis didn't time-bar a later suit filed after he developed mesothelioma, a fatal cancer.

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Harley said the decision won't lead to more suits but gives plaintiffs peace of mind.

On the defense side, James Sinunu of San Francisco's Adams Nye Sinunu Walker said he was surprised the court went as far as it did.

"People shouldn't be allowed to bring another suit for the same disease," he said.

Sinunu said asbestos litigation has matured. He criticized the court for reading a liberal 20-year-old statute much too literally. "They didn't apply a practical approach to this," he said. Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

LOAD-DATE: May 16, 2000

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The Recorder

May 12, 2000, Friday

SECTION: AD HOMINEM; PG. 8

HEADLINE: DOCTORING THE LAW

BYLINE: Greg Mitchell

BODY:

It's time for a little employment law tea-leaf reading.

This week, a bitterly divided California Supreme Court said businesses that have enormous power over an individual's livelihood can't wield that power arbitrarily. They must act fairly.

But no, it wasn't an employment case. It only reads like one.

In Potvin v. Metropolitan Life Insurance Co., 00 C.D.O.S. 3628, Justice Joyce Kennard ruled that a doctor who was de-listed from a health insurer's preferred provider list may have been owed a hearing. Kennard relied on the rarely-invoked common law right to fair procedure.

Given that most companies don't owe their own employees anything under current law, it's an odd result, and one that didn't sit well with three dissenting justices. Justice **Janice Rogers Brown** claimed the majority had declared it the public policy of California to provide physicians with a minimum income.

Yet more may have been at stake in Potvin than the rights of doctors in the age of HMOs. Like the future of at-will employment.

Kennard inserted a footnote claiming that since Dr. Louis Potvin wasn't a MetLife employee, his case has no impact on at-will employment.

But Brown sure wasn't buying it. "Employers will not be comforted, for why wouldn't the majority's opinion apply to employer-employee contractual relations?" she asked.

And if Potvin doesn't affect at-will employment, Brown continued, "the majority will have created the anomalous situation that MetLife would have greater obligations to independent contractors like Potvin than to its own employees."

If the majority wants to fix the anomaly, they've got an opportunity sitting right in front of them.

In Guz v. Bechtel, S062201, which has already been argued but awaits a ruling on a related issue from the U.S. Supreme Court, the justices must decide whether factors like the plaintiff's length of employment and glowing job evaluations created an implied contract that trumped his employer's at-will employment policy.

Guz also involves the plaintiff's claim that an abrupt termination can amount to a breach of the covenant of good faith and fair dealing.

The four-member Potvin majority -- comprised of Kennard, Chief Justice Ronald George, and Justices Stanley Mosk and Kathryn Mickle Werdegar -- might agree.

After all, they refused to enforce a contractual provision between Potvin and MetLife that mimics the

at-will employment language most companies stuff in their employee handbooks. It said MetLife could de-list the doctor without cause.

And they backed it up with a cite to a New Hampshire Supreme Court case, Harper v. Healthsource New Hampshire, 674 A.2d 962, where that court said a similar contract provision violated the covenant of good faith and fair dealing.

Kennard's majority opinion was salted with concerns about the delivery of affordable health care and drew heavily on precedents developed by former Justices Phil Gibson and Matthew Tobriner.

Perhaps for that reason, the ruling may evoke nostalgia for a time when California's high court was a vaunted legal laboratory, whose creative application of the law to social injustice and public policy problems was widely copied by courts across the country.

Plaintiff-side employment lawyers can be forgiven if they see in Potvin the second coming of that court. Associate editor Greg Mitchell's e-mail address is gtmitchell@therecorder.com.

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May 11, 2000, Thursday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES TURN AWAY PROP 21 CHALLENGE

BYLINE: Kevin Livingston

BODY:

In a victory for Gov. Gray Davis and state prosecutors, the California Supreme Court on Wednesday declined to hear a challenge to the constitutionality of Proposition 21, the tough-on-juvenile-crime initiative.

By a 5-2 vote the court refused to look at whether the measure violated the state's 51-year-old single-subject rule. Justices Stanley Mosk and Joyce Kennard voted to grant a hearing in League of Women Voters v. Davis, SO87669.

Passed by 62 percent of the voters in March, Prop 21 -- dubbed the "Gang Violence and Juvenile Crime Prevention Act" -- allows prosecutors to decide whether juveniles as young as 14 should be tried in adult court, expands the category of felonies that would funnel youth offenders into state prison and increases punishment.

In April the American Civil Liberties Union, on behalf of the League of Women Voters of California and other groups, challenged the initiative, claiming it dealt with more than one subject.

The ACLU asked the court to stay implementation of the law because, it argued, not only did the measure intend to overhaul the juvenile justice system, it separately aimed to curb gang activity in prison and amend the state's six-year-old Three Strikes and You're Out law.

To bolster its argument for a stay, the ACLU noted that the initiative makes far-reaching changes in the juvenile justice system that would be complicated and expensive to implement. They added that young people would suffer irreparable injuries that would be difficult to remedy if the court later found the initiative to be unconstitutional.

Robert Kim, a San Francisco staff attorney with the ACLU, said the message from the court Wednesday was that "we have to start somewhere else."

Kim said that because the court did not resolve the matter, the ACLU is free to bring a challenge in a lower court. "It hasn't ruled on the merits," he said. "There is no preclusive effect."

The attorney added that the petitioners will discuss the situation further and decide what course of action to take.

But in Sacramento, lawyers at the California attorney general's office welcomed the ruling.

"The court seemed to agree with our argument that Prop 21 only deals with one subject," said spokesman Nathan Barankin.

In defending the measure, the AG's office took the position that single-subject challenges can't be brought after an election.

Government lawyers had argued that because the ACLU brought its challenge some six weeks after

the election, granting the petition would have defeated the "constitutionally contemplated procedure" reflected in the language of the single-subject statute. They also wrote that upholding such a challenge would "contribute to an increasing cynicism on the part of the electorate."

Kim disagreed, saying that the Supreme Court has yet to say if challenges must be brought before or after a vote is taken. "Historically, the court has suggested one should wait," he said.

In December, the court relied on the single-subject rule to strike an initiative that would have appeared on the March ballot, a step the court had taken just one other time in 50 years.

But in shelving Prop 24, which would have cut legislators' pay and set new boundaries for electoral districts, the justices disagreed fiercely over when single-subject challenges should be brought.

In a blistering dissent, Kennard, joined by Justice **Janice Rogers Brown**, called the majority decision in *Senate of the State of California v. Jones*__, 99 C.D.O.S 9729, hasty and said that "absent compelling circumstances," initiative challenges should never be resolved by the court before an election.

Chief Justice Ronald George, the author of the majority opinion in that case, countered in a footnote that Kennard "pays little heed to the explicit language" of the single-subject rule and "fails to take into account the considerable effort and many millions of dollars that both supporters and opponents of the measure would be required to expend during an election campaign in what would prove to be a futile exercise." Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

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May 9, 2000, Tuesday

SECTION: Pg. 3

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HEADLINE: 'Fair Procedure' Applies to Removal From Preferred Provider Lists--S.C.

BYLINE: By a MetNews Staff Writer

BODY: The common law right of "fair procedure" may apply to attempts by insurers to strike physicians from their preferred provider lists if the action, coupled with the company's clout in the industry, could prevent an ordinary, competent doctor from practicing in any given area, the state Supreme Court ruled yesterday.

Citing cases that struck down bids by unions to expel African Americans and orthodontic associations to remove members, the court ordered the case of obstetrician-gynecologist Louis Potvin against Metropolitan Life Insurance Company to proceed to trial in Los Angeles Superior Court.

Potvin sued after MetLife dropped him from its preferred provider list, noting that with four malpractice suits both filed before affiliating with MetLife in 1990 the doctor fell below the company's standards. The plaintiffs dropped three of the claims and Potvin settled the fourth.

The Superior Court granted MetLife's summary judgment motion, but the Court of Appeal and the Supreme Court reversed.

Potvin, a physician with 35 years of experience, was one of 16,000 participants on two of MetLife's preferred provider lists. He was to serve MetLife policy holders and be paid by the company under a contract that provided for termination on 30 days notice without cause.

MetLife dropped Potvin in 1992.

He alleged that he was required to tell other insurers and managed care groups that he was terminated and was then removed from their preferred provider lists, and that he suffered rejection by "physician groups . . . dependent upon credentialing by MetLife" and by current MetLife preferred provider physicians, who stopped referring patients to him.

"One practical effect of the health care revolution, which has made quality care more widely available and affordable through health maintenance organizations and other managed care entities, is that patients are less free to choose their own doctors for they must obtain medical services from providers approved by their health plan," Justice Joyce Kennard wrote.

The public interest is at stake when medical services are provided through a "unique tripartite relationship among an insurance company, its insureds, and the physicians who participate in the preferred provider network," Kennard said. That relationship, she said, spurs use of the common law right to fair procedure a sort of private sector right to due process.

But just because the court concluded that the relationship between insurers and their preferred provider physicians significantly affects the public interest, Kennard said, that doesn't necessarily mean that every insurer that wants to remove a doctor from one of its preferred provider lists must comply with the common law right to fair procedure.

There must be a showing that the insurer possesses power so substantial that it can impair a doctor's ability to practice medicine or a medical specialty in a particular geographic area, "thereby affecting an important, substantial economic interest," Kennard said.

Justice **Janice Rogers Brown**, joined by Justices Marvin Baxter and Ming W. Chin, dissented.

"With its decision today, the majority, in effect, declares that it is the public policy of this state that physicians are entitled to a minimum income and, therefore, if removal of a physician from an insurer's preferred provider list would reduce the physician's income below that guaranteed minimum, the physician is entitled to a hearing and to the judicial review that would inevitably follow upon an adverse decision," Brown wrote.

The case is *Potvin v. Metropolitan Life Insurance Company*, S061945.

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