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August 24, 1999, Tuesday

SECTION: IN BRIEF

BYLINE: Rinat Fried

BODY:

The California Supreme Court on Monday issued a ruling that brought applause from the construction industry: Plaintiffs in construction defect cases cannot sue for emotional distress.

"Adding an emotional distress component to recovery for construction defects would increase the already prohibitively high costs of housing in California, affect the availability of insurance for builders, and greatly diminish the supply of affordable housing," wrote Justice **Janice Rogers Brown** for the court.

Brown said such recovery simply has no basis in law.

Chief Justice Ronald George and Justices Joyce Kennard, Marvin Baxter and Ming Chin concurred. Justices Kathryn Mickle Werdegar and Stanley Mosk partially concurred.

The opinion overturns a decision from the Second District Court of Appeal upholding a verdict in favor of the plaintiff in a construction defect case.

Barry and Sandra Erlich claimed that discovering profound structural defects in their custom-built house triggered Barry Erlich's heart disease. A San Luis Obispo County Superior Court jury awarded Erlich \$165,000 in lost wages and emotional distress and \$407,000 to compensate him and wife for repairs they had to make to the house.

Brown said the Erlichs couldn't be compensated for the strain they endured.

"Here the breach did not cause physical injury," she said. "No one was hit by a falling beam. . . . The only physical injury alleged is Barry Erlich's heart disease, which flowed from the emotional distress and not directly from the negligent construction."

The case is Erlich v. Menezes, 99 C.D.O.S. 6808.

LOAD-DATE: August 24, 1999

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View Related Topics

August 24, 1999, Tuesday

SECTION: COURT WATCH; PG. 4

HEADLINE: JURY'S ROLE IN STRIKES CASES STILL CAUSES CONFUSION

BYLINE: Dennis J. Opatrny

BODY:

Five years after the "Three Strikes and You're Out" law was enacted, the California Supreme Court is still not comfortable with the role jurors play regarding the past convictions of recidivist offenders.

Last week, Justice Ming Chin authored an opinion that limited the role of jurors and openly questioned what they should be allowed to do.

Chin led a 4-3 majority in deciding that trial judges -- and not jurors -- can decide whether a prior conviction qualifies as a serious felony under the Three Strikes law. Juries may only determine whether the defendant has those prior convictions.

"Whether this role makes sense is not for us to say," Chin added. "If the Legislature wants to provide a greater, or more precisely defined, role for the jury, or chooses to eliminate the jury altogether as many states have done, it may still do so." Chief Justice Ronald George and Justices Marvin Baxter and **Janice Rogers Brown** joined the majority opinion in *People v. Kelii*, 99 C.D.O.S. 6709.

Justice Joyce Kennard, joined by Stanley Mosk, disagreed, arguing that denying a defendant a jury trial on prior convictions "can never be harmless, no matter how strong the evidence of guilt."

Justice Kathryn Mickle Werdegard concurred with the majority in upholding the conviction of Lester Kelii and his 25-years-to-life sentence for convictions on second-degree burglary and grand theft charges, even though the jurors were not the ones who determined whether the strikes were serious or violent. She said a properly instructed jury would have come to no other conclusion in Kelii's case.

But she argued for defendants' rights to jury trials to decide whether priors qualified as serious felonies. To hold otherwise would be "depriving criminal defendants in California . . . of the most basic procedural protection granted them by the Legislature."

LOAD-DATE: August 24, 1999

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View Related Topics

August 24, 1999, Tuesday

SECTION: COURT WATCH; PG. 4

HEADLINE: NO MAJORITY CAN BE A MAJOR PROBLEM

BYLINE: Rinat Fried

BODY:

It's one thing to lose a case. It's another to lose it in front of a court that can't tell you definitively why.

That's the situation criminal defense attorneys found themselves in last week thanks to a kaleidoscope opinion from the California Supreme Court. In the decision, the court upheld a warrantless search by the Richmond Police Department in 1996. But an equal number of judges signed two different opinions explaining why, leaving attorneys uncertain as to what the opinion will ultimately do for their clients.

The lead opinion in the case, by **Janice Rogers Brown**, rattled the defense bar because it seemingly created a new exception to Fourth Amendment protections from illegal searches by saying cops may enter a home out of concern for its inhabitants.

"Under the community caretaking exception," Brown wrote, "circumstances short of a perceived emergency may justify a warrantless entry."

Justices Joyce Kennard and Marvin Baxter concurred.

But Chief Justice Ronald George, joined by Ming Chin and Kathryn Mickle Werdegar, said that the warrantless search fell under an existing exception that allows police to barge into a private residence if they believe a burglary is in progress.

Justice Stanley Mosk dissented from both opinions in People v. Ray, 99 C.D. O.S. 6712.

Police officers entered Andre Lamont Ray's Richmond house on Christmas Day, 1996, after a neighbor called to say the door had been ajar all day and the house looked like a wreck.

Police said they entered Ray's home to make sure no one was hurt. The cops found the house empty, but saw cocaine in plain view. They left, got a search warrant, and later confiscated some 10 kilograms of cocaine.

One defense attorney says he is worried that, even though Brown's opinion isn't technically the law of the land, confusion will lead some lawyers to say it is.

"My concern is that the opinion will be represented as a case that will bind the lower courts," says Los Angeles Deputy Public Defender Albert Menaster.

"We don't like this community caretaker stuff because it doesn't have defined limits," Menaster adds. "George's position at least doesn't open any new areas for concern."

One observer of the court says fractured opinions such as Ray are more common than they used to

be.

"I think that's actually a cause for concern with the George court," says professor Gerald Uelmen of Santa Clara University School of Law.

Splintered opinions are happening because judges are much more independent, Uelmen says. "That's why there are more dissenting and concurring opinions."

"I don't think that's unhealthy," Uelmen adds. But if you don't have four justices agreeing, "you end up with a decision with very little value as a precedent."

LOAD-DATE: August 24, 1999

The Associated Press State & Local Wire

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August 23, 1999, Monday, BC cycle

SECTION: State and Regional

LENGTH: 457 words

HEADLINE: No distress damages for shoddy homebuilding, court says

DATELINE: SAN FRANCISCO

BODY:

Shoddy construction might turn someone's dream house into a nightmare but doesn't justify damages for emotional distress, the state Supreme Court has ruled.

The court on Monday unanimously overturned \$ 150,000 of a \$ 571,000 damage award to a San Luis Obispo County couple whose ocean-view house leaked from every direction in February 1991, two months after they moved in.

Inspectors found errors throughout the construction and reported that three decks were in danger of collapse and that the foundation of the main beam for the living room could support only 2,000 pounds instead of the required 12,000, the court said.

The husband, Barry Erlich, said he had to be carried away in an ambulance when he learned the full extent of the problem, and suffered a permanent heart condition that forced him to quit his job as a local track coach and athletic director.

His wife, Sandra Erlich, said she feared the house would collapse in an earthquake and feared for her daughter's safety. However, the family lived in the house for five years after their troubles began, the court said.

A Superior Court jury rejected their claims of fraud and negligent misrepresentation but found that the contractor, John Menezes, had violated his contract by building the home negligently. Jurors awarded each spouse \$ 50,000 for emotional distress, awarded Barry Erlich \$ 50,000 for pain and suffering and \$ 14,000 for lost earnings, and also assessed \$ 406,000 for repair costs.

A state appeals court upheld the damages, saying Menezes' negligence had exposed the Erlichs to "intolerable living conditions and a constant, justifiable fear about the safety of their home." But the state's high court said damages for emotional distress are not available for violation of an ordinary commercial contract.

Someone who breaches a contract must repay the other party's financial losses, but damages for emotional distress are generally available only when the violation involves deceit, coercion or intentional acts that are certain to cause personal hardship or anguish, said the opinion by Justice **Janice Rogers Brown**.

She said the only exception was the bad-faith violation of an insurance contract, which entitles the policy-holder to damages for emotional as well as financial harm, as well as punitive damages.

Brown said damage limits were appropriate in this case because the poor construction was unintentional and caused no physical injury. She said the Erlichs could have moved out at any time

and charged the cost to the contractor.

Allowing emotional distress damages for construction defects "could increase the already prohibitively high cost of housing in California," Brown said.

The case is Erlich vs. Menezes, S068325.

LOAD-DATE: August 24, 1999

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Las Vegas Review-Journal (Las Vegas, NV)

August 22, 1999 Sunday FINAL EDITION

SECTION: D; Pg. 2D

LENGTH: 598 words

HEADLINE: Outwitting the founders

BODY:

One of syndicated columnist Joseph Sobran's most engaging themes involves the erosion of American liberties at the hands of judges who view the Constitution as a 'living document.'

At least since the reign of Franklin Delano Roosevelt, liberal jurists have pushed the limits of their authority, chipping away at the Bill of Rights and justifying their actions on the dubious grounds that the Constitution can and should be altered by judicial fiat in response to pressing social concerns. Example: Drunken driving emerges as a cause de jure, and the courts respond by permitting random, warrantless searches at police roadblocks _ despite the clear language of the Fourth Amendment.

A ruling out of the California Supreme Court last week is bound to irk Americans who still believe the Constitution actually means what it says.

The case before the California high court involved a warrantless police search of a home in Richmond. On Christmas Day 1996, a neighbor called police, informing them that the front door of a nearby house had been ajar all day, and the place appeared to be a 'shambles' inside, with papers and clothing scattered about.

Police arrived at the home of Andre Lamont Ray, knocked several times and announced themselves, but no one answered. According to The Los Angeles Times, the cops, sans warrant, then entered Mr. Ray's home and spotted what appeared to be cocaine. They left, obtained a search warrant and returned to discover a quantity of the drug. Mr. Ray was busted on a possession-for-sale rap.

A Superior Court judge in Contra Costa County tossed out the case, ruling the search illegal under the Fourth Amendment which (to refresh your memory) reads: 'The right of the people to be secure in their persons, houses, papers, and effects shall not be violated, and no warrants shall issue, but upon probable cause. ...'

In the initial search, the police had neither probable cause nor warrant. The courts have long held that, when confronted with a true emergency situation where someone's life or limb is in immediate jeopardy, a warrant need not be obtained. But a house with its door ajar and a messy floor is hardly such an emergency.

Nonetheless, the prosecution appealed, and Mr. Ray's case eventually landed in the state Supreme Court which on Thursday ruled _ incredibly _ that the warrantless search was legal. Writing the court's lead opinion, Justice **Janice Rogers Brown** said the Fourth Amendment can be brushed aside and warrantless searches conducted if police are engaged in 'community care-taking functions.' That's a new one _ a sweeping exception to fundamental Fourth Amendment freedoms that Justice Brown evidently plucked out of the ether.

In a forceful dissent, Justice Stanley Mosk, the Times wrote, 'complained that a 'community care-taking' exception means warrantless searches 'can be justified on the paternalistic premise that, 'We're from the government, and we're here to help you.' To the extent that the officers believed they were called upon to perform a community care-taking function, it would have sufficed to shut the door," wrote the Times.

This country needs a lot more judges like Stanley Mosk. Unfortunately, we are saddled with far too many judge Browns. In minds such as hers, the 'living document' is so darn lively that it just up and absconded with another of our precious, God-given freedoms. Let us hope, for the sake of liberty, this case reaches the U.S. Supreme Court where the majority is more inclined to see the Constitution as less animated and more like the bedrock of the Republic.

LOAD-DATE: August 25, 1999

The Associated Press State & Local Wire

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August 20, 1999, Friday, PM cycle

SECTION: State and Regional

LENGTH: 492 words

HEADLINE: Court allows police search but can't decide reason

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Six of the seven state Supreme Court justices agree that police who find the door of a home open, and see clutter inside, can enter without a warrant and seize drugs or other contraband in plain view.

But, to the relief of a defense lawyer, they disagree on the reason.

Thursday's split ruling, in a case from Contra Costa County, left the law as it was before: Officers can enter a home without a warrant only in an emergency when quick action is needed to protect life or property.

Three justices, one short of a majority, wanted to go further and declare a new legal rationale: "community caretaking," a security check to "find out what is going on" when there are signs of a possible break-in but no apparent emergency.

"That is what law-abiding, taxpaying citizens desire and expect of their local constabulary," said Justice **Janice Rogers Brown**, writing for the three.

Justice Stanley Mosk, the lone dissenter on the legality of the home search, said disdainfully of Brown's rationale that it was based on "the paternalistic premise that 'We're from the government and we're here to help you.'"

Defense lawyer Ted Cassman said he was horrified by Brown's opinion.

The proposal "invites Big Brother into our homes without any standards for the police to know when they can and can't enter," said Cassman, lawyer for defendant Andre L. Ray.

Deputy Attorney General Juliet Haley, the state's lawyer, was unavailable for comment.

Police in Richmond were called to the home on Christmas Day 1996 by a neighbor, who said the door had been open all day and it was a shambles inside. Arriving officers saw the door about two feet open and could see clothing and paper strewn on the floor, as if the house had been ransacked.

After getting no response from inside, they entered, searched the rooms and found a large amount of cash and over 20 pounds of suspected cocaine in plain view, the court said.

Ray, who has not come to trial, challenged evidence found in the search. Superior Court Judge Garrett Grant ruled the search illegal, saying no apparent emergency existed that required immediate entry without a warrant. A state appeals court and the state's high court disagreed, for different

reasons.

Brown, joined by Justices Joyce Kennard and Marvin Baxter, said no emergency is needed when police see signs of trouble and enter to see if someone needs help.

The scene at the house "justifiably aroused concern for the welfare of persons inside and the possibility of a burglary in progress," Brown said. She said the circumstances "warranted further inquiry to resolve the possibility someone inside needed assistance or property needed protection."

Chief Justice Ronald George, joined by Justices Kathryn Mickle Werdegar and Ming Chin, cited the same circumstances to find an emergency: Police believed a burglary was in progress or had taken place and someone might need immediate help.

The case is *People vs. Ray*, S071999.

LOAD-DATE: August 20, 1999

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Los Angeles Times

August 20, 1999, Friday, Home Edition

SECTION: Part A; Page 3; Metro Desk

LENGTH: 1180 words

HEADLINE: CALIFORNIA AND THE WEST;
RULING MAY LEAD TO MORE POLICE SEARCHES;
RIGHTS: STATE HIGH COURT OPINION SAYS OFFICERS DID NOT NEED A WARRANT
TO ENTER A HOME FOR 'COMMUNITY CARE-TAKING' PURPOSES. IMPACT IS
UNCLEAR.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

In a decision that may make it easier for police to enter homes without a warrant, the California Supreme Court on Thursday upheld a search made because a front door was open and clothing and papers were strewn on the floor inside.

In a splintered ruling, the court said police legally entered a Richmond home on Christmas afternoon in 1996 after a neighbor called to say the front door had been left ajar all day and the house was "a shambles" inside.

Police said they knocked several times on the open door and loudly announced their presence. When no one answered, they said, they entered the home of Andre Lamont Ray in a quiet middle-class neighborhood and saw drugs and cash.

They left, obtained a search warrant and later found more than 10 kilograms of cocaine, including some in a pillowcase under the Christmas tree, they said.

The decision is likely to make police less leery about entering private residences without warrants. At the same time, no faction of the court could muster enough votes to change the current legal standard for warrantless searches--that an emergency must exist at the time of entry.

In the court's lead opinion, signed by only three of the seven members, Justice **Janice Rogers Brown** carved out an exception to 4th Amendment protections against unreasonable searches and seizures. The exception, she wrote, is for "community care-taking functions" of police.

Three other justices also upheld the search, but on different grounds. Chief Justice Ronald M. George, in the concurring opinion, said the search was justified by "exigent circumstances," a well-established exception to the warrant requirement allowed in cases of emergency.

Dissenter Denounces Exception

Justice Stanley Mosk, in the sole dissent, chastised the lead opinion for attempting to create a "broad new exception" to the 4th Amendment's protection against unwanted government intrusions.

Mosk complained that a community care-taking exception means that warrantless searches "can be justified on the paternalistic premise that 'We're from the government, and we're here to help you.' "

He added: "To the extent that the officers believed they were called upon to perform a community care-taking function, it would have sufficed to shut the door."

Because the court failed to muster four votes on the legal rationale for upholding the search, prosecutors probably will argue both theories in future cases, said Ted Cassman, the defense lawyer who represented Ray in the case.

He called the ruling "an invitation" to police to enter a home if all they see is "an open door and a mess."

Ray, who owns a hairdressing business, was charged with possession of cocaine for sale. But the trial judge dismissed the case because police did not have a warrant when they initially entered the home.

Contra Costa County Superior Court Judge Garrett J. Grant said it is not uncommon for people to leave their front door open.

"I do not in any way think that the officers were necessarily wrong in what they did," said Grant when he dismissed the case. "But if we are going to get into a situation where you are going to prosecute somebody for a crime in this situation, I think they needed to get a search warrant."

The government appealed, and a Court of Appeal upheld the search on the grounds that it had been made under emergency circumstances.

Justice Brown, in the lead opinion, said no emergency justified the search. "This justification requires specific, articulable facts indicating the need for 'swift action to prevent imminent danger to life or serious damage to property,'" she wrote, citing a 1986 case. "... The record fails to meet this standard."

But she said situations "short of a perceived emergency" may nonetheless justify a warrantless entry, including a search to protect property where police believe a burglary may have occurred.

If a warrant were required in such situations, police might be less likely to answer calls from concerned citizens about their neighbors, she said. Quoting another court decision, she wrote: "In the future police will tell such concerned citizens, 'Sorry. We can't help you. We need a warrant and can't get one.'"

She cautioned, however, that an open door alone was not enough to justify a warrantless search and said courts should be vigilant in ensuring that police do not use community concerns as a pretext for an entry aimed at gathering criminal evidence. In this case, she said, the condition of the front room combined with the open door justified the entry.

Chief Justice George, in the concurring opinion, said the situation triggered the emergency exception because the officers reasonably believed that a burglary was in progress or had occurred and that occupants inside might need help.

Justice Mosk, however, said that there was no sign of forced entry and that officers could see an expensive-looking television and stereo untouched near the front door. There also was no sign that anyone was inside the house, and no attempt was made to contact the neighbor who called the police or to look in the backyard, he said.

If this kind of entry is legal, abuses will follow, Mosk warned. Can police enter when a door is merely unlocked? he asked. Or when the occupants simply choose not to answer a knock at the door?

Defense May Appeal

Defense lawyer Cassman said he may ask the U.S. Supreme Court to review the case. Unless the high

court intervenes, his client, Ray, will again be prosecuted.

Cassman said he is "deeply concerned" that the lead opinion appears to allow officers to "enter your home to conduct a security check." Under this rationale, he said, officers could enter a home if a neighbor reported that newspapers were piling up outside and the occupant had not planned to be on vacation.

"It's an absolutely frightening concept," he said.

McGeorge School of Law Professor J. Clark Kelso said the lead opinion would have significantly expanded the exceptions to the search warrant requirement if a fourth judge had voted to make it law.

For instance, the exception would have further aided the prosecution in successfully arguing that the search of O.J. Simpson's home was legal in the hours after the murders of his former wife and her friend, Kelso said.

In that case, a judge upheld the decision of police officers to leap over Simpson's fence and enter his estate without a warrant. The judge said the police reasonably believed that there might be other victims in the home after finding blood outside.

Kelso said it is difficult for courts to ensure that police searches meet legal requirements, because officers will generally testify that they acted with noble motives, such as concern for a resident's safety.

California Deputy Atty. Gen. Gerald Engler, whose office represented the prosecution before the state high court, said he could not comment on the ruling because he had not read it. But because no faction on the court commanded four votes, the ruling "may or may not provide a whole lot of guidance," he said.

LOAD-DATE: August 20, 1999

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August 20, 1999, Friday; Second Edition

SECTION: NEWS; Pg. A-23

LENGTH: 129 words

HEADLINE: BAY AREA DATELINES

COLUMN: BAY AREA DATELINES

SOURCE: Compiled from Examiner staff and wire reports

BODY:

Six justices agreed Thursday that the officers didn't need a search warrant, but only three voted to recognize a new legal rationale for a home search: "community caretaking," a security check to "find out what is going on" when there are signs of a possible break-in but no apparent emergency.

"That is what law-abiding, taxpaying citizens desire and expect of their local constabulary," said Justice **Janice Rogers Brown**, writing for the three.

Three other justices said the open door and suspicion of a burglary created an emergency that justified a police entry. Without a majority for either view, the ruling left the law where it was: Officers can enter without a warrant only in an emergency when quick action is needed to protect life or property.

LOAD-DATE: August 21, 1999

The Associated Press State & Local Wire

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August 19, 1999, Thursday, AM cycle

SECTION: State and Regional

LENGTH: 532 words

HEADLINE: Court allows police search but can't decide reason

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Police who find the door of a house open and see clutter inside can enter and seize any contraband they find in plain sight, the state Supreme Court said Thursday in a ruling that failed to pinpoint the reason.

Six justices agreed that the officers didn't need a search warrant, but only three voted to recognize a new legal rationale for a home search: "community caretaking," a security check to "find out what is going on" when there are signs of a possible break-in but no apparent emergency.

"That is what law-abiding, taxpaying citizens desire and expect of their local constabulary," said Justice **Janice Rogers Brown**, writing for the three.

Three other justices said the open door and suspicion of a burglary created an emergency that justified a police entry. Without a majority for either view, the ruling left the law where it was: Officers can enter without a warrant only in an emergency when quick action is needed to protect life or property.

The defense lawyer in the Contra Costa County case before the court was disappointed at his loss but relieved the court hadn't gone further.

The "community caretaking" rule proposed by three justices "invites Big Brother into our homes without any standards for the police to know when they can and can't enter," said Ted Cassman, lawyer for defendant Andre L. Ray.

Deputy Attorney General Juliet Haley, the state's lawyer, was unavailable for comment.

Police in Richmond were called to the home on Christmas Day 1996 by a neighbor, who said the door had been open all day and it was a shambles inside. Arriving officers saw the door about two feet open and could see clothing and paper strewn on the floor, as if the house had been ransacked.

After getting no response from inside, they entered, searched the rooms and found a large amount of cash and over 20 pounds of suspected cocaine in plain view, the court said.

Ray, who has not come to trial, challenged evidence found in the search. Superior Court Judge Garrett Grant ruled the search illegal, saying no apparent emergency existed that required immediate entry without a warrant. A state appeals court and the state's high court disagreed, for different reasons.

Brown, joined by Justices Joyce Kennard and Marvin Baxter, said no emergency is needed when police see signs of trouble and enter to see if someone needs help.

The scene at the house "justifiably aroused concern for the welfare of persons inside and the possibility of a burglary in progress," Brown said. She said the circumstances "warranted further inquiry to resolve the possibility someone inside needed assistance or property needed protection."

Chief Justice Ronald George, joined by Justices Kathryn Mickle Werdegar and Ming Chin, cited the same circumstances to find an emergency: Police believed a burglary was in progress or had taken place and someone might need immediate help.

But dissenting Justice Stanley Mosk noted that Judge Grant had found no emergency. Mosk disagreed with Brown's rationale for a non-emergency search, saying it was based on "the paternalistic premise that 'We're from the government and we're here to help you.'"

The case is *People vs. Ray*, S071999.

LOAD-DATE: August 20, 1999

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The Ethnic NewsWatch
AsianWeek

August 18, 1999

SECTION: Vol. 20; No. 50; Pg. 8

LENGTH: 665 words

HEADLINE: Racial Epithet Case Ignites Debate

BYLINE: Ni, Perla

BODY:
Racial Epithet Case Ignites Debate

BY PERLA NI

A California Supreme Court decision that allows courts not only to award monetary damages but also bar employees from using racial epithets ever again at work has ignited debate about free speech verses non-discrimination rights.

"A government that tells its citizens what they may say will soon be dictating what they may think," said Justice **Janice Rogers Brown**, one of the dissenters in last Monday's 4-3 ruling.

"I don't think it's censorship, it's a very fine line," said Victor Hwang of the Asian Law Caucus.

A jury had already awarded \$135,000 to eight Latino employees of Avis-Rent-a-Car at the San Francisco International Airport who were called derogatory names in 1991 and 1992 by their supervisor, John Lawrence. Lawrence had referred to the employees as "wetbacks," "crooks" and "m-f--s", according to the San Francisco Daily Journal. The jury found that Avis did nothing to restrain him. San Francisco Judge Carlos Bea further prohibited Lawrence from using these words and ordered Avis to stop him in the future if possible.

"I'm hesitant to say that a judge can say what you can and can't say," qualified Hwang, referring to the list of words that the judge deemed racially bigoted. "It should be a reasonable standard. In this case, it doesn't seem close because the speech was clearly offensive."

Attorneys for Avis at Curiale, Dellaverson, Hirschfeld, Kelly & Kraemer in Los Angeles did not return phone calls.

While damages are commonly awarded in racial harassment and discrimination lawsuits, what is precedent-setting about last week's decision was the judge's order to prohibit the supervisor involved from using bigoted words in the future.

"Certainly this case in California is an anomaly and ground-breaking. It could potentially go up to the U.S. Supreme Court," said John Trasvia, special counsel, Department of Justice Civil Rights Division.

Monetary damages are the norm, but injunctions are a rarely-used remedy for harassment situations because of the freedom-of-speech rights that are triggered. But the majority said free expression isn't violated by an injunction against bigoted speech that has already been found by a jury to be so extreme and pervasive that it causes a hostile and discriminatory work environment.

One justice, Kathryn Mickle Werdegarr, described employees as a "captive audience" and said speech can be restricted in the workplace in ways that wouldn't be allowed elsewhere. She said the workers in this case could have escaped the harassment only by quitting their jobs.

However, Bruce Adelstein, who filed arguments on behalf of the Libertarian Law Council and other groups, said that while speech can cause harm "it is more dangerous for the government to ban it."

Acknowledging the value of free speech, other civil rights lawyers support the decision's balance between speech and discrimination rights. "The thing about race or sex harassment, if someone calls you chink one time, it's not necessarily legally actionable ... it has to be severe, pervasive and affect working conditions. You have to meet a lot of elements," said Rose Fua, a lawyer for Equal Rights Advocates.

Lawyers hope that the case will raise awareness about fair employment rights among Asian Americans. The U.S. Department of Justice estimates that Asian Americans under-report discrimination in the workplace. About two-thirds of complaints to the Department of Justice's toll-free phone number are from Latinos while only 7 percent are from Asian Americans.

"Our sense is that the Asian American community doesn't complain about discrimination," said Trasvia. "We'd like to encourage those who are not paid enough, discriminated because of their accent or origin, to come forward and express their rights."

Associated Press writer Bob Egelko contributed to this story.

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ETHNIC-GROUP: Asian/Pacific Island

LOAD-DATE: January 15, 2000

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The National Law Journal

View Related Topics

August 16, 1999, Monday

SECTION: THE WEEK IN REVIEW; Pg. A6

LENGTH: 379 words

HEADLINE: Calif. court upholds hate speech gag

BYLINE: Greg Mitchell

BODY:

The California Supreme Court upheld an injunction on Aug. 2 that prohibits a car rental employee from using racial slurs in the workplace.

"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,' " wrote Chief Justice Ronald M. George. But the case spawned five separate opinions, with a trio of anguished dissents and a concurrence that deprived Chief Justice George of a majority.

This case is unusual because of the injunction barring the use of certain words and epithets in the future. The author of the concurrence, Justice Kathryn Mickle Werdegarr, agreed that in this particular case, the injunction could be found valid so long as it is redrawn to include an "exemplary" list of words forbidden in the workplace. But she said that the chief justice had refused to acknowledge that the court was "sailing into uncharted First Amendment waters."

The dissents were ever harsher. "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," wrote Justice **Janice Rogers Brown**.

For the chief justice and justices Ming W. Chin and Marvin R. Baxter, deciding the constitutional validity of the injunction issued against Avis Rent A Car and its employee, John Lawrence, was pretty simple. Mr. Lawrence and Avis were sued in 1993 by a group of Latino co-workers who said that the shop steward called them names like "wetback" and snapped towels at them.

After a jury awarded damages, a San Francisco judge enjoined Mr. Lawrence and Avis from using racial epithets in the future. A bitterly divided appeals panel upheld the injunction but said that it must include a list of the banned words and could only cover Mr. Lawrence at work.

Chief Justice George said that the injunction wasn't a prior restraint because a jury had found that Mr. Lawrence's speech had created a hostile work environment. Dissenting justices Brown, Stanley Mosk and Joyce L. Kennard all but demanded that the U.S. Supreme Court take the case. *Aguilar v. Avis Rent A Car System*, No. 99 C.D.O.S. 6144.

GRAPHIC: Photo, JUSTICE KATHRYN M. WERDEGAR: Voted to uphold the injunction, but would like to see some "exemplary" slurs.

LOAD-DATE: August 24, 1999

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August 13, 1999, Friday

SECTION: Pg. 1

LENGTH: 597 words

HEADLINE: Criminal Defendant May Raise Limitations Defense for First Time on Appeal, State High Court Rules

BYLINE: By a MetNews Staff Writer

BODY: A criminal defendant may argue a statute of limitations defense on appeal, without having raised it in the trial court, the state Supreme Court ruled yesterday.

In a 5-2 decision, with Justice Ming Chin writing for the majority, the court said there was no reason to overrule "over 60 years" of precedent, in which the court has "described the statute of limitations as limiting the court's subject matter jurisdiction and said that trial courts could not proceed in a time-barred case."

The high court overturned the Los Angeles Superior Court conviction of James Thomas Williams, who was sentenced by Los Angeles Superior Court Judge Victor H. Person to three years in prison for perjury.

Williams argued on appeal that the events alleged in the information had to have occurred more than three years before he was charged, thus barring prosecution. The Court of Appeal ruled that compliance with the statute of limitations could not be determined from the record, and sent the case back to the trial court with directions to vacate the conviction if the three-year period had, in fact, expired.

Rejecting arguments by the attorney general and the Criminal Justice Legal Foundation, as amicus, Chin said it would be "bad policy" to hold "that because defendant did not assert the statute of limitations at trial, he has forfeited his right ever to do so, and that he must remain convicted of a felony and serve a prison sentence even if the prosecution is untimely and should have been dismissed."

A defendant should not be "bound forever" by a failure to realize that prosecution is time-barred, Chin said, even though that is the rule in some other jurisdictions.

Since most defendants are represented by counsel, and will inevitably claim that a failure to plead a valid limitations defense is ineffective assistance, treating that failure as a waiver on appeal will unnecessarily prolong litigation without altering the result, Chin said. The only cases where the result would change, he said, are those where the defendant pleads guilty and waives counsel.

Those defendants "would forever have a criminal conviction and might serve a prison sentence in an action that would have been dismissed had they only asked," Chin said. "A rule that achieves these results has little to commend it," he wrote.

Justices Joyce L. Kennard and **Janice Rogers Brown** authored separate dissents. Kennard argued that a waiver rule would be consistent with a 1996 decision allowing express waivers of statutes of limitations, while Brown questioned the majority's ineffective-assistance rationale.

Brown explained that in some cases, counsel might have legitimate tactical reasons for not raising the

limitations defense at trial.

A defendant might, she reasoned, raise a non-meritorious limitations defense on appeal in hopes that the prosecution will agree to a time-served sentence rather than have to relitigate in the trial court, as in Williams' case. Or, she said, a defendant could go to trial, be convicted on some lesser offense, and then seek to have the conviction overturned on the ground that the statute period on the lesser offense had expired.

Chin, however, said the effect of a conviction on a time-barred lesser offense when the charged offense is timely wasn't at issue before the high court and should be dealt with in future cases.

Attorneys who argued before the high court were Edward H. Schulman of Northridge for the defendant and Deputy Attorney General Kyle S. Brodie of Los Angeles.

The case is People v. Williams, 99 S.O.S. 6491.

LOAD-DATE: October 4, 1999

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View Related Topics

August 13, 1999, Friday

SECTION: NEWS; PG. 1

HEADLINE: LIMITATIONS DEFENSE CAN'T BE WAIVED

BYLINE: Rinat Fried

BODY:

A criminal defendant can raise a statute of limitations defense on appeal even if he didn't raise the issue at trial, a divided California Supreme Court ruled Thursday.

The high court's decision in favor of a man prosecuted for perjury more than three years after he allegedly committed the crime split the court 5-2, with Justices **Janice Rogers Brown** and Joyce Kennard dissenting.

The majority said defendants should be allowed to raise a statute of limitations defense at any time.

"To allow defendants to lose the protection of the limitation accidentally could mean that persons could languish in prison under convictions that could not have occurred had they merely thought of the statute of limitations in time," Justice Ming Chin wrote for the majority.

But the dissenters warned that the majority was creating a loophole that will likely be abused by defendants.

The appeal stems from the April 1995 prosecution of James Thomas Williams for perjury he allegedly committed in February 1992.

Perjury charges have a three-year statute of limitations. But neither Williams nor his attorney raised the issue at a court trial. Los Angeles Superior Court Judge Victor Person sentenced Williams to a three-year term in state prison.

Williams appealed, raising for the first time the question of whether the charges were time-barred. In an unpublished opinion, the Second District Court of Appeal gave Williams the green light to raise the issue and sent the case back to the trial court.

The attorney general's office objected and urged the Supreme Court to overturn the lower court's decision on the grounds that once Williams failed to assert the statute of limitations at trial, he forfeited his right to do so later.

But a majority of justices expressed concern that a forfeiture rule would create unfortunate consequences.

"A forfeiture rule would merely add a step to the litigation," Chin said, because defendants whose attorneys failed raise the limitations rule at trial would merely claim ineffective assistance of counsel in a _habeas corpus_ petition.

Those without attorneys, Chin added, "would forever have a criminal conviction and might serve a prison sentence in an action that would have been dismissed had they only asked. A rule that achieves these results has little to commend it."

Nonsense, Brown replied in her six-page dissent in People v. Williams, 99 C. D.O.S. 6491.

"In our justice system we require defendants to affirmatively raise defenses for full exploration in the trial court," Brown said.

Failure to raise a statute of limitations defense, Brown continued, is no different than a defendant's failure to challenge the legality of a search or the voluntariness of a confession.

Under the majority's non-forfeiture rule, Brown warned, a defendant charged with a number of crimes -- including lesser offenses that are time-barred -- could keep quiet about the applicable statute of limitations until after being convicted of the lesser offenses. Then the defendant could assert that the charge was time-barred and get the conviction reversed.

This is not the first time the statute of limitations issue has divided the court.

Three years ago, in Cowan v. Superior Court, 14 Cal.4th 367, the court held that a defendant could waive a statute of limitations defense if it was in his interest to do so. In that case, a man charged with murder sought to plead guilty to the lesser offense of manslaughter, even though that was time-barred. Carving out an exception to a 62-year old precedent, the court allowed him to do so.

The 5-2 opinion in Cowan drew a concurring and dissenting opinion from Brown, who said it would encourage defendants to engage in "gamesmanship."

Reporter Rinat Fried's e-mail address is rfried@therecorder.com.

LOAD-DATE: August 13, 1999

The Associated Press State & Local Wire

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August 12, 1999, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 567 words

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

If someone who sues for injuries dies from unrelated causes before trial, the estate can't collect damages for the plaintiff's pain and suffering, even if the suit was for federal civil rights violations, the state Supreme Court ruled Thursday.

The unanimous ruling barred the husband and children of Patricia Cordova, a former Los Angeles County deputy sheriff, from damages for the suffering allegedly caused by sexual harassment by her coworkers and supervisors. She was killed in a car crash just before trial of her suit against the county, which is still pending.

When a plaintiff dies before trial, California law allows the heirs to go to trial against the original defendant and recover damages for the plaintiff's financial losses, as well as punitive damages. But the law bars damages for pain and suffering - most or all of the damages sought in typical harassment cases - on the grounds that those were personal to the plaintiff.

Lower courts allowed Ms. Cordova's family to seek full damages under federal civil rights law, saying California law shouldn't be allowed to thwart the federal goal of compensating discrimination victims. But Justice Joyce Kennard, writing for the state's high court, found no conflict between federal law and the "reasonable" limits in state law.

Barbara Hadsell, a lawyer for the family, was dismayed. "As the result of a tragic accident, the bad guys get to go scot-free," she said.

SAN FRANCISCO (AP) - A defendant who learns only after being convicted that the charges were filed too late can still get the case thrown out on appeal, the state Supreme Court ruled Thursday.

The 5-2 decision reaffirmed a conclusion the court first reached in 1934: A defendant who fails to object to a violation of the statute of limitations, or deadline for prosecution, at the time of trial doesn't lose the right to challenge it later.

The court revived James Thomas Williams' challenge to his Los Angeles County perjury conviction and three-year prison sentence. Williams said he learned only after the trial that the charges were filed two months after the three-year deadline. Whether the prosecutor actually missed the deadline will be determined by a Superior Court judge.

Justice Ming Chin wrote the ruling, saying the 65-year-old rule prevents convictions based on a defendant's ignorance of the deadline and avoids the need for new challenges based on the defense lawyer's incompetence. Dissenting Justice **Janice Rogers Brown** said the statute of limitations, like

most other defenses, should be forfeited if it isn't raised at trial.

SAN FRANCISCO (AP) - A taxpayer who wants to dispute the amount owed must pay the tax before suing for a refund - but doesn't have to pay interest as well, the state Supreme Court ruled Thursday.

The unanimous ruling by Justice Marvin Baxter rejected the state Board of Equalization's policy of requiring prepayment of interest, as well as the challenged tax, before a suit for the refund of sales or use taxes.

The California Constitution has required payment of disputed taxes before litigation since 1910. But Baxter said neither the Constitution nor the sales and use tax laws mentioned interest, which must instead be paid after the fact if the protest fails.

Though the ruling involved sales taxes, its reasoning appeared to apply to disputes over other state taxes, such as the income tax.

LOAD-DATE: August 12, 1999

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August 12, 1999, Thursday

SECTION: NEWS; PG. 1

HEADLINE: COURT TAKES UP IN-HOUSE FEE RECOVERIES

BYLINE: Rinat Fried

BODY:

The California Supreme Court agreed Wednesday to decide whether in-house counsel can collect big-firm attorneys fees in litigation.

The high court took the case at the behest of attorney David Drexler, who was socked with attorneys fees after a squabble with in-house counsel at his legal malpractice insurance carrier.

"This case presents a question of substantial and increasing importance to litigants throughout California as more and more insurance companies and corporations turn to using salaried employees as in-house counsel," wrote the petitioner's attorney, Thomas Watters, of L.A.'s Hart & Watters.

In an unrelated order, the Supreme Court on Wednesday also decided to review a decision allowing judges to fight disqualification orders.

The fees case could affect every suit in the state in which an insurance company or corporation uses in-house counsel. The case drew amicus curiae briefs from the American Corporate Counsel Association and the Los Angeles County Bar when it was before the Second District.

The petition for review stems from a dispute between Drexler and his insurer over the costs of his malpractice defense.

The insurer, PLCM Group Inc., used its in-house staff to litigate the case -- Drexler's first -- and demanded Drexler pay a \$20,000 deductible.

When Drexler balked, a trial judge ordered him to cough up the deductible plus another \$61,050 to cover his insurer's fees and costs for the fee dispute.

The judge relied on a declaration submitted by PLCM that pegged the market rate for its in-house attorney's services at \$185 an hour.

Drexler appealed, arguing that the court shouldn't have awarded fees and shouldn't have calculated them by using the prevailing market rates that outside counsel charge. Instead, he argued, the hourly rate should be based on the actual expense incurred by PLCM.

A Second District panel rejected Drexler's argument. Writing for the court, Justice Patti Kitching said that not only were in-house attorneys entitled to collect fees, but that "the prevailing market rate relieves the court and litigants from the specter of wasteful and prolonged litigation over a matter ancillary to the primary case."

All of the justices except **Janice Rogers Brown** voted to review PLCM Group Inc. v. Drexler, S080201.

The second case taken up Wednesday stems from Shasta County Superior Court Judge Wilson Curle's bid to reinstate himself after he was disqualified from hearing a criminal case.

Curle was challenged by defendant Andrew Gleason after presiding over a plea deal in which he allegedly indicated he would recommend probation. But at a later hearing, the judge allegedly said he was leaning toward prison time. A retired judge from another county granted the disqualification motion.

Curle attempted to overturn the disqualification order, but Gleason's attorneys said he had no standing to do so. But a Third District panel disagreed earlier this year, saying that because Curle was party to the disqualification proceeding, he had a right to petition for reinstatement.

All of the justices except Brown voted to take Curle v. Superior Court, S080322.

Reporter Rinat Fried's e-mail address is rfried@therecorder.com

LOAD-DATE: August 12, 1999

The Associated Press State & Local Wire

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August 10, 1999, Tuesday, PM cycle

SECTION: State and Regional

LENGTH: 515 words

HEADLINE: Court allows suit by uninsured driver's heirs

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

The state Supreme Court is again refusing to take a broad view of Proposition 213, the 1996 initiative that limited lawsuits by uninsured drivers.

In a 6-1 ruling Monday, the court declined to apply the limits - a ban on damages for pain and suffering or other "non-economic" harm - to a suit by the heirs of an uninsured driver who was killed in a crash.

A week earlier, the justices ruled unanimously that an uninsured driver whose injuries were caused by a defective car, rather than another driver, could sue for a full range of damages.

The court had earlier denied review of a constitutional challenge to Proposition 213. A lawyer for consumer groups and trial lawyers opposed to the measure found some consolation in the latest ruling.

"We still believe it's unconstitutional, but this at least limits the measure to what the voters intended it to do," said attorney James C. Harrison, whose clients included the Congress of California Seniors, the Latino Issues Forum and the Utility Consumer Action Network.

An insurance lawyer in Monday's case also found a silver lining.

"The major Proposition 213 issues are now settled," said attorney Jon Eisenberg. "It's constitutional and we know its scope."

The suit was filed by the parents of Melissa Acuna, 19, who was killed in a rear-end collision on the Hollywood Freeway in September 1996. She had been insured when she lived in Paso Robles but couldn't afford premiums that more than doubled when she moved to Los Angeles, said M. Scott Radovich, the parents' lawyer.

They sued Benjamin Horwich, the driver of the other car, seeking damages for loss of their daughter's care, comfort and society.

Horwich, whose responsibility for Ms. Acuna's death has not yet been determined, sought to dismiss the claims for non-economic damages under Proposition 213. Los Angeles Superior Court Judge Marlene Kristovich ruled against him and was upheld by an appellate court. Monday's ruling returns the case to Superior Court for a possible trial.

The state's high court said the damage restrictions applied only to a suit by the uninsured driver and

not to a suit by family members seeking damages for the driver's wrongful death. Such suits typically seek damages for non-economic losses, such as loss of the dead relative's love and companionship.

Proposition 213 was aimed at "the unlawful conduct of uninsured motorists who, at the expense of law-abiding citizens, could recover for non-economic losses while flouting the financial responsibility laws," said the opinion by Justice **Janice Rogers Brown**.

The driver's heirs, she said, "do not contribute to this perceived unfairness, nor are they in a position to rectify it." She also said the ballot language mentioned suits by an uninsured driver or owner but did not mention the driver's heirs.

Dissenting Justice Ming Chin interpreted the ballot language differently and said applying the restrictions to a driver's heirs would give the driver a greater incentive to buy insurance, one purpose of Proposition 213.

The case is Horwich vs. Superior Court, S073129.

LOAD-DATE: August 10, 1999

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August 10, 1999, Tuesday

SECTION: Pg. 5

LENGTH: 704 words

HEADLINE: Proposition 213 No Bar to Claim by Uninsured Driver's Survivors--S.C.

BYLINE: From Staff and Wire Service Reports

BODY: Proposition 213, which bars drunk drivers and uninsured motorists from recovering general damages for injuries resulting from auto accidents, doesn't apply to a wrongful death action by an uninsured motorist's survivors, the state Supreme Court ruled yesterday.

In a 6-1 decision, the high court agreed with Div. One of this district's Court of Appeal, which held that a survivor isn't an "owner" or "operator" of a vehicle and thus does not fall within the literal terms of the 1996 initiative.

The ruling denies a writ of mandate sought by Benjamin Horwich, the defendant in a suit by the parents of Melissa Acuna. Los Angeles Superior Court Judge Marlene Kristovich granted judgment on the pleadings, concluding that Acuna's lack of insurance didn't bar her parents from suing under Proposition 213.

Justice **Janice Rogers Brown**, writing for the high court majority, cited Proposition 213's declaration of purpose and the ballot arguments in support of the initiative. Proponents, the justice explained, said the purpose of the measure was to bring down insurance premiums by penalizing "criminals, drunk drivers, and uninsured motorists."

Brown reasoned:

"The declaration of purpose focuses the electorate's concern solely on those who have failed to take personal responsibility for their actions, including drivers without obligatory liability insurance. According to the plain language of the proposition, the 'civil justice reform'...is aimed at these individuals and these individuals alone. A wrongful death plaintiff who is neither the uninsured owner nor operator of a vehicle involved in the accident cannot be one who has failed to take personal responsibility because the law imposes no obligation on that person. nor are wrongful death plaintiffs mentioned in the text of the proposition as subject to its restrictions."

Brown rejected the argument that limiting wrongful-death plaintiffs to special damages would serve the initiative's purposes by encouraging motorists to purchase insurance in order to protect the rights of their survivors.

"Whether it takes the form of a carrot or a stick, an incentive is most effective to the extent it directly rewards or punishes the person it is intended to motivate," the justice wrote. "...If the only adverse effect is to limit recovery for one's heirs (who also can still recover economic damages in any event), the provision's efficacy as an incentive decreases to virtually nil."

Justice Ming Chin was the lone dissenter.

Chin argued that the phrase 'injured person' in the initiative's definition of to whom it applies, refers to "someone directly injured in the accident, not merely anyone who is a plaintiff in an action relating to an accident." Thus, he contended, the measure limits recovery by the survivors of an 'injured

person' who dies as a result of the accident.

Chin also took issue with the majority's conclusion as to the effect of the declaration of purpose, saying it didn't "specifically create any exception to the general rule that a wrongful death plaintiff 'stands in the shoes' of the decedent."

M. Scott Radovich of San Luis Obispo, the parents' lawyer, said Acuna had been insured but couldn't afford premiums that more than doubled when she moved to Los Angeles.

"It is tragic that the insurance companies get all the breaks from Proposition 213, and yet fail to offer low-cost and basic automobile insurance to working-class Californians," Radovich said. He said the ruling would affect hundreds of cases.

Jon Eisenberg of Encinco's Horvitz & Levy, said he saw a silver lining in his defeat: "The major Proposition 213 issues are now settled. It's constitutional and we know its scope."

Eisenberg also argued unsuccessfully last week in *Hodges v. Superior Court*, 99 S.O.S. 6166, in which the Supreme Court held unanimously the initiative inapplicable to a products liability suit alleging that injuries suffered by an uninsured motorist in a crash were caused by the defective manufacture of his vehicle.

The court previously denied review of appellate rulings upholding the constitutionality of the measure and its retroactive application.

The case is *Horwich v. Superior Court*, Acuna RPI, 99 S.O.S. 6353.

LOAD-DATE: October 4, 1999

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August 10, 1999, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: HIGH COURT GIVES HEIRS A BREAK ON PROP 213

BYLINE: Rinat Fried

BODY:

Further curbing California's tough uninsured motorist law, the state Supreme Court said Monday that the parents of a woman who died in an auto accident can sue for non-economic damages even though their daughter was not insured.

The heirs of uninsured motorists "are not part of the problem," wrote Justice **Janice Rogers Brown**. "Therefore we cannot deem them part of the solution."

Brown's majority opinion drew a dissent from Justice Ming Chin, who said the ruling bucks the intent of voters who passed a 1996 law barring uninsured motorists from recovering non-economic damages for auto accidents.

"Barring the heirs of uninsured motorists from recovering nonpecuniary damages provides an additional incentive for those motorists to buy insurance, to the benefit of all law-abiding citizens," Chin wrote.

Monday's 6-1 decision is the second this month to narrow the scope of the 1996 voter initiative, Proposition 213. Last week, in *Hodges v. Superior Court*, 99 C.D.O.S. 6166, the court said that Prop 213 doesn't bar a products liability suit brought by the uninsured driver of a Ford Mustang.

The plaintiff in that case alleged that his injuries arose from a defective gas tank design, and not from operating a motor vehicle. And the high court agreed the plaintiff had a right to sue.

In Monday's case, *Horwich v. Superior Court*, 99 C.D.O.S. 6353, the court said that Ed and Elisa Acuna, the parents of 19-year-old Melissa Acuna -- who perished in a 1996 collision with defendant Benjamin Horwich -- could recover for the loss of her care and comfort.

Prop 213 only bars recovery when the injured person is an uninsured owner or operator of a vehicle involved in an accident, Brown wrote.

"Since plaintiffs are neither, they do not come within the express terms of the statute," she said.

In his dissent, Chin said the majority was misreading the term "injured person" and said the same restrictions that apply to uninsured drivers should apply to their heirs.

An attorney for the defendant agreed.

"I think the electorate intended to create a powerful incentive for people to buy insurance, and the initiative should be construed in a manner that implements that intent," said Jon Eisenberg, an Oakland attorney who is of counsel to Encino's Horvitz & Levy.

But San Luis Obispo solo practitioner M. Scott Radovich said that a contrary ruling would have

simply benefited Horwich's insurer.

"It is tragic that the insurance companies get all the breaks from Proposition 213, yet fail to offer low-cost and basic automobile insurance to working class Californians," Radovich said in a prepared statement.

Radovich said Acuna let her insurance lapse when she moved from rural Paso Robles to metropolitan Southern California and found her insurance rates had doubled.

Reporter Rinat Fried's e-mail address is rfried@therecorder.com.

LOAD-DATE: August 10, 1999

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AUGUST 10, 1999, TUESDAY, FINAL EDITION

SECTION: NEWS; Pg. A16

LENGTH: 627 words

HEADLINE: Heirs of Uninsured Driver Who Died in Wreck Are Able to Sue;

Prop. 213 doesn't bar wrongful-death suits, justices say

BYLINE: Harriet Chiang, Chronicle Legal Affairs Writer

DATELINE: STATE

BODY:

The heirs of an uninsured motorist killed in an auto accident are not barred from filing a wrongful-death suit under Proposition 213, the California Supreme Court ruled yesterday.

The decision is the second in a week to limit the scope of the 1996 voter-approved measure that prevents uninsured drivers from recovering for pain and suffering and other noneconomic damages.

By a 6-to-1 vote, the court ruled that the parents of an uninsured teenager who died on the morning of her 19th birthday could sue the other driver involved in the accident.

The justices said the purpose of the measure was to prevent the uninsured motorist from recovering damages at the expense of insured motorists. The initiative makes no mention of heirs who might sue for loss of care, comfort and society of their loved ones, the court said.

"Wrongful-death plaintiffs aren't the ones who have failed to take personal responsibility and have nothing to do with skyrocketing insurance costs blamed on uninsured motorists," wrote Justice **Janice Rogers Brown** in the court's decision.

Justice Ming Chin cast a lone dissent, saying that the general rule should apply that a survivor who sues for wrongful death "stands in the shoes" of the decedent and is subject to the same defenses.

Yesterday's decision is the second ruling by the court to define the parameters of the uninsured motorist initiative.

In its first ruling on Proposition 213, the high court ruled one week ago that the measure does not bar uninsured motorists from suing car manufacturers for injuries caused by vehicle design defects.

Yesterday's decision was a victory for Edward and Elisa Acuna of Paso Robles, whose daughter, Melissa, was killed on the Hollywood Freeway in September 1996. Melissa's car was rear-ended by a pickup truck driven by Benjamin Horwich shortly before midnight.

She died hours later, on her 19th birthday.

Melissa had just moved to Los Angeles from Paso Robles, San Luis Obispo County, only to find that her auto insurance rates had doubled, according to the lawyer for the Acunas. She was unable to afford the insurance and let the policy lapse.

After her death, her parents, who are insured, filed suit against Horwich. But he argued that Proposition 213 prevents anyone from recovering noneconomic damages when the driver is uninsured.

Both the trial judge and the state Court of Appeal ruled that Proposition 213 did not prevent the Acunas from suing.

M. Scott Radovich, the San Luis Obispo lawyer for the Acunas, said that the insurance companies, which backed the initiative, are at fault for not providing low-cost auto insurance.

"The insurance industry would rather spend their money fighting legitimate damage claims," he said in a prepared statement. "Finally, the California Supreme Court has spoken loud and clear that enough is enough."

Jon Eisenberg, who represented Horwich in the appeal, said he was disappointed by the outcome, but was pleased that the court settled the major issues surrounding Proposition 213.

"At least we know it's constitutional," said the Encino lawyer. He said the initiative appears to be encouraging more people to buy insurance. The latest figures show that 22 percent of drivers are uninsured, a drop from 1996, when 28 percent had no insurance.

Several groups filed friend-of-the-court briefs in support of the Acunas, including Congress of the California Seniors, Latino Issues Forum and the Consumer Attorneys of California.

James Harrison, a San Francisco lawyer who represented the groups, said they were delighted with the decision. "We wanted to make sure that the measure was limited to its intended scope and that the rights of the heirs of uninsured motorists were preserved," he said.

LOAD-DATE: August 10, 1999

The Associated Press State & Local Wire

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August 9, 1999, Monday, AM cycle

SECTION: State and Regional

LENGTH: 480 words

HEADLINE: Court allows suit by uninsured driver's heirs

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

The heirs of an uninsured driver killed in a crash can sue for damages beyond the limits placed by California voters on lawsuits by the uninsured drivers themselves, the state Supreme Court ruled Monday.

It was the second ruling in a week to limit the scope of Proposition 213, an insurer-backed 1996 initiative that barred uninsured drivers from recovering damages for "non-economic" harm such as pain and suffering. The measure allowed them to sue only for economic damages such as wage losses.

On Aug. 2, the court ruled unanimously that Proposition 213 didn't limit damages to an uninsured driver whose injuries were caused by a defective car rather than another driver.

In Monday's case, the parents of Melissa Acuna, who was killed in a rear-end collision, sued the driver of the other car, seeking damages for loss of her care, comfort and society.

The driver, Benjamin Horwich, sought to dismiss the suit under Prop. 213 but Los Angeles Superior Court Judge Marlene Kristovich refused to dismiss the claims and was upheld by an appellate court. Monday's ruling returns the case to Superior Court for a possible trial.

Monday's 6-1 ruling said the restrictions applied only to a suit by the uninsured driver and not to a suit by family members seeking damages for the driver's wrongful death. Such suits typically seek damages for non-economic losses, such as loss of the dead relative's love and companionship.

Proposition 213 was aimed at "the unlawful conduct of uninsured motorists who, at the expense of law-abiding citizens, could recover for non-economic losses while flouting the financial responsibility laws," said the opinion by Justice **Janice Rogers Brown**.

The driver's heirs, she said, "do not contribute to this perceived unfairness, nor are they in a position to rectify it." She also said the ballot language mentioned suits by an uninsured driver or owner but did not mention the driver's heirs.

Dissenting Justice Ming Chin interpreted the ballot language differently and said applying the restrictions to a driver's heirs would give the driver a greater incentive to buy insurance, one purpose of Proposition 213.

M. Scott Radovich, the parents' lawyer, said Ms. Acuna had been insured but couldn't afford premiums that more than doubled when she moved to Los Angeles.

"It is tragic that the insurance companies get all the breaks from Proposition 213, and yet fail to offer low-cost and basic automobile insurance to working-class Californians," Radovich said. He said the ruling would affect hundreds of cases.

Jon Eisenberg, an insurance lawyer representing Horwich, saw a silver lining in his defeat: "The major Proposition 213 issues are now settled. It's constitutional and we know its scope."

The court previously denied review of an appellate ruling upholding the measure.

The case is Horwich vs. Superior Court, S073129.

LOAD-DATE: August 9, 1999

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August 9, 1999, Monday

SECTION: ON THE MOVE

BYLINE: Matthew Leising

BODY:

Morrison & Foerster's Roland Brandel, a partner in the firm's financial services group, has been elected president of the American College of Consumer Financial Services Lawyers.

Brandel, 60, has been with MoFo since 1967, becoming a partner in 1971. He practices in the field of consumer financial services and financial institution regulation. Brandel received his J.D. from the University of Chicago Law School in 1966.

Employee benefits and compensation law specialist Deene Goodlaw has rejoined Pillsbury Madison & Sutro as a partner.

Goodlaw, 58, comes to the firm from Oakland's Sigman, Lewis & Feinberg, where she was of counsel. But the move marks a return to Pillsbury -- she was of counsel at the firm from 1981 to 1991. The 1965 graduate of Harvard Law School teaches courses at Boalt Hall School of Law and has been affiliated with other law schools, including Hastings College of the Law and UC-Davis School of Law.

Farella Braun & Martel has signed on Susan Thorner as special counsel.

Thorner, 50, most recently served as director of legal affairs for Ross Stores Inc. and before that was director of corporate law for Apple Computer Inc. She will join Farella's business department, specializing in corporate securities matters.

Thorner earned her J.D. from Harvard Law School in 1974.

Frank McGuire has joined the appellate practice group at Oakland's Crosby, Heafey, Roach & May as of counsel.

McGuire comes to the firm from the California Supreme Court, where he worked three years as a staff attorney to Justice **Janice Rogers Brown**. Before that, he served in the chambers of Justices John Benson and Robert Dossee at the First District Court of Appeal.

He earned his J.D. in 1986 from Stanford Law School and later clerked for Ninth Circuit Judge Cynthia Holcomb Hall and worked as an extern for Northern District Judge Marilyn Hall Patel.

The Legal Aid Society of San Francisco has promoted Marielena Hincapie and Claudia Center to the position of staff attorney.

Hincapie, 29, joined the group as a John A. Sutro Public Service fellow after graduating from Northeastern University School of Law in 1996. She focuses on the rights of poor immigrant workers and undocumented workers.

Center, 33, a 1992 graduate of Boalt Hall School of Law, came to the organization in 1995 as a Felix Velarde Munoz fellow. She specializes in promoting equal employment opportunities for workers

with psychiatric disabilities.

Dean Myatt has joined Coblenz, Patch, Duffy & Bass as an associate.

Myatt, 34, a 1994 graduate of the William S. Richardson School of Law at the University of Hawaii-Manoa, will focus on general real estate law at the Coblenz firm. Previously, he was an associate at Orrick, Herrington & Sutcliffe.

Kaden Reece has joined Sacramento's Trainor & Robertson as an associate in the firm's business, taxation and estate planning group.

Reece, 29, received her J.D. from Santa Clara University School of Law in 1995. Previously, she was an associate at the Law Offices of John M. Reece in Stockton.

Please send news about partners or associates, appointments or awards to: editor@therecorder.com, or On the Move, _The Recorder_, 625 Polk St., Suite 500, San Francisco, CA 94102.

LOAD-DATE: August 7, 1999

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The Guardian (London)

August 5, 1999

SECTION: Guardian Foreign Pages; Pg. 13

LENGTH: 654 words

HEADLINE: US court silences workplace racists

BYLINE: Duncan Campbell in San Francisco

BODY:

Duncan Campbell in San Francisco

Does freedom of speech include the freedom to call your workmates racist names? In what is seen as a precedent-setting legal decision, a Californian court has ruled that the rights of a victim of racist harassment are greater than the rights of his tormentor to call him what he likes.

The Californian supreme court ruled by four votes to three that an employee of Avis Rent A Car was not entitled to call his Latino workmates 'wetback motherfuckers'. The ruling is controversial.

One of the seven judges said it was 'sailing into uncharted waters', civil rights groups admit there is confusion over the issue, and some commentators have claimed that the ruling undercuts the right to free speech enshrined in the first amendment of the US constitution.

The case arose from an action brought by Latino workers at the San Francisco international airport branch of Avis, who objected to the language directed at them by a supervisor, John Lawrence.

A group of 17 Latinos said that he routinely called them 'crooks, wetbacks (the name given to illegal immigrants who swim across the Mexican border) and motherfuckers'.

In 1994, eight of the plaintiffs were awarded a total of \$ 150,000 (pounds 92,828) damages by a San Francisco jury.

Judge Carlos Bea also issued an injunction prohibiting Lawrence, who is still employed by Avis, from using the racist language. The court of appeal backed the judge but argued that he should come up with a list of offensive terms.

Avis, while not condoning racist language, appealed on the basis that an employee could not be prohibited from making such remarks in the future. The issue then became one of free speech.

The Californian supreme court has now ruled that 'pervasive use of racial epithets is not protected by the first amendment'.

Chief Justice Ronald George said in the judgment that prohibition of the continued use of racial epithets 'does not violate the right to freedom of speech'.

But his fellow judge, Justice Kathryn Mickle Werdegar, while concurring with the decision, said: 'No decision by the United States supreme court has, as yet, declared that the first amendment permits restrictions on speech creating a hostile work environment.'

The three dissenting judges argued that the remedy in this case should be a damages action for harassment after the remarks had been made rather than an attempt to forbid such remarks in

advance.

'A government that tells its citizens what they may say will soon by telling them what they may think,' said Justice **Janice Rogers Brown**. 'I can think of no circumstance in which this court has brushed aside such an important constitutional protection as to the right to free speech on the basis of so little analysis or authority.'

The ramifications of the decision are great. One San Francisco lawyer said that employers would now be watching with trepidation to see what other actions were brought.

The San Jose Mercury newspaper splashed the story with the headline 'Free speech takes a hit', and other media organisations said they feared that it would now be possible to serve injunctions prohibiting the publication of supposedly offensive articles.

The case has presented a delicate dilemma to the American Civil Liberties Union, an organisation long committed to free speech.

The ACLU had argued that it was the right of the Ku Klux Klan to march in a Jewish neighbourhood of Chicago, on the grounds of free speech.

On this issue, however, it backed the court's decision, on the grounds that the Latino workers had been a 'captive audience' and were entitled to freedom from abuse.

Michelle Alexander of the Northern Californian branch of the ACLU greeted the decision as 'modest and appropriate.' She added: 'The first amendment is not a license to discriminate.'

The case is now likely to go to the US supreme court.

LOAD-DATE: August 5, 1999

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August 4, 1999 Wednesday

SECTION: NATIONAL NEWS ; ca; Pg. 4

LENGTH: 966 words

HEADLINE: Ca. Supreme Court Upholds Hate-Speech Gag

BYLINE: By Greg Mitchell, American Lawyer Media

BODY:

San Francisco The California Supreme Court upheld an injunction Monday that prohibits a car-rental employee from using racial epithets in the workplace.

"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,'" wrote Chief Justice Ronald George. But the closely watched case spawned five separate opinions, with a trio of anguished dissents and a concurrence that deprived George of a majority. It's common for employees to sue over past harassing speech. Monday's case is unusual because of the injunction barring the use of certain words and epithets in the future. The author of the concurring opinion, Justice Kathryn Mickle Werdegar, agreed that, in this particular case, the injunction could be found valid so long as it is redrawn to include an "exemplary" list of words forbidden in the workplace. But she said George had refused to acknowledge that the court was "sailing into uncharted First Amendment waters" with its decision. The dissents were ever harsher. "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," wrote Justice **Janice Rogers Brown**. For George and Justices Ming Chin and Marvin Baxter, deciding the constitutional validity of the injunction issued against Avis Rent A Car and its employee, John Lawrence, was pretty simple. Lawrence and Avis were sued in 1993 by a group of Latino co-workers who said the shop steward has called them names like "wetback" and snapped towels at them. After a jury awarded damages under the Fair Employment and Housing Act, San Francisco Superior Court Judge Carlos Bea enjoined Lawrence and Avis from using racial epithets in the future. A bitterly divided First District Court of Appeal panel upheld the injunction but said it must include a list of the banned words and could only cover Lawrence at work. The state and federal constitutions frown on prior restraints on speech. But George said the injunction wasn't a prior restraint because Lawrence had already had his day in court and a jury had found his speech created a hostile work environment. George based his argument on a series of cases, including *People ex rel. Gallo v. Acuna* where the justices upheld a gang injunction two years ago. In that case, George noted, the court observed that "[u]nlike the pervasive 'chill' of an abstract statutory command that may broadly affect the conduct of the absent class and induce self-censorship, the decree here did not issue until after these defendants had their day in court." But Werdegar said George was ducking the real question: whether the First Amendment permits restrictions on speech that create a hostile workplace. According to Werdegar, the U.S. Supreme Court hasn't given a definitive answer, but its decisions in sexual-harassment cases hint at how the highest court would respond. The high court, she concluded, would permit some restrictions on racially hostile or abusive speech at work. Werdegar noted that the state has a compelling interest in curbing race discrimination and that Lawrence can still express his ideas away from work. She said his Latino co-workers were a captive audience and that restrictions on work speech were somewhat akin to "time, place and manner" restrictions. With that, Werdegar handed

George the fourth vote needed to uphold the injunction. Justices Stanley Mosk, Joyce Kennard and Brown each attacked different parts of the plurality and concurring opinions, and all but demanded the U.S. Supreme Court take the case. Mosk said that even if speech can amount to employment discrimination, future speech can't be banned "because the offensive content and effect of using any one, or more, verboten words cannot be determined in advance." Kennard, meanwhile, savaged the idea that a judicial finding that past speech caused a harm supports the prior restraint of similar speech in the future. That's akin, she said, to saying that a newspaper that had been found to have defamed a politician could be stopped from publishing other derogatory statements about that politician in the future. Brown's dissent included an impassioned defense of the First Amendment and its tolerance of ugly speech, but it also recognized the motive behind Bea's novel injunction. "When we are confronted with bigotry, our visceral reaction is to strike back hard, which in this case took the form of the tough injunction the court upholds today." But she argued as did Werdegarr that the U.S. Supreme Court has never addressed whether civil-rights laws that ban offensive verbal conduct in the workplace run afoul of the First Amendment. "Nevertheless, the plurality opinion assumes the high court resolved that issue long ago in favor of censorship," she wrote. "Every age has its fashionable ideas and its disfavored ideas," wrote Brown in *Aguilar v. Avis Rent A Car System*. "Today this court reopens the door to censorship with a resounding yes." Neither Edwin Currey, who represented the Latino plaintiffs, nor Joel Kelly, who represented Lawrence and Avis, could be reached for comment. Michelle Alexander, an attorney with the American Civil Liberties Union, praised the decision and said it was in line with U.S. Supreme Court precedents. The ACLU, which typically backs free speech over restrictions, filed an amicus curiae brief in support of the plaintiffs in this case. "The First Amendment is not a license to discriminate," she said. "The U.S. Supreme Court has made clear that speech that is protected on the sidewalk isn't protected at work." This story originally appeared in *The Recorder*.

LOAD-DATE: August 3, 1999

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AP Online

August 03, 1999; Tuesday 06:14 Eastern Time

SECTION: Domestic, non-Washington, general news item

LENGTH: 361 words

HEADLINE: Court: Judge Can Bar Bigoted Speech

BYLINE: BOB EGELKO

DATELINE: SAN FRANCISCO

BODY:

A judge's order prohibiting an Avis supervisor from using ethnic slurs has been upheld by the California Supreme Court, despite a scorching dissent.

"A government that tells its citizens what they may say will soon be dictating what they may think," said Justice **Janice Rogers Brown**, one of the dissenters in Monday's 4-3 ruling.

But the majority said free expression isn't violated by an injunction against bigoted speech that has already been found, by a jury, to be so extreme and pervasive that it causes a hostile and discriminatory work environment.

One justice, Kathryn Mickle Werdegar, described employees as a "captive audience" and said speech can be restricted in the workplace in ways that wouldn't be allowed elsewhere. She said the workers in this case could have escaped the harassment only by quitting their jobs.

A jury had already awarded \$135,000 to eight employees of Avis Rent-a-Car at San Francisco International Airport. They accused supervisor John Lawrence of constantly calling them vulgar and derogatory names, in Spanish and English, in 1991 and 1992, based on their ethnicity and lack of English skills. They said Avis did nothing to restrain him.

Superior Court Judge Carlos Bea ordered Lawrence not to use epithets toward Hispanic workers and ordered Avis to stop him if possible. His injunction was upheld on appeal.

The court's lead opinion, by Chief Justice Ronald George, said the jury had already found Lawrence's and Avis' conduct illegal _ and the injunction "simply precluded (them) from continuing their unlawful activity."

Avis lawyer Donna Rutter declined comment on the ruling. The company could appeal to a federal court.

The case has divided free-speech advocates.

"The First Amendment is not a license to discriminate," said American Civil Liberties Union lawyer Michelle Alexander. "Employees have a right to work in an environment free from discrimination, ridicule and insult."

However, Bruce Adelstein, who filed arguments on behalf of the Libertarian Law Council and other groups, said that while speech can cause harm "it is more dangerous for the government to ban it."

LOAD-DATE: August 03, 1999

The Associated Press

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August 3, 1999, Tuesday, PM cycle

SECTION: Business News

LENGTH: 357 words

HEADLINE: Court says judge can bar bigoted speech in workplace

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

A judge's order prohibiting an Avis supervisor from using ethnic slurs has been upheld by the California Supreme Court, despite a scorching dissent.

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LOAD-DATE: August 3, 1999

The Associated Press State & Local Wire

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August 3, 1999, Tuesday, PM cycle

SECTION: State and Regional

LENGTH: 598 words

HEADLINE: Court says judge can bar bigoted speech in workplace

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

A judge's rare order against workplace harassment - an injunction prohibiting a supervisor from using ethnic slurs - has narrowly survived state Supreme Court review, over a scorching dissent.

"A government that tells its citizens what they may say will soon be dictating what they may think," said Justice **Janice Rogers Brown**, one of the dissenters in Monday's 4-3 ruling.

But the majority said free expression is not violated by an injunction against bigoted speech that has already been found, by a jury, to be so extreme and pervasive that it causes a hostile and discriminatory work environment.

One justice, Kathryn Mickle Werdegar, described employees as a "captive audience" and said speech can be restricted in the workplace in ways that wouldn't be allowed on the street. She said the workers in this case could have escaped the harassment only by quitting their jobs.

The case is unusual because of a San Francisco Superior Court judge's order that broadened the legal remedies for workplace harassment.

A jury had already awarded \$ 135,000 to eight employees of Avis Rent-a-Car at San Francisco International Airport. They accused a supervisor, John Lawrence, of constantly calling them vulgar and derogatory names, in Spanish and English, in 1991 and 1992, based on their ethnicity and lack of English skills, and said Avis did nothing to restrain him.

Judge Carlos Bea found that the harassment was likely to continue. He issued an injunction, punishable by contempt of court, prohibiting Lawrence from using epithets toward Hispanic workers, and ordered Avis to stop him if possible.

A divided state appellate court upheld Bea's order but told him to include a list of words as examples of forbidden speech.

The case divided free-speech advocates.

"The First Amendment is not a license to discriminate," said American Civil Liberties Union lawyer Michelle Alexander. "Employees have a right to work in an environment free from discrimination, ridicule and insult."

"A lot of speech does cause harm ... but it is more dangerous for the government to ban it," said attorney Bruce Adelstein, who filed arguments on behalf of the Libertarian Law Council and the

National Writers Union, among other groups.

Avis lawyer Donna Rutter declined comment on the ruling. The company could appeal to the U.S. Supreme Court.

The Supreme Court's lead opinion, by Chief Justice Ronald George, said freedom of speech would not protect an employer who posted a "Whites Only" sign outside the workplace. He said that past rulings have allowed injunctions banning types of expression that the law considers unworthy of protection, such as obscenity and sex-segregated wanted ads.

Noting that the jury had already found Lawrence's and Avis' conduct illegal, George said the injunction "simply precluded (them) from continuing their unlawful activity" and avoided the need to sue over each instance of harassment.

Justices Marvin Baxter and Ming Chin agreed. Werdegarr reached the same result in a separate opinion.

Dissenters - Brown, Stanley Mosk and Joyce Kennard - said the only legal remedy for offensive, harassing speech should be a damage suit, after the fact. An injunction that forbids speech, based on its content, is an unconstitutional restraint on expression, they said.

Kennard contrasted the jury's damage award, based on a long period of harassment, with an injunction against "even isolated use of racial and ethnic slurs having no demonstrable effect on any plaintiff ... on the basis of content and viewpoint."

The case is Aguilar vs. Avis, S054561.

LOAD-DATE: August 3, 1999

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August 3, 1999, Tuesday

SECTION: Pg. 1

LENGTH: 1193 words

HEADLINE: S.C. Upholds Injunction Against Use of Racist Language in Workplace

BYLINE: By KENNETH OFGANG, Staff Writer

BODY: An employer may be enjoined from engaging in the persistent use of racist epithets that affect employees in the workplace, the California Supreme Court ruled yesterday.

In a 4-3 decision, resulting in five separate opinions, the high court upheld a First District Court of Appeal ruling in favor of a group of Hispanic employees who sued for discrimination and harassment by an Avis Rent-a-Car supervisor at San Francisco Airport.

The Court of Appeal panel, which was also divided, said the injunction by San Francisco Superior Court Judge Carlos Bea wasn't an invalid prior restraint on free speech, but was vague in failing to exemplify the types of slurs which would be prohibited and overbroad in that it was not limited to comments made at work.

Chief Justice Ronald M. George, writing yesterday for the high court plurality, said that trial courts may enjoin the future use of racial slurs where such conduct has previously occurred, has been judicially determined to be so pervasive as to violate anti-discrimination laws, and has been found likely to recur if not enjoined.

George's opinion was joined by Justices Marvin Baxter and Ming Chin. Justice Kathryn M. Werdegar concurred separately, while Justices Stanley Mosk, Joyce L. Kennard, and **Janice Rogers Brown** wrote separate dissents.

Harassment Alleged

The injunction arose out of a Fair Employment and Housing Act suit by 17 Latino drivers who move vehicles at the San Francisco facility. They alleged that they were subjected to constant harassment, such as the use of profane language not directed at non-Hispanic workers, by their manager, John Lawrence.

A jury found that some of the plaintiffs were subjected to racial discrimination and/or harassment by Lawrence and another supervisor and that Avis knew of some of the unlawful conduct and acquiesced in it. Five plaintiffs were awarded damages of \$ 15,000 each and two received \$ 25,000 awards.

One plaintiff was found to have been the victim of harassment or discrimination but to have suffered no damages.

At a subsequent hearing, Bea enjoined Lawrence "from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees" and to "refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System."

He also ordered Avis to post notices that employees should report discrimination or harassment by

managers and fellow employees and adopt a policy statement on non-discrimination.

Avis argued, in seeking Supreme Court review, that even with the modifications required by the Court of Appeal, the injunction constituted an invalid prior restraint on free speech. But the chief justice disagreed.

"Although stated in broad terms, the right to free speech is not absolute," George wrote. The state may punish terrorist threats, and suits may be brought for torts that "may consist solely of spoken words, such as slander and intentional infliction of emotional distress," he noted.

'Prior Restraint'

The U.S. Supreme Court, George pointed out, has upheld injunctions against the exhibition of obscene materials and the publication of gender-specific "help wanted" ads. Those decisions, he said, "recognize that 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' of speech."

Werdegar, in her separate concurrence, said the court was "sailing into uncharted First Amendment waters" in which the right of free speech must be balanced against the societal interest in suppressing racial harassment and discrimination.

While the utterance of racist remarks, even though "distasteful," has general constitutional protection, the justice wrote, that protection fades when one addresses a "captive audience." The plaintiffs, she said, "were the unwilling targets of Lawrence's racial invective" and had "a right to work free of racial discrimination and intimidation."

Since the workers could only have avoided Lawrence's slurs by quitting their jobs, she said, it was proper to grant an injunction once the judge found the conduct likely to continue otherwise.

Mosk argued in dissent that the injunction constitute an invalid prior restraint, even though it was granted after a full trial on the merits. "

"Like my colleagues, I abhor discrimination in any form," he wrote. "But I feel equally strongly that we cannot use the instrumentality of the courts to penalize speech before we know what was said, to whom, and with what effect."

Kennard argued that even with the Court of Appeal's modifications, the injunction would be overly broad, because it would prohibit "every utterance of a racial or ethnic insult in the workplace, not just utterances that actually produce a hostile work environment."

Brown said the court had created "the FEHA exception to the First Amendment."

Los Angeles attorney Bruce Adelstein, co-author of an amicus brief on behalf of several groups, including the National Writers Union, the Reason Foundation, and the Libertarian Law Council, said the court had allowed a far broader exception to the prior-restraint doctrine than anything the U.S. Supreme Court had ever approved.

While Lawrence's conduct, as explained in the opinion, was reprehensible, Adelstein said, the injunction goes to far in restraining not only conduct which is directed at offended employees, but remarks made at the workplace but outside the employees' hearing. Lawrence, the lawyer said, now can't engage even in a "a frank discussion of affirmative action" if it involves a word on the list that the court ultimately comes up with.

But Michelle Alexander, a staff lawyer for the ACLU of Northern California which filed an amicus brief in support of the injunctions said the decision was "absolutely correct."

The ruling, she said, was a narrow, "reasonable effort to secure dignity for Latino workers." The fact that the injunction was issued only after a full trial on the merits should be sufficient to alleviate prior-restraint concerns, she said.

Avis, she said, had "a warped understanding of the First Amendment" arguing that it had a free-speech right to subject employees to harassment that could only be alleviated by a damage award long after the fact.

Eugene Volokh, a UCLA law professor who has written extensively on workplace harassment law and First Amendment concerns, said the decision was a narrow one. George, he said, "doesn't say that all harassing speech is denied free speech protection."

The opinion, he added, leaves open the questions of whether other forms of expression, such as political statements, jokes, and religious proselytizing can be enjoined on the grounds they constitute harassment.

Volokh also noted that the decision isn't binding on federal courts or those in other states. The fact that it was a 4-3 decision, he said, indicates that these issues are likely to be the subject of much further litigation.

The case is *Aguilar v. Avis Rent A Car System, Inc.*, 99 S.O.S. 6144.

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August 3, 1999, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: COURT UPHOLDS HATE SPEECH GAG

BYLINE: Greg Mitchell;
Reporter Greg Mitchell's e-mail address is gmittell@therecorder.com

BODY:

The California Supreme Court upheld an injunction Monday that prohibits a car rental employee from using racial epithets in the workplace.

"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,'" wrote Chief Justice Ronald George.

But the closely watched case spawned five separate opinions, with a trio of anguished dissents and a concurrence that deprived George of a majority.

It's common for employees to sue over past harassing speech. Monday's case is unusual because of the injunction barring the use of certain words and epithets in the future.

The author of the concurring opinion, Justice Kathryn Mickle Werdegar, agreed that, in this particular case, the injunction could be found valid so long as it is redrawn to include an "exemplary" list of words forbidden in the workplace.

But she said George had refused to acknowledge that the court was "sailing into uncharted First Amendment waters" with its decision.

The dissents were ever harsher. "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," wrote Justice **Janice Rogers Brown**.

For George and Justices Ming Chin and Marvin Baxter, deciding the constitutional validity of the injunction issued against Avis Rent A Car and its employee, John Lawrence, was pretty simple.

Lawrence and Avis were sued in 1993 by a group of Latino co-workers who said the shop steward has called them names like "wetback" and snapped towels at them.

After a jury awarded damages under the Fair Employment and Housing Act, San Francisco Superior Court Judge Carlos Bea enjoined Lawrence and Avis from using racial epithets in the future. A bitterly divided First District Court of Appeal panel upheld the injunction, but said it must include a list of the banned words and could only cover Lawrence at work.

The state and federal constitutions frown on prior restraints on speech. But George said the injunction wasn't a prior restraint because Lawrence had already had his day in court and a jury had found his speech created a hostile work environment.

George based his argument on a series of cases, including People ex rel. Gallo v. Acuna, 14

Cal.4th 1090, where the justices upheld a gang injunction two years ago. In that case, George noted, the court observed that "u nlike the pervasive 'chill' of an abstract statutory command that may broadly affect the conduct of the absent class and induce self-censorship, the decree here did not issue until after these defendants had their day in court."

But Werdegar said George was ducking the real question: whether the First Amendment permits restrictions on speech that create a hostile workplace. According to Werdegar, the U.S. Supreme Court hasn't given a definitive answer, but its decisions in sexual harassment cases hint at how the highest court would respond.

The high court, she concluded, would permit some restrictions on racially hostile or abusive speech at work.

Werdegar noted that the state has a compelling interest in curbing race discrimination and that Lawrence can still express his ideas away from work. She said his Latino co-workers were a captive audience and that restrictions on work speech were somewhat akin to "time, place and manner" restrictions. With that, Werdegar handed George the fourth vote needed to uphold the injunction.

Justices Stanley Mosk, Joyce Kennard, and Brown each attacked different parts of the plurality and concurring opinions, and all but demanded the U.S. Supreme Court take the case.

Mosk said that even if speech can amount to employment discrimination, future speech can't be banned "because the offensive content and effect of using any one, or more, verboten words cannot be determined in advance."

Kennard, meanwhile, savaged the idea that a judicial finding that past speech caused a harm supports the prior restraint of similar speech in the future.

That's akin, she said, to saying that a newspaper that had been found to have defamed a politician could be stopped from publishing other derogatory statements about that politician in the future.

Brown's dissent included an impassioned defense of the First Amendment and its tolerance of ugly speech, but it also recognized the motive behind Bea's novel injunction. "When we are confronted with bigotry, our visceral reaction is to strike back hard, which in this case took the form of the tough injunction the court upholds today."

But she argued -- as did Werdegar -- that the U.S. Supreme Court has never addressed whether civil rights laws that ban offensive verbal conduct in the workplace run afoul of the First Amendment. "Nevertheless, the plurality opinion assumes the high court resolved that issue long ago in favor of censorship," she wrote.

"Every age has its fashionable ideas and its disfavored ideas," wrote Brown in Aguilar v. Avis Rent A Car System, 99 C.D.O.S. 6144. "Today this court reopens the door to censorship with a resounding yes."

Neither Edwin Currey, who represented the Latino plaintiffs, nor Joel Kelly, who represented Lawrence and Avis, could be reached for comment.

Michelle Alexander, an attorney with the American Civil Liberties Union, praised the decision, and said it was in line with U.S. Supreme Court precedents. The ACLU, which typically backs free speech over restrictions, filed an amicus curiae brief in support of the plaintiffs in this case.

"The First Amendment is not a license to discriminate," she said. "The U.S. Supreme Court has made clear that speech that is protected on the sidewalk isn't protected at work."

LOAD-DATE: August 3, 1999

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The Recorder

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August 3, 1999, Tuesday

SECTION: COURT WATCH; PG. 4

HEADLINE: LAWMAKERS, LITIGANTS TURN JUSTICES INTO EDITORS

BYLINE: Greg Mitchell

BODY:

The justices of the California Supreme Court went back to school last week.

Grammar school, that is.

Tackling alleged "drafting errors" in the Three Strikes law and a toxic tort complaint, the justices offered up some lessons on working with the written word.

First, there's a difference between "and" and "or." And second, a plaintiff's complaint should be precise.

In the first case, Justice Kathryn Mickle Werdegarr rather politely suggested that lawmakers' work on the Three Strikes law was the opposite of "careful legislative craftsmanship."

Werdegarr found a way for the majority to read apparently inconsistent language in the sentencing law without rewriting it, as had been urged by the defendant.

But it took some effort. Understanding the result requires, as Werdegarr put it, "a close reading of the statutory language exactly as written." Loosely translated from judgespeak, that means "Don't read on unless you absolutely must."

The outcome is that juvenile priors not listed in a section of the Welfare and Institutions Code -- like defendant Edwin Garcia's residential burglary prior -- don't qualify as strikes.

Justice Stanley Mosk, meanwhile, wrote separately to explain the lesson he has now learned about the ways laws are made.

Mosk explained that in a 1985 case, he "wrote at some length . . . to suggest that the grievous error made in an initiative measure -- using 'and' instead of 'or' in a crucial context -- would not have been made if the proposal advanced its laborious way through the legislative process."

At the time, Mosk continued, it seemed to him that the Legislature, with all its internal checks, was less likely to make the goofs that often plague voter initiatives.

But, here, he wrote last week in *People v. Garcia*, 99 C.D.O.S. 6033, "we have an enigmatic result, attributable at least in part to the very legislative process I extolled so enthusiastically" in 1985.

"I now reach the inevitable conclusion that no process, however well structured, is certain to be free of potential error or uncertainty," Mosk wrote.

Justices Marvin Baxter and **Janice Rogers Brown** also penned separate opinions taking issue with aspects of the majority approach.

But when it came time to grade the efforts of the attorneys representing an alleged toxic tort victim, all the justices agreed they flunked the test. But they gave them another chance at a makeup test.

Plaintiff Thomas Bockrath sued hundreds of manufacturers, alleging in his complaint that all or some of their products had caused him to develop cancer.

The scattershot and internally inconsistent complaint -- which lower courts eventually tossed on demurrer -- was "long, rambling," and "prolix," Mosk wrote for the court in Bockrath v. Aldrich Chemical Co., 99 C.D.O.S. 6018.

Under current pleading standards, it doesn't make the cut, Mosk explained. But since the standards are new, the court gave Bockrath and his lawyers another chance.

LOAD-DATE: August 3, 1999

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AUGUST 3, 1999, TUESDAY, FINAL EDITION

SECTION: NEWS; Pg. A1

LENGTH: 1022 words

HEADLINE: Court Backs Ban on Racial Slurs at Work;

State justices say pervasive use of epithets is harassment

BYLINE: Harriet Chiang, Chronicle Legal Affairs Writer

DATELINE: SACRAMENTO

BODY:

In the first ruling of its kind, the California Supreme Court yesterday upheld the right of a judge to ban racial slurs in the workplace, rejecting the argument that it violated free speech rights.

Balancing two powerful constitutional protections, the high court said a San Francisco judge could legally prevent an Avis Rent A Car employee from subjecting Latino workers to constant racial slurs.

The "pervasive use of racial epithets" that a judge or jury has found violates discrimination laws "is not protected by the First Amendment and such unlawful conduct properly may be enjoined," wrote Chief Justice Ronald George in the court's decision.

Harassment based on race or national origin is a form of employment discrimination.

The 4-to-3 decision is the first in the nation to address the complicated issue of how to deal with hate speech in the workplace, as opposed to speech in public areas where a hearer is free to walk away.

Legal scholars expressed skepticism about whether the elimination of on-the-job racial discrimination outweighs free speech rights.

Justice Kathryn Mickle Werdegard warned in a concurring opinion that the court was "sailing into uncharted First Amendment waters.

"No decision by the United States Supreme Court has, as yet, declared that the First Amendment permits restrictions on speech creating a hostile work environment," she wrote.

New York attorney Floyd Abrams, a leading First Amendment expert, predicted that the ruling will be reversed if it reaches the nation's highest court.

"It's an area that awaits a U.S. Supreme Court decision," Abrams said. "There are other things that can be done to Avis short of an injunction against speech."

In its decision, the state Supreme Court said a judge can ban an employee from using racial epithets if a jury has already found that the worker illegally harassed others. In those cases, the court said, a judge's order may be necessary to prevent continued verbal abuse.

The decision could pose a major problem for employers. Patricia Gillette, a San Francisco attorney who represents management in labor relations cases, said a supervisor cannot regulate what workers say, beyond training them and disciplining them for violating company rules.

"It's almost as though they're trying to drive employers out of California with this decision," said Gillette, who had not yet read the opinion.

In the Avis case, 17 Latino workers charged that they were subjected for years to a barrage of racial epithets from John Lawrence, an agent at Avis's rental office at San Francisco International Airport.

The employees said Lawrence routinely called them "crooks," "wetbacks," and "mother f--s." Lawrence denied the charges. But in 1994, a San Francisco jury found that he had repeatedly harassed at least some of the Latino workers and awarded eight of the plaintiffs \$150,000 in damages.

San Francisco Judge Carlos Bea also issued an injunction ordering Lawrence not to use the racial slurs anymore. In 1996, a state Court of Appeal in San Francisco upheld the order but directed Bea to come up with a list of words, so that the ban would not be overly broad.

In its appeal of the order, Avis said an employee who makes racial remarks can be sued for damages but cannot be prohibited from making the remarks.

The U.S. Supreme Court has made it clear that a person can be held liable for speech that amounts harassment because it creates a hostile work environment. But the issue here was whether a court can stop an employee from making offensive remarks in the future.

Because of constitutional protections, "prior restraints" of speech are generally unlawful.

But in this case, the court said it was not illegally limiting Lawrence's speech because a jury had already found that he and Avis had engaged in illegal employment discrimination.

"The order simply precluded defendants from continuing their unlawful activity," George said.

An Avis spokesman said the company could not comment on the decision until it has a chance to review it.

Jesse Choper, a constitutional law professor at Berkeley's Boalt Hall School of Law, said the court was trying to deal with one of the most complicated areas of the law. Although obscenity and "fighting words" are not protected by free speech rights, hate speech remains a murky area of the law because it can be considered an expression of ideas.

"It is undefined as to what is protected by the First Amendment in the workplace," Choper said.

Even the American Civil Liberties Union, one of the leading advocates of free speech rights, took the unexpected step of filing a brief in support of the judge's ban on racial epithets in the workplace.

In her concurring opinion, Werdegarr upheld the judge's ban because it took place in the workplace and the Latino workers were "an unwilling and captive audience." She also said the state has a compelling interest in eliminating racial discrimination.

The decision created an unusual split in the court. Two of the most liberal members of the court were joined by the most conservative in issuing angry dissenting opinions.

Justice Stanley Mosk, regarded as the most liberal member of the court, said the ban prohibiting certain words clearly violated the free speech rights of Avis and Lawrence.

"The injunction at issue constitutes a broad prohibition touching on core protected speech," he said.

"It applies to words that, although offensive, may be used to convey ideas or emotions and are, therefore, shielded by the First Amendment."

Justice Joyce Kennard, who often sides with Mosk, also dissented. She said the ban was overly broad because it applied even if Lawrence made the remarks outside the presence of the Latino workers.

The most outspoken conservative on the court, Justice **Janice Rogers Brown**, said the decision ran afoul of Supreme Court decisions protecting free speech, including a historic decision allowing the Ku Klux Klan to march through a Jewish community in Skokie, Ill.

The case is Aguilar vs. Avis Rent A Car System, S054561.

LOAD-DATE: August 3, 1999

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SAN JOSE MERCURY NEWS

August 3, 1999, Tuesday

KR-ACC-NO: SJ-WORK-BIAS

LENGTH: 933 words

HEADLINE: California Justices Place Bias-Free Workplace over Free Speech

BYLINE: By Howard Mintz

BODY:

A sharply divided California Supreme Court, struggling with an unprecedented clash between free-speech rights and workplace discrimination, decided Monday that the First Amendment can take a back seat to preventing harassment on the job.

In a case with national implications, the state's high court held that government has the power to regulate words in the employment setting, at least when there is a proven need to correct harassing conduct and discrimination. The ruling, written by Chief Justice Ronald George, essentially permits a judge to muzzle an employee found to have created a hostile work setting by directing racial slurs at colleagues.

Closely watched by civil-liberties groups, the ruling stems from a long legal battle over a discrimination lawsuit filed against Avis Rent-a-Car by a group of Latino employees who maintained a supervisor constantly berated them with racial epithets.

At the end of a 1995 trial, in which a San Francisco jury sided in part with the Latino workers, a judge barred Avis service agent John Lawrence from uttering any derogatory statements in the future. The scope of that order -- and its constitutionality -- posed unsettled legal questions for California's high court.

While the justices fell short of carving out a free-speech exception in the workplace, they concluded that a restraint on Lawrence was justified by the jury's finding that he caused a hostile environment at Avis. Justice Kathryn Mickel Werdegar, who provided the deciding vote in a 4-3 ruling, would have gone further, saying the state has a fundamental interest in trying to "eradicate racial discrimination in the workplace."

Avis attorneys said the company had not fully evaluated the opinion and would have no comment on it until today. Avis, joined by several free speech groups, has argued that while harassing conduct can be regulated, speech of any kind cannot. They have warned that gag orders like the one imposed on Lawrence are a clear violation of free-speech guarantees.

Avis can appeal the case to the U.S. Supreme Court, which legal experts say has not addressed the issue head on. Lawyers worried about the free-speech implications say Monday's ruling might force employers to be overly restrictive about speech in the office.

"I think it leaves us more confused than when we started," Los Angeles attorney Bruce Adelstein, who sided with Avis on behalf of the Center for Individual Rights, said of the court's decision.

University of California at Los Angeles law professor Eugene Volokh, who has studied the case closely, agreed. "The case leaves open a lot more questions than it resolves," Volokh said. "The majority decision is very narrow, but it does say that racial slurs may be enjoined by a court

consistent with the First Amendment."

Lawyers for the Latino workers, with backing from groups including the American Civil Liberties Union, argued that the need to keep the workplace free of harassment outweighs any restraint on free speech. They were pleased with the court's ruling, saying it simply ratified the importance of protecting workers against discrimination.

"The opinion was not evolutionary," said Michelle Alexander, director of the racial justice project at the ACLU, which usually sides with free-speech advocates, but came down on the side of anti-discrimination forces in the case. "What would have been shocking is if the California Supreme Court came out the other way. The First Amendment is not a license to discriminate."

At least three of the justices did find the ruling revolutionary, however. The three dissenters, in strong language, condemned any use of a court order to block speech, even if it is designed to cure workplace discrimination or harassment. One justice called Monday's ruling "sailing into uncharted First Amendment waters," and the dissenters invited the U.S. Supreme Court to settle the matter.

"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 **Janice Rogers Brown** observed in her dissent. "Speech is unpleasant sometimes. It may be disgusting. It may be offensive. But, with few exceptions... courts (are prohibited) from using their... powers as a surgical instrument to extricate disfavored ideas." Added Justice Joyce Kennard, "Employees do not surrender their constitutional free-speech rights when they go to work."

The legal dispute actually dates back to 1991 and 1992, when Lawrence and other Avis employees were first accused of harassing Latino service workers at the agency's San Francisco International Airport facility. Seventeen workers sued, and eight of them eventually won \$ 135,000 in total damages.

Avis did not appeal the damage award. But the company appealed an injunction issued by Superior Court Judge Carlos Bea barring Lawrence from ever directing epithets at his colleagues, on or off the job.

A divided San Francisco appeals court in 1996 upheld Bea's order, but found that it was too vague and should be specifically limited to job-related speech. The state Supreme Court, which reviewed that ruling, made it clear that it would only permit restrictions on harassing speech in the workplace.

Bea also has been instructed to come up with a description of the kinds of words Lawrence should be banned from speaking.

Lawrence remains an Avis employee, according to Avis lawyers.

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JOURNAL-CODE: SJ

LOAD-DATE: August 4, 1999

The Associated Press State & Local Wire

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August 2, 1999, Monday, AM cycle

SECTION: State and Regional

LENGTH: 584 words

HEADLINE: Court says judge can bar bigoted speech in workplace

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Over free-speech objections, the state Supreme Court ruled Monday that an employee who has harassed coworkers with bigoted words can be ordered by a judge to use no epithets at work in the future.

The 4-3 ruling said freedom of expression is not violated by an injunction against speech that has already been found to cause a hostile work environment.

Majority justices noted that past rulings have allowed bans on other types of expression that the law considers unworthy of protection, such as obscene films and sex-segregated want ads. One justice, Kathryn Mickle Werdegar, described employees as a "captive audience" and said speech can be restricted in the workplace in ways that wouldn't be allowed on the street.

Dissenters said the only legal remedy for offensive, harassing speech should be a damage suit, after the fact. The injunction in this case came after a \$ 135,000 damage award to eight Hispanic employees of Avis Rent-a Car.

"Today this court reopens the door to censorship," said one dissenting justice, **Janice Rogers Brown**. "A government that tells its citizens what they may say will soon be dictating what they may think."

Free-speech advocates lined up on both sides.

"The First Amendment is not a license to discriminate," said American Civil Liberties Union lawyer Michelle Alexander. "Employees have a right to work in an environment free from discrimination, ridicule and insult."

"A lot of speech does cause harm ... but it is more dangerous for the government to ban it," said attorney Bruce Adelstein, who filed arguments on behalf of the Libertarian Law Council and the National Writers Union, among other groups.

Avis lawyer Donna Rutter declined comment. The company could appeal to the U.S. Supreme Court.

The case stemmed from a suit by Hispanic employees of Avis at San Francisco International Airport. They accused a supervisor, John Lawrence, of constantly calling them vulgar and derogatory names, in Spanish and English, in 1991 and 1992, based on their ethnicity and lack of English skills, and said Avis did nothing to restrain him.

After a jury awarded damages against both Lawrence and Avis, San Francisco Superior Court Judge Carlos Bea found that the harassment was likely to continue. He issued an injunction - punishable by contempt of court - prohibiting Lawrence from using epithets toward Hispanic workers, and ordered Avis to stop him if possible.

A divided state appellate court upheld Bea's order but told him to include a list of words as examples of forbidden speech.

The Supreme Court's lead opinion, by Chief Justice Ronald George, said freedom of speech would not protect an employer who posted a "Whites Only" sign outside the workplace. Noting that the jury had already found Lawrence's and Avis' conduct illegal, George said the injunction "simply precluded (them) from continuing their unlawful activity" and avoided the need to sue over each instance of harassment.

Justices Marvin Baxter and Ming Chin agreed. Werdegarr reached the same result in a separate opinion, observing that the employees could have avoided the harassment only by quitting their jobs.

Brown and Justices Stanley Mosk and Joyce Kennard dissented separately. Kennard contrasted the jury's damage award, based on a long period of harassment, with an injunction against "even isolated use of racial and ethnic slurs having no demonstrable effect on any plaintiff ... on the basis of content and viewpoint."

The case is Aguilar vs. Avis, S054561.

LOAD-DATE: August 2, 1999

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The Corporate Counsellor

August 1999

SECTION: Vol. 14; No. 3; Pg. 13

LENGTH: 392 words

HEADLINE: CALIF. COURT TAKES UP IN-HOUSE FEE RECOVERIES

BYLINE: BY RINAT FRIED, Rinat Fried is a reporter for the Recorder, the San Francisco-based daily that is affiliated with this newsletter.

BODY:

THE CALIFORNIA Supreme Court has agreed to decide whether in-house counsel can collect big-firm attorney fees in litigation.

The high court took the case at the behest of attorney David Drexler, who was socked with attorney fees after a squabble with in-house counsel at his legal malpractice insurance carrier.

"This case presents a question of substantial and increasing importance to litigants throughout California as more and more insurance companies and corporations turn to using salaried employees as in-house counsel," wrote the petitioner's attorney, Thomas Watters of Los Angeles' Hart & Watters.

The fees case could affect every suit in the state in which an insurance company or corporation uses in-house counsel. The case drew amicus curiae briefs from the American Corporate Counsel Association and the Los Angeles County Bar when it was before the Second District, California's intermediate appeals court.

The petition for review stems from a dispute between Drexler and his insurer over the costs of his malpractice defense.

The insurer, PLCM Group Inc., used its in-house staff to litigate the case -- Drexler's first -- and demanded Drexler pay a \$ 20,000 deductible.

When Drexler balked, a trial judge ordered him to cough up the deductible plus another \$ 61,050 to cover his insurer's fees and costs for the fee dispute.

The judge relied on a declaration submitted by PLCM that pegged the market rate for its in-house attorney's services at \$ 185 an hour.

Drexler appealed, arguing that the court shouldn't have awarded fees and shouldn't have calculated them by using the prevailing market rates that outside counsel charge. Instead, he argued, the hourly rate should be based on the actual expense incurred by PLCM.

A Second District appeals panel rejected Drexler's argument. Writing for the court, Justice Patti Kitching said that not only were in-house attorneys entitled to collect fees, but that "the prevailing market rate relieves the court and litigants from the specter of wasteful and prolonged litigation over a matter ancillary to the primary case."

All of the Supreme Court justices except **Janice Rogers Brown** voted to review PLCM Group Inc. v. Drexler, S080201.

Rinat Fried is a reporter for The Recorder, the San Francisco-based daily that is affiliated with this newsletter.

LOAD-DATE: September 27, 1999

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View Related Topics

July 30, 1999, Friday

SECTION: NEWS; PG. 3

HEADLINE: SPLIT COURT HANDS LOSS TO REAL ESTATE DEVELOPERS

BYLINE: Greg Mitchell

BODY:

Companies that issue construction performance bonds can't be tagged with tort and punitive damages for breaching a contract in bad faith, the California Supreme Court ruled Thursday.

Four of the justices said so-called surety bonds aren't insurance contracts, the only class of contracts where tort damages are currently available in California, and shouldn't be treated as such for policy reasons.

The decision, written by Justice Marvin Baxter, erases what was once a \$28 million punitive damages award won by real estate developer Talbot Partners against bond issuer Transamerica Insurance Co., now known as TIG Insurance Co.

Surety bonds, a common feature in construction projects, require the issuer to step in to complete a developer's project in the event the contractor walks off the job or goes belly-up.

Talbot hired Cates Construction Inc. to build condos in Malibu, and bought a surety bond from Transamerica Insurance. But when a dispute over construction costs arose and Cates walked away, Transamerica blamed Talbot and refused to act. After losing the project to the bank, Talbot accused Transamerica of acting in bad faith.

Although surety bonds are listed in regulations that govern the insurance industry, Baxter said they lack the hallmarks of insurance contracts. He also said the unusual three-way relationship between the issuer, the contractor and the developer puts issuers in an impossible spot.

Allowing developers "to wield the club of tort and punitive damages may make it easier to pressure sureties into paying questionable default claims," Baxter wrote, "because the sureties will be reluctant to risk the outcome of a tort action."

Dissenting Justice Stanley Mosk suggested, however, that bond purchasers going after the likes of Transamerica need more than just a club.

Swiping at Baxter's suggestion that a bad faith remedy wasn't needed because developers and other purchasers have bargaining power, Mosk wrote, "It is unlikely that a mammoth insurer like Transamerica -- an economic entity that counts money in the billions of dollars and dwarfed the now-defunct Talbot and Cates when they were in business -- would engage in negotiations" with Talbot over the terms.

Mosk also said surety bonds are insurance. Justices Joyce Kennard and Kathryn Mickle Werdegarr signed Mosk's dissent, while Baxter was joined by Chief Justice Ronald George and Justices Ming Chin and **Janice Rogers Brown**.

"The court is saying, 'We're only going to turn a breach of contract into a tort in the very limited

relationship that exists between an insurer and an insured," said Barry Levy, who argued the case for Transamerica.

Talbot's counsel, Paul Shoop of Malibu's Shoop & Leanse, could not be reached.

Although Thursday's decision turned on whether surety bonds are insurance contracts, the majority's discussion of the policy reasons against tort damages for breach of contract parallels the ongoing debate over a bill, now pending before Gov. Gray Davis, that would bring back third-party bad faith.

Levy, a partner at Encino's Horvitz & Levy, said the majority opinion "certainly highlights some of the problems that exist with the legislation" that would undo *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal.3d 287, the 11-year-old case that ended third-party bad faith claims.

Indeed, Baxter relied on *Moradi-Shalal* in fretting about the litigation "club" the tort would hand to developers.

It's worth noting that *Cates Construction v. Talbot*, 99 C.D.O.S. 6021, has not only attracted the attention of the seven sitting justices, but three of their former colleagues, as well. The contract claims were tried to retired Justice David Eagleson, while two other Supreme Court retirees, Armand Arabian and Marcus Kaufman, are co-counsel for Talbot.

Reporter Greg Mitchell's e-mail address is gmitchell@therecorder.com.

LOAD-DATE: August 2, 1999

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View Related Topics

JULY 30, 1999, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A19

LENGTH: 891 words

HEADLINE: Supreme Court Curbs Three Strikes' Sentencing;

Some juvenile cases will not be counted

BYLINE: Harriet Chiang, Chronicle Legal Affairs Writer

DATELINE: STATE

BODY:

The California Supreme Court yesterday limited the reach of the "three strikes" sentencing law, ruling that a residential burglary conviction in juvenile court cannot be counted as a strike.

By a unanimous vote, the court threw out an eight-year prison term for a San Diego man who was sentenced under the three-strikes law because he had a previous conviction in juvenile court for residential burglary.

The decision is a rare setback for prosecutors and could have a far-reaching impact because burglary is one of the most common offenses in juvenile court. Minors account for 40 percent of all burglaries, according to FBI statistics.

The court is "backing off" from its previous strict interpretation of the law, said Frank Zimring, a criminal law professor at Berkeley's Boalt Hall School of Law. "I think they're more comfortable in the current political culture, so they don't have to look over their shoulder," he said.

It is uncertain exactly how many cases will be affected because the state Department of Corrections does not have a breakdown on the types of prior convictions that have been counted as strikes.

Gary Nichols, the San Diego deputy public defender who challenged the law, said the ruling could affect "potentially thousands of cases throughout the state." He said that his office is expected to challenge the sentences of dozens of people because of the court's decision.

But the impact of the decision may vary, depending on the county. The San Diego district attorney's office is one of the most aggressive enforcers of the three-strikes law. Lawyers in Alameda and San Francisco counties, where the law is used sparingly, say that the decision will not have a big impact on their cases.

"We normally don't charge nonviolent offenses as strikes anyway," said Alameda County District Attorney Tom Orloff.

The law originated after Mike Reynolds of Fresno, whose daughter was murdered by a repeat felon, urged lawmakers to find a way to end the revolving-door syndrome in state prisons. After the murder of Polly Klaas, the measure sailed through the Legislature and was signed into law by then-Gov. Pete Wilson in 1994.

Under the law, a defendant who has two prior convictions for a serious or violent felony can receive 25 years to life if convicted of any third felony -- or strike. A felon with one prior strike can receive double the normal sentence.

Only adults can be prosecuted under the law.

Since its passage in 1994, 47,861 felons have been sentenced under the law, including 5,419 who have received sentences of at least 25 years to life in prison.

More than a third have been for property-related crimes.

But there has been a dispute over whether all juvenile offenses count as strikes.

The court cleared up the ambiguity yesterday by ruling that only those juvenile offenses that are serious enough to be tried in adult court qualify as strikes, including the sale of certain drugs, rape, robbery and other violent crimes. Those not on the list include residential burglaries, theft of a firearm and unarmed robberies.

The justices rejected the state attorney general's argument that they interpret the law broadly to ensure longer prison terms for anyone with a prior conviction for a serious or violent felony.

The court said that would mean rewriting the three-strikes law.

"We must limit ourselves to interpreting the law as written, and leave for the People and the Legislature the task of revising it as they deem wise," wrote Justice Kathryn Mickle Werdegard in the court's opinion.

In a separate opinion, Justice Marvin Baxter said that authors of the law made a "drafting error" and did not intend to limit juvenile offenses that count as strikes. He said he would not be surprised if the Legislature responded to the court's ruling by amending the law.

Nonetheless, he agreed with the majority that it is up to the lawmakers and not the court to rewrite the statute.

Justice **Janice Rogers Brown** also disagreed with the majority's reasoning, saying that the law would require minor revisions. But she agreed with the final result.

Legal scholars say that the decision is important because it shows that the state Supreme Court is exercising more flexibility in interpreting the law.

In the leading case on the law, the high court ruled in 1997 that judges have the authority to reduce sentences under the three-strikes law if they feel it would be just. But since then, most of its decisions have favored a tough interpretation of the law.

The court is "pulling back" on the three-strikes law, said San Francisco Public Defender Jeff Brown. "The last thing you need is the Supreme Court rewriting legislation so that we can include more people in the three-strikes net," he said.

In the San Diego case, Edwin Garcia was barely 18 years old when he was arrested and convicted of burglary. He was facing a sentence of four years in prison. But because he had a prior residential burglary conviction in juvenile court when he was a minor, the prosecutor charged him under the three-strikes law. As a result, he received an eight-year prison sentence, double the usual term.

He has already served more than four years in prison. Nichols said that he will immediately seek Garcia's release.

The case is People vs. Edwin Gilmore Garcia, S059302

LOAD-DATE: July 30, 1999

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July 28, 1999, Wednesday

SECTION: Pg. 4

LENGTH: 422 words

HEADLINE: Federal Statute Preempts Tort Action Over Railroad Safety Equipment--S.C.

BYLINE: By a MetNews Staff Writer

BODY: Federal law bars state tort suits for injuries alleged to result from

the lack of appropriate safety equipment on railroad freight cars, the state Supreme Court ruled yesterday.

In a 6-1 decision, the justices overturned a contrary ruling of this

district's Court of Appeal and a \$ 1.4 million judgment in favor of Jose Carrillo, a truck driver who fell while trying to reposition a steel hose used to transfer his cargo of polystyrene pellets from his truck to a railroad boxcar.

Carrillo sued ACF Industries, Inc., the manufacturer of the boxcar, on theories of strict liability for design defect and failure to warn. His lawyers argued that the top walkways on the boxcar's roof hatches should have been equipped with a high railing or a lower railing to which a lanyard and safety harness could be attached as protection against falls.

ACF argued that it could not be held liable because the safety devices cited by the plaintiff aren't required by the Safety Appliance Acts and the Federal Railroad Safety Act.

Justice Janice Rogers Brown, writing for the high court, agreed. Railroad equipment safety, she concluded, is a subject as to which a uniform rule is required, preempting the application of tort standards which vary from state to state.

Citing U.S. Supreme Court rulings, Brown wrote:

"That insight is as true now as it was in the glory days of rail a century ago. In our modern rail system, individual freight cars are treated interchangeably as 'free runners,' traveling on continent-wide routes and multiple roads in an interstate system that knows no boundaries....Standardization of safety devices is thus vital, and employees depend upon the certainty that at all times and in all weather conditions they 'will find them in like place and of like size and usefulness on all cars, from whatever line of railway or section of the country they may come.'"

Justice Stanley Mosk argued in dissent that because the implementing regulations of the federal statutes do not specify whether the protective devices cited by the plaintiff are required, states are not precluded from applying their own laws. States, he said, have traditionally been allowed "to regulate railroad safety as to matters not covered by federal regulation."

Attorneys who argued in the Supreme Court were Ellis Horvitz of

Encino's Horvitz & Levy for the defendant and Jerome Ringler of Santa Monica's Fogel, Feldman, Ostrov, Ringler & Klevens for the defendant.

The case is Carrillo v. ACF Industries, Inc., 99 S.O.S. 5916.

LOAD-DATE: August 5, 1999

The Associated Press State & Local Wire

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July 22, 1999, Thursday, PM cycle

SECTION: State and Regional

LENGTH: 484 words

HEADLINE: Court rejects appeal by partner who sought visitation

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Despite pleas by gay-rights groups, the state Supreme Court has turned down an appeal by an Alameda County woman who sought the right to visit two children she helped raise with her lesbian partner.

An appellate court ruled in April that the woman, Kathleen C., had no parental rights because she was not the biological mother, and because there was no evidence that the children were being harmed by living with their biological mother.

The state's high court denied review of the case Wednesday. Only Justices Stanley Mosk and Janice Rogers Brown voted to grant a hearing, two short of the needed majority. The appellate ruling is now binding on trial courts statewide.

The case was closely watched by gay-rights groups, who wanted California to follow a handful of court rulings in other states that have granted parental rights to former members of same-sex couples.

Kathleen and her partner, Lisa W., started living together in February 1985, when Lisa's daughter was almost 3. They had a child together by artificial insemination in 1987 and separated in 1990.

Kathleen was allowed to visit the children on alternate weekend until November 1994, when Lisa cut off visitation.

Kathleen argued that she should be considered the children's "de facto parent," one who develops a parent-like relationship by providing daily care, affection and concern over a long period.

An appellate court in New Jersey ruled this March that a woman who had helped her lesbian partner raise two children was a "psychological parent" entitled to visitation. Courts in Wisconsin and Pennsylvania have also granted limited parental rights to former members of lesbian couples.

But Alameda County Superior Court Judge Roderic Duncan ruled against Kathleen C. and was upheld by the 1st District Court of Appeal.

Kathleen had shown the characteristics of a "de facto parent," but there is no legal authority to grant a non-parent visitation rights "over the objection of the biological parent and in the absence of any showing of detriment to the child," said the opinion by Presiding Justice Daniel Hanlon.

The ruling means Kathleen cannot see the children until they turn 18. They are now 17 and 12.

The state Supreme Court appeal drew support from the National Center for Lesbian Rights, the Youth Law Center, the American Civil Liberties Union and other advocacy groups.

The appellate ruling "leaves the two children ... locked in the embrace of but one of their mothers, denied by her - and by the courts of this state - any contact with the other woman they call 'Mom,'" said E. Elizabeth Summers, a lawyer for Kathleen, in court papers.

She acknowledged that a lesbian partner can get parental rights by adopting the child with her partner, but said not all California counties, or judges in the same county, allow adoptions by same-sex couples.

The case is Guardianship of Z.C.W., S079355.

LOAD-DATE: July 22, 1999

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The Recorder

View Related Topics

July 22, 1999, Thursday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES TAKE UP BONDS DIVORCE CASE

BYLINE: Greg Mitchell

BODY:

Barry Bonds has finally made the legal big leagues: On Wednesday, his nasty divorce landed in the California Supreme Court.

Six of the justices agreed to review a court of appeal decision that lawyers for the baseball slugger say completely rewrote the rules on what constitutes "voluntary" entry into a prenuptial agreement.

Also on Wednesday, the justices rejected pleas to review an appellate ruling in a lesbian couple's custody dispute. A First District Court of Appeal panel had found that non-biological, non-adoptive parents have no standing to assert custody and visitation rights over a natural mother's children.

Barry and Sun Bonds married in 1988 after a short courtship. The day before the wedding, Barry's lawyers presented Sun with a prenuptial agreement that said Barry -- then a minor leaguer earning \$106,000 -- would keep all his earnings should the two wind up divorcing.

By the time the couple's six-year marriage ended, Barry was earning \$8 million a year playing left field for the San Francisco Giants. The trial judge presiding over the divorce said the prenup was valid.

But in April, a divided First District panel said Sun hadn't entered the agreement voluntarily and tossed it out.

The author of the majority opinion, Justice James Lambden, noted that Barry had two lawyers and a financial adviser at his side while Sun just had a friend from Sweden who spoke little English. Lambden said the agreement was difficult to understand and said Barry pressured Sun to sign by telling her that the wedding would be off if she didn't. Lambden also said Barry's lawyers hadn't told Sun they only represented Barry's interests, and not hers. Justice J. Anthony Kline joined that opinion.

Justice Ignazio Ruvolo dissented, protesting what he said was the creation of a new requirement that both parties to a prenup have counsel, a requirement he said could sink thousands of existing prenups and was contrary to the Legislature's intent.

After Barry's attorneys filed a petition for rehearing, the First District modified its opinion and gave Barry another chance to prove at trial that Sun had entered the agreement voluntarily.

In petitioning the high court for review, Barry's appellate attorney, Richard Sherman, said Lambden's decision placed existing prenuptial agreements in legal limbo. Sherman, of Berkeley's DeGoff & Sherman, also said the decision "could spawn a flood of malpractice lawsuits against attorneys who were not prescient enough to anticipate the new rules" and discourage attorneys from assisting clients with drafting prenuptials.

Sun's appellate attorney, Paige Wickland, said the court was obviously interested in the kinds of marital rights that can be waived in premarital agreements, as well as how those rights are waived. "I'm looking forward to the opportunity to discuss the public policy issues," said the partner at San Francisco's Fancher & Wickland.

All of the justices except Kathryn Mickle Werdegard voted to take up In re Marriage of Bonds, S079760. SAME-SEX CUSTODY

Despite pleas from lesbian civil rights groups who say a First District ruling ignored the fact that same-sex couples cannot marry in California, only Justices Stanley Mosk and **Janice Rogers Brown** voted to take up Guardianship of Z.C.W. and K.G.W., S079355.

First District Justice Daniel Hanlon turned away Kathleen Crandall's bid to establish the custody and visitation rights that a married non-biological parent has in California. Crandall lived with former partner Lisa Wagner for five years and helped raise Wagner's two biological children, now 12 and 17.

Crandall's attorneys billed the dispute as a ground-breaking civil rights case.

Though Hanlon agreed that Crandall had acted like a de facto parent -- which, had she been married, would allow her to seek custody and visitation rights -- he said the problem was best addressed by the Legislature. Reporter Greg Mitchell's e-mail address is gmitchell@therecorder.com.

LOAD-DATE: July 22, 1999

The Associated Press State & Local Wire

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July 21, 1999, Wednesday, AM cycle

SECTION: State and Regional

LENGTH: 504 words

HEADLINE: Court rejects appeal by partner who sought visitation

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

The state Supreme Court rejected an appeal Wednesday by a woman who helped her lesbian partner raise two children and sought visitation after the couple broke up.

The Alameda County case was closely watched by gay-rights groups, who wanted California to follow a handful of court rulings in other states that have granted parental rights to former members of same-sex couples.

But an appellate court ruled in April that the California woman, Kathleen C., had no parental rights because she was not the biological mother, and because there was no evidence that the children were being harmed by living with their biological mother.

Only Justices Stanley Mosk and **Janice Rogers Brown** voted for Supreme Court review of the case, two short of the majority needed on the seven-member court. The appellate ruling is now binding on trial courts statewide.

The ruling means Kathleen cannot see the children until they turn 18. They are now 17 and 12.

Kathleen and her partner, Lisa W., started living together in February 1985, when Lisa's daughter was almost 3. They had a child together by artificial insemination in 1987 and separated in 1990.

Kathleen was allowed to visit the children on alternate weekend until November 1994, when Lisa cut off visitation. She got a restraining order against future contacts after Kathleen visited them surreptitiously several times in 1996.

In seeking visitation, Kathleen argued that she should be considered the children's "de facto parent," one who develops a parent-like relationship by providing daily care, affection and concern over a long period.

An appellate court in New Jersey ruled this March that a woman who had helped her lesbian partner raise two children was a "psychological parent" entitled to visitation. Courts in Wisconsin and Pennsylvania have also granted limited parental rights to former members of lesbian couples.

But Alameda County Superior Court Judge Roderic Duncan ruled against Kathleen C. and was upheld by the 1st District Court of Appeal.

Kathleen had shown the characteristics of a "de facto parent," but there is no legal authority to grant a non-parent visitation rights "over the objection of the biological parent and in the absence of any

showing of detriment to the child," said the opinion by Presiding Justice Daniel Hanlon.

The state Supreme Court appeal drew support from the National Center for Lesbian Rights, the Youth Law Center, the American Civil Liberties Union and other advocacy groups.

The appellate ruling "leaves the two children ... locked in the embrace of but one of their mothers, denied by her - and by the courts of this state - any contact with the other woman they call 'Mom,'" said E. Elizabeth Summers, a lawyer for Kathleen, in court papers.

She acknowledged that a lesbian partner can get parental rights by adopting the child with her partner, but said not all California counties, or judges in the same county, allow adoptions by same-sex couples.

The case is Guardianship of Z.C.W., S079355.

LOAD-DATE: July 22, 1999

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Metropolitan News-Enterprise; Capitol News Service

July 9, 1999, Friday

SECTION: Pg. 5

LENGTH: 879 words

HEADLINE: Intervening Employer Can't Collect Legal Fees Out of Worker's Recovery--S.C.

BYLINE: By a MetNews Staff Writer

BODY: An employer who intervenes in an employee's third-party tort action in order to recover workers' compensation benefits is not entitled to take a share of its legal fees and costs out of the employee's portion of the recovery, the state Supreme Court ruled yesterday.

"Consistent with...the law in a substantial majority of our sister states, we have concluded that under [Labor Code] section 3860(e) the fees awarded to the employer's attorney and the employer's pro rata share of other litigation costs are to be deducted from the amount paid to the employer out of the settlement proceeds as reimbursement for its workers' compensation expenses," Justice Joyce L. Kennard wrote.

Kennard was joined by Justices Marvin Baxter and Ming Chin. Chief Justice Ronald George, joined by Justice Kathryn Werdegarr, concurred separately, while Justice Stanley Mosk authored a dissent for himself and Justice **Janice Rogers Brown**.

The high court ruled in favor of injured truck driver Rick B. Summers, who had resisted payment of \$ 25,600 in fees and costs to his employer, A. Teichert & Sons, Inc. His lawyer, who said the time he spent on the issue was worth more than the disputed amount, said he fought the case "as a matter of principle."

The employer's position was "completely outrageous," Sacramento attorney Timothy Smith told the MetNews. "Injured employees shouldn't have to pay the employer's fees for unnecessarily intervening," he said, calling employer intervention "completely detrimental to [the employee's] case."

Teichert's attorney, Franklin Gumpert, said he may ask for rehearing once he has a chance to talk to his client.

Summers, who was hit head-on by another trucker in a Sacramento County accident, sued several defendants in a case that was settled for \$ 575,000 plus an assignment valued at \$ 425,000 of claims against the insurers of some of the defendants.

Teichert which intervened in order to protect its claim for \$ 135,000 it paid to Summers in workers' compensation benefits claimed that Summers was liable for a pro rata share of the company's legal expenses, payable out of the settlement. Since Summers disputed that claim, it was agreed that the plaintiff would repay the workers' compensation benefits out of his \$ 575,000 payment, while the additional \$ 25,600 would be set aside pending court order.

A Sacramento Superior Court judge ruled that Teichert was entitled to the disputed sum, and the Third District Court of Appeal affirmed.

But Kennard said the lower courts' rulings were unfair and inconsistent with the intent of Sec. 3860 (e), which provides that "prior to reimbursement of the employer...there shall be deducted from the

amount of the settlement the reasonable expenses incurred by both the employer and the employee or on behalf of either, including costs of suit, if any, together with reasonable attorneys' fees to be paid to the respective attorneys for the employer and the employee, based upon the respective services rendered in securing and effecting settlement for the benefit of the party represented."

Kennard cited *Quinn v. State of California* (1975) 15 Cal.3d 162, which construed another workers' compensation provision, Sec. 3856. The high court held that where the employer obtained reimbursement of workers' compensation benefits solely through the efforts of the employee's attorney, the employer was responsible for a pro rata share of the worker's legal costs.

"We are aware of no analogous situation in which all attorney fees and other litigation expenses are charged against the share of just one of the parties benefiting from the litigation or, stated differently, in which one of the two parties benefiting from the litigation would be required to contribute nothing even to the payment of its own attorney," Kennard wrote.. "Thus, construing section 3860(e) to require that the fee paid to the employer's attorney be deducted from the employer's reimbursable compensation costs is more consistent with general principles of law applied in analogous situations."

The alternative, Kennard said, would be a "startling anomaly" in which an employer who doesn't participate in the litigation would have to pay a share of the employee's legal costs, but an employer who does participate wouldn't have to pay any legal costs at all. "We can conceive of no legitimate legislative purpose to be served by this disparate treatment...", the jurist wrote.

Mosk, in dissent, took issue with Kennard's fairness argument:

"[A]s between the employee who has suffered injury and the innocent employer who has paid him workers' compensation benefits therefor, it is altogether 'fair' for the employer to obtain reimbursement for the costs of such benefits out of the proceeds of the settlement of the action against the third party responsible for the injury prior to, and in reduction of, what the employee may obtain as a remainder, inasmuch as the employee has already obtained, and will retain, the workers' compensation benefits paid to him by the employer. That is because it would be 'unfair' for the employee to get more for himself if the employer did not first receive back what he gave."

The case is *Summers v. Newman*, 99 S.O.S. 5443.

LOAD-DATE: August 5, 1999

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The Recorder

View Related Topics

July 7, 1999, Wednesday

SECTION: NEWS; PG. 1

HEADLINE: HIGH COURT'S BROWN-OUTS ARE FADING

BYLINE: Greg Mitchell;
Reporter Greg Mitchell's e-mail address is gmitchell@therecorder.com.

DATELINE: It's easy

BODY:

almost too easy -- to draw parallels between California Supreme Court Justice **Janice Rogers Brown** and U.S. Supreme Court Justice Clarence Thomas.

Most obviously, both are conservatives, and both became the second African- Americans to ascend their respective benches.

And for each, the ascent itself was ugly: Thomas' self-described "high-tech lynching" dragged porn character Long Dong Silver into the lexicon. Brown's climb was, thankfully, far more dignified, but embarrassing nonetheless: It was leaked out that the Judicial Nominees Evaluation Committee had found her " not qualified" for the job.

More enduringly, each judge has earned a reputation for staying silent during oral argument, a reputation that may prove hard to shake.

But it may be time to retire Brown's reputation for reticence, as it appears she's found her voice in recent months. And it's a surprisingly gentle one -- surprising, anyway, to those who know her only through her blustery, blistering written work.

To be sure, Brown remains the least active questioner on the seven-member bench. But her queries are now coming with far more frequency.

For most of her first three years on the high court, Brown's occasional forays into argument had been brief and for the most part unremarkable. One colorless question, maybe two. Even when faced with evasive answers, she wouldn't press the point as her colleagues are prone to do. Sometimes she'd sit through a six-hour calendar without asking any questions.

But even though she's become more active at oral argument, her questions -- unlike her written opinions -- still have little bite and even less bile.

The seeming paradox may simply stem from Brown's personality. At the court, those who know her consider her to be a very private person. She's friendly and gracious, but quiet.

But her approach to those who come to the podium may also reflect how she views the purpose of oral argument.

Her colleagues put their so-called questions to a wide range of purposes, only one of which is to obtain clarification on a particular point. (By the time a case is called, the court's written opinions are already in draft form.)

Oftentimes, a justice's comment isn't aimed at the lawyers but at a colleague down the bench who happens to be on the opposite side of the issue. (Justice Joyce Kennard -- the court's chatterbox -- will sometimes call one of her own questions an "argument.")

And sometimes a pointed question is posed mostly to scold an attorney for taking an absurdly untenable position, or for playing fast and loose with precedent or procedure.

But Brown almost never harangues anyone from the bench, even when she hears a statement or assertion that must make her blood boil.

One notable exception came two years ago in the unfair competition case Stop Youth Addiction v. Lucky Stores, 17 Cal.4th 573.

Brown ended up writing a dissent that teed off on the masses of judges who she said had erred by broadly construing the law over the years.

But at the argument, her anger seemed to focus mostly on Albany attorney Donald Driscoll's practice of using underage decoys to prove stores sold tobacco to kids.

"So you were actually having minors go in and purchase cigarettes?" she asked, with a mix of anger and astonishment.

BROWN POUNCES

Although Brown slung multiple questions at counsel in a host of cases argued during the court's five-day June calendar, she was particularly aggressive in Vandenburg v. Superior Court, S067115. The case concerns whether conclusions reached by a private arbitrator can preclude litigating the same issues in subsequent insurance coverage litigation.

Instead of hanging back and waiting for an opening, as has been her custom in the past, she pounced on an attorney for one of the insurers as soon as he began to speak. She fired off a series of detailed questions, and even cut the lawyer off. "I understand that," she said impatiently, before pressing on to her next question.

In another case last month, she teamed up with Justice Stanley Mosk, who was torturing a deputy attorney general who showed up to argue that a sex offender registration law doesn't violate the ex post facto prohibition because its a civil regulation, not a criminal sanction. "How can you say its not a criminal penalty when the defendant ends up in jail?" demanded Mosk. "That's penal."

But Brown's approach was more subtle. "You said the purpose of the ex post facto prohibition was to ensure awareness of the consequences. Didn't the consequences change here?" she asked.

And even when Brown does lard a dose of argument into a question, it's a far cry from what she pours into her opinions. Indeed, of all the justices, Brown is least likely to get into a lather on the bench.

A good example is 1997's divisive abortion case, American Academy of Pediatrics v. Lungren, 16 Cal.4th 307. At the argument, Brown opined that a position advanced by the American Civil Liberties Union was "a radical idea."

But Brown came out swinging in her written dissent, calling Chief Justice Ronald George's plurality opinion an "excellent example of the folly of courts in the role of philosopher kings."

In short, Brown eschews drama at oral argument and focuses instead on the dry details of decision making.

But despite her growing interest in oral advocacy, Brown passed up on a chance earlier this year to

extol its virtues.

Last November, the justices took up the question of whether reviewing courts must allow for oral argument before summarily reversing obvious trial court errors. Brown had one question: Even if dispensing with oral argument might be more efficient, she asked, "don't we have to deal with our prior cases? How do we do this without overruling them?"

That sounded pretty innocuous, but the dissenting opinion she released got off to a snide start: "This is a simple case. Or at least it ought to be," she wrote in *Lewis v. Superior Court*, 99 C.D.O.S. 1031. She then accused the majority of drawing an "arbitrary and senseless distinction" between writs and appeals in order to skirt its own precedents requiring oral argument.

But the opinion didn't harp on the importance of oral argument. In fact, Brown wrote that she was willing to reconsider some of the earlier rulings she believes requires giving parties time to plead a case in person.

And Brown withheld her signature from Justice Kennard's impassioned dissent, which closed with a quote from a federal judge: "An oral argument is as different from a brief as a love song is from a novel. It is an opportunity to go straight to the heart!"

Brown may not buy into that sentiment. And she may never come to dominate oral arguments. But if recent arguments offer any guide, Brown can no longer be counted on to sit them out.

LOAD-DATE: July 7, 1999

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Pension Fund Litigation Reporter

June 24, 1999

SECTION: Vol. 10; No. 12; Pg. 4

LENGTH: 786 words

CASE: ESOPs:StorMedia Inc. v. Werczberger

HEADLINE: CA Sup. Ct. Upholds State's Open-Door Policy to Securities Fraud Class Actions

BODY:

The California Supreme Court has declared that a company's sale of shares through its employee stock ownership plan (ESOP) makes it a "seller" of securities under the California Corporations Code, thereby subjecting companies with ESOPs to nationwide class actions filed in state court. *StorMedia Inc. et al. v. Werczberger et al.*, No. S062661 (CA Sup. Ct, May 27, 1999).

The decision maintains the expansive scope of the state's securities laws, allowing plaintiffs' attorneys to avoid the stringent pleading requirements contained in the Private Securities Litigation Reform Act of 1995 (PSLRA) by filing in state court.

Background

The plaintiffs had successfully alleged in state court that StorMedia and its officers had misrepresented the company's fiscal prospects and that the sale of stock through its ESOP and put option plans constituted sufficient "market activity" under Secs. 25400(d) and 25500 of California's Corporations Code. The decision was appealed, briefed and argued to the state high court in 1998, but the company filed bankruptcy soon thereafter and the case was stayed. The stay was lifted on May 17, 1999.

Currently there are at least two other pending appeals before the California Supreme Court addressing the same issue which was stayed by the StorMedia bankruptcy: *In re S3 Securities Litigation and Learning Tree International Inc. v. Guthrie*. The StorMedia decision, however, will only affect pending cases due to the passage of federal legislation in November 1998 which eliminated such claims from being filed in state courts.

The Appeal

Like the other pending appeals, StorMedia challenged the lower court decision on the basis that the company did not conduct a stock offering or otherwise sell its stock to the general public during the class period; instead, the company's stock was traded exclusively between third parties on the open market.

StorMedia and amicus curiae Adobe Systems Inc. argued that giving employees stock options as part of their compensation is different from the stock sales that Secs. 25400(d) and 25500 sought to regulate. Any company with an ESOP will become the target for plaintiff attorneys to use the state securities laws to bypass the PSLRA, the defense maintained.

Plaintiffs, on the other hand, argued that shareholders who are employees of a company are still defrauded by misrepresentations that artificially boost the stock price and deserve the same protection as other investors.

The California Supreme Court's Opinion

By the same 5-2 margin as the Diamond Multimedia decision, the court held that securities transactions covered under Sec. 25400(d) include the sale of shares through a company's employee stock incentive plan or ESOP. The court rejected StorMedia's argument that Sec. 25400(d) predicates liability on the sale of securities on the open market, finding no such express or implied requirement in the statute.

"Since StorMedia sold shares to employees pursuant to the employee stock purchase plan and sold shares pursuant to the exercise of other stock options, it did sell securities during the class period," the court held.

The court further dismissed defense contentions that because its alleged misrepresentations were not directed at its employees, such sales pursuant to its employee stock purchase plan should not be considered in determining whether it is a "seller" under Sec. 25400(d).

"The conduct is unlawful regardless of whether any person actually purchases the stock, and it is not necessary that the defendant intend to induce the sale or purchase which qualifies the defendant as a seller or purchaser under Sec. 25400(d)," the court said. The court also rejected defense claims that out-of-state purchases of securities are not protected by the state's securities laws, based on the Diamond Multimedia decision.

Citing their dissent in Diamond Multimedia, Justice **Janice Rogers Brown** and Justice Ming Chin again reiterated their opinion that defrauded out-of-state investors have no right to sue under California's securities laws.

StorMedia was represented by James A. DiBoise, Lloyd Winawer, Michael J. Levy, Shirley C. Wang and Jonathan Block with Wilson Sonsini Goodrich & Rosati. Amicus curiae Adobe Systems Inc. was represented by Jeffrey S. Facter and Michel F. Kyrouz with Shearman & Sterling.

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(See Document Section B for the opinion.)

LOAD-DATE: July 20, 1999

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Computer & Online Industry Litigation Reporter

June 15, 1999

SECTION: Vol. 16; No. 18; Pg. 11

LENGTH: 806 words

CASE: Securities Fraud:StorMedia v. Werczberger

HEADLINE: CA Sup. Ct. Upholds State's Open Door Policy to Securities Fraud Class Actions

BODY:

The California Supreme Court has declared that a company's sale of shares through its employee stock option plan (ESOP) makes it a "seller" of securities under the California Corporations Code, thereby subjecting companies with ESOPs to nationwide class actions filed in state court. The decision maintains the expansive scope of the state's securities laws, allowing plaintiffs' attorneys to avoid the stringent pleading requirements contained in the Private Securities Litigation Reform Act of 1995 (PSLRA) by filing in state court. *StorMedia Inc. et al. v. Werczberger et al.*, No. S062661 (CA Sup. Ct, May 27, 1999); see *Computer & Online Industry LR*, Feb. 3, 1998, P. 10.

Background

The plaintiffs had successfully alleged in state court that StorMedia and its officers had misrepresented the company's fiscal prospects and that the sale of stock through its ESOP and put option plans constituted sufficient "market activity" under Secs. 25400(d) and 25500 of California's Corporations Code. The decision was appealed, briefed and argued to the state high court in 1998, but the company filed bankruptcy soon thereafter and the case was stayed. The stay was lifted on May 17, 1999.

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Plaintiffs, on the other hand, argued that shareholders who are employees of a company are still defrauded by misrepresentations that artificially boost the stock price and deserve the same protection as other investors.

The California Supreme Court's Opinion

By the same 5-2 margin as the Diamond Multimedia decision (see *Diamond Multimedia Systems Inc. v. Pass*, P. 10), the court held that securities transactions covered under Sec. 25400(d) include the sale of shares through a company's employee stock incentive plan or ESOP. The court rejected StorMedia's argument that Sec. 25400(d) predicates liability on the sale of securities on the open market, finding no such express or implied requirement in the statute.

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"The conduct is unlawful regardless of whether any person actually purchases the stock, and it is not necessary that the defendant intend to induce the sale or purchase which qualifies the defendant as a seller or purchaser under Sec. 25400(d)," the court said. The court also rejected defense claims that out-of-state purchases of securities are not protected by the state's securities laws, based on the Diamond Multimedia decision.

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(Call 800-345-1101 for the 19-page opinion.)

LOAD-DATE: July 23, 1999

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The Recorder

View Related Topics

June 15, 1999, Tuesday

SECTION: COURT WATCH; PG. 4

HEADLINE: BROWN'S QUOTATIONS COME BACK, WITH BITE

BYLINE: Greg Mitchell

BODY:

Fourth District Court of Appeal Justice Thomas Crosby Jr. is rarely at a loss for words.

But apparently in need of a little something to spice up a dissent issued Friday, Crosby passed over Bartlett's Quotations for what is fast becoming its judicial equivalent: the opinions of California Supreme Court Justice **Janice Rogers Brown**.

Brown has produced more memorable lines and sharp soundbites in her three years at the court than most of her colleagues have in their careers.

Her latest contribution, uncorked two weeks ago, colorfully accused her colleagues of bowing to political expediency in a Three Strikes ruling.

Brown said the voters who passed Three Strikes didn't want a "just" sentencing scheme, but a guarantee of "swift, certain and harsh retribution."

But she opened her opinion with a pithy denunciation of expediency sure to find its way into other opinions.

"This case," Brown wrote in People v. Garcia, 99 C.D.O.S. 4094, "asks the age-old question: Does judicial commitment to principle matter? The majority gives the modern answer. Not if it gets in the way of expediency."

Unlike fine wines, Brown's vintage lines need not age before they can be appreciated.

It took Crosby just 10 days to work the quote into Friday's People v. Mejia, 99 C.D.O.S. 4675.

But while Brown was upset with what she saw as a majority bending over backwards to coddle criminals, Crosby employed her words to accuse his colleagues of bending over backwards to convict them.

Rene Mejia was charged with possessing a gun within 1,000 feet of a school. But when police first spotted him, the car he was traveling in was apparently straddling that boundary.

The jury asked if it mattered which side of the boundary the gun was on, but the trial judge said it didn't matter: If any part of the car was inside the line, that was enough. Fourth District Justices William Rylaarsdam and Thomas Sills voted to affirm the resulting conviction.

But Crosby said the law says nothing about cars, and the jury should have been told it needed to find that either the defendant or his gun were within the school zone. The majority, he said, was misreading the plain language in order to affirm.

And if the statute is ambiguous, Crosby wrote, then the majority should adopt the construction more favorable to the offender. "They stretch instead to do the opposite," he wrote.

LOAD-DATE: June 15, 1999

Copyright 1999 Andrews Publications, Inc.
Corporate Officers and Directors Liability Litigation Reporter

June 14, 1999

SECTION: Vol. 14; No. 15; Pg. 14

LENGTH: 793 words

CASE: State Securities Fraud:StorMedia Inc. v. Werczberger

HEADLINE: CA Sup. Ct. Upholds State's Open-Door Policy to Securities Fraud Class Actions

BODY:

The California Supreme Court has declared that a company's sale of shares through its employee stock option plan (ESOP) makes it a "seller" of securities under the California Corporations Code, thereby subjecting companies with ESOPs to nationwide class actions filed in state court. The decision maintains the expansive scope of the state's securities laws, allowing plaintiffs' attorneys to avoid the stringent pleading requirements contained in the Private Securities Litigation Reform Act of 1995 (PSLRA) by filing in state court. *StorMedia Inc. et al. v. Werczberger et al.*, No. S062661 (CA Sup. Ct., May 27, 1999); see *Corporate Officers & Directors LR*, Jan. 26, 1998, P. 16.

Background

The plaintiffs had successfully alleged in state court that Stor Media and its officers had misrepresented the company's fiscal prospects and that the sale of stock through its ESOP and put option plans constituted sufficient "market activity" under Secs. 25400(d) and 25500 of California's Corporations Code. The decision was appealed, briefed and argued to the state high court in 1998, but the company filed bankruptcy soon thereafter and the case was stayed. The stay was lifted on May 17, 1999.

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The California Supreme Court's Opinion

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LOAD-DATE: July 9, 1999

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View Related Topics

June 14, 1999, Monday

SECTION: Pg. A5

LENGTH: 333 words

HEADLINE: Calif. judges get leeway on 3-strikes

BYLINE: American Lawyer Media

DATELINE: San Francisco

HIGHLIGHT:

But letting judges ignore prior convictions riles one Supreme Court justice.

BODY:

The California Supreme Court has given judges more room to reduce sentences in "three strikes" cases.

A June 1 decision in *People v. Garcia*, No. 99 C.D.O.S. 4094, addressed a relatively narrow issue: whether trial judges have discretion to strike prior convictions in one new case while factoring them in for sentencing on another.

The majority opinion, saying that they do, drew a vehement dissent from Justice **Janice Rogers Brown**, who warned that the majority is thwarting the law by allowing judges too much latitude.

"The Three Strikes law was not about judicial discretion; it was about accountability," Justice Brown wrote. "It was not about 'just' sentences; it was about swift, certain and harsh retribution."

Justice Ming W. Chin, writing for the majority, said that judges may consider the length of a defendant's sentence -- along with such factors as the nature and circumstances of the prior felony cases -- when deciding whether to strike a prior conviction. In fact, Justice Chin wrote, "the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences."

The case involved an ex-convict convicted in two burglaries.

Superior Court Judge Teri Schwartz sentenced him to 30 years to life in prison for one of the burglaries. In the other case, the judge struck all of the prior conviction allegations, citing various mitigating circumstances, such as his cooperation with the police and lack of violent history.

The defendant appealed, arguing that his sentence constituted cruel and unusual punishment.

The state countered that the trial court lacked the authority to strike prior convictions with regard to one conviction and not to the other.

Justice Chin wrote that the court had properly exercised its discretion under cases including the landmark 1996 *People v. Superior Court (Romero)*, 13 Cal. 4th 497, in which the court ruled that the three-strikes law did not eliminate judges' power to dismiss prior offenses.

GRAPHIC: Photo, **DISSENTER BROWN:** Said the law "was not about 'just' sentences." AP/WIDE

WORLD PHOTOS

LOAD-DATE: June 18, 1999

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Securities & Commodities Litigation Reporter

June 9, 1999

SECTION: Vol. 4; No. 19; Pg. 11

LENGTH: 838 words

CASE: State Securities Fraud:StorMedia v. Werczberger

HEADLINE: CA Sup. Ct. Upholds State's Open-Door Policy to Securities Fraud Class Actions

BODY:

The California Supreme Court has declared that a company's sale of shares through its employee stock option plan (ESOP) makes it a "seller" of securities under the California Corporations Code, thereby subjecting companies with ESOPs to nationwide class actions filed in state court. The decision maintains the expansive scope of the state's securities laws, allowing plaintiffs' attorneys to avoid the stringent pleading requirements contained in the Private Securities Litigation Reform Act of 1995 (PSLRA) by filing in state court. *StorMedia Inc. et al. v. Werczberger et al.*, No. S062661 (CA Sup. Ct, Ma y 27, 1999); see *Securities & Commodities LR*, Jan. 28, 1998, P. 7.

Background

The plaintiffs had successfully alleged in state court that StorMedia and its officers had misrepresented the company's fiscal prospects and that the sale of stock through its ESOP and put option plans constituted sufficient "market activity" under Secs. 25400(d) and 25500 of California's Corporations Code. The decision was appealed, briefed and argued to the state high court in 1998, but the company filed bankruptcy soon thereafter and the case was stayed. The stay was lifted on May 17, 1999.

Currently there are at least two other pending appeals before the California Supreme Court addressing the same issue which was stayed by the StorMedia bankruptcy: *In re S3 Securities Litigation* (see *Securities Litigation & Regulation Reporter*, April 28, 1999, P. 3) and *Learning Tree International Inc. v. Guthrie* (see *Securities Litigation & Regulation Reporter*, March 24, 1999, P. 9). The StorMedia decision, however, will only affect pending cases due to the passage of federal legislation in November 1998 which eliminated such claims from being filed in state courts (see *Securities Litigation & Regulation Reporter*, Nov. 11, 1998, P. 13).

The Appeal

Like the other pending appeals, StorMedia challenged the lower court decision on the basis that the company did not conduct a stock offering or otherwise sell its stock to the general public during the class period; instead, the company's stock was traded exclusively between third parties on the open market.

StorMedia and amicus curiae Adobe Systems Inc. argued that giving employees stock options as part of their compensation is different from the stock sales that Secs. 25400(d) and 25500 sought to regulate. Any company with an ESOP will become the target for plaintiff attorneys to use the state securities laws to bypass the PSLRA, the defense maintained.

Plaintiffs, on the other hand, argued that shareholders who are employees of a company are still defrauded by misrepresentations that artificially boost the stock price and deserve the same protection as other investors.

The California Supreme Court's Opinion

By the same 5-2 margin as the Diamond Multimedia decision (see P. 3, herein), the court held that securities transactions covered under Sec. 25400(d) include the sale of shares through a company's employee stock incentive plan or ESOP. The court rejected StorMedia's argument that Sec. 25400(d) predicated liability on the sale of securities on the open market, finding no such express or implied requirement in the statute.

"Since StorMedia sold shares to employees pursuant to the employee stock purchase plan and sold shares pursuant to the exercise of other stock options, it did sell securities during the class period," the court held.

The court further dismissed defense contentions that because its alleged misrepresentations were not directed at its employees, such sales pursuant to its employee stock purchase plan should not be considered in determining whether it is a "seller" under Sec. 25400(d).

"The conduct is unlawful regardless of whether any person actually purchases the stock, and it is not necessary that the defendant intend to induce the sale or purchase which qualifies the defendant as a seller or purchaser under Sec. 25400(d)," the court said. The court also rejected defense claims that out-of-state purchases of securities are not protected by the state's securities laws, based on the Diamond Multimedia decision.

Citing their dissent in Diamond Multimedia, Justice **Janice Rogers Brown** and Justice Ming Chin again reiterated their opinion that defrauded out-of-state investors have no right to sue under California's securities laws.

StorMedia was represented by James A. DiBoise, Lloyd Winawer, Michael J. Levy, Shirley C. Wang and Jonathan Block with Wilson Sonsini Goodrich & Rosati. Amicus curiae Adobe Systems Inc. was represented by Jeffrey S. Facter and Michel F. Kyrrouz with Shearman & Sterling.

Representing the plaintiffs were Patrick J. Coughlin, Leonard B. Simon, William S. Dato, Randi D. Bandman, Spencer A. Burkholz, Amber L. Eck and John K. Grant with Millberg Weiss Bershad Hynes & Lerach and Sandy A. Liebhard and Mel E. Lifshitz with Bernstein Liebhard & Lifshitz.

(See the opinion, Document Section E.)

LOAD-DATE: July 15, 1999

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The Recorder

View Related Topics

June 3, 1999, Thursday

SECTION: NEWS; PG. 1

HEADLINE: MCLE MAY GET A PASSING GRADE

BYLINE: Greg Mitchell;
Reporter Greg Mitchell's e-mail address is gmittell@therecorder.com.

BODY:

School may soon be back in session for California attorneys.

Two years after a court of appeal panel struck down the State Bar's mandatory continuing legal education program, the California Supreme Court sounded ready Wednesday to reinstate it.

But judging by the justices' questions during an hour-long oral argument, they may rewrite -- or even excise -- the exemptions given to lawyer-legislators and law professors.

Lawyers in California have eagerly awaited word from the court on the fate of the program, which requires attorneys to spend several hours a year attending classes.

Most of the justices seemed to accept State Bar attorney James Wagstaffe's argument that any exemptions lacking a rational basis could be severed out.

But the Cooper, White & Cooper attorney gamely defended the exemptions anyway, saying the Legislature could have had a rational basis for leaving out its own members, as well as retired judges and law professors.

Legislators may not need refresher courses because "legislators make the law. Legislators constantly deal with the law," Wagstaffe told the justices, prompting snickers from a handful of attorneys in attendance.

Justice Joyce Kennard tossed Wagstaffe what at first appeared to be a softball. Wouldn't a rational basis for the exemptions be "that these exempted individuals are less likely to represent clients on a full-time basis?"

That would be one basis, replied Wagstaffe.

But Kennard put some heat on her next pitch, asking Wagstaffe if other licensed occupations contained similar exemptions. Could commercial airline pilots be exempted from training exercises "because they fly only a few airplanes?"

No, replied Wagstaffe.

"So why should we be less concerned about consumers of legal services?" she shot back.

That exchange, along with comments made by other members of the court, suggests the justices view the MCLE program as a boon to consumers and see no reason to exempt lawmakers or professors with an active law practice.

But the justices weren't entirely unsympathetic to Lew Warden, whose quest to quash continuing legal education cost him his own bar license.

Warden drew a broad grin from Justice **Janice Rogers Brown** when he called the MCLE program a "Potemkin village."

And Kennard got a laugh from the gallery when she asked the Bar's attorney if the Legislature could properly exempt judges from MCLE.

Sure, said Wagstaffe, with a rational basis the Legislature can draw the line anyplace it wants on judges.

"As long as they are, of course, exempt, right?" she asked.

Wednesday's case, Warden v. State Bar of California, S060702, began in 1993, when Warden, who was then 73, was told he would lose his law license for failure to comply with MCLE.

When his suit landed at the First District Court of Appeal, now-retired Justice J. Clinton Peterson teed off on the oft-ridiculed program, pointing out that its requirements can be met by taking classes on nutrition and stress-reduction techniques, in addition to more traditional offerings on firm management and changes in the law.

Peterson found the program was an unconstitutional burden -- not because of its offerings, but because the exemptions violated the equal protection clause of the Constitution.

In a concurring and dissenting opinion, First District Justice Paul Haerle agreed the exemptions were problematic, but said tossing the entire program "throws the baby out with the proverbial bathwater."

On Wednesday, Bar lawyer Wagstaffe told the justices that as long as the exemptions had some conceivable rational basis, it didn't matter what they were or whether they made much sense to the justices -- or anyone else.

But when it was Warden's turn to argue, Kennard asked if it made sense to exempt law professors because they can keep abreast of developments in the field without need of formal instruction.

"Not the lawyers and professors I know," replied Warden, who was represented by Boalt Hall law professor Stephen Barnett in the case before the two went their separate ways.

Law professors "teach what has happened in the past in the law," continued Warden in his dismissive brogue. "Where's the greater wisdom?"

With State Bar president Raymond Marshall looking on from the gallery, Warden then questioned the Bar's motive for backing legal education in the first place. "It looks to me like there was a play for power," he informed the justices, sketching for them a vision of Bar lobbyists skulking around the Capitol with offers of quid pro quo exemptions.

But Justice Stanley Mosk pressed on to other matters. "Can you justify invalidating the entire statute?" Mosk asked with evident skepticism.

Warden said yes, citing a raft of other perceived infirmities in the program - - such as the fact he himself didn't get a hearing before his ouster for non-compliance. "But maybe I'm wrong," he added.

Perhaps, gauging by the justices' reaction to that line of argument.

Instead, Chief Justice Ronald George asked Warden if he understood that there had been an extensive public comment period before the MCLE rules were finalized.

That didn't happen, replied Warden, and if it did, it wasn't well-advertised. "But maybe I'm wrong," he added again.

Even so, Wagstaffe was peppered with skeptical questions when he returned to the podium for rebuttal.

Kennard mocked what she described as the "broad range" of MCLE offerings. "It can include a trip to the wine country," she reminded Wagstaffe, where frazzled attorneys can learn how "to sip wine and reduce stress."

Wagstaffe said the answer was not to junk continuing education, but to tighten up the regulations on courses that have gone astray.

Kennard also noted that the lawyer-lawmaker exemption extended to all politicians, including the state treasurer and others who don't actually craft new legislation. "How will they keep up with the law?" she asked sarcastically.

And Justice Ming Chin sounded surprised to hear that while government lawyers who enjoy the exemption lose it as soon as they take on a client matter, that doesn't happen with law professors -- even if the legal matter isn't in their area of expertise.

What about a real estate law professor who decides to represent criminal defendants. "Isn't that a problem?" Chin asked.

LOAD-DATE: June 3, 1999

The Associated Press State & Local Wire

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June 2, 1999, Wednesday, PM cycle

SECTION: State and Regional

LENGTH: 608 words

HEADLINE: Court orders dismissal of student newspaper suit

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

The state Supreme Court says a student newspaper waited too long to accuse then-Gov. Pete Wilson and University of California regents of holding illegal secret talks before voting to repeal UC affirmative action.

Tuesday's unanimous ruling dismisses the core of the suit without resolving the question of whether Wilson and individual regents violated open-meeting laws by talking privately, and allegedly committed their votes, before the July 1995 public meeting.

"A cloud of suspicion will always hang over the Wilson administration," said Dan Tokaji, an American Civil Liberties Union lawyer who represented the UC Santa Barbara Daily Nexus and one of its reporters.

But Cynthia Larsen, a lawyer for Wilson's office, said declarations by regents in the court record show that none of them committed their votes to the governor before the meeting. She called the ruling "a complete vindication."

The ruling leaves alive, at least for now, a separate portion of the suit challenging Wilson's refusal to release records of his telephone conversations with regents before the public meeting.

The suit accused Wilson of privately lining up commitments by a majority of regents to vote to outlaw affirmative action at the university before their public vote. The newspaper claimed a violation of a state law requiring public bodies to make decisions in public.

The suit sought to nullify the regents' vote, a request that became largely meaningless when voters barred race and gender considerations in affirmative action programs statewide by passing Proposition 209 in 1996. After that, the Nexus and reporter Tim Molloy said they would be content with a declaration the regents and Wilson had acted illegally.

Wilson and the university denied the allegation but sought to dismiss the suit on other grounds, a law requiring certain types of open-meeting suits to be filed within 30 days of the meeting.

The suit was not filed until February 1996. Molloy explained that he telephoned Wilson's office immediately after the meeting and was told by an unidentified staffer that Wilson had not talked with any regents before the vote.

He said the governor rejected 28 subsequent requests for records, but eventually released information that led him to believe Wilson had improperly secured votes before the meeting.

San Francisco Superior Court Judge William Cahill ruled that the 30-day limit would not apply if evidence of the violation were deliberately concealed, as the suit alleged. The state's high court disagreed, saying a suit that challenged an action at a past meeting must be filed within 30 days, with no exceptions.

The court said the 30-day deadline does not apply to a suit seeking to prevent violations of the open-meeting law - but those suits apply only to present or future meetings and not to past meetings.

The opinion was written by Justice Stanley Mosk. In a separate opinion, Justice **Janice Rogers Brown**, joined by Justice Marvin Baxter, questioned past rulings that applied the open-meetings law to a series of private discussions between members of public boards.

"There is a point beyond which open-meeting requirements may effectively paralyze informed and efficient decision-making," said Brown, Wilson's former legal affairs secretary. "...The ringing rhetoric of the public-meetings acts jibes poorly with political reality."

The ACLU's Tokaji disagreed with Brown, saying California courts have consistently interpreted the open-meeting law to forbid "covert agreements to agree behind closed doors or through secret telephone conversations."

The case is Regents vs. Superior Court, S069688.

LOAD-DATE: June 2, 1999

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Insurance Industry Litigation Reporter

June 2, 1999

SECTION: Vol. 14; No. 23; Pg. 20

LENGTH: 899 words

CASE: Punitive Damages:PPG Industries Inc. v. Transamerica Insurance Co.

HEADLINE: No Indemnity Coverage for Punitive Damages Despite Insurer's Refusal to Settle

BODY:

In a 4-3 decision, the California Supreme Court has ruled an insured may not recover a punitive damages award from its insurer despite the insurer's alleged "unreasonable" failure to settle a third-party suit against the insured. Although the insurer's alleged negligent failure to settle the third-party suit may have led to the award of punitive damages against the insured, the state high court said it was not a proximate cause of the award and, therefore, the insured cannot shift to the insurer its responsibility for the payment of punitive damages. PPG Industries Inc. v. Transamerica Insurance Co., No. S056618 (CA Sup. Ct., May 10, 1999). Background

Plaintiff PPG Industries Inc. was the successor in interest to Solaglas California Inc., a distributor and installer of replacement windshields for cars and trucks. In 1982, George Miller, a Solaglas customer, was driving his truck when another vehicle struck it. The truck's windshield popped out and Miller was ejected from the vehicle, rendering him a quadriplegic. It turned out that Solaglas had used silicone rather than urethane to secure the windshield despite industry safety standards requiring the use of urethane.

Miller sued Solaglas in Colorado, seeking both compensatory and punitive damages. Solaglas tendered the defense to its liability carrier, Transamerica Insurance Co., which had policies totaling \$1.5 million. Transamerica agreed to defend Solaglas, but informed the insured the policies did not provide indemnity coverage for punitive damages.

A jury trial resulted in a judgment for Solaglas, which was overturned on appeal. Miller offered to settle the case for an amount within the limits of Solaglas' liability coverage but Transamerica refused. A second jury then returned a \$6.1 million judgment against Solaglas, including a \$1 million punitive damages award. Solaglas appealed and the Colorado appellate court upheld the awards.

Transamerica paid the policy limit of \$1.5 million plus costs and interest on the judgment. Industrial Indemnity Co., Solaglas' excess liability carrier, paid the remaining \$3.6 million in compensatory damages, leaving PPG, Solaglas' successor in interest, to pay the \$1 million in punitive damages.

In 1994, PPG sued Transamerica in Los Angeles Superior Court for damages, alleging Transamerica had breached the covenant of good faith and fair dealing implied in the insurer's policies by unreasonably refusing to settle the Miller suit. PPG sought to recover from the insurer as compensatory damages the \$1 million it had to pay as punitive damages in the Miller suit.

The trial court granted summary judgment for Transamerica, following the well-established rule prohibiting coverage for punitive damages awarded against an insured. The California Court of Appeal affirmed. The California Supreme Court's Decision

Under California law, an insurer must accept a reasonable settlement offer or risk bad faith liability. Justice Joyce Kennard, writing for the majority, was not persuaded by this logic as she insisted that the windshield company pay the punitive damages. She wrote, "Here, the punitive damages in the

third-party lawsuit were awarded not against the insurance company for its unreasonable failure to settle the lawsuit, but against the insured for the insured's own morally reprehensible behavior in installing the windshield on the truck."

The majority opinion rejected PPG's contention it was entitled to recover from its insurer any monetary award, including punitive damages, it became legally obligated to pay in the Miller suit. PPG asserted settlement would have ended the suit, thus precluding any punitive damage liability, and therefore the insurer's failure to settle the suit was a proximate cause of the punitive damages award.

The California high court said the failure to settle was a cause in fact, not a proximate cause of the award of punitive damages. The court also said at least three policy considerations militated against allowing the insured, the morally culpable wrongdoer in the third-party suit, to shift to its insurer the obligation to pay punitive damages resulting from the insured's egregious misconduct in that suit.

First, there is the policy of not allowing liability for intentional wrongdoing to be offset or reduced by the negligence of another. Second, the purposes of punitive damages are to punish the defendant and to deter future misconduct by making an example of the defendant. Third, California public policy prohibits indemnification for punitive damages.

Justice Kennard was joined in the majority by Justices Marvin Baxter, Ming Chin and **Janice Rogers Brown**.

The Dissent

In his dissent, Justice Stanley Mosk contended Transamerica was not indemnifying PPG for the punitive damages but merely paying damages for its own failure to settle the case when it should have. "The insurer's duty to defend its insured is of no lesser significance as a legal matter than its duty to indemnify it," the justice said. "If the insurer breaches its duty to settle the claim of its insured, it commits a tort against its insured, at least if its breach is 'wrongful.'"

Chief Justice Ronald George and Justice Kathryn Mickle Werdegare concurred with Justice Mosk's dissent.

(Call 800-345-1101 for the 10-page majority opinion and the 11-page dissent.)

LOAD-DATE: June 24, 1999

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June 2, 1999, Wednesday

SECTION: Pg. 5

LENGTH: 652 words

HEADLINE: S.C. Overturns Ruling That Limited Trial Judges' Discretion to Dismiss 'Strikes'

BYLINE: By a MetNews Staff Writer

BODY: A trial judge may, in the interests of justice, structure a three-strikes sentence by dismissing priors as to some counts but not as to others, the state Supreme Court ruled yesterday.

Structuring a sentence in that manner is a logical means of implementing the high court's Romero ruling, which holds that judges may dismiss "strikes" under Penal Code Sec. 1385, Justice Ming Chin wrote for the court.

Justice **Janice Rogers Brown** dissented from the 6-1 ruling, accusing her colleagues of setting aside "judicial commitment to principle" because it had gotten "in the way of expediency."

The ruling in favor of convicted burglar Jerry Garcia resolves a conflict between Div. Seven of this district's Court of Appeal which reversed Garcia's "split" sentence and Div. Two, which upheld such a sentence in *People v. [Raymond] Garcia* (1997) 59 Cal.App.4th 834.

Los Angeles Superior Court Judge Teri F. Schwartz had sentenced Jerry Garcia to 31 years, four months to life in prison. The prosecution had objected that a minimum sentence of 55 years to life was required under the three-strikes law, based on two new convictions for first degree burglary and five "strikes."

Schwartz noted that the 33-year-old defendant has a series of convictions, dating to 1983, for offenses including petty theft, forgery, possessing heroin, disobeying a court order, and driving under the influence, as well as the five "strike" burglaries for which he was sentenced to eight years in prison and released on parole in 1995.

The judge, however, found in mitigation that all of the "strikes" resulted from a single period of aberrant behavior, that the defendant had confessed and cooperated with the police, that his conduct was motivated, at least in part, by his need to support a drug habit, that he had no record of violence, and that his current offenses didn't involve threats.

Schwartz rejected defense counsel's suggestion that Garcia be sentenced as a second-strike offender, which would have resulted in a sentence of less than 23 years. She noted that he had victimized two families shortly after being released from prison.

Instead, she sentenced him to 30 years to life for the first burglary the minimum term being 25 years for the underlying offense and a five-year enhancement for the priors plus 16 months for the second burglary.

That was a legal sentence, Chin said yesterday. "When a proper basis exists for a court to strike prior conviction allegations as to at least one current conviction, the law does not require the court to treat other current convictions with perfect symmetry if symmetrical treatment would result in an unjust sentence," the justice wrote.

Garcia's sentence, Chin went on to say, was a just one "not lenient," not "outside the bounds of reason," and not an abuse of discretion.

Brown argued in dissent that the court was heading toward a "standardless" approach to three-strikes sentencing and undermining the law's goal of replacing "perceived laxity in a criminal justice system that allowed repeatedly convicted felons to be released after serving modest sentences with time off for good behavior," with "swift, certain, and harsh retribution."

The justice went on to say:

"[T]he majority has in effect taken Romero out of its box. Romero is no longer reserved for the rare case involving a particularly harsh sentence for a relatively minor offense. Courts may now routinely apply Romero to the benefit of recidivists for whom such solicitude is not appropriate."

Garcia's sentence was "lengthy," Brown acknowledged.

"But that is beside the point," she said. "It was still less than the law required."

The case was argued before the high court by Robert Navarro, by appointment, for the defendant and Deputy Attorney General Aleme M. Games for the prosecution.

The case is *People v. Garcia*, 99 S.O.S. 4094.

LOAD-DATE: August 5, 1999

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June 2, 1999, Wednesday

SECTION: Pg. 3

LENGTH: 915 words

HEADLINE: State High Court Upholds Death Sentences in Riverside, Alameda Slayings

BYLINE: By KENNETH OFGANG, Staff Writer

BODY: The state Supreme Court yesterday affirmed death sentences in cases from Riverside and Alameda Counties.

The justices unanimously upheld the sentence imposed on Joseph William Hart by Riverside Superior Court Judge Edward Webster. Hart was convicted in 1988 of having murdered a teenage girl with special circumstances involving rape and sodomy.

In a 5-2 ruling, the court also affirmed the sentence imposed on David Esco Welch for the killing of six people at an Oakland residence in 1986.

Hart was convicted of killing Diana Lynn Harper known as Diane after enticing her and a friend to leave the parking lot of a convenience store, where they had gone to meet the victim's boyfriend during school hours. The friend, identified as Amy R., said Hart offered them \$ 1,000 each to serve as lookouts while he harvested marijuana 30 to 40 miles from the store.

Amy testified that Hart and the victim left her by Hart's car, stopped on a dirt road in a rural area, and walked out of sight. When Hart later asked Amy to come with him and help with some bags, Amy said, she saw Diane lying dead or unconscious on the ground partially clothed.

Amy said that when she tried to run, Hart caught her and raped and sodomized her. He told her he hit Diane because she called him names, Amy said.

Amy said she persuaded Hart to drive him back into town. She later contacted the police and led them to Diane's body.

Hart was arrested two months later five days after the murder of his 11-year-old niece. Prosecutors, who linked him to Diane's murder and Amy's rape by several pieces of physical evidence as well as Amy's testimony, presented evidence of five sex-related crimes of violence committed by Hart between 1972 and 1975, along with evidence that he had murdered his niece.

Chief Justice Ronald George, writing for the high court, said there was sufficient evidence to support the rape and sodomy special circumstances, even though the prosecution pathologist was uncertain whether penetration occurred.

To support the felony-murder special-circumstance allegations, George explained, it was only necessary to show that Hart attempted to commit the underlying crimes. There was, the chief justice said, "overwhelming evidence to support a finding that defendant had sexually assaulted Diane and at least had attempted to rape and sodomize her, and that the murder occurred during the commission of these offenses."

George also concluded that Webster didn't abuse his discretion in allowing the jury to see 16 slides or photographs of the victim's body.

"Our independent review...convinces us that, although a few of the slides and photographs are unpleasant, none is unduly gory or inflammatory," the chief justice wrote, adding that the pictures were highly probative in showing that the victim was sexually assaulted and that her wounds were consistent with malice and criminal intent, and in depicting other crime-scene evidence linked to Hart.

The justices also upheld Welch's sentence for the murders of his 16-year-old former girlfriend, Dellane Mabrey; her brothers, Sean and Darnell Mabrey; her daughter, Valencia Morgan; and two other people as they were sleeping in various rooms of Dellane Mabrey's mother's house.

Welch's case was characterized by disputes between himself and his lawyers, as Welch insisted on testifying, saying he wasn't the shooter but refusing to say who was. His lawyers sought to present a defense based on mental illness or impairment.

His first appointed lawyer was removed on a Marsden motion, and several later pretrial and trial motions for removal of counsel were denied by various Alameda Superior Court judges. His motion to represent himself was denied by the trial judge, Stanley P. Golde, who found that Welch's "mental condition...precludes realistic assessment of the need for assistance and risk of waiving counsel."

He cited Welch's allegations of "conspiracy between the parties to the judicial system," his proclivity to "engage[] in verbal displays and interrupt[] and interfere[] with the conduct of the courtroom proceedings," and his constant interruptions of counsel.

After he was convicted and sentenced to death on all six murder counts, Welch brought an automatic appeal, contending among other things that having declared the defendant incompetent to represent himself, the judge should have also declared a doubt as to his competency to stand trial.

In a per curiam opinion, Chief Justice Ronald George and Justices Kathryn Werdegar, Ming Chin, Marvin Baxter, and **Janice Rogers Brown rejected that contention.** To sustain it, they said, "would +elevate+ the standard of mental capacity to stand trial to the higher level of mental capacity that the trial court obviously believed necessary for defendant to be permitted to represent himself."

Justice Stanley Mosk, joined by Justice Joyce L. Kennard, dissented, saying the judge's failure to declare a doubt as to competence violated the defendant's constitutional and statutory rights.

"...I would hold...that when, as here, evidence of a defendant's mental incompetence and mental incapacity to cooperate with counsel is sufficiently substantial so as to validly serve as the primary reason for denying a defendant's Faretta motion, then it is incumbent on the trial court to hold a hearing on the defendant's competence to stand trial.," Mosk wrote.

The cases are *People v. Hart*, 99 S.O.S. 4099, and *People v. Welch*, 99 S.O.S. 4127.

LOAD-DATE: August 5, 1999

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The Recorder

View Related Topics

June 2, 1999, Wednesday

SECTION: NEWS; PG. 3

HEADLINE: JUDGES WIN ROOM TO SCALE BACK THREE STRIKES SENTENCES

BYLINE: Kelly Flaherty;
Reporter Kelly Flaherty's e-mail address is kflaherty@therecorder.com.

BODY:

The California Supreme Court gave judges more room to scale back sentences in Three Strikes cases Tuesday, continuing the debate over judicial discretion that the court started three years ago.

Tuesday's decision in People v. Garcia, 99 C.D.O.S. 4094, addresses a relatively narrow issue: whether trial judges have discretion to strike prior convictions in one new case while factoring them in for sentencing on another.

But the majority opinion drew a vehement dissent from Justice **Janice Rogers Brown**, who warned that the majority is thwarting the law by allowing judges too much latitude to reduce sentences.

"The Three Strikes law was not about judicial discretion; it was about accountability," wrote Brown. "It was not about 'just' sentences; it was about swift, certain and harsh retribution."

Justice Ming Chin, writing for the majority, noted that judges may consider the length of a defendant's sentence -- along with factors such as the nature and circumstances of the prior felony cases -- when deciding whether to strike a prior conviction. In fact, Chin wrote that a defendant's sentence is the "overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences."

The case stems from the trial of a particularly incompetent criminal named Jerry Garcia who confessed to burglarizing three homes. Garcia managed to leave his wallet at the scene of one burglary and was caught bicycling away from another with a bag of loot in his hands.

Garcia waived his right to a jury trial and was convicted on two counts of burglary. He had already served three prior prison terms, including one for a series of five burglaries that the trial judge found qualified to be considered strikes.

Following the Three Strikes law, Los Angeles Superior Court Judge Teri Schwartz sentenced Garcia to 30 years to life in prison for the first of the new burglary cases. But the judge struck all of the prior conviction allegations in regard to the second case.

In striking the priors, the trial judge took into consideration Garcia's drug addiction and noted that his prior burglary convictions stemmed from one period of "aberrant behavior". The judge also noted that Garcia cooperated with the police and had no record of violent behavior.

Garcia appealed, arguing that his sentence amounted to cruel and unusual punishment. The attorney general countered that the trial court lacked authority to strike the prior convictions with regard to one burglary conviction and not the other.

But Chin found nothing in the trial court's sentence to conflict with Three Strikes, saying that the

court had properly exercised its discretion under the raft of cases that have interpreted judicial power, including the landmark 1996 decision, People v. Superior Court (Romero), 13 Cal.4th 497.

LOAD-DATE: June 2, 1999

The Associated Press State & Local Wire

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June 1, 1999, Tuesday, AM cycle

SECTION: State and Regional

LENGTH: 687 words

HEADLINE: Court orders dismissal of student newspaper suit

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

The state Supreme Court ordered dismissal of a student newspaper's suit against former Gov. Pete Wilson and the University of California regents on Tuesday without deciding whether the public officials held illegal closed-door meetings.

Instead, the justices ruled unanimously that the newspaper had missed a 30-day legal deadline for challenging a regents' vote repealing UC affirmative action programs. The court also said the newspaper's allegations, that Wilson had concealed pre-meeting discussions with individual regents, did not justify extending the deadline.

The ruling leaves alive, at least for now, a separate portion of the suit challenging Wilson's refusal to release records of his telephone conversations with regents before the public meeting.

An American Civil Liberties Union lawyer called the decision a defeat for the principle of open meetings.

"It will make it very difficult to challenge secret governmental wrongdoing in the future," said Dan Tokaji, who represented the UC Santa Barbara Daily Nexus and reporter Tim Molloy.

He said the ruling "provides a virtual recipe for public officials who want to violate the (Open Meeting) Act. All they need to do is conduct a secret meeting, conceal their wrongdoing for 30 days and then get off scot-free."

As a result of the ruling, he added, "the public will never know ... whether then-Governor Wilson broke the law."

Cynthia Larsen, who represented Wilson's office, called the ruling "a decision for good government" because it limits open-meetings challenges "to the 30-day period that the Legislature intended." She also said statements from the regents prove no law was violated.

The suit accused Wilson of privately lining up commitments by a majority of regents to vote to outlaw affirmative action at the university before their public vote in July 1995. The newspaper claimed a violation of a state law requiring public bodies to make decisions in public.

The suit sought to nullify the regents' vote, a request that became largely meaningless when voters barred race and gender considerations in affirmative action programs statewide by passing Proposition 209 in 1996. After that, the Nexus and Molloy said they would be content with a declaration the regents and Wilson had acted illegally.

Wilson and the university denied the allegation, and presented declarations from individual regents denying any private commitments to the governor before the meeting. But they sought to dismiss the suit on other grounds, a law requiring certain types of open-meeting suits to be filed within 30 days of the meeting.

The suit was not filed until February 1996. Molloy explained that he telephoned Wilson's office immediately after the meeting and was told by an unidentified staffer that Wilson had not talked with any regents before the vote.

He said the governor rejected 28 subsequent requests for records, but eventually released information that led him to believe Wilson had improperly secured votes before the meeting.

San Francisco Superior Court Judge William Cahill ruled that the 30-day limit would not apply if evidence of the violation were deliberately concealed, as the suit alleged. The state's high court disagreed, saying a suit that challenged an action at a past meeting must be filed within 30 days, with no exceptions.

The court said the 30-day deadline does not apply to a suit seeking to prevent violations of the open-meeting law - but those suits apply only to present or future meetings and not to past meetings.

The opinion was written by Justice Stanley Mosk. In a separate opinion, Justice **Janice Rogers Brown**, joined by Justice Marvin Baxter, questioned past rulings that applied the open-meetings law to a series of private discussions between members of public boards.

"There is a point beyond which open-meeting requirements may effectively paralyze informed and efficient decision-making," said Brown, Wilson's former legal affairs secretary. "...The ringing rhetoric of the public-meetings acts jibes poorly with political reality."

The case is Regents vs. Superior Court, S069688.

LOAD-DATE: June 2, 1999

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Chapter 11 Update

June 1999

SECTION: PENSIONS; Vol. 9; No. 6; Pg. 11

LENGTH: 765 words

CASE: StorMedia Inc. v. Werczberger

BODY:

The California Supreme Court has declared that a company's sale of shares through its employee stock ownership plan (ESOP) makes it a "seller" of securities under the California Corporations Code, thereby subjecting companies with ESOPs to nationwide class actions filed in state court.

The decision maintains the expansive scope of the state's securities laws, allowing plaintiffs' attorneys to avoid the stringent pleading requirements contained in the Private Securities Litigation Reform Act of 1995 (PSLRA) by filing in state court.

Background

The plaintiffs had successfully alleged in state court that StorMedia and its officers had misrepresented the company's fiscal prospects and that the sale of stock through its ESOP and put option plans constituted sufficient "market activity" under Secs. 25400(d) and 25500 of California's Corporations Code. The decision was appealed, briefed and argued to the state high court in 1998, but the company filed bankruptcy soon thereafter and the case was stayed. The stay was lifted on May 17, 1999.

Currently there are at least two other pending appeals before the California Supreme Court addressing the same issue which was stayed by the StorMedia bankruptcy: *In re S3 Securities Litigation and Learning Tree International Inc. v. Guthrie*. The StorMedia decision, however, will only affect pending cases due to the passage of federal legislation in November 1998 which eliminated such claims from being filed in state courts.

The Appeal

Like the other pending appeals, StorMedia challenged the lower court decision on the basis that the company did not conduct a stock offering or otherwise sell its stock to the general public during the class period; instead, the company's stock was traded exclusively between third parties on the open market.

StorMedia and amicus curiae Adobe Systems Inc. argued that giving employees stock options as part of their compensation is different from the stock sales that Secs. 25400(d) and 25500 sought to regulate. Any company with an ESOP will become the target for plaintiff attorneys to use the state securities laws to bypass the PSLRA, the defense maintained.

Plaintiffs, on the other hand, argued that shareholders who are employees of a company are still defrauded by misrepresentations that artificially boost the stock price and deserve the same protection as other investors.

The California Supreme Court's Opinion

By the same 5-2 margin as the *Diamond Multimedia* decision, the court held that securities transactions covered under Sec. 25400(d) include the sale of shares through a company's employee

stock incentive plan or ESOP. The court rejected StorMedia's argument that Sec. 25400(d) predicates liability on the sale of securities on the open market, finding no such express or implied requirement in the statute.

"Since StorMedia sold shares to employees pursuant to the employee stock purchase plan and sold shares pursuant to the exercise of other stock options, it did sell securities during the class period," the court held.

The court further dismissed defense contentions that because its alleged misrepresentations were not directed at its employees, such sales pursuant to its employee stock purchase plan should not be considered in determining whether it is a "seller" under Sec. 25400(d).

"The conduct is unlawful regardless of whether any person actually purchases the stock, and it is not necessary that the defendant intend to induce the sale or purchase which qualifies the defendant as a seller or purchaser under Sec. 25400(d)," the court said. The court also rejected defense claims that out-of-state purchases of securities are not protected by the state's securities laws, based on the Diamond Multimedia decision.

Citing their dissent in Diamond Multimedia, Justice **Janice Rogers Brown** and Justice Ming Chin again reiterated their opinion that defrauded out-of-state investors have no right to sue under California's securities laws.

StorMedia was represented by James A. DiBoise, Lloyd Winawer, Michael J. Levy, Shirley C. Wang and Jonathan Block with Wilson Sonsini Goodrich & Rosati. Amicus curiae Adobe Systems Inc. was represented by Jeffrey S. Facter and Michel F. Kyrouz with Shearman & Sterling.

Representing the plaintiffs were Patrick J. Coughlin, Leonard B. Simon, William S. Dato, Randi D. Bandman, Spencer A. Burkholz, Amber L. Eck and John K. Grant with Millberg Weiss Bershad Hynes & Lerach and Sandy A. Liebhard and Mel E. Lifshitz with Bernstein Liebhard & Lifshitz.

LOAD-DATE: July 16, 1999

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Insurance Coverage Litigation Reporter

May 28, 1999

SECTION: COURT DECISIONS; Vol. 8; No. 22; Pg. 421

LENGTH: 931 words

CASE: Punitive Damages

HEADLINE: No Indemnity Coverage for Punitive Damages Despite Insurer's Refusal to Settle

BODY:

In a 4-3 decision, the California Supreme Court has ruled an insured may not recover a punitive damages award from its insurer despite the insurer's alleged "unreasonable" failure to settle a third-party suit against the insured. Although the insurer's alleged negligent failure to settle the third-party suit may have led to the award of punitive damages against the insured, the state high court said it was not a proximate cause of the award and, therefore, the insured cannot shift to the insurer its responsibility for the payment of punitive damages. *PPG Industries Inc. v. Transamerica Insurance Co.*, No. S056618 (CA Sup. Ct., May 10, 1999).

Background

Plaintiff PPG Industries Inc. was the successor in interest to Solaglas California Inc., a distributor and installer of replacement windshields for cars and trucks. In 1982, George Miller, a Solaglas customer, was driving his truck when another vehicle struck it. The truck's windshield popped out and Miller was ejected from the vehicle, rendering him a quadriplegic. It turned out that Solaglas had used silicone rather than urethane to secure the windshield despite industry safety standards requiring the use of urethane.

Miller sued Solaglas in Colorado, seeking both compensatory and punitive damages. Solaglas tendered the defense to its liability carrier, Transamerica Insurance Co., which had policies totaling \$1.5 million. Transamerica agreed to defend Solaglas, but informed the insured the policies did not provide indemnity coverage for punitive damages.

A jury trial resulted in a judgment for Solaglas, which was overturned on appeal. Miller offered to settle the case for an amount within the limits of Solaglas' liability coverage but Transamerica refused. A second jury then returned a \$6.1 million judgment against Solaglas, including a \$1 million punitive damages award. Solaglas appealed and the Colorado appellate court upheld the awards.

Transamerica paid the policy limit of \$1.5 million plus costs and interest on the judgment. Industrial Indemnity Co., Solaglas' excess liability carrier, paid the remaining \$3.6 million in compensatory damages, leaving PPG, Solaglas' successor in interest, to pay the \$1 million in punitive damages.

In 1994, PPG sued Transamerica in Los Angeles Superior Court for damages, alleging Transamerica had breached the covenant of good faith and fair dealing implied in the insurer's policies by unreasonably refusing to settle the Miller suit. PPG sought to recover from the insurer as compensatory damages the \$1 million it had to pay as punitive damages in the Miller suit.

The trial court granted summary judgment for Transamerica, following the well-established rule prohibiting coverage for punitive damages awarded against an insured. The California Court of Appeal affirmed.

The California Supreme Court's Decision

Under California law, an insurer must accept a reasonable settlement offer or risk bad faith liability. Justice Joyce Kennard, writing for the majority, was not persuaded by this logic as she insisted that the windshield company pay the punitive damages. She wrote, "Here, the punitive damages in the third-party lawsuit were awarded not against the insurance company for its unreasonable failure to settle the lawsuit, but against the insured for the insured's own morally reprehensible behavior in installing the windshield on the truck."

The majority opinion rejected PPG's contention it was entitled to recover from its insurer any monetary award, including punitive damages, it became legally obligated to pay in the Miller suit. PPG asserted settlement would have ended the suit, thus precluding any punitive damage liability, and therefore the insurer's failure to settle the suit was a proximate cause of the punitive damages award.

The California high court said the failure to settle was a cause in fact, not a proximate cause of the award of punitive damages. The court also said at least three policy considerations militated against allowing the insured, the morally culpable wrongdoer in the third-party suit, to shift to its insurer the obligation to pay punitive damages resulting from the insured's egregious misconduct in that suit.

First, there is the policy of not allowing liability for intentional wrongdoing to be offset or reduced by the negligence of another. Second, the purposes of punitive damages are to punish the defendant and to deter future misconduct by making an example of the defendant. Third, California public policy prohibits indemnification for punitive damages.

Justice Kennard was joined in the majority by Justices Marvin Baxter, Ming Chin and **Janice Rogers Brown**.

The Dissent

In his dissent, Justice Stanley Mosk contended Transamerica was not indemnifying PPG for the punitive damages but merely paying damages for its own failure to settle the case when it should have. "The insurer's duty to defend its insured is of no lesser significance as a legal matter than its duty to indemnify it," the justice said. "If the insurer breaches its duty to settle the claim of its insured, it commits a tort against its insured, at least if its breach is 'wrongful.'"

Chief Justice Ronald George and Justice Kathryn Mickle Werdegard concurred with Mosk's dissent.

LOAD-DATE: October 25, 1999

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International Reinsurance Dispute Reporter

May 28, 1999

SECTION: Vol. 3; No. 24; Pg. 10

LENGTH: 906 words

CASE: Punitive Damages: PPG Industries Inc. v. Transamerica Ins. Co.

HEADLINE: No Indemnity Coverage For Punitive Damages Despite Insurer's Refusal to Settle

BODY:

SACRAMENTO, CA -- In a 4-3 decision, the California Supreme Court has ruled an insured may not recover a punitive damages award from its insurer despite the insurer's alleged "unreasonable" failure to settle a third-party suit against the insured. Although the insurer's alleged negligent failure to settle the third-party suit may have led to the award of punitive damages against the insured, the state high court said it was not a proximate cause of the award and, therefore, the insured cannot shift to the insurer its responsibility for the payment of punitive damages. PPG Industries Inc. v. Transamerica Insurance Co., No. S056618 (CA Sup. Ct., May 10, 1999).

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The failure to settle was a cause in fact, the California high court said, not a proximate cause of the award of punitive damages. The court also said at least three policy considerations militated against allowing the insured, the morally culpable wrongdoer in the third-party suit, to shift to its insurer the obligation to pay punitive damages resulting from the insured's egregious misconduct in that suit.

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The Dissent

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Chief Justice Ronald George and Justice Kathryn Mickle Werdegare concurred in Mosk's dissent.

(Call 800-345-1101 for the majority's 10-page opinion and the minority's 11-page dissent.)

LOAD-DATE: June 11, 1999

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View Related Topics

May 28, 1999, Friday

SECTION: NEWS; PG. 10

HEADLINE: NON-PUBLIC SHARES SUBJECT TO SECURITIES FRAUD ALLEGATIONS

BYLINE: Paul Elias;

Reporter Paul Elias' e-mail address is pelias@therecorder. com.

BODY:

Shooting down a novel defense theory from a Silicon Valley computer company, the California Supreme Court on Thursday for a second time voted to keep courthouse doors open to aggrieved, out-of-state shareholders who sue California corporations.

By the same 5-2 margin that ruled in January that defrauded out-of-state investors had a right to sue under California law, the court ruled against a Santa Clara hardware manufacturer that argued it could not be held liable for stock fraud because it did not actually sell any stock when the alleged fraud occurred.

The company, represented by Wilson Sonsini Goodrich & Rosati, had argued that during the alleged fraud all of its stock was traded between third parties on the open market.

But since the company offered its employees a stock-purchase plan, the company was directly peddling stock and therefore on the hook, Justice Marvin Baxter wrote for the majority in StorMedia Inc. v. Santa Clara County Superior Court, 99 C.D.O.S 3989.

No actual sale has to take place for stock fraud to exist, Baxter wrote.

"It is enough," he wrote, "that the defendant is a seller or a purchaser when the false and misleading statement is made and that the statement is made with an intent to induce others to buy or sell the stock."

Baxter also wrote the majority opinion, joined by the same justices, in January's Diamond Multimedia Inc. v. Santa Clara County Superior Court, 19 Cal.4th 1036, the case that allowed out-of-state investors to sue in California courts. Justice **Janice Rogers Brown**, simply citing her dissent in Diamond and again joined by Justice Ming Chin, renewed her opposition. In Diamond, Brown said that such stock-drop cases have always been the exclusive purview of the federal courts.

The win for Milberg Weiss Bershad Hynes & Lerach Thursday, and indeed in January, was largely a symbolic one.

In November, Congress passed a law that jibes with Brown's dissent and essentially bars additional stock-drop suits from being filed in state court.

LOAD-DATE: May 28, 1999

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View Related Topics

May 28, 1999, Friday

SECTION: NEWS; PG. 1

HEADLINE: THE BAXTER FACTOR

BYLINE: Greg Mitchell;
Reporter Greg Mitchell's e-mail address is gmitchell@therecorder.com.

BODY:

A year ago, when the California Supreme Court pulled the plug on the tort of first-party evidence destruction, Justice Marvin Baxter sat on the sidelines.

Saying the issue wasn't properly before the court, Baxter declined to sign Justice Joyce Kennard's majority opinion -- even though he said he agreed the tort created more problems than it solved.

On Thursday, the justices erased the tort of third-party evidence destruction, too.

In both instances, the majority decided an issue that hadn't been briefed or considered below.

But this time, with the game tied, the procedural purist agreed to play ball. He cast the decisive vote, giving Chief Justice Ronald George a majority.

Recognizing he had some explaining to do, Baxter penned a separate concurrence.

"I continue to believe that this court should generally avoid 'reaching out' to decide questions not raised or resolved in the lower courts," he wrote, but he said last year's case showed his colleagues disagree with his position. "To withhold my vote on the merits in the present case would thus serve little purpose," he said, and "would prevent me, once again, from participating in a significant legal question which all of my colleagues are determined to decide."

But unlike last time, his colleagues were evenly split on how to decide the question raised in the case decided Thursday.

Since the 1980s, judges have operated under the assumption that there is a remedy in tort law for intentional evidence destruction. That assumption, based on a series of court of appeal rulings, ended with 1998's *Cedars-Sinai v. Superior Court*, 18 Cal.4th 1. In that case, the court said a plaintiff alleging medical malpractice couldn't also sue the hospital for destroying the fetal-monitoring strips that might have proved the hospital's negligence.

In *Cedars*, signed by everyone but Baxter, Kennard wrote that evidence destruction is bad and should be punished. But she concluded that the tort would require juries to speculate about the impact the missing evidence might have had, prompting troublesome "trials within trials."

Sanctions and attorney discipline -- not to mention the inferences a jury might draw from the absence of key evidence -- were adequate deterrents, she wrote.

But Thursday's question was what to do when the smoking gun is intentionally melted down by someone else.

Temple Community Hospital v. Superior Court, 99 C.D.O.S. 3993, began when plaintiff Sandra Ramos was badly burned by an electrocautery tool during a hospital procedure.

In her suit, Ramos named the hospital, her doctors, and Valleylab Inc., the manufacturer of the electrocautery tool, which her lawyers contend was defective. But the hospital didn't preserve the tool, and with no evidence to prove it was defective, Valleylab got out on summary judgment.

Ramos then sued the hospital for intentionally destroying the evidence. But until the case landed in the Supreme Court, where it drew amicus curiae attention from consumer attorneys and tort reformers, the legitimacy of the tort itself hadn't been in dispute.

In deciding to trash the tort, George relied heavily on Cedars-Sinai, saying third-party evidence destruction raised the same problems as the first-party version.

"The doubtful benefit of the proposed tort remedy is outweighed by the prospect of a spiral of litigation giving rise to verdicts based upon speculation," he wrote. Along with Baxter, Justices Ming Chin and **Janice Rogers Brown** signed his opinion in Temple.

But Kennard's dissent said George's reliance on her analysis in Cedars was misplaced, since it left Ramos with no real remedy -- and left the state's citizens with no way to stop spoliators.

"Non-tort remedies for third-party spoliation are much more limited, as the majority grudgingly admits," she wrote. She was joined by Justices Stanley Mosk and Kathryn Mickle Werdegar.

The divide appears to stem mostly from the majority's concern that the tort would clog courts and tag businesses with the duty to save everything forever.

But Kennard said her tort was a narrow one. "The limited duty I would recognize bears no resemblance to the majority's overwrought speculation," she wrote. She said the tort would require a showing that whoever destroyed evidence was aware of its importance and intended to affect the outcome of a court case.

And it wouldn't place a burden on businesses that destroy documents at regular intervals. "Routine destruction alone would not subject a non-party to liability for spoliation," she wrote.

At any rate, the significance of Thursday's opinion could extend beyond the debate over evidence destruction.

By siding with George, Baxter has apparently capitulated on the propriety of the court "reaching out" to decide issues not briefed or considered below.

As George put it in a footnote echoing language in Cedars, if the "issue is one of public importance, is presented by the case before us, and has been fully argued in this court," all seven justices now agree it's fair game.

LOAD-DATE: May 28, 1999

The Associated Press State & Local Wire

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May 27, 1999, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 359 words

HEADLINE: Court to review church exemption from preservation law

DATELINE: SAN FRANCISCO

BODY:

The state Supreme Court will review the constitutionality of a law that exempts religious organizations from local preservation laws and lets them raze and replace historic church buildings.

An appellate court upheld the law in February, saying it did not provide improper state assistance or endorsement of religion.

But the high court granted review Thursday of an appeal from private preservation groups and the city of San Francisco. Chief Justice Ronald George and Justices Joyce Kennard, Ming Chin and **Janice Rogers Brown**, the majority needed for review by the seven-member court, voted to grant a hearing.

The 1994 law stops cities and counties from enforcing historic landmark preservation laws against noncommercial property owned by religious organizations. A religious organization can alter or demolish a historic building if it decides the change is necessary for religious or financial purposes.

The law was sponsored by then-Assembly Speaker Willie Brown to aid San Francisco Archbishop John Quinn, who was in the process of closing nine Catholic churches with damaged foundations and declining congregations. Some parishioners threatened to sue under landmark preservation laws.

Brown is now mayor of San Francisco, which is challenging the law.

Sacramento County Superior Court Judge Joe Gray ruled in 1996 that the law established an unconstitutional state preference for religious organizations.

But the 3rd District Court of Appeal overruled him and said the law merely removes a potential burden from the practice of religion by allowing religious organizations to decide which of their buildings to preserve.

"The state has not assisted religious organizations but has merely stepped out of their way," said Presiding Justice Robert Puglia in the 3-0 ruling Feb. 4.

He noted that the U.S. Supreme Court has upheld a law exempting religious employers from discrimination claims.

In seeking Supreme Court review, San Francisco and preservation groups said the appellate decision "gives the Legislature a green light to exempt religious organizations, for purely economic reasons, from all kinds of legislation."

LOAD-DATE: May 27, 1999

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View Related Topics

May 27, 1999, Thursday

SECTION: NEWS; PG. 2

HEADLINE: JUDGES WIN RIGHT TO FIGHT DISQUALIFICATION

BYLINE: Greg Mitchell;
Reporter Greg Mitchell's e-mail address is gmitchell@therecorder.com.

BODY:

Reinstating a holding that was wiped off the books last year, an appellate panel ruled Tuesday that state judges have standing to fight disqualification orders.

Saying that Shasta County Superior Court Judge Wilson Curle could personally petition for his reinstatement in a criminal case, the Third District Court of Appeal said that was "the obvious logical extension" of a line of cases allowing judges to participate in challenges for cause.

"It gives judges a remedy," said John Loomis, the Shasta deputy county counsel who went to bat for the judge. Loomis said the remedy was especially important in cases like the one decided Tuesday, where neither side in the underlying dispute chose to pursue the matter.

Loomis said the ruling clarified what "was always kind of implied" in earlier published cases touching on the issue of disqualification.

Curle was challenged by defendant Andrew Gleason after presiding over a plea deal where Gleason argued it was "implied" that when it came time for sentencing, the judge would accept a probation recommendation. At a later hearing, Curle indicated he would buck the probation recommendation, and instead opt to send Gleason to prison.

But before Gleason was formally sentenced, he filed a disqualification motion saying Curle's alleged change of heart suggested bias. The motion was granted by retired Butte County Judge Norris Goodwin, who was sitting on assignment.

Since prosecutors didn't file a petition for writ relief, Curle asked county counsel to do so on his behalf.

However, Gleason's attorneys argued that the judge had no standing because he wasn't a party to the proceeding.

But Third District Justice Coleman Blease said Curle was a party to the disqualification proceeding, and thus had a right to petition for relief based on the logic of *_Ng v. Superior Court_*, 52 Cal.App.4th 1010 (1997).

"A disqualified judge may personally petition the appellate court for relief from the order," wrote Blease in *_Curle v. Superior Court_*, 99 C.D.O.S. 3949. "That result is the obvious logical extension of the cases which have accepted active participation by the challenged judge in other contexts." He was joined by Justices George Nicholson and Fred Morrison.

The panel also concluded that there was no objective evidence Curle was biased, and ordered him reinstated.

Gleason's attorney, Eric Berg of Redding, could not be reached for comment.

Last year, the First District Court of Appeal reached a similar result in deciding that San Francisco Superior Court Judge James Warren had standing to seek review of an order ousting him from a high-profile kidnapping case.

But the precedent established by Warren was short-lived. In September, the California Supreme Court voted to depublish the ruling over the protests of Justices Marvin Baxter and **Janice Rogers Brown**.

The high court doesn't explain its reasons for depublication, so it's impossible to know what led the justices to delete the case. But the First District's *per curiam* opinion was particularly caustic in its treatment of S.F. Deputy Public Defender Paul DeMeester, who had moved to kick Warren off the case. The panel concluded Warren wasn't biased and said DeMeester had been "disingenuous" and may have sought to oust Warren in a fit of "juvenile pique."

At the time, DeMeester speculated that the justices erased the ruling because they were uncomfortable with the First District acting "like a mini- legislature" in giving judges the right to fight for reinstatement.

But since Justice Baxter takes every opportunity to stress the importance of deferring to the Legislature, his vote to keep the opinion on the books would seem to undermine DeMeester's theory.

LOAD-DATE: May 27, 1999

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View Related Topics

May 27, 1999, Thursday

SECTION: NEWS; PG. 2

HEADLINE: COURT TO DECIDE EXEMPTION FOR RELIGIOUS ORGANIZATIONS

BYLINE: Greg Mitchell;
Reporter Greg Mitchell's e-mail address is gmittell@therecorder.com.

BODY:

The California Supreme Court agreed Wednesday to decide if a law exempting religious organizations from historic preservation ordinances is unconstitutional.

And in two separate cases, the justices agreed to revisit the use of lodestar adjustments in attorneys fee awards and will decide whether an insurance policy exclusion for "illegal" acts is ambiguous.

Earlier this year, a state court of appeal panel said the religious exemption law, passed in 1994, didn't unconstitutionally favor religious entities.

San Francisco and historic preservation groups said the Third District Court of Appeal ruling "gives the Legislature a green light to exempt religious organizations, for purely economic reasons, from all kinds of legislation."

The petition for review, signed by S.F. Deputy City Attorney Dennis Aftergut and Morrison & Foerster attorney William Fleishhacker, said the law could mean the demolition of more than 20 buildings in San Francisco that haven't yet been designated as landmarks. Non-religious owners of such buildings don't benefit from the law, making it unconstitutional, Aftergut and Fleishhacker argued.

But in defending the measure, AB 133, Deputy Attorney General Kathleen Mikkelsen echoed the opinion of retired Third District Justice Robert Puglia, who said the law actually aided in the separation of church and state by removing government interference in religious affairs.

Chief Justice Ronald George and Justices Joyce Kennard, Ming Chin and **Janice Rogers Brown** voted to review East Bay Local Development Corp. v. California, S077396.

The insurance case taken up Wednesday turns on some tragic facts. Four years ago, 16-year-old Kelly S. took his mother's gun and, after thinking he had unloaded it, fired a shot that killed his friend, Christopher Mitchell.

The dead boy's parents sued Kelly's family for wrongful death, but Safeco Insurance Co., the family's homeowners' insurance carrier, moved for declaratory relief. Noting that Kelly had committed involuntary manslaughter, Safeco relied on a coverage exclusion for claims stemming from "illegal acts."

The Second District reversed a trial court, finding the term "illegal act" was ambiguous and ordered summary judgment entered on behalf of Safeco.

George, Kennard, Chin, Brown and Justice Stanley Mosk voted to review Safeco Insurance v. Robert S., S078199.

In a third case taken up Wednesday, the justices agreed to look at whether the long-established "touchstone" method for calculating attorneys fee awards in California is in conflict with a 1992 U.S. Supreme Court case.

The case concerns a fee award won by a tenant who beat back a SLAPP suit filed by his building's owner.

Under the state's anti-SLAPP law, the prevailing party is entitled to fees. The trial judge doubled the tenant's attorneys fees to take into account the contingent nature of the litigation and the high quality of representation the tenant's attorneys provided.

In an unpublished opinion, the First District trimmed the extra fees, saying no published case has ever said the anti-SLAPP law provides for a multiplier. The ruling relied in part on a 1992 U.S. Supreme Court case, City of Burlingame v. Dague, 505 U.S. 557, which said the contingent nature of a case was already reflected in the number of hours expended in pursuing it.

But in 1977, the state Supreme Court said in Serrano v. Priest, 20 Cal.3d 25, that under fee-shifting statutes, courts could take into account the contingent nature of the litigation.

George, Mosk, Kennard and Chin voted to take up Ketchum v. Moses, S077350.

LOAD-DATE: May 27, 1999

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The Recorder

View Related Topics

May 21, 1999, Friday

SECTION: NEWS; PG. 1

HEADLINE: GEORGE DIRECTS BUT THE ACTOR MISSES HIS CUE

BYLINE: Greg Mitchell;
Reporter Greg Mitchell's e-mail address is gtmitchell@therecorder.com.

BODY:

As a deputy attorney general, Chief Justice Ronald George argued 11 times in the California Supreme Court, and six more at the U.S. Supreme Court.

It's been 27 years since he left that job to begin climbing the judicial ladder. But sometimes you can't help but think George still pines for the podium.

Like earlier this month, when the court heard arguments over whether judges may enjoin workers from using racially derogatory language at work.

Pitting as it does the right to free speech against the more modern expectation of workplace equality, Aguilar v. Avis Rent A Car Systems, S054561, seems destined for the George court's typically pragmatic treatment. Since becoming chief justice, George has directed a trilogy of constitutional compromises, producing opinions -- on drug testing, parental consent and the interpretation of the Unruh Civil Rights Act -- that poll well.

And from the opening moments of this month's argument, George gave every indication that he had assigned himself the task of scripting the court's latest blockbuster.

But as it turned out, George's leading man hadn't learned his lines.

And because the chief justice was unable to coax a credible performance out of Edwin Currey Jr., the pro bono attorney for the plaintiffs, his opponent was able to steal the show.

The case carries the potential for a landmark ruling on free speech. Five years ago, San Francisco Superior Court Judge Carlos Bea enjoined Avis and its shop steward, John Lawrence, from directing racial epithets at a group of Latino workers. Lawrence had routinely called the workers "wetbacks" and other epithets and snapped towels at them.

Ordinarily, prior restraints on speech are frowned upon. But a bitterly divided First District Court of Appeal panel said speech could be enjoined when it has the secondary effect of employment discrimination.

Avis attorney Joel Kelly argued first before the Supreme Court. Within minutes it was clear from George's aggressive questioning that he didn't agree the injunction was an impermissible prior restraint on speech.

George sounded ready -- almost eager -- to uphold some version of the order, arguing through his questions to Kelly that an injunction can be issued once there has been a judicial determination that speech has created a hostile work environment.

But when Currey stepped to the podium, it became clear he hadn't rehearsed for his role in the closely watched case.

George asked Currey, a former Bronson, Bronson & McKinnon partner, to explain the significance of the court's 1997 ruling in People ex rel. Gallo v. Acuna, 14 Cal.4th 1090.

It's significant because the majority upheld an injunction barring dozens of reputed gang members from gathering on certain streets and engaging in activities, including expressive ones, that would otherwise be legal -- like wearing clothing with certain insignia and flashing gang signs.

The ruling, written by Justice **Janice Rogers Brown**, was handed down as briefing in Aguilar was getting under way, and it made a big splash. It's even cited by the plaintiffs' amici.

But Currey had no idea what George was talking about.

"We did uphold that injunction in Gallo," George informed him, somehow curbing the impulse to spring off the bench and take Currey's place at the podium. "Doesn't that help you?"

Currey then uttered the six saddest words in the advocate's language: "I'm not familiar with that case."

SWAYING BROWN

He should have been.

Especially if he had any hope of winning a vote from Brown, who has exhibited a civil libertarian streak that suggests she would be predisposed to void the injunction.

But Brown's opinion in Gallo contains all sorts of arguments for Currey.

For example, after noting that residents of a gang-infested neighborhood were "subjected to loud talk, loud music, vulgarity, profanity" and other nuisances, Brown turned philosophical: "Often the public interest in tranquility, security and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual. In this case, however, the true nature of the trade-off becomes painfully obvious."

Currey's case is all about trade-offs. As the American Civil Liberties Union put it in an amicus curiae brief supporting Currey's position, "the trial court's injunction is a modest effort to secure equality and dignity for Latino workers, who have suffered racial discrimination, without trampling on Lawrence's free speech rights."

But aside from its rhetorical flourishes, Gallo contains an important piece of precedent for the puzzle George seemed intent on putting together. In rejecting the gang members' claim that the injunctive mechanism was overly broad, Brown had written, "Unlike the pervasive 'chill' of an abstract statutory command that may broadly affect the conduct of an absent class and induce self-censorship, the decree here did not issue until after these defendants had had their day in court."

That sounds pretty much like the distinction George wanted Currey to make between prior restraint and an injunction that follows a judicial determination that the words created a hostile workplace.

Of course, had Currey sought to share time with an attorney at the ACLU, it's a safe bet that attorney would have had at least a passing familiarity with Gallo. After all, Gallo was an ACLU case. But for whatever reason, Currey chose to go it alone.

Now, it's true that the ACLU resolved the issue a little differently, so sharing time could have made for a muddle.

But when the ACLU says a workplace speech gag isn't a restriction that creates a problem with prior restraint, you'd think it would help to have them at the table.

SWITCH HITTING

Currey's mostly passionless performance left Kelly plenty of room to paint his client's position as one of principle.

It was a nice switch, especially since Kelly and his employment law boutique usually swing from the employer's side of the plate.

Now, you might well wonder why the bean counters at Avis would dig deep for an appeal premised on the principle that its employees should be free to toss around words like "wetback." After all, the company paid \$1.85 million in 1997 to settle claims that its franchises in North Carolina routinely discriminated against black motorists with the tacit approval of Avis' top management. But Bea's injunction runs to Avis, too -- which means it could wind up paying big damages should Lawrence shoot his mouth off.

So Kelly told the justices the company wasn't interested in a "license" to discriminate and said Lawrence had already stopped haranguing Hispanics.

Then why fight the injunction?

"Because it's wrong," said Kelly, of the Los Angeles office of Curiale Dellaverson Hirschfeld Kelly & Kraemer. "No court has the right to tell me what I can and cannot say."

George mustered every argument he could against Kelly. He even suggested that Avis' position would waste judicial resources. If the behavior can't be enjoined after a judicial determination, George asked, are the plaintiffs "confined to having to bring repetitive lawsuits -- once a month or whatever?"

But the Avis attorney seemed to be scoring points with Brown, as well as with Justices Stanley Mosk and Joyce Kennard. Ming Chin, a possible swing vote, remained uncharacteristically silent.

To be sure, it's a truism that cases are won on the briefs, and not at the podium. And based on George's take on the case -- he is almost never in the minority -- Currey will probably win despite himself.

But at the very least, it appears the argument in Aguilar gave the justices something to chew on.

A few hours after the argument ended, the clerk of the court made an unusual announcement to the lawyers and spectators assembled for the court's afternoon calendar.

Saying George wanted to apologize for the court's 20-minute delay in taking the bench, the clerk explained that the court's usual post-argument deliberation session had consumed the entire lunch hour.

LOAD-DATE: May 21, 1999

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THE PRESS-ENTERPRISE (RIVERSIDE, CA.)

May 19, 1999, Wednesday , ALL ZONES

SECTION: A SECTION; Pg. A03

LENGTH: 608 words

HEADLINE: Panel eases secrecy in choosing of judges;
In a break with the past, reports and letters on the qualifications of appointees will be released before confirmation hearings.

BYLINE: Mike Kataoka, The Press-Enterprise

BODY:
SAN FRANCISCO

Much of the secrecy surrounding appointments to the California Supreme Court and state Courts of Appeal was lifted Tuesday with the adoption of new disclosure guidelines pushed by Chief Justice Ronald M. George.

Reports and letters concerning the qualifications of high court and appellate court nominees will be made public before confirmation hearings, representing a major departure from past practices.

"It became apparent to me that the public would be served by more openness," George said.

The chief justice chairs the Commission on Judicial Appointments, which was created 65 years ago to confirm Supreme Court and Courts of Appeal justices. Other members are the state attorney general and the presiding Court of Appeal justice from the district affected by the appointment.

The commission functioned privately until 1977, when it first held public confirmation hearings. But until Tuesday, information about the judicial nominees, including letters from supporters and critics, was withheld from the public until after the hearing.

George, who has been considering changes to commission guidelines for two years, discussed the issue at a meeting with journalists last December. "Some of the reporters expressed a concern at that time that certain documents be made available to the public and press before the hearing rather than after the hearing," said Lynn Holton, spokeswoman for the state Supreme Court and Judicial Council.

"He had received many helpful suggestions from news media organizations," said Holton, who knew of no opposition to the new guidelines.

Justice James Ward, who sits on Division Two of the 4th

District Court of Appeal in Riverside, also advocated greater openness.

"Obviously, it's a very positive step that the materials pertinent to the commission's work are going to be made public," Ward said.

Among the documents open to public scrutiny will be reports of the State Bar's Judicial Nominees Evaluation Commission, which probes the background and qualifications of people seeking judgeships.

"I'm delighted that will become public," Ward said.

The public also will have access to the governor's personal data questionnaire. "It would behoove the governor's office to make a note on (the questionnaire) that other people may be reading that besides the governor," Ward said.

The commission's guidelines require identifying those planning to testify and releasing written information at least two days before the confirmation hearing.

"It's unfortunate the time is as short as it is," Ward said, noting that material often is not available sooner.

The appellate court justice doesn't see new guidelines scaring away judicial candidates uncomfortable with the public spotlight.

Anyone who is concerned about maintaining personal privacy for such a public position as the state Supreme Court "probably shouldn't be appointed in the first place," he said.

Chief Justice George said that under the old policy, information about a nominee did become public after the hearing, so confidentiality was not permanent.

The Commission on Judicial Appointments meets only when the governor fills a seat on the Supreme Court or Courts of Appeal. In the past 17 years, the commission has confirmed all nominees.

In 1996, the commission confirmed **Janice Rogers Brown** as a Supreme Court justice after the State Bar panel that reviews nominees deemed her unqualified.

Last December, the commission weighed heavy criticism against Terry O'Rourke, a San Diego judge, before naming him to the Court of Appeal in San Diego.

LOAD-DATE: May 20, 1999

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Los Angeles Times

May 11, 1999, Tuesday, Home Edition

SECTION: Part A; Page 3; Metro Desk

LENGTH: 857 words

HEADLINE: CALIFORNIA AND THE WEST;
RULING MAKES IT EASIER FOR TEACHERS TO FIGHT DISMISSALS;
COURT: JUSTICES OVERTURN LAW THAT FORCES INSTRUCTORS TO PAY HALF OF
HEARING COST WHEN THEY LOSE APPEAL OF FIRING OR SUSPENSION.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court on Monday made it easier for tenured public school teachers to challenge dismissals and suspensions.

Current state law requires that teachers who challenge disciplinary actions and lose pay half the cost of a state administrative hearing. The court, ruling 4-3, overturned that law, finding that it violated the due process clause of the Constitution by discouraging teachers from exercising their legal rights to challenge dismissals and suspensions.

Chief Justice Ronald M. George, writing for the majority, said the state law, adopted in 1976, deters teachers from seeking a review hearing "by making it expensive to do so."

The law "poses a tangible risk that teachers will be dismissed or suspended--and that baseless charges against teachers will stand--simply because the teacher fears incurring liability for the cost" of a hearing, George wrote.

But Justice Kathryn Mickle Werdegard contended in a dissent that state law already gives tenured teachers "substantial protection" against arbitrary dismissal.

Joined by Justices Ming W. Chin and **Janice Rogers Brown**, Werdegard said the state's need to remove teachers who are unfit or commit serious misconduct justifies measures that prevent delays and hold down expenses.

Deputy Atty. Gen. Karen Leaf, who represented the state in the case, warned that the ruling will cause more teachers to challenge disciplinary action. "They will just fight it, even if it is likely the discipline will be sustained," she said.

But Priscilla Winslow, a staff attorney for the California Teachers Assn., said teachers will now "be able to more freely exercise their right to have those hearings without being faced not only with unemployment, but with a huge bill from the state of California."

The case before the court stemmed from the 1986 dismissal of Stockton teacher Gary Daloyan. Daloyan, certified to teach since 1971, had been transferred out of his high school journalism class to a middle school in the Lincoln Unified School District.

He and his attorney said district officials transferred him because they disliked critical stories in the

high school newspaper about the school administration. Daloyan filed a federal civil rights suit against the district in 1986 to protest the transfer and received notification four months later that he was to be fired.

The district charged him with immoral conduct and unfitness for service. The morals charge permitted the district to suspend him immediately without pay.

The allegation was triggered by an incident in which Daloyan called a student "a foul-mouthed little slut" and another in which he wrote swear words on the chalkboard, according to Daloyan and Leaf, who represented the state in the Supreme Court case. Daloyan said he wrote the words to ensure his students knew they were forbidden.

Daloyan asked for a hearing to challenge the dismissal. Under the law, hearings to decide whether a tenured public school teacher should be dismissed or suspended are held before a three-member commission. One member is a teacher chosen by the school board, another is a teacher selected by the instructor who is challenging the discipline and the third is a state administrative law judge.

After a 13-day hearing, the commission unanimously decided that the district failed to prove that Daloyan engaged in immoral conduct but also concluded that he was unfit for service and should be dismissed. Neither the teacher nor the district asked a court to review the decision.

The state later billed Daloyan nearly \$ 8,000 for half the cost of the hearing, including the cost of the administrative law judge. When Daloyan did not pay the bill, his state income tax refunds were offset against the debt.

He and the California Teachers Assn. then challenged the bill in court.

Daloyan said Thursday he was "tickled pink" by the decision but added that "it is a long time coming." The Stockton district eventually settled his federal civil rights suit for \$ 65,000, and he received another \$ 75,000 in workers' compensation, he said.

But he said he has applied for more than 350 teaching positions unsuccessfully since his firing. "The district has effectively destroyed my teaching career," he said.

Locally, United Teachers Los Angeles attorney Rick Schwab said he does not expect the ruling to affect districts adversely.

He said that hearings over discipline can cost \$ 1,200 a day. "On a teacher's salary, having to pay half that amount could mean the difference between making the mortgage payment or not," Schwab said.

Statewide, officials estimate that the teachers' share of the cost of hearings runs between \$ 50,000 and \$ 100,000 a year. School districts pay the other half.

Margaret Farrow, an attorney with the state Office of Administrative Hearings, which provides administrative law judges in teacher discipline disputes, said the ruling leaves "well over" \$ 300,000 in hearing costs that have been billed to teachers but not paid. She said her office will consider proposing that school districts pick up the full cost of the hearings in the future.

LOAD-DATE: May 11, 1999

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Los Angeles Times

May 11, 1999, Tuesday, Orange County Edition

SECTION: Metro; Part B; Page 2; Metro Desk

LENGTH: 1129 words

HEADLINE: RULING MAKES IT EASIER FOR TEACHERS TO FIGHT DISMISSALS, SUSPENSIONS;
COURTS: SAYING IT VIOLATED DUE PROCESS, JUSTICES OVERTURN A LAW MAKING INSTRUCTORS PAY HALF OF HEARING COSTS WHEN THEY LOSE AN APPEAL OF DISCIPLINARY ACTIONS.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

BODY:

The California Supreme Court on Monday made it easier for tenured public school teachers to challenge dismissals and suspensions.

Current state law requires that teachers who challenge disciplinary actions and lose pay half the cost of a state administrative hearing. The court, ruling 4 to 3, overturned that law, finding that it violated the due process clause of the Constitution by discouraging teachers from exercising their legal rights to challenge dismissals and suspensions.

Despite the decision's potential import statewide, it is unlikely to change the course of a very public teacher dismissal in Capistrano Unified School District.

A majority of Capistrano trustees voted Feb. 8 to dismiss high school history teacher Paul Pflueger, saying the iconoclastic instructor graded arbitrarily, used offensive language, did not help struggling students and failed to adopt any improvements suggested to him.

On paid leave since the dismissal, Pflueger contends he is being punished for promoting high standards and failing students who did not meet them. He has contested the dismissal, requesting an evidentiary hearing before a three-member panel, which could convene as soon as August. Discovery for the hearing should begin this month.

Pflueger praised the California Supreme Court decision but said it did not change his strategy in contesting his dismissal. Pflueger is paying for his defense with help from California's largest teachers union and with contributions totaling about \$ 5,000 from more than a dozen individuals.

"I feel strongly enough about this case and its bearing on the overall state of education that I would follow it to the limit if I had to mortgage my house," Pflueger said Monday.

Even though the dismissal process could cost the Capistrano district more than \$ 100,000 in attorney and hearing fees, Supt. James A. Fleming also expected to continue pursuing the matter.

"I wish the court decision was 4 to 3 the other way," Fleming said. "This is a definite disincentive for school districts to pursue dismissal of incompetent or unsatisfactory teachers. In the interests of children, it will not deter this district from doing so."

Chief Justice Ronald M. George, writing for the majority, said the state law, adopted in 1976, deters teachers from seeking a review hearing "by making it expensive to do so."

The law "poses a tangible risk that teachers will be dismissed or suspended--and that baseless charges against teachers will stand--simply because the teacher fears incurring liability for the cost" of a hearing, George wrote.

But Justice Kathryn Mickle Werdegard contended in a dissent that state law already gives tenured teachers "substantial protection" against arbitrary dismissal.

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Times staff writer Karen Alexander contributed to this report.

LOAD-DATE: May 11, 1999

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May 11, 1999, Tuesday

SECTION: Pg. 1

LENGTH: 1052 words

HEADLINE: Kicker: State Supreme Court Rules:Law Requiring Fired Teacher to Pay Hearing Costs Unconstitutional

BYLINE: By KENNETH OFGANG, Staff Writer

BODY: A state law requiring a fired or suspended teacher to pay one-half the costs of the administrative law judge who hears the teacher's appeal violates due process, the state Supreme Court ruled yesterday.

In a 4-3 decision, the high court upheld a divided panel of the Third District Court of Appeal and struck down Education Code Sec. 44944(c).

"The imposition upon such a teacher of the open-ended cost of the adjudicator conflicts with the centuries-old common law tradition that the salaries of judges are to be borne by the state, and not by the litigants," Chief Justice Ronald George wrote for the majority.

"By its terms, the cost provision at issue in the present case-which is not limited to frivolous hearing requests but applies whenever the teacher ultimately is suspended or dismissed, without regard to the reasonableness of the teacher's position-advances no legitimate governmental interest," the chief justice continued.

Justices Stanley Mosk, Marvin Baxter, and Joyce L. Kennard joined in the opinion.

Reasonable Attempt

Justice Kathryn Werdegar, joined by Justices Ming Chin and **Janice Rogers Brown**, dissented. Werdegar argued that the statute was a reasonable attempt, "albeit an imperfect one," to save money and avoid disruption of the educational process "by encouraging teachers who suspect they are likely to lose their challenges to accept the district's decision or seek a settlement, rather than delay termination through administrative and subsequent judicial appeals."

The ruling requires the state to refund money it has collected from Gary Daloyan.

A 15-year teacher in the Lincoln Unified School District in Sacramento County, Daloyan was billed more than \$ 7,700 by the state after a commission on professional competence ruled that the district properly dismissed him as unfit for service.

Such commissions are made up of three members-an employee representative, a school district representative, and a state administrative law judge-and are appointed whenever an employee exercises the right to a hearing following notice of the school district's intent to suspend or dismiss.

Dismissal Upheld

The Lincoln district fired Daloyan in 1986, charging him with immoral conduct and unfitness for service. The commission cleared him on the immoral conduct charge, but agreed with the district on the unfitness allegation and upheld his dismissal.

Daloyan and the California Teachers Association filed a petition for writ of mandate and complaint for declaratory relief in 1993, after Daloyan's state tax refunds were garnished to pay his half of the hearing expenses.

In concluding that the writ was properly granted, George concluded that while the state may discourage frivolous appeals, Sec. 44944(c) is unconstitutional on its face because it limits access to the hearing process regardless of the good faith with which an appeal is brought.

"A statute containing a standard for imposing costs that deters all teachers who ultimately prove unsuccessful is not rationally related to the goal of discouraging only patently meritless challenges to dismissal," the chief justice wrote, noting that the code provision would apply even to cases where the teacher prevails before the commission but the ruling is overturned on appeal.

George also concluded that the statute is inconsistent with the tradition of ensuring access to the judicial forum by having judges paid by the state rather than the parties. The principle applies equally to administrative law judges, the chief justice said.

The teacher's interest in keeping his or her job and good name, the chief justice said, outweighs the benefits of the statute to the state. "We may not assume on this facial challenge that teachers who are facing the loss of their jobs will be able to pay half the cost of the hearing, nor may we assume that the cost provision will not have a chilling effect upon teachers with colorable claims," George wrote.

The threat of being both unemployed and indebted to the state for hearing costs, George said, "invariably will chill the exercise of the right of teachers to a hearing."

Werdegarg argued in dissent that while the statute "could be improved" by a provision limiting its scope to frivolous appeals, applying it to all unsuccessful appeals doesn't violate due process. Daloyan, she noted, wasn't deterred from contesting his firing.

Besides, the justice wrote, requiring litigants to bear the costs of an adjudicative forum-while generally contrary to the American legal tradition-isn't unheard of, either in California or in other states.

Werdegarg agreed with the chief justice that the teacher's interest in continuing employment and good reputation is a strong one. But she disagreed with his conclusion as to the law's chilling effect.

"On this facial challenge, I am unable to conclude that the possible sharing of partial hearing costs will inevitably, or even ordinarily, deter a hearing demand from teachers who believe they have a meritorious defense to the charges against them," Werdegarg wrote.

Deputy Attorney General Karen Leaf, who argued the case for the state, said the decision places in doubt the validity of a number of statutes that shift administrative proceeding costs to individuals, including one which shifts State Bar hearing costs to attorneys facing discipline.

One of the statutes, dealing with barbers and cosmetologists, is very similar to Sec.44944(c). The others, however, have language differences which "may or may not be material," she told the MetNews.

Attorney Ernest Tuttle III of Fresno, who argued the case for Daloyan and the CTA, noted that the California Medical Association filed a brief in support of the teacher's position.

He said he was uncertain as to what impact the decision would have on other professions, and had attempted to keep his arguments focused on the Education Code section.

"It's fundamentally unfair [to charge teachers] for the only hearing they're entitled to," Tuttle commented. "[Daloyan] exercises his right to a hearing and they send him a bill... When you go to

court, you never get charged for the cost of the judge or the bailiff in any civil case or any criminal case."

The case is California Teachers Association v. State of California, 99 S.O.S. 3376.

LOAD-DATE: November 9, 1999

Copyright 1999 Metropolitan News Company
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May 11, 1999, Tuesday

SECTION: Pg. 5

LENGTH: 694 words

HEADLINE: Punitive Damages Can't Be Shifted to Insurer Who Failed to Settle--S.C.

BYLINE: By a MetNews Staff Writer

BODY: An insurer who unreasonably fails to settle a claim isn't liable for an ensuing punitive damage award against its insured, the state Supreme Court ruled yesterday.

In a 4-3 decision, the high court held that allowing a wrongdoer to shift punitive damages on to an insurer would be contrary to public policy.

The decision affirms prior rulings of Los Angeles Superior Court Judge Frances Rothschild and Div. Five of this district's Court of Appeal in favor of Transamerica Insurance Company.

The plaintiff in the case, PPG Industries, Inc., sought to hold Transamerica responsible for \$ 1 million in punitive damages for which PPG was held liable in a Colorado personal injury suit.

PPG is the successor-in-interest to Solaglass California, Inc., a distributor and installer of replacement windshields for cars and trucks. The plaintiff in the Colorado case, George Miller, sued Solaglass after a windshield which it had installed "popped out" after a collision, causing Miller to be ejected through the resulting opening and severely injured.

Miller's offer to settle within the limits of Solaglass' insurance policy was rejected by Transamerica. Miller eventually won a judgment for \$ 5.1 million in compensatory damages, plus the \$ 1 million in punitive damages.

Transamerica paid \$ 1.5 million its policy limit plus more than \$ 1.2 million in costs and interest. Solaglass' excess carrier paid the remaining \$ 3.6 million in compensatory damages, leaving PPG to pay the punitive damages.

Justice Joyce L. Kennard, writing for the high court majority, said Rothschild correctly applied the traditional rule that insurance doesn't indemnify against a punitive damage award.

Kennard reasoned that while an unreasonable failure to settle, if proven, would be a cause-in-fact of the ensuing punitive damage award, it would not be a legal cause.

"[T]he law must impose limitations on liability other than simple causality," the justice wrote. "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy."

Compelling the non-settling insurer to pay punitive damages, Kennard reasoned, would violate public policy by allowing the intentional tortfeasor to reduce or offset its liability based on the negligence of another party and would be inconsistent with the purpose of punitive damages, which is to punish the wrongdoer and deter others from engaging in similar misconduct, in addition to violating the principle that insurance can't cover punitive damages.

A different result might attain, Kennard said, if the insurer's conduct was fraudulent, malicious, or

oppressive, rather than merely in breach of the implied covenant of good faith and fair dealing. But that was not the case with Transamerica, the justice said.

Justices Marvin Baxter, Ming Chin, and **Janice Rogers Brown** concurred.

Justice Stanley Mosk, joined by Chief Justice Ronald George and Justice Kathryn Werdegarr, dissented.

Mosk argued that the policy against allowing an intentional wrongdoer to foist its liability off on a merely negligent party should have no application where the "relative culpability" is determined in separate actions; that imposing punitive damage liability on a non-settling insurer would not deter future misconduct; and would not constitute indemnification.

Mosk explained:

"The insurer's payment to its insured is not indemnification, inasmuch as it is not required under the terms of any liability insurance policy. It is rather damages, inasmuch as it is compelled by law. To be sure, a payment of this sort makes up for punitive damages. But...a payment in settlement avoids such damages at the outset."

Transamerica attorney John R. Brydon said the decision "merely preserves the status quo." The alternative, he said, would have given "an additional hammer to plaintiffs' lawyers" in extracting settlements.

PPG's attorney, Kirk Pasich, said he was disappointed. The ruling, he said, "will give insurers advantages that they should not have" over their insureds.

The case is PPG Industries, Inc. v. Transamerica Insurance Company, 99 S.O.S. 3388.

LOAD-DATE: November 9, 1999

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The Recorder

View Related Topics

May 11, 1999, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: HIGH COURT HARD TO READ ON INSURANCE CASES

BYLINE: Rinat Fried;
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BODY:

When it comes to insurance coverage cases, the California Supreme Court is getting about as easy to read as a Rorschach test.

The court is increasingly fractured when it comes to making insurance law. And some individual justices are shuttling back and forth unpredictably between the policyholder and insurer divide.

That murkiness is underscored by Monday's decision in PPG Industries Inc. v. Transamerica Insurance Co., 1999 C.D.O.S 3388. The court held that an insured cannot recover punitive damages from its insurer if the company went to trial after the insurance company refused to settle the case.

Although the decision could exert more pressure on policyholders to settle cases before trial, it may not have a huge impact since insurance companies only rarely force trials in coverage cases. If nothing else, however, PPG Industries offers a case study in the court's shifting allegiances on insurance issues.

Justice Joyce Kennard, who is typically in the pro-policyholder minority, wrote the majority 4-3 opinion. To make matters more confusing, the usually pro-insurer Chief Justice Ronald George joined the dissenters.

"This Supreme Court is difficult to predict with regard to insurance coverage issues," says Paul Glad, who represents insurance companies as managing partner of the San Francisco office of Sonnenschein, Nath & Rosenthal.

Policyholder attorney David Goodwin, a partner with Heller Ehrman White & McAuliffe, shares Glad's puzzlement with the increasingly opaque court.

"This was a weird split," Goodwin said, particularly because of Justice George's defection to the policyholder's side. "It's bizarre. He must have felt very strongly about this."

It is only the second time since George became chief that he has thrown his vote in with the minority in a 4-3 case. (The first time was in People v. Williams, 17 Cal.4th 148, a criminal case.)

The appellant in Monday's case is PPG Industries, a successor-in-interest to Solaglas California Inc., a distributor and installer of replacement windshields for cars and trucks. In 1982, a Solaglas customer, George Miller, was struck by another vehicle. His windshield popped out, Miller was ejected from the car and rendered quadriplegic. It turned out that Solaglas had used silicone rather than urethane to secure the windshield despite industry safety standards requiring the use of urethane.

Miller sued, but lost at trial. An appellate court overturned the lower court's decision. Miller offered

to settle the case, but Solaglas' insurer, Transamerica, refused. A second jury then returned a \$6.1 million judgment against Solaglas, including a \$1 million punitive damage award.

PPG's insurers paid everything but the punitive damages, which are exempt from coverage by law.

But in 1994, PPG sued Transamerica in Los Angeles Superior Court, demanding coverage because, the company contended, Transamerica's refusal to accept Miller's settlement offer resulted in a second jury trial, which lead to the punitive damage award.

Under California law, an insurer must accept a reasonable settlement offer or face bad faith liability.

That logic made no headway with Kennard, who insisted that the windshield company pay the price.

"Here, the punitive damages in the third party lawsuit were awarded not against the insurance company for its unreasonable failure to settle the lawsuit, but against the insured for the insured's own morally reprehensible behavior in installing the windshield on the truck," she wrote.

Kennard was joined in the majority by Justices Marvin Baxter, Ming Chin and **Janice Rogers Brown**.

Justice Stanley Mosk, in his dissent, contended that the majority missed the point. He said that Transamerica wasn't indemnifying PPG for the punitives but merely paying damages for its own failure to settle the case when it should have.

"The insurer's duty to defend its insured is of no lesser significance as a legal matter than its duty to indemnify it," wrote Mosk. "If the insurer breaches its duty to settle the claim of its insured's victim, it commits a tort against its insured, at least if its breach is 'wrongful.'"

In addition to George, Justice Kathryn Mickle Werdegard concurred with Mosk's dissent.

But in the two other major 4-3 insurance decisions of recent years, the configurations have been a little different. In the pro-insurer, 1998 decision *Foster-Gardner Inc. v. National Union Fire Insurance Co.*, 18 Cal. 4th 858, Justice Brown wrote for the majority, which included George, Baxter and Chin. Kennard dissented, joined by Mosk and Werdegard.

Justice Brown was joined by George, Baxter and Chin in another pro-insurer decision, *Aydin Corp. v. First State Insurance Co.*, 18 Cal.4th 1183. In that case, Mosk wrote the dissent, with Kennard & Werdegard joining with him.

"There does not seem to be a trend favoring one or the other, but a shifting position based on what the court thinks the correct position is," says Sonnenschein's Glad.

Monday's opinion is a good one, Glad said, because it prevents insurance companies from underwriting egregious behavior.

"This is going to have a very dramatic effect on settlement conferences," he said.

But Goodwin maintains that the impact of the opinion won't be terribly great because insurers and insured typically find a way to settle such cases before they go to the jury.

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