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001	Application	Application for United States District Court [Pages 1, 3, and 24]	3	07/09/2001	P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Binder - District Court Committee [1]

FRC ID:
9598

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Superior Court of California

San Francisco

CARLOS BEA
JUDGE

9 October 2002

Brett Kavanaugh, Esq.
Office of the White House Counsel
The White House
1600 Pennsylvania Avenue
Washington, DC

Dear Mr. Kavanaugh,

Enclosed is a copy of the binder delivered to the District Court committee last year.

In the pocket I have supplied some press comment on recent cases and a recent color photo.

I look forward to meeting with you on Tuesday next, at 4.00pm.

Very truly yours,

Carlos Bea

Carlos Bea



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Jury Finds MTBE Manufacturer, Gasoline Refiners, Distributors Liable For Selling Defective Product, Failing To Warn Of Risks

In the first plaintiffs' victory in an MTBE products liability case in the history of this tort, a California jury ruled April 15 that Lyondell Chemical and Shell Oil Co. acted with malice in selling gasoline containing MTBE "that was defective in design" because they failed to warn their customers of the risks of using the product (South Tahoe Public Utility District v. Atlantic Richfield Co., et al., No. 999129, Calif. Super., San Francisco Co.; See March 2002, Page 6).

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Refiners Shell, Equilon Enterprises, Texaco Inc. and Tosco Corp. also were found by the jury to have sold a defective gasoline because, according to the verdict form, "the risk of harm inherent in its design outweighed the benefits of that design."

Shell, Equilon, Texaco and Tosco also were found to have manufactured, sold or supplied a defective product by way of their failure to warn of the risks of the product.

The customers of Lyondell's predecessor, ARCO Chemical Co., did not recognize the risks involved with the transportation, storage and handling of gasoline with MTBE because the warnings Lyondell provided were inadequate, the jury found. It found that Lyondell knew of the risks and that the product was defective when it left its control and entered the market.

The malice recognized by the jury in the cases against Shell and Lyondell was based on the "risk of harm inherent in the design" outweighing the benefits of the design, according to the verdict form.

The standard for finding evidence that Shell and Lyondell acted with malice was the "clear and convincing" standard, according to the verdict form.

Counsel for the South Tahoe Public Utility District and the defendants were placed under a gag order regarding the verdict by San Francisco County Superior Court Judge Carlos Bea. The one-page order said "considerable public interest . . . may result in substantial publicity."

Because "there is a reasonable likelihood that dissemination by any means of public communication of extra-judicial statements relating to this case may interfere with a fair trial or otherwise prejudice the due administration of justice," all parties and counsel are limited to talking

OCT - 9 2002
These are news stories post July, 2001, when this binder was prepared.

about the scheduling of future proceedings and direct quotes from documents already in the public record, Judge Bea wrote.

The jury began deliberating March 5. Jury instructions were given 83 days after the start of the first phase of the trial.

Twenty-four of 31 original defendants settled with South Tahoe Public Utility District for approximately $32 million before the trial began. South Tahoe alleges that MTBE from the defendants contaminated 12 of 34 wells used by the utility to provide water to its service area.

04/17/02

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Settlements in MTBE Case Reach $69 Million

Dennis J. Opatrny
The Recorder

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Two final defendants agreed Monday to settle in an MTBE underground water contamination case, concluding an 11-month trial that involved more than a dozen companies.

Shell Oil Co. said Monday it would pay $28 million -- the largest payout -- to the South Lake Tahoe Public Utility District, bringing the total settlement to $69 million.

Twelve companies settled for a total of $30 million before the trial began in September. In April, a jury verdict declared MTBE as a gasoline additive was a "defective product," and the remaining four companies, including Shell, since have reached agreements rather than let the jury ring up a damage award for them.

Duane Miller, who represents the utility district, said the verdict and settlements put the petroleum companies on notice that they must take remedial action or risk more financial adversity.

"The oil industry has to seriously consider getting MTBE out of gasoline sooner rather than later, unless they wish to face juries again with these kinds of issues," said Miller, name partner in Sacramento, Calif.'s Miller, Sher & Sawyer.

Miller predicted the trial testimony and damage awards would have a major impact on similar lawsuits pending in Illinois, Texas and elsewhere in California, such as Santa Monica.

"Hopefully they'll be resolved without going to court," he said.

San Francisco Superior Court Judge Carlos Bea, who presided over the closely watched trial and approved the settlements, told jurors Monday before he dismissed them that they had made history.

"It's an important case that is part of the development of environmental law," Bea said.

Jury foreman Michael Hawley said jurors found that evidence overwhelmingly showed the environmental problems posed by the gasoline additive were ignored by petroleum companies.

"We wanted our verdict to mean that the oil companies didn't tell their customers or the public of the danger," Hawley said.

During the trial, defendants including Texaco Inc. and Tosco Corp. argued the federal government ordered them to make a cleaner-burning gasoline.

They said MTBE, or methyl tertiary butyl ether, met the demand, and gas stations were taught how to safely store the fuel.

But the jury rejected that argument and instead told the oil companies in *South Lake Tahoe Public Utility District v. Atlantic Richfield Co.*, 999128, that whatever the benefits of MTBE, its risks and potential danger to humans outweighed them.

"It's as I've told the jury, for a long time, we have had air we can see," Miller said. "We don't want water we can taste." MTBE reportedly tastes like turpentine.

He conceded, however, that there is no scientific evidence that MTBE is a carcinogen.

But the powerful defective product verdict cleared the way for serious settlement talks to begin, he said, after initial efforts fizzled.

"It was the major motivating factor," he said. "We were able to settle with people whom we were unable to settle with before."

The defendants who settled before the trial began included Unocal Corp., Exxon Mobil Corp. (NYSE:XOM - News) and BP American Inc.

After the jury verdict, one by one the remaining defendants reached agreements.

Tosco settled for $3 million in June, and Lyondell Chemical Co. (NYSE:LYO - News) of Houston, the country's main manufacturer of MTBE, paid $4 million soon afterward.

That left two defendants, Shell and a Lake Tahoe gas station, preparing for the damage phase of the trial. In addition to Shell's settlement Monday, the gas station known as Tahoe Tom's agreed to pay $300,000.

Shell defense counsel Stephen Jones of San Francisco's Sedgwick, Detert, Moran & Arnold declined to comment and referred questions to company headquarters in Van Nuys, Calif.

Shell spokesman Cameron Smyth said the oil giant decided to throw in the towel and put the lawsuit

behind it.

"It was just determined that this was the appropriate action to eliminate other protracted litigation," such as appeals, Smyth said in an interview.

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Questions or Comments?

THE WALL STREET JOURNAL TUESDAY, MARCH 31, 1992

REVIEW & OUTLOOK

Asides

The Streets of San Francisco

While much else in the nation's life may seem increasingly weird and bizarre of late, we can't help but note the recent turn toward sanity in the courtrooms. We noted last week the Federal Appeals Court decision overturning the nutty ruling that turned a Morristown library into a playpen for the local vagrant population. Now comes good news from the other end of the country. The San Francisco cabdriver who was found guilty recently of excessive force when he used his cab to capture a mugger has been granted a new trial. Recall also that driver Charles Hollom had been ordered to pay $24,000 to the criminal, who sustained a broken leg when Mr. Hollom backed him into a wall with his cab to stop him from fleeing. It was a judgment that aroused indignation all over the country and made, it seems, no sense to Judge Carlos Bea, either. Judge Bea is the superior-court judge who granted the cabbie a new trial—and in so doing uttered a piece of trenchant wisdom. When announcing his decision, the judge noted, "It is not now nor was it ever the law that before submitting to a lawful arrest, a fleeing felon is entitled to a fair fist fight." The nation's faith in its justice system may yet return.

APPLICATION FOR UNITED STATES DISTRICT COURT

Date: JUL 9 2001

1. Name: CARLOS TIBURCIO BEA
(List any other names you have used and the dates.)

2. Specific Judicial District Sought:

Southern District ☐ Central District ☐ Northern District ☒ Eastern District ☐

3. Business/Government Title: JUDGE, SUPERIOR COURT OF CALIFORNIA

Firm/Office:

Address: 400 McALLISTER STREET

SAN FRANCISCO CALIFORNIA 94102
City County State Zip

Phone: (415) 551-3933 Fax: (415) 551-3934

E-Mail: (b)(6) ; cbea@sftc.org

4. Residence Address: (b)(6)

(b)(6)
City County State Zip

Phone: (b)(6) Fax: (415) 563-1695

5. Date of Birth: (b)(6) Place of Birth: (b)(6)

6. Ethnicity (Optional): HISPANIC Gender: XX M ___F

7. Driver's License No: (b)(6) Social Security No: (b)(6)

8. California Bar Admission Date: 21 JANUARY, 1959 Bar No: 29405 *(no longer active account a Judge since 1990)

9. If you are currently serving as a judge, magistrate, commissioner, referee or administrative law judge, were you:

Appointed? by GOV. DEUKMEJIAN Date: 23 JANUARY, 1990

Elected? YES; contested election Date: 1990; 1996
RE-ELECTED (UNCONTESTED)

10. Are you a registered voter? XX Yes ___ No County: SAN FRANCISCO

List all current and past political party affiliations, with date:

REPUBLICAN

11. Identify your Member of Congress:

NANCY PELOSI (D-SAN FRANCISCO)

12. Educational History (inverse chronological order):

Colleges/Law Schools Attended	From	To	Degree Received	Date Degree Received
STANFORD UNIVERSITY	1951	1956	B.A.	6/1956
STANFORD LAW SCHOOL	1955	1958	LL.B.	6/1958

13. Professional Work History (inverse chronological order):

Employer (Include current address)	Position	Supervisor (Include current phone no. and current address)	From To
SUPERIOR COURT, 400 McAllister, SF,CA. 94102	JUDGE	N/A	1/23/90 -
CARLOS BEA, A LAW CORP. 151 Union,SF. CA. 94104	OWNER	N/A	1975-1990
DUNNE, PHELPS & MILLS	OWNER/PARTNER	N/A (non existent)	1959-1975
AMPAC	SR. VP & GEN. COUNSEL	C.BEA	1966-1999

Provide the following information sequentially on plain, letter-sized paper. Each request or question

14. **Residence address:**

(b)(6)

15. **Naturalization:**

Formerly a Cuban citizen, I was naturalized in San Francisco, July 8, 1958 in the United States District Court for the Northern District of California.

16. **Spouse and children information:**

Louise Rubey Bea, homemaker.

Sebastian Bea, Alexander Bea, (b)(6)
Nicholas Bea and Dominic Bea, (b)(6)

17. **Military Service:**

(b)(6)

18. **Languages:**

I am fluent in Spanish. I know some French.

19. **Courts admitted to practice:**

When in practice, I was admitted to:

1959: Supreme Court of California and inferior courts.
1959: US Court of Appeals for the Ninth Circuit.
1960: United States Distict Court, Northern District, California
1984: United States District Court, Central District, California.
1985: United States District Court, District of Nevada.
1988: United States Court of Claims, Washington DC

20. **Legal practice (latest)**:

As a sitting judge, I am not currently practicing law. Before I took the Bench, I was primarily a trial lawyer, representing both plaintiffs and defendants. From 1959-1975 I was an associate and partner of Dunne, Phelps and Mills, trying railroad, construction and securities cases in both Federal and State courts. From 1975-1990, I had my own firm and tried commercial, construction and securities cases in both Federal and State courts, as well as labor matters before the NRLB. I also did a good deal of advising on business transactions.

21. **Career (years of)**:

a. Civil litigation experience: 31 (1959-1990) as attorney; 11 since then as Trial Judge, Superior Court.

b. Criminal experience: As an attorney, I handled three criminal cases. One appeal in the 9th Circuit (1959). Two misdemeanor cases in Los Angeles (1964) and Richmond.(1980). Of course, I handled many criminal trials as a Judge while at the Hall of Justice 1990 and 1991.

c. Cases tried to verdict. As an attorney, I have tried over 100 cases to verdict or judgment in trial courts. All but 2 were civil cases.

d. Citations. Attached hereto as Appendix 23 are reports of the last ten cases I tried or commenced trial upon, with some appellate citation.

22. **Last five years**:

a. 100% of time in court dedicated to litigation. I have been a judge in charge of a Civil Trial department, unless assigned to criminal cases or juvenile cases.

b. I appear in court daily.

c. I do not appear at administrative hearings, unless they are related to court administration.

d. At present, almost 100% of my work is civil, although once a year or so I get a criminal case or a juvenile case assignment.

e. I do not appear in Federal Court. When in practice, including my NRLB work (and administrative hearings associated therewith) I appeared in Federal venues 10-15% of my litigation time.

f. Cases tried to verdict or judgment. Please see answer to question 23, below, for the last ten cases during the last years of my practice as a lawyer. (The question is not directed to cases over which I have presided as a Judge.)

23. Ten (most recent) litigated cases while still in practice:

Please see Appendix 23. These were the last ten cases I handled before becoming a Judge and were cited in my 1992 Senate application in answer to the same question.

24. Experience in court in the period of time prior to the last five (5) years:

1990-1996: I have presided over all sorts of civil Superior Court actions, including asbestos trials (single and multiple cases), personal injury (including Federal Employers Liability Act and Jones Act cases), civil rights (Federal and State cases), disability (ADA) claims, and commercial actions. These actions have included complex litigation actions such as catastrophe cases, large insurance pollution coverage actions, and class actions for wrongful burial and fraudulent business and banking practices.

1959-1990: I was principally engaged as trial counsel in State (85%) and Federal Courts(15%) in Federal Employers Liability and Jones Act cases, commercial litigation, construction litigation and securities litigation (1933 and 1934 Securities Acts). I also did some business counseling and transactional work.

25. Judicial duties and cases:

(a) I preside over civil trials, jury and non-jury. These range from small unlawful detainer actions to large, complex litigation [Insurance Coverage] or class action [Bank overcharge; Catastrophe] cases. Occasionally, I am sent a criminal case. Occasionally, I am sent to Juvenile Hall for Juvenile Court or Drug Court duties.

(b) Ten significant cases:

(1) ***Aguilar v. Avis Rent-a-Car***. San Francisco Superior Ct. No. 948597. Aff'd & mod'fd (1st Dist., 1996) 50 Cal. App. 4th 28; Aff'd (1999) 21 Cal.4th. 121; *cert. denied* 120 S. Ct. 2029 (2000). (Supreme Court of California opinion attached as Appendix 25 (b)(1).

Attorneys:
Plaintiffs:
A.P. Bedecarre,
2479 E. Bayshore Rd. #820,
Palo Alto, CA 94303
(650)494-3900
Renee Saucedo,
La Raza Centro Legal, 474 Valencia St.,
San Francisco, Ca 94103
(415) 575-3500
Defendants:
Joanne Dellaverson,
727 Sansome St.,
San Francisco, CA 94111
(415) 835-9000.

Action for damages for racial, ethnic harassment by slurs to Hispanic workers from their supervisor and employer. 5 of 17 plaintiffs recovered jury verdicts, then sought prohibitory permanent injunction to restrain defendants from further similar racial and ethnic taunts. Applicant granted injunction to prevent recurrent torts. Defendants' appealed on grounds that injunction constituted a content-based prior restraint, violative of the First Amendment to the US Constitution.

Court of Appeal, lst Dist., affirmed judgment, but ordered injunction modified to be limited to work place only. The Supreme Court of California affirmed judgment of the Court of Appeal. The United States Supreme Court denied *certiorari,* one Justice dissenting.

The case established that racial and ethnic harassment in the work place can be judicially restrained without violating Free Speech rights.

(2) ***Kransco v. American Empire Insurance Co.,*** San Francisco Superior Ct. No. 939603. Aff'd (1st Dist 1997) 54 Cal. App. 4th 1171; Aff'd (2000) 23 Cal 4th 390. (Supreme Court of California opinion attached as Appendix 25(b)(2).)

Attorneys:

Plaintiff:

James F. Thatcher and Amy C. Bloom,
300 Montgomery St., Suite 700,
San Francisco, CA, 94104
(415) 981-1434

Defendant:

J. Ric Gass,
825 North Jefferson,
Milwaukee, WI 53202
(414) 271-7100

Action for damages suffered through insurer's bad faith refusal to settle third party action within policy limits. Jury verdict was for plaintiff insured, but damages were reduced 90% due to insured's "comparative" bad faith conduct in withholding Discovery during pre-trial phase of third party action.

Applicant granted plaintiff's motion for Judgment notwithstanding verdict, restoring the full amount of the verdict without reduction for "comparative" bad faith on ground that insured's Discovery conduct was known to all parties BEFORE third party plaintiff offered to settle within policy limits and played no causative role in refusal of defendant insurer to settle within policy limits.

Court of Appeal, lst Dist., affirmed judgment, adding as grounds that an insured's bad faith can never be a defense in an action for insurer's bad faith. Supreme Court of California affirmed judgment of Court of Appeal.

The case is significant as to the use of evidence of an insured's claimed comparative bad faith. The trial court ruling requires such conduct be a cause of the carrier's failure to settle within policy limits. The appellate decisions rule out its use as a defense to a bad faith action.

(3) ***Ceridian v. Franchise Tax Board.*** San Francisco Superior Ct. No. 983377, Aff'd (1st Dist. 2000) 85 Cal. App.4th 875. (1st District Court of Appeal opinion attached as Appendix 25 (b)(3)).

Attorneys:
Plaintiff:
James P. Klier,
One Maritime Plaza, Suite 2400,
San Francisco, CA 94111
(415) 788-8822
Defendant:
Julian O. Standen, Dep. Atty Gen.,
455 Golden Gate Ave.,
San Francisco, CA 94102
(415) 362-6395

Action for refund of California income tax paid for dividend income from insurance subsidiary. The tax was imposed on plaintiff, but not others similarly situated with home offices in California, because plaintiff's home office was out of state. Applicant held Rev. & Taxation Code Sec. 24410 to be unconstitutional under the US Constitution's commerce clause (US Const Art I, 8,cl 3.) as an undue burden on interstate commerce.

Judgment was affirmed by the Court of Appeal, First District.

The case is significant in establishing that insurance company parent corporations cannot be taxed differently on dividend income from subsidiary corporations merely because they have home offices outside California, and that the California scheme for adjustment of such differences was inadequate to correct the discrimination. It also established that repayment to the taxpayer of the taxes paid was the proper remedy, rather than some future credits against taxes.

(4) ***Ventresca v. City and County of San Francisco.*** No. 313-931 (2000). (Order denying Petition for Alternative Writ of Mandate, 8/8/2000 attached as Appendix 25(b)(4).)

Attorneys:
Plaintiff:
Angela Alioto Law Offices,
700 Montgomery St.,
San Francisco, CA 94111
(415) 434 8700

Defendant:
Louise Renne, City Atty and Randy Riddle, Dep City Atty.,
Room 234 City Hall,
San Francisco, CA 94102
(415) 554-4675

Writ of mandate sought to require an election be held for the formation of a Municipal Utility District in San Francisco, notwithstanding such proposal had not been heard, reviewed nor approved by the Local Agency Formation Commission. Applicant *denied* the issuance of the writ on the ground that State law (Government Code) required prior approval of the utility district's formation before an election could be ordered put to the voters.

The case is significant in establishing that one city or two (San Francisco and Brisbane) cannot form a local district without approval of the proposal by the body set forth in the general law of the State of California regarding formation of local districts.

(5) ***Robertson v. Asbestos Defendants***. San Francisco Superior Court No. 304715 (2001). (Decision on Defendants' Motion for Judgment based upon Statute of Limitations (Sec. 340.2 CCP), attached as Appendix 25(b)(5)).

Attorneys:
Plaintiff:
Gilbert Purcell,
Brayton Law Firm,
222 Rush Landing
P. O. Box 2109,
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(415) 898-1555
Defendant:
Peter Gilbert,
Berry & Berry,
1300 Clay St., 9th Floor,
San Francisco, CA 94612
(415) 250-0220

Motion for judgment of dismissal in bifurcated trial of asbestos case upon grounds that the statute of limitations (Sec. 340.2 CCP) barred action filed more

than one year after plaintiff was disabled because of asbestos related disease. Plaintiff had become disabled because of *asbestosis* and had filed an action. At that time, he had no symptoms of *lung cancer*, nor any reason to believe that he would develop that disease. That action was settled.

Some years later, he developed symptoms and was diagnosed with lung cancer. It was as to this second action that the statute of limitations was interposed.

Applicant denied defendant's motion to dismiss on ground that were Sec. 340.2 CCP to be interpreted to bar a second action for injuries unknown and unknowable at the time of the earlier disability, it would create an absurdity. Applicant interpreted the statute of limitations to allow commencement of an action within one year of discovery, or reason to know of, separate and independent disease (cancer).

(6) *Coalition for Healthy and Humane Business Practices v. Never Ending Quails,et al.* 986-059 (1998). (Tentative Opinion 7/21/98 attached as Appendix 25(b)(6)).

Attorneys:
Plaintiff:
Baron L. Miller,
1390 Market St., #1204,
San Francisco, CA 94102
(415) 522-0500
Defendants:
Paul Wartelle,
West Bay Law Firm,
582 Market St., # 12155,
San Francisco, CA 94104
(415) 693-0504.

Action by animal rights group to prohibit certain Chinese-type markets from keeping, selling or butchering live animals for human food consumption on grounds that defendants' practices constituted unlawful trade practices, i.e, violated Penal Code and Health and Safety Code sections with respect of treatment of animals and selling food where animals are kept.(Bus & Prof Code 17200 et seq.). Following non-jury trial, applicant found defendant's treatment of food animals was within statutory limits; keeping animals and food on same premises did not violate health codes.

The case was significant because it constituted the first interpretation of animal abuse statutes as applied to the keeping and slaughter of food animals. It also involved the rejection of an unnecessary defense based on "cultural" considerations.

(7) **The application I submitted yesterday stated at Question 25 (b)(7) that no petition for extraordinary writ review had been filed as to my ruling on defendant's demurrer to the alleged Sixth Cause of Action (claim for relief for alleged violation of constitutional right to travel). That was accurate then. However, today's mail brought a Petition for Writ of Mandate, etc., to the First District Court of Appeal.**

Although my application was not a public comment on a case pending before me, it might be considered a private comment. It would be better to withdraw that case and my comment on it from your committee's consideration. In its place, I should like to submit the Appellate Department's decision in *Lindstrom v. Stone, SF Superior Court, Appellate Division,* Limited Jurisdiction No. 170609, Appellate No. 5215 ORDER AFFIRMING JUDGMENT. (January, 2001).

This case's significance is limited to San Francisco, as it is a case of first impression as to the interpretation of the Rent Ordinance. The specific issue is whether a garage rented together with an apartment was part of a "rental unit"as to which a tenant cannot be evicted without statutory just cause. I interpreted the Ordinance as *including* the garage in the "rental unit". The ruling was affirmed. There was a dissent.

The decision is appended as 25(b)(11) hereto, to take the place of the Chevron Fire Cases' demurrer ruling.

(8) ***P.G.& E v. Lexington Insurance (and Lloyds of London)***. San Francisco Superior Court, No. 984209 (1998). (PG&E Statement of Decision, Phase II, Rule 232.5, Rules of Court is attached as Appendix 25(b)(8)).

Attorneys:
Plaintiff:
Robert Venning, Judith Gold, Michael Greenberg
Heller, Ehrman, et al.
333 Bush Street,
San Francisco, CA 94104-2878
(415) 772-6000
Defendants:
(Lowsley-Williams "Lloyds") Andrew Gordon, David Gabianelli,
Hancock, Rothert & Bunshoft
4 Embarcadero Center, 10th Floor,
San Francisco, CA 94111
(415) 981-5550

Action for declaratory relief and breach of contract by insured utility against various excess insurers for reimbursement and future costs of pollution cleanup ordered by Federal and State administrative agencies. The period of time covered 1933 to recent times.

No appeal was filed. After trial of the Interpretation Phase of the case, settlements were reached as to the remaining defendants.

The Statement of Decision tracked the issues of interpretation of excess policies. The determination was made that certain indemnity policies did not have a duty to defend, and that indemnity was not owed for expenses ordered by administrative agencies.

The case was significant as the first of several coverage cases tried by applicant, without a jury, involving large policies, and large damages. The determinations made played a part in disposing of cases involving other insured polluters (large oil companies) and their claims against their insureds.

(9) ***Varian Associates vs. Aetna Casualty & Surety Co.***, San Francisco Superior Court, No. 944196 (1998). (Tentative Statement of Decision, Phases III and IV, 1/4/2000 is attached as Appendix 25(b)(9)).

Attorneys:
Plaintiffs:
Brian Brosnahan,
Heller, Ehrman, et al
333 Bush Street,
San Francisco, CA 94104
(415) 772-6000
Defendants:
Alan Feiler,
Lillick & Charles
Two Embarcadero Center, Suite. 2700,
San Francisco, CA 94111
(415) 984-8200

Phase III (breach of contract, damages) and Phase IV(contribution) Bench trials of complex insurance coverage action, by insured manufacturer against excess insurers.

The action presented an interpretation of the rule of the landmark decision regarding which policies were responsible for indemnity in a case where the pollution had taken place over a number of years. *FMC Corp v Plaisted,* (1998) 61 Cal . App 4th 1132,1189 had held that the insured could pick any year in which damage occurred, and seek indemnity from primary and excess carriers in that policy year.

Insurers took the position that if the insured had settled with excess carriers in years outside the year so chosen, the insured had made an *election of remedies* and could not chose years other than those of policies which had contributed to the settlement. Applicant ruled against insurers on the grounds the *FMC* case dealt only with litigation remedies; parties were free to settle out of court on whatever base they chose without effecting a "choice" of policy years through the settlement itself.

Another facet of the case was fact-specific: Allocation of over $10,000,000 in settlement as off-set to particular pollution sites for past and future damages.

(10) ***People v. Cooney,*** San Francisco Superior Court, Appellate Department, Appeal No. CR 4374, Municipal Court No 1260812. (1991) (Decision, 8/2/1991 is attached as Appendix 25(b)(10).

Attorneys:

People:

S.F. District Atty. Arlo Smith, Dep. Celia Rowland, Asst. D.A.,
880 Bryant Street,
San Francisco, CA 94103
(415) 553-17554.

Defendant:

Sharon A. Meadow,
USF Law Clinic,
2199 Fulton St.,
San Francisco, CA 94117
(415) 666-6752

Appeal from a trial court decision denying a motion to suppress evidence based on defendant's claim police made an unconsented search of a locked closet in her home, where a gun was found.

The trial court was reversed on appeal. The applicant *dissented* on the basis that when the defendant consented to a search of her house for a gun, without any reservation of rights as to areas to be searched, and the Magistrate was within his discretion in finding the consent reasonably included a locked closet.

The case is significant because it involved the extent to which a reviewing court can go in interpreting the evidence of the extent of consent given in a warrantless, consensual search. Applicant's dissent points out that Magistrate's discretion in fact-finding and the specificity of the consent given should make the search legal and the evidence admissible.

26. Services as Judge pro tem, arbitrator, etc.:

I served as Judge pro tem for both Municipal and Superior Courts, as part of the American Board of Trial Advocates program, before I was appointed to the Superior Court in 1990. I also volunteered as an arbitrator for court-ordered arbitration, before my appointment, and served many times. I cannot remember any significant cases. This was more than 11 years ago.

27. Lack significant trial experience:

I have tried over 100 cases to a verdict or judgment. I became a member of the (elective) American Board of Trial Advocates (requiring 100+ jury trials) in

1977, at rank of Advocate. I am now a Diplomate.

28. Law School courses taught:

1978-1981: I taught Litigation Advocacy Seminar at *Hastings College of the Law*, San Francisco. I was an adjunct professor and was paid a modest stipend.

1982-3: I taught Litigation Advocacy Seminar at *Stanford Law School*, Palo Alto, California. My appointment was Lecturer at Law. I was paid more than at Hastings, but still a modest sum.

1984-5: I returned to teach the same course at *Hastings College of the Law.* My litigation practice became too heated; at the end of the school year, 1985, I resigned.

29. Engaged in business:

Yes. I was a shareholder, director and officer of American Pacific Concrete Pipe Co., Inc .from 1966 through the present. The company manufactures reinforced concrete pipe in Upland and Rancho Cucamonga, California. It was a family owned enterprise. The company stopped production account the recession in 1992. It was later liquidated. At present, it is collecting receivables while in dissolution and winding up.

I was and am a general partner and the Managing Partner of Mount Olive Storage, Duarte, California, a mini-warehouse in Southern California. It is a family owned enterprise. I became an owner in 1971.

30. Business other than law practice: (present)

(a) I am now the managing partner of *Mount Olive Storage*, a family-held partnership since its inception in 1971. The nature of the business: a mini-warehouse and outside storage installation in Irwindale, California. My duties are that of general supervision of operations. My term is unlimited. I do not intend to resign. I have had the position since 1993 (when my older brother died) and have been able to attend to the duties and help make the venture successful through week-end trips. It constitutes an important source of income to my family and to my brother's family.

(b) During the last five years I have received compensation from:

(1) *American Pacific Concrete Pipe Company, Inc.*, a California corporation, of which I was acting CEO and Sr Vice President, after the death of my brother. The company manufactured reinforced concrete pipe in Rancho Cucamonga, California. Upon the 1993 death of my brother, the CEO, I conducted a liquidation of assets and a winding up of the business. The corporation has ceased operations. Its only remaining business is the collection of monies due it for eventual distribution to shareholders. All creditors have been fully paid.

(2) I receive a salary as Managing Partner of *Mount Olive Storage.* (See above)

31. Conflicts of interest:

I am careful to instruct investment advisers never to purchase securities of insurance companies, oil companies, or other companies which may have litigation pending in the courts.

I don't foresee my mini-warehouse interest creating a conflict of interest.

32(a) I do hold judicial office. See above.

32(b) Not applicable.

33. Public office held (other than judicial office):

Associate member, Republican State Central Committee 1965-7.

34. Writings:

1. "Nuts and Bolts of Rehabilitation", The Chronicle, National Association of Railroad Trial Lawyers, 1973 (Out of print).

2. "An Update on Rehabilitation" Ibid., 1974 (Out of print).

3. "Rehabilitation in Discovery and Trial: A Defense Tool to Mitigate Damages", *For the Defense*, Defense Research Institute (1976).

4. "Novel DUI Defense: Alcoholic Withdrawal Seizure " *Forum,* California Attorneys for Criminal Justice, November-December 1981.

5. "Enforce Your Settlement Without Waiving Claims Not Included and Without Becoming an Insurer". *Forum of California Trial Lawyers Association,* January, 1986.

6. "Inspection of Documents, Things and Places", Chapter 9, *Civil Discovery Practice in California, Second* University of California-Continuing Education of the Bar, 1988.

35. **Honors, prizes, medals:**

Scholarship Award, Menlo Junior College.

Pacific Coast Conference Intercollegiate Association Honor Roll, 1953-1956. (Best student athletes).

Block S, Stanford Varsity basketball 1953-6.

Participant's Medal, XV Olympiad, Helsinki, Finland (Member, Cuban basketball team).

Moot Court Finals Award, Stanford Law School.

State Bar of California, State Moot Court Finals, Best Brief, 1958.

State Bar Governor's Award for *pro bono* services, 1989.

Knight's Cross of Isabela la Católica, 1980 (King of Spain).

Knight's Emblem, Civil Order of Merit, Limited Number, 1993 (King of Spain)

36. **Associations:**

(a) (Before appointment to the Bench, 1990):

1959-1990: State Bar of California.

1959-1975: National Association of Railroad Trial Counsel. Member of National Rehabilitation Committee (1971-75).

1959-1990: American Bar Association, member of Litigation Section.

1974-1989: Hastings College of the Law, College of Advocacy, teaching staff; 1985-98, Member Board of Directors/Advisory Group.

1977- American Board of Trial Advocates (elective) Advocate (1977); Diplomate (1997).

1975-1990: California Trial Lawyers Association.

1990-2001: California Judges Association-Rutter Group panels on Real Estate, Employment and Disability litigation.

In addition, since 1990 I have been a member of several committees of the Superior Court, including the Executive Committee.

Since 1996 I have been a member (re-appointed 2000) of the Judicial Council's Advisory Committee on Access and Fairness in the Courts.

(b) Dolphin Swimming and Boating Club, San Francisco

The Olympic Club, San Francisco.

St. Vincent de Paul, Parish and Financial Advisory Councils (1990-1996); Auxiliary (sports sponsors).

Federalist Society.

Union Benefica Española de San Francisco

Northern California Olympians

(c) I am not a member of any such club or organization. In 1989 I was a member of The Olympic Club, San Francisco, which at that time did not admit women members. Over the years I had urged members to change the rules

excluding women. (See 1990 Daily Journal article, Appendix 55). Upon appointment to the Superior Court, I resigned. In July, 1991, The Olympic Club changed its by-laws and policy and commenced admitting women. After my wife Louise joined, I re-joined.

37. Pro bono legal services:

I have not provided legal services pro bono or otherwise since my appointment to the Bench.

I have appeared on Spanish-language television to explain legal issues to the public, for no compensation. I have given lectures on legal subjects for the United States Information Agency, for no compensation. (Please see question 58 below, for details.)

When in practice I represented appellant defendants in criminal appeals early in my career in both Federal and State courts. Thereafter, I provided pro bono services to immigrants and temporary immigrants as requested by the Spanish consulate, as the Honorary Vice-Consul of Spain (1979-1993). For these services I received two medals (see Awards, above) from the King of Spain and a State Bar Board of Governors *pro bono* Award (1989).

38. Community affairs:

Parish Financial Council and Advisory Council, St. Vincent de Paul. San Francisco, 1990-1995.

Unión Benéfica Española de California. San Francisco, commencing in 1960.

Honorary Vice-Consul of Spain, San Francisco, 1979-1993.

39. Summons and Citations:

I was taken into custody in Franco Spain in 1955 on the charge of military service evasion. I was held a few hours, then released, upon proof I had never been a Spanish subject, but was born a Cuban citizen.

Other than that: No.

40. Under investigation for possible violation of criminal statute: No.

41. Licenses other than practice law:

At one time I held an A-1 license as responsible managing employee from the State of California State Contractors' License Board. This was during the time I was Vice President and Counsel to American Pacific Concrete Pipe Company. I cannot remember the details, but it was well over 12 years ago.

42. Bonded position: No.

43. Attorney or judicial discipline: No.

In 1993 a complaint was made to the Commission on Judicial Performance that I had misused court stationery. Two weeks later, the complaint was dismissed after staff investigation. I cooperated fully with the Commission, presenting documentation and interview testimony.

44. Suspension, revocation of license; reprimand, etc.: No.

45. Sued by a client:

Before becoming a judge, I was sued by clients:

1. In 1981, as cross-defendant when I represented plaintiff. *Juan Luis Villanueva v. Cal.Esp et al,* Sacramento Superior Court. Demurrer to cross-complaint was sustained without leave to amend. While on appeal, action was dismissed as part of an overall settlement with my client.

2. In 1986-7 I was sued by a former client on a claim of professional malpractice in advising investment opportunities. *Claus Walter v. Carlos Bea, et al.* The case was dismissed as part of a settlement negotiated through my malpractice carrier.

46. Malpractice carrier settlement:

Yes, see 45, above. As to the amount paid, I do not remember precisely. I believe it to have been $50,000.

47. **Party to actions, proceedings:**

1. *Bea v. Bea*, 1951 Los Angeles Superior Court action for instructions to my uncle, Pedro Bea, testamentary trustee under my father's will. All counsel involved have passed away. I have no knowledge of further particulars.

2. *Mount Olive Storage v. Nationwide Auctioneers,* a 1988 action in San Bernardino Superior Court (action number unknown) by family held storage company against defaulting tenant. Tenant cross-complained against my brother and me. Before trial, tenant dismissed cross-complaint with prejudice. Case proceeded to trial and judgment for plaintiff. Southern California counsel (names forgotten). No files available.

3. *Selleck v. American Home Assurance Company,* 1989 San Diego Superior Court action (action number unknown) declaratory relief action for attorneys fees; I was made a cross-defendant. The case was settled before I was appointed to the Bench. Southern California counsel involved. (Names forgotten) No files available.

4. In addition, in 1955 the U.S. Immigration and Naturalization Service commenced proceedings to have me deported for expressing an intent inconsistent with my visa (non-immigrant) visa status: that I desired to become an American citizen. The proceeding was dismissed by order of the Board of Immigration Appeals in 1958, and I became a US citizen on July 8, 1958.

48. **Party in legal proceedings:** See 45, 46 and 47 above.

In 1980 the City of Irwindale commenced an eminent domain proceeding against my brother and me as owners of some land contiguous to our mini-warehouse business. In 1988 the action was dismissed with prejudice in exchange for a waiver of costs. Counsel for Irwindale was Charles Martin, Esq., who no longer practices law, and whose whereabouts are unknown to me. I was counsel for the defendant.

49. **Unsatisfied judgments against me:** None.

50. **Sanctions in excess of $1,000:** No.

51. **Charged with conduct involving moral turpitude:** No.

52. **Tax lien or other collection procedure:** No.

53. **Appropriate tax returns filed:** Yes.

54. (a) I can certainly perform the requirements of a USDC judge.

I presently work more than an eight (8) hour day under the conditions listed. I usually arrive at 7:45a and leave around 5.30pm.

I daily perceive a courtroom clearly, review evidence including exhibits.I daily review and process substantial volumes of information. Not only do I have Master Calendar assignments, but Complex Litigation matters which are assigned for all purposes to my department.

I have no problem comprehending attorneys and others.

I daily absorb and analyze complex issues quickly.

I daily respond to situations with discretion, judgment and restraint under pressure (we have no paralegals or legal secretaries assigned to help us.)

(b) **Illegal drugs use:** None.

(c) **Gambling:** I do not gamble other than an occasional social poker game. The last time I was in a casino was perhaps 20 years ago.

(d) No reason why I could not exercise discretion, judgment, etc. required of a judge. I think I do it daily.

55. **Articles:** Attached articles. Other articles may be accessed through a Lexis-Nexis search.

56. Not aware of any individuals or groups who may oppose my appointment. Indeed I have received support from both Democratic and Republican office holders and party officials. I attach hereto letters of recommendation from persons and organizations. (Appendix 56)

57. My personal, business and professional conduct has always been good and will reflect positively on the President, should he nominate me. I do not know of any reason why any of my conduct would reflect adversely on the President.

58. The most important thing a District Court Judge can do to make the society a better place is to do his/her job well. Society benefits enormously by having good judges. One of the distinguishing features of the United States is the Rule of Law that decisions affecting people are made pursuant to laws justly applied. A good judge contributes to the stability and predictability of justice, which allow free people to make decisions, and to stay free.

A Judge should also contribute to the public understanding of Law and how it functions. In this regard, I have prepared scripts and appeared on Spanish language television (Channel 14, Univision) on segments entitled "*Conozca la Ley*" (Know the Law) to explain legal questions of interest to the Hispanic community. I have also appeared on local television KBIT-32 to answer questions from callers. I have also written a column in the San José *Mercury News* Spanish supplement with the same name and content.

I have been fortunate to be chosen by the United States Information Agency to make trips to Central and South America to give Spanish language lectures explaining the United States and California legal systems and to demonstrate that the Rule of Law is applied in our country. I made several trips in 1995-1997.

59. I want to become a District Court Judge because I like the work and think I can do it well, and be of good service to the country.

I believe I am qualified because of my extensive experience as a trial lawyer, my law school teaching and lecturing background and my 11 years as a Superior Court trial court judge.

If appointed, I would seek to accomplish those goals stated in answer to question 58, regarding my view of the role of a District Court judge: a quality of work which would increase the community's respect for the Rule of Law and a better understanding by our community of the importance of the Rule of Law. In the latter goal, I think I would be particularly effective in the Hispanic community.

60. Photo attached; copy of resumé attached.

61. **Samples of legal writing:** Please see attachments 25(b), 1-10, ten decisions described and appended.

62. **Five references:**

1. Justice Laurence D. Kay
   California Court of Appeal
   350 McAllister Street, San Francisco, California
   (415) 865-7230

2. Judge Alex Kozinski
   9th Circuit Court of Appeal
   125 So. Grand Avenue
   Pasadena, California 91105
   (626) 229-7140

3. Judge Alfred G. Chiantelli
   San Francisco Superior Court
   400 McAllister Street
   San Francisco, California 94102
   (415) 551-4020

4. H. Jesse Arnelle, Esq.

   (b)(6)

5. Mercedes Moreno
   Asst. District Attorney
   375 Woodside Avenue
   San Francisco, CA 94127.
   (415) 753-7711

ATTACHMENT 2

1. 1989. U.S. v. Sarasa

Judge: Hon. Irene Weiss, Immigration Judge
Phoenix, Arizona

Opposing Counsel: Charles Knuck, Esq.
U.S. Attorney
230 N. Main Avenue
Phoenix, Arizona
(602) 379-3122

Trial Time: One (1) day.

Pro bono defense of deportation hearing in Executive Office of Immigration Review (U.S.D.C. Immigration Court) Phoenix, Arizona. Basque shepherd had overstayed visa for 14 years, could be eligible for (a) Registry and (b) Suspension of Deportation, but not Amnesty because of several Driving Under the Influence (no injuries) convictions. The Immigration Judge ruled from the Bench that the applicant was a person of good moral character and that it would be hardship to deport him in view of the fact of the separation it would cause with his six year old son. [This was a very satisfying victory for me, especially since I am also a Basque immigrant.]

U.S. Court of Immigration Review
(Unable to get docket number after
several calls. Need Alien Registration
Number and that is not available to me.)

2. 1988: Interlocking Roof Tile Cases

Judge: By order of Lucas, C.J.): Winton McKibben
Alameda Superior Court, Department 16

Attorneys: William Scott, Esq.
2501 Park Boulevard
Palo Alto, California
(415) 326-3633

Walter V. Hays, Esq.
755 Page Mill Rd., #A280
Palo Alto, California
(415) 494-9100

No Trial Time: Several hearings on Summary Judgments and Summary Adjudications.

Three cases in Sonoma, San Mateo and Alameda (Southern) Superior Courts were consolidated by Judicial Council Order, after contested motion made by our firm. The cases involved a large ($1.8 million) unpaid equipment sales contract, between a local manufacturer and our client a foreign equipment manufacturer and its Swiss banker. I was able to procure (a) a Summary Judgment for the Swiss bank ($250,000), and (b) an attachment for the foreign manufacturer ($800,000), and proceeded to trial before Judge Winton McKibben, on issues narrowed somewhat by motions for Summary Adjudication. The case settled while trailing on the trial calendar. This case dealt with novel matters of UCC Law regarding what constitutes acceptance of goods, when there can be a renovation of acceptance after use, and hypothecation of goods. Depositions took place in Spain, involving issues of discovery on foreign soil.

3. 1988: Lacy v. Selleck San Diego Superior Court, N 37106

Judge: None, settled.

Opposing Counsel: John V. Kays, Esq.
4000 McArthur Boulevard
Newport Beach, California
(714) 833-9499

Foster Furcolo, Esq.
Hillside & Costanzo
450 "B" St., #950
San Diego, California
(619) 232-8486

David Thompson, Esq.
580 Beach Ave., Suite C
Carlsbad, California
(619) 434-5011

No Trial Time: Two-three (2-3) days on Motions for Summary Judgment.

San Diego Superior Court Action for professional malpractice and fraud by a patient and former lover against a psychologist (our client). Plaintiff had signed a release for an insurance company for policy limits on a prior auto accident settlement, but claimed the release was procured through fraud and promissory estoppel. A dismissal without prejudice had been procured by prior insurance counsel and insurance company. We were able to establish in Discovery that plaintiff fully understood the terms of the Release, and her abandonment of all rights against the psychologist stated in her release, and procured Summary Judgment against a "non-negotiable" demand for several hundred thousand dollars. The legal issues involved were primarily the extent to which Sec. 622, Evidence Code and Code of Civil Procedure 1856 can be used to establish the language of the release as conclusive evidence against claims of oral promises and fraud. The case was appealed; we represented respondents in the Fourth District, as Cumis counsel. (Case settled, December 1989).

4. 1988: Ampac v. NLRB
(Roland). 290 NLRB 77 (1988).

Judges: Panel of NLRB (Johnson, Babson, Cracraft; Stephens, Chairman

Opposing Counsel: Aileen Armstrong
Assistant General Counsel
NLRB General Counsel
Washington, D.C.
(202) 254-9150

Trial Time: Two-three (2-3) days.

This case made new law under the NLRA. It established the doctrine that a release of a "back-pay" dispute directly with the worker and his Union representative, if fairly and openly negotiated, could not be disregarded by the General Counsel of the National Labor Relations Board. Such a release was held to bar the claim of Roland put forward by the General Counsel, who had not agreed to the settlement because, in her opinion, it was inconsistent with the General Counsel's guidelines. I represented Ampac.

5. 1987: McArthur v. Bockman; Docket No. 559170

Judge: San Diego Superior Court; T.G. Duffy C-572063-3

Counsel: Herman A. Hauslein, Esq.
110 West "C" Street
San Diego, California
(619) 234-6812

Ronald J. Mix, Esq.
1059 Tenth Avenue
San Diego, California
(619) 236-0011

Trial Time: One (1) day; Punitive damage adjudication for discovery, one (1) day.

San Diego Superior Court action by Canadian couple against Mexican architect, resident in San Diego, for constructive trust of a Mexican property that defendant had put in his mother's name under a fictitious sale. Forum non conveniens motion was denied in trial court, and taken up on writs in Fourth District. Our clients won denial of writ, 2-1. Petition for hearing in Supreme Court. Our clients won, 6-1. Case recognized California law that foreign land can be the subject of a California State court transitory action under constructive trust theory. I represented plaintiffs McArthur.

6. 1987: Spicer v. McDonnell Douglas

Judge: W. McKibben, Alameda Superior Court, C-572463-3 O.

Counsel: Jeffrey Williams, Esq.
101 Market St., Suite 601
San Francisco, California
(415) 896-0666

Trial Time: Two (2) days; motions in limine and jury selection.

Product liability action against airplane manufacturer for steward's fall in airplane elevator. Action had originally been filed in Municipal Court, by former counsel, but resulted in substantial six-figure recovery on first day of trial in Alameda Superior Court. Issues involved application of non-airplane manufacturing standards for elevators to lifts in airplanes, and extensive expert witness depositions. Also, there was a complicated medical picture due to prior accidents and injuries, lawsuits and workmens' compensation proceedings. I represented plaintiff Spicer.

7. 1986: Ampac v. NLRB
788 F.2d 586 (1986). 9th Cir.

Panel: Hug, Wallace & Hall

Counsel: NLRB General Counsel
Los Angeles Office

Trial Counsel for NLRB: Rachel Young
Assistant General Counsel
11000 Wilshire Boulevard
Los Angeles, California
(213) 575-7351

On Appeal: Patrick J. Szyman
Aileen A. Armstrong
NLRB
Washington, D.C.
(202) 254-9150

Trial Time: Combined with back-pay trial which took a week.

Discretionary petition for appeal to 9th Circuit from NLR granted because issue presented a matter of first impression in the Circuit regarding an interpretation of the Equal Access to Justice Act: Does the "net worth" limit to claimants require deduction of depreciation of assets in arriving at "net worth' The Government took the position that depreciation should not deducted in arriving at Net Worth. We were able to prevail, eventually received fees for our efforts at trial and appeal the Act. I represented Ampac.

8. 1985: B.O.E. v. Ampac
Affirmed, First Dist. Ct. Appeal, non-published

Opposing Counsel: Attorney General of California
Assistant Attorney General Abe
3115 Buchanan Street
San Francisco, California
(415) 567-6989

Trial Time: B.O.E.: One (1) day; Superior Court: Three (3) days (by Ms. Shipman Pala).

Franchise Tax Board appeal by taxpayer seeking refund of sales tax assessment on shipping charges (a service) when pipe was sold FOB plant. Franchise Tax Board took the position that it was taxable. Company lost before Board of Equalization, but sued in Superior Court, San Francisco, and won judgment in full amount of sales tax and interest, establishing that properly separated statement of shipping charge to customer's destination is not part of "sale" of goods and should not be subject to Sales and Use Tax. Case now appealed to the First District Court of Appeal, Affirmed (1990). All administrative proceedings handled by applicant. Superior Court trial handled by Associate Jeanette Shipman, before Judge Carlos Baker (1988). I represented Ampac.

9. 1985: Estaun v. Heckler

Judge: Eugene Lynch, U.S. D.C., No. Dist. Cal., C 85-1

Counsel: Attorney General of California
Michael Tonsing
Assistant Attorney General
7677 Oakmont
Oakland, California
(415) 569-3097

Motion for Summary Judgment: One-half (1/2) day.

Summary Judgment cross-motions on SSA disability case for 4(year old Basque shepherd. Although lifetime shepherd had a surgically fixed, rigid right knee, SSA claimed he was able to do "some" work, according to their Grid Guidelines. Ruling disapproved of SSA use of "grid" guidelines for disability when there was no foundational evidence that there was residual abilit to do any of the tasks of the work classifications in the SSA "grid." I represented plaintiff Estaun.

10. 1984: **NLRB (Teamsters) v. Ampac**
290 NLRB 22; 290 NLRB 77 (1988)

Judge: Clifford Anderson

Counsel: NLRB General Counsel
Rachel Young
Assistant General Counsel
11000 Wilshire Boulevard
Los Angeles, California
(213) 575-7351

Trial Time: Ten (10) days.

Back-pay specification before Administrative Judge in Los Angeles, NLRB. Most of the cases involved complicated issues of whether the applicants had worked during the back-pay period, and had falsified interim work statements to the NLRB, which called for a great deal of documentary probing and cross-examination without the aid of discovery, which was disallowed by the General Counsel.

The Womack case was significant. As finally determined (290 NLRB 22 (1988) the NLRB held that the General Counsel acted "without substantial justification" in bringing the back-pay specification after the Respondent company had provided evidence that Womack had taken permanent Workmen's Compensation disability benefits before the "back-pay" period. This cleared the way for an award under the Equal Access to Justice Act. To my knowledge, it is the first adjudicated case which holds that the General Counsel of the NLRB can "over-step" his authority to prosecute "back-pay" cases, and that the NLRB must pay employer counsel when that happens. I represented defendant Ampac.

0016j/fv
July 31, 1991

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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

OSCAR AGUILAR et al., Plaintiffs and Respondents, v. AVIS RENT A CAR SYSTEM, INC., et al., Defendants and Appellants.	S054561 Ct. App. A069353 San Francisco County Super. Ct. No. 948597

A jury found that defendants had engaged in employment discrimination, in part by permitting plaintiffs to be the target of racial epithets repeatedly spoken by a fellow employee. In addition to awarding damages, the trial court issued an injunction prohibiting the offending employee from using such epithets in the future. Defendants argue that such an injunction constitutes a prior restraint that violates their constitutional right to freedom of speech. For the reasons that follow, we hold that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination.

SEE CONCURRING AND DISSENTING OPINIONS

I

The present appeal is from a judgment awarding damages and injunctive relief. Defendants have not provided a reporter's transcript of the trial proceedings, and have elected to proceed by means of an appendix in lieu of a clerk's transcript. We glean the following from this rather limited record.

In a first amended complaint dated April 26, 1993, 17 Latino employees of Avis Rent A Car System, Inc., sued Avis and 10 named individuals, alleging causes of action for employment discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.),[1] wrongful discharge in violation of public policy, intentional infliction of emotional distress, and negligent infliction of emotional distress.

The complaint alleged that plaintiffs were employed by Avis as "drivers," at its San Francisco Airport facility, to move Avis vehicles among parking lots and from one airport location to another. Defendant John Lawrence was "the service station manager at the SFO AVIS location and was authorized to direct and control the drivers." The complaint alleged that Lawrence "verbally harassed [plaintiffs] constantly. He routinely called *only* the Latino drivers 'motherfuckers' and other derogatory names, and continually demeaned them on the basis of their race, national origin and lack of English language skills." (Italics in original.) Defendant Kathy Black was alleged to have conducted a discriminatory investigation into the suspected theft of a calculator from a rental vehicle, detaining and questioning only Latino employees. In the course of this inquiry, a police officer was summoned and plaintiffs were told that the Immigration and

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[1] All further statutory references are to the Government Code, unless otherwise specified.

Naturalization Service would be called if they did not cooperate. The calculator was found the following day, and Black apologized to plaintiffs.

On October 27, 1994, the jury returned special verdicts, finding as follows: Plaintiffs Ramiro Hernandez, German Lazo, Oswaldo Ramirez, Carlos Reyes, and Mario Serrano were harassed or discriminated against by a supervisor, Black. Each of these plaintiffs was awarded damages in the amount of $15,000. Plaintiffs Pedro Mojica and Orlando Peraza were harassed or discriminated against by Black and Lawrence. Avis knew or should have known of Lawrence's conduct with respect to these employees and took no action. Mojica and Peraza each were awarded damages in the amount of $25,000. Plaintiff Marcos Recinos was harassed or discriminated against by Black and Lawrence, but Avis did not know, nor should it have known, about Lawrence's conduct with respect to him. Recinos was awarded damages in the amount $25,000. Plaintiff Miguel Fonseca was harassed or discriminated against by Lawrence. Avis knew or should have known of Lawrence's conduct with respect to Fonseca and took no action, but Fonseca did not suffer severe emotional distress, and the jury awarded no damages.

On December 15, 1994, a hearing was held to consider plaintiffs' request for injunctive relief. Defendants argued there was no evidence of ongoing harm, nor any danger of ongoing harm, and the court responded: "Well, there was evidence presented sufficient for the jury to find that . . . as to four plaintiffs who were working there, all of whom had a common characteristic, that is, that they were Latinos or members of Hispanic Latino racial ancestry, Lawrence had engaged in acts of harassment so continual and severe as to alter the working conditions for those people there, because that was the statutory test; [¶] Secondly, that Avis knew or should have known of that harassment. It may be that the bringing of the action at the Department of Fair Employment and Housing and the

action here had a chilling effect on the harassment. But I want to make sure that that chilling effect survives the end of this process."

The court further stated during the hearing: "Well, the court is making a finding of fact based on evidence observed during the trial, that based on the evidence showing harassment and discrimination to the extent already commented on by Mr. Lawrence, there's a substantial likelihood based on his actions that he will do so in the future unless restrained."

On February 14, 1995, the court entered judgment awarding damages against Avis in the amount of $15,000 each to Hernandez, Lazo, Ramirez, Reyes, and Serrano, and damages against Avis and Lawrence jointly and severally in the amount of $25,000 each to Mojica, Peraza, and Recinos. The court also issued an injunction that stated as follows: "Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and shall further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc., in California. [¶] Defendant Avis Rent A Car System, Inc. shall cease and desist from allowing defendant John Lawrence to commit any of the acts described in [the above quoted paragraph], under circumstances in which it knew or should have known of such acts; and shall further not investigate or permit investigations regarding breaches of its employment rules or practices when such investigations are limited to subjects or targets who are Hispanic/Latino employees of said defendant, unless the circumstances are such that no employees other than Hispanic/Latinos are reasonably subjects or targets of such investigation(s)."

The injunction further ordered Avis to post certain notices advising employees to report any instances of discriminatory or harassing conduct by Avis or its employees and to "publish a policy statement in English and Spanish

delineating employee rights and manager responsibilities with regard to employee complaints of racial or national origin harassment or discrimination . . . ."

Defendants appealed "from the mandatory and prohibitory injunction portion of the Judgment," providing the Court of Appeal with the reporter's transcript of the post-trial hearing at which the injunction was issued, but not providing the court with a reporter's transcript of the trial proceedings. Defendants further elected to prepare an appellants' appendix in lieu of a clerk's transcript.

The Court of Appeal concluded "that to the extent the injunction prohibits Lawrence from continuing to use racist epithets in the workplace it is constitutionally sound, but to the extent it reaches beyond the workplace it improperly exceeds the scope of the FEHA violation sought to be prevented and must be modified accordingly." The Court of Appeal reversed the injunctive portion of the judgment and remanded the case to the trial court with directions to "redraft the injunction in a manner that . . . limits its scope to the workplace." In response to defendants' argument that the injunction's prohibition of the use of "derogatory racial or ethnic epithets" was vague, the Court of Appeal further ordered the trial court to add "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence" in order to "more precisely warn Lawrence and Avis what is forbidden." Plaintiffs have not challenged the Court of Appeal's restriction of the terms of the injunction, but Avis and Lawrence sought review of that court's decision, arguing that the injunction, even as limited by the Court of Appeal, constitutes an improper prior restraint of freedom of expression. We granted review to address this question.

II

The FEHA declares "as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age." (§ 12920.) "This court has declared that policy to be 'fundamental.' " (*Brown* v. *Superior Court* (1984) 37 Cal.3d 477, 485.) "Employment discrimination 'foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.' (§ 12920.) The express purpose of the FEHA is 'to provide effective remedies which will eliminate such discriminatory practices.' (*Ibid.*) In addition, the Legislature has directed that the FEHA is to be construed 'liberally' so as to accomplish its purposes. (§ 12993.)" (*Brown* v. *Superior Court*, *supra*, 37 Cal.3d at p. 486.)

One form of employment discrimination is harassment on the basis of race or national origin. Section 12940, subdivision (h)(1), states that it is unlawful: "For an employer . . . or any other person, because of race . . . [or] national origin . . . to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."[2] California Code

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[2] Avis and Lawrence move to augment the record on appeal with a document entitled "Jury Instruction No. 23" that states, in pertinent part, that "John Lawrence is not a supervisor of Avis." Plaintiffs object on the ground, among others, that this motion is untimely. We deny the motion to augment the record,

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of Regulations, title 2, section 7287.6, subdivision (b)(1)(A), defines harassment to include "[v]erbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act[.]"

Verbal harassment in the workplace also may constitute employment discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.; Title VII), the federal counterpart of the FEHA. (*Meritor Savings Bank* v. *Vinson* (1986) 477 U.S. 57; *Beyda* v. *City of Los Angeles* (1998) 65 Cal.App.4th 511, 517 [Title VII cases may be considered in interpreting the FEHA.].) Explaining the potentially debilitating effects of this form of employment discrimination, the United States Supreme Court has observed: "A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." (*Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17, 22 [126 L.Ed.2d 295, 302]; *Davis* v. *Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349.)

Of course, not every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: "[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. [Citations.] For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' [Citation.]" (*Meritor*

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but observe that it does not appear from the special verdicts that the jury found that Lawrence was a "supervisor" of plaintiffs within the meaning of section 12940, subdivision (h)(1).

Savings Bank v. *Vinson*, *supra*, 477 U.S. 57, 67.) The high court reaffirmed this standard in *Harris* v. *Forklift Systems, Inc.*, *supra*, 510 U.S. 17, 21-22 [126 L.Ed.2d 295, 302]: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." Recently, the high court observed that it had "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment . . . ." (*Faragher* v. *City of Boca Raton* (1998) 524 U.S. 775 [141 L.Ed.2d 662, 677].)

California courts have adopted the same standard in evaluating claims under the FEHA. In rejecting a FEHA claim that alleged acts of sexual harassment directed toward other women had created a hostile work environment for the plaintiff, the Court of Appeal in *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590 held that the harassment complained of must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment . . . ." (*Id.* at p. 608.) "The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended." (*Id.* at pp. 609-610, fn. omitted.) "[H]arassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]" (*Id.* at p. 610.)

In the present case, Avis and Lawrence do not contest the validity of that portion of the judgment awarding monetary damages against them. They concede that the jury's findings that they violated the FEHA are supported by substantial

evidence and they do not claim that the damage award violates the First Amendment. For purposes of this case, therefore, it is established that Lawrence's conduct created a hostile or abusive work environment for plaintiffs on the basis of race, and that Avis properly was held liable for knowingly failing to prevent this misconduct by Lawrence.[3] (See *Lai* v. *Prudential Insurance Co.* (1998) 62 Cal.App.4th 220, 225-226; *Matthews* v. *Superior Court* (1995) 34 Cal.App.4th 598, 603-604; *Page* v. *Superior Court* (1995) 31 Cal.App.4th 1206, 1210.)

III

Avis and Lawrence challenge only that portion of the judgment awarding injunctive relief. It is beyond question that, in general, both the Department of Fair Employment and Housing and courts enforcing the FEHA are empowered not only to redress past instances of employment discrimination, but to prevent a recurrence of such misconduct. Section 12920 states that the purpose of the FEHA is "to provide effective remedies which will eliminate" employment discrimination. Section 12920.5 adds: "In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful

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[3] The question whether, and to what extent, the regulation of speech that constitutes racial or sexual harassment may violate the First Amendment has been the subject of scholarly debate. (Compare Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment* (1991) 52 Ohio St. L.J. 481; and Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment* (1993) 68 Notre Dame L.Rev. 1003, with Comment, *Freedom of Speech and Workplace Harassment* (1992) 39 U.C.L.A. L.Rev. 1791; and Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight* (1995) 47 Rutgers L.Rev. 461.) Because defendants have not challenged the finding that their past conduct amounted to unlawful employment discrimination in violation of the FEHA, we need not, and do not, address that broad issue here.

employment practices and redress the adverse effects of those practices on aggrieved persons." Accordingly, if the Fair Employment and Housing Commission finds that an employer has engaged in an unlawful practice, it may order the employer "to cease and desist from the unlawful practice." (§ 12970, subd. (a).) Further, the Commission may order "[a]ffirmative or prospective relief to prevent the recurrence of the unlawful practice." (§ 12970, subd. (a)(5).) Similarly, courts can, and often do, issue injunctions prohibiting the recurrence or continuation of employment discrimination. We have held "that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained." (*Commodore Home Systems, Inc.* v. *Superior Court* (1982) 32 Cal.3d 211, 221.) This includes injunctive relief. (*Snipes* v. *City of Bakersfield* (1983) 145 Cal.App.3d 861, 869-870.)

Avis and Lawrence argue initially that the injunction was unnecessary, because the record does not demonstrate that "Lawrence used words that are constitutionally proscribable." As noted above, the jury determined that Lawrence's conduct violated the FEHA, and defendants concede that this finding is supported by substantial evidence. The record before this court does not reveal the precise words used by Lawrence, because defendants elected not to provide a reporter's transcript of the trial proceedings. We reject defendants' claim, therefore, because they failed to provide this court with a record adequate to evaluate this contention. (*Ballard* v. *Uribe* (1986) 41 Cal.3d 564, 574-575.)

Defendants also argue that the injunction was unnecessary because the record does not demonstrate that Lawrence "engaged in ongoing conduct that arguably might justify injunctive relief." The trial court found to the contrary, stating: "[T]he court is making a finding of fact based on evidence observed during the trial, that based on the evidence showing harassment and discrimination to the extent already commented on by Mr. Lawrence, there's a substantial

likelihood based on his actions that he will do so in the future unless restrained." In order to prevail on this claim, defendants must show that this finding is not supported by substantial evidence. But, as noted above, defendants elected not to provide a reporter's transcript of the trial proceedings. Accordingly, they have no basis upon which to argue that the evidence adduced at trial was insufficient to support the trial court's finding that injunctive relief was necessary to prevent a continuation of defendants' unlawful conduct.

Defendants claim we must conclude that injunctive relief is unnecessary, because it appears from the trial court's comments that Lawrence had ceased his unlawful conduct during the pendency of the present proceedings. The trial court rejected this contention, observing that "[i]t may be that the bringing of the action at the Department of Fair Employment and Housing and the action here had a chilling effect on the harassment," and finding that "based on the evidence showing harassment and discrimination [by Mr. Lawrence] to the extent already commented on . . . , there's a substantial likelihood based on his actions that he will do so in the future unless restrained." The trial court did not err in so ruling. The mere fact that a defendant refrains from unlawful conduct during the pendency of a lawsuit does not necessarily preclude the trial court from issuing injunctive relief to prevent a post-trial continuation of the unlawful conduct.

"[M]any courts have rejected arguments against injunctive relief where defendants changed their practices only in response to being sued." (2 Lindemann, Employment Discrimination Law (3d ed. 1996) ch. 40, p. 1748, fn. omitted.) "Generally, a person subjected to employment discrimination is entitled to an injunction against future discrimination, [citation], unless the employer proves it is unlikely to repeat the practice, [citations]. . . . An employer that takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction." (*EEOC* v. *Goodyear*

Aerospace Corp. (9th Cir. 1989) 813 F.2d 1539, 1544; *EEOC* v. *Frank's Nursery & Crafts, Inc.* (6th Cir. 1999) ___ F.3d ___ [1999 WL 235476, 1, 17] ["upon a finding of any intentional employment discrimination, a district court possesses broad discretion to craft an injunction that will ensure the employer's compliance with the law"]; *Dombeck* v. *Milwaukee Valve Co.* (7th Cir. 1994) 40 F.3d 230, 238 [injunction proper although harasser and victim had been reassigned to different work areas]; *EEOC* v. *Gurnee Inn Corp.* (7th Cir.1990) 914 F.2d 815, 817 [injunction prohibiting future sexual harassment proper although the employment of the sole harasser had been terminated]; cf. *Marin County Bd. of Realtors, Inc.* v. *Palsson* (1976) 16 Cal.3d 920, 929 [" 'the voluntary discontinuance of alleged illegal practices does not remove the pending charges of illegality from the sphere of judicial power or relieve the court of the duty of determining the validity of such charges where by the mere volition of a party the challenged practices may be resumed.' [Citation.]"].)

IV

Avis and Lawrence further claim that the injunction is invalid because it is a prior restraint that violates their rights to free speech guaranteed by the First Amendment to the federal Constitution, and article I, section 2, of the California Constitution. We first consider defendants' claims under the federal Constitution.

A.

The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . . ." This fundamental right to free speech applies to the states through the Fourteenth Amendment's due process clause. (*Gitlow* v. *New York* (1925) 268 U. S. 652, 666.)

Although stated in broad terms, the right to free speech is not absolute. (*Near* v. *Minnesota* (1931) 283 U.S. 697, 708 ["Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse. Whitney v. California, supra; Stromberg v. California, supra."].) Many crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422). As we stated in *In re M.S.* (1995) 10 Cal.4th 698, 710: "[T]he state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, ' "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . ." ' [Citations.]" (See also *NAACP* v. *Claiborne Hardware Co.* (1982) 458 U.S. 886, 916; *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.* (1941) 312 U.S. 287, 292, 295; Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark* (1995) 1994 Sup. Ct. Rev. 1, 13.) Civil wrongs also may consist solely of spoken words, such as slander and intentional infliction of emotional distress. A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. (*Roberts* v. *United States Jaycees* (1984) 468 U.S. 609, 628 ["[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent — wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct

from their communicative impact, such practices are entitled to no constitutional protection."])

This reasoning applies equally when spoken words, either alone or in conjunction with conduct, amount to employment discrimination. As already noted, the United States Supreme Court has held that the use of racial epithets that is sufficiently severe or pervasive constitutes "employment discrimination" in violation of Title VII (*Harris* v. *Forklift Systems, Inc.*, *supra*, 510 U.S. 17; *Meritor Savings Bank* v. *Vinson*, *supra*, 477 U.S. 57), and these decisions are at least implicitly inconsistent with any suggestion that speech of this nature is constitutionally protected. Furthermore, in *R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 389, the high court made this point explicit in discussing certain circumstances in which spoken words are not constitutionally protected, stating: "[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) . . . speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [Citations.] Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, [citations]." (See also *Wisconsin* v. *Mitchell* (1993) 508 U.S. 476, 487.)[4]

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[4] Relying upon the decision in *R.A.V.* v. *St. Paul*, *supra*, 505 U.S. 377, the Court of Appeal in the present case upheld the injunction because it was aimed at the "secondary effects" of Lawrence's use of racial epithets. We do not agree that the "secondary effects" doctrine applies in the present case. In *Boos* v. *Barry* (1988) 485 U.S. 312, the high court held that a Washington, D.C., ordinance prohibiting the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into "public odium" or "public disrepute" was an impermissible content-based restriction of speech, not a permissible content-neutral regulation of conduct aimed only at the secondary effects of

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Justice Werdegar's concurring opinion asserts that we fail to "address . . . a critical preliminary question, that is, whether the First Amendment permits imposition of civil liability under FEHA for pure speech that creates a racially hostile or abusive work environment," and asserts that this issue takes us "into uncharted First Amendment waters." (Conc. opn. of Werdegar, J., *post*, at pp. 1-2.) To the contrary, as noted above, we conclude that it is clear from the high court's decisions in *Harris, supra, Meritor, supra,* and *R.A.V., supra*, that the First Amendment permits imposition of civil liability for past instances of pure speech that create a hostile work environment. Defendants do not argue otherwise. The sole issue in the present case is whether the First Amendment also permits the issuance of an injunction to prohibit the continuation of such discriminatory actions.

It is not surprising that defendants concede that the First Amendment permits the imposition of civil liability for pure speech that violates the FEHA, because the high court's opinions, discussed above, leave little room for doubt on this score. As noted above, in *R.A.V.* v. *St. Paul*, *supra*, 505 U.S. 377, 389, the high court demonstrated its point that some forms of pure speech are not

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speech. The court stated: "The emotive impact of speech on its audience is not a 'secondary effect.' " (*Id.* at p. 321.) Similarly, in the present case, the effects of Lawrence's use of racial epithets on plaintiffs is not a "secondary effect." (Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, *supra*, 1994 Sup. Ct. Rev. 1, 17 ["Despite occasional suggestions to the contrary prohibitions against sexual harassment cannot be justified on the rationale that creation of a hostile environment is a prohibitable secondary effect."]; (Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, *supra,* 47 Rutgers L.Rev. 461, 511, fn. 215.)

constitutionally protected, by observing that words "may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." One commentator observed: "When the majority and concurring opinions are viewed in conjunction, it appears that all nine Justices participating in *R.A.V.* assumed that the core Title VII prohibition against speech that creates a discriminatorily hostile work environment would pass constitutional muster. *Harris*, coming less than two years after the decision in *R.A.V.*, buttresses this impression." (Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark, supra*, 1994 Sup. Ct. Rev. 1, 12.) Like Professor Fallon, we do not find the message of *R.A.V.*, *Harris*, and *Meritor* nearly as opaque as suggested in the concurring opinion.[5]

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[5] The concurring opinion cites several law review articles for the proposition that "the question [whether the First Amendment permits imposition of civil liability for pure speech that creates a hostile work environment] is one of considerable debate among First Amendment scholars" (conc. opn. of Werdegar, J., *post*, at p. 2, fn. omitted), but the controversy reflected in the cited articles has a different focus. Although there is considerable academic debate concerning *the extent to which* sexually and racially discriminatory speech may be regulated, consistent with the First Amendment, with a single exception every scholar cited by the concurring opinion agrees that, in some circumstances, pure speech that violates Title VII is not protected by the First Amendment.

Professor Sangree believes "that hostile environment law passes First Amendment scrutiny" and "concludes that while debate concerning the parameters of protected speech and unlawful discrimination can clarify why hostile environments are prohibitable, Title VII protections should not be curtailed." (Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, supra,* 47 Rutgers L.Rev. 461, 465, 479.) Professor Strauss discusses at length the extent to which "sexist speech" in the workplace is protected by the First Amendment, but has no difficulty concluding that speech that violates Title VII is not protected: "Once the plaintiff alleges a cause of action under Title VII, and demonstrates a discriminatory intent or effect, the employer cannot successfully defend on first

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amendment grounds." (Strauss, *Sexist Speech in the Workplace* (1990) 25 Harv. C.R.-C.L. L.Rev. 1, 46.) Professor Volokh concludes that only the prohibition of "undirected" speech that contributes to the creation of a hostile work environment would offend the First Amendment: "Liability could be imposed not for any speech that creates a hostile work environment, but only for speech that the speaker knows is offensive, that is directed at an employee because of her race, sex, religion, or national origin, and creates (together with whatever other nonspeech conduct might be present) a hostile work environment." (Comment, *Freedom of Speech and Workplace Harassment, supra,* 39 U.C.L.A. L.Rev. 1791, 1846.) Professor Fallon states: "After Harris . . . it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech. Some trimming of the cause of action remains possible, but it is highly unlikely that workplace expressions of gender-based hostility and communications of explicitly sexual messages will receive categorical protection." (Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark, supra,* 1994 Sup. Ct. Rev. 1, 9.) Professor Gerard, although arguing that the federal guidelines implementing Title VII's prohibition of sexual harassment are unconstitutionally overbroad, states: "Various forms of pure speech are also unprotected; the sexual solicitation, the false and defamatory statement of fact, and the display of obscene graphics. These are some of the worst abuses and can be eliminated without hindrance." (Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment, supra,* 68 Notre Dame L.Rev. 1003, 1034.) Professor Gerard also questions whether "profane and vulgar words" could be prohibited. (*Id.* at p. 1035.) Only Professor Browne argues that the First Amendment prohibits all violations of Title VII based primarily on speech. (Browne, *Title VII as Censorship; Hostile Environment Harassment and the First Amendment, supra,* 52 Ohio St. L.J. 481.)

As explained above, in this case we have no occasion to address the issue on which these commentators are divided, because defendants have not provided a record that discloses the precise nature or extent of the racial epithets and insults that were found by the jury to have created a racially abusive working environment, and because defendants do not contend that the past racial epithets and insults, found by the jury, comprise constitutionally protected speech for which no damage award may be imposed. None of the cited law review articles specifically address the much narrower issue presented by this case, namely, whether once it has been judicially determined that a racially abusive working

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The concurring opinion ultimately agrees that speech that violates Title VII by permeating the workplace with " 'discriminatory intimidation, ridicule, and insult,' [citation], that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and created an abusive work environment,' [citation]" (*Harris*, *supra*, 510 U.S. 17, 21) is not protected by the First Amendment, but the concurring opinion reaches this conclusion primarily by weaving together "strands of analysis" from several areas of First Amendment jurisprudence. (Conc. opn. of Werdegar, J., *post*, at pp. 3, 12.) We find such efforts unnecessary in light of the rulings of the United States Supreme Court in *Harris, supra,* and *Meritor, supra,* and the statement in *R.A.V.* v. *St. Paul, supra*, that harassing speech that is sufficiently severe or pervasive to constitute employment discrimination is not constitutionally protected.[6]

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environment has been created by pervasive racial epithets and insults, a court may enjoin the offending employee from uttering similar racial epithets in the future that will perpetuate the discriminatory abusive environment.

[6] Justice Brown's dissenting opinion quotes numerous decisions that eloquently explicate the unquestioned proposition that the First Amendment protects the expression of ideas that are reviled as well as those that are revered. But just as it is perfectly clear that the First Amendment does not protect an individual's right to commit treason (or, for that matter, securities fraud) through the use of the spoken word, it is equally clear that the First Amendment does not protect an employer's or employee's right to engage in employment discrimination through the use of the spoken word. An employer that posted a "Whites Only" sign outside its workplace could not claim that the First Amendment right of free expression shielded its "speech" from the reach of a law prohibiting racial discrimination in employment (cf. *Pittsburgh Press Co.* v. *Human Rel. Comm'n* (1973) 413 U.S. 376 ["male help wanted" and "female help wanted" designations constitute unprotected employment discrimination]), and an employer that utters or tolerates racial epithets or insults in the workplace that are so severe or pervasive as to alter the working conditions of targeted minority employees similarly may

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Defendants contend that, although it is proper to punish a defendant after the fact for a violation of the FEHA based upon spoken words, the trial court's injunction against the use of future epithets is an invalid prior restraint of speech. (*Organization for a Better Austin* v. *Keefe* (1971) 402 U.S. 415, 419; *Near* v. *Minnesota*, *supra*, 283 U.S. 697, 713.) Under well-established law, however, the injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity.

In *Kingsley Books, Inc.* v. *Brown* (1957) 354 U.S. 436, 437, the United States Supreme Court upheld a criminal provision authorizing a " 'limited injunctive remedy' " prohibiting "the sale and distribution of written and printed matter found after due trial to be obscene." The defendants did not contest that the printed material at issue was obscene, but argued that issuance of an injunction "amounts to a prior censorship" in violation of the First Amendment. (*Id.* at p. 440.) The high court rejected this argument, quoting *Near* v. *Minnesota*, *supra*, 283 U.S. 697, 716, for the proposition that "the protection even as to previous restraint is not absolutely unlimited," and observing: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." (354 U.S. at p. 441.) In upholding the statute, the court noted that the defendants "were enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene." (*Id.* at p. 444.) The high court

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not take refuge in the claim that the racial harassment, because spoken, may not constitutionally be treated as employment discrimination.

then distinguished as "glaringly different" (*id.* at p. 445) the decision in *Near* v. *Minnesota*, *supra*, 283 U.S. 697, in which the abatement as a public nuisance of a newspaper was found to be an invalid prior restraint, noting that the abatement in *Near* "enjoin[ed] the dissemination of future issues of a publication because its past issues had been found offensive," which is " 'the essence of censorship,' " while the injunction in *Kingsley Books* "studiously withholds restraint upon matters not already published and not yet found to be offensive." (354 U.S. at p. 445.)

In *Times Film Corp.* v. *Chicago* (1961) 365 U.S. 43, 44, a film distributor challenged a municipal ordinance that required "submission of all motion pictures for examination prior to their public exhibition," claiming this was an invalid prior restraint on expression. The film distributor argued that the state must permit the motion picture to be shown and only thereafter could punish any violation of law that occurred. The high court disagreed and upheld the ordinance, stating that the distributor's argument "is founded upon the claim of absolute privilege against prior restraint under the First Amendment — a claim without sanction in our cases." (*Id.* at p. 49.)

The decision in *Freedman* v. *Maryland* (1965) 380 U.S. 51, reaffirmed the rule announced in *Times Film Corp.* v. *Chicago*, *supra*, 365 U.S. 43, that a requirement of submission of motion pictures in advance of exhibition does not necessarily constitute an invalid prior restraint, but clarified that such a requirement must include "procedural safeguards designed to obviate the dangers of a censorship system." (*Freedman* v. *Maryland*, *supra*, 380 U.S. at p. 58.) One such safeguard is that before an injunction may issue prohibiting the exhibition of a motion picture, there must be a judicial determination that the film does not constitute protected expression. The high court stated: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures

the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. [Citations.]" (*Ibid.*)

In *Paris Adult Theatre I* v. *Slaton* (1973) 413 U.S. 49, 55, the high court upheld a Georgia statute authorizing an injunction prohibiting the exhibition of obscene materials, stating: "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected."

In *Pittsburgh Press Co.* v. *Human Rel. Comm'n., supra,* 413 U.S. 376, the United States Supreme Court upheld an order prohibiting a newspaper from publishing advertisements in a manner that would constitute employment discrimination. The city ordinance at issue in that case proscribed discrimination in employment in a manner similar to the FEHA and had been interpreted to forbid newspapers from carrying "help wanted" advertisements in gender-designated columns under captions such as "Male Help Wanted" and "Female Help Wanted." Observing that the ordinance made sexual discrimination in employment illegal, the high court held that the First Amendment did not protect such illegal conduct, stating: "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." (413 U.S. at p. 388.) The high court concluded: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction

on advertising is incidental to a valid limitation on economic activity."[7] (413 U.S. at p. 389.)

The court in *Pittsburgh Press Co.* then addressed the argument that the order forbidding the newspaper from publishing the advertisements in gender-designated columns was a prohibited prior restraint on expression. The high court, first noting that it never had held that all injunctions against newspapers were impermissible, stated: "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment. [¶] The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication. [Citations.] Moreover, the order is clear and sweeps no more broadly than necessary. And because no interim relief was granted, the order will not have gone into effect before our final determination that the actions of Pittsburgh Press were unprotected." (*Id.* at p. 390, fn. omitted; see also *Madsen* v. *Women's Health Center* (1994) 512 U.S. 753, 764, fn. 2 [129 L.Ed.2d 593, 607, fn. 2] ["Not all injunctions that may incidentally affect expression, however, are 'prior restraints' in the sense that the term was used in *New York Times Co., supra*, or *Vance, supra*."].)

The foregoing high court decisions 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

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[7] In *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n* (1980) 447 U.S. 557, 566, the high court stated: "For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." (*Rubin* v. *Coors Brewing Co.* (1995) 514 U.S. 476 [131 L.Ed.2d 532, 538-539].)

restraint" of speech. (*Kramer* v. *Thompson* (3rd Cir. 1991) 947 F.2d 666, 675 ["The United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected."]; *Intern. Union, United Auto., etc.* v. *Dana Corp.* (6th Cir. 1982) 679 F.2d 634, 646-647 ["A court may validly restrain communications which are not protected by the First Amendment."].) For the same reason, the injunction at issue in the present case does not constitute a prohibited prior restraint on expression, provided the order "is clear and sweeps no more broadly than necessary." (413 U.S. 376, 390.) The injunction at issue is based upon a continuing course of repetitive speech that has been judicially determined to violate the FEHA. Thus, prohibiting Avis and Lawrence from continuing to violate the FEHA does not violate their First Amendment rights.

A persuasive discussion is found in *Auburn Police Union* v. *Carpenter* (1st Cir. 1993) 8 F.3d 886, which upheld a Maine statute prohibiting persons from soliciting property for the benefit of a law enforcement officer, agency, or association. Violations of the statute could be enjoined and penalized civilly. The court of appeals rejected the argument that an injunction against such solicitation necessarily would constitute an invalid prior restraint on expression: "A prior restraint is a government regulation that limits or conditions in advance the exercise of protected First Amendment activity. [Citation.] Although the classic form of prior restraint involves an administrative licensing scheme, [citation], a judicial injunction that prohibits speech prior to a determination that the speech is unprotected also constitutes a prior restraint. [Citation.] Any system of prior restraints of speech 'comes to this Court bearing a heavy presumption against its constitutional validity.' [Citation.] [¶] . . . [¶] The Supreme Court, however, 'has never held that all injunctions are impermissible.' [Citation.] 'The special

vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.' [Citation.] An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint.' " (*Id.* at p. 903; *Retail Credit* v. *Russell* (1975) 234 Ga. 765, 779 [218 S.E.2d 54] [" 'The present order [an injunction prohibiting the defendant from continuing to report false credit information about the plaintiff] does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the court is asked to speculate as to the effect of publication.' "]; *Haseotes* v. *Cumberland Farms, Inc.* (Bankr. D. Mass. 1997) 216 B.R. 690, 695.)[8]

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[8] In a variety of contexts, courts have upheld injunctions prohibiting the continuation of a course of expressive conduct that violates a specific statutory prohibition. (*Vendo Co.* v. *Lektro-Vend Corp.* (1997) 433 U.S. 623, 635, fn. 6 ["nothing . . . prevents a federal court . . . [from] enjoin[ing] the commencement of additional state-court proceedings if it concludes from the course and outcome of the first one that such proceedings would constitute a violation of the antitrust laws"]; *San Antonio Community Hospital* v. *Southern California District Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230 [upholding preliminary injunction against union to prohibit continuing display near hospital entrance of fraudulent banner reading "THIS MEDICAL FACILITY IS FULL OF RATS"]; *Lothschuetz* v. *Carpenter* (6th Cir. 1990) 898 F.2d 1200 [directing entry of a "narrow and limited injunction to prohibit [the defendant] from continuing and reiterating the same libelous and defamatory charges."]; *O'Brien* v. *University Community Tenants Union, Inc.* (1975) 42 Ohio St.2d 242 [327 N.E.2d 753, 755] ["Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that *same* speech may be proper." (Italics in original.)]; *Advanced Training Systems, Inc.* v. *Caswell Equipment Co., Inc.* (Minn., 1984) 352 N.W.2d 1, 11 ["We therefore hold that the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand."]; *Federal*

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By parity of reasoning, the pervasive use of racial epithets that has been judicially determined to violate the FEHA is not protected by the First Amendment, and such unlawful conduct properly may be enjoined. (Cf. *EEOC* v. *Beverage Canners, Inc.* (11th Cir.1990) 897 F.2d 1067, 1070 [upholding injunction directed to racially abusive language in workplace, without addressing free speech issues]; *Robinson* v. *Jacksonville Shipyards, Inc.* (M.D. Fla. 1991) 760 F. Supp. 1486 [holding that First Amendment does not bar injunctive relief against continuing course of conduct found to constitute sexual harassment, including verbal harassment and display of sexually explicit photographs: "[T]he pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."].) As the amicus curiae brief of the American Civil Liberties Union of Northern California suggests, the controlling authorities establish that "[s]peech may be enjoined where a fair judicial process has determined that a repetitive pattern of speech is unprotected."

B.

Defendants also argue that the injunction violates the California Constitution. Article I, section 2, subdivision (a), of the California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Avis and Lawrence rely heavily on a decision

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Trade Comm'n v. *Saja* (D. Ariz. Oct. 7, 1997) 1997 WL 703399 [upholding injunction prohibiting continuation of fraudulent solicitations of charitable donations.].)

of this court, handed down more than a century ago, interpreting an earlier version of this provision.

In *Dailey* v. *Superior Court* (1896) 112 Cal. 94, 97, this court invalidated a superior court order prohibiting the performance or advertising of a play that was based upon the circumstances of a pending criminal case that was about to go to trial, unequivocally declaring: "We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by section 9, article I, of the constitution of this state. That section provides: 'Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right; and no law shall be passed to restrain or abridge liberty of speech or of the press.' The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility."

The above quoted language in *Dailey* cannot be interpreted as broadly as defendants suggest, to prohibit a court, under all circumstances, from enjoining "speech." The circumstances in *Dailey* involved a true prior restraint in which the superior court had prohibited the production of a play prior to its first performance simply because the play was based upon the circumstances of a pending criminal case. The court in *Dailey* was not faced with the question whether an injunction prohibiting the continuation of conduct that has been judicially determined to be

unlawful constitutes a prior restraint. *Dailey*, therefore, does not support the position that the injunction in the present case constitutes an invalid prior restraint. (*Ginns* v. *Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."].)

Recent decisions of this court demonstrate that we have not adopted the rule advocated by defendants, that any injunction impinging upon the right of free expression constitutes an invalid prior restraint. In *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, while we observed that our state constitutional guarantee of free speech and press is "more definitive and inclusive than the First Amendment" (*id.* at p. 658), we recognized at the same time that "an injunction restraining speech may issue in some circumstances to protect private rights [citation] or to prevent deceptive commercial practices [citation]." (*Id.* at p. 662.) In *People* ex rel. *Busch* v. *Projection Room Theatre* (1976) 17 Cal.3d 42, 57, we rejected the argument that enjoining the exhibition of obscene films or magazines would constitute an impermissible prior restraint, stating: "Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is 'proper and suitable' in each case. *It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing.* (*Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. 49, 54-55.)" (Italics added.)

In *Goldin* v. *Public Utilities Commission* (1979) 23 Cal.3d 638, we affirmed an order of the Public Utilities Commission terminating a subscriber's telephone service on the ground that the service was being used to violate the law. At hearings before the commission, evidence was introduced establishing that the subscriber was operating a business offering outcall massage and nude modeling

services. The commission found that the subscriber's telephone service had been used to facilitate the violation of Penal Code section 647, subdivision (b), which prohibits soliciting or engaging in an act of prostitution. The subscriber argued that terminating his telephone service violated his right to free speech. We rejected this argument, quoting the high court's decision in *Pittsburgh Press Co.* v. *Human Rel. Comm'n.*, *supra*, 413 U.S. 376: "[T]elephone communication which does 'no more than propose a commercial transaction' can be . . . protected 'commercial speech.' By the same token, however, when such communication proposes, discusses, or is intended to encourage or facilitate a commercial transaction *which is itself illegal*, the principle established in the *Pittsburgh Press* case is applicable. Thus: 'Any First Amendment interest which might be served by [telephone communications concerning] an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation *is altogether absent* when the commercial activity itself is illegal and the restriction on [telephone communication] is incidental to a valid limitation on economic activity.' " (23 Cal.3d at p. 657, italics in *Goldin*.)

Most recently, in *People* ex rel. *Gallo* v. *Acuna* (1997) 14 Cal.4th 1090, our court, in upholding against a First Amendment challenge the validity of an injunction restraining a wide array of future activities of gang members, explained that in a variety of respects a specific injunction, issued against a particular party on the basis of a proven past course of conduct, poses less of a danger to free speech interests than a general statutory prohibition. We noted: "As with any injunction, the preliminary decree here is addressed to identifiable parties and to specific circumstances; the enjoined acts are particularly described in the trial court's order. 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, a

procedure that assures ' "a prompt and carefully circumscribed determination of the issue." ' [Citation.]" (14 Cal.4th at p. 1114.)

Under the California Constitution, as under its federal counterpart, the injunction in the present case thus does not constitute a prohibited prior restraint of speech, because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the FEHA.

V

Defendants further claim that, even if some injunctive relief against future racial epithets is permissible, the order in this case is invalid because it is overly broad. As noted above, one provision of the injunction prohibited defendant Lawrence from "using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc. . . ." The Court of Appeal upheld this provision to the extent it prohibited Lawrence "from continuing to use racist epithets in the workplace," but ruled that, to the extent the prohibition applied to conduct outside the workplace, "it improperly exceeds the scope of the FEHA violation sought to be prevented and must be modified accordingly." In further response to defendants' claim, the Court of Appeal additionally restricted the injunction by directing the trial court to add to the injunction "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets, such as those actually used in the workplace by Lawrence" in order to "more precisely warn Lawrence and Avis what is forbidden." Because neither plaintiffs nor defendants have sought review of those limitations of the scope of the injunction, their validity is not before us and we express no opinion on that matter.

Defendants assert that, even as modified by the Court of Appeal, the injunction is overly broad because it enjoins Lawrence from employing racially derogatory terms "descriptive of" Avis's Hispanic employees, even outside the hearing of those employees.

Defendants argue that the use of racial epithets outside the hearing of Hispanic employees does not contribute to a hostile work environment if the audience does not find the speech unwelcome and the subjects of the racial invective are unaware they are being maligned. The Court of Appeal disagreed, stating: "Continual use of racist epithets poisons the atmosphere of the workplace, even when some of the invective is not directed at or even heard by the victims. If the Hispanic/Latino employees at Avis's San Francisco airport location know that Lawrence is free to continue voicing his on-the-job racist epithets behind their backs, it will remain a hostile place at which to work. Under the present circumstances, where there was direct racist invective, continued indirect invective would serve to maintain an abusive work environment, and thus both are properly enjoined."

The United States Supreme Court has held that an injunction that imposes a content-neutral restriction upon expression must "burden no more speech than necessary to serve a significant government interest. [Citations.]" (*Madsen* v. *Women's Health Center*, *supra*, 512 U.S. 753, 765 [129 L.Ed.2d 593, 608]; *People* ex rel. *Gallo* v. *Acuna, supra,* 14 Cal.4th 1090, 1120.) The high court explained: "Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, 'that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.' [Citations.]" (*Madsen* v. *Women's Health Center*, *supra*, 512 U.S. at p. 765 [129 L.Ed.2d 593, 608].)

Because defendants elected not to provide a transcript of the trial proceedings, we have no basis upon which to conclude that, in the particular circumstances of this case, it was unnecessary to prohibit the use of the racial epithets even outside the hearing of plaintiffs, in order to prevent a continuation of the hostile work environment. It certainly is possible that the use of racial epithets even outside the hearing of plaintiffs would contribute to an atmosphere of racial hostility that would perpetuate the hostile work environment created by defendants. Nothing in the limited record before us suggests that the injunction was more burdensome than necessary to prevent future violations of the FEHA.[9]

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[9] Justice Kennard's dissenting opinion suggests that the injunction is necessarily overbroad because it is not limited to the type of repeated or pervasive racial epithets that must *initially* be shown in order to establish the creation of an abusive or hostile work environment. The dissent cites no authority, however, to support the proposition that once it has been established that the existence of sufficiently severe or pervasive racial insults or epithets in a workplace already has created an abusive work environment, a court may not enjoin the offending party from perpetuating the abusive environment by continuing to use such racial insults or epithets in the future.

As a general matter, when a repeated course of conduct has been found to constitute a nuisance or unlawful employment practice, a court is authorized to enjoin future individual acts that are likely to continue or perpetuate the nuisance or unlawful practice. In *EEOC* v. *Wilson Metal Casket Co.* (6th Cir. 1994) 24 F.3d 836, the court upheld an injunction — following a finding of sexual harassment — that prohibited the defendant from leaving the premises with any female employee. Although this conduct, standing alone, did not constitute sexual harassment, it properly could be enjoined, because it was sufficiently "related to the proven unlawful conduct." (*Id.* at p. 842.) The court of appeals explained: "In the instant case, a distinct pattern of sexual harassment emerged. Wilson either waited until female employees were alone with him in isolated portions of the facilities or transferred them to isolated areas. Once they were isolated, he grabbed them and fondled their breasts and buttocks. With Barbara Ellis, in addition to unwanted fondling, Wilson forced her to engage in oral sex and sexual intercourse. Wilson also sexually propositioned female employees and asked them to accompany him

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The trial court found that John Lawrence's use of racial epithets was sufficiently severe or pervasive to constitute employment discrimination. The trial court further found that injunctive relief was necessary to prevent a continuation of

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off the company's premises. Based on this pattern of behavior, the injunction appropriately enjoins conduct which allowed sexual harassment to occur." (*Ibid.*; accord, *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.* (5th Cir. 1977) 549 F.2d 368, 390 ["An injunction can be therapeutic as well as protective. In fashioning relief against a party who has transgressed the governing legal standards, a court of equity is free to proscribe activities that, standing alone, would have been unassailable."].)

Thus, although a single use of a racial epithet, standing alone, would not create a hostile work environment, once the jury determined that a pervasive pattern of such use had created a hostile work environment, the trial court in this case did not abuse its discretion in concluding that each additional instance would perpetuate the hostile environment and should be enjoined.

the abusive work environment. Accordingly, the trial court enjoined Lawrence from "using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc." Because Lawrence's past use of such epithets in the workplace had been judicially determined to violate the FEHA, prohibiting him from continuing this discriminatory activity does not constitute an invalid prior restraint of speech.

VI

The judgment of the Court of Appeal is affirmed.

GEORGE, C.J.

WE CONCUR:

BAXTER, J.
CHIN, J.

COPY

AGUILAR v. AVIS RENT A CAR SYSTEM, INC.

S054561

CONCURRING OPINION BY WERDEGAR, J.

This case presents the collision of two very basic values protected by the United States Constitution. The first is to live one's life free of racial discrimination. (U.S. Const., Amend. XIV.) The second is to speak one's mind free of government censorship. (U.S. Const., Amend. I.) The trial court balanced these two bedrock constitutional principles to conclude defendant John Lawrence validly could be enjoined from engaging in a form of speech a jury found was in violation of the Fair Employment and Housing Act. (Gov. Code, § 12900 et seq. [hereafter FEHA].) A divided Court of Appeal affirmed the trial court judgment, but remanded the case to the trial court with directions to narrow the terms of the injunction by limiting it to the workplace and to provide an exemplary list of prohibited words.

To the extent the plurality opinion affirms the judgment of the Court of Appeal, and with my understanding of the purpose and context of the "exemplary list" of words (see *post*, at p. 32, fn. 9), I concur.[1] I write separately because the plurality opinion does not address what I believe to be a critical preliminary question, that is, whether the First Amendment permits imposition of civil liability under FEHA for pure speech that creates a racially hostile or abusive work

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[1] I also agree with the plurality opinion's conclusion that the "secondary effects" doctrine does not control this case. (Plur. opn., *ante*, pp. 14-15, fn. 4.)

environment. By declining to address this question, the plurality opinion fails to acknowledge that we are with this case 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; indeed, the question is one of considerable debate among First Amendment scholars.[2] (Volokh, *How Harassment Law Restricts Free Speech* (1995) 47 Rutgers L.Rev. 563; Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight* (1995) 47 Rutgers L.Rev. 461 (Sangree, *No Collision in Sight*); Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark* (1994) 1994 Sup. Ct. Rev. 1 (Fallon, *Sexual Harassment*); Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment* (1993) 68 Notre Dame L.Rev. 1003; Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 U.C.L.A. L.Rev. 1791 (Volokh, *Workplace Harassment*); Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment* (1991) 52 Ohio St. L.J. 481 (Browne, *Title VII as*

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[2] "There is a lively debate within First Amendment scholarship over the constitutional status of discriminatory verbal harassment, particularly in the workplace. A number of decisions finding harassment liability under Title VII have turned in whole or in part on what we would ordinarily recognize as 'speech'; yet few courts have seriously considered the relevance of the First Amendment in this regard. The commentators have stepped into the judicial vacuum with gusto. Some commentators have argued that Title VII's harassment law, as applied to nearly all speech, abridges the freedom of speech protected by the First Amendment. Others have defended harassment law as both necessary to workplace equality and entirely consistent with free speech principles and doctrine. Still others situate themselves at some point in the middle and advocate some restrictions on the application of Title VII to speech." (Estlund, *The Architecture of the First Amendment and the Case of Workplace Harassment* (1997) 72 Notre Dame L.Rev. 1361, 1363-1364, fns. omitted.)

Censorship); Strauss, *Sexist Speech in the Workplace* (1990) 25 Harv. C.R.-C.L. L.Rev. 1.) Accordingly, a serious question arises whether or not the injunction in this case constitutes an impermissible prior restraint on defendant John Lawrence's speech.

As I explain, despite the absence of any direct United States Supreme Court authority finding speech creating a hostile work environment falls outside the protection of the First Amendment, existing high court decisions provide strands of analysis that, woven together, produce a coherent theory that explains why the injunction in this case does not violate defendant Lawrence's First Amendment rights.

I

At the outset, I note the appellate record in this case is woefully inadequate. Defendants proceeded in this appeal by relying on an appellants' appendix in lieu of a clerk's transcript. This is a permissible choice under the rules governing appellate procedure (see rule 5.1, Cal. Rules of Court), but, as a consequence of that choice, the record does not reveal what defendant Lawrence said that the jury found created a hostile work environment in violation of FEHA. The record also does not reveal how often he made the offending utterances or in what context. Defendants, of course, as the appellants in this case, bear the burden of providing a record on appeal that is adequate to adjudicate their claims. (*Null* v. *City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532, 1535; *Buckhart* v. *San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 518, pp. 562-564.) If the record furnished is insufficient to establish the merits of an appellant's legal position, it is the appellant who bears the risk of uncertainty caused by the lacuna. (See, e.g., plur.

opn., *ante*, pp. 10-11 [rejecting claims for failure to provide an adequate record]; *Null* v. *City of Los Angeles*, *supra*, at p. 1536.)

Even if defendants took this risk willingly, for an appellate court to adjudicate an important First Amendment case on such a sketchy record is unfortunate. Were we apprised of the nature and frequency of Lawrence's verbal outbursts against plaintiffs, perhaps we would find his speech did not actually create a hostile work environment, thereby rendering resolution of this important constitutional issue unnecessary. (See *People* v. *Hernandez* (1998) 19 Cal.4th 835, 845-848 (dis. opn. of Werdegar, J.) [court should not decide constitutional issues until necessary to do so]; *People* v. *Bennett* (1998) 17 Cal.4th 373, 393 (conc. opn. of Werdegar, J.) [same].) Were we provided with a record describing the nature of Lawrence's epithets, perhaps we would find, for example, that his speech fell into the category of so-called "fighting words," which the high court has found unprotected by the First Amendment. (See *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568.) Or perhaps, if his offensive speech was combined with conduct, different First Amendment concerns would be implicated. (See *Texas* v. *Johnson* (1989) 491 U.S. 397; *United States* v. *O'Brien* (1968) 391 U.S. 367.)

Lacking a record that would resolve these questions, we must decide the case as we find it. I proceed now to explain briefly why I find the plurality opinion's analysis unsatisfactory; I next put forth a different analysis supportive of the judgment.

II

From the abbreviated record provided by defendants, we may discern that the jury found defendant Lawrence created a hostile work environment by engaging in a continuous pattern and practice of using racial and other epithets to

demean and embarrass a group of Latino workers. The plurality opinion concludes we need not in this case confront the thorny constitutional question of whether speech alone may constitute the basis for liability based on the creation of a hostile work environment, reasoning that "defendants have not challenged the finding that their past conduct amounted to unlawful employment discrimination in violation of the FEHA, [so] we need not, and do not, address that broad issue here." (Plur. opn., *ante*, p. 9, fn. 3.)

By taking this approach, the plurality opinion never establishes the speech at issue in this case is unprotected by the First Amendment. Although the opinion declares that under "well-established law" the injunction is not an invalid prior restraint, "because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity" (plur. opn., *ante*, p. 19), as discussed at greater length hereafter (*post*, at pp. 9-12), I can locate no authority from this court or the United States Supreme Court that concludes speech in the workplace that creates a racially hostile work environment, *standing alone*, can be made the basis of civil liability (under either FEHA or the similar federal law, title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) [hereafter title VII][3]) consistent with the First Amendment's guarantee that the state shall not

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[3] Harassment in the workplace is also prohibited by federal law. (42 U.S.C. § 2000e et seq.) "Although the wording of title VII differs in some particulars from the wording of FEHA, the antidiscriminatory objectives and overriding public policy purposes of the two acts are identical." (*Beyda* v. *City of Los Angeles* (1998) 65 Cal.App.4th 511, 517.) "Where there is a dearth of state authority in an area of emerging law, such as employment discrimination, it is appropriate to consider federal cases interpreting title VII." (*Mogilefsky* v. *Superior Court* (1993) 20 Cal.App.4th 1409, 1416, fn. 5.) "Although they are not

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make laws "abridging the freedom of speech." (See *Gitlow* v. *New York* (1925) 268 U.S. 652, 666 [applying the First Amendment to the states].)

The plurality opinion's implicit assumption that a legislative body can validly pass a statute having the effect of removing constitutional protection from speech is unfounded. For example, the mere fact Congress has decreed (by enacting title VII) that the creation of an abusive or hostile work environment violates federal law does not necessarily mean racial speech creating such a work atmosphere is unprotected by the First Amendment. Congress cannot, by legislation, change the scope of one's First Amendment rights. (*United States* v. *Eichman* (1990) 496 U.S. 310 [Flag Protection Act of 1989 violated the First Amendment]; cf. *City of Boerne* v. *Flores* (1997) 521 U.S. 507 [Congress's attempt to redefine scope of free exercise clause by enacting the Religious Freedom Restoration Act of 1993 found unconstitutional].) Likewise, the mere fact the jury found defendant Lawrence was in violation of FEHA does not necessarily mean his speech was unprotected by the First Amendment.

In sum, by relying on the jury's finding that defendants were liable for violating FEHA, together with defendants' failure to challenge that finding on appeal, the plurality opinion attempts to resolve this case without deciding the critical First Amendment question involved. In contrast, I believe we must confront the fundamental preliminary question whether speech creating a racially hostile work environment is protected by the First Amendment. I now turn to that question.

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controlling, federal cases interpreting title VII are instructive when analyzing a FEHA claim." (*Spaziano* v. *Lucky Stores, Inc.* (1999) 69 Cal.App.4th 106, 112.)

III

I begin my analysis with the recognition that we must assume for purposes of this appeal that defendant Lawrence engaged in a pervasive practice of hurling racially-tinged insults at Latino workers, singling them out as the recipients of his offensive epithets. Defendant Avis Rent A Car Systems, Inc., Lawrence's employer, tolerated this outrageous workplace behavior and was thus complicit in the creation of a racially hostile and abusive work environment. Though I assume the majority of persons finds such words distasteful, their utterance nevertheless is generally protected by the free speech guarantee of the First Amendment to the United States Constitution. If Lawrence's invective would not have caused a reasonable person to react with violence (*Chaplinsky* v. *New Hampshire*, *supra*, 315 U.S. 568), if his words did not incite people to engage in imminent lawless action under circumstances making such action reasonably likely (*Brandenburg* v. *Ohio* (1969) 395 U.S. 444 (*per curiam*)), if his words were not obscene under the *Miller* test (*Miller* v. *California* (1973) 413 U.S. 15), if his words did not come within some other category of speech the high court has found outside the First Amendment's protective umbrella, then an injunction prohibiting Lawrence from expressing himself in his chosen manner simply because we (or the Legislature) disagree with his message or wish to protect listeners against hurt feelings raises serious constitutional concerns.[4]

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[4] The law generally prohibiting prior restraints on speech is settled. "Any system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc.* v. *Sullivan*, [(1963)] 372 U. S. [58], at 70 [additional cites omitted]. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who

(footnote continued on next page)

It is true Lawrence chose to express himself in a rude and provocative manner, inevitably producing feelings of anger, hostility and humiliation in his listeners, the plaintiffs here. However, "[i]nsults may contain a point of view that the speaker is entitled to express and his audience to hear. 'Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.' " (Fried, *The New First Amendment Jurisprudence: A Threat to Liberty* (1992) 59 U. Chi. L.Rev. 225, 242, quoting *NAACP* v. *Claiborne Hardware Co.* (1982) 458 U.S. 886, 928; see also Greenawalt, *Insults and Epithets: Are They Protected Speech?* (1990) 42 Rutgers L.Rev. 287, 302 ["It is no coincidence that the less privileged and more radical are those who often use words and phrases that might be judged to impair civil discourse."].) As the Supreme Court has trenchantly observed, "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." (*Cohen* v. *California* (1971) 403 U.S. 15, 25.)

What, then, of the rights of the Latino workers, who were the unwilling targets of Lawrence's racial invective? Do they have the right *not* to listen, a right to work free of racial discrimination and intimidation? Do Lawrence's First Amendment rights trump their rights? Most fundamentally, do Lawrence's racially offensive epithets come within the protection of the First Amendment?

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abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, Ltd.* v. *Conrad* (1975) 420 U.S. 546, 558-559, italics in original.) The government bears a " 'heavy burden' " to justify a prior restraint. (*New York Times Co.* v. *United States* (1971) 403 U.S. 713, 714 (*per curiam*); *Organization for a Better Austin* v. *Keefe* (1971) 402 U.S. 415, 419.)

A. The Relevance of *R.A.V.* and *Harris*

As noted, *ante*, nothing in the decisions of the Supreme Court provides definitive guidance on whether racist speech at the workplace that is so pervasive and constant that it creates a hostile and abusive work environment is protected by the First Amendment's guarantee of freedom of speech. Hints from two decisions, however, suggest the high court considers such speech outside the protective scope of the First Amendment.

In 1992, the Supreme Court held the City of St. Paul's municipal ordinance banning certain hate speech was unconstitutional. (*R. A. V.* v. *St. Paul* (1992) 505 U.S. 377 (*R.A.V.*).) Justice Scalia, speaking for a five-justice majority, explained that, although fighting words in general are not protected by the First Amendment, the city's ordinance unconstitutionally engaged in viewpoint discrimination by prohibiting hate speech on some topics but not others. Noting the ordinance outlawed fighting words "that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender' " (*id.* at p. 391), the majority found it significant that "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered." (*Ibid.*)

The justices concurring separately in the *R.A.V.* decision expressed concern that the majority's rationale called into question the constitutionality of sexual harassment claims under title VII, which declares it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(a)(1).) Thus, Justice White, writing for four justices, stated that "[u]nder the

broad principle the Court uses to decide the present case, hostile work environment claims based on sexual harassment should fail First Amendment review . . . ." (*R.A.V.*, *supra*, 505 U.S. at pp. 409-410 (conc. opn. of White, J.).)

Addressing this question, Justice Scalia replied that title VII claims did not come within the ambit of the majority's analysis: "since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [Citations.] Thus, for example, sexually derogatory 'fighting words,' *among other words*, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, [citations]." (*R.A.V.*, *supra*, 505 U.S. at p. 389, italics added.)

Of course, *R.A.V.* did not involve a title VII claim and thus its pronouncement on whether such a claim would survive under the First Amendment is dictum. Moreover, what Justice Scalia was referring to when he explained that, in addition to fighting words, some "other words" could produce a constitutionally valid hostile work environment claim under title VII is unclear. We need not unravel this conundrum, however. It is enough for us to recognize that "[w]hen the majority and concurring opinions are viewed in conjunction, it appears that all nine Justices participating in *R.A.V.* assumed that the core Title VII prohibition against speech that creates a discriminatorily hostile work environment would pass constitutional muster." (Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at p. 12.) Thus, although *R.A.V.* did not "hold" that harassing workplace speech violative of title VII is unprotected speech, the opinions in the case suggest the court would so hold.

The next year, the Supreme Court gave a further hint of its views when it decided *Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17 (*Harris*). *Harris* concerned a sexual harassment claim under title VII, the basis of which involved both conduct and speech. For example, the defendant's male president made Harris, the plaintiff, the target of sexual innuendo and made comments such as " 'You're a woman, what do you know' " and that Harris was " 'a dumb ass woman.' " (*Harris*, *supra*, at p. 19.) He also made sexually suggestive comments about Harris's clothing. (*Ibid.*) Because the case involved the defendant's speech as a contributory factor to the creation of a hostile work environment, "[s]ome observers therefore thought that the Supreme Court might use *Harris* to clarify the bearing of the First Amendment on sexual harassment law and, in doing so, might cut back sharply on accepted theories of Title VII liability." (Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at pp. 1-2.) That both the parties and amici curiae briefed the First Amendment issue before the court further supported this belief. (*Id.* at pp. 9-10 & fns. 44-47.)

It was not to be. The Supreme Court in *Harris* simply found that, where an abusive and hostile work environment is created in violation of title VII, the plaintiff's entitlement to relief is not dependent on her ability to show she suffered psychological injury. (*Harris*, *supra*, 510 U.S. at p. 22.) Neither Justice O'Connor, who wrote for the *Harris* majority, nor Justices Scalia or Ginsburg, concurring separately, mention whether harassing speech, standing alone, may constitute a violation of title VII consistent with the First Amendment.[5]

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[5] The *Harris* majority at one point noted that whether a hostile or abusive work environment exists under title VII requires consideration of several factors, including whether the harassing conduct is severe "or a mere offensive utterance." (*Harris*, *supra*, 510 U.S. at p. 23.)

The question thus remains open.[6] Nevertheless, I find strands of analysis in several high court decisions which, taken together, indicate that, even if speech creating a racially hostile or abusive work environment is protected by the First Amendment, such speech may be subject to some restrictions consistent with that amendment. I turn now to discussion of these strands.

B. Speech in the Workplace

Of course, speech is not wholly protected from government regulation in all places; the location of the speech is relevant to the degree of protection, if any, the speech will receive under the First Amendment. (*Frisby* v. *Schultz* (1988) 487 U.S. 474, 479 (*Frisby*) ["To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ."]; *Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 298, 302-303 (plur. opn.) ["[T]he nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question."].)

For example, speech uttered in a traditional public forum is afforded the highest degree of protection from state regulation. (*Perry Ed. Assn.* v. *Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45 (*Perry*).) Streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between

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[6] Professor Fallon argues that after *R.A.V.*, *supra*, 505 U.S. 377, and *Harris*, *supra*, 510 U.S. 17, "it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech." (Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at p. 9.)

citizens, and discussing public questions." (*Hague* v. *C. I. O.* (1939) 307 U.S. 496, 515.) Content-based restrictions on speech uttered in a traditional public forum must be narrowly tailored to achieve a compelling state interest. (*Perry*, *supra*, at p. 45.)

Speech may occur in nonpublic fora as well, but in such cases the government is permitted to place reasonable restrictions on speech, even based on its content. (See *Jones* v. *North Carolina Prisoners' Union* (1977) 433 U.S. 119 [prison]; *Greer* v. *Spock* (1976) 424 U.S. 828 [military base]; *Adderley* v. *Florida* (1966) 385 U.S. 39 [jail].) Thus, speech in nonpublic fora is subject to reasonable time, place and manner restrictions, and "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Perry*, *supra*, 460 U.S. at p. 46.)

Not all speech-related activity occurs publicly in traditional public or even nonpublic fora. For most adult Americans, a great deal of time is spent at work. That the speech at issue in this case occurred at plaintiffs' workplace is significant, because the Supreme Court has recognized that speech occurring in the workplace presents special considerations that sometimes permit greater restrictions on First Amendment rights. For example, in *Connick* v. *Myers* (1983) 461 U.S. 138 (*Connick*), an assistant district attorney unhappy with a job transfer circulated a questionnaire in her office, asking her colleagues their opinion about "[the] office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." (*Id.* at p. 141, fn. omitted.) The district attorney fired her in part for this speech-related action, but the district court ordered her reinstated. The circuit court of appeals affirmed. The Supreme Court granted certiorari and reversed. The court explained that, with the exception of the question about

political campaigns, the plaintiff's speech was not a matter of "public concern" and that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." (*Id.* at p. 146.) Thus, the Supreme Court held the employee's free speech rights could constitutionally be curtailed on the job. (See also *Branti* v. *Finkel* (1980) 445 U.S. 507 [recognizing that for some public jobs, an employer could fire an employee for belonging to a particular political party without violating the employee's First Amendment rights, but holding assistant public defender is not such a job]; but see *Rankin* v. *McPherson* (1987) 483 U.S. 378 (*Rankin*) [violation of clerical employee's First Amendment rights for constable to fire her for expressing opinion, while on the job, that she disagreed with the president's policies and hoped he would be killed]; Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee* (1998) 25 Hastings Const. L.Q. 529, 550-551 [criticizing *Connick* and arguing that *Connick* and *Rankin* "point in different directions"].)

The intersection of an individual's place of employment and his or her free speech rights also appeared in *CSC* v. *Letter Carriers* (1973) 413 U.S. 548 (*Letter Carriers*). In that case, the high court held the Hatch Act (5 U.S.C. former § 7324(a)(2), now see § 7323), which as then written prohibited federal employees from taking active roles in political campaigns for public office, did not violate federal employees' rights under the First Amendment. Although activity in political campaigns is core political speech that would otherwise be entitled to the highest constitutional protection, the court found substantial public policy reasons justified the limitation on employee speech. "[A] judgment [was] made by this country over the last century that it is in the best interest of the country, indeed

essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." (*Letter Carriers*, *supra*, at p. 557; but see *Bauers* v. *Cornett* (8th Cir. 1989) 865 F.2d 1517, 1523 [explaining that Hatch Act was amended after *Letter Carriers*].) Thus, a strong public policy in avoiding coercing public employees to work on political campaigns justified restrictions on employees' First Amendment rights. (Cf. *Snepp* v. *United States* (1980) 444 U.S. 507 (*per curiam*) [imposition of constructive trust on book profits justified by failure of former Central Intelligence Agency employee, in violation of employment agreement, to obtain preclearance from agency before publishing book based on admittedly unclassified information].)

Thus, in order to vindicate sufficiently weighty public policies governing the workplace, the high court has in the past found the First Amendment rights of employees must sometimes give way. In the cases described above, however, the government directly restricted the speech of public employees. Not so with *NLRB* v. *Gissel Packing Co.* (1969) 395 U.S. 575 (*Gissel*). In that case, a private employer, Sinclair Company, faced a union organizing campaign among its workers. When the president of Sinclair Company first learned of the campaign, he spoke to his employees, attempting to dissuade them from joining a union. He stated that the workers were forgetting the " 'lessons of the past' " when a prior strike had shut down the plant for three months and the plant had then reopened without a union contract; that the company was still on " 'thin ice' " financially; that a strike " 'could lead to the closing of the plant' "; and that because of their age and the limited usefulness of their skills, the workers would not find ready employment if the plant closed. (*Id.* at pp. 587-588.) In the weeks leading up to the election, the company sent each of the workers letters and pamphlets to the

same effect. (*Id.* at pp. 588-589.) When the union lost the election, it filed objections to the employer's communications.

As pertinent here, the National Labor Relations Board (NLRB) found Sinclair Company's communications with its workers violated section 8(a)(1) of the National Labor Relations Act, codified at 29 United States Code section 158(a): "It shall be an unfair labor practice for an employer— [¶] (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." Title 29, United States Code section 158(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." The First Circuit Court of Appeals affirmed the NLRB's ruling.

On certiorari before the Supreme Court, Sinclair Company argued that application of these rules to the speech of its president violated his First Amendment rights. The high court rejected the argument, reasoning that "[a]ny assessment of the precise scope of employer expression, of course, must be made *in the context of its labor relations setting*." (*Gissel*, *supra*, 395 U.S. at p. 617, italics added.) The Supreme Court emphasized that the employer's First Amendment rights must be balanced against "the equal rights of the employees to associate freely," and the court must "take into account the economic dependence of the employees on their employers." (*Ibid.*) In such a setting, said the court, free speech rights in the workplace must be distinguished from speech relating to "the election of legislators or the enactment of legislation . . . where the independent voter may be freer to listen more objectively and employers as a class freer to talk." (*Id.* at pp. 617-618.) In short, because the speech at issue occurred at the

workplace, some restrictions on speech could be tolerated that would be impermissible if applied to speech in other settings.

Of course, employees retain First Amendment rights while on the job (*Rankin*, *supra*, 483 U.S. 378; *Branti* v. *Finkel*, *supra*, 445 U.S. 507); *Gissel* did not create a general "workplace exception" to the First Amendment. Still, "in *Gissel* the Supreme Court validated congressional power, under the Commerce Clause, to impose content-based speech restrictions in the workplace to effectuate values embodied in the greater Constitution. The *Gissel* Court's holding, in large part, rested on its understanding of the unique nature of the employment relationship and the potential for even subtle coercion in this context to undermine valid economic policy which promotes constitutional interests." (Sangree, *No Collision in Sight*, *supra*, 47 Rutgers L.Rev. at p. 520; see also Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at p. 19 [advocating development of a workplace speech doctrine "responding to distinctive features of the workplace"]; but see Volokh, *Workplace Harassment*, *supra*, 39 U.C.L.A. L.Rev. at pp. 1820-1822 [reading *Gissel* much more narrowly].)

Thus, *Connick*, *Letter Carriers* and *Gissel* demonstrate the Supreme Court's recognition that strong public policies governing the workplace—both private and public—may justify some limitations on the free speech rights of employers and employees. This view is consistent with the reality that workplaces and job sites are not usually thought of as marketplaces for the testing of political and social ideas (Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment* (1990) 1990 Duke L.J. 375, 423 [suggesting some may view workplace speech as different from political speech generally]), and, therefore, the importance of preserving the workplace as a forum where free speech rights will outweigh other important constitutional considerations is diminished.

C. Employees Are a Captive Audience

In addition to high court authority recognizing free speech limitations at the workplace, another analytical strand that recurs frequently in Supreme Court decisions is relevant here. The Supreme Court has in a number of cases recognized that when an audience has no reasonable way to escape hearing an unwelcome message, greater restrictions on a speaker's freedom of expression may be tolerated. Stated differently, even if the speaker enjoys the right to free speech, he or she has no corollary right to force people to listen.

The relevance of a captive audience to determining the scope of First Amendment protection of speech is exemplified by *Frisby*, *supra*, 487 U.S. 474. In that case, the Supreme Court upheld an ordinance that prohibited focused picketing in front of an individual's home. Although picketing is generally characterized as core political speech (*Carey* v. *Brown* (1980) 447 U.S. 455, 460; *Shuttlesworth* v. *Birmingham* (1969) 394 U.S. 147, 152) and was so in *Frisby* (the resident was targeted because he was a physician who performed abortions), the Supreme Court explained that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." (*Frisby*, *supra*, at p. 487.)

The high court responded to similar concerns in *Bethel School Dist. No. 403* v. *Fraser* (1986) 478 U.S. 675 (*Bethel School*). In *Bethel School*, the high court upheld discipline imposed on a high school student who gave a speech laced with sexual innuendo at a school assembly that many students were required to attend. Although relying largely on the presence of children at the assembly, the high court also stated that school authorities acting in loco parentis "[should] protect children—*especially in a captive audience*—from exposure to sexually explicit, indecent, or lewd speech." (*Id.* at p. 684, italics added.)

That the presence of a captive audience is important in determining the proper degree of First Amendment protection was also discussed in *Rowan* v. *Post Office Dept.* (1970) 397 U.S. 728 (*Rowan*). In *Rowan*, the appellants challenged the constitutionality of a federal law that permitted householders to request their name be removed from mailing lists so they might not receive sexually-themed mailings. The Supreme Court upheld the law, stating: "We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." (*Id.* at p. 738.)

In addition to *Frisby*, *Bethel School* and *Rowan*, numerous other cases have cited an audience's "captivity" as a factor justifying limitations on free speech. (*FCC* v. *Pacifica Foundation* (1978) 438 U.S. 726, 748-750 (plur. opn.) (*Pacifica*) [possibility that nonconsenting adults might inadvertently tune in to radio broadcast containing indecent speech justified precluding broadcast during the day]; *id.* at p. 759 (conc. opn. of Powell, J.) ["Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away . . . , a different order of values obtains in the home."]; *Erznoznik* v. *City of Jacksonville* (1975) 422 U.S. 205, 209 (*Erznoznik*) [restrictions on speech are justified when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"]; *id.* at p. 218 (conc. opn. of Douglas, J.) [endorsing view that "a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences"]; *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at p. 302 (plur. opn.) [recognizing riders of public transit are a captive audience to

advertising placed inside the cars]; *id.* at pp. 306-307 (conc. opn. of Douglas, J.) [also recognizing bus riders are a captive audience]; *Cohen* v. *California*, *supra*, 403 U.S. at pp. 21-22 [noting those objecting to the defendant's objectionable message, exhibited on his jacket, could simply avert their eyes].)

The relative captivity of plaintiffs here supports the restriction on defendant Lawrence's speech. Plaintiffs were not present at their job because they wished to hear Lawrence's particular views on their Latino heritage, but neither were they reasonably free to walk away when confronted with his racial slurs. Although plaintiffs could have avoided the undesired speech by quitting their jobs and seeking employment with more racially tolerant supervisors, the cases discussed above indicate the captive audience doctrine is not reserved for situations in which listeners are physically unable to leave, such as passengers on airplanes or inmates in prison. The Constitution does not require plaintiffs to sacrifice their employment to avoid a racially clamorous work environment any more than the doctor in *Frisby*, *supra*, 487 U.S. 474 was required to move from his home, the students in *Bethel School*, *supra*, 478 U.S. 675 were required to leave school, or the passengers in *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. 298 were required to walk home. People need not engage in heroic efforts before we will conclude they have sufficiently averted their eyes and plugged their ears. People need to work; expecting them to walk past someone handing out leaflets on the sidewalk without accepting and reading the flyer is not the same as requiring them to walk off their job to avoid unwanted speech. So long as avoiding unwelcome speech is—as here—sufficiently "impractical" (*Erznoznik*, *supra*, 422 U.S. at p. 209), we can conclude listeners constitute a captive audience, with the result that courts will show greater solicitude for their privacy and their right not to be forced to listen to unwelcome speech.

Most of the cases cited above concededly did not solely concern a captive audience. *Frisby*, *Pacifica* and *Rowan* relied in addition on the increased privacy interest in one's home. (*Frisby*, *supra*, 487 U.S. at pp. 484-485; *Pacifica*, *supra*, 438 U.S. at pp. 731, fn. 2, 748-749; *Rowan*, *supra*, 397 U.S. at p. 738 [emphasizing "the sanctuary of the home"]; cf. *Wilson* v. *Layne* (1999) ___ U.S. ___, ___ [119 S.Ct. 1692, 1697] ["The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home . . . ."].) *Bethel School* and *Pacifica* relied also on the presence of children. (*Bethel School*, *supra*, 478 U.S. at pp. 683-684; *Pacifica*, *supra*, at pp. 731, fn. 2, 749-750.) *Pacifica*, *Rowan* and *Erznoznik* involved, as well, lewd or indecent speech. (*Pacifica*, *supra*, at pp. 739-740; *Rowan*, *supra*, at p. 730; *Erznoznik*, *supra*, 422 U.S. at p. 207 [ordinance prohibited drive-in theater with screen visible from public street from exhibiting any film portraying nudity].)

The applicability of the captive audience doctrine to harassing speech in the workplace is, moreover, debated by legal commentators. (Compare Volokh, *Workplace Harassment*, *supra*, 39 U.C.L.A. L.Rev. at pp. 1832-1843 [captive audience doctrine should not apply to the workplace], with Sangree, *No Collision in Sight*, *supra*, 47 Rutgers L.Rev. at pp. 515-518 [rejecting Professor Volokh's argument], and Volokh, *How Harassment Law Restricts Free Speech*, *supra*, 47 Rutgers L.Rev. at pp. 571-572 [replying to Professor Sangree]; cf. *Cohen* v. *California*, *supra*, 403 U.S. at p. 21 ["Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."].) Nevertheless, the Supreme Court authority discussed above firmly establishes, at the least, that the relative captivity of an audience is a relevant and important, if not dispositive, factor in determining whether government restrictions on speech in the workplace are permissible under the First Amendment. Applying that concept here, I find that although defendant

Lawrence may desire to offer his apparently low opinion of the Latino workers at his place of employment, plaintiffs apparently do not wish to hear it. Further, plaintiffs were not free to walk away easily from Lawrence's speech, avert their eyes, cover their ears or otherwise avoid hearing his unwanted message. I conclude plaintiffs' status as forced recipients of Lawrence's speech lends support to the conclusion that restrictions on his speech are constitutionally permissible in the circumstances at hand, where the regulation of speech is limited solely to the workplace and the offended recipients constitute a captive audience.

D. The Injunction Here Is Similar to a Time, Place and Manner Regulation

A separate, but related, basis for countenancing an injunction in these circumstances is that an injunction restricting speech that creates a racially hostile work environment is analogous to a permissible time, place and manner restriction on speech. As a general matter, speech in even a traditional public forum may be subject to reasonable time, place and manner restrictions. (*Perry*, *supra*, 460 U.S. at p. 45.) Such restrictions must be content-neutral, serve a significant government interest and "leave open ample alternative channels of communication." (*Ibid.*) In a nonpublic forum, the government may also "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Id.* at p. 46.)

Time, place and manner rules generally have been applied to public and nonpublic fora. As a private employer's place of business, defendants' workplace is neither a public nor a nonpublic forum; it is private property. Nevertheless, the Supreme Court has "on at least one occasion applied [the time, place and manner doctrine] to conduct occurring on private property" (*Barnes* v. *Glen Theatre, Inc.* (1991) 501 U.S. 560, 566 (plur. opn.), referring to *Renton* v. *Playtime Theatres,*

Inc. (1986) 475 U.S. 41), and adapting to a private workplace the rules applicable to nonpublic fora does not seem inconsistent with the basic goals and purposes of the First Amendment. (See *Robinson* v. *Jacksonville Shipyards, Inc.* (M.D. Fla. 1991) 760 F.Supp. 1486, 1535 ["the regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech"].) Private property is rarely dedicated to the purpose of permitting the unrestrained dissemination of speech; common sense suggests that government restrictions on speech that would be impermissible in public and even nonpublic fora may nevertheless be permissible when applied to certain types of private property.[7]

We begin with the state's interest in restricting workplace speech that creates a racially hostile work environment. The state has announced that it is "the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race . . . ." (Gov. Code, § 12920.) The state recognizes that such discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." (*Ibid.*)

Of course, the elimination of racial discrimination, even by private parties or entities, has often been found to be a governmental interest of the highest order.

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[7] Indeed, private employers commonly place any number of restrictions on the speech of their employees, from requiring salespersons to speak well of an employer's products to potential customers and instructing restaurant wait staff not to speak ill of the food they are serving, to requiring employees to keep trade secrets confidential.

(See, e.g., *Edmonson* v. *Leesville Concrete Co.* (1991) 500 U.S. 614 [exercise of race-based peremptory challenge to juror by private litigant in civil case held unconstitutional]; *Bob Jones University* v. *United States* (1983) 461 U.S. 574 [denial of federal tax benefits for private religious schools with racially discriminatory policy upheld]; *Jones* v. *Mayer Co.* (1968) 392 U.S. 409 [federal statute barring racial discrimination in sale or rental of private property valid under the Thirteenth Amendment]; *Shelley* v. *Kraemer* (1948) 334 U.S. 1 [enforcement of racially restrictive covenant in private property deed unconstitutional].) In short, the State of California has stated a compelling governmental interest in support of its laws aimed at eliminating racially discriminatory practices in private employment.

Restricting Lawrence in the future from engaging in speech that is productive of a racially hostile work environment leaves him ample alternatives for advocating, espousing or simply stating his beliefs. Because I agree with the plurality opinion's affirmance of the Court of Appeal's decision reversing and remanding the case to permit the trial court to "redraft the injunction in a manner that . . . limits its scope to the workplace," a majority of this court agrees the injunction in this case should be limited to speech in the workplace. Lawrence is thus free to speak anywhere and at any time outside of his place of employment, whether it be in his home, on the sidewalk, in the park, in his local restaurant or on the Internet.

Madsen v. *Women's Health Center, Inc.* (1994) 512 U.S. 753 (*Madsen*) is illustrative. In that case, protesters picketing an abortion clinic were subject to an injunction that prohibited them from blocking access to the clinic or physically abusing persons entering or leaving it. On finding the injunction to have been violated, the trial court issued a new injunction, providing, inter alia, that demonstrators must (with some exceptions) stay at least 36 feet from clinic

driveways and entrances. The demonstrators eventually sought review in the Supreme Court, claiming the new injunction violated their First Amendment rights.

The Supreme Court, although striking down other parts of the injunction, upheld the requirement of a 36-foot buffer zone, finding the limitation was a valid time, place and manner restriction on speech. As pertinent to the question here, the high court noted the "petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone." (*Madsen*, *supra*, 512 U.S. at p. 764, fn. 2.) If the injunction in the instant case is limited on remand to apply to the workplace only, Lawrence similarly will have open to him ample alternative channels of communication.

The Supreme Court's existing time, place and manner decisions admittedly do not wholly govern this case, for not only does this case not involve a public forum, the injunction here is not content-neutral. "The Supreme Court has stated repeatedly . . . that time, place, and manner regulations must be content neutral in order to receive deferential judicial review." (Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at pp. 16-17, fn. omitted.) "[The] principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' " (*Madsen*, *supra*, 512 U.S. at p. 763.) "We thus look to the government's purpose as the threshold consideration." (*Ibid.*)

The state's purpose here is the elimination of racial discrimination and harassment at the workplace. FEHA thus is clearly concerned with the content of harassing speech; hence, the injunction cannot be classified as content-neutral. This fact has led some commentators to conclude that reliance on the time, place and manner doctrine in the employment harassment setting is misplaced. (Volokh,

Workplace Harassment, *supra*, 39 U.C.L.A. L.Rev. at pp. 1826-1828; Browne, *Title VII as Censorship*, *supra*, 52 Ohio St. L.J. at p. 521.) As noted at the beginning of this opinion, no Supreme Court decision is directly on point; accordingly, we do not know how that court would balance the diverse interests present here.

Whether the content-based nature of the injunction wholly disqualifies the time, place and manner doctrine from any application to this case need not be decided, however. Instead, it is sufficient to consider components of the doctrine as relevant to the overall assessment of whether the injunction violates defendant Lawrence's First Amendment rights. When those components—a compelling state interest and alternative channels of communication—are considered together with the facts the speech sought to be enjoined occurred in the workplace and the recipients of the unwelcome speech were a captive audience, a strong case for upholding the injunction appears.

We must consider the implications of a contrary holding. The state's interest in eradicating racial discrimination in the workplace is compelling, and the state has made a reasonable determination that such discrimination causes "domestic strife and unrest" and is harmful to "the interest of employees, employers, and the public in general." (Gov. Code, § 12920.) The state's interest is fully applicable to this case, as it is undisputed the speech in question occurred at the workplace where both plaintiffs and defendant Lawrence work. Plaintiffs do not wish to listen to Lawrence's constant stream[8] of verbiage denigrating them on

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8 "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]" (*Fisher* v. *San Pedro*

(footnote continued on next page)

account of their Latino heritage, but they are not free, as a practical matter, to leave their jobs to avoid being the targets of his racial slurs. Lawrence, on the other hand, is free to speak his mind anywhere and everywhere, with the sole exception of the workplace.

Diverse interests are in play in this case, and balancing them is undeniably a difficult task. Were we to find the injunction violates Lawrence's First Amendment rights, we would be concluding those rights outweigh the rights of the Latino plaintiffs to be free of unwanted racial discrimination. Like Lawrence's asserted interest in free speech, however, plaintiffs' interest also finds recognition in our federal Constitution (U.S. Const., Amends. XIII, XIV, XV; see *Fitzpatrick* v. *Bitzer* (1976) 427 U.S. 445, 453 & fn. 9 [Congress exercising powers under section 5 of the 14th Amendment when it passed relevant amendments to title VII]). Given the constellation of factors present in this case, no clear reason appears why Lawrence's free speech rights should predominate over the state's and the individual plaintiffs' similarly weighty antidiscrimination interests.

Balancing Lawrence's First Amendment free speech rights with the equally weighty right of plaintiffs to be let alone at their jobsite, free of racial discrimination, I find the several factors coalescing in this case—speech occurring in the workplace, an unwilling and captive audience, a compelling state interest in eradicating racial discrimination, and ample alternative speech venues for the

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Peninsula Hospital (1989) 214 Cal.App.3d 590, 610; *Muller* v. *Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 446 [quoting *Fisher*]; see also *Meritor Savings Bank* v. *Vinson* (1986) 477 U.S. 57, 67 [finding sexual harassment on the job must be "sufficiently severe or pervasive" before there can be liability under title VII].)

speaker—support the conclusion that the injunction, if sufficiently narrowed on remand to apply to the workplace only, will pass constitutional muster.

IV

Having found the injunction, properly narrowed on remand, would not violate the First Amendment, I reach the same result under the California Constitution. Article I, section 2, subdivision (a) of the state Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." We have in the past observed this state constitutional free speech guarantee is "[a] protective provision more definitive and inclusive that the First Amendment" (*Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658; see also *Blatty* v. *New York Times Co.* (1986) 42 Cal.3d 1033, 1041) and its plain meaning prohibits prior restraints on speech (*Dailey* v. *Superior Court* (1896) 112 Cal. 94, 100; *Pines* v. *Tomson* (1984) 160 Cal.App.3d 370, 393). Lawrence argues that even if the injunction is permissible under the federal Constitution, it is invalid under this state constitutional provision, which provides greater protection for speech than is afforded by the First Amendment.

Although the First Amendment is written in absolute terms, it has not been so interpreted. The same is true for article I, section 2, subdivision (a) of the state Constitution. As we explained in *Wilson* v. *Superior Court*, *supra*, 13 Cal.3d at pages 661-662: "We do not . . . suggest that prior restraint upon publication can never be justified. The decisions recognize that prior restraints may be imposed under some extraordinary circumstances. For example, it has been said that the government may prohibit the disclosure of military secrets in time of war and prevent the utterance of words that may have the effect of force. [Citation.]

Furthermore, an injunction restraining speech may issue in some circumstances to protect private rights (see, e.g., *Magill Bros.* v. *Bldg. Service etc. Union* (1942) 20 Cal.2d 506, 511-512 [127 P.2d 542]) or to prevent deceptive commercial practices (*Securities and Exchange Comn.* v. *Texas Gulf Sulphur Co.* (2d Cir. 1971) 446 F.2d 1301, 1306)." In other words, a sufficiently strong public policy reason can justify a prior restraint on speech even under the heightened protection afforded by the state Constitution.

As with the federal constitutional analysis set forth above, in the state constitutional analysis as well two powerful constitutional interests are at issue. In addition to the protection for one's freedom to "speak, write and publish his or her sentiments on all subjects," the state Constitution—like the Fourteenth Amendment to the federal Constitution—also mandates people not be "denied equal protection of the laws." (Cal. Const., art. I, § 7, subd. (a).) Moreover, just as the state Constitution's free speech guarantee provides greater protection than its federal counterpart, our state charter also provides heightened protection against racial discrimination in the workplace. Article I, section 8 provides "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of . . . race . . . ." It is thus no answer to observe that free speech rights are greater under the state Constitution, because the same document also grants greater protection against racial discrimination in the workplace. We are once again faced with a difficult balance between competing constitutional values.

The confluence of factors that justifies the limitation on defendant Lawrence's speech under the First Amendment to the United States Constitution supports the same result under the California Constitution. For example, that a potential listener is unable to escape hearing an unwanted message has been cited as a significant factor in the evaluation of free speech rights in this state. In *Braxton* v. *Municipal Court* (1973) 10 Cal.3d 138, this court found that regulation

of bullhorns or loud speakers used in demonstrations was "necessary to prevent substantial interference with the work of captive audiences in classrooms and research facilities." (*Id.* at p. 149.) Similarly, in *City of San Jose* v. *Superior Court* (1995) 32 Cal.App.4th 330, the appellate court approved a city ordinance that, in creating a 300-foot buffer zone around the residences of staff members of an abortion clinic, declared " 'targeted picketing activity creates a "captive audience" situation.' " (*Id.* at p. 341.) Clearly an audience's practical ability to avoid unwelcome or unpleasant speech is relevant to evaluating the validity of an injunction under the state Constitution.

Notwithstanding the heightened protection free speech rights enjoy under the state Constitution, time, place and manner restrictions are also recognized under our state charter. (*Robins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910; *Dulaney* v. *Municipal Court* (1974) 11 Cal.3d 77, 85; *Savage* v. *Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1572; *Planned Parenthood* v. *Holy Angels Catholic Church* (N.D.Cal. 1991) 765 F.Supp. 617, 625.) Although the speech here was not uttered in a public forum and the injunction is not content neutral, I find the two remaining factors in the equation—a significant state interest, and ample alternative avenues of communication—are relevant under the state Constitution.

As noted, the California Constitution itself recognizes the importance of eliminating racial discrimination in the workplace. (Cal. Const., art. I, § 8.) Our Legislature has similarly declared such workplace discrimination odious. (Gov. Code, § 12920 [FEHA]; see also, Civ. Code, § 51 ["All persons within the jurisdiction of this state are free and equal, and no matter what their . . . race, . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."].) This court has also observed that the "policy that promotes the right to seek and hold employment free of prejudice is fundamental." (*Commodore Home Systems, Inc.*

v. *Superior Court* (1982) 32 Cal.3d 211, 220.) State law, both statutory and constitutional, thus recognizes a compelling interest in the elimination of racial discrimination in the workplace.

In short, I find defendants' rights under the California Constitution do not compel the conclusion the injunction must be set aside.

V

When we leave our homes, we enter a hurly-burly world where we are sometimes required to endure the unpleasant and undesirable opinions and entreaties of others. Unfortunately, such unwelcome speech sometimes attacks us on the basis of our race, gender or ethnic heritage. (See, e.g., *Brandenburg* v. *Ohio*, *supra*, 395 U.S. 444 [Ku Klux Klan leader made derogatory remarks about African-Americans]; *Contento* v. *Mitchell* (1972) 28 Cal.App.3d 356 [defendant called plaintiff a "bitch" and a "whore"]; *National Socialist Party* v. *Skokie* (1977) 432 U.S. 43 (*per curiam*) [American Nazis wishing to stage parade in predominantly Jewish village].) Ensuring proper breathing room for the airing of diverse views generally requires that we simply close our ears, avert our eyes and move on. The freedom of speech guaranteed by the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (*United States* v. *Associated Press* (S.D.N.Y. 1943) 52 F.Supp. 362, 372 (opn. of Hand, J.), affd. *sub nom. Associated Press* v. *United States* (1945) 326 U.S. 1.)

The workplace is different from sidewalks and parks, however; workers are not so free to leave to avoid undesired messages. When employees are forced to endure racially harassing speech on the job, it is arguable that "substantial privacy interests are being invaded in an essentially intolerable manner." (*Cohen* v.

California, *supra*, 403 U.S. at p. 21.) In enacting FEHA and its related provisions, the state has recognized the damage racial discrimination at the workplace can cause, both economically to society and psychologically to the victimized worker. Finally, the restriction on the harasser seems de minimis because he remains free to state his views and opinions in every place other than his place of employment.

No single factor present in this case justifies the restraint on speech here; indeed, another case posing different facts may lead to a different conclusion. However, for all the reasons stated above, I conclude that Lawrence's speech, even if constitutionally protected, may nevertheless be subject to the modest time and place restrictions discussed above, and that an injunction, properly narrowed on remand,[9] will not violate his right to freedom of speech guaranteed to him by both the First Amendment to the United States Constitution and by article I, section 2, subdivision (a) of the California Constitution.

WERDEGAR, J.

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[9] Insofar as the "exemplary list of prohibited derogatory racial or ethnic epithets," which the appellate court directed the trial court to provide, is fashioned in the context of an injunction directed not against individual words per se, but the creation of, or perpetuation of, a racially hostile work environment, I concur in this limitation as well. Such a list should be intended as illustrative and explanatory, rather than prohibiting the mere utterance of specified words regardless of context. In this way, defendants will have additional notice what types of speech are prohibited by the injunction, reducing any potential vagueness that may inhere to an injunction that even partially restricts speech.

COPY

OSCAR AGUILAR ET AL. v. AVIS RENT A CAR SYSTEM, INC., ET AL.

S054561

DISSENTING OPINION BY MOSK, J.

I dissent.

The plurality conclude that a remedial injunction under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), banning a list of derogatory words from use in the workplace, is a permissible remedy for employment discrimination by defendants John Lawrence and Avis Rent A Car System, Inc. (Avis). I disagree. Among our most cherished constitutional principles is that speech — even if offensive — should be protected unless, and until, it produces a demonstrable harmful effect.

Both the First Amendment of the United States Constitution and article I, section 2, subdivision (a), of the California Constitution restrict the use of content-based prior restraints on speech. The order at issue here — enjoining *any* future use in the workplace of specified words — constitutes just such a prior restraint. It impermissibly restricts speech based on the mere assumption that these words will inevitably create a hostile and abusive work environment amounting to employment discrimination. Nor is this injunction salvaged by labeling it a restraint on *conduct* rather than *speech*.

The plurality's error is particularly glaring because they are deciding this matter in a contextual vacuum, without the benefit of a factual record. They thus overlook the duty of an appellate court, where free speech rights are at stake, to

independently review the trial court's findings and the whole record to assure that any injunction is narrowly tailored and justified by compelling necessity. That duty is no less imperative in a matter involving speech in the workplace. As the United States Supreme Court recently emphasized: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (*Oncale* v. *Sundowner Offshore Services, Inc.* (1998) __ U.S. __, __ [118 S.Ct. 998, 1003].) Here, we know nothing of the surrounding circumstances. We do not even know what offensive remarks were made, to whom, or when. All we do know is that the parties have agreed that the remarks did *not* amount to "fighting words" — i.e., that the injunction involves otherwise protected speech — and that Lawrence has apparently not made any similarly offensive remarks to Avis employees since 1992.

Like my colleagues, I abhor discrimination in any form. 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*. It should be obvious that we may not do so in advance, based only on predictions of future harm.

I

The crux of the lead opinion is that the injunction forbidding the use of a list of words does not amount to a prior restraint so long as it was issued after a jury determination of past employment discrimination. It endorses the formulation of amicus curiae American Civil Liberties Union of Northern California that speech was properly enjoined here because "a fair judicial process has determined that a repetitive pattern of speech is unprotected." I am unpersuaded.

"The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' [Citation.] Temporary restraining orders and

permanent injunctions —*i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints." (*Alexander* v. *United States* (1993) 509 U.S. 544, 550.) The injunction here falls squarely within that definition. It was not transformed into something acceptable simply because it was issued after a judicial finding of past employment discrimination.

According to the Chief Justice, the injunction passes constitutional muster because it simply precludes defendants from continuing their unlawful activity. It does more than that. It directly targets otherwise protected speech, forbidding *any* future use of a list of offensive words in the workplace — even outside the presence of plaintiffs and even if welcome or overtly permitted. Although the lead opinion insists that it would prohibit an illegal course of *conduct*, in fact it regulates *speech* on the basis of expressive content. (See *De Angelis* v. *El Paso Mun. Police Officers Assn.* (5th Cir. 1995) 51 F.3d 591, 597, fn. 7.)

Moreover, it is not true that any and all future use even of offensive epithets will necessarily amount to a continuation of the same unlawful activity. As the lead opinion concedes, "not every utterance of a racial slur in the workplace violates the FEHA or Title VII [of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)]." (Maj. opn., *ante*, at p. 7; see *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608; *Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17, 21 [" '[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee [citation] does not sufficiently affect the conditions of employment to implicate Title VII . . . . Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."].) I am not persuaded that a judicial finding that employees were previously subjected to verbal harassment in

violation of FEHA could justify a prior restraint on expression not amounting to "fighting words."[1]

The lead opinion draws analogies to several United States Supreme Court decisions. None is in point.

Thus, the lead opinion relies on several decisions involving limited injunctive remedies against the sale or exhibition of obscene materials, including *Kingsley Books, Inc.* v. *Brown* (1957) 354 U.S. 436, *Times Film Corp.* v. *Chicago* (1961) 365 U.S. 43, *Freedman* v. *Maryland* (1965) 380 U.S. 51, and *Paris Adult Theater I* v. *Slaton* (1973) 413 U.S. 49. Unlike the language at issue here, obscenity is not within the area of constitutionally protected speech. (*Roth* v. *United States* (1957) 354 U.S. 475, 485.)

The lead opinion's analogy to *Pittsburgh Press Co.* v. *Human Rel. Comm'n* (1973) U.S. 376, 413 is also unavailing. There, the United States Supreme Court addressed the constitutionality of a restriction on commercial speech in support of an illegal commercial activity. (*Id.* at pp. 388-389.) Again, the United States Supreme Court emphasized that the order "[did] not endanger arguably protected speech" and did not require the court "to speculate as to the effect of the publication" in the future. (*Id.* at p. 390.) *Madsen* v. *Women's Health Center, Inc.* (1994) 512 U.S. 753, also

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[1] "Fighting words" — "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" — are not safeguarded by the federal Constitution. (*Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568, 572.) Significantly, plaintiffs conceded that the offensive speech at issue here did *not* consist of fighting words; the superior court apparently agreed. Nor did the superior court find any "real and immediate threat of future injury" by Lawrence, who had not harassed anyone at Avis since 1992. (See *Los Angeles* v. *Lyons* (1983) 461 U.S. 95, 107, fn. 8 ["The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant."].) In the absence of a record, we have no basis to conclude otherwise.

relied on by the majority, is inapposite; unlike the speech at issue in *Madsen*, the speech here is not content-neutral, nor can it be said that the injunction burdens no more speech than necessary, since it forbids *any* use of particular words.[2]

By contrast, the injunction at issue constitutes a broad prohibition touching on *core protected speech*. It applies to words that, although offensive, may be used to convey ideas or emotions and are therefore shielded by the First Amendment. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas* v. *Johnson* (1989) 491 U.S. 397, 414; *Cohen* v. *California* (1971) 403 U.S. 15, 26 ["[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."].)

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[2] *Auburn Police Union* v. *Carpenter* (1st Cir. 1993) 8 F.3d 886, discussed at length by the majority, offers no guidance. In that case, which involved a statute barring solicitation for the benefit of law enforcement officers and organizations, there was no injunction before the court; the First Circuit observed that without the concrete example of a particular injunction, it could not determine whether the prior restraint doctrine had been violated. (*Id.* at p. 904.) The majority also summarily cite several federal and state law cases upholding injunctions; with a single exception (*Robinson* v. *Jacksonville Shipyards, Inc.* (M.D.Fla. 1991) 760 F.Supp. 1486), none involves a comparable injunction against otherwise protected speech in the workplace. Significantly, *Robinson* has been widely criticized. (See, e.g., Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 UCLA L.Rev. 1791, 1818 ["Thus, in the recent case of [*Robinson*], the district court was wrong . . . ."]; Karner, *Political Speech, Sexual Harassment, and a Captive Workforce* (1995) 83 Cal.L.Rev. 637, 665, fn. 168 ["[T]he *Robinson* court ignored basic [First Amendment] doctrine in reaching this conclusion."].) Nor do any of the cases cited by the majority analyze the question in light of article I, section 2, subdivision (a), of the California Constitution, which, as discussed below, affords broader protection against prior restraints on speech.

Even assuming that the use of derogatory speech can amount to employment discrimination, I disagree that *any future use* even of slurs, vulgarity, or derogatory epithets in the workplace — even by a person who has previously engaged in employment discrimination — can constitutionally be proscribed. That is because the offensive content *and effect* of using any one, or more, of a list of *verboten* words cannot be determined in advance: "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.' " (*Young* v. *American Mini Theatres* (1976) 427 U.S. 50, 66, fn. omitted.) For this reason, I would hold that the injunction fails to overcome the heavy presumption against the constitutional validity of prior restraints on speech. (*Vance* v. *Universal Amusement Co.* (1980) 445 U.S. 308, 317; *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 657.)[3]

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[3] I am also unpersuaded by the concurring opinion's attempt to create an exception to the the prohibition against prior restraints in the case of workplace discrimination using "strands of analysis" from United States Supreme Court precedents. The logic of the concurring opinion unravels upon closer scrutiny. Thus, *R.A.V.* v. *St. Paul* (1992) 505 U.S. 377 does not, as the concurring opinion asserts, state or imply that any use of derogatory speech in the workplace is unprotected or that a content-based prior restraint such as the one at issue here would pass constitutional muster; nor do the high court's decisions suggest that the workplace may be regarded as a public forum or employees a "captive audience." The concurring opinion's analysis under the California Constitution is equally unpersuasive. Again, in the absence of any sound constitutional basis for exempting this injunction from the restriction against prior restraints, the concurring opinion ignores our precedents in point and, instead, hopelessly attempts to construct a coherent theory from random "strands" of doctrine taken

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II

But we need look no farther than article I, section 2, subdivision (a), of the California Constitution to resolve this matter: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse of this right. A law may not restrain or abridge liberty of speech or press." As explained in the majority opinion I authored in *Wilson* v. *Superior Court*, *supra*, 13 Cal.3d at page 658: "A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."

Article I, section 2, subdivision (a), plainly permits holding Lawrence and Avis responsible for abuse of the right, but not censorship by way of a prior restraint. "The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. . . . It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility." (*Dailey* v. *Superior Court* (1896) 112 Cal. 94, 97; *Pines* v. *Tomson* (1984) 160 Cal.App.3d 370, 393 ["Although the section does not use the term 'prior restraint,' the plain meaning of the first sentence of article I, section 2, subdivision (a) is that 'sentiments' are protected from any prepublication sanctions, i.e., from all prior restraints."].)

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from cases about equal protection, captive audiences, time, place, and manner restrictions, and racial discrimination. Our goal must be to construe constitutional provisions with careful regard to precedent; otherwise the public has little assurance that the court's decisions will not be influenced by its members' personal policy views. (See *People* v. *Jefferson* (Aug. 2, 1999, S057834) __ Cal.4th __, __ [dis. opn. of Werdegar, J., at pp. 2-3.].)

As the dissenting opinion in the Court of Appeal below correctly observed: "Punishment for and suppression of speech are two very different things. . . . No California appellate court has ever held . . . that persons can be subjected to prior restraint on speech, and legally forbidden to speak on pain of fine or being sent to jail, for merely making rude or even immoral comments that might have a bad effect on the listener."

The lead opinion's attempt to construe *Dailey* — and the California Constitution — narrowly on this point fails. Thus, it relies on *People ex rel. Busch* v. *Projection Room Theatre* (1976) 17 Cal.3d 42, 57, which upheld the constitutionality of an action to abate the sale or display of obscene material as a public nuisance. As I stated at the time, in my view the decision in *Busch* was incorrect; the public nuisance proceedings at issue failed to pass constitutional muster. (See *id.*, at p. 62 (conc. & dis. opn. by Mosk, J.) ["[S]uch proceedings . . . offend article I, section 2, of the California Constitution which prohibits action that may 'restrain or abridge liberty of speech or press.' "]; see also *id.*, at pp. 63-74 (dis. opn. by Tobriner, J.).) It is also distinguishable: it involved exhibition of specific magazines and films adjudged to be obscene, i.e., to constitute unprotected expression. Nor did the majority therein purport to apply, or even cite, article I, section 2, subdivision (a).

The lead opinion also relies on *Goldin* v. *Public Utilities Commission* (1979) 23 Cal.3d 638, which, like *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, *supra*, 413 U.S. 376, involved restrictions on commercial speech related to illegal activity — using the telephone to solicit acts of prostitution. The activity was found not to involve protected speech within the meaning of the First Amendment. On those grounds, *Goldin*, too, is distinguishable. Nor, again, did the majority in *Goldin* even address the free speech protections under article I, section 2, subdivision (a).

Finally, the lead opinion cites *People* ex rel. *Gallo* v. *Acuna* (1997) 14 Cal.4th 1090, which upheld the validity of an injunction restraining future activities of gang

members under the common law nuisance laws. I continue to believe that *Gallo* was wrongly decided. (See *id.*, at pp. 1132-1148 (dis. opn. by Mosk, J.).) But, in any event, it is unilluminating: the majority in *Gallo* did not address any question involving prior restraints on speech; nor did *Gallo* involve any application whatsoever of article I, section 2.[4]

The plurality express a concern that unless an injunction issues in this matter, plaintiffs will be confined to bringing repetitive lawsuits. I hope that would not result. However, a mere policy consideration is of little weight in light of the strong presumption against prior restraints.

In any event, I disagree that the threat of repetitive litigation would be less effective in terms of avoiding future workplace discrimination by Avis than the possibility that an individual supervisor will be jailed for contempt. As the damages action in this matter demonstrates, speech may be subject to strong sanctions under FEHA if it amounts to employment discrimination. Faced with the high costs of defending against such suits — including compensatory damages, attorney fees, and punitive damages — employers like Avis are likely to regard it as a potent remedy indeed.

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[4] The First Amendment issue addressed in *Gallo* involved not free speech, as the majority here erroneously suggest, but freedom of association, i.e., an injunction against "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant" or any other gang member. (See *People* ex rel. *Gallo* v. *Acuna*, *supra*, 14 Cal.4th at p. 1110.) The underlying injunction issued by the superior court in *Gallo* also prohibited the use of words, phrases, physical gestures, or symbols, or engaging in other forms of communication that described the gang; it also forbade the wearing of clothing bearing the name or letters of the gang. (See *id.*, at p. 1136, fn. 3 (dis. opn. by Mosk, J.) [quoting injunction].) Those provisions of the injunction, however, were stricken as unconstitutional by the Court of Appeal, and its holding on this point was not challenged on review by this court.

III

For the foregoing reasons, I would reverse the judgment of the Court of Appeal.

MOSK, J.

COPY

AGUILAR v. AVIS RENT A CAR SYSTEM, INC.

S054561

DISSENTING OPINION BY KENNARD, J.

I dissent.

Constitutional free speech guarantees are in undeniable tension, if not conflict, with the statutory rights of employees to be free from discriminatory verbal harassment that creates a hostile work environment. Although this tension has generated lively debate in scholarly legal journals, the United States Supreme Court has yet to address the issue. This case presents one aspect of the problem: the use of injunctions prohibiting certain kinds of future speech, on the basis of its content, as a remedy for hostile environment employment discrimination.

As I will explain, the particular content-based injunction at issue here, both as drafted by the trial court and as modified by the Court of Appeal, is invalid under the free speech guarantees of both the federal and state Constitutions because the record fails to establish that an injunction restricting future speech is necessary to prevent a recurrence of the wrongful acts of employment discrimination. Moreover, even assuming a need for some content-based speech restriction could be shown, the injunction here is invalid because it is not narrowly drawn to target only the prohibited discrimination.

These defects are not curable. In particular, the Court of Appeal's proposal to amend the injunction by adding a list of forbidden "bad words" will not make the injunction any less an abridgment of the right of free speech. Indeed, I

question whether *any* injunction prohibiting workplace expression of particular views, however abhorrent those views, can be reconciled with constitutional free speech guarantees: "[U]nder our system of government we may not prohibit the dissemination of views simply because they are controversial, distasteful, or disturbing. To sanction such a prohibition 'would be a complete repudiation of the philosophy of the Bill of Rights.' [Citation.]" (*Planned Parenthood Shasta-Diablo, Inc.* v. *Williams* (1995) 10 Cal.4th 1009, 1027 (dis. opn. of Kennard, J.).)

I

Seventeen employees brought this action claiming employment discrimination in violation of the state Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). They named as defendants their common employer, Avis Rent A Car System, Inc. (Avis), and 10 Avis employees, one of whom was John Lawrence. Of relevance to the issue raised here, plaintiffs alleged that Avis had employed them as drivers and that Lawrence, who was assigned to Avis's service station at the San Francisco International Airport, created a hostile work environment by verbally harassing and demeaning them "on the basis of their race, national origin and lack of English language skills." They also alleged that Kathy Black, an Avis supervisor, had conducted a discriminatory investigation of an alleged theft.

For reasons not disclosed by the appellate record, the case proceeded to trial as to only 12 of the 17 plaintiffs. By special verdicts, the jury found that Lawrence had unlawfully harassed and discriminated against four of these plaintiffs, three of whom Black had also discriminated against. With respect to three of these four plaintiffs, the jury found that Avis knew or should have known of Lawrence's conduct and failed to stop it. The jury awarded $25,000 in emotional distress damages to each of the three plaintiffs against whom both Lawrence and Black had

discriminated, but it awarded no damages to the plaintiff against whom Lawrence alone had discriminated.

After the jury returned these special verdicts, the trial court decided to grant injunctive relief. Interpreting the special verdicts as findings that Lawrence had "engaged in acts of harassment so continual and severe as to alter the working conditions" for the four plaintiffs, the court found "a substantial likelihood based on his actions that he will do so in the future unless restrained." Referring to Lawrence, the court said that "[i]f he has done it four times against four Latinos, there is a substantial likelihood that he will do it again . . . ." But neither the plaintiff nor the court disputed the representations of defendants' attorney that only one of the plaintiffs still worked for Avis in San Francisco and that Lawrence had not engaged in any harassment during the pendency of the lawsuit. Defendants Avis and Lawrence objected that the proposed injunction was an unconstitutional abridgment of their free speech rights, but the court overruled these objections.

The trial court found that Lawrence's discriminatory acts had consisted of offensive touching and the utterance of derogatory racial or ethnic epithets. As here relevant, the trial court granted a permanent injunction prohibiting Lawrence "from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of [Avis]" and also "from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by [Avis] in California." The injunction prohibited Avis from "allowing defendant John Lawrence to commit any [such] acts . . . under circumstances in which it knew or should have known of such acts . . . ."

Lawrence and Avis appealed from the portion of the judgment granting the permanent injunction. The Court of Appeal found the injunction overbroad insofar as it restricted Lawrence's activities other than at the workplace, and it found the injunction vague in its prohibition against "derogatory racial or ethnic epithets."

To cure these defects, the Court of Appeal reversed and remanded to permit the trial court to redraft the injunction to limit its scope to the workplace and to add "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence."

To determine whether the injunction, even as limited by the Court of Appeal, is an unconstitutional abridgment of constitutional free speech rights, this court granted the petition for review filed by defendants Avis and Lawrence.

II

The First Amendment to the federal Constitution, made applicable to the states by the Fourteenth Amendment (*Near* v. *Minnesota* (1931) 283 U.S. 697, 732), declares that "Congress shall make no law . . . abridging the freedom of speech . . . ." This First Amendment free speech guarantee restricts not only the power of legislatures to enact laws of general applicability but also the authority of courts to issue injunctions as remedies for violations or threatened violations of a legislative or judicial decree. (*Madsen* v. *Women's Health Center, Inc.* (1994) 512 U.S. 753, 764.) Indeed, because injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," the United States Supreme Court requires "a somewhat more stringent application of general First Amendment principles" to injunctions restricting speech. (*Id.* at pp. 764–765.)

An injunction that regulates speech on the basis of its topic is termed a content-based regulation and is presumptively invalid. (*Rosenberger* v. *Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 828; *R.A.V.* v. *St. Paul* (1992) 505 U.S. 377, 382.) An injunction that regulates speech on the basis of the particular views or biases that the speaker expresses about a topic is termed a viewpoint regulation and is likewise presumptively invalid, because the United States Supreme Court regards viewpoint discrimination as "an egregious form of content

discrimination." (*Rosenberger* v. *Rector and Visitors of Univ. of Va., supra,* at p. 829.)

An injunction that regulates speech on the basis of its content or viewpoint is scrutinized more strictly than a content neutral injunction. (*Madsen* v. *Women's Health Center, Inc., supra,* 512 U.S. 753, 762–763.) If an injunction is based on content or viewpoint, the proponent ordinarily must show both that the injunction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (*Perry Ed. Assn.* v. *Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45; see *Madsen* v. *Women's Health Center, Inc, supra,* at pp. 763–764.)

The injunction at issue here is based on both content and viewpoint. It is based on content because it prohibits speech for its communicative impact — its potential to offend the person who hears it. (*Reno* v. *American Civil Liberties Union* (1997) 521 U.S. 844, 867–868 [117 S.Ct. 2329, 2342–2343]; *Forsyth County* v. *Nationalist Movement* (1992) 505 U.S. 123, 134; *Texas* v. *Johnson* (1989) 491 U.S. 397, 411–412.) It is based on viewpoint because it prohibits the utterance of "derogatory racial or ethnic epithets," words that convey and embody a particular bias. (*R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 391–393 [state may not prohibit only those fighting words expressing a viewpoint of racial intolerance].)

The state may prohibit racial or ethnic *discrimination* in housing and employment. Indeed, it has a compelling interest in doing so. (See *R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 395; *Walnut Creek Manor* v. *Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 273 (dis. opn. of Kennard, J.).) Although the state may adopt various means to combat racial and ethnic bias in general, antidiscrimination measures collide with the First Amendment when they attempt to combat racial and ethnic bias by "silencing speech on the basis of its content" (*R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 392) or by "handicap[ping] the expression of particular ideas" (*id.* at p. 394). The proper test to determine the validity of the

content- and viewpoint-based injunction at issue here is whether its restriction on speech is necessary to serve a compelling state interest and narrowly drawn to achieve that end. (*Perry Ed. Assn.* v. *Perry Local Educators' Assn., supra,* 460 U.S. 37, 45.)

The state has a compelling interest in eradicating invidious employment discrimination (see *R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 395), and the injunction here surely *promotes* that interest (see *ibid.*), but plaintiffs have not shown that the injunction here is *necessary* to serve that interest. An award of damages for proven employment discrimination is a presumptively adequate and content neutral alternative, particularly for a first time offender. So far as the record shows,[1] this is the first case in which damages have been awarded against Lawrence or Avis for employment discrimination. Only one Avis employee, Lawrence, was found to have caused an abusive work environment by using racial or ethnic slurs, and he did so as to only four of the original seventeen plaintiffs. The harassment was confined to a limited time period and ceased after plaintiffs filed this lawsuit. Thus, there is no basis upon which to conclude that damages will not have the desired deterrent effect. (See *Intern. Soc. for Krishna Consciousness* v. *Eaves* (5th Cir. 1979) 601 F.2d 809, 833 [rejecting the view that a speech restraint may be based on the generalization that one who has violated a law once is likely to do so again].) The trial court's assertion that an injunction is necessary is entirely speculative.

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[1] I disagree with the majority that the appellate record, which includes the pleadings, the jury's special verdicts, and all postverdict proceedings relating to issuance of the injunction, is inadequate to determine the constitutionality of the injunction or requires this court to indulge in presumptions, belied by the record before us, that the injunction is necessary and narrowly tailored.

Even assuming for the sake of argument that injunctive relief were necessary, the record does not demonstrate the necessity of an injunction restricting speech. The trial court found that Lawrence's harassment had consisted of both offensive touching and the use of racial and ethnic epithets. The jury's special verdicts do not specify whether the employment discrimination findings were based on the offensive touching, the epithets, or a combination of the two. The record contains no finding by the jury or by the trial court that the utterance of epithets alone created a hostile work environment for any Avis employee. Lawrence and Avis do not challenge the portion of the injunction prohibiting uninvited intentional touching. Nothing in the record shows that enforcement of this portion of the injunction, and the portion of the injunction concerning the non-speech activities of Avis supervisor Kathy Black, will not be effective to prevent a recurrence of the hostile environment employment discrimination.

Nor is the injunction narrowly drawn to prevent a recurrence of a hostile work environment for plaintiffs. For First Amendment purposes, a regulation is narrowly drawn "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." (*Frisby* v. *Schultz* (1988) 487 U.S. 474, 485.) "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." (*Ibid.*)

Here, the injunction prohibits Lawrence from addressing epithets to *any* Hispanic employee, not just the four plaintiffs (only one of whom still works for Avis) whom Lawrence was found to have harassed. This is not a class action, a criminal prosecution, or a civil enforcement action by government; it is a civil action by individual private plaintiffs. I am aware of no authority permitting a trial court, in a civil action by individual plaintiffs, to award equitable relief in favor of persons who are strangers to the proceeding.

Also, the injunction prohibits Lawrence not only from addressing racial and ethnic epithets to Hispanic employees, but also from using those epithets as descriptive of these employees. The latter prohibition, because it applies even to statements made outside the hearing and knowledge of any Hispanic employee, encompasses speech unlikely to contribute in any way to a hostile work environment for plaintiffs. Thus, the injunction is an invalid infringement of free speech rights because it prohibits expressive activity that is not the precisely targeted evil of employment discrimination against plaintiffs.

Even if the injunction were narrowed to prohibit Lawrence only from directing epithets at the workplace to the particular Avis employees he previously harassed, it would still prohibit more speech than necessary. As the Chief Justice concedes, "not every utterance of a racial slur in the workplace violates the FEHA." (Plur. opn., *ante*, at p. 8.) An isolated use of an epithet, however odious, does not produce a hostile work environment. To establish employment discrimination by verbal harassment, the employee must show that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . .' " (*Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17, 21 [enunciating this standard for hostile environment employment discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)]; *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [adopting same standard for claims under FEHA].) An injunction prohibiting *every* utterance of a racial or ethnic insult in the workplace, not just utterances that actually produce a hostile work environment, is not narrowly drawn to serve the state's compelling interest in eliminating employment discrimination.

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." (*Harris* v. *Forklift Systems, Inc., supra,* 510 U.S. 17, 23.) For this reason, I question whether any injunction prohibiting specifically identified speech, without regard to its frequency, its context, or its effect on any employee, could survive the strict scrutiny the First Amendment requires for injunctions restricting speech on the basis of content and viewpoint.

Also, as Justice Mosk points out in his dissent, a content-based injunction restricting workplace speech would appear necessarily and invariably to be an invalid prior restraint. "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' . . . [P]ermanent injunctions — i.e., court orders that actually forbid speech activities — are classic examples of prior restraints." (*Alexander* v. *United States* (1993) 509 U.S. 544, 550.) The injunction at issue here certainly fits this definition of a prior restraint.

The First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." (*Nebraska Press Assn.* v. *Stuart* (1976) 427 U.S. 539, 589 (conc. opn. of Brennan, J.).) The particular disfavor for prior restraints is based on "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, Ltd.* v. *Conrad* (1975) 420 U.S. 546, 559, italics in original.) Although not invalid per se, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." (*Nebraska Press Assn.* v. *Stuart, supra,* 427 U.S. 539, 559.)

A prior restraint is subject to a "heavy presumption against its constitutional validity." (*Bantam Books, Inc.* v. *Sullivan* (1963) 372 U.S. 58, 70.) Anyone seeking to defend a prior restraint "thus carries a heavy burden of showing justification for the imposition of such a restraint." (*Organization for a Better Austin* v. *Keefe* (1971) 402 U.S. 415, 419.) Although the United States Supreme Court has not stated precisely what this "heavy burden" entails, it apparently includes at least a showing that the prohibited speech is "overwhelmingly likely" to be subject to regulation without violating the First Amendment (*Intern. Soc. for Krishna Consciousness* v. *Eaves* (5th Cir. 1979) 601 F.2d 809, 833) and that it will "surely result in direct, immediate, and irreparable damage" (*New York Times Co.* v. *United States* (1971) 403 U.S. 713, 730 (conc. opn. of Stewart, J.); see also Tribe, American Constitutional Law (2d ed. 1988) § 12-36, pp. 1045–1051).

Because isolated remarks seldom, if ever, cause a hostile work environment, and because determining the existence of a hostile work environment requires an examination of all relevant circumstances, it is impossible to demonstrate in advance that any particular workplace speech will create a hostile work environment (and thus potentially be subject to regulation without violating the First Amendment), much less that it will produce direct, immediate, and irreparable injury. Accordingly, the conclusion seems inescapable that injunctions prohibiting any future offensive workplace speech on the basis of content and viewpoint are invariably and necessarily unconstitutional prior restraints on speech.

III

The Chief Justice's plurality opinion does not treat the injunction at issue here as a prior restraint, nor does it apply the strict test that the United States Supreme Court has mandated for content- and viewpoint-based injunctions. It

suggests various reasons why a less rigorous test is appropriate, and plaintiffs and amici curiae offer other reasons. I consider these reasons in turn.

Preliminarily, I note that an otherwise content neutral statute or injunction may prohibit speech falling within certain narrowly defined categories — such as obscenity, defamation, and "fighting words" — without meeting any separate compelling interest test. (See *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568, 572.) The "fighting words" category is quite narrow (see *Gooding* v. *Wilson* (1972) 405 U.S. 518), however, and it is conceded that the speech at issue here is outside this category. Nor is any contention advanced that the speech at issue here may be prohibited as obscene or defamatory. Also, for purposes of deciding what First Amendment test to apply, it makes no difference that a content-based injunction prohibits speech at only one location, here the workplace. (See *Reno* v. *American Civil Liberties Union, supra,* 521 U.S. 844, 880 [117 S.Ct. 2329, 2349] [" 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place' "]; *Consolidated Edison Co.* v. *Public Serv. Comm'n* (1980) 447 U.S. 530, 541, fn. 10 ["we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternate means of expression"].)

Under what some commentators have termed the "captive audience doctrine," the United States Supreme Court in a few instances has acknowledged the legitimate interests of persons who would prefer to avoid exposure to unwelcome speech but are unable to do so. (See, e.g., *Frisby* v. *Schultz, supra,* 487 U.S. 474, 487; *Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 298.) Plaintiffs here argue that because employees are generally unable to avoid exposure to the offensive workplace speech of coworkers and supervisors, a court should be permitted to enjoin all offensive discriminatory speech, regardless of its

effect on any particular employee, at any workplace where hostile environment employment discrimination has been demonstrated.

This argument reads more into the captive audience doctrine than the decisions of the United States Supreme Court permit. Under those decisions, a court may impose a content-based restriction to protect unwilling listeners from offensive speech only in the "narrow circumstances" where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure" and " 'substantial privacy interests are being invaded in an essentially intolerable manner.' " (*Erznoznik* v. *City of Jacksonville* (1975) 422 U.S. 205, 209–210.) Even when listener "captivity" is demonstrated, a court may not prohibit all insulting, disturbing, or offensive speech, but only speech that invades a substantial interest in an intolerable manner. An employee surely has a substantial interest in a work environment that is not hostile or abusive, but this interest is invaded in an intolerable manner only when harassing speech actually produces a hostile or abusive environment. Because the injunction here prohibits even isolated use of racial and ethnic slurs having no demonstrable effect on any plaintiff, it cannot be saved by invoking the captive audience doctrine.

Moreover, in one important respect the work environment is different from other captive audience situations that the United States Supreme Court has considered: While it is true that during working hours an employee is not free to go elsewhere to avoid hearing a coworker's offensive speech, it is equally true that the coworker is not free to go elsewhere to express his or her views. Although the United States Supreme Court has upheld content neutral prohibitions on residential picketing (see *Frisby* v. *Schultz, supra,* 487 U.S. 474, 487 [upholding ordinance regulating residential picketing]; but see also *Carey* v. *Brown* (1980) 447 U.S. 455, 470–471 [striking down content-based residential picketing ordinance]), it has never applied the captive audience doctrine to, for example, a content-based

regulation prohibiting homeowners from posting signs offensive to their neighbors, such as the ordinance at issue in *R.A.V.* v. *St. Paul, supra,* 505 U.S. 377. (See also *City of Ladue* v. *Gilleo* (1994) 512 U.S. 43 [holding that ordinance banning almost all residential signs violated First Amendment].) If the captive audience doctrine has any application to the work environment, it must be applied in a manner that acknowledges and accommodates the legitimate rights of both the captive speaker and the captive listener. (See Strauss, *Redefining the Captive Audience Doctrine* (1991) 19 Hastings Const.L.Q. 85, 116–119 [suggesting consideration of three factors: the extent of the listener's "captivity," the seriousness of the threatened harm to the unwilling listener, and the degree to which restrictions burden the speaker's legitimate First Amendment interests].) A blanket prohibition on offensive epithets, regardless of the effect on any listener, surely gives insufficient consideration to the legitimate speech interests of the captive speaker.

In a footnote containing its only reference to this dissent, the Chief Justice's plurality opinion cites two federal appellate decisions for the proposition "when a repeated course of conduct has been found to constitute a nuisance or unlawful employment practice, a court is authorized to enjoin future individual acts that are likely to continue or perpetuate the nuisance or unlawful practice." (Plur. opn., *ante*, at p. 31, fn. 9.) But neither of the cited decisions addresses any issue under the First Amendment. (See *People* v. *Scheid* (1997) 16 Cal.4th 1, 17 [an appellate opinion is not authority on issues not considered].) I agree that when free speech concerns are *not* implicated, courts have broad equitable powers to issue injunctions to halt proven patterns of illegal activity. For this reason, I do not question the portion of the injunction here prohibiting Lawrence from engaging in offensive touching, because this portion of the injunction does not restrict speech. But the portion of the injunction prohibiting Lawrence from using offensive epithets *does* restrict speech, and it does so on the basis of content and viewpoint.

As I have explained, the First Amendment, as authoritatively construed by the United States Supreme Court, treats such injunctions as presumptively invalid and requires courts to subject them to an exacting form of scrutiny that this injunction cannot withstand.

Insofar as he deigns to consider the First Amendment at all, the Chief Justice may be understood to argue that once a court has fully and fairly determined that a person has engaged in speech that contributed to a hostile work environment for a particular employee, a court may, without violating the First Amendment, prohibit that person not only from causing the same harm to the same employee by the same speech, but also from engaging in any similar speech that *might* cause similar harm to any similar employee. The Chief Justice suggests that an injunction is not an invalid prior restraint if it is remedial in this sense.

Isolated remarks by individual justices of the United States Supreme Court suggest there may be some sort of "remedial injunction" exception to the general prohibition against prior restraints. (See, e.g., *Madsen* v. *Women's Health Center, Inc., supra,* 512 U.S. 753, 778–779 (conc. opn. of Souter, J.); but see also *id.* at p. 794, fn. 1 (conc. and dis. opn. of Scalia, J.) [questioning whether judicial abridgment of First Amendment rights may be imposed as a sanction for misconduct].) But the high court's decisions do not support the broad proposition that viewpoint-based remedial injunctions are exempt from strict First Amendment scrutiny simply because they are issued against a person who has once been found to have engaged in speech that produced or contributed to a hostile work environment.

The Chief Justice here seems to rely in particular on *Pittsburgh Press Co.* v. *Human Rel. Comm'n* (1973) 413 U.S. 376, in which the high court upheld an injunction prohibiting commercial speech proposing unlawful commercial transactions. A newspaper had segregated its "help wanted" classified

advertisements into separate columns for men's jobs and women's jobs. The injunction prohibited this practice as violating a local antidiscrimination ordinance. Rejecting a claim that the injunction was an invalid prior restraint on speech, the court reasoned that the ordinance prohibiting segregation of employment advertisements on the basis of sex was itself a valid prohibition of sexual discrimination, that the injunction went into effect only after a full and final determination that the newspaper had violated the ordinance, and that the injunction did no more than prohibit the very conduct determined to be unlawful. (*Id.* at pp. 389–390.) Because the injunction's prohibition extended only to commercial speech already determined to be unprotected by the First Amendment, and because this determination did not turn on the publication's actual effect on particular jobseekers, the court observed that "this is not a case in which the Court is asked to speculate as to the effect of publication." (*Id.* at p. 390.)

Here, by contrast, the speech at issue is *not* commercial speech, and the determination of employment discrimination *does* turn on the *effect* of the prohibited speech on particular employees, because racial and ethnic slurs in the workplace cause employment discrimination only if they have the *effect* of producing a hostile work environment, which in turn depends upon, among other things, the subjective emotional impact of the speech on the employees claiming discrimination. Because a finding of hostile environment discrimination turns on the effect of particular speech, and because this court cannot know in advance what effect future speech will have, this court *is* asked to speculate as to the effect of the expression that the injunction prohibits.

To take a different example, if a newspaper has maliciously published a defamatory statement about a public figure, as determined by a jury after a full and fair trial, some (but not all) courts would permit issuance of an injunction prohibiting the newspaper from again publishing the very same defamatory

statement. (See *Kramer* v. *Thompson* (3d Cir. 1991) 947 F.2d 666, 675–676 [discussing various appellate decisions on this point].) To my knowledge, however, no court has ever so much as suggested that in this situation a court could enjoin the newspaper from publishing other derogatory statements about the same public figure, on the theory that these statements *might* prove to be defamatory and their prohibition would serve a remedial purpose.

To take another example that the high court has specifically addressed, once a movie theater has shown a film that is obscene, as determined by a jury following a full and fair trial, a trial court may thereafter enjoin the theater from exhibiting that film (*Paris Adult Theatre I* v. *Slaton* (1973) 413 U.S. 49, 54–55), but it may *not* enjoin the theater from exhibiting other films based on a court's preliminary determinations that they *might* be obscene. (*Vance* v. *Universal Amusement Co.* (1980) 445 U.S. 308, 311.) Rather, a final adjudication of obscenity is required before a court may enjoin exhibition of a film.

Speech having only the potential to cause hostile environment employment discrimination deserves at least as much protection as speech that is potentially obscene or defamatory, two types of speech that are categorically proscribable under the First Amendment. An employer who has engaged in or permitted discriminatory verbal harassment that produced a hostile work environment, as determined by a jury following a full and fair trial, may not thereafter be enjoined from engaging in or permitting similar offensive speech on the theory that it *might* again produce a hostile work environment. Any injunction that restricts speech on the basis of viewpoint, even one issued to remedy past discrimination and to prevent its recurrence, must narrowly target the evil of employment discrimination and not prohibit more speech than necessary.

IV

Article I, section 2, of the California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." I agree with Justice Mosk that, for the reasons cogently stated in part II of his dissenting opinion, the injunction at issue here violates our state constitutional free speech guarantee, which is "more definitive and inclusive" than the federal provision. (*Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658.)

V

Employees expect and deserve effective protection against invidious discrimination at work. Federal and state statutes provide this protection. But when the alleged discrimination consists of verbal harassment by a coworker, the statutory right to equal employment opportunity comes into conflict with constitutional free speech guarantees. Employees do not surrender constitutional free speech rights when they go to work. "[T]o wholly exclude workplace speech from the realm of the First Amendment would immeasurably impoverish the freedom of expression in this society. For many people, there is no other time or place in their lives in which they can talk about public issues, personal problems, and spiritual concerns with individuals from diverse backgrounds and perspectives." (Estlund, *The Architecture of the First Amendment and the Case of Workplace Harassment* (1997) 72 Notre Dame L.Rev. 1361, 1375; see also Comment, *Political Speech, Sexual Harassment, and a Captive Workforce* (1995) 83 Cal. L.Rev. 637, 646 ["it is arguable that today more political speech occurs at the workplace than in the public square"].) And, as Justice Holmes reminds us, "we should be eternally vigilant against attempts to check the expression of

opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." (*Abrams* v. *United States* (1919) 250 U.S. 616, 630 (dis. opn. of Holmes, J.).)

Our employment discrimination law attempts to resolve the conflict by permitting an employee to recover damages for discriminatory verbal harassment, but only if, viewed against the totality of the circumstances, the harassment is so severe or pervasive as to create a hostile or abusive work environment. Although some have questioned whether this standard sufficiently protects freedom of speech (see, e.g., Comment, *Freedom of Speech and Workplace Harassment* (1992) 39 U.C.L.A. L.Rev. 1791), the standard's validity is not at issue here. What is at issue is whether a trial court, after a finding of hostile environment employment discrimination, may upset the legislatively defined balance, tilting it decidedly to one side, by prohibiting future use of even isolated epithets without regard to their effect on any employee. Unlike the plurality, I would hold that an injunction so drawn violates the free speech guarantees of the state and federal Constitutions. For this reason, I dissent.

KENNARD, J.

COPY

OSCAR AGUILAR et al. v. AVIS RENT A CAR SYSTEM, INC., et al.
S054561

DISSENTING OPINION BY BROWN, J.

In America, Father Terminiello can give a speech in which he describes the crowd outside the auditorium as " 'imported from Russia' " (*Terminiello* v. *Chicago* (1949) 337 U.S. 1, 19 (dis. opn. of Jackson, J.)) and then adds, "I speak of the Communistic Zionist Jew . . . . We don't want them here; we want them to go back where they came from." (*Id.* at p. 21.) In America, Clarence Brandenburg can attend a Ku Klux Klan rally, stand near a large burning cross wearing a hood, and give a speech saying, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." (*Brandenburg* v. *Ohio* (1969) 395 U.S. 444, 447.) In America, Nazis can march through the streets of the predominately Jewish community of Skokie, Illinois, wearing uniforms and displaying swastikas. (*National Socialist Party* v. *Skokie* (1977) 432 U.S. 43; see also *Collin* v. *Smith* (1978) 578 F.2d 1197, cert. den. 439 U.S. 916.) In each instance, racist and discriminatory views are being expressed. Nevertheless, these expressions are protected by the First Amendment to the federal Constitution and by our state Constitution. We as a nation so value the free exchange of ideas that we are willing to tolerate even offensive ideas, knowing that "one man's vulgarity is another's lyric" (*Cohen* v. *California* (1971) 403 U.S. 15, 25) and today's heretical idea may become tomorrow's gospel.

"[T]ime has upset many fighting faiths." (*Abrams* v. *United States* (1919) 250 U.S. 616, 630 (dis. opn. of Holmes, J.).) For example, the abolition of slavery, women's suffrage, and even a solar-centric solar system were once controversial ideas, but today are considered conventional wisdom. Some ideas—like bigotry

and prejudice—have been wrong from the beginning and always will be. And 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 hostility, hatred, jealousy, resentment, envy, and vengefulness are passions as old as humankind and, though the expression of such sentiments may cause much misery and mischief, hateful thoughts cannot be quelled at too great a cost to freedom. "That at any rate is the theory of our Constitution." (*Ibid.*)

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (*Texas* v. *Johnson* (1989) 491 U.S. 397, 414)—that is, until today. Today, this court holds that an idea that happens to offend someone in the workplace is "not constitutionally protected." (Plur. opn., *ante*, at p. 18.) Why? Because it creates a "hostile . . . work environment" (*id.* at p. 1) in violation of the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.) In essence, the court has recognized the FEHA exception to the First Amendment.

In *Meritor Savings Bank* v. *Vinson* (1986) 477 U.S. 57 (*Meritor*), the United States Supreme Court held that a "hostile environment" could constitute workplace sex discrimination in violation of title VII of the Civil Rights Act of 1964 (Title VII). (*Meritor*, *supra*, 477 U.S. at pp. 66, 73.) Specifically, the high court held that a plaintiff need not suffer " 'tangible loss' of 'an economic character,' " as distinguished from " 'purely psychological aspects of the workplace environment,' " in order to recover under Title VII. (*Meritor*, *supra*, 477 U.S. at p. 64.) In support of its holding, the court cited with approval the Equal Employment Opportunity Commission's guidelines on discrimination because of sex, which defined unlawful "sexual harassment" as including " 'verbal . . . conduct of a

sexual nature.' . . . [having] 'the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment.' " (*Id.* at p. 65.)

In *Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17 (*Harris*), the court reaffirmed and refined its holding in *Meritor*. The court held that a discriminatory environment need not cause "concrete psychological harm" to violate Title VII; rather, it need only "reasonably be perceived . . . as hostile or abusive." (*Id.* at p. 22.) More important, in *Harris*, unlike *Meritor*, the only conduct that was at issue was offensive speech. Thus, in *Harris* (and in dictum in *Meritor*), the high court recognized what is in essence the statutory tort of injurious speech. How does that holding reconcile with the court's statement just a few years earlier in *Hustler Magazine* v. *Falwell* (1988) 485 U.S. 46, reaffirming its "longstanding refusal to allow damages to be awarded because . . . speech . . . may have an adverse emotional impact on the audience"? (*Id.* at p. 55.) The residents of Skokie, Illinois—some of whom had survived the horrors of the Holocaust in Europe only to face similar hatred on the streets of America—must have learned about *Meritor* and *Harris* and wondered why hostile and offensive speech is remediable in the often rough-and-tumble environment of the workplace, but not on the streets and sidewalks of our neighborhoods. (See *Rowan* v. *United States Post Office Department* (1970) 397 U.S. 728, 738 [upholding a statute protecting people from objectionable speech in the places where they live].) A constitutional scholar would answer that the high court has never addressed whether Title VII's ban on "offensive" "verbal . . . conduct" in the workplace is consistent with the First Amendment. (*Meritor*, *supra*, 477 U.S. at p. 65.) Nevertheless, the plurality opinion assumes the high court resolved that issue long ago and in favor of censorship.

The plurality notes that the FEHA has the same broad scope as Title VII, and, like Title VII, it prohibits "[v]erbal harassment" (plur. opn., *ante*, at p. 7) that is " 'sufficiently pervasive so as to . . . create an abusive working environment . . . .' " (Plur. opn., *ante*, at p. 8, quoting *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.) Then, with an offhand summary of the holdings in *Meritor* and *Harris* and no further analysis, the plurality states that "these decisions are at least implicitly inconsistent with any suggestion that speech of this nature is constitutionally protected." (Plur. opn., *ante*, at p. 14.) Why? These cases did not even discuss the First Amendment, let alone apply it. Finally, the plurality relies on dictum that is not even on point from *R.A.V.* v. *St. Paul* (1992) 505 U.S. 377 (*R.A.V.*).

The issue in *R.A.V.* had nothing to do with Title VII or workplace discrimination. Rather, *R.A.V.* held that, even when speech falls within a category that is generally subject to regulation—such as obscenity, defamation, or fighting words—the government cannot regulate the speech in a content-based way. (*R.A.V.*, *supra*, 505 U.S. at pp. 383-384.) "Thus, the government may proscribe libel; but it may not . . . proscrib[e] *only* libel critical of the government." (*Id.* at p. 384.) Similarly, the government may proscribe fighting words, but it may not proscribe only those fighting words that "provoke violence 'on the basis of race, color, creed, religion or gender.' " (*Id.* at p. 391.) In dictum elaborating on this point, the court noted that this content-neutrality requirement is less strict in the case of fighting words and similar "proscribable speech" than in the case of "fully protected speech." (*Id.* at p. 387.) As an example, the court noted, expressly without deciding, that "sexually derogatory 'fighting words,' among other words, *may*" violate Title VII, though this regulation of only those fighting words that are "sexually derogatory" is obviously not content neutral. (*Id.* at p. 389, italics added.)

This tentative dictum is hardly a "ruling[]" (plur. opn., *ante*, at p. 18) that "leave[s] little room for doubt" (*id.* at p. 15), and, in any case, it is clearly limited to "proscribable speech" such as fighting words. Indeed, if it were not so limited, it would fail to illustrate the high court's point, which is that the content-neutrality requirement applies less strictly in the case of "proscribable speech." As such, this dictum can hardly be characterized as a definitive determination that the First Amendment does not protect speech that creates a hostile work environment. On the contrary, *R.A.V.* emphasizes that the content-neutral requirement is more strict in the case of "fully protected speech." (*R.A.V.*, *supra*, 505 U.S. at p. 387.) Thus, if anything, *R.A.V.* suggests Title VII's content-based regulation of speech is invalid to the extent it regulates "fully protected speech" like the speech at issue here. In other words, if the ordinance at issue in *R.A.V.* was unconstitutional because it singled out for regulation only those fighting words that "provoke[d] violence 'on the basis of race, color, creed, religion or gender' " (*R.A.V.*, *supra*, 505 U.S. at p. 391), then a fortiori Title VII is unconstitutional because it is a content-based regulation of speech *not* limited to fighting words.

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. And it is no answer that the government is merely proscribing discriminatory conduct, whether or not spoken words are an integral part of that conduct, and therefore it can incidentally regulate speech in the workplace without violating the First Amendment. (Plur. opn., *ante*, at pp. 13-14, 18, fn. 6.) Here, it is the speaker's philosophical beliefs and opinions themselves that cause the injury, and it is those beliefs and opinions that the government wants to censor. If government can censor those beliefs and opinions under the rubric of merely proscribing discriminatory conduct, then it can also punish Father Terminiello for discriminatorily denouncing Russian Jews in his speech in a

Chicago auditorium, and it can punish Clarence Brandenburg for advocating the deportation of Blacks, and it can prevent Nazis from marching through the streets of Skokie.

Indeed, if applied generally, the plurality's rule would create the exception that swallowed the First Amendment. As part of the FEHA, the Legislature has also attempted to address the problem of discrimination in our neighborhoods by regulating residential real estate transactions. (Gov. Code, § 12955.) If, in furtherance of this goal, the Legislature had enacted a prohibition against "verbal conduct" creating a "hostile sidewalk environment" analogous to the similar prohibition that applies in the workplace, courts could then enjoin speeches and parades that express discriminatory ideas, and under the plurality's open-ended standard, these injunctions would be constitutional because they merely proscribed discriminatory conduct with only an incidental effect on speech. The plurality simply has not explained what makes the workplace different from all the other places where we have to put up with hateful and discriminatory speech.

Moreover, here we are not dealing merely with a regulation of speech, we are dealing with an absolute prohibition—a prior restraint. Prior restraints of speech are particularly inimical because they do not merely place a burden on the speaker's ability to communicate a message; rather they erase that message before its effects can be assessed. The plurality repeatedly asserts that the prior restraint at issue here is permitted under the First Amendment "because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the FEHA." (Plur. opn., *ante*, at p. 29; see also *id.* at pp. 1, 22-23, 25, 33.) So speech that is "unlawful" is now unprotected by the state and federal Constitutions. That standard turns the world on its head. In effect, the plurality says, "The Legislature, acting in response to current popular sentiments, has carved out certain ideas from

the universe of ideas and declared them to be bad ideas, and once an idea has been judicially determined to be one of these bad ideas, courts can prohibit anyone from expressing it." I disagree.

Justice Werdegar's concurring opinion, though it agrees the court's analysis is fatally flawed (conc. opn., *ante*, at pp. 4-6) and tries harder to address the First Amendment issues, is no more persuasive. Conceding that none of the existing First Amendment doctrines standing alone permits the injunction at issue here, she carves a new exception from the First Amendment because a "contrary holding" (*id.* at p. 26) would mean "Lawrence's First Amendment rights . . . outweigh the rights of the Latino plaintiffs to be free of unwanted racial discrimination." (*Id.* at p. 27.)

The Constitution, however, has already balanced the scales. Plaintiffs should not be subjected to racial invectives in the workplace. But this case is not, as Justice Werdegar suggests, an all-or-nothing choice between either upholding the injunction or subjecting employees to a "constant stream of [denigrating] verbiage." (Conc. opn., *ante*, at p. 26, fn. omitted.) There is a middleground: employees can sue and recover damages. It is hard to imagine any employer would continue to tolerate discriminatory speech in the workplace after shouldering the cost of litigation and a damage award, and, if it did, it would run the risk of paying a second award, including hefty punitive damages and attorney fees. I think that remedy is sufficient to deter any "unwanted racial discrimination." (*Id.* at p. 27.)

As Justice Werdegar recognizes, this case pits freedom of speech against racial equality, and because the tension between freedom and equality cannot be reconciled, the best that can be achieved is a rough equilibrium. (Conc. opn., *ante*, at pp. 27, 29.) In this regard, the California Constitution strikes the appropriate balance by distinguishing between prior restraints and all other regulations of

speech. Article I, section 2, subdivision (a), of the state Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." In *Dailey* v. *Superior Court* (1896) 112 Cal. 94, 97 (*Dailey*), discussing an earlier, almost identical version of this provision, we said, "The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility."

Since *Dailey*, we have upheld injunctions against speech, but only proscribable speech such as obscenity or fighting words, or where other compelling circumstances made injunctive relief absolutely necessary. (Cf. *People ex rel. Gallo* v. *Acuna* (1996) 14 Cal.4th 1090.) No such circumstances exist here, where the speaker has merely expressed disgusting opinions and may well have ceased doing so. Forcibly prohibiting expression may only reinforce the animosities we are trying to subvert. In permitting speech, but requiring the speaker to pay damages for injurious speech, the California Constitution preserves both the freedom of the speaker and the equal dignity of the audience. This compromise not only discourages injurious speech, but may also foster positive change in the speaker's attitudes. Accordingly, I would draw the line in the same place as the California Constitution and find the injunction at issue here to be an unconstitutional prior restraint of speech.

The court also rejects defendants' argument that the injunction here is overly broad. Justice Werdegar's concurring opinion does not address this issue

other than to state that the injunction must be "sufficiently narrowed on remand to apply to the workplace only." (Conc. opn., *ante*, at p. 28.) The plurality opinion recognizes that an injunction restraining speech must "burden no more speech than necessary to serve a significant government interest" (*Madsen* v. *Women's Health Center, Inc.* (1994) 512 U.S. 753, 765), but argues that this injunction satisfies that standard. (Plur. opn., *ante*, at p. 31.) I disagree.

First, because we are deciding this case on a very limited record, we do not know what exactly plaintiffs' supervisor said, how often he said it, or what the surrounding circumstances were. Moreover, we do not know whether the damages award, which defendants have chosen not to challenge, was adequate to bring an end to the conduct that created the hostile work environment. Therefore, we do not know if the broad injunction was necessary, or if a more specific one prohibiting, for example, only pervasive use of certain epithets would have sufficed. Second, the injunction does not merely prohibit plaintiffs' supervisor from repeating his discriminatory comments in plaintiffs' presence; rather, it prohibits him from repeating them anywhere in the workplace. The United States Supreme Court made clear in *Harris* that, "if the victim does not subjectively perceive the [work] environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." (*Harris*, *supra*, 510 U.S. at pp. 21-22.) This standard also applies under the FEHA. (Plur. opn., *ante*, at p. 8.) Therefore, if an employee never learns about the use of certain words in the workplace, those words cannot create a hostile work environment for that employee. I see no reason under this standard to enjoin plaintiffs' supervisor from expressing his discriminatory opinions to persons in the workplace who are not offended by them. In sum, even if the injunction at issue here were otherwise constitutional, it is overly broad as written and therefore invalid.

Every age has its fashionable ideas and its disfavored ideas. In the early part of this century, the public was particularly thin-skinned about communism. Courts tried to prohibit and punish the dissemination of communist ideas, but the United States Supreme Court struck down these decisions with a resounding no. (See, e.g., *Gitlow* v. *New York* (1925) 268 U.S. 652.) Justice Holmes added the phrase "free trade in ideas" to our judicial lexicon and admonished us that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." (*Abrams* v. *United States*, *supra*, 250 U.S. at p. 630 (dis. opn. of Holmes, J.).) In other words, the only way to fight a bad idea is with a good idea. But today this court reopens the door to censorship with a resounding yes. The Legislature is now free to prohibit the expression of ideas it dislikes, and courts can enforce these prohibitions with injunctions.

None of us on this court condones ethnic and racial discrimination in the workplace, but the issue in this case is speech, not just discrimination. Speech is unpleasant sometimes. It may be disgusting. It may be offensive. Contrary to the nursery rhyme, it may even be injurious. But, with few exceptions, none of which applies, the state and federal Constitutions prohibit courts from using their injunctive power as a surgical instrument to extricate disfavored ideas from the popular discourse, and this principle applies even here where the ideas in question were, from what we can tell from the limited record, both offensive and abhorrent.

One of the truths we hold to be self-evident is that a government that tells its citizens what they may *say* will soon be dictating what they may *think*. But in a country that puts such a high premium on freedom, we cannot allow ourselves to be the captives of orthodox, culturally imposed thinking patterns. Indeed, I can conceive no imprisonment so complete, no subjugation so absolute, no debasement so abject as the enslavement of the mind.

Fundamentally, this is a case about equality and freedom. Thus, it is a case about our most basic political ideals; about our highest aspirations and our greatest failures; our toughest challenges and our deepest fears. It is about a bafflingly elusive dream of equality and the freedom, not immune from abuse, to speak words that make others more than uncomfortable. It is a case about equality and freedom and the irreconcilable tension between the two. We are all the beneficiaries of the freedom the Constitution guarantees, and we all pay its costs, even though the price may sometimes be anguish.

I dissent.

BROWN, J.

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See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Unpublished Opinion
Original Appeal
Original Proceeding
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**KRANSCO, Plaintiff and Appellant;
INTERNATIONAL INSURANCE COMPANY et al.,
Plaintiffs and Respondents,
v.
AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, Defendant and Appellant.**

No. S062139.

Supreme Court of California

June 22, 2000.

SUMMARY

An insured manufacturer of a toy water slide brought a bad faith action against its primary insurer, which had rejected an offer to settle a personal injury action against the insured brought by a person who was injured on the toy. The trial court initially asked the jury to determine if the insured itself breached its reciprocal duty of good faith and fair dealing by falsely denying, in discovery in the underlying suit, its knowledge of prior similar injuries suffered on the toy. The jury set the insured's comparative fault at 90 percent. The trial court later decided that it erred in instructing the jury and entered judgment notwithstanding the verdict in favor of the insured, without any reduction for the insured's comparative fault as allocated by the jury. (Superior Court of the City and County of San Francisco, No. 939603, Carlos Bea, Judge.) The Court of Appeal, First Dist., Div. One, No. A070954, affirmed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that the trial court properly refused to allow the insurer to assert the comparative bad faith of its insured as an affirmative defense. It is an insurer's breach of the covenant of good faith that is governed by tort principles; an insured's breach of the covenant is not a tort and does not give rise to tort damages. The insurer's tort duty is unconditional and independent of the performance of the insured's contractual obligations. The obligations undertaken by an insured in entering into an insurance contract are not of the same character as the obligations undertaken by an insurer. Further, the insurer did not demonstrate that the insured's discovery misconduct in the underlying action was a proximate cause of the jury's excess verdict, and the insurer, at the time it rejected the settlement offer, was fully aware of the insured's discovery misconduct. (Opinion by Baxter, J., with Mosk, Werdegar, Chin, and Brown, JJ., concurring. Concurring opinion by Mosk, J. (see p. 412). Concurring and dissenting opinion by George, C. J. (see p. 414). Dissenting opinion by Kennard, J. (see p. 417).) ***391**

HEADNOTES

Classified to California Digest of Official Reports

(1) Insurance Contracts and Coverage § 109--Adjustment of Loss and Liability--Duty of Insurer to Act in Good Faith.
There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything that will injure the right of the other to receive the benefits of the agreement. This principle applies equally to insurance policies, which are a category of contracts. Because the covenant is a contract term, in most cases compensation for its breach is limited to contract rather than tort remedies. An exception to this general rule has developed in the context of insurance contracts. The availability of tort remedies in the limited context of an insurer's breach of the covenant advances the social policy of safeguarding an insured in an inferior bargaining position who contracts for calamity protection, not commercial advantage. The scope of the duty of good faith and fair dealing depends upon the purposes of the particular contract because the covenant is aimed at making effective the agreement's promises. In the context of an insurance policy, the terms and conditions of the policy define the duties and performance to which the insured is entitled.

(2) Insurance Contracts and Coverage § 110--Adjustment of Loss and Liability--Duty of Insurer to Act in Good Faith--Settlement.
A liability insurance policy's express promise to defend and indemnify the insured against injury claims implies a duty to settle third party claims in an appropriate case. More specifically, the insurer must settle within policy limits when there is substantial likelihood of recovery in excess of those limits. The duty to settle is implied in law to protect

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the insured from exposure to liability in excess of coverage as a result of the insurer's gamble on which only the insured might lose. An insurer that breaches its implied duty of good faith and fair dealing by unreasonably refusing to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits.

(3a, 3b) Insurance Contracts and Coverage § 109--Adjustment of Loss and Liability--Duty of Insurer to Act in Good Faith--Insured's Comparative Bad Faith as Affirmative Defense.

In a bad faith action brought by an insured manufacturer of a toy water slide against its primary insurer for failure to settle an underlying personal injury action within policy limits, the trial court properly refused to allow the ***392** insurer to assert the comparative bad faith of its insured as an affirmative defense. It is an insurer's breach of the covenant of good faith that is governed by tort principles; an insured's breach of the covenant is not a tort and does not give rise to tort damages. The insurer's tort duty is unconditional and independent of the performance of the insured's contractual obligations. The obligations undertaken by an insured in entering into an insurance contract are not of the same character as the obligations undertaken by an insurer. Further, in this case, the insurer did not demonstrate that the insured's discovery misconduct in the underlying action (failure to disclose previous similar injuries involving the same toy) was a proximate cause of the jury's excess verdict and huge punitive damages award, and the insurer, at the time it rejected the settlement offer, was fully aware of the discovery misconduct. The insurer was bound under the insurance policy to protect the insured from an excess judgment, whether that judgment be the result of the insured's negligence in marketing the toy slide, the insured's conduct as a litigant in the underlying action, or a combination. (Disapproving, to the extent it is inconsistent: California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274 [218 Cal.Rptr. 817].)

[See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, 1146, 1153 et seq. See also Croskey, Cal. Practice Guide: Insurance Litigation (The Rutter Group 1998) 12:120 et seq., 12:1163 et seq.]

(4) Insurance Contracts and Coverage § 109--Adjustment of Loss and Liability--Duty of Insurer to Act in Good Faith--Insurer's Remedies Where Insured Acts in Bad Faith.

Even though the comparative bad faith of the insured is not available as an affirmative defense to an insurer in a bad faith action, the insurer is not left without remedies for an insured's breach of the covenant of good faith and fair dealing. Evidence of an insured's misconduct may factually disprove the insurer's liability for bad faith by showing the insurer acted reasonably under the circumstances. The insured's breach of the covenant of good faith and fair dealing is also separately actionable as a contract claim. Some forms of misconduct by an insured will void coverage altogether under the insurance policy. Without coverage there can be no liability for bad faith on the part of the insurer. Also, an insured's fraudulent misconduct is separately actionable and can give rise to tort damages. These remedies adequately serve to protect an insurer from the insured's misconduct without creating the logical inconsistencies and troublesome complexities of a defense of comparative bad faith. ***393**

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BAXTER, J.

Can a liability insurer assert the insured's "comparative bad faith" as an affirmative defense in a bad faith action brought against it for ***394** breach of the covenant of good faith and fair dealing? In this case a liability insurer breached its duty of good faith and fair dealing owed its insured manufacturer by unreasonably failing to settle an injured third party's action against the insured within policy limits, thereby exposing the insured to a verdict awarding the injured party compensatory and punitive damages far in excess of policy limits. On appeal the insurer did not contest the jury's finding of bad faith, but argued the insured's comparative bad faith and comparative negligence as a litigant in the underlying third party action was a contributing legal cause of the verdict and should reduce its liability for tort damages in the bad faith action.

The trial court initially accepted this argument, instructing the jury to determine if the insured itself breached its reciprocal duty of good faith and fair dealing toward the insurer or acted negligently in failing to exercise ordinary care as a litigant in the underlying third party action. The jury found the insured's conduct did contribute to the amount of the verdict in excess of policy limits and set the insured's comparative fault at 90 percent. The trial court thereafter decided it had erred in instructing the jury on comparative bad faith and comparative negligence and entered judgment notwithstanding the verdict in favor of the insured for the full amount of the insured's damages, without reduction for the insured's comparative fault as allocated by the jury. (Code Civ. Proc., 629.)

Both the insurer and insured appealed on a number of grounds. As relevant here, the insurer sought reinstatement of the jury's verdict allocating fault and liability for damages. The Court of Appeal affirmed the judgment in its entirety. For reasons to be explained, we conclude a liability insurer cannot assert the comparative bad faith of its insured in the underlying third party litigation as an affirmative defense in a bad faith action brought against it.

I. Facts

A. The Wisconsin Products Liability Litigation

In June 1987, 35-year-old Michael Hubert jumped headfirst onto his Wisconsin neighbor's backyard water slide toy known as a Slip 'N Slide and broke his neck, rendering him a partial quadriplegic. [FN1] Hubert brought a personal injury action in Wisconsin against Kransco, the California corporation that manufactured the Slip 'N Slide toy (the Hubert action). ***395**

> FN1 Hubert is six feet three inches tall and weighed 220 pounds at the time. The Slip 'N Slide is basically a piece of plastic that lies flat on the ground and becomes slippery when made wet. It was "not intended for adult use" and contains explicit warnings against adult usage as well as instructions on its proper use. Hubert never saw or attempted to read the instructions on the proper use of the toy slide. He ran toward it from a point nearly 40 feet away and, when he reached it, dove into the air, coming down at a steep angle in what one witness described as "a jackknife."

Kransco tendered defense of the action to its Ohio-based primary liability carrier, American Empire Surplus Lines Insurance Company (AES), which had agreed to defend Kransco against personal injury actions in any state and indemnify it for all sums it became legally obligated to pay as damages up to $1 million, less Kransco's $100,000 self-insured retention. Kransco also had three layers of excess insurance above its AES primary insurance coverage: International Insurance Company (International) provided $2 million in excess of the $1 million primary coverage, Agricultural Excess

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and Surplus Insurance Company (Agricultural) provided the next layer of $1 million in excess of the $3 million, and Transco Syndicate No. 1 Ltd. (Transco) provided the last layer of excess insurance: $1 million in excess of the $4 million. In all, Kransco had $5 million in available liability coverage over and above its $100,000 self-insured retention.

During the discovery phase of the Hubert action, in response to an interrogatory by Hubert, Kransco denied knowledge of prior Slip 'N Slide accidents that had resulted in cervical injuries to adults. Kransco later amended its response to admit knowledge of two such accidents. One accident had resulted in the user's death, the other had left the user a quadriplegic and resulted in a $1.5 million settlement against the corporation from which Kransco had purchased the rights to manufacture the Slip 'N Slide. Kransco's amended response itself contained inaccurate information about the date of one of these accidents.

Hubert's action against Kransco was tried to a Wisconsin jury in April 1991. During the trial, Hubert offered to settle the action for $750,000, almost a million dollars less than his pretrial demand. Kransco approved settlement at that amount and tendered its $100,000 self-insured retention. Primary insurer AES, however, would contribute only $250,000 toward a settlement. AES rejected Hubert's $750,000 settlement offer and, given Kransco's willingness to contribute $100,000, and excess insurer International's willingness to contribute another $100,000, made a counteroffer of $450,000, which Hubert rejected. The jury ultimately returned verdicts awarding Hubert roughly $2.3 million in compensatory damages and $10 million in punitive damages. ***396**

In June 1991, while postverdict motions were pending in the Wisconsin trial court to reduce the unprecedented punitive damages award, [FN2] Kransco settled with Hubert. Kransco and its insurers paid Hubert $7.5 million. Of this amount, AES contributed its policy limits of $900,000 while objecting to the settlement as unreasonable because it thought the verdict likely would have been judicially reduced or set aside. Excess insurers International and Agricultural contributed their policy limits of $2 million and $1 million, respectively, and excess insurer Transco contributed $500,000, half its policy limit. [FN3] Kransco paid the remaining $3.1 million from its own funds. At Hubert's insistence, Kransco stipulated to entry of judgment against it in the full amount of the jury verdict plus interest (approximately $12.5 million) but Hubert agreed not to execute on the judgment. Additionally, under the terms of the settlement Kransco agreed to prosecute a bad faith action against AES and to split equally with Hubert any net proceeds from the litigation (after deduction of litigation expenses and reimbursement of the subrogated excess insurers' cash settlement payments).

FN2 Prior to the Hubert verdict, the largest punitive damage award ever returned in Wisconsin was $200,000.

FN3 The Transco policy expressly excluded punitive damages, which are insurable in Wisconsin. The exclusion may explain Transco's failure to contribute its policy limits.

B. The California Bad Faith Litigation

Kransco initiated this bad faith action against AES in January 1992, alleging AES had breached the implied covenant of good faith and fair dealing by rejecting Hubert's offer to settle his lawsuit against Kransco for a sum within the AES policy limits despite a substantial risk of a verdict greatly in excess of those limits. Among other claims, Kransco sought recovery of $11.6 million, the amount by which the Hubert judgment exceeded the AES policy limits and Kransco's self-insured retention. [FN4] AES answered with a general denial and the assertion of various affirmative defenses. As one affirmative defense, AES alleged that Kransco had "failed to exercise ordinary care for its own safety" and that "such failure on its part proximately contributed to and was the sole proximate cause of all the loss and damage complained of by [Kransco], if any there were." AES further alleged that "any recovery by [Kransco] is barred or limited by the unreasonable conduct and comparative bad faith actions of [Kransco] and/or its ***397** duly authorized agents and representatives with respect to the matters alleged in its First Amended Complaint herein."

FN4 Kransco further sought $10 million in punitive damages from AES. In September 1993, the trial court granted summary adjudication, dismissing

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Kransco's punitive damages claim. Kransco also claimed that damages were incurred after the Hubert settlement when an unrelated injury action cost over $2 million in settlement and defense, which was paid by Kransco and its excess insurer Transco because otherwise-available insurance coverage had been exhausted by the Hubert claim mishandled by AES. These consequential damages were included in the Kransco judgment and affirmed on appeal.

At the trial of the bad faith action, AES argued that Kransco was itself largely at fault for the excess verdict (i.e., the large Hubert compensatory and punitive damages award) as a consequence of its having given false interrogatory answers during pretrial discovery in the Wisconsin products liability action. The Court of Appeal characterized the claim and relevant supporting facts as follows:

"Kransco submitted an incorrect interrogatory answer in the underlying Hubert action and AES contends that this act constituted breach of the covenant of good faith and fair dealing or negligence in handling the Hubert action. Early in the case, Hubert served an interrogatory asking Kransco if it knew of any similar injury accidents predating his own injury in 1987. Kransco replied, in July 1990, that it had no notice of any adult cervical injuries from backyard water toys before 1987. The interrogatory answer was wrong.

"A Kransco product development vice-president knew of two adult cervical injuries on the Slip 'N Slide that had occurred when the water slide was made by another toy manufacturer before Kransco acquired that manufacturer's assets and reintroduced the toy in 1983. One of those injuries resulted in quadriplegia, the other in death. [FN5] Kransco's general counsel neglected to ask the product development vice-president about prior injuries before answering the interrogatory. [FN6] Kransco's counsel in the Hubert action learned of the vice-president's knowledge of prior injuries when preparing him for his December 1990 deposition, and immediately informed Hubert's counsel of the error. Kransco amended its interrogatory answer several months before trial to disclose this information, although the amendment itself was inaccurate because it stated that one of the accidents occurred approximately 30 years earlier when it was really closer to 20 years earlier.

FN5 The earlier accident resulting in a fatality was a matter of public record in Wisconsin, as the ensuing litigation had culminated in a reported decision. (See Drake v. Wham-O Manufacturing Company (E.D.Wis. 1974) 373 F.Supp. 608.) As the Court of Appeal noted, there was also evidence that Hubert and his counsel were already aware of at least one of the two prior Slip 'N Slide accidents prior to Kransco's tendering the incorrect interrogatory responses to plaintiffs.

FN6 Kransco's general counsel, Stuart Schneck, who prepared and submitted the false interrogatory responses on Kransco's behalf, was not a witness in the underlying Wisconsin action.

"AES was fully informed of the previous Slip 'N Slide injuries well before trial and receipt of Hubert's settlement offer, but complains that the *398 excess verdict is attributable in substantial part to Kransco's pretrial discovery blunders which were exploited by Hubert's counsel at trial. Hubert's counsel argued to the jury that Kransco's original and amended interrogatory responses were an untruth followed by a half-truth and suggested that there may be other Slip 'N Slide accidents never disclosed. Of course, the extended argument to the jury included a great many points unrelated to Kransco's interrogatory answers, including the central claim that Kransco should never have reintroduced an injury-producing toy discontinued by its predecessor and did so without adequate warnings of danger in callous pursuit of $5 million annual gross profit. But AES maintains that the accusation of lying leveled against Kransco was explosive to a jury considering punitive damages, and invokes principles of comparative bad faith and comparative negligence to demand that Kransco's damages be reduced in proportion to its posited fault in causing the excess verdict."

The trial court instructed the jury on both of AES's comparative fault theories. Regarding comparative bad faith, the trial court instructed the jury: "I have already described the implied covenant of good faith and fair dealing that the law implies in every insurance contract. Because that implied covenant of good faith and fair dealing applies to both the insurer and the insured, Kransco had a duty to AES not to do anything that would injure AES's right to receive the benefits of their agreement. To do so would constitute bad faith on Kransco's part. [] Comparative bad faith does not relieve AES of its

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obligations or bar a recovery by Kransco against AES, but the total amount of damages to which Kransco would otherwise be entitled shall be reduced in proportion to the amount of comparative fault attributable to Kransco, Kransco's attorneys, or Kransco's agent."

Regarding comparative negligence, the trial court instructed the jury: "Comparative negligence is the failure, if any, on the part of Kransco to exercise ordinary care, which when combined with AES's breach, if any, of its obligations of good faith and fair dealing contributed to cause Kransco's injury. [] The negligence referred to here is not any lack of care or breach of any legal duty owed by Kransco to Michael Hubert or other Hubert plaintiffs involved in the 1991 Wisconsin trial. It is the negligence, if any, of Kransco in the preparation and trial of the Hubert v. Kransco case, and then only if it was a legal cause of the plaintiffs verdict in the amount returned and entered. [] Comparative negligence, if any, on the part of Kransco does not bar a recovery against AES, but the total amount of damages to which Kransco would otherwise be entitled shall be reduced in proportion to the amount of fault attributable to Kransco."

Upon evidence not challenged by AES on appeal, the jury returned a special verdict finding AES had breached its duty of good faith and fair ***399** dealing toward Kransco in its handling of Hubert's personal injury claim. However, the jury also found Kransco had breached the duty of good faith and fair dealing owed to AES or had failed to exercise ordinary care for its own safety, or both, in its handling of Hubert's claim before the verdict. The jury assessed compensatory damages at over $13.6 million, apportioning fault for these damages at 90 percent to Kransco and 10 percent to AES. The jury further found Kransco did not act unreasonably in agreeing to the postverdict settlement with Hubert.

Kransco moved for judgment notwithstanding the verdict (Code Civ. Proc., 629) or, in the alternative, for new trial (id., 657) on the ground, among others, that the trial court had erred in instructing on both theories of comparative fault: comparative bad faith and comparative negligence. The trial court reconsidered and agreed, concluding comparative negligence was wholly inapplicable to the case and that its instruction on comparative fault should have been limited to "whether Kransco contributed to AES's failure to settle by impairing its assessment of the risk of a substantial likelihood of an excess judgment." The court found the jury's verdicts finding comparative fault were unsupported by the evidence because "AES presented no substantial evidence that Kransco's failure promptly to convey to AES its knowledge of prior cervical injuries contributed to AES's failure to recognize the substantial likelihood of excess judgment." Accordingly, judgment was entered in favor of Kransco for the full amount of damages as calculated by the jury, plus prejudgment interest and costs.

C. The Appeal

Both parties appealed on a number of grounds. The Court of Appeal affirmed the judgment in its entirety. Of relevance here, the court held that in an insured's action against its insurer for breach of the implied covenant of good faith and fair dealing, the insured's comparative bad faith is not an affirmative defense. [FN7] The court further held that on the facts of this case comparative negligence was not an available defense. [FN8] ***400**

FN7 The court went on to hold that even if comparative bad faith were available as a defense, it would be available only when the insured's conduct interfered with the insurer's ability to fairly evaluate a settlement offer, a situation not shown on these facts. This dictum was inconsistent with the court's primary holding that, as a matter of law and policy, an insured's comparative bad faith cannot set off or reduce the tort damages available to the insured when the insurer breaches the covenant of good faith and fair dealing.

FN8 Another issue raised in the Court of Appeal was whether the compensatory damages that Kransco could recover for AES's bad faith included the amount of punitive damages awarded against Kransco in the Wisconsin litigation. Because Wisconsin law permits indemnity coverage for punitive damages, while California law does not, the Court of Appeal treated the issue as presenting a conflict of law and resolved the conflict in favor of the application of Wisconsin law, thus permitting Kransco to include the Wisconsin punitive damages within the amount of compensatory damages recoverable from AES. We initially included this issue within our grant of review but deferred briefing on it. After we issued our opinion in PPG Industries, Inc. v. Transamerica Ins. Co. (1999) 20 Cal.4th 310 [84

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Cal.Rptr.2d 455, 975 P.2d 652], however, we amended our order granting review to encompass only the availability of a comparative bad faith defense. Accordingly, we express no opinion on the Court of Appeal's resolution of the punitive damages question.

II. Discussion

A. AES Breached the Covenant of Good Faith and Fair Dealing by Unreasonably Failing to Settle the Underlying Action on Kransco's Behalf Within Policy Limits

(1) It has long been recognized in California that "[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 658 [328 P.2d 198, 68 A.L.R.2d 883].) This principle applies equally to insurance policies, which are a category of contracts. (Ibid.) Because the covenant is a contract term, in most cases compensation for its breach is limited to contract rather than tort remedies. (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 684 [254 Cal.Rptr. 211, 765 P.2d 373] (Foley).) But "[a]n exception to this general rule has developed in the context of insurance contracts where, for a variety of policy reasons, courts have held that [an insurer's] breach of the implied covenant will provide the basis for an action in tort." (Ibid.) The availability of tort remedies in the limited context of an insurer's breach of the covenant advances the social policy of safeguarding an insured in an inferior bargaining position who contracts for calamity protection, not commercial advantage. (Foley, supra, 47 Cal.3d at pp. 684-685; see also Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 819-820 [169 Cal.Rptr. 691, 620 P.2d 141].)

The scope of the duty of good faith and fair dealing depends upon the purposes of the particular contract because the covenant "is aimed at making effective the agreement's promises." (Foley, supra, 47 Cal.3d at p. 683; Egan v. Mutual of Omaha Ins. Co., supra, 24 Cal.3d at p. 818.) In the context of an insurance policy, "[t]he terms and conditions of the policy define the duties and performance to which the insured is entitled." (Western Polymer Technology, Inc. v. Reliance Ins. Co. (1995) 32 Cal.App.4th 14, 24 [38 Cal.Rptr.2d 78].) "One of the most important benefits of a maximum limit insurance policy is the assurance that the company will provide the insured with defense and indemnification for the purpose of protecting him from ***401** liability. Accordingly, the insured has the legitimate right to expect that the method of settlement within policy limits will be employed in order to give him such protection." (Commercial Union Assurance Companies v. Safeway Stores, Inc. (1980) 26 Cal.3d 912, 918 [164 Cal.Rptr. 709, 610 P.2d 1038].)

(2) Consistent with these principles, a liability insurance policy's express promise to defend and indemnify the insured against injury claims implies a duty to settle third party claims in an appropriate case. (Commercial Union Assurance Companies v. Safeway Stores, Inc., supra, 26 Cal.3d at p. 917; Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]; Comunale v. Traders & General Ins. Co., supra, 50 Cal.2d at p. 659.) "More specifically, the insurer must settle within policy limits when there is substantial likelihood of recovery in excess of those limits. [Citations.] [] The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble-on which only the insured might lose." (Murphy v. Allstate Ins. Co. (1976) 17 Cal.3d 937, 941 [132 Cal.Rptr. 424, 553 P.2d 584].) An insurer that breaches its implied duty of good faith and fair dealing by unreasonably refusing to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits. (Commercial Union Assurance Companies v. Safeway Stores, Inc., supra, 26 Cal.3d at pp. 916-917.)

Here, the jury concluded AES breached its duty of good faith and fair dealing owed Kransco by rejecting Hubert's $750,000 settlement offer, which was within the $900,000 policy limits, despite a substantial likelihood of recovery in excess of those limits. (3a) AES did not challenge that conclusion on appeal, but instead argued it should not be liable for the full amount of the judgment because Kransco's own litigation misconduct or comparative fault contributed to the excess verdict. Specifically, AES claims the Wisconsin jury in the underlying Hubert action assessed $10 million in punitive damages to punish Kransco for its false and incorrect interrogatory responses made during pretrial

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discovery.

B. Comparative Bad Faith as an Affirmative Defense in a Third Party Insurance Bad Faith Action

Should AES be permitted to assert Kransco's comparative bad faith as an affirmative defense in the bad faith action brought against it by Kransco for breach of the covenant of good faith and fair dealing? More specifically to the facts at hand, may an insurer that breaches the covenant of good faith and fair dealing, by failing to settle a third party action within policy limits ***402** when there is a substantial risk of an excess judgment, later fault the insured's litigation misconduct for contributing to the amount of the verdict in excess of policy limits? In entering judgment notwithstanding the verdict, and in affirming that judgment on appeal, the trial court and Court of Appeal correctly answered "no."

To be sure, the "duty of good faith and fair dealing in an insurance policy is a two-way street, running from the insured to his insurer as well as vice versa." (Commercial Union Assurance Companies v. Safeway Stores, Inc., supra, 26 Cal.3d at p. 918.) But the scope of the insured's duty of good faith and fair dealing, and the remedies available to the insurer for a breach of that duty, are fundamentally and conceptually distinct from the insurer's reciprocal duty, and the remedies available to the insured for breach of that duty, under the insurance policy. As this court has explained, it is an insurer's breach of the covenant of good faith that is governed by tort principles, at least as concerns the availability of tort damages. (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 574 [108. Cal.Rptr. 480, 510 P.2d 1032] (Gruenberg).) In contrast, an insured's breach of the covenant is not a tort. (See California Fair Plan Assn. v. Politi (1990) 220 Cal.App.3d 1612, 1618 [270 Cal.Rptr. 243].) An insurer's tort liability is predicated upon special factors inapplicable to the insured. (Foley, supra, 47 Cal.3d at pp. 684-685 [insurer tort liability based on special relationship with insured]; California Fair Plan Assn. v. Politi, supra, 220 Cal.App.3d at pp. 1618- 1619 [same].)

We suggested in Gruenberg, supra, 9 Cal.3d 566, that an insurer's breach of the covenant of good faith and fair dealing is not directly comparable with the insured's contractual breach, concluding that the insured's alleged contractual breach of the policy's cooperation clause by failing to submit to an examination and produce requested documents did not excuse the insurer's duty of good faith and fair dealing. (Id. at pp. 576-578.) We observed that "the insurer's duty is unconditional and independent of the performance of [the insured's] contractual obligations." (Id. at p. 578, italics added.)

Applying comparative fault principles (see Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]) [FN9] by recognizing a comparative bad faith defense in a third party insurance bad faith action would set the insurer's tortious breach of the covenant against the insured's contractual breach of the covenant, even though contractual breaches are generally excluded from comparative fault allocations. (See 12 ***403** West's U. Laws Ann. (1996) U. Comparative Fault Act, com. to 1, p. 128 [comparative fault inapplicable to "actions that are fully contractual in their gravamen"].) This distinction between tort and contract liabilities convinced one state supreme court to reject comparative bad faith as a defense in a bad faith action against an insurer ("the [insurer's] tort cannot be offset comparatively by the [insureds'] contract breach") and characterize the differing legal concepts as "apples and oranges." (Stephens v. Safeco Ins. Co. of America (1993) 258 Mont. 142 [852 P.2d 565, 568-569]; see also First Bank v. Fidelity and Deposit Ins. (1996) 1996 Okla. 105 [928 P.2d 298, 306-309] (First Bank) [rejecting comparative bad faith defense for an insured's misperformance of its contractual duties in a bad faith action against the insurer for refusal to defend].)

> FN9 In Li v. Yellow Cab Co., supra, 13 Cal.3d 804, this court abolished the common law doctrine of contributory negligence and adopted in its stead a "general scheme of assessment of liability in proportion to fault" (id. at p. 825), i.e., a comparative negligence standard.

In First Bank, supra, 928 P.2d 298, the Oklahoma Supreme Court noted its reliance on this court's jurisprudence (Crisci v. Security Ins. Co., supra, 66 Cal.2d 425; Comunale v. Traders & General Ins. Co., supra, 50 Cal.2d 654) in adopting as the law in Oklahoma California's treatment of an insurer's bad faith refusal to settle a claim as a tort. (First Bank, supra, 928 P.2d at p. 306.) The First Bank court,

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however, rejected the rationale of a subsequent California Court of Appeal decision-California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274, 283 [218 Cal.Rptr. 817] (California Casualty)-which for the first time held that in a bad faith action the insurer could interpose as a defense the tort concept of comparative fault, in an entirely new form known as comparative bad faith. [FN10] In the Court of Appeal and now in this court, AES places principal reliance on California Casualty.

> FN10 This court has not previously decided whether an insurance company may assert a comparative fault defense in a bad faith action. An insurer raised this or a similar issue in Johansen v. California State Auto. Assn. Inter-Ins. Bureau (1975) 15 Cal.3d 9 [123 Cal.Rptr. 288, 538 P.2d 744], but we did not resolve it because the record failed to support the contention "that the excess judgment can be attributed to [the] insured's conduct." (Id. at p. 20.)

Although California Casualty involved a bad faith action by an insured against her insurer for breach of the covenant of good faith and fair dealing, it did not, as in this case, involve a claim of bad faith refusal to settle a third party action within policy limits on the insured's behalf. The insured in California Casualty asserted her automobile insurer in bad faith had failed to pay a claim she had suffered under the uninsured motorist provisions of her automobile policy. (California Casualty, supra, 173 Cal.App.3d at pp. 276-277.) The insurer in turn sought to assert as an affirmative defense that the insured and her attorney " '[were] guilty of bad faith conduct in the prosecuting, handling and management of [her] uninsured motorist claim.' " (Id. at p. 277.) ***404**

The California Casualty court set the insurer's breach of the covenant of good faith and fair dealing against the insured's breach in applying principles of comparative fault, and held that an insurer sued by its insured for failure to pay her claim for uninsured motorist coverage may allege the insured's comparative bad faith as an affirmative defense. (California Casualty, supra, 173 Cal.App.3d at pp. 276-284.) The court ruled that the insured's undue delay in submitting information necessary to process her claim, which contributed to the insurer's failure to pay the claim, may reduce the insured's recovery for damages resulting from the insurer's bad faith nonpayment. (Id. at p. 283.) Responsibility and liability for damages were to be allocated between insurer and insured in proportion to the amount of bad faith attributable to each party. (Ibid.; cf. Li v. Yellow Cab Co., supra, 13 Cal.3d at p. 829 [adopting and explaining comparative negligence standards].)

The California Casualty court's recognition of a comparative bad faith defense sounding in tort does not withstand scrutiny in light of the authorities discussed above distinguishing an insurer's tortious breach of the covenant from an insured's contractual breach. The court reasoned that the comparative fault tort doctrine should apply to insurance bad faith cases because breach of the covenant is a tort: "While the duty of good faith and fair dealing arises out of a contractual relationship between the parties, breach of the duty and ensuing damages are governed by tort principles." (California Casualty, supra, 173 Cal.App.3d at p. 283.) What the California Casualty court overlooked, however, is that it is an insurer's breach of the covenant of good faith and fair dealing that is governed by tort principles. (Gruenberg, supra, 9 Cal.3d at p. 574.) An insured's breach of the covenant is not a tort, and hence does not give rise to tort damages recoverable by the insurer. (California Fair Plan Assn. v. Politi, supra, 220 Cal.App.3d at p. 1618.)

As the Court of Appeal below recognized, the California Casualty court's holding is grounded on the faulty premise that the obligations of insurer and insured-and thus their bad faith-are comparable. They are not. The parties are bound by a reciprocal obligation of good faith and fair dealing, but the particular duties differ given the differing performance due under the contract of insurance. A fundamental disparity exists between the insured, which performs its basic duty of paying the policy premium at the outset, and the insurer, which, depending on a number of factors, may or may not have to perform its basic duties of defense and indemnification under the policy. (See Foley, supra, 47 Cal.3d at p. 693 [noting the "insurer's and insured's interest are financially at odds"].) An insured is thus not on equal footing ***405** with its insurer-the relationship between insured and insurer is inherently unequal, the inequality resting on contractual asymmetry. An insurer's tort liability for breach of the covenant is thus predicated upon special policy factors inapplicable to the insured.

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(Foley, supra, 47 Cal.3d at pp. 684-685.)

The scope of the insured's duty of good faith and fair dealing in turn is confined by the express contractual provisions of the policy. (Western Polymer Technology, Inc. v. Reliance Ins. Co., supra, 32 Cal.App.4th at p. 24.) An insured's reciprocal duty of good faith and fair dealing does not always necessitate reciprocal conduct. (See, e.g., Commercial Union Assurance Companies v. Safeway Stores, Inc., supra, 26 Cal.3d at pp. 917-921 [insurer may be obligated to accept a settlement offer to protect its insured from personal liability but insured is not similarly obligated].) Because an insured's breach of the covenant does not sound in tort, the insured's contractual breach of an express policy provision cannot be raised by the insurer as a defense in a bad faith action brought against it by the insured. It would be illogical to allow the insurer in such a suit to instead interpose as a defense the insured's contractual breach of an implied policy provision (i.e., the covenant of good faith and fair dealing) based on those same express policy terms.

The recent decision in Agricultural Ins. Co. v. Superior Court (1999) 70 Cal.App.4th 385 [82 Cal.Rptr.2d 594] (Agricultural) is in accord. Agricultural involved a bad faith action arising out of an insurance claim for earthquake damage. After the insurer paid the claim in part, controversies arose, ultimately leading to the insured's suit for breach of contract and bad faith. The trial court stayed the action to allow the insurer to complete its investigation. The insurer did, and then cross-complained, contending that the insured's claim was in significant part falsified. The insurer pleaded various contract theories, and also the tort theories of fraud and so-called reverse bad faith, i.e., tortious breach of the covenant of good faith and fair dealing by the insured. The insured demurred to the tort theories, and the trial court sustained the demurrers without leave to amend. (Id. at p. 389.)

In denying in part the insurer's petition for a writ of mandate to set aside the trial court's order sustaining the demurrer to the reverse bad faith cross- claim, the Agricultural court explained: "An insurer has no claim against its insured in tort for breach of the covenant of good faith and fair dealing. A breach of this covenant is, at base, a breach of contract. A relationship including specialized circumstances of reliance and dependence ***406** is necessary to transmute such a contractual breach into a tort. Such circumstances do not exist in the context of an insured's responsibilities toward its insurer, or in the reciprocal context of an insurer's legitimate expectations from its insured. Although a false claim by an insured might trigger adverse contractual or penal consequences, the obligations undertaken by an insured in entering into an insurance contract are simply not of the same character as the obligations undertaken by an insurer. Hence an insured does not bear a risk of affirmative tort liability for failing to perform the panoply of indefinite but fiduciary-like obligations contained within the concept of 'insurance bad faith.' The trial court therefore correctly sustained the insured's demurrer to the insurer's 'reverse bad faith' claim ...." (Agricultural, supra, 70 Cal.App.4th at pp. 389-390.)

In granting in part the insurer's petition for mandamus relief to set aside the trial court's order sustaining the demurrer to the fraud cross-claim, the Agricultural court explained: "Although an insured does not bear the type of obligations which can give rise to a claim for tortious breach of covenant, an insured-no different than everyone else-has a duty not to defraud. Firstly, an insured must not defraud in the procurement of the policy. Secondly, an insured must not defraud in making a claim on the policy. When an insured makes a claim to its insurer, the insurer's duty to investigate is triggered. If, because of the insured's false factual assertions, the insurer incurs expenses that would otherwise not have been necessary, justifiable detrimental reliance can be pleaded by the insurer. Although a mere inflated opinion of a claim's value is not fraud, deliberately false factual assertions can be fraud. There is a significant distinction between a mere aggressive claims position and an outright factual fraud. Hence the insurer's petition will be granted to the extent of directing the trial court to vacate its order sustaining without leave to amend as to the fraud cause of action ...." (Agricultural, supra, 70 Cal.App.4th at p. 390.)

We agree with the analysis and holding in Agricultural, and disagree with the California Casualty court's extension of tort comparative fault principles to an insured's contractual breach of the covenant of good faith and fair dealing. By allowing an insurer to assert a defense of comparative bad faith, California Casualty's holding misleadingly

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equates an insured's contractual breach of the reciprocal covenant of good faith and fair dealing with an insurer's tortious breach of the covenant. The holding is confusing and inconsistent insofar as it acknowledges an insured's breach of the covenant is not actionable in tort, but nonetheless can give rise to tort consequences ***407** because the insurer may assert it as a defense in a bad faith action to lessen responsibility for its own tortious conduct. [FN11]

FN11 The Chief Justice suggests California Casualty has been "the seminal California decision that has been the controlling California authority on this issue for the past 15 years." (Conc. & dis. opn. of George, C. J., post, at p. 414.) California Casualty is the only published California appellate court decision to have discussed the issue and affirmatively recognized a comparative bad faith defense in the insurance bad faith arena. (But see Patrick v. Maryland Casualty Co. (1990) 217 Cal.App.3d 1566, 1572 [267 Cal.Rptr. 24] [acknowledging California Casualty's holding in dictum as supportive of a comparative negligence defense], discussed post, at pp. 410-412; Travelers Ins. Co. v. Lesher (1986) 187 Cal.App.3d 169, 192 [231 Cal.Rptr. 791] ["[a]ssuming arguendo the correctness of the California Casualty court's analysis" without discussion and rejecting its application to the case before it].) Nor has California Casualty been accepted or treated as controlling authority in sister state jurisdictions or the federal courts. We have noted that the Oklahoma Supreme Court in First Bank, supra, 928 P.2d at page 308, expressly rejected the rationale and holding of California Casualty, and that the Montana Supreme Court in Stephens v. Safeco Ins. Co. of America, supra, 852 P.2d at pages 568-569, likewise refused to recognize a comparative bad faith defense. (Ante, at p. 403.) Similarly, in Johnson v. Farm Bureau Mut. Ins. Co. (Iowa 1995) 533 N.W.2d 203, 207-208, the Iowa Supreme Court refused to recognize the analogous tort of reverse bad faith. Appellate courts in Texas, Oregon and Florida, and district courts in the Virgin Islands and Hawaii, have likewise all refused to recognize an affirmative defense of comparative bad faith. (See Southland Lloyd's Ins. Co. v. Tomberlain (Tex.Ct.App. 1996) 919 S.W.2d 822, 832, fn. 5; Stumpf v. Continental Cas. Co. (1990) 102 Or.App. 302 [794 P.2d 1228]; Nationwide Property & Cas. Ins. Co. v. King (Fla.Dist.Ct.App. 1990) 568 So.2d 990, 990-991; In re Tutu Water Wells Contamination Litigation (D.V.I. 1999) 78 F.Supp.2d 436, 454-455; Wailua Associates v. Aetna Cas. and Sur. Co. (D. Hawaii 1998) 183 F.R.D. 550, 559-560.) To the extent it is inconsistent with the conclusions reached herein, California Casualty Gen. Ins. Co. v. Superior Court, supra, 173 Cal.App.3d 274, is disapproved.

The Chief Justice disagrees, observing that in Knight v. Jewett (1992) 3 Cal.4th 296 [11 Cal.Rptr.2d 2, 834 P.2d 696], at pages 314-315, this court explained that the comparative fault doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury in order to arrive at an equitable apportionment or allocation of loss. (Conc. & dis. opn. of George, C. J., post, at pp. 414-415.) In the context of comprehensive general liability coverage, however, the insured is purchasing insurance in exchange for the payment of premiums precisely to avoid financial liability for its own negligent or fault-based conduct causing injury to others, and to further insure against the inherent risks of litigation that can result in a larger verdict against it, up to the amount of its policy limits. Hence, when an insured sues its liability insurer for breach of its express promise to defend and indemnify the insured against injury claims, and for breach of the concomitant duty to reasonably settle third party claims within policy limits under the covenant of good faith and fair dealing, commonsense notions of relative responsibility of the parties for proximate causation of an injury, equitable allocation of ***408** loss, and indeed responsibility for less-than- perfect litigation conduct that leads to an inflated verdict, have limited, if any, application.

We agree with the Court of Appeal below that the jury should not have been instructed at all with principles of comparative bad faith, and accordingly reject AES's argument that it was error to affirm the trial court's judgment notwithstanding the verdict entered in Kransco's favor.

(4) We observe that rejection of comparative bad faith in this context does not leave the insurer without remedies for an insured's breach of the covenant of good faith and fair dealing. Evidence of an insured's misconduct may factually disprove the insurer's liability for bad faith by showing the insurer acted reasonably under the circumstances. (Blake v. Aetna Life Ins. Co. (1979) 99 Cal.App.3d 901, 918-924 [160 Cal.Rptr. 528] [no insurer liability]; see also Campbell v. Allstate Ins. Co.

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(1963) 60 Cal.2d 303, 305 [32 Cal.Rptr. 827, 384 P.2d 155] [breach of cooperation clause]; Pryor, Comparative Fault and Insurance Bad Faith (1994) 72 Tex. L.Rev. 1505, 1522- 1525 [discussing contract defenses].) The insured's breach of the covenant of good faith and fair dealing is also separately actionable as a contract claim. (California Fair Plan Assn. v. Politi, supra, 220 Cal.App.3d at pp. 1614, 1618.) Some forms of misconduct by an insured will void coverage altogether under the insurance policy. (See Imperial Casualty & Indemnity Co. v. Sogomonian (1988) 198 Cal.App.3d 169, 182 [243 Cal.Rptr. 6399] [material misrepresentation of policy application].) Of course, without coverage there can be no liability for bad faith on the part of the insurer. (Waller v. Truck Ins. Exchange (1995) 11 Cal.4th 1, 36 [44 Cal.Rptr.2d 370, 900 P.2d 619].) And, as explained in Agricultural, supra, 70 Cal.App.4th at page 390, an insured's fraudulent misconduct is separately actionable and can give rise to tort damages. These remedies adequately serve to protect an insurer from the insured's misconduct without creating the logical inconsistencies and troublesome complexities of a defense of comparative bad faith.

(3b) The focus of AES's defense, at trial of the bad faith action, on appeal, and in the briefing on review in this court, has been to show that Kransco's assertedly negligent litigation conduct in the underlying Hubert action, specifically the tendering of the two false interrogatory responses during pretrial discovery, was the chief proximate cause of the huge Hubert punitive damages award handed down by an inflamed Wisconsin jury, allegedly incensed by Kransco's litigation misconduct.

As a factual matter, there are a number of flaws in AES's argument. First, Kransco's general counsel, Stuart Schneck, who prepared and submitted the ***409** false interrogatory responses on Kransco's behalf, testified in the California bad faith action but was not a witness in the underlying Wisconsin products liability action. Hence, the Wisconsin jury was not presented with direct evidence that Schneck had been advised of the prior Slip 'N Slide accidents before answering the interrogatories, a circumstance bearing directly on the question whether competent admissible evidence (as opposed to the arguments of Hubert's counsel, which were not evidence) supports an inference that the false interrogatory responses were a legal proximate cause of the Wisconsin jury's excess verdict.

Second, in finding Kransco liable and awarding damages in the Hubert action, the Wisconsin jury may have relied exclusively upon the insured's manufacture and marketing of a defective product and the damages caused by the product. Both the compensatory and punitive damage awards properly were based only on the insured's production and sale of the Slip 'N Slide toy, not upon the insured's erroneous discovery response. Although the plaintiff's counsel in the Wisconsin action may have taken advantage of the insured's erroneous discovery response to embellish its argument that the insured had acted maliciously in continuing to market and to profit from a toy that it knew had caused serious injuries in the past, the damage award did not reflect any damage or loss caused by the false or erroneous discovery response, and indeed there is no indication that Hubert suffered any damage as a result of the insured's incorrect interrogatory responses. Presumed to have followed the law, the Wisconsin jury determined its award on the basis of Kransco's underlying conduct that caused the plaintiff's injury-the marketing of a dangerous product-conduct that was covered under Kransco's policy of insurance with AES. As a factual matter, AES has not demonstrated that Kransco's litigation misconduct was a proximate cause of the Wisconsin jury's excess verdict and huge punitive damages award.

Third, the record establishes that AES was made fully aware of the false interrogatory responses prior to its rejection of Hubert's $750,000 settlement offer, and that Kransco and its counsel approved the settlement terms and tendered Kransco's $100,000 self-insured retention. AES was thus in sole control of the decision whether to accept the Hubert settlement offer, well within policy limits, and rejected that offer with full knowledge that Kransco had furnished two false interrogatory responses during pretrial discovery. Hence, Kransco's litigation misconduct was not a factual cause of AES's decision to reject Hubert's midtrial settlement offer, the rejection of which ***410** ultimately led to submission of the case to the Wisconsin jury and the ensuing excess verdict and unprecedented punitive damages award. [FN12]

FN12 On the first day of trial in the Hubert action, the trial judge ruled that prior Slip 'N Slide accident victims would be permitted to testify on plaintiff's behalf, one from a wheel chair. This

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ruling apparently did not cause AES to reevaluate its assessment of Hubert's claim or later accept the settlement offer.

As a matter of law, AES's assertion that Kransco's two false interrogatory responses alone begot the Wisconsin jury's record-breaking punitive damages award in the Hubert action is likewise flawed. Generally, punitive damages may be awarded only if it is proven that the defendant engaged in conduct intended to cause injury or engaged in despicable conduct with a conscious disregard of the rights or safety of others. (See, e.g., Civ. Code, 3294, subds. (a), (c).) It is questionable whether Kransco's two false interrogatory responses, exploited in the eyes of the Wisconsin jury largely through Hubert's counsel's impassioned arguments, could themselves validly be deemed a legal proximate cause of the jury's punitive damages award and verdict, as AES would have us conclude.

Most importantly however, and as recognized by the Court of Appeal below, to have any meaning, the express promise of a liability insurer to defend and indemnify the insured against injury claims, and the implied duty to reasonably and in good faith settle third party claims within policy limits in an appropriate case, must extend to insureds that are less than perfect litigants. An insured's known weaknesses as a litigant should inform the insurer's assessment of the likelihood of an excess judgment, not diminish the insurer's obligation to reasonably accept settlement offers within policy limits. (See Kinder v. Western Pioneer Ins. Co. (1965) 231 Cal.App.2d 894, 898, 903 [42 Cal.Rptr. 394] [insured's weakness as a trial witness due to contradictory pretrial statements and low intelligence provided additional reason to settle case].) An insurer legitimately expects its insured's cooperation in defending third party injury claims, but cooperation does not demand flawless discovery responses.

We again emphasize that a liability insurer is not without redress for an insured's litigation misconduct, be it negligent or intentional. Evidence of the insured's misconduct or breach of its express obligations under the terms of the insurance policy (i.e., breach of the cooperation clause) may support a number of contract defenses to a bad faith action, by voiding coverage, factually disproving the insurer's bad faith by showing the insurer acted reasonably under the circumstances, or forming the basis for a separate contract claim, and an insured's intentionally fraudulent conduct may give ***411** rise to tort damages. (Ante, at p. 408.) An insurer may not, however, assert an insured's comparative bad faith as an affirmative defense to partially absolve itself of its own tort liability for breach of the covenant of good faith and fair dealing.

C. Comparative Negligence

AES also argued on appeal that the jury was properly instructed to compare Kransco's negligence in the preparation and trial of the underlying Hubert action (i.e., the pretrial tendering of incorrect interrogatory responses) with AES's bad faith failure to reasonably settle the Hubert action within policy limits, and to allocate fault and liability for the Wisconsin jury's excess verdict among the insured and insurer. The argument rested entirely upon the holding in Patrick v. Maryland Casualty Co., supra, 217 Cal.App.3d 1566 (Patrick). In Patrick, the insured sued his first party insurer for bad faith delay in paying his homeowners insurance claim for a storm-damaged roof. (Id. at pp. 1568-1569.) The insured included as damages his personal injuries suffered when he fell off the roof after tiring of the insurer's delay and undertaking the repairs himself. (Id. at pp. 1569-1570.) The Patrick court found that the insured's negligence in walking backward on a roof while dragging a heavy sheet of plywood warranted jury instructions on comparative fault and held that the trial court erred in refusing the insurer's requested instructions on the issue. (Id. at pp. 1570-1575.) The court rejected the insured's argument that his negligence should not be compared with the bad faith of the insurer. (Id. at p. 1572.)

Both the trial court (on Kransco's motion for judgment notwithstanding the verdict) and the Court of Appeal concluded Patrick and its application of the doctrine of comparative negligence to a first party insurance case was wholly inapplicable here. Although AES's briefing in this court for the most part addresses as the issue on review whether principles of comparative fault and comparative bad faith were properly invoked below to allocate liability for the excess verdict in the underlying Hubert action, AES cites and appears to rely on the holding in Patrick in arguing that the jury instructions on comparative bad faith and comparative negligence were properly given in this

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case.

Review was not granted on the matter of the propriety of the comparative negligence instructions, and accordingly that issue is not squarely before us. In any event, we need not address Patrick's extension of comparative negligence principles to first party insurance bad faith actions because the instant third party insurance bad faith action case is factually distinguishable. ***412** (Patrick, supra, 217 Cal.App.3d at pp. 1570- 1575.) Patrick concerned a first party insured's negligent acts following an insurer's bad faith failure to pay a claim under a homeowners policy where those negligent acts-walking backwards on a roof while dragging a heavy sheet of plywood, patently the proximate cause of the insured's injuries when he fell from the roof-were outside the contractual relationship of the parties. (Id. at pp. 1569-1570.) Here, the contractual relationship of the parties vested AES with a continuing duty to reasonably settle the Hubert case so long as it was defending Kransco, as discussed above. While the insurer in Patrick had no duty to protect its insured when the latter determined to make his own roof repairs, AES did have a duty to protect Kransco during the Hubert litigation. As explained, AES was duty bound under the insurance policy to protect Kransco from an excess judgment, whether that judgment be the result of Kransco's negligence in marketing the Slip 'N Slide or its conduct as a litigant in the underlying third party personal injury action, or a combination of both.

The holding in Patrick, a first party insurance case, does not shield a third party insurer from full responsibility for its bad faith failure to settle a case even if the insured's litigation misconduct or mishandling of the claim inflated the size of the verdict, although as noted, evidence of such misconduct may support contract defenses, cross claims or separate causes of action for breach of the terms of the insurance contract otherwise available to the insurer. (See ante, at p. 408.)

III. Conclusion

The judgment of the Court of Appeal is affirmed.

Mosk, J., Werdegar, J., Chin, J., and Brown, J., concurred.

MOSK, J.

I concur in the opinion of the court.

I write separately to explain why I believe the court is right to conclude that an action by an insured for an insurer's breach of the covenant of good faith and fair dealing, which is implied in an insurance policy, should not allow an affirmative defense of comparative fault, in whatever form it might take.

A syllogistic argument for an affirmative defense of comparative fault is suggested by the Chief Justice and Justice Kennard in their separate opinions herein: Actions in tort allow an affirmative defense of comparative fault; an action by an insured for an insurer's breach of the covenant of good faith and ***413** fair dealing is in tort; therefore, such an action allows such an affirmative defense.

This argument, however, fails to persuade.

We have held that an action by an insured for an insurer's breach of the covenant of good faith and fair dealing sounds, fundamentally and originally, in contract. (See generally Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 683-684 [254 Cal.Rptr. 211, 765 P.2d 373].) The policy is a contract; the covenant is implied therein. Actions in contract do not allow an affirmative defense of comparative fault. Fault, comparative or otherwise, generally does not matter under the law of contracts. What matters, rather, is performance. Hence, performance with fault is sufficient, and nonperformance without fault is not enough.

But we have also held that an action by an insured for an insurer's breach of the covenant of good faith and fair dealing may be deemed to sound as well in tort. (See generally Foley v. Interactive Data Corp., supra, 47 Cal.3d at pp. 683-684.) We have done so in order to extend to individual insureds in individual cases against individual insurers the remedies of the law of torts, which are broader and deeper than those of the law of contracts. And we have done that in order to attempt to true the balance in the relationship between insurers and insureds generally in the world at large-a balance that we have found to be skewed in favor of insurers and against insureds-by providing further deterrents against nonperformance on the part of insurers to the detriment of insureds.

All this is not to say that we could not choose to

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treat an action by an insured for an insurer's breach of the covenant of good faith and fair dealing, for purposes of the affirmative defense of comparative fault, as sounding in tort.

Any such choice, however, would not be without consequences.

One effect might be to do finer justice on the unique facts of each particular case by equitably apportioning loss.

But another, corresponding, effect would be to limit or restrict the tort remedies extended to individual insureds in individual cases against individual insurers. Yet another effect following on this one would be to undermine the attempt to true the balance in the relationship between insurers and insureds generally in the world at large by removing or reducing deterrents against nonperformance by insurers detrimental to insureds. Still ***414** another effect following on this one would be to foster more breaches by insurers and hence more actions by their insureds.

The effect first identified might help a handful of parties in the judicial sphere. The others, however, would hurt society as a whole in everyday life.

In conclusion, concurring in the opinion of the court, I join with my colleagues in affirming the judgment of the Court of Appeal.

GEORGE, C. J., Concurring and Dissenting.

Although I agree with the result reached by the majority-upholding the determination of the trial court and the Court of Appeal that in this case plaintiff insured's damage award should not be reduced under either a comparative bad faith or comparative negligence theory-I do not agree with the majority's proposal to reject the comparative bad faith doctrine in its entirety and to disapprove California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274 [218 Cal.Rptr. 817] (California Casualty), the seminal California decision that has been the controlling California authority on this issue for the past 15 years. Instead, I believe the court should rest its decision in this case solely upon the narrower, and fully dispositive, ground that the insured's conduct here at issue-negligently providing incorrect answers to a discovery request-does not represent a breach of the implied covenant of good faith and fair dealing and does not constitute the type of misconduct that properly may reduce an insurer's liability for damages resulting from its failure to accept a reasonable settlement offer.

In reaching the conclusion that California should adopt a rule precluding the application of a comparative bad faith doctrine under any circumstance, the majority relies upon the rationale that although an insurer's bad faith conduct may support a tort action and tort damages, an insured's bad faith conduct constitutes only a breach of contract and may not properly be used to reduce an insurer's tort liability. Even if an insurer may not itself bring a tort action against an insured for breach of the covenant of good faith and fair dealing and may seek only contract damages for any loss the insurer sustains as a result of the insured's bad faith conduct, however, it does not follow that when an insured seeks to recover tort damages against an insurer for breach of the covenant of good faith and fair dealing, the insured's tort recovery may not be reduced to the extent that the insured's own bad faith conduct has contributed to the injury or loss of the insured for which tort damages are sought.

In the past, this court has taken a broad view of the type of "comparative fault" of a plaintiff that may reduce damages in a tort action, permitting the ***415** comparative fault doctrine to be applied in strict liability cases (see, e.g., Daly v. General Motors Corp. (1978) 20 Cal.3d 725, 734-742 [144 Cal.Rptr. 380, 575 P.2d 1162]; Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal.3d 322, 328-332 [146 Cal.Rptr. 550, 579 P.2d 441]) and even in cases in which a plaintiff voluntarily chooses to engage in an unusually risky sport, whether or not the choice to do so is unreasonable. (Knight v. Jewett (1992) 3 Cal.4th 296, 314 [11 Cal.Rptr.2d 2, 834 P.2d 696].) As this court explained in Knight: "Past California cases have made it clear that the 'comparative fault' doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.' [Citations.]" (Knight, supra, 3 Cal.4th at pp. 313-314, italics added.) In my view,

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it is neither fair nor compatible with our past comparative fault precedent to permit an insured to obtain tort damages when an insurer's breach of the covenant of good faith and fair dealing is a proximate cause of an injury or loss incurred by the insured, but to refuse to permit a proportionate reduction in such tort damages when the insured's own bad faith conduct also is a concurrent cause of the insured's injury or loss.

Contrary to the reasoning of the majority, the circumstances in which a plaintiff's conduct will support a reduction of recovery under the comparative fault or comparative responsibility doctrine are not limited to instances in which the plaintiff breaches a tort duty or may otherwise be held liable in tort. Indeed, the classic instance in which the comparative fault doctrine comes into play-that is, when a plaintiff's injury is caused in part by the plaintiff's failure to exercise due care with regard to his or her own safety- clearly demonstrates this point, because a plaintiff, of course, is not entitled to sue himself or herself in tort for a self-inflicted injury (and thus may not, for example, obtain recovery from his or her liability insurer for such an injury). Accordingly, rejection of the comparative bad faith doctrine cannot properly be defended on the theory that the insured owes no tort duty to the insurer or that the insured may be liable only in contract for any damage inflicted upon the insurer by the insured's bad faith conduct. [FN1]

> FN1 Indeed, upon close analysis, it becomes clear that the majority's conclusion is not supported by the circumstance that an insurer may seek only contract (and not tort) damages from an insured for an injury to the insurer resulting from the insured's breach of the covenant of good faith and fair dealing. As noted above, when the comparative bad faith doctrine is invoked to reduce an insured's tort recovery, the reduction is justified by the circumstance that the insured's bad faith conduct has been found by the trier of fact to constitute one of the proximate causes of the loss or injury to the insured for which the insured is seeking tort recovery, and not because of some independent harm that the insured's bad faith conduct has inflicted upon the insurer. When the harm imposed upon the insurer by an insured's bad faith conduct lies simply in the circumstance that the insured's bad faith conduct has contributed to a loss to the insured for which the insurer may be liable in tort, application of the comparative bad faith doctrine to determine what proportion of the loss should be allocated to the insurer on the one hand, and to the insured on the other, is the only appropriate means to measure the economic harm that the insured's bad faith conduct has inflicted upon the insurer. Thus, even if it were appropriate to focus upon the circumstance that the insurer is limited to recovering contract damages from an insured for the insured's breach of the covenant of good faith and fair dealing, in this setting the insurer's contract damages logically would be measured by the insured's proportionate responsibility for the tort damages, which is the same amount that would be deducted from the insured's gross tort damages under the comparative bad faith doctrine.

It is true, as the majority points out, that in some circumstances a comparative bad faith doctrine may not be necessary to protect the interests ***416** of the insurer. Thus, there will be instances in which an insurer may be able to establish that in light of the insured's bad faith conduct (for example, the withholding of crucial information), the insurer's own conduct (for example, a delay in paying a first party claim or the refusal to accept a settlement offer) did not constitute a breach of the covenant of good faith and fair dealing at all. And there may be other instances in which the harm caused by the insurer's bad faith conduct is sufficiently distinct from the harm caused by the insured's bad faith conduct that-even without a comparative bad faith doctrine-the insurer's tort liability will reflect only the harm caused by the insurer, and the insurer may bring a contract claim (or, in appropriate circumstances, a fraud claim) to recover for a separate injury that the insured's misconduct has inflicted upon the insurer.

But the existence of these circumstances in which a comparative bad faith doctrine is not necessary to ensure fair treatment of an insurer does not establish, as the majority implies, that a comparative bad faith doctrine is unnecessary in any circumstance. The comparative bad faith doctrine properly comes into play only in those circumstances in which both the insurer's bad faith conduct and the insured's own bad faith conduct are concurrent proximate causes of an indivisible harm or loss to the insured, such as emotional distress, for which the insured is seeking recovery in tort. It is precisely such circumstances that the alternative remedies relied upon by the majority do not reach. Thus, by rejecting the application of a comparative bad faith doctrine in all circumstances, the majority renders the insurer solely responsible for a loss or harm for

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which both the insurer and the insured are responsible-the very unfairness and inequity that the comparative fault doctrine is designed to alleviate.

Accordingly, in a case like California Casualty, supra, 173 Cal.App.3d 274, in which an insured seeks to obtain tort damages for an insurer's alleged bad faith delay in failing to pay benefits due under a first party ***417** insurance policy, but in which the insured's own bad faith conduct in failing to provide information to the insurer allegedly played some part in causing the resulting harm to the insured, I believe it would be appropriate for the insurer to obtain a reduction in the tort damages it must pay, based upon the comparative fault or relative responsibility of the insured for its own harm. Experience over the past 15 years since California Casualty was decided demonstrates the feasibility of applying comparative fault principles in such circumstances, and I see no reason to abandon completely the comparative bad faith doctrine at this point. Thus, I disagree with the majority insofar as it disapproves California Casualty and rejects the comparative bad faith doctrine in its entirety.

On the facts of the case now before us, however, I agree with the majority's determination that plaintiff's damages should not be reduced on either a comparative bad faith or comparative negligence theory. As the majority explains, the conduct of the insured here at issue-in negligently failing to provide a correct answer to a discovery request-does not constitute a breach of the insured's duty of good faith and fair dealing to its insurer, nor the type of fault that should reduce the insurer's liability. Furthermore the insured's erroneous discovery response may not properly be characterized as a "legal cause" of the excess-damage award for which the insured is seeking to recover in its bad faith action against the insurer.

Accordingly, I concur in the affirmance of the judgment of the Court of Appeal.

KENNARD, J.

I dissent.

The majority holds that comparative fault principles have no application to a policyholder's tort action against its liability insurer for unreasonable failure to settle a third party's suit against the policyholder. In so ruling, the majority denies juries in these insurance bad faith actions the ability to equitably apportion the policyholder's loss according to the respective fault of all parties responsible for that loss. I disagree.

As this court has stressed, "the 'comparative fault' doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.' " (Knight v. Jewett (1992) 3 Cal.4th 296, 314 [11 Cal.Rptr.2d 2, 834 P.2d 696], italics added.) The comparative fault doctrine is flexible enough to encompass a tort action against an insurance company ***418** for breach of a policy's implied covenant of good faith and fair dealing (commonly known as an insurance bad faith action), and the argument in favor of equitable apportionment is as compelling in this setting as in others this court has considered. Refusing to recognize comparative fault in this context sanctions the harsh, one-sided, all-or-nothing verdicts that this court has frequently criticized. As one commentator puts it: "Holding insurers wholly liable for damages for which they are only partly responsible, while allowing insureds to recover for self-inflicted harm, offends all notions of equity and fairness." (Richmond, The Two-way Street of Insurance Good Faith: Under Construction, But Not Yet Open (1996) 28 Loy. U. Chi. L.J. 95, 140, fn. omitted.)

The majority also holds that the insurance company's comparative fault defense in this case was flawed "[a]s a factual matter." (Maj. opn., ante, at p. 408.) Given its primary holding that a comparative fault defense is unavailable as a matter of law in this entire class of insurance bad faith tort actions, the majority's purpose in discussing these factual matters is obscure. In any event, I disagree that the evidence in this case fails to support the jury's verdicts finding comparative fault.

I

In Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393] (Li), this court abolished the common law doctrine of contributory negligence, under which a plaintiff was denied any remedy for an injury proximately caused by the defendant's negligence if the

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plaintiff's own conduct involved an unreasonable risk of self-injury and was also a contributing cause of the plaintiff's injury. In place of the harsh, all-or-nothing contributory negligence doctrine, this court adopted a "general scheme of assessment of liability in proportion to fault." (Id. at p. 825; see also Daly v. General Motors Corp. (1978) 20 Cal.3d 725, 736-737 [144 Cal.Rptr. 380, 575 P.2d 1162]; American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578, 591 [146 Cal.Rptr. 182, 578 P.2d 899].)

Under the comparative fault system, it is normally a partial defense to a tort claim that the plaintiff's own "fault" was a contributing cause of the injury for which the plaintiff seeks damages. A policyholder's claim against an insurance company for breach of a policy's implied covenant of good faith and fair dealing sounds in tort. (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032].) Therefore, comparative fault should provide a partial defense to a bad faith claim against an insurance company, or, stated otherwise, a jury deciding a bad faith claim ***419** should be instructed to equitably apportion the policyholder's loss according to the respective fault of the insurance company and the policyholder. In insurance bad faith tort actions, as in other tort actions this court has considered, there is no sound reason to conclude that a "common sense determination of proportional fault or proportional responsibility will be beyond the ken of ... juries." (Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal.3d 322, 332 [146 Cal.Rptr. 550, 579 P.2d 441].) Here also, apportioning liability according to fault is preferable to an all-or-nothing outcome "from the point of view of logic, practical experience, and fundamental justice." (Li, supra, 13 Cal.3d 804, 808.) Simply put, the law should not allow a policyholder to shift to its insurance company the entire burden of damages for which the policyholder is partly responsible.

Of course, liability insurance exists in large measure to protect policyholders from the consequences of their own improvident conduct, and in this sense it is neither unfair nor uncommon for an insurance carrier to bear the full financial burden of a policyholder's careless conduct. But the carrier's obligation is not unbounded; the policy defines and limits the scope of the insurance company's responsibility. Although the carrier is required to indemnify the policyholder for the consequences of improvident conduct within the terms of the policy's coverage provisions, the policyholder should not be permitted to add to the carrier's burden by inflating the loss through additional improvident conduct outside the terms of the insurance bargain. To add this extra load to the carrier's burden is, in essence, to judicially enlarge the carrier's obligation without its consent. [FN1]

> FN1 Here, for example, the majority asserts that "[the insurance carrier] was duty bound under the insurance policy to protect [the policyholder] from an excess judgment, whether that judgment be the result of [the policyholder's] negligence in marketing the [defective product] or its conduct as a litigant in the underlying third party personal injury action, or a combination of both." (Maj. opn., ante, at p. 412.) Yet the majority fails to identify any provision of the policy obligating the carrier to protect the policyholder from an excess judgment resulting from litigation misconduct rather than from the marketing of a defective product.

The majority never pauses to ask whether, in a policyholder's tort action against its insurance company for unreasonably failing to settle a third party claim, the jury should be permitted to equitably apportion the policyholder's loss according to the respective fault of the insurance company and the policyholder. The majority never frames the issue this way because it spends most of its energy considering and rejecting the concept of "comparative bad faith," a somewhat novel variant of comparative fault. [FN2] Almost as an afterthought, the majority also rejects the defense of comparative negligence. The ***420** majority's rejection of both comparative bad faith and comparative negligence necessarily means that equitable apportionment of loss is not permitted in insurance bad faith actions based on failure to settle third party suits.

> FN2 In California, the term "comparative bad faith" first appeared in California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274 [218 Cal.Rptr. 817], a decision authored by Justice Marcus Kaufman before his appointment to this court. The Chief Justice aptly describes it as "the seminal California decision that has been the controlling California authority on this issue for the past 15 years." (Conc. & dis. opn. of George, C. J., ante, at p. 414.) The majority disapproves this decision; I would not.

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In rejecting comparative fault, the majority argues primarily that the defense of comparative bad faith is conceptually flawed because an insurance company's breach of the implied covenant of good faith and fair dealing "is governed by tort principles" whereas a policyholder's breach of the same covenant "is not a tort" and thus "an insurer's breach of the covenant of good faith and fair dealing is not directly comparable with the insured's contractual breach." (Maj. opn., ante, at p. 402.) The majority insists that allowing a defense of comparative bad faith "misleadingly equates an insured's contractual breach of the reciprocal covenant of good faith and fair dealing with an insurer's tortious breach of the covenant" and "is confusing and inconsistent insofar as it acknowledges an insured's breach of the covenant is not actionable in tort, but nonetheless can give rise to tort consequences because the insurer may assert it as a defense in a bad faith action to lessen responsibility for its own tortious conduct." (Maj. opn., ante, at pp. 406-407, fn. omitted.)

In so arguing, the majority badly misses the point of comparative fault. Comparative fault is not about offsetting equivalent tort claims that parties have against each other for damages each has suffered. Rather, comparative fault is about the equitable apportionment of a single loss that only one of the parties has suffered. In the comparative fault context, it is not necessary that the plaintiff's fault be "directly comparable with" the defendant's fault. Nor is it necessary that the party who suffered the loss at issue engaged in conduct that breached a duty to the other party, resulted in loss to the other party, or would be legally actionable in tort if it did result in loss to the other party.

The source of the majority's confusion may be traced back to the term "contributory negligence." As the late Dean Prosser has explained, "It is perhaps unfortunate that contributory negligence is called negligence at all. ' Contributory fault' would be a more descriptive term. Negligence as it is commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence requires a duty, an obligation of ***421** conduct to another person. Contributory negligence involves no duty, unless we are to be so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of the plaintiff's own negligence." (Prosser & Keeton on Torts (5th ed. 1984) 65, p. 453, fns. omitted.)

What Dean Prosser says of contributory negligence is equally true of comparative negligence, comparative bad faith, and indeed of comparative fault in all its varieties as applied to a plaintiff. Because a plaintiff's comparative fault is conduct that contributed to the plaintiff's own loss, it is conduct that has resulted in self-inflicted harm. Because a plaintiff's comparative fault is invoked only to prevent the plaintiff from shifting all of the plaintiff's own loss onto another party, the plaintiff's conduct need not involve breach of any duty owed to another. It is sufficient that the plaintiff's conduct involved an unreasonable risk of self-inflicted injury and is at least partly responsible for the injury suffered. Thus, comparative negligence is self-directed negligence and comparative bad faith is, in essence, self-directed bad faith. Comparative bad faith means only that in determining whether a policyholder has acted unreasonably during third party litigation, a jury may properly consider the policyholder's contractual obligations to the carrier under the policy. To avoid confusion occasioned by the terms "negligence" and "bad faith," it would be better to use the term comparative fault as a substitute for both.

In real life situations, of course, conduct frequently involves an unreasonable risk of harm to both the actor and others. For example, careless driving likely to result in a collision is fault that is both self-directed and other-directed, because a vehicle collision may injure not only the careless driver but also the innocent drivers of other vehicles, as well as passengers and pedestrians. But if one driver sues another for injuries suffered in a collision, it is not essential to comparative fault as a defense that the plaintiff's own conduct risked harm to others or breached a duty owed to others. For example, a partial defense of comparative fault may be based on the plaintiff's failure to wear a seat belt (see Housley v. Godinez (1992) 4 Cal.App.4th 737 [6 Cal.Rptr.2d 111]), conduct that creates no risk of harm to others and breaches no duty owed to others, but merely creates an unreasonable risk of self-injury.

The same principles should apply to liability insurance litigation. When a third party sues a

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policyholder, the suit creates a risk of financial loss for both the policyholder and its liability carrier. The policyholder risks the amount of any deductible or self-insured retention, plus any amount by ***422** which the third party's recovery exceeds the policy's liability coverage. The carrier risks the amount of the liability coverage it is contractually obligated to provide. Just as drivers sharing a highway have a common interest in avoiding a collision, a policyholder and its liability carrier have a common interest in avoiding or minimizing liability in a third party action. Any litigation misstep by either policyholder or carrier that increases the likelihood or the size of an adverse judgment threatens harm to the interests of both. For purposes of a carrier's partial defense of comparative fault, it should not be essential that a litigation misstep by the policyholder breached a duty owed to the carrier that would be actionable in tort. For purposes of the comparative fault defense and equitable apportionment of a loss suffered by the policyholder alone, it should be sufficient that the policyholder's misstep created an unreasonable risk of self-injury in the form of an adverse verdict in the third party action.

The majority betrays its confusion by its reliance on Agricultural Ins. Co. v. Superior Court (1999) 70 Cal.App.4th 385, 389 [82 Cal.Rptr.2d 594], a Court of Appeal decision that did not involve a comparative fault defense, but the assertion of a cross-claim for "reverse bad faith." The Court of Appeal itself correctly recognized that "the two issues pose significantly different considerations." (Id. at p. 396, fn. 3.) By relying on this decision, the majority misleadingly equates bad faith as a form of comparative fault with bad faith as a basis for a claim or cross-claim, although the two share almost nothing except the "bad faith" label. When a policyholder sues its insurance carrier for bad faith, allowing the carrier to assert bad faith as a form of comparative fault merely permits the jury to equitably apportionment the damages suffered by the policyholder according to the respective fault of the carrier and the policyholder. The focus of the comparative bad faith inquiry is the extent to which the policyholder's damages should be deemed self-inflicted. By contrast, an insurance carrier asserting a bad faith cross-claim is seeking damages for a loss the carrier has suffered, rather than equitable apportionment of a loss the policyholder has suffered. Unlike a partial defense of comparative fault, a cross-claim must meet all the requirements of an independent cause of action. For a cross-claim in tort, it is essential that the cross-defendant have owed a duty to the cross-plaintiff, that the cross-defendant have breached that duty, and that breach of that duty constituted a tort. For a partial defense of comparative fault, none of these elements is required.

Finding the majority's reasoning conceptually flawed and unpersuasive, I do not join in its holding. Instead, I would hold that the comparative fault system inaugurated by Li, supra, 13 Cal.3d 804, encompasses a policyholder's tort action against its liability carrier for breach of the policy's implied ***423** covenant of good faith and fair dealing. In this context, comparative fault includes a policyholder's failure to exercise ordinary care in the preparation and trial of third party litigation when that failure is a legal cause of all or part of the adverse third party judgment in excess of policy limits. The jury in the bad faith action should be instructed that in determining whether the policyholder exercised ordinary care during the third party litigation, the jury should consider the policyholder's contractual responsibilities under the terms of the liability insurance policy.

II

The other reasons that the majority offers for rejecting equitable allocation of loss under the comparative fault doctrine all relate to the particular facts of this case. Accordingly, I summarize those facts.

In June 1987, 35-year-old Michael Hubert broke his neck when he jumped on a water slide, called Slip 'N Slide, manufactured by Kransco, a California corporation. When Hubert sued Kransco in Wisconsin, where the injury occurred, Kransco tendered defense of the action to its primary liability carrier, American Empire Surplus Lines Insurance Company (AES), which assumed the defense. Because Kransco had a $100,000 self-insured retention under the policy, decisions regarding defense and settlement were made jointly by Kransco and AES.

The attorney representing Kransco at first thought there was a good chance of a defense verdict because Hubert had disregarded various warnings printed prominently on the Slip 'N Slide. In the

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event of liability, he thought compensatory damages might be relatively modest because the seriousness of Hubert's injuries was unclear.

During discovery, Hubert served Kransco with interrogatories asking, among other things, whether Kransco knew of prior Slip 'N Slide accidents resulting in cervical injuries to adults. The interrogatories required Kransco to diligently inquire among its agents and employees to elicit all available information. Kransco's in-house counsel, Stuart Schneck, prepared answers in which Kransco denied knowledge of any such prior accidents. Schneck affirmed that he had "made a due and diligent inquiry of [Kransco's] agents and employees with a view to eliciting all available information for the purpose of placing [himself] in a position to fully answer these interrogatories." This affirmation was false. Schneck had not spoken to Steven Schneider, Kransco's vice-president in charge of the redesign and manufacture of the Slip 'N Slide, who knew of two prior cervical injuries to adults.

The falsehood came to light during a conversation between Schneider and the attorney representing Kransco in the Wisconsin litigation. At this attorney's insistence, Kransco prepared an amended answer admitting knowledge ***424** of two accidents in which the Slip 'N Slide had caused cervical injury to an adult. One accident had resulted in the user's death; the other accident had left the user a quadriplegic and he had accepted $1.5 million in settlement of his claim against Wham-O, the corporation from which Kransco had acquired the rights to manufacture the Slip 'N Slide. The amended response contained a new falsehood, putting the date of one accident much earlier than it was.

While the Wisconsin trial was in progress, Hubert offered to settle for $750,000. Kransco wanted to accept and agreed to contribute its $100,000 self-insured retention, but AES thought the offer was too high in light of the potential for a defense verdict and the doubts about the seriousness of Hubert's injuries. AES counteroffered for $450,000, which Hubert rejected. During these midtrial settlement negotiations, AES was aware of Kransco's false interrogatory answers but apparently misjudged their significance.

The trial proceeded, and Hubert introduced evidence of Kransco's false and misleading interrogatory answers. In his summation to the Wisconsin jury, Hubert's counsel used this damaging evidence to good effect. He argued that Kransco should be punished because it knew when it reintroduced the Slip 'N Slide that the product was inherently and unreasonably dangerous as shown by its knowledge of the prior adult cervical injuries, one fatal and the other catastrophic. Hubert's counsel argued that the false interrogatory answers were part of a plan by Kransco to cover up its own knowledge of the Slip 'N Slide's dangerous propensities. As further evidence of Kransco's supposed arrogance and mendacity, Hubert's counsel pointed to the amended interrogatory answer's incorrect dating of one of the prior accidents, which counsel suggested was an attempt by Kransco to diminish the significance of this incident by making it appear more remote in time. The Wisconsin jury awarded Hubert $12.3 million in damages, of which $10 million was punitive damages.

Kransco then brought this action in California against AES, alleging that AES had breached the implied covenant of good faith and fair dealing by unreasonably failing to accept Hubert's settlement offer. Kransco sought as damages the amount by which the Wisconsin judgment exceeded the coverage provided by AES's policy, plus interest. Instructed on comparative fault principles, the California jury returned verdicts finding that although AES had unreasonably refused the midtrial settlement offer, Kransco was also at fault in submitting the false interrogatory answers. Finding that each party's fault was a legal cause of the excess verdict, the jury apportioned fault 90 percent to Kransco and 10 percent to AES. ***425**

Concluding that it had erred in instructing the jury on comparative fault, the trial court granted Kransco's motion for judgment notwithstanding the verdict and ordered judgment for Kransco for the full amount of compensatory damages found by the jury. On appeal, the Court of Appeal affirmed the judgment.

The majority asserts that comparative fault cannot apply on these facts because AES was aware of Kransco's false interrogatory responses when it rejected Hubert's settlement offer and so "Kransco's litigation misconduct was not a factual cause of

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AES's decision to reject Hubert's midtrial settlement offer ...." (Maj. opn., ante, at p. 409.) Here also, the majority displays a misapprehension of comparative fault principles: The issue is not apportionment of fault for the failure to settle, it is apportionment of fault for the excess judgment.

To understand why this is so, examples from other tort liability contexts may be helpful. Suppose, for example, that the driver of one vehicle sues the driver of another vehicle for injuries sustained in a collision. Suppose further that the evidence at trial reveals that the defendant drove carelessly and that the plaintiff drove carefully but failed to wear a seat belt. Although the plaintiff's failure to wear a seat belt in no sense caused either the defendant's careless driving or the collision, it nonetheless may provide the basis for a comparative fault apportionment if the evidence reveals that the plaintiff's injuries would have been less severe had the plaintiff worn a seat belt. (Housley v. Godinez, supra, 4 Cal.App.4th 737.)

To take another example, suppose the driver of a vehicle is injured when his vehicle leaves the roadway and overturns. The driver sues the vehicle's manufacturer, claiming negligent vehicle design caused the rollover, and the manufacturer asserts comparative fault, claiming that the plaintiff negligently drove the car off the roadway. The comparative fault defense is permitted even though the plaintiff's careless driving in no sense caused or contributed to the defendant's defective design of the vehicle. (See Daly v. General Motors Corp., supra, 20 Cal.3d 725, 736-737.)

As these examples illustrate, the comparative fault inquiry has always been understood to include all fault that contributed to the particular injury or harm at issue, and never before has a defendant been required to show that the plaintiff's fault affected the defendant's own conduct. If this requirement does not exist in other comparative fault situations, why does the majority insist on it here? Nothing about insurance bad faith litigation justifies this novel requirement. The majority's reasoning presses back into ***426** service the "last clear chance" doctrine that this court expressly abolished in Li, supra, 13 Cal.3d 804, 826. Under that repudiated doctrine, a defendant in an action for negligence could not assert the plaintiff's self-directed negligence as a defense if the defendant had the final opportunity to avert the harm. Similarly, the majority makes comparative fault unavailable as a defense because the insurance company had the final opportunity to avert an excess verdict by accepting a reasonable settlement offer.

It is true, of course, that there would have been no excess verdict in the Wisconsin litigation had AES agreed to accept Hubert's settlement offer. But the same may be said of the other hypothetical situations just discussed. In the first situation, the plaintiff not wearing a seat belt would have suffered no injury had the defendant not driven carelessly. In the second situation, the plaintiff who carelessly drove off the roadway would have suffered no injury had the manufacturer not defectively designed the vehicle to easily overturn. But a defendant's ability to prevent all of the harm at issue by acting with proper care has not been considered a barrier to application of comparative fault in any other setting.

The purpose of comparative fault is to equitably distribute loss among the responsible parties in proportion to their respective fault. To achieve that end, the loss should be equitably distributed among all parties whose failure to use proper care was a legal cause of the harm, regardless of the effect of that conduct on the acts or omissions of other parties.

Because Kransco's misconduct in making the false and incomplete discovery responses increased the likelihood of a judgment in excess of policy limits, AES's knowledge of that misconduct may be relevant to an assessment of AES's fault in rejecting Hubert's settlement offer, but that knowledge in no way lessens or eliminates Kransco's own fault, nor does it prevent Kransco's litigation misconduct from being a legal cause of the huge verdicts that the Wisconsin jury ultimately returned. Having found that the loss Kransco suffered as a result of the Wisconsin litigation was in part self-inflicted by means of its litigation misconduct, the jury acted properly in requiring that Kransco share the financial burden of that loss in proportion to its comparative fault.

The majority's last line of reasoning for rejecting equitable apportionment under comparative fault on the facts shown here is its assertion that the record contains insufficient evidence to establish that Kransco's litigation misconduct, in submitting false

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interrogatory answers, was a legal or proximate cause of the Wisconsin verdicts in excess of AES's policy limits. The ***427** majority asserts, specifically, that evidence of causation is insufficient because Stuart Schneck, Kransco's in-house counsel, did not testify in the Wisconsin litigation and because the Wisconsin jury may have relied entirely on Kransco's manufacture of the defective product, and not at all on its false interrogatory responses, when it made the $12.3 million award of compensatory and punitive damages. (Maj. opn., ante, at pp. 408-409.)

The standard of review for a jury's findings on causation issues in relation to comparative fault is substantial evidence. (Sparks v. Owens-Illinois, Inc. (1995) 32 Cal.App.4th 461, 476 [38 Cal.Rptr.2d 739].) Under that standard, a court starts by presuming that the record contains evidence to sustain every finding of fact, and its power begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the finding. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr. 162, 479 P.2d 362].) The majority fails to apply this deferential standard of review.

Although Schneck, who prepared and executed the false interrogatory responses for Kransco, did not testify in the Wisconsin litigation, it is undisputed that the Wisconsin jury heard evidence of the false responses. For purposes of applying the substantial evidence test, it makes no conceivable difference that the evidence did not consist of Schneck's testimony but instead the testimony of Steven Schneider, Kransco's vice-president in charge of the redesign and manufacture of the Slip 'N Slide, who knew that the interrogatory responses were false when made and who knew that, despite his sworn statement to the contrary, Schneck had not made a diligent inquiry among Kransco employees before executing the responses.

The record does not show with absolute certainty or precision the effect that evidence of the false interrogatory responses had on the excess judgment in the Wisconsin products liability action. But when a jury awards $12.3 million in damages, of which $10 million is punitive damages, on a claim that the plaintiff would have settled during trial for $750,000, it is reasonable to infer that something happened at trial to cause the jury to form a very low opinion of the defendant. Kransco's own experts conceded during the California bad faith trial that one of the worst things that can happen at any trial is for the jury to believe that a party has lied. This is especially true when the jury has the option of awarding punitive damages. The California jury in the bad faith action could reasonably conclude, based upon the evidence presented, that the Wisconsin judgment would have been substantially less, and perhaps within policy limits, had Kransco never submitted the false interrogatory responses. This causation determination is no more conjectural or speculative than the determinations juries routinely make in legal ***428** malpractice actions in deciding whether counsel's errors or omissions injured the client by affecting a verdict in an earlier proceeding. (See Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal.App.4th 820, 831-837 [60 Cal.Rptr.2d 780].)

III

"[C]ourts cannot logically ground the duty of good faith and fair dealing in tort law and, at the same time, reject the concomitant and well-established affirmative defense of comparative fault. Fidelity to legal doctrine requires that if the implied duty of good faith and fair dealing merits tort remedies for its breach, so must it be subject to tort defenses." (Richmond, The Two- way Street of Insurance Good Faith: Under Construction, But Not Yet Open, supra, 28 Loy. U. Chi. L.J. 95, 140, fns. omitted.) When it abolished the all- or-nothing contributory negligence doctrine, this court said the decision was "to be viewed as a first step in what we deem to be a proper and just direction." (Li, supra, 13 Cal.3d 804, 826.) By refusing to recognize a partial defense of comparative fault in insurance bad faith actions based on unreasonable failure to settle with third parties, the majority takes a step backward, making liability insurers the only parties to whom this court has denied the benefits of California's comparative fault tort system.

Rather than perpetuate an all-or-nothing system in this one tort setting, I would take the next logical step in the proper and just direction of equitable apportionment by recognizing that the comparative fault system includes insurance bad faith tort litigation.

On July 26, 2000, the opinion was modified to read

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as printed above. ***429**

Cal. 2000.

KRANSCO, Plaintiff and Appellant;
INTERNATIONAL INSURANCE COMPANY et al., Plaintiffs and Respondents, v. AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, Defendant and Appellant.

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