Daily Appellate Report

A Daily Journal Corporation Publication *Friday, November 22, 1991*

Full texts of all published opinions of the California Supreme Court, the California Courts of Appeal, the California Attorney General, the U.S. Supreme Court, the Ninth U.S. Circuit Court of Appeals, the Ninth U.S. Circuit Bankruptcy Appellate Panel, State Bar Court and U.S. District Courts in California.

U.S. Central District Court
Civil Justice Advisory Group
Seeks Comments on Costs & Delays
page 14281

Table of contents continued on page 14279

Table of contents continued from front page

CIVIL JUSTICE ADVISORY GROUP
CENTRAL DISTRICT OF CALIFORNIA

Last year Congress enacted the Civil Justice Reform Act of 1990. In addition to creating new judgeships throughout the country, the Act requires each of the 93 federal districts to appoint an advisory committee to conduct a study of the principal causes of costs and delays in civil litigation in federal court and to prepare an expense and delay reduction plan for its district. Pursuant to the Act, the advisory committee for this district, the Central District of California, has been formed.

As part of the study process, our advisory committee is conducting a survey of practitioners active in federal court in our district.

Please take the time necessary to fill out the enclosed questionnaire and return it by Friday, November 29, 1991 to:

Christopher Benbow
Morgan, Lewis & Brockius
801 So. Grand Ave., 22nd Floor
Los Angeles, CA 90017-4615

Your responses will be compiled together with the responses of other practitioners, and the results will be released in the form of a report.

Please be assured that the ultimate report our committee issues will not separately identify you or your firm or office.

Your views are very important to the committee's analysis, and we greatly appreciate your time and cooperation.

LAP00552

CIVIL JUSTICE ADVISORY GROUP

CENTRAL DISTRICT OF CALIFORNIA

QUESTIONNAIRE DIRECTED TO

PRACTITIONERS

IN THE CENTRAL DISTRICT

OF CALIFORNIA

CIVIL JUSTICE ADVISORY GROUP

CENTRAL DISTRICT OF CALIFORNIA

Questionnaire to Practitioners re: Effect of Existing and Proposed Rules and Procedures on the Speed and Cost Effectiveness of Dispute Resolution in the Central District of California.

Note: If you have any questions, please call Christopher Benbow at (213) 612-2646.

QUESTIONS FOR PRACTITIONERS

1. Approximately how many **appearances** have you made in the Central District since January 1, 1986, as to

   (a) Motions ☐

   (b) Trials begun but not completed due to settlement, mistrial or otherwise ☐

   (c) Trials to verdict/judgment ☐

2. Generally, what percentage of your legal fees are attributable to discovery, motion practice and trial?

   Discovery _____%

   Motion practice _____%

   Trial _____%

   Total 100%

CAUSES OF DELAY IN LITIGATION

3. What do you believe to be the most important cause of delay in getting to trial in civil matters pending before the Central District?

CONGRESSIONAL LEGISLATION

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
4. Recent Congressional legislation is a substantial cause of congestion in federal district courts (e.g., RICO, 18 U.S.C. §§ 1961-1968.)	☐	☐	☐	☐	☐

Comments, if any: _____

5. Specific legislation which contributes most heavily to congestion in federal district courts includes (use space to the right to respond): _____

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
6. Congress should address in legislation certain procedural issues (e.g., standing, private rights of action, statutes of limitation, etc.) which are a substantial cause of congestion.	☐	☐	☐	☐	☐

Comments, if any: _____

7. Specific procedural issues which would be most helpful to have Congress address when considering new legislation include (use space to the right to respond): _____

APPOINTMENTS PROCESS	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
8. Delay is caused by the failure of the President to fill promptly judicial vacancies in the Central District.	☐	☐	☐	☐	☐
9. Delay is caused by the failure of Congress to consider confirmation of Presidential nominations to the federal bench in a timely manner.	☐	☐	☐	☐	☐

Comments, if any: _____

Comments, if any: _____

UNIFORMITY OF RULES	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
10. Delay is caused by the use of different rules in different Central District courtrooms, and uniform adherence to the Local Rules would reduce delay.	☐	☐	☐	☐	☐
Comments, if any: _____					

JUDGE-CAUSED DELAY					
11. The following is a frequent source of **judge-caused delay** in the trial of civil actions in the Central District:	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
(a) Judges holding motions under submission without decisions in excess of 30 days;	☐	☐	☐	☐	☐
(b) Civil trials postponed shortly before scheduled trial date upon the court's order;	☐	☐	☐	☐	☐
(c) Judges allowing unrealistically long periods of discovery or the filing of dispositive motions;	☐	☐	☐	☐	☐
(d) Judges not requiring a discovery plan;	☐	☐	☐	☐	☐

		Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
(e)	Judges not setting and adhering to a firm trial date;	☐	☐	☐	☐	☐
(f)	Judges not rendering decisions on a motion immediately after argument;	☐	☐	☐	☐	☐
(g)	Judges declining to consider seriously dispositive motions;	☐	☐	☐	☐	☐
(h)	Judges not actively case managing the matter; and	☐	☐	☐	☐	☐
(i)	Other reasons (please specify using space on the right):					

PRACTICES OF ADVERSARY COUNSEL

12. What do you believe to be the three most common causes of trial delay attributable to practices of adversary counsel?

(1) _____

(2) _____

(3) _____

CAUSES OF EXCESSIVE COSTS IN CIVIL LITIGATION

13. What procedure(s) do you believe to be the most common cause(s) of excessive costs in getting to trial in civil matters pending before the Central District?

_____

PROPOSALS FOR REDUCTION OF COST AND DELAY

14. **The following procedures would reduce cost or delay in the civil litigation process:**

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
(1) **Mandatory pre-discovery disclosures,** i.e., to be furnished before either party files discovery, including:					
(a) Identities of all persons known or believed to have substantial discoverable information about the claims or defenses;	☐	☐	☐	☐	☐
(b) Description and location of all documents that are reasonably likely to bear substantially on the claims or defenses;	☐	☐	☐	☐	☐
(c) Computation of any damages claimed;	☐	☐	☐	☐	☐

		Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
	(d) Substance of any insurance agreement that may cover any resulting judgment;	☐	☐	☐	☐	☐
	(e) Any report of an expert who may be called at trial.	☐	☐	☐	☐	☐
(2)	Absolute limits to the number of depositions, interrogatories and requests for production.	☐	☐	☐	☐	☐
(3)	An initial round of discovery that would be "free" to the requesting party.	☐	☐	☐	☐	☐
(4)	Stricter enforcement of the meet and confer requirements prior to filing a motion to compel compliance with a discovery request.	☐	☐	☐	☐	☐

		Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
(5)	Elimination of the meet and confer requirements.	☐	☐	☐	☐	☐
(6)	Mandatory settlement conferences.	☐	☐	☐	☐	☐
(7)	Voluntary settlement conferences.	☐	☐	☐	☐	☐
(8)	Use of Magistrate Judges for all non-dispositive matters.	☐	☐	☐	☐	☐
(9)	Right to depose experts with advance submission of proposed expert testimony.	☐	☐	☐	☐	☐
(10)	Remand of all pendent claims.	☐	☐	☐	☐	☐
(11)	Stricter standards for admission to the federal bar.	☐	☐	☐	☐	☐
(12)	Increased disciplinary proceedings of federal bar.	☐	☐	☐	☐	☐
(13)	Requiring the loser of a suit brought in federal district court to pay the costs incurred by the winner (the "loser pays" rule).	☐	☐	☐	☐	☐

		Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
(14)	Requiring expert testimony to be based on "widely accepted" theories.	☐	☐	☐	☐	☐
(15)	Banning contingency fees for expert witnesses.	☐	☐	☐	☐	☐
(16)	Requiring judges to establish an early trial date after the pleadings are completed.	☐	☐	☐	☐	☐
(17)	Conditioning the right to sue on a showing that the parties have attempted, but failed, to resolve their dispute.	☐	☐	☐	☐	☐
(18)	Requiring notice prior to filing a lawsuit.	☐	☐	☐	☐	☐

Comments, if any: _____

RULE 11, FRCP

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
15. Federal district courts should adopt a procedure under **Rule 11, FRCP,** by which the court or either party to state the facts supporting its claim and defenses at any time after the filing of the complaint.	☐	☐	☐	☐	☐

Comments, if any: _____

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
16. Federal district courts should uniformly and vigorously enforce the sanctions and powers available under **Rule 11, FRCP**.	☐	☐	☐	☐	☐
Comments, if any: _____					
17. **Rule 11, FRCP**, should be amended to establish clearer standards for sanctions upon attorneys who abuse the discovery process.	☐	☐	☐	☐	☐
Comments, if any: _____					

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
18. **Rule 11, FRCP,** should be amended to empower federal district courts to penalize those responsible for making unfounded assertions in filings, not merely the attorney who signs the document.	☐	☐	☐	☐	☐

Comments, if any: _____

THREE TRACK CIVIL LITIGATION DOCKET

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
19. The federal district courts should adopt a **"Three Track Civil Litigation Docket,"** classifying a case on a track by degree of complexity (e.g., most complex, somewhat complex, and not complex) and limiting time of discovery accordingly.	☐	☐	☐	☐	☐

Comments, if any: _____

TELEPHONE CONFERENCE CALLS

20. The federal district courts should adopt procedures which encourage and increase the usage of **telephone conference calls** for routine appearances in lieu of court hearings attended by counsel for the following:

		Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
(a)	Law and motion calendar appearances where no oral argument is anticipated.	☐	☐	☐	☐	☐
(b)	Orders to Show Cause re: dismissal for want of prosecution.	☐	☐	☐	☐	☐
(c)	Orders to Show Cause re: dismissal for failure to submit an early meeting report.	☐	☐	☐	☐	☐
(d)	Pre-trial conferences.	☐	☐	☐	☐	☐

21. Would **telephone conference calls** reduce costs? Yes ☐ No ☐

22. Would **telephone conference calls** reduce delays? Yes ☐ No ☐

Comments, if any: _____

ALTERNATIVE DISPUTE RESOLUTION

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
23. In federal district court, reference of civil cases to **alternative dispute resolution** (e.g., arbitration, mediation) before trial should be mandatory.	☐	☐	☐	☐	☐

Comments, if any: _____

	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Uncertain or No Opinion
24. If civil cases in federal district court are referred to **alternative dispute resolution** (e.g. arbitration, mediation), the outcome of the alternative dispute resolution process should be binding upon the parties.	☐	☐	☐	☐	☐
25. In federal district court, reference of civil cases to **alternative dispute resolution** (e.g., arbitration, mediation) before trial should be at the discretion of the parties.	☐	☐	☐	☐	☐

Comments, if any: _____

Comments, if any: _____

GENERAL ORDERS AND LOCAL RULES

26. What changes do you recommend be made in the General Orders and/or Local Rules to reduce the cost and delay of civil litigation in federal district courts?

_____

_____

_____

27. Please explain the reasons for each change which you recommend to each given General Order or Local Rule.

Thank you for your time and comments.

Please return by Friday, November 29, 1991 in the enclosed envelope.

CRIMINAL LAW AND PROCEDURE

Defendant Isn't Presumptively Ineligible For Probation Due to Armed Accomplice

Cite as 91 Daily Journal D.A.R. 14301

THE PEOPLE,
Plaintiff and Respondent,
v.
IRENE MANRIQUEZ,
Defendant and Appellant.

No. E008320
Super. Ct. No. CR-35243
California Court of Appeal
Fourth Appellate District
Division Two
Filed November 20, 1991

APPEAL from the Superior Court of Riverside County. James T. Warren, Judge. Reversed and remanded for resentencing.

David C. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney General, and Robert M. Foster, Deputy Attorney General, for Plaintiff and Respondent.

Defendant pled guilty to second degree murder and was sentenced to a term of 15 years to life. On appeal, she contends that the trial court erred in finding her statutorily ineligible for probation. We agree and therefore reverse.

FACTS[1]

The body of Raul Contreras was found on December 17, 1989, by the side of a road in the unincorporated area near Hemet, California. He had been shot four times at close range with a .22 caliber gun. The defendant subsequently admitted that she and Victor Ballesteros had agreed to kill Mr. Contreras on behalf of Mr. Contreras's common-law wife. On December 16, 1989, Ballesteros and defendant asked the victim to give them a ride to the store. Once in the car, Ballesteros and defendant demanded all of the victim's money and when the victim tried to run away, Ballesteros shot him several times with a .22 caliber gun.

DISCUSSION

The single issue on appeal is whether defendant was statutorily ineligible for probation under Penal Code section 1203 because of her accomplice's use of a weapon.[2] The probation report stated that defendant was eligible for probation under section 1203, subdivision (e)(1) only if there were unusual circumstances. The probation officer did not believe there were any unusual circumstances warranting probation because a weapon was used, the murder involved premeditation and because although the defendant had no prior record she was not a youthful offender. The court denied probation.

In arguing that she was not presumptively ineligible for probation, defendant contends that section 1203, subdivision (e)(1) only applies to persons who are armed with a deadly weapon which is not a firearm and that subdivision (e)(2) which applies to a person who uses any deadly weapon, including a firearm, requires the person to have personally used the deadly weapon. She concludes that since subdivision (e)(1) does not apply to persons armed with firearms and since she did not personally use a firearm within the meaning of subdivision (e)(2), she was not presumptively ineligible.

Defendant's initial contention, i.e., that section 1203, subdivision (e)(1) only applies to persons armed with deadly weapons other than firearms can be summarily rejected. This paragraph, while admittedly not a model of clarity, states that absent unusual circumstances, probation shall be denied "[u]nless the person had a lawful right to carry a deadly weapon, other than a firearm, at the time of the perpetration of the crime or his or her arrest, any person who has been convicted of . . . murder, . . . and was armed with such a weapon at either of those times."

Under defendant's analysis, the inclusion of the phrase "other than a firearm" means persons armed with deadly weapons are ineligible for probation under paragraph (1) only if the deadly weapon is not a firearm. In other words, a person who is armed with a firearm would be eligible for probation but a person who was armed with a different type of deadly weapon, such as a knife, would not be eligible for probation. To accept defendant's interpretation would lead to absurd results and we therefore reject it.

It should be beyond question that a person armed with a firearm either at the time he or she commits a crime or at the time of arrest poses a far greater risk of serious injury or death than does a person armed with other types of weapons such as knives. Accordingly, the Legislature reasonably could and did make a distinction between defendants armed with firearms and those armed with other types of deadly weapons. The distinction, however, is not, as contended by defendant, that persons armed with a firearm are eligible for probation. Rather, we believe the Legislature's intention in using the phrase "other than a firearm" was to provide that all persons armed with firearms are presumptively ineligible for probation while those armed with other types of deadly weapons would be ineligible for probation only if they had no "lawful right to carry" a deadly weapon.

Thus, as we read the statute, the phrase "other than a firearm" modifies and refers to the preceding phrase "unless the person had a lawful right to carry a deadly weapon." With this interpretation, subdivision (e)(1) can be restated to provide that a person who has been convicted of murder and who was armed with a deadly weapon either at the time he or she committed the crime or at the time of his or her arrest is presumptively ineligible for probation except when the deadly weapon is not a firearm and the person had a lawful right to carry the "non-firearm" deadly weapon. Therefore, if a defendant was armed with a firearm, he or she is presumptively ineligible for probation within the meaning of section 1203, subdivision (e)(1).

Having determined that persons armed with firearms fall within the ambit of paragraph (e)(1), we turn to defendant's next contention which is that this paragraph requires the defendant personally be armed with a weapon. On this point we agree.

Interestingly, prior to 1949, section 1203 contained the same language as in the present version and provided that probation was not to be granted to one who "was armed with a deadly weapon." Prior to 1949, courts had interpreted this language to mean that a defendant was ineligible for probation if either he or his accomplice was armed with a weapon. (People v. Gillstarr (1933) 132 Cal.App. 267, 269.)

In 1949, the Legislature amended section 1203 to state that a defendant was ineligible for probation if he "was himself armed with a deadly weapon." Applying traditional rules of statutory interpretation, in 1951, the Supreme Court concluded that the addition of the word "himself" was intended to change the prior law. (People v. Perkins (1951) 37 Cal.2d 62, 63.) "It is presumed that the Legislature knew of the judicial construction of its statute and that by amending the portion of the statute construed it intended to change the law. [Citations.] Ordinarily (and there is nothing to suggest that this is not an ordinary case) the Legislature uses words for some reason and intends them to have some meaning." (Id., at pp. 63-64.) Applying these rules, the court concluded that a defendant was ineligible for probation only if the defendant personally was armed with a weapon. If the defendant was not armed, he was eligible for probation even though his accomplice may have been armed with a weapon. (See also, In re Hernandez (1966) 64 Cal.2d 850, 852.)

The Legislature again acted in 1971 and once again amended section 1203 -- this time to rewrite the section and delete the word "himself." If we were to apply the same analysis employed in Perkins, we would conclude that the Legislature once again intended to change the law and would presume that the Legislature intended that a defendant would be ineligible if either the defendant or his or her accomplice was armed with a weapon.

However, the presumptions regarding legislative intent should be utilized only in the absence of evidence regarding the Legislature's intent. Here we have obtained certain documents from the California State Archives of which we take judicial notice. These documents indicate that the 1971 amendments to section 1203 were not intended to make any substantive changes in that section. Instead the amendments were intended only to "restructure[] the statute, break[] it into subdivisions and subsections, delete[] repetitive material, and in general make[] it easier to read and understand." (Assem. Com. on Criminal Justice, Analysis of Sen. Bill No. 1087, Aug. 3, 1971.) From this we can infer that although the prior version had been interpreted as requiring the defendant personally to be armed with a weapon primarily, if not exclusively because of the addition of the word "himself," the Legislature did not intend to change the requirement of personal arming by deleting that word.

We find further support for this conclusion in case law. In People v. Walker (1976) 18 Cal.3d 232, the court held that "[g]enerally, if a statute is intended to impose a derivative liability on some person other than the actor, there must be some legislative direction that it is to be applied to persons who do not themselves commit the proscribed act." (Id., at pp. 241-242.) An example of legislative direction is found in section 12022, subdivision (a). This section imposes an enhancement if the defendant was "armed with a firearm during the commission or attempted commission of a felony." Although this section did not include the word "himself" as did section 1203, subdivision (e)(1), it nonetheless had been interpreted to require the defendant to personally be armed with a firearm. (People v. Hicks (1971) 4 Cal.3d 757, 766, fn. 4.) Effective July 1, 1977, section 12022, subdivision (a) was amended to specify that "[t]his additional term shall apply to any person who is a principal in the commission or attempted commission of a felony if one or more of the principals is armed with a firearm, whether or not such person is personally armed with a firearm." (Stats. 1977, c. 165, § 91, p. 678.)

Here section 1203, subdivision (e)(1) does not contain any legislative direction that a defendant is presumptively ineligible for probation because an accomplice was armed with a weapon. Further the legislative materials clearly state that the Legislature, in making the 1971 amendments, did not intend to make any substantive changes by deleting the word "himself." Accordingly we conclude that since only defendant's accomplice was armed with a weapon at the time of the murder and defendant was not armed, she was not presumptively ineligible for probation.

"[W]hen as in this case the sentencing court bases its determination to deny probation in significant part upon an erroneous impression of the defendant's legal status, fundamental fairness requires that the defendant be afforded a new hearing and 'an informed, intelligent and just decision' on the basis of the facts. (See People v. Surplice (1962) 203 Cal.App.2d 784, 791 [. . .].)" (People v. Ruiz (1975) 14 Cal.3d 163, 168.) Here in recommending the denial of probation, the probation officer was under the erroneous impression the defendant was presumptively ineligible for probation and there were no unusual circumstances. As the trial court relied exclusively on this report, it appears that the trial court was under the same erroneous impression regarding defendant's legal status. Accordingly we reverse and remand the matter for resentencing.

DISPOSITION

Judgment reversed and the matter is remanded for resentencing.

HOLLENHORST, Acting P.J.

We concur:
McKINSTER, J.
McDANIEL, J.*

*Retired Associate Justice of the Fourth District Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

1. The facts are taken from the probation report.

2. Unless otherwise indicated, all further statutory references are to the Penal Code.

CIVIL PROCEDURE

No Appeal Allowed From Minute Order, Final Order of Dismissal Is Mandatory

Cite as 91 Daily Journal D.A.R. 14303

CAROLINA MUNOZ et al.,
Plaintiffs-Appellants,
v.
FLORENTINE GARDENS,
Defendant-Respondent.

No. B050644
(LASC C669835)
California Court of Appeal
Second Appellate District
Division Seven
Filed November 20, 1991

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Lachs, Judge. Dismissed.

Judith S. Fogel for Plaintiffs and Appellants.

Brown & DePiano and David M. Brown for Defendant and Respondent.

Plaintiffs purport to appeal from an order dismissing their case for failure to prosecute or as a sanction for failing to appear at the court scheduled status conference. Such an order is not a final judgment and is not an appealable order. (Code Civ. Proc., § 581d[1]; Rios v. Torvald Klaveness (1969) 2 Cal.App.3d 1077; Graski v. Clothier (1969) 273 Cal.App.2d 605.)

At the request of the justices of this court, the clerk communicated with counsel to request letter briefs on the issues of whether there was a written order signed by the trial court dismissing the action and, if not, whether this appeal should be dismissed.

In response, both parties acknowledged the minute order in this case was not an appealable judgment. Counsel also confirmed there was no final judgment in the case because there was no written order of dismissal signed by the trial court. Despite notification of the defect plaintiffs still neglected to secure the order of dismissal. Had plaintiffs done so, and had they requested this court to take judicial notice of the signed order of dismissal, we could have taken judicial notice of the after-filed judgment and deemed the notice of appeal to be from that judgment in order and thereby acquired jurisdiction of the appeal. (Evid. Code, §§ 452, 4592[2]; see, e.g., Estate of Silver (1982) 133 Cal.App.3d 937; Minor v. San Francisco Mun. Court (1990) 219 Cal.App.3d 1541.)

Instead of responding to this court's letter by obtaining and filing an order of dismissal, however, plaintiffs merely cited cases in which minute orders of dismissal were interpreted or amended to deem the order of dismissal sufficient under Code of Civil Procedure section 581d. (See, e.g., Freedman v. Pacific Gas and Electric Company (1987) 196 Cal.App.3d 696, 703; Bellah v. Greenson (1978) 81 Cal.App.3d 614, 618; see also 9 Witkin Cal. Procedure (3d ed. 1985) Appeal, § 59, p. 82.) But as we announced to the bar in 1987, this we are no longer willing to do. (Cohen v. Equitable Life Assurance Society (1987) 196 Cal.App.3d 669, 671.)

This appeal is dismissed because this court is without jurisdiction to entertain an appeal from a non-appealable order. (Code Civ. Proc., §§ 904, 904.1, 581d; 9 Witkin Cal. Procedure (3d ed. 1985) Appeal, § 38, p. 61 ["Since an appealable judgment or order is essential to appellate jurisdiction, the parties cannot by any form of consent make a nonappealable order appealable. The court must of its own motion dismiss an appeal from such an order."] Emphasis in original.)

DISPOSITION

Appeal is dismissed.

JOHNSON, J.

We concur:

LILLIE, P.J.
WOODS (Fred), J.

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1. Code of Civil Procedure section 581d provides:

"A written dismissal of an action shall be entered in the clerk's register and is effective for all purposes when so entered.

"All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and such orders when so filed shall constitute judgments and be effective for all purposes, and the clerk in superior, municipal, and justice courts shall note such judgments in his register of action in the case."

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2. Evidence Code section 459 provides in pertinent part:

"(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452....

Evidence Code section 452 provides judicial notice may be taken of:

"(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

CIVIL PROCEDURE

Dismissal for Failure to Pay Transfer Fees Is Reversed

Cite as 91 Daily Journal D.A.R. 14303

FRANCISCO VELASQUEZ,
Plaintiff-Appellant,
v.
KENICHIRS SAKAMOTO,
Defendant-Respondent.

No. B052451
Super. Ct. No. C696755
California Court of Appeal
Second Appellate District
Division Seven
Filed November 20, 1991

APPEAL from judgment of the Superior Court of Los A ngeles County. Abbey B. Soven, Judge. Reversed.

Timothy E. Meyer for Plaintiff and Appellant.

Hawkins, Schnabel & Lindahl and Randy M. McElvain for Defendant and Respondent.

FACTS AND PROCEEDINGS BELOW

The complaint in this action was filed on August 23, 1988, in the superior court. On March 9, 1989, the case was ordered transferred to the municipal court. When the transfer fees had not been paid for over a year the superior court ordered plaintiff's counsel to show cause on April 4, 1990, at 9:00 a.m. why the case should not be dismissed. On April 3, 1990, the day before the hearing on the order to show cause, plaintiff's counsel gave the transfer fees to an attorneys' service with instructions to take them to department 68 of the superior court, the department in which the show cause order was scheduled to be heard. The attorneys' service did not deliver the fees to Department 68 until 4:30 p.m. on April 4th. In the meantime, plaintiff's counsel having failed to appear at the show cause hearing, the court dismissed the case under Code of Civil Procedure section 583.420, subdivision (a)(2)(B).

On May 18, 1990, plaintiff's counsel moved to vacate the dismissal under Code of Civil Procedure section 473. The trial court denied this motion on June 19, 1990. On August 16, 1990, plaintiff's counsel filed a notice of appeal from the dismissal order and the order denying relief from the dismissal.[1]

DISCUSSION

Code of Civil Procedure section 583.420, subdivision (a)(2)(B) authorizes discretionary dismissal "[t]wo years after the action is commenced against the defendant . . . ." This action was commenced on August 3, 1988, and dismissed on April 4, 1990. It is clear on the face of the record this case was not subject to dismissal under section 583.420, subdivision (a)(2)(B).

This conclusion, however, does not end our inquiry because we are reviewing the correctness of the order, not its reasoning. Therefore, we must determine if some other ground would support dismissal of the action. (Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal.App.3d 706, 712.)

We look first to Code of Civil Procedure section 399[2] which covers the transfer of actions from the superior court to the municipal court. That section contains a specific provision on dismissal of the action for failure to pay the transfer fees. Under section 399, if the transfer fees are not paid within 30 days after service of the order of transfer "the court on a duly noticed motion by any party may dismiss the action . . . ." Section 399, therefore, does not expressly authorize the dismissal in the present case because the dismissal was on the court's own motion, not the motion of a party.[3]

In the absence of express statutory authority, a court may dismiss an action for dilatory prosecution on the basis of its inherent common law power. (Romero v. Snyder (1914) 167 Cal. 216, 218; Lyons v. Wickhorst (1986) 42 Cal.3d 911, 915; and see Link v. Wabash R.R. Co. (1961) 370 U.S. 626, 630.) However, the courts have long recognized their inherent authority to dismiss may not be exercised in a manner contrary to statute. (Romero v. Snyder, supra, 167 Cal. at p. 219; Weeks v. Roberts (1968) 68 Cal.2d 802, 805; Lyons v. Wickhorst, supra, 42 Cal.3d at p. 915.)[4] If this were not so, and courts could dismiss an action at any time, then statutes setting minimum and maximum time frames for dismissal would be meaningless. (Holden v. California Emp. Etc. Com. (1950) 101 Cal.App.2d 427, 437-438.)

Thus, it has been held a court has inherent power to dismiss an action prior to the time at which dismissal would be mandatory (see, e.g., Inderbitzen v. Lane Hospital (1936) 17 Cal.App.2d 103, 106), but a court may not dismiss an action prior to the time at which dismissal would be discretionary, as established by the Legislature. For example, in Inderbitzen v. Lane Hospital, supra, the court held the provision of former section 583 of the Code of Civil Procedure, mandating dismissal of an action if it was not brought to trial within three years after filing a remittitur reversing the judgment, did not deprive the trial court of its inherent power to dismiss the action for lack of prosecution for a shorter period. (17 Cal.App.2d at p. 106.) On the other hand, in Romero v. Snyder, supra, the court held the provision of former Code of Civil Procedure section 583, permitting dismissal of an action not brought to trial within two years after the answer was filed, precluded the trial court from dismissing an action not brought to trial in a period less than two years after the answer was filed. "The [statutory] declaration that the court, in its discretion, may dismiss the case because of such inaction for two years, implies that inaction of that kind for a shorter period will not suffice." (167 Cal. at p. 219.)[5]

Under the reasoning of Romero and Weeks, supra, the trial court erred in dismissing the present case for delay in bringing the matter to trial because less than two years had elapsed since commencement of the action. (Code of Civ. Proc., § 583.420, subd. (a)(2)(B).)

Furthermore, the trial court's inherent power to dismiss an action did not permit the court to dismiss the present case for delay in paying the transfer fees. As previously noted, Code of Civil Procedure section 399 contains its own dismissal provision which authorizes dismissal "on a duly noticed motion by any party." It could be argued that notwithstanding Code of Civil Procedure section 399 the court retains an inherent power to dismiss for failure to pay the transfer fee. This would be a plausible conclusion were it not for the fact the same statute which added the provision to section 399 authorizing a party's motion to dismiss repealed section 581b of the Code of Civil Procedure which authorized dismissal on the court's own motion. (Stats. 1974, ch. 1369, § 3.5; and see fn. 4, supra.)

Where the Legislature repeals a statute

specifically authorizing a trial court or a party to move to dismiss an action under certain circumstances and, at the same time, replaces it with a statute authorizing only a party to make such a motion, the Legislature clearly expresses an intent such actions may no longer be dismissed on the court's own motion. The Legislature's authority to so restrict the court's inherent power to dismiss was recognized in Weeks, Lyons and Salas. (See fn. 4, supra.)

In the present case, the trial court, on its own motion, dismissed the plaintiff's action after the plaintiff failed for over a year after the transfer order to pay the transfer fees. If we were to sustain this dismissal under the "inherent power" theory we would, in effect, be reinstating a law, former Code of Civil Procedure section 581b, the Legislature repealed seven years ago. (See fn. 2, supra, p. 4.) Not even the most "activist" court could justify such a flat out usurpation of the legislative function.[6]

DISPOSITION

The judgment dismissing the action is reversed. Appellant is awarded costs on appeal.

JOHNSON, J.

I concur:
LILLIE, P.J.

1. There being no evidence in the record of proof of service of either of these orders we treat the notice of appeal as timely. (Cal. Rules of Court, rule 2, subd. (a).)

1. All statutory references are to Code of Civil Procedure unless otherwise indicated.

2. Former section 581b of the Code of Civil Procedure would have authorized dismissal of this action. That section provided an action "which has been ordered transferred to the proper court . . . must be dismissed by the court in which the action or proceeding was originally commenced, on its own motion, or on the motion of any party interested therein . . . where the costs and fees [for transfer] . . . have not been so paid for one year after the entry of the order for transfer." (Emphasis added.) Section 581b was repealed by statutes 1974, chapter 1369, section 5 and replaced by the dismissal provision in Code of Civil Procedure section 399 quoted in the text above.

3. This rule is now codified in Code of Civil Procedure section 583.150 which provides: "This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions under a rule adopted by the court pursuant to section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent authority of the court." (See 17 Cal. Law Revision Com. Rep. (1984) 905, 930.)

4. The court, in Romero, did not base its holding on the ground the statute restricted the power of the court, "but upon the ground that it is a legislative determination of the fact that a delay for two years, or less in bringing the action to trial after answer, is not to be regarded as unreasonable." (167 Cal. at p. 220.) In Weeks, however, the court expressed the view "[t]he two year statute limits the court's independent power to dismiss an action for want of prosecution at any time." (68 Cal.2d at p. 805.) The court repeated this rationale in Lyons v. Wickhorst, supra, 42 Cal.3d at page 915 and Salas v. Sear, Roebuck & Co. (1986) 42 Cal.3d 342, 348. The limitation of power rationale was also adopted by the Law Revision Commission in its report on amendments to the dismissal statutes (see fn. 3, supra), and is consistent with Code of Civil Procedure section 4 which provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

5. In this case we need not reach the question, posed in the concurring opinion, whether in a "particularly egregious case" a trial court would have the inherent power to dismiss the action. (See conc. op. at p. 1; Lyons v. Wickhorst (1986) 42 Cal.3d 911, 927 [Reynoso, J. conc.].) Unlike the ambiguous legislative staff report in Lyons, the legislative history relevant to this case clearly evidences an intent to preclude dismissal of this action on the court's own motion. Unless the court's inherent power includes the legislative power to enact statutes or the executive power to veto them, the trial court had no power to dismiss this action on its own motion, no matter how "egregious" the conduct of plaintiff's attorney.

Even if the trial court had such power we have no way of knowing whether it would have exercised this discretion to dismiss by making a finding of "egregious" conduct in this case had it known that was the test to be applied. The attorney's conduct in this case does not appear to have been egregious compared, for example, to the conduct of defendant's attorney in Salowitz Organization, Inc. v. Traditional Industries, Inc. (1990) 219 Cal.App.3d 797, 800-802. (But see conc. op., infra, at pp. 2-3.) Rather, the conduct here appears to be the kind of garden-variety neglect which occurs all too often in our trial courts. But, the fact reasonable minds can differ on what constitutes egregious conduct highlights the danger the exercise of the power to dismiss poses if it can be exercised unfettered and unbridled by procedural limits and guidelines. (See Bauguess v. Paine (1978) 22 Cal.3d 626, 638-639.

WOODS (Fred), J.

I concur in the majority opinion but write separately to again urge the California Supreme Court to reassess its views expressed by the majority of that court in Lyons v. Wickhorst (1986) 42 Cal.3d 911.

In Salowitz Organization, Inc. v. Traditional Industries, Inc. (1990) 219 Cal.App.3d 797, 802-806, we were faced with a different but not entirely unrelated situation and held that the trial court lacked inherent power to deny a plaintiff a trial de novo as a sanction under Code of Civil Procedure section 128.5 for failure to participate in judicially mandated arbitration since it was the apparent desire of the Legislature to give the plaintiff an unfettered right to a trial de novo regardless of his conduct in the arbitration proceedings.

In a separate concurring opinion, I urged the Supreme Court and/or the Legislature to extend the inherent power of trial courts to dismiss in the case of egregious circumstances as expressed in the views of Justice Reynoso in his separate concurring opinion in Lyons v. Wickhorst, supra, 42 Cal.3d at pages 926-927.

Once again we are faced with an egregious plaintiff who for thirteen months flaunted an order of court to transfer his matter to the municipal court by failing to pay the required transfer fees and by failing to attend a regularly set hearing to show cause why the action should not be dismissed. Under such circumstances, I am of the opinion that the trial court should have the inherent power to dismiss the action, consonant with an abuse of discretion standard of review, in keeping with Government Code section 68609, subdivision (d) which gives courts the power to dismiss actions to implement the Trial Court Delay Reduction Act. But until the Supreme Court changes its

view in Lyons or the Legislature intervenes by statute to indicate that it meant what it said in Government Code section 68609, under Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455-456, I am compelled to concur in the majority opinion.

WOODS (Fred), J.

CRIMINAL LAW AND PROCEDURE

Denial of Diversion Eligibility Doesn't Violate Equal Protection

Cite as 91 Daily Journal D.A.R. 14306

THE PEOPLE,
Plaintiff-Respondent,
v.
DAVID EDWARDS,
Defendant-Appellant.

No. A052052
Alameda County
Superior Court No. C104003
California Court of Appeal
First Appellate District
Division Two
Filed November 20, 1991

Introduction

David Edwards appeals the judgment of the Alameda County Superior Court convicting him of violation of Health and Safety Code section 11370.1 (possession of half a gram or less of a substance containing cocaine base while in the immediate personal possession of a loaded firearm). His sole contention on appeal is that Health and Safety Code section 11370.1 denies equal protection of the laws under article I, section 7 of the California Constitution and the Fourteenth Amendment to the United States Constitution. We find no violation of equal protection and so affirm the judgment.

Statement of the Case/Statement of Facts

Appellant was arrested on July 18, 1990 during an undercover drug buy operation in Oakland. While officers were arresting the drug seller, one officer saw appellant, who was standing nearby, pull a plastic bag from his pants pocket, drop it to the ground, and take a few steps away from the bag. Appellant was arrested and the bag appeared to contain a small rock of cocaine. A search of appellant pursuant to his arrest disclosed another bag containing rock cocaine in appellant's shirt pocket and a loaded .44 Magnum revolver tucked in appellant's waistband.

Appellant was charged in count 1 with possession of cocaine base, a felony violation of Health and Safety Code section 11350 and with possession of a handgun within the meaning of Penal Code section 12022, subdivision (a). In count 2, appellant was charged with possession of half a gram or less of a substance containing cocaine base while in the immediate personal possession of a loaded, operable firearm, a felony violation of Health and Safety Code section 11370.1.[1]

Following closing arguments in appellant's jury trial, the court dismissed count 1 and the accompanying handgun enhancement on the prosecutor's motion. On November 2, 1990, the jury found appellant guilty of the crime charged in count 2. Appellant was placed on supervised probation for three years. This timely appeal followed.

Discussion

I.

Appellant contends that section 11370.1[2] denies him equal protection of the laws by punishing people more severely than would be the case if they were charged under a possession statute augmented by a firearm enhancement. Specifically, he points to different terms of imprisonment and the unavailability of diversion as an alternative to prison or probation under section 11370.1. He argues that persons charged under section 11370.1 for possession of less than half a gram of cocaine base while possessing a weapon are punished more harshly than persons similarly situated who are charged under the alternate scheme of section 11350 with simple possession of cocaine base plus an arming enhancement under Penal Code section 12022, subdivision (a). He points out that under section 11350, one may be charged with simple possession even where possessing more than half a gram, but less than a salable quantity. Hence, he contends that one who possesses a weapon is subject to harsher criminal penalties for possessing smaller amounts of cocaine base under section 11370.1 than would be the case if punished under section 11350 with a Penal Code section 12022, subdivision (a) gun enhancement.

In reality, the possible term of imprisonment under section 11370.1 is equal to or less than that imposed under the combination of section 11350 and the enhancement. Section 11370.1 provides for punishment of two, three, or four years in prison and makes diversion unavailable. In contrast, under section 11350, subdivision (a) (as provided in Penal Code section 18), punishment is 16 months, two or three years in state prison. The firearm enhancement of Penal Code section 12022, subdivision (a), provides an additional one year imprisonment. Thus, the minimum term of imprisonment under the allegedly "harsher" punishment of section 11370.1 is actually four months less than under section 11350, subdivision (a), in conjunction with the firearm enhancement.

II.

A. The only way in which section 11370.1 could be asserted to operate more harshly than the alternate statutes is that it makes anyone convicted under it ineligible for diversion.

"'Before deciding whether or not the . . . legislation violates the equal protection clauses of the United States and California Constitutions, we must look at the tests employed in reviewing legislative

classification. [Citations.] "When a classification is based upon a 'suspect' category (race, creed, sex, wealth, etc.) or touches upon a 'fundamental interest,' it is subject to 'strict scrutiny' and 'active and critical analysis' by the court. The state then 'bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.'" [Citation.] In the absence of a suspect category or fundamental interest, it must be determined whether the legislative classification rationally relates to a legitimate state interest. (Newland v. Board of Governors (1977) 19 Cal.3d 705, 711 . . . .) . . . .' (Hooper v. Deukmejian, supra, 122 Cal.App.3d at pp. 1008-1009.)" (People v. Jones (1985) 176 Cal.App.3d 120, 126.) The inquiry under the "rational basis" test requires the court to conduct "'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals'" (Newland v. Board of Governors (1977) 19 Cal.3d 705, 711; see also People v. Jones, supra; Cooper v. Bray (1978) 21 Cal.3d 841, 847-848; Hooper v. Deukmejian (1981) 122 Cal.App.3d 987, 1008-1009.)

Appellant maintains that a fundamental "liberty interest" is impacted by the statutory denial of diversion to persons convicted under section 11370.1 and that strict scrutiny is required. The California Supreme Court has determined otherwise. In Sledge v. Superior Court (1974) 11 Cal.3d 70, our Supreme Court held that the preliminary determination by the district attorney of an accused's eligibility for diversion was not an exercise of the judicial power and did not violate the constitutional requirement of separation of powers. (Cal. Const., art. III, § 3.) The court also rejected the petitioner's contention that the diversion statute denied him due process and equal protection of the laws, stating: "[I]nasmuch as the resulting ineligibility of persons who have a history of drug abuse or crimes of violence is rationally related to the purposes of this legislation identified in [People v. Superior Court (On Tai Ho) (1974) 11 Cal.3d 59], no denial of equal protection is shown." (Sledge v. Superior Court, supra, at p. 76, fn. 7.) Hence, Sledge v. Superior Court establishes that equal protection challenges based upon statutory ineligibility for diversion are reviewed under the rational basis standard to determine whether the classification is rationally related to the purposes of the statute.

Assuming for the sake of argument that persons convicted under section 11370.1 are similarly situated with persons convicted under section 11350 with a Penal Code section 12022, subdivision (a) arming enhancement, we proceed to examine the purposes of the statute and the relationship of the asserted classification to those purposes.[3]

The legislative intent behind section 11370.1 was to address a deficiency in California law which did not specifically make it a public offense for a person to possess or be under the influence of a small amount of a controlled substance while in the immediate possession of a firearm. (Enrolled Bill Report of the Office of Criminal Justice Planning, dated September 25, 1989.) As stated in a memorandum from Department of Justice Legislative Advocate Carolyn McIntyre, dated February 7, 1990: "[T]he bill accomplishes what the author, Ex-Senator Stirling, the sponsors, San Diego SD, and the Committee on Public Safety intended it to accomplish. It was intended to provide an enhanced punishment for individuals that are convicted of possessing small quantities of drugs for personal use while possessing a loaded operable firearm . . . ."[4]

The provision of the statute denying eligibility for diversion to one convicted of this offense is rationally based. Penal Code section 1000, the diversion statute, does not provide diversion for offenses involving possession for sale. The focus of the diversion program is the tentative or experimental user who possesses only a small amount of drugs for personal use. "[D]iversion permits the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction." (People v. Superior Court (On Tai Ho) (1974) 11 Cal.3d 59, 61.) Consequently, there is less likelihood that one carrying amounts exceeding the amounts specified in section 11370.1 would be diverted. Where larger amounts are involved, the fact that the defendant was also carrying a firearm is less a factor in the diversion decision.

Moreover, before section 11370.1, it was not at all clear that personal possession of a weapon would disqualify from diversion a defendant arrested for simple possession of a small amount of drugs. For instance, in People v. Macafee (1980) 109 Cal.App.3d 808, the defendant had been arrested for disorderly conduct and battery. A booking search revealed a usable amount of cocaine. He was convicted of possession of cocaine, and the charges of battery and disorderly conduct were dismissed. (Id., at p. 811.) The defendant challenged the prosecutor's determination that he was ineligible for diversion under Penal Code section 1000. "For an accused to be eligible for diversion, Penal Code section 1000 requires, inter alia, that '[t]he offense charged did not involve a crime of violence or threatened violence.' (Pen. Code, § 1000, subd. (a)(2).)" (Id., at p. 812.) The court reversed the probation order and remanded to allow the trial court to determine whether the defendant should be diverted, stating: "An offense specified in section 1000 does not 'involve' a crime of violence or threatened violence unless the drug offense played some part in the commission of the violent crime, e.g., where the defendant committed a crime of violence while under the influence or during the purchase of a controlled substance. [¶] Appellant's possession of cocaine apparently played no part in the commission of the battery. There was no evidence that he was under the influence of cocaine at the time." (Id., at pp. 812-813.)

Similar reasoning has been applied to the arming enhancement statute, Penal Code section 12022. In People v. Miley (1984) 158 Cal.App.3d 25, the court held the defendant's act of handing a gun to a solicitee during an aborted solicitation for murder did not invoke the arming statute, because the defendant did not carry the firearm as an instrument of offense or defense during the solicitation. (Id., at pp. 32-33.)

It appears, then, that in order to sustain an arming enhancement, the felon must have possessed the firearm as an instrument in the commission of the offense. Therefore, if the prosecution could not prove that the firearm was possessed as an instrument in the commission of the drug offense, it would not be possible to sustain an arming allegation or the

prosecutor's determination that the defendant committed an offense which "involve[d] a crime of violence or threatened violence." (Pen. Code, § 1000, subd. (a)(2).) Consequently, the possessor of a small amount of drugs would face a lesser term and would be eligible for diversion, despite the simultaneous possession of a loaded firearm.

We may reasonably infer that the Legislature enacted section 11370.1 in 1989 as a response to judicial construction of the diversion statute and the arming enhancement statute. As respondent argues: "The legislators' intent was clearly to punish a distinct category of offenders: those who possess very small amounts of controlled substances while in the 'immediate personal possession of a loaded, operable firearm.' Under the old law, this is the category of offenders most likely to be placed in a civil diversion program (due to the very small amounts of contraband involved) despite the presence of a weapon." (Italics omitted.)

The statute reasonably focuses upon possessors of small amounts of drugs because they are significantly more likely to be diverted than persons possessing larger amounts. The Legislature could reasonably conclude that the prosecutor should not be required to convince a trial court that the loaded, operable weapon possessed by the user or possessor of a small amount of drugs was an "instrument" in the commission of the drug offense, or that the drug offense was "involved with" a crime of violence in order to justify a refusal to divert the offender.

It is well established that the Legislature may single out a particular threat to society and punish it as a separate category from other types of threat. "'[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. [Citation.]' [Citation.]" (People v. Jerez (1989) 208 Cal.App.3d 132, 140, quoting Dandridge v. Williams (1970) 397 U.S. 471, 486-487.) "'The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident.' [Citations.]" (People v. Jerez, supra.)

Section 11370.1, subdivision (b) denying eligibility for diversion to persons convicted of possessing small amounts of drugs while in personal possession of a loaded, operable firearm is rationally related to the legitimate purposes of the statute.

B. Appellant also contends that section 11370.1 denies equal protection of the law as the statute "targets only cocaine base or 'crack', not cocaine powder, heroin, methamphetamine nor any other illegal narcotics, only cocaine base." Therefore, appellant argues such selective targeting disproportionately impacts the black community. We need not address this argument as appellant obviously has overlooked the language of the statute applying to possession of substances other than cocaine base, including cocaine, heroin, methamphetamine, and phencyclidine. (§ 11370.1, subd. (a).)

The judgment is affirmed.

Kline, P. J.

WE CONCUR:
Smith, J.
Peterson, J.

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1. All statutory references are to the Health and Safety Code, unless otherwise indicated.

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2. Section 11370.1 provides:

"(a) Nothwithstanding Section 11350 or 11377 or any other provision of law, every person who unlawfully possesses one-half gram or less of a substance containing cocaine base, one gram or less of a substance containing cocaine, one gram or less of a substance containing heroin, one gram or less of a substance containing methamphetamine, one-eighth gram or less of a crystalline substance containing phencyclidine, one milliliter or less of a liquid substance containing phencyclidine, one-half gram or less of plant material containing phencyclidine, or one hand-rolled cigarette treated with phencyclidine while in the immediate personal possession of a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

"As used in this subdivision, 'immediate personal possession' includes, but is not limited to, in the interior passenger compartment of a motor vehicle.

"(b) Any person who is convicted under this section shall be ineligible for diversion under Chapter 2.5 (commencing with Section 1000) of Title 6 of Part 2 of the Penal Code.)"

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3. We do not here decide whether the classification affects persons who are similarly situated.

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4. Upon respondent's request, we have taken judicial notice of The Enrolled Bill Report; a Memorandum from Deputy Attorney General Michael D. O'Reilley, dated February 2, 1990; and the responding Memorandum from Department of Justice Legislative Advocate Carolyn McIntyre, dated February 7, 1990. (Order dated August 16, 1991.)

Trial Court:
Alameda County Superior Court

Trial Judge:
Honorable Benjamin Travis

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CRIMINAL LAW AND PROCEDURE

Latest Consented-to Trial Date Triggers 10-Day Grace Period

Cite as 91 Daily Journal D.A.R. 14309

THE PEOPLE,
Plaintiff-Appellant,
v.
ROBERT LEE GRIFFIN,
Defendant-Respondent.

No. E009066 (E004690)
Super. Ct. No. OCR-7980
California Court of Appeal
Fourth Appellate District
Division Two
Filed November 20, 1991

APPEAL from the Superior Court of San Bernardino County. Kenneth G. Ziebarth, Judge. Order of dismissal reversed.

Dennis Kottmeier, District Attorney, and Joseph A. Burns, Deputy District Attorney, for Plaintiff and Appellant.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the pretrial dismissal of this case, in which Robert Lee Griffin was charged with the 1980 murder of one of his fellow prison inmates at Chino's California Institution for Men.

Griffin was first tried and convicted for the killing several years ago, but this court reversed his first degree murder conviction due to jury instruction error. He was tried a second time and convicted as before, and we once again reversed his conviction, this time for improper admission of evidence at trial. We noted in our opinion as to this trial that ". . . [T]he majority of witnesses testifying . . . were fellow inmates of Griffin and the victim[, including the now infamous Leslie Vernon White, one of the chief prosecution witnesses.[1]] The air at trial was thick with accusations and insinuations of lack of credibility, favors in exchange for testimony, and gang affiliations." After our reversal of the second verdict, proceedings were begun a third time, but were terminated by the trial court's dismissal order. The People here contend that that order was improper. We agree and reverse.

Facts

When Griffin was first tried, he was charged with the enhancement that he personally used a knife during the stabbing murder of the victim. Griffin's first jury found that allegation to be not true. Therefore, when he was tried a second time, the People proceeded on an aiding-and-abetting theory. In our opinion reversing the second conviction, we advised the trial court, in the event of another retrial, to avoid admitting evidence inconsistent with the first jury's negative finding on the enhancement allegation in light of the split of authority on the subject.[2]

Accordingly, during pretrial proceedings for this third go-round, Griffin made a motion to prevent the People from introducing evidence that he was the one who stabbed the victim. Four days later, the parties were before the court when the following colloquy occurred:

"The court: . . . [W]hat were you going to do about the trial?

"[Defense counsel]: Your honor, . . . [the prosecutor] and I have agreed . . . to continue the matter for trial assignment to November 2, trial to commence November 5. [¶] Mr. Griff[i]n . . . is aware of the fact that he has a right to be brought to trial within 60 days of the filing of the [remittitur] and is agreeable to waive that statutory time. [¶] [To Griffin:] Is that correct?

"[Griffin]: Yes, sir, it is.

"The court: What about some days beyond, or have we been doing that in this case? Usually if it is a court continuance to a date that far off, we don't know what our trial situation is. [¶] I note there have been some waivers to a date plus 15 days. Would he be willing to waive 15 beyond that date?

"[Defense counsel]: Fifteen calendar days.

"The court: All right.

"[Griffin]: Yes, sir.

"The court: . . . [W]e will then note for good cause, matter being reset for . . . November 2 . . . trial assignment, and trial November 5 . . . ." (Emphasis added.)

Thereafter, the trial court granted Griffin's motion to prevent the prosecution from introducing evidence that he was the stabber, adding, "[A]t retrial[,] the [P]eople will be limited to guilt based on 'aiding and abetting' rather than 'stabber.'" Three weeks later, Griffin filed an "On Going Request for Evidentiary Suppression of Facts Showing Defendant to be the Actual Perpetrator of the Stabbing Death of the Victim." Thereafter, the People filed points and authorities in opposition to Griffin's "On Going Request . . ." and, therein, sought "specification of exactly what evidence is encompassed by the [c]ourt's exclusionary order." That clarification was made by the court on October 9, and an order setting it forth was filed the following day. On October 16, during a status conference, the trial court was informed that the People would be seeking a writ at this court. Although the minute order for that date does not specify which ruling was to be the subject of the writ petition, it is clear that the People were intending to challenge the trial court's orders regarding the evidence that Griffin was the actual stabber. Despite being informed of the People's intention to pursue a writ with this court, the minute order for October 16 indicates that "the trial dates of 11-2-90 and 11-5-90 are confirmed." (Emphasis added.)

The People's petition for writ of mandate/prohibition challenging the trial court's evidentiary rulings was filed with this court on November 9, 1990. We denied the petition on November 14.[3]

On November 21, Griffin moved for dismissal on the grounds that the last day during which trial could have commenced by agreement of the parties, November 20, had passed. The People argued that "under [Penal Code section] 1382 . . . we . . . ha[d] ten days beyond [November 20] . . . the last date agreed upon by the defendant for trial. . . . [T]he statute is relied upon by the People in the filing of the writ." During colloquy following the parties' presentations of their conflicting views, both defense

counsel and the prosecutor agreed that "the trial date was November the 5th[.]" (Emphasis added.)[4] Defense counsel stated, without contradiction by the prosecutor that, "[I]t has been my experience in this courthouse, in this jurisdiction, that additional time waivers beyond the ten days [provided by section 1382] incorporate and include the ten days.

The trial court, in apparent agreement, said in granting Griffin's motion to dismiss:

". . . [I]t has been the practice in all of the departments in the West District that I am familiar with handling criminal cases and [it] may well be a countywide policy, that when we seek waivers of times from defendants for trial, that we select a date and then we seek to get an additional period of time, either 30 days, if a defendant is in custody, or 60 days, if a defendant is not in custody, to give the People more time to get the case out for trial than is afforded by the statute. . . . [Griffin] agreed to a commencement of trial 15 calendar days beyond November the 5th which meant that the trial could have commenced on or before November 20, which was yesterday. [¶] . . . [I]t is my distinct impression based on the practice that has existed in this jurisdiction for a long period of time that it was the intention and understanding of the parties that the defendant and his counsel were not agreeing to an additional 10-day period after the 15 days but rather were agreeing to an additional five days over and above the ten days to which the People would have been entitled . . . under the statutory provision. [¶] . . . [I]f the People are insisting now that they have an additional 10-day period beyond November 20, that not only w[ere] the defendant and his counsel misle[]d, but also this court and probably [the] judge . . . at the time that the waiver was taken . . . . And, therefore, on that basis this court determines that this court has no alternative but to grant the defendant's motion for dismissal pursuant to the provision of 1382, subsection b, and also the practice that has existed in this jurisdiction for some period of time which in my judgment has caused an apparent estoppel situation."

Discussion

Penal Code Section 1382, subdivision (b), provides in pertinent part: ". . . [A]n action shall not be dismissed under this subdivision if it is set for trial on a date beyond the 60- day period at the request of the defendant . . . and if the defendant is brought to trial on the date so set for trial or within 10 days thereafter." (Emphasis added.) The crucial question is the meaning of the term "the date so set for trial."

At the hearing on the motion to dismiss below, the prosecutor conceded, in two different ways,[5] that the date set for trial was November 5 and not November 20. By backward reasoning from a concession in the People's briefs on appeal, they still take that same position.[6]

Penal Code section 1382 uses the term "[the] date . . . set for trial" as the trigger to the 10-day grace period. Clearly, November 5 was the "date . . . set for trial" here. The problem arises in the interchangeable use over the years by the cases construing section 1382 of the term "the last day to which defendant may have consented [for trial]," or "the latest trial date to which he consented" with the pivotal phrase, "[the] date . . . set for trial." Perhaps this seemingly haphazard interchange occurred because the problem we confront here, where there is clearly a difference between the date set for trial (November 5) and the last day to which the defendant consented for trial (November 20) was never anticipated.

Before it was amended in 1959, Penal Code section 1382 provided, "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: [¶] 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days. . . ." There was no 10-day grace period, therefore, defendants whose trials did not commence within the 60 days could obtain a dismissal on day 61.

In Ray v. Superior Court (1929) 208 Cal. 357, 358, where defense counsel consented to a resetting of the trial date beyond the 60 days, the Supreme Court held that "[t]he consent of a defendant that his trial . . . be set for a date beyond the sixty-day limit . . . is equivalent to a postponement upon his application within the meaning of that section, and is sufficient excuse for the delay." The court therefore denied defendant's dismissal motion brought on the day she had agreed trial could commence.

In re Lopez (1952) 39 Cal.2d 118, defense counsel consented to continuances of the case, then later announced that he was ready and objected to any further continuances, while moving to dismiss. The Supreme Court called the latter date "the last trial date to which the defendant had consented" (id., at p. 119)[7] and, relying on Ray, held that this was the equivalent of an application to postpone the trial. (Id., at p. 120.) The court commented that a defendant who "consents to a trial date beyond the 60-day time limit thereby waived any statutory right he had to a dismissal on that date."

Lopez decided, albeit unsatisfactorily, questions that had arisen due to the unclear wording of Penal Code section 1382. (Owe ns v. Superior Court (1980) 28 Cal.3d 238, 244.) As the Supreme Court in Owens noted years later, "the statute [itself, apart from the holding in Lopez] was unclear as to whether an accused who obtained a postponement of his trial to a date past the 60-day limit thereby lost forever his statutory rights to a speedy trial and a dismissal. Moreover, section 1382 did not indicate whether these statutory rights were affected by an accused's request for a postponement to a date within the 60-day period. [¶] . . . [T]he Judicial Council urged the Legislature to clarify these ambiguities in section 1382. It 'recommended that the section be amended to provide for dismissal of all cases not brought to trial within the statutory period (unless good cause is shown) except when the defendant has consented to the trial being set beyond the statutory period, and that in the latter situation the case must be dismissed if it is not brought to trial within 10 days after the last date for trial to which the defendant consented. This will clarify the present rule by (a) establishing that dismissal under Section 1382 may be had even though the defendant has previously consented to a delay beyond the statutory period, (b) fixing 10 days as a reasonable time for trial after expiration of the period consented to by the defendant, and (c) eliminating the possibility that delays attributable to a defendant which are wholly within the [60 day] period may prevent dismissal.' ([Judicial Council of Cal., 17th Biennial Rep. (1959)] at p. 32.) [¶] To implement its recommendations, the Judicial Council proposed [the 1959] amendment to section 1382 . . . . The text of the eventual

amendment adopted verbatim the language proposed by the Judicial Council . . . . [T]he language added to subdivision 2 by the 1959 amendment remains intact today. [¶] Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. [Citations.] This is particularly true where [, as here,] the statute proposed by the commission is adopted by the Legislature without any change whatsoever . . . ." (Owens v. Superior Court, supra, 28 Cal.3d at pp. 244-246, emphasis in original and added.)

Unfortunately, when the Judicial Council proposed the amendment to Penal Code section 1382 and it was adopted by the Legislature, it provided that the 10-day grace period was to begin running on "[the] date . . . set for trial" and not, as the council obviously intended, on "the last date for trial to which the defendant had consented." In our case, there is a difference between these two dates. However, because of the Supreme Court's comments in Owens, and that court's continual use of the two terms synonymously (see, e.g., Rhinehart v. Municipal Court (1984) 35 Cal.3d 772, 776-777; Owens v. Superior Court, supra, 28 Cal.3d at p. 250; People v. Wilson (1963) 60 Cal.2d 139, 145; Malengo v. Municipal Court (1961) 56 Cal.2d 813, 815),[8] albeit in factual contexts different from the one before us, we feel compelled to fall in line and interpret the two phrases to mean the same thing.

The 10-day grace period is automatic and the defendant may not rescind it. From a logical standpoint, then, we agree with the People's point, asserted at oral argument, that Griffin could not and therefore did not waive the 10-day period when he consented to trial within the November 5 to November 20 period.

Finally, we recognize that Griffin and his trial attorney may have reasonably believed that the People had until November 20, at the latest, to bring him to trial. However, there is no authority supporting the derogation of the 10-day grace period in the face of contrary belief by defendant as to when he will be tried.

Disposition

The order dismissing this case is reversed.

RAMIREZ, P. J.

We concur:
DABNEY, J.
McDANIEL, J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

1. Mr. White has received wide attention in recent years due to his appearance on the "60 Minutes" television show and the coverage he has received in the New York and Los Angeles Times newspapers, Time magazine and various other publications. The attention has been due to the fact that Mr. White now claims that he has lied often in the past about claims he made as a "jailhouse informant."

2. Compare People v. White (1986) 185 Cal.App.3d 822 with People v. Pettaway (1988) 206 Cal.App.3d 1312. Recently, in Pettaway v. Plummer (9th Cir. 1991) 943 F.2d 1041, the Ninth Circuit, in a well-reasoned opinion, undid the First District's opinion in People v. Pettaway, supra. In light of Pettaway v. Plummer and People v. White, we believe the prosecutor acted prudently in retrying this case strictly on an aiding-and- abetting theory. In the event a fourth trial is attempted, the prosecutor would do well to continue on his/her prudent course.

During oral argument, appellate counsel for Griffin stated that his client could not be charged with this offense for a fourth time. That conflicts with Penal Code section 1387, which prohibits retrials only when two dismissals under Penal Code section 1382 have been granted. Here, Griffin's conviction was twice reversed on appeal, by this court, and only one section 1382 dismissal was granted. Of course, by reversing that order herein, we restore Griffin to the position he was in after the second reversal of his conviction by this court.

3. The People then challenged the evidentiary ruling by Petition for Writs of Mandate and Prohibition, addressed to the California Supreme Court, a copy of which was lodged with our court on January 2, 1991. The Supreme Court denied the petition on February 28, 1991. The People concede in their briefs before us that they cannot bring Griffin to trial for the third time unless they can obtain a favorable ruling on this evidentiary issue.

4. The prosecutor also conceded that had Griffin not agreed to the additional 15 days beyond November 5, he would have had to have been brought to trial under section 1382 by 10 days from the 5th. Reasoning backward, that means that the "date set for trial," as provided by the statute, was November 5.

5. See footnote 4, supra, and text accompanying it.

6. See footnote 4, supra, for that concession, which was repeated twice in the People's briefs on appeal.

7. Relying on Lopez, in 1958, in a case wherein defense counsel consented to trial on a date certain outside the 60 days, the Supreme Court held the defendant "'was not entitled to go to trial as of right on the day to which he last consented. . . .'" (People v. Weiss (1958) 50 Cal.2d 535, 559.)

8. Of course, there are numerous non-binding Court of Appeal decisions which treat the two phrases identically, citing in support these Supreme Court decisions.

Just to demonstrate the casual attitude which even the Supreme Court had about the difference between the two phrases, we quote from another of its decisions, interspersed, chronologically with the others cited: "The 10-day grace period described in section 1382 . . . becomes operative only when defendant has consented, expressly or impliedly, to a trial date beyond the basic 60-day limit." (Townsend v. Superior Court (1975) 15 Cal.3d 774, 780.)

CRIMINAL LAW AND PROCEDURE

Good-Faith Exception Upholds Issuance of Search Warrant

Cite as 91 Daily Journal D.A.R. 14312

THE PEOPLE,
Plaintiff-Respondent,
vs.
JOHN FRANCIS MURTHA,
Defendant-Appellant.

No. A049473
Solano County Superior
Court No. C-27594
California Court of Appeal
First Appellate District
Division Two
Filed November 20, 1991

Appellant John Francis Murtha appeals following his conviction, based upon a plea of nolo contendere, to a charge of residential burglary. (Pen. Code, §§ 459-460.1.) He asserts the court erroneously denied his motion to quash the search warrant and suppress the seized evidence. We shall affirm.

STATEMENT OF THE FACTS

On September 12, 1989, Officer Anthony Welch of the Suisun City Police Department received a telephone call from Sergeant Cimino of the Fairfield Department of Public Safety. Cimino told Welch he had received an anonymous tip that appellant and Anthony Moraga were going to commit a burglary in Suisun City. The informant reported that appellant and Moraga were going to meet at a Round Table Pizza restaurant in Fairfield, and were then going to burglarize a white house with green trim on Buena Vista Avenue in Suisun City. The informant could not provide the address, but indicated that a blue 4-wheel drive vehicle would be parked in front of the house.

Officers Welch and Rowe drove to Buena Vista Avenue and determined that the house at 52 Buena Vista matched the informant's description. The officers performed a security check on the home, and found the rear sliding glass door closed, but unlocked. There were no signs of forced entry and the interior of the home appeared undisturbed. Officer Welch left a business card on the door, requesting the owners to contact him.

Later that day, Officer Smothers of the Suisun Police Department was dispatched to 52 Buena Vista to investigate a residential burglary. The victim, Richard Reed, reported that a pager, a wedding ring and tools were taken from his home.

On September 14 Officer Smothers told Welch a confidential informant had given him a tape cassette containing a conversation between appellant and Moraga in which they discuss robbing a house in the informant's neighborhood. The informant stated that she has known both appellant and Moraga for a long period of time.

The tape contained two conversations between appellant and Moraga. In the first conversation they discuss a "job to do," and note that there are guns and money at Tom's house. The two agree to meet at Round Table Pizza in Fairfield to discuss the "job." In the second conversation the men say they are ready and agree to meet by a fence "right now."

At the preliminary hearing Officer Welch stated he knew it was illegal to surreptitiously tape record other parties' telephone conversations. He nonetheless included the information gathered from the tape in the affidavit he prepared in support of the search warrant because he believed that so long as the tape was made by a private citizen, and not a police officer, it could be used as evidence. Welch testified he discussed the use of the tape with his supervisor who told him he could include the information from the telephone conversation in the affidavit. Finally, Officer Welch admitted he had not disclosed in his affidavit that the tape of the suspects' conversation was illegally recorded.

Officer Welch obtained a search warrant and searched Moraga's home on September 15. During the search a PacTel pager was discovered in Moraga's bedroom and Moraga was placed under arrest. Subsequently, appellant's home was searched and he too was arrested for the burglary. Moraga initially claimed he committed the burglary alone; however, after he listened to the tape-recorded conversations, he admitted appellant had helped him.

STATEMENT OF THE CASE

On September 19, 1989, a complaint was filed in Solano County Municipal Court charging appellant with residential burglary. (Pen. Code, §§ 459-460.1.)

On October 13, 1989, appellant filed a motion to quash search warrant and suppress evidence, and on November 9 filed a supplemental points and authorities in support of the motion. The District Attorney filed opposition papers on November 27. On November 30, following a hearing on the matter, the magistrate denied the motion, concluding (1) the information on the tape was properly included in the affidavit; and (2) Officer Welch had not recklessly omitted information from the affidavit. On December 15 appellant was arraigned in Superior Court on an information filed December 14, 1989.

On January 25, 1990, appellant filed a motion to traverse and quash search warrant and suppress evidence in the superior court; this was denied on February 21, 1990.

On March 1, 1990, appellant entered a plea of nolo contendere. He was thereafter placed on probation for three years, and was ordered to serve a concurrent sentence of 180 days in the county jail. Appellant was also ordered to pay restitution fines and perform 100 hours of community service.

This timely appeal followed.

DISCUSSION

I.

Appellant contends the court erred in denying his motion to quash the search warrant because the affidavit included evidence that was illegally obtained.

In 1968 the United States Congress enacted the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 2510 et seq., the "Act.") Title III of the Act

makes it a crime for any person to surreptitiously intercept others' wire or oral communications unless prior authorization for the interception is obtained in accordance with the provisions of the Act.[1] Section 2515 contains a broad suppression provision that guards against the use of any illegally intercepted evidence: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." As appellant correctly notes, the Act applies to private parties, since section 2511 forbids interception by "any person," and a "person" is defined as "any employee, or agent of the United States or of a State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation." (18 U.S.C. § 2510(6), italics added.)

Appellant argues Title III absolutely precludes the use of the tape recorded conversations to support the search warrant in this case. In response, the People maintain the Act does not apply here because the tape was made by a private party and the police were not involved in any wrongdoing.

Several federal cases have examined the application of Title III where the tape recording is made by a private party, rather than the government. In U.S. v. Vest (1st Cir. 1987) 813 F.2d 477 the defendant, a police detective, was indicted for making false statements before a grand jury. He moved to suppress a privately made recording of a transaction proving (contrary to his statements under oath) that he accepted payments on behalf of another detective to insure police efforts to protect an accused man from imprisonment. The accused man, Waters, testified at the suppression hearing that he made the tape to create a record in the event the officers denied that payment had been made.

The government claimed the exclusionary rule of section 2515 was inapplicable because it was the "innocent recipient, rather than the procurer," of the illegally intercepted communication. (813 F.2d at p. 480.) The government argued, as the People do in this appeal, that because the purpose of section 2515 was to deter further violations of the Act, the statutory objectives would not be served by applying the exclusionary rule against the government where it is merely the innocent recipient of the recording.

The court in Vest rejected this argument, concluding section 2515 was not solely intended to deter violations of the Act. The court noted that "the protection of privacy was an overriding congressional concern" when Title III was passed (813 F.2d at p. 481, quoting Gelbard v. United States (1972) 408 U.S. 41, 47-52) and observed that "an invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere. The impact of this second invasion is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor. . . . " (813 F.2d at p. 481.)

The court in U.S. v. Underhill (6th Cir. 1987) 813 F.2d 105 reached the opposite conclusion on similar facts. In that case, the defendants, participants in an illegal gambling enterprise, sought to suppress recordings of telephone conversations some of them had made in the course of running their gambling operation. The court refused to suppress the evidence on two grounds. First, the court concluded "Congress did not intend for § 2515 to shield the very people who committed the unlawful interceptions from the consequences of their wrongdoing." (813 F.2d at p. 112.) The court also reasoned that Underhill waived his right of privacy with respect to these conversations by "[his] deliberate act of causing them to be recorded." (Id.)

Similarly, in Traficant v. C.I.R. (6th Cir. 1989) 884 F.2d 258, a member of Congress charged with failure to report bribes sought to suppress a recording surreptitiously made by one of his bribers. The court refused to suppress the recording, concluding Title III was not intended "to protect wrongdoers whose criminal activity is tape recorded by their own confederates." (884 F.2d at p. 266.)

Finally, in U.S. v. Nietupski (C.D. Ill. 1990) 731 F.Supp. 881, the defendant sought to suppress tapes of drug dealing activities surreptitiously made by a co-conspirator. The court refused to suppress the recordings and expressly disagreed with the analysis in Vest, concluding that the legislators who voted in favor of the Act never intended, in the interest of privacy, to exclude "criminal communications recorded by criminals for criminal purposes." (731 F.Supp. at p. 886.) While this result is contrary to the literal words of the statute, the court reasoned that a result contrary to the literal interpretation is justified when "'the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. . . .'" (Id., at p. 884, quoting Griffin v. Oceanic Contractors, Inc. (1982) 458 U.S. 564, 570.)

As the above discussion reveals, Vest, Underhill, Traficant and Nietupski all involved conversations recorded by either the defendant or a co-conspirator. The facts in the instant case are patently distinguishable because the confidential informant was (so far as the record reveals) a third party who was not involved in appellant's criminal venture.

Our analysis of the statute begins with the words of the provision. "It is the duty of a court in construing a federal statute to discover and carry out the intent of Congress. When the intent of Congress is expressed in 'reasonably plain terms,' a court must ordinarily treat that language as conclusive." (U.S. v. Underhill, supra, at p. 111, quoting Griffin, supra, at p. 570.) "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning." (U.S. v. Amer. Trucking Ass'ns. (1940) 310 U.S. 534, 543, fn. omitted.) The wording of section 2515, which bars the use in any court of the contents of any illegally intercepted wire communication, or any evidence derived therefrom, provides no room for an interpretation that would permit the use in this case of the admittedly illegal recordings of appellant's telephone conversations. Furthermore, there is no reason in this case to deviate from the plain meaning of the words Congress chose, as a literal interpretation of the statutory language clearly and directly promotes the privacy interests Congress sought to protect.

Accordingly, we conclude that under Title III the recorded conversations could not properly be used to support the search warrant herein.

This conclusion is also supported by State v. Thomas (Ohio App. 1989) 1989 Ohio App. LEXIS 2658, a case the People erroneously cite in support of their position. In Thomas, the police were informed (based on a privately -- and illegally -- intercepted phone conversation) that Thomas was going to violate a condition of his parole by meeting with his former girlfriend. Based on this tip an officer followed Thomas and arrested him for violating his parole. A search of Thomas' car revealed four grams of marijuana. In reviewing Thomas' conviction the court concluded the contents of his phone conversation could not be used, and stated, "the federal wiretap law, and, we assume, the Ohio statute, prohibits further disclosure of the contents regardless of whether the illegal interception was made by a state official or private individual." (1989 Ohio App. LEXIS 2658, pp. 6-7, italics added.) However, the court refused to suppress the marijuana discovered during the search, erroneously concluding that with respect to the marijuana, "the intercepted conversation became irrelevant except as to how the officer initially became aware of the meeting." (Id., at p. 7.)

The People argue section 2515 should be interpreted consistent with the Fourth Amendment exclusionary rule, which does not apply to evidence obtained by a illegal search and seizure conducted by a private party. They assert such a limitation is in accord with the statute's purpose and the Congressional intention not to "press the scope of the suppression [rule] beyond present search and seizure law." (1968 U.S. Code Cong. & Admin. News at p. 2185.) This argument is unavailing. First, permitting the use of the recorded conversations in this case would be directly inconsistent with the statutory objective to guard against invasions to personal privacy, an invasion that is exacerbated every time the intercepted communication is used. Second, as the Attorney General acknowledges, section 2515 was never intended to be co-extensive with the Fourth Amendment exclusionary rule. (United States v. Dorfman (7th Cir. 1982) 690 F.2d 1217, 1227 [Title III's suppression provision has "roots in the Fourth Amendment exclusionary rule," but is not co-extensive with that rule].) The Fourth Amendment exclusionary rule is intended to deter future constitutional violations, an objective that would not be furthered by penalizing the police for a private violation. In contrast, suppression under Title III is necessary not only to guard against future violations, but also to minimize the invasion of privacy inherent in each re-use of the intercepted material. As the First Circuit has observed, "the fourth amendment exclusionary rule is a judicially-fashioned rule serving different purposes than the congressionally-created rule of section 2515 . . . ." (U.S. v. Vest, supra, 813 F.2d at p. 481; accord United States v. Giordano (1974) 416 U.S. 505, 524 [distinguishing between the "judicially fashioned exclusionary rule" and the provisions of Title III].)

In a related argument, the Attorney General emphasizes that the legislative history of the Act provides that in order to compel compliance with the statute, "the perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." (Senate Report 1097, at p. 69, italics added.) The People rely on this language as support for their claim that section 2515 was designed to punish those who defy the law and to deter future violations of the Act, objectives that would not be advanced by denying an innocent party's use of the tape. We cannot accept this interpretation of the congressional intent. As the Supreme Court has acknowledged, "[section] 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct . . . ." (Gelbard v. United States, supra, 408 U.S. 41, 51, italics added, fn. omitted.) Clearly, if the courts are to avoid becoming "partners to illegal conduct," they may not countenance the use of illegally obtained information even when the information is proferred by an innocent party.

The cases cited by the People that have allowed the use of illegally intercepted communications have involved either petty violations of the Act that did not substantially affect congressional objectives,[2] or taped conversations that were recorded by a party to the conversation (and, in some instances, by the defendant himself.)[3] We thus do not find them relevant or persuasive.[4]

II.

Appellant also contends Officer Welch cannot claim he relied in good faith on the magistrate's determination that probable cause had been shown because the officer omitted pertinent facts from the affidavit. In particular, appellant complains the affidavit prepared by Officer Welch failed to explicitly indicate appellant's telephone conversations had been surreptitiously and illegally recorded, and did not express the officer's concern that the tape could not legitimately be used to support the warrant. The court rejected these contentions and concluded the "good faith" exception recognized in United States v. Leon (1984) 468 U.S. 897 permitted the officer to rely on the magistrate's determination that the affidavit supported the issuance of the warrant.

In Leon, which we analyzed at some length in People v. Maestas (1988) 204 Cal.App.3d 1208, 1213-1221, the Supreme Court held that suppression is not required when an officer relies in good faith on a facially legitimate warrant that is later determined to be deficient. The court reasoned that in such cases suppression is unwarranted because "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." (468 U.S. at p. 921, fn. omitted.)

In the instant case the affidavit stated that the police received an anonymous tip regarding a planned burglary; that the tip was borne out the subsequent burglary at the location the informant indicated; that a cassette of appellant's telephone conversations concerning the burglary was provided to the police by the informant, who indicated she personally knew appellant. Appellant contends this affidavit was deficient because the officer was further obligated to reveal his own concerns (1) that the tape was illegally recorded, and (2) that such evidence could not be used to gain a search warrant. We disagree.

At the preliminary hearing Officer Welch testified that although he initially had some doubts as to the propriety of using the evidence on the cassette, by the time he prepared the affidavit he was satisfied the police could legally use the tape because the

recording was made by a private party, with no police involvement. As the Supreme Court observed in Leon, "'If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" (Leon, supra, at p. 919, quoting United States v. Peltier (1975) 422 U.S. 531, 542.) Officer Welch's testimony supports the conclusion that he prepared the affidavit believing in good faith that it was proper to rely on the cassette provided by the informant. Although we have determined the officer's legal conclusion was wrong, he cannot be faulted for failing to correctly anticipate our ruling on this question. As the Tenth Circuit Court of Appeal has noted, an officer's "appreciation for constitutional intricacies [is] not to be judged by the standards applicable to lawyers." (United States v. Cardell (10th Cir. 1985) 773 F.2d 1128, 1133.)

Furthermore, so long as an affidavit sets forth the facts necessary for the magistrate to evaluate whether probable cause exists, the officer is not obligated to offer his personal opinion regarding the legal sufficiency of the affidavit. It is, after all, "the magistrate's responsibility to determine whether the officer's allegations establish probable cause . . . ." (Leon, supra, at p. 921, italics added.) Here, the magistrate was provided with the facts necessary for him to assess whether probable cause had been shown.[5] Officer Welch was entitled to, and did, rely in good faith on that assessment in executing the warrant. Under Leon, suppression is therefore unwarranted.

DISPOSITION

Although the warrant was improperly founded on a telephone conversation recorded in violation of Title III, the officer relied in good faith on the magistrate's erroneous determination that the recording could be used to support the search warrant. Accordingly, under United States v. Leon, supra, the warrant need not be suppressed. Appellant's conviction is therefore affirmed.

KLINE, P. J.

WE CONCUR:

SMITH, J.
PETERSON, J.

Trial Court:
Solano County Superior Court

Trial Judge:
Honorable Richard M. Harris

Attorney for Defendant
and Appellant:
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1. The Act allows certain federal agencies to obtain an order for a legal wiretap to aid in the investigation or prevention of certain specified types of serious crimes. Under 18 United States Code section 2516 the United States Attorney General or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge for the FBI or other appropriate federal investigatory agency to legally intercept wire or oral communications. The application must contain details of the suspected offenses and reasons as to why other investigative procedures have not been or are not being used. (18 U.S.C. § 2518 (1)(a)-(f).)

2. For example, in United States v. Chavez (1974) 416 U.S. 562 the court permitted the use of information gathered through the use of a wiretap despite a technical violation of the Act. In that case, the application for the wiretap erroneously indicated the Assistant Attorney General had authorized the intercept, when in fact the Attorney General had done so. The court held suppression was unnecessary because a statutorily eligible person had in fact authorized the wiretap application. (416 U.S. at pp. 579-580.)

3. As we previously have explained, Underhill, Traficant and Nietupski are all inapposite, since they involved recording made by the defendant or a co-conspirator. In such circumstances suppression would be inappropriate since it would lead to a result Congress clearly did not intend.

4. Exceptions to the rule requiring suppression have been recognized where the information is used in prosecutions for violations of the Act (United States v. Liddy (D.C. Cir. 1973) 354 F.Supp. 217, 221) and for purposes of impeachment (United States v. Grubbs (5th Cir. 1985) 776 F.2d 1281, 1286; United States v. Winter (5th Cir. 1981) 663 F.2d 1120, 1154.) Neither of those exceptions apply here.

5. For this reason we also reject appellant's assertion that he was entitled to an evidentiary hearing under Franks v. Delaware (1978) 438 U.S. 154. Under Franks, such a hearing only is required where there is evidence the affidavit contains deliberate falsehoods or was prepared with reckless disregard for the truth of the statements contained therein. (Id., at pp. 171-172.) No such showing was made here.

BANKING

Saving and Loan's Misrepresentations Can't Be Challenged in Fraud Action

Cite as 91 Daily Journal D.A.R. 14316

HAROLD D. BARTRAM et al.,
Plaintiffs and Appellants,
v.
FEDERAL DEPOSIT INSURANCE CORP., et al.,
Defendants and Respondents.

No. G009613
Super. Ct. No. X-480140
California Court of Appeal
Fourth Appellate District
Division Three
Filed November 20, 1991

APPEAL from a judgment of the Superior Court of Orange County, Jonathan H. Cannon, Judge. Affirmed.

Snell & Wilmer and Raymond J. Ikola for Plaintiffs and Appellants.

Arter, Hadden, Lawler, Felix & Hall, Edwin W. Duncan and J. Michael Echevarria; Ann S. DuRoss, Assistant General Counsel of Federal Deposit Insurance Corporation, Colleen B. Bombardier, Senior Counsel, and Christopher J. Bellotto, Counsel, for Defendants and Respondents.

Is the Federal Deposit Insurance Corporation (FDIC), acting as manager of the Federal Savings and Loan Insurance Corporation (FSLIC) Resolution Trust and receiver for an insolvent savings and loan, protected from a claim of fraud when the debtors have performed their obligations? Relying on D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp. (1942) 315 U.S. 447, we conclude that it is.

I.

Harold and Donna Bartram and Joseph and Vita Tessitors (hereafter the Bartrams) engaged a realtor to sell or exchange two of the four parcels of land they owned. On May 31, 1985, the Bartrams and John Molinaro, the chairman of the board of Ramona Savings and Loan, executed a real estate exchange contract. Ramona would receive the Bartrams' two undeveloped parcels of land valued at $2,279,600 in exchange for 32 condominium units owned by Ramona and valued at $3,410,450. A $1,130,850 note provided the difference in value between the land and the condominiums.

A few weeks later and before escrow closed, the Bartrams were told their parcels had been over-valued and the promissory note had to be increased to $1,730,000. Subsequently, Molinaro explained that Ramona would be developing the parcels it was purchasing and the value of the land retained by the Bartrams would therefore increase. On June 25, the real estate contract was amended: The land's value was decreased, and the amount of the note was increased. No mention was made of Ramona's intent to develop the property. On July 1, escrow closed. Subse-quently, the Bartrams paid the $1,730,000 note.

Ramona did not develop the property; in fact, less than a month after the close of escrow, Ramona sold the property to a third party. Unhappy, the Bartrams filed the underlying suit in June 1986, alleging fraud and negligence. The Bartrams sought $600,000 in compensatory damages, the difference between the property's alleged market value and the contract price, plus punitive damages and costs.

Ramona and Molinaro cross-complained against the Bartrams for fraud, negligent misrepresentation, and rescission. The cross-complaint also sought declaratory relief for indemnification from Rancho and Walmer.

On September 12, the Federal Home Loan Bank Board placed the state-chartered Ramona into receivership, appointed the FSLIC receiver and created a new federally-chartered entity, Ramona Federal Savings and Loan Association (Ramona Federal).

On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which abolished FSLIC and established for institutions like Ramona, the FSLIC Resolution Fund. The FDIC was appointed manager of the FSLIC Resolution Fund (12 U.S.C. § 1441a(b)(6)), and in that capacity replaced Ramona as defendant and cross-complainant. The FDIC's answer alleged that the doctrine set forth in D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., supra, 315 U.S. 447, as well as 12 United States Code section 1823(e), barred the Bartrams' action. The trial court granted the FDIC's motion for judgment on the pleadings. Thereafter, the FDIC dismissed the Ramona cross-complaint with prejudice. Rancho, Walmer, and the Bartrams settled. The Bartrams were awarded a $600,000 default judgment against Molinaro.

II.
The D'Oench Doctrine

In D'Oench, Duhme & Co., a securities dealer sold bonds to a bank. After default on the bonds, the firm's president executed a note in favor of the bank so that the transaction could be carried on the bank's books as an asset rather than as a liability. An oral agreement that the note need not be paid was reflected on a receipt, but not on the note. Thereafter, the bank charged off the note.

The bank was declared insolvent and the FDIC was appointed as receiver. When the FDIC sued on the note, the oral agreement was raised as an affirmative defense. The court held that a federal policy, evidenced by the Federal Reserve Act, existed to "protect [the FDIC] from misrepresentations made [by the bank] to induce or influence [third parties], including misstatements as to the . . . integrity of securities . . . ." (D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., supra, 315 U.S. at p. 459.) Allowing a secret agreement as a defense would enable the notemaker to defeat the statute's purpose. The purpose of the federal policy articulated by the Supreme Court in D'Oench "is to allow federal and state bank examiners to rely on a . . . bank's assets." (Langley v. Federal Deposit Ins. Corp. (1987) 484 U.S. 86, 91.) "'The doctrine encourages debtors to memorialize all agreements in writing and reflects the equitable principle that losses incurred as a result of unrecorded arrangements should not fall on deposit

insurers, depositors, or creditors but rather upon the person who could have best avoided the loss. [Citations.]'" (Webb v. Superior Court (1990) 225 Cal.App.3d 990, 995.)

Recently, an even "more expansive protection of federal bank insurers developed in the federal common law following D'Oench." (Vernon v. Resolution Trust Corp. (11th Cir. 1990) 907 F.2d 1101, 1106.) "The doctrine has been expanded to encompass any claim against an insolvent institution that would either diminish the value of the assets held by the FSLIC or increase the liabilities of the insolvent institution. [Citation.]" (Castleglen, Inc. v. Commonwealth Sav. Ass'n (D.Utah 1989) 728 F.Supp. 656, 671, italics added.)

III.

D'Oench Bars the Bartram Claim

The Bartrams acknowledge the D'Oench doctrine but maintain it is inapt here. They concede "D'Oench bars any defense or claim based upon a 'secret agreement' which seeks to defeat or diminish the value of a particular asset held by the federal insurer where the claim or defense is asserted as a dollar-for-dollar offset against the specific asset sought to be collected by the federal insurer; but [argue] to the extent the affirmative claim represented by the 'secret agreement' is otherwise established as a valid claim, the holder of the claim is entitled to share pro-rata in the general assets of the receivership estate together with all general creditors."

The Bartrams recognize they could not defend on the basis of the secret agreement if they were being sued on the note. They concede they could not rely on the secret agreement if they were suing to invalidate the note. They urge, however, such is not the case. They are plaintiffs suing in tort for compensation for damages resulting from the bank's misrepresentation. They maintain that because they do not seek dollar-for-dollar compensation, they should not be denied the opportunity to stand as general creditors and be compensated pro-rata with all of the other bank's creditors. Several courts have already addressed these arguments. In Hall v. Federal Deposit Ins. Corp. (6th Cir. 1990) 920 F.2d 334, the plaintiffs were parties to a loan contract requiring the lender to fully fund their project. Because the Halls never provided the required security interest, the lender failed to fully fund the project. The Halls received funding elsewhere, paid off the original lender, and then sued the lender for breach of contract. The Halls claimed an oral agreement excused them from providing the security. The court held, even if such secret agreement existed, D'Oench barred the claim. (Id. at p. 340.)

The Hall court acknowledged that in most cases where the D'Oench doctrine has been applied, "an interest in an asset of an insolvent bank" existed. (Hall v. Federal Deposit Ins. Corp., supra, 920 F.2d. at p. 339, italics added.) But the court explained that was only because "typically [the] FDIC was suing to collect on a note . . . ." (Ibid.) It observed the "logic of D'Oench should still apply to protect FDIC" (ibid.) even when an interest in an asset ceases to exist.[1]

The Hall court recognized the sound policy reason for applying D'Oench to our facts. "If . . . D'Oench did not apply to bar the introduction of evidence of a side agreement in a claim against FDIC (or FSLIC), then an obligor could circumvent the sound policy behind D'Oench by asserting as a counterclaim that which could not be asserted as an affirmative defense. . . . [¶] . . . [Thus e]xaminers for FSLIC could easily have over-estimated the value of the loan agreement [or property] on the books because of the alleged unevidenced [agreement to develop the property]. . . . The D'Oench doctrine is intended to avoid exactly this sort of potential confusion." (Id. at p. 340.)[2]

Bell & Murphy & Assoc. v. Interfirst Bank Gateway (5th Cir. 1990) 894 F.2d 750 is also instructive. After Bell sought help from a bank in solving severe cash flow problems, the parties entered into an agreement. Bell was to surrender its accounts receivable and its pension and profit sharing plans to the bank, which would extend open loans and honor checking overdrafts. This arrangement was memorialized in a letter but was not reflected in the bank's records. After the bank failed to live up to the terms of the letter agreement, the plaintiffs sought damages for fraudulent misrepresentations. The FDIC intervened as receiver and was successful in its summary judgment motion. The trial court concluded the bank could not be held to its agreement to extend loans and to fund overdrafts; the agreement was unrecorded in the bank's records.

On appeal, Bell argued "the D'Oench Duhme rule bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a specific asset acquired from a bank." (Id. at p. 753.) Because the side agreement could not have misled the FDIC, Bell maintained D'Oench was inapt. The court made short shift of this argument, finding it to be meritless. (Ibid.)

Because the Bell agreement was not clearly evidenced in the bank's records, it was not apparent to the bank examiner who could have been misled. "Thus, it could not have been discovered by [the examiner] and is not enforceable against the FDIC." (Ibid.) And the same is true here. Indeed, to miss this point is to fail to understand D'Oench's significance. Oral agreements cannot be enforced because bank examiners must be able to rely on the bank's written records.[3]

At oral argument, the Bartrams urged us to note that general creditors were junior to the FDIC. Thus, were the Bartrams to prevail, public monies would be repaid prior to their pro-rata share. We find no authority for that suggestion.

Indeed, the FDIC is a general creditor. (Federal Deposit Ins. Corp. v. Jenkins (11th Cir. 1989) 888 F.2d 1537, 1546.) As such, it has no priority over other creditors of insolvent institutions.

Recently, Walsh v. New West Federal Savings & Loan Assoc. (Sept. 13, 1991, D011477) ___ Cal.App.3d ___ considered a fact situation similar to ours. The plaintiffs sued a savings and loan alleging fraud, conspiracy to defraud, and breach of contract after the financial institution failed to transfer certain property to them as promised. The FSLIC, who had taken possession of all the savings and loan assets, successfully raised the D'Oench doctrine as a complete defense. "[T]his case comes within the . . . doctrine because (1) the [plaintiffs] are attempting . . . to recover for oral misrepresentations . . . (2) which would reduce the value of assets formerly held by [the savings and loan]." (Id. at p. ___.)

As the Walsh court observed, "Admittedly this case does not fit within the usual pattern into which a D'Oench Duhme defense is generally asserted. The

Walshes do not allege a borrower/lender relationship between themselves and State Savings. Moreover, the focus of their action is not the enforceability of a promissory note to which they made a contemporaneous oral agreement. Nonetheless, mindful of the federal court's expansive interpretations of the doctrine and consistent with the authorities cited, conclude this case comes within the D'Oench Duhme doctrine . . . ." (Id. at p. ____.) All of the elements of D'Oench were present: an oral agreement unsubstantiated in the records, an opportunity for the bank examiner to be misled, and a potential for loss by the financial institution.

The Bartrams rely on Vernon v. Resolution Trust Corp., supra, 907 F.2d 1101. There, the Vernons bought stock in a savings and loan institution. After it proved worthless, they sued, alleging misrepresentations by the institution's officers, legal counsel, and bankers regarding its condition induced them to purchase the stock. They complained the bank's true financial condition was not disclosed. The court refused to apply the D'Oench doctrine. "Appellants are not obligees trying to avoid their commitment . . . . The . . . Agreement [has been] fully executed. . . . [Instead a]ppellants wish to obtain compensation from the general assets of [the institution] . . . for the damages they claim to have suffered as stockholders due to the alleged tortious acts of [the institution]." (Id. at pp. 1107-1108.)

Vernon does not compel a different result. First, it is distinguishable. The Vernons' suit was not predicated upon an oral agreement. Rather their complaint was that the financial records presented to them were fraudulent. Nor did they claim they were told one thing but shown another, as in our case.

Second, Vernon does not stand for that which the Bartrams allege it does. They maintain Vernon allows all tort plaintiffs who sue as general creditors to maintain a suit against an insolvent financial institution's assets. This is incorrect. Vernon simply allowed such a claim under the facts presented there. To the extent Vernon goes any further, it is wrong.

Relying on Astrup v. Midwest Federal Sav. Bank (8th Cir. 1989) 886 F.2d 1057, Vernon implies that D'Oench affords no protection against tort claims. However, that statement, taken from Astrup, must be read in context. The Astrup plaintiffs sued a financial institution for breach of contract, alleging it failed to provide favorable financing as orally promised, and for breach of a fiduciary duty. The Astrup court disallowed the contract claim, noting D'Oench "precluded recovery by [plaintiff] on the basis of agreements which contradicted the [institution's] records . . . ." (Id. at p. 1059.)

The court did not, however, bar the tort action, finding "the law imposes a fiduciary duty on parties to a joint venture towards other parties in the venture." (Astrup v. Midwest Federal Sav. Bank, supra, 886 F.2d at p. 1059.) The Astrup court did say D'Oench bars recovery for causes of action based in contract but not those founded in tort. Reading the case as a whole, it is clear that is not what the court meant. The court itself explains that some tort actions may be precluded. The "doctrine affords no protection against tort claims against a financial institution, whether for personal injuries to a motorist in a collision with an armored car . . . or for insider profits in a sale of securities . . . ." (Id. at pp. 1059-1060.) In other words, torts unrelated to agreements which could have been memorialized in the bank's records are not protected by D'Oench. However, the doctrine does not provide blanket tort protection anymore than it bars all breach of contract claims.[4]

The Bartrams give great weight to Vernon's reliance on former 12 United States Code section 1729(d) which empowered the FSLIC to pay claims proved to the FSLIC's satisfaction and allowed claimants, if necessary, to bring suit to have a court determine the validity of their claims.[5] The statute's intended thrust was to compel the payment of valid claims and to provide claimants an opportunity to be heard when the FSLIC failed to pay. The Vernon court reasoned the FDIC, which receives the benefit of federal policy when defending on an unrecorded obligation, has the burden of paying on a valid claim. True enough, but the Vernon court mixed dollars and cents. Just because the FDIC is mandated to honor valid claims does not validate unrecorded side agreements.

Simply stated, the Bartrams should have insisted the bank's representation that it intended to develop the purchased property be put in writing as part of the bank's records. Having failed to do that, they can neither seek to enforce this oral agreement nor ask for compensation because of it. And this is true whether the complaint is framed in tort or contract, whether asserted affirmatively or as a defense, or whether they are general creditors or plaintiffs seeking a specific asset. The D'Oench doctrine bars their claim.[6]

The judgment is affirmed. Respondents to receive costs on appeal.

SONENSHINE, J.

WE CONCUR:

SILLS, P. J.
CROSBY, J.

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1. One example cited by the court is particularly apt here. "[A]n obligor and a bank in receivership might have mutual breach of contract claims growing out of loan documents in the bank's records. The obligor, anticipating a suit by FDIC, might quickly pay off the note in an attempt to block FDIC's resort to the D'Oench doctrine. Under these circumstances, the fact that the obligor paid off the debt so as that [sic] FDIC did not have 'an interest in an asset' should not prohibit FDIC from invoking D'Oench." (Ibid.)

2. As Hall observed, however, its holding does not preclude all claims against the FDIC, only those based on oral side agreements which could have been recorded. (Id. at pp. 340-341.) Indeed, the Hall dissent seems to have missed this point. Justice Jones argued that D'Oench should be limited to circumstances where the FDIC had acquired an asset. (Id. at p. 341.) As explained by the majority, that argument is irrelevant to the D'Oench doctrine.

3. We realize the Bartrams are innocent of any wrongdoing. Unlike the D'Oench plaintiffs, they did not join with the bank to mislead the banking authorities. But "courts in numerous subsequent decisions have applied the D'Oench, Duhme rule in cases in which the borrower was innocent of any wrongdoing, holding that the relevant question is not whether the secret agreement was itself fraudulent or whether the borrower intended to deceive banking authorities, but rather whether the borrower 'lent himself to a scheme or arrangement' whereby those authorities were likely to be misled. [Citations.] The D'Oench, Duhme doctrine thus favors the interests

of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can. [Citations.] [¶] Hence, it is irrelevant to the applicability of the D'Oench, Duhme rule whether [the plaintiffs] acted in good faith and even whether [they were] 'coerced,' under 'economic duress,' into accepting the terms of the agreement . . . . [They] could have protected [themselves] by insisting that the bank properly record the agreement; because [they] did not, [they are] estopped from asserting any claims arising out of the bank's alleged secret promise to make future loans." (Bell & Murphy & Assoc. v. Interfirst Bank Gateway, supra, 894 F.2d 750 at pp. 753-754.)

4. We note Federal Deposit Insurance Corp. v. Meo (9th Cir. 1974) 505 F.2d 790, where the plaintiffs executed a promissory note to the bank to enable them to purchase bank common stock. The bank instead issued voting trust certificates. The purchaser never saw these because they were held as collateral. When the bank sued on the unpaid note, the purchasers raised the misissued stock as a defense. The court agreed, finding no consideration. "Appellant was a bona fide purchaser-borrower; he did not enter into anyscheme or secret agreement whereby the assets of the bank would be overstated; . . . he was not negligent in failing to discover the manner in which the stock order was actually executed; and, most importantly, appellant had no knowledge whatsoever of the failure of consideration until after the bank was closed and appellee instituted this suit." (Id. at p. 792.)

5. Former 12 United States Code section 1729(d) provided: "In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority." The repealed section has been replaced by 12 United States Code section 1821(d) which outlines the powers and duties of a receiver.

6. In light of the above, we need not consider whether 12 United States Code section 1823(e) bars the Bartrams' claim. This section provides: "No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement -- [¶] (1) is in writing, [¶] (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, [¶] (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and [¶] (4) has been, continuously, from the time of its execution, an official record of the depository institution."

MODIFICATION

COMMERCIAL LAW

Costs of Collection Include Fees to Defend Note Validity

Cite as 91 Daily Journal D.A.R. 14219

FINALCO, INC.,
Plaintiff, Cross-Defendant/Respondent,
v.
T. STEVEN ROOSEVELT,
Defendant, Cross-Complainant/and Appellant.

No. B050679
LASC C701567
California Court of Appeal
Second Appellate District
Division Seven
Filed November 20, 1991

THE COURT:

It is ordered that the opinion filed herein on October 22 , 1991, be modified in the following particular:

1. On page 4*, delete the last 5 lines beginning "3." and, continuing on to page 5, delete the first 11 lines and insert in place thereof the following:

3.Finalco Took Roosevelt's Note Free From Any Defenses Roosevelt May Have Had Against Dover.

Roosevelt contends Finalco was not a holder in due course of the note because at the time it accepted assignment of the note from Dover it was on notice Roosevelt was in default on his payments. (Com. Code, § 3302, subd. (1)(c).) There is no evidence to support this claim. Although the record does not reflect the date Roosevelt's note was assigned from Dover to Finalco it had to have been prior to June 25, 1986, because on that date Michigan National Bank, to whom Finalco endorsed the note, in turn endorsed the note to Marine Midland Bank. The first indication of Finalco's knowledge of Roosevelt's default is Finalco's letter of January 21, 1987. Furthermore, Roosevelt testified he was not in default on the note in 1986.

Roosevelt next contends even if Finalco took the note from Dover as a holder in due course Finalco lost that status when it assigned the note to the Michigan National Bank because after the assignment Finalco was no longer a holder. (Com. Code § 1201(2) ["'Holder' means a person who is in possession of a document . . ."].) Furthermore, when Finalco subsequently reacquired Roosevelt's note several months before trial it did not take as a holder in due course because by then Finalco clearly knew Roosevelt was in default. (Com. Code, § 3302(1) ["A holder in due course is a holder who takes the instrument . . . (c) without notice that it is overdue . . ."].)

Roosevelt's argument ignores section 3201(1) of the Commercial Code which provides, "Transfer of an instrument vests in the transferee such rights as the transferor has therein . . . ."

This "shelter" provision is identical to section 3-201(1) of the Uniform Commercial Code. "Its policy is to assure the holder in due course a free market for the paper." (Uniform Commercial Code Comment, [¶] 3,

quoted in 23B West's Ann. Com. Code (1964 ed.) § 3201, p. 106; and see Rozen v. North Carolina Nat. Bank (4th Cir. 1978) 588 F.2d 83, 86.) Thus, when a transferee takes an instrument from a holder in due course the transferee takes free from all claims and defenses to the same extent as did the holder in due course even if the transferee is aware of those claims and defenses. If this was not the rule, a holder in due course could be deprived of a market for the instrument if the obligor widely disseminated notice of a claim or defense. Such a result would not benefit the obligor, who would still be liable to the holder in due course, but it would harm the holder in due course by destroying a market for the instrument. (Rozen v. North Carolina, supra, 588 F.2d at p. 86; 4 Hawkland, Uniform Commercial Code Series (1984) § 3-201:03, p. 272.)

Under Commercial Code section 3201(1) it is irrelevant that Finalco could not reacquire the note as a holder in due course. The shelter provision does not make the transferee a holder in due course, it transfers the freedom from claims and defenses of the original holder in due course to each succeeding transferee. Finalco was simply another transferee in a chain of transfers of the Roosevelt note. Where the transferee happens to have been a prior holder in due course, it takes back from its transferor the same rights it transferred. Here, Finalco was in no better or worse position vis a vis Roosevelt's claims and defenses against Dover than if Finalco had originally retained possession of Roosevelt's note.

There is no change in judgment.

Appellant Roosevelt's petition for rehearing is denied.

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* See Daily Appellate Report on page 13197, column 2, delete the whole subsection 3; October 29, 1991.

Cite as 91 Daily Journal D.A.R. 14320

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a Corporation,
Plaintiff-Appellant,
v.
STITES PROFESSIONAL LAW CORPORATION, a California corporation,
Defendant-Respondent.

No. B050749
Super. Ct. No. C709717
California Court of Appeal
Second Appellate District
Division Five
Filed November 20, 1991

THE COURT:

The opinion in the above entitled matter filed on October 25, 1991, and certified for publication on November 18, 1991, is modified in the following particulars:

Slip opinion page 5*, footnote 2, lines 16-17, delete the sentence: "In the present case, Stites did not file such a request." Add the following language to line 31 of footnote 2: "In the present case, Stites did not initiate a challenge to the arbitration award."

Slip opinion page 9**, lines 20-22, delete the language "In the present case, section 6203, subdivision (b), explicitly incorporates the provisions of Code of Civil Procedure section 1285 et seq." Add the following language in its place: "Section 6203, subdivision (b), explicitly incorporates the provisions of Code of Civil Procedure section 1285 et seq."

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* See Daily Appellate Report on page 14166, line 14, column 2; November 20, 1991.

** See Daily Appellate Report on page 14165, line 32, column 1; November 20, 1991.

MODIFICATION
ATTORNEYS

Insurer and Cumis Counsel Dispute Is Not Subject to State Bar Arbitration

CIVIL PROCEDURE

Stay Motions Are Properly Granted Pursuant to Forum Non Conveniens

Cite as 91 Daily Journal D.A.R. 14320

MELLET STANGVIK et al.,
Plaintiffs-Appellants,
v.
SHILEY INCORPORATED et al.
Defendants-Respondents.

Ct. App. 4/3
No. G008426

JENNY MIKAELA MARIE THERESE BIRGITTA KARLSSON et al.,
Plaintiffs-Appellants,
v.
SHILEY INCORPORATED et al.,
Defendants-Respondents.

Orange Super. Ct.
Nos. 530881, 530887

No. S018015
California Supreme Court
Filed November 21, 1991

In this case we address the question of the appropriate standards to be applied in deciding whether a trial court should grant a motion based on the doctrine of forum non conveniens when the plaintiff, a resident of a foreign country, seeks to bring suit against a California corporation in the courts of this state. We granted review to resolve a conflict between the opinion of the Court of Appeal in the present case on the one hand, and Corrigan v. Bjork-Shiley Corp. (1986) 182 Cal.App.3d 166, and Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal.App.3d 372, on the other.

Plaintiffs, members of two families, one residing in Norway and the other in Sweden, are the wives and children of two men who received heart valve implants in the countries of their residence. The valves were designed and manufactured in California by defendant Shiley Incorporated (Shiley), a California corporation. In both cases, the valves allegedly failed, and the patients died. Thereafter, plaintiffs filed suit in California against Shiley and its parent company, a Delaware corporation (hereinafter defendants), alleging that the valves were defective. They sought damages based on theories of negligence, strict liability, breach of warranty, fraud, and loss of consortium. One of the complaints also sought recovery for negligent infliction of emotional distress.

Defendants moved to dismiss or stay the actions on the ground of forum non conveniens, as authorized by section 410.30 of the Code of Civil Procedure.[1] They asserted that the cases should be tried in Sweden and Norway because it was in those countries that the plaintiffs resided, the valves were sold, decedents received medical care, the alleged fraudulent representations were made, and evidence regarding the provision of health care and other matters existed. Plaintiffs countered that California was the more convenient place of trial because the valves were designed, manufactured, tested and packaged in California. The parties introduced conflicting evidence regarding plaintiffs' legal rights and remedies in Scandinavia, and each claimed that the most important and numerous documents and witnesses were located in the country which they asserted was the most appropriate place for trial. The trial court found in favor of defendants, concluding that California was an inconvenient forum and that Sweden and Norway provided adequate alternative forums for resolution of the actions. It stayed the actions, and retained jurisdiction to make such further orders as might become appropriate. The order was subject to seven conditions, with which defendants agreed to comply.[2]

The Court of Appeal affirmed, after discussing the various private and public interest factors relevant to a determination of the appropriate forum for the trial of an action under the doctrine of forum non conveniens. It declined to follow Corrigan v. Bjork Shiley Corp., supra, 182 Cal.App.3d 166 (herafter Corrigan), and Holmes v. Syntex Laboratories, Inc., supra, 156 Cal.App.3d 372 (hereafter Holmes), a case which preceded Corrigan by two years.

Plaintiffs claim that the convenience of the parties and public policy would be best served if the actions were tried in California, and that the Court of Appeal distorted the analysis of these factors in upholding the trial court's decision. They assert also that the appellate court failed to analyze or give weight to certain matters which prior California decisions have held are relevant to a determination of a forum non conveniens motion. We conclude that the Court of Appeal correctly decided the case and affirm its judgment.

Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. (Leet v. Union Pac. R. R. Co. (1944) 25 Cal.2d 605, 609.) The doctrine was first applied in California in Price v. Atchison, T. & S. F. Ry. Co. (1954) 42 Cal.2d 577 (hereafter Price). We described the basis of the doctrine as follows: "'There are manifest reasons for preferring residents in access to overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.' [¶] . . . [T]he injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state . . . require that our courts, acting upon the equitable principles . . ., exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere." (Id. at pp. 582-584.)

In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of

California and the alternate jurisdiction in the litigation. (Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 259-261 (hereafter Piper); Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, 507-509.)

On a motion for forum non conveniens defendant, as the moving party, bears the burden of proof. The granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard. (Piper, supra, 454 U.S. at p. 257; Lacey v. Cessna Aircraft Co. (3d Cir. 1991) 932 F.2d 170, 178-179; Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal.App.3d 1424, 1436.)

On the first of these issues, whether the case may be "suitably" tried in Norway and Sweden, the answer is clear. The Judicial Council comment to section 410.30 declares in part, "[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff [citations]. Because of . . . [this] factor, the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same will be true if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept the defendant's stipulation that he will not raise this defense in the second state [citations]." (Judicial Council com., 14 West's Ann. Code Civ. Proc. (1973 ed.) § 410.30, pp. 492-493, hereinafter referred to as Judicial Council Comment.) Defendants stipulated that they would submit to jurisdiction in Sweden or Norway, respectively, as well as to the tolling of the statute of limitations during the pendency of the actions in California. Thus, the courts of Sweden and Norway present suitable forums for trial of the actions.[3]

We proceed, then, to the second and more difficult question, whether the Court of Appeal erred in concluding that the balance of the private and public interests justified a stay of the actions. The court relied heavily on Piper, supra, 454 U.S. 235, in reaching its decision. Piper, like the present case, involved foreign plaintiffs who sought to hold an American manufacturer liable for deaths which occurred in a foreign country. There, an airplane built by the defendant in Pennsylvania, crashed in Scotland, killing several residents of that country. The representative of the decedents' estates filed a wrongful death action in federal district court, alleging negligence and strict liability. The district court in Pennsylvania granted a motion by defendants on the ground of forum non conveniens, concluding that Scotland was the appropriate forum for trial of the action. The circuit court reversed the judgment because Scottish law was less favorable to the plaintiffs than the law of Pennsylvania.

This decision was in turn reversed by the Supreme Court, in an opinion which discussed the factors to be considered in determining a forum non conveniens motion. The high court, in its analysis of the doctrine, reiterated long-standing principles, first clearly enunciated by it in Gulf Oil Corp. v. Gilbert, supra, 330 U.S. 501, and later applied in California in Price, supra, 42 Cal.2d 577. The court warned that the private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. A court should not decide that there are circumstances in which the doctrine will always apply or never apply. Otherwise, the flexibility of the doctrine would be threatened, and its application would be based on identification of a single factor rather than the balancing of several. (Piper, supra, 454 U.S. at pp. 249-250.)[4] The high court recognized that there is "ordinarily a strong presumption in favor of the plaintiff's choice of forum" (id. at p. 255), but held that a foreign plaintiff's choice deserves less deference than the choice of a resident.

The high court discussed in some detail the significance to be accorded to the fact that the law of the forum state is more favorable to the plaintiff than that of the alternate jurisdiction. In this connection, it observed that the laws of the United States in product liability actions favor plaintiffs in several respects: the law of strict liability, which exists in almost all 50 states but only a handful of foreign countries; the existence of jury trials in such actions, resulting in sometimes generous awards, contingent attorney fee arrangements, and more liberal rules of discovery. It held that if substantial weight is given to the circumstance that the law in the forum state is more favorable to the plaintiff than the one in the alternate jurisdiction, "The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts. [Fn. omitted.]" (Piper, supra, 454 U.S. at p. 252.)

Thus, the possibility of an unfavorable change in the law is a "relevant consideration" only if the remedy in the alternativ e forum "is so clearly inadequate or unsatisfactory that it is no remedy at all . . . ." (Id. at p. 254.)[5]

After analyzing the interests of the parties and of Scotland in the litigation, the court concluded that "the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." (Piper, supra, 454 U.S. at pp. 260-261.)[6]

In the present case, the trial court found that Sweden and Norway were adequate alternative forums. Defendants produced evidence that Norway and Sweden might permit recovery under a strict liability theory, that Norway might allow special damages (but not punitive damages) in some circumstances, and that the actions could be pursued in those countries without undue delay. Although some of this evidence was contradicted by plaintiffs, the trial court's determination of these issues is supported by substantial evidence, and we defer to its conclusion. Thus, the fact that California law would likely provide plaintiffs with certain advantages of procedural or substantive law cannot be considered as a factor in plaintiffs' favor in the forum non conveniens balance.

Next we consider the effect of the residence of the parties in deciding a motion based on forum non conveniens. Many cases hold that the plaintiff's choice of a forum should rarely be disturbed unless the balance is strongly in favor of the defendant. (E.g., Goodwine v. Superior Court (1965) 63 Cal.2d 481, 485; Price, supra, 42 Cal.2d 577, 585; Brown

v. Clorox Co. (1976) 56 Cal.App.3d 306, 311.) But the reasons advanced for this frequently reiterated rule apply only to residents of the forum state: (1) if the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient (Piper, supra, 454 U.S. at pp. 255-256; Thomson v. Continental Ins. Co. (1967) 66 Cal.2d 738, 744-745); and (2) a state has a strong interest in assuring its own residents an adequate forum for the redress of grievances (Archibald v. Cinerama Hotels (1976) 15 Cal.3d 853, 859). Indeed, until the recent amendment of section 410.30, dismissal of an action (as opposed to a stay) was ordinarily not permitted on the basis of inconvenient forum if the plaintiff was a California resident. (15 Cal.3d at p. 859; Thomson v. Continental Ins. Co., supra, 66 Cal.2d at p. 742; Goodwine v. Superior Court, supra, 63 Cal.2d at p. 485.) Where, however, the plaintiff resides in a foreign country, Piper holds that the plaintiff's choice of forum is much less reasonable and is not entitled to the same preference as a resident of the state where the action is filed. (Piper, supra, 454 U.S. at p. 256.) At best, therefore, under the rule laid down in Piper, the fact that plaintiffs chose to file their complaint in California is not a substantial factor in favor of retaining jurisdiction here.[7]

Defendant's residence is also a factor to be considered in the balance of convenience. If a corporation is the defendant, the state of its incorporation and the place where its principal place of business is located is presumptively a convenient forum. (Judicial Council comment, supra, p. 493.) As noted above, Shiley is a California corporation with its principal place of business in this state.

The Court of Appeal held that in view of a 1986 amendment to section 410.30, a defendant's choice to incorporate or do business in California is no longer a significant factor in the balancing process. The amendment, effective until January 1, 1992, unless extended by the Legislature, provides that the "domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

We doubt the correctness of the Court of Appeal's analysis. We agree with the statements in a number of cases which have examined the issue (see, e.g., Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal.App.3d 1553, 1562; Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney, supra, 202 Cal.App.3d at p. 1434; Klein v. Superior Court (1988) 198 Cal.App.3d 894, 901),[8] that the purpose of the amendment was to overcome the holding of Archibald v. Cinerama Hotels, supra, 15 Cal.3d 853, and other cases cited above that a trial court was powerless to dismiss an action on the ground of forum non conveniens if the plaintiff was a California resident. Thus, the presumption of convenience to a defendant which follows from its residence in California remains in effect despite the amendment of section 410.30.

But, as Piper, supra, 454 U.S. 235, and other authorities make clear, this presumption is not conclusive.[9] Even though evidence relating to the design, manufacture, and testing of the airplane involved in Piper was located in the United States, the plaintiffs were relegated to the Scottish courts to vindicate their claims. A resident defendant may overcome the presumption of convenience by evidence that the alternate jurisdiction is a more convenient place for trial of the action.[10]

On this issue, the parties disagree sharply. The Court of Appeal held that because virtually all witnesses and documents relating to the decedents' medical care and treatment , medical histories, loss of earnings, and all the witnesses to the familial impacts of their deaths are located in Scandinavia, it is more convenient to try the actions there. Defendants point out in addition that, although the alleged fraudulent representations emanated from California, they were received and relied on in Scandinavia, and the Scandinavian doctors have knowledge of decedents' preexisting medical conditions, the factors relevant to a risk-benefit analysis, and the handling of the heart valves prior to implantation.

Plaintiffs counter that evidence relating to defendants' allegedly culpable conduct, such as the design, manufacture, testing and packing of the valves, is in California; that warnings and advice to doctors using the valve were issued from this state; and that investigations of the reasons for the valve failure were conducted here. Plaintiffs represented that the Scandinavian witnesses to damages and decedents' medical care have agreed that they will be available to testify in California. In addition, they assert, there are more than one million pages of documents in California that are relevant to the issue of the valve failures, and it would be extremely time consuming and costly to translate even a fraction of these into Swedish and Norwegian. Hundreds of witnesses from California and perhaps other states will be called, some of whom would not be available for trial in Scandinavia.

Defendants produced evidence that Swedish and Norwegian courts routinely receive documents into evidence that are written in English, without requiring translation. Among the conditions imposed by the trial court with which defendants agreed to comply were to make available in Norway and Sweden past and present employees of defendants and documents in their possession, as required by the Scandinavian courts.[11] They also agreed to defray the expenses for the production of these witnesses and documents.

Before deciding whether the private convenience of the parties weighs in favor of plaintiffs or defendants, we consider the interests of the California public in retaining the trial of the actions in this state. Piper held that the jurisdiction with the greater interest should bear the burden of entertaining the litigation. (Piper, supra, 454 U.S. at pp. 260-261.)

The Court of Appeal considered four factors in holding that the public interest favored the granting of the motions: (1) California's interest in avoiding undue congestion of its courts due to the trial of foreign causes of action; (2) this state's deterrent and regulatory interests in products manufactured here; (3) appropriate deference to the laws and policy decisions of foreign governments; and (4) the competitive disadvantage to California business if resident corporations were required to defend lawsuits here based on injuries incurred in other jurisdictions.

As to the first of these matters, the court concluded trial in California would unduly burden the

court. It noted that foreign plaintiffs have filed 108 actions in California against Shiley relating to the heart valves, and that, according to plaintiffs, about one million pages of documents are relevant to their actions, and that the testimony of hundreds of witnesses might be required. Defendants state that the number of cases filed against Shiley involving the heart valves had increased to 235 by the time the briefs were filed. The court observed correctly that preventing court congestion resulting from the trial of foreign causes of action is an important factor in the forum non conveniens analysis. (Citing Gulf Oil Corp. v. Gilbert, supra, 330 U.S. at pp. 508-509; Price, supra, 42 Cal.2d at pp. 583-584.)

Plaintiffs rely on authorities stating generally that if a case is "properly" before the court (Hemmelgarn v. Boeing Co. (1980) 106 Cal.App.3d 576, 586) or if the action is "legitimately and correctly brought before it" (Lake v. Richardson-Merrell (N.D.Ohio 1982) 538 F.Supp. 262, 275), a court will retain the case even in the face of a congested calendar. We have no argument with these propositions, and we agree with plaintiffs that dismissals or stays for forum non conveniens should not be used primarily to control a court's docket. Nevertheless, there can be no question that the already congested courts of this state would be burdened by the trial of the numerous and complex actions relating to the heart valve brought by plaintiffs who reside in foreign countries. Whether this would constitute an "undue burden," however, is another question. In order to determine that issue, we must consider other factors as well.

The appellate court next considered whether California's interest in deterring wrongful conduct justified retention of the actions. As we have already noted, in Piper, the high court, after observing that Scotland had the stronger interest in the litigation because the decedents who died in the airplane crash were Scottish, and all potential defendants except those before the American court were Scottish or English, held that the "incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." (Piper, supra, 454 U.S. at pp. 260-261.) The Court of Appeal adopted this "incremental deterrence" reasoning and concluded that California's interest in deterring wrongful conduct did not outweigh the other factors pointing to trial in Scandinavia.

Plaintiffs argue vigorously against this conclusion. They cite cases stating that California has a strong interest in regulating the conduct of manufacturers who produce products in this state which cause injury to persons in other jurisdictions. (Hurtado v. Superior Court (1974) 11 Cal.3d 574, 583-584; Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal.App.3d 605, 615; Hemmelgarn v. Boeing Co., supra, 106 Cal.App.3d at p. 586; see Van Cauwenberghe v. Biard (1988) 486 U.S. 517, 528.)[12] This interest, as the cited cases make clear, is to deter negligent conduct; the likelihood of a substantial recovery against such a manufacturer strengthens the deterrent effect.

We are persuaded that under the facts in the present case, the additional deterrence that would result if defendants were called to account for their allegedly wrongful conduct in a California court rather than in the courts of Scandinavia would be negligible. As we observe above, there are 235 lawsuits pending in California relating to the heart valve. According to defendants, some of these have been filed on behalf of persons with functioning valves who seek damages for the anxiety engendered by the apprehension that the valves may fail. At least 108 of these suits were filed by foreign residents, according to the Court of Appeal. Many valves were implanted in California, and it is safe to assume that the plaintiffs in some of the 235 actions are California residents.[13] The burden imposed on defendants in trying these cases by California residents in the California courts, and the damages that defendants might be required to pay if they are found liable, would provide sufficient deterrence to prevent wrongful conduct in the future even if the suits filed by nonresident plaintiffs were tried elsewhere.

The Court of Appeal found that there were two additional factors that weighed in favor of granting the motions. One is the competitive disadvantage to California business that would result if California manufacturers were called on to defend lawsuits involving extraterritorial injuries. A few decisions have relied on similar reasoning in granting motions for forum non conveniens. (Fraizer v. St. Jude Medical, Inc. (D.Minn. 1985) 609 F.Supp. 1129, 1131-1132; Kaiser Foundation Health Plan of Mid-Atlantic States, Inc. v. Rose (D.C. 1990) 583 A.2d 156, 159; see Howe v. Diversified Builders, Inc. (1968) 262 Cal.App.2d 741, 746.)

The other factor relates to the interests and policy concerns of Sweden and Norway in the litigation, such as their interest in assuring that new medical devices be made available promptly and inexpensively, policies that might be threatened by applying American regulation of medical products and liability laws to actions brought by foreign citizens. A number of cases consider these matters in determining whether the forum where the action is brought or the alternative forum has a greater interest in the action. (E.g., Jennings v. Boeing Co. (E.D.Pa. 1987) 660 F.Supp. 796, 808; In re Union Carbide Corp. Gas Plant Disaster (S.D.N.Y. 1986) 634 F.Supp. 842, 864-865, affd. (2d Cir. 1987) 809 F.2d 195; Fraizer v. St. Jude Medical, Inc., supra, 609 F.Supp. at pp. 1131-1132; Abiaad v. General Motors Corp. (E.D.Pa. 1982) 538 F.Supp. 537, 543, affd. per curiam (2d Cir. 1982) 696 F.2d 980; Harrison v. Wyeth Laboratories Division, supra, 510 F.Supp. at p. 4; Jones v. Searle Laboratories, supra, 444 N.E.2d at p. 161.)

The Court of Appeal mentions the foregoing two factors only in passing, and we may assume that they do not represent a significant basis for the court's decision. A detailed discussion of their effect on the balance of conveniences is unnecessary since, as we shall conclude, the court was justified in upholding the judgment on the basis of the other public and private interest factors which it considered.

Plaintiffs place great reliance on an additional factor, which they complain the Court of Appeal failed to consider, i.e., the relationship of defendants to California. We hold above that a presumption of convenience to defendants arises from the fact that

Shiley is incorporated in California and has its principal place of business here. Another aspect of defendants' connection with this state is that alleged wrongful conduct was committed here, and there is a close connection between such conduct and plaintiffs' causes of action. We agree with plaintiffs that defendants' cumulative connection with California is an appropriate matter for consideration in deciding a forum non conveniens motion.

The significance of such a connection is that, as Corrigan implies, it is not unfair to a defendant to hold the trial in a state where a substantial part of the wrongful conduct was committed. (182 Cal.App.3d at pp. 180-181.) However, Corrigan and other authorities cited by defendants also appear to hold that a court is not unfairly burdened by the trial of an action in California if a corporate defendant has its principal place of business here and the tort was allegedly committed in this state. (Id. at pp. 181-182; Holmes , supra, 156 Cal.App.3d at pp. 388-389; Brown v. Clorox Co., supra, 56 Cal.App.3d 306, 313-314; see Hemmelgarn v. Boeing Co., supra, 106 Cal.App.3d at p. 580.) We reject this analysis, for it would require that the court congestion factor always be decided in favor of the plaintiff and against a California corporation which caused injury to consumers anywhere in the world, if the product was manufactured here.[14] While the cumulative connection of the defendant and its conduct within the state is relevant in deciding whether retention of an action would place an undue burden on the courts, we cannot look only to such circumstances; matters like the complexity of the case, whether it would consume considerable court time, and the condition of the court's docket are also relevant to the issue.

We come, then, to an assessment of the factors discussed above. We are confronted with the somewhat anomalous situation that the parties seek to try the action in a jurisdiction which would appear to violate their interest in a convenient place for trial. Both plaintiffs and defendants are willing--indeed, eager--to litigate the matter in a jurisdiction separated by an ocean and a continent from their places of residence. Although both claim that they are motivated by the convenience of the place of trial, this court, like others before it, recognizes that an additional motivating factor--and perhaps the major one--relates to the circumstance that trial in California will enhance the possibility of substantial recovery. Plaintiffs seek and defendants resist trial in the California courts substantially for this reason. In the service of this goal, they are willing to transport numerous witnesses and documents many thousand miles.

Amici curiae, the California Chamber of Commerce and the California Manufacturers Association, suggest that the private convenience of the parties should be afforded less weight than the public interest in deciding issues of forum non conveniens when the plaintiff is the resident of a foreign country. They point out that with modern transportation and transmission methods, witnesses can attend trials relatively easily in distant places and documents may be transferred almost instantaneously, and that conditions imposed by courts can mitigate inconvenience to the parties to a substantial degree. (See Stein, Forum Non Conveniens (1985) 133 U.Pa.L.Rev. 781, 784, fn. 12; Note, Forum Non Conveniens (1985) 64 Tex. L. Rev. 193, 216.) Here, for example, the trial court conditioned the granting of a stay on defendants' agreement to make documents in their possession and witnesses available in Scandinavia, at their expense.

The suggestion of amici curiae has a certain appeal. Perhaps in the light of vastly improved transportation and transmission methods (Fitzgerald v. Texaco, Inc. (2d Cir. 1975) 521 F.2d 448, 455, 456 (dis. opn. by Oakes, J.) and the conditions the trial court may impose to mitigate inconvenience, we should be less concerned with the convenience of the parties or with harassment of defendants by the filing of lawsuits in a forum inconvenient for them (e.g., Price, supra, 42 Cal.2d at p. 585; Bechtel Corp. v. Industrial Indem. Co. (1978) 86 Cal.App.3d 45, 50) than with forum shopping by plaintiffs and reverse forum shopping by defendants, seeking to take advantage of, or to resist the advantage of, laws favorable to the plaintiff in the jurisdiction the suit is filed. (Note, Forum Non Conveniens, supra, 64 Tex. L. Rev. at pp. 215-216.)

In any event, even without adopting the suggestion of amici curiae, there was clearly substantial evidence to sustain the trial court's determination that the balance of private and public interests favors defendants under traditiona l rules laid down in prior cases. It is true that much, but not all, of the evidence concerning liability exists in California;[15] but virtually all the evidence relating to damages is in Scandinavia. Since defendants have promised to supply documents in their possession if required by the Scandinavian courts, the fact that a large number of documents will be involved appears not to pose a significant inconvenience to plaintiffs. The Court of Appeal concluded that these documents could be admitted into evidence without translation, and although there was conflicting evidence on this score, its conclusion was supported by the record.

It is probable that both parties will suffer some disadvantage from trial in their home forums. For example, former employees of defendants may be beyond the jurisdiction of the Scandinavian courts and defendants may be unable to make good their promise to produce them for trial in Scandinavia. Conversely, defendants have no means by which to ensure that Scandinavian medical witnesses and others whose testimony might be important will attend the trial in California. But these problems are implicit in many cases in which forum non conveniens motions are made, and it is for the trial court to decide which party will be more inconvenienced.

The public interest factors clearly favor defendants' position. If we hold that the present cases may be tried in California, it will likely mean that the remaining 108 cases involving the Shiley valve will also be tried here. The burden on the California courts of trying these numerous complex actions is considerable. Moreover, California's interest in deterring future improper conduct by defendants would be amply vindicated if the actions filed by California resident plaintiffs resulted in judgments in their favor. Under all the circumstances, we hold that the Court of Appeal was correct in concluding that there was substantial evidence to support the trial court's determination that the private and public interest factors, on balance, justified the stays granted in these actions.

Finally, we consider Corrigan, supra, 182 Cal.App.3d 166, and Holmes, supra, 156 Cal.App.3d 372, the two decisions the Court of Appeal declined to follow. Holmes involved a suit filed in California by British plaintiffs who alleged that they were injured as a result of ingesting an oral contraceptive produced by an American manufacturer whose principal place of business was California. The court first held that California law, unlike federal law, affords substantial deference to a foreign plaintiff's choice of forum. We have concluded above to the contrary, and, indeed, plaintiffs in these actions do not claim that the same amount of deference is due to foreign and resident plaintiffs.[16]

A second ground of the Holmes decision was that "California attaches far greater significance to the possibility of an unfavorable change in applicable law" in the alternative forum than the federal courts. (156 Cal.App.3d at p. 381.) The decision concluded that a factor of "fundamental importance" in favor of denial of the motion for forum non conveniens was that the plaintiffs would be substantially disadvantaged if the case were tried in Britain because that country did not afford recovery on the basis of strict liability. We disapprove of this holding. As Piper, supra, 454 U.S. 235, points out, if substantial weight is given to the fact that the law in the forum state is more favorable to a plaintiff than in the foreign jurisdiction, the balance will ordinarily favor denial of the motion, and substantial weight should be given to this factor only if the alternative forum provides no remedy at all.

Corrigan also was a wrongful death action involving the alleged failure of a heart valve manufactured by Shiley. The valve was implanted in Australia, and the Australian plaintiffs filed suit in California for strict liability, among other causes of action. Defendant moved to dismiss on the ground of forum non conveniens. The Court of Appeal reversed a trial court order staying the action. It declined to follow Holmes, (supra, 156 Cal.App.3d 372) insofar as that decision accorded a critical role to the circumstance that the law of the alternative jurisdiction did not provide for strict liability. (182 Cal.App.3d 166, 178.) However, the Corrigan court held that the fact the plaintiffs would be disadvantaged by the absence of this precise remedy in Australia was entitled to some weight. We have concluded above that this factor may not be considered in the forum non conveniens balance. To the extent Corrigan holds to the contrary, it is disapproved.

CONCLUSION

The judgment of the Court of Appeal is affirmed.

MOSK, J.

We Concur:

LUCAS, C. J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.
BAXTER, J.
GEORGE, J.

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1. Section 410.30 of the Code of Civil Procedure provides in relevant part, "when a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." All further statutory references are to the Code of Civil Procedure.

2. The conditions were: (1) submission to jurisdiction in Sweden and Norway; (2) compliance with discovery orders of the Scandinavian courts; (3) agreement to make past and present employees reasonably available to testify in Sweden and Norway at defendants' cost if so ordered within the discretion of Scandinavian courts; (4) tolling of the statute of limitatio ns during the pendency of the actions in California; (5) agreem ent to make documents in their possession in the United States available for inspection in Sweden and Norway, as required by Scandinavian law, at defendants' expense; (6) agree ment that depositions in the United States might proceed under section 2029; and (7) agreement to pay any final judgments rendered in the Scandinavian actions.

3. Holmes, supra, 156 Cal.App.3d 372, appears to consider the "suitability" of the alternative forum not as a threshold inquiry, as applied above, but as part of the discretionary determination of the balance of conveniences. We decline to follow this approach. The Judicial Council Comment makes it clear that the question of a suitable alternative forum depends not on the factors relevant to the convenience of the parties and the interests of the public, but on whether an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant. (See Note, Considerations of Choice of Law in the Doctrine of Forum Non Conveniens (1986) 74 Cal. L. Rev. 565, 587-590.)

4. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum, whereas the court congestion factor will usually weigh in favor of trial in the alternate jurisdiction.

5. It is not entirely clear from the language of Piper whether an unfavorable change of law should be given no consideration whatsoever in the forum non conveniens balance or only slight consideration. The high court states in various parts of its opinion that this factor should not be given "substantial weight" (e.g., Piper, supra, 454 U.S. at pp. 247, 250), but in another passage it states that an unfavorable change in the law might in some circumstances be a "relevant consideration." (Id. at p. 254.) The first of these references indicates that a slight amount of weight may be accorded to an unfavorable change in the law, whereas the second implies the contrary. In our view, the fact that an alternative jurisdiction's law is less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens provided, however, that some remedy is afforded. (See, e.g., Lockman Foundation v. Evangelical Alliance Mission (9th Cir. 1991) 930 F.2d 764, 768-769, and cases cited.) One basis underlying the doctrine, as Piper and other cases hold, is to avoid burdening the trial court by requiring it to interpret the law of foreign jurisdictions, which compels it to conduct "complex exercises in comparative law." (Piper, supra, at p. 251; see also, e.g., Gulf Oil Corp. v. Gilbert, supra, 330 U.S. at p. 509.) To impose such a burden on the trial court for the purpose of facilitating its consideration of a factor of only slight significance in the forum non conveniens balance would, we believe, be unwarranted.

6. The court noted that the law of California relating to forum non conveniens is "virtually identical" to federal law. (Piper, supra, 454 U.S. at p. 248, fn. 13.)

7. It is difficult to justify giving preferential status to a plaintiff's choice of forum if the plaintiff is not a resident. Since the preference is based on factors which apply only to residents, it would appear that the underlying justification for the preference does not apply to nonresidents. However, defendants do not make this argument, and this view is admittedly contrary to Piper, which states that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum (Piper, supra, 454 U.S. at p. 255), and the cases decided both before and after it. (Gulf Oil Corp. v. Gilbert, supra, 330 U.S. at p. 508; Lony v. E. I. Du Pont de Nemours & Co. (3d Cir. 1991) 935 F.2d 604, 609; Lacey v. Cessna Aircraft Co., supra, 932 F.2d 170, 178-179 [some deference owed to forum choice of foreign national]; Price, supra, 42 Cal.2d at p. 585; Dendy v. MGM Grand Hotels, Inc. (1982) 137 Cal.App.3d 457, 460; Great Northern Ry. Co. v. Superior Court (1970) 12 Cal.App.3d 105, 110.)

One writer has suggested that a preference for plaintiffs' choice may be based on the circumstance that, in declining to exercise jurisdiction where the Legislature has authorized a court to hear a case, a court is overriding the Legislature's will, and should do so only with caution. (Note, Considerations of Choice of Law in the Doctrine of Forum Non Conveniens, supra, 74 Cal.L.Rev. at p. 583.) But such a rationale is not persuasive where, as here, the Legislature has authorized a court to decline the exercise of jurisdiction "in the interest of substantial justice." (§ 410.30.)

Holmes, supra, 156 Cal.App.3d 372, holds that substantial deference is accorded even a foreign plaintiff's choice of forum. We disapprove of this ruling, which is contrary to not only Piper but to Corrigan (supra, 182 Cal.App.3d 166) as well.

8. The Court of Appeal cites Credit Lyonnais Bank in support of its holding. The opinion in that case declares the amendment was intended to require that considerations of justice and convenience should govern rulings on forum non conveniens motions and "'not solely . . . the residence of one of the parties.'" (202 Cal.App.3d at p. 1434.) But only the residence of the plaintiff was a determinative factor before the amendment; this statement must therefore refer to the effect of a plaintiff's residence in deciding a forum non conveniens motion rather than that of a defendant.

9. Among the numerous cases granting stays or dismissals for forum non conveniens even though the defendant corporation was a resident of the state in which the action was brought or maintained its principal place of business there, are Watson v. Merrell Dow Pharmaceuticals, Inc. (6th Cir. 1985) 769 F.2d 354; Dowling v. Richardson-Merrell, Inc. (6th Cir. 1984) 727 F.2d 608; Harrison v. Wyeth Laboratories Div. of American Home Products Corp. (E.D.Pa. 1980) 510 F.Supp. 1; and Jones v. Searle Laboratories (Ill. 1982) 444 N.E.2d 157.

10. The effect to be given a corporate defendant's residence in the forum has two aspects: the first, discussed above, relates to the convenience of the parties. The second, examined later herein, implicates public policy considerations, such as California's interest in deciding actions against resident corporations whose conduct in this state causes injury to persons in other jurisdictions.

11. Plaintiffs assert that the stipulation that defendants will make past and present employees available to testify in Scandinavia "if so ordered within the discretion of Swedish or Norwegian courts" does not remedy the problem because the courts in those countries have no jurisdiction to order the appearance of foreign witnesses. If the wording of this stipulation will not accomplish what was obviously its intent (to assure that defendants will attempt to the best of their ability to make employee witnesses available to testify in Scandinavian courts), plaintiffs may return to the trial court for a modification of the stipulation to accomplish that objective.

12. Plaintiffs place particular reliance on Van Cauwenberghe, claiming that it "clarified" Piper by requiring that in deciding a motion for forum non conveniens, a court must inquire into the merits of the underlying dispute and the relevance to the dispute of the evidence for and against forum dismissal, as well as the locus of the alleged culpable conduct and the connection of that conduct with the plaintiff's chosen forum. The language relied on by plaintiffs is dictum, since the case involved a procedural issue, i.e., whether an order denying a forum non conveniens motion is immediately appealable under federal law. Moreover, we agree with the Court of Appeal's observation that the high court was merely commenting that the merits of an action are to some extent relevant to a determination of the motion. Finally, we do not disagree that the locus of the alleged culpable conduct is a consideration in the forum non conveniens analysis.

13. At oral argument, it was undisputed that 30 California plaintiffs have brought suit on the same and related claims in the courts of this state.

14. Brown goes so far as to hold that California must provide a forum if products manufactured here by a resident corporation with its principal place of business here cause injury in another state. Hemmelgarn contains similar language.

15. Plaintiffs insist that defendants have conceded there is no evidence that conduct outside California contributed to the valve failures and that the fact the surgical implantation occurred there is not relevant to their potential defenses. But the portions of the voluminous record which plaintiffs cite for these propositions reveal that plaintiffs asked for admissions in these respects, and that defendants did not make such admissions. Moreover, defendants in their briefs assert that some of the evidence relating to liability is in Scandinavia, such as statements by the physicians to their patients about the risks and benefits of the implantation procedure, and the receipt there of warnings and allegedly fraudulent representations regarding the valves.

16. Plaintiffs cite two cases for the proposition that substantial limitations on the remedy may be considered in deciding a motion for forum non conveniens. One held that an action for indemnity should be retained in California because, inter alia, plaintiffs might be deprived of that remedy if their action were tried in Kansas. (International Harvester Co. v. Superior Court (1979) 95 Cal.App.3d 652, 660.) The other upheld a trial court order staying an action to collect double damages afforded by a California statute, on the ground that Texas would apply California law and allow recovery under the statute. (Chavarria v. Superior Court (1974) 40 Cal.App.3d 1073, 1076.) In International Harvester, if the case had not been retained, the plaintiff might have been denied the remedy on which its complaint was based. Chavarria is more problematic. But the opinion focussed on the issue whether California or Texas law would be applied if the case were tried in Texas, not on the principle for which plaintiffs offer the case.strip

REAL PROPERTY

Homestead Exemption Doesn't Apply If Home Sold Pursuant to Deed of Trust

NORMA SPENCER, as Executrix, etc.,
Plaintiff-Appellant,
v.
DONALD RAY LOWERY et al.,
Defendants-Respondents.

No. A052337
Humboldt County
Super.Ct.No. 73323
California Court of Appeal
First Appellate District
Division Five
Filed November 20, 1991

Plaintiff appeals from the grant of defendants' claim of statutory homestead exemption under Code of Civil Procedure section 704.720, subdivision (b).[1] Plaintiff contends defendants are not entitled to the statutory homestead exemption because the sale of defendants' home under a power of sale in a deed of trust was not in execution of a money judgment, as required under section 704.720, subdivision (b). We agree and reverse.

Plaintiff Norma Spencer is the executrix of the estate of Anthony Kryla. An action was filed during Kryla's lifetime against the defendants Donald and Sharon Lowery for, inter alia, constructive trust of Kryla's real property. After Kryla's death, the action was pursued to judgment by plaintiff, who then commenced enforcement of the judgment. On November 16, 1990, defendants' home was sold by the California Reconveyance Company, as trustee, when defendants defaulted in the payment of a note secured by a deed of trust. Defendants claimed exemption for the $7,000 in proceeds in surplus of the note. The court allowed the exemption.

Plaintiff asserts that because the foreclosure sale of defendants' home was not in execution of a money judgment, defendants are not entitled to the statutory homestead exemption under section 704.720, subdivision (b) (hereafter section 704.720(b)). The defendants contend that section 704.720(b) exempts proceeds from all involuntary sales.

Section 704.720(b) reads in part: "If a homestead is sold under this division . . . the proceeds of sale . . . are exempt in the amount of the homestead exemption . . . ." (Emphasis added.) The section's reference is to division 2 of title 9 of the Code of Civil Procedure (§§ 695.010-709.030), which is concerned with the enforcement of money judgments. Sections 701.510 to 701.640 describe the procedures for the sale of real property in execution of a money judgment. Sales "under this division" referred to in section 704.720(b) are sales in execution of a money judgment. This category does not include a sale pursuant to the power of sale in a deed of trust or mortgage; such sales are not within the referenced division, but instead are described in Civil Code sections 2924 to 2924k. There is nothing ambiguous or uncertain in section 704.720(b) which would require us to examine any policy concerns or legislative history. Since defendants' property was not sold in execution of a money judgment, they are not entitled to the statutory homestead exemption.

The confusion between the parties regarding whether section 704.720(b) refers only to an execution sale, as plaintiff asserts, or includes all involuntary sales, as defendants contend, may be attributed to the 1982 legislative committee comment. (See legis. committee com., Deering's Ann. Code Civ. Proc. (1983) § 704.720, p. 417.) The comment states, "Subdivision (b) provides an exemption for proceeds of an execution sale of a homestead," and also explains that "proceeds of a voluntary sale of the homestead are not exempt." (Emphasis added.) The first part of the legislative committee comment makes clear that the exemption applies to "execution sales." However, the illustration that a "voluntary sale" of a homestead would not be exempt may suggest the converse, that proceeds of all involuntary sales are exempt. Despite the possibly ambiguous legislative committee comment, the language of the statute itself is clear.

Examination of related provisions supports our conclusion. Defendants' argument that a foreclosure sale is included within the meaning of section 704.720(b) would imply that subdivision (a) of the same section also includes foreclosure sales. Subdivision (a) states: "A homestead is exempt from sale under this division to the extent provided in section 704.800." (Emphasis added.) Section 704.800, subdivision (a) provides that a homestead shall not be sold if no bid is received at the sale which exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property. Under defendants' reading of section 704.720, there could be no foreclosure of a home unless the bid price exceeded the amount of the homestead exemption plus the outstanding amount of the mortgage. In other words, no mortgage or deed of trust could be foreclosed if the equity in the home were less than the statutory homestead amount. That is not the rule.

Section 703.010, subdivision (b) provides that the exemptions in chapter 4 of division 2, including the homestead exemption, "do not apply if the judgment to be enforced is for the foreclosure of a mortgage [or] deed of trust." Thus, "sale under this division" in section 704.720, subdivision (a) cannot include a foreclosure sale, and there is nothing to suggest a different meaning for "sold under this division" in section 704.720(b).

In In re Cole (9th Cir. BAP 1988) 93 B.R. 707, the Ninth Circuit bankruptcy appeals panel interpreted section 704.720(b) to include all forced sales. The district court concluded that a sale under Chapter 11 is not equivalent to an execution of judgment sale as contemplated by section 704.720(b) and, therefore, the proceeds from the sale were not exempt. In reversing, the Ninth Circuit assumed that the proceeds of all forced or involuntary sales were exempt, and held that a sale under Chapter 11 was forced and therefore within the exemption. (Id., at pp. 709-710.)

We decline to follow the Ninth Circuit's interpretation of section 704.720 for two reasons. First, we are not bound by a federal court's opinion on matters of California law. (Bank of Italy v. Bentley (1933) 217 Cal. 644, 653.) Second, the Ninth Circuit's rationale is flawed in that the court never discussed the precise language of the statute which states that the exemption applies only "[i]f a homestead is sold under this division." The court instead assumed that all involuntary sales were within the exemption, and concluded that the category of forced or involuntary sales should be construed broadly to include reorganizations under Chapter 11. "[E]xemptions are to be interpreted liberally and in the debtor's favor whenever possible. [Citation.]" (In re Cole, supra, 93 B.R. at p. 709.)

While we agree with the policy of liberal

interpretation, and see no obvious reason to distinguish for purposes of the proceeds exemption between a foreclosure sale and a sale in execution of money judgment, we must follow the plain language of the statute. Under section 704.720(b), the proceeds of a sale pursuant to a deed of trust's power of sale are not exempt from execution to satisfy a money judgment.

The order granting the claim of exemption is reversed. Appellant to recover costs on appeal.

LOW, P.J.

We concur:

KING, J.
HANING, J.

Trial court:
Humboldt County Superior Court

Trial judge:
Honorable William F. Ferroggiaro, Jr.

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1. All statutory references are to the Code of Civil Procedure unless otherwise specified.

GOVERNMENT

District Isn't Obligated to Set Aside Moratorium on New Water Service

Cite as 91 Daily Journal D.A.R. 14329

BUILDING INDUSTRY ASSOCIATION OF NORTHERN CALIFORNIA et al.,
Plaintiffs-Appellants,
v.
MARIN MUNICIPAL WATER DISTRICT,
Defendant-Respondent.

No. A052930
Marin County
Super. Ct. No. 142063
California Court of Appeal
First Appellate District
Division Three
Filed November 20, 1991

Appellants, Building Industry Association of Northern California (BIA), Perini Land and Development Company (Perini), and others, filed petitions for writs of mandate and for declaratory and injunctive relief, in which they sought to invalidate an ordinance adopted by respondent, the Marin Municipal Water District (the District), prohibiting new water connections in the District's service area. This appeal is from the judgment of dismissal entered after the trial court sustained the District's demurrer to appellants' third amended petitions without leave to amend. We affirm the judgment.

APPELLANTS' ALLEGATIONS

According to the allegations of the petitions, the District is a municipal water district organized and existing under Water Code section 71000 et seq., which provides water to the southern two-thirds of Marin County.[1] Its water supply is highly variable and depends primarily on annual rainfall collected in a local reservoir system.

Appellants alleged that between 1982 and 1988, the District failed to take effective action to control demand or augment its available water supply, and that by 1988, demand approached the limits of that supply. In July 1988, the District declared a water shortage emergency pursuant to section 350 et seq.; in February 1989, it adopted a temporary moratorium on new water service connections. In December 1989, it enacted ordinance No. 302, an indefinite moratorium on new water service connections, with certain limited exceptions, pending the development of new water supplies. As a result of the moratorium, no new water service is being allowed by the District for residential construction. Appellants allege that because the District has stated that it may take from five to ten years to authorize and construct facilities to augment its water supply, the moratorium will effectively block new housing construction for at least that period.

Appellant Perini wants to build 151 housing units on 81 acres which it owns in the District, in the Town of Corte Madera. Appellants alleged that because of the moratorium, Perini will be denied a pipeline extension and will be unable to begin construction of that housing development.

The petitions alleged that the District (1) breached its statutory duties under the Water Code including its duty to give priority to domestic use when adopting emergency water use restrictions; (2) breached its duty to augment its available water supply to meet increasing demands; (3) breached its duty to facilitate, not hinder, the development of housing; and (4) failed

to comply with the terms of its own moratorium. Among other relief, the petitions sought a writ of mandate ordering the District to set aside its moratorium, allocate and reserve water for all domestic uses before imposing any new emergency regulations, and exert every reasonable effort to augment its water supply.

The trial court sustained the District's demurrer without leave to amend, on the ground that the allegations of the amended petitions did not establish any enforceable duty. Judgment was entered dismissing the action.

DISCUSSION

A. Introduction

Our task here is to determine whether the facts alleged in the petitions for writ of mandate would entitle appellants to the relief they seek under any legal theory. Although we must treat the demurrer as admitting all properly pleaded facts, it is not deemed to admit contentions, deductions, or conclusions of fact or law. (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1149; Blank v. Kirwin (1985) 39 Cal.3d 311, 318.) Thus a demurrer does not admit the truth of argumentative allegations about the legal construction, operation, and effect of statutory provisions; similarly, it does not admit the truth of allegations that challenged actions are arbitrary and capricious or an abuse of discretion. (Sklar v. Franchise Tax Board (1986) 185 Cal.App.3d 616, 621.)

Familiar rules governing the issuance of a writ of mandate are also applicable here. A petition for writ of mandate under Code of Civil Procedure section 1085 must plead facts showing that a public body or official has a clear legal and usually ministerial duty and that the petitioner has a beneficial interest in or right to the performance of that duty. (Gilbert v. State of California (1990) 218 Cal.App.3d 234, 241; Elmore v. Imperial Irrigation Dist. (1984) 159 Cal.App.3d 185, 193.) On the other hand, a writ of mandate is not available to control the discretion of that public body or official. Although a court may order a public body to exercise its discretion in the first instance when it has refused to act at all, the court will not compel the exercise of that discretion in a particular manner or to reach a particular result. (McClure v. County of San Diego (1987) 191 Cal.App.3d 807, 812.) When the duty of a public body is broadly defined, the manner in which it carries out that responsibility ordinarily requires the exercise of discretion; under such circumstances, mandate is not available to order that public body to proceed in a particular manner. (See, e.g., Sklar v. Franchise Tax Board, supra, 185 Cal.App.3d at pp. 622-626 [mandamus will not lie to direct manner in which Franchise Tax Board should exercise its authority to administer state income tax laws].)

Finally, judicial review of regulations or restrictions adopted pursuant to sections 350 et seq. is specifically limited to a determination of whether the water district's actions were "fraudulent, arbitrary, or capricious," or whether it failed to follow the procedure and give the notices required by law. (§ 358; Swanson v. Marin Mun. Water Dist. (1976) 56 Cal.App.3d 512, 517-518.)

B. The District's Duties Under the Water Code

The District's resolution imposing the moratorium states the finding of its board of directors that the ordinance was a necessary and appropriate exercise of its authority pursuant to sections 350 et seq. and 71640. First, we consider appellants' contention that the District failed to comply with certain mandatory duties under section 350 and its companion sections.

Section 350 authorizes the governing body of a distributor of a public water supply to declare "a water shortage emergency condition" within its service area "whenever it finds and determines that the ordinary demands and requirements of water consumers cannot be satisfied without depleting the water supply . . . to the extent that there would be insufficient water for human consumption, sanitation, and fire protection." A water shortage emergency condition within the meaning of section 350 includes both an immediate emergency, in which a district is presently unable to meet its customers' needs, and a threatened water shortage, in which a district determines that its supply cannot meet an increased future demand. (Swanson v. Marin Mun. Water Dist., supra, 56 Cal.App.3d at pp. 519-521.)

Section 353 empowers a district to prescribe rules and regulations during a water shortage emergency. That section provides: "When the governing body has . . . declared the existence of an emergency condition of water shortage . . . it shall thereupon adopt such regulations and restrictions on the delivery of water and the consumption within said area of water . . . as will in the sound discretion of such governing body conserve the water supply for the greatest public benefit with particular regard to domestic use, sanitation, and fire protection." (Emphasis added.) A ban on new service connections is explicitly authorized by section 356, which states: "The regulations and restrictions may include the right to deny applications for new or additional service connections . . . ."

Section 354 permits the setting of water use priorities during an emergency shortage. It provides: "After allocating . . . the amount of water which in the opinion of the governing body will be necessary to supply water needed for domestic use, sanitation, and fire protection, the regulations may establish priorities in the use of water for other purposes and provide for the allocation, distribution, and delivery of water for such other purposes, without discrimination between consumers using water for the same purpose or purposes."

Appellants read sections 353 and 354 to mean that before adopting a moratorium, the District was obligated to consider and make findings on the domestic water needs of both its current and its potential consumers; they then insist that the District had a statutory duty under section 354 to set aside water for all domestic users, both current and potential, before allocating water for other purposes, including nondomestic use by current consumers. To bolster their argument, they note that the Legislature has expressly declared domestic use to be "the highest use of water" in the state. (§ 106.)

Appellants' interpretation of the statutory scheme is not persuasive. Under the plain language of section 353, when a water shortage emergency occurs, a district has discretion to determine how to conserve its water supply for the greatest public benefit, and no findings are required. Section 353 certainly permits a district, in the exercise of that sound discretion, to respond by imposing rationing on its present

consumers. The clear import of section 354 is that when a district does decide to impose rationing, it must first allocate or set aside the amount of water needed for domestic use, sanitation, and fire protection, and may then establish priorities for the use of water for other purposes.

Section 356 permits another response to a water shortage emergency; according to that section, a district's discretion includes the unrestricted right to deny applications for any new or additional service connections. Read together, sections 353 and 356 unquestionably allow districts to distinguish between all existing or current consumers and potential users when deciding how to respond to a water shortage emergency; nothing in the legislation requires a district to grant some sort of priority or preference for potential domestic water users over current nondomestic users before imposing a ban on new service connections.

The allegations of the petitions reflect appellants' dissatisfaction with the District's determination of how best to respond to the water shortage emergency, but they do not establish any breach of statutory duty under these sections of the Water Code. Given this conclusion, we need not consider the District's alternative contention that it had separate and independent authority under section 71640 to impose a moratorium without giving priority to potential domestic users.[2]

C. The District's Duty to Augment Its Water Supply

Appellants alleged that the District had a duty under Swanson v. Marin Mun. Water Dist., supra, 56 Cal.App.3d at page 524, to "exert every reasonable effort to augment its available water supply" to meet increasing public demand. They alleged that the District breached this duty by arbitrarily refusing to pursue numerous available and feasible opportunities for augmenting supply.

The powers of a municipal water district such as the District are specified in section 71590 et seq. Section 71610 is permissive; it provides that a district "may acquire, control, distribute, store, spread, sink, treat, purify, reclaim, recapture, and salvage any water . . . for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district." (Emphasis added.) In addition, section 71590 provides in pertinent part that a district "may exercise the powers which are expressly granted by this division or are necessarily implied." When exercising its statutory powers, a district's governing board of necessity has considerable discretion to decide what is in the best interest of the population it serves. (See Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal.App.2d 271, 286-287.)

As the District points out, its determination of how the existing water system can and should be augmented can only be accomplished by an exercise of discretion. It must gather information and compare and evaluate various alternatives, taking into consideration numerous complex factors such as technical feasibility, time, cost, and revenue sources. The District has not refused to take action; appellants themselves have acknowledged in their petitions that the District has "commenced studies of water supply options." Appellants' allegation that the District has not exerted every "reasonable" effort to find more water is in reality no more than a disagreement with the District's approach to this difficult problem. That disagreement is insufficient to entitle them to mandamus relief.

Swanson v. Marin Mun. Water Dist., supra, 56 Cal.App.3d 512, which involves a previous moratorium imposed by the District, is of no assistance to appellants. As noted, the Swanson court held that a water shortage emergency under section 350 et seq. includes both an immediate existing water shortage and a threatened future shortage. It also rejected a constitutional argument that the moratorium resulted in a taking without just compensation, reasoning that a potential water user does not possess any absolute right either to water service or to the same treatment as established users of the water system. (Id., at p. 522.) Recognizing the unfavorable consequences of its decision for the water service applicant, the court then added in passing, "Nevertheless, we do foresee a continuing obligation on the part of District to exert every reasonable effort to augment its available water supply in order to meet increasing demands. Clearly, the Legislature anticipated the need for such a requirement when it limited the duration of such restriction to the period of the emergency and 'until the supply of water available for distribution within such area has been replenished or augmented.' (§ 355.)" (Swanson, supra, at p. 524.)

The Swanson court did not attempt to outline precisely how a district might satisfy that "continuing obligation," and its admonition that a district must make every "reasonable" effort is itself recognition that the task can only be accomplished through the measured exercise of discretion. What appellants seek here is the exercise of that discretion in a particular manner to reach a result of their choosing, but mandate is unavailable for that purpose.

Appellants' reliance on Carlton Santee Corp. v. Padre Dam Mun. Water Dist. (1981) 120 Cal.App.3d 14 is also unavailing. The question in Carlton was whether a water and sewer district could charge a connection fee before the connection was actually furnished. In that context, the court remarked that the district had a substantial responsibility to "fairly allocat[e] this vital finite resource for the benefit of the entire populace within the District when faced with a demand greater than the capacity of the system." (Id., at p. 26.) Instead of furthering appellants' position, that comment only reinforces the conclusion that a water district is necessarily entrusted with extensive discretion to accomplish its challenging task.

D. The Duty to Facilitate the State's Housing Policies

Next, appellants turn to the Government Code in their effort to find some ministerial duty which is enforceable by mandate. They contend that the District's adoption of the moratorium, without an allocation of water for potential domestic users, breached its duty under Government Code section 65580 et seq. to cooperate with the efforts of local governments to provide housing and address regional housing needs. However, the trial court correctly concluded that the District had no affirmative duty under the Government Code to provide water for new housing construction under the circumstances at issue here. It is true that state policy encouraging the development of residential housing is embodied in several sections of that code. For instance, counties and cities must include a housing element in their general plans. (Gov. Code, §§ 65300, 65302, subd. (c).) Government Code section 65580 declares that housing availability is of "vital statewide importance" and that

the provision of affordable housing "requires the cooperation of all levels of government." (Gov. Code, § 65580, subds. (a), (c).) However, Government Code section 65580 is a general statement of public policy, not a directive to any agency, let alone a water and sewer district, on how to implement that policy.

The narrow question here is whether the Government Code sections relied on by appellants impose any ministerial duty on the District which is enforceable by mandate. Clearly they do not. Given that conclusion, we need not analyze the District's alternative argument that general state policy encouraging housing development must yield to what the District describes as the more specific and controlling policy, its goal of protecting and fairly allocating its finite resource when faced with a demand greater than the capacity of the system. (See Getz v. Pebble Beach Community Services Dist. (1990) 219 Cal.App.3d 229, 231-233 [general statewide policy supporting the construction of senior housing units, as embodied in Government Code section 65852.1, must yield to competing specific policy mandating protection of coastal waters by limiting effluent discharge].)

E. The District's Duty Under Its Ordinance

Section 13.01.034 of the ordinance establishing the moratorium provides, "The District will continue to pursue sources of additional water supply. When supplies become available that are in addition to present supplies, such supplies shall be considered by the Board and be allocated in a manner as deemed appropriate by the Board so long as the [Board] finds that there is no increase in magnitude or frequency of risk of future use reductions to existing consumers."

Appellants contend that this section of the ordinance obligated the District to allocate a new 200 acre-foot supply of water available from its reclamation project for the development of new housing. The argument is refuted by the language of the ordinance itself, which makes it clear that Board is vested with discretion in determining how new water supplies are to be allocated. We reiterate that mandamus cannot be used to compel the District to exercise its discretion in the manner which appellants deem preferable.

DISPOSITION

Appellants are not entitled to relief under the facts alleged, whether by way of mandamus, declaratory relief, or injunction. The judgment of dismissal is affirmed.

Strankman, J.*

We concur:
Merrill, Acting P.J.
Chin, J.

* Assigned by the Chairperson of the Judicial Council.

1. Unless otherwise indicated, all further statutory references are to the Water Code.

2. Section 71640 provides in pertinent part that a municipal water district "may restrict the use of district water during any emergency caused by drought, or other threatened or existing water shortage . . . ."

Trial Court:
Superior Court, Marin County

Trial Judge:
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ENVIRONMENTAL LAW

District's Environmental Impact Report On Water Restrictions Is Sufficient

Cite as 91 Daily Journal D.A.R. 14332

MARIN MUNICIPAL WATER DISTRICT,
Plaintiff and Appellant,
v.
KG LAND CALIFORNIA CORPORATION et al.,
Defendants and Respondents.

No. A050793
Super. Ct. No. 144922
California Court of Appeal
First Appellate District
Division Three
Filed November 20, 1991

The Marin Municipal Water District (the District) declared a water shortage emergency in its service area in 1989 and imposed a moratorium on new service connections, pending the development of new water supplies. Before imposing the moratorium, the District issued an environmental impact report (EIR) concluding that the proposed restriction would have no significant adverse environmental effects. Developers

KG Land California Corporation (KG Land), Perini Land and Development Company (Perini) and others who opposed the moratorium challenged the EIR in the trial court, claiming among other arguments that it failed to analyze adequately the adverse environmental consequences of the moratorium or to consider several purportedly feasible alternatives. The trial court concluded that the report was invalid under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)[1] The District has appealed; we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The District is a public utility which provides water to approximately 167,000 people in a 147 square mile area of Marin County. The District's service area extends north along the east side of the county from the Golden Gate Bridge to and including part of Novato. Its primary water source is rainfall and runoff stored in seven reservoirs or lakes.

The District determined in late 1984 that it could prudently supply 35,000 acre-feet of water annually to its consumers.[2] Thereafter, studies indicated that its growth projections were too low; in addition, per capita water consumption increased more than anticipated. In September 1988, the District began preparation of a new Water Supply Master Plan to update growth projections and address alternative sources of water supply.

The demand for new connections also increased faster than anticipated. As of February 1989, only about 495 acre-feet remained uncommitted, and the District declared a water shortage emergency pursuant to Water Code sections 350 et seq. and 71640 et seq. It adopted an urgency ordinance temporarily prohibiting any new water service connections, to become effective upon its allocation of 34,900 acre-feet of water, and subject to certain limited exceptions. At the same time, the District continued work on the new Water Supply Master Plan.

As of April 1989, only about 18 acre-feet remained uncommitted, and the District proposed a new ordinance prohibiting new water service connections for an extended indefinite period. A draft environmental impact report (DEIR) was prepared to evaluate the potential environmental effects of this moratorium and consider alternatives to its adoption.

Initially, the DEIR explained that despite the District's doubts whether the moratorium was a project within the meaning of CEQA, it had chosen to proceed with the EIR process and would consider the EIR before any decision on adoption of the moratorium. The DEIR concluded that the moratorium would have a beneficial effect on water supply by restricting additional demand in the District until new water supplies could be developed and would have no adverse environmental impact either on water supply or existing consumers. It then commented on the potential effect of the moratorium on economic conditions within the District's service area, not because those conditions would result in significant environmental effects, but "for informational purposes." As will be discussed in more detail later, the DEIR analyzed the possible impact of the moratorium on housing stock, housing affordability, employment, and public finance. It concluded, "[W]hile certain potentially adverse economic effects were identified, they were determined not to have an adverse effect on the physical environment."

The DEIR also discussed two alternatives to the moratorium: no project and mandatory conservation of 15 percent. As will be discussed, it rejected both and concluded that the moratorium would be environmentally superior and would have the least effect on the District's existing customers.

The District received numerous comments on the DEIR and held a public hearing; those comments and the District's written responses were incorporated into the final EIR. At its December 13, 1989, public meeting, the District certified the adequacy of the EIR and adopted the moratorium.

Perini, KG Land, and Joe and Haidy Shekou (the Shekous) filed petitions for writs of mandate and complaints for declaratory relief challenging the District's compliance with CEQA in certifying the EIR and adopting the moratorium; their actions were consolidated. After a hearing, the trial court concluded that the EIR was deficient in several respects, both substantive and procedural. Among the court's conclusions were that the EIR did not consider and analyze adequately the potentially significant adverse secondary environmental effects of the moratorium, an appropriate range of feasible alternatives to its adoption, and its inconsistencies with potentially affected local and regional plans. The court also concluded that the final EIR included significant new information requiring its recirculation before certification.

The court then ordered the District to void its certification of the EIR and either repeal the moratorium or prepare a new EIR; it also granted a limited injunction regarding enforcement of the moratorium. In effect the injunction required the District to provide up to 200 acre-feet of water (1) to those on the District's waiting list for new connections as of July 30, 1990, including Perini, and (2) to KG Land and the Shekous, who were apparently not then on the waiting list, provided that they otherwise complied with the District's generally applicable water service procedures.

The District appeals from the judgment. Respondents are KG Land and Perini; the District has settled its dispute with the Shekous, who are no longer parties to this appeal. We have issued a writ of supersedeas staying that portion of the order enjoining enforcement of the moratorium, pending our determination of the appeal.

DISCUSSION

A. Introduction

The Supreme Court has repeatedly observed that the Legislature intended CEQA to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. (See, e.g., Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 390; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 259.) The EIR has been described both as the heart of CEQA and as an environmental alarm bell, whose purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before those decisions are made. (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564; County of Inyo v. Yorty (1973) 32 Cal.App.3d 795, 810.)

Nevertheless, that court has also cautioned, "The wisdom of approving . . . any . . . project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions." (Citizens o f Goleta Valley v. Board of Supervisors, supra, 52 Cal.3d at p. 576.) Therefore, a court's inquiry into agency actions under CEQA "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.) The reviewing court assesses only the sufficiency of an EIR as an informative document, not the correctness of its environmental conclusions; it may not set aside an agency's approval of an EIR on the ground that a different conclusion would have been equally or more reasonable. (Citizens of Goleta Valley, supra, at p. 564.) When applying the substantial evidence standard to the agency's determination, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (Laurel Heights Improvement Assn. v. Regents of University of California, supra, 47 Cal.3d at pp. 392-393, and fn. 5.)

B. Secondary Consequences of the Proposed Moratorium

The trial court concluded that the EIR did not consider and evaluate adequately the possible secondary adverse environmental consequences of the moratorium, particularly those resulting from its effect on (1) the ability of cities in the District to meet their regional fair share of housing; (2) any regional jobs/housing imbalance; (3) regional growth and the development of vacant land in neighboring communities; and (4) the generation of fees for public services and on environmental services funded by these fees. The District contends that its analysis was sufficient, and we agree.

With certain limited exceptions, CEQA requires an EIR whenever a public agency proposes to approve or carry out a project that may have a significant effect on the environment. (§§ 21100, 21151; Guidelines, § 15002, subd. (f)(1).)[3] "'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." (§ 21068; see also Guidelines, § 15001, subd. (g) ["significant effect on the environment is defined as a substantial adverse change in the physical conditions which exist in the area affected by the proposed project. . . ."].)[4]

According to the Guidelines, both primary and secondary environmental consequences must be considered in determining whether a project may have a significant effect. Primary or direct consequences are those immediately related to the project, i.e., dust and noise resulting from construction of a sewage treatment plant; secondary or indirect consequences "may be several steps removed from the project in a chain of cause and effect," i.e., increased air pollution which may result from population growth facilitated by construction of that plant. (Guidelines, § 15064, subd. (d)(1), (2).)

Generally social and economic changes resulting from a project are not treated as significant environmental effects, either primary or secondary, which require EIR analysis. (San Franciscans for Reasonable Growth v. City and County of San Francisco (1989) 209 Cal.App.3d 1502, 1516; No Slo Transit, Inc. v. City of Long Beach (1987) 197 Cal.App.3d 241, 256; Guidelines, §§ 15064, subd. (f), 15131.) Nevertheless, the Guidelines do explain that a project's social and economic effects may have some relevance in determining the significance of a physical change; for example, an EIR may identify anticipated economic changes which will in turn cause a physical change, or may use economic effects to determine the importance of physical changes. (Guidelines, §§ 15064, subd. (f), 15131, subds. (a), (b).)[5] But "[t]he focus of the analysis shall be on the physical changes." (Guidelines, § 15131, subd. (a).)

Analyzing whether a project may have a significant environmental effect necessarily involves some degree of forecasting, but perfect prescience is not required. For example, EIR analysis may be required if the future expansion and general type of future use of a project are reasonably foreseeable and likely to change the scope or nature of the project and its environmental effects. (Laurel Heights Improvement Assn. v. Regents of University of California, supra, 47 Cal.3d at p. 396.) But when the nature of future development is nonspecific and uncertain, an EIR need not engage in "sheer speculation" as to future environmental consequences. (Atherton v. Board of Supervisors (1983) 146 Cal.App.3d 346, 351; see also Residents Ad Hoc Stadium Com. v. Board of Trustees (1979) 89 Cal.App.3d 274, 286 ["'Crystal ball' inquiry is not required."].) Section 15145 of the Guidelines expresses a similar consideration: "If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact."

Here, it is undisputed that the moratorium presented no risk of primary or direct adverse environmental consequences. As suggested by the Guidelines, the EIR did consider and discuss potential social and economic effects of the moratorium which could result in secondary environmental consequences. Its analysis of housing is illustrative of its approach to these nonenvironmental factors. First, the EIR explained that the moratorium would not affect residential construction for at least five or six years, because numerous pending development projects have already received water commitments and remain to be built during that time. The EIR then acknowledged that a moratorium of longer than five or six years could result in increased pressure for growth and development in areas outside the District's service area. But future development in communities outside the District's service area and in other counties will be dependent on what those local agencies permit, among many other factors, and the environmental consequences of any such development will necessarily be considered and analyzed in subsequent environmental impact reports. Accordingly, the District reasonably concluded that the potential environmental impact of possible future development elsewhere was simply too speculative to evaluate; it was therefore unable to identify any secondary adverse environmental consequences which might result from the effect of the moratorium on housing.

The EIR provided a similar analysis of employment. It acknowledged that Marin County

traditionally has had a larger labor force than number of jobs and discussed the moratorium's possible impact on this "jobs/housing imbalance." Again, however, the EIR emphasized the problems involved in forecasting the long-range effect of the moratorium. It recognized that if the moratorium lasted for an extended period, the reduction of new commercial development could result in slowing employment growth. But to illustrate the difficulty in predicting the physical or environmental changes which might result from changes in employment patterns, it suggested two possible scenarios. A reduction in commercial development in the District's service area might mean that more of its residents will commute elsewhere, thereby causing increased highway congestion; conversely, it might also mean that fewer people will commute from elsewhere into the area, thereby reducing potential highway congestion.

The EIR also considered the impact the moratorium might have on public finance. It acknowledged that the moratorium would lessen local government revenue generated by development fees but concluded that any decrease in fees would be offset by the reduced demand for public services which would result from reduced development.

To summarize, the EIR addressed the possible economic and social impact of the moratorium and concluded that any such impact would not be felt for several years; obviously, then, there would be no secondary environmental consequences at least for that period. The EIR then reasonably refused to speculate about possible secondary environmental consequences which might result from any long-term economic or social changes. Given the unique nature of the project under consideration, this analysis was legally adequate. Respondents' disagreement with the EIR's conclusions does not establish that the analysis which led to those conclusions was deficient.

C. Feasible Alternatives to the Moratorium

We next consider whether the EIR included and adequately analyzed an appropriate range of feasible alternatives to the moratorium. The trial court concluded that it did not; again, we disagree.

It is state policy that governmental agencies at every level must "consider alternatives to proposed actions affecting the environment." (§ 21001, subd. (g).) To further that public policy, an EIR must identify both the significant effects of a project on the environment and alternatives to the project. (§ 21002.1, subd. (a); see § 21061.) A feasible alternative is one which is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (See § 21061.1; Guidelines, § 15364.)

The Supreme Court has recently instructed, "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose. . . . [A]n EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project . . . which: (1) offer substantial environmental advantages over the project proposal . . . ; and (2) may be 'feasibly accomplished in a successful manner' considering the economic, environmental, social and technological factors involved. [Citations.]" (Citizens of Golet a Valley v. Board of Supervisors, supra, 52 Cal.3d at p. 566, emphasis added.) An exhaustive list of alternatives is not required, and the statutory requirements for consideration of alternatives must be evaluated against a rule of reason. (Id., at p. 565.)

Consistent with these statutory and judicial principles, the Guidelines state that an EIR must "[d]escribe a range of reasonable alternatives to the project . . . which could feasibly attain the basic objectives of the project and evaluate the comparative merits of the alternatives." (Guidelines, § 15126, subd. (d).)

If the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion. The analysis must be sufficiently specific to permit informed decisionmaking and public participation, but the requirement should not be construed unreasonably to defeat projects easily. An EIR need not consider in detail every conceivable variation of the alternatives stated; instead, as with the range of alternatives which need discussion, the level of analysis is subject to a rule of reason. (Laurel Heights Improvement Assn. v. Regents of University of California, supra, 47 Cal.3d at pp. 406-407.)

The DEIR under consideration here discussed two possible alternatives, no project and a form of mandatory conservation. The no project alternative would obviously mean continued commitment of water service to new users without restriction. The DEIR explained that with no moratorium, the risk of water shortage would become unacceptable sometime in the early 1990s. The mandatory conservation alternative would attempt to reduce the amount of water needed to satisfy existing commitments by mandating an immediate 15 percent cut in water use by all existing customers; to maintain demand below the safe yield of the system, that reduction would necessarily have to be increased as the number of new connections grew.

The DEIR concluded that the moratorium was the environmentally superior alternative. It acknowledged that none of the three alternatives would have a direct effect on the natural environment, but cautioned that extended rationing could result in some loss of landscape vegetation. It pointed out that development increases the rate of air and water pollution and converts lands with value as wildlife habitat to urban or suburban uses; it concluded that the moratorium would have an indirect beneficial effect on the natural environment by slowing and ultimately halting land development if additional water supplies are not developed. The DEIR also acknowledged that mandatory conservation would reduce the risk of shortage, but only by accepting immediate and increasingly stringent routine reductions in use.

Comments to the DEIR suggested other possible alternatives, including a tiered rate system (i.e., higher rates for water use in excess of certain amount), increased development and use of reclaimed water, expedited development of new water sources, such as the Russian River or additional water from Phoenix Lake, 5 or 10 percent mandatory conservation, voluntary conservation, and use of water allocated to Hamilton Field, for which there are no current development plans.

The final EIR rejected each of these alternatives. Although plans were underway to upgrade the quality and quantity of reclaimed water, its current quantity

and permissible uses were limited. New water sources could not be implemented immediately; any benefits from such development would not be felt for at least five years or more. The possibility of extracting additional water from Phoenix Lake had already been rejected, after assessing the cost of development, as well as aesthetic and recreational considerations. Reducing the District's existing commitments by rescinding its 750 acre-feet commitment to Hamilton Air Force Base was also not considered to be a feasible alternative; the EIR explained that although one development proposal for that site had been rejected by the voters, uncertainty about whether the District could legally extinguish its commitment to serve the base meant that such action could not be deemed a feasible alternative. The remaining alternatives suggested in comments were variations on the conservation alternative considered and rejected in the DEIR, and were rejected in the final EIR for similar reasons.

Respondents disagree with the District's conclusion that the moratorium is the environmentally superior alternative, but our task is only to assess the sufficiency of the EIR as an informative document, not the correctness of its environmental conclusions. What must be emphasized in reviewing these alternatives is that the objective of the moratorium was not to solve the District's long-term water supply problems; rather, its more modest goal was to prevent an immediate over-commitment of the District's water supply, as the District's operational yield was effectively fully committed when the EIR process began. The EIR explained why each suggested alternative either could not satisfy this goal, did not offer substantial environmental advantages over the moratorium, or could not be feasibly accomplished in a successful manner considering the economic or environmental or technological factors involved. (See Citizens of Goleta Valley v. Board of Supervisors, supra, 52 Cal.3d at p. 566.) The EIR discussed a reasonable range of alternatives and provided an adequate discussion of their feasibility; no more was required.

D. Recirculation of the DEIR

As we have stated, the essential purpose of the EIR is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. (Citizens of Goleta Valley v. Board of Supervisors, supra, 52 Cal.3d at p. 564.) Therefore after a DEIR has been completed, it must be made available to interested parties and the public for their comments. (Guidelines, § 15087.) The responsible agency must evaluate these comments and prepare a written response which describes the disposition of significant environmental issues raised; the response to comments may take the form of a revision to the DEIR or may be a separate section in the final EIR. (Guidelines, § 15088.) The agency must prepare and certify a final EIR before approving the project. (Guidelines, §§ 15089, 15090.) When "significant new information" is added after public notice and public agency consultation and comment, but before certification, the lead agency must issue a new notice and recirculate the EIR. (§ 21092.1.)[6]

Recirculation is not required if a revision simply clarifies, amplifies, or makes insignificant modifications to an adequate EIR. On the other hand, when substantial new information on the environmental consequences of a project is added to an inadequate EIR, recirculation is essential. Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal.App.3d 813 is illustrative. In that case, the County Board of Supervisors circulated a DEIR about a proposed tomato paste processing plant. After a public hearing at which the document was criticized for several deficiencies, the Board determined that the document should be redrafted. A revised final EIR was prepared, which fundamentally reorganized the previous material and provided a considerable amount of new information, including many additional details about the potential effect of the plant on the environment; it also substituted some new data for information which had been repudiated by its purported author. Under these circumstances, the reviewing court concluded that the failure to recirculate the revised final EIR to responsible public agencies rendered it procedurally inadequate. (Id., at pp. 822-823.)

In the present case, the trial court concluded that the final EIR included significant new information, "such as reference to information in the Water Supply Master Plan prepared for the District," that required its recirculation under section 21092.1. Respondents expand upon or explain that conclusion, urging that not until the release of the Water Supply Master Plan, which was completed and made available to the public after preparation of the DEIR, was it clear that the moratorium would have a probable duration of 10 years or more.

Respondents' argument is not convincing. The DEIR stated that the District proposed to adopt a moratorium for an "extended, although indefinite period," until additional water supplies were developed and in place. The discussion of the potential impact of the moratorium included consideration of what might result if it lasted for more than five or six years. The final EIR here did not contain substantial new information about the duration of the moratorium or its environmental consequences; instead, it reiterated that the duration was uncertain and was dependent on the development of new water supplies.

City of Santee v. County of San Diego (1989) 214 Cal.App.3d 1438, upon which respondents rely, is inapposite. The proposed project in Santee included an "interim men's detention facility" which would serve until new detention facilities relieved an existing jail overcrowding problem. (Id., at pp. 1450-1451.) Neither the draft nor the final EIR specified the duration of this interim period, but the traffic impact analysis attached to the final EIR was based on three years. When the agency certified the final EIR, it also set a seven-year limit for removal of the interim project. The reviewing court concluded that the board's belated setting of a seven-year time frame was "too little too late" to apprise all interested parties of the scope of the project and that the EIR was therefore inadequate. (Id., at p. 1454.) Here, in contrast, the project was consistently defined as a moratorium of indefinite duration; the final EIR contained no significant new information.

Our conclusion is dispositive of respondents' related contention that the District did not comply with the notice and consultation requirements of section 21092.2 before certifying the final EIR; that section mandates further notice and consultation only when significant new information is added.

E. Consistency With General Plan

A local agency engaged in EIR analysis may not ignore regional needs and the cumulative impacts of a proposed project. (Citizens of Goleta Valley v. Board of Supervisors, supra, 52 Cal.3d at p. 573.) Thus the Guidelines require an EIR to discuss any inconsistencies between the proposed project and applicable general and regional plans. (Guidelines, § 15125, subd. (b).) Respondents contend that the EIR did not adequately consider inconsistencies between the moratorium and the housing elements of local and regional general plans.

Again, the argument reflects respondents' disagreement with the conclusions of the EIR but does not establish its inadequacy as an informative document. Housing needs identified in a general plan are simply goals, not mandated acts. (Northwood Homes, Inc. v. Town of Moraga (1989) 216 Cal.App.3d 1197, 1204.) The final EIR did address the relationship between the moratorium and local general plans. Responding to comments, it stated in pertinent part that the "proposed ordinance would generally be consistent with the intent of local general plans to guide community growth and ensure the adequate provision of water and other community services in a coordinated and efficient manner." In other words, whatever their stated housing goals, general and regional plans favor development only where there is adequate water and other utilities. Respondents cite no authority to the contrary.

F. The Injunction

The District contends even if the EIR requires revision, the trial court's remedy here was inappropriate, in part because it ignored the District's determination that the maximum amount of water which can be safely committed annually to customers has already been reached, and favored respondents over other potential users. Because we have concluded that the EIR was legally sufficient, we need not address this issue.

DISPOSITION

The judgment is reversed and the trial court is directed to enter judgment denying respondents' petitions for writ of mandate and complaints for declaratory relief. Costs to appellant.

Strankman, J.*

We concur:

Merrill, Acting P.J.
Chin, J.

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* Assigned by the Chairperson of the Judicial Council.

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1. Unless otherwise indicated, all further statutory references are to the Public Resources Code.

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2. This amount, termed the District's operational yield, was based in part on an analysis of conditions from 1928 through 1986, including the 1976-1977 drought; it allows for consecutive deficiencies of 15 percent and 33 percent upon a recurrence of drought conditions similar to those of 1976-1977 and total depletion of reservoir storage.

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3. References to Guidelines are to the State CEQA Guidelines, which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.) Although the Supreme Court has not decided whether the Guidelines are regulatory mandates or simply interpretive aids, it has stated that at a minimum, courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA. (Laurel Heights Improvement Assn. v. Regents of University of California, supra, 47 Cal.3d at p. 391, fn. 2.)

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4. The question which immediately springs to mind is how a moratorium of this type, which by its very nature will maintain the status quo rather than foster development, might result in any adverse change in physical conditions existing in the area, let alone one which is substantial. Nevertheless, the District chose to participate in the EIR process and did not argue in the trial court that CEQA compliance was not required; thus that issue is not before us.

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5. Section 15064, subdivision (f), of the Guidelines provides in pertinent part: "Economic and social changes resulting from a project shall not be treated as significant effects on the environment. Economic or social changes may be used, however, to determine that a physical change shall be regarded as a significant effect on the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment. . . ."

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6. Section 21092.1 provides in pertinent part, "When significant new information is added to an [EIR] after notice has been given pursuant to Section 21092 and consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification, the public agency shall give notice again . . . and consult again . . . before certifying the [EIR]."

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