STATE COURT
DocketWatch
SUMMER 2008

California: *In re Marriage Cases*

by John Shu

Gay marriage litigation continues throughout the several states. On May 15, 2008, the California Supreme Court struck down California's limitation of the term "marriage" to opposite-gender couples in *In re Marriage Cases*, a consolidation of several gay marriages cases. In its decision, the court held that discrimination based on sexual orientation must be analyzed under a strict scrutiny standard of review because it held that sexual orientation is a suspect class, the first court in the nation to do so. While California already permitted same-gender couples to enter into domestic partnerships, *In re Marriage Cases* meant that, starting at 5:01 PM on June 16, 2008, same gender couples could marry officially. This article, the fifth in a series, will briefly analyze this decision.

I. Procedural History

Plaintiffs, several gay couples, challenged the constitutionality of California Family Code sections 300(a) and 308.5, which limit marriage between a man and a woman.[1] The plaintiffs also challenged California's 2003 Domestic Partner Act, codified at California Family Code section 297 *et seq.*, as constitutionally insufficient on equal protection grounds.[2]

On February 12, 2004, the City of San Francisco, at the instruction of Mayor Gavin Newsom, began issuing marriage licenses to same-sex couples. The following day, two separate actions were filed in the San Francisco Superior Court seeking an immediate stay and writ relief to prohibit the licenses' issuance.[3] The superior court refused to grant an immediate stay. Bill Lockyer (D), who was then California's Attorney General, filed two separate petitions—along with a number of other parties—seeking to have the Supreme Court issue a writ of mandamus.[4] On March 11, 2004, the California Supreme Court issued an order to show cause in these writ proceedings and directed city officials to enforce the existing marriage statutes and refrain from issuing unauthorized ones; the order also stayed the *Proposition 22* and *Campaign* proceedings.

Shortly afterwards, the city filed a writ petition and a complaint for declaratory relief in superior court.[5] Two similar actions were then filed challenging the constitutionality of the statutes.[6] Subsequently, the *CCSF*,

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Washington Supreme Court Round-Up: 2007 Highlights

Court Rules That Voters Did not Understand the Initiative For Which They Voted

by Andrew Cook

The Washington Supreme Court recently issued another much publicized opinion, ruling 5-4 that the voters of the state misunderstood what they were voting for when they decided to limit property tax increases to 1% a year.

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INSIDE

FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Additionally, readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Sarah Field, at sarah.field@fed-soc.org.

CASE IN FOCUS

Ohio Supreme Court Upholds Civil Liability Reforms

by David J. Owsiany

The Ohio Supreme Court has a long and somewhat controversial history of striking down laws enacted by the Ohio General Assembly to reform the state's civil liability system.[1] In stark contrast with the past, however, Ohio's highest court recently upheld caps on non-economic and punitive damages in *Arbino v. Johnson & Johnson* and a ten-year product liability statute of repose in *Groch v. General Motors Corp.* These decisions may bode well for advocates of tort reform who have worked to enact other civil liability reforms in Ohio during recent years.

Arbino v. Johnson & Johnson

In 2006, the petitioner, Melisa Arbino, initiated a products liability action alleging that she suffered injuries from using a birth control patch manufactured by the respondent, Johnson & Johnson.[2] The petitioner's complaint contained challenges to the constitutionality of four statutory tort reform provisions that were enacted into law in 2005. The petitioner's claim was consolidated with other claims relating to the birth control patch at issue before Judge David A. Katz in the United States District Court for the Northern District of Ohio, Western Division.[3]

Judge Katz certified four questions of state law for the Ohio Supreme Court's review. Ohio's highest court accepted three of the certified questions for review and later ruled that the petitioner did not have standing to challenge the statutory provision at issue in one of the certified questions, leaving two remaining questions for substantive review.[4]

The remaining certified questions were challenges to a recently enacted statute limiting non-economic and punitive damages in certain tort actions.[5]

The Ohio Supreme Court's Recent History Related to Tort Reform

Chief Justice Thomas Moyer, in an opinion issued in December 2007 for a 5-2 majority of the court, briefly reviewed "the major tort reform laws enacted by the General Assembly in recent history." The court noted that "[s]ince 1975, the General Assembly has adopted several so-called tort-reform acts, which were inevitably reviewed by this court." Many of those statutes included "specific provisions" that were "similar in language and purpose" to those at issue in *Arbino*. The court conceded that "all of these similar statutes had been declared unconstitutional" in previous Ohio Supreme Court decisions.[6]

The *Arbino* court noted these past decisions did not necessarily mean the current version of tort reform was unconstitutional as well. According to Moyer's majority opinion, "[i]n its continued pursuit of reform, the General Assembly has made progress in tailoring its legislation to address the constitutional defects identified" in past cases.[7]

Limits on Non-Economic Damages

The statute at issue in *Arbino* limits recoverable non-economic damages to the greater of $250,000 or three times the economic damages up to a maximum of $350,000 for each plaintiff or a maximum of $500,000 per each occurrence. The statute does not place any limits on economic damages, and the non-economic damages

cap does not apply if the plaintiff suffers "[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system," or "[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities."[8]

Limits on Punitive Damages

The statute also limits punitive damages in tort actions to a maximum of two times the total amount of compensatory damages awarded to a plaintiff per defendant. However, if the defendant is a "small employer" (i.e., generally no more than 100 full-time employees) or an individual, punitive damages may not exceed the lesser of two times the amount of compensatory damages or 10 percent of the employer's or individual's net worth, up to a maximum of $350,000.[9]

Standard of Review

As an initial matter, the *Arbino* majority noted "it is difficult to prove that a statute is unconstitutional" since "[a]ll statutes have a strong presumption of constitutionality." In order to strike a statute down, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.[10] Furthermore, the court noted that the petitioner presented a facial challenge to the statute at issue in *Arbino* and that, to be successful, the petitioner must show there is no set of circumstances in which the statute would be valid.[11]

The Right to a Trial by Jury

The Ohio Constitution provides: "[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."[12] The petitioner argued that because the right to a trial by jury includes the right to have a jury determine the full amount of a plaintiff's damages, the non-economic and punitive damages limits are unconstitutional.[13]

The *Arbino* majority acknowledged that "the right to trial by jury protects a plaintiff's right to have a jury determine all issues of fact" and "[b]ecause the extent of damages suffered by a plaintiff is a factual issue, it is within the jury's province to determine the amount of damages to be awarded."[14] However, the *Arbino* majority also noted that "the right to a trial by jury does not extend to the determination of questions of law" and "awards may be altered *as a matter of law*."[15]

The *Arbino* court noted several ways in which a court

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Connecticut Supreme Court Reverses $41 Million Judgment in Construction Injury Case

by Karen Torre

In a case of great interest to the construction industry and the plaintiff's personal injury bar, the Connecticut Supreme Court, after protracted litigation spanning nearly 13 years, reversed a trial court judgment and damage award—in excess of 41 million dollars—against a general contractor for the negligence of a subcontractor. In *Pelletier v. Sordoni/Skanska Construction Co.*, the state's high court considered whether Sordoni, as general contractor for the construction of a building for Pitney Bowes, Inc., owed the plaintiff, Norman Pelletier, a non-delegable duty of due care to ensure the integrity of the welding of the structure's steel frame.[1] Pelletier was an employee of Berlin Steel Construction Company, a subcontractor engaged to fabricate and erect the building's steel frame.

Among Berlin's contractual obligations was the duty to inspect welds to ensure their integrity and the capacity of structural columns to bear the weight of crossbeams and other components of the frame. Although Sordoni reserved a right to inspect the steel and welds "solely for its own benefit," its contract with Berlin emphasized that this reservation would not operate to relieve Berlin of its primary responsibilities as subcontractor.

In June of 1994, Pelletier suffered catastrophic injuries when struck by a steel crossbeam that fell on him only minutes after its installation between two columns by co-workers. It appeared undisputed that the cause of the collapse was insufficient "tack" welding of a steel flange on one of the columns that served as the seat connection for the two-ton beam. Pelletier was entitled to, and commenced receiving, workers compensation benefits from Berlin Steel.

He brought an action against Sordoni for negligence and breach of contract. He also asserted a claim of negligence against Professional Services Industries, Inc., a firm hired by Sordoni to inspect Berlin Steel's work on the project. Both defendants moved for summary judgment under state appellate authority holding

that a general contractor may not be held liable for the negligent acts of its subcontractors.[2]

The trial court granted both motions. In Pelletier's first appeal, the Connecticut Supreme Court, in July of 2003, reversed the judgment for Sordoni on the negligence count and remanded the action for further proceedings. Rejecting an absolute bar, the court held that in certain defined circumstances, an injured employee of a negligent independent subcontractor might establish a "legal and factual basis" for imposition of liability on the general contractor.[3]

Upon remand, protracted proceedings ensued with Sordoni's second attempt to gain summary judgment on the ground that the plaintiff could not establish a basis for any of the identified exceptions permitting general contractor liability. Once again, the trial court granted Sordoni's motion. Upon Pelletier's motion for reconsideration, however, the trial court vacated its decision, agreeing with Pelletier that it should have considered whether certain aspects of Sordoni's contract with Berlin Steel and/or Sordoni's obligations, under state statutes and building code regulations, gave rise to a separate and distinct duty to inspect all welds and otherwise exercise due care to prevent the injury.

The trial court concluded that Sordoni owed a non-delegable duty of due care to Pelletier based on section 1307 of the Building Officials and Code Administrators International, Inc., (BOCA) National Building Code, which requires special inspection of all welds.[4] Further, the court held that a violation of the code's provisions and standards respecting weld safety and inspection constitutes negligence per se. On the latter point, the trial court's conclusion that this principle applied to Sordoni hinged on Sordoni's status as the project's permit applicant.

The case proceeded to trial on Pelletier's claim against Sordoni based on a theory of statutory negligence. The trial court rejected Pelletier's argument that the jury should also consider whether Sordoni was liable under principles of common law negligence, and/or one or two of the established exceptions permitting

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Oklahoma: The Inverted Federalism of *Grider v. Compaq*

by Theodore H. Frank

In *Phillips Petroleum Co. v. Shutts*, the U.S. Supreme Court held that due process prohibits a state from imposing its law extraterritorially upon transactions with no connection to the state.[1] A 2003 decision in Oklahoma, however, does just that, creating fifty state classes under choice-of-law principles, even though the Oklahoma legislature would be forbidden from doing so.[2] A recent unreported Oklahoma case, *Grider v. Compaq Computer Corp.*, applies Texas consumer law on a nationwide basis—even as the Texas Supreme Court has held that such law is inapplicable outside of Texas.[3] *Grider*'s class certification raises troubling questions of due process, the Full Faith and Credit Clause, and public policy.

On June 4, 2003, Stephen and Beverly Grider sued in Oklahoma state court, alleging that Compaq breached its express limited warranty by selling computers with purportedly defective floppy disk controllers ("FDCs"). They sought to represent a putative nationwide class of approximately 1.7 million purchasers of certain Compaq computers. As was common in the days before the Class Action Fairness Act (CAFA),[4] the *Grider* suit was forum-shopping: identical claims on behalf of an identical class had been filed by the Griders' counsel in Texas state court in January 2000. Plaintiffs' experts were unable to generate malfunctions through normal use of the computer, and the named plaintiff had no evidence of injury. Rather, Grider alleged that the computers were "defective in the box," because their FDCs allegedly did not comply with unspecified industry standards or Compaq specifications.

In the Texas suit, a trial court had certified a proposed nationwide class, and the court of appeals affirmed, holding that it "believed" it could apply Texas law to the nationwide class.[5] The Supreme Court of Texas reversed, noting that while the case involved a claim of a breach of express warranty under the Uniform Commercial Code, the UCC is not uniform across all fifty states.[6] Thus, the court held that a choice-of-law analysis must be applied to satisfy the due process standard of *Shutts*, and that, absent a contractual choice-of-law provision, Texas law would apply lex loci delicti—the law of the place of injury—rather than a law of the manufacturer's domicile.[7] After all, when a Texas consumer sued an out-of-state manufacturer over a contract made in Texas, Texas courts would apply the Texas consumer protection law; thus, the Texas consumer protection law was intended to compensate Texas consumers adequately, rather than to deter Texas businesses.[8] Other jurisdictions had a similar

interest in ensuring their consumers were adequately compensated under their state's consumer protection law. Texas consumer protection law thus could not apply to a fifty-state class under Texas law or *Shutts*. In the absence of consistent law, the class could not be certified. Such a result is hardly surprising; it is how the vast majority of courts to evaluate such allegations have proceeded.[9]

After *LaPray* was remanded to the trial court in Beaumont, the plaintiffs proceeded instead in their second-choice forum, Oklahoma, once again arguing that Texas law applied to the nationwide class. Here, however, they could rely upon a 2003 Oklahoma Supreme Court case, *Ysbrand v. DaimlerChrysler Corp.*,[10] which affirmed the certification of a nationwide class action on breach of warranty claims against the automaker, using a law of the manufacturers' principal place of business principle.[11] The trial court held that Texas law would apply to all members of the putative *Grider* class—regardless of their individual state of residence—and refused to recognize the Texas Supreme Court's decision in *LaPray* as controlling on this question of the applicability of Texas law.

The trial court certified this interlocutory question to the Oklahoma Supreme Court, but that court denied review, whereupon the trial court certified the same class that the Texas Supreme Court had decertified. The Oklahoma Court of Civil Appeals affirmed in an unpublished opinion, relying upon *Ysbrand*. Compaq sought review in the Supreme Court of Oklahoma; the state of Texas filed an amicus brief seeking proper application of its laws. But the Oklahoma Supreme Court denied certiorari, and a further appeal was similarly fruitless; the U.S. Supreme Court denied certiorari at the beginning of this term.[12]

As is common when faced with gigantic certified classes where damages could be enormous if the case were fully litigated, the defendant agreed to a settlement. Subject to a fairness hearing in April 2008, class members will receive coupons in future purchases; the plaintiffs' attorneys are due to request $48.5 million in fees, notwithstanding the uncertainty of the eventual redemption value of the coupons or the fact that Compaq can pass the cost of the coupon program onto its future customers if it accurately anticipates the redemption rate.

The theory of suit raises questions as a matter of public policy. When damages are awarded without harm to the plaintiffs, there is inefficient over-deterrence.[13] But the problem is magnified by the Oklahoma court's disregard for the Texas court's decision. The state court recognized a national cause of action that neither the Oklahoma nor the Texas legislature—much less the federal legislature—had created.

The problems under the Full Faith and Credit Clause

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Minnesota: Vacation Question is Settled, But Contract Issue Surprises Employers

by Samuel W. Diehl

After more than a year of confusion, Minnesota employers breathed a sigh of relief when the state's supreme court issued *Lee v. Fresenius Medical Care, Inc.*[1] Interpreting Minnesota's wage payment statute, the court held that a terminated employee's "wages" include accrued vacation or paid time-off benefits.[2] Nonetheless, the court concluded that the terms of the employer's vacation policy determined whether such benefits—if any—are accrued, used, or paid. Additionally, it held that there is no substantive right to payment for accrued vacation under the statute. The decision eliminated significant concern caused by a 2006 Minnesota Court of Appeals decision, while also clarifying the extent to which an employer has discretion to set the terms of vacation policies.

Despite the *Lee* court's clarity regarding vacation benefits, the court's brief, but significant, discussion regarding the contractual nature of employment handbook policies was still jarring for employment attorneys. Without any lengthy analysis, the court held that the employer's vacation policy was an enforceable unilateral employment contract—a noteworthy conclusion for such a common policy. Whether this holding represents a modification of employment relationships in Minnesota, or simply an application of a fundamental principle still remains to be seen.

Facts

Lee's facts were relatively straightforward, as evidenced by the plaintiff's original filing in conciliation court. Susan Lee, a dialysis technician for Fresenius Medical Care, Inc, was terminated for both performance and safety issues. After termination, she brought a claim alleging Fresenius owed her more than $3,000 for 181 hours of accrued, but unused, vacation time. Her claim was

based on Minnesota Statute section 181.13 which states, in relevant part, that "[w]hen any employer… discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee."[3]

The company's employee handbook included a paid time-off policy providing, among other terms, that "earned but unused" vacation would be paid upon termination if an employee provides "proper notice." The policy also stated, however, that employees would not be paid for such vacation if either he or she did not provide proper notice or if his or her "employment [wa]s terminated for misconduct… unless required by state law."[4]

The conciliation court found that Fresenius was liable for Lee's accrued, but unused, vacation time, causing Fresenius to appeal to a Minnesota district court. The district court granted the company's motion for summary judgment, finding that the employer's policy actually controlled; thus, Lee was ineligible for payment of her accrued vacation.[5] Lee appealed the district court's decision to the Minnesota Court of Appeals.

The Court of Appeals Decision

The short court of appeals opinion—just five pages in the *North Western Reporter*—caused significant concern and confusion among employers and their counsel.[6] The appellate court held that under section 181.13, employers must pay terminated employees for accrued, but unused, vacation, regardless of the terms of their vacation policy. The court first determined that accrued vacation constitutes "wages" that must be paid under the statute. The court grounded this conclusion on a 1994 court of appeals decision requiring an employer to pay a discharged employee for accrued vacation when the employer's policy called for such payment.[7]

The court of appeals then noted that "an employer's liability for an employee's vacation pay is wholly contractual," but held that employers nonetheless "'cannot provide by contract what is prohibited by statute."[8] The court concluded that, since vacation was wages for the purposes of section 181.13 and the statute contained no misconduct exception, employers could not, by contract, refuse to pay employees for accrued, but unused, vacation upon termination.[9] Employers were obviously concerned with the holding because it not only mandated payment of accrued, but unused, vacation time upon termination, but also called into question the validity of common practices such as "use or lose" and maximum vacation accrual levels.

The Supreme Court's Decision

In considering Fresenius's request for review, the supreme court focused on two primary issues: (1) whether an employment agreement governs eligibility for vacation; and (2) whether an enforceable contract existed between Fresenius and Lee. Addressing these issues in the affirmative, the court first found that Minnesota statutes do not "provide for employee vacation pay as of right. Accordingly, when employers choose to offer paid time-off as a benefit, employers and employees can contract for the circumstances under which employees are entitled to paid time-off and payment in lieu of paid time-off [.]"[10] The court then held that an enforceable unilateral contract existed between the two parties. The court found that Fresenius's dissemination of its vacation policy in the employee handbook constituted an offer that was accepted by Lee through her continued employment, applying the standard from the seminal 1983 decision, *Pine River State Bank v. Mettille*.[11]

Turning next to section 181.13 to determine whether Lee was owed payment for her accrued vacation time, the court affirmed the lower court's holding that vacation time does constitute wages. However, rather than stopping there as the court of appeals had done, the supreme court then considered the phrase "actually earned" in the statute. The court held that section 181.13 is a "timing statute, mandating not *what* an employer must pay a discharged employee, but *when* an employer must pay a discharged employee."[12] Further, the court opined that the statute should be strictly construed, since its language provides for a civil penalty.

After considering previous vacation pay decisions, the court rejected Lee's argument "that Minnesota case law has never allowed an employer to refuse to pay a terminated employee benefits that have already been earned and vested."[13] The court held that the contractual nature of vacation benefits allows employers to provide conditions on the use of such benefits, including whether such benefits would be paid upon termination. Ultimately, the court concluded that Lee was bound by the policy's terms and therefore was not owed any payment for accrued, but unused, vacation benefits.[14] Justice Alan Page dissented, advocating an interpretation of the statute similar to that of the court of appeals.[15]

What Does The Decision Mean?

Vacation policies are important to all employers and one of the few policies most employees carefully scrutinize. *Lee*'s most immediate effect clearly gives

employers the right to set the terms of their vacation policies and the ability to determine whether, if at all, such accrued vacation will be paid upon termination. The court also approvingly cited certain common vacation restrictions. Under *Lee*, the following vacation policies are clearly allowed in Minnesota: requiring employer pre-approval for use; "use or lose" provisions; accrual caps (setting a maximum level above which an employee no longer accrues benefits); refusing buyback or payment for accrued time upon employee termination; as well as other common policies. This was welcome news for employers and employment lawyers drafting vacation policies.

The opinion's discussion of employment contracts is also noteworthy, in part because of its brevity. The court devoted a mere four paragraphs to its finding that the company's employee handbook constituted an enforceable unilateral employment agreement. Since the Minnesota Supreme Court decided *Pine River* nearly 25 years ago, employers and their lawyers have expended significant effort disavowing any contractual relationships formed by oral or written statements—particularly with regard to employee handbooks. Nevertheless, without elaboration, the *Lee* court applied *Pine River*, finding an enforceable unilateral contract without considering any contract disclaimers in the handbook.

It is unclear whether the case's circumstances caused the court to apply an abbreviated contract analysis or whether the court simply found this point unremarkable. It was, after all, the employer in *Lee* that argued the handbook constituted a contract, unlike the vast majority of such litigation. It is also possible that most vacation policies have been unilateral contracts all along under the *Pine River* analysis; yet, this proposition has been tested infrequently in the Minnesota courts. Because *Pine River*'s standard rests, in part, on the handbook policy's level of specificity, vacation policies may often contain the requisite "definiteness" to form a unilateral contract, if only as to the benefits described in the policy.[16] Finally, the court's brevity may be due to the fact that contract language is not entirely new to Minnesota vacation pay jurisprudence.[17]

Ultimately, *Lee* provides employers with new clarity and freedom in drafting vacation policies. The decision is a boon to employers because it allows them to set the terms of their policies and makes clear that there is no absolute employee right to a payout of accrued, but unused, vacation. The decision's implications for the *Pine River* contract analysis are less clear. Regardless of whether the decision is viewed as a modification or straightforward application of that standard, at a minimum, employers should again take notice that handbook policies may be considered unilateral contracts. They should continue to avoid specificity in policies by which they do not intend to be bound. At the same time, as evidenced in *Lee*, creating a binding contract, at least for certain policies, may be in the employer's interest.

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Endnotes

1 741 N.W.2d 117 (Minn. 2007).

2 This article will refer to vacation or other paid time-off benefits interchangeably, as "vacation" or "vacation time."

3 Minn. Stat. § 181.13 (2007).

4 *Lee*, 741 N.W.2d at 120.

5 *Id.* at 121-22.

6 Lee v. Fresenius Medical Care Inc., 719 N.W.2d 222 (Minn. Ct. App. 2006).

7 *Id.* at 224 (citing Brown v. Tonka Corp., 519 N.W.2d 474, 477 (Minn. Ct. App. 1994)).

8 *Lee*, 719 N.W.2d at 225 (quoting Winnetka Partners Ltd. P'ship v. County of Hennepin, 538 N.W.2d 912, 914 (Minn. 1995)).

9 *Id.* at 226.

10 *Lee*, 741 N.W.2d at 123.

11 *Id.* (citing Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)).

12 *Id.* at 125 (emphasis in original).

13 *Id.* (internal quotation omitted).

14 *Id.* at 130.

15 *Id.* at 130-36 (Page, J. dissenting).

16 *See Pine River*, 333 N.W.2d at 626-27.

17 *See, e.g.*, Brown v. Tonka Corp., 519 N.W.2d 474, 475 (Minn. Ct. App. 1994); Tynan v. KSTP, Inc., 77 N.W.2d 200, 206 (Minn. 1956).

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may apply the law to change a jury award of damages without running afoul of the constitution, including the courts' authority to order remittiturs to reduce jury awards when the courts deem these amounts to be excessive.[16]

The *Arbino* court also recognized the numerous statutes that treble jury damages in certain causes of action, including for Consumer Sales Practices Act violations, unauthorized removal of timber, and public utilities law violations. The *Arbino* majority noted that in each of these examples, the General Assembly demonstrated a clear policy choice to modify the amount of jury awards. The court noted that if a legislative choice to increase a jury award as a matter of law does not infringe upon the right to a trial by jury then a corresponding decrease as a matter of law cannot logically violate that right.[17]

The *Arbino* majority concluded that "[b]y limiting non-economic damages for all but the most serious injuries, the General Assembly made a policy choice that non-economic damages exceeding set amounts are not in the best interest of the citizens of Ohio" and the Ohio Constitution presents no barrier to such a policy judgment.[18] Similarly, in upholding the punitive damages cap, the *Arbino* majority noted that the U.S. Supreme Court has held that "legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards."[19] Accordingly, the court concluded the statutory caps on non-economic and punitive damages did not violate the right to trial by jury.

Open Courts, Right to a Remedy, and Due Course of Law

The Ohio Constitution provides: "*[a]ll courts shall be open*, and every person, for an injury done him in his land, goods, person, or reputation, *shall have remedy by due course of law*, and shall have justice administered without denial or delay."[20]

The petitioner claimed the limits on the non-economic damages and punitive damages also violate the Ohio Constitution's "open courts," "right to a remedy," and "due course of law" provisions set out above.

The *Arbino* majority noted that "[w]hen an individual is wholly foreclosed from relief after a verdict is rendered in his or her favor, the rights to a meaningful remedy and open courts become hollow rights hardly worth exercising."[21] The caps on damages under consideration in *Arbino*, however, do not wholly deny a remedy. Injured plaintiffs not suffering catastrophic injuries may still recover their full economic damages, up to $350,000 in non-economic damages, and punitive damages up to twice the amount of compensatory damages. The *Arbino* court concluded that such recoveries were "meaningful" remedies under the Ohio Constitution, and therefore the statutory caps on damages did not violate the "right to a remedy" or the right to an "open court" under the Ohio Constitution.[22]

The *Arbino* court also noted the "due course of law" clause of the Ohio Constitution is the equivalent to the "due process of law" protections in the United States Constitution.[23] Accordingly, when reviewing a statute on due-process grounds, the court uses a rational basis test unless the statute restricts the exercise of fundamental rights. Because the *Arbino* majority already found the caps on non-economic and punitive damages did not violate either the right to a jury trial or the right to a remedy, it applied the rational basis test. Accordingly, the court asked whether the damages caps (1) bear a real and substantial relation to the public health, safety, morals, or general welfare of the public and (2) whether the damage caps are unreasonable or arbitrary.[24]

The *Arbino* majority found there was ample evidence that the caps on non-economic and punitive damages had a real and substantial relation to the general welfare of the public. The court reviewed the uncodified sections of the tort reform legislation that found the current state of the litigation system "represents a challenge to the economy of the state of Ohio."[25] The court noted that the General Assembly relied upon, among other things, studies showing: (1) states that adopted tort reforms experienced growth in employment, productivity, and total output; (2) the cost of tort litigation amounted to a significant tax on wages, personal consumption, and capital investment income; and (3) "the tort system failed to return even 50 cents for every dollar to injured plaintiffs."[26]

In addition to the general economic concerns, the General Assembly found that damages for "pain and suffering" were inherently subjective, imprecise, and susceptible to inflation. Further their inflated cost was being passed on to the general public.[27] The General Assembly had similar concerns regarding the subjectivity of punitive damages.[28]

Having found the statutory caps on non-economic and punitive damages bore a real and substantial relation to the general welfare of the public, the court then asked whether the caps were arbitrary or unreasonable. The *Arbino* court noted that in previous cases the court found earlier legislative attempts to place statutory caps on non-economic damages to be arbitrary and unreasonable because they "imposed the cost of the

intended benefit to the public solely upon those most severely injured."[29] Moyer's opinion noted that the statute under consideration in *Arbino* "alleviates this concern by allowing for limitless non-economic damages for those suffering catastrophic injuries."[30] Similarly, the General Assembly's statutory change to punitive damages would still facilitate punishment of reprehensible behavior while "ensuring that lives and businesses are not destroyed in the process."[31]

The court concluded that the General Assembly "tailored" its statutory caps on damages "to maximize benefits to the public while limiting damages to litigants," which is "neither unreasonable nor arbitrary."[32] Accordingly, the court concluded that the caps on non-economic and punitive damages did not violate the "due course of law" provision of the Ohio Constitution.

Equal Protection

The Ohio Constitution provides: "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit."[33] The Ohio Supreme Court has interpreted this provision as the "equivalent of the federal Equal Protection Clause."[34] The petitioner claimed the limits on non-economic and punitive damages violate the "equal protection" clause of the Ohio Constitution because such damages would disproportionately affect women, children, minorities, the elderly, and people with low incomes.

The *Arbino* court noted that because the statute does not infringe upon a fundamental constitutional right and is facially neutral as to suspect classes, the rational basis test applies and the statute will be upheld if it is found to be rationally related to a legitimate government purpose.[35]

The court conceded that the cap on non-economic damages created distinctions between different groups of people, as the limits do not apply to plaintiffs with catastrophic injuries.[36] The court noted the General Assembly was concerned with the imprecise nature of non-economic damages generally—but recognized that severe injuries offered "more concrete evidence" of non-economic loss, thus posing a "lesser risk of being tainted by improper external considerations" when awarded.[37] Similarly, the General Assembly made distinctions related to the cap on punitive damages depending on whether the defendant is an individual or small business, as opposed to a large business, based on legitimate concerns regarding the state's economy.

The court found the statutory caps on non-economic and punitive damages were "rationally related to the legitimate state interests of reforming the state civil justice system to make it fairer and more predictable and thereby improving the state's economy."[38] The *Arbino* majority concluded "the General Assembly is charged with making difficult policy decisions on such policy issues" and the court was "not the forum to second-guess such legislative choices."[39] Accordingly, the court found the statutory caps on damages did not violate the Ohio Constitution's "equal protection" clause.

Concurring and Dissenting Opinions

Justice Robert Cupp wrote a concurring opinion discussing the petitioner's claim that the statutory caps violated the right to a trial by jury. Cupp cited Alexander Hamilton and Thomas Jefferson in finding that the right to a trial by jury was primarily intended to protect against judicial overreaching and bias and concluded the General Assembly's adoption of statutory caps on damages did not implicate those intentions.[40]

Justice Terrence O'Donnell wrote a dissenting opinion concluding that the limit on non-economic damages violated the Ohio Constitution's right to a jury trial because it substitutes the judgment of the General Assembly for that of a jury.[41] Justice Paul Pfeifer wrote a lengthy dissent, a large portion of which was his own "examination of the evidence the General Assembly relied on" in enacting the caps on damages.[42] Following his review of the various studies, surveys, public testimony, and other evidence, Justice Pfeifer concluded none of the General Assembly's findings were "reliable," and reliance on such evidence was "arbitrary and unreasonable."[43]

Groch v. General Motors Corp.

Petitioner, Douglas Groch, was injured in March of 2005 while operating equipment manufactured more than ten years before the injury by respondents, Kard Corporation and Racine Federated, Inc., during the course of the petitioner's employment with respondent, General Motors. Groch and his wife, who sought damages for loss of consortium, brought action against the respondents in the Court of Common Pleas for Lucas County. General Motors removed the case to federal court.[44]

The United States District Court for the Northern District of Ohio, Western Division, certified a series of questions for the Ohio Supreme Court to review. Several of the questions involved constitutional challenges to Ohio's product liability statute of repose, which was enacted by the General Assembly, signed by then-governor Bob Taft and made effective in April 2005.[45]

The petitioners in *Groch* raised several of the same constitutional arguments that the petitioners in *Arbino* raised in arguing for the court to strike down the caps on damages. The *Groch* petitioners contended that the statute

of repose violated the "open courts," "right to a remedy," "due course of law" and "equal protection" provisions of the Ohio Constitution.

Ten-year Product Liability Statute of Repose

The statute at issue in *Groch* provided that "no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser."[46]

Standard of Review

In an opinion issued in February 2007 for a 6-1 majority, Justice Maureen O'Connor reiterated the same standard of review in *Groch* as was set out in *Arbino*. O'Connor noted, as an initial matter, that it is difficult to prove a statute is unconstitutional because "all statutes have a strong presumption of constitutionality."[47] The court will only find a legislative enactment unconstitutional if it appears "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."[48]

The *Groch* court also reiterated that it is not the court's duty to assess the wisdom of a particular statute since the legislative branch is the ultimate arbiter of public policy. The court recognized that in fulfilling its role of setting public policy, the legislature continually refines Ohio's tort law to meet the needs of Ohio citizens.[49]

Open Courts and Right to a Remedy

The *Groch* court noted that the "right to a remedy" and "open courts" provisions of the Ohio Constitution apply only to existing, vested rights. The product liability statute of repose operates to potentially bar a plaintiff's suit before a cause of action arises. For example, the piece of equipment that allegedly caused the injury in *Groch* was produced more than ten years before the injury, so the statute of repose would effectively prevent the claim from ever vesting.[50]

The court also noted that state law determines what injuries are recognized and what remedies are available and, by enacting the statute of repose for product liability actions, the General Assembly established "the injuries that are recognized and the remedies that are available" under law.[51]

O'Connor's opinion also pointed out that the existence of a product liability statute of repose did not necessarily extinguish a right to a remedy just because the statute foreclosed a suit by a plaintiff against certain defendants. While the product liability statute of repose may prevent some suits against manufacturers, an injured party may still be able to seek recovery against other parties, including, for example, an employer that negligently modified a machine after it was acquired. [52]

Because the statute does not impact a vested right and plaintiffs may still have a right of remedy other than against the original manufacturer or supplier, the *Groch* court concluded that the product liability statute of repose was not incompatible with the "open courts" and "right to a remedy" guarantees of the Ohio Constitution.

Due Course of Law and Equal Protection

Because the *Groch* court found that the statute of repose did not violate the "open courts" and "right to a remedy" provisions of the Ohio Constitution, the court concluded the statute did not impinge upon a fundamental right. The court further found that the statute of repose did not involve a suspect class for purposes of the equal protection claim.[53] Accordingly, the court applied a rational basis review to determine whether the ten-year product liability statute of repose is rationally related to a legitimate government purpose and is not unreasonable and arbitrary.[54]

The court noted that the General Assembly made several findings in adopting the product liability statute of repose, including:

• Subsequent to delivery of the product, the manufacturer or supplier lacks control over the product and its uses, and it is more appropriate for the party which has control over the product during the intervening time period to be responsible for any harm caused;

• More than ten years after a product has been delivered, it is very difficult for the manufacturer or supplier to locate reliable evidence and witnesses regarding design, production, or marketing of the product, thus severely disadvantaging manufacturers and suppliers in their efforts to defend actions based on product liability claims;

• It would be inappropriate to apply current legal and technological standards to products manufactured many years prior to the commencement of a product liability action; and

• A statute of repose for product liability claims would enhance the competitiveness of Ohio manufacturers by reducing their exposure to disruptive and protracted liability with respect to products long out of their control.[55]

The *Groch* court concluded that for both "due course of law" and "equal protection" purposes, the above findings "adequately demonstrate[d]" that the statute of repose bore a "real and substantial relation to the public health, safety, morals, or general welfare of the public"

and was "not unreasonable or arbitrary."[56] Accordingly, the court found the statute did not violate the principles of due process or equal protection and was constitutional on its face.[57]

Dissenting Opinion

As in *Arbino*, Justice Paul Pfeifer issued a stinging dissent in *Groch.* Pfeifer accused the majority of "a propensity to engage in legal mumbo jumbo"[58] and offering a "bromide" in suggesting the legislative branch is the ultimate arbiter of public policy.[59] Pfeifer wrote that he does "not agree" that the court "owes all legislation passed by the General Assembly the presumption of constitutionality."[60] However, the 2003 *Klein v. Leis* case, Pfeifer wrote the majority opinion upholding a statutory prohibition on carrying concealed weapons, declaring that "[i]t is fundamental that a court must presume the constitutionality of lawfully enacted legislation."[61]

As in *Arbino*, Pfeifer reexamined the General Assembly's findings and concluded they were "devoid" of facts.[62] Pfeifer concluded that the *Groch* majority erred in not finding the product liability statute of repose violated the "open courts," "right to a remedy" and "equal protection" provisions of the Ohio Constitution.

CONCLUSION

In several cases during the 1990s, the Ohio Supreme Court found various statutory reforms to the civil justice system inconsistent with the Ohio Constitution.[63] In upholding the limits on non-economic and punitive damages in *Arbino* and the product liability statute of repose in *Groch*, the court took notice of the General Assembly's recent efforts to tailor its reforms to address the constitutional defects identified in those prior cases and exhibited a new-found respect for the legislature's role in crafting such reforms. The General Assembly has enacted other reforms that will likely be challenged in the future, including regarding the admissibility of collateral benefits evidence[64] and establishment of statutes of repose for medical malpractice actions.[65] The *Arbino* and *Groch* decisions suggest those reforms may receive a more welcome reception from the court than in the past.

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Endnotes

1 *See* Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 Clev. St. L. Rev. 539, 540 (1997) ("In a real sense, the Court has become a super legislature comprised of a somewhat consistent four member majority."). *See also* Note, *State Tort Reform—Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*, 113 Harv. L. Rev. 804 (2000).

2 Arbino v. Johnson & Johnson, Slip Op. No. 2007-Ohio-6948, at ¶ 1.

3 *Id.* at ¶ 2.

4 *Id.* at ¶¶ 83-84.

5 *Id.* at ¶¶ 3-6.

6 *Id.* at ¶¶ 9-10. The *Arbino* court reviewed the following Ohio Supreme Court cases invalidating various statutory tort reform provisions: Morris v. Savoy, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991), Sorrell v. Thevenir, 69 Ohio St.3d 415, 633 N.E.2d 504 (1994), Galayda v. Lake Hosp. Sys., Inc., 71 Ohio St.3d 421, 644 N.E.2d 298 (1994), Zoppo v. Homestead Ins. Co., 71 Ohio St.3d 552, 644 N.E.2d 397 (1994), State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999). *See id.* at ¶¶ 10 -18.

7 *Id.* at ¶ 24.

8 Ohio Rev. Code, § 2315.18.

9 *Id.* at § 2315.21.

10 *Arbino,* at ¶ 25 (citations omitted).

11 *Id.* at ¶ 26 (citations omitted).

12 Ohio Const. art. I, § 5.

13 *Arbino,* at ¶ 33.

14 *Id.* at ¶ 34 (citations omitted).

15 *Id.* at ¶ 37 (emphasis in original) (citations omitted).

16 *Id.* at ¶ 38 (citation omitted).

17 *Id.* at ¶ 39 (citation omitted).

18 *Id.* at ¶ 40. The *Arbino* majority also noted that limitations on damages in the federal system have not been found to violate the analogous Seventh Amendment right to a jury trial. *Id.* at ¶ 41 (citation omitted).

19 *Id.* at ¶ 94 (*quoting* Cooper Ind., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433, 121 S.Ct. 1678 (2001)).

20 Ohio Const. art. I, § 16 (emphasis added).

21 *Arbino,* at ¶ 45 (*quoting* Sorrell v. Thevenir, 69 Ohio St.3d 415, 426, 633 N.E.2d 504 (1994)).

22 *Id.* at ¶¶ 47 & 98. The *Arbino* majority also noted that the limits on punitive damages could not implicate the right to a remedy since punitive damages are intended to punish and deter reprehensible behavior, not to remedy injuries. *Id.* at ¶¶ 97-98.

23 *Id.* at ¶ 48 (citations omitted).

24 *Id.* at ¶¶ 49 & 99 (citations omitted).

25 *Id.* at ¶ 53 (quoting Am. Sub. S.B. 80, § 3 (A)(1) (125th General Assembly) (2003-04)).

26 *Id.* at ¶ 53.

27 *Id.* at ¶ 54 (citations omitted).

28 *Id.* at ¶ 101.

29 *Id.* at ¶ 59 (*citing* Morris v. Savoy, 61 Ohio St.3d 684, 690-691, 576 N.E.2d 765 (1991)).

30 *Id.* at ¶ 60.

31 *Id.* at ¶ 103.

32 *Id.* at ¶¶ 61 & 103.

33 Ohio Const. art. I, § 2.

34 *Arbino,* at ¶ 63 (citation omitted).

35 *Id.* at ¶¶ 65-66 (citations omitted).

36 *Id.* at ¶ 67.

37 *Id.* at ¶ 72.

38 *Id.* at ¶¶ 69 & 106.

39 *Id.* at ¶ 71.

40 *Id.* at ¶¶ 119-136 (citations omitted) (Cupp, J. concurring).

41 *Id.* at ¶ 162 (O'Donnell, J. dissenting).

42 *Id.* at ¶ 186 (Pfeifer, J. dissenting).

43 *Id.* at ¶ 204 (Pfeifer, J. dissenting).

44 Groch v. Gen. Motors Corp., Slip Op. No. 2008-Ohio-546, at ¶¶ 5-7.

45 *Id.* at ¶¶ 15-19 & 22. The petitioners also challenged the constitutionality of a workers compensation subrogation statute that was enacted in 2003. *Id.* at ¶¶ 12-14.

46 Ohio Rev. Code, § 2305.10(C)(1).

47 *Groch*, at ¶ 25 (citation omitted).

48 *Id.* at ¶ 25 (*quoting* State ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142, 128 N.E.2d 59).

49 *Id.* at ¶¶ 102 & 141 (citations omitted).

50 *Id.* at ¶¶ 149-150 (citation omitted).

51 *Id.* at ¶ 150 (citation omitted).

52 *Id.* at ¶¶ 151-152.

53 *Id.* at ¶ 159.

54 *Id.* at ¶ 157 (citation omitted).

55 *Id.* at ¶¶ 166-170.

56 *Id.* at ¶ 172.

57 *Id.* at ¶ 175. The *Groch* majority found that the product liability statute of repose violated the Ohio Constitution as applied to the petitioners because the injuries at issue occurred only thirty-four days before the effective date of the statute. According to the court, the statute of repose operated "unreasonably as applied to petitioners because it provided them with only 34 days to commence their suit, with the consequence that they lost their cause of action if they did not file suit within 34 days." *Id.* at ¶ 198. The court concluded that the statute was "unconstitutionally retroactive under section 28, Article II of the Ohio Constitution." *Id.* at ¶ 199. Section 28, Article II of the Ohio Constitution provides that "[t]he general assembly shall have no power to pass retroactive laws." Ohio Const. art. II, § 28. The court's holding that the product liability statute of repose is unconstitutional as applied to the petitioners in *Groch* will likely have limited impact on the applicability of the statute going forward. It would only affect those plaintiffs with injuries that occurred shortly before the effective date of the statute, thereby providing an "unreasonably short period of time in which to file suit." *Groch*, at ¶ 199.

58 *Id.* at ¶ 227 (Pfeifer, J., dissenting).

59 *Id.* at ¶ 238 (Pfeifer, J., dissenting).

60 Id. at ¶ 239 (Pfeifer, J., dissenting).

61 Klein v. Leis, 99 Ohio St.3d 537, Slip Op. No. 2003-Ohio 4779, at ¶ 4 (citations omitted); *see* David J. Owsiany, *Ohio's High Court Back on Right Track, Columbus Dispatch*, Mar. 2, 2008.

62 *Groch,* at ¶ 254 (Pfeifer, J., dissenting).

63 *See Arbino* at ¶¶ 10-18.

64 Ohio Rev. Code, § 2315.20.

65 *Id.* at § 2305.113(C).

Oklahoma: *The Inverted Federalism of Grider v. Compaq*

Continued from page 5...

The problems under the Full Faith and Credit Clause are the most obvious. Plaintiffs lost in the Texas Supreme Court, and took the proverbial second bite at the apple in Oklahoma, where Oklahoma courts gave them a reading of Texas law that Texas courts rejected. An error in interpreting state law does not by itself violate the Full Faith and Credit clause, but a court cannot "contradict law of the other State that is clearly established and that has been brought to the court's attention."[14]

CAFA largely eliminates this sort of litigation tactic, where plaintiffs are permitted to seek any number of class certifications until they find a court willing to grant one.[15] Under CAFA, defendants are able to remove putative nationwide classes to federal court, where multiple identical class actions can be consolidated. The plaintiffs' bar, however, can continue to avoid federal consolidation through smaller class actions of under $5 million (where no CAFA jurisdiction rests) or through federal courts that narrowly interpret the statute to refuse to grant removal jurisdiction where the amount in controversy could be, but is not necessarily, $5 million.[16] Oklahoma courts' decision in *Grider*, a natural consequence of *Ysbrand*, effectively turns its court system into an appellate court to collaterally attack the decisions of other state courts interpreting their state law.

The implications for federalism and separation of powers are thus also significant. Under *Shutts*, both Texas and Oklahoma are prohibited from creating a fifty-state statute subjecting other states' citizens to their law without significant contacts. Yet the courts have done this through "choice of law." In an example of what Michael Greve calls "upside-down federalism," Oklahoma state courts are now engaging in national regulation of consumer markets: exercising jurisdiction to hear claims of non-Oklahoma plaintiffs against non-Oklahoma defendants, while at the same time creating a hybrid Oklahoma/Texas law to resolve those claims created neither by the Texas nor the Oklahoma state legislatures and explicitly rejected by the Texas Supreme Court, as well as by Congress, which rejected the idea of amending CAFA to permit such fifty-state classes.[17]

Meanwhile, in *Klaxon v. Stentor Manufacturing Co.*, the U.S. Supreme Court held that the *Erie* doctrine required federal courts to apply the choice of law of the underlying state.[18] Thus, if a federal court heard a class

action filed in Oklahoma and chose to honor *Klaxon* over *Shutts*, it could create the national cause of action that Congress rejected.[19] Such a conflict should not occur, however. *Shutts* is a matter of constitutional law, while the Court's holding in *Klaxon* does not rise to that level.[20]

Other state supreme courts, when faced with such a situation, have usually recognized the limits of their authority. For example, the Illinois Supreme Court rejected a trial court's attempt to create a nationwide cause of action over State Farm's insurance contracts[21] (The New Jersey Supreme Court, when faced with a certification of a nationwide class action against Merck, decertified the class on other grounds, and avoided the "choice of law" question.[22]). If Oklahoma does not change its "choice of law" and federal courts do not step in to address the inconsistency with *Shutts*, Oklahoma could well find itself becoming the next magnet jurisdiction for overbroad consumer class actions.[23]

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Endnotes

1 472 U.S. 797 (1985).

2 Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618 (Okla. 2003).

3 Unreported decision from Oklahoma, *cert. denied,* 128 S.Ct. 378 (2007).

4 Ted Frank, *The Class Action Fairness Act Two Years Later*, 2 Liability Outlook No. 2, March 2007; John H. Beisner & Jessica Davidson Miller, *They're Making A Federal Case Out of It... In State Court*, 25 Harv. J. L. & Pub. Pol'y 143 (2002).

5 Compaq Computer Corp. v. LaPray, 135 S.W.3d 657, 670 (Tex. 2004).

6 *Id*. at 673-74.

7 *Id*. at 680-81.

8 *Id*. at 681.

9 *E.g.,* Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005); State ex rel. American Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 486-7 (Mo. 2003); *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1016 (7th Cir. 2002); Spence v. Glock, Ges.m.b.H., 227 F.3d 308, 312-314 (5th Cir. 2000); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996); Castano v. Am. Tobacco Co., 84 F.3d 734, 741-743, 749-750 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986); *In re* Pharmaceutical Industry Average Wholesale Price Litigation, 230 F.R.D. 61, 83 (D. Mass. 2005); Sweet v. Pfizer d/b/a Pharmacia and Upjohn, 2005 WL 3074602, *11-12 (C.D. Cal. Nov. 15, 2005); Bostick v. St. Jude Medical, Inc., 2004 WL 3313614, *12 (W.D. Tenn. Aug. 17, 2004); *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 194 F.R.D. 484, 487-490 (D.N.J. 2000); Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 211-217 (E.D. Pa. 2000); Clay v. Am. Tobacco Co., 188 F.R.D. 483, 497-98 (S.D. Ill. 1999); Dhamer v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 532-534 (N.D. Ill. 1998); Chin v. Chrysler Corp., 182 F.R.D. 448, 456-457 (D.N.J. 1998); *In re* Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214, 222-24 (E.D. La. 1998); Tylka v. Gerber Prods. Co., 178 F.R.D. 493, 497-98 (N.D. Ill. 1998); *In re* Ford Motor Co. Bronco II Prod. Liab. Litig., 177 F.R.D. 360, 369-371 (E.D. La. 1997); *In re* Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 422-3 (E.D. La. 1997); Harding v. Tambrands Inc., 165 F.R.D. 623, 631-632 (D. Kan 1996); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 605-608 (S.D.N.Y. 1982).

10 81 P.3d 618 (Okla. 2003), cert. denied 542 U.S. 937 (2004).

11 *Id*. at 625-26.

12 Compaq Computer Corp. v. Grider, 128 S.Ct. 378 (Oct. 9, 2007).

13 Greve, *supra* note 5; *cf*. also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 (7th Cir. 2002) ("Plaintiffs describe the injury as financial rather than physical and seek to move the suit out of the tort domain and into that of contract (the vehicle was not the flawless one described and thus is not merchantable, a warranty theory) and consumer fraud (on the theory that selling products with undisclosed attributes, and thus worth less than represented, is fraudulent). It is not clear that this maneuver actually moves the locus from tort to contract. If tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation.").

14 Sun Oil Co. v. Wortman, 486 U.S. 717, 731 (1988).

15 Compare *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 333 F.3d 763, 767 (7th Cir. 2003) (enjoining class certification efforts in other courts because any other result would create "an asymmetric system in which class counsel can win but never lose") with *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 145-46 (3d Cir. 1998) (denial of certification "lacks sufficient finality to be entitled to preclusive effect").

16 *E.g.,* Lowery v. Alabama Power Co., 483 F.3d 1184 (11th Cir. 2007). *See* Kenneth J. Reilly & Frank Cruz-Alvarez, *Has the Eleventh Circuit Set a New Standard for Federal Diversity Jurisdiction?*, Class Action Watch 5 (Sep. 2007).

17 151 Cong. Rec. S1215 (S. Amdt. 4 (Feinstein), rejected by vote of 38-61 (record vote no. 7)) (Feb. 9, 2005).

18 313 U.S. 487 (1941).

19 *See also* discussion in Richard A. Nagareda, *Bootstrapping In Choice Of Law After The Class Action Fairness Act*, 74 UMKC L. Rev. 661 (2006).

20 *Id*. at 679; Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 637 (5th ed. 2003).

21 Avery, *supra* note 10.

22 International Union of Operating Engineers Loc. No. 68 Welfare Fund v. Merck, Inc., 192 N.J. 372, 388 n. 3 (2007).

23 *See* Frank, *supra* note 4; *see also* Beisner, *supra* note 4.

California: *In re Marriage Cases*

Continued from front cover...

Woo, and *Tyler* actions, along with the *Proposition 22* and *Campaign* actions and *Clinton v. State of California*, were consolidated into a single proceeding entitled *In re Marriage Cases.* While *In re Marriage Cases* was pending in superior court, the California Supreme Court issued its decision in *Lockyer*, which held that San Francisco officials exceeded their authority, ordered San Francisco officials to comply with California's existing marriage statutes, and voided approximately 4,000 same-sex marriages that had already been performed.

After *Lockyer* issued, the superior court, in *In re Marriage Cases*, heard arguments on the constitutionality of California's statutes limiting marriage to a man and a woman. On April 13, 2005, the superior court found those statutes constitutionally infirm. The superior court confined its decision to the plaintiffs' equal protection challenge, determined that the statutes must be evaluated under strict scrutiny, and held that the statutes failed this standard of review. On appeal, the court of appeal, in a two-to-one decision, reversed the superior court's ruling on the substantive constitutional issue and found that same-gender couples did not have a constitutional right to marriage.[7] The California Supreme Court granted review and issued its ruling on May 15, 2008.

II. Majority Opinion

A. Fundamental Right to Marry

Chief Justice Ronald George wrote the 4-3 majority opinion.[8] He began by stating that the gay marriage issue before the California Supreme Court was different than that faced by other state supreme courts, namely that the question was not whether California could limit marriage to opposite-gender couples while denying same-gender couples similar rights, but rather whether California's failure to refer to the same-gender relationship scheme as a "marriage" (as opposed to a domestic partnership) violated California's constitution. Chief Justice George noted that some states such as New Jersey, Vermont, and Connecticut have civil unions and that *Kerrigan v. Comm'r of Pub. Health*, currently pending in Connecticut, addresses a question similar to that in California.[9] He also took great pains to state that the majority was not deciding policy, writing that "[w]hatever our views as individuals with regard to this question as a matter of policy, we recognize as judges and as a Court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions."[10]

Chief Justice George relied heavily on *Perez v. Sharp* in reaching the majority's decision.[11] *Perez* outlawed anti-miscegenation laws in California, which the U.S. Supreme Court would do nearly twenty years later in *Loving v. Virginia*.[12] The majority leaned heavily on *Perez* to affirm that the right to marry is a fundamental right. The majority noted that "privacy" is specifically mentioned in California Constitution Article I, Section 1's inalienable rights. Thus, the majority held that the right to marry is part of personal autonomy protected by that privacy interest, as well as the liberty interest which is protected by the due process clause of Article I, Section 7. Thus, the majority declared that the right of same-gender couples to marry has independent substantive content which the legislature cannot prohibit, stating that the legislature cannot "define a fundamental constitutional right or interest in so narrow a fashion that the basic protections afforded by the right are withheld from a class of persons."[13] Chief Justice George emphasized that same-gender couples have the right to have their family relationships accorded dignity and respect equal to that accorded to other officially recognized families, and thus the term "marriage" must be afforded to both same- and opposite-gender couples, i.e., the form is as important as the substance.[14]

The majority admitted that both *Perez* and *Loving* dealt with opposite-gender marriages, but, analogizing between different-race and same-gender couples, stated that "the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual."[15] The chief justice attempted to explain that the majority was not creating a right to gay marriage, but rather simply stating that the right to marry applies to same-gender couples as well as opposite-gender ones.[16] The majority stated that, under *Perez* and *Loving*, one could not have "marriage" and "trans-racial marriage." The majority stated that the constitutional right to marriage is not about procreation, thus dismissing the defendants' argument that procreation is a part of marriage and that only opposite-gender couples can create their own biological children. The majority noted that California still permitted opposite-gender couples who were physically unable to conceive a child to marry. The majority did not find any cases which discussed procreation or child-rearing within the context of heterosexual marriage to be persuasive, as same-gender couples in California could adopt and raise children, opposite-gender couples could have kids and raise those kids outside the institution of marriage, and marriage's government sanction and sanctuary for the family should

be available to both opposite- and same-gender couples. The majority also rejected the defendants' "responsible procreation" argument, finding no rational basis for it, and stating that the constitutional right to marry was not possessed only by those who could accidentally conceive or denied to people who planned. The majority cited *Griswold v. Connecticut,* noting the Griswolds fought to use contraception to *prevent* procreation, and *Turner v. Safley,* where a prisoner without conjugal visits still had the fundamental right to marry.[17] The majority also rejected the defendants' argument that de-linking marriage and procreation sends a message that it is acceptable to have children out of wedlock.

The majority also dismissed the defendants' argument that marriage is traditionally between a man and a woman, by essentially stating that tradition alone is not adequate. The majority conceded that, since California's inception, civil marriage was not only different from religious marriage, but also that civil marriage was consistently defined as between a man and a woman.[18] The majority found such deeply-rooted definitions and traditions unpersuasive, stating that "it is apparent that history alone does not provide a justification for interpreting the constitutional right to marry as protecting only one's ability to enter into an officially recognized daily relationship with a person of the opposite sex."[19] Chief Justice George described how society's views have changed towards both racial miscegenation and the role of women in the workplace.[20] The court emphasized that:

> [f]or similar reasons, it is apparent that history alone does not provide a justification for interpreting the constitutional right to marry as protecting only one's ability to enter into an officially recognized family relationship with a person of the opposite sex. In this regard, we agree with the view expressed by Chief Judge Kaye of the New York Court of Appeals in her dissenting opinion in *Hernandez v. Robles, supra,* 855 N.E.2d 1, 23: "fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.[21]

Chief Justice George also cited *People v. Belous,* stating that:

> [c]onstitutional concepts are not static. 'In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.' [22]

Among the many other cases which the majority cited was *Lawrence v. Texas*.[23]

III. Equal Protection

Article I, Section 7 of the California Constitution contains equal protection guarantees. An equal protection claim in California is analyzed either under a strict scrutiny or rational basis test; unlike *United States v. Virginia,* California does not recognize an intermediate or heightened level of scrutiny for gender-based discrimination.[24] Chief Justice George summarily rejected the dissent's argument that same-gender and opposite-gender couples are *not* similarly situated. He also rejected the plaintiffs' argument that California's marriage limitations treated men and women dissimilarly on the basis of gender, stating that persons of either gender are permitted to marry a person of the opposite gender.[25] He distinguished *Perez* and *Loving* by pointing out that the anti-miscegenation laws applied only to interracial marriages that involved whites, e.g., blacks and Latinos could get married to each other, but not blacks and whites or Latinos and whites.

Chief Justice George, however, went on to hold that sexual orientation was considered a suspect class in California, which was an issue of first impression. Interestingly, it seems he tried to lessen the precedential effect of other state supreme courts, which did not find a constitutional right to same-gender marriage, by pointing out that those decisions had one-vote margins; the California Supreme Court's decision was 4-3. The chief justice used much of the reasoning against gender-based discrimination to support finding gays a suspect class. The majority found that the class contained an immutable trait that had no relation to the person's ability to perform in, or contribute to, society. Further, this trait is associated with a stigma of inferiority and second-class citizenship, which is manifested by the class's history of legal and social disabilities. Although Chief Justice George noted that the factual record did not address whether being gay was an immutable trait, he bypassed the issue by stating that "immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes," pointing out that a person's religion, a choice, can be considered a suspect class.[26] Chief Justice George also rejected the defendants' contention that, while gays may have been politically powerless in the past, they certainly do not lack for political power now, as evidenced by, among other things, their growing number of statutory rights. The chief justice wrote that the analysis requires considering whether a particular class was *historically* subject to invidious or prejudicial treatment, not just whether it currently suffers such treatment. The majority held that it was not necessary for California to deny same-gender couples the right to marry in order to protect the marriages of opposite-gender couples. Thus

under the strict scrutiny standard of review, the majority found that the state had no compelling interest to prevent same-gender couples from getting married. Chief Justice George directly addressed the dissent's contention that the legislature, and the political process, is more appropriate than the judiciary for allowing gay marriage in California. The chief justice stated that the judiciary has a responsibility to strike down any law, no matter how popular, if it is unconstitutional; he also emphasized that the California Constitution is the "ultimate expression of the people's will."[27]

IV. Dissents

A. Justice Carol Corrigan[28]

Justice Corrigan began by stating that, in this case, California's constitution did not compel the court to overrule the people's will. She stated that the majority gave short-shrift to the Domestic Partner Act, its legislative history, and the legislature's intent behind the law. In Justice Corrigan's view, the political process, not the judicial, is the correct way to change the traditional definition of marriage to encompass same-gender couples. She stated that the anti-miscegenation cases were inapplicable to *In re Marriage Cases* because the post-Civil War amendments specifically targeted the issues of slavery and racial discrimination and, thus, Jim Crow and other segregationist laws openly flouted the Constitution. Justice Corrigan also pointed out that the law does not treat same-gender domestic partners differently than opposite-gender married couples (although the majority lists nine ways in which the two are still different), but "plaintiffs seek both to join the institution of marriage and at the same time to alter its definition."[29]

B. Justice Marvin Baxter[30]

Justice Baxter's passionate dissent began by chastising the majority for violating the separation of powers doctrine and stating that the legislative/political process was the correct one to change the definition of marriage. Justice Baxter stated that, in his view, the majority improperly used the legislature's avoidance of creating gay marriage by adopting increasing civil rights protections for gays so that the majority could find, ironically, a constitutional right to gay marriage.[31] Justice Baxter did not believe that gays should be part of a suspect class and entitled to strict scrutiny, stating that "the United States Supreme Court has never declared, for federal constitutional purposes, that a classification based on sexual orientation is entitled to any form of scrutiny beyond rational basis review."[32] Justice Baxter also disagreed with the majority's belief that permitting same-gender couples to marry was in-line with prevailing contemporary values, stating that both Sections 300 and 308.5 were still on the books and thus reflective of the people's will and prevailing values.

CONCLUSION

California now joins Massachusetts, the only other state to do so, in permitting same-gender marriage. The California Supreme Court went beyond any other state court by granting constitutional protections to gays.[33] Non-California residents may marry in California and return to their respective home states, which sets up full faith and credit, and perhaps Defense of Marriage Act, issues if those home states do not recognize same-gender marriages.[34] Gay marriage litigation remains on-going in several states and will continue to be controversial for the years to come.

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Endnotes

1 Section 300(a) provides, in full: "[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500)." *See* In re Marriage Cases, 43 Cal. 4th 757, 795 (2008). Section 308.5 provides, in full: "[o]nly marriage between a man and a woman is valid or recognized in California." *See id*. at 796.

2 California domestic partnership is available to same-gender couples, and to certain opposite-gender couples in which at least one party is at least 62 years of age. Domestic partnership grants a wide range of rights and responsibilities similar to marriage. Governor Gray Davis (D) signed it into law in 2003, and the law took effect on January 1, 2005. California has had a domestic partnership registry since 1999, the first of its kind in the United States, which the legislature created without any court intervention. It is unclear what will happen to either the Domestic Partner Act or currently-existing domestic partnerships now that the California Supreme Court has granted same-gender couples the right to marry.

3 *See* Proposition 22 Legal Def. and Educ. Fund v. City and County of San Francisco, 2005 Cal. LEXIS 8746 (2005); Campaign for Calif. Families v. Newsom, San Francisco Super. Ct. No. CGC-04-428794.

4 Lockyer v. City & County of San Francisco, Lewis v. Alfaro, 2005 Cal. LEXIS 1698 (2005) (As of this writing, Lockyer serves as California's State Treasurer).

5 City and County of San Francisco v. State of California, Case No. 429-539 (2004).

6 Woo v. Lockyer, 27 Cal. Rptr. 3d 722 (Cal Ct. App. 2005); Tyler v. County of Los Angeles, Los Angeles Super. Ct. No. BS-088506 (2004).

7 Justice J. Anthony Kline's dissent, stating that same-gender couples were a suspect class and that same-gender couples sought the right to marriage, *not* the right to same-gender marriage, served as an early predictor of the California Supreme Court's final decision.

8 Chief Justice George's term expires 2010. Governor Pete Wilson (R) appointed him in 1996.

9 New Jersey, Connecticut, New Hampshire, Vermont, Oregon, the District of Columbia, Hawaii, Maine, and Washington all have some sort of civil union or domestic partnership rights. Some commentators have wondered whether California's ruling will encourage same-gender couples in jurisdictions with civil union or domestic partnership rights to challenge those legislative schemes.

10 43 Cal. 4th at 780. The dissenting justices, among others, would contend that the majority did just that—decide policy—by striking down the law and ballot initiative.

11 32 Cal.2d 711 (1948).

12 388 U.S. 1 (1967).

13 43 Cal. 4th at 824.

14 Meaning that the Domestic Partner Act's rights and privileges are insufficient as a matter of law because, even though they are substantively the same as the rights and privileges of marriage, a domestic partnership and a marriage are of two different forms. Chief Justice George's focus on form practically begs the academic question as to whether the majority would have accepted a legislative scheme which referred to "heterosexual marriage" and "homosexual marriage," or "traditional marriage" and "non-traditional marriage," or some other pair of names.

15 43 Cal. 4th at 814-815.

16 In doing so, however, the majority cited *Elden v. Sheldon,* 46 Cal. 3d 267 (1988), which specified "joining of man and woman in marriage."

17 381 U.S. 479 (1965); 482 U.S. 78 (1987).

18 It is interesting that Chief Justice George would note that California's marriage statutes were derived from the 1872 California Code, which in turn was based on Field's New York Draft Civil Code—and that the New York Court of Appeals, the Empire State's highest court, found that same-gender couples had no constitutional right to marriage in New York.

19 43 Cal. 4th at 824.

20 *See* 32 Cal.2d 711 (1948); *see also* Sail'er Inn v. Kirby, 5 Cal.3d 1, 17-19 (1971).

21 *Id.*

22 43 Cal. 4th at 821. Chief Justice George pointed out that, as evidence of shifting social mores, homosexuality was once characterized as an illness. The Chief Justice did not mention, however, the legislature, in fact, changed this and other inaccurate characterizations, not the judiciary. *See also* People v. Belous, 71 Cal.2d 954, 967 (1969).

23 539 U.S. 558 (2003). Justice O'Connor's concurrence attempted to carve out same-gender marriage from *Lawrence's* holding:

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Id. at 585 (O'Connor, J., concurring). Justice Scalia was prescient in his dissent when he stated that *Lawrence* would be used as legal support in favor of gay marriage:

> At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' *Ante, at 156 L Ed 2d, at 525*. *Do not believe it.* More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to 'personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,' and then declares that 'persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.' *Ante, at 156 L Ed 2d, at 523* (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, *ante, at 156 L Ed 2d, at 526*; and if, as the Court coos (casting aside all pretense of neutrality), 'when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,' *ante, at 156 L Ed 2d, at 518*; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution,' *ibid.* Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

Id. at 604-605 (2003) (Scalia, J., dissenting) (emphasis added).

24 *See* 518 U.S. 515 (1996).

25 While one might find it disingenuous for gays to claim gender discrimination, that claim was almost certainly a matter of legal strategy. Until *In re Marriage Cases,* no court in the union had ever found that sexual orientation was a suspect class, and the rational basis test applied. *See, e.g.*, Gay Law Students Assoc. v. Pac. Tel. & Telegraph Co., 24 Cal.3d 458 (1979). An equal protection analysis of gender-based discrimination requires an intermediate, or "heightened" level of scrutiny. United States v. Virginia, 518 U.S. 515 (1996).

26 43 Cal. 4th at 841-842.

27 43 Cal. 4th at 852. However, the majority may have hinted at some distrust of the "people's will," however, when it stated that "even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions."

28 Governor Schwarzenegger (R) appointed Justice Corrigan on December 9, 2005 and she was confirmed on January 4, 2006. She replaced Janice Rogers Brown, who currently is a judge on the United States Court of Appeals for the District of Columbia.

29 43 Cal. 4th at 880.

30 Governor George Deukmejian (R) appointed Justice Baxter to the California Supreme Court in January 1991. From 1983 to 1989 Justice Baxter served as Governor Deukmejian's Appointment Secretary, the Governor's principal advisor on all gubernatorial appointments in both the executive and judicial branches.

31 Justice Baxter referred to the majority's reasoning as "legal jujitsu."

32 43 Cal. 4th at 875.

33 Some commentators believe that Chief Justice George had long-ago made up his mind. For example, some commentators point to an interview where he said that, with regards to gay marriage, he thought of a "long ago trip he made with his European immigrant parents through the American South. There, the signs warning 'No Negro' or 'No Colored' left quite an indelible impression on me ... I think there are times when doing the right thing means not playing it safe." Maura Dolan, *California Chief Justice Says Same-Sex Marriage Ruling was One of His Toughest*, L.A. Times, May 18, 2008, *available at* http://www.latimes.com/news/local/la-me-gay18-2008may18,0,2131713,print.story. *In Re Marriage Cases* relies heavily on *Perez* and *Loving*.

34 In the future, there will almost certainly be issues surrounding same-gender divorce.

Washington Supreme Court Round-Up: 2007 Highlights

Continued from front cover...

Background

In *Washington Citizens Action of Washington v. State*,[1] a deeply divided Washington Supreme Court struck down Initiative 747 (I-747). The initiative amended existing law by limiting property tax increases to 1% per year.[2] I-747 would have kept in place the ability of local governments to increase property tax collections above 1% if approved by the voters.[3]

Prior to I-747's passage, Washington voters passed a similar initiative (I-722) in 2000 which set the property tax limit from 6% to 2%. After I-722's passage, a number of local jurisdictions challenged the measure as unconstitutional. On November 20, 2001, the trial court entered a preliminary injunction against implementation or enforcement of I-722.[4] As a result of the trial court's decision, supporters of I-722 filed I-747 with the Secretary of State's Office. Seven months later in July 2001, I-747 supporters turned in the requisite number of signatures, placing the initiative on the 2001 November general election ballot. I-747's official ballot title stated:

> Initiative Measure No. 747 concerns limiting property tax increases. This measure would require state and local governments to limit property tax levy increases to 1% per year, unless an increase greater than this limit is approved by the voters at an election. Should this measure be enacted into law?[5]

On September 20, 2001 the Washington Supreme Court ruled[6] I-722 violated the single-subject rule of the Washington Constitution.[7] Because I-722 was struck down by the Washington Supreme Court, the previous 6% property tax limit was reinstated. On November 6, 2001, Washington voters overwhelmingly passed I-747 (59% to 41%) which set the property tax increase limit at 1%.

Washington Supreme Court's Decision

Writing for the majority, Justice Bobbe Bridge[8] upheld the trial court's ruling that I-747 violated Article II, Section 37 of the Washington Constitution. Concurring in the decision were Justices Susan Owens, Barbara Madsen, Stephen Brown (Pro Tem), and Teresa Kulik (Pro Tem).[9]

The court ruled that I-747 violated the Washington Constitution because the "text of the initiative claimed to reduce the general property tax limit from two percent

to one percent, but in reality it reduced the limit from six percent to one percent."[10]

Article II, Section 37 provides that "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." According to the court, when I-747 was enacted, the text of the initiative "did not accurately set forth the law that the initiative sought to amend."[11] The court ruled that I-747's text led voters to believe the initiative would generally reduce the property tax increase limit from 2% to 1% when in reality—because I-722 was recently declared unconstitutional—I-747 was actually reducing the property tax increase limit from 6% to 1%.[12]

The court dismissed the State's argument that Section 37's purpose was, in fact, satisfied because the official Voters' Pamphlet made it clear that there was an ongoing challenge to I-722, and if that law was struck down, I-747 would reduce the property tax increase limit from 6% to 1%.[13] In addition, the court disagreed that the "Argument For" section and Washington Attorney General's explanatory statement set forth in the Voters' Pamphlet cured any defect:

> While complete review of the attorney general's explanatory statement in the Voters' Pamphlet might have explained the relationship between pre-I-722 law and the changes proposed by I-747, article II, section 37 does not simply require that notice of an amendatory initiative's impact on existing law be somehow available to voters. '[T]he act revised or the section amended' must be 'set forth at full length.' Nothing in the plain language of article II, section 37 or in the case law interpreting it suggests that information in the Voters' Pamphlet can cure the type of textual violation of article II, section 37 that occurred here, where the initiative's inaccuracy strikes at the substance of the amendment's impact.[14]

The majority further noted that the court "previously acknowledged that many voters do not read the Voters' Pamphlet when evaluating an initiative or referendum." Thus, according to the court's reasoning, a voter would have thought the initiative was reducing the property tax limit from 2% to 1%, if he or she had simply read the text of I-747.[15]

In sum, the court ruled that at the time of the popular vote, the text of I-747 misled the voters because the initiative did not accurately set forth the act being revised or the section being amended.

The Dissent

Justice Charles Johnson—joined by Chief Justice Gerry Alexander and Justices Tom Chambers and Richard Sanders—chided the majority for suggesting that "the voters are unable to think or read for themselves[.]"[16]

According to the dissent, Article II, Section 37 of the Washington Constitution has two primary purposes: (1) "to avoid confusion, ambiguity, and uncertainty in statutory law, essentially to disclose the effect of the new legislation"; and (2) "to ensure that legislators and voters are aware of the impact that an amendatory law will have on existing law."[17]

The dissent argued that there was no confusion, ambiguity, or uncertainty to I-747's text. The dissent noted that the "ballot title and the text clearly disclose[d] the effect of the new legislation to reduce taxes."[18] Moreover, the dissent opined that the voters were informed there was a previous higher property tax limit of 6% and that I-747 reduced the maximum tax to 1%.[19] According to the dissent, "[w]hether the former tax cap was six percent or two percent, the voters understood the effect of this law was to reduce the tax, and this is what they voted to approve."[20]

The dissent further explained that the former 6% property tax limit was specifically referenced in the Voters' Pamphlet's "Policies and Purposes" section, the "Argument For" section, and the Washington Attorney General's explanation section.[21] Thus, the voters who wished to read only the official ballot title were apprised of the initiative's effect, to reduce taxes to a maximum of 1% increase per year.[22] Voters who further decided to read the Voters' Pamphlet were fully apprised of both the status of I-722 and the former 6% property tax cap.[23]

The dissent concluded that the voters "were aware the existing law was higher taxes and the impact of [I-747] was to reduce taxes."[24]

Washington Legislature's Response to Court's Decision

As a result of the public outcry sparked by the Washington Supreme Court's decision, Governor Christine Gregoire (D) convened the state legislature for a rare one-day special session to reinstate the 1% property tax limit.[25] Both houses overwhelmingly voted to overturn the Washington Supreme Court's decision and to reinstate the 1% property tax cap; the bill was signed into law the same day by Governor Gregoire.[26]

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Endnotes

1 171 P.3d 486 (Wash. 2007).

2 In some taxing districts, I-747 would have limited property tax collections at the lesser of 1% or the rate of inflation.

3 State of Washington Voters Pamphlet, General Election 15 (Nov. 6, 2001) (Voters' Pamphlet).

4 171 P.3d at 490.

5 Voters' Pamphlet, *supra* note 3, at 4.

6 City of Burien v. Kiga, 144 Wn.2d 819, 31 P.3d 659 (Wash. 2001).

7 Wash. Const. art. II, section 19 ("No bill shall embrace more than one subject, and that shall be expressed in the title").

8 Justice Bridge retired in December, one year before her six-year term ended. Bridge was replaced by Debra Stephens, who was appointed by Governor Christine Gregoire.

9 Justices Mary Fairhurst and Jim Johnson recused themselves. Justice Jim Johnson, prior to being elected to the court, represented the proponents of I-747 and drafted the initiative's text.

10 171 P.3d at 488.

11 *Id*. at 492.

12 *Id*.

13 *Id*.

14 *Id*. at 492-93 (citations omitted).

15 *Id*. at 493.

16 *Id*. at 496.

17 *Id*. (citing Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 245, 11 P.3d 762 (Wash. 2000) and Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 642, 71 P.3d 644 (Wash. 2003)).

18 Washington Citizens Action of Washington v. State, 171 P.3d at 496-97.

19 *Id*. at 497.

20 *Id*.

21 *Id*.

22 *Id*.

23 *Id*.

24 *Id*.

25 Ralph Thomas & Andrew Garber, *Shouting, Name-Calling as Lawmakers Cap Property Taxes*, The Seattle Times, Nov. 30, 2007, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=session30m&date=20071130&query=Initiative+747.

26 *Id*. (The House of Representatives voted 86-8 voted in favor of reinstating the 1% property tax limit; the Senate voted 39-9.)

Washington State Supreme Court Strikes Down Campaign Speech Restrictions

By Seth Cooper

In *Rickert v. State ex rel Public Disclosure Commission* (2007), the Washington Supreme Court confronted the constitutionality of a state statute which prohibited political advertising containing false statements of material fact—made with actual malice—about candidates for public office. A 5-4 majority struck down the statute as unconstitutional on its face, running contrary to the First Amendment's freedom of speech protections.[1]

The case arose in 2002, when Green Party candidate Marilou Rickert challenged Democratic Senator Tim Sheldon for his seat in the 35th Legislative District. Rickert sponsored a mailing which *falsely* claimed that Sheldon "voted to close a facility for the developmentally challenged in his district."[2] Sheldon filed a complaint with Washington State's Public Disclosure Commission (PDC), alleging that Rickert violated RCW 42.17.530(1)(a). Under that statute, a person may not sponsor with actual malice a "[p]olitical advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office."[3] The statute requires establishment of proof by clear and convincing evidence before the PDC.[4]

Months after Sheldon easily defeated Rickert in the 2002 election, the PDC held a hearing on the complaint and found Rickert's mailing contained two false statements (i.e., "(a) Senator Sheldon voted to close the Mission Creek Youth Camp, and (b)… Mission Creek was a facility for the developmentally challenged").[5] It concluded that those statements were material, sponsored with actual malice, and that this conclusion was supported by clear and convincing evidence. A Washington superior court subsequently affirmed the order; this was later reversed by the court of appeals.[6]

Majority Opinion

Justice James Johnson wrote the plurality opinion. At the outset, he asserted that political speech is at the heart of the freedom of speech guaranteed by the First Amendment. The statute was subjected to strict scrutiny analysis, and the burden placed upon the state to demonstrate the statute was necessary to achieve a compelling state interest and narrowly tailored to serve that purpose.

It appeared that the legislature designed the statute's actual malice requirement to limit the scope of the law's prohibition on political defamation speech identified by the U.S. Supreme Court in *New York Times v. Sullivan*.[7] However, Justice Johnson noted that the statute did *not* require proof of the defamatory nature of the prohibited statement. Thus, by prohibiting false statements of material fact, the law extended beyond the more limited category of defamatory speech identified by *New York Times v. Sullivan*.

The previous version of RCW 42.17.530(1)(a) applied to materially false statements of fact more generally—*not* being limited to false statements about candidates – and was struck down almost ten years earlier in *State ex Rel. Pub. Disclosure Comm'n v. 119 Vote No! Committee* .[8] Justice Johnson wrote that Rickert's case "provides an opportunity to reiterate the fundamental principles enunciated by the lead opinion in *119 Vote No! Committee*… and to clarify that neither statements about political issues nor those about candidates may be censored by the government under a scheme like RCW 42.17.530(1)(a)."[9]

Justice Johnson, further relying on *119 Vote No! Committee*, found that the statute wrongly presupposed an independent right of the state to determine truth from falsehood in political debate, arguing the statute "naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech."[10] Justice Johnson also rejected the assertion (voiced by Justice Madsen's concurrence in *119 Vote No! Committee*) that non-defamatory, false material statements about political candidates may be censored, but that such statements about political issues may not. He concluded: "there simply cannot be any legitimate, let alone compelling, interest in permitting government censors to vet and penalize political speech about issues *or* individual candidates."[11]

Justice Johnson maintained that even the compelling state interest in compensating individuals for wrongful injury to reputation does not justify the statute's enforcement scheme, which protected candidates from criticism, but offered no mechanism for damages to the wronged.

The majority opinion rejected the PDC's claim that the protection of the integrity of the election process supported the statute's constitutionality. Acknowledging that government has a compelling interest in preventing direct harm to elections, Justice Johnson nonetheless insisted that such interest was not advanced by prosecuting an individual like Rickert. Rather, he concluded that the statute was under-inclusive for purposes of protecting elections because the terms of RCW 42.17.530(1)(a) exempt all statements made by a candidate about his- or herself. "Basically, a candidate is free to lie about himself, while an opponent will be sanctioned," he wrote.[12] Justice Johnson surmised that the exemption suggested that protection of *candidates* was the statute's true purpose.

Finally, Justice Johnson maintained that RCW 42.530(1)(a) suffered from an unconstitutional set of enforcement procedures that were *not* the restrictive means of achieving the statute's proffered compelling interests. Members of the PDC—which enforces the statute—are appointed by the governor. "This group of unelected individuals is empowered not only to review alleged false statements made in political campaigns but also to impose sanctions," he wrote.[13] Justice Johnson pointed out that the statute contained no requirement for a court of law to conduct an independent, de novo review of PDC rulings in this regard. Thus, "the speaker bears the burden of seeking out, and paying for, vindication in the courts whenever the PDC erroneously finds a violation."[14] He likewise observed that under the statute, charges need not be proved to a jury. Justice Johnson concluded that, although Sen. Sheldon was ultimately vindicated by his overwhelming re-election, were there injury to his reputation, compensation would be available to the Senator through a defamation action. (Such an action would go before a jury.)

Concurrence & Dissents

Chief Justice Gerry Alexander filed a one-paragraph concurring opinion. The chief justice agreed with the result reached by the plurality, acknowledging that the statute unconstitutionally "prohibits non-defamatory speech in addition to defamatory speech."[15] However, the chief justice also wrote that "the majority goes too far in concluding that any government censorship of political speech would run afoul of the First Amendment."[16]

Justice Barbara Madsen penned a lengthy dissenting opinion; Justices Bobbi Bridge, Tom Chambers, and Mary Fairhust joining. Wrote Justice Madsen: "[t]he impression left by the majority's rhetoric, that oppressive government regulation is at issue in this case, is simply wrong."[17] Rather, "it is obvious that RCW 42.17.530(1)(a) infringes on no First Amendment rights."[18] Justice Madsen asserted that the majority's decision "is an invitation to lie with impunity."[19]

"The majority is wrong when it says that state government cannot constitutionally regulate truth or falsity of political speech," insisted Justice Madsen.[20] She claimed that no such rule was ever established in *119 Vote No! Committee*. Justice Madsen frequently cited the 1964

U.S. Supreme Court case *Garrison v. Louisiana* to bolster her conclusion:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.[21]

Justice Madsen disagreed with the majority's application of strict scrutiny analysis to RCW 42.17.530(1)(a) and reasoned that "if the actual malice standard is met the speech falls within a class of speech that is not constitutionally protected."[22]

Justice Madsen maintained that government's authority to prohibit political speech is not limited to statements that constitute civil defamation in tort law. She went on to write: "the actual malice standard is both a necessary and sufficient standard for regulating false campaign speech."[23] In defending the power of government to regulate political speech, she asserted that "while the majority would prefer that no entity have authority to make final decisions on whether speech may be regulated and whether any regulations that are enacted conform to first amendment requirements, this authority is constitutionally vested in the courts."[24] For this reason, Justice Madsen maintained that the court would always have acted as final arbiter of any administrative decision under the statute.

Rickert was the third significant political speech case decided by the Washington Supreme Court in 2007. In *San Juan County v. No New Gas Tax*, the court unanimously struck down PDC regulations defining on-air political speech as in-kind political campaign contributions triggering public disclosure requirements.[25] The court also upheld PDC regulations defining "political committee" and its enforcement of those regulations in *Voters Education Committee v. Public Disclosure Commission*.[26]

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Endnotes

1 161 Wn.2d 843, 168 P.3d 826 (2007).

2 *Id*. at 827.

3 Former RCW 42.17.530(1)(a).

4 Former RCW 42.17.530(2)

5 168 P.3d at 828 (cite omitted).

6 129 Wn.App. 450, 119 P.3d 379 (2005).

7 376 U.S. 254, 84 S.Ct. 710 (1964).

8 135 Wn.2d 618, 957 P.2d (1998).

9 168 P.3d at 829.

10 *Id*. at 829.

11 *Id*. at 830 (emphasis in original).

12 *Id*. at 831.

13 *Id*.

14 *Id*. at 832.n9.

15 *Id*. at 833 (Alexander, C.J., concurring).

16 *Id*. at 832 (Alexander, C.J., concurring).

17 *Id*. at 833 (Madsen, J., dissenting).

18 *Id*.

19 *Id*.

20 *Id*.

21 379 U.S. 64, 75, 85 S.Ct. 209 (1964).

22 168 P.3d at 834 (Madsen, J., dissenting).

23 *Id*. at 840 (Madsen, J., dissenting).

24 *Id*. at 834 (Madsen, J., dissenting).

25 160 Wn.2d 141, 157 P.3d 831 (2007). *See* Andy Cook, *Washington Supreme Court Upholds Talk Show Hosts' Right to Free Speech*, State Court Docket Watch (July 2007), *available at* http://www.fed-soc.org/publications/pubID.351/pub_detail.asp.

26 161 Wn.2d 470, 166 P.3d 1174 (2007), *cert. denied*, __ S. Ct.__, 2008 WL 2229183 (2008).

Connecticut Supreme Court Reverses $41 Million Judgment in Construction Injury Case

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general contractor liability, to wit, whether there was an alleged peculiar or unreasonable risk of injury at the site, which required Sordoni to employ special precautions, in addition to the question of whether Sordoni retained, under its contract with Berlin Steel, control over Berlin's work.

On November 29, 2005, the jury returned a verdict in favor of Pelletier, awarding him $5,645,834.74 in economic damages, $22,710,000 in non-economic damages, and an additional $3,800,000 in damages for loss of consortium, a claim shared by Pelletier's spouse as a co-plaintiff.[5] With attorneys' fees and accrued post-judgment interest permitted by state statute, the initial award of $32,155,834.74 ballooned to a judgment worth $41,417,065.15.

On appeal for the second time, the case drew amicus curiae briefs from the Connecticut Building Congress, the Southern New England Chapter of the Construction Management Association of America, the Connecticut Council on Occupational Safety and Health, and the Connecticut Trial Lawyers Association.

On April 22, 2008, the Connecticut Supreme Court reversed the judgment and remanded the case to the trial court with a direction to render judgment for Sordoni. Justice Peter T. Zarella, writing for a unanimous court, agreed with Sordoni "that neither the building code itself, nor any provisions incorporated therein" created a non-delegable duty on its part to inspect all welds on the site and, accordingly, Sordoni's failure to do so did not constitute negligence per se.

The justices found fault in the trial court's interpretation of the building code, in particular its construction of the provision requiring permit applicants to "provide" special inspections to mean a duty on the part of Sardoni, as the permit holder, to conduct such inspections itself. Taking particular note of the code's record-keeping and reporting requirements, which include the duty to "provide a list of the individuals, agencies and/or firms intended to be retained for conducting such inspections," the justices reasoned such provisions belie any notion that the code imposes on general contractors a non-delegable duty and concluded the safety and inspection requirements properly fell on Sordoni's chosen subcontractor.

Finally, the court rejected Pelletier's alternative claim against Sordoni for common law negligence, finding no basis for imposition of general contractor liability. There was no evidence to support a finding that Sordoni knew or had reason to know of the defective weld. Nor, the court observed, did Sordoni assume control over Berlin's work. Finally, the court disagreed that the nature of Berlin's work was, as a matter of law, "inherently dangerous" or posed a "peculiar unreasonable risk of physical harm" such that special precautions were required to be taken by Sordoni.

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Endnotes

1 286 Conn. 563, 945 A.2d 388 (2008).

2 *See* Ray v. Schneider, 16 Conn. App. 660, 548 A.2d 461, *cert. denied*, 209 Conn. 822, 551 A.2d 756 (1988).

3 *See* Pelletier v. Sordoni/Skanska Construction Co., 264 Conn. 509, 825 A.2d 72 (2003). Among the exceptions to the general rule precluding such liability are work contracted for which is "intrinsically dangerous" or by its nature "calculated to cause injury to others", the negligent hiring of an "incompetent or untrustworthy contractor," the reservation by the general contractor of "general control over the contractor or his servants", in-progress assumption of "control" or "interfere[nce]" with the contractor's work", or the existence of a identifiable legal duty to "see that the work is properly performed." *Id.* at 518.

4 This model construction code, and its constituent provisions incorporating the standards of the Structural Welding Code – Steel of the American Welding Society, Inc. were adopted by the State of Connecticut as part of its own building code. *See* Conn. Gen. Stat. § 29-252. Section 307.1 of that national code requires permit applicants to "provide" special inspections of steel fabrications; other sections articulate standards for weld fabrication and inspection and impose safety inspection record-keeping and reporting requirements. As is noted hereafter, the Connecticut Supreme Court's rejection of the trial court's analysis turned in large part on its interpretation of the term "provide."

5 Mrs. Pelletier's claim did not receive independent treatment by the high court as it was entirely derivative of her husband's claims.

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