STATE COURT
DocketWatch®

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California Supreme Court Broadly Construes Unfair Competition Law

by John Querio

The principal consumer protection statute in California, known as the Unfair Competition Law (UCL),[1] provides remedies against unfair competition, which the statute defines as "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[2] In recent decades, courts have construed this language broadly to encompass a host of business practices under the "unlawful, unfair or fraudulent" rubric.[3] Counterbalancing this interpretive breadth, the remedies available under the UCL are limited. A plaintiff can seek injunctive relief or restitutionary disgorgement, but may not recover compensatory or punitive damages.[4]

Prior to November 2004, plaintiffs frequently brought suit under the UCL to take advantage of its extraordinarily generous standing provision, which allowed "any person" to bring a representative action on behalf of the general public as a private attorney general.[5] The California electorate narrowed the scope of the UCL by enacting Proposition 64 in the November 2004 election. Proposition 64 amended the standing provision of the UCL to require that a private plaintiff have suffered injury in fact and have lost money or property as a result of the unfair competition that is the subject of the lawsuit.[6] It also required UCL plaintiffs wishing to proceed on a representative basis to satisfy the class action requirements of California Code of Civil Procedure section 382, rather than allowing them to act as self-appointed private attorneys general under no constraints at all.[7] In 2009, the California Supreme Court, in a 4-3 opinion in *In re Tobacco II Cases*, held that only the named class representatives in a UCL class action had to satisfy Proposition 64's standing requirements. The 4-3 majority also narrowly construed the causation element of the standing analysis to require only a watered-down version of actual reliance in UCL cases premised on fraudulent or misleading advertising.[8] The three-justice dissent argued that the majority's opinion disregarded the clear text and purpose behind the enactment of Proposition 64.[9] After *Tobacco II*, Proposition 64 continued to pose substantial limitations on UCL

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New York's Highest Court Narrows the Assumption of Risk Defense to Tort Liability

by Jodi S. Balsam

On April 6, 2010, the New York State Court of Appeals rejected use of the assumption of the risk doctrine to nullify a school district's duty to supervise the children within its care.[1] The ruling would likely have been uncontroversial if the majority had limited its pronouncements to those necessary to resolve the present dispute: a child cannot assume the risk of injuries from "horseplay" enabled by his teachers' failure to supervise him. This proposition provided the basis for the unanimous judgment in *Trupia v. Lake George Central School District*

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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.

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 Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

North Carolina Appellate Court Questions the Constitutionality of Campus Police at Universities with Religious Heritages in *State v. Yencer*

by Robert Numbers

In late August, as colleges and universities across North Carolina were preparing to welcome back their students, the North Carolina Court of Appeals issued an opinion that calls into question the constitutionality of campus police forces at any institution of higher learning that is in any way affiliated with a religious institution. In *State v. Yencer*,[1] a unanimous three judge panel of the North Carolina Court of Appeals ruled that the "the delegation of police power to Davidson College, pursuant to § 74G, is an unconstitutional delegation of 'an important discretionary governmental power' to a religious institution in the context of the First Amendment."[2] The opinion reaches beyond its specific facts, calling into question the legitimacy of campus police forces of any college or university that has ever been affiliated with organized religion.

North Carolina, like many states, allows its Attorney General "to certify a private, nonprofit educational institution of higher education . . . as a campus police agency and to commission an individual as a campus police officer."[3] Campus police officers "have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors" on property owned by the college or university and any public road or highway immediately enjoining the college or university property.[4]

However, the delegation of the state's arrest power to campus police forces has generated a fair amount of controversy. In *State v. Pendleton*,[5] the North Carolina Supreme Court, in a 4-3 decision, addressed whether the delegation of the state's arrest power to the Campbell University Police Department was permissible under the *Lemon* test, the standard which arose from the 1971 United States Supreme Court case *Lemon v. Kurtzman*.[6] In order to resolve this issue, the North Carolina Supreme Court addressed two questions: (1) whether the police power constituted an important, discretionary governmental power; and (2) "whether the particular uncontroverted evidence presented in this case supports the Superior Court's conclusion that Campbell University is a religious institution of the type contemplated by the Supreme Court"[7] in *Larkin v Grendle's Den*.[8]

After quickly determining that the police power was an important discretionary governmental power,[9] the *Pendleton* court turned to the question of whether Campbell University constituted a religious institution. In resolving this issue the supreme court held that "this Court is bound by the . . . uncontested findings of the Superior Court" because the lower court's findings were not challenged by the state on appeal.[10] The superior court's factual findings established that Campbell University was not a secular university with a religious heritage and affiliation but instead that it "is a Baptist university" focused on propagating and promoting a particular religious faith to its students.[11] Based upon these findings the North Carolina Supreme Court threw out

the criminal charges on the ground that the delegation of the police power to Campbell University violated the Establishment Clause of the First Amendment."[12]

On January 5, 2006, Julie Anne Yencer was arrested by a member of the Davidson College Police Department on charges of driving while impaired and reckless driving on a street adjacent to campus.[13] Davidson College, a private college with an enrollment of 1,800 students located approximately twenty miles north of Charlotte, North Carolina,[14] employs a number of campus police officers certified by the Attorney General.[15]

Yencer initially plead guilty in Mecklenburg County District Court, but then filed a notice of appeal to superior court.[16] Once in superior court, Yencer filed a motion to suppress evidence related to her arrest on the grounds that Davidson College was a religious institution and, therefore, the delegation of the state's police power to the Davidson College Police Department "violated the excessive entanglement prohibitions of the Establishment Clause of the First Amendment to the United States Constitution."[17]

After conducting an evidentiary hearing on the motion to suppress, the Honorable W. Robert Bell of the Mecklenburg County Superior Court entered an order containing various findings of fact related to the organization and operation of Davidson College. These findings included: (1) Davidson College is voluntarily affiliated with the Presbyterian Church of the United States of America ("PCUSA"); (2) PCUSA does not play a role in hiring or firing employees, does not play a role in the student admissions process, does not own the land Davidson College is situated on, and does not play a role in setting the college's curriculum; (3) Davidson College is committed to a Christian tradition, but that commitment "extends beyond the Christian community to the whole of humanity and necessarily includes openness to and respect for the world's various religious traditions[;]"[18] (4) eighty percent of the college's board of trustees must be an active member of a Christian church; (5) students are admitted to the college regardless of faith and are not required to attend religious services; (6) faculty members are required to sign a statement that they will work in harmony with the college's statement of faith; (7) Davidson requires students to successfully complete thirty-two courses, one of which must be a course on religion; (8) there are a

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BETTER ALIVE THAN DEAD

PA Supreme Court: Guardians Cannot Refuse Treatment for Mentally Challenged

by Thomas Forr

When David Hockenberry, a man with profound mental retardation, came down with pneumonia in 2007, he began having difficulty breathing. His doctors insisted that he be placed on a temporary ventilator to survive. His guardians, however, citing Mr. Hockenberry's "best interests," sought to refuse the treatment. In doing so, they launched a legal battle that reached all the way to Pennsylvania's highest court.[1]

In *In re D.L.H., an Incapacitated Person*, the Pennsylvania Supreme Court addressed "whether plenary guardians can refuse life-preserving treatment on behalf of a person who lacks—and has always lacked—the capacity to make personal health care decisions, where the person is neither suffering from an end-stage medical illness nor permanently unconscious."[2] The parties framed this issue in starkly different lights. The guardians, Mr. Hockenberry's parents, cast their case in the language of "autonomy," "best interests," and the "fundamental right to refuse unwanted medical treatment."[3] The Department of Public Welfare ("DPW"),[4] by contrast, underscored the potential for abuse and stressed that permitting guardians to refuse such treatment would be a radical rejection of the inherent value of life for those with severe disabilities.[5]

In the end, the court decided that the legislature had already resolved this dispute. Under Pennsylvania law, only competent individuals can designate a "health care agent" as a substitute medical decision-maker; and only a "health care agent" can refuse life-preserving treatment for an incompetent person who is neither terminally ill nor permanently unconscious.[6] The court found that these provisions superseded the broad power of guardians to assert the "rights and best interests" of their wards.[7] Treatment, the court concluded, must be provided in cases like Mr. Hockenberry's: "[W]here, as here, life-preserving treatment is at issue for an incompetent person who is not suffering from an end-stage condition or permanent unconsciousness, and that person has no health care agent . . . care must be provided."[8]

The Story

According to his doctors, 53 year-old David Hockenberry has an IQ of around 25, classifying his condition as one of "profound mental retardation."[9] Accordingly, Mr. Hockenberry has been deemed incompetent by the state since his birth. Nevertheless, the parties to the case stipulated that Mr. Hockenberry enjoys high quality of life at the state-run facility where he lives.[10] As the DPW put it,

> [Mr. Hockenberry], though nonverbal, is ambulatory, can partially dress himself, selects his food at the Ebensburg Center cafeteria (his favorite dessert is rice pudding), can feed himself, expresses preference for the company of some over others, and goes off the Ebensburg Center campus several times a month to visit shopping malls, eat at restaurants such as Wendy's and Dairy Queen, and go to the movies.[11]

In 2007, Mr. Hockenberry contracted aspiration pneumonia. Breathing became a struggle. To prevent suffocation, Mr. Hockenberry's doctors advised that he be placed on a temporary ventilator.[12]

Mr. Hockenberry's guardians attempted to refuse the ventilator. In essence, they advanced two claims: First, if Mr. Hockenberry were competent to assess his situation, he would not want the ventilator; second, that it was in Mr. Hockenberry's best interests to refuse an intrusive mechanical ventilator. Rejecting these arguments, and holding that guardians have no power to refuse treatment in such circumstances, the Orphan's Court ordered doctors to treat Mr. Hockenberry.[13]

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Habeas Petitioner Denied Use of Sentence Reduction Credits in *Jones v. Keller*

by Daniel Morton-Bentley

In *Jones v. Keller*,[1] the North Carolina Supreme Court denied a prisoner's release after the prisoner asserted he had completed his sentence through a combination of time served and sentence reduction credits. The court deferred to the Department of Corrections' contention that the credits were awarded only for limited purposes.

Case Background

On September 1, 1976 Alford Jones was convicted of murder and sentenced to life imprisonment.[2] At the time of his conviction, North Carolina law defined "life imprisonment" as "a term of 80 years in the State's prison."[3] While serving his sentence, Jones accumulated sentence reduction credits for good behavior and by November 2009, Jones believed he had completed his 80 year sentence through a combination of jail time and credits. Accordingly, he filed a habeas corpus petition demanding his immediate release.[4]

The North Carolina Department of Corrections (DOC) opposed Jones' release, arguing that the credits were not intended to apply directly to Jones' sentence. DOC argued that the credits were only to be considered for the limited purpose of calculating Jones' release date if the Governor commuted his sentence from life imprisonment to a finite term of years.[5] At that point, Jones' earned time would be subtracted from his commuted sentence.

The Wayne County Superior Court, disagreeing with DOC, granted Jones' petition and ordered his release. DOC appealed, and the North Carolina Supreme Court accepted certiorari on the issue of whether North Carolina law and DOC's regulations mandated Jones' release. In the event that they did not, Jones argued that his continued incarceration would violate: (1) the due process clause; (2) the ex post facto clause; and (3) the equal protection clause.[6]

Jones' Entitlement to Immediate Release

The North Carolina Supreme Court held that Jones was not entitled to release because the details of how to apply sentence credits were firmly within DOC's discretion. The court held that the Legislature's grant of power to the DOC to enact "provisions . . . relating to rewards . . . for good conduct [and] allowances of time for good behavior" implied the power "to determine the purposes for which that time is allowed."[7] Deeming that DOC's construction had been reasonable, the court deferred to it.[8] The majority next considered whether Jones' continued incarceration would violate the federal or North Carolina constitutions.

Due Process

Jones argued that having his credits count toward his release was a constitutionally protected liberty interest

of which he was deprived without legal process. While acknowledging that prisoner entitlement programs could give rise to such a right, the majority held that Jones did not possess a liberty interest in having his credits applied "for the purpose[] of unconditional release."[9] Furthermore, they asserted, even if Jones had a liberty interest, it was "de minimis" compared to the government's interest in keeping prisoners incarcerated "until they can be [safely] released."[10] This interest was particularly strong because Jones was convicted of first-degree murder.[11] Additionally, the parole process was deemed "adequate to preserve Jones' constitutional rights."[12]

Ex Post Facto

The court held that DOC's interpretation of Jones' good time credits had remained constant and, thus, did not amount to an after-the-fact increase in punishment. Because Jones could not point to any intervening law, regulation, or policy interpretation that altered his sentence, his ex post facto claim was dismissed.[13]

Equal Protection

Finally, Jones argued that DOC's refusal to apply his credits toward his sentence violated his right to equal protection. Jones contended that he received a determinate sentence (80 years) and, due to DOC's refusal to apply his credits to his release time, was treated differently from other recipients of determinate sentences.[14] The court justified this distinction by stating that since Jones had committed first-degree murder, he could be treated differently than those who committed different crimes.[15]

Concurring Opinion

Justice Newby's concurring opinion went farther in rejecting the petitioner's claims in three respects. First, Justice Newby argued that the Legislature intended to preserve a natural life sentence even though it explicitly defined life sentence as "a term of 80 years."[16] Second, he opined that no life inmate sentenced under the "80 years" statute has a liberty interest in having credits applied to his or her sentence.[17] He stressed that no law, regulation, or policy imbued life inmates with this interest. Finally, Justice Newby offered a more detailed equal protection analysis. He argued that Jones, a life inmate, could only be compared with other life inmates sentenced under the "80 years" statute. Therefore, because all members of this group have been denied sentence reductions based on good behavior credits, Jones' treatment was not discriminatory.

Dissent

Justice Timmons-Goodson's dissent criticized several points made by the majority opinion. She first discussed two North Carolina Supreme Court cases from 1978 that clearly established that a life sentence, at the time of Jones' sentencing, constituted an 80-year period.[18] DOC

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New Jersey Supreme Court Requires Police to Give Breathalyzer Warnings in Foreign Languages

State v. German Marquez, Case No. A-85-09 (July 12, 2010)

by Eric H. Jaso

When a police officer stops a suspected drunk driver in New Jersey, and the driver refuses an alcohol breath test, state law requires the officer to inform the driver of the consequences of his refusal, including the automatic loss of license.[1] What if the driver is not (apparently) able to speak or understand English? Must the police warn the driver in his native language? In July, a divided New Jersey Supreme Court ruled that they must.

The traffic incident that gave rise to this case was routine. When police responded to a minor fender-bender, one driver remained in his car with the motor running. An officer asked the driver, German Marquez, for his license, registration and proof of insurance. Marquez apparently did not understand him, so the officer repeated his request in Spanish, and Marquez complied. Marquez was slurring, and the officer smelled alcohol on him. When he got out of the car at the officer's direction, Marquez stumbled, braced himself against the car, and swayed when he tried to walk to the curb. The officer tried to get Marquez to perform field sobriety tests, but Marquez appeared not to comprehend. Based on his observations, the officer arrested Marquez.[2]

Marquez was taken to the station for a breathalyzer test. Before attempting to administer the test, the officers read Marquez a standard warning (in English) stating what the test is for, how it is administered, and explaining that the law requires DWI arrestees to submit to the test or be charged separately with the refusal. Marquez shook his head and pointed to his eye; because

that response was considered ambiguous, the officers read an additional statement. Marquez then stated (in Spanish), "I don't understand."[3] After that, the officers attempted to show Marquez how to take the test, but he did not respond. Marquez was cited for DWI, careless driving, and also for his refusal to take the breath test.[4]

The municipal court found Marquez guilty of all three offenses; the judge rejected the argument that he could not be found guilty of the refusal when the warnings were given in English, concluding that the arresting officer properly read him the statement, that the law did not require that the statement be given in another language, and that in any event Marquez in fact refused the test. Marquez pursued a trial in Superior Court, but that judge reached the same conclusion. The appellate court affirmed, holding that the law did not require translation of the warnings, that by obtaining a driver's license, Marquez had given "implied consent to submit to a breath test," and that there had been no violation of due process.[5] The court nonetheless suggested that the state motor vehicle authorities get the statement translated into Spanish "and perhaps other prevalent foreign languages."[6]

Before the New Jersey Supreme Court, Marquez argued that having the police read him the warnings in English did not "inform" him of the consequences of refusing the breathalyzer test as state law requires, and that he was consequently deprived of due process. The prosecutor responded that, because state law also provides that any licensed driver gives his implied consent to submit to alcohol testing, Marquez had no right to refuse, so any shortcomings in warning him of the consequences of refusal could not implicate due process rights. The state also argued that the statute only required that the warnings be given (in English), not that they be understood, and, in any event, the police physically demonstrated how to take the test, so that Marquez's failure to understand English was irrelevant.[7]

The state attorney general filed a brief taking the position that Marquez's refusal conviction should be affirmed even though he did not understand the warnings and no interpreter was provided, and that there was neither a statutory or constitutional right to have them read in languages other than English.[8] The state allowed that a defendant could assert a defense based on an inability to understand English, but that he would bear the burden of proof on that claim. (Before argument, the state also informed the supreme court that the MVC would post the warnings on its web site (including video) in the nine foreign languages in which it administers the driver exam.)[9] Amicus curiae the Association of Criminal Defense Lawyers asserted that the warnings should be available in any language in which the state offers drivers tests; for its part, the ACLU contended that the state's failure to provide translations was "fundamentally unfair" and "violated due process."[10]

In rendering the court's judgment, Chief Justice Stuart Rabner first recounted the history of drunk driving laws in the state. The court observed that DWI was first criminalized in 1921 (the Chief Justice evidently forbearing comment on the irony of this law being enacted one year after federal prohibition), but noted that convictions were hard to come by, because most drunk drivers could (and did) refuse alcohol testing. The Legislature addressed this shortcoming in 1966, enacting both a refusal violation and the implied consent law, which provided that "all motorists operating a vehicle on a public road had consented to the taking of breath samples, which would be tested for blood-alcohol content."[11] The court described these enactments as "designed to encourage people arrested for drunk driving to submit a breath sample and to enable law enforcement to obtain objective scientific evidence of intoxication."[12] However, the Legislature did not require warnings until 1977, having found that the relatively lesser penalties for refusing breath tests resulted (unsurprisingly) in drunken motorists electing to take that hit rather than submit to the testing and risk the higher penalties of a DWI conviction. The penalties were therefore beefed up and the warning provision added to the statute requiring police to "inform the person arrested of the consequences of refusal" by reading a standard statement.[13]

The court opined that Marquez's claim hinged on "the Legislature's intent expressed through the implied consent and refusal statutes," starting with the "generally accepted meaning" of the words of the statutes.[14] The implied-consent statute provides that "[a]ny person who operates a motor vehicle . . . shall be deemed to have given his consent to the taking of samples of his breath for the purpose of . . . determin[ing] the content of alcohol in his blood," and that the police "shall . . . inform the person arrested of the consequences of refusing to submit to such test[.] . . . A standard statement . . . shall be read by the police officer to the person under arrest."[15] The court also recited the criminal refusal statute, which includes "whether [the defendant] refused to submit to the test upon request of the officer" as an element.[16]

These statutes are "plainly interrelated," according to the court, and dictate "what police officers must say to motorists": "the refusal statute requires officers to *request* motor vehicle operators to submit to a breath test; the implied consent statute tells officers *how* to

make that request."[17] Thus, the court reasoned, for a refusal conviction to obtain, the trial judge must find that the defendant "refused to submit to the test upon request of the officer," which request in turn must consist of the police reading "a standard statement . . . for the specific purpose of informing 'the person arrested of the consequences of refusing to submit to such a test. . .'"[18] Because the statute itself dictates that the police must read a standard statement created by the MVC, the request cannot be communicated in other words or by other means, and this means that the statutes "not only cross-reference one another internally, but they also rely on each other substantively."[19] Thus, the court concluded, to find that the reading of the warning does not substantively affect the element required to convict "would in effect read [the warning aspect of the statute] out of existence."[20]

Therefore, to convict a driver of refusal, the court ruled that the prosecution must prove not only that the defendant refused to submit to a breathalyzer test, but also that "the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so."[21] The court acknowledged that this element had never been included before, but that was only because the issue of the "request" aspect of the statute had never previously been squarely presented to an appellate court.

Having thus described the additional element, the court focused on the requirement that the officer "inform" the driver by means of reading the written warning. Citing dictionary definitions of the word "inform" (e.g., "the imparting of knowledge, especially of facts . . . necessary to the understanding of a pertinent matter") the court concluded that "the statute's obligation to 'inform' calls for more than a rote recitation of English words to a non-English speaker."[22] The court warned of "absurd results" if the state's position were accepted: "Such a practice would permit Kafkaesque encounters in which police read aloud a blizzard of words that everyone realizes is incapable of being understood because of a language barrier," comparing Marquez's case to "reading aloud the standard statement to a hearing-impaired driver who cannot read lips."[23] The statute's inclusion of the term "inform," the court concluded, "means that [police] must convey information in a language the person speaks or understands."[24] As it is no defense to be too drunk to understand the warnings when rendered in a language one speaks, the prosecution need not prove that the driver "actually understood the warnings on a subjective level"; rather, "[i]f properly informed in a language they speak or understand while sober, drivers can be convicted under the implied consent and refusal statutes."[25] Having based its decision on "the plain language of the statutes and the case law," the court found it unnecessary to address the constitutional claims raised.[26]

The court recognized that its decision would have a "practical impact," given that judicial proceedings in New Jersey required translation into some 81 foreign languages in the preceding two years (hastening to add that 85% of the translations involved Spanish and the others eight languages in which MVC publishes the drivers' license exam).[27] The court also acknowledged that time is of the essence in collecting evidence of alcohol in the body, and that "it is not practical to expect that interpreters will be available on short notice in all cases."[28] However, the court declared that "[t]he executive branch, and not the courts, is best-equipped to respond to those concerns," and expressed confidence that the MVC and the Attorney General would "fashion a proper remedy," noting that the Attorney General had already prepared written and audio translations of the warnings and posted them on a website.[29] (In the event a non-English speaker responded ambiguously or attempted to ask questions after hearing or viewing the standard warning, the court directed that a translation of the standard follow-up statement be provided).[30]

Three justices dissented. Because New Jersey law provides that licensed motorists using the roads have given their implied consent to submitting to breathalyzer tests, the dissenters reasoned, the statutory requirement that the police read warnings to suspected drunk drivers is merely a "procedural safeguard" which does not give rise to "an additional substantive element of the [refusal] offense," which the dissenters characterized as a "novel interpretation" that "eviscerates" the implied consent provision and renders it "entirely meaningless."[31] The dissenters also claimed that the majority abandoned the tradition of deferring to the agency's interpretation of the law, that the court emphasized the term "inform" out of its proper statutory context, and pointed to the fact that although many other states had similar warning provisions, none required translation to sustain a conviction for refusing a breathalyzer.[32]

The practical effects concerned the dissenters as well; they opined that it was "particularly incongruous" that non-English-speakers can take the New Jersey drivers' exam in their native tongue, and in doing so confirm their implied consent to breath testing, "[y]et round-the-clock translation must be available to police officers on patrol to reconfirm that understanding, again, when that person is suspected of violating the drunk driving laws."[33]

Instead, the dissenters concluded, if police officers "made reasonable efforts" to inform the driver of the consequences of refusal, a refusal conviction should stand.[34]

In a footnote, the majority dismissed the dissenters' arguments and conclusion, accusing them of seeking to "import[] a reasonable efforts test" from other states' decisions and thus ignore the "precise language the New Jersey Legislature used in crafting this state's laws . . . It is not for the courts to rewrite those statutes and substitute a different approach."[35]

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Endnotes

1 N.J.S.A. 39:4-50.4a.

2 New Jersey v. German Marquez, 202 N.J. 485, 490- 491 (2010).

3 *Id.* at 492-493.

4 *Id.* at 493.

5 *Id.* at 494-495.

6 *Id.* at 495.

7 *Id.*

8 *Id.* at 495-496.

9 *Id.* at 496.

10 *Id.* at 428.

11 *Id.* at 497.

12 *Id.*

13 *Id.* at 498.

14 *Id.* at 499.

15 N.J.S.A. 39:4-50.2.

16 N.J.S.A. 39:4-50.4a.

17 *German Marquez*, 202 N.J. at 501.

18 *Id.*

19 *Id.* at 502

20 *Id.*

21 *Id.* at 503.

22 *Id.* at 507.

23 *Id.*

24 *Id.*

25 *Id.* at 513.

26 *Id.* at 506.

27 *Id.* at 509-510.

28 *Id.* at 513.

29 *Id.* at 511.

30 *Id.* at 511-512.

31 *Id.* at 515.

32 *Id.* at 515-516.

33 *Id.* at 528.

34 *Id.* at 516.

35 *Id.* at 506.

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number of religious groups and clubs of both Christian and non-Christian faiths; and (9) "Davidson College is not a church."[19]

Based upon these findings of fact, Judge Bell determined that the "religious character of Davidson College is not so pervasive that a substantial portion of its functions are subsumed in the religious mission of the [PCUSA]."[20] Instead of being a religious institution, "Davidson College is an institution of higher education affiliated with the [PCUSA] whose predominant higher education mission is to provide its students with a secular education." Therefore, "although Davidson College is religiously affiliated, it is not a religious institution within the meaning of the First Amendment."[21]

After Judge Bell's ruling, *Yencer* once again plead guilty and appealed to the North Carolina Court of Appeals.

In a unanimous decision authored by Judge James A. Wynn[22] and joined by Judges Donna S. Stroud and Cheri Beasley, the court of appeals reversed the trial court's order. The court of appeals held that "Davidson College is a religious institution for the purposes of the establishment clause and . . . the delegation of the police power to Davidson College . . . is an unconstitutional delegation of 'an important discretionary governmental power' to a religious institution in the context of the

first amendment."[23] In the court's view, it was bound to reach this conclusion by the North Carolina Supreme Court's opinion in *State v. Pendleton*.[24] The court of appeals acknowledged that "if we were starting afresh . . . there is evidence in the record to show that Davidson College is not a religious institution for Establishment Clause purposes."[25] The court of appeals also urged the North Carolina Supreme Court to take up the case, despite its unanimous holding,[26] to revisit *Pendleton* and provide instruction on how to address "the important distinction between an institution with religious influence or affiliation and one that is pervasively sectarian."[27]

The North Carolina Supreme Court took up the court of appeals on this invitation and granted the State's Petition for Discretionary Review on October 7, 2010.[28] Oral argument took place on March 15, 2011. The supreme court's review of *Yencer* and *Pendleton* over the coming months will need to address a number of issues.

First, the findings of the trial court in *Yencer* were vastly different from the findings of the trial court in *Pendleton*. A review of the lower court's findings shows that ties between Davidson College and the PCUSA were far weaker than the ties between Campbell University and the Baptist State Convention of North Carolina. The court of appeals' opinion in *Yencer* focused primarily on those facts that demonstrated a strong religious affiliation and overlooked a number of factors which supported Davidson's secular goals and mission. Given the supreme court's admonition in *Pendleton* that the holding was highly fact specific, the "evidence in the record [showing] that Davidson College is not a religious institution for Establishment Clause purposes"[29] may form the basis for reversing the court of appeals' opinion.

Additionally, the North Carolina Supreme Court may need to reconcile *Pendleton* with decisions from other state appellate courts that have found that the delegation of the police power to colleges with religious affiliations is emphatically not a violation of the Establishment Clause. Since the North Carolina Supreme Court decided *Pendleton* in 1994, appellate courts in Michigan[30] and Indiana[31] have found that the delegation of the police power to colleges and universities with religious affiliations is permissible under the First Amendment. These courts have found that the delegation was appropriate because "[t]he delegation [at issue] was neither to a church nor a religious governing body, did not involve the exercise of civic power without standards, and did not have the purpose or effect of protecting or promoting religious interests."[32] In fact, the Indiana Court of Appeals explicitly rejected the reasoning of the majority in *Pendleton* and adopted the reasoning of the dissenting justices.[33]

The North Carolina Supreme Court may also consider whether *Pendleton* was an accurate interpretation of the United States' Supreme Court's "excessive entanglement" jurisprudence and, specifically, the decision in *Larkin*. On its face, a delegation of a discretionary government power to a college or university, even one with a religious affiliation, is distinct from a delegation of discretionary government power directly to a church. Moreover, while approval of a liquor license, the government power at issue in *Larkin*, and the police power of arrest are both largely discretionary tasks, the risk of improper religious influence is far greater in the former instance than the latter. The determination of whether a driver is legally intoxicated is largely identical regardless of the arresting officer's faith or the religious views of those who employ him. Any reconsideration of *Pendleton* will also need to take into account several United States Supreme Court decisions that have limited the circumstances in which an institution of higher learning is deemed a religious institution for First Amendment purposes.

The North Carolina Supreme Court's decision to hear the *Yencer* case demonstrates that several members of the court believe this area of the law is in need of additional discussion and clarification. The need for additional consideration of this issue is further demonstrated by the explicit rejection of *Pendleton* by appellate courts in other states. Regardless whether the North Carolina Supreme Court chooses to reconsider *Pendleton* in its entirety or limit its review to the facts of *Yencer*, the issue of whether the delegation of the police power to private colleges and universities with religious affiliations violates the First Amendment will depend on each school's history, traditions, and organizational structure. Given the fact-intensive nature of the inquiry and the importance of the issue to the safety and security of institutions of higher education, North Carolina's lower courts will benefit from any clarification that the North Carolina Supreme Court or, given the disagreement among state courts on the issue, the United States Supreme Court can provide on the issue.

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Endnotes

1 696 S.E.2d 875 (N.C. Ct. App. 2010).

2 *Id.* at 879.

3 N.C. Gen. Stat. § 74G-2(a).

4 N.C. Gen. Stat. § 74G-6(b).

5 451 S.E.2d 274 (1994).

6 403 U.S. 602 (1971).

7 451 S.E.2d 274, 278 (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)).

8 459 U.S. 116 (1982).

9 451 S.E.2d at 278-79.

10 *Id.* at 280.

11 *Id.* at 281.

12 *Id.*

13 State v. Yencer, 696 S.E.2d 875, 879 (N.C. Ct. App. 2010).

14 About Davidson, http://www3.davidson.edu/cms/x389.xml (last visited Apr. 29, 2011).

15 696 S.E.2d 875, 877 (2010).

16 *Id.* at 876-77.

17 *Id.* at 877.

18 Order, Finding of Fact 9.

19 Order at FF 1.

20 Order at CL 8.

21 Order at CL 8.

22 After the case was decided, but before the opinion was filed, Judge Wynn was sworn in as a judge on the United States Court of Appeals for the Fourth Circuit.

23 State v. Yencer, 696 S.E.2d 875, 879 (N.C. Ct. App. 2010) (quoting State v. Pendleton, 451 S.E.2d 274, 279 (1994)).

24 451 S.E.2d 274 (N.C. 1994)

25 696 S.E.2d at 879.

26 Under North Carolina law, a party does not have a right of appeal to the North Carolina Supreme Court from an unanimous opinion of the court of appeals. N.C. Gen. Stat. § 7A-30(2) (2007).

27 696 S.E.2d at 880.

28 *See* Supreme Court of North Carolina Petitions 7 October 2010, http://www.aoc.state.nc.us/www/public/sc/pc101008.pdf .

29 696 S.E.2d at 879.

30 Michigan v. Van Tubbergen, 642 N.W.2d 368 (Mich. Ct. App. 2002).

31 Myers v. Indiana, 714 N.E.2d 276 (Ind. Ct. App. 1999).

32 *Id.* at 283.

33 *Id.* at 283 n.5.

PA Supreme Court: Guardians Cannot Refuse Treatment for Mentally Challenged

Continued from page 4...

After three weeks on the ventilator, Mr. Hockenberry fully recovered.[14] Today, Mr. Hockenberry continues to live as he always had. And so, the issue of his treatment is technically moot. Regardless, the Pennsylvania appellate courts decided to hear his guardians' appeal, recognizing that this critical issue would likely recur.[15]

Background Law: Constitutional and Common Law

Throughout this litigation, Mr. Hockenberry's guardians insisted that the case implicated "the fundamental right to refuse unwanted medical treatment."[16] This argument proved unsuccessful for two main reasons. First, the court recognized that the argument has no basis in constitutional law.[17] Moreover, the argument calls for a vast extension of the common law right recognized in Pennsylvania—an extension, the court concluded, that the legislature had foreclosed.

In *Cruzan v. Director, Missouri Department of Health*, the seminal case involving decision-making for a patient in a persistent vegetative state, the U.S. Supreme Court noted that a competent person generally has the right to refuse unwanted medical treatment.[18] The Court, however, expressly rejected the notion that an incompetent person possesses the same right.[19] Emphasizing that those who lack capacity cannot make informed and voluntary decisions, the Court stated,

> The differences between the choice made *by* a competent person to refuse medical treatment, and the choice made *for* an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.[20]

Thus, the Court held, to protect the vulnerable or simply to assert an unqualified interest in life over death, states are free to require treatment for those who cannot refuse it themselves.[21]

Pennsylvania, however, is not among those states that always require treatment for those who are legally incompetent to refuse it. Relying on common law principles, the Pennsylvania Supreme Court concluded in *In re Fiori* that close family members of a patient in

a persistent vegetative state can implement the decision they believe the patient would have desired.[22] The court, however, explicitly limited this substitute decision-making power to cases involving *once-competent* patients who have become *permanently unconscious*.[23] For those who never had the capacity to speak for themselves and for those with treatable illnesses, the power recognized in *Fiori* does not apply and, as discussed below, the legislature precluded that power from being extended to such cases.

The Statutory Scheme

In the absence of any compelling constitutional argument, the court focused exclusively on two statutes. Beginning with a statute delineating the powers of guardians, the court recognized that Pennsylvania law grants guardians broad authority "to assert the rights and best interests" of incapacitated persons in their care.[24] However, the statute limits a guardian's authority for certain decisions—decisions such as abortion, sterilization, divorce, admission to a psychiatric facility, and relinquishing parental rights.[25] Nowhere in this list, however, will one find "refusing medical treatment." Thus, the guardians, invoking *expressio unius est exclusio alterius*, argued that the refusal of treatment falls within their broad power to assert Mr. Hockenberry's "best interests."[26]

In response, the court pointed out that the guardianship statute limits a guardian's powers in one additional way: powers under the guardianship statute are limited where another statute trumps its broad grant of authority.[27] The court found that the Health Care Agents and Representatives Act ("Act") did just that.[28] The Act establishes a framework for surrogate decision-making through advance health care directives, such as health care powers of attorney. The cornerstone of the Act is its provision permitting competent persons—and only competent persons—to designate a "health care agent," that is, someone vested with the power to make health care decisions in the event that the principal loses competency.[29] And, critically for the present case, the Act imposes an affirmative duty on doctors, in certain circumstances, to treat incompetent patients who have not designated a "health care agent." The Act provides that

> [*h*]*ealth care necessary to preserve life shall be provided* to an individual who has neither an end-stage medical condition nor is permanently unconscious, except if [1] the individual is competent and objects to such care or [2] a health care agent objects on behalf of the principal . . . [30]

The court emphasized the clarity of the Act's mandate: treatment, for those without a health care agent, *including those who never had the capacity to designate one*, must be provided. According to the court, this legislation reflects "a policy position of greater state involvement to preserve life" where—absent an express designation of authority—an "incompetent person suffers from a life-threatening but treatable condition."[31] Such legislation, the court wrote, supplanted the guardians' plenary power and any common law right to refuse medical treatment, even if such a right had existed.[32] Thus, making clear that it was expressing no policy position, the court held, "[W]here, as here, life-preserving treatment is at issue for an incompetent person who is not suffering from an end-stage condition or permanent unconsciousness, and that person has no health care agent, the Act mandates that care must be provided."[33]

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Endnotes

1 *In re* D.L.H., an Incapacitated Person, No. 98 MAP 2009 (Pa. Aug. 17, 2010).

2 *Id.*, slip op. at 8.

3 *See In re* D.L.H., Pet. for Permission to Appeal, at 2; Brief for Appellants at 13.

4 In addition, amici for the DPW included both disability rights and pro-life groups. *See* Brief of the Disability Rights Network of Pennsylvania, et al.; Brief of the Pennsylvania Family Institute, et al.

5 *See In re* D.L.H., Brief of Appellees to Super. Ct., at 12-15.

6 *See* Health Care Agents and Representatives Act, 20 Pa. C.S. §5452(a), 5462(c)(1).

7 *In re* D.L.H., No. 98 MAP 2009, slip op. at 14, 15 n.9.

8 *Id.* at 16.

9 *See In re* D.L.H., Brief of Appellees to Super. Ct., at 7.

10 *Id.* at 2.

11 *Id.* at 2-3.

12 *Id.* at 3; *In re* D.L.H., No. 98 MAP 2009, slip op. at 2.

13 *In re* D.L.H., No. 98 MAP 2009, slip op. at 2-5.

14 *Id.* at 2.

15 *Id.* at 5-6.

16 *See In re* D.L.H., Pet. for Permission to Appeal, at 2; Brief for Appellants at 13.

17 *See In re* D.L.H, No. 98 MAP 2009, slip op. at 13, 16.

18 497 U.S. 261, 278 (1990).

19 *Id.* at 279-80.

20 *Id.* at 287, n. 12.

21 *Id.* at 281-82.

22 673 A.2d 905, 912 (Pa. 1996).

23 *Id.* at 912-13. In addition, by statute, Pennsylvania now permits close family members to refuse treatment on behalf of an incompetent person in the end-stage of a terminal illness, where the burdens of treatment outweigh the benefit. *See* 20 Pa. C.S. §5456(c).

24 *See* 20 Pa. C.S. § 5521(a).

25 *Id.* at 5521(d)-(f).

26 *In re* D.L.H., No. 98 MAP 2009, slip op. at 8.

27 *Id.* at 14-15.

28 *Id.* (citing 20 Pa. C.S. §§ 5451-5471, particularly §5462(c)(1)).

29 20 Pa. C.S. §5456(a).

30 20 Pa. C.S.§5462(c)(1).

31 *In re* D.L.H. 98 MAP 2009, slip op. at 14.

32 *Id.* at 15 n.9.

33 *Id.* at 16.

Habeas Petitioner Denied Use of Sentence Reduction Credits in *Jones v. Keller*

Continued from page 5...

participated in these cases and did not contest the issue. Its current policy appeared to have been recently crafted to prevent the imminent release of several life inmates.[19]

Justice Timmons-Goodson then scrutinized the majority and concurrence's reliance on DOC's "policy" of limited good behavior credits for life inmates. This policy was owed no deference, argued Justice Timmons-Goodson, because it was not based on any law or regulation. In fact, the policy contradicted DOC's own regulations, which mandated distribution of sentence reduction credits except under seven defined situations, none of which applied.[20] Therefore, the court was without authority to ignore the provisions' "plain and unambiguous language."[21]

Finally, the dissent emphasized the significance of Jones' reliance on the sentence reduction credits. The United States Supreme Court has held that an alleged denial of sentence reduction credits is important enough to require some form of legal process.[22] Jones' interest was particularly important since it would determine whether Jones was to be released or not, "a question deeply implicating fundamental constitutional rights."[23]

Conclusion

The North Carolina Supreme Court broadly deferred to the Department of Corrections' ability to interpret and apply sentence reduction credits in *Jones v. Keller*. This resulted in the conclusion that the defendant was properly awarded credits but not allowed to use them to reduce his sentence.

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Endnotes

1 698 S.E.2d 49 (N.C. 2010).

2 *Id.* at 52.

3 *Id.* at 53.

4 *Id.* at 52.

5 *Id.* at 54. DOC also argued that the credits were calculated for "allowing [Jones] to move to the least restrictive custody grade and

to calculate his parole eligibility date." *Id.*

6 *Id.* at 55.

7 *Id.*

8 *See id.* at 59 ("[W]e give *controlling* weight to an agency's interpretation of its own regulations unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'") (Newby, J., concurring) (emphasis in original).

9 *Id.* at 57.

10 *Id.* at 56.

11 *Id.*

12 *Id.* The dissent found this observation significant: "The majority effectively concedes that some process is due by suggesting that the parole process is sufficient." *Id.* at 62 (Timmons-Goodson, J., dissenting).

13 *Id.* at 57.

14 *Id.*

15 *Id.* at 58.

16 *Id.* at 59.

17 *Id.* at 58.

18 *Id.* at 60.

19 *Id.*

20 *Id.* at 63.

21 *Id.*

22 *See* Wolff v. McDonnell, 418 U.S. 539, 556-67 (1974) ("It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has . . . provided a statutory right to good time. . . . [T]he State having created the right to good time . . . , the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances. . .").

23 *Id.* at 64.

California Supreme Court Broadly Construes Unfair Competition Law

Continued from front cover...

claims because intermediate appellate courts enforced the requirement that a plaintiff show a loss of money or property.[10]

In *Kwikset Corp. v. Superior Court*, the California Supreme Court recently returned to the issue of the UCL standing requirements as amended by Proposition 64, and considerably loosened those requirements yet again by broadly construing the definition of "lost money or property" so as to increase the number of claims that fall under the UCL .[11] In that case, plaintiffs James Benson, Al Snook, Christina Grecco, and Chris Wilson sued Kwikset Corporation under the UCL, claiming that Kwikset falsely labeled and marketed locksets as "Made in U.S.A." when in fact they contained foreign-made parts or were partly manufactured abroad, in violation of federal and state false country-of-origin labeling laws.[12] The trial court subsequently entered judgment against Kwikset on the plaintiffs' UCL claim, enjoining it from labeling locksets with false country of origin information but declining to impose restitution.[13] Both sides appealed, and Proposition 64 came into effect while the appeals were pending.[14] The court of appeal agreed with the trial court's reasoning on the merits of the plaintiffs' claims, but remanded to the trial court for a determination whether the plaintiffs could satisfy Proposition 64's new standing requirements.[15] The plaintiffs then amended their complaint to allege that they purchased several Kwikset locksets in reliance on their "Made in U.S.A." label and would not have done so absent that false designation of origin.[16] Overruling Kwikset's demurrer, the trial court concluded that these allegations satisfied Proposition 64's "injury in fact" and "lost money or property" requirements.[17] Disagreeing, the court of appeal reversed, holding that the plaintiffs had failed to allege that they lost money or property in the transaction because, although they parted with money, they received fully functioning locksets that they did not allege were overpriced or defective.[18]

In a 5-2 decision, the California Supreme Court reversed the Court of Appeal, and in the process, interpreted Proposition 64's standing requirement that a plaintiff have "lost money or property" as imposing merely a minimal burden on UCL plaintiffs.[19] In doing so, the court largely conflated the separate "injury in

fact" and "lost money or property" elements of UCL standing into a single "economic injury" requirement.[20] Under that newly created requirement, a UCL plaintiff in a mislabeling case need only allege that he bought a product in reliance on a misrepresentation on its label and that he would not have bought the product but for the misrepresentation.[21] The majority explained that such allegations show that "because of the misrepresentation the consumer . . . was made to part with more money than he or she otherwise would have been willing to expend, i.e., that the consumer paid more than he or she actually valued the product. That increment, the extra money paid, is economic injury and affords the consumer standing to sue."[22]

The court also overruled a line of lower-court cases that had held that a UCL plaintiff satisfies the "lost money or property" requirement only where he or she is eligible for restitution.[23] The court explained that this reasoning incorrectly conflates UCL standing with the remedies available under the UCL, and would also exalt restitution over injunctive relief, contrary to the traditional understanding that injunctive relief is the primary remedy available under the UCL while restitution is merely an ancillary remedy.[24] The net result is that UCL plaintiffs can now sue even though they are not entitled to any restoration of lost money or property.

The two dissenting justices objected that the majority's interpretation effectively rendered the "lost money or property" element of UCL standing a nullity, in contravention of the manifest purpose of Proposition 64 to narrow the category of persons who could sue under the UCL.[25] In particular, the dissent argued that the plaintiffs could not have "lost money or property" because the locksets they purchased were not overpriced or defective but rather fully functioning, and thus they received the benefit of their bargain.[26] The dissenters also criticized the majority for allowing UCL plaintiffs to rely solely on their subjective motivations for purchasing a product to establish the "lost money or property" element of UCL standing, thereby relieving plaintiffs of the burden of alleging and proving that what they received was worth objectively less (i.e. had a smaller fair market value) than what they paid for it—in other words, their burden to show that they "lost money or property."[27]

The *Kwikset* decision is the latest in an emerging trend in which the California Supreme Court is liberalizing the UCL standing requirements imposed by Proposition 64. But the apparent purpose of the California electorate in enacting that initiative was to make it harder to bring UCL claims because of the perceived abuse of the statute.[28] If the people of California wish to reinforce their intent to have Proposition 64 serve as a limit on the UCL, it may take another initiative to accomplish that purpose.

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Endnotes

1 Cal. Bus. & Prof. Code §§ 17200-17210 (West 2011).

2 *Id.* § 17200.

3 *See, e.g.*, Californians for Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 227 (2006) (A plaintiff sought injunction barring practices that allegedly violated the UCL, including "that pathways between fixtures and shelves in Mervyn's stores were too close to permit access by persons who use mobility aids such as wheelchairs, scooters, crutches, and walkers."); Kasky v. Nike, Inc., 27 Cal. 4th 939, 945 (2002) (A plaintiff "alleged that defendant corporation, in response to public criticism, and to induce consumers to continue to buy its products, made false statements of fact about its labor practices and about working conditions in factories that make its products.").

4 *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143-52 (2003); Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 126-37 (2000).

5 Cal. Bus. & Prof. Code § 17204 (West 2004) ("Actions for any relief pursuant to this chapter shall be prosecuted . . . in the name of the people of the State of California . . . upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.").

6 Cal. Bus. & Prof. Code § 17204 (West 2011) ("Actions for relief pursuant to this chapter shall be prosecuted . . . in the name of the people of the State of California . . . upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.").

7 Cal. Bus. & Prof. Code § 17203 (West 2008) ("Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of [s]ection 17204 and complies with [s]ection 382 of the Code of Civil Procedure . . . ."); *see also* Arias v. Superior Court, 46 Cal. 4th 969, 980 (2009).

8 46 Cal. 4th 298, 314-29 (2009).

9 *Id.* at 332-37; *see also* Jeremy B. Rosen, *Case in Focus—California: Unfair Competition Law*, State Court Docket Watch, Summer 2009, at 3, 10.

10 *See* Citizens of Humanity, LLC v. Costco Wholesale Corp., 171 Cal. App. 4th 1, 22 (2009) (A high-end clothing manufacturer who sued low-end retailer for selling counterfeit or stolen products could not satisfy "lost money or property" requirement of Proposition 64 by showing harm to its goodwill.), *overruled by* Kwikset Corp.

v. Superior Court, 51 Cal. 4th 310, 337 (2011); Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 1592 (2008) (construing "lost money or property" under Proposition 64 to exclude situations in which a consumer pays money for a product or service, receives the product or service he paid for, and does not allege the product or service is defective or worth less than the purchase price); Medina v. Safe-Guard Prods., Int'l, Inc., 164 Cal. App. 4th 105, 114-15 (2008) (holding that a plaintiff failed to allege loss of money or property where he purchased vehicle service contract from auto dealership that was not licensed with the Department of Insurance, but did not allege he received substandard service under the service contract or otherwise did not receive his money's worth); Animal Legal Def. Fund v. Mendes, 160 Cal. App. 4th 136, 145-47 (2008) (holding that plaintiffs who purchased dairy products that were not of inferior quality did not lose money or property within the meaning of Proposition 64 when they discovered defendants allegedly mistreated milk-producing cows in violation of criminal laws); Hall v. Time, Inc., 158 Cal. App. 4th 847, 855, 857-58 (2008) (holding that a plaintiff failed to show he lost money or property as a result of a defendant's alleged deceptive practice of offering a free trial period before purchasing a book by mail and then sending a bill for the price of the book during the free trial period, because the plaintiff paid the bill only after the free trial period and kept the book, which was not defective or worth less than he paid for it); Buckland v. Threshold Enters., Ltd., 155 Cal. App. 4th 798, 817-19 (2007) (holding that a plaintiff who purchased cosmetic products solely to acquire standing to file UCL lawsuit did not lose money or property), *overruled by* Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 337 (2011).

11 51 Cal. 4th 310 (2011).

12 *Id.* at 317.

13 *Id.* at 318.

14 *Id.*

15 *Id.* at 318-19.

16 *Id.* at 319.

17 *Id.*

18 *Id.* at 319-20.

19 *Id.* at 322-27.

20 *Id.* at 323-25.

21 *Id.* at 327-30.

22 *Id.* at 330.

23 *Id.* at 335-37.

24 *Id.*

25 *Id.* at 338-39, 342-43.

26 *Id.* at 339.

27 *Id.* at 340-42.

28 *See, e.g.*, Kwikset Corp. v. Superior Court, 51 Cal. 4th 310 (2011); Clayworth v. Pfizer, Inc., 49 Cal. 4th 758 (2010); *In re* Tobacco II Cases, 46 Cal. 4th 298 (2009).

New York's Highest Court Narrows the Assumption of Risk Defense to Tort Liability

Continued from front cover...

disallowing the defense in that case. However, the court split 4-3 in its reasoning, with the minority concurrence decrying the "extended dictum" in which the majority reconceived and narrowed the defense of assumption of the risk in New York State.[2]

The full court endorsed the proposition that an educational institution is obligated to adequately supervise the children in its charge, who cannot "be deemed to have consented in advance to risks of their misconduct."[3] The majority went further, however, and announced that the defense of assumption of the risk is available in New York State only when it furthers the public policy goal of encouraging participation in sports and other recreational activities.[4]

In *Trupia*, the child in question, Luke Anthony Trupia, was attending the defendants' summer program when he fell while sliding down a banister and sustained serious injuries. Trupia, twelve years old at the time, suffered a fractured skull and brain injury, causing retrograde amnesia. He and his father sued, alleging negligent supervision, because at the time of the accident no one was supervising the child. Following discovery, during which it was revealed that Trupia was a frequent banister joyrider, and had fallen from the railing in the past, the defendants moved to amend their answer to allege assumption of the risk as a complete defense to liability.

Assumption of the risk bars legal recovery when a plaintiff has expressly or implicitly consented in advance of an activity not to hold a defendant responsible, or consented in advance that the defendant would have no duty of care to the plaintiff. The doctrine was often equated with contributory negligence because both doctrines barred a plaintiff from any recovery. However, contributory negligence barred recovery under the causation theory that the plaintiff's negligence intervened to extinguish defendant's liability. Assumption of the risk barred recovery under a consent or "no duty" theory. Both doctrines have been replaced in most jurisdictions by a comparative negligence scheme under which the apportionment of liability in personal injury, property damage, and wrongful death cases depends on the relative responsibility of the parties.

New York State's version of comparative negligence, § 1411 of the Civil Practice Law and Rules, likewise abolished contributory negligence and most forms of assumption of the risk as a complete defense to liability.[5] Some forms of assumption of the risk, however, were deemed to have survived the enactment because § 1411 is silent as to the long-standing common law right of parties to contract to limit liability. The court of appeals had previously declined to read this silence as abrogating freedoms of contract and association, and had construed § 1411 to retain assumption of the risk as a bar to recovery when the plaintiff has actually consented to assume the known or reasonably foreseeable risks of an activity.[6] Accordingly, unless public policy proscribed an agreement limiting liability, New York law permitted a plaintiff to consent to assume the risk of an activity, thereby relieving the defendant of legal duty and insulating the defendant from charges of negligence.

Over the years, at least one New York State intermediate appellate court has attempted to limit the availability of the assumption of the risk defense to situations where the plaintiff was injured while voluntarily participating in a sporting or entertainment activity.[7] This limitation garnered no support in the state's other intermediate appellate courts, which approved application of the doctrine to situations unrelated to recreation.[8] Although the New York State Court of Appeals had occasion to apply the doctrine in the context of athletic activities, it similarly never explicitly limited the doctrine to such activities until *Trupia*.[9]

In *Trupia*, a majority of the court revisited the doctrinal underpinnings of assumption of the risk, characterizing it as a "highly artificial construct" that is essentially "result-oriented."[10] Distancing itself from its earlier explanation of the doctrine as based on theories of consent and individual freedom, the court justified retention of the doctrine solely for its utility in facilitating participation in athletic activities. Because of the "enormous social value" of "athletic and recreative activities," the court endorsed "the notion that [the significantly heightened risks involved in these activities] may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise."[11]

In Trupia's case, involving "horseplay" apparently not rising to the level of a recreative or otherwise "socially valuable" activity, the court declined to permit the assertion of assumption of the risk as a bar to liability.[12] The court did allow, however, that to the extent Trupia's injury was attributable to his own misconduct, it should be taken into account within a comparative fault allocation.

In his concurrence, Justice Smith, joined by two other judges, expressed dismay at the majority's "extended dictum" limiting assumption of the risk to cases involving sports and leisure activities. The concurring judges criticized the majority for saying anything more than that children cannot consent to the risks of their mischief because of their age. "Assumption of the risk cannot possibly be a defense here, because it is absurd to say that a 12-year-old boy 'assumed the risk' that his teachers failed to supervise him," Justice Smith wrote. "That is a risk a great many children would happily assume, but they are not allowed to assume it for the same reason that the duty to supervise exists in the first place: Children are not mature, and it is for adults, not children to decide how much supervision they need."[13]

The concurring judges observed that the majority opinion raised more questions than it answered, such as: How is a judge to define an "athletic or recreative" activity? What quantum of "social value" justifies application of assumption of the risk? How is social value to be measured and by whom? And why should those who participate in less desirable forms of amusement, for example, banister sliding rather than bobsledding, be in a *better* position to recover damages? Stating that "there may be perfectly good answers to [these] questions," the concurrence concluded that "it is a mistake to make sweeping pronouncements in a case that does not require it, while ignoring the questions those sweeping pronouncements raise."[14]

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Endnotes

1 Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392 (2010).

2 *Id.* at 397 (Smith, J., concurring).

3 *Id.* at 394. The court further explained: "Children often act impulsively or without good judgment—that is part of being a child; they do not thereby consent to assume the consequently arising dangers, and it would not be a prudent rule of law that would broadly permit the conclusion that they had done so." *Id.* at 396.

4 *Id.* at 395.

5 N.Y. C.P.L.R. 1411 (McKinney 2010) (effective 1975) ("In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise

recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.").

6 *See* Turcotte v. Fell, 68 N.Y.2d 432, 438-39 (1986); Arbegast v. Bd. of Educ., 65 N.Y.2d 161, 168 (1985).

7 Roe v. Keane Stud Farm, 261 A.D.2d 800 (N.Y. App. Div. 3d Dep't 1999).

8 Sy v. Kopet, 18 A.D.3d 463 (N.Y. App. Div. 1st Dep't 2005) (tenant locked out for non-payment of rent assumed risk of injuries from fall while attempting to enter his room from second floor window; doctrine not limited to leisure or sporting activities); Lamandia-Cochi v. Tulloch, 305 A.D.2d 1062 (N.Y. App. Div. 4th Dep't 2003) (Mem. Op.) (minor child assumed risk when he fell from porch railing of defendant's residence); Westerville v. Cornell Univ., 291 A.D.2d 447 (N.Y. App. Div. 2d Dep't 2002) (mental health professional assumed risk of injury in training session on patient physical restraint techniques). *But see* Pelzer v Transel El. & Elec. Inc., 41 A.D.3d 379, (N.Y. App. Div. 1st Dep't 2007) (declining to extend assumption of the risk to an elevator accident causing injury to a building employee).

9 *See* Morgan v. State, 90 N.Y.2d 471 (1997) (participant in sport or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation"); Benitez v. N.Y. City Bd. of Educ., 73 N.Y.2d 650 (1989) (high school football player assumed the risk of injury in voluntary competitive athletics); Watson v. State, 52 N.Y.2d 1022 (1981), *aff'd for the reasons stated in* 77 A.D.2d 871 (1981) (juvenile assumed risk of injury when swung arm at teacher causing clipboard to fly loose).

10 Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 395 (2010).

11 *Id.*

12 *Id.* at 396.

13 *Id.* at 397 (Smith, J., concurring).

14 *Id.* at 397-98 (Smith, J., concurring).

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