

# STATE COURT Docket Watch®

SPRING  
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## A RECENT HISTORY OF MEDICAL MALPRACTICE AND CIVIL JUSTICE REFORM IN ILLINOIS: THE FIVE YEAR WAIT FOR THE SUPREME COURT TO DECIDE THE FATE OF REFORM IN *LEBRON V. GOTTLIEB MEMORIAL HOSPITAL*

by Christopher Hage

Recently, the Illinois Supreme Court ruled on the validity of the bipartisan Medical Malpractice Reform Act of 2005.<sup>1</sup> The last effort to enact civil justice reform occurred in 1995 when a Republican majority controlled the Illinois General Assembly and the Governorship. That General Assembly promulgated several civil reforms and bundled a hard cap on noneconomic damages inside a larger omnibus bill. At the time, the Illinois civil justice reforms were considered the most comprehensive tort reform to be enacted by any state legislature. A Cook County trial judge ruled the legislation unconstitutional almost immediately after its effective date. On appeal from Cook County, the Illinois Supreme Court ruled in *Best v. Taylor Machine Works*<sup>2</sup> that the caps on noneconomic damages were an infringement of the separation of powers and the bar on “special legislation” and struck the entire tort reform package. In doing so, the supreme court considered a severability clause meant to preserve the other tort reforms in the legislation and determined that the parts

that were unconstitutional could not be severed from those remaining.

In the ensuing years, the business and healthcare community significantly increased the pressure for reform. In particular, the litigation in a southern region of the state made national news. On the east side of the Mississippi from St. Louis, two counties repeatedly produced large jury verdicts, and the docket was growing. Those two counties, Madison and St. Clair, make up part of what is commonly referred to as the Metro East region of Illinois. Metro East became an increasingly preferred venue for trial lawyers due to the advantages plaintiffs enjoyed there. The American Tort Reform Association even nicknamed the region a “judicial hellhole.” More and more class action lawsuits and personal injury actions ended up in Metro East courthouses despite what critics said were tenuous connections to the counties concerned, or Illinois generally. No

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by Jason J. Jarvis

The current economic crisis is forcing states to adopt creative means of balancing their budgets. California is again at the vanguard.<sup>1</sup> The state has raised taxes, issued IOUs, and made deep budget cuts in numerous aspects of state government.<sup>2</sup> Those efforts, however, have not been enough to bring the budget into balance. As a result, Governor Arnold Schwarzenegger acted on his own authority to furlough state workers in an effort to save money.<sup>3</sup> The Governor's furlough decisions have resulted in the filing of numerous lawsuits, which are being resolved in conflicting ways by the California trial courts.

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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 Allison Aldrich, at [allison.aldrich@fed-soc.org](mailto:allison.aldrich@fed-soc.org).

CASE IN  
FOCUS

## *Caperton* Decision Prompts Changes to Judicial Recusal Standards and Procedures

by Stephen R. Klein

In June of 2009, the Supreme Court decided the case *Caperton v. A. T. Massey Coal Co.*<sup>1</sup> The Court ruled, in a 5-4 decision, that the due process clause of the 14th Amendment is violated when a judge denies a recusal motion based on the judge's benefit of "extraordinarily large" campaign contributions or independent expenditures from the opposing party.<sup>2</sup> Before this ruling, the 14th Amendment required recusal only when the judge had a financial interest contingent on the outcome of the case, or if the judge had participated in a previous stage of the case and was likely biased from that participation.<sup>3</sup> The majority ruled that "[d]ue process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"<sup>4</sup> The majority did not name a specific figure, but the amount in question was \$3 million in independent expenditures.<sup>5</sup> Chief Justice Roberts, in dissent, argued that while the majority's interpretation greatly expanded the previous standard, its opinion failed to articulate a new objective inquiry, and Justice Roberts listed forty separate "fundamental questions" that courts have to determine in light of the majority opinion.<sup>6</sup>

Before *Caperton*, the American Bar Association ratified a revised Model Code of Judicial Conduct ["MCJC"] in February of 2007.<sup>7</sup> The MCJC contains a number of disqualification rules that do not rise to pre-*Caperton* due process requirements, and addresses disqualification for judicial campaign contributions and expenditures by

providing a framework in Rule 2.11(A)(4):

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality\* might reasonably be questioned, including but not limited to the following circumstances . . . . The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate\* contributions\* to the judge's campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

Following *Caperton*, MCJC 2.11(A)(4), previously a framework for a professional standard, has become a framework for a constitutional standard. Early last year, one professor opined that "the bulk of states will soon be reviewing and probably adopt the 2007 Judicial Code, including . . . 2.11 and commentary by 2010."<sup>8</sup> As of this writing, seventeen states have adopted the new MCJC with varying provisions.<sup>9</sup> *Caperton* will likely accelerate the process: the decision has already influenced changes in recusal standards in some state court rules, prompted discussion of changes in other states and at the federal level, and will likely influence state legislation that stalled prior to the decision.

Soon after *Caperton*, the Nevada Judicial Conduct Code Commission "recommend[ed] adoption of new Rule 2.11(A)(4) mandating a judge's disqualification based

on aggregate campaign support that exceeds \$50,000 within the previous 60 years from a party, its affiliates or lawyers.”<sup>10</sup> In September, the Washington State Supreme Court Code of Judicial Conduct Task Force published a proposal for a new judicial code, one that will require disqualification when “an adverse party has provided financial support . . . for any of the judge’s judicial election campaigns within the last six years in an amount in excess of 10 times the dollar amount of the campaign contribution limit established by [law].”<sup>11</sup> In December, the Michigan Supreme Court amended the Michigan Court Rules to adhere to the *Caperton* decision, making a specific citation to the case but declining to set a specific contribution amount.<sup>12</sup> The rule change also provides de novo review by the entire Michigan Supreme Court when an individual justice denies a recusal motion.<sup>13</sup> Also in December, the California Commission for Impartial Courts issued its Final Report.<sup>14</sup> The report recommends mandatory disqualification for a judge in “any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution of [\$1,500 or greater] to the judge’s campaign, directly or indirectly.”<sup>15</sup> In January, the Wisconsin Supreme Court

adopted a rule that distinguishes *Caperton* and says that “campaign donations from people and groups with cases before the court are not, *by themselves*, enough to force judges off cases.”<sup>16</sup> So far, *Caperton* has only impacted rules of judicial conduct, but it may also lead to procedural options for attorneys beyond recusal motions.

In some areas where it is not currently provided, *Caperton* has encouraged discussion of rule changes that would allow a peremptory challenge of a judge in a case. In Florida, the Judicial Ethics Advisory Committee and the Rules of Judicial Administration and Ethics Committee have formed a joint subcommittee to consider new recusal standards.<sup>17</sup> “It’s too early to say what the committee may recommend, but [the JEAC chair] said he’s interested in an approach that combines the peremptory challenge and referring recusal motions to a second judge.”<sup>18</sup> The peremptory challenge of judges was also recently discussed at the federal level. The U.S. House Judiciary Subcommittee on Courts and Competition Policy held hearings in December to discuss implementing new rules that will ensure the federal courts adhere to *Caperton*.<sup>19</sup> Some, including Judge Margaret McKeown of the Ninth

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## West Virginia Court Expands *Copperweld* Doctrine

by Jarrett Gerlach

In the 1984 case *Copperweld Corp. v. Independence Tube Corp.*,<sup>1</sup> the United States Supreme Court forever altered antitrust law by holding that a parent company cannot conspire with one of its wholly owned subsidiaries such as to violate Section 1 of the Sherman Act.<sup>2</sup> Since that time, lower courts have been left to decide the scope of what has become known as the *Copperweld* Doctrine. A recent decision of the Supreme Court of Appeals of West Virginia clarified just how far the *Copperweld* Doctrine extends within West Virginia’s own antitrust law jurisprudence.

### The *Copperweld* Case

In *Copperweld Corp. v. Independence Tube Corp.*, the United States Supreme Court framed the scope of Sherman Act antitrust protection by deciding the question of “whether the coordinated acts of a parent and its wholly owned subsidiary can . . . constitute a combination or conspiracy” in violation of Section 1 of the Sherman Act.<sup>3</sup> Section 1 of the Sherman Act established that in order to demonstrate an illegal restraint on trade, a plaintiff must prove:

(1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted action were illegal; and (4) that it was injured as a proximate result of the concerted action.<sup>4</sup>

The Court in *Copperweld* held that, in the instance of a parent corporation and a wholly owned subsidiary, there can be no section 1 violation because, regardless of any possible restraint on trade, a parent company and its wholly owned subsidiary have a “unity of purpose or a common design” that prevents them from conspiring in concerted action.<sup>5</sup>

### Lower Courts Must Decide How Far *Copperweld* Doctrine Extends

While the *Copperweld* Doctrine clearly established that a corporation and its wholly-owned subsidiary cannot conspire as contemplated in the “concerted action” requirement of section 1 of the Sherman Act, just how far the *Copperweld* Doctrine extends to anything less than a parent company/wholly-owned

subsidiary relationship, such as in the instance of partially-owned subsidiaries, has been left up to lower courts to decide. Courts have been left to wrestle with whether a parent company must have complete ownership interest in the subsidiary, whether mere majority ownership interest is enough to trigger the *Copperweld* Doctrine, or whether a legal “control” standard decides the issue without drawing a bright line at a particular ownership percentage.

*Princeton Insurance Agency, Inc. v. Erie Insurance Co.*

A recent insurance case in West Virginia has cast some light on how the state’s appellate court will interpret the *Copperweld* Doctrine as it applies to companies doing business within West Virginia. The Supreme Court of Appeals of West Virginia recently

decided the case of *Princeton Insurance Agency, Inc. v. Erie Insurance Co.*<sup>6</sup> The case involved a challenge by a former insurance agent to the termination of his contract by the insurance company as an unlawful restraint on trade under the state’s antitrust law, the West Virginia Antitrust Act.<sup>7</sup> In a decision that reversed a \$4 million verdict against the insurance company, the court applied the *Copperweld* Doctrine to less than wholly-owned subsidiary companies within the state.

Facts of the *Erie* Case

*Erie* involved Erie Insurance Company, which had an independent insurance agency agreement with Princeton Insurance Agency (“Agency”) and Kevin Webb, the licensed agent. The Agency was an independent insurance agency, in the business of marketing insurance for multiple insurance companies.<sup>8</sup>

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## Montana Supreme Court: Physician-Assisted Suicide Is an End-of-Life Option

by Rita L. Marker

On the last day of 2009, Montana’s Supreme Court handed down its ruling in *Baxter v. Montana*,<sup>1</sup> making it the first high court to permit physician-assisted suicide. “[W]e find nothing in Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy,”<sup>2</sup> stated the court. “We also find nothing in the plain language of Montana statutes indicating that physician aid in dying is against public policy. In physician aid in dying, the patient—not the physician—commits the final death-causing act by self administering a lethal dose of medicine.”<sup>3</sup> Therefore, under Montana’s consent statute<sup>4</sup> “a terminally ill patient’s consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply.”<sup>5</sup>

“Aid in dying,” the phrase the court chose to describe physician-assisted suicide, has become the label of choice for assisted-suicide advocates. When it was first used in failed voter initiatives in Washington and California,<sup>6</sup> it encompassed both assisted suicide and euthanasia.

The Montana case originated when Robert Baxter, a terminally ill retired truck driver, along with four physicians and the assisted-suicide advocacy organization Compassion and Choices (the former Hemlock Society) brought an action in district court challenging the constitutionality of the application of Montana homicide

statutes to physicians who provide drugs for assisted suicide to mentally competent terminally ill patients. The complaint alleged that patients have a right to physician-assisted suicide under the Montana Constitution’s guarantee of individual dignity and privacy.<sup>7</sup>

In December 2008, the district court issued its order and decision, holding that the Montana constitutional rights of privacy and human dignity together encompass the right of a competent terminally ill patient to die with dignity.<sup>8</sup> In addition, the district court held that a patient may use the assistance of a physician to obtain a prescription for a lethal dose of drugs and that the patient’s physician would be protected from prosecution under the state’s homicide statutes.

The issue on appeal, as rephrased by the Montana Supreme Court, was “[w]hether the District Court erred in its decision that competent, terminally ill patients have a constitutional right to die with dignity, which protects physicians who provide aid in dying from prosecution under the homicide statutes.”<sup>9</sup>

However, the high court did not resolve the question of whether the Montana Constitution provides the right to assisted suicide. Instead, it based its conclusion, in large part, on the interpretation of the state’s advance directive law, the “Rights of the Terminally Ill Act,”<sup>10</sup> stating, “The Terminally Ill Act, by its very subject matter, is an apt statutory starting point for understanding the

legislature's intent to give terminally ill patients—like Mr. Baxter—end-of-life autonomy, respect and assurance that their life-ending wishes will be followed.”<sup>11</sup> Furthermore, the court explicitly stated that there was no significant difference between a physician's act of withholding or withdrawing treatment and that of writing a prescription for drugs that will be used to cause death:

The Terminally Ill Act, in short, confers on terminally ill patients a right to have their end-of-life wishes followed, even if it requires *direct* participation by a physician through withdrawing or withholding treatment. Section 50-9-103, MCA. Nothing in the statute indicates it is against public policy to honor those same wishes when the patient is conscious and able to vocalize and carry out the decision himself with self-administered medicine and no immediate or direct physician assistance.<sup>12</sup>

The Terminally Ill Act authorizes physicians to commit a direct *act* of withdrawing medical care, which hastens death. In contrast, the physician's involvement in aid in dying consists solely of making the instrument of the “act” available to the terminally ill patient. The patient himself then chooses whether to commit the act that will bring about his own death.<sup>13</sup>

In addition to making it clear that Montana's advance directive law permits physician-assisted suicide, the court implied that the state's education and outreach program,

which pertains to “advance health care planning and end-of-life decision making,” encompasses informing patients of the availability of all life-ending actions, including physician-assisted suicide:

[O]utreach and education provisions, and state funding for both, indicate legislative intent to honor and promulgate the rights of terminally ill patients to autonomously choose the direction of their end-of-life medical care. There is no indication in the statutes that another choice—physician aid in dying—is against this legislative ethos of honoring the end-of-life decisions of the terminally ill.<sup>14</sup>

### And Montana Makes Three

The Montana decision makes that state the third to transform physician-assisted suicide into an end-of-life option. Prior to it, physician-assisted suicide was permitted only in Oregon and Washington after voter initiatives approved laws, each called the “Death with Dignity Act,”<sup>15</sup> transforming the crime of physician-assisted suicide into a medical treatment. Attempts to pass similar laws by legislative action and voter initiative have failed in more than twenty states.<sup>16</sup>

In Montana, qualification for end-of-life drugs is far more relaxed than in Oregon and Washington, where two physicians must determine that a patient has a predicted life expectancy of six months or less and certain other

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## WASHINGTON SUPREME COURT UPHOLDS SCHOOL FUNDING STRUCTURE: DISPARITIES IN SCHOOL EMPLOYEE PAY NOT UNCONSTITUTIONAL

by Michael J. Reitz

**O**n November 12, 2009, the Washington State Supreme Court unanimously declined to declare as unconstitutional the state's educational funding structure.<sup>1</sup> The case asked whether the state legislature is constitutionally compelled to equalize state allocations to school districts for school employee salaries.

### Case Background

In 2006, the Federal Way School District, along with district employees and students, sued the State of Washington, arguing that funding disparities violated the state constitution.

The Washington Constitution contains two relevant provisions addressing the state's educational system:

Art. IX, Sec. 1. PREAMBLE. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Art. IX, Sec. 2. PUBLIC SCHOOL SYSTEM. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

Education funding is a complex formula of federal, state, and local funds that are distributed to individual school districts, and employees in different districts are often paid different amounts. For example, the state allocation to districts for the 2007-08 school year ranged from \$32,746 to \$34,612 among teachers and from \$54,405 to \$80,807 for administrators. Federal Way was at the bottom classification in all three salary allocation ranges. Additionally, the state's per-pupil funding varied from district to district, from \$2,766 to \$3,707 (Federal Way received \$3,005 per student).

The Federal Way School District alleged that the state, by allowing salary disparities between school districts, was in violation of Article IX, Section 2 of the Washington Constitution, which mandates a "general and uniform system of public schools." The plaintiffs argued the state's obligation is not just ample funding,

but ample funding within a general and uniform system.

At trial, King County Superior Court Judge Michael Heavey ruled that the state's funding model violates the "general and uniform" duty, and violated the state's equal protection clause by paying similarly-situated school employees differently. The State appealed to the Washington State Supreme Court.

### Oral Arguments

The supreme court heard arguments in the case on June 11, 2009. Senior Assistant Attorney General David Stolier, arguing for the state, said that where the "ample provision" for basic education is met, variances in school funding allocations are of no constitutional significance. The constitutional duty is to create a common education system, not to guarantee precisely equal funding to

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## New York's Highest Court Backtracks on Property Owners' Rights in Eminent Domain Case

by Craig Mausler

In *In re Goldstein v. New York State Urban Development Corp.*, New York State used its power of eminent domain to seize property that would be included in a private developer's twenty-two-acre mixed-use development project.<sup>1</sup> The project was to include a sports arena for a professional basketball team and numerous high rise buildings, the latter of which would serve both commercial and residential purposes.

New York State law requires that there be a finding of "substandard and insanitary" conditions, and that the development would serve a "public use, benefit or purpose," in order for the power of eminent domain to be invoked constitutionally. The plaintiffs originally brought suit in U.S. district court, raising both federal and state challenges to the state's exercise of eminent domain power. After losing all federal claims in that case, the district court refused to exercise jurisdiction on the state law claims. As such, the lawsuit was re-commenced six months later in the New York State court system on the state law claims.

By the time *Goldstein* reached the New York State Court of Appeals, the main issue for the court was whether using eminent domain powers to aid private commercial entities in pursuit of private economic gain—with perhaps some incidental public benefit—constitutes a "public use."<sup>2</sup> The landowners challenged the state's argument

that this development project fell within the constitutional definition of "public use," contending that:

authorizing the condemnation of their properties for the Atlantic Yards project is unconstitutional because the condemnation is not for the purpose of putting their properties to "public use" within the meaning of article I, § 7 (a) of the State Constitution—which provides that "[p]rivate property shall not be taken for public use without just compensation"—but rather to enable a private commercial entity to use their properties for private economic gain with, perhaps, some incidental public benefit.<sup>3</sup>

By a 6-1 vote, the New York State Court of Appeals rejected the petitioners' argument and held that "it is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain."<sup>4</sup> Although the court agreed that the landowners' property was not blighted in accordance with existing statutory and constitutional definitions, it found that it "[has] never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions replicating those to which the Court and the Constitutional Convention responded in the midst of the Great Depression."<sup>5</sup> Instead, wrote the majority, it is entirely proper for the court to

modify this definition to meet the needs of the existing case.<sup>6</sup>

In his dissent, Justice Smith expressed concern about the majority opinion's deference to the definition of "blight" presented by both the state and private developers, but applauded its resistance to adopting an even more sweeping interpretation of eminent domain.<sup>7</sup> He underscored the fact that New York case law did not establish a general proposition that property may be condemned and turned over every time a state agency thinks it would help to improve a neighborhood. Justice Smith also pointed out that economic development and job creation, not the elimination of blight, were the original justifications for this project and that, even if blight were a proper justification for the project, the record did not support any type of finding that these neighborhoods were, in fact, blighted or insanitary. Stating that the "determination of whether a proposed taking is truly for public use has always been a judicial exercise," the dissent ultimately concluded that "while no doubt some degree of deference is due to public agencies and to legislatures, to allow them to decide the facts on which constitutional rights depend is to render the constitutional protections impotent."<sup>8</sup>

\* *Craig Mausler is the president of the Federalist Society's Albany Lawyers Chapter.*

## Endnotes

1 *In re Goldstein v. New York State Urban Dev. Corp.* 13 N.Y.3d 511 (2009).

2 Two members of the majority, Justice Read and Justice Pigott, dismissed the case on procedural statute of limitations grounds, never reaching the merits of the dispute.

3 13 N.Y.3d at 523 (emphasis added).

4 *Id.* at 524. According to the court, blight "has been deemed a public use since the court's decision in *Matter of New York City Hous. Auth. v. Muller*, 270 NY 333 (1936)."

5 13 N.Y.3d at 524-25.

6 The majority stressed the need for judicial action when "reasonably" necessary:

Whether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is ordinarily the province of the Legislature, not the Judiciary . . . . It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies; where, as here, "those bodies have made their finding, not corruptly or irrationally or

baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts" (*Kaskel*, 306 NY at 78).

*Id.* at 526.

7 According to Justice Smith:

[t]he good news from today's decision is that our Court has not followed the lead of the United States Supreme Court in rendering the 'public use' restriction on the Eminent Domain Clause virtually meaningless. The bad news is that the majority is much too deferential to the . . . Empire State Development Corporation."

*Id.* at 546 (Smith, J., dissenting).

8 *Id.* at 552.

## CAPERTON DECISION PROMPTS CHANGES TO JUDICIAL RECUSAL STANDARDS AND PROCEDURES

*Continued from page 3...*

Circuit Court of Appeals and Professor Eugene Volokh, argued that the proper framework is already in place for judges to adhere to the decision.<sup>20</sup> Others, including Professor Charles Geyh and Norman Reiner, president of the National Association of Criminal Defense Lawyers, supported modifying the federal disqualification statutes—28 U.S.C. sections 144 and 455, respectively—to include a peremptory challenge.<sup>21</sup> The peremptory challenge is currently available in about twenty states.<sup>22</sup> So, *Caperton* may influence the creation of new standards for practicing attorneys as well as judges.

Before the *Caperton* decision, some state legislatures were considering rules that require mandatory recusal based on campaign contributions or expenditures. In Georgia, a bill was introduced in early 2009 that reads, in pertinent part: "A judge or Justice of any court that is elected to such office shall recuse himself or herself from any case before his or her court . . . [i]nvolving a party or his or her attorney that has made an influential action concerning a campaign of the judge presiding over the party's case during the election of such judge."<sup>23</sup> The bill did not pass and will carry over to the 2010 legislative session. In Montana, a bill was considered that stated "A justice of the supreme court may not participate in a hearing on oral argument of a case before the court or in an opinion or order of the court concerning that case if a campaign contribution from a party or an attorney representing a party to that case was made . . . in excess of the amount allowed."<sup>24</sup> The draft "died in process" and is described as "probably dead" on the Montana

legislature's website.<sup>25</sup> The bills in these states were delayed or died before *Caperton*: in the coming months, like states considering the new MCJC, these bills may be considered more favorably in light of the decision.

*Caperton* expanded the influence of 14th Amendment due process on judicial recusal, but the question of where a judge's discretion ends and due process begins—especially in light of judicial campaign finance—has led to a plethora of answers across the country. And the questions do not end there. Some have argued that the *Caperton* precedent has created “[t]he ability to disqualify elected judges with little oversight or accountability,”<sup>26</sup> or that entrusting recusal decisions to other judges (such as the changes to the Michigan Court Rules) will politicize recusal. Furthermore, *Caperton* could raise numerous questions regarding the Court's previous ruling for broad protection of judicial campaign speech in *Republican Party of Minnesota v. White* in 2002,<sup>27</sup> especially in light of the recent *Citizens United* decision that ruled in favor of unlimited independent expenditures by corporations and unions.<sup>28</sup> Others, however, applaud the decision.<sup>29</sup> Some see the case as a ruling not merely against judicial campaign influence, but judicial campaigns themselves: *Caperton* has been cited as one reason to undo judicial elections entirely.<sup>30</sup> The legal community will continue to debate whether the decision is a benefit or a detriment to the judiciary, but there can be little doubt as to its impact. The president of the ABA contends *Caperton* is not “the final word on this issue” of judicial recusal.<sup>31</sup> Given the myriad responses of states—by courts, committees, legislatures, and scholars—to where judicial campaign finance support ends and undue influence begins, *Caperton* is likely just the beginning of a discussion for a new paradigm for judicial recusal.

\* *Stephen R. Klein is a member of the Executive Committee of the Free Speech and Election Law Group.*

## Endnotes

1 129 S. Ct. 2252 (2009).

2 *Id.* at 2265.

3 *Id.* at 2259–62.

4 *Id.* at 2264 (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

5 *Caperton*, 129 S. Ct. at 2257.

6 *Id.* at 2269–72 (Roberts, J., dissenting).

7 See MODEL CODE OF JUD. CONDUCT (2007), available at [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf).

8 Jeffrey W. Stempel, *Chief William's Ghost: The Problematic*

*Persistence of the Duty to Sit*, 57 BUFFALO L. REV. 813, 956 (2009).

9 ABA Center Prof'l Responsibility Pol'y Implementation Comm., Comparison of ABA Model Judicial Code and State Variations (2010), available at [http://www.abanet.org/cpr/code/2\\_11.pdf](http://www.abanet.org/cpr/code/2_11.pdf) (last viewed Jan. 28, 2010).

10 Supplement to the Final Report Dated April 1, 2009, In the matter of the Amendment to the Nevada Code of Judicial Conduct, August 12, 2009, available at <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/2308/>.

11 Washington State Supreme Court Code of Judicial Conduct Task Force, Proposed New Washington State Code of Judicial Conduct, September 8, 2009, at 21–22, available at <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Code%20of%20Judicial%20Conduct%20Task%20Force%20Committee/Proposed%20New%20Washington%20State%20Code%20of%20Judicial%20Conduct.pdf>.

12 MICH. CT. R. 2.003(C)(1)(b), available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-112509.pdf>.

13 “If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo.” MICH. CT. R. 2.003(D)(3)(b).

14 Commission for Impartial Courts: Final Report: Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in California, available at <http://www.courtinfo.ca.gov/jc/tflists/documents/cic-finalreport-attacha.pdf>.

15 *Id.* at 34–35.

16 Patrick Marley, *Court Adopts New Campaign Donation Rules*, MILWAUKEE J. SENTINEL, Jan. 21, 2010 (emphasis added), available at <http://www.jsonline.com/news/statepolitics/82319592.html>.

17 Gary Blankenship, Gary, *To Recuse or Not to Recuse: How to do it is the Real Question*, FLA. BAR NEWS, Nov. 1, 2009, available at <http://www.floridabar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/f51978310189653485257657006e60e4!OpenDocument>.

18 *Id.*

19 Melissa Lipman, *Recusal Experts Back Peremptory Judicial Challenge*, LAW 360, Dec. 10, 2009, <http://www.law360.com/articles/137585>.

20 *Id.*

21 *Id.*

22 Blankenship, *supra* note 17.

23 [http://www.legis.ga.gov/legis/2009\\_10/fulltext/hb601.htm](http://www.legis.ga.gov/legis/2009_10/fulltext/hb601.htm).

24 <http://data.opi.mt.gov/bills/2009/lchtml/LC2027.htm>.

25 [http://laws.leg.mt.gov/laws09/LAW0203W\\$BSRV.ActionQuery?P\\_BLTP\\_BILL\\_TYP\\_CD=&P\\_BILL\\_NO=&P\\_BILL\\_DFT\\_NO=2027&P\\_CHPT\\_NO=&Z\\_ACTION=Find&P\\_SBJ\\_DESCR=&P\\_SBJT\\_SBJ\\_CD=&P\\_LST\\_NM1=&P\\_ENTY\\_ID\\_SEQ=](http://laws.leg.mt.gov/laws09/LAW0203W$BSRV.ActionQuery?P_BLTP_BILL_TYP_CD=&P_BILL_NO=&P_BILL_DFT_NO=2027&P_CHPT_NO=&Z_ACTION=Find&P_SBJ_DESCR=&P_SBJT_SBJ_CD=&P_LST_NM1=&P_ENTY_ID_SEQ=)

26 Editorial, *Judges Gone Wild*, WALL ST. J., Dec. 26, 2009, at A10, available at <http://online.wsj.com/article/SB10001424052748704240504574585754116196202.html>.

27 536 U.S. 765 (2002).

28 *Citizens United v. FEC*, 558 U.S. \_\_\_ (2010).

29 See JAS – Legal Reform Groups Hail Caperton Ruling, [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/legal\\_reform\\_groups\\_hail\\_caperton\\_ruling?show=news&newsID=5671](http://www.justiceatstake.org/newsroom/press_releases.cfm/legal_reform_groups_hail_caperton_ruling?show=news&newsID=5671).

30 See, e.g., Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 234–47 (2009).

31 H. Thomas Wells Jr., President, American Bar, Association, statement on the ruling of The Supreme Court of The United States in *Caperton Et Al. v. A.T. Massey Coal Co., Inc., Et Al.* (June 8, 2009), <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=671>.

## WEST VIRGINIA COURT EXPANDS COPPERWELD DOCTRINE

*Continued from page 4...*

The Erie Insurance Group consisted of Erie Insurance Company, Erie Insurance Property and Casualty Company, Erie Family Life Insurance Company, Erie Insurance Exchange, and Erie Indemnity Company. The Agency entered into an agency agreement with two members of the Erie Insurance Group: Erie Insurance Property and Casualty and Erie Family Life.<sup>9</sup> In 1999, Kevin Webb became the responsible agent for the Agency.<sup>10</sup>

In 2002, the Agency entered into an agreement with a new insurance agency, Princeton Insurance Associates (“Insurance Associates”), whereby the Agency allowed Insurance Associates to operate out of its Princeton, West Virginia offices and utilize its office staff.<sup>11</sup> A “significant portion” of Insurance Associate’s business came from an Insurance Associate stockholder who transferred her book of business with State Auto.<sup>12</sup> Erie claimed, and produced supporting evidence at trial, that after the Agency and Insurance Associates entered into a business relationship, Erie noticed a substantial reduction in the profitability and quantity of the Erie insurance products that the Agency was underwriting.<sup>13</sup>

After some negotiation in which Erie unsuccessfully attempted to force the Agency to disclose production reports of Insurance Associates for sales of State Auto policies, Erie gave proper notice and terminated its agency agreement with the Agency and Kevin Webb.<sup>14</sup> The Agency and Kevin Webb sued under the West Virginia Antitrust Act and the jury returned a verdict in favor of the plaintiffs, stating that the termination of the agency agreement was an unreasonable restraint of trade in

violation of the West Virginia Antitrust Act.<sup>15</sup> From this verdict, Erie appealed.

### The Ruling of the Supreme Court of Appeals of West Virginia

The Supreme Court of Appeals of West Virginia stated that the only difference between W.Va. Code § 47-18-3(a) and Section 1 of the Sherman Act was that the state Act applies in the State of West Virginia, whereas the Federal Act applies to contracts and conspiracies in restraint of trade or commerce “among the several states, or with foreign nations.”<sup>16</sup> The court therefore cited to applicable state law stating that when the antitrust law of West Virginia follows the Sherman Act, federal law should be followed.<sup>17</sup>

The court noted that the “triggering event” for liability under Section 1 of the Sherman Act is “an agreement that entails a ‘unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.’”<sup>18</sup> The court then cited the United States Court of Appeals for the Fourth Circuit in stating that “[p]roof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities.”<sup>19</sup> The court further pointed out that the *Copperweld* court and subsequent federal courts have made it clear that antitrust liability does not merely depend on corporate form, such as whether a subsidiary is wholly or partially owned, but requires an examination of the practical application of the governance of the subject corporations.<sup>20</sup> The court further quoted the United States Court of Appeals for the Third Circuit in stating that the key question for application of the *Copperweld* Doctrine is “whether an agreement between a parent and its wholly owned subsidiary represents the conduct of one economic actor or two.”<sup>21</sup>

Erie argued that its corporate structure was such that the parent company and its subsidiaries could not engage in concerted action such as to restrain trade in violation of the West Virginia Antitrust Act. Erie effectively argued that Erie Indemnity owns 100% of Erie Insurance Company and Erie Insurance Property and Casualty; Erie Indemnity owns 21.6% of Erie Family Life Insurance with Erie Insurance Exchange owning another 53.5%; Erie Indemnity is the attorney-in-fact for the policyholders of Erie Insurance Exchange; and therefore, Erie Indemnity, as the parent corporation, owns over 75% of Erie Family Life Insurance. Erie’s winning argument was that all of its subsidiaries are owned and operated by the parent company, Erie Indemnity.<sup>22</sup>

The court criticized the trial court for simply stating that Erie Family Life was not a *wholly-owned* subsidiary

of Erie Indemnity and therefore refusing to apply the *Copperweld* Doctrine to the charges of antitrust violation, with no examination of the possible unity of interest. The court stated that the trial court in essence ignored what *Copperweld* and subsequent case law stood for: the fact that employees of the same company cannot conspire together as is necessary for there to be concerted action in violation of state and federal antitrust law.<sup>23</sup> The West Virginia court ultimately held that Erie Indemnity effectively controlled its subsidiaries and had a unity of interest with the same. As such, they could not conspire together to violate the West Virginia Antitrust Act. Thus, the court applied the *Copperweld* Doctrine to less than wholly-owned subsidiaries of companies within the State of West Virginia.

### Court Further Comments on Antitrust Damages

In dicta, the court went even further in making the argument that even if the Agency and Kevin Webb could have proven concerted action and a conspiracy amongst Erie and its subsidiaries, it could not have proven damages because antitrust damages require more than mere damage to a competitor, but damage to actual competition itself.<sup>24</sup> The court stated that the appellees could show that they had been harmed by Erie's action, but they had no evidence to demonstrate an actual injury to competition in the relevant market.<sup>25</sup>

As a result of *Erie*, antitrust law is more settled in West Virginia. It is clear that not only can a parent company not violate antitrust law by engaging in conspiracy and concerted action with a wholly-owned subsidiary, but the same *Copperweld* Doctrine applies to less than wholly-owned subsidiaries, when the parent company has legal control over the subsidiary companies and they share a unity of interest.

\*Jarrett D. Gerlach, attorney at Huddleston Bolen LLP in Huntington, West Virginia.

### Endnotes

1 467 U.S. 752 (1984).

2 15 U.S.C. § 1 (federal law making it illegal to conspire to restrain trade)

3 467 U.S. at 759.

4 15 U.S.C. § 1.

5 467 U.S. at 777.

6 685 S.E.2d 914 (W. Va. 2009).

7 W. VA. CODE § 47-18-3 (2006).

8 685 S.E.2d at \*3.

9 *Id.*

10 *Id.* at \*4.

11 *Id.*

12 *Id.*

13 *Id.* at \*5.

14 *Id.* at \*6-7.

15 *Id.* at \*9.

16 *Id.* at \*12 (citing *Kessel v. Monongalia County Gen. Hosp. Co.*, 648 S.E.2d 366, 375 (W. Va. 2007)).

17 *Id.* (citing W. VA. CODE § 47-18-16).

18 *Id.* at \*13 (citing *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 639 (3d Cir. 1996)).

19 *Id.* at \*14 (citing *Oksanen v. Page Mem'l Hosp.*, 945 F.3d 696, 702 (4th Cir. 1991)).

20 *Id.* at \*18.

21 *Id.* at \*19 (citing *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1132 (3d Cir. 1995)).

22 *Id.* at \*21-22.

23 *Id.* at \*25.

24 *Id.* at \*32-33.

25 *Id.* at \*35.

# WASHINGTON SUPREME COURT UPHOLDS SCHOOL FUNDING STRUCTURE: DISPARITIES IN SCHOOL EMPLOYEE PAY NOT UNCONSTITUTIONAL

*Continued from page 6...*

every district. The “general and uniform” requirement, he argues, deals with the structure of education: uniform academic learning requirements, graduation standards, teacher licensing standards, uniform discipline standards, and other elements. “We’ve got a structure so that a student in Nine Mile Falls, who transfers to Olympia, is going to get reasonably the same education.”<sup>2</sup>

Justice Debra Stephens, who mentioned that she served on a school board for 12 years, asked Mr. Stolier where the trial judge went wrong. “I think the trial court saw something that needed fixing, and did not trust the legislature to do it,” he said.<sup>3</sup>

Attorney Lester “Buzz” Porter, Jr., arguing for the school district, asked the court to uphold Judge Heavey’s order. “Then what?” asked Justice Stephens. She cited separation of powers concerns, and objected to a school system run by the courts. If the court were to rule for the district, she asked, what would the remedy be? Mr. Porter said it is not the job of the court to tell the legislature *how* to run schools. Only if the legislature failed to act would the court be required to provide a remedy. But it is within the court’s duty, he said, to explain what the state constitution means and requires.

Responding to the State’s argument, Mr. Porter argued that “you can’t divorce” Sections 1 and 2 of Article IX of the state constitution. The state’s obligation, he said, is not just ample funding, but ample funding within a general and uniform system. Noting the complexity of school funding formulas, Justice Stephens asked if it was a mistake to simply focus on per-pupil spending or district salaries, which are pieces of the entire school funding pie. “I wonder if your argument robs from Peter to pay Paul—if we equalize this, aren’t we creating non-uniformity in other categories of state funding because of the variances in district size? . . . We’re really talking about putting the entire system of educational funding on the table, aren’t we?”<sup>4</sup>

Justice Madsen asked what would happen to local control. “There are wealthier districts that want to have enhancements for their schools. If we put too fine a point on uniformity, don’t we take that option away?”<sup>5</sup> She also

asked about whether students have standing to sue in this case, wondering what harm the students have experienced when test results show the Federal Way School District outperforms many other districts in the state. Mr. Porter said the court shouldn’t confuse results versus opportunity. The state’s obligation, he said, is to provide an equal educational system and opportunity to thrive. Results don’t necessarily discount differential treatment.

## Court Unanimously Rejects Invitation to Micromanage Education

The supreme court, with Justice Jim Johnson writing the unanimous decision, soundly rejected the school district’s case—overturning Judge Heavey and upholding the existing funding allocation system.

The court began by reviewing the history of educational funding in the state, noting that salary disparities have long existed—even at the adoption of the state constitution—but that the legislature has attempted to minimize inequalities. Prior to 1977, the state’s funding to school districts was determined through a formula in which minimum funding per pupil could be enhanced by certain weighting factors. Pay disparities were common due to “collective bargaining contracts, staff experience levels, and local school levies passed by voters.”<sup>6</sup>

In 1977 the Washington Legislature replaced the weighted funding formula with the Washington Basic Education Act of 1977, which provided a three-part approach for basic education: “(1) educational system goals, (2) educational program requirements, and (3) a new funding mechanism, called the staff unit allocation system.”<sup>7</sup> The staff unit allocation system was not a uniform statewide salary schedule, and took into account the variances between individual school districts, using average salaries paid by districts in the 1976-77 school year.

The legislature continued to adopt measures to shrink salary disparities between districts and to increase education funding overall. As Justice Johnson noted, “Under the 1977 budget, the highest teacher average base salary was more than 150 percent greater than the lowest. By the 2008-09 school year, that gap had been reduced to 4.9 percent.”<sup>8</sup>

The supreme court then turned to the uniformity clause of the constitution (Art. IX, Sec. 2). The uniformity requirement, according to the court, mandates that every child has the same educational advantages:

A general and uniform system, we think, is, at the present time, one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities

and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.<sup>9</sup>

The court reviewed several cases that had addressed educational funding cited by the Federal Way School District but noted that each case addressed the constitution’s “ample provision” mandate (Art. IX, Sec. 1). “Our cases discussing article IX, section 2 make it clear that the provision requires uniformity in the educational program provided, not the minutiae of funding.”<sup>10</sup>

The court also held that the individual parents, students, and teachers challenging the funding allocation model are unable to show any direct harm and therefore were unable to meet requirement for justiciability.

In conclusion, the supreme court rejected the argument that the court should micromanage the education system when various constituents are dissatisfied with the legislature’s efforts:

The legislature’s use of the staff unit allocation system to fund education with differing salary allocations to school districts with historically disparate average salaries does not violate article IX, section 2, although there remains a slight gap between the highest and lowest salary funding statewide. There is no showing that the legislature’s funding allocations, including those for Federal Way School District, do not constitute “ample provision for the education of all children” as required under article IX, section 1. The legislature has acted well within its constitutional authority and its duty to make ample provision for the education of children and to provide for a general and uniform system of education under article IX.<sup>11</sup>

*\*Michael J. Reitz is general counsel of the Evergreen Freedom Foundation, a free-market policy organization in Olympia, Washington, where he blogs at wasupremecourtblog.com.*

## Endnotes

1 Federal Way School Dist. No. 210 v. State, 219 P.3d 941 (2009).

2 Video recording of arguments available at: <http://www.tvw.org/media/mediaplayer.cfm?evid=2009060018B&TYPE=V&CFID=5>

537430&CFTOKEN=94483622&bhcp=1.

3 *Id.*

4 *Id.*

5 *Id.*

6 Federal Way School Dist. No. 210 v. State, 219 P.3d at 943.

7 *Id.* at 944.

8 *Id.* at 945.

9 *Id.* at 946-47.

10 *Id.* at 948.

11 *Id.* at 950.

## MONTANA SUPREME COURT: PHYSICIAN-ASSISTED SUICIDE IS AN END-OF-LIFE OPTION

*Continued from page 5...*

guidelines, including two oral requests and one written witnessed request, must be met before the prescription is written.<sup>17</sup>

The Montana decision permits the lethal prescription to be written under far more expansive circumstances. There, a “terminally ill patient” may seek out a physician and merely “asks him to provide him the means to end his own life.”<sup>18</sup> Furthermore, Montana’s Rights of the Terminally Ill Act broadly defines “terminal condition” as “an incurable or irreversible condition that, *without the administration of life-sustaining treatment*, will, in the opinion of the attending physician or attending advanced practice nurse, result in death within a *relatively short time*.”<sup>19</sup>

### Montana Decision Departs from Previous Courts

The Montana case marked the fifth time that assisted-suicide advocates had sought to achieve their goals through court action. But, until the Montana decision, they had not prevailed.

In 1997, the United States Supreme Court issued two decisions on the subject of whether there was a right to assisted suicide under the United States Constitution.<sup>20</sup> The Court found no such right and clearly distinguished between the withholding and withdrawal of life-sustaining treatment and the provision of physician-assisted suicide: “The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.”<sup>21</sup>

That same year, the Florida Supreme Court overturned a lower court decision which held that Florida's assisted-suicide prohibition violated the privacy guarantee of the Florida Constitution.<sup>22</sup> The trial court, after explaining that there was no difference between withholding or withdrawing treatment and assisted suicide, held that Florida's assisted-suicide prohibition violated the Florida Constitution's privacy guarantee. In overturning the lower court decision, the Florida Supreme Court, like the U.S. Supreme Court, rejected claims that physician-assisted suicide is no different than removing treatment:

We cannot agree that there is no distinction between the right to refuse medical treatment and the right to commit physician-assisted suicide through self administration of a lethal dose of medication. The assistance sought here is not treatment in the traditional sense of that term. It is an affirmative act designed to cause death—no matter how well-grounded the reasoning behind it.<sup>23</sup>

In rejecting the rationale that there was no distinction between refusing treatment and physician-assisted suicide, the court held that there is no right to assisted suicide under a 1980 right to privacy provision in a constitutional amendment to Florida's constitution.<sup>24</sup>

Four years later, in *Sampson v. Alaska*,<sup>25</sup> the Alaska Supreme Court decided a case in which two competent terminally ill adults sued for an order declaring that their physicians are exempt from Alaska's manslaughter statute for the purpose of assisting them to commit suicide. They based their claim on the Alaska Constitution's guarantees of privacy and liberty.<sup>26</sup> In rejecting their claims, the state high court explained:

Sampson and Doe offer nothing from the Alaska Constitution's history suggesting that either suicide or assisted suicide were topics of concern when the privacy and liberty clauses were drafted and adopted. The approach of the Alaska Statutes toward assisted suicide has been consistent since statehood; Alaska law prohibited all forms of assisted suicide and has never recognized an exception for physicians assisting their patients.<sup>27</sup>

As in the cases previously decided by the U.S. and Florida Supreme Courts, Sampson and Doe argued that the ban on assisted suicide created an arbitrary distinction between assisted suicide and withholding or withdrawal of medical treatment because "it allows physicians to hasten the deaths of some patients by passive measures—such as withdrawal of life support or terminal sedation—but forbids them from helping

other patients who prefer physician-assisted suicide as a method for hastening death."<sup>28</sup> And, as in the previous cases, the Alaska court rejected that argument, stating that it "overlooks an important distinction between a physician's active participation in a patient's suicide and a physician's willingness to honor a patient's request to cease or withdraw treatment . . . . [T]hese two types of conduct are significantly different. Their difference reflects the long-recognized distinction between action and forbearance."<sup>29</sup>

Contrasting a physician's omission of unwanted medical treatment with assisting a suicide, the Alaska court noted:

In sharp contrast to this situation, when a physician assists a terminally ill patient by prescribing medication to hasten the patient's death, the death is caused by the patient and is abetted by the physician's affirmative actions. The physician thus becomes liable because the physician actively participates in the patient's suicide.<sup>30</sup>

Montana was not the first court to consider whether assisted-suicide should be deemed an end-of-life option. Nor will it be the last.

It remains to be seen whether other states will follow the lead of the U.S. Supreme Court, the Florida Supreme Court, and the Alaska Supreme Court or whether, like Montana, they will interpret their advance directive laws to permit physician-assisted suicide under the label "aid in dying."

\* Rita L. Marker is an attorney and executive director of the International Task Force on Euthanasia and Assisted Suicide. (<http://www.internationaltaskforce.org>).

## Endnotes

1 Baxter v. Montana, 2009 MT 449; 2009 Mont. LEXIS 695 (2009).

2 *Id.* at ¶49.

3 *Id.*

4 MCA §45-2-11.

5 Baxter v. Montana, 2009 MT 449 at ¶50.

6 A 1991 Washington State voter initiative (Initiative 119) and a 1992 California initiative (Proposition 161) sought to allow both assisted suicide and euthanasia, calling such actions "aid in dying," defined as "any medical procedure that will terminate the life of a qualified patient swiftly, painlessly, and humanely."

7 MONT. CONST. art. II, §§ 4 and 10.

8 Baxter v. Montana, 2008 Mont. Dist. LEXIS 482 (2008).

- 9 Baxter v. Montana, 2009 MT 449 at ¶3.
- 10 MCA Title 50, ch. 9.
- 11 Baxter v. Montana, 2009 MT 449 at ¶27.
- 12 *Id.* at ¶30 (emphasis in original).
- 13 *Id.* at ¶32 (emphasis in original).
- 14 *Id.* at ¶37.
- 15 Oregon’s “Death with Dignity Act” (Measure 16) passed in November 1994 and went into effect in 1997. Washington’s “Death with Dignity Act” (Initiative 1000) passed in November 2008 and went into effect in March 2009.
- 16 Attempts to pass similar laws by legislative action and voter initiative have failed in more than twenty states. See “Failed Attempts to Legalize Euthanasia/Assisted Suicide in the United States,” <http://www.internationaltaskforce.org/usa.htm> (last accessed January 13, 2009).
- 17 OR. REV. STAT. §§ 127.800-.897; REV. CODE WASH. §§ 70.245.010-.903.
- 18 Baxter v. Montana, 2009 MT 449 at ¶44.
- 19 MCA 50-9-102 (16) (emphasis added).
- 20 Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).
- 21 Vacco v. Quill, 521 U.S. at 801.
- 22 FLA. CONST. art. I, § 23.
- 23 Krischer v. McIver, 697 So. 2d 97, 102 (Fla. 1997).
- 24 *Id.*
- 25 Sampson v. Alaska, 31 P.3d 88 (Alaska 2001).
- 26 ALASKA CONST. art. 1, §§1 and 22.
- 27 Sampson v. Alaska, 31 P.3d at 92.
- 28 *Id.* at 98-99.
- 29 *Id.* at 99.
- 30 *Id.*

## A RECENT HISTORY OF MEDICAL MALPRACTICE AND CIVIL JUSTICE REFORM IN ILLINOIS: THE FIVE YEAR WAIT FOR THE SUPREME COURT TO DECIDE THE FATE OF REFORM IN *LEBRON V. GOTTLIEB MEMORIAL HOSPITAL*

*Continued from front cover...*

serious legislative debate of civil justice reforms occurred until 2004.

### The Debate over Civil Justice Reform Is Revived by Medical Malpractice Issues

Prior to 2004, medical service delivery in Illinois was changing as a result of the number of lawsuits and the resulting jury verdicts. Two examples are striking. As of 2004, there were no neurosurgeons south of Springfield, the state capital. This meant that in any car accident resulting in head trauma, patients were being transported north, or out of the state, to get to the nearest available trauma center. This could typically require helicopter transport due to the long distances involved. A second effect of the lawsuits against physicians was that women in downstate Illinois found it more and more difficult to find obstetric and gynecological services. Due to massively increased medical malpractice insurance premiums, OBGYN doctors and clinics were relocating outside Illinois, sometimes just over the state border. Other service providers simply shut down, and there are indications that many doctors simply went without malpractice insurance. In the end, the dwindling number of insurance carriers who would even sell medical malpractice insurance in Illinois forced other regions of the state to take notice.

#### Solutions Debated in the 93rd General Assembly

The pressure from constituents and the absence of OBGYN and neurosurgical services caused the single-party-controlled General Assembly to hold bipartisan meetings on healthcare litigation beginning in 2004. These meetings included representatives of the Illinois Hospital Association, the Illinois State Medical Society, the Illinois Trial Lawyer Association, and members of the General Assembly and their respective staff members. Senator Cullerton, Chairman of the Judiciary Committee, conducted meetings throughout the legislative year,

and they were later taken over by Governor Blagojevich and his staff. Discussions revolved around what the problems were, who was affected, and how they could be addressed. Very specific reforms were proposed and debated. These included ideas such as broadening the liability protections for those providing free medical services to the poor and creating incentives for medical malpractice insurance carriers to begin writing policies in Illinois once again. Negotiations reached an impasse over caps on noneconomic damages and the disclosure of certifying experts. With that deadlock, the regular session of the 93rd General Assembly ended with no agreement on an omnibus reform package despite nearly two dozen reforms that were approved by all participants. The interested parties differed as to the cause of the problems. The Medical Society and Hospital Association believed the problems were caused by the civil justice system, and the trial lawyers believed inadequate regulation of the insurance industry and inadequate disciplinary enforcement for medical professionals were to blame.

### **The Summer of 2004 and a Judicial Election in the Metro East Region**

In Madison and St. Clair Counties a supreme court battle had been brewing during the medical malpractice reform negotiations of 2004. Illinois is laid out in 5 appellate court districts, and the supreme court is made up of 7 justices. All appellate court and supreme court justices are elected on a partisan ballot in Illinois. Cook County elects 3 of the supreme court justices at large, and the rest of the state elects one from each of the four remaining appellate court districts. Madison and St. Clair Counties lie within the Fifth Appellate Court District, which stretches from the Mississippi River on the west to the Indiana border on the east. It encompasses the entire southern point of Illinois bordering Kentucky and Missouri. As such, the Fifth District includes all of the Metro East area.

Judicial vacancies in Illinois are typically filled by appointment if a judge or justice retires. The appointed judge can then circulate petitions and campaign to keep that seat for a multi-year term. Since the supreme court justice of any given appellate district has direct control of appellate justice appointments, those supreme court justices have a huge impact on appointments further down the line. In general, the party controlling the supreme court seat has an opportunity to make appointments and elect their fellow partisans all the way down to the associate judge level. This means that in a region dominated by one political party, that political party may control the direction of judicial philosophy through

their candidates for supreme court, appellate, and circuit judge vacancies.

In 2003 it became clear that the sitting Fifth District supreme court justice would retire and a new justice would then be elected in the fall of 2004. The candidates for the supreme court vacancy raised and spent almost \$10 million, making it the most expensive judicial election in United States' history. That does not include money spent by allied interest groups. The sheer volume of campaign contributions put an exclamation point on what was happening in the Metro East judicial system.

In the end, Lloyd Karmeier, self-identified as the tort reform candidate, soundly defeated Appellate Justice Gordon Maag, who was favored by the state's trial lawyers. Karmeier not only won a clear victory in the supreme court race, but Justice Maag also lost his simultaneous retention election for the appellate court. Perhaps because of a surprising result after such a hard fought campaign, Gordon Maag filed suit over the election. His complaint was dismissed, but the message of the voters reverberated under the capitol dome in Springfield.

### **The Stakeholders in Medical Malpractice Reform Return to Springfield**

House Speaker Mike Madigan and Senate President Emil Jones, both trial lawyer allies, began the Spring 2005 Session of the General Assembly determined to pass medical malpractice reform. Over the strongest objections of the trial bar, the leaders passed a package of medical malpractice reforms compiled by the Illinois State Medical Society and the Illinois Hospital Association in negotiations with the Democratic leadership of the General Assembly. The ISMS and IHA included almost all of the agreed provisions from the prior year's worth of negotiations along with hard caps on non-economic damages and required disclosure of certifying experts. Specifically, Public Act 94-677 limited non-economic damages to \$1,000,000 against a hospital and \$500,000 against a doctor. In a tactical move, the ISMS inserted an inseparability clause in the bill. If any provision of the reform bill was deemed unconstitutional, the whole bill would fail. This ISMS condition is critically important, as will be explained later.

While the spirit of bipartisan cooperation continued, some of the original negotiators were unhappy. During the committee hearings when the ISMS and Senate President Emil Jones introduced the medical malpractice reform package, the trial lawyers' lobbyists confronted President Jones directly. There were even allegations that the trial lawyers threatened to run candidates in the primary against prominent Democrat leaders.

The ISMS Medical Malpractice reforms passed quickly through the Senate and the House during the May 2005 Spring Session. The election results in the 5th District Supreme Court race were fresh in legislators' memories. Now known as P.A. 94-677, the ISMS-drafted reform package was soon challenged in Cook County courts. In that venue, a local judge deemed the cap on noneconomic damages unconstitutional in the case of *LeBron v. Gottlieb Memorial Hospital*.<sup>3</sup> Under Illinois law a finding of unconstitutionality takes the appeal immediately to the Illinois Supreme Court.

The ISMS hired former U.S. Solicitor General Ted Olson to represent the defense of the reform package, and numerous amicus briefs were filed on both sides. The oral arguments occurred in November 2008 and the decision was rendered on February 4, 2010.

### **Public Act 94-677 Found Invalid and Void Due to the Separation of Powers Clause of the Illinois Constitution**

Under *LeBron v. Gottlieb Memorial Hospital*,<sup>4</sup> the Illinois Supreme Court consolidated several medical malpractice cases and ruled invalid the section of the Code of Civil Procedure at 735 ILCS 5/2-1706.5, which contained the caps on noneconomic damages adopted as part of Public Act 94-677. The court found that that the limitation of noneconomic damages in medical malpractice actions violated the separation of powers clause of the Illinois Constitution by supplanting the judicial branch's power to correct jury verdicts through remittitur. Remittitur is a century old doctrine that allows a judge to reduce an excessive jury verdict. The court referred to the medical malpractice caps as a "legislative remittitur" that would override this unique power of the judiciary. That is the basis for the same violation of the separation of powers rationale used to invalidate the civil justice reforms in *Best v. Taylor Machine Works*.

In order to reuse the *Best* analysis, the Illinois Supreme Court had to distinguish the hard caps in P.A. 94-677 from limitations of the rule of joint and several liability as well as prohibitions on punitive damages the court upheld in the past. The court accomplished this by pointing out that noneconomic damages are part of compensatory damages that are meant to make the plaintiff whole whereas punitive damages are meant to punish bad conduct. For example, the court noted that statutes banning punitive damages in certain types of action do not require the courts to reduce a jury award of noneconomic damages to a predetermined level like P.A. 94-677 does.

After rejecting comparisons to successful caps on noneconomic damages and dismissing comparisons to reforms in other states, the court held the entire package of medical malpractice reforms invalid and void due to the inseparability clause contained in the Act. As you may recall, the parties to the medical malpractice reform effort made a strategic decision that it should be all of the agreed-upon reforms or none. The court left it to the legislature to reenact any of remaining reform provisions in P.A. 94-677. Finally, the court criticized the emotional and political rhetoric in Justice Karmeier's dissent and deemed standing and ripeness waived by the defendants in this matter.

Justice Karmeier began his dissent with a recitation of the purpose of P.A. 94-677 and the primacy of the legislature in regulating and reforming healthcare. The justice noted that that the constitutionality tests of a statute have changed since the *Best* decision was rendered in 1997. Continuing in his dissent, Justice Karmeier then posited that there actually was a problem with ripeness and standing since the underlying case was still at the pleading stage. The justice noted that no jury verdict has actually been reduced due to P.A. 94-677 in the 5 years since its passage, bringing into question any remittitur-like effect. Moving right along, the justice questioned the judicially-created doctrine of remittitur itself, which has also been challenged under the separation of powers clause of the Illinois Constitution. He further criticized the majority in *LeBron v. Gottlieb Memorial Hospital* for failing to appreciate that P.A. 94-677 is a proper exercise of the legislature's authority to modify the common law. Justice Karmeier stated that it is a court's job to "do justice under the law, not make the law."

### **What the Future Holds for Civil Justice Reform in Illinois**

The Speaker of the Illinois House, a surprising proponent of P.A. 94-677 in 2005, has indicated that medical malpractice reforms are unlikely to advance in the legislature in the wake of *LeBron v. Gottlieb Memorial Hospital*. When asked about what he would do in reaction to caps on compensatory damages being struck down for what is actually the third time in Illinois history, the Speaker said, "Three strikes and you're out." He and his colleagues in the legislature may be assuming that the issue cannot heat up as fast or as intensely as it did in 2004 and 2005 which led to P.A. 94-677. One of the justices in the majority opinion is up for retention this year, so a push to challenge his retention is still possible however.

In the aftermath of the court's decision in *LeBron v. Gottlieb Memorial Hospital*, there is plenty of time to

debate what the outcome of the ISMS inseverability strategy actually achieved. Without the provision, the Illinois Supreme Court would have stricken the damage caps, leaving all of the previously agreed-upon provisions intact. If that had happened, the remaining reforms would have looked like the legislation preferred by the trial bar in the spring of 2004. However, with the inseverability provision, the supreme court's action has placed the various parties to the reform effort back in the same situation they were in prior to 2004. While the fervency of the interest groups and the memory of the dramatic Karmeier election may have waned, those favoring limits on medical malpractice liability remain in a strategically advantageous position if OBGYN and neurosurgical services once again leave the state.

*\* Christopher Hage is the former legal counsel to the Illinois Senate Judiciary Committee.*

## Endnotes

1 P.A. 94-677 (eff. August 25, 2005).

2 689 N.E. 2d 1057 (Ill. 1997).

3 No. 2006 L 012109 (Ill. Cir. Ct., Cook County Nov. 13, 2007).

4 No. 105741 (Ill. Feb 4, 2010).

# A SURVEY OF CALIFORNIA FURLOUGH LAWSUITS

*Continued from front cover...*

## Summary of Lawsuits

On December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08, directing California's Department of Personnel Administration ("DPA") to furlough certain employees and managers for two days per month.<sup>4</sup> Six months later, the Governor issued a second furlough Executive Order that increased the number of furlough days from two to three.<sup>5</sup> Union employees affected by the furloughs filed several lawsuits in different courts seeking to either stop the furloughs or pay money already lost due to their imposition. State Controller John Chiang, as well as other state executive officers who are separately elected by the voters, refused in many instances to act in accordance with the furlough orders on the basis that, as separately elected officers, they were not bound by Governor Schwarzenegger's decision.<sup>6</sup> These actions also resulted in widespread litigation.<sup>7</sup>

Union-plaintiffs composed of the Professional Engineers in California Government, California Association of Professional Scientists ("PECG, CAPS"), Service Employees International Union Local 1000 ("SEIU"), and California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment ("CASE") filed the first group of anti-furlough cases in Sacramento Superior Court, challenging generally the authority of the Governor to order furloughs.<sup>8</sup> The trial court rejected that broad argument, however, and held that the Governor was authorized to reduce state-employee hours and pay to reduce state-employee hours because of the fiscal emergency.<sup>9</sup> The court considered California's economic situation to be "an extremely urgent fiscal crisis" in which certain agencies would not be able to function without budget cuts such as the furloughs.<sup>10</sup>

The California Correctional Peace Officers Association ("CCPOA") filed a separate action against the Governor, (which was not consolidated with the first three but was heard and ruled upon by the same judge) arguing that his Executive Order violated Government Code section 10826(b) because state employees cannot use accrued vacation and holiday time, meaning that the Executive Order constitutes a "true salary range reduction."<sup>11</sup> The trial court concluded that the exigency of the budget crisis authorized Governor Schwarzenegger to order furloughs because temporary reductions in hours did not constitute a salary adjustment per se.<sup>12</sup>

Having failed to secure relief in the first set of cases, the same unions filed subsequent actions in other counties, relying on more nuanced arguments. CASE, for example, filed suit in San Francisco Superior Court, alleging that the furlough orders could not apply to non-executive agency employees who were specially funded, such as those of the State Compensation Insurance Fund.<sup>13</sup> The trial court agreed, finding that Insurance Code § 11873(a) protects Insurance Fund workers from any provisions of the Government Code that apply to agencies “generally or collectively” unless specifically named. The San Francisco Superior Court denied the Governor’s argument that jurisdiction over the CASE allegations should continue to reside exclusively in the Sacramento Court because those consolidated actions had only concerned executive-branch employees. Thus, in spite of “any other provision of law,” Insurance Fund employees “are exempt from any hiring freezes and staff cutbacks otherwise required by law.”<sup>14</sup>

Three additional actions were filed against the Governor by CASE, SEIU, and UAPD in Alameda County Superior Court.<sup>15</sup> They argued that Government Code section 19851 mandated that the Governor consider the varying needs of various agencies before reducing working hours.<sup>16</sup> By failing to do more than require an across-the-board hour reduction, Governor Schwarzenegger had not “considered” varying needs at all.<sup>17</sup> Further, each of the plaintiff-employees was employed by a “specially funded” agency. Thus, they claimed to be affected by the furloughs in violation of Government Code § 16310(a),<sup>18</sup> which forbids any transfer “that will interfere with the object for which a special fund was created.” The court issued nearly identical rulings in these cases,<sup>19</sup> holding that plaintiffs had made a prima facie showing based on the fact of the furloughs alone, such that there had been a “transfer” of monies, which interfered with the respective special funds’ missions.<sup>20</sup> In response, the Governor argued that there was no interference because the agencies’ employees can work overtime, even if the additional work is done by non-specially funded workers.<sup>21</sup> The court rejected that argument and it also rejected the notion that the existence of an “emergency” situation permits the Governor to avoid his other obligations under the law.

In a related but not coordinated or consolidated case, CCPOA also brought an action in Alameda County where it maintained that the DPA cannot “reduce salaries” under either of two theories: first, that Labor Code Section 223 prohibits paying less than that agreed upon, and, second, that the minimum wage statute in California forbids the division of total compensation by hours worked to achieve compliance with that provision.<sup>22</sup> The trial court agreed.<sup>23</sup>

Although several cases other than the consolidated Sacramento and coordinated Alameda County actions have been filed,<sup>24</sup> only one has resulted in a substantive decision: *California Public Employees’ Retirement System Board of Administration v. Schwarzenegger (CalPERS)*.<sup>25</sup> CalPERS is the organization that represents state pension workers.<sup>26</sup> It claimed a specific need for workers to handle the influx of investment issues related to the poor economy, as well as claiming—similar to CASE, SEIU, and UADP—that as a specially-funded entity the Governor could not furlough its employees. Unlike the Alameda County actions, however, the trial court there rejected the “special funding” argument and upheld Governor Schwarzenegger’s power to require furloughs.<sup>27</sup>

### Addressing Conflicting Decisions

The present set of divergent decisions coming from different state trial judges has left the Governor’s power to furlough state workers in doubt. Governor Schwarzenegger has appealed the Alameda County actions to the California Court of Appeal’s 1st Appellate District.<sup>28</sup> The Court of Appeal granted a stay of the order directing the furloughs to stop two days after the appeal was filed, but the case is not yet briefed on the merits.<sup>29</sup> Resolution of this issue by the intermediate appellate courts and ultimately the Supreme Court is urgently needed as the state continues to risk running out of money. Indeed, the Governor recently sought consolidation and review in the California Supreme Court of a series of actions related to the furloughs.<sup>30</sup> The Supreme Court has not yet ruled on this request.

CCPOA has also recently filed another action, this time in the United States District Court for the Northern District of California.<sup>31</sup> In its federal action, CCPOA claims violations of the Fair Labor Standards Act (FLSA), arguing that “by requiring [CCPOA] employees to work their furlough days without paying them within the pay period in which they work, and by failing to count their hours worked during uncompensated furlough days towards overtime, [the Governor] continuously violate[s] the FLSA’s wage and hour, overtime, and record keeping requirements.”<sup>32</sup> CCPOA brought three causes of action in its complaint: (i) a failure to pay for work performed in a given pay period; (ii) a failure to calculate hours worked during furlough periods as overtime; and (iii) a failure to keep adequate payroll records. Governor Schwarzenegger and other defendants have not yet responded to the complaint. Adding a federal component to this litigation will only further delay resolution of this vital question regarding the ability of the state to function during these

challenging economic times and will certainly lead to additional appellate proceedings.

### Conclusion

Although Governor Schwarzenegger has been vocal in his frustration with court rulings that fail to agree with his perspective, thus far he has won as many disputes as he has lost. The result is that many, but not all, state workers targeted for furloughs have been taking them, resulting in some savings for the state.<sup>33</sup> However, it is uncertain how long the furloughs will continue or how they will ultimately fare in the courts.

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### Endnotes

1 J. Steinhauer, "Plan to Close California's Budget Deficit," NYTimes Jan. 8, 2010, located at: <http://www.nytimes.com/2010/01/09/us/09calif.html>.

2 R. Knutson, "Big Banks Don't Want California IOUs," Wall Street Journal July 7, 2009, located at: <http://online.wsj.com/article/SB124692354575702881.html>; E. Halper and S. Goldmacher, "Governor Warns of Deep Fiscal Crisis As He Unveils California Budget Plan," LA Times Jan. 9, 2010, located at: <http://articles.latimes.com/2010/jan/09/local/la-me-state-budget9-2010jan09>.

3 For most intents and purposes, a furlough is an unpaid vacation.

4 Prof. Eng. in California Gov't v. Schwarzenegger, Case No. 08-80000126, Amended Minute Order at 1.

5 Executive Order S-13-09, located at: <http://gov.ca.gov/executive-order/12634/>.

6 See, e.g., M. Yi, "Governor Orders Layoffs, Heavy Pay Cuts," S.F. Gate Aug. 1, 2008, located at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/31/MNEP122S2P.DTL>.

7 After a dispute arose between the State Controller and Governor Schwarzenegger, the Governor sued the Controller in Sacramento Superior Court to force him to execute the furloughs. See Schwarzenegger v. Chiang, Case No. 34-2009-80000158. Other executives, including the Lieutenant Governor, intervened. The Controller argued that applying the furlough orders to other executives' offices' employees would violate the California Constitution's system of "divided executive power" and that the exigency no longer existed. The court rejected Controller Chiang's arguments, finding that other executives enjoyed no special privilege against the Governor's power to manage agency budgets and that the exigency persisted despite the passing of a new budget because the new budget had included furloughs in its accounting.

8 The first case filed was 2008-80000126 (PECG). Also consolidated in the court's ruling on the petition for writ of mandate and declaratory relief were 2009-80000134 and 2009-80000135; as used in this article, the short titles for those cases are *CASE I* and

*SEIU I*, respectively. The California Correctional Peace Officers Association ("CCPOA") also filed in Sacramento, but its action was not consolidated with the other three although it was considered related and assigned to the same judge.

9 "It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of the state employee eight hours, *except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies.*" CAL. GOV'T CODE § 19849(a) (emphasis added). Section 19851(a) states in part that "[The Department of Personnel Administration] shall adopt rules governing hours of work and overtime compensation and the keeping of records. . . . Each appointing power shall administer and enforce such rules."

10 Amended Minute Order at 6.

11 *Id.* at 2.

12 See *id.* The court also noted that, unlike other plaintiffs, CCPOA did not have a current Memorandum of Understanding ("MOU") with the state, which governed the parties' employment relationship. See *id.* at 6-7.

13 California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger, (*CASE II*) Case No. 09-509205, Order Granting Writ at 2.

14 CAL. INS. CODE § 11873(c). Although the decision appears to be correct substantively, there are a few troubling aspects of the court's decision in *CASE II* not dismiss or transfer the action to the Sacramento court. First, the Sacramento Superior Court's consolidation order does not distinguish between executive and non-executive employees represented by CASE. Second, the chief basis on which the Sacramento Superior Court based its decision was Government Code sections 19851 and 19849, which do not distinguish between executive and non-executive employees. Finally, the *CASE II* order addresses the exclusive concurrent jurisdiction issue but not any issue or claim preclusion effects of the Sacramento consolidated cases decision (released one day after *CASE II* was filed). Even if preclusive effects should not have applied, one would think analysis of the question was in order. In any event, CASE was successful not only in keeping the case from the unfriendly Sacramento forum, but also in carving out a group of represented employees from the Governor's Executive Orders.

15 CCPOA v. Schwarzenegger (*CCPOA II*), Case No. 09-441544; CASE v. Schwarzenegger (*CASE III*), Case No. 09-453982; Service Employees International Local 1000 (SEIU II) v. Schwarzenegger, Case No. 09-456750; Union of American Physicians and Dentists (UAPD II) v. Schwarzenegger, Case No. 09-456684. The petitions for writ of mandate were "coordinated" but the cases were not consolidated.

16 See SEIU v. Schwarzenegger, Slip Op. at 7; UAPD v. Schwarzenegger, Slip Op. at 7-8; CASE v. Schwarzenegger, Slip Op. at 8. The failure to consider the varying needs of agencies was not saved, according to the court, by Governor Schwarzenegger's exemption from the furloughs of public safety and firefighter officers because it does not prove that the needs of other agencies, such as the California Earthquake Authority, were considered. See *CASE III* at n.5.

17 The court also noted that where money saved through the furloughs is not sourced from special or federal funds, the delay in payout achieved by the furloughs does not actually save the General

Fund money, and, thus, the Governor abuses his discretion in ordering the furloughs. The court's reasoning on this point relies on contentions by the plaintiffs that the furloughs will result in slower unemployment claims and delay in moving disabled workers from state to federal rolls. Although the court asserted that certain agencies will save nothing but instead suffer increased costs, it undertook no analysis of the cost versus benefit of the alleged financial "harms" to the General Fund as opposed to benefits from the furloughs. The court concluded, however, that because the General Fund will not save money, it "cannot do otherwise than to conclude that [the Governor has abused his discretion]."

18 Section 16310(a) permits the General Fund to borrow monies from other funds when it is exhausted. Although there is no specified time limit, the monies borrowed "shall" be returned as soon as available.

19 As noted *supra*, the cases were coordinated but not consolidated.

20 See, e.g., *CASE III*, Slip Op. at 11.

21 See *id.* The court did not analyze what is meant by "interfere"; is *de minimis* interference enough, or must severe interference occur before the special funds are protected from borrowing?

22 See *CCPOA II*, Slip Op. 8-9 (citing CAL. LABOR CODE § 1171 et seq.).

23 In concluding a violation of Labor Code § 223, the court quotes the statute and also cites *Steinhebel v. Los Angeles Times Communications*, 126 Cal.App.4th 696, 707 (Cal. App. 2 Dist. 2005). The court ignored an arguably critical aspect of the statute, however, which the court in *Steinhebel* recognized, to wit: "it is unlawful for an employer to pay less than any contract or statute requires *while purporting to pay the required wage.*" *Id.* (emphasis added). In other words, the point of Labor Code § 223 is to prohibit dishonest pay practices, not prohibit forever any form of salary reduction. As to its conclusion under § 1171 et seq., because certain employees may need to *work anyway in spite of the furlough*, not paying for those three days, concluded the court, would violate § 1171 et seq.

24 *CASE*, *SEIU*, and *CAPS* also filed actions in San Francisco Superior Court; other unions have filed in San Francisco, Sacramento, and Los Angeles.

25 Case No. 09-509754, filed August 19, 2009.

26 See <http://www.calpers.ca.gov/index.jsp?bc=/about/home.xml>.

27 See Minute Order dated December 18, 2009, located at <http://webaccess.sftc.org/Scripts/Magic94/mgrqisp94.dll?APPNAME=IJS&PRGNAME=ROA22&ARGUMENTS=-ACPF09509754>.

28 *CCPOA v. Schwarzenegger*, Case No. A127292.

29 Governor Schwarzenegger filed a petition for writ of supersedeas and requested a temporary stay of the writ of mandate issued by the Alameda Superior Court.

30 K. Yamamura, "Schwarzenegger Seeks to Consolidate Furlough Cases," *Sacramento Bee* Mar. 2, 2010, located at: <http://www.sacbee.com/static/weblogs/capitolalertlatest/2010/03/schwarzenegger-153.html>.

31 *Newton v. Schwarzenegger*, Case No. 2009cv05887, filed December 16, 2009. The case is so styled because the three named plaintiffs are individual corrections officers, albeit under the CCPOA

umbrella, and the attorneys who filed the complaint are employed in CCPOA's Legal Department. A copy of the Complaint is located at: <http://www.courthousenews.com/2009/12/17/ArnoldFurlough.pdf>.

32 Complaint at 2 ¶ 3.

33 K. Yamamura, "Governor Blames Budget Woes on Judges 'Going Absolutely Crazy,'" *Sacramento Bee* Jan. 24, 2010, located at: <http://www.sacbee.com/capitolandcalifornia/story/2272576.html>. His complaints, however, tend to address challenges to his authority in contexts other than just the furlough orders.

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