relating to potential interference from Mr. Celmer's wife with the suicide."

On June 19, 2008, two of the defendants went to Celmer's house, where the "exit hood" was connected to one of the helium tanks and the tank turned on. The defendants "held [Celmer's] hands while he inhaled helium through the hood." After Celmer died, the defendants left, taking the hood, the helium tanks, and Network documents. One of the defendants "disposed of the tanks and hood in a dumpster."

A grand jury sitting in Forsyth County indicted four members of the Final Exit Network on charges of assisting in Celmer's suicide, racketeering, and tampering with evidence. The defendants moved to dismiss the indictment, arguing that it violated their right to equal protection under the Fourteenth Amendment to the United States Constitution and the parallel provision of the 1983 Georgia Constitution. They also contended that the law was unconstitutionally vague.

The trial court denied motions to dismiss, rejecting the contention that the law regulated speech and, instead, finding that the law criminalized some combinations of speech and conduct. The trial court further concluded that the law served a compelling public purpose and that it was narrowly tailored.

The trial court then granted a certificate of immediate review. The Georgia Supreme Court allowed the interlocutory appeal.

In a unanimous decision[10] written by Associate Justice Hugh Thompson, the court sustained a facial challenge to the assisted suicide statute, finding that it violated the free speech provisions of both the U.S. and Georgia Constitutions.[11] The court concluded that because the statute prohibited advertisements and public offers to assist in suicide, but not all assisted suicides, it created a content-based restriction on speech. As such, the statute was subject to strict scrutiny, requiring the state to show that the statute serves a compelling interest and is narrowly drawn.

Acknowledging the state's argument that its interest in preserving life is a compelling interest, the court nonetheless concluded that the statute was not narrowly tailored. In the court's view the statute was "wildly underinclusive."[12] It did not prohibit all suicides or nonpublic advertisements or offers of assistance. "Many assisted suicides are either not prohibited or are expressly exempted from the ambit of § 16-5-5(b)'s criminal sanctions."[13] Targeting actors like Dr. Kevorkian, as the state tried to do, left others "free" to make such nonpublic offers.[14]

The court rejected the contention that the requirement for an overt act provided the necessary narrow tailoring. It explained that the state could have "imposed a ban on all assisted suicides with no restriction on protected speech whatsoever," or it could have "sought to prohibit

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California Supreme Court Upholds Law Dissolving Redevelopment Agencies

by Angela Kopolovich

In *California Redevelopment Assn. v. Matosantos*[1] the California Supreme Court upheld a law dissolving the state's redevelopment agencies, while simultaneously striking down the agencies' last vestige of hope, a pay-to-play companion bill. The court's December 2011 decision thereby eliminated the state's redevelopment agencies entirely.[2]

By way of background, over the last several decades California's property tax revenue allocation system has been subject to a tug of war between local interests and the state's obligation to achieve equality in school funding. As a result of multiple constitutional amendments and judicial decisions, and through a rather complex system of transfers, the state essentially collects all property tax revenue and then redistributes that revenue back to the schools and other local governments.[3] Enter redevelopment agencies. Created after World War II and tasked with remediating urban decay, the agencies, in and of themselves, do not have the power to levy taxes. However, they are a powerful tool used (and sometimes abused[4]) by local governments to fund economic development (arguably, at the expense of other governmental agencies). Redevelopment agencies operate on a tax increment financing basis.

> *Under this method, those public entities entitled to receive property tax revenue in a redevelopment project area (the cities, counties, special districts, and school districts containing territory in the area) are allocated a portion based on the assessed value of the property prior to the effective date of the redevelopment plan. Any tax revenue in excess of that amount—the tax increment created by the increased value of project area property—goes to the redevelopment agency for repayment of debt incurred to finance the project.*[5]

Because the redevelopment law does not really limit the amount of revenue the agencies can collect per year (so long as it does not exceed the given agency's total debt), some blighted municipalities have been able to shield all of their property tax revenue.[6] In an attempt to remedy the inequity, the Legislature has put certain tax transfer obligations on redevelopment agencies.[7] Some of these obligations have been more successful than others,[8] but the tax increment financing remains controversial. It gives the redevelopment agencies and their sponsoring municipalities a great advantage over school districts and other entities that rely on tax revenues, subsequently burdening the state, which scrambles to fill in the budgetary gaps. As a result of one of the most recent skirmishes between state and local interests (and pertinent to this case), in 2010, voters passed Proposition 22, which amended California's state constitution in order to limit the state's ability to require payments from redevelopment agencies for the state's benefit.[9]

Last summer California's Governor, Jerry Brown, responding to a declared state fiscal emergency and a $25 billion operating deficit, proposed the elimination of redevelopment agencies to redirect property tax revenues back to state and local governmental units. At the time, *four hundred* redevelopment agencies were receiving 12% of all property tax revenues in California.[10] The Legislature, employing a slightly different approach, enacted Assembly Bill 26[11] and Assembly Bill 27,[12] two measures intended to stabilize school funding (thereby easing the deficit) by reducing or eliminating the diversion of property tax revenues to community redevelopment agencies. AB26 provided

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California: Traditional Marriage Proponents Have Standing When Public Officials Refuse to Defend It

by Jonathan Berry

The U.S. Court of Appeals for the Ninth Circuit made headlines recently when a divided panel declared unconstitutional California's Proposition 8, which affirmed that the state would recognize marriages only between one man and one woman.[1] Before the Ninth Circuit could decide the merits, however, it had to deal with the fact that state officials had all declined to defend the law.[2] In the district court below, the law was defended by the official proponents of Proposition 8, the organizers who put it on the 2008 ballot. On appeal, the plaintiffs attacking the law argued that its proponents lacked standing to defend it in court; to resolve any doubts about its jurisdiction, then, the Ninth Circuit certified the following question to the California Supreme Court:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.[3]

By a unanimous vote, the seven justices of the California Supreme Court agreed that Proposition 8's official proponents had standing to defend the initiative in court, by the proponents' authority to assert the state's own interest in the law's validity.[4] Having thus affirmed the proponents' standing, the court did not reach the question whether they possessed a particularized interest in the initiative's validity.[5]

Federal Courts Look to State Law

To properly frame its response to the Ninth Circuit, the California court first examined the U.S. Supreme Court's two most relevant cases on standing. The earlier case, *Karcher v. May*,[6] considered the standing of New Jersey legislators who had intervened before the district court to defend a state statute's constitutionality when neither the state attorney general nor any of the named government defendants were willing to defend it.[7] When they originally intervened, the lawmakers did so in their official capacities as Speaker of the state General Assembly and President of the state Senate, but after the Third Circuit held the statute unconstitutional, they lost their posts as presiding legislative officers, and their successors chose not to continue defending the statute.[8] When the lawmakers petitioned the U.S. Supreme Court regardless, their appeal was dismissed for lack of standing.[9] In response to the lawmakers' argument that dismissal should also vacate the judgments below, restoring the invalidated statute, the Court upheld the judgments instead, relying "on the fact that New Jersey law permitted the current

14 *Id.*

15 *Id.*

16 *Id.*

17 *See Law on Assisted Suicide Rejected*, Atlanta Journal-Constitution, Feb. 7, 2012, A1, at A9.

California Supreme Court Upholds Law Dissolving Redevelopment Agencies

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for the dissolution of redevelopment agencies entirely, and outlined winding up procedures for pending projects and outstanding debts; while AB27 provided agencies with an "opt-in" or "pay-to-play" option—the agencies could continue to operate if the sponsoring cities or counties agree to make payments into funds benefiting the state's schools and special districts.

The California Redevelopment Association, the League of California Cities, and other affected parties brought a constitutional challenge directly to the California Supreme Court. In reviewing this case, the court considered two issues: (1) "[whether under the state constitution] redevelopment agencies, once created and engaged in redevelopment plans, have a protected right to exist that immunizes them from statutory dissolution[;]" and (2) whether under the state constitution "redevelopment agencies and their sponsoring communities have a protected right not to make payments to various funds benefiting schools and special districts as a condition of continued operation."[13] The court answered the first question no and the second question yes, effectively upholding AB26 (and its elimination of California's redevelopment agencies) as a proper exercise of legislative power and striking down AB27 as unconstitutional, thereby eliminating the agencies' opt-in alternative.[14]

The court reasoned that dissolution of the redevelopment agencies "is a proper exercise of the legislative power vested in the Legislature by the state Constitution. That power includes the authority to create entities, such as redevelopment agencies, to carry out the state's ends, and the corollary power to dissolve those same entities when the Legislature deems it necessary and proper."[15] The court rejected the argument that the state constitutional amendment authorizing allocation of property taxes to redevelopment agencies created an implied right for those agencies to exist, or somehow impaired the Legislature's power to dissolve those agencies.[16] Quoting prior case law, the court reasoned that "[i]n our federal system the states are sovereign but cities and counties [along with redevelopment agencies, which are political subdivisions thereof] are not; in California as elsewhere they are mere creatures of the state and exist only at the state's sufferance."[17] Thus the court rejected the petitioners' argument and held that AB26 is not unconstitutional and is properly within the Legislature's plenary powers.

The court then turned its attention to AB27, which was meant to provide redevelopment agencies an opt-in alternative—an exoneration, as it were. If an agency, or its sponsoring municipality, were to pay into a fund benefiting the schools and special districts (in theory easing the state's financial burden), the agency would have the option to continue to operate uninterrupted and conduct new business.[18] The petitioners argued that this provision is unconstitutional because it squarely conflicts with Proposition 22, which bars the state from requiring direct or indirect payments from the agencies for its benefit.[19] The court agreed.[20] Relying on drafters' and voters' intent, the Court reasoned that despite respondent's characterization of the payment as voluntary, the bill is facially invalid.[21] Thus the court struck down AB27 as unconstitutional.

The Chief Justice concurred that AB26 is not unconstitutional, but dissented in that he would have upheld AB27, as he didn't see it in conflict with Proposition 22.[22] Conceding that they aren't perfect, the Chief Justice noted that the Public Market Building in Sacramento, the Bunker Hill Project in Downtown Los Angeles, Horton Plaza and the GasLamp Quarter in San Diego, the HP Pavilion in San Jose, and Yerba Buena Gardens in San Francisco are all successful redevelopment agency projects which "create jobs, encourage private investment, build local business, reduce crime and improve a community's public works and infrastructure."[23]

On the other hand, others have applauded the outcome,[24] as it not only alleviates the state's budgetary problems[25] but "also has the beneficial side effect of curtailing eminent domain abuse."[26] For nearly a decade, following the U.S. Supreme Court's decision in *Kelo v. New London*, redevelopment agencies have been the target of intense scrutiny and at times political beatings. The *Kelo* decision prompted a domino effect of state legislative enactments drastically reducing eminent domain powers for redevelopment.[27] This case can be seen as an unintended (or perhaps intended) extension

of the post-*Kelo* anti-redevelopment sentiment that swept the nation.

Ironically for petitioners, by losing their AB26 challenge and winning their argument with respect to AB27, they drove the final nail into their own coffin.[28] Had they not challenged the constitutionality of AB27, the agencies would have been able to pay to maintain their existence; "an alternative [they would have] vastly preferred to being shut down altogether."[29] This may not be quite the end of redevelopment as agency representatives are expected to go back to lawmakers and petition the Legislature to recreate them.[30] In the interim, Californians watch as the state's Department of Finance unwinds redevelopment projects, "throwing into question the fate [of] hundreds of millions of dollars that the cities say must be paid, while the state says, not so much."[31]

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Endnotes

1 53 Cal. 4th 231, No. S194861 (Dec. 29, 2011).

2 Assem. Bill Nos. 26 & 27 (2011-2012 1st Ex. Sess.) enacted as Stats. 2011, 1st Ex. Sess. 2011-2012, chs. 5-6; *see also* Assem. Bill 1X 26, § 1, subds. (d)-(i); Assem. Bill 1X 27, § 1, subds. (b), (c).

3 The system is much more complex, but for the purposes of this article, the nuances are not entirely relevant.

4 According to Los Angeles County Board of Supervisors Chairman Zev Yaroslavsky, "[Over the years, redevelopment has] evolved into a honey pot that was tapped to underwrite billions of dollars worth of commercial and other for-profit projects . . . . [The projects] had nothing to do with reversing blight, but everything to do with subsidizing private real estate ventures that otherwise made no economic sense." *Quoted in* Maura Dolan, Jessica Garrison & Anthony York, *California High Court Puts Redevelopment Agencies out of Business*, L.A. Times, Dec. 29, 2011, *available at* http://articles.latimes.com/2011/dec/29/local/la-me-redevelopment-20111230.

5 Slip Op. at 10 (emphasis added).

6 Slip Op at 11.

7 The Legislature has required that twenty percent of the agencies' revenue must be deposited in a fund for low- and moderate-income housing. Additionally, redevelopment agencies must make payments to local government taxing agencies on projects adopted or expanded after 1994. Relevant to this case, the Legislature has often required redevelopment agencies to make payments for the benefit of school and community college districts. In each of the 2004-2005 and 2005-2006 fiscal years, redevelopment agencies were charged amounts intended to generate a combined $250 million. Slip Op. at 11-12.

8 In the 2008-2009 fiscal year, the Legislature required a combined $350 million or five percent of the total statewide tax increment, whichever was greater, to be transferred to school district funds, but that was ultimately invalidated in litigation. Similar provisions for shifts of tax increment revenue in the 2009-2010 and 2010-2011 fiscal years are still in litigation. Slip Op. at 12.

9 *See* Cal. Const. art. XIII, § 25.5, subd. (a)(7) (added by Prop. 22, as approved by voters, Gen. Elec. (Nov. 2, 2010)).

10 Slip Op. at 8, 11.

11 Stats. 2011, 1st Ex. Sess. 2011-2012; Assem. Bill 1X 26, § 1, subds. (d)-(i).

12 Stats. 2011, 1st Ex. Sess. 2011-2012; Assem. Bill 1X 27, § 1, subds. (b), (c).

13 Slip Op. at 2-3.

14 *Id.*

15 Slip Op. at 3.

16 Slip Op. at 20-32.

17 Slip Op. at 22.

18 *See* note xii.

19 Slip Op. at 24.

20 Slip Op. at 44.

21 Slip Op. at 35.

22 Slip Op. at 26 (dissent).

23 *Id.*

24 Libertarian groups, such as Institute for Justice, that have been on the forefront of these challenges consider this decision a "landmark victory for private property owners . . . . California redevelopment agencies have been some of the worst abusers of eminent domain for decades, violating the private property rights of tens of thousands of home, business, church, and farm owners. The Institute for Justice has catalogued more than 200 abuses of eminent domain across California during the past ten years alone. Dolan et al., *supra* note 4.

25 Gov. Jerry Brown expressed satisfaction with the Court's decision: "[It] validates a key component of the state budget and guarantees more than a billion dollars of ongoing funding for schools and public safety." *Id.*

26 Posting of Ilya Somin to The Volokh Conspiracy, *California Supreme Court Upholds Law Abolishing Redevelopment Agencies*, http://volokh.com/2011/12/30/california-supreme-court-upholds-law-abolishing-redevelopment-agencies/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+volokh%2Fmainfeed+%28The+Volokh+Conspiracy%29 (Dec. 30, 2011, 00:11 EST).

27 Prior to the court's decision, only eight states had prohibitions against use of eminent domain for redevelopment (except for blight). By mid-2007, forty two states had enacted reforms to limit (to varying degrees) the power of local governments to invoke eminent domain for the purpose of redevelopment. Eminent Domain Legislation Status Since *Kelo*, http://www.castlecoalition.org/pdf/legislation/US_States_ED_Legis_Map_2007.pdf (last visited May 3, 2012).

28 Steven L. Mayer, a lawyer for the petitioners, declined to second-guess their legal strategy to sue to overturn both provisions. "Hindsight is always 20-20, isn't it?" Mayer said. *Quoted in* Dolan et al., *supra* note 4.

29 *Id.*

30 *Id.*

31 Teri Sforza, *Undoing Redevelopment: State Slaps down O.C. Cities*, Orange County Reg., Apr. 24, 2012, *available at* http://taxdollars.ocregister.com/2012/04/24/undoing-redevelopment-state-slaps-down-o-c-cities/153778/.

Wisconsin Supreme Court Rules Plaintiffs Entitled to Receive "Phantom Damages"

Continued from front cover...

expenses billed, including amounts written off ("phantom damages") is *Ellsworth v. Schelbrock*.[3]

In *Ellsworth*, the plaintiff was injured in an automobile accident and was hospitalized for months. She sued the negligent driver and the driver's insurer. At trial, the plaintiff introduced evidence of the amount billed by her medical providers, which totaled $597,448.27. The defendant objected to the amount arguing that only the amount actually paid ($354,941) by Medical Assistance to the medical providers should have been introduced as evidence. The trial court ruled that the amount billed ($597,448.27)—the sticker price—rather than the amount actually paid ($354,941) was the proper measure of the amount of past medical expenses.

The case was appealed to the Wisconsin Supreme Court, which upheld the lower court (4-3). Finding that the collateral source rule applies to medical assistance benefits, the defendant was not allowed to introduce evidence of the amount actually paid. Instead, the plaintiff could introduce the amount that was billed by the medical providers. The court reasoned that Wisconsin's tort law "applies the collateral source rule as part of a policy seeking to 'deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor.'"[4]

Former Justice Diane Sykes—who now sits on the United States Court of Appeals for the Seventh Circuit—dissented. Justice Sykes cited to a California Supreme Court decision that reached the opposite conclusion:

> In tort actions damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position, or giving him some pecuniary equivalent. . . . The primary object of an award of damages in a civil action, and the fundamental principle of which it is based, are just compensation or indemnity for the loss or injury sustained by the complainant, and no more . . . .
>
> Applying the above principles, it follows that an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation.
>
> Thus, when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate.[5]

B. *Koffman v. Leichtfuss* (2001)—Contractual Write-offs

Just a year later, the Wisconsin Supreme Court decided *Koffman v. Leichtfuss*,[6] which held (5-2) that the collateral source rule applies to cases involving payments made by health insurers. Similar to *Ellsworth*, the plaintiff in *Koffman* was injured in an automobile accident and required medical treatment. The total amount billed by the plaintiff's health providers was $187,931.78. However, due to contractual relationships with the plaintiff's health care providers, the insurance company received reduced rates and only paid $62,324 of the amount billed. Another $3,738.58 was paid by an insurance company and by the plaintiff personally, bringing the total amount of past medical expenses actually paid to $66,062.58.

During trial, the defendants moved to limit the evidence regarding medical expenses to the amounts actually paid ($66,062.58), rather than the amounts billed ($187,931.78). The trial court granted the defendant's motion, and therefore ruled that the plaintiff was only entitled to the amount of medical expenses incurred ($66,062.58) rather than the full sticker price ($187,931.78).

The case was appealed to the Wisconsin Supreme Court, which reversed the trial court. Once again, the court held that the collateral source rule applied, even to "payments that have been reduced by contractual arrangements between insurers and health care providers."[7] The court reasoned that this "assures that the liability of similarly situated defendants is not dependent on the relative fortuity of the manner in which each plaintiff's medical expenses are financed."[8]

Justice Sykes again dissented, arguing that the "proper measure of medical damages is the amount reasonably and necessarily incurred for the care and treatment of the plaintiff's injuries, not an artificial, higher amount