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California Court of Appeal for the Sixth Appellate District: A Review of the Court's Opinions in Civil Cases Decided in 1988 through 1990, The

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The California Court Of Appeal For The Sixth Appellate District: A Review of the Court's Opinions in Civil Cases Decided in 1988 Through 1990

Russell J. Hanlon*

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I. INTRODUCTION

In an article in a prior volume of the *Pacific Law Journal*, the major civil decisions of the California Court of Appeal for the Sixth Appellate District that were published during that court’s first three years of operation (1985 through 1987) were analyzed. In that article, trends which appeared from a review of all of the court’s reported civil decisions during the same time period were also identified. In this Article, the same two tasks will be performed with respect to the published opinions of the Sixth District Court of Appeal in civil cases during the years 1988 through 1990.

At the outset, it should be noted that the Sixth District experienced several changes in personnel over the last three years. During that time period, four new justices joined the court and one of the original members of the court retired. The arrival of three justices on the same day provided overdue relief to the court. During its first three years, the Sixth District had far too few justices to cope with an ever-increasing caseload and backlog. The California Legislature authorized the appointment of three new justices to the court, effective January 1, 1988. However, Governor George Deukmejian did not fill the new posts right away. September 29, 1988 was a significant day for the Sixth District Court of Appeal because three new justices appointed by the Governor took office on that date. The new justices were Justice Eugene M. Premo, Justice Christopher C. Cottle and Justice Franklin D. Elia. The three new justices supplied the staffing which the court desperately needed.

2. *Id.* at 1069-71 & 1124-25.
3. *Id.* at 1068-69.
Justice Premo was elevated from the Santa Clara County Superior Court. He had served as a judge on that court since January 2, 1975.\textsuperscript{6} He had formerly served as a municipal court judge in Santa Clara County from September 23, 1969 to January 2, 1975.\textsuperscript{7} Justice Cottle came to the court of appeal from the Santa Cruz County Superior Court, where he had been a judge since August 26, 1977.\textsuperscript{8} Justice Elia had served on the Santa Clara County Superior Court since July 7, 1986 and was a Santa Clara County Municipal Court judge from October 14, 1983 to July 7, 1986.\textsuperscript{9}

June 30, 1989 was another memorable day in the history of the court. Justice Harry F. Brauer, one of the original justices appointed to the court, retired on that day.\textsuperscript{10} Thus, the court lost one of its greatest writers and one of its most inquisitive members at oral argument. Governor Deukmejian appointed Justice Patricia Bamattre-Manoukian to fill the vacancy left by Justice Brauer's retirement. Justice Bamattre-Manoukian joined the court of appeal on October 16, 1989, after serving as a Santa Clara County Superior Court judge since March 7, 1988.\textsuperscript{11} She had been a Santa Clara County Municipal Court judge from July 31, 1985 to March 7, 1988 and an Orange County Municipal Court judge from October 31, 1983 to June 2, 1985.\textsuperscript{12}

Over the last three years, the Sixth District maintained its reputation as one of the hardest working courts of appeal in the state.\textsuperscript{13} For the year ending July 30, 1988, the Sixth District led the state in the number of appeals and original proceedings resolved by an opinion \textit{per justice}.\textsuperscript{14} By a great margin, the Sixth

\begin{itemize}
  \item \textsuperscript{6} Id. at 441 (5th ed. 1988).
  \item \textsuperscript{7} Id.
  \item \textsuperscript{8} Id. at 201.
  \item \textsuperscript{9} Id. at 231.
  \item \textsuperscript{10} Id. at 68 (1990 Supp.).
  \item \textsuperscript{11} Id. at 64.
  \item \textsuperscript{12} Id. at 137 (5th ed. 1988).
  \item \textsuperscript{13} Data is available only for two years: July 1, 1987-June 30, 1988 and July 1, 1988-June 30, 1989. The Judicial Council of California has not yet released its annual report for the July 1, 1989-June 30, 1990 year.
  \item \textsuperscript{14} 1 JUDICIAL COUNCIL OF CALIFORNIA, 1989 ANNUAL REPORT 31 (Figure 5), 36 (Table T9).
\end{itemize}
District likewise led the state in the number of dispositions of appeals and original proceedings, with or without opinion, *per justice*.\(^1\) The Sixth District held the top rank in productivity before the three new justices took office; the three sitting justices undoubtedly were working at a frenetic pace to prevent the backlog from spiraling. After the three new justices joined the court, they could not be expected immediately to decide cases at the same rate as the sitting justices. Nonetheless, the Sixth District performed very well during the year ending June 30, 1989. Under the standard of dispositions of appeals and original proceedings by opinion *per justice*, the Sixth District was second in the state in 1988-89, just behind the Third District.\(^2\) In 1988-1989, the Sixth District met the statewide average in dispositions of appeals, with or without opinion, *per justice*.\(^3\) Data for the year ending June 30, 1990 has not yet been released.

The Sixth District showed no reluctance at publishing the court’s opinions in civil cases. For example, in the year ending June 30, 1988, the Sixth District published twenty-two percent of its majority opinions in civil cases, compared to the statewide average of eighteen percent.\(^4\) In the year ending June 30, 1989, the Sixth District met the statewide average of sixteen percent of majority opinions published in civil appeals.\(^5\) The Sixth District’s productivity and publication rate in future years can only improve, after the four relatively new justices have acclimated to their positions.

**II. GENERAL TRENDS IN CIVIL CASES**

In 1988-1990, the Sixth District issued 155 published opinions in civil cases, including opinions superseded by the supreme court’s grant of review, but excluding opinions which the supreme court depublished without review. In this Article, as in *Emerging Trends*,

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1. *Id. at 31 (Figure 4), 36 (Table T9).*
2. 1 JUDICIAL COUNCIL OF CALIFORNIA, 1990 ANNUAL REPORT 34 (Figure 3).
3. *Id. at 38 (Figure 7).*
4. 1 JUDICIAL COUNCIL OF CALIFORNIA, 1989 ANNUAL REPORT 61 (Table T25).
5. 1 JUDICIAL COUNCIL OF CALIFORNIA, 1990 ANNUAL REPORT 48 (Table 8).
the general trends which emerge from a review of the Sixth District’s 155 published opinions in civil cases will be noted. Also, the rationale in the court’s major civil decisions will be analyzed.

A major trend in the court’s 1985-1987 opinions was that the court exhibited judicial conservatism, but not political conservatism. Although the court strictly construed the law and refused to create new law, it often would rule against “big business.” Other significant trends were: (1) The court strictly applied statutes of repose in tort cases to cut off the rights of even severely injured plaintiffs; (2) the court ruled in favor of employers in every reported employment or labor law case; (3) landlords won every one of the court’s few published landlord-tenant decisions; (4) the court generally ruled against developers and public agencies in California Environmental Quality Act (“CEQA”) cases; and (5) the court displayed a benign attitude toward consumers in consumer law cases and likewise decided lender-borrower cases in favor of the borrower.

The salient trend in the court’s 1988-1990 opinions is that the Sixth District has grown more conservative. That is the inescapable conclusion from a comparison of the general trends in the court’s 1985-1987 opinions with the general trends in the court’s 1988-1990 decisions.

In tort cases decided in 1988-1990, the Sixth District continued to reject the claims of plaintiffs in most cases. For example, the court ruled in favor of the government in all eight tort cases in which the government was the defendant. However, the results were far from uniform when the liability of a private party was at issue: The court decided three cases in favor of the defendant, but three other important cases in favor of the plaintiff. When it applied a statute of limitations in a tort case, the court’s decisions again were split evenly again: Two plaintiffs prevailed, but two other plaintiffs suffered dismissals.

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23. *See infra* notes 311-45 and accompanying text.
24. *See infra* notes 146-80 and accompanying text.
In its insurance law cases, the Sixth District showed a strong predisposition to rule in favor of insurance companies. In 1988-1990, insurers were the victors in nine out of eleven insurance coverage cases. As discussed below, the supreme court granted review in two of the decisions which favored the insurer, reversing one and ordering reconsideration in the other. The reasoning in other pro-insurer decisions seems questionable. The Sixth District also ruled for the insurer in two out of three non-coverage cases; the insured prevailed in the third case where the court applied Nevada law.25

In 1988-1990, the Sixth District again was partial to employers in employment law cases, although not consistently so, as it was in its 1985-1987 decisions. In 1988-1990, the court denied recovery in four out of seven wrongful termination cases involving a private employer. The court ruled in favor of the government in both of the two minor cases involving a public employer. In three labor cases, employers won two and obtained a "split decision" in the third case.26

In its 1988-1990 decisions, the Sixth District signaled a departure from the proconservation stance which it exhibited in its 1985-1987 opinions. In 1988-1990, the court concluded that the public agency had complied with CEQA in five out of seven cases. The court delivered mixed rulings in three non-CEQA cases involving environmental issues.27

In 1988-1990, the court's landlord-tenant decisions did not always favor landlords, as they did in 1985-1987. Instead, tenants prevailed in two such cases and landlords were victorious in the other two cases. The court did not publish any lender-borrower opinions, much less an opinion which favored a borrower. Nor did the court publish any consumer law cases in 1988-1990.28

In constitutional law cases, the court did not hesitate to safeguard freedom of the press in libel actions and the right to

25. See infra notes 181-299 and accompanying text.
26. See infra notes 300-90 and accompanying text.
27. See infra notes 391-463 and accompanying text.
28. See infra notes 464-89 and accompanying text.
privacy in a mandatory drug testing case. However, the court would
not allow the right of religious expression to immunize church
members from the consequences of their injurious conduct.29

Finally, as in the area of tort law, the court continued to apply
procedural statutes strictly, even to bar a plaintiff's entire action.
In 1988-1990, the Sixth District tossed out a plaintiff's action in
five out of seven cases in which it applied the dismissal rules in
the Code of Civil Procedure.30

In sum, in its 1988-1990 decisions, the Sixth District: (1)
continued to disfavor tort and wrongful termination plaintiffs; (2)
revealed a marked tendency to rule for insurers in both insurance
coverage and non-coverage cases; (3) shifted away from favoring
environmental concerns in CEQA cases; (4) issued a mixed bag of
decisions in the landlord-tenant realm; and (5) did not publish any
decisions which favored consumers or borrowers. Although the
Sixth District's 1988-1990 decisions did not unanimously favor
employers and landlords, as they did in 1985-1987, the overall
impression which the court conveyed in 1988-1990 is that it moved
in a more conservative direction.

The new justices on the court are not necessarily responsible
for this change in direction. The justices who serve on the Sixth
District Court of Appeal appear to think alike. Out of 155
published civil decisions in 1988-1990, only two dissenting
opinions were written.

Another notable trend is that it was nearly impossible to "fight
city hall" in the Sixth District Court of Appeal in 1988-1990. The
government prevailed in all eight tort actions, in both employment
law cases and in most of the environmental and land use appeals
which the Sixth District decided in 1988-1990.

29. See infra notes 490-549 and accompanying text.
30. See infra notes 550-96 and accompanying text.
III. TORT CASES

A. The Sixth District Ruled for the Government in All of Its Government Tort Liability Cases

1. Breach of Duty Cases Involving Public Defendants

In all eight of the Sixth District’s tort decisions involving public defendants, the court refused to hold the government liable for damages. In three such cases, the court concluded that the public defendants owed no legal duty to the plaintiffs.

In Garcia v. Superior Court,31 the court held that the trial court properly sustained the demurrer of certain state defendants in an action for wrongful death arising out of the death of the plaintiffs’ mother (Morales).32 One defendant was the parol agent who was supervising the parol of the individual (Johnson) who eventually murdered Morales. The parol agent knew that Johnson: (1) previously had murdered his wife in a fit of jealousy; (2) previously had an intimate relationship with Morales and that Morales had terminated that relationship; and (3) had threatened to look for and kill Morales in a conversation with the parol agent.33 When the parol agent and Morales had a telephone conversation regarding Morales’ safety, the parol agent misinformed Morales that she had nothing to worry about because Johnson was not going to come looking for her. Shortly thereafter, Johnson kidnapped and murdered Morales. The court of appeal concluded that the parol officer’s erroneous advice did not involve a breach of duty.34 The court explained that the murder of Morales was not a foreseeable result of the parol agent’s misinformation, there was not a close connection between the erroneous advice and the victim’s death.

32. Id. at 699, 249 Cal. Rptr. at 456.
33. Id. at 700, 249 Cal. Rptr. at 451-52.
34. Id.
and the burden on the community would be too great, if liability were fastened on a parol officer under these circumstances.\textsuperscript{35}

In Garcia, the California Supreme Court effectively reversed the decision of the Sixth District, holding that the plaintiffs could state a cause of action for "negligent misrepresentation involving a risk of physical harm."\textsuperscript{36} The supreme court decided that the parol agent had a duty to use reasonable care in his voluntary communications with Morales, even though he had no duty to speak to Morales in the first place.\textsuperscript{37} The court further found that the plaintiffs had pleaded adequately the parol officer's negligence and the proximate cause element, but had failed to allege the victim's reasonable reliance on the parol agent's misrepresentations.\textsuperscript{38} Accordingly, the supreme court granted the plaintiffs leave to amend their complaint.

The supreme court actually agreed with the Sixth District that the plaintiffs had not stated a cause of action for wrongful death in Garcia. However, the supreme court, unlike the court of appeal, determined that the plaintiffs could state a valid claim against the state defendants. The supreme court correctly and fairly decided the ultimate issue: upon electing to speak to Morales about her personal safety, the parol agent had a duty to use reasonable care and to refrain from making misrepresentations which could lull her into a false sense of security.

In a similar case, the Sixth District reached the same result as it did in Garcia. In City of Sunnyvale v. Superior Court,\textsuperscript{39} police officers cited two men for unlawful possession of alcohol in a car and released them. The two men proceeded to continue to drink and drive until the car crashed and injured the plaintiff, who was another passenger in the car. The plaintiff sued the city which employed the police officers, contending that the policemen, at the time that they stopped the car, had a duty to advise the plaintiff to

\textsuperscript{35} Id. at 702-03, 249 Cal. Rptr. at 453.
\textsuperscript{37} Id. at 736, 789 P.2d at 964, 268 Cal. Rptr. at 783-84.
\textsuperscript{38} Id. at 736-37, 789 P.2d at 965, 268 Cal. Rptr. at 783-84.
\textsuperscript{39} 203 Cal. App. 3d 839, 250 Cal. Rptr. 214 (1988).
get out of the car and find other transportation. Following established precedent, the Sixth District held that the police officers had no duty of care to the plaintiff. The court reasoned that one has no duty to protect or assist another, unless the first party has created a peril or has a special relationship with the other party that imposes a duty to act. The court distinguished cases where the police officers had caused danger to the victim by willingly undertaking a duty to protect the plaintiff and then negligently performing that duty. In City of Sunnyvale, the Sixth District properly found that the police officers owed no legal duty to the plaintiff.

In Gray v. State of California, the court again concluded that the government was not liable in tort on the ground that the government had no duty of care to the plaintiff. Pursuant to Penal Code section 12076, the California Department of Justice investigated a potential handgun purchaser’s criminal record in California, but did not check any out-of-state records on the gun purchaser. The Department found that the purchaser was eligible for the purchase. Six months after he bought the gun, the gun purchaser shot and killed the plaintiff’s decedent. The gun purchaser had been certified as mentally ill and had been committed to an institution for the mentally ill in South Dakota. If the Department had discovered that fact, it would have found that the gun purchaser was legally ineligible to own a gun. In Justice Elia’s first published opinion in a civil case, the Sixth

40. Id. at 842, 250 Cal. Rptr. at 216.
41. Id. at 843, 250 Cal. Rptr. at 216-17.
46. Id.
47. Id. at 154, 254 Cal. Rptr. at 582.
48. Id. at 153, 254 Cal. Rptr. at 582.
49. Gray, 207 Cal. App. 3d at 153, 254 Cal. Rptr. at 582. See also CAL. WELP. & INST. CODE §§ 8100, 8103 (West Supp. 1991) (possession, purchase, or receipt of firearm or other deadly weapon by mental patient and weapons restrictions for particular persons, respectively).
District ruled that Penal Code section 12076 did not impose upon the Justice Department a duty to conduct an investigation in any particular manner; the statute conferred upon the Department the discretion to conduct an investigation of a purchaser’s eligibility for handgun ownership, as the Department saw fit. Thus, the court affirmed the summary judgment for the state in the wrongful death action. Notwithstanding the harsh result, the court’s decision seems correct. As the court explained, given that Penal Code section 12076 does not set forth standards for investigations, the court effectively would redraft the statute, if it were to impose its own standards.

In another tort case, the Sixth District found that a public agency did have a duty to the plaintiff, but had not breached that duty. In *Lussier v. San Lorenzo Valley Water District*, the court held that the water district was neither absolutely immune from liability nor strictly liable for the damage to the plaintiff’s property that was caused by natural conditions on the water district’s upstream property during a severe rainstorm. The court further decided that a plaintiff must prove negligence in the handling of a natural condition in order to impose liability on another property owner, under the theory of nuisance, for property damage caused by the natural condition. The court expressed its disagreement with a line of older cases which imposed liability for nuisance without proof of wrongful conduct. As the jury found that the water district was not negligent, the court of appeal affirmed the

50. Gray, 207 Cal. App. 3d at 155, 254 Cal. Rptr. at 583-84.
51. Id. at 153 and 158, 254 Cal. Rptr. at 582 and 585.
52. Id. at 158, 254 Cal. Rptr. at 585.
54. Id. at 101, 253 Cal. Rptr. at 474.
55. Id. at 102, 253 Cal. Rptr. at 474.
judgment in favor of the water district. The court’s rationale seems correct in view of the California Supreme Court’s decision in Sprecher v. Adamson Companies.

2. Government Immunity Cases

In three cases, the Sixth District determined that a statutory immunity barred the imposition of tort liability on the government. In City of Santa Cruz v. Superior Court, the court held that Government Code section 831.2, which shields a public entity from liability for any injury caused by a natural condition on unimproved public property, precluded the imposition of liability on a city for the personal injuries suffered by the plaintiff when he dived into a sandbar in a river. In doing so, the Sixth District distinguished and criticized Gonzales v. City of San Diego. Gonzales had created a “hybrid condition” exception to section 831.2. The exception to the statutory immunity applies if a city is negligent in providing lifeguards or warning signs on unimproved beaches; the beach is deemed improved if the city fails to give adequate warnings of unsafe conditions at the beach. The Sixth District charged that the “hybrid condition” exception created by Gonzales is inconsistent with the intent of the legislature, which sought to restrict governmental liability resulting from the use of public property, unless the public entity affirmatively acted to increase the degree of peril of a natural condition.

57. Id. at 106, 253 Cal. Rptr. at 577-78.
60. See CAL. GOV'T CODE § 831.2 (West 1980).
61. City of Santa Cruz, 198 Cal. App. 3d at 100-02, 244 Cal. Rptr. at 110.
63. Id. at 885-86, 183, Cal. Rptr. at 75.
64. Id.
65. City of Santa Cruz, 198 Cal. App. 3d at 1006-07, 244 Cal. Rptr. at 108-09.
The *Gonzales* exception to section 831.2 lacks vitality. As the Sixth District noted in *City of Santa Cruz*, the legislature effectively has overruled *Gonzales* by adopting Government Code section 831.21, which provides that public beaches are deemed to be in a natural condition, whether or not lifeguards or warning signs are present.\(^{66}\) Therefore, the Sixth District’s reading of legislative intent, in its criticism of *Gonzales*, was entirely proper. Also, in a subsequent case with facts virtually identical to the facts in *City of Santa Cruz*, the court of appeal criticized *Gonzales* and quoted the *Santa Cruz* opinion with approval.\(^{67}\)

The Sixth District applied the bar of a government immunity statute again in *Cappuccio, Inc. v. Harmon*.\(^{68}\) The plaintiffs had been found guilty of unlawfully underweighing squid which they had purchased from fishermen. In a California Department of Fish and Game newsletter, an investigating officer grossly overstated the magnitude of the fraud committed by the plaintiffs. The Sixth District concluded that the investigating officer and the Department were immune from liability for libel under Government Code section 821.6.\(^{69}\) Adopting the reasoning of the court in *Kayfetz v. State of California*,\(^{70}\) the court explained that the publication was authorized by law and was part of the prosecuting process.\(^{71}\)

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69.  *Id.* at 1500, 257 Cal. Rptr. at 67. *See also Cal. Gov't Code* § 821.6 (West 1984).
70.  A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.
In *LaBadie v. State of California*, the court held that Government Code section 8655 precluded liability of the state for the plaintiff’s personal injuries which resulted from the state’s Emergency Medfly Spraying Program. The court essentially followed its earlier decision in *Farmers Insurance Exchange v. State of California*.

3. Government Tort Claims Act Case

In another public defendant tort case, the Sixth District ruled that the plaintiffs’ failure to comply with the procedural requirements of the Tort Claims Act barred them from bringing a tort action against a public agency. In *Santee v. Santa Clara County Office of Education*, the court determined that the plaintiffs neither timely filed a claim, as required by Government Code section 911.2, nor substantially complied with the requirements of the Government Code section 911.4 for filing a late-claim application. With regard to the latter issue, the court stated that the plaintiffs’ timely presentation of a late-claim application to the County Board of Supervisors was ineffective, where the only public agency which could be liable the County Office of Education was a separate entity.

In *Santee*, the Sixth District announced its position on an issue which has divided the courts. Whenever there is any question as to whether a party has timely filed a tort claim with a public agency, the party could bring an immediate tort action upon the denial of the claim and contend that the agency simply denied a timely

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73. See CAL. GOV’T CODE § 8655 (West 1984) (liability of state or political subdivisions for discretionary functions).
76. CAL. GOV’T CODE § 900 et seq. (West 1980).
79. See id. § 911.4 (West Supp. 1991) (application to present late claim).
81. Id. at 713-14, 269 Cal. Rptr. at 611-12.
claim. Alternatively, the cautious approach would be for the party to file a late-claim application with the public agency\textsuperscript{82} and, after the application is denied, file in court a petition for relief from the failure to timely file a claim.\textsuperscript{83} As the Sixth District pointed out, some courts hold that the trial court lacks jurisdiction to decide the issue of the timeliness of the filing of the tort claim in the claim-relief proceeding because the predicate for such a proceeding is that the claim was not timely filed.\textsuperscript{84} Under that view, the party's timeliness in filing the tort claim should be decided only in the plaintiff's tort action against the public agency. Other courts hold that the trial court can decide that issue in the claim-relief proceeding.\textsuperscript{85}

In \textit{Santee}, the Sixth District adopted the latter approach, concluding that a trial court has jurisdiction to decide the issue of the timeliness of the filing of the tort claim in the claim-relief proceeding.\textsuperscript{86} That approach seems sensible. If a court must decide in a claim-relief proceeding whether or not the plaintiff is entitled to relief from default, the court certainly should be able to decide in that proceeding whether or not the plaintiff is in default. Moreover, judicial economy would be served by allowing the trial court to decide all issues concerning the plaintiff's compliance with Tort Claims Act procedures \textit{before} the plaintiff commences the tort action against the public agency.

\textbf{B. The Sixth District's Decisions Contained Mixed Results for Private Defendants in Tort Cases}

When a private party was the defendant in a tort case, the Sixth District's decisions were evenly divided. The court ruled in favor


\textsuperscript{83} \textit{See id.} § 946.6 (West Supp. 1991).


\textsuperscript{86} \textit{Id.}
of the defendant in three of those cases and ruled for the plaintiff in three such cases.

I. The Court Found No Tort Liability in Three Private Defendant Cases

In three tort cases involving private defendants, the Sixth District decided that the defendant was exempt from any liability. In each of those three cases, the court refused to create a statutory exception that would allow an injured plaintiff to recover compensation for personal injuries.

In Hepe v. Paknad, the plaintiff was injured when he was struck by a car driven by an individual who had just consumed alcoholic beverages at a bar owned by a defendant. Seeking to evade the immunity conferred by Business and Professions Code section 25602 upon servers of alcoholic beverages for injuries resulting from a consumer's intoxication, the plaintiff alleged that the defendants knew or should have known that the driver suffered from alcoholism and thus, they had a duty to refrain from serving alcoholic beverages to the driver. Applying the California Supreme Court's ruling in Strang v. Cabrol, the Sixth District refused to find an exception to the statutory immunity beyond the statutory exception for service of alcoholic beverages to an obviously intoxicated minor.

In doing so, the Sixth District specifically criticized the decision in Cantor v. Anderson, which held that the section 25602 immunity does not apply where the server knows that the consumer should not be given any alcoholic beverages due to some exceptional physical or mental condition. Pointing out that the Cantor decision is inconsistent with the language in section 25602

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88. Id. at 414-15, 244 Cal. Rptr. at 824. See CAL. BUS. & PROF. CODE § 25602 (West 1985) (immunity for servers).
89. Hepe, 199 Cal. App. 3d at 414, 244 Cal. Rptr. at 824.
90. 37 Cal. 3d 720, 728, 209 Cal. Rptr. 347, 691 P.2d 1013 (1984) (holding that no exception to the section 25602 immunity exists, other than the single exception set forth in the statute).
91. Hepe, 199 Cal. App. 3d at 418-19, 244 Cal. Rptr. at 827.
and the supreme court’s subsequent decision in Strang, the Sixth District in Hepe essentially issued a call to courts to refuse to follow Cantor’s example and to deny any request to create a nonstatutory exception to section 25602.93

The court arrived at the same conclusion in Dodge Center v. Superior Court.94 The plaintiff was injured when he was struck by a truck driven by an unlicensed driver. Relying upon Vehicle Code section 14606(a),95 the plaintiff sought to impose liability on the car dealership which had sold the truck to the driver and which had not verified whether the purchaser had a driver’s license. Section 14606(a) prohibits a vehicle owner from knowingly allowing an unlicensed driver to use a motor vehicle.96 If the prohibition has been violated, the statute imposes liability on the consenting party for injuries resulting from the other driver’s negligence.97 The Sixth District concluded that section 14606 requires knowledge of the other driver’s lack of a license and creates no duty of inquiry.98 The court noted that the casting of a duty of inquiry regarding license verification on a car seller would be unprecedented.99 Likewise, the court also determined that the car dealership had no duty to inquire about the truck purchaser’s driving record before selling the vehicle to him.100 As the plaintiff submitted no evidence indicating that the car dealership had actual knowledge of the truck driver’s lack of a license or poor driving record, the court of appeal issued a writ of mandate directing the trial court to issue an order granting the car dealership’s motion for summary judgment.101

In Williams v. Foster,102 the Sixth District held that a property owner’s duty under Streets and Highways Code section 5610 to
maintain and repair public sidewalks adjoining his or her property. Following Schaefer v. Lenahan, the court declined to find that the statutory duty to maintain sidewalks ran in favor of any person who used the sidewalk, in the absence of clear statutory language which indicated that the duty is owed to the public. Thus, the Williams plaintiff could not recover damages from the private defendant for injuries sustained in a trip and fall accident on the sidewalk abutting the defendant’s property. A subsequent case already has followed the Sixth District’s holding in Williams.

2. The Court Found Private Defendants Liable in Three Other Tort Cases

Although it repeatedly frowns upon tort liability, the Sixth District’s most important tort decisions in 1988-1990 imposed liability on the defendant. In Bily v. Arthur Young & Co., the court held that an accounting firm was liable for its negligence in preparing an audit opinion, which was issued just prior to a public offering of a corporation’s securities, to reasonably foreseeable plaintiffs - none of whom were clients of the accounting firm - who relied on the audit opinion in purchasing the securities. In reaching that result, the Sixth District expressly relied upon the holding and reasoning in the Fourth District’s opinion in International Mortgage Co. v. John P. Butler Accountancy Corp. Although its opinion has been superseded by the

103. CAL. STS. & HIGH. CODE § 5610 (West 1969).
104. Williams, 216 Cal. App. 3d at 522, 265 Cal. Rptr. at 23.
106. Williams, 216 Cal. App. 3d at 521, 265 Cal. Rptr. at 22.
107. Id. at 522, 265 Cal. Rptr. at 23.
110. Id. at 295-96, 271 Cal. Rptr. at 483.
111. 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (1986).
supreme court's grant of review in Bily, the Sixth District's rationale can be gleaned through a review of International Mortgage.

The issue of an accountant's liability for professional negligence to non-client third parties has stirred considerable controversy in state appellate courts. A leading early case on the issue was an opinion authored by Justice Cardozo in Ultramares Corp. v. Touche.\textsuperscript{112} In Ultramares, the New York Court of Appeals held that an accounting firm was not liable for the negligent preparation of financial statements to a plaintiff who had no contractual privity with the firm.\textsuperscript{113} The soundness of the Ultramares holding has been the subject of a raging debate in state courts throughout the land, with many courts taking each side of the debate.\textsuperscript{114} In its recent opinion in Credit Alliance Corp. v. Arthur Anderson & Co.\textsuperscript{115} the New York Court of Appeals retreated from the privity requirement in Ultramares. The court concluded that an accounting firm could be liable for negligence to a non-contracting party only if three factors were present: (1) the accountant was aware that the financial reports would be used for a specific purpose; (2) the accountant knew the parties who intended to rely on the reports; and (3) the accountant's conduct linked him or her to those parties, thereby demonstrating the accountant's awareness of the reliance of those parties on the reports.\textsuperscript{116}

In International Mortgage and Bily, the California courts rejected the Ultramares and Credit Alliance tests, concluding that an accountant's liability for negligence extends to those noncontractual parties who reasonably and foreseeably relied upon the audit reports.\textsuperscript{117} In International Mortgage, the court

\begin{itemize}
\item \textsuperscript{112} 255 N.Y. 170, 174 N.E. 441 (1931).
\item \textsuperscript{113} Id. at 189, 174 N.E. at 448.
\item \textsuperscript{114} See, e.g., Credit Alliance Corp. v. Arthur Anderson & Co., 65 N.Y. 2d 536, 546, 493 N.Y.S.2d 435, 439, n.7, 483 N.E. 2d 110, 114, n.7 (1985), and cases cited therein.
\item \textsuperscript{115} 65 N.Y.2d 536, 493 N.Y.S.2d 435, 483 N.E.2d 110 (1985).
\item \textsuperscript{116} Id. at 551, 493 N.Y.S.2d at 443, 483 N.E.2d at 118.
\item \textsuperscript{117} International Mortgage, 177 Cal. App. 3d at 818-20, 223 Cal. Rptr. at 22627; Bily, 222 Cal. App. 3d at 304-06 and 311, 271 Cal. Rptr. at 483.
\end{itemize}
explained that it simply was extending the foreseeability test, which applied in negligence actions against virtually all other professionals, to the accounting profession.118

The California Supreme Court's grant of review in Bily suggests that the plaintiffs are in trouble in that case. Otherwise, the supreme court would have let the International Mortgage and Bily decisions stand. In deciding Bily, the supreme court should consider that even the New York Court of Appeals has discarded the strict privity test in Ultramares. Also, the major difference between the Credit Alliance three-part test and the foreseeability standard is that, under the former test, the accountant must know and have some interaction with the parties who intended to rely upon the audit report. Those requirements serve no purpose, however, if the pertinent public policy is to increase the flow of accurate information in a securities transaction involving a public company, such as the transaction in Bily. Measured against that public policy, the accountant's knowledge of and dealings with the intended beneficiaries of his or her report are immaterial.119 It seems that foreseeability should be the test for the liability of accountants to third parties, just as it is the test for all other professionals in California. In any event, the supreme court's recent rejection of foreseeability as the touchstone for liability for negligent infliction of emotional distress120 foreshadows the ultimate result in Bily.

The Sixth District issued another significant tort opinion in Potter v. Firestone Tire & Rubber Co.121 The tire company unlawfully dumped carcinogenic chemicals at a waste disposal site and thereby contaminated the water supply of the nearby plaintiffs.122 After their discovery of the water contamination in

122. Id. at 219, 274 Cal. Rptr. at 887.
their homes, the plaintiffs eventually became extremely fearful that they would develop cancer, although none were diagnosed as having cancer.\textsuperscript{123} The trial court awarded damages, \textit{inter alia}, in the amount of $200,000 to each of the four plaintiffs for his or her "fear of cancer" and a total of $142,975 for the cost to monitor the plaintiffs' health in the future.\textsuperscript{124}

In \textit{Potter}, the court of appeal held that a plaintiff can recover damages for fear of cancer, under a cause of action for negligent infliction of emotional distress, where the defendant’s negligent conduct causes the plaintiff to ingest a carcinogenic substance and to acquire a fear that he or she will get cancer.\textsuperscript{125} The court further ruled that a plaintiff does not need to prove that he or she is likely to develop cancer in order to recover for an existing fear of cancer.\textsuperscript{126} The court fashioned a five-part test in order to allow courts, in future cases, to eliminate false claims of fear of cancer: (1) the plaintiff must prove the defendant’s negligence; (2) the plaintiff must show that the emotional distress is serious; (3) the plaintiff must establish that a reasonable person would have suffered serious emotional distress under the circumstances; (4) the trier of fact should consider evidence concerning the probability that the plaintiff will develop cancer, although such evidence is not dispositive; and (5) the trier of fact should consider expert testimony, his or her own experience and the specific circumstances of the case.\textsuperscript{127}

In \textit{Potter}, the Sixth District reversed the trial court’s award of future medical monitoring costs.\textsuperscript{128} As the court of appeal pointed out, there is a split of authority regarding the circumstances under which a plaintiff may recover the expenses of future medical surveillance. Most courts conclude that such expenses are recoverable only where the plaintiff has sustained a physical injury

\begin{itemize}
\item \textsuperscript{123} \textit{Id.} at 220, 274 Cal. Rptr. at 888.
\item \textsuperscript{124} \textit{Id.} at 221, 274 Cal. Rptr. at 889.
\item \textsuperscript{125} \textit{Id.} at 225, 229, 274 Cal. Rptr. at 891, 894.
\item \textsuperscript{126} \textit{Id.} at 225-26, 274 Cal. Rptr. at 891.
\item \textsuperscript{127} \textit{Id.} at 226-27, 274 Cal. Rptr. at 892-93.
\item \textsuperscript{128} \textit{Id.} at 234, 274 Cal. Rptr. at 897-98.
\end{itemize}
or can prove that the latent disease likely will occur.\textsuperscript{129} Other courts hold that evidence of physical harm is not required and that such costs are recoverable, if expert testimony indicates that the plaintiff's risk of acquisition of the latent disease has significantly increased and that the future medical expenses will be reasonable and necessary.\textsuperscript{130} The Sixth District adopted the majority view, deciding that the minority view effectively creates a new cause of action, a judicial act which the California Supreme Court alone should perform.\textsuperscript{131} Applying the majority rule, the court determined that the plaintiffs were ineligible for future medical surveillance costs. The evidence showed that the plaintiffs had an increased risk of cancer, but there was no determination that any plaintiff likely would get cancer. Nor had any plaintiff suffered any physical injury.\textsuperscript{132}

Whether to deny recovery for fear of cancer or to establish the right to recover future medical monitoring costs, the supreme court granted review in *Potter*. The Sixth District's rationale and test for the fear of cancer claim seen well-reasoned. However, the position which the Sixth District chose in the debate over the recoverability of future medical expenses seems analytically suspect. Under Civil Code section 3333, the measure of damages in a tort action is the amount which will compensate the plaintiff for all detriment which the defendant's wrongful conduct proximately caused.\textsuperscript{133} If a defendant causes a plaintiff to ingest sufficient quantities of a carcinogenic substance so as to significantly increase the plaintiff's risk of cancer, the plaintiff necessarily will incur future medical expenses to monitor his or her health. Such medical expenses

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\textsuperscript{131} Id.

\textsuperscript{132} Id. at 233-34, 274 Cal. Rptr. at 897.

\textsuperscript{133} CAL. CIV. CODE § 3333 (West 1970).
\end{flushright}
would be a detriment caused by the defendant's misconduct, within the meaning of section 3333. If the plaintiff presents expert testimony which establishes the need for and the amount of future monitoring costs, then the plaintiff would surmount the obstacle caused by Civil Code section 3301, which prohibits an award of speculative or uncertain damages. Indeed, Civil Code section 3283, which the court cited in Potter, expressly authorizes an award of damages which are certain to occur in the future. The minority view seems the better rule. The supreme court should allow plaintiffs such as those in Potter to recover future medical diagnosis expenses, if the plaintiff can prove, with expert testimony, the need for and amount of such expenses.

In Blankenheim v. E.F. Hutton & Co., the Sixth District addressed the issue of whether Civil Code section 1668 voids a hold-harmless agreement, insofar as the agreement exempts a party from liability for negligent misrepresentations. The plaintiffs sued to recover their lost investments from the stock brokerage firm which had sold them the securities which they had bought. The defendant argued that the plaintiffs' claims were barred by an agreement whereby the plaintiffs held the defendant harmless from any loss resulting from the plaintiffs' investments. Section 1668 operates to void any agreement to exempt any party from liability for fraud, any other intentional wrong, or a negligent violation of a statute. However, section 1668 does not apply to a contract which waives a party's liability for ordinary negligence, if no public policy is at issue. In Blankenheim, the plaintiffs' cause of action against the stock brokerage firm was for negligent misrepresentation. Thus, the court had to decide whether the cause of action for negligent misrepresentation was a claim of intentional fraud, which could not be waived under section 1668, or a claim

134. Id. § 3301 (West 1970).
138. Id. at 1466, 266 Cal. Rptr. at 594.
139. Id. at 1469, 266 Cal. Rptr. at 596.
140. See CAL. CIV. CODE § 1668 (West 1985).
141. Blankenheim, 217 Cal. App. 3d at 1471-72, 266 Cal. Rptr. at 598.
of ordinary negligence, which could be waived under the hold-harmless agreement.

After noting a conflict in authorities on this issue,\textsuperscript{142} the court of appeal held in \textit{Blankenheim} that section 1668 nullified any agreement to exempt a party from liability for negligent misrepresentation.\textsuperscript{143} The court explained that a cause of action for negligent misrepresentation is considered a fraud claim, and section 1668 expressly applies to contracts which seek to exact the waiver of a claim for fraud.\textsuperscript{144} The court’s position in the controversy over the applicability of section 1668 seems correct, because a claim of negligent misrepresentation involves more than mere negligence; it is a claim of fraud.\textsuperscript{145}

\textbf{C. The Sixth District’s Application of Statutes of Limitations in Tort Cases Also Achieved Mixed Results}

In 1985-1987, the Sixth District regularly applied statutes of repose to bar the claims of plaintiffs.\textsuperscript{146} In 1988-1990, the court did not always rule for defendants in interpreting and applying statutes of limitations. Instead, the court decided two of those cases in favor of the plaintiff and two in favor of the defendant.

\textbf{1. The Court Enforced a Statute of Limitations to Bar a Claim in Two Cases}

In \textit{Sandy v. Superior Court},\textsuperscript{147} a developer was timely sued for negligently performing renovations at an apartment complex. The developer cross-complained for indemnity against an architect who had performed work on the original construction of the building more than ten years before the lawsuit against the developer was filed. The Sixth District held that Code of Civil

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1472 n.5, 266 Cal. Rptr. at 598 n.5.
\item \textit{Id.} at 1473, 266 Cal. Rptr. at 599.
\item \textit{Id.} at 1472-73, 266 Cal. Rptr. at 598-99.
\item See, \textit{e.g.}, CAL. CIV. CODE §§ 1572 (West 1982).
\item \textit{Emerging Trends}, supra note 1, at 1071-77.
\item 201 Cal. App. 3d 1277, 247 Cal. Rptr. 677 (1988).
\end{enumerate}
\end{footnotesize}
Procedure section 337.15 -- the ten-year statute of limitations for latent construction defects\(^{148}\) -- barred the cross-complaint for indemnity.\(^{149}\) The court distinguished the California Supreme Court's decision in *Valley Circle Estates v. VTN Consolidated, Inc.*,\(^{150}\) which held that a general contractor, who had been timely sued for construction defects, could file a cross-complaint for indemnity against a subcontractor who otherwise was exempt from liability to the plaintiff under section 337.15, by virtue of the passing of ten years from the date on which the subcontractor's work was completed.\(^{151}\) In *Valley Circle*, according to the Sixth District, the general contractor and the subcontractor both participated in the original construction of the building, whereas the contractor in *Sandy* performed his renovations on the building eight to ten years after the architect had completed his services on the original construction. After pointing to this distinction, the court of appeal emphasized that section 337.15(c) allows only a *transactionally related* cross-complaint for indemnity after the ten-year limitations period has expired as to the cross-defendant.\(^{152}\)

In *Sandy*, the court reasoned that all parties involved in the original construction should have been able to rely on the fact that none of them had been sued more than ten years after the project was completed.\(^{153}\) Also, a subsequent improver, who is sued for construction defects, should not be allowed to drag into the case all parties who performed work on the original construction more than ten years before the entire lawsuit began.\(^{154}\) Otherwise, section 337.15 would become a nullity and those involved in the construction industry would face endless liability.\(^{155}\) The court of appeal arrived at its conclusion in the face of the cross-complainant's argument that the cross-complaint for indemnity

\(^{148}\) CAL. CIV. PROC. CODE § 337.15 (West 1982).

\(^{149}\) Sandy, 201 Cal. App. 3d at 1280, 247 Cal. Rptr. at 678-79.

\(^{150}\) 33 Cal. 3d 604, 659 P.2d 1160, 189 Cal. Rptr. 871 (1983).

\(^{151}\) Id. at 606, 659 P.2d at 1161, 189 Cal. Rptr. at 872.

\(^{152}\) Sandy, 201 Cal. App. 3d at 1283-84, 247 Cal. Rptr. at 681.

\(^{153}\) Id. at 1285, 247 Cal. Rptr. at 682.

\(^{154}\) Id.

\(^{155}\) Id. at 1285, 247 Cal. Rptr. at 682.
could not possibly be time-barred because it had not yet accrued; the cross-complainant had not yet sustained a loss by the payment of damages. Deciding a question of first impression, the court stated that its interpretation and application of section 337.15 was essential in order to effectuate the legislative intent underlying the statute, notwithstanding the apparent lack of accrual of the indemnity claim.156

In *Gallo v. Superior Court*,157 the Sixth District held that the legislature’s passage of Code of Civil Procedure section 340.3 which extended the time for filing a personal injury action by the victim of a felony against the perpetrator of the crime to one year after the latter’s conviction158 did not revive the plaintiff’s already time-barred claims for personal injuries, such as causes of action for assault and battery, false imprisonment, intentional infliction of emotional distress, and negligence, among others.159 The court explained that a statute of limitations does not apply retroactively, unless the legislature expressly provides that it does.160

In *Gallo*, the court criticized the court of appeal decision in *Nelson v. Flintkote Co.*161 *Nelson* decided that the legislature’s adoption of Code of Civil Procedure section 340.2 which extended the time for filing a cause of action for personal injuries resulting from exposure to asbestos162 resurrected claims which were stale under the previously applicable statute of limitations.163 The *Nelson* court reasoned that unlawful retroactivity was not actually at issue because the new statute of limitations did not extend the limitations period, but rather postponed the accrual date for the affected cause of action.164 In *Gallo*, the Sixth District scoffed at that rationale, commenting that it involved semantics instead of reason.165

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156. Id. at 1286, 247 Cal. Rptr. at 683.
159. *Gallo*, 200 Cal. App. 3d at 1377, 246 Cal. Rptr. at 588.
160. Id. at 1378, 246 Cal. Rptr. at 588.
162. CAL. CIV. PROC. CODE § 340.2 (West 1982).
164. Id.
In *Gallo*, the Sixth District did not address a second rationale for the decision in *Nelson*. In *Nelson*, the court noted that the law disfavors the retroactive application of a new statute when substantive rights are affected. However, a statute of limitations for a common law tort is a *procedural* rule. Thus, the retroactive application of a new statute of limitations to revive a time-barred common law tort claim is permissible because no substantive rights under a statute are implicated. In *Gallo*, the plaintiff brought only common law causes of action. Under the *Nelson* rationale (which the Sixth District did not address) the new statute of limitations would have been applied retroactively to revive the plaintiff’s time-barred common law claims. Had it considered the point, however, the *Gallo* court likely would have rejected the second rationale in *Nelson*. Consistent with its ruling in *Sandy*, the Sixth District probably would have concluded that the defendant had a right to rely on the expiration of the then-applicable limitations period.

2. The Court Applied Statutes of Limitations in Favor of the Plaintiff in Two Other Cases

In *Delgado v. Estate of Espinoza*, the Sixth District applied the longer of two potentially relevant statutes of limitations, thereby reversing a judgment in favor of the defendant. The plaintiff had sustained personal injuries in a car accident while riding in a car driven by the decedent. The decedent immediately died in the accident. More than one year after the accident occurred, the plaintiff sued the estate of the decedent for personal injuries. She also timely filed a claim with the administrator of the decedent’s estate. The administration denied the claims. Thereafter, she sought to amend her complaint to include an action on a

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166. *Nelson*, 172 Cal. App. 3d at 733, 218 Cal. Rptr. at 565. See also 3 WITKIN, CALIFORNIA PROCEDURE, ACTIONS, § 308 at 337-38 (3d ed, 1985) (stating that statutes of limitations are procedural).
168. *Id.* at 263, 252 Cal. Rptr. at 187.
169. *Id.*
rejected claim. The trial court denied her motion to amend and eventually granted the defendant’s motion for summary judgment on the ground that the plaintiff had failed to bring her action within the one-year limitations period set forth in Code of Civil Procedure section 340(3).

In Delgado, the court of appeal stated that the trial court applied the wrong statute of limitations. The pertinent statute was Code of Civil Procedure section 353, which applies in a case where the defendant has died before the expiration of the otherwise pertinent statute of limitations. Section 353 allows the filing of an action against the administrator of an estate as late as one year after the appointment of the administrator. Under section 353, the plaintiff’s action was timely filed.

In Goebel v. Lauderdale, the court again reversed a trial court’s misapplication of a statute of limitations. The plaintiff, a general contractor, followed the advice of his attorney by collecting $15,000 owed to him from an unfinished project, and then stopping work on the project. Unknown to the attorney, he had advised his client to commit a felony under Penal Code section 44(b), which prohibits the diversion of funds received on a construction project for a use other than to finish a project which has not been completed. The plaintiff was convicted of diversion of funds. He filed his action for legal malpractice within one year of his conviction, but more than one year after (1) he had received the advice from his attorney and (2) he had been arrested. The trial court granted the defendant’s motion for a nonsuit under Code of Civil Procedure section 340.6, the one-year statute of limitations.

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170. *Id.* at 264, 252 Cal. Rptr. at 187.
171. *Id.* at 264, 252 Cal. Rptr. at 188. See CAL. CIV. PROC. CODE § 340(3) (West Supp. 1991) (one-year statute of limitations for personal injury actions).
175. *Id.* at 1505, 263 Cal. Rptr. at 276. See CAL. PENAL CODE § 484(b) (West 1988) (prohibition of diversion of construction funds).
177. *Id.* at 1506, 263 Cal. Rptr. at 276.
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for legal malpractice actions. The court of appeal correctly concluded that the plaintiff's cause of action for legal malpractice did not accrue until the plaintiff had suffered actual harm, which did not occur until the plaintiff was convicted of a crime after following his attorney's advice. Consequently, the court found that the plaintiff had filed his action within one year of the accrual of his action.

IV. INSURANCE LAW CASES

A. The Sixth District Generally Found No Coverage or Minimal Coverage Under an Insurance Policy

1. The Court Denied Coverage in all Three Cases Involving the Application of a Contractual Limitations Provision

In its decisions on insurance coverage, the Sixth District repeatedly ruled in favor of insurance companies. For example, the court had three occasions to apply a limitations provision set forth in an insurance policy. In all three cases, the court ruled that the insured had not timely commenced his or her action against the insurer.

In Jekot v. State Farm Fire and Casualty Co, the homeowner's insurance policy at issue contained the standard one-year limitations period for an action on the policy. The plaintiff noticed cracks in the walls and ceiling of her home in September 1982, noticed more cracks in the summer of 1983, received a letter from a soils engineer in the fall of 1983 indicating that the house had a foundation settlement problem and was told again by three contractors in 1984 that the house had a foundation problem.
In July 1985, she learned that the cause of the foundation problem was negligent construction on the fill and that the house would require major repair work. She filed a claim with her insurer by September 1985, the claim was denied in February 1986 and she filed her action against the insurer in April 1986. The plaintiff contended that the limitations provision did not begin to run until July 1985, when she became aware of the cause of the property damage, in addition to the damage itself. The court of appeal refused her request to apply a delayed discovery rule, holding that she was obligated to file her action within one year of the date on which the property damage was visible. Finding that the limitations period began to run in 1983, when the plaintiff noticed that the cracks had become worse, the court ruled that the action was untimely.

The California Supreme Court granted review in *Jekot*. Thereafter, the supreme court remanded *Jekot* to the Sixth District with instructions to reconsider its decision in view of the supreme court's recent decision in *Prudential-LMI Commercial Insurance v. Superior Court*. In *Prudential-LMI*, the supreme court adopted the following delayed discovery rule in connection with a limitations provision in a homeowner's insurance policy like the one in *Jekot*:

The insured's suit on the policy will be deemed timely if it is filed within one year after "inception of the loss," defined as that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.

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183. *Id.* at 1496, 272 Cal. Rptr. at 465.
184. *Id.* at 1495, 272 Cal. Rptr. at 465.
185. *Id.* at 1497, 272 Cal. Rptr. at 466.
186. *Id.* at 1504, 272 Cal. Rptr. at 471.
187. *Id.*
188. 798 P.2d 1214, 274 Cal. Rptr. 371 (1990)
190. 51 Cal. 3d 674, 798 P.2d 1230, 274 Cal. Rptr. 387 (1990).
191. *Id.* at 686-87, 798 P.2d at 1238, 274 Cal. Rptr. at 395.
Significantly, discovery of the property damage is the hallmark of the Prudential-LMI rule. In Jekot, the plaintiff urged the courts to adopt a delayed discovery rule which would keep the running of the limitations period in abeyance until the insured discovers the cause of the property damage.

If the supreme court believed that the factual situation in Jekot clearly fell outside the Prudential-LMI rule, it simply could have dismissed review in Jekot. Given the remand, the court apparently seeks from the Sixth District an opinion as to whether the Prudential-LMI rule should extend to the delayed discovery of the cause of property damage. There are good reasons to extend the law in that direction. Insurance coverage for property damage often depends upon the cause of the damage; policy exclusions may preclude coverage for damages resulting from certain events, such as floods or earthquakes. If a "loss" accrues in the same manner as a cause of action, a loss should not be deemed to accrue until the insured is aware of all necessary "elements" of the loss, including causation. Accordingly, the Prudential-LMI rule could be adapted in Jekot to say that property damage is not sufficiently known to trigger an insured's duty to present a claim until the insured has ascertained the cause of the damage and thus has acquired sufficient information to determine whether the damage is covered. At the same time, it also seems reasonable to require the presentation of a claim upon the discovery of the damage, even if the cause of the damage is unknown. Upon receiving a claim, an insurer must conduct, at its expense, an investigation to determine whether coverage exists. Thus, the insurer must discover the cause of the damage. It does not seem excessively burdensome to place on the insured a duty to file a claim upon the discovery of the damage when the insured can require the insurer to proceed to discover the cause of the damage.

In Magnolia Square Homeowners Association v. Safeco Insurance Co., the Sixth District again held that a plaintiff's action for insurance coverage was barred by the one-year

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limitations provision in the insurance policy. Magnolia Square was an easy case because the plaintiff plead itself out of court. In July 1985, the plaintiff filed a First Amended Complaint in a separate action for construction defects against certain individuals involved in the construction of the condominium complex at issue. In that pleading, the plaintiff alleged that it was aware of numerous structural defects in the building. In May 1986, the plaintiff’s experts cut into the building walls at the complex and discovered the full extent of the structural inadequacies. The plaintiff presented a claim to its insurer in August 1986. In February 1987, the insurer brought an action for declaratory relief regarding the insurance policy and the plaintiff filed a cross-complaint in April 1987.

On these facts, the court of appeal determined that the plaintiff’s First Amended Complaint in the construction defects action revealed that the plaintiff had actual notice of extensive property damage by July 1985. The plaintiff contended that it did not have notice of the property damage until its experts cut into the walls, but the court dismissed that argument. The court explained that the plaintiff, at a minimum, had a duty of inquiry based upon its awareness of the extent of the property damage in July 1985. Thus, the plaintiff reasonably should have discovered the full extent of the property damage by July 1985. Finally, following established precedent, the court ruled that the plaintiff’s claims for bad faith and breach of fiduciary duty were barred because they were essentially claims on the policy and the plaintiff had failed to commence its action against the insurer within the one-year limitations provision in the policy.
In State Farm Fire & Casualty Co. v. Superior Court, the Sixth District overturned a trial court's interpretation of a limitations provision in an insurance policy. The limitations provision was not restricted to actions on the policy. Instead, it facially applied to all actions which the insured could bring. Finding that the limitations provision violated Insurance Code section 207, the trial court held that the limitations provision was void. The court of appeal upheld the validity of the provision, construing it to apply only to actions on the policy. The court observed that the trial court should have interpreted the limitations provision so as to bring it in line with the applicable statute, rather than nullify the provision. Thus, the court issued a writ of mandate directing the trial court to grant the insurer's summary judgment motion, which had been made on the ground that the insured had not timely filed its action against the insurer.

2. The Court Generally Found No Coverage or Minimal Coverage in its Other Insurance Coverage Cases

In eight published decisions, the Sixth District had occasion to decide a "pure" insurance coverage issue (i.e., a coverage question not involving a dispositive procedural matter, such as the applicability of a limitations provision). The court denied coverage in four cases, found minimal coverage in two cases and decided that coverage may exist in the other two cases.

In AIU Insurance Co. v. Superior Court, the Sixth District held that insurance coverage did not extend to government-compelled response costs to remedy toxic pollution, imposed pursuant to the Comprehensive Environmental Response

203. See CAL. INS. CODE § 2071 (West 1972) (standard firm policy).
204. State Farm, 210 Cal. App. 3d at 607, 258 Cal. Rptr. at 414.
205. Id. at 610, 258 Cal. Rptr. at 416-17.
206. Id.
207. Id. at 613, 258 Cal. Rptr. at 418.
Compensation Liability Act\textsuperscript{209} (CERCLA).\textsuperscript{210} The coverage provisions at issue essentially provided that the insurer would pay the insured all sums which the insured became legally obligated to pay as damages because of property damage. The court of appeal determined that the parties could not reasonably have anticipated that this coverage provision would apply to remedial costs which were mandated by the government’s exercise of its police power under CERCLA.\textsuperscript{211}

In \textit{AIU}, the Sixth District vigorously disagreed with \textit{Aerojet-General Corp. v. Superior Court},\textsuperscript{212} which reached the opposite result on very similar facts on the central issue of whether CERCLA response costs constitute “damages” under the policies. The court had three specific criticisms of \textit{Aerojet}: (1) whereas \textit{Aerojet} ruled that all government-compelled response costs were covered, the Sixth District believed that coverage applied in cases of harm to the government’s proprietary interest in property, but not in cases where the government merely exercised the police power; (2) whereas \textit{Aerojet} concluded that CERCLA response costs could be damages, even though the costs always are ordered by a court exercising \textit{equitable} powers, the Sixth District took issue with \textit{Aerojet}’s explanation that the distinction between law and equity no longer exists; and (3) whereas \textit{Aerojet} determined that CERCLA response costs are damages, rather than “restitution,” the Sixth District expressly rejected the \textit{Aerojet} rationale that such costs do not require the return of wrongfully received property.\textsuperscript{213}

In \textit{AIU}, the California Supreme Court reversed the decision of the Sixth District Court of Appeal.\textsuperscript{214} The court expressly relied upon the standard rules for interpreting insurance policies: terms are construed in their ordinary and popular sense, ambiguities are resolved in favor of coverage and coverage provisions are

\begin{itemize}
  \item \textsuperscript{209} 42 U.S.C. § 9606 \textit{et seq.} (1987).
  \item \textsuperscript{210} \textit{AIU}, 213 Cal. App. 3d at 1234, 262 Cal. Rptr. at 194.
  \item \textsuperscript{211} \textit{Id.} at 1234-35, 262 Cal. Rptr. at 191.
  \item \textsuperscript{212} 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1989).
  \item \textsuperscript{213} \textit{AIU}, 213 Cal. App. 3d at 1232-34, 262 Cal. Rptr. at 191.
\end{itemize}

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interpreted broadly so as to protect the reasonable expectations of the insured.\(^{215}\)

Applying those rules to the coverage provision at issue, the court first determined that the insured became "legally obligated" to pay the CERCLA costs. In doing so, the court, following Aerojet, rejected the insurer's contention that no "legal" obligation to pay the costs arises because a court, sitting in "equity," orders the payment of the costs.\(^{216}\) Relying upon California's abandonment of the distinction between law and equity, the court concluded that the reasonable expectations of the insured is that a legal obligation to pay CERCLA costs results from any order to pay costs by a court of law.\(^{217}\)

Next, the supreme court decided that CERCLA response costs are "damages" within the meaning of the coverage provision.\(^{218}\) The court's holding applied both to court-ordered reimbursement of cleanup costs, which actually were incurred by the government, and costs paid pursuant to an injunction compelling the insured to perform a cleanup on contaminated property, in lieu of a government cleanup.\(^{219}\) Here, the supreme court questioned Aerojet's interpretation that "damages" should include all sums paid by the insured for property damage which he or she has caused.\(^{220}\) The court found that definition too broad and inconsistent with the ordinary and popular sense of the term "damages."\(^{221}\) However, the court also stated that, even if the reimbursement of the government's cleanup expenses constitutes "restitution," such CERCLA costs are nonetheless "damages" in the ordinary sense of that term.\(^{222}\)

Finally, the supreme court determined that the CERCLA costs were paid as a result of "property damage" because toxic contamination of the environment necessarily involved damage to

\(^{215}\) Id. at 822, 799 P.2d at 1264, 274 Cal. Rptr. at 631.
\(^{216}\) Id. at 824-25, 799 P.2d at 1266, 274 Cal. Rptr. at 833.
\(^{217}\) Id.
\(^{218}\) Id. at 837, 799 P.2d. at 841-42, Cal.'Rptr. at 844.
\(^{219}\) Id.
\(^{220}\) Id. at 827-28,799 P.2d at 1267-68, 274 Cal. Rptr. at 835.
\(^{221}\) Id.
\(^{222}\) Id. at 835-36, 799 P.2d at 1279, 274 Cal. Rptr. at 842.
property. In this regard, the supreme court expressly rejected the Sixth District's conclusion that coverage exists to remedy the government's proprietary interests, but not to comply with the government's regulatory requirements. In either case, remedial costs are paid by the insured because of "property damage." In either case, remedial costs are paid by the insured because of "property damage."223 The supreme court decided that the insurance policies provided coverage for CERCLA response costs, whether the cleanup occurred at the insured's property, on government property, or on private property owned by a third party.224

In sum, the supreme court, in AIU, rejected the Sixth District's analysis and essentially followed Aerojet.

In Fire Insurance Exchange v. Abbott,225 the Sixth District decided the issue of the existence of insurance coverage for an insured's liability for sexual molestation of a child. In two consolidated cases, the insureds had sexually assaulted children and plead, in the underlying criminal cases, no contest in one case and guilty in the other case to felony charges. When the victims sued the insureds, they each claimed insurance coverage under a homeowner's policy.226 The policies incorporated Insurance Code section 533, which provides that an insurer does not have to pay for a loss resulting from the insured's "willful" act.227 The insurers requested declaratory relief on the issue of coverage.228

In Abbott, the Sixth District denied coverage, holding that the insureds' intent to injure must be inferred, as a matter of law, from their felonious sexual assaults on the children.229 In reaching that result, the court dismissed the testimony of the insureds' expert psychiatrists, who stated that the insureds did not intend to harm their victims. The court found that the expert testimony was irrelevant because it related only to the insureds' subjective intent.

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223. Id. at 842-43, 799 P.2d at 1279, 274 Cal. Rptr. at 846.
224. Id. at 843, 799 P.2d at 1279, 274 Cal. Rptr. at 846.
226. Id. at 1015, 1017-18, 251 Cal. Rptr. at 621, 623.
227. Id. at 1015, 1018, 251 Cal. Rptr. at 621, 623. See CAL. INS. CODE § 533 (West 1972) (coverage does not exist for willful acts).
228. Abbott, 204 Cal. App. 3d at 1014, 251 Cal. Rptr. at 621.
229. Abbott, 204 Cal. App. 3d at 1023-24, 251 Cal. Rptr. at 630.
to injure their victims; the psychiatric evidence did not tend to prove whether the insureds intended to perform the acts which constituted criminal child molestation.  

It was the mere performance of those acts which established the inference that the insureds did intend to harm their victims.

On the question of the insureds' "subjective intent," the court's opinion in Abbott contained an inconsistency. The court first stated:

> We assume that the policies' definition of accident as "a sudden event . . . resulting in bodily injury . . . neither expected or intended by the insured" excludes from insurance coverage only conduct by the insured which was subjectively intended to harm or injure.

In rejecting the insured's psychiatric evidence as irrelevant, the court later commented that the evidence was irrelevant because it related only to the insured's subjective intent to harm their victims. The court's reason for rejecting the psychiatric evidence was at odds with its earlier assumption.

In a recent decision, the supreme court eliminated any ambiguity resulting from the Sixth District's opinion in Abbott. In J.C. Penney Casualty Insurance Co. v. M.K., which presented facts virtually identical to the facts in Abbott, the supreme court held that Insurance Code section 533 precluded coverage for an insured's liability for damages resulting from the sexual molestation of a child. The supreme court explained:

> Because the wrongful act of child molestation is itself the harm, section 533 does not require a showing of the insured's subjective intent to harm . . . . Section 533 precludes coverage in this case because child molestation is

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230. Id. at 1028-29, 251 Cal. Rptr. at 630-31.
231. Id.
232. Id. at 1021, 251 Cal. Rptr. at 625.
233. Id. at 1029, 251 Cal. Rptr. at 630.
234. 52 Cal. 3d 1009, 804 P.2d 689, 278 Cal. Rptr. 64 (1991).
235. Id. at 1021, 804 P.2d at 695, 278 Cal. Rptr. at 70.
always intentional, it is always wrongful, and it is always harmful.²³⁶

The court scorned the insured's expert psychiatric testimony, which suggested that the insured's sexual assault of a child in that case was intended as affection rather than harm. Relying upon Abbott, the supreme court emphasized that such testimony was irrelevant because the subjective intent of a child molester is immaterial to the issue of insurance coverage.²³⁷ In view of the supreme court's decision in J.C. Penney, the assumption expressed by the Sixth District in Abbott should be ignored.

In Equitable Life Assurance Society v. Berry,²³⁸ the Sixth District ruled that the insured's disability from and medical treatment for his manic-depressive illness were not covered by his disability and medical insurance policies, except for medical benefits of $500 per year.²³⁹ The disability policy at issue contained an exclusion for mental or nervous disorders. The medical plan contained a benefits limitation for "mental and/or nervous treatment." The insured proved that manic-depressive illness had an organic cause. Nonetheless, in his last published opinion in a civil case, Justice Brauer reasoned:

The language of either policy is simply not susceptible of the construction that only functionally but not organically caused mental illnesses are excluded. Manifestation, not cause, is the yardstick.²⁴⁰

Justice Brauer acknowledged that an Arkansas appellate court had reached the opposite conclusion in an identical case.²⁴¹ However, he believed that, regardless of the medical profession's

²³⁶. Id. at 1025, 804 P.2d. at 689, 278 Cal. Rptr. at 73.
²³⁷. Id. at 1026-27, 804 P.2d at 699, 278 Cal. Rptr. at 74.
²³⁹. Id. at 840-41, 260 Cal. Rptr. at 824-25.
²⁴⁰. Id. at 849, 260 Cal. Rptr. at 824.
²⁴¹. Id. at 840-41 n.2, 260 Cal. Rptr. at 824 n.2. See Arkansas Blue Cross & Blue Shield, Inc. v. Doe, 22 Ark. App. 89, 733 S.W.2d 429, 432 (1987) (holding that sufficient evidence supported the trial court's decision to classify manic-depressive illness by cause rather than symptom).
categorization of the illness, a lay person would classify an illness as physical or mental based upon the symptoms rather than the cause.\(^{242}\)

The federal courts likewise are divided on the issue decided in *Berry*. The Ninth Circuit has concluded that the treatment of autism was not subject to a medical policy's limitation on benefits for treatment of "mental illness or nervous disorders."\(^{243}\) The court found that the term "mental illness" was ambiguous and concluded that the ambiguity had to be resolved in favor of the insured to allow for full coverage.\(^{244}\) By contrast, the Eighth Circuit has decided that affective mood disorder was subject to policy limitations for the treatment of mental illnesses.\(^{245}\) The court agreed with Justice Brauer's rationale: Although medical experts may judge an illness by its cause, lay persons understand an illness in terms of its symptoms.\(^{246}\)

The rationale of the Eighth Circuit and the Sixth District in *Berry* -- that lay persons would classify affective mood disorder or manic-depressive illness as a mental illness -- seems questionable. The reasoning has superficial appeal in that a current Gallup Poll might reveal that a majority of lay persons believe that those illnesses are mental diseases. The results of such a poll could very well change, however, if the public were informed that the medical profession (1) had determined that those illnesses have physical causes; and (2) had classified those illnesses as organic, rather than mental. Although Justice Brauer and the Eighth Circuit correctly stated that medical experts should not resolve insurance coverage questions, public perception can change, depending upon the information to which the public has access.

The Ninth Circuit rule seems better reasoned. If the insurance policy does not define the term "mental illness" and conflicting evidence exists regarding the classification of the illness, a court

\(^{242}\) *Berry*, 212 Cal. App. 3d at 840-41 n.2, 260 Cal. Rptr. at 824 n.2.


\(^{244}\) Id. at 541.


\(^{246}\) Id.
should find that the insurance policy is ambiguous concerning coverage of the illness at issue. Then, applying a standard rule of construction, the court should resolve the ambiguity in favor of coverage. Had the Ninth Circuit rule been applied in *Equitable Life*, the court would have found coverage under the disability policy because that policy apparently did not define the term "mental or nervous disorders." On the other hand, the benefits limitation in the medical policy would have applied. That restriction extended to "mental and/or nervous treatment," defined as "treatment for a neurosis, psychoneurosis, psychopathy, psychosis, or mental or nervous disease or disorder of any kind." Manic-depressive illness certainly would come within that broad definition.

In *United Services Automobile Association v. Baggett*, the Sixth District construed a car insurance policy to favor the insurer in a wrongful death action. The policy provided maximum coverage for bodily injury of $100,000 per person and $300,000 per accident. The insured's car struck the decedent's car on a freeway. The two drivers parked their cars and discussed the accident outside their cars. Within sixty seconds, a third vehicle struck the insured's car, thereby driving it into the decedent and killing her. The decedent's heirs claimed that the insured was negligent in three respects: (1) driving his car; (2) stopping his car without flashing a warning signal; and (3) guiding the decedent to a perilous position. The heirs and the insured claimed that there were two accidents, not one, and thus, the insurer's maximum liability should be *two times* the maximum amount of coverage in the policy. The court of appeal ruled that two consecutive collisions were intended to be treated as one accident under the policy. The court expressly relied upon the causation test set forth in *State Farm Fire & Casualty Co. v. Kohl*. Under that test:

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248. Id. at 1390, 258 Cal. Rptr. at 54.
249. Id. at 1391, 258 Cal. Rptr. at 55.
250. Id. at 1396, 258 Cal. Rptr. at 58.
[A] single * uninterrupted course of conduct * which gives rise to a number of injuries or incidents of property damage is one "accident" or "occurrence." On the other hand, if the original cause is interrupted or replaced by another cause, then there is more than one "accident" or "occurrence."^252

However, the Sixth District misinterpreted the teachings of *Kohl*. In *Kohl*, coverage under both a homeowner's policy and an auto policy of the insured were at issue. The insured's truck struck a woman, who was riding a motorcycle, and caused her to hit the pavement and sustain severe injuries. Immediately after the accident, the insured got out of his truck and negligently dragged the motorcyclist from the street, thereby causing her to suffer additional serious injuries. The insurer apparently conceded coverage, under the auto policy, for the injuries which the motorcyclist suffered in the traffic accident. The court of appeal held that coverage existed under the insured's homeowner's policy for the injuries stemming from the insured's negligent dragging of the victim.^253

In *Kohl*, the court explained that the insured's dragging of the motorcyclist was an independent negligent act, which was unrelated to the insured's negligent driving of his truck, even though the insured's use of the truck put the victim in a place which resulted in additional injuries to her.^254 Thus, on facts remarkably similar to the facts in *Baggett*, the *Kohl* court applied the causation test so as to find additional coverage, albeit under a separate insurance policy, for the loss which the insured may incur from his second act of negligence immediately following the traffic accident.

In *Kohl*, the court stated in dictum that the auto policy also would cover the insured's loss resulting from the insured's negligent dragging of the motorcyclist because that second act of

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^254. *Id.*
negligence was a foreseeable consequence of his use and operation of the insured vehicle.\textsuperscript{255} In Baggett, the Sixth District claimed that the Kohl dictum supported its conclusion because, according to the Sixth District’s interpretation of Kohl, all of the motorcyclist’s personal injuries purportedly were deemed to be “caused” by the insured’s negligent driving, for the purposes of the insurance coverage issue.\textsuperscript{256} However, the dictum in Kohl has the exact opposite meaning. To say that the negligent dragging was covered by the auto insurance policy is not to say that the insured’s two acts of negligence produced a single cause of the motorcyclist’s injuries. On the issue of the existence of coverage, the Kohl dictum means only that both the insured’s negligent driving and his negligent conduct immediately following the traffic accident were covered under the auto policy. As the Sixth District decided, the same conclusion applies in Baggett. On the separate issue of causation, however, the Kohl court held that the insured’s post-accident conduct involved “an independent negligent act” which was subject to coverage under the homeowner’s policy.\textsuperscript{257} The court necessarily found that the negligent dragging constituted a separate accident, or else there could not have been coverage under that policy. No accident means no coverage. Applying this analysis to Baggett, the Sixth District should have decided, as the court did in Kohl, that the insured’s post-accident conduct involved an independent negligent act which caused a separate accident. The result should have been separate coverage for the separate accident under the insurance policy.

In Lumbermens Mutual Casualty Co. v. Vaughn,\textsuperscript{258} the Sixth District denied coverage under a homeowner’s policy for an accident which resulted in the death of the insured’s wife. The policy contained an exclusion for bodily injury of any relative of the insured. The insured’s spouse was killed while operating a tractor on the insured’s property. The court of appeal correctly

\textsuperscript{255} Id. at 1035, 182 Cal. Rptr. at 721.
\textsuperscript{256} Baggett, 209 Cal. App. 3d at 1394-95, 258 Cal. Rptr. at 57-58.
\textsuperscript{257} Kohl, 131 Cal. App. 3d at 1039, 182 Cal. Rptr. at 724.
\textsuperscript{258} 199 Cal. App. 3d 171, 244 Cal. Rptr. 567 (1988).
concluded that the plain and unambiguous exclusion precluded coverage.

The court reached a similar result in *Mid-Century Insurance Co. v. Haynes.* The auto policy at issue provided coverage for the insured and her family members in the amount of $100,000 for injuries to a single person and $300,000 for injuries to more than one person in a single accident. The policy limited coverage for non-family members, who used the insured vehicle with the permission of the insurer, to the limits of the Financial Responsibility Law. That law requires a car insurance policy to provide coverage in the minimum amounts of $15,000 for injuries to a single person and $30,000 for injuries to more than one person in one accident. When an unrelated user of the insured’s car caused an accident while driving her car, the insured claimed that the $100,000/$300,000 policy limits should apply. The court of appeal rejected that argument, holding that the policy plainly and unambiguously restricted coverage in this situation to the $15,000/$30,000 limits in the Financial Responsibility Law.

In two insurance coverage cases, the Sixth District ruled for the insured, although one of those decisions was not based upon an analysis of insurance law.

In *State Farm Fire & Casualty Co. v. Eddy,* the Sixth District held that a homeowner’s policy could provide coverage for the insured’s unintentional transmission of herpes to another party through an act of consensual sexual intercourse. The policy covered any personal liability of the insured for damages resulting from bodily injury, which was defined as “harm, sickness or disease.”

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259. *Id.* at 181, 244 Cal. Rptr. at 574.
261. *Id.* at 739, 267 Cal. Rptr. at 249. See CAL. VEH. CODE §§ 16000 et seq. (West 1971) (Financial Responsibility Law).
263. *Mid-Century,* 218 Cal. App. 3d at 742, 267 Cal. Rptr. at 251.
265. *Id.* at 972, 267 Cal. Rptr. at 386.
266. *Id.* at 964, 267 Cal. Rptr. at 381.
party to contract herpes. The insured claimed that he was unaware that he had herpes at the time of the sexual act in question; in fact, a medical test taken nine months before the sexual act at issue indicated that he did not have herpes. In the insurer's declaratory relief action, the trial court granted summary judgment for the insured. The court of appeal reversed, finding that coverage may exist, if the insured had no intent to harm, even though the loss was caused by his intentional act. Distinguishing cases involving criminal sexual misconduct (where the intent to injure may be inferred from an unlawful sexual act) the court followed two out-of-state cases which had arrived at the same conclusion.

The Sixth District reversed another summary judgment in favor of an insurer in Grain Dealers Mutual Insurance Co. v. Marino. The insured had a homeowner's policy which covered liability for bodily injury, but excluded personal injuries which the insured intentionally caused. The insured shot two persons, one of whom died. The surviving victim, who was the father of the decedent, sued the insured for personal injuries and the wrongful death of his son. When the insured claimed coverage, the insurer brought an action for declaratory relief. After the insured was convicted of second degree murder in federal court, the insurer brought a summary judgment motion in the coverage action, based upon the doctrine of collateral estoppel. The trial court granted the motion, finding that the insured's conduct was willful.
and intentional. After the trial court’s ruling in the coverage action, the Ninth Circuit granted the insured’s habeas corpus petition in the criminal case.

In Marino, the Sixth District concluded that the Ninth Circuit’s intervening decision rendered summary judgment inappropriate in the coverage action. The court observed that the trial court necessarily relied upon the doctrine of collateral estoppel; the lower court could not have resolved the factual issue of the insured’s intent in a summary judgment proceeding, particularly where there was evidence that the insured may have acted in self-defense. The court of appeal further reasoned that the judgment in the criminal action was extinguished by the Ninth Circuit’s decision and thus, the predicate for the application of collateral estoppel vanished. Absent the doctrine of collateral estoppel, summary judgment was improper because there remained triable issues of fact regarding the intent of the insured. Accordingly, the Sixth District’s decision rested upon its application of the doctrine of collateral estoppel, rather than on principles of insurance law.

B. The Sixth District Tended to Favor Insurers in Bad Faith Cases

Apart from coverage issues, the Sixth District issued three decisions in cases involving claims of bad faith on the part of an insurer. The insurers prevailed in two of those cases. The insured won the other case which, because it was decided under Nevada law, will not be discussed in this Article.

In Gagnon v. Continental Casualty Co., the insurer terminated the benefits of the insured under a disability insurance policy. The insured brought an action against the insurer for, among other things, breach of fiduciary duty, issuing a deceptive

278. Id. at 1087, 246 Cal. Rptr. at 412.
279. Marvin v. Vasquez, 812 F.2d 499, 507 (9th Cir. 1987).
280. Marino, 200 Cal. App. 3d at 1089, 246 Cal. Rptr. at 413.
281. Id. at 1088, 246 Cal. Rptr. at 412.
282. Id. at 1088-89, 246 Cal. Rptr. at 413.
283. Id.
brochure and bad faith settlement practices. The insured died before trial. The jury awarded the wife of the insured $70,000 in emotional distress damages and $2,500,000 in punitive damages.

In *Gagnon*, the court of appeal reversed the award of punitive damages, concluding that the trial judge had erred by failing to instruct the jury that the amount of punitive damages must bear a reasonable relation to the harm suffered by the plaintiff. The trial judge had declined to use or adapt BAJI No. 14.71, which states that "punitive damages must bear a reasonable relation to the actual damages," because punitive damages could be awarded to the insured's wife only in her representative capacity and she was not entitled to any actual damages in that capacity. The Sixth District reasoned that, although the amount of compensatory damages is a useful tool in fixing an award of punitive damages, it is "the nature and degree of the actual harm suffered by the plaintiff" to which the award of punitive damages must bear a reasonable relation. Therefore, even though the decedent was entitled to no actual damages, the trial judge should have adapted BAJI No. 14.71 to read that the punitive damages must bear a reasonable relation to the magnitude of the actual injury sustained by the plaintiff. Although the court's decision deprived a sympathetic plaintiff of her large award of punitive damages, the result and rationale seem correct.

In *Industrial Indemnity Co. v. Superior Court*, the action arose out of a mud slide which damaged the plaintiffs' property. Eventually, the injured plaintiffs, rather than the insured, sued the insurer for unfair competition under Business and Professions Code section 17203, and for unfair business practices under Insurance Code section 790.03(h). The Sixth District issued two significant rulings. First, the court held that a plaintiff may not

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286. *Id.* at 1605, 260 Cal. Rptr. at 309.
287. BAJI 14.71.
289. *Id.* at 1603-04, 260 Cal. Rptr. at 307-08.
290. *Id.* at 1605, 260 Cal. Rptr. at 309.
293. See CAL. INS. CODE § 790.03(h) (West Supp. 1991) (unfair business practices).
recover damages in an action for unfair competition under section 17203. That ruling was consistent with a multitude of federal cases and one California case which had considered the issue. Second, the Sixth District concluded that the supreme court’s decision in Moradi-Shalal v. Fireman’s Fund Insurance Companies296 abolished a private action for any party under Insurance Code section 790.03(h).297 As the Moradi-Shalal holding necessarily was limited to third-party actions against insurers, the plaintiffs in Industrial Indemnity claimed that they should be treated as first parties because they were intended beneficiaries under the insurance policy.298 The court of appeal disagreed, deciding that neither first party nor third-party actions under section 790.03(h) survived Moradi-Shalal. Another court has followed the Sixth District’s second ruling in Industrial Indemnity.299

V. EMPLOYMENT LAW CASES

In contrast to 1985-1987, when employers prevailed in all of the court’s reported employment law cases, the Sixth District occasionally ruled for the employee in such cases in 1988-1990. The court’s seven wrongful termination cases involving a private employer showed a nearly even split. As in tort cases, the court ruled in favor of the government in both of the two minor public

employee cases. Finally, the court favored employers over unions in three labor cases.

A. The Sixth District's Decisions in Private Employer Cases Were Evenly Split

1. Rulings for Employers

In *Andersen v. Pacific Bell*, the court affirmed a summary judgment in favor of the employer against twenty-three plaintiffs. The plaintiffs claimed that they had experienced emotional distress when their employer forced them, through disciplinary threats, to engage in marketing practices which subsequently were found to be illegal. None of the plaintiffs was a "whistleblower" and only one of them actually had been disciplined, a one-day suspension which the employer later revoked. None of the plaintiffs resigned. Rather than state a cause of action for infliction of emotional distress, the plaintiffs pleaded a cause of action for constructive wrongful termination in violation of public policy. Finding that the plaintiffs actually sought to recover for retaliatory discipline, the court of appeal determined that the plaintiffs were not entitled to damages. None of them, except one, suffered any discipline or discharge. As for the one employee who had been suspended, the court determined that the employer's revocation of her suspension rendered her bereft of economic damage and thus, she had no viable claim for damages. In this regard, the court's rationale was that the disciplined employee could not recover the only damages which she claimed -- damages for emotional distress --

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301. Id. at 281, 251 Cal. Rptr. at 68.
302. Id. at 282-83, 251 Cal. Rptr. at 69.
303. Id.
304. Id. at 283, 251 Cal. Rptr. at 69.
305. Id. at 283-84, 251 Cal. Rptr. at 69.
306. Id.
307. Id. at 284-85, 251 Cal. Rptr. at 70.
because she lacked the requisite "substantial damages apart from emotional distress." 308

In Andersen, the Sixth District's employment law analysis seems correct. If one plaintiff's discipline had been rescinded and all other plaintiffs had never been disciplined, then no plaintiff had a meritorious action for retaliatory discipline. However, another court has criticized the Sixth District's tort analysis in Andersen. In Pintor v. Ong, 309 the First District Court of Appeal questioned the Sixth District's explanation that "substantial damages apart from emotional distress" were a prerequisite for the recovery of damages for emotional distress. 310 In advancing its critique, the Pintor court pointed to the rulings in the California Supreme Court's two decisions in Molien v. Kaiser Foundation Hospitals 311 and Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc. 312 In Marlene F., the supreme court, citing Molien, prescribed the following rule:

Damages for severe emotional distress . . . are recoverable in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two. 313

The Marlene F. rule supports the First District's observation in Pintor that damages are recoverable when the only harm is serious emotional distress. 314

Even more to the point, in Thing v. La Chusa, 315 the California Supreme Court, amidst its lengthy analysis of the right to recover for negligent infliction of emotional distress, stated:

308. Id.
310. Id. at 845, 259 Cal. Rptr. at 581.
311. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
312. 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989).
313. Id. at 590, 770 P.2d at 282, 257 Cal. Rptr. at 102.
314. Pintor, 211 Cal. App. 3d at 845, 259 Cal. Rptr. at 581.
Our own prior decisions identify factors that will appropriately circumscribe the right to damages, but do not deny recovery to plaintiffs whose emotional injury is real even if not accompanied by out-of-pocket expense.\textsuperscript{316}

Although Andersen was decided prior to Marlene F. and Thing, the supreme court observed that its past decisions established the two above-quoted rules. Applying those rules to Andersen, all twenty-three plaintiffs could have plead and perhaps proven claims for negligent infliction of emotional distress. However, none of them elected to make that attempt. The result in Andersen appears correct, in view of the fact that the plaintiffs essentially brought claims for retaliatory discipline, but were unable to prove any discipline which a court could remedy.

In Slivinsky v. Watkins-Johnson Co.,\textsuperscript{317} the Sixth District again affirmed a summary judgment in favor of the employer. An employment contract provided that there was no agreement for employment for any specific period of time and that the employment contract could be terminated with or without cause. After the plaintiff was discharged, she brought an action against her former employer for wrongful termination and breach of the implied covenant of good faith and fair dealing. Following its earlier decision in Gerdlund v. Electronic Dispensers International,\textsuperscript{318} the court of appeal concluded that the employment contract was integrated regarding the grounds for termination and plainly provided that the employer could discharge the plaintiff with or without cause.\textsuperscript{319} The court's interpretation of the employment contract effectively disposed of both the termination without good cause claim and the breach of the implied covenant claim.\textsuperscript{320}

\textsuperscript{316} Id. at 663, 771 P.2d at 826, 257 Cal. Rptr. at 877.
\textsuperscript{318} 190 Cal. App. 3d 263, 270-72, 235 Cal. Rptr. 279, 282-83 (1987).
\textsuperscript{319} Slivinsky, 221 Cal. App. 3d at 804-05, 270 Cal. Rptr. at 587-88.
\textsuperscript{320} Id. at 806, 270 Cal. Rptr. at 588-89.
In *Panopulos v. Westinghouse Electric Corp.*, the court decided a question of first impression: Whether a cause of action for constructive discharge based upon a breach of contract theory, survived the supreme court's decision in *Foley v. Interactive Data Corp.* The Sixth District held that a *contractual* claim of constructive wrongful discharge is alive and well. However, the court decided that the plaintiff did not present sufficient proof to defeat the employer's summary judgment motion on that claim, finding that the plaintiff admitted that he had endured allegedly intolerable working conditions, following a job transfer imposed by the employer, for five years before he retired and brought his action. In reaching that result, the Sixth District declined to adopt the strict rule of one federal court. In *Wagner v. Sanders Associates, Inc.*, a district court announced that an employee, who does not immediately resign upon the commencement of the purportedly intolerable working conditions, is barred from bringing a constructive discharge action. The Sixth District rejected that standard and embraced the test whereby each constructive discharge case is decided on its facts. Under that test, the length of time that the employee remains on the job, in spite of allegedly intolerable working conditions, is just one of many factors to consider. Applying that test, the court properly ruled that five years was simply too long; the employee's tolerance of the working conditions for five years established the inference that the conditions were not intolerable.

Another employment law case involved a doctor's discipline by a hospital. In *Rhee v. El Camino Hospital District*, a surgeon was placed on probation, following an initial investigation and administrative hearing by the hospital. Contrary to the

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324. Id. at 670-71, 264 Cal. Rptr. at 816-17.
326. Id. at 745.
329. Id. at 483-86 Cal. Rptr. at 246-48.
hospital's bylaws, the surgeon never received a copy of the final
decision which resulted from the first proceeding. After a second
investigation and hearing two years later, the hospital restricted the
doctor's surgical privileges to only two types of surgeries. The
doctor filed an administrative mandamus action and the trial court
granted a writ.\footnote{330}

In \textit{Rhee}, the Sixth District reversed. The court rejected the
doctor's argument that the hospital had denied him fair procedure
by permitting several doctors to have overlapping functions in the
investigation and adjudicatory proceedings.\footnote{331} That determination
certainly was correct; none of the seven doctors, whom the plaintiff
challenged, were involved in more than one stage in the second
round of proceedings. Thus, there was no danger of bias to the
plaintiff as a result of a decision-maker reviewing charges or an
investigative report which he or she had drafted.\footnote{332} The court
likewise dismissed the plaintiff's contention that he had not
received notice of the "charge" that his caseload was insufficient
to enable him to improve his surgical skills.\footnote{333} Here, the court
determined that the hospital's finding of inadequate caseload
actually was extraneous to the central issue of the level of the
plaintiff's performance in surgery.\footnote{334} Thus, according to the
court, no unfairness resulted from the hospital's failure to notify the
plaintiff that the hospital would consider the issue of inadequate
caseload.\footnote{335}

The court of appeal further concluded in \textit{Rhee} that the
hospital's violation of its bylaws, by not providing the plaintiff
with a copy of the written decision after the first proceeding, did
not constitute a denial of fair procedure.\footnote{336} In this regard, the
plaintiff contended that he was prejudiced because the first decision
emphasized that he did not have a sufficient surgery caseload and

\footnote{330. Id. at 486-88 Cal. Rptr. at 248-49.}
\footnote{331. Id. at 494, 247 Cal. Rptr. at 253.}
\footnote{332. Id. at 490-94, 247 Cal. Rptr. at 251-53.}
\footnote{333. Id. at 495-97, 247 Cal. Rptr. at 254-55.}
\footnote{334. Id. at 496, 247 Cal. Rptr. at 255.}
\footnote{335. Id. at 495-97, 247 Cal. Rptr. at 254-55.}
\footnote{336. Id. at 497-99, 247 Cal. Rptr. at 256-57.}
thus, he would have been alerted to the significance of that issue
in the eyes of the hospital.\textsuperscript{337} The court rejected that point as
well, noting that one of the charges and some of the evidence in
the first proceeding concerned the plaintiff’s inadequate
caseload.\textsuperscript{338} It seems that the court missed the plaintiff’s point
that his receipt of the first decision would have allowed him to
conduct his affairs differently both prior to and during the second
proceeding. If he had known that the first decision emphasized his
insufficient caseload, perhaps he would have taken drastic
corrective action and avoided the second proceeding.

There is a conflict in the decisions of the courts of appeal over
whether “fair procedure” mandates that a private hospital observe
its bylaws at all stages in disciplinary proceedings against the
doctor. In some cases, like \textit{Rhee} and the case upon which \textit{Rhee}
relied, the courts have determined that fair procedure does not
require a private hospital to adhere to its bylaws, so long as the
hospital provides the doctor with a fair hearing at some stage in the
proceedings.\textsuperscript{339} Other courts have held that a private hospital
must follow all procedural requirements of its bylaws before it may
deprive a doctor of staff privileges at the hospital.\textsuperscript{340} The holding
in the latter cases finds support in public agency cases, which
conclude that a discharge of a public employee is void if the public
agency has failed to observe the procedures specified in the
governing statute or ordinance.\textsuperscript{341}

Ultimately, the California Supreme Court will need to resolve
this conflict. The supreme court should bring the hospital cases in
line with the public agency cases. As the supreme court has stated,
a private hospital must render decisions regarding hospital
privileges of physicians in conformity with the minimal requisites

\textsuperscript{337} \textit{Id.} at 498, 247 Cal. Rptr. at 256.
\textsuperscript{338} \textit{Id.} at 497-99, 247 Cal. Rptr. at 256-57.
\textsuperscript{339} \textit{Id.} at 497; Tiholiz v. Northridge Hosp. Found., 151 Cal. App. 3d 1197, 1203, 199 Cal.
\textsuperscript{340} \textit{See, e.g.}, Hackethal v. Loma Linda Community Hosp. Corp., 91 Cal. App. 3d 59, 67, 153
Cal. Rptr. 783, 788 (1979); Ascherman v. San Francisco Medical Soc’y, 39 Cal. App. 3d 623, 650,
\textsuperscript{341} \textit{See, e.g.}, Layton v. Merit System Comm’n, 60 Cal. App. 3d 58, 63, 131 Cal. Rptr. 318,
of "fair procedure." The courts repeatedly state that the fair procedure doctrine affords an individual the same level of protection furnished by the state due process clause. Given that due process is the standard in a public employee discipline case, the supreme court should rule that a court, in deciding a doctor discipline case, must apply the due process rules set forth in the public employee cases.

2. Rulings for Employees

In three private employer cases, the Sixth District ruled in favor of the employee. In two of those cases, the court applied the parol evidence rule so as to find that an employment agreement could be terminated only for good cause.

In McLain v. Great American Insurance, the court affirmed a judgment for the employee in a wrongful termination action. The court first determined that the written employment agreement at issue was not integrated because it: (1) was a standardized form; (2) did not exhaustively cover the terms of employment; and (3) stated that the terms of employment could be altered with or without cause and with or without notice. In this regard, the court distinguished its decision in Gerdlund, where the employment agreement contained an integration clause, was drafted with the employee's participation, thoroughly covered the terms of employment, and contained a termination provision which provided that the employer could discharge the employee "for any cause." In McLain, extrinsic evidence was admissible to

345. Id. at 1485, 256 Cal. Rptr. at 868.
347. McLain, 208 Cal. App. 3d at 1484-85, 256 Cal. Rptr. at 867-68.
ascertain the nature of the parties' agreement regarding the need for cause to terminate.\textsuperscript{348} The court concluded that substantial evidence supported the findings below that there was an implied agreement that the employee could be terminated only for good cause and that the employer violated the implied agreement.\textsuperscript{349}

In \textit{Wallis v. Farmers Group, Inc.},\textsuperscript{350} the court applied the parol evidence rule in an action for wrongful termination of an insurance agency contract. The written agreement exhaustively treated the topic of termination and provided a termination review procedure. For this reason, the court found that the agreement was integrated as to the subject of termination.\textsuperscript{351} However, the court concluded that parol evidence was admissible because the integrated termination provisions were silent regarding whether or not good cause was a prerequisite for termination.\textsuperscript{352} Based upon the testimony of the defendant's officers, who apparently believed that the agency agreement could be terminated only for good cause, the court of appeal found that the parties had an implied-in-fact agreement that the agency relationship would not be terminated except for good cause.\textsuperscript{353} Ultimately, the court decided that substantial evidence supported the jury's finding that the defendant did not have good cause in terminating the agency.\textsuperscript{354} Therefore, the court affirmed the judgment in favor of the plaintiff under her breach of contract claims.\textsuperscript{355}

In \textit{Kerr v. Rose},\textsuperscript{356} the Sixth District reversed a summary judgment in favor of the employer in a wrongful termination action. The employer had a policy of recalling a laid off employee for an open position at the same level as the position which he or she formerly held, provided that the former employee was qualified for the open position, before hiring better qualified persons for the

\begin{footnotes}
\textsuperscript{348} Id. at 1485, 256 Cal. Rptr. at 868.
\textsuperscript{349} Id. at 1487, 256 Cal. Rptr. at 870.
\textsuperscript{351} Id. at 730, 269 Cal. Rptr. at 305-06.
\textsuperscript{352} Id. at 730-31, 269 Cal. Rptr. at 306.
\textsuperscript{353} Id. at 733, 269 Cal. Rptr. at 307.
\textsuperscript{354} Id. at 733-34, 269 Cal. Rptr. at 307-08.
\textsuperscript{355} Id. at 725-26, 259 Cal. Rptr. at 302-03.
\end{footnotes}
The plaintiff sued his former employer because he was never reinstated following a layoff. The court of appeal ruled that the employer was obligated to prove that no positions at the employee's former level had opened following his layoff or, if any such positions had opened, the plaintiff was not qualified for those positions. The employer did not make either showing and thus, was not entitled to summary judgment.

B. The Sixth District Ruled for the Government in Two Public Employer Cases

The Sixth District decided two public employer cases which were not as significant as the court's private employer decisions. In both of these cases, the court approved the termination of a probationary teacher. In *Royster v. Cushman*, the court held that the teacher had no right to reemployment as a probationary teacher because she was not qualified to serve as a bilingual teacher since she had not made progress toward receiving a bilingual credential, as required by law. The court's decision was proper in view of the mandate of the statutes which it applied. In *Fleice v. Chualar Union Elementary School District*, the court ruled that a probationary teacher, whom the school district had mistakenly and invalidly classified as a tenured teacher, was not entitled to keep her tenured position. Again, the court properly applied the governing statutes.

357. *Id.* at 1560, 265 Cal. Rptr. at 601.
358. *Id.* at 1555, 265 Cal. Rptr. at 598.
359. *Id.* at 1560, 265 Cal. Rptr. at 601-02.
360. *Id.* at 1560-61, 265 Cal. Rptr. at 602.
362. *Id.* at 71, 261 Cal. Rptr. at 461-62.
364. *Id.* at 888, 893, 254 Cal. Rptr. at 55, 58.
C. The Sixth District Favored Management Over Unions in Labor Law Cases

The Sixth District decided three actions involving labor disputes. The employer won two of those cases and prevailed on the important issues in the third case.

In J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890, the court of appeal held that a union’s liability for the wrongful conduct of union members during a strike is governed by California state agency principles, rather than federal labor law. The employer sustained property damage at the hands of union members during a strike. The employer sued the union for, among other things, negligent supervision of the striking members. A jury returned a verdict for the employer. On appeal, the union argued that the trial court erred when it instructed the jury on the standard by which the union could be held liable for the acts of its members, as well as on the standard of proof. Specifically, the union contended that the trial judge should not have used state law agency principles, coupled with the preponderance of the evidence standard; instead, the trial court should have used only section 6 of the federal Norris-LaGuardia Act, with its clear evidence standard of proof. The Sixth District concluded that the federal standard

367. Id. at 434, 256 Cal. Rptr. at 247-48.
368. Id. at 434, 256 Cal. Rptr. at 248.
369. Id. at 437, 256 Cal. Rptr. at 249.
371. Id. §§ 100-115.
372. J.R. Norton, 308 Cal. App. 3d at 437-38, 256 Cal. Rptr. at 250. Section 6 of the Norris-LaGuardia Act provides:

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

for the liability of unions did not preempt California's agency rules. The court found significant the fact that the legislature, although it used federal labor statutes as a model for some California labor statutes, did not incorporate the section 6 standard of liability or standard of proof.

In Norton, the Sixth District adopted the minority view without a persuasive rationale. As the court noted, the preemption issue has been decided by nine out-of-state courts: Six courts decided that the section 6 standards apply to tort actions in state courts and three courts ruled that state agency rules apply in such actions. Also, the court cited only one section, out of the fifteen sections in the Norris-LaGuardia Act, which the legislature adopted as a California labor statute. Thus, this is not a situation where the legislature adopted virtually every provision of a federal act, except the one under scrutiny. The legislature's omission of section 6 from California's labor laws seems insignificant.

The United States Supreme Court has expressed the congressional intent underlying section 6 as follows:

[T]he simple concern of Congress was that unions had been found liable for violence and other illegal acts occurring in labor disputes which they had never authorized or ratified and for which they should not be held responsible. Congress discerned a tendency in courts to blame unions for everything occurring during a strike.

374. Id. at 441-42, 256 Cal. Rptr. at 252-53.
376. Id. at 441-42, 256 Cal. Rptr. at 252-53.
For this reason, Congress required federal courts to apply the section 6 standards, rather than common law agency rules, in deciding the liability of unions for the wrongful conduct of union members. The standards should be the same when an action is filed in state court rather than federal court, as six out-of-state courts have recognized. In Norton, the Sixth District did not provide a satisfactory justification for the use of different standards.

Bertuccio v. Agricultural Labor Relations Board378 was a case which involved a protracted labor dispute with numerous administrative proceedings and a plethora of complex issues. Although the Sixth District decided some issues in favor of the union, the court ruled in favor of the employer on most of the key issues. The court first ruled that the employer could accept the union’s proposal for a labor contract after he had rejected it, given that the union had never withdrawn it.379 Here, the court relied upon the Ninth Circuit’s test set forth in Presto Casting Co. v. N.L.R.B.:380 A rejected offer can be accepted within a reasonable period of time unless (1) it has been expressly withdrawn; (2) it was contingent upon a condition subsequent; or (3) subsequent events would make acceptance of the offer unfair.381 The court also decided that the board could not award “make whole” whereby the employee receives the benefits of the labor contract which would have been adopted, but for the unfair labor practices of the employer or the union to any employee for any period of time that the employee was on strike.382 In another significant ruling, the court, after finding that the employer unlawfully refused to bargain, remanded the matter to the board to determine whether make whole was appropriate for non-striking employees; the court directed the board to order make whole, unless the employer could prove that his unlawful refusal to bargain did not prevent the parties from entering into a labor contract.383 Finally, the court

379. Id. at 1385, 249 Cal. Rptr. at 481.
381. Bertuccio, 202 Cal. App. 3d at 1381, 249 Cal. Rptr. at 479.
382. Id. at 1398, 249 Cal. Rptr. at 489.
383. Id. at 1391-92, 249 Cal. Rptr. at 484-85.
understandably ruled that an employer was not required to reinstate a union employee who had committed violent acts on the employer’s property during the strike.\textsuperscript{384}

In \textit{Breaux v. Agricultural Labor Relations Board},\textsuperscript{385} Justice Bamattre-Manoukian’s first reported opinion in a civil case, the Sixth District set aside the board’s procedures for the reimbursement of union members for their pro rata shares of dues and assessments which are used for the union’s political activities that some members find objectionable.\textsuperscript{386} The court determined that the board’s procedures were deficient in four respects. First, the board did not adequately define the expenditures which the union could make over the objection of any member; such expenditures should be restricted to those which are reasonably or necessarily incurred in connection with the performance of the duties of a bargaining agent for the union members in dealing with the employer on work-related issues.\textsuperscript{387} Second, the union had to place in escrow all amounts of dues and other assessments which are reasonably in dispute by virtue of objections by union members, pending a decision on the objections.\textsuperscript{388} Third, the union must provide, with every assessment of dues or other charges, a clear statement of the allocations which the union will make with the amounts collected, so as to enable union members to make an informed decision regarding the propriety of the union’s expenditures.\textsuperscript{389} Finally, the union must furnish an impartial decision-maker to decide the objections of members to the union’s expenditures. The decision-maker cannot be a committee, board, or agency of the union.\textsuperscript{390} As the court expressly relied upon six United States Supreme Court decisions and one California Supreme Court decision, the Sixth District’s conclusions were on solid ground.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{384} \textit{Id.} at 1400-01, 249 Cal. Rptr. at 490-91.
\item \textsuperscript{385} 217 Cal. App. 3d 730, 265 Cal. Rptr. 904 (1990).
\item \textsuperscript{386} \textit{Id.} at 752, 265 Cal. Rptr. at 916.
\item \textsuperscript{387} \textit{Id.} at 752-54, 265 Cal. Rptr. at 916-17.
\item \textsuperscript{388} \textit{Id.} at 754-55, 265 Cal. Rptr. at 917-18.
\item \textsuperscript{389} \textit{Id.} at 756, 265 Cal. Rptr. at 918-19.
\item \textsuperscript{390} \textit{Id.} at 757-58, 265 Cal. Rptr. at 919-20.
\end{enumerate}
\end{footnotesize}
VI. ENVIRONMENTAL LAW CASES

In 1985-1987, the result in virtually all of the Sixth District’s CEQA decisions was to require a public agency to take additional measures to comply with CEQA. In 1988-1990, the court’s CEQA opinions show an opposite trend. In seven cases involving CEQA issues, the court ruled that the public agency had to go back to the drawing board in only two. In the other five cases, the court held that the public agency fully complied with the requirements of CEQA. A consistent theme in those five cases was that the public agency had performed a proper environmental review in light of the development stage of the project under review.

A. The Sixth District Regularly Found Compliance With CEQA

In \textit{Sierra Club v. Gilroy City Council}\textsuperscript{391} the Sixth District refused to determine that CEQA imposed on public agencies three duties advanced by the plaintiffs. In \textit{Sierra Club}, a developer sought to build a large housing project on certain property that served as a habitat for the California Tiger Salamander. The developer applied for a general plan amendment. After the Draft Environmental Impact Report (DEIR) was prepared, a local resident pointed out to the city that a population of the salamander resided on the project site and that this species of salamander purportedly was threatened.\textsuperscript{392} The city halted the environmental review process to allow for a study of the impact of the project on the salamander population.\textsuperscript{393} A report on that study was included in the Final Environmental Impact Report (FEIR). Also, the city adopted every mitigation measure concerning the salamander that was proposed by the California Department of Fish and Game, the state agency charged with the protection of rare species of plants.

\textsuperscript{392} \textit{Id.} at 36, 271 Cal. Rptr. at 395.
\textsuperscript{393} \textit{Id.} at 37, 271 Cal. Rptr. at 395.
and animals. Eventually, the city approved the general plan amendment for the project and the FEIR. 394

On appeal in Sierra Club, the Sixth District decided that the city had complied with CEQA. The plaintiffs argued that CEQA contains a species preservation duty which obligates a public agency to deny approval of a project where the preservation of any particular species on the project site cannot be guaranteed. 395 As the city had stated in the FEIR that it could not guarantee the survival of the salamander population on the project site, the plaintiffs contended that the city had a duty to deny approval of the project. 396 The court rejected that argument, observing that numerous CEQA provisions and guidelines allow a public agency to approve a project which will have a significant adverse effect on the environment, if the public agency has found, as the city did in Sierra Club, that mitigation measures and project alternatives are infeasible. 397

In Sierra Club, the plaintiffs also urged that the city had a separate duty to deny project approval because project alternatives existed that would not have a significant adverse effect on the salamander; in other words, no population of this species of salamanders existed at alternative locations for the housing development. 398 The court of appeal dismissed that contention as well, ruling that the city properly found that project alternatives were infeasible. 399 The plaintiffs further argued that the city had a duty, under CEQA Guideline 15380, 400 to determine whether or not the California Tiger Salamander was a rare or endangered species. 401 Again, the court refused to accept that CEQA imposed such a duty. Here, the court concluded that the term “shall” in

394. Id. at 38, 271 Cal. Rptr. at 396.
395. Id. at 41-42, 271 Cal. Rptr. at 398.
396. Id.
397. Id. at 41-42, 271 Cal. Rptr. at 398-99.
398. Id. at 44, 271 Cal. Rptr. at 400.
399. Id.
400. 14 CAL. CODE REGS. § 15380(d) (1990) (providing that a species which is not included on any list of rare or endangered species maintained by a federal or state agency “shall” be deemed to be rare or endangered, if the species is shown to meet certain specified criteria).
401. Sierra Club, 222 Cal. App. 3d at 44, 271 Cal. Rptr. at 400.

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Guideline 15380(d) was intended to be directory rather than mandatory, as the discussion under that Guideline indicated, and that CEQA Guidelines do not impose mandatory duties in any event.\textsuperscript{402} The court also noted that the federal and state agencies which, by law, maintain official lists of protected species are the only public agencies which have a duty to classify a species as rare or endangered.\textsuperscript{403}

The Sixth District's result and reasoning in \textit{Sierra Club} are beyond reproach. However, the opinion contained some problematic language which a litigant could misuse in a future case.

First, in a footnote, the court limited its holding to the facts in the case and stated, in dictum, that the result might have been different, if the last known population of an endangered species resided on the project site.\textsuperscript{404} However, nothing in CEQA would require a different result in the hypothetical posed by the court. Although the same result would be harsh under that scenario, a court still would have to reject the purported species preservation duty in CEQA. No California case, statute, or guideline would allow a court to do otherwise.

Second, the court did not accurately recite the law regarding a public agency's duties under CEQA. The court stated:

\begin{quote}

The most important of these [substantive duties under CEQA] is the provision requiring public agencies to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects.\textsuperscript{405}
\end{quote}

A public agency has no duty to deny project approval under the circumstances stated by the court. If a proposed project will have a significant adverse impact on the environment and feasible alternatives or mitigation measures exist, the public agency has at

\begin{footnotes}
\item[402.] \textit{Id.} at 47, 271 Cal. Rptr. at 402.
\item[403.] \textit{Id.}
\item[404.] \textit{Id.} at 42 n.5, 271 Cal. Rptr. at 399 n.5.
\item[405.] \textit{Id.} at 41, 271 Cal. Rptr. at 398.
\end{footnotes}
least two choices, other than denial of project approval. The public agency can adopt a feasible alternative or feasible mitigation measures which would reduce or eliminate the impact of the project on the environment. Alternatively, a public agency can approve the project, as proposed, if it makes a finding that the project alternatives and mitigation measures are infeasible. 406

Third, in another passage in the opinion, the court again misstated the law. The court remarked:

Plaintiffs also contend that the City was duty bound to “not approve projects as proposed if there are feasible alternatives.” We certainly agree with this proposition as a matter of law since that is the mandate of section 21002 as well as sections 21002.1, subdivision (b) and 21081. 407

The cited statutes do not compel a public agency to deny approval of a project simply because there are feasible alternatives. If that were true, a public agency could never approve a project which had a feasible alternative. Assuming that the proposed project was feasible, an objector could compel denial of approval of the original proposed project by reference to a feasible alternative and, when the alternative became the proposed project, compel denial of approval of the alternative by reference to the original proposed project. The statutes, upon which the court relied, do allow a public agency to approve a proposed project which will have significant environmental effects, if the public agency has either: (1) adopted project alternatives or mitigation measures which lessen the adverse environmental effects of the project; or (2) made a finding that project alternatives and mitigation measures are infeasible. The only case in which CEQA would require denial of project approval is where: (1) the proposed project will have a significant adverse impact on the environment; (2) project alternatives or mitigation measures could reduce or eliminate that impact; and (3) the public

407. Sierra Club, 222 Cal. App. 3d at 44, 271 Cal. Rptr. at 400.

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agency cannot find that those project alternatives or mitigation measures are infeasible.

In Schaeffer Land Trust v. San Jose City Council, the court of appeal approved a city’s adoption of a negative declaration in connection with a general plan amendment which allowed development of a former golf course. The court held that the general plan amendment would not have any adverse environmental consequences because, among other reasons, a general plan is tentative and further environmental review would be required, once a detailed, specific project was proposed. The plaintiffs argued that that position would be inconsistent with the Sixth District’s prior decision in City of Carmel-by-the-Sea v. Board of Supervisors, which held that a county’s adoption of a negative declaration in connection with a rezoning of certain property was erroneous. The court answered that Carmel was distinguishable. Whereas Carmel found that experts disagreed over the environmental impact of the proposed project on certain wetlands, Schaeffer Land Trust did not involve any significant environmental effects. Also, whereas Carmel decided that adoption of the negative declaration would preclude further environmental review on the issue of the boundaries of the rezoned property vis a vis the wetlands, Schaeffer Land Trust did not preclude further environmental review on any issues. Thus, the Sixth District intimated that it was not retreating from Carmel; Schaeffer Land Trust simply presented a different case.

In a separate ruling in Schaeffer Land Trust, the court also upheld the city’s approval of an EIR in connection with a general plan amendment which would allow the development of a former high school property, finding that the EIR sufficiently analyzed the environmental effects and cumulative impacts of the proposed project. Finally, on the issue of the standard of review, the

409. Id. at 625-26, 263 Cal. Rptr. at 819.
412. Id. at 626-27, 263 Cal. Rptr. at 820.
413. Id. at 630-32, 263 Cal. Rptr. at 822-24.
court stated that Public Resources Code section 21168 applied in a CEQA action which challenges a public agency's approval of a general plan or general plan amendment. However, the Sixth District overruled the Schaeffer Land Trust conclusion regarding the standard of review in its Sierra Club decision. In Sierra Club, the court stated that Public Resources Code section 21168.5 sets forth the applicable standard of review in an action which objects to a general plan amendment on CEQA grounds. Therefore, the court's statement regarding the applicable standard of review in Schaeffer Land Trust should be disregarded.

The court again upheld the sufficiency of an EIR in Towards Responsibility in Planning v. City Council. The city approved an EIR for a large parcel of property which would be developed in several stages over a number of years. The development would require additional sewage treatment capacity, which would be provided by the construction of additional facilities, as the need arose, in conjunction with the construction of each phase of the development. The EIR analyzed, among other things, the impact of the sewage treatment facilities which would be built in connection with the first phase of the project. The plaintiffs complained that the EIR did not sufficiently discuss the impact of the proposed project's inevitable increase in discharge of treated sewage on regional water quality. The court of appeal disagreed, finding that the analysis of the effect of the project on water quality was sufficient. The court explained:

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414. See CAL. PUB. RES. CODE § 21168 (West 1986). Section 21168 adopts the standard of review in an administrative mandamus action and limits the presentation of evidence to the record before the public agency at the time that it made its decision, except in unusual circumstances. Id.
416. See CAL. PUB. RES. CODE § 21168.5 (West 1986). Section 21168.5 adopts the standard of review in a traditional mandamus action and does allow the presentation of any relevant evidence, including evidence outside the record before the public agency at the time of its decision. Id.
419. Id. at 676-77, 246 Cal. Rptr. at 319.
420. Id. 681, 246 Cal. Rptr. at 322.
It would be unreasonable to expect this EIR to produce detailed information about the environmental impacts of a future regional facility whose scope is uncertain and which will in any case be subject to its own environmental review. The degree of specificity in an EIR need only correspond to the degree of specificity involved in the underlying activity which is described in the EIR, here the rezoning of two properties.\textsuperscript{421}

Thus, the court aptly articulated the theme that the level of environmental review need only match the level of development of the proposed project under review.

In \textit{Towards Responsibility in Planning}, the court also rejected the plaintiff’s argument that the city should have waited for the completion of a five-year study which had been identified in the EIR, ruling that a public agency need not delay approval of an EIR for the completion of a potentially relevant work in progress.\textsuperscript{422} The court likewise dismissed the plaintiff’s contention that the city had a duty, under Government Code section 65030.2,\textsuperscript{423} to prepare a financing plan for the additional sewage treatment facilities before approving the rezoning. The court concluded that a cause of action does not arise for the violation of a statute which merely sets forth a broad legislative policy.\textsuperscript{424}

In \textit{Leonoff v. Monterey County Board of Supervisors},\textsuperscript{425} the court upheld the county’s adoption of a negative declaration in connection with a use permit for the construction of a large commercial building. Responding to the plaintiffs’ claim that the county’s initial study was inadequate, the court found that the plaintiffs’ expectations were unrealistic because an initial study

\textsuperscript{421} Id.
\textsuperscript{422} Id.
\textsuperscript{423} \textit{See} \textit{CAL. GOV'T CODE} § 65030.2 (West 1983). Section 65030.2 provides: “It is further the policy of the state and the intent of the Legislature that land use decisions be made with full knowledge of their economic and fiscal implications . . . .” \textit{Id}.
need not resemble an EIR, with expert evaluations of the environmental effects of the proposed project.\textsuperscript{426} Also, the court recognized that the legislature’s adoption of Public Resources Code section 21082.2\textsuperscript{427} ended the debate over whether serious public controversy regarding the environmental impact of a proposed project, without more, can compel the preparation of an EIR. Public controversy, alone, is not sufficient evidence to require an EIR.\textsuperscript{428}

\textit{Lexington Hills Association v. State of California}\textsuperscript{429} involved a proposal by a private party to conduct a logging operation near a state highway and to transport the trees over the highway. The California Department of Forestry approved the timber harvesting plan for the project and the California Department of Transportation issued encroachment permits which would allow flagmen to direct traffic on the highway during the removal and transportation of trees.\textsuperscript{430} The issue before the court was whether Caltrans was obligated to observe CEQA. The court held that Caltrans had no duty to comply with CEQA, before granting the encroachment permits, because the issuance of the permits was not a project.\textsuperscript{431}

\section*{B. The Sixth District Required Further Environmental Review in Two Cases}

\textit{Laupheimer v. State of California}\textsuperscript{432} involved the same facts as those in \textit{Lexington Hills}, including the same logger, but a different, nearby property. The major legal issue, however, was

\begin{paracol}{1}

\begin{flushright}
\textit{Id.} at 1347, 272 Cal. Rptr. at 376.
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\textit{Id.} at 1358-59, 272 Cal. Rptr. at 383-84.
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\textit{Id.} at 421, 246 Cal. Rptr. at 99.
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\textit{Id.} at 429-30, 246 Cal. Rptr. at 103-04.
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\begin{flushright}
\textit{Id.} at 440, 246 Cal. Rptr. 82 (1988).
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whether the Department of Forestry had to comply with the requirements of CEQA before approving the timber harvesting plans. Under the pertinent statutory scheme, a logger must prepare a timber harvesting plan, in lieu of an EIR, and the Forestry Department must approve the plan, if it satisfies the criteria set forth in the Z'berg-Nejedly Forest Practice Act of 1973 and related regulations. The court of appeal first held that CEQA does not directly apply to the Forestry Department's approval of a logging plan. However, the court next concluded that the Forestry Department must consider the cumulative environmental impacts of a proposed timber harvesting plan, even though a cumulative impact analysis is not a requirement set forth in the Forestry Act and regulations. Reversing the trial court, the court ultimately decided that the Forestry Department had not adequately analyzed the cumulative impacts of the timber harvesting plan at issue and thus, the agency abused its discretion in approving the plans. In reaching its result, the court imported from CEQA the duty of a public agency to consider the cumulative environmental effects of a proposed project, even though it determined that CEQA was not expressly applicable.

The court overturned a public agency's declaration that a project was exempt from CEQA in McQueen v. Board of Directors. A local agency sought to acquire surplus federal property on which there were electrical transformers filled with a toxic contaminant. Describing the project as a purchase of property for open space purposes with no plans for development, the agency claimed an exemption from the requirements of CEQA. The court of appeal ruled that the project was not the mere acquisition of the property, but necessarily included the storage, use and potential disposal of toxic contaminants on the property. The court

436. Id. at 460-62, 246 Cal. Rptr. at 91-93.
437. Id. at 466, 246 Cal. Rptr. at 95-96.
439. Id. at 1147, 249 Cal. Rptr. at 445.
explained that the agency, upon purchasing the property, would have to satisfy federal and state regulations which imposed stringent requirements on the storage and handling of the contaminant at issue. 440 Once the project was described properly, the court concluded that no CEQA exemption applied to the project. 441 Although the agency already had completed its acquisition of the property and had adopted a use plan, the court of appeal directed the trial court to issue a writ of mandate to compel the agency to conduct a proper environmental review before implementing its use plan. 442 The result was correct in view of the Sixth District’s proper analysis of CEQA.

C. There Were No Discernible Trends in the Sixth District’s Environmental or Land Use Cases Which Did Not Involve CEQA Issues

The Sixth District decided three cases which presented environmental or land use issues outside the realm of CEQA. The court set aside a public agency’s action in two of those cases and upheld it in the other case.

In Western Oil & Gas Association v. Monterey Bay Unified Air Pollution Control District, 443 the court held that the Tanner Act, 444 which specifies procedures by which the state Air Resources Board may identify and control toxic air contaminants, preempts a local air pollution control district from adopting a regulation by which it may identify toxic air contaminants. 445 The court was impressed by the statutory procedures, by which the state board must identify sources of air pollution; the procedures were highly detailed, so as to indicate an intention by the legislature that the state has occupied fully the area of identification of toxic air contaminants.

440. Id. at 1145-47, 249 Cal. Rptr. at 444-45.
441. Id. at 1149, 249 Cal. Rptr. at 447.
442. Id. at 1152-53, 249 Cal. Rptr. at 448-49.

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Pointing to the statutory goal that toxic air contaminants be identified through the best available scientific evidence, the court reasoned that the state could achieve that goal only through the utilization of the statutory procedures.\(^4\)

The supreme court reversed the Sixth District's decision in *Western Oil*.\(^4\) Finding that local districts had the power to identify sources of air pollution before the Tanner Act was passed, the supreme court stated that the issue was not preemption, but whether the legislature had impliedly repealed that power of the local districts.\(^4\) The court held that the Tanner Act neither expressly nor impliedly repealed the authority of local districts to identify toxic air contaminants.\(^4\) Addressing the issue of preemption, the supreme court decided that the legislature did not intend to preempt local districts from identifying sources of air pollution before the state board has done so.\(^4\) The court emphasized that the complexity of the statutory procedures which the state board must employ is insufficient to establish preemption. Given the significant legislative goal to protect public health, the court concluded that the legislature must have intended that local districts could identify and control toxic air contaminants in the interim, before the state board has completed its lengthy and complex procedures with respect to any particular contaminant.\(^4\) Thus, the supreme court rejected the Sixth District's preemption analysis, while reversing the court on an independent ground.

In *Orsi v. City Council*,\(^5\) the court strictly applied the provisions of the Permit Streamlining Act\(^5\) so as to compel a city to issue a permit to the plaintiffs. The Act requires a public agency to notify an applicant that a permit application is

\(^{446}\) *Id.* at 520-21, 248 Cal. Rptr. at 423-24.
\(^{447}\) *Id.* at 521, 248 Cal. Rptr. at 424-25.
\(^{448}\) *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.*, 49 Cal. 3d 408, 429, 777 P.2d 157, 170, 261 Cal. Rptr. 384, 397 (1989).
\(^{449}\) *Id.* at 417, 777 P.2d at 162, 261 Cal. Rptr. at 389.
\(^{450}\) *Id.* at 419, 777 P.2d at 163, 261 Cal. Rptr. at 390-91.
\(^{451}\) *Id.* at 423-24, 777 P.2d at 166-67, 261 Cal. Rptr. at 393-94.
\(^{452}\) *Id.*
incomplete within thirty days of receipt of the incomplete application.\textsuperscript{455} If no EIR is required, the public agency then must issue a decision on the requested approval within six months of the date on which the application was complete.\textsuperscript{456} In \textit{Orsi}, the city notified the plaintiffs that their permit application was inadequate forty-one days after the city had received the application. In cooperation with the city, the plaintiffs resubmitted a completed application three months after their original application.\textsuperscript{457} The city denied the permit application nine months after the original application was filed, but within six months of the resubmitted application.\textsuperscript{458}

The court of appeal determined in \textit{Orsi} that the city's tardy notification of the incompleteness of the application was ineffective; thus, the application was deemed complete thirty days after it was filed, notwithstanding the plaintiffs' resubmittal of a completed application.\textsuperscript{459} The court also found that the city issued a negative declaration for the proposed project and failed to grant or deny the permit within six months of the date on which the application was deemed complete.\textsuperscript{460} Consequently, the court held that the plaintiffs' permit application was granted by operation of law and the city's denial of the permit was a nullity.\textsuperscript{461} Given that it ruled against the city and reversed the judgment of the trial court, the Sixth District gave notice that it would enforce the mandatory provisions of the Permit Streamlining Act.

In \textit{Getz v. Pebble Beach Community Services District},\textsuperscript{462} the court upheld the public agency's denial of a sewer permit to the owners of a qualified senior citizen housing unit. The local land use plan prohibited the allocation of sewer hookups to senior citizen housing units, as a result of insufficient sewer capacity. The court of appeal concluded that the state policy to provide housing

\textsuperscript{455} \textit{Id.} § 65943 (West Supp. 1991).
\textsuperscript{456} \textit{Id.} § 65950.
\textsuperscript{457} \textit{Orsi}, 219 Cal. App. 3d at 1580, 268 Cal. Rptr. at 914.
\textsuperscript{458} \textit{Id.}
\textsuperscript{459} \textit{Id.} at 1584-86, 268 Cal. Rptr. at 916-18.
\textsuperscript{460} \textit{Id.} at 1586-87, 268 Cal. Rptr. at 918-19.
\textsuperscript{461} \textit{Id.} at 1587-88, 268 Cal. Rptr. at 919.
\textsuperscript{462} 219 Cal. App. 3d 229, 268 Cal. Rptr. 76 (1990).
for senior citizens was outweighed, in this case, by the conflicting policy to protect coastal waters and the local land use plan which effectuated that policy.\textsuperscript{463}

VII. LANDLORD-TENANT CASES

The Sixth District's only significant real property decisions involved landlord-tenant issues. There were no discernible trends in those decisions. Out of four landlord-tenant cases, the court decided two in favor of the tenant and the other two in favor of the landlord.

A. Decisions Which Favored Tenants

The court's most significant landlord-tenant decision was in \textit{Carma Developers (California), Inc. v. Marathon Development California, Inc.}\textsuperscript{464} The Sixth District held that a commercial lease provision, which granted the lessor the right to terminate the lease upon the tenant's mere request for the lessor's consent to a sublease, was void as an unreasonable restraint on alienation of the tenant's interest in the lease.\textsuperscript{465} The court likewise ruled that the lessor had violated the implied covenant of good faith and fair dealing when the lessor terminated the ten-year lease -- shortly after the tenant located a subtenant and requested the lessor's permission to sublet -- solely to obtain the increase in the rental value of the leased premises.\textsuperscript{466} Thus, the court effectively voided, as against public policy, a "recapture" provision in the commercial lease that enabled the lessor to cancel a lease in order to reap the additional rent which the subtenant was willing to pay over and above the contract rent in the lease between the lessor and

\textsuperscript{463} \textit{Id.} at 233, 268 Cal. Rptr. at 79.
\textsuperscript{465} \textit{Id.} at 418, 421, 259 Cal. Rptr. at 910, 912.
\textsuperscript{466} \textit{Id.} at 421-22, 259 Cal. Rptr. at 912.
the tenant. In arriving at those conclusions, the court properly applied the principles laid down by the supreme court in *Kendall v. Ernest Pestana, Inc.*

All members of the California Supreme Court recused themselves in *Carma* because the court leased space in a building owned by Marathon. The court transferred the matter to the Third District Court of Appeal in Sacramento for decision by a seven-justice panel, sitting as the supreme court. The surrogate supreme court granted review, but has not yet issued a decision on the merits in *Carma*.

In 1989, the same year in which *Carma* was decided, the legislature entered the fray by adding new provisions to the Civil Code regarding assignments and subleases. Civil Code section 1995.230 provides that a lease may prohibit absolutely a tenant’s transfer of his or her interest in the lease. Also, under Civil Code section 1995.240, a lease may provide that the lessor is entitled to some or all of any consideration which the tenant becomes eligible to receive from a sublease or assignment in excess of the rent specified in the lease. Although the new statutory provisions took effect on January 1, 1990, the legislature expressly stated that they would have retroactive effect.

The Sixth District’s ruling in *Carma* very well could survive the recent legislation and supreme court review. The new statutes do not undermine the Sixth District’s decision. For example, the new legislation does not address recapture clauses, such as the one which the court found objectionable in *Carma*. Also, the *Carma* lease did not contain a provision which prohibited any transfer of the tenant’s interest in the lease nor a provision which expressly allowed the lessor to obtain the bonus rent from a sublease. Moreover, the Sixth District’s *Carma* decision was entirely

470. *Id.* § 1995.240.
471. *Id.* § 1995.030.
consistent with Kendall. The surrogate supreme court probably would not consider overruling Kendall.

In Dover Mobile Estates v. Fiber Form Products, Inc., the court of appeal determined that a tenant was not liable to the lessor’s successor-in-interest, who had acquired the leased property at a foreclosure sale, following the tenant’s termination of the lease upon thirty days notice. The court merely reaffirmed the rule that a foreclosure sale under a deed of trust extinguishes a junior lease. Applying that rule, the court correctly decided that the foreclosure sale resulted in the creation of a month-to-month tenancy, which the tenant lawfully could terminate after giving thirty days notice.

B. Decisions Which Favored Landlords

In Pay ’N Pak Stores, Inc. v. Superior Court, the Sixth District reached a questionable result in ruling for a lessor. The tenants operated a small store in a shopping center under a ten year lease which required the lessor’s consent to a sublease. Pay ’N Pak, which operated a large home improvement store in the same shopping center, assumed the original lessor’s interest in the lease. When the tenants tried to sublease their store, Pay ’N Pak refused to consent to two potential subtenants because both parties purportedly planned to operate a business in competition with Pay ’N Pak. One prospective subtenant intended to sell fireplace equipment and the other would sell ceiling fans and lighting fixtures. After Pay ’N Pak finally gave permission to another subtenant, the tenants sued Pay ’N Pak for, among other things, breach of the implied covenant of good faith and fair

473. Id. at 1501, 270 Cal. Rptr. at 187.
474. Id. at 1499-1500, 270 Cal. Rptr. at 186-87.
475. Id. at 1501, 270 Cal. Rptr. at 187.
477. Id. at 1406-07, 258 Cal. Rptr. at 817.
478. Id. at 1407, 258 Cal. Rptr. at 817.
479. Id.
In support of their summary judgment motion, the plaintiffs presented evidence which showed that, over a one-year period, Pay 'N Pak sold only $23,000 worth of fireplace equipment and $39,000 worth of fans and lighting fixtures out of over $4,000,000 of sales at the store in the shopping center. Pay 'N Pak claimed that the fireplace equipment, fans and lighting fixtures were important product lines for the store. The trial court granted the plaintiffs' motion, ruling that the issue of the unreasonableness of Pay 'N Pak's refusal to consent to the two potential subtenants was without substantial controversy.

In Pay 'N Pak, the Sixth District issued a writ of mandate which directed the trial court to set aside that order. The court of appeal stated that the evidence revealed issues of fact regarding the reasonableness of Pay 'N Pak's withholding of consent. The court also concluded that protection from business competition is a commercially reasonable objection of a lessor to a proposed subtenant.

The court's legal principle in Pay 'N Pak may be correct in that a lessor should be entitled to ward off competition, in a proper case, by withholding consent to a prospective subtenant. However, Pay 'N Pak did not realistically present that situation. Each of the two rejected subtenants sold goods which constituted less than one percent of the volume of sales at the Pay 'N Pak store in the shopping center. Thus, any competition would be de minimis. Naturally, Pay 'N Pak resisted the plaintiffs' summary judgment motion with claims that the types of goods at issue were important and drew customers into the store. The trial court properly ruled that no material issue of fact existed and that Pay 'N Pak's refusal to consent to the two subtenants was unreasonable.

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480. Id.
481. Id. at 1408, 258 Cal. Rptr. at 818.
482. Id.
483. Id. at 1412, 258 Cal. Rptr. at 820.
484. Id. at 1408-09, 258 Cal. Rptr. at 818.
485. Id. at 1410-11, 258 Cal. Rptr. at 819-20.
Zanker Development Co. v. Cogito Systems, Inc.\textsuperscript{486} concerned a tenant's claim that a lessor had failed to mitigate its damages following the eviction of the tenant. After it obtained a judgment of unlawful detainer, the lessor made substantial efforts to locate a new tenant for the leased premises and eventually found a new tenant. The lessor also rejected the defaulting tenant's offer to remain in possession and to pay full rent under the lease until the lessor asked the tenant to leave. The court of appeal held that the lessor had no duty to negotiate a new lease with the evicted tenant in order to mitigate damages, even if the tenant offered terms which could have avoided a loss to the lessor.\textsuperscript{487} The court's rationale was that the reasonableness of the actions which the plaintiff took - not the reasonableness of the actions which the plaintiff could have taken - is the focus of the inquiry regarding the issue of a plaintiff's mitigation of damages.\textsuperscript{488} The court decided that the lessor had mitigated its damages because the lessor acted reasonably in its successful efforts to find a new tenant.\textsuperscript{489} Although the tenant's proposal may have seemed reasonable, the court's decision and analysis seem proper.

\section*{VIII. CONSTITUTIONAL LAW CASES}

\subsection*{A. The Sixth District Tended to Protect Freedom of the Press in Libel Cases}

In three decisions, the Sixth District addressed the tension between the constitutional right of freedom of the press and an individual's right to be free from defamation. In two of those cases, the court ruled for the press, based upon constitutional standards. In the other case, the court found for the individual, based upon a statute.

\begin{itemize}
\item 487. Id. at 1382, 264 Cal. Rptr. at 79.
\item 488. Id. at 1381, 264 Cal. Rptr. at 79.
\item 489. Id. at 1382-83, 264 Cal. Rptr. at 79-80.
\end{itemize}
In *Fletcher v. San Jose Mercury News*, a former city councilman sued the newspaper as a result of a series of articles which alleged that he had a conflict of interest regarding the city’s award of a government contract. He also sued the reporter for slander because the reporter had called him a “crook” and a “crooked politician” during an interview with a third party. The trial court granted a motion for nonsuit as to the slander claim, but awarded over $1,000,000 in damages, including punitive damages, on the libel claim.

The court of appeal reversed the judgment on the libel cause of action. Finding that the plaintiff was a public figure, the court applied the *New York Times Co. v. Sullivan* standard, under which a plaintiff must prove with clear and convincing evidence that the defendant published the defamatory statement with “actual malice,” that is, with knowledge of falsity or reckless disregard of the falsity of the statement. The court explained that that standard is not objective; instead, the plaintiff must show that the defendant had actual doubt regarding the truth of the published statement. Upon a review of the evidence which purportedly demonstrated that the reporter and the newspaper were hostile to the plaintiff and lacked objectivity in the published articles, the Sixth District concluded that the plaintiff’s evidence of actual malice was “neither clear nor convincing.” The court also affirmed the judgment on the slander claim, finding that the reporter’s remarks constituted opinions, rather than actionable factual statements. The result and reasoning in the court’s opinion were sound, even though the newspaper articles contained factual errors.

*Carney v. Santa Cruz Women Against Rape* involved a libel action by a plaintiff who was not a public figure. In a periodic

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491. Id. at 177, 264 Cal. Rptr. at 760.
493. *Fletcher*, 216 Cal. App. 3d at 184, 264 Cal. Rptr. at 704.
494. Id.
495. Id. at 189-90, 264 Cal. Rptr. at 707-08.
496. Id. at 190-91, 264 Cal. Rptr. at 708-09.
newsletter which was distributed in public places throughout a city, the defendant charged that the plaintiff had committed an assault and attempted rape on a woman (Karen) in the community. The newsletter provided the plaintiff’s physical description, address and place of employment. The defendant based its accusation on Karen’s account of the disputed incident and did not contact the plaintiff before publication. Denying the published charges, the plaintiff brought an action for libel, among other things, against the newsletter publisher and Karen. Under the terms of a settlement with Karen, he exchanged letters of apology with Karen. Her letter stated that the plaintiff never raped her and never had any sexual relations with her. After a trial, the jury awarded the plaintiff $7,500 in compensatory damages and $25,000 in punitive damages.

In Carney, the court of appeal reversed because the jury instructions contained prejudicial errors of law. First, the trial court’s instruction on the standard of proof was erroneous. Although the plaintiff was a private figure, the trial court gave an “actual malice” instruction. The court of appeal emphasized that the defendant’s negligence, not malice, was the standard; the plaintiff had the burden of proving that the defendant failed to exercise reasonable care in confirming the accuracy of the information published in the newsletter. The plaintiff argued that the error was not prejudicial because the actual malice instruction contained a higher standard of proof than a negligence instruction. The court rejected that argument, reasoning that the absence of a negligence instruction allowed the jury to impose liability without fault and without considering whether the plaintiff had carried his burden of proof on the salient issue of the defendant’s negligence.

498. Id. at 1013-14, 271 Cal. Rptr. at 32.
499. Id. at 1015, 271 Cal. Rptr. at 33.
500. Id.
501. Id. at 1016, 271 Cal. Rptr. at 33.
502. Id. at 1016, 271 Cal. Rptr. at 34.
503. Id. at 1017, 271 Cal. Rptr. at 34.
504. Id.
Second, the trial court's failure to give an actual malice instruction on the issue of punitive damages in Carney also was erroneous. When a publication relates to a matter of public concern, the court explained, even a private-figure plaintiff must prove actual malice in order to recover punitive damages. In this regard, the court noted that the test is whether the entire publication -- not just the defamatory statement or article -- treated matters of public concern. Using that test, the court decided that the newsletter did address matters of public importance and therefore, the award of punitive damages was improper.

On two significant evidentiary issues in Carney, the court ruled that Karen's letter of apology was admissible to prove the plaintiff's case against the publisher because Evidence Code section 1152(a) bars the admission of a settlement letter to demonstrate the liability of only the settling party -- in this case, Karen. Also, the court determined that, upon retrial, the defendant could present evidence that Karen had experienced rape trauma syndrome on the issue of the import of Karen's letter of apology to the plaintiff, but not to prove that an attempted rape had occurred or that the defendant believed that a sexual assault had occurred.

In Carney, the Sixth District's rulings on the jury instructions faithfully followed the supreme court's recent decision in Brown v. Kelly Broadcasting Co. The court also provided a proper reading of Evidence Code section 1152(a). Finally, the court's rulings on the admissibility of the rape trauma syndrome evidence were correct, in view of the supreme court's decision in People v. Bledsoe, which held that such evidence is inadmissible to

505. Id. at 1019, 271 Cal. Rptr. at 35-36.
506. Id. at 1021, 271 Cal. Rptr. at 36.
507. Id. at 1022, 271 Cal. Rptr. at 37.
510. Id. at 1025-26, 271 Cal. Rptr. at 39-40.
establish that a rape had taken place. Evidence of rape trauma syndrome is admissible for other purposes, as the Sixth District decided in *Carney*.

In *Pierce v. San Jose Mercury News*, the court faced the issue of the validity of the newspaper's retraction of a defamatory statement. In a front-page article, the newspaper falsely reported that a police officer had been disciplined for misconduct. Nearly a month later, on Christmas day, the newspaper printed a retraction of the story, as to that police officer, on page two. The police officer sued for libel, but the trial court granted the newspaper's motion for summary judgment, based upon the findings that the retraction was proper and that the plaintiff failed to prove special damages.

The Sixth District held that the question of the newspaper's compliance with the requirements of Civil Code section 48a, which governs retractions of defamatory statements, was an issue of fact which a jury should decide. In reaching that conclusion, the court expressly refused to follow out-of-state cases which ruled that the sufficiency of a retraction is an issue of law. The court's ruling on the statute was dispositive in *Pierce* because, as the court found, reasonable minds could differ as to whether the retraction was published in a "substantially as conspicuous a manner" as the original article.

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514. Id. at 1628-29, 263 Cal. Rptr. at 412.
515. Id. at 1629-30, 263 Cal. Rptr. at 412.
516. Id. at 1630, 263 Cal. Rptr. at 412-13.
517. *Section 48a exempts the press from liability for all damages, other than "special damages," if the defendant publishes a correction of the allegedly defamatory statement "in substantially as conspicuous a manner in said newspaper ... as the statements claimed in the complaint to be libelous ..."* CAL. CIV. CODE § 48a (West 1982).
518. *Pierce*, 214 Cal. App. 3d at 1631, 264 Cal. Rptr. at 413.
519. Id. at 1632-33, 263 Cal. Rptr. at 414-15.
520. Id. at 1633, 263 Cal. Rptr. at 415.
B. The Sixth District Upheld the Right to Privacy in a Major Drug Testing Case

The constitutionality of mandatory drug testing is currently an issue of critical importance to the public. Finding that neither an absolute authorization nor a total prohibition of drug testing is appropriate, the courts have proceeded cautiously in balancing the competing interests at stake. Within the last three years, the Sixth District offered its first contribution to this area of law.

In *Hill v. National Collegiate Athletic Association*,521 two Stanford University athletes brought an injunction action to enjoin their required participation in the NCAA's drug testing program for athletes. The Sixth District held that the National Collegiate Athletic Association's (NCAA) mandatory drug testing program violated the athletes' right to privacy under the California Constitution.522

Consistent with the conclusion of other courts, the Sixth District first determined, in *Hill*, that the privacy clause in the California Constitution523 applied to actions by a private entity, such as the NCAA.524 Next, the court announced that the compelling interest test would apply. Under that test, the NCAA's program would violate an athlete's constitutional right to privacy, unless the NCAA showed that: (1) the drug testing program had some relation to the objectives of the NCAA regulations which confer the benefit of participation in intercollegiate athletics; (2) the utility of the program manifestly outweighed the impairment of the right to privacy; and (3) there were no less restrictive means to accomplish the purposes of the program.525 Following a comprehensive review of the evidence, the court summarized its conclusions as follows:

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522. Id. at 1647, 1675, 273 Cal. Rptr. at 404-05, 422.
523. CAL. CONST. art. 1, § 1.
525. Id. at 1656-57, 273 Cal. Rptr. at 410-11.
From the evidence it is clear that the ... test has not been satisfied. First, the evidence did not support the NCAA's claim that there is significant drug use among student athletes, and that by testing, students' health and safety and the integrity of the competition will be protected. The evidence showed that the test program was too broad, and its accuracy doubtful. The appeal procedure was inadequate. Finally, there are alternatives to testing that are less offensive to the right of privacy which have not been adequately considered. Therefore, what usefulness the program had did not manifestly outweigh the resulting impairment of the constitutional right of privacy. For these reasons, the NCAA may not require student athletes to "waive" their constitutional rights in order to receive the benefit of participation in intercollegiate athletics.\footnote{526}{Id. at 1675, 273 Cal. Rptr. at 422.}

Thus, the court concluded that the NCAA had not satisfied any of the three elements of the compelling interest test.

In \textit{Hill}, the Sixth District applied the correct test and reached the proper result based upon an exhaustive analysis of the evidence. Surprisingly, the supreme court granted review in \textit{Hill},\footnote{527}{801 P.2d 1070, 276 Cal. Rptr. 319 (1990).} in spite of its unique facts. Although \textit{Hill} certainly presented a significant legal issue, it seems that the supreme court should review a drug testing case which would have more widespread ramifications, such as a case involving an employer's mandatory drug testing program. In \textit{Hill}, the supreme court certainly should not provide judicial benediction to all mandatory drug testing programs.

\textbf{C. The Sixth District Was Skeptical of Claims of Religious Freedom in Two Cases}

The Sixth District decided two cases involving claims of protection under the constitutional guaranty of freedom of religious expression. In both cases, the court declined an invitation to use the

\begin{footnotes}
\footnote{526}{Id. at 1675, 273 Cal. Rptr. at 422.}
\footnote{527}{801 P.2d 1070, 276 Cal. Rptr. 319 (1990).}
\end{footnotes}
constitutional right as an impenetrable shield against state authorized sanctions.

In *Snyder v. Evangelical Orthodox Church*, the plaintiffs, a bishop and another church member, confessed that they were having an extramarital sexual affair to church officials, who promised to maintain the confidentiality of the confession. The church officials disclosed the confession to numerous other church officials and to an assembled congregation. The plaintiffs sued the church under numerous tort theories. The trial court dismissed most of these claims for lack of jurisdiction, finding that they presented ecclesiastical questions.

In *Snyder*, the court of appeal reversed the dismissal. The court stated that the trial court initially had to determine whether the church was a religion and whether the disclosure of the confidential confessions qualified as religious expression. A positive answer to both questions would require the court to ask next whether the state’s interest in deterring the harm, which the religious expression allegedly caused, outweighed the need to protect the religious expression. According to the court, the balancing of these two interests would involve a four-part inquiry: (1) The government interest must be compelling; (2) the burden on expression must be necessary to promote the government interest; (3) the burden must be the least restrictive means to accomplish the government objective; and (4) the burden may not discriminate against any particular religion. Applying the test, the court of appeal concluded that the church was a religion, but found that the record did not show whether the church officials disclosed the confessions pursuant to a church doctrine. Therefore, the court could not determine whether the challenged conduct constituted religious expression. The court’s disposition was a remand to the trial court.

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529. Id. at 301, 264 Cal. Rptr. at 641.
530. Id. at 306, 264 Cal. Rptr. at 645.
531. Id.
532. Id.
533. Id. at 307, 264 Cal. Rptr. at 645.
to resolve the issues which the lower court had not addressed.\textsuperscript{534} Specifically, if it determined that the disclosure of the confessions was religious expression, the trial court would have to apply the four-part compelling interest test.\textsuperscript{535}

Although the result was a remand, the Sixth District’s opinion left little doubt that the court viewed the conduct of the church officials as actionable. The court relied heavily on two recent cases which held religious organizations liable for tortious conduct in the face of a claim of constitutional protection.\textsuperscript{536} In Snyder, the Sixth District emphasized that the state has an important interest in discouraging wrongful conduct of a church that inflicts injury upon a church member, even if the conduct amounts to religious expression.

In Board of Medical Quality Assurance v. Andrews,\textsuperscript{537} several individuals died or suffered severe injury by following the fasting practices prescribed by the defendant, who was the president and first minister of a certain religion. The board obtained an injunction which enjoined the defendant from the unauthorized practice of medicine without a license.\textsuperscript{538} On appeal, the defendant contended that his conduct was protected by the constitutional guaranty of the right to freedom of expression.\textsuperscript{539} The defendant also argued that he was exempt from the requirement to obtain a license to practice medicine under Business and Professions Code section 2063.\textsuperscript{540}

In affirming the judgment, the court of appeal vigorously rejected both arguments in Andrews. Finding that the defendant’s fasting treatments unquestionably constituted the practice of

\textsuperscript{534} Id. at 310, 264 Cal. Rptr. at 647.
\textsuperscript{535} Id.
\textsuperscript{537} 211 Cal. App. 3d 1346, 260 Cal. Rptr. 113 (1989).
\textsuperscript{538} Id. at 1353, 260 Cal. Rptr. at 118.
\textsuperscript{539} Id. at 1348, 260 Cal. Rptr. at 115.
\textsuperscript{540} Id. Section 2063 provides, in pertinent part: “Nothing in this chapter [the Medical Practice Act] shall be construed so as to . . . interfere in any way with the practice of religion.” CAL. BUS. & PROF. CODE § 2063 (West 1990).
medicine, the court concluded that the state had a sufficiently compelling interest in the protection of public safety so as to allow the state to prohibit the defendant’s dangerous practices, even if those practices constituted religious expression.541 The court likewise decided that the section 2063 exemption did not apply because the statute did not afford any greater rights than the protection afforded by the federal and state constitutions.542

On the subject of the applicability of the statutory exemption, the Sixth District, in Andrews, severely condemned the decision of the Third District Court of Appeal in Northrup v. Superior Court.543 In Northrup, the court applied the exemption to preclude the criminal prosecution of members of an established religion for practicing midwifery without a license.544 In Andrews, the defendant sought to rely on Northrup, but the Sixth District rejected the reasoning in that case. The Andrews court refused to believe that the legislature could have intended section 2063 to permit dangerous medical practices.545 The court further criticized Northrup’s implicit conclusion that the section 2063 exemption provides a member of a religious organization with more protection than the First Amendment to the U.S. Constitution.546

The Sixth District’s criticism of Northrup was justified. In Northrup, the Third District narrowly limited its holding; the court stated that its interpretation of the section 2063 exemption prohibited only a criminal prosecution for the failure to practice medicine without a license.547 In other words, the state could prosecute the church members who practiced midwifery for any wrongful and dangerous acts which they performed.548 Moreover, the court expressly distinguished the situation before it from "cases

542. Id. at 1356-57, 260 Cal. Rptr. at 120-21.
544. Id. at 282, 237 Cal. Rptr. at 258-59.
546. Id. at 1355-57, 260 Cal. Rptr. at 119-20.
547. Northrup, 192 Cal. App. 3d at 283-84, 237 Cal. Rptr. at 259-60.
548. Id. at 283, 237 Cal. Rptr. at 239.
involving the clash between religious beliefs concerning medical treatment and the state’s interest in protecting its citizens.\textsuperscript{549} Thus, the Third District essentially distinguished the situation in \textit{Northrup} from the scenario in \textit{Andrews}. However, the effect of \textit{Northrup} is that unlicensed individuals can continue to practice medicine and injure innocent victims. While \textit{Northrup} allows these individuals to be sued or prosecuted \textit{after} they inflict injury, the state is helpless in attempting to achieve the paramount goal of protection of public health. If presented with the choice, courts should follow \textit{Andrews} rather than \textit{Northrup}.

IX. \textsc{The Court’s Construction of Procedural Statutes}

In 1985-1987, the Sixth District did not hesitate to apply a statute of repose so as to bar a plaintiff’s untimely claim. In 1988-1990, the court usually followed that pattern. Apart from government tort claims statutes, the court had occasion to construe the dismissal statutes in the Code of Civil Procedure in seven cases. Four of these cases involved the five-year rule, under which an action must be dismissed if not brought to trial within five years of the filing of the lawsuit, and three cases involved the three-year rule, whereby an action must be dismissed if the summons and complaint are not served within three years of the filing of the complaint. In five out of the seven cases concerning the dismissal rules, the Sixth District sustained a dismissal of the plaintiff’s action.

\textit{A. The Sixth District Generally Applied the Five-Year Dismissal Rule to Bar a Plaintiff’s Action}

Code of Civil Procedure section 583.310 mandates that a plaintiff bring his or her action to trial within five years of the filing of the complaint.\textsuperscript{550} Code of Civil Procedure section 583.360 provides that a trial court shall dismiss the action,\textsuperscript{551}

\textsuperscript{549} Id. at 284 n.7, 237 Cal. Rptr. at 260 n.7.
\textsuperscript{550} \textit{CAL. CIV. PROC. CODE} § 583.310 (West Supp. 1991).
if the plaintiff has not timely brought his or her action to trial.\textsuperscript{551} In three out of four cases in which the Sixth District applied the five-year dismissal rule, the court affirmed a dismissal.

In two cases, the Sixth District announced its position with respect to a split in authorities on the issue of a plaintiff’s duty to obtain a trial date within the five-year period following a court-ordered, nonbinding arbitration.

In \textit{Moran v. Superior Court},\textsuperscript{552} the supreme court held that the five-year period in former Code of Civil Procedure section 583(b) (now sections 583.310 and 583.360) is tolled, once a party files a request for a trial \textit{de novo} after arbitration.\textsuperscript{553} The court explained that tolling of the five-year dismissal period was necessary because the trial court has a duty, under Code of Civil Procedure section 1141.20,\textsuperscript{554} to recalendar the trial in the same place which it had on the active list before arbitration and a plaintiff has the right to rely upon the court’s performance of that duty.\textsuperscript{555}

Some courts have construed the \textit{Moran} rule literally to mean that a plaintiff, upon filing a request for a trial \textit{de novo} after arbitration within the five-year period, does not need to take any further steps to avoid dismissal; other courts conclude that, notwithstanding the \textit{Moran} rule, a plaintiff must exercise reasonable diligence in attempting to secure a trial date within the five-year period following arbitration.\textsuperscript{556}

The Sixth District opted for the rule which mandates that a party use reasonable diligence in seeking a trial date after

\textsuperscript{551} Id. § 583.360.
\textsuperscript{552} 35 Cal. 3d 229, 673 P.2d 216, 197 Cal. Rptr. 546 (1983).
\textsuperscript{553} Id. at 241-42, 673 P.2d at 222-24, 197 Cal. Rptr. at 554-55.
\textsuperscript{554} See \textit{CAL. CIV. PROC. CODE} § 1141.20 (West Supp. 1991). California Code of Civil Procedure section 1141.11 requires all superior court actions which are at-issue and which involve less than $50,000 in damages to be referred to non-binding arbitration. Id. § 1141.11. Section 1141.20 authorizes a party to file a request for a trial \textit{de novo} in the superior court after the arbitrator has made his or her award. Id. § 1141.20.
\textsuperscript{555} \textit{Moran}, 35 Cal. 3d at 242, 673 P.2d at 224, 197 Cal. Rptr. at 554.
\textsuperscript{556} See, e.g., Baccus v. Superior Court, 207 Cal. App. 3d 1526, 1535, 255 Cal. Rptr. 781, 786 (1989), and cases cited therein; Santa Monica Hosp. Medical Center v. Superior Court, 203 Cal. App. 3d 1026, 1031-33, 250 Cal. Rptr. 384, 386-87 (1988), and cases cited therein.
arbitration. In Serrano v. FMC Corp.,\textsuperscript{557} the plaintiff filed his action on December 14, 1983. Following an unsuccessful arbitration, the plaintiff requested a trial \textit{de novo} on December 23, 1986. He took no further action until November 1988. When a clerk advised him to file a new at-issue memorandum, he did so on December 22, 1988, without mentioning that the five-year period was about to expire. After the five-year period passed, the trial court granted the defendant's motion to dismiss.\textsuperscript{558} The court of appeal affirmed. Pointing out the conflict in authority, the court ruled that the plaintiff was required to exercise reasonable diligence after the arbitration to secure a trial date within the five-year period.\textsuperscript{559} The court held that the plaintiff unreasonably ignored the running of the five-year period in the dismissal statute.\textsuperscript{560} The Sixth District reached the same result in Dresser v. Bindi.\textsuperscript{561}

In Schwenke v. J & P Scott, Inc.,\textsuperscript{562} the court again affirmed a dismissal under the five-year rule. The plaintiff brought an action in municipal court and the defendant filed an unverified cross-complaint seeking damages in excess of the jurisdictional limit of the municipal court.\textsuperscript{563} The case was transferred to the superior court eight and one-half months after the defendant filed the cross-complaint.\textsuperscript{564} Eventually, the superior court dismissed the plaintiff's action five years and six months after he had commenced the action in the municipal court.\textsuperscript{565} On appeal, the plaintiff contended that dismissal was improper because the eight and one-half month period between the filing of the cross-complaint and the transfer of the case to the superior court should

\textsuperscript{558.} Id. at 1029, 271 Cal. Rptr. at 42.
\textsuperscript{559.} Id. at 1031-32, 271 Cal. Rptr. at 43.
\textsuperscript{560.} Id. at 1032, 271 Cal. Rptr. at 43-44.
\textsuperscript{561.} 221 Cal. App. 3d 1493, 1497-1500, 271 Cal. Rptr. 137, 139-41 (1990).
\textsuperscript{562.} 205 Cal. App. 3d 71, 252 Cal. Rptr. 91 (1988).
\textsuperscript{563.} Id. at 74, 252 Cal. Rptr. at 92.
\textsuperscript{564.} Id.
\textsuperscript{565.} Id.
have been excluded in that the jurisdiction of the courts was suspended during that period.\textsuperscript{566}

In \textit{Schwenke}, the court of appeal disagreed, based upon its construction of the transfer statute, Code of Civil Procedure section 396.\textsuperscript{567} Section 396 provides that a court, which discovers that it lacks subject matter jurisdiction from verified pleadings or at trial or at a hearing, must suspend all proceedings and transfer the case to a court with jurisdiction.\textsuperscript{568} Observing that the defendant had filed an unverified cross-complaint, the court decided that the jurisdiction of the municipal court was not suspended under section 396 upon the mere filing of the cross-complaint because the municipal court, at that time, did not and could not determine that it lacked jurisdiction based upon admissible evidence.\textsuperscript{569} The municipal court first became aware that it lacked jurisdiction at the hearing on the defendant’s motion to transfer.\textsuperscript{570} The court of appeal affirmed the dismissal because the five-year period had run.\textsuperscript{571} The moral of the case is that a plaintiff in Schwenke’s position should file a motion to transfer the case immediately upon receiving a cross-complaint which would deprive the municipal court of jurisdiction.

In \textit{Schiro v. Curci},\textsuperscript{572} the court held that the plaintiff’s action was not barred by the five-year dismissal rule. After the parties reached a settlement of their cross-actions, the plaintiff refused to perform his obligations under the settlement agreement. The defendant brought a motion for a judgment on the settlement agreement, under Code of Civil Procedure section 664.6,\textsuperscript{573} and the plaintiff responded with a dismissal motion under the five-year

\textsuperscript{566} Id. at 75, 252 Cal. Rptr. at 92. California Code of Civil Procedure section 583.340(a) tolls the running of the five-year period in the dismissal statute for any period of time during which the jurisdiction of the court was suspended. \textit{CAL. CIV. PROCE. CODE} § 583.340(a) (West Supp. 1991).


\textsuperscript{568} \textit{Id.} \textit{CAL. CIV. PROC. CODE} § 396 (West 1991).

\textsuperscript{569} \textit{Schwenke}, 205 Cal. App. 3d at 78-79, 252 Cal. Rptr. at 95.

\textsuperscript{570} \textit{Id.} at 78, 252 Cal. Rptr. at 95.

\textsuperscript{571} \textit{Id.} at 80, 252 Cal. Rptr. at 96.


\textsuperscript{573} \textit{Id.} at 842, 269 Cal. Rptr. at 640. \textit{See CAL. CIV. PROCE. CODE} § 664.6 (West 1987) (authorizing a trial court to enter a judgment pursuant to the terms of a settlement agreement).
The court of appeal affirmed the trial court's judgment in favor of the defendant. The court pointed out the disagreement in appellate decisions in cases involving a conflict between section 664.6 and the five-year dismissal rule. Some courts hold that dismissal under the five-year rule cannot be entered after the parties execute a settlement agreement because the settlement necessarily precludes a trial and renders the dismissal statute irrelevant; other courts conclude that the action can be dismissed under the dismissal statute, if no judgment has been entered on the settlement agreement and the case has not been brought to trial within the five-year period. The Sixth District chose to apply the former rule, based primarily on the policy which favors settlements. The court also reasoned that it would have been futile for the parties to bring the action to trial after they executed the settlement agreement and thus, the factual situation fit within the futility exception to the five-year dismissal statute.

B. The Sixth District Also Enforced the Three-Year Dismissal Rule Against Plaintiffs

Code of Civil Procedure section 583.210(a) directs a plaintiff to serve the summons and complaint on the defendant within three years of the filing of the complaint. Code of Civil Procedure section 583.250 provides that a court shall dismiss the action, if the plaintiff has not timely served the summons and complaint. In three cases involving the three-year dismissal statute, the Sixth District ordered a dismissal in two cases, but found a dismissal improper in the third case.

574. Schiro, 220 Cal. App. 3d at 842, 269 Cal. Rptr. at 640.
575. Id. at 841-42, 269 Cal. Rptr. at 639.
578. Schiro, 220 Cal. App. 3d at 844, 269 Cal. Rptr. at 641.
579. Id. at 844-45, 269 Cal. Rptr. at 641. See CAL. CIV. PROC. CODE § 583.340(c) (West Supp. 1991) (futility exception).
581. Id. § 583.250.
In *Sanchez v. Superior Court*, two separate actions were brought on behalf of different plaintiffs arising out of the same fatal traffic accident. The defendants and their attorneys were the same in both actions. The two actions were consolidated for trial and the parties proceeded to take discovery, including depositions. The complaint in one of the actions was not served upon the defendants. The defendants brought a motion to dismiss that action under the three-year rule. The trial court denied the motion, finding that the participation of the defendants' attorneys at depositions in the consolidated action constituted a general appearance which rendered unnecessary actual service of the complaint in the one action. The trial judge commented that the defendants' attorneys, by seeking a dismissal under the circumstances, had engaged in "sharp practice."

The court of appeal issued a writ of mandate in *Sanchez*, directing the trial court to dismiss the action in which the defendants had not been served with the complaint. The court explained that the two lawsuits remained separate, even after consolidation for trial, and the participation of the defendants' attorneys in the action in which the defendants had been served did not constitute a general appearance in the other action. The court further refused to apply the doctrine of estoppel against the defendants because they had engaged in no affirmative conduct and did not have a duty to advise the plaintiffs in the one action that they had not been served with the complaint. Ultimately, the court found the defendants' attorneys innocent of "sharp practice."

In *Tzolov v. International Jet Leasing, Inc.*, the court affirmed a judgment of dismissal under the three-year statute. The

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583. Id. at 1394-95, 250 Cal. Rptr. at 788-89.
584. Id. at 1395, 250 Cal. Rptr. at 789.
585. Id.
586. Id. at 1394, 1401, 250 Cal. Rptr. at 788, 792-93.
587. Id. at 1399, 250 Cal. Rptr. at 791.
588. Id. at 1399-1400, 250 Cal. Rptr. at 791-92.
589. Id. at 1400, 250 Cal. Rptr. at 792.
plaintiff suffered a severe head injury when he fell from a truck owned by the defendant. In light of his incompetence, his mother brought an action on his behalf against the defendant for personal injuries. The complaint was never served. Nearly four years after the action was commenced, the plaintiff filed an amended complaint and served it on the defendant. The trial court granted the defendant’s motion to dismiss.\(^{591}\) On appeal, the plaintiff argued that the three-year period in the dismissal statute should have been tolled as a result of his incompetence.\(^{592}\) The court of appeal dismissed that contention, holding that the three-year time period set forth in section 583.210 cannot be tolled.\(^{593}\)

In *Davis v. Allstate Insurance Co.*\(^{594}\) the court reversed a dismissal under the three-year statute. A flood resulted in an action by many property owners against their insurance companies. The plaintiffs eventually filed a third amended complaint. Davis apparently had not served on Allstate any of the first three complaints. Shortly before the three-year period would expire, Davis attempted to serve Allstate with the third amended complaint. He inadvertently gave Allstate the superseded second amended complaint. After the three-year period had run, he corrected his mistake and provided Allstate with the third amended complaint. The court of appeal decided that Davis timely served the summons and complaint on Allstate in that he substantially complied with the statutory requirements for serving summons.\(^{595}\) The court pointed out that the purpose of the three-year dismissal statute -- to limit delay -- was not defeated because the third amended complaint was substantially similar to the second amended complaint and thus, Allstate had timely notice of Davis’ allegations against it.\(^{596}\)

\(591.\) *Id.* at 326-27, 262 Cal. Rptr. at 607.
\(592.\) *Id.* at 327, 262 Cal. Rptr. at 607.
\(593.\) *Id.* at 327, 262 Cal. Rptr. at 607-08.
\(595.\) *Id.* at 1233-34, 266 Cal. Rptr. at 670-71.
\(596.\) *Id.* at 1234, 266 Cal. Rptr. at 671.
CONCLUSION

Between 1988 and 1990, the Sixth District Court of Appeal issued a myriad of opinions in civil cases that defined significant substantive rights of parties and procedural duties of the attorneys who serve them. Following a review and analysis of those opinions, the court’s specific tendencies in reaching its decisions, as well as the court’s general outlook, come into view.

In 1988-1990, the court again exhibited a conservative philosophy, more conservative than its approach in 1985-1987. For example, the court showed little tolerance for lawsuits against the government, ruling in favor of public defendants in the vast majority of cases. Also, the court generally continued to construe and apply statutes strictly, even if the result was to deprive a plaintiff of his or her action. Once again, the court lacked interest in creating new law.

In tort cases, the court generally ruled against the plaintiffs. However, public defendants received much better results than private defendants. The court decided all eight of its government tort liability cases in favor of the government. Defendants prevailed in only half of the court’s tort cases involving private defendants. In two of the court’s most important tort decisions, the Sixth District held the defendants responsible for damages. In one case, the court ruled that an accounting firm was liable to non-clients who foreseeably were injured by the firm’s negligence. In the other case, the court allowed recovery for “fear of cancer.”

The Sixth District revealed a strong tendency to favor insurance companies. In nine out of eleven cases, the court accepted the insurer’s position of no coverage or minimal coverage. The supreme court reversed one of the court’s rulings in favor of an insurer and directed the Sixth District to reconsider another one of those rulings. The court’s rationale in other decisions for insurers was not convincing. Aside from coverage issues, the court’s rulings in bad faith actions against insurers likewise tended to favor insurers.

As it did in 1985-1987, the Sixth District generally ruled for employers in employment law cases. Unlike its 1985-1987
decisions which unanimously benefitted employers, the court denied all relief in only four out of seven wrongful termination actions against a private employer in 1988-1990. The government won both of the two employment cases involving public defendants. Also, the court showed a tendency to favor management over unions in a few labor cases.

In environmental cases, the Sixth District may be shifting its direction or, at least, its focus. Whereas it was partial to plaintiffs in nearly all of its environmental cases in 1985-1987, the court held that the public agency complied with CEQA in five out of seven cases in 1988-1990. Despite the remarkable statistical difference, the court's opinions reveal no disdain for environmental concerns. Instead, the court refused to read into CEQA alleged duties which found no support in the language of the act. Also, the court rejected demands for comprehensive environmental review of a project which was at a preliminary stage of development. The Sixth District recognized that environmental review must be commensurate only with the development stage of the project.

The Sixth District's landlord-tenant decisions did not evince a more conservative outlook. Although the court decided all three of its landlord-tenant cases in favor of the landlord in 1985-1987, the court ruled for the landlord in two cases, and held for the tenant in two cases, in 1988-1990. In its key decision in this area, the court concluded that a recapture provision, which allowed a lessor to cancel a lease upon the tenant's mere request for consent to a sublease, was void as against public policy.

The Sixth District faced many important constitutional law issues. The court revealed a tendency to prefer First Amendment values in libel cases. The court also protected the right to privacy in a significant mandatory drug testing case. However, the court was reluctant to allow the religious expression freedom to insulate members of religious organizations from liability for harmful conduct.

Finally, as it did in 1985-1987, the Sixth District continued to enforce procedural statutes strictly in 1988-1990. In five out of seven cases, the court applied the dismissal rules in the Code of Civil Procedure to bar a plaintiff's action.
Between 1988 and 1990, the court seemed very willing to address controversial issues in its reported decisions in civil cases. Now that it has six justices operating at peak efficiency, the court’s decisions in upcoming years will merit and receive considerable attention from legal scholars and the bar.