

# **EXHIBIT F**



**CHRYSLER CREDIT CORPORATION, Plaintiff and Respondent, v. HAROLD J. OSTLY, as Tax Collector, etc., et al., Defendants and Appellants**

Civ. No. 43333

Court of Appeal of California, Second Appellate District, Division Three

*42 Cal. App. 3d 663; 117 Cal. Rptr. 167; 1974 Cal. App. LEXIS 1257*

October 25, 1974

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Los Angeles County, No. C 965022, Delbert E. Wong, Judge.

**DISPOSITION:** The judgment is reversed as to each of the defendants.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

While there was pending a Commercial Code sale of personal property of an automobile dealership by a credit company that had taken possession and control of the dealership following default under a security agreement, a city and a county posted notices at the dealership premises that the property was seized and was to be sold for delinquent personal property taxes. No prior notification was given to the credit company. The credit company paid the taxes "under protest" and thereafter in an action against the city and the county to recover the taxes paid, the court entered judgment for the credit company, finding that the perfected security interest of the credit company was superior to the claim of the city and the county based on their tax assessments and that the manner in which the city and the county proceeded in respect of the threatened sale constituted an unlawful assertion of the right to transfer full title to the assets of the dealership free and clear of the credit company's security interest, and to deliver possession thereof to the high bidder, and that such conduct was a disparagement

of the credit company's perfected security interest and its right to possession of the assets for the purpose of completing its sale pursuant to the provisions of the Commercial Code. (Superior Court of Los Angeles County, No. C 965022, Delbert E. Wong, Judge.)

The Court of Appeal reversed. The court held that the notices of seizure and sale, purporting to offer for sale full title to and right to possession of all the property assessed, constituted an unlawful disparagement of the credit company's title, but that no findings were made that the tax payments were made by the credit company under circumstances sufficient to control the action of a reasonable man, or that the credit company must have considered it necessary to make the payment to protect its business interests, which were necessary elements of plaintiff's right to recover. Thus the court held it was not possible to affirm the judgment on the basis of recovery of a payment involuntarily made. The court further held that the action was a suit for refund of taxes "erroneously or illegally collected" and that the credit company failed to make the mandatory claim for refund, which was fatal to its right to recovery. (Opinion by Potter, J., with Allport, Acting P. J., and Cobey, J., concurring.)

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**  
Classified to McKinney's Digest

(1) Taxation § 323(1)--Sale for Delinquent Taxes--

**Purchases--Title--Prior Security Interest.** --A seizure and sale of personal property under *Rev. & Tax. Code, § 2914 et seq.*, for delinquent taxes is not effective to defeat or impair the interest of anyone holding a perfected security interest in the property, and there was thus nothing unlawful per se in a proceeding to conduct such a seizure and sale of an automobile dealership's personal property of which a credit corporation had assumed possession and control following a default on a security agreement.

**(2) Taxation § 299--Sale for Delinquent Taxes--Prerequisites to Valid Sale--Delinquency--Notice.** --Notices of seizure and sale of an automobile dealership for delinquent personal property taxes did not constitute the taking of property without due process of law in respect to a credit company which was in possession and control of the dealership following the dealership's default under a security agreement, on the ground the credit company was not given prior notice and hearing, where the purported "seizure" consisted of simply posting a notice that the property had been seized. Such notice had no legal effect and did not in fact interfere with the physical possession which was retained by the credit company at all times.

**(3) Libel and Slander § 101--Slander of Title--Interference With Sale for Delinquent Taxes.** --Notices of seizure and sale of all personal property of an automobile dealership for delinquent taxes, under *Rev. & Tax. Code, § 2914 et seq.*, constituted an unlawful disparagement of title as to a credit company that had previously assumed possession and control of the dealership after the dealership's default under a security agreement and had posted a notice that the property was to be sold at public auction, where it could be inferred that the taxing authorities were aware of the existence of the credit company's prior rights, which were a matter of public record, but the notices purported to offer for sale full title to and right to possession of all the property assessed, with no indication on the notice that the title to the property being sold, as well as the right to possession, was subject to the rights of any prior lienholders of record.

**(4) Taxation § 275--Remedies of Taxpayer--Recovery of Taxes Paid--Payment Under Compulsion--By Third Party.** --The fact that the holder of a security interest in personal property was not the taxpayer against whom personal property taxes were assessed would not preclude

it from recovering delinquent personal property taxes involuntarily paid in order to carry out its sale of the property pursuant to the Commercial Code following a default on a security agreement by the taxpayer. Where the effect of an unlawful assertion of a disparaging claim is a demand that some third party (not the obligor) pay it, a payment made by a third party may be recoverable as an involuntary payment.

**(5) Taxation § 288(1)--Remedies of Taxpayer--Proceedings in Action to Recover Taxes Paid--Trial; Findings--Involuntary Payment.** --In an action by a credit company to recover taxes paid on the personal property of an automobile dealership that the credit company had assumed the possession and control of following default on a security agreement, which taxes were paid to avoid jeopardizing its sale of the property, a judgment in favor of the credit company could not be sustained on the basis of recovery of a payment involuntarily made where there was no finding that the credit company's payment of the taxes were made under circumstances sufficient to control the action of a reasonable man and that the credit company must, in fact, have considered it was necessary to make the payment in order to protect its business interests. Both such elements were matters of fact which depended upon the evidence in each particular case and were for the trial court to determine.

**(6) Taxation § 293--Remedies of Taxpayer--Claim for Taxes Erroneously Collected--Presentation and Determination of Claim.** --An action by a security interest holder to recover taxes paid by it pertaining to taxpayer's personal property which it had assumed possession and control of following default on a security agreement, was not an action for taxes paid under protest since such an action may only be brought by the "owner" of the property on which the tax is levied; rather, the action was one for refund of taxes "erroneously or illegally collected," subject to the provisions of *Rev. & Tax. Code, § 5104*, which makes a claim for refund mandatory, and the security interest holder's failure to file a claim for refund or a claim for money or damages was fatal to its right to recovery.

**COUNSEL:** John H. Larson, County Counsel, and Lawrence B. Launer, Deputy County Counsel, for Defendants and Appellants.

Styskal, Wiese & Melchione and Alvin O. Wiese, Jr., for

Plaintiff and Respondent.

**JUDGES:** Opinion by Potter, J., with Allport, Acting P. J., and Cobey, J., concurring.

**OPINION BY: POTTER**

**OPINION**

[\*666] [\*\*168] This is an appeal from a judgment in favor of the plaintiff, Chrysler Credit Corporation (1) against defendant Harold J. Ostly, Tax Collector for the County of Los Angeles, and the County of Los Angeles (hereinafter collectively referred to as County), and (2) against William A. Ramsell, Tax Collector for the City of Long Beach, and the City of Long Beach (hereinafter collectively referred to as City). The judgment against defendant County was in the principal sum of \$ 3,160.95 with interest in the sum of \$ 641.19; the judgment against defendant City was in the principal sum of \$ 659.38 with interest in the sum of \$ 133.72. The principal sums of the two judgments were amounts paid by plaintiff "under protest" to prevent scheduled [\*\*\*2] sales of personal property pursuant to notices of tax collector's sale posted by defendant County and by defendant City, specifying respectively said sums as the amounts due for personal property taxes, fees and mileage.

The facts are not disputed. All the evidence presented to the trial court was included in a stipulation of facts. Some additional facts are available to this court by virtue of concessions in the appellate briefs.

The pertinent facts are that on August 10, 1967, Ray Vines Chrysler-Plymouth Corporation (hereinafter referred to as Vines) entered into a loan [\*667] agreement with plaintiff. Vines received a loan, in excess of \$ 800,000, and it executed a security agreement in favor of plaintiff pledging all of its vehicles, accounts receivable, contract rights, chattel paper, inventory, equipment, fixtures, personal property and the proceeds thereof then existing or thereafter acquired to secure repayment of [\*\*169] the debt. This security agreement was perfected by filing a financing statement with the Secretary of State on August 10, 1967.

On March 1, 1969, the County and the City made assessments of the business personal property of Vines. Personal [\*\*\*3] property taxes in the sum of \$ 3,143.95 were levied thereon by the County, and personal property taxes in the sum of \$ 656.36 were levied on said personal

property by the City. Both of these assessments were placed on the unsecured tax roll.

On July 3, 1969, Vines advised plaintiff that it could not pay its debts as they matured and invited plaintiff to take possession of the assets pledged as security. On that date plaintiff took possession and assumed control of the assets of Vines, including all of the personal property at said dealership, and placed a security patrol on the premises.

On or about July 11, 1969, plaintiff posted a notice of sale pursuant to *section 9504 of the Commercial Code* for the purpose of selling the pledged personal property at public auction. On July 15, 1969, plaintiff accelerated the indebtedness and duly notified Vines that the entire balance of the indebtedness, which exceeded \$ 800,000, was due. On July 16, 1969, while plaintiff's Commercial Code sale was pending, defendants, without prior notification to plaintiff, took action pursuant to *section 2914 et seq. of the Revenue and Taxation Code*<sup>1</sup> by posting notices of sale at Vines' premises. According [\*\*\*4] to defendants' closing brief, "[the] property was seized in July because it clearly appeared that the assessee was experiencing financial difficulties and it was imperative to act immediately to collect the tax debt."

<sup>1</sup> The pertinent portions of these sections are: "Taxes due on unsecured property may be collected by seizure and sale of any of the following property belonging or assessed to the assessee: (a) Personal property. (b) Improvements. (c) Possessory interests." (§ 2914.)

"Notice of the time and place of sale shall be given at least one week before the sale by publication in a newspaper in the county, or by posting in three public places. In the event that it is necessary to continue the sale to a later date, notice shall be given as provided above." (§ 2916.)

"On payment of the price bid for property sold, the delivery of the property with a bill of sale vests title in the purchaser." (§ 2918.)

The notice posted by defendant County stated that the "Assessee and/or Owner" was "Vines Chrysler-Plymouth," [\*\*\*5] specified the amount due for taxes, fees and mileage as \$ 3,160.95, described the

42 Cal. App. 3d 663, \*667; 117 Cal. Rptr. 167, \*\*169;  
1974 Cal. App. LEXIS 1257, \*\*\*5

property "seized" and to be sold at public auction as "Chrysler-Plymouth Dealer, all Personal Property," [\*668] and stated that "On payment of the amount bid for any property sold, the Tax Collector, or his deputy, will deliver the property to the purchaser, with a Bill of Sale, and the title shall thereon vest in the purchaser." The notice posted by defendant City described the property "seized" and to be sold as "personal property belonging to Vines, Chrysler & Plymouth and or other unknown owners," at the address of Vines. It likewise stated, "Upon payment of the price bid for any property sold, the property sold will then and there be delivered to the purchaser, together with a bill of sale vesting title in said purchaser."

The amounts stated as due on said notices and sale were, on July 31, 1969, paid by plaintiff to defendant County and to defendant City, respectively. According to defendants' opening brief, "The taxes were paid by Respondent to prevent a scheduled County sale of certain property upon which there were delinquent taxes." <sup>2</sup> Plaintiff made said payments "under protest," claiming [\*\*\*6] in each case that its security interest took priority over the assessments which were "void" as to such interest. On August 10, 1969, pursuant to the notice of sale under *section 9504 of the* [\*\*170] *Commercial Code*, the assets of Vines were sold by plaintiff, and after application of the proceeds of said sale to Vines' indebtedness, there remained due, owing and unpaid to plaintiff a sum in excess of \$ 150,000 (including the \$ 3,160.95 paid to defendant County and the sum of \$ 659.38 paid to defendant City).

<sup>2</sup> Though this statement makes no reference to the sale scheduled by the City, it is apparent that the City was paid on the same basis as the County.

There is no allegation in the complaint and nothing in the stipulated facts or findings of fact to indicate or suggest that plaintiff filed any claim for refund pursuant to *section 5097 of the Revenue and Taxation Code*, or filed any claim for money or damages pursuant to *sections 905 and 910 of the Government Code*.

The matter was submitted to the trial [\*\*\*7] courts on the basis of the stipulation of facts and on written briefs and oral argument. When the court indicated its intended decision to render judgment for plaintiff as prayed, findings of fact and conclusions of law were requested by both parties. Findings were submitted by

counsel for plaintiff. Objections and proposed counterfindings were filed by defendants. The court heard argument and settled the findings, making interlineations and deletions in those submitted by plaintiff.

The contentions argued in the trial briefs related primarily to the availability of the seizure and sale procedure provided by *section 2914 et seq. of the Revenue and Taxation Code* in respect of personal property subject to a perfected security interest or lien in favor of someone other than the assessee. In this connection, plaintiff contended that this procedure is not [\*669] intended to apply to property which is subject to a perfected security interest and, therefore, that defendants' resort to the use of it was unlawful. Defendants contended there was no such exception to the applicability of the procedure and that their conduct was fully authorized.

A secondary issue extensively argued [\*\*\*8] in the trial briefs was whether *section 2914 et seq.* were constitutional if construed as providing for seizure and sale of property subject to prior perfected security interests, by reason of their failure to provide for notice to the holder of the security interest and for a hearing in advance of the seizure and sale.

The findings of fact and conclusions of law do not precisely articulate the basis for plaintiff's recovery of the amounts paid. They suggest, however, a theory of recovery not directly urged in plaintiff's trial brief. The court concluded (conclusion No. 2) that the perfected security interest of plaintiff was superior to the claim of defendants based upon their tax assessments, and (conclusion No. 5) that defendants were not authorized to "seize, attempt to seize, sell, or attempt to sell personal property pursuant to *Revenue and Taxation Code sections 2914 and 2916 . . .* the effect of which would be to impair or defeat a perfected lienholder's right to possession of or an interest in the personal property." It found, however (finding No. 14), as follows: "Defendants have continually asserted that they have a prior lien on or right to plaintiff's personal property [\*\*\*9] as security for the payment of unsecured personal property taxes assessed on account of personal property even though such taxes are assessed to Ray Vines Chrysler Plymouth subsequent to the date upon which Chrysler Credit Corporation perfected its security interest. . . ."

The court further concluded (conclusion No. 4) that

42 Cal. App. 3d 663, \*669; 117 Cal. Rptr. 167, \*\*170;  
1974 Cal. App. LEXIS 1257, \*\*\*9

the defendants' "seizure and threatened sale" of the assets of Vines was "in derogation [*sic*] of the rights of" plaintiff.

By the foregoing findings and conclusions, the court held that the unauthorized manner in which defendants proceeded in respect of the threatened sale constituted an unlawful assertion of the right to transfer full title to the assets of Vines, free and clear of plaintiff's security interest, and to deliver possession thereof to the high bidder, and that such conduct was a disparagement of plaintiff's perfected security interest and of plaintiff's right to possession [\*\*171] of such assets for the purpose of completing its sale pursuant to the provisions of the Commercial Code.

[\*670] It thus appears that the court's judgment was based at least in part<sup>3</sup> on the proposition that (a) even if defendants had the power to conduct [\*\*\*10] a sale, they had no right publicly to assert the power to conduct a sale which would defeat plaintiff's security interest, (b) defendants wrongfully asserted such power, and (c) money paid by plaintiff "to prevent" such threatened sale was recoverable on the theory that it was an involuntary payment. This theory is now urged by plaintiff in its brief (albeit without citation of supporting authorities)<sup>4</sup> as a basis for affirming the judgment.

3 Other findings and conclusions of the court resolved other issues in favor of plaintiff's contentions. It was found (finding No. 12) that the procedure specified in *section 2914 et seq.* afforded plaintiff "no prior notice or opportunity to be heard respecting the seizure of the personal property" of Vines. The court concluded (conclusion No. 3) that defendants were not authorized "to seize, attempt to seize, sell, or attempt to sell personal property . . . subject to a prior perfected security interest" without giving plaintiff, as holder of a perfected security interest, "prior notice and opportunity to be heard."

4 As will hereinafter appear, there are such authorities.

[\*\*\*11] Before proceeding to a discussion of any of the contentions of the parties, it should be noted that various legal issues have been eliminated from the case by concessions on the part of defendants. Defendants concede: (1) that plaintiff had a perfected security interest which was a lien on all of Vines' property which defendants purported to seize and sell; (2) that the taxes

assessed upon such property did not constitute a lien upon it<sup>5</sup> and, therefore, (3) that the interest in such property which defendants were entitled to sell pursuant to *section 2914 et seq. of the Revenue and Taxation Code* (assuming the applicability thereof) was a limited title, subordinate to the security interest of plaintiff.<sup>6</sup>

5 This concession accords with established law: "The lien of a property tax exists only by virtue of statute. The general rule is that, unless expressly made so by statute, taxes are not a lien. [Fns. omitted.]" (46 Cal. Jur. 2d (1959) Taxation, § 230, at p. 755. See *Guinn v. McReynolds*, 177 Cal. 230, 232-234 [170 P. 421]; *Home Owners' Loan Corp. v. Hansen*, 38 Cal. App. 2d 748, 750-752 [102 P. 2d 417].)

[\*\*\*12]

6 In their opening brief, defendants say: "[A] lien-holder's interest in property which is sold at a 2914 sale will not be impaired or defeated."

Concession (3) is based upon two court decisions: *Fresno County v. Commodity Credit Corporation* (9th Cir. 1940) 112 F.2d 639 and *Dohrmann Co. v. Security Sav. & Loan Assn.*, 8 Cal. App. 3d 655 [87 Cal. Rptr. 792]; and accords with the holdings in those cases. In *Fresno County v. Commodity Credit Corporation*, *supra*, a declaratory relief action was brought by a secured creditor who had a lien on cotton which had been assessed as personal property by Fresno County. The county contended that the cotton was "subject to seizure and sale in the event of non-payment of taxes, without . . . seizures or sales being made subject to said rights, [\*\*671] interests and liens of plaintiff." The Court of Appeals rejected said contention, stating (112 F.2d at p. 642): "Upon the controversy between the appellants and appellee we hold the seizure of the cotton by appellants, because of non-payment of taxes by the owner, creates no priority [\*\*\*13] over the lien of appellee and that the rights of appellee cannot be impaired or destroyed by such action by appellants."

In *Dohrmann Co. v. Security Sav. & Loan Assn.*, *supra*, the dispute was between a plaintiff who was an unpaid conditional seller of personal property and a subsequent creditor holding a junior security interest in said property. The creditor with the junior security interest was also the purchaser of the property at a tax collector's sale conducted pursuant to *section [\*\*172] 2914 et seq. of the Revenue and Taxation Code*. In

42 Cal. App. 3d 663, \*671; 117 Cal. Rptr. 167, \*\*172;  
1974 Cal. App. LEXIS 1257, \*\*\*13

reversing a judgment for defendant after general demurrers were sustained, the court stated the following concerning the effect of a sale under *section 2914 et seq.* upon previously perfected liens: "[The] items were personal property which had appeared on Alameda County's 'unsecured roll' (see § 109), and which had been seized and sold for delinquent taxes pursuant to *section 2914*. A tax collector, seizing and selling personal property for taxes, is acting under the statutory equivalent of a common law writ of distraint. (See *In Re Timberline Lodge (D.Ore. 1955) 139 F.Supp. 13, 16.*) He does not, however, pass title to personal [\*\*\*14] property which has been perfected from his own lien upon it; unlike the situation with realty, the law gives him no tax lien on personal property. (Ehrman and Flavin [*op. cit. supra*] § 529, pp. 504-505. See *Fresno County v. Commodity Credit Corp. (9th Cir. 1940) 112 F.2d 639, 640.*) Section 3712, operating to deliver clear title to property sold for taxes, is part of a statutory scheme which is obviously designed to stabilize and guarantee tax title to realty. The Legislature has enacted no similar scheme as to personal property." (8 Cal.App.3d at pp. 663-664.)

The above interpretation of *section 2914 et seq. of the Revenue and Taxation Code* is reinforced by the addition of *sections 2191.3, 2191.4 and 2191.5* to the Code in 1961. Those sections provide for liens to secure payment of personal property taxes, specify the time of filing for record of a certificate of delinquency as the date of attachment of such liens, and make such liens subordinate to "any other lien which attached prior to the date" upon which the tax lien attaches.

The third concession of defendants, therefore, correctly states the law with respect to the effect of a seizure and sale under *section [\*\*\*15] 2914 et seq. of the Revenue and Taxation Code*; such proceedings are not effective to defeat or impair the interest of anyone holding a perfected security interest.

#### [\*672] Contentions

Defendants contend that the action taken by them pursuant to *section 2914 et seq. of the Revenue and Taxation Code* was authorized by said sections, and that no denial of due process was involved therein since plaintiff was duly notified of the seizure and intended sale and had available to it post-seizure judicial procedures to test any resulting claim of title or right to possession superior to plaintiff's rights under its perfected security interest. Plaintiff contends that, under the

circumstances, the defendants had no power or authority to seize and sell the property, that the notice of seizure and sale constituted a taking of plaintiff's property without due process, and that the payment of the taxes by plaintiff as a result of the coercive effect of defendants' unlawful conduct is recoverable as an involuntary payment.

#### Issues

The issues determinative of this appeal, as perceived by this court, are somewhat different than those posed by the contentions of the parties. They are:

[\*\*\*16] (1) Were the notices of "seizure" and sale as posted by defendants an unlawful threat to sell and deliver title and possession, constituting wrongful disparegement of plaintiff's title and right to possession?

(2) Was plaintiff's payment of the taxes on the property assessed an involuntary payment made under compulsion of defendants' wrongful disparegement?

(3) Has plaintiff shown its compliance with the procedural conditions precedent to the recovery of money paid under such compulsion?

#### *The Notices of Seizure and Sale Were Unlawful*

(1) The foregoing authorities limiting the effect of a seizure and sale under *section [\*\*173] 2914 et seq. of the Revenue and Taxation Code* to a transfer of the assessed property subject to the valid liens in favor of third parties eliminate any valid reason for holding such procedure inapplicable to property subject to prior liens. There is nothing in the statutory language suggesting any such restriction and no logical reason to imply one. If the assessee has any equity in the property, the tax collector should be able to reach it like any other property. The foreclosure of junior liens by sale of property subject to prior encumbrances is [\*\*\*17] common practice. Properly conducted, it results in no interference with the rights of senior lien holders and therefore there is no reason to assume that the Legislature would not intend to [\*673] sanction proceeding in such fashion to effect collection of personal property taxes.

There was, therefore, nothing unlawful per se in defendants' proceeding to conduct a seizure and sale pursuant to *section 2914 et seq. of the Revenue and Taxation Code*. Such a sale, as a matter of law, could not

42 Cal. App. 3d 663, \*673; 117 Cal. Rptr. 167, \*\*173;  
1974 Cal. App. LEXIS 1257, \*\*\*17

terminate plaintiff's security interest and if such seizure and sale had been properly carried out by defendants, plaintiff's security interest and possessory rights would have suffered no adverse effect. The interest of the assessee, Vines, would have been seized and sold (if there had been any bidders) subject to the prior rights of plaintiff. The prior rights thus respected would have included not only the security interest but, as well, plaintiff's right to retain possession of such property and sell it in accordance with the provisions of the Commercial Code governing disposition of collateral after default.<sup>7</sup> Such a tax sale would not have interfered in any respect with plaintiff's [\*\*\*18] rights.

<sup>7</sup> Section 9503 of the Commercial Code, as well as the express terms of the security agreement between plaintiff and Vines, authorized such action.

(2) The foregoing authorities also dispose of plaintiff's contention that the notices of seizure and sale were the taking of its property without due process of law because it was not given prior notice and a hearing. It is true that "[when] conducting a proceeding which may result in the termination of a citizen's title to property, government denies due process of law to a known, interested party if it fails to give him adequate notice of its action." (*Dohrmann v. Security Sav. & Loan Assn.*, *supra*, 8 Cal.App.3d 655, 664.) It is also true that normally in addition to such notice some kind of preliminary hearing must precede the taking of any significant interest in property. (*Randone v. Appellate Department*, 5 Cal.3d 536 [96 Cal.Rptr. 709, 488 P.2d 13], and *People ex rel. Younger v. Allstate Leasing Corp.*, 24 Cal.App.3d 973 [101 [\*\*\*19] Cal.Rptr. 470].) However, these requirements were not invoked by defendants' mere initiation of proceedings to seize and sell, since their conduct did not constitute any taking of plaintiff's property. The purported "seizure" by simply posting a notice stating that the property had been seized was a nullity. Section 2914 et seq. of the Revenue and Taxation Code give no legal effect to any such notice and it did not, in fact, interfere with the physical possession which was retained by plaintiff at all times.

The threatened sale did not actually occur and could not have terminated plaintiff's title even if it had occurred. It is, therefore, unnecessary to decide whether, under the rule of *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820] and

*Randone v. Appellate Department*, *supra*, 5 Cal.3d 536, 541, the termination of interests (such as that of the assessee) by seizure and sale to collect taxes can be accomplished [\*674] without prior notice and hearing, and we express no opinion on that question.

(3) The foregoing, however, does not dispose of plaintiff's challenge to the lawfulness of defendants' conduct. Defendants had [\*\*\*20] only the right to seize and sell Vines' assets subject to plaintiff's prior security interest and right to possession. From the [\*\*174] facts that defendants acted precipitously, in light of the assessee's financial difficulties, and that plaintiff was in possession of Vines' assets in the premises at which defendants posted their notices, it may be inferred that defendants were aware of the existence of plaintiff's prior rights, which were a matter of public record. Nonetheless, defendants' notices purported to offer for sale full title to and right to possession of all of the property assessed. In the notice posted by defendant County, the property was described as: "Chrysler-Plymouth dealer all personal property." In the notice posted by defendant City the property is described as: "Personal property belonging to Vines, Chrysler & Plymouth and or other unknown owners." Both notices expressly stated that the property would be delivered to the purchaser with a bill of sale, and that the title would thereon vest in the purchaser.

Under the circumstances, defendants' notices of seizure and sale constituted an unlawful disparagement of plaintiff's title. That tort is defined [\*\*\*21] in *Gudger v. Manton*,<sup>8</sup> 21 Cal.2d 537 [134 P.2d 217], where the court said (at page 541): "The judgment here under attack rests upon the theory of a slander by appellant of the title of plaintiff's property, or more accurately the wrongful disparagement of plaintiff's title thereto to his injury. At the outset it is helpful to have before us an accurate definition of that tort. It may be best stated as follows: 'One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.' (Rest. Torts, § 624.)" (See also Rest., Torts, §§ 624-625; Rest. 2d Torts, Tentative Draft No. 12, §§ 623A, 624.) The circumstances were such that defendants were obliged to foresee that the

42 Cal. App. 3d 663, \*674; 117 Cal. Rptr. 167, \*\*174;  
1974 Cal. App. LEXIS 1257, \*\*\*21

conduct of prospective purchasers from plaintiff might be determined by the notices of seizure and sale. Such notices indicated to any such purchaser that he would be buying [\*\*\*22] a lawsuit, a commodity commonly regarded as of doubtful value. The disparagement of plaintiff's security interest inherent in the form of notice used by defendants [\*675] was, moreover, wholly unnecessary. The simple addition of a statement to the effect that the title to the property being sold, as well as the right to possession, was subject to the rights of any prior lienholders of record would eliminate such disparagement without the necessity of the tax collector's making any inquiry as to the existence of such prior liens. It would then be the duty of the bidders to check the necessary public records to verify the extent of the title subject to acquisition.

8 One statement only in *Gudger v. Manton* was disapproved in *Albertson v. Raboff*, 46 Cal.2d 375 [295 P.2d 405]. The portion disapproved, however, is not pertinent to the definition of the tort of disparagement.

*Plaintiff's Payment of the Tax, if in Fact Involuntary, Was Recoverable*

The principle governing recovery of involuntary [\*\*\*23] payments made to satisfy an illegal demand is stated in *Flynn v. San Francisco*, 18 Cal.2d 210 [115 P.2d 3]. A taxpayer sued to recover illegally levied license taxes upon vehicles. The taxes had been paid by the plaintiff as a result of defendant's policy of enforcement which included wholesale stopping of vehicles whereupon "their drivers were escorted to the tax collector's office and were forced to notify their employers they were so held until such time as the money arrived to satisfy the demands made." In holding the tax recoverable, the court said [\*175] (18 Cal.2d at pp. 216-217): "Appellant urges, however, that otherwise there was no compulsion, and the payments were voluntary because made without the filing of formal protests and because the tax collector had no power to execute the threats of seizures, confiscations or sequestrations. (*Maxwell v. County of San Luis Obispo*, 71 Cal. 466 [12 Pac. 484]; *Brumagin v. Tillinghast*, 18 Cal. 265 [79 Am. Dec. 176].) Decidedly apropos to the argument thus advanced is the following language from *Young v. Hoagland*, 212 Cal. 426, 430, 431 [298 Pac. 996, 75 A. L. R. 654]:

. . . That case [\*\*\*24] [*Brumagin v. Tillinghast*,

*supra*] may have stated the rule of the common law at the time of its pronouncement in regard to voluntary payments, but the rule, as thus announced, has been greatly relaxed in more recent decisions in favor of the recovery of money improperly exacted by a defendant. (21 R. C. L., p. 147.) "Among the instances of the relaxation of the strictness of the original common law rule is the case of payments constrained by business exigencies, that is payments of illegal charges or exactions under apprehension on the part of the payers of being stopped in their business if the money is not paid. It has been stated that the general rule with regard to duress of this character is that where, by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, he may recover it." (21 R. C. L., pp. [\*676] 154, 155.) Upon this same subject we find the following statement in 20 California Jurisprudence, page 964: "The underlying principle (that money paid [\*\*\*25] under compulsion may be recovered) is said to be that, by the performance of or threat to perform some unlawful act whereby plaintiff will suffer loss, the defendant has induced the plaintiff, under circumstances sufficient to control the action of a reasonable man, to pay money which he would not otherwise have paid." . . ."

*Young v. Hoagland*, 212 Cal. 426 [208 P. 996, 75 A.L.R. 654], cited and quoted by the court in *Flynn*, was an action by stockholders to recover an assessment illegally levied by the board of directors and paid under threat of sale of the stock for nonpayment. In addition to that portion of the opinion quoted above in *Flynn*, the following pertinent statement appears in *Young v. Hoagland* (212 Cal. at p. 431): "It has frequently been held that payment of an illegal claim to a public officer upon the threat of the latter to seize and sell the property of the plaintiff under process held by said officer, is a payment made under compulsion and may be recovered back. 'In such cases the parties cannot treat on equal terms, and the one on whom the demand is made is not bound to submit to the seizure of his property, and then seek his remedy [\*\*\*26] for trespass, but he may pay the illegal demand and then recover it back.' (21 R. C. L., p. 159.)"

The same principle has been found controlling in several more recent decisions of our appellate courts.

42 Cal. App. 3d 663, \*676; 117 Cal. Rptr. 167, \*\*175;  
1974 Cal. App. LEXIS 1257, \*\*\*26

(See, e.g., *City of Belmont v. Union Paving Co.*, 156 Cal.App.2d 214, 217-218 [319 P.2d 353]; *Newport Bldg. Corp. v. City of Santa Ana*, 210 Cal.App.2d 771, 778 [26 Cal.Rptr. 797].)

(4) The fact that plaintiff was not the taxpayer against whom the taxes were assessed does not preclude him from recovering. Where the effect of an unlawful assertion of a disparaging claim is a demand that some third party (not the obligor) pay it, a payment made by a third party may be recoverable as an involuntary payment. In *Wake Development Co. v. O'Leary*, 118 Cal.App. 131 [4 P.2d 802], plaintiff, an owner of property in the middle of a transaction to sell it, was confronted with a levy of execution upon such property on a judgment [\*\*176] against a debtor who had no interest in it. After prevailing in an action to quiet title, the plaintiff, who had in the meantime paid \$ 3,000 to effect a release and thereby avoid cancellation of the sale by his purchaser, brought [\*\*\*27] suit to recover the \$ 3,000. The judgment for plaintiff was affirmed. The court said (118 Cal.App. at p. 135): "Respondent had a right to sell its property without being molested with the wrongful levy of execution based upon appellant's unfounded claim that her judgment debtor had an interest in the property. That right was denied to respondent by the act of appellant. Owing to the threatened loss of the [\*677] sale and the delay necessarily incident to the prosecution of the injunction suit, respondent's only means of avoiding serious loss was by payment of the money. Under these circumstances the payment may not be considered voluntary (*McTigue v. Arctic Ice Cream S. Co.*, supra), and the trial court properly found that 'the exaction of the three thousand dollars from the plaintiff was without right on the part of the defendant and that plaintiff paid the same under compulsion in order to save financial loss to plaintiff.'"

The opinion of this division in *Scol Corp. v. City of Los Angeles*, 12 Cal.App.3d 805 [91 Cal.Rptr. 67], is not to the contrary. In that case the payment of the so-called "tipplers' tax" by a bar owner was held to be voluntary and [\*\*\*28] not recoverable though the tax was illegal. The plaintiff claimed that he was coerced into making payment from his own funds and did not collect the tax from his customers, as required by the ordinance, because of the economic necessity of competing with bars outside the city. This court said (12 Cal.App.3d at p. 810): "Scol was not a taxpayer who was compelled to pay illegal taxes. Rather, Scol was a tax collector who was

compelled to collect illegal taxes and was subject to possible penalties for failure to collect these taxes. As already noted, Scol's liability to the city was for this failure to collect these taxes and not for the taxes themselves. (Cf. *Brandtjen & Kluge v. Fincher*, supra, and cases noted therein.) Further, while the use tax at issue has been declared illegal in *Century Plaza Hotel Co. v. City of Los Angeles*, supra, 7 Cal.App.3d 616 [87 Cal.Rptr. 166], the statutory scheme requiring retailers like Scol not only to collect the tax, but also making them liable for their failure to collect the tax was many years ago upheld against constitutional challenge by the highest court in the land. (See *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 [\*\*\*29] U.S. 62 [83 L.Ed. 488, 59 S.Ct. 376].)"

The situation in *Scol* is thus distinguishable on the basis that it was not a wrong against plaintiff to require him to collect the tax, even if the tax was unlawful. Another distinction between the factual situation in *Scol* and those involved in the above cited authorities is that the conduct of the City of Los Angeles in enacting and attempting to enforce the tipplers' tax did not constitute a demand, express or implied, that the bartender pay the tax from his own funds.

(5) The conduct of defendants in the case at bar in posting notices of seizure and sale in which they asserted the right to sell and deliver possession and full title to plaintiff's property, apparently with full knowledge of plaintiff's rights, and for the purpose of effecting quick collection to avoid the effect of "the actual or threatened insolvency of the taxpayer" [\*678] constituted not only an unlawful disparagement of plaintiff's title but as well a demand that plaintiff pay the taxes.

Under the authorities cited, plaintiff's right to recover depended upon its proving that the payment was made under circumstances constituting compulsion. There are two [\*\*\*30] elements to such a showing: first, the payment must have been made "under circumstances sufficient to control [\*\*177] the action of a reasonable man," and second, the plaintiff must, in fact, have considered that to protect its business interests it was "necessary to make a payment." (*Flynn v. San Francisco*, supra, 18 Cal.2d at p. 217.) Both such elements are matters of fact which depend upon the evidence in each particular case and which facts are for the trial court to determine. (*Engelken v. Justice Court*, 50 Cal.App. 157, 159 [195 P. 265].)

The findings of fact below do not include any finding upon either of these issues. Though defendants concede that the taxes were paid "to prevent a scheduled County sale of certain property," no evidence was offered on the basis of which the trial court could have found, or this court can find, that either of the above two elements existed. Plaintiff simply did not try the case on this theory.<sup>9</sup> It is, therefore, not possible for this court to affirm the judgment on the basis of recovery of a payment involuntarily made.

9 If plaintiff had tried the case on this theory, it is not unlikely that it would have been able to prove both such elements. In the form in which they were posted, the notices of seizure and sale would no doubt have a chilling effect on plaintiff's Commercial Code sale. In view of the small amount of the tax claims involved, alternate methods of eliminating the problem could have entailed greater monetary outlay than paying them. For example, an injunction suit against the tax collector might have involved fees and expenses in excess of the tax. If plaintiff's sale were made under an indemnity agreement with its purchaser, there might have been comparable expenses incurred in defending the purchaser's title and right to possession.

[\*\*\*31] *A Claim for Refund of Taxes or a Claim for Money or Damages Was Required*

(6) According to its title, plaintiff's complaint seeks "refund of taxes paid under protest." The letters which accompanied plaintiff's payments stated that payment was made "under protest," and claimed that the whole assessment was "void to the extent of the security interest held by" plaintiff. No claims for refund of the taxes so paid were filed.

There are two procedures provided by the Revenue and Taxation Code for obtaining refund of taxes. The normal procedure is specified in *sections 5096 through 5108*. This procedure is specifically applicable to taxes "[erroneously] or illegally collected" (§ 5096, *subd. (b)*), requires a verified [\*679] claim for refund filed within four years after making of the payment (§ 5097), permits suit within six months after rejection (§ 5103) and makes a claim for refund a mandatory condition precedent to any such action (§ 5104).<sup>10</sup>

<sup>10</sup> *Revenue and Taxation Code section 5104*

reads as follows: "No action shall be commenced or maintained under this article unless a claim for refund shall have been filed in compliance with the provisions of this article, and no recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund."

[\*\*\*32]

The only exception to the procedures specified in *section 5096 et seq.* (requiring a claim for refund) is that provided by *section 5136 et seq. of the Revenue and Taxation Code*. These sections permit the owner of property to pay the taxes on it under protest and to sue for recovery thereof within six months after such payment. The pertinent provisions of the Revenue and Taxation Code establishing this protest procedure are *sections 5136, 5137, 5139 and 5141*.<sup>11</sup>

11 "After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment." (§ 5136.)

"The protest shall be in writing, specifying: (a) Whether the whole assessment is claimed to be void or, if only a part, what portion. (b) The grounds on which the claim is founded." (§ 5137.)

"The action may be brought only: (a) As to the portion of the assessment claimed to be void. (b) On the grounds specified in the protest. (c) By the owner, his guardian, executor, or administrator." (§ 5139.)

"If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is allowed at a rate per centum per annum equal to the rate per centum per annum that the defendant has received, through investment or by bank deposit, on the amount allowed and recovered as taxes from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void

42 Cal. App. 3d 663, \*679; 117 Cal. Rptr. 167, \*\*177;  
1974 Cal. App. LEXIS 1257, \*\*\*32

shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interests and costs." (§ 5141.)

[\*\*33] [\*\*178] It is apparent from the language of these sections that the protest procedure is available only where the entire assessment or some specific portion thereof is void.

Though plaintiff sought in its protests to characterize the assessments as "void to the extent of the security interest" held by it, it made no showing which supports that claim and appears to have abandoned it. In the statement of the case in defendants' opening brief it is asserted that "[there] is no issue involving the validity of those assessments as they were not challenged by any party." Plaintiff, in its brief, concedes: "Appellants' statement of the case is substantially correct." It is, moreover, [\*680] apparent that plaintiff's concession in this respect is unavoidable. Vines was the owner of and was in possession and control of the assessed property on the first Monday in March 1969. The assessment was, therefore, valid when made. (*Rev. & Tax. Code*, § 405; see *S. & G. Gump Co. v. San Francisco*, 18 Cal.2d 129, 131 [114 P.2d 346, 135 A.L.R. 595]; *Thompson v. Board of Supervisors*, 13 Cal.App.2d 134, 137 [56 P.2d 571].)

Sections 5136 and 5139 of the *Revenue and Taxation* [\*\*34] Code also require that the party paying under protest and bringing the action be the "owner" of the property on which the tax is levied. Plaintiff, as holder of a perfected security interest, was not owner of

the property assessed.

Plaintiff's action is not, therefore, a suit to recover taxes paid under protest; it is a suit for refund of taxes "erroneously or illegally collected" subject to the provision of *section 5104 of the Revenue and Taxation Code* which makes a claim for refund mandatory.

The right to recovery of taxes is purely statutory and is granted upon conditions. In order to recover, the conditions must be met. (*Sierra Investment Corp. v. County of Sacramento*, 252 Cal.App.2d 339, 346 [60 Cal.Rptr. 519].)

Defendants' conduct may also have constituted disparagement giving rise to an action for damages in tort. However, on that theory plaintiff's causes of action would be "claims for money or damages against local public entities" subject to the provisions of *section 905 of the Government Code*. This section also requires filing of a claim which is a statutory condition precedent to the right to bring an action. (*County of San Luis Obispo v. Ranchita* [\*\*35] *Cattle Co.*, 16 Cal.App.3d 383 [94 Cal.Rptr. 73]; *Lewis v. City and County of San Francisco*, 21 Cal.App.3d 339 [98 Cal.Rptr. 407].)

Plaintiff's failure to file a claim for refund or a claim for money or damages is fatal to its right to recovery.

The judgment is reversed as to each of the defendants.

# **EXHIBIT G**



**BETTY JEAN CURRY et al., Petitioners, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; RIALTO UNIFIED SCHOOL DISTRICT et al., Real Parties in Interest.**

No. E012847.

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION TWO**

*20 Cal. App. 4th 180; 24 Cal. Rptr. 2d 495; 1993 Cal. App. LEXIS 1161; 93 Cal. Daily Op. Service 8601; 93 Daily Journal DAR 14723*

**November 18, 1993, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] Review Denied February 3, 1994, Reported at: *1994 Cal. LEXIS 556*.

**PRIOR HISTORY:** Superior Court of San Bernardino County, No. 268794, Jeffrey Giarde, Judge. \*

\* Judge of the San Bernardino Municipal Court, East Division, sitting under assignment by the Chairperson of the Judicial Council.

**DISPOSITION:** Accordingly, the trial court correctly overruled the Currys' demurrer to the fifth cause of action of the District's cross-complaint. The petition is denied, and the alternative writ is discharged.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

A high school student, who had been sexually molested by a minor, brought an action against the school district and its employees for failure to control the minor. Defendants cross-complained for indemnity against the minor and against the minor's parents under general claims of indemnity, under a theory of negligent supervision, and under *Civ. Code, § 1714.1* (civil liability of parents for minor's wrongful acts). Cross-defendants

successfully demurred to the cross-complaint except as to the § 1714.1 claim. (Superior Court of San Bernardino County, No. 268794, Jeffrey Giarde, Judge. \*)

\* Judge of the San Bernardino Municipal Court, East Division, sitting under assignment by the Chairperson of the Judicial Council.

The Court of Appeal denied the parents' petition for a writ of mandate. It held that *Civ. Code, § 1714.1*, which imputes liability to parents for the willful misconduct of a minor that results in death, personal injury, or property damage, inures to the benefit of third party tortfeasors as well as the injured party. Since the establishment of comparative negligence in California, the law has pursued the goal of the equitable sharing of financial responsibility for a plaintiff's damages among all those legally liable. The parents were not able to escape liability merely because of the fortuitous decision of the student not to name the minor or the parents in her suit. Further, construing the statute so as to benefit third parties is in accordance with the legislative trend of expanding parental liability for the wrongful acts of their children. Thus, the trial court properly overruled the parents' demurrer as to the cause of action under § 1714.1. (Opinion by Dabney, Acting P. J., with Hollenhorst and McKinster, JJ., concurring.)

**HEADNOTES****CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports

**(1) Mandamus and Prohibition § 35--Mandamus--To Courts--Pleading--Rulings on Demurrers: Appellate Review § 128--Rulings on Demurrers.** --Appellate courts do not routinely afford plenary review to rulings on demurrers, since the appellate courts do not have the time or resources to police law and motion rulings on the pleadings through the mandamus power. Absent unusual circumstances, the appellate courts decline to do so. However, where a significant issue of law is raised, and where resolution of the issue in favor of the petitioner would result in a final disposition as to that party, review by writ is appropriate.

**(2) Contribution and Indemnification § 8.2--Indemnification--Parents of Minor Who Commits Willful Misconduct--Parents' Indemnification of Third Party Tortfeasors: Torts § 7--Persons Liable.** --In a cross-action, brought by a school district that had been sued by a student who had been sexually molested by a minor, against the minor's parents for indemnification under *Civ. Code, § 1714.1* (civil liability of parents for minor's wrongful acts resulting in death, personal injury, or property damage), the trial court properly overruled the parents' demurrer. *Section 1714.1*, inures to the benefit of third party tortfeasors as well as the injured party. Since the establishment of comparative negligence in California, the law has pursued the goal of the equitable sharing of financial responsibility for a plaintiff's damages among all those legally liable. The parents were not able to escape liability merely because of the fortuitous decision of the student not to name the minor or the parents in her suit. Further, construing the statute so as to benefit third parties is in accordance with the legislative trend of expanding parental liability for the wrongful acts of their children.

[See 6 *Witkin*, Summary of Cal. Law (9th ed. 1988) Torts, § 1003.]

**COUNSEL:** Roberts & Morgan and Arthur K. Cunningham for Petitioners.

No appearance for Respondent.

Lewis, D'Amato, Brisbois & Bisgaard and Karen A. Feld for Real Parties in Interest.

**JUDGES:** Opinion by Dabney, Acting P. J., with Hollenhorst and McKinster, JJ., concurring.

**OPINION BY:** DABNEY Acting, P. J.

**OPINION**

[\*182] [\*\*496] In this matter we are called upon to decide whether a tortfeasor seeking partial equitable indemnity may claim the benefit of *Civil Code section 1714.1*<sup>1</sup>, which imposes financial responsibility upon the parents of an errant minor. We hold that the statute's provisions do run in favor of the third party tortfeasor, and are not limited [\*\*\*2] to the injured party. We therefore conclude that the trial court correctly overruled petitioners' demurrer to real party's cause of action seeking equitable indemnity based on that statute.

1 All subsequent statutory references are to the Civil Code unless otherwise specified.

The facts and procedural history of the case may be briefly summarized. A complaint was filed by Latashia Washington in which she alleged that she was sexually molested by cross-defendant David Curry, a minor. At the time of the alleged molestation, Ms. Washington--confined to a wheelchair due to cerebral palsy--was a student at Eisenhower High School, operated by petitioner Rialto Unified School District. The complaint sought damages primarily on the theory that the district, through its defendant employees Gayle Rellstab and Edna Herring, failed to control David Curry and failed to protect plaintiff from him.<sup>2</sup>

2 A second cause of action alleged that the school premises were in a dangerous condition because the "length, slope, and condition" of the path used by plaintiff were such that she could not negotiate it in her wheelchair without assistance, thus leading to the assault in some unspecified way.

[\*\*\*3] Plaintiff did not name David Curry or any members of his family in this action. The only defendants were, and apparently are, the district and its employees Rellstab and Herring.

Defendants (hereinafter sometimes simply District) then filed a cross-complaint against David Curry (therein referred to as Davey) and his parents, petitioners here Betty Curry and David Curry, setting forth general

demands for indemnity and a more specific claim based on the parents' allegedly negligent supervision of their son. Summary judgment was granted on this cross-complaint, but District was given leave to amend to set forth a cause of action for indemnity based on *section 1714.1*.

The amended cross-complaint included some of the general claims for equitable indemnity as to which summary judgment had been granted, but also added a new fifth cause of action for indemnification based on *section 1714.1*. The Currys successfully demurred to all causes of action save the [\*183] 1714.1 claim.<sup>3</sup> They seek mandate from this court to compel the trial court to sustain the demurrer to that cause of action as well, and thus eliminate them from the litigation.

3 As this claim does not involve the son, David or Davey Curry, he is not a party to this petition.

#### [\*\*4] DISCUSSION

(1) Initially, we reiterate once again that we do not routinely afford plenary review to rulings on demurrers.<sup>4</sup> "Appellate [\*\*497] courts simply do not have the time or resources to police law and motion rulings on the pleadings through the mandamus power and, absent unusual circumstances, decline to do so." (*James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 252 [21 Cal.Rptr.2d 169]; see also *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851 [92 Cal.Rptr. 179, 479 P.2d 379], noting the "extreme reluctance" with which such review is given.) However, where a significant issue of law is raised, and where resolution of the issue in favor of the petitioner would result in a final disposition as to that party, review by writ is appropriate. (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 897-898 [16 Cal.Rptr.2d 32].) This is such a case in both respects.

4 We consider repetition of this principle appropriate, because many practitioners--seeing only the published cases in which such review is granted--may otherwise assume that writ review may always appropriately be sought, even of insignificant or mootable pleading issues.

[\*\*5] *Section 1714.1* provides in pertinent part as follows: "(a) Any act of willful misconduct of a minor which results in injury . . . to another person . . . shall be imputed to the parent or guardian having custody and control of the minor for all purposes of civil damages,

and the parent or guardian having custody and control shall be jointly and severally liable with the minor for any damages resulting from the willful misconduct." The parent's liability is limited to \$10,000, and, with respect to personal injury claims, is limited to medical, dental, and hospital expenses.

(2) District relies on this statutory liability to support its claim for at least partial indemnity from the Curry parents. The Currys, petitioners here, argue that the statute inures to the benefit only of injured parties, and that the District has no claim against them.

The Currys argue that liability under *section 1714.1* must be strictly construed. In support, they cite *Cynthia M. v. Rodney E.* (1991) 228 Cal.App.3d 1040, 1046 [279 Cal.Rptr. 94], [\*\*6] which in turn relied upon *Weber v. Pinyan* (1937) 9 Cal.2d 226, 229 [70 P.2d 183, 112 A.L.R. 407].

Under the common law, there is no general parental liability for the torts of a child. (See generally, 6 Witkin, Summary of Cal. Law (9th ed. 1988) [\*184] Torts, § 1001.) The court in *Cynthia M.* accordingly remarked that statutes imposing parental liability are therefore "in derogation of the common law," and the rule is that statutes which increase liability, or provide a remedy against a person who was not liable at common law are to be narrowly construed in favor of those sought to be subjected to them. (*Weber*, 9 Cal.2d at p. 229.) However, *Cynthia M.* and *Weber* (which involved a predecessor to the current owners' strict liability under *Vehicle Code sections 17150 et seq.*) both involve the question of when the liability should be imposed in general; neither considers in what directions the liability runs, once the conditions for imposing it are met. This was also the case in *Robertson v. Wentz* (1986) 187 Cal.App.3d 1281, 1292-1295 [232 Cal.Rptr. 634], [\*\*7] in which a construction favoring the parent was in fact applied, with the result that the parent was found not to fit within the statutory language.

In this case, the question is not whether the statutory circumstances exist. No issue is raised as to whether the child's act was willful and intentional (cf. *Hanks v. Booth* (1986) 11 Kan.App.2d 149 [716 P.2d 596, 598]) or whether the parents had custody and the opportunity to control (cf. *Robertson v. Wentz*, *supra*). For the purposes of the demurrer, the allegations that these circumstances exist must be accepted as true. (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232,

238 [282 Cal.Rptr. 233].) The only question is whether the parents' statutory benefit should inure to the benefit of District, as well as of the victim. <sup>5</sup> We do not believe that the statute need be so strictly construed in favor of the parents in this situation. We also note that the approach of *Weber v. Pinyan* is not absolute; in *Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 50-51 [17 Cal.Rptr. 828, 367 P.2d 420], the court gave a liberal construction [\*\*\*8] to the owner's liability statute, in order to carry out the "palpable" legislative purposes of providing protection to injured persons.

<sup>5</sup> It will be recalled that the Currys have not been named as defendants. We do not imply that both the victim and District could recover up to the statutory limits of section 1714.1.

[\*\*498] The Currys' position is, however, strongly supported by the closest authority which has been cited by the parties or uncovered by our research. In *Southern Pac. Transportation Co. v. Dolan* (1972) 27 Cal.App.3d 534 [104 Cal.Rptr. 131], third parties were injured when a car driven by a minor collided with a railroad handcar. The third parties sued both the minor and the railroad, recovering judgment against both. When the minor was unable to pay his full share under the then-controlling rules for contribution, the railroad satisfied the judgment of the plaintiff and obtained a judgment of contribution against the minor. It then filed a complaint against the [\*\*\*9] minor's parents for contribution, on the theory that they stood in their son's shoes for purposes of such liability.

[\*185] The railroad's complaint relied on three Vehicle Code sections imputing negligence or imposing strict liability in three situations: on the person signing the minor's application for a driver's license, on the parent having custody of a minor causing damage due to "negligence or wilful misconduct," and on the owner of a vehicle driven by one who causes damage. Although the language of these three statutes differed slightly, the parental liability statute (*Veh. Code*, § 17708) included the same significant language as does section 1714.1: the minor's act ". . . shall be imputed to the parent[] . . . for all purposes of civil damages and the parent[] . . . shall be jointly and severally liable with the minor . . ." <sup>6</sup> (*Veh. Code*, § 17708, as it read at the time the *Dolan* cause of action arose.)

<sup>6</sup> The other two statutes discussed in *Dolan* provided that ". . . any civil liability of a minor . . .

is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor . . ." (*Veh. Code*, § 17707) and "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle . . . and the negligence [of the permissive user] shall be imputed to the owner for all purposes of civil damages." (*Veh. Code*, § 17150, as it then read.)

[\*\*\*10] Nevertheless, the court held that the railroad could not recover from the parents under any of the statutes. It first rejected the railroad's argument that the language of the statutes was perfectly clear and needed no interpretation, citing cases which found ambiguities in the statutes in other contexts. (E.g. *Weber v. Pinyan*, *supra*, commenting upon the construction of the word "negligence.") The court then relied on cases holding that the purpose of all three statutes was to provide a means of financial protection to the "tragically large group of persons" injured on the highways. In so doing, it cited, *inter alia*, *Burgess v. Cahill* (1945) 26 Cal.2d 320 [158 P.2d 393, 159 A.L.R. 1304]--a case defining "permissive use" under the owner's liability statute--and several other cases not particularly relevant to our issue. <sup>7</sup> The *Dolan* court apparently believed that the policy of affording an avenue of compensation to injured parties was exclusive, and therefore left no room for the joint tortfeasor. We think this conclusion was unwarranted, and we decline to follow it.

<sup>7</sup> The other cases upon which the *Dolan* court relied involved two related, but distinct, issues of insurance coverage (*Interinsurance Exchange v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142 [23 Cal.Rptr. 592, 373 P.2d 640], and *Glens Falls Ins. Co. v. Consolidated Freightways* (1966) 242 Cal.App.2d 774 [51 Cal.Rptr. 789]), the question of whether the owner must suffer the imputation of negligence when it is the owner who is the injured plaintiff (*Mason v. Russell* (1958) 158 Cal.App.2d 391 [322 P.2d 486]), and whether the owner was liable when the injury occurred on private property whether than a public highway. (*Webster v. Zevin* (1947) 77 Cal.App.2d 855 [176 P.2d 960].)

[\*\*\*11] At the time that case was decided, the law

of equitable indemnity was in its infancy. Although there was a statutory right of contribution, by which [\*186] one tortfeasor judgment debtor could recover from his cojudgment debtors any portion of the judgment which he had paid in excess of his pro rata share (see *Code Civ. Proc.*, § 875 *et seq.*), noncontractual indemnity was available only where the parties' roles in the injury fell into the "passive-active" or "primary-vicarious" categories. (See *Alisal Sanitary Dist. v. Kennedy* (1960) 180 Cal.App.2d 69, 75 [4 Cal.Rptr. 379].) The establishment [\*\*499] of a right to such indemnity resulted in a total shifting of liability from one who had been compelled to pay a judgment based on his imputed or constructive fault, to a joint tortfeasor who was actively and personally negligent. Other than pro rata contribution rights, no provisions were made for partially shifting the burdens among defendants whose fault was qualitatively analogous.

At the time, a plaintiff's contributory negligence was relevant only in a similarly [\*\*\*12] "all or nothing" manner. If a plaintiff was found to be contributorily negligent to any extent, he could not recover against a defendant whose greater fault had also contributed to the injury. However, this harsh doctrine was abrogated in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], in which the court adopted a rule of "comparative fault." The court first detailed the inequities inherent both in the "all or nothing" rule of contributory negligence, and the "50 per cent system" of comparative fault under which a plaintiff was completely barred if his own negligence equalled or exceeded 50 percent, but could recover a proportional amount of his damages of his fault measured at 49 percent or less. It then adopted a "pure" comparative fault system, "the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of both parties." (13 Cal.3d at p. 829.)

*Li* represented a long step forward on what the court deemed "a proper and just direction;" the next step transported the principles of comparative fault into the context of [\*\*\*13] multiple tortfeasors. In *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899], the court declined to abolish the rule of joint and several liability, thus ensuring the plaintiff's continuing ability to collect his entire damages as long as any defendant was solvent. However, it did establish a procedure and a rule by which

multiple tortfeasors could establish the parties' relative percentages of fault, and by which a judgment debtor who paid more than his share could recover from joint tortfeasors who had paid less than their proportionate shares, as calculated by the percentages of fault. (20 Cal.3d at p. 599.) Thus, a new form of indemnity among tortfeasors was recognized in the interests of the equitable sharing of loss among multiple tortfeasors. (20 Cal.3d at p. 591.)

Subsequent cases have extended the rationale and rule of *American Motorcycle Assn.* to demands between two strictly liable defendants ( [\*187] *Gentry Construction Co. v. Superior Court* (1989) 212 Cal.App.3d 177, 182-183 [260 Cal.Rptr. 421]) and, with particular relevance to this case, to demands [\*\*\*14] by a negligent defendant against a strictly liable defendant. 8 ( *GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419, 431 [261 Cal.Rptr. 626]; see also *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 328 [146 Cal.Rptr. 550, 579 P.2d 441].) *GEM Development* also confirms the defendant's general power to pursue any other joint tortfeasor for indemnity, rejecting a contention that indemnity could only be sought from a joined defendant. (213 Cal.App.3d at p. 419; see also *American Motorcycle Assn.*, *supra*, 20 Cal.3d at pp. 604-607.)

8 *Section 1714.1* provides for an imputation of misconduct to the parent, making the parent theoretically a joint *affirmative* wrongdoer with the minor. However, the parent's liability is frequently described as "vicarious" or "strict." (See *Robertson v. Wentz*, *supra*, 187 Cal.App.3d at p. 1293.) Thus, we find the extensions of the basic *American Motorcycle Assn.* rule significant to our analysis of the policies served by the alternative constructions of *section 1714.1* in the case before us.

[\*\*\*15] Finally, we note the alteration of the rules of joint and several liability among tortfeasors accomplished by "Proposition 51," codified at section 1431 *et seq.* These statutes attempt to further fine-tune proportionate liability by relieving each defendant of more than his proportionate share of damages for noneconomic losses--thus partially abolishing the rule of [\*\*500] joint and several liability among tortfeasors.

Thus, the 18 years since *Li* was decided have seen a sea of change in the way liability is measured and shifted

among defendants. Without exception, these cases and statutes pursue the goal of the equitable sharing of financial responsibility for a plaintiff's damages among all those legally liable therefor. It is in this modern context that we will consider *section 1714.1*.

We next examine whether *section 1714.1* may reasonably be said to serve other social and legislative purposes. Although the court in *Dolan* ended its inquiry when it decided that the policy behind the cited statutes was to provide compensation for injured parties, we do not think that the recognition of one policy requires the elimination of all others. For example, in *General Ins. Co. v. Faulkner* (1963) 259 N.C. 317 [130 S.E.2d 645, 651-652, 8 A.L.R.3d 601], [\*\*\*16] the court held that an insurer was entitled to the benefit of a parental liability statute, where it had paid its insured for damage inflicted by the minor. To hold otherwise, the court observed, would give the parents the benefit of the insurance without their "having paid a cent for it." Similarly, in *Liberty Mutual Ins. Co. v. Davis* (1977) 52 Ohio Misc. 26 [6 Ohio Op.3d 108, 368 N.E.2d 336, 337-338], the court held that there was no reason to give the parent the benefit of the victim's prudence in obtaining insurance. Furthermore, the court noted that one purpose of the parental [\*188] liability laws is to encourage responsibility in parents--that is, to encourage parents to exercise effective control over their children. This goal would not be aided by a construction which made parental liability contingent on whether or not a victim had insurance covering the loss.

We think this policy is significant. California has recently amended its penal statute governing contributing [\*\*\*17] to the delinquency of a minor to permit the imposition of criminal liability on a parent who fails to make reasonable efforts to control a minor child. (*Pen. Code, § 272*; see *Williams v. Garcetti* (1993) 5 Cal.4th 561 [20 Cal.Rptr.2d 341, 853 P.2d 507], upholding the constitutionality of the statute.) In an era of increasing juvenile crime, society is clearly losing its patience with parents who are indifferent to the irresponsible, malicious, or even vicious propensities of their offspring.

9

9 In this case, the minor is accused of forcibly compelling plaintiff--helpless in a wheelchair--to orally copulate him until he ejaculated. It hardly seems unreasonable to impose liability on parents who have not managed to persuade their child that

such behavior is improper.

It is true that *section 1714.1* does not require parental fault before liability is imposed. However, this does not compel the conclusion that it does not serve the purpose of encouraging responsible parenting. [\*\*\*18] A parent who acts unreasonably in raising his or her child may be subject to penal liability (*Pen. Code, § 272*) or unlimited civil liability. (See *Reida v. Lund* (1971) 18 Cal.App.3d 698, 705 [96 Cal.Rptr. 102], noting that a parent who acts negligently in permitting a minor child to have access to a firearm may be subject to unlimited liability based on his own fault, despite the monetary damage limits of *section 1714.3*, which imputes the act of the minor in shooting the firearm to the parent analogously to *section 1714.1*.) By contrast, a parent who is not charged with active fault faces only limited financial liability. Nevertheless, *section 1714.1* constitutes a meaningful incentive to the parent; \$10,000 is not chicken feed, even in these days of inflated prices and devalued currency.

Returning to the statutory language, we note that *section 1714.1* imputes the child's negligence to the parent "for all purposes of civil damages." The *Dolan* court found this language ambiguous, and construed it to apply only [\*\*\*19] to third party plaintiffs. Insofar as we agree that it is not absolutely clear, we believe that "all purposes" should be read to include the equitable allocation of damages among tortfeasors.

To summarize, we find *Dolan* unpersuasive for two reasons. First, the modern trend of the law clearly favors the equitable sharing of losses among tortfeasors. Even if *section 1714.1* was designed to afford relief to injured [\*189] third parties by imposing liability on a presumably financially responsible parent, we can see no reason why that liability should not run also in favor of a concurrently liable tortfeasor. If the minor is unable to respond [\*\*501] in damages, we do not believe that the parent should be immune from a claim for equitable indemnity, made by a tortfeasor who has been compelled to pay all or a portion of the minor's fair share of the loss. If plaintiff here had elected to join the Curry parents as defendants, their potential liability would be obvious; the fact that plaintiff did not so join them should not insulate them from a duty to contribute. (See *American Motorcycle Assn. v. Superior Court, supra*, 20 Cal.3d at pp. 604-607.) The District's [\*\*\*20] actual obligation of payment should not depend on the fortuitous decision of the plaintiff. (See *General Ins. Co. v. Faulkner, supra*,

130 S.E.2d 645, refusing to make the application of the parental liability statute depend on whether the victim was insured and had assigned its claim to the insurer by operation of law.)

Second, our construction is in accord with the trend of expanding parental liability for the wrongful acts of their children. *Section 1714.1* clearly expresses the policy that parents should stand in the shoes of their children for the purpose of paying damages caused by the children, for which the children are "judgment proof." Although the statute does not require proof of fault, we think it is founded on the implicit understanding that a parent has the duty and opportunity to control, supervise, and train his or her child in the ways of responsible behavior. If the parent fails to do so, it is fair to impose liability on the

parent--and, in our view, fair to require the parent to compensate not only the "innocent third party" injured by the child, but also a joint tortfeasor who, due to the child's financial status, would otherwise be required [\*\*\*21] to pay the child's share of the damages caused.

Accordingly, the trial court correctly overruled the Currys' demurrer to the fifth cause of action of the District's cross-complaint. The petition is denied, and the alternative writ is discharged.

Hollenhorst J., and McKinster J., concurred.

Petitioners' application for review by the Supreme Court was denied February 3, 1994.

# **EXHIBIT H**



**JOEY WELLS, a Minor, etc., et al., Plaintiffs and Appellants, v. ONE2ONE  
LEARNING FOUNDATION et al., Defendants and Respondents; STATE OF  
CALIFORNIA, Real Party in Interest and Respondent.**

S123951

**SUPREME COURT OF CALIFORNIA**

*39 Cal. 4th 1164; 141 P.3d 225; 48 Cal. Rptr. 3d 108; 2006 Cal. LEXIS 10227; 2006  
Cal. Daily Op. Service 8194; 2006 Daily Journal DAR 11679*

August 31, 2006, Filed

**NOTICE:**

As modified Oct. 25, 2006.

**SUBSEQUENT HISTORY:** Time for Granting or Denying Rehearing Extended *Wells (Joey) v. One2One Learning Foundation State of California, 2006 Cal. LEXIS 13318 (Cal., Sept. 21, 2006)*

Modified by *Wells v. One2One Learning Foundation, 2006 Cal. LEXIS 12911 (Cal., Oct. 25, 2006)*

**PRIOR HISTORY:** Superior Court of Sierra County, No. S46-CV-5844, William Wooldridge Pangman, Judge. Court of Appeal of California, Third Appellate District, No. C042504.

*State ex rel. Harris v. PricewaterhouseCoopers, LLP, 39 Cal. 4th 1220, 48 Cal. Rptr. 3d 144, 141 P.3d 256, 2006 Cal. LEXIS 10230 (2006)*

*Wells v. One2One Learning Foundation, 116 Cal. App. 4th 515, 10 Cal. Rptr. 3d 456, 2004 Cal. App. LEXIS 254 (Cal. App. 3d Dist., 2004)*

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

A group of students and their parents or guardians sued certain charter schools, their corporate operators,

and the chartering school districts, alleging that the schools--designed to provide and facilitate home instruction through use of the Internet (so-called distance learning)--failed to deliver instructional services, equipment, and supplies as promised, and as required by law. The trial court dismissed plaintiffs' claims under the California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*), unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), and for breach of contract, and misrepresentation. (Superior Court of Sierra County, No. S46-CV-5844, William Wooldridge Pangman, Judge.) The Court of Appeal, Third Dist., No. C042504, reversed the judgment of dismissal and remanded for further proceedings.

The Supreme Court reversed the judgment of the Court of Appeal and remanded as to its findings that the public school defendants were "persons" subject to suit under the CFCA, the charter school defendants were not "persons" subject to suit under the UCL, and the "independent study" restrictions set forth in *Ed. Code, § 51747.3*, in the form adopted in 1993, did not apply to charter schools until that section was amended in 1999. In all other respects, the court affirmed the judgment of the Court of Appeal. The court held that: (1) public school districts are not "persons" who may be sued under the CFCA; (2) charter schools, and their operators, are "persons" subject to suit under both the CFCA and the UCL, and are not exempt from either law merely because

such schools are deemed part of the public school system; (3) the CFCA cause of action was not a barred claim for "educational malfeasance" insofar as it asserted, not simply that the charter schools provided a substandard education, but that they submitted false claims for school funds while failing to furnish any significant educational services, materials, and supplies; (4) the CFCA cause of action was not barred insofar as it alleged that, before 2000, the charter schools violated independent [\*1165] study rules set forth in a 1993 statute, *Ed. Code, § 51747.3*, because § 51747.3 applied to charter schools even before its amendment in 1999; and (5) a qui tam action under the CFCA against a charter school or its operator is not subject to the requirement of the Tort Claims Act (*Gov. Code, § 815 et seq.*) of prior presentment of a claim for payment (*Gov. Code, §§ 905, 910 et seq.*) (Opinion by Baxter, J., with George, C. J., Chin, Moreno, Corrigan, JJ., and Irion, J.,\* concurring. Concurring and dissenting opinion by Kennard, J. (see p. 1217).)

\* Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES Classified to California Digest of Official Reports

**(1) Schools § 3--Classes--Charter--Operation.**--The Charter Schools Act (CSA) (*Ed. Code, § 47600 et seq.*) is intended to allow teachers, parents, pupils, and community members to establish schools that operate independently from the existing school district structure (*Ed. Code, § 47601*). By this means, the CSA seeks to expand learning opportunities, encourage innovative teaching methods, provide expanded public educational choice, and promote educational competition and accountability within the public school system (*§ 47601, subs. (a)-(g)*). If statutory requirements are met, public school authorities must grant the petition of interested persons for a charter to operate such a school within a public school district (*Ed. Code, § 47605*). For certain purposes, the school is deemed to be a school district (*Ed. Code, § 47612, subd. (c)*), is part of the public school system (*Ed. Code, § 47615, subd. (a)*), falls under the jurisdiction of that system, and is subject to the exclusive control of public school officers (*§ 47615, subd. (a)(2); §*

*47612, subd. (a)*). A charter school must operate under the terms of its charter, and must comply with the CSA and other specified laws, but is otherwise exempt from the laws governing school districts (*Ed. Code, § 47610*). A charter school may elect to operate as, or be operated by, a nonprofit corporation organized under the Nonprofit Public Benefit Corporation Law (*Ed. Code, § 47604, subd. (a)*). A charter school is eligible for its share of state and local public education funds, which share is calculated primarily, as with all public schools, on the basis of its average daily attendance (*§ 47612; Ed. Code, § 47630 et seq.*). Provisions added to the CSA since its original adoption enumerate certain oversight responsibilities of the chartering authority (*Ed. Code, § 47604.32*), and authorize that agency to charge the school supervisory fees, within specified limits, for such services (*Ed. Code, § 47613*). [\*1166]

**(2) Parties § 1.2--Standing--False Claims Act Actions.**--The California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*) provides that any person who, among other things, knowingly presents or causes to be presented to the state or any political subdivision thereof, a false claim for payment or approval, or knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision, or conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or any political subdivision, or is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery thereof, shall be liable to the state or to the political subdivision for three times the amount of damages the state or political subdivision thereby sustained, as well as for the state's or political subdivision's costs of suit, and may also liable for a civil penalty of up to \$ 10,000 for each false claim (*Gov. Code, § 12651, subd. (a)(1)-(3), (8)*). The CFCA defines a person to include any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust (*Gov. Code, § 12650, subd. (b)(5)*). Where a "person" has submitted a false claim upon state funds, or upon both state and political subdivision funds, in violation of the CFCA, the Attorney General may sue that person to recover the damages and penalties provided by the statute (*Gov. Code, § 12652, subd. (a)(1)*). Where the false claim was upon political

39 Cal. 4th 1164, \*1166; 141 P.3d 225, \*\*;  
48 Cal. Rptr. 3d 108, \*\*\*, 2006 Cal. LEXIS 10227

subdivision funds, or upon both state and political subdivision funds, the prosecuting authority of the affected political subdivision may bring such an action (§ 12652, *subd. (b)(1)*). The CFCA includes no exemption, either in the definitional section or elsewhere, for corporations organized under the Nonprofit Public Benefit Corporation Law (*Corp. Code, § 5110*) or for corporations, limited liability companies, organizations, or associations that operate charter schools under the California Charter Schools Act (*Ed. Code, § 47600 et seq.*).

**(3) Parties § 1--False Claims Act Actions.**--Under the California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*), when either the Attorney General or the local prosecuting authority unilaterally initiates an action involving both state and political subdivision funds, the other affected official or officials must be notified. If the Attorney General initiates such an action, the local prosecuting authority may, upon receiving notice, intervene. If the local prosecuting attorney is the initiator, the Attorney General may, upon notice, elect to assume responsibility for the action, though the local prosecuting authority may continue as a party (*Gov. Code, § 12652, subs. (a)(2), (3), (b)(2), (3)*). [\*1167] A CFCA action may also be initiated by a "person," as a qui tam plaintiff, for and in the name of the state or the political subdivision whose funds are involved (*Gov. Code, § 12652, subd. (c)(1), (3)*). The complaint in such an action shall be filed in camera, and may remain under seal for up to 60 days. While the complaint remains sealed, no service shall be made on the defendant (§ 12652, *subd. (c)(2)*). The qui tam plaintiff must immediately notify the Attorney General of the suit and disclose to him all material evidence and information the plaintiff possesses. If the qui tam complaint involves only state funds, the Attorney General may, within the 60-day period or extensions thereof, elect to intervene and proceed with the action. If political subdivision funds alone are involved, the Attorney General must forward the qui tam complaint to the local prosecuting authority, who may elect to intervene and proceed with the action. If both state and political subdivision funds are involved, the Attorney General and the local prosecuting authority are to coordinate their investigation and review. Either official, or both of them, may then elect to intervene and proceed with the action. If these officials decline to proceed, the qui tam plaintiff shall have the right to conduct the action (§ 12652, *subd. (c)(4)-(8)*). If state or local officials intervene, they may assume control of the

action, but the qui tam plaintiff may remain as a party (§ 12652, *subd. (e)(1)*).

**(4) State of California § 7--Actions--False Claims Act--Entitlement to Proceeds of Settlement or Award--Cumulative Remedies.**--A substantial portion of the proceeds of any settlement or court award in a California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*) action--as much as 66 percent--does not revert to the general coffers of the state or the political subdivision against which the false claim was submitted. Instead, a significant cut of these proceeds goes to those who pursued the action on behalf of the defrauded entity. Thus, if the Attorney General or a local prosecuting authority initiated an CFCA action, that officer is entitled to a fixed 33 percent of the proceeds of the action, or settlement thereof. Where a local prosecuting authority intervened in an action initiated by the Attorney General, the court may award the local prosecuting authority a portion of the Attorney General's 33 percent, as appropriate to the local authority's role in conducting the action. If, in an action brought by a qui tam plaintiff, the Attorney General or the local prosecuting authority proceeds with the action, that official receives a fixed 33 percent of the proceeds, and the qui tam plaintiff receives from 15 to 33 percent, depending on his or her litigation role. Where both the Attorney General and a local prosecuting authority are involved in a qui tam action, the court may award the latter officer a portion of the Attorney General's 33 percent, depending on the role played by the local prosecutor. If neither the Attorney General nor [\*1168] the local prosecuting authority elects to proceed with the action, the qui tam plaintiff may receive between 25 and 50 percent of the proceeds (*Gov. Code, § 12652, subd. (g)*). The CFCA's remedies are cumulative to any others provided by statute or common law (*Gov. Code, § 12655, subd. (a)*). Further, its provisions shall be liberally construed and applied to promote the public interest (§ 12655, *subd. (c)*).

**(5) Unfair Competition § 8--Actions--Parties Who May Bring Suit--Cumulative Remedies.**--The unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) provides for relief by civil lawsuit against any person who engages, has engaged, or proposes to engage in unfair competition (*Bus. & Prof. Code, § 17203*). "Unfair competition" is defined to include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising (§ 17200). An action for injunctive relief, which relief may include

orders necessary to restore to any person in interest any money or property acquired by means of such unfair competition (§ 17203), may be brought (1) by the Attorney General or a specified local prosecuting officer upon their own complaint or upon the complaint of any board, officer, corporation, or association, or (2) by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition (*Bus. & Prof. Code*, § 17204). For purposes of the UCL, the term "person" shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons (*Bus. & Prof. Code*, § 17201). Except as otherwise specifically provided, the UCL's remedies are cumulative to each other and to the remedies or penalties available under all other laws of the state (*Bus. & Prof. Code*, § 17205).

**(6) Statutes § 29--Construction--Language--Legislative**

**Intent--Usual and Ordinary Meaning--Ambiguous Terms.**--A reviewing court's task is to discern the Legislature's intent. The statutory language itself is the most reliable indicator, so the court starts with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, the court presumes the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, the court may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, the court may also consider the consequences of a particular interpretation, including its impact on public policy. [\*1169]

**(7) Schools § 4--Districts--Actions--Liability Under False Claims Act.**--While, in the broadest sense, a school district might be considered an "association" or an "organization," the statutory list of "persons" under *Gov. Code*, § 12650, *subd. (b)(5)*, contains no words or phrases most commonly used to signify public school districts, or, for that matter, any other public entities or governmental agencies. Yet the California False Claims Act (CFCA) (*Gov. Code*, § 12650 *et seq.*) makes very specific reference to governmental entities in other contexts. Thus, it provides that any "person" who presents a false claim to the state or a political subdivision is liable to such entity for two or three times the damage thereby sustained (*Gov. Code*, § 12651, *subds. (a), (b)*). A "political subdivision" is defined to

include any city, city and county, county, tax or assessment district, or other legally authorized local government entity with jurisdictional boundaries (§ 12650, *subd. (b)(3)*). The specific enumeration of state and local governmental entities in one context, but not in the other, weighs heavily against a conclusion that the Legislature intended to include public school districts as "persons" exposed to CFCA liability.

**(8) Statutes § 19--Construction--Exclusion of Governmental Entities Within General Words of Statute--Issues of Federalism.**--A traditional rule of statutory construction is that, absent express words to the contrary, governmental agencies are not included within the general words of a statute. Government agencies are excluded from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers. Pursuant to this principle, governmental agencies have been held subject to legislation which, by its terms, applies simply to any "person." When deciding whether the California Legislature intended a California statute to include or exclude California government entities, the California Supreme Court is not concerned with issues of federalism, constitutional or statutory.

**(9) Schools § 6.6--Districts--Funding--Taxation.**--The People, by initiative, have put all agencies of government, including school districts, on a strict fiscal diet by adding provisions to the California Constitution that limit their power to tax and spend. *Cal. Const.*, art. XIII A, § 1, places a general ceiling on the ad valorem property taxes which may be levied on behalf of local governments and school districts. Article XIII A also bans other new local taxes levied by, or for the specific benefit of, school and other special districts except as approved by a two-thirds majority of the voters (*Cal. Const.*, art. XIII A, § 4). At the state level, article XIII A forbids the enactment of any new ad valorem real property tax, and prohibits all increases in state taxes except by a two-thirds vote of each house of the Legislature (*Cal. Const.*, art. XIII A, § 3). *Cal. Const.*, art. XIII B, generally limits the annual appropriations of state and local governments to the prior years' appropriations as adjusted for the cost of living (*Cal. Const.*, art. XIII B, § 1). Under this constitutional provision, these limits may be changed only by vote of the affected electorate (*Cal. Const.*, art. XIII B, § 4). Public school districts face an additional restriction on their ability to tax and spend for their educational

39 Cal. 4th 1164, \*1170; 141 P.3d 225, \*\*;  
48 Cal. Rptr. 3d 108, \*\*\*; 2006 Cal. LEXIS 10227

mission. Because disparities in school funding levels based on the comparative wealth of local districts violate the equal protection clause of the California Constitution, the Legislature has adopted a strict system of equalized funding (*Ed. Code, § 42238 et seq.*), under which the amount of property tax revenues a district can raise, with other specific local revenues, is coupled with an equalization payment by the state, thus bringing each district into a rough per student equivalency of revenues. The current system of public school finance largely eliminates the ability of local districts, rich or poor, to increase local ad valorem property taxes to fund current operations at a level exceeding their state-equalized revenue per average daily attendance.

**(10) Schools § 6.6--Districts--Funding--Powers.**--School districts must use the limited funds at their disposal to carry out the state's constitutionally mandated duty to provide a system of public education. The Constitution requires, and makes the Legislature responsible for providing, a system of common schools by which a free school shall be kept up and supported in each district (*Cal. Const., art. IX, § 5*). The Legislature has chosen to implement this fundamental guarantee through local school districts with a considerable degree of local autonomy, but the state retains plenary power over public education.

**(11) Schools § 4--Districts--Application of False Claims Act--Effect on Finances.**--Public education is among the State's most basic sovereign powers. Laws that divert limited educational funds from this core function are an obvious interference with the effective exercise of that power. Were the California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*) applied to public school districts, it would constitute such a law. The ultimate purpose of the CFCA is to protect the public fisc. Given that school district finances are largely dependent on and intertwined with state financial aid, the assessment of double and treble damages, as well as other penalties, to school districts would not advance that purpose. Of course, where liability otherwise exists, public entities must pay legal judgments from their limited revenues and appropriations, even if they cannot exceed their tax or appropriations ceilings to do so and must therefore cut spending in other areas (*Gov. Code, § 970 et seq.*). This obligation, in and of itself, does not infringe their sovereign powers. But courts may consider the effect on sovereign [\*1171] powers when determining whether the Legislature intended, by mere

implication, to expose a public entity to a particular statutory liability.

**(12) Schools § 4--Districts--Public--Not Subject to Suit Under False Claims Act.**--The Legislature did not intend to subject financially constrained public school districts--or any agency of state or local government--to the treble-damages-plus-penalties provisions of the California False Claims Act (*Gov. Code, § 12650 et seq.*). Such entities are not "persons" subject to suit under that statute. (Disapproving to the extent inconsistent: *LeVine v. Weis* (1998) 68 Cal.App.4th 758 [80 Cal. Rptr. 2d 439], and *LeVine v. Weis* (2001) 90 Cal.App.4th 201 [108 Cal. Rptr. 2d 562].)

**(13) Schools § 3--Classes--Charter--Operation--Chartering Authority's Immunity from Financial Liability.**--Though charter schools are deemed part of the system of public schools for purposes of academics and state funding eligibility, and are subject to some oversight by public school officials, they are operated, not by the public school system, but by distinct outside entities--including nonprofit corporations--that are given substantial freedom to achieve academic results free of interference by the public educational bureaucracy. The sole relationship between the charter school operators and the chartering district in this case is through the charter governing the school's operation. Except in specified respects, charter schools and their operators are exempt from the laws governing school districts (*Ed. Code, § 47610*). The autonomy, and independent responsibility, of charter school operators extend, in considerable degree, to financial matters. Thus, where a charter school is operated by a nonprofit public benefit corporation, the chartering authority is not liable for the school's debts and obligations (*§ 47604, subd. (c)*). A 2003 amendment to the Charter Schools Act (*Ed. Code, § 47600 et seq.*) makes clear that the chartering authority's immunity from financial liability for a charter school extends to claims arising from the performance of acts, errors, or omissions by the school, if the authority has complied with all oversight responsibilities required by law (*§ 47604, subd. (c)*).

**(14) Schools § 1--Charter--Public Districts' Financial Liability Under False Claims Act.**--The California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*) was designed to help the government recover public funds of which it was defrauded by outside entities with

which it deals. The CFCA applies generally to nongovernmental entities that contract with state and local governments to provide services on their behalf. The statutory purpose is equally served by applying the CFCA to [\*1172] the independent corporations that receive public monies under the Charter Schools Act (*Ed. Code, § 47600 et seq.*) to operate schools on behalf of the public education system. On the other hand, the sovereign power over public education is not infringed by application of the CFCA, including its treble-damages-plus-penalties provisions, to charter school operators. Public school districts are the entities fundamentally responsible for operating the system of free public education required by the Constitution. The districts' continuing financial ability to carry out this mission at basic levels of adequacy is thus critical to satisfying the state's free public school obligation. Accordingly, the Legislature did not intend to undermine this sovereign obligation by exposing public school districts to the harsh monetary sanctions of the CFCA.

**(15) Schools § 3--Classes--Charter--Applicability of False Claims Act's Monetary Remedies to School Operators.**--Under the Charter Schools Act (CSA) (*Ed. Code, § 47600 et seq.*), the term of a charter cannot exceed five years, subject to renewal (*Ed. Code, § 47607, subd. (a)(1)*). The grant and renewal of charters are dependent upon satisfaction of statutory requirements, including attainment of specific educational goals (*Ed. Code, §§ 47607, subds. (b), (c), 47605*). A charter may be revoked for material violations of the law or charter, failure to meet pupil achievement goals, or fiscal mismanagement (*§ 47607, subd. (d)*). If a charter school ceases to exist, its pupils are reabsorbed into the district's mainstream public schools, and the average daily attendance revenues previously allotted to the charter school for those pupils revert to the district. The CSA was adopted to widen the range of educational choices available within the public school system. That is a salutary policy. Yet application of the California False Claims Act's (CFCA) (*Gov. Code, § 12650 et seq.*) monetary remedies, however harsh, to a charter school presents no fundamental threat to maintenance, within the affected district, of basically adequate free public educational services. Thus, application of the CFCA to charter school operators in this case cannot be said to infringe the exercise of the sovereign power over public education.

**(16) Schools § 3--Classes--Charter--Liability Under**

**Unfair Competition Law.**--Charter schools are operated, pursuant to the Charter Schools Act (*Ed. Code, § 47600 et seq.*) by corporations that, for purposes of the California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*), do not qualify as public entities. Though, by statutory mandate, these institutions are an alternative form of public schools financed by public education funds, they and their operators are largely free and independent of management and oversight by the public education bureaucracy. Charter schools compete with traditional public schools for students, and they receive funding based on the number of students they [\*1173] recruit and retain at the expense of the traditional system. Insofar as their operators use deceptive business practices to further these efforts, the purposes of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) are served by subjecting them to the provisions of that statute. Nor is the state's sovereign educational function thereby undermined. Even if governmental entities, in the exercise of their sovereign functions, are exempt from the UCL's restrictions on their competitive practices, no reason appears to apply that principle to charter schools, which are covered by the plain terms of the statute and which compete with the traditional public schools for students and funding.

**(17) Schools § 3--Classes--Charter--Funding--Independent Study Programs.**--*Ed. Code, § 51745, subd. (a)*, provides that, beginning with the 1990-1991 school year, local school districts may offer independent study programs to meet the educational needs of pupils in accordance with the requirements of the article's provisions. *Ed. Code, § 47610*, provided that a charter school must comply with its charter, but was otherwise exempt from the laws governing school districts except as specified in *Ed. Code, § 47611*. Since its inception, the Charter Schools Act (*Ed. Code, § 47600 et seq.*) has further stated that, with specified exceptions, admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or guardian, within the state (*Ed. Code, § 47605, subd. (d)(1)*). The Legislature has amended *Ed. Code, § 47610*, part of the CSA, to add certain additional statutes to the list of laws from which charter schools, in derogation of the general rule, were not exempt. *Ed. Code, § 51747.3* was not included. As amended in 1999, *§ 51747.3, subd. (a)*, specifies that notwithstanding any other provision of law, charter schools are among the local educational agencies barred from claiming state funding for pupils who have

received funds or other things of value not provided to regular classroom students. A new sentence in § 51747.3, *subd. (a)*, further declares that a charter school may not claim state funding for the independent study of a pupil if the charter school has provided any funds or other thing of value to the pupil or his or her parent or guardian that a school district could not legally provide to a similarly situated pupil of the school district, or to his or her parent or guardian. In § 51747.3, *subd. (b)*, the amendment added charter schools to school districts and county superintendents of schools as entities ineligible to claim state apportionment funds for independent study pupils who reside outside the county from which the apportionment claim is reported, or an adjacent county. [\*1174]

**(18) Statutes § 51--Construction--Codes--Conflicting Provisions.**--Where statutes are otherwise irreconcilable, later and more specific enactments prevail, *pro tanto*, over earlier and more general ones.

**(19) Schools § 3--Classes--Charter--Residency Restrictions.**--The 1993 version of *Ed. Code*, § 51747.3, including its provision for nonwaiver under the Charter Schools Act (*Ed. Code*, § 47600 *et seq.*) is a more recent and specific enactment on the subjects it addresses than the pertinent provisions of *Ed. Code*, §§ 47605 and 47610. The latter statutes, enacted in 1992, provided generally that charter schools were exempt from most school district laws and must accept nonresident students. But § 51747.3 later placed restrictions, including residence restrictions, on the circumstances under which charter schools, like other public schools, could obtain average daily attendance funding for independent study programs and pupils in particular. To that extent, § 51747.3 supersedes the earlier statutes. Indeed, § 51747.3 has always expressly provided that its residency restrictions apply notwithstanding any other provision of law (§ 51747.3, *subd. (b)*).

**(20) Schools § 3--Classes--Charter--Liability Under False Claims Act--Independent Study Claims.**--The California False Claims Act (*Gov. Code*, § 12650 *et seq.*) cause of action brought by a group of students and their parents or guardians appeared properly tailored to the pre-1999 version of *Ed. Code*, § 51747.3, where the complaint alleged that certain charter schools, their corporate operators, and the chartering school districts submitted false average daily attendance claims for independent study pupils who (1) received funds or other

things of value not provided to classroom students, and (2) resided outside the counties designated by the statute. Accordingly, the trial court and the court of appeal erred in holding that plaintiffs' "independent study" claims were barred because § 51747.3, did not apply to charter schools until it was amended in 1999.

[5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 767.]

**(21) Government Tort Liability § 17--Claims--Presentation--"Local Public Entity"--Charter School Operators.**--The Tort Claims Act (TCA) (*Gov. Code*, § 815 *et seq.*) states that, with specified exceptions, all claims for money or damages against the state or local public entities must be presented in accordance with that law (*Gov. Code*, §§ 905, 905.2). Except as otherwise provided, no suit for money or damages may be brought against a public entity until such a claim has been presented to the entity and acted upon or deemed rejected (*Gov. Code*, § 945.4). The claim must be presented within six months of accrual of [\*1175] the cause of action (*Gov. Code*, § 911.4), but the claimant may apply to the public entity for leave to present a late claim (*Gov. Code*, § 911.6). If such an application is denied, or deemed denied, the claimant may petition the court for relief from the claim presentation requirement (*Gov. Code*, § 946.6). For purposes of the TCA, "local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the state (*Gov. Code*, § 900.4). Under the Charter Schools Act (*Ed. Code*, § 47600 *et seq.*), charter schools are part of the public school system and, for specified purposes, are deemed to be school districts. However, those purposes do not expressly include coverage by the TCA, and charter schools do not fit comfortably within any of the categories defined, for purposes of the TCA, as "local public entities."

**(22) Government Tort Liability § 17--Claims--Presentation--Exemptions--Government Entities--False Claims Act--Qui Tam Plaintiffs.**--The Tort Claims Act (TCA) (*Gov. Code*, § 815 *et seq.*) expressly excludes from the claim presentation requirement claims by the state or by a state department or agency or by another local public entity. Hence, California False Claims Act (CFCA) (*Gov. Code*, § 12650 *et seq.*) actions brought, in their official capacities,

by the Attorney General (*Gov. Code, § 12652, subd. (a)*) or local prosecuting authorities (*§ 12652, subd. (b)*) clearly are exempt. The same rule appears applicable to qui tam actions by "persons" under the CFCA. Such a suit is brought, not only for the qui tam plaintiff, but for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved (*§ 12652, subd. (c)(1)*). If the Attorney General or local prosecuting authority elects not to intervene and proceed with the action, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed (*§ 12652, subd. (f)(1)*). Hence, at the time a qui tam action is brought, the qui tam plaintiff stands in the shoes of the state or political subdivision, and within the TCA exemption for claims by the state or a local public entity.

**(23) Government Tort Liability § 17--Claims--Presentation--Qui Tam Provisions of False Claims Act--Conflict with Tort Claims Act.--**

The qui tam provisions of the California False Claims Act (CFCA) (*Gov. Code, § 12650 et seq.*) are at odds with the policy behind the Tort Claims Act's (*Gov. Code, § 815 et seq.*) claim presentment requirement. A qui tam complaint under the CFCA must be filed under seal, and immediately must be served, along with a written disclosure of all material evidence and information the qui tam plaintiff possesses, on the [\*1176] Attorney General (*Gov. Code, § 12652, subd. (c)(2), (3)*). If political subdivision funds are involved, the Attorney General must forward these materials to the local prosecuting authority within 15 days (*§ 12652, subd. (c)(7)(A)*). The complaint must remain sealed for up to 60 days after filing, with additional extensions available upon timely application, while the Attorney General or local prosecuting authority investigates and decides whether to intervene (*§ 12652, subd. (c)(2), (4), (6), (7)*). During this period, the complaint must not be served on the defendant (*§ 12652, subd. (c)(2), (4), (6), (7)*). Moreover, once a qui tam action is filed, it cannot be settled without the consent of the court, taking into account the best interests of the parties involved and the public purposes behind the CFCA (*§ 12652, subd. (c)(1)*).

**(24) Government Tort Liability § 17--Claims--Presentation--Qui Tam Provisions of False Claims Act--Conflict with Tort Claims Act.--**The California False Claims Act (CFCA) (*Gov. Code, §*

*12650 et seq.*) does not explicitly preclude a potential qui tam plaintiff, prior to filing a CFCA complaint, from disclosing to the potential defendant the basis of the claim, or even from attempting to settle it. But the CFCA's purposes would obviously be undermined if CFCA qui tam plaintiffs were required, under the Tort Claims Act (TCA) (*Gov. Code, § 815 et seq.*), to present "local public entity" defendants, as defined in that statute, with written claims before proceeding with suit. The TCA includes an explicit exemption from the claim presentment requirement for claims by the state and local public entities. Qui tam actions under the CFCA are, in essence, claims of that kind. In any event, in view of the secrecy provisions of the CFCA, a later and more narrowly focused statute, it must prevail over contrary provisions of the earlier and more general TCA.

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39 Cal. 4th 1164, \*1177; 141 P.3d 225, \*\*;  
48 Cal. Rptr. 3d 108, \*\*\*; 2006 Cal. LEXIS 10227

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**JUDGES:** Baxter, J., with George, C. J., Chin, Moreno, Corrigan and Irion, JJ., concurring. Concurring and dissenting opinion by Kennard, J.

**OPINION BY:** Baxter

**OPINION**

[\*\*228] [\*\*\*111] **BAXTER, J.**--The Charter Schools Act (CSA; *Ed. Code, § 47600 et seq.*), as adopted by the Legislature in 1992 and since amended, represents a revolutionary change in the concept of public education. Under this statute, interested persons may obtain charters to operate schools that function within public school districts, accept all eligible students, charge no tuition, and are financed by state and local tax dollars, but nonetheless retain considerable academic independence from the mainstream public education system. Such schools may elect to operate as, or be operated by, corporations organized under the Nonprofit Public Benefit Corporation Law. (*Id.*, § 47604, *subd. (a)*.)

Here certain charter schools, their corporate operators, and the chartering school districts were sued on multiple grounds by some of the schools' students and their parents or guardians. The gravamen of all the claims is that the schools--designed to provide and facilitate home instruction through use of the Internet (so-called distance learning)--failed to deliver instructional services, equipment, [\*\*\*112] and supplies as promised, and as required by law. In effect, plaintiffs assert, the schools functioned only to collect "average daily attendance" (ADA) forms, on the basis of which the schools, and the districts, fraudulently claimed and received public education funds from the state. Plaintiffs also claim violations of specific statutory rules governing "independent study" programs offered by the public schools.

This case concerns whether, and in what circumstances, public school districts, charter schools, and/or the operators of such schools may be exposed to civil liability based on allegations of this kind. Among other things, we must determine whether such entities, or any of them, are "persons" who may be sued (1) under the unfair competition law (UCL; *Bus. & Prof. Code, § 17200 et seq.*) and (2) in a qui tam action, brought by [\*1179] individuals on behalf of the state, under the California [\*\*229] False Claims Act (CFCA; *Gov. Code, § 12650 et seq.*).<sup>1</sup>

<sup>1</sup> The CFCA provides a single definition of "person" for all purposes of that statute. "Persons" who knowingly submit false claims to state or local governments may be sued under the CFCA (

39 Cal. 4th 1164, \*1179; 141 P.3d 225, \*\*229;  
48 Cal. Rptr. 3d 108, \*\*\*112; 2006 Cal. LEXIS 10227

*Gov. Code, § 12651*), and, under certain circumstances, "persons" may also bring "qui tam" actions, *on behalf of* defrauded governmental entities, *against* alleged false claimants (*id.*, § 12652, *subd. (c)*). Here, as noted above, we consider, among other things, whether public entities are "persons" who *may be sued* as false claimants under the CFCA. In a companion case, *State of California ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal.4th 1220 [48 Cal.Rptr.3d, 141 P3d 256] (*Harris*), we address the question whether a governmental entity is a person who, as a qui tam plaintiff under the CFCA, *may sue* for alleged false claims that were submitted only to *other* public agencies.

We reach the following conclusions: (1) Public school districts are not "persons" who may be sued under the CFCA. (2) On the other hand, the charter schools in this case, and their operators, are "persons" subject to suit under both the CFCA and the UCL, and are not exempt from either law merely because such schools are deemed part of the public school system. (3) The CFCA cause of action is not a barred claim for "educational malfeasance" (see *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal. App. 3d 814 [31 Cal. Rptr. 854] (*Peter W.*)) insofar as it asserts, not simply that One2One's charter schools provided a *substandard* education, but that they submitted false claims for school funds while failing to furnish *any* significant educational services, materials, and supplies. (4) The CFCA cause of action is not barred insofar as it alleges that, before 2000, the charter schools violated "independent study" rules set forth in a 1993 statute, *Education Code section 51747.3*, because *section 51747.3* applied to charter schools even before its amendment in 1999. (5) Finally, a qui tam action under the CFCA against a charter school or its operator is not subject to the Tort Claims Act (TCA; *Gov. Code, § 815 et seq.*) requirement of prior presentment of a claim for payment (see *id.*, §§ 905, 910 *et seq.*). These conclusions require that we affirm in part, and reverse in part, the judgment of the Court of Appeal.

#### FACTS AND PROCEDURAL BACKGROUND

On December 30, 1999, plaintiffs filed a complaint, which included a claim for qui tam relief on behalf of the state, under the CFCA. (*Gov. Code, § 12652, subd. (c)(1)*.) As provided by the CFCA in such cases, the complaint was filed under seal. (*Gov. Code, § 12652,*

*subd. (c)(2)*.) In July 2000, after the seal was lifted, the Attorney General noticed his election to intervene in, and proceed [\*\*\*113] with, the CFCA action on behalf of the state. (*Gov. Code, § 12652, subd. (c)(6)*.) [\*1180]

On August 11, 2000, plaintiffs filed their first amended complaint (the complaint). As pertinent to the issues before us, the complaint alleged the following:

At various times during 1997, 1998, and 1999, defendant One2One Learning Foundation (One2One), a Texas corporation, operated three charter schools in California through its California corporate alter ego, defendant Charter School Resource Alliance (CSRA). These schools included (1) defendant Sierra Summit Academy, Inc. (Sierra Summit Academy), operating as a California nonprofit corporation, and chartered by the Sierra Plumas Joint Unified School District (Sierra District) in Sierra County, (2) defendant Mattole Valley Charter School (Mattole Valley School), chartered by the Mattole Unified School District (Mattole District) in Humboldt County, and (3) defendant Camptonville Academy, Inc. (Camptonville Academy), operating as a California nonprofit corporation, and chartered by defendant Camptonville Union Elementary School District (Camptonville District) in Yuba County.

Defendant Robert Carroll is One2One's president and chief executive officer. Defendant Jeff Bauer is Superintendent of the Sierra District. Defendant Carol Kennedy is the Director of Sierra Summit Academy. Defendant Richard Graey is Superintendent of the Mattole District and the Director of Mattole Valley School. Defendant Allen Wright is Superintendent and Principal of the Camptonville District. Defendant Janis [\*\*230] Jablecky is the Director of Camptonville Academy.<sup>2</sup>

<sup>2</sup> One2One, CSRA, Sierra Summit Academy, Mattole Valley School, and Camptonville Academy, as identified and described in the complaint, are hereafter collectively referred to as the charter school defendants. The Sierra District, the Mattole District, and the Camptonville District are hereafter collectively referred to as the district defendants. The charter school defendants, the district defendants, and the individual defendants are hereafter collectively referred to as all defendants.

Each plaintiff was a minor student enrolled in one of

39 Cal. 4th 1164, \*1180; 141 P.3d 225, \*\*230;  
48 Cal. Rptr. 3d 108, \*\*\*113; 2006 Cal. LEXIS 10227

defendant charter schools at some time during 1998 and/or 1999, or the parent and/or guardian of such a student. All plaintiffs were direct victims of One2One's failure to provide promised instruction, testing, equipment, materials, and supplies.

Like traditional public schools, charter schools are funded by the state based on ADA records. While charter schools have considerable freedom in their academic approach, they must meet statewide educational standards and use appropriately credentialed teachers. The chartering entity, usually a school district, has oversight responsibilities, and must revoke a school's charter for fiscal mismanagement, material violation of the charter, failure to meet or pursue any of the educational outcomes set by the charter, failure to meet generally accepted accounting principles, or violation of law. [\*1181]

Sierra Summit Academy, Mattole Valley School, and Camptonville Academy were operated as distance learning schools, in which students study at home, complete lessons on their computers, and transmit them via the Internet to the school. Students are also tested through the Internet.

The charters and promotional literature for One2One-operated schools promised to provide "ways and means" for students to achieve an education through distance learning, including the furnishing of computers, necessary software, and textbooks, and reimbursement of up to \$ 100 per month for out-of-pocket educational expenses incurred by students or their parents or guardians. Each student was also [\*\*\*114] to be assigned an "educational facilitator," who was to devise a learning contract for the student, provide parents with a copy of the student's curriculum goals, order necessary educational materials, and come to the student's home a few hours per week for personal instruction, testing, and evaluation.

Despite its promises, One2One has failed to provide the enumerated equipment, supplies, and services, either to plaintiff students or to any of its enrollees. Its educational facilitators--who, on information and belief, are teaching outside their credentialed areas or are not credentialed at all--do not provide assessment, instruction, review, or curriculum, either online or in person. One2One also fails to reimburse students, parents, and guardians for educational expenses. In some cases, parents actually pay One2One for equipment and for educational materials and supplies, either because

One2One has failed to provide these items for free as promised, or because parents have exhausted their \$ 100 per month expense allowance. Moreover, One2One overbills for the educational materials and software it does provide. In particular, the educational software programs One2One uses are available online for free, or for much less than One2One charges. <sup>3</sup>

3 Included in the complaint were detailed allegations concerning the charter schools' treatment of the named plaintiffs, including the schools' broken promises to supply computers and educational materials, and the failure of their "educational facilitators" to provide home visits, or any other significant contact, except for "religious" visits to collect signed ADA forms. The complaint also contained class action allegations.

One2One aggressively recruits poor, rural districts to approve their charter schools, then enrolls students throughout the state for distance learning. In return for chartering its schools and allowing their operation, One2One pays the districts administration fees in excess of those allowed by statute. Despite their oversight responsibilities, the districts enable One2One to misuse public funds by turning a blind eye to the charter schools' activities, and, for the most part, failing to take steps to monitor them. [\*1182]

On the basis of allegations such as these, the complaint asserted causes of action [\*\*231] against the charter school defendants for breach of contract (seventh cause of action) and intentional and negligent misrepresentation (fourth and fifth causes of action, respectively). Against the charter school and district defendants, it contained claims for mandamus and declaratory relief (third and 10th causes of action, respectively), and for violation of the free school, equal protection, and due process guarantees of the California Constitution (eighth and ninth causes of action, respectively). As to all defendants, it sought injunctive relief against misuse of taxpayer funds (second cause of action).

Finally, the complaint included, (1) against the charter school and district defendants, a CFCA cause of action for qui tam relief, on behalf of the state, for the alleged submission of false and fraudulent claims for payment of state educational funds (first cause of action) and, (2) against the charter school defendants, an

individual and representative claim under the UCL, alleging unfair and deceptive business practices in the operation of the schools (sixth cause of action).

The CFCA cause of action asserted that the charter school defendants submitted false claims, within the meaning of this statute, by requesting funding from the districts and/or the state, "knowing that their ADA records did not accurately reflect the students enrolled in and receiving instruction, educational materials, or services [\*\*\*115] from their schools." (At another point, the complaint alleged more generally that One2One "fails to provide the education it promises but falsely collects State educational funds as if the education were provided.")

The CFCA count also alleged that the charter school defendants falsely claimed ADA funds (1) for what was effectively independent study, though the schools were in violation of *Education Code section 51747.3, subdivision (a)*, in that they provided money or other things of value to independent study pupils that were not provided to students attending regular classes, and (2) for independent study pupils who, in violation of *subdivision (b)* of the same section, resided outside the counties in which the respective schools were located, or adjacent counties.<sup>4</sup>

<sup>4</sup> According to the complaint, for each of the 5,200 students enrolled statewide in its distance learning charter schools, One2One collects ADA funds of about \$ 120 per day, or \$ 4,350 per school term. The complaint thus asserted generally that, on the basis of One2One's failure to provide educational services and materials as promised in its charters and required by law, "One2One engages in a practice of defrauding parents, school districts, and the State by collecting more than \$ 20 million annually in educational funds."

[\*1183]

In the CFCA cause of action, the complaint alleged that the district defendants had submitted false claims on behalf of the charter schools, even though they "knew or deliberately or recklessly disregarded whether the public funds were being used for wrongful purposes." Further, the complaint asserted, the district defendants wrongfully claimed funds for supervisory services beyond the limits set forth in the CSA.

Aside from the injunctive and declaratory relief noted above, the complaint sought, among other things, (1) compensatory and punitive damages against the charter school defendants, and, (2) against the charter school and district defendants, restitution of funds falsely claimed and received, with treble damages and civil penalties as provided in the CFCA.

Several defendants demurred.<sup>5</sup> In November 2001, the trial court sustained, without leave to amend, the demurrers as to the first (CFCA), second (taxpayer injunctive relief), fourth (intentional misrepresentation), fifth (negligent misrepresentation), sixth (UCL), and seventh (breach of contract) causes of action.<sup>6</sup> The court reasoned as [\*\*232] follows: (1) All these counts are noncognizable private claims for "educational malfeasance." (2) Because the charter school and district defendants are "public entities," the CFCA, intentional misrepresentation, and negligent misrepresentation causes of action are subject to the TCA requirement of prior presentment of a claim for payment. (3) As "public entities," the charter school defendants are not "persons" subject to suit under the [\*\*\*116] UCL. (4) The taxpayer claim for injunctive relief is subject to the requirement of a prior claim for refund. (5) The CFCA claim for violation of the statutory restrictions on "independent study" programs fails, because those restrictions applied to charter schools only in and after 2000, and all the facts alleged in the complaint precede that date.<sup>7</sup>

<sup>5</sup> Separate demurrers were filed by (1) CSRA and Carroll, (2) Sierra Summit Academy, Sierra District, Bauer, and Kennedy, and (3) One2One. One2One later filed a joinder in the demurrer of CSRA and Carroll.

<sup>6</sup> Previously, in September 2001, the trial court had denied the State of California's motion to dismiss plaintiffs' CFCA claim for lack of jurisdiction. The motion was made under *Government Code section 12652, subdivision (d)(3)(A)*, which deprives the court of jurisdiction over a private qui tam CFCA action that is based on the prior "public disclosure" of the facts supporting the claim, where the disclosure was made "in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or by the news media,"

unless the qui tam plaintiff "is an original source of the information." The ruling on this motion is not involved in the appeal before us.

7 After an initial hearing on the demurrers, the trial court issued a final ruling as to the second (taxpayer injunctive relief), third (mandamus), fourth (intentional misrepresentation), fifth (negligent misrepresentation), seventh (breach of contract), eighth (free school guarantee), ninth (equal protection and due process), and 10th (declaratory relief) causes of action. However, as to the first (CFCA) and sixth (UCL) causes of action, the court obtained additional briefing on whether, in light of a then recent Court of Appeal decision, *LeVine v. Weis* (2001) 90 Cal.App.4th 201 [108 Cal. Rptr. 2d 562] (*LeVine II*) (see also *LeVine v. Weis* (1998) 68 Cal.App.4th 758 [80 Cal. Rptr. 2d 439] (*LeVine I*)), the charter school and district defendants, as "public entities within the public school system," could be sued under the CFCA and the UCL. In its final ruling, as noted, the court determined that the charter school defendants were not subject to suit under the UCL, but the court did not decide whether a similar rule applied to either the charter school or district defendants under the CFCA.

[\*1184]

All parties stipulated that (1) the trial court's ruling on the demurrers was binding, as law of the case, on those defendants who had not demurred, (2) the remaining causes of action would be dismissed in order to facilitate appellate review, and (3) plaintiffs would dismiss the individual defendants. Judgment was entered accordingly.

Plaintiffs appealed, urging that the CFCA, UCL, contract, and misrepresentation claims should not have been dismissed.<sup>8</sup> The Court of Appeal reversed the judgment of dismissal. The Court of Appeal agreed with the trial court that the causes of action for breach of contract and misrepresentation are barred by the rule that private parties cannot sue public schools for "educational malfeasance." The Court of Appeal also concurred that the charter school defendants, as part of the public school system, are "public entities," and thus are not "persons" who may be sued under the UCL.

<sup>8</sup> No defendant cross-appealed from the trial court's order *overruling* demurrers to the third

(mandate), eighth (free school guarantee), ninth (equal protection/due process), and 10th (declaratory relief) causes of action. Nor did any of defendants' Court of Appeal briefs argue that those counts should have been dismissed. By the same token, after stipulating in the trial court to dismissal of individual defendants Carroll, Bauer, Kennedy, Graey, Wright, and Jablecki, plaintiffs did not contend in the Court of Appeal that the second cause of action (taxpayer relief)--the only one naming those defendants--should be reinstated. The State of California, as real party and respondent, filed a brief asserting only that the "prior claim" requirement of the TCA should not apply to qui tam actions under the CFCA.

On the other hand, the Court of Appeal held that the CFCA, unlike the UCL, does include public entities among the "persons" who may be sued. Hence, the Court of Appeal determined, charter schools and public school districts may be subject to private qui tam actions under the CFCA. Moreover, the Court of Appeal reasoned, plaintiffs' CFCA allegations--i.e., that the charter school and district defendants made or facilitated fraudulent claims to obtain state ADA funds for educational services that were not provided--are not a prohibited cause of action for "educational malfeasance."

Nor, the Court of Appeal concluded, must a qui tam action under the CFCA be preceded by presentment of a claim for payment pursuant to the TCA. In this regard, the Court of Appeal noted that (1) the state is expressly exempt from the [\*\*\*117] TCA's "prior presentment" requirement (*Gov. Code, § 905, subd. (i)*), (2) a qui tam plaintiff under the CFCA stands in the shoes of the state, and (3) application of a "prior presentment" requirement in this context would undermine [\*\*233] the CFCA's provision that qui tam actions must initially be [\*1185] filed under seal, thus allowing the state to investigate, without prior warning to the alleged false claimant, before deciding whether to intervene in the action.

Finally, however, the Court of Appeal concurred with the trial court that plaintiffs' CFCA claim must fail insofar as it is based on allegations that the charter schools violated the "independent study" statute (*Ed. Code, § 51747.3*). Like the trial court, the Court of Appeal concluded that, while the complaint covered only acts done by the charter school defendants in the years 1998 and 1999, the "independent study" statute did not

apply to charter schools until the year 2000.

The Court of Appeal remanded for further proceedings consistent with its opinion. We understand the effect of the Court of Appeal's judgment to be that plaintiffs may proceed against both the district and charter school defendants on the CFCA cause of action--minus the allegations concerning violation of the statutory rules governing "independent study" programs--but may not proceed on the UCL, contract, or misrepresentation causes of action.

Petitions for review were filed by defendants (1) One2One, (2) CSRA, (3) the Mattole District and Graey, (4) Camptonville Academy and Jablecki, and (5) the Sierra District and Sierra Summit Academy. All challenged the Court of Appeal's reinstatement of plaintiffs' CFCA cause of action. The petitions variously argued that (1) the charter school and district defendants are "public entities," and as such, are not "persons" subject to suit under the CFCA, (2) a *qui tam* action under the CFCA is subject to the "claim presentment" provisions of the TCA, and (3) the CFCA allegations are a disguised claim for "educational malfeasance."

Plaintiffs answered the petitions, urging, as additional issues, that (1) the restrictions on "independent study" programs imposed by *Education Code section 51747.3* have applied to charter schools since that statute's adoption in 1993 and (2) private nonprofit corporations operating charter schools are "persons" covered by the UCL. We granted review. As will appear, we agree with certain of the Court of Appeal's holdings and disagree with others. We will therefore reverse in part the Court of Appeal's judgment.<sup>9</sup>

<sup>9</sup> Amicus curiae briefs in support of defendants have been filed by (1) the Statewide Association of Community Colleges et al., (2) Fullerton Joint Union High School District et al., (3) the Pacific Legal Foundation, (4) the California State Association of Counties, (5) Coast Community College District, and (6) PricewaterhouseCoopers, LLP. An amicus curiae brief in support of plaintiffs has been filed by Taxpayers Against Fraud. We appreciate the assistance provided by these briefs.

[\*1186]

## DISCUSSION

### 1. *The CSA.*

(1) The CSA, as adopted in 1992 and since substantially amended, is intended to allow "teachers, parents, pupils, and community members to establish ... schools that operate independently from the existing school district structure." (*Ed. Code, § 47601.*) By this means, the CSA seeks to expand learning opportunities, encourage innovative teaching methods, provide expanded public educational choice, and promote educational competition and accountability within the public school system. (*Ed. Code, § 47601, subs. (a)-(g).*) [\*\*\*118]

If statutory requirements are met, public school authorities must grant the petition of interested persons for a charter to operate such a school within a public school district. (*Ed. Code, § 47605.*) For certain purposes, the school is "deemed to be a 'school district'" (*id., § 47612, subd. (c)*), is "part of the Public School system" (*id., § 47615, subd. (a)*), falls under the "jurisdiction" of that system, and is subject to the "exclusive control" of public school officers (*id., § 47615, subd. (a)(2)*); see *§ 47612, subd. (a)*). (See *Wilson v. State Bd. of Education (1999) 75 Cal.App.4th 1125, 1136-1142 [89 Cal. Rptr. 2d 745] (Wilson).*)

A charter school must operate under the terms of its charter, and must comply with the CSA and other specified laws, but is otherwise exempt from the laws governing school districts. (*Ed. Code, § 47610.*) A charter school may elect to operate as, or be [\*\*234] operated by, a nonprofit corporation organized under the Nonprofit Public Benefit Corporation Law. (*Id., § 47604, subd. (a)*), as added by Stats. 1998, ch. 34, § 3.)

A charter school is eligible for its share of state and local public education funds, which share is calculated primarily, as with all public schools, on the basis of its ADA. (*Ed. Code, § 47612*; see also *id., § 47630 et seq.*) 10 Provisions added to the CSA since its original adoption enumerate certain oversight responsibilities of the chartering authority (*Ed. Code, §§ 47612, 47604.32*), and authorize that agency to charge the school supervisory fees, within specified limits, for such services (*id., § 47613*).

10 California school finance is enormously complex, but the basic system is that "funds raised by local property taxes are augmented by state equalizing payments. Each school district has a

base revenue limit that depends on average daily attendance, ... and varies by size and type of district. [¶] The revenue limit for a district includes the amount of property tax revenues a district can raise, with other specific local revenues, coupled with an equalization payment by the state, thus bringing each district into a rough equivalency of revenues." (56 Cal.Jur.3d (2003) Schools, § 7, p. 198.)

[\*1187]

## 2. The CFCA.

(2) The CFCA, which is patterned after a similar federal law, was adopted in 1987. (Stats. 1987, ch. 1420, § 1, p. 5237.) It provides that "[a]ny person" who, among other things, "[k]nowingly presents or causes to be presented to ... the state or ... any political subdivision thereof, a false claim for payment or approval," or "[k]nowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision," or "[c]onspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or any political subdivision," or "[i]s a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery [thereof]," "shall be liable to the state or to the political subdivision for three times the amount of damages" the state or political subdivision thereby sustained, as well as for the state's or political subdivision's costs of suit, and may also liable for a civil penalty of up to \$ 10,000 for each false claim. (*Gov. Code, § 12651, subd. (a)(1)-(3), (8).*)<sup>11</sup>

11 In certain circumstances, where the person submitting the false claim reported it promptly and cooperated in any investigation, the court may assess less than three times the damages (though no less than two times the damages), and no civil penalty. (*Gov. Code, § 12651, subd. (b).*)

[\*\*\*119]

The CFCA defines a "person" to "include[]" any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust." (*Gov. Code, § 12650, subd. (b)(5).*)

Where a "person" has submitted a false claim upon

state funds, or upon both state and political subdivision funds, in violation of the CFCA, the Attorney General may sue that person to recover the damages and penalties provided by the statute. (*Gov. Code, § 12652, subd. (a)(1).*) Where the false claim was upon "political subdivision funds," or upon both state and political subdivision funds, the "prosecuting authority" of the affected political subdivision may bring such an action. (*Id., subd. (b)(1).*)<sup>12</sup>

12 " 'Prosecuting authority' refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision." (*Gov. Code, § 12650, subd. (b)(4).*)

(3) When either the Attorney General or the local prosecuting authority unilaterally initiates an action involving both state and political subdivision funds, the other affected official or officials must be notified. If the Attorney General initiates such an action, the local prosecuting authority may, [\*1188] upon receiving notice, intervene. If the local prosecuting attorney is the initiator, the Attorney General may, upon notice, elect to assume responsibility for the action, though the local prosecuting authority may continue as a party. (*Gov. Code, § 12652, subds. (a)(2), (3), (b)(2), (3).*)

A CFCA action may also be initiated by a "person," as a "qui tam" plaintiff, for and in [\*\*235] the name of the state or the political subdivision whose funds are involved. (*Gov. Code, § 12652, subd. (c)(1), (3).*) The complaint in such an action shall be filed in camera, and may remain under seal for up to 60 days. While the complaint remains sealed, "[n]o service shall be made on the defendant." (*Id., subd. (c)(2).*)

The qui tam plaintiff must immediately notify the Attorney General of the suit and disclose to him all material evidence and information the plaintiff possesses. If the qui tam complaint involves only state funds, the Attorney General may, within the 60-day period or extensions thereof, elect to intervene and proceed with the action. If political subdivision funds alone are involved, the Attorney General must forward the qui tam complaint to the local prosecuting authority, who may elect to intervene and proceed with the action. If both state and political subdivision funds are involved, the Attorney General and the local prosecuting authority are to coordinate their investigation and review. Either

# EXHIBIT I



**CALIFORNIA TEACHERS ASSOCIATION et al., Plaintiffs and Appellants, v.  
GOVERNING BOARD OF RIALTO UNIFIED SCHOOL DISTRICT et al.,  
Defendants and Respondents.**

No. S051274.

**SUPREME COURT OF CALIFORNIA**

*14 Cal. 4th 627; 927 P.2d 1175; 59 Cal. Rptr. 2d 671; 1997 Cal. LEXIS 1; 97 Cal. Daily  
Op. Service 34; 96 Daily Journal DAR 73*

**January 2, 1997, Decided**

**PRIOR HISTORY:** Superior Court San Bernardino County, No. SCV1842, A. Rex Victor, Judge.

**DISPOSITION:** The judgment of the Court of Appeal directing the trial court to issue a writ of mandate is vacated and the matter transferred to the Court of Appeal with directions to remand the case to the trial court for further proceedings consistent with this opinion.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court denied a petition for a writ of mandate, filed by a teacher and employee organizations, seeking to enjoin a school district from filling coaching positions with persons not employed by the district as teachers unless no teacher wanted the position. The teacher had applied for three coaching positions, but the district hired one district employee who was a teacher, one employee who was not a teacher, and one individual who was neither an employee nor a teacher. In denying the petition, the trial court found that *Ed. Code, § 44919, subd. (b)*, which provides that a limited assignment supervising athletic activities of pupils "shall first be made available to teachers presently employed by the district" does not require a district, when hiring to fill an open athletic coaching position, to give credentialed

teachers currently employed in the district a hiring preference over noncredentialed employees or nonemployees. (Superior Court of San Bernardino County, No. SCV1842, A. Rex Victor, Judge.) The Court of Appeal, Fourth Dist., Div. Two, No. E013807, reversed, concluding that *Ed. Code, § 44919, subd. (b)*, grants teachers currently employed in the school district a "right of first refusal" for vacant athletic coach positions.

The Supreme Court vacated the judgment of the Court of Appeal that directed the trial court to issue a writ of mandate and transferred the matter to the Court of Appeal with directions to remand the case to the trial court for further proceedings. The court held that *Ed. Code, § 44919, subd. (b)*, establishes, for limited duty assignments of athletic coach, a limited employment preference for credentialed teachers presently employed by the school district, a preference conditioned on such a teacher applying for the position and meeting the qualifications established by the school district. The court further held that the Legislature intended in *Ed. Code, § 44919, subd. (b)*, to create a preferential employment right; by using the word "first," the Legislature clearly intended to afford some degree of advantage or priority to "teachers presently employed by the district," an advantage more tangible than mere early notification of a job vacancy. However, since the Legislature has also clearly made a public policy decision that power over matters involving interscholastic athletics reside in the

individual school districts (*Ed. Code, § 35179*), *Ed. Code, § 44919, subd. (b)*, establishes an employment preference for district teachers, not an employment guaranty. Hence, only to the extent a teacher-applicant currently employed in the school district satisfies the qualifications promulgated by the district for the coaching position does *Ed. Code, § 44919, subd. (b)*, prohibit the district from hiring a noncredentialed employee or nonemployee in preference to that teacher. (Opinion by Werdegar, J., with George, C. J., Mosk, and Kennard, JJ., concurring. Dissenting opinion by Chin, J., with Baxter and Brown, JJ., concurring.)

#### HEADNOTES

#### CALIFORNIA OFFICIAL REPORTS HEADNOTES Classified to California Digest of Official Reports

**(1a) (1b) (1c) (1d) (1e) (1f) (1g) (1h) (1i) Schools § 26--Teachers and Other Employees--Employment--Athletic Coaching Position in District--Hiring Preference for District Teachers.** --In a mandamus proceeding brought by a teacher and employee organizations, seeking to require the school district to comply with *Ed. Code, § 44919, subd. (b)*, which provides that a limited assignment supervising athletic activities of pupils "shall first be made available to teachers presently employed by the district," the trial court erred in finding that *Ed. Code, § 44919, subd. (b)*, does not require a district, when hiring to fill an open athletic coaching position, to give credentialed teachers currently employed in the district a hiring preference over noncredentialed employees or nonemployees. The Legislature intended in *Ed. Code, § 44919, subd. (b)*, to create a preferential employment right; by using the word "first," the Legislature clearly intended to afford some degree of advantage or priority to "teachers presently employed by the district," an advantage more tangible than mere early notification of a job vacancy. However, since the Legislature has also clearly made a public policy decision that power over matters involving interscholastic athletics reside in the individual school districts (*Ed. Code, § 35179*), *Ed. Code, § 44919, subd. (b)*, establishes an employment preference for district teachers, not a guaranty. Hence, only to the extent a teacher-applicant currently employed in the school district satisfies the qualifications promulgated by the district for the coaching position does *Ed. Code, § 44919, subd. (b)*, prohibit the district from hiring a noncredentialed employee or nonemployee in preference

to the teacher.

**(2a) (2b) (2c) (2d) (2e) (2f) Statutes § 29--Construction--Language--Legislative Intent.** --To interpret statutory language, a court must ascertain the intent of the Legislature so as to effectuate the purpose of the law, ever mindful of the court's limited role in the process of interpreting enactments from the political branches of the state government. The court must follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act. The court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. In analyzing statutory language, the court seeks to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose; the court cannot assume the Legislature engaged in an idle act or enacted a superfluous statutory provision. The court interprets a statute in context, examining other legislation on the same subject. A word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a law should be accorded the same meaning in other parts or portions of the law. Committee reports are often useful in determining the Legislature's intent.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 96 et seq.]

**(3) Schools § 26--Teachers and Other Employees--Employment--Athletic Coaching Position in District--District Discretion.** --Individual school districts have, since Jan. 1, 1982 (the effective date of *Ed. Code, § 35179*) had the benefits of the Legislature's educational policy choice--as expressed through statutory enactments, amendments, and deletions--delegating to individual districts discretion over the hiring of athletic coaches. This delegation of discretion takes two forms. First, districts may establish the qualifications for athletic coaches as high as necessary to coincide with local preferences. Under this system, each school district may decide for itself how experienced a coach it wants and how dynamic a coach it needs. Each district may decide how to allocate scarce educational resources to athletics, which sports deserve funding, and how much. Second, the discretion granted districts permits them to assess the knowledge, competence, skill, and experience of any coaching applicants in accordance with the qualifications so established. Thus, whatever qualifications a district establishes, it retains much leeway in determining

whether an applicant for a coaching position has met those criteria.

**(4) Schools § 26--Teachers and Other Employees--Employment--Statutory**

**Interpretation--Temporary Employees and Athletic Coaches.** --The Legislature, by first adding *subdivision (b) to Ed. Code, § 44919*, and then amending the new subdivision, clearly intended to broaden the circumstances in which individuals could be hired as "temporary employees." The Legislature, by amending *Ed. Code, § 44919*, also intended to give school districts greater flexibility in hiring athletic coaches.

**COUNSEL:** Charles R. Gustafson, Beverly Tucker, Rosalind D. Wolf and Robert E. Lindquist for Plaintiffs and Appellants.

Atkinson, Andelson, Loya, Ruud & Romo, Sherry G. Gordon, Howard J. Fulfrost and Byron C. Smith for Defendants and Respondents.

John L. Bukey, Abhas Hajela, Lozano, Smith, Smith, Woliver & Behrens, Michael E. Smith and John C. Valdez as Amici Curiae on behalf of Defendants and Respondents.

**JUDGES:** Opinion by Werdegar, J., with George, C. J., Mosk, and Kennard, JJ., concurring. Dissenting opinion by Chin, J., with Baxter and Brown, JJ., concurring.

**OPINION BY: WERDEGAR**

**OPINION**

[\*630] [\*\*1175] [\*\*\*671] **WERDEGAR, J.**

We address in this case the proper interpretation of *Education Code section 44919, subdivision (b)* (hereafter *section 44919(b)*); all statutory references are to the Education [\*\*1176] [\*\*\*672] Code unless otherwise stated), which concerns the employment of persons to serve in "limited assignment[s] supervising athletic activities of pupils," i.e., athletic coaches. Specifically, we must construe the portion of the statute providing that such positions, when vacant, "shall first be made available to teachers presently employed by the district." We hold the language of *section 44919(b)* demonstrates the Legislature intended to accord an advantage in the hiring process, as discussed hereafter, to credentialed teachers presently employed by the school district,

provided such teachers apply for the position and are otherwise qualified under applicable criteria promulgated by the school district.

[\*631] **FACTS**

The facts are essentially undisputed: <sup>1</sup> Defendant Rialto Unified School District (hereafter the District) had one high school, Eisenhower High School, and decided to open a second one, Rialto High School, in September 1992. Staffing decisions for the new school began in the spring of 1992. Flyers were circulated advertising an opening for a boys varsity basketball coach at the new high school. Gary Stanley, a tenured, credentialed teacher employed in a district junior high school, applied for the job. He also applied for a subsequent opening for an assistant coach for the boys varsity team. Finally, he applied for an opening to serve as assistant coach on the boys freshman basketball team.

<sup>1</sup> No evidence was taken below, with both sides submitting on the state of the record, which included admissions by the District, as well as declarations under penalty of perjury by Martin Sipe, Anna Rodriguez, and Gary Stanley.

The District filled the boys head coach position by hiring Martin Sipe, who had been head coach for the boys varsity basketball team at Eisenhower High School. Sipe, a credentialed teacher, was also selected to serve as Rialto High School Athletic Director. The District then hired Keith Ellis, who had been Sipe's assistant coach at Eisenhower, to fill the assistant varsity coach position at Rialto. Ellis was a security guard for the District and was therefore a classified (i.e., noncredentialed) employee. Stanley was not interviewed for either position.

Sipe, apparently in his role as athletic director for Rialto High, interviewed three applicants for the position of assistant coach for the freshman team: Stanley, an unidentified teacher, and Dion Downey. Sipe recommended to Rialto High School Principal Anna Rodriguez that the District hire Downey, as Sipe believed he was the most qualified of the three applicants. Rodriguez concurred in the recommendation and referred it to the District's governing board. The District hired Downey to fill the remaining assistant coach position. Downey does not have a teaching credential.

Plaintiff Stanley, joined by two nonprofit employee organizations, the California Teachers Association and

the Rialto Education Association (hereafter collectively Stanley), filed a petition for a writ of mandate in superior court, seeking: (i) to require the District to comply with *section 44919(b)* and (ii) damages. The trial court denied the writ, finding *section 44919(b)* does not require the District, when hiring to fill an open athletic coaching position, to give credentialed teachers currently employed in the district a hiring preference over noncredentialed employees or nonemployees. The Court of Appeal reversed, and we granted the District's petition for review.

#### [\*632] DISCUSSION

Resolution of this case turns on the proper interpretation of *section 44919(b)*, which provides: "Governing boards shall classify as temporary employees persons, other than substitute employees, who are employed to serve in a limited assignment supervising athletic activities of pupils; *provided, such assignment shall first be made available to teachers presently employed by the district.* Service pursuant to this subdivision shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district." (Italics added.)

(1a) The District contends the phrase in *section 44919(b)* emphasized above requires only that [\*1177] [\*\*\*673] it advertise openings for athletic coach positions to teachers currently employed in the district and allow them to apply for such positions, but the statute does not give such teachers any other advantage in the employment process. By contrast, Stanley argues (and the Court of Appeal held) *section 44919(b)* grants such teachers a "right of first refusal" for vacant athletic coach positions.

As in many past cases, we are called upon to interpret a legislative enactment whose meaning is not as clear as the parties, and the appellate courts, would like. As we explain below, *section 44919(b)* cannot mean (as argued by the District) that school districts can comply with the statute simply by posting notice of an athletic coach opening so that teachers can learn of the vacancy. On the other hand, we also reject Stanley's rigid interpretation of *section 44919(b)*, which would elevate teachers to a level above that which we believe our Legislature envisioned when it amended *section 44919(b)* to its present wording.

(2a) We begin with the touchstone of statutory interpretation, namely, the probable intent of the Legislature. To interpret statutory language, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1386 [241 Cal. Rptr. 67, 743 P.2d 1323].) In undertaking this determination, we are mindful of this court's limited role in the process of interpreting enactments from the political branches of our state government. In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, " ' whatever may be thought of the wisdom, expediency, or policy of the act.' " (*People v. Weidert* (1985) 39 Cal. 3d 836, 843 [218 Cal. Rptr. 57, 705 P.2d 380], quoting *Woodmansee v. Lowery* (1959) 167 Cal. App. 2d 645, 652 [334 P.2d 991].) [\*633] "[A]s this court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government ... ." (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal. 4th 607, 675 [47 Cal. Rptr. 2d 108, 905 P.2d 1248] (conc. opn. of Werdegar, J.)) It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365 [5 P.2d 882]; *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal. 2d 471, 475 [224 P.2d 677]; *County of Madera v. Superior Court* (1974) 39 Cal. App. 3d 665, 668 [114 Cal. Rptr. 283]; *Woodmansee v. Lowery, supra*, 167 Cal. App. 2d 645, 652.)

"Our first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal. 3d 753, 763 [280 Cal. Rptr. 745, 809 P.2d 404]; *Lungren v. Deukmejian* (1988) 45 Cal. 3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299].)" (*People v. Valladoli* (1996) 13 Cal. 4th 590, 597 [54 Cal. Rptr. 2d 695, 918 P.2d 999].) In our case, the actual words comprise a single, critical phrase: "provided, such assignment shall first be made available to teachers presently employed by the district." (§ 44919(b).)

(1b) The District contends this language, especially

the phrase "made available," merely directs it to "make the application and interview process available to current certificated employees." This proposed interpretation is flawed for several reasons. First, the actual words of *section 44919(b)* do not mention or even allude to *the application and interview process*. The statute does not direct school districts to make *the application process* available to teachers. Had the Legislature intended school districts merely to provide teachers with an opportunity to apply for a vacant coaching position, it could easily have written the statute to state: "provided, teachers presently employed by the district shall be notified of such a job opening." Instead, *section 44919(b)* plainly provides school districts must make *the assignment itself* available to such teachers. The "assignment," of course, is the actual position of [\*\*1178] [\*\*\*674] athletic coach. The District's proposed interpretation is thus inconsistent with the very terms of the statute.

The District's proposed interpretation is implausible for a second reason. Were we to conclude, as the District urges, that *section 44919(b)* merely [\*634] requires it to consider applications from teachers employed in the school district, but that such teachers enjoy no further advantage in the employment process, *section 44919(b)* would be a nullity, for it would then give teachers no greater rights than they would have in the absence of the statute. In other words, even without a statute, nothing would prevent such teachers from learning of an opening for athletic coach and applying to fill the opening. We cannot presume the Legislature, in amending *section 44919* in 1977 to add *subdivision (b)* (see Stats. 1977, ch. 565, § 1, pp. 1795-1796), engaged in an idle act or enacted a superfluous statutory provision. (*Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 22 [276 Cal. Rptr. 303, 801 P.2d 1054, 20 A.L.R.5th 1016].)

A third reason the District's proposed interpretation of *section 44919(b)* is flawed strikes to the heart of the matter: The District's proposed interpretation fails to give meaning to every word in the key phrase. (2b) "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose ... ." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1159 [278 Cal. Rptr. 614, 805 P.2d 873]; *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal. 4th 30, 39 [32 Cal. Rptr. 2d 200, 876 P.2d 999].)

(1c) *Section 44919(b)* states: "such assignment shall

*first* be made available to teachers presently employed by the district." (Italics added.) By using the word "first," the Legislature clearly intended to afford some degree of advantage or priority to "teachers presently employed by the district," placing them on a level *above* both noncredentialed employees currently employed by the district, as well as persons not then employed by the district in question, whether or not credentialed.<sup>2</sup> Under the District's proposed interpretation of *section 44919(b)*, however, teachers can simply apply and be considered along with every other applicant, with no advantage. We fail to see how this interpretation of *section 44919(b)* assigns any substantive meaning to the word "first."

2 Persons not presently employed by a district who are hired are known as "walk-ons." (See *San Jose Teachers Assn. v. Barozzi* (1991) 230 Cal. App. 3d 1376, 1378 [281 Cal. Rptr. 724].)

The dissent posits a possible meaning of the word "first" that assertedly gives teachers some advantage in the hiring process. The dissent claims the word "first" simply means teachers must be notified of a coaching vacancy before a nonteacher candidate is hired. (Dis. opn., *post*, at p. 656.) With due respect, this interpretation is empty of content. If teachers must be notified of job openings before a walk-on candidate is hired, but then must apply and be considered for the position with all candidates (i.e., in a pool containing [\*635] both teachers and walk-ons), the early notification would provide no particular advantage at all, and no reason appears why the Legislature would see fit to amend the statute to include this provision. Indeed, giving teachers notice of a vacancy at the same time as nonteacher applicants would seem to serve equally well.

Contrary to the protestations of the dissent, such early notification of teachers would not prevent a school district that secretly preferred a walk-on candidate from simply complying with the early notice requirement and thereafter hiring the outsider of its choice. Moreover, in the situation where a school district did not have a candidate already in mind, but simply wanted to cast a wide net to find a candidate whom it considered the best coach available, whether a teacher or walk-on, early notification to teachers (with no other hiring advantage) would offer no special benefit at all. (2c) To reiterate, we cannot assume our Legislature engaged in an idle act or enacted a superfluous statutory provision. (*Shoemaker v. Myers, supra*, 52 Cal. 3d at p. 22.)<sup>3</sup>

3 Needless to say, we also reject the interpretation embraced by both the District and the dissent that districts can satisfy the key phrase of *section 44919(b)* by merely posting notice of the vacancy. Of course, nothing in the actual words of the statute in question mentions the "posting" of notices, and, as the statutes cited by the dissent make clear, the Legislature knows how to specifically require the posting of notices. (Dis. opn., *post*, at p. 655.)

[\*\*1179] [\*\*\*675] (1d) Because the District's proposed interpretation of *section 44919(b)* (i.e., that only the *application process* be made available to credentialed teachers in the district) fails to give meaning to every word of the statute, we reject it as unreasonable. Instead, the key phrase ("such assignment shall first be made available to teachers presently employed by the district") must mean the Legislature intended such teachers to enjoy some type or degree of priority in filling vacant coaching positions. Stated differently, we find the Legislature intended teachers employed in the school district to have some tangible advantage in the hiring process not shared by walk-on candidates. Early *notification* of a job vacancy, without more, does not constitute such an advantage.

Having rejected the District's proposed interpretation, we now also reject Stanley's proposed interpretation. Stanley contends that, as the only applicant for the assistant athletic coach positions at issue who was a credentialed teacher presently employed in the school district,<sup>4</sup> he was entitled to the job *on demand*. That is, he claims the district was required to give him the opportunity to accept or decline the coaching position before offering it to a [\*636] noncertificated employee or a nonemployee. We disagree. Stanley's interpretation of *section 44919(b)* is too rigid, for it fails to take into account the relevant qualifications and skills the school district may require of an applicant before entrusting him or her to "supervis[e] athletic activities of pupils." One cannot qualify for a coaching position simply by possessing a teaching credential. In short, that an applicant for a coaching position is a "teacher[]" presently employed by the district," is not, by itself, a guarantee of the job.

4 The abbreviated record indicates an unidentified teacher also applied unsuccessfully for the position of assistant to the boys freshman

basketball team. Because the District filled the position with a walk-on candidate, the fact another teacher applied is irrelevant for purposes of the present argument.

Having rejected the interpretations of *section 44919(b)* proposed by both the District and Stanley, we turn to the more difficult question, namely, what type of employment advantage does *section 44919(b)* confer on "teachers presently employed in the district"? To answer this question, we begin with a public policy decision the Legislature has made, as expressed in other, related statutes: power over matters involving interscholastic athletics resides in the governing boards of the individual school districts.

Some history helps explain the Legislature's policy decision in this regard. The key phrase now under scrutiny in *section 44919(b)* was added to that statute in 1977. (Stats. 1977, ch. 565, § 1, pp. 1795-1796.) At that time, and until 1981, the Legislature placed primary control over athletic activities in public schools in the State Department of *Education*. *Section 33352*, as it read before 1981, stated: "The Department of Education shall exercise general supervision over the courses of physical education in elementary and secondary schools of the state; *exercise general control over all athletic activities of the public schools*; advise school officials, school boards, and teachers in matters of physical education; and investigate the work in physical education in the public schools." (Stats. 1976, ch. 1010, § 2, p. 3043, operative Apr. 30, 1977, italics added.)

Beginning in 1981, the Legislature began transferring general supervisory power over public school athletic activities from the Department of Education to the individual school districts. First, *section 33352* was amended to delete the phrase directing the department to "exercise general control over all athletic activities of the public schools." (Stats. 1981, ch. 1001, § 1, p. 3866.) More importantly, the same legislation added *section 35179*, which provided: "(a) Each school district governing board shall have general control of, and be responsible for, all aspects of the interscholastic athletic policies, programs, and activities in its district, including, but not limited to, eligibility, season of sport, number of sports, *personnel*, and sports facilities." [\*\*1180] [\*\*\*676] (Stats. 1981, ch. 1001, § 5, p. 3868, italics added.) As is clear, these [\*637] 1981 enactments "retained the education department's power of general

14 Cal. 4th 627, \*637; 927 P.2d 1175, \*\*1180;  
59 Cal. Rptr. 2d 671, \*\*\*676; 1997 Cal. LEXIS 1

supervision over physical education courses, . . . [but] divested the department of control over interscholastic athletics, vesting that control instead in the governing boards of school districts." (*San Jose Teachers Assn. v. Barozzi, supra*, 230 Cal. App. 3d at p. 1381; see also *Steffes v. California Interscholastic Federation (1986)* 176 Cal. App. 3d 739, 750 [222 Cal. Rptr. 355].)

Although the Legislature changed this system slightly when it enacted former section 35179.5 in 1985 (Stats. 1985, ch. 694, § 1, p. 2306), it nevertheless preserved each school district's control over athletics. Former section 35179.5 stated in pertinent part: "(a) The State Board of Education shall adopt rules and regulations establishing minimum qualifications for persons who are employed by school districts under subdivision (b) of Section 44919 to serve in a limited assignment supervising the athletic activities of pupils. The adopted rules and regulations shall include, but need not be limited to, minimum educational and work experience standards which will ensure that these employees are qualified to provide supervision and instruction of pupils participating in interscholastic athletic programs and activities." Subdivision (b) of former section 35179.5 further provided: "The governing board of each school district shall comply with the rules and regulations establishing minimum qualifications for persons employed in a limited assignment supervising the athletic activities of pupils adopted by the State Board of Education under Subdivision (a)."

Pursuant to this new enabling authority, the State Board of Education promulgated statewide regulations establishing minimum qualifications for athletic coaches, codified as *title 5, section 5593 of the California Code of Regulations* (hereafter Regulation 5593).<sup>5</sup> It [\*\*1181] [\*\*\*677] was this regulation that was in effect when Stanley brought his suit. The regulation, by its terms, expressly [\*638] recognized that school districts retained significant local control, notwithstanding applicable statewide regulations. For example, *subdivision (a) of Regulation 5593* provided: "*The district shall determine whether a temporary athletic coach is knowledgeable and competent in [four specified areas].*" (Italics added.) In addition, *subdivision (b)* of the regulation provided: "*The district shall establish a temporary athletic coach's qualifications in each of the below specified four competency areas.*" (Italics added.)

<sup>5</sup> *Title 5, section 5593, of the California Code of*

*Regulations* provided: "This section applies to any person serving at any grade level as a temporary athletic team coach.

"(a) The district shall determine whether a temporary athletic team coach is knowledgeable and competent in the areas of:

"(1) Care and prevention of athletic injuries, basic first aid and emergency procedures;

"(2) Coaching techniques;

"(3) Rules and regulations in the athletic activity being coached; and

"(4) Child or adolescent psychology, whichever is appropriate to the grade level of the involved sports activity.

"(b) The district shall establish a temporary athletic team coach's qualifications in each of the below specified four competency areas.

"(1) Care and prevention of athletic injuries, basic sports injury first aid, and emergency procedures as evidenced by one or more of the following:

"(A) Completion of a college-level course in the care and prevention of athletic injuries and possession of a valid cardiopulmonary resuscitation (CPR) card; or

"(B) A valid sports injury certificate or first aid card, and a valid cardiopulmonary resuscitation CPR card; or

"(C) A valid Emergency Medical Technician (EMT) I or II card; or

"(D) A valid trainer's certification issued by the National or California Athletic Trainers' Association (NATA/CATA); or

"(E) The person has had practical experience under the supervision of an athletic coach or trainer, or has assisted in team athletic training and conditioning, and has both valid CPR and first aid cards.

"(2) Coaching theory and techniques in the

sport or game being coached, as evidenced by one or more of the following:

"(A) Completion of a college course in coaching theory and techniques; or

"(B) Completion of in-service programs arranged by a school district or a county office of education; or

"(C) Prior service as a student coach or assistant athletic coach in the sport or game being coached; or

"(D) Prior coaching in community youth athletic programs in the sport to be coached; or

"(E) Prior participation in organized competitive athletics at high school level or above in the sport to be coached.

"(3) Knowledge of the rules and regulations pertaining to the sport or game being coached, the league rules and, at the high school level, regulations of the CIF.

"(4) Knowledge of child or adolescent psychology as it relates to sports participation as evidenced by one or more of the following:

"(A) Completion of a college-level course in child psychology for elementary school positions and adolescent or sports psychology for secondary school positions; or

"(B) Completion of a seminar or workshop on human growth and development of youth; or

"(C) Prior active involvement with youth in a school or community sports program.

"(c) The school district superintendent may waive compliance with any one or more of the competencies described in subsection (a) provided that the person is enrolled in a program leading to acquisition of a competency. Until the competencies are met, the prospective coach shall serve under the immediate supervision of a fully qualified temporary athletic team coach."

Thus, despite establishment of statewide minimum qualifications standards for coaches pursuant to

*Regulation 5593*, each school district retained discretion in two significant areas. First, each district could still evaluate a coaching applicant's knowledge and competency in four relevant subject areas: first aid, coaching techniques, rules of the sport, and child or adolescent psychology. By permitting individual school districts to retain the evaluative function when choosing their athletic coaches, *Regulation 5593* [\*639] preserved to the districts the local control they had enjoyed before promulgation of the regulation.

Second, *Regulation 5593* expressly permitted districts to continue to set qualification criteria for athletic coaches in accordance with local priorities. In other words, each school district retained the discretion to promulgate and apply *heightened qualifications standards* for a particular coaching position so as to ensure that level of competence, knowledge, skill, and experience the district preferred. This much is clear from the fact *Regulation 5593* established *minimum* qualification criteria, but did not purport to establish *maximum* qualification standards.

Former section 35179.5 was amended in 1990, but the Legislature did not alter its basic framework. (Stats. 1990, ch. 1212, § 1, pp. 5077-5078.)<sup>6</sup> The express terms of former section 35179.5, as amended, included a sunset provision providing the statute would be repealed as of January 1, 1994, unless extended by the Legislature. No action was taken and former section 35179.5 was allowed to lapse as of its final date. Its demise meant the enabling legislation for *Regulation 5593* also disappeared. The repeal of section 35179.5 did not, however, serve to remove from local school districts power over the selection of athletic coaches. Control over the hiring of athletic coaches, placed initially with the individual school districts by *section 35179* and later continued by the provisions of *Regulation 5593*, was retained, because *section 35179*--with its express grant to school districts of power over athletic "personnel"--remained in effect throughout this period.

<sup>6</sup> The first part of the amendment added language to subdivision (a), directing athletic coaches be qualified "in the subject of substance abuse prevention, including, but not limited to, tobacco, alcohol, steroids, and human growth hormones." (Stats. 1990, ch. 1212, § 1, p. 5077.) This amendment is irrelevant to our present discussion. The second part of the amendment

added a new *subdivision (d)*, clarifying that, "[t]his section shall apply to all credentialed persons and staff providing instruction in or supervision of athletic activities." (Stats. 1990, ch. 1212, § 1, pp. 5077-5078.)

(3) In sum, individual school districts have, since January 1, 1982 (i.e., the effective date of *section 35179*; see Stats. 1981, ch. 1001, § 5, p. 3868), enjoyed the benefits of the Legislature's educational policy choice--as expressed through statutory enactments, amendments and deletions--delegating to individual districts discretion over the hiring of athletic coaches.

This delegation of discretion takes two forms. First, districts may establish the qualifications for athletic coaches as high as necessary to coincide with local preferences (with the caveat that during the period Regulation 5593 was in effect, local qualifications could not fall below the specified minimums). Under this system, each school district may decide for itself how [\*640] experienced a coach it wants and how dynamic a coach it needs. Each district may decide how to allocate [\*\*1182] [\*\*\*678] scarce educational resources to athletics, which sports deserve funding, and how much. For example, each district may decide for itself whether "success" should be measured by winning on the field or by the creation of an athletic environment that does not overemphasize winning. A district might define "excellence" as the attainment of a high graduation rate among student athletes or the realization of moderate success on the field coupled with an emphasis on students' academic studies. A district might decide the goal for its coaches is an increase in the participation of girls in competitive sports or the increased participation in sports by all students. All of these goals are worthy; the point is the Legislature has left it to the individual school districts to rank these (and no doubt other) values in relative importance according to local conditions and preferences. That members of the governing boards of school districts are elected further ensures each district's conception of what makes a "successful" athletic coach will be followed.

Under this scheme of individual school district discretion, if a district were to decide it desired for a particular sport a coach more experienced or successful than one who met only minimum qualifications, the district could set elevated qualification standards so as to ensure applicants would possess a proportionately higher

degree of demonstrated knowledge, competence, experience, past success or skill.

Second, the discretion granted districts permits them to assess the knowledge, competence, skill and experience of any coaching applicants in accordance with the qualifications so established. Thus, whatever qualifications a district establishes, it retains much leeway in determining whether an applicant for a coaching position has met those criteria. For example, whether a coaching candidate is "COMPETENT IN THE AREA[] OF: [¶] ... [¶] Child or adolescent psychology, whichever is appropriate to the grade level of the involved sports activity" (see former Reg. 5593, subd. (a)(4)), can rightly involve an assessment of whether the candidate can demonstrate an ability to motivate student-athletes or to help students balance a demanding academic workload with an athletic commitment. Whether a coaching candidate is "knowledgeable and competent in the area[] of: [¶] ... [¶] Coaching techniques" (see former Reg. 5593, subd. (a)(2)), can properly involve more than a candidate's knowledge of drills and exercises, permitting an evaluation of whether he or she has demonstrated an ability to instill commitment, discipline, and teamwork in a group of young people of perhaps widely varying athletic ability, socioeconomic background, or language skills.

(1e) Although some of these assessments, by their nature, involve the evaluation of intangibles, we believe allowing districts to consider such [\*641] intangibles is consistent with the Legislature's clear policy decision to commit to individual school districts the power both to establish the qualifications for athletic coaches and to determine the competency and knowledge of individual applicants for coaching positions. In recognizing the school districts' power in this regard, we do no more than follow the Legislature's declaration of educational policy, as expressed in the various statutory enactments, amendments and deletions described above.

As indicated, Stanley's case arose during the period in which *Regulation 5593* was in effect. Whether the District adopted as its local rules the standards set forth in *Regulation 5593*, or established for the basketball coach positions at issue in this case some higher qualification standards, is unclear from the record. As demanding or stringent as the District's qualifications for basketball coach may have been, however, Stanley--as a teacher currently employed in the district--was entitled, pursuant

14 Cal. 4th 627, \*641; 927 P.2d 1175, \*\*1182;  
59 Cal. Rptr. 2d 671, \*\*\*678; 1997 Cal. LEXIS 1

to *section 44919(b)*, to have the District consider his application before the applications of walk-on candidates and to hire him, if qualified under the established standards.

The District raises a variety of contrary arguments, but, after close scrutiny, we find none persuasive. Thus, the District argues that when the Legislature, in other parts of the Education Code, has established a preferential right to employment, it has used verbal formulations that make clear it was giving teachers such a right. For example, *section 44918, subdivision (c)*, provides that if [**\*\*1183**] [**\*\*\*679**] a district employs a temporary or substitute employee "for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has performed the duties normally required of a certificated employee of the school district, *that employee shall receive first priority if the district fills a vacant position ...*" (Italics added.)

Similarly, *section 45195* provides a classified employee who has exhausted his or her paid leave due to a nonindustrial accident or illness may be granted an additional six-month unpaid leave. Following this period, if the employee is still unable to resume his or duties, the employee is placed on a 39-month reemployment list. *Section 45195* continues: "At any time, during the prescribed 39 months, the employee is able to assume the duties of his or her position *the employee shall be reemployed in the first vacancy* in the classification of his or her previous assignment." (Italics added.) Further, "[t]he employee's reemployment *will take preference* over all other applicants," with some other exceptions. (*Ibid.*, italics added; see also § 44830, [**\*642**] *subd. (m)* "[a] school district may hire a teacher credentialed in another state who has not taken the state basic skills test if," among other reasons, the district certifies its "need to fill the position and the reasons for the need, proof of its attempts to recruit qualified teachers in California, and a statement attesting to the failure of those attempts", 44917 [district must hire substitute teachers from "regularly employed persons absent from service," but after September 1st, may hire others on conditions including that there is "no regular employee ... available"], 44918, *subd. (b)* [temporary or substitute employee who worked at least 75 percent of the time the previous year "shall be reemployed for the following school year to fill any vacant position[]] unless other

enumerated conditions apply], 44956, *subd. (a)(1)* [in some circumstances, terminated permanent employee who has not yet attained the age of 65 "shall have the preferred right to reappointment ... if the number of employees is increased or the discontinued service is reestablished"], 45119 [in situation concerning reorganization of a school district, if there are more teachers than jobs in the reorganized district, "such personnel shall ... be placed upon appropriate reemployment lists for 39 months and, if so placed, shall be offered and may accept positions of lower rank in their line of promotion in the order of seniority"].)

(2d) Of course, we interpret a statute in context, examining other legislation on the same subject, to determine the Legislature's probable intent. (*Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal. 3d 209, 223 [216 Cal. Rptr. 688, 703 P.2d 27]; *Cossack v. City of Los Angeles* (1974) 11 Cal. 3d 726, 733 [114 Cal. Rptr. 460, 523 P.2d 260].) The District contends that because the Legislature, in the above cited instances, carefully and clearly expressed its intent that certain persons should have a preferential right of reemployment, we should conclude the Legislature's failure to use unambiguous language in *section 44919(b)* must mean it intended no such priority right.<sup>7</sup>

7 This argument was raised in the Court of Appeal for the first time in the District's petition for rehearing. The issue is properly before this court, however, because the facts are undisputed and the issue merely raises a new question of law. (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal. 3d 374, 391, *fn. 10* [216 Cal. Rptr. 733, 703 P.2d 73].) Stanley does not contend otherwise.

(1f) We agree with the District the six statutes cited above give the described classes of persons a preferential right of reemployment. We disagree, however, that because the Legislature's choice of words in *section 44919(b)* is not as clear as in the six cited statutes, nor does it duplicate any of their various language, we should infer the Legislature did not intend in *section 44919(b)* to create a preferential employment right. Although the District argues the Legislature has used "very precise language" when [**\*643**] creating a preferential employment right in other situations, even cursory inspection of the six examples set forth above reveals that the Legislature has used a different phraseology in each

instance. (2e) Although a "word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a law, [\*\*1184] [\*\*\*680] should be accorded the same meaning in other parts or portions of the law" (*Miranda v. National Emergency Services, Inc.* (1995) 35 Cal. App. 4th 894, 905 [41 Cal. Rptr. 2d 593]), the Legislature has not used consistent language here. (1g) In short, there is no "term of art" that is missing in *section 44919(b)*, because there is no evidence the Legislature uses a "term of art" when describing a preferential employment right. Accordingly, because the Legislature has not consistently used any particular wording in the Education Code to create a preferential employment right, we find no significance in the fact its choice of words in *section 44919(b)* fails to duplicate language in any of the other statutes that create such a right.

The District, supported by amici curiae,<sup>8</sup> next makes a constellation of related arguments to the effect that our interpretation of *section 44919(b)* will lead to the absurd result of forcing districts to employ *unqualified* athletic coaches, merely because an applicant is a credentialed teacher currently employed in the district, and without consideration of the teacher-applicant's relevant qualifications. (See *California School Employees Assn. v. Governing Board* (1994) 8 Cal. 4th 333, 340 [33 Cal. Rptr. 2d 109, 878 P.2d 1321] [court "need not follow plain meaning of a statute when to do so would ... '[lead] to absurd results.' "].) Together, the District and amici curiae pose a parade of horrors emanating from this perceived "rule." The District and amici curiae argue such a rule would, for example, mandate that a district rehire as a coach a teacher who had previously been dismissed from a coaching position for unfitness or misconduct, if that teacher were the only credentialed applicant the next year. The District and amici curiae contend such an interpretation of *section 44919(b)* will lead to the employment of incompetent, dangerous or unfit teachers as athletic coaches and expose districts to liability for negligent hiring, that such prospects will lead districts to hire only those teachers who can also coach athletics, or that in hiring teachers districts will give preference to applicants who it is reasonably sure will not apply for a coaching position, with little regard for their teaching abilities. The District posits its ultimate worst case scenario: suppose a district needs a new varsity football coach at the high school and the only credentialed teacher currently employed in the district who applies is "a [\*644] kindergarten teacher with no

knowledge of skills at the sport [and yet] the district would be compelled to offer that person the position[!]"

8 We have received amicus curiae briefs in support of the District from the Templeton Unified School District and the Education Legal Alliance. The latter entity describes itself as "a non-profit association of public school district (K-12) governing boards and county boards of education ... [whose members represent] more than 650 of the state's 1,000 school districts."

We find these claims to be exaggerated and unrealistic for the simple reason that the District's premise, namely, that our interpretation of *section 44919(b)* will require it to hire unqualified athletic coaches, is patently incorrect. We reiterate that districts have the discretion both to establish their own coaching qualifications and to evaluate coaching applicants to determine whether they meet those standards. Because no district is forced to hire an "unqualified" coach, as the districts may define that term, the District's argument falls of its own weight.

In short, the District and amici curiae fail to appreciate that *section 44919(b)* gives credentialed teachers currently employed in the district an employment *preference*, not a *guarantee* of the position they seek. Only to the extent a teacher-applicant currently employed in the school district, including a kindergarten teacher, satisfies the qualifications promulgated by the district, does *section 44919(b)* prohibit the district from hiring a walk-on in preference to the teacher. If more than one teacher in the district applies and meets the district's qualifications, the district may employ its evaluative function to hire whomever of the teacher-applicants it considers the best qualified. In no sense, therefore, does a teacher's mere status as a credentialed employee currently working in the district guarantee the teacher employment as an athletic coach, should he or she apply.

Our interpretation of *section 44919(b)* necessarily undermines several of the District's other, subsidiary, arguments. First, the [\*\*1185] [\*\*\*681] District contends the phrase "make available" means "gain through effort." Because we hold that a teacher who applies for an athletic coach position is not guaranteed the position, but must demonstrate his or her qualifications under applicable regulations as promulgated by the district, as well as superiority over other teacher-applicants, our interpretation of the statute

is consistent with the District's argument that teacher-applicants must gain assignments as athletic coaches through "effort."

Second, the District contends requiring it to hire teacher-applicants as athletic coaches merely because teachers apply, are credentialed and are currently employed in the district, would require it to violate *article I, section 28, subdivision (c) of the California Constitution*, the so-called "Right to Safe Schools" enacted as part of Proposition 8 in 1982. That provision states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses [\*645] which are safe, secure and peaceful." The District argues using unqualified coaches will lead to more sports injuries and, therefore, an unsafe school environment in violation of the constitutional guarantee.

This argument is specious for two reasons. First, it proceeds from the assumed premise the District will be forced to hire unqualified coaches. As we have explained, *ante*, that premise is patently erroneous. Second, the District's reliance on *article I, section 28, subdivision (c) of the state Constitution* is misplaced in this context. That constitutional provision was part of a larger package of reforms intended to strengthen substantive and procedural safeguards in the criminal justice arena. To the extent the District argues the "Right to Safe Schools" constitutional provision is relevant to a proper interpretation of *section 44919(b)*, which has no relevance to criminal law or procedure, it is mistaken. (See *Clousing v. San Francisco Unified School Dist.* (1990) 221 Cal. App. 3d 1224, 1236 [271 Cal. Rptr. 72] [*Article I, section 28, subdivision (c)*] is not self-executing and does not create a private cause of action for damages.); see also *Brosnahan v. Brown* (1982) 32 Cal. 3d 236, 247-248 [186 Cal. Rptr. 30, 651 P.2d 274] [Proposition 8 satisfies single subject rule in that *article I, section 28, subdivision (c)* is interpreted as limited to the criminal law arena].)

The District next argues the language of *section 44919(b)* is unclear and thus urges we examine the section's history. Even were we, for purposes of argument, to agree the language of *section 44919(b)* lacks sufficient clarity, our examination of the legislative history of the section reveals little support for the District's proposed interpretation.

Before its amendment, *section 44919* provided in pertinent part that if a temporary certificated employee

worked longer than "the first three school months of any school term ... , the certificated employee, unless a permanent employee, shall be classified as a probationary employee." This identical provision remains in current *subdivision (a)* of the section. Its significance lies in the fact that probationary employees have somewhat greater statutory protections than are enjoyed by mere temporary employees. (Compare § 44954 [release of temporary employees] with § 44957 [preferred right of terminated probationary employee to reemployment under certain circumstances]; see also § 44958 [termination of probationary employee's reemployment rights due to reduction in attendance of pupils].)

In 1977, *section 44919* was amended to add *subdivision (b)*. (Stats. 1977, ch. 565, § 1, pp. 1795-1796.) The amendment, proposed by Assemblymember Dixon on April 14, 1977, as Assembly Bill No. 1690, 1977-1978 Regular [\*646] Session (Assembly Bill No. 1690), made only two changes to the existing statute: (i) it added language that became *subdivision (b)* to provide that school district governing boards could classify as temporary employees those persons employed as athletic coaches, and (ii) it numbered as *subdivisions (a)* and *(c)* the two pre-amendment paragraphs of the statute. The Legislative Counsel's Digest stated: "The law currently specifies the circumstances under which a school district may employ a certificated individual and classify such person as a 'temporary' employee. In general, such classification is limited to employment for terms of not longer than 3 or 4 months, depending on [\*\*1186] [\*\*\*682] the type of assignment. [¶] This bill would add to the circumstances under which a certificated individual could be classified as a 'temporary' employee, cases in which a person was employed to serve in a limited assignment supervising the extracurricular activities of pupils. The bill would not limit such classification to employment for terms of any specified length." (Legis. Counsel's Dig., Assem. Bill No. 1690 (1977-1978 Reg. Sess.) Apr. 14, 1977.)

Assembly Bill No. 1690 was amended in the Assembly on June 1, 1977. Significantly, the amendment added two provisions to the proposed *subdivision (b) of section 44919*: (i) the language now under examination regarding the employment preference for teachers in the district, and (ii) a final sentence providing that time of service as an athletic coach shall not be included when calculating time required as a prerequisite for attainment of permanent employee status. The Legislative Counsel,

however, made only a slight and apparently nonsubstantive modification in its digest, striking the word "extracurricular" and substituting in its place the word "athletic."<sup>9</sup> The Legislative Counsel's Digest made no reference either to the provision at issue herein or to the new final sentence.

<sup>9</sup> The second paragraph of the digest, as amended, read: "This bill would add to the circumstances under which a certificated individual could be classified as a 'temporary' employee, cases in which a person was employed to serve in a limited assignment supervising the extracurricular *athletic* activities of pupils. The bill would not limit such classification to employment for terms of any specified length." (Legis. Counsel's Dig., Assem. Bill No. 1690, 3 Stats. 1977 (1977-1978 Reg. Sess.) as amended June 1, 1977.)

(2f) Committee reports are often useful in determining the Legislature's intent. (*People v. Cruz* (1996) 13 Cal. 4th 764, 773-774, fn. 5 [55 Cal. Rptr. 2d 117, 919 P.2d 731].) As explained in an Assembly Education Committee report on Assembly Bill No. 1690, the Legislature was concerned with the prospect of temporary employees gaining probationary status while serving as athletic coach: "Current law makes provision for the classification of certificated employees as temporary employees in a number of specified circumstances." "Existing provisions regarding temporary employees either state or imply the employment of temporary employees [is] for relatively [\*647] short time periods. Employment beyond those periods generally leads to probationary status." (Assem. Ed. Com., Rep. on Assem. Bill No. 1690 (1977-1978 Reg. Sess.) May 16, 1977, p. 1.) A subsequent Assembly Education Committee report is more specific: "According to current statutes, part-time teachers become eligible for probationary status (3 years on probation are needed for tenure) if they teach for two consecutive semesters in a given school year. [When these individuals gain such probationary status,] [p]roblems arise because the regular teaching positions are not available for them to fill ... . With the growing popularity of new sports such as soccer, additional coaches are needed on a part-time basis. Flexibility is needed to allow for their remaining non-probationary and non-permanent while in such assignments." (Assem. Ed. Com., Rep. on Assem. Bill No. 1690 (1977-1978 Reg. Sess.) June 1, 1977, pp. 1-2,

italics added.)

(4) The District argues that the Legislature, by first adding *subdivision (b) to section 44919* and then amending the new subdivision, "[c]learly ... intended to broaden the circumstances in which individuals could be hired as 'temporary' employees." We agree. We further agree the Legislature, by amending *section 44919*, intended to give school districts greater flexibility in hiring athletic coaches. The expressed concern, however, was not that districts were hampered in hiring the "best available" athletic coaches. The concern, rather, was with the consequences of hiring certificated temporary employees as athletic coaches for more than three months. Certificated temporary employees thus hired would be converted from temporary to probationary status and thereby become entitled to reemployment in positions that would not always be available the next year. This was the potential problem the amendment of *section 44919* was designed to address. With one minor exception (discussed, *post*), neither the Legislative Counsel's Digest nor the committee reports indicate the Legislature believed one way or the other concerning whether it was creating [\*\*1187] [\*\*\*683] an employment preference for credentialed teachers.<sup>10</sup>

<sup>10</sup> The dissent makes much of the fact the Legislative Counsel's Digest does not mention the key statutory language. (Dis. opn., *post*, at p. 661.) From this, the dissent concludes the Legislative Counsel considered "the new language was merely a clarification, not a major change in the bill and the overall statutory scheme." (*Id.* at pp. 661-662.) The issue clarified, according to the dissent, is that even after the amendment districts could hire permanent teachers as coaches. (*Id.* at p. 663.) Why this point needed "clarification," the dissent fails to say. Nor does the dissent's theory explain the Legislative Counsel's Digest's similar silence concerning the new final sentence of *section 44919(b)*, which for the first time expressly excluded service in a limited assignment from the service required to attain a classification as a permanent employee.

In any event, from the Legislative Counsel's Digest's silence, apparently, the dissent concludes the Legislature intended the key statutory language in *section 44919(b)* to mean school districts need only post notice of the coaching

14 Cal. 4th 627, \*647; 927 P.2d 1175, \*\*1187;  
59 Cal. Rptr. 2d 671, \*\*\*683; 1997 Cal. LEXIS 1

vacancies, but need not afford teachers any other advantage in the employment process. This chain of reasoning, which begins with the Legislative Counsel's silence and ends with an interpretation that is nowhere mentioned in the words of the statute or the available legislative history, is too tenuous a basis on which to arrive at the proper interpretation of *section 44919(b)*.

(1h) To the extent the legislative history mentions the employment preference issue at all, it cuts against the District's position. A staff analysis [\*648] of Assembly Bill No. 1690, prepared for the Senate Committee on Education, summarizes the bill and states: "[According to the bill], [t]he district must offer these assignments to their regular teachers before hiring such temporary coaching assistance." (Sen. Com. on Ed. Analysis of Assem. Bill No. 1690 (1977-1978 Reg. Sess.) Aug. 17, 1977, p. 1, italics added.) Although we hesitate to accord much weight to an anonymous staff report that was merely summarizing the effect of a proposed bill (but see *People v. Cruz, supra*, 13 Cal. 4th at p. 780, fn. 9 [granting judicial notice of legislative staff analyses]), the report is, nevertheless, fully consistent with our conclusion the Legislature intended to create an employment preference for teachers currently employed in the district.

That the Legislature intended to provide districts more flexibility when hiring athletic coaches does not of necessity negate the employment preference to "teachers presently employed in the district" created by the plain language of *section 44919(b)*. Indeed, were that the case, no purpose would have been served in amending Assembly Bill No. 1690, as it was originally proposed, to state such a preference. In any event, the available legislative history, such as it is, offers no evidence the Legislature believed it was important (as the District contends) to notify teachers of a coaching vacancy, or that the Legislature believed the import of the 1977 amendment of *section 44919(b)* was to require such notice. We thus conclude the legislative history is generally unhelpful, but to the extent it sheds any light on this issue at all, such history indicates the District's proposed interpretation of *section 44919(b)* is incorrect.

The District's final arguments are even less weighty. It argues we should construe *section 44919(b)* within a broader constitutional and statutory framework, noting the state Constitution grants the Legislature power to

authorize school districts to exercise broad powers (*Cal. Const., art. IX, § 14*), and that the Legislature has done so in *section 35160*. That section provides: "[T]he governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law. ..." (*Ibid.*) By this statute, the Legislature intends to "give school districts ... broad authority to carry on activities and programs ... which, in the determination of the governing board of the school district, ... are necessary or desirable in meeting their need and are not inconsistent with the [\*649] purposes for which the funds were appropriated." (§ 35160.1, *subd. (b)*.) Regarding athletics, as noted, *ante*, *section 35179, subdivision (a)* specifically gives to "[e]ach school district governing board [the] general control of, and [the] responsibility for, all aspects of the interscholastic athletic policies, programs, and activities in its district, including, but not limited to, eligibility, season of sport, number of [\*\*1188] [\*\*\*684] sports, personnel, and sports facilities." (Italics added.)

The District contends a consideration of *article IX, section 14 of the state Constitution*, as well as *sections 35160, 35160.1, and 35179*, should lead us to conclude the Legislature intended to confer broad power on school districts and that statutes such as *section 44919(b)* should be liberally construed in the District's favor. As discussed above, we agree the Legislature has delegated broad discretion to the individual districts. These broad grants of power, however, do not control over the more specific *section 44919(b)*, which expressly governs the employment of temporary employees for the limited "assignment supervising athletic activities of pupils." (See *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal. 4th 1133, 1154 [43 Cal. Rptr. 2d 693, 899 P.2d 79] [general rule allocating burden of proof does not take precedence over more specific rules established by statute or judicial decision].) *Section 35179* itself recognizes this broad grant of power to school districts may be limited by other statutes, for the last sentence of subdivision (a) of that section provides the governing boards of each school district "shall assure that all interscholastic policies, programs, and activities in its district are in compliance with state ... law." (Italics added.)

(1i) Finally, the District contends the Legislature has recognized, through numerous statutes, the importance of physical education and, accordingly, has placed it "on

14 Cal. 4th 627, \*649; 927 P.2d 1175, \*\*1188;  
59 Cal. Rptr. 2d 671, \*\*\*684; 1997 Cal. LEXIS 1

equal ground with other elements of the public school curriculum." To effectuate this policy decision, claims the District, "California schools have always endeavored to hire the most qualified teachers and the highest quality athletic coaches." (Underscoring in original.) Requiring school districts to hire less than the best, it claims, is contrary to this policy. This contention is echoed by amicus curiae Templeton Unified School District (Templeton). Templeton argues public policy demands school districts have the "right to hire the most qualified coach available"; in oral argument, counsel for Templeton opined that the controlling public policy is "excellence ... in athletics."

To begin with, it is unclear what is meant by "excellence ... in athletics," and how that term applies in the educational setting. To the extent the [\*650] District and Templeton contend their "best coach" policy means school districts should be free to hire nonteachers who they believe have the best chance of producing winning seasons for their sports teams, the argument fails to consider that athletic activities in a public school setting reasonably may be seen as pedagogical as well as physical. In other words, the question is not simply one of "excellence in athletics" for its own sake, whatever that may mean. Instead, the "best coach" in a public school setting may be defined as one who can achieve *multiple goals*, not just winning seasons.

Neither the District nor Templeton persuasively identifies how it has determined "public policy" requires we value one aspect of coaching ability (what they term "excellence") over all other valuable characteristics a coaching applicant might bring to bear, including the training and skills reflected in successfully obtaining a teaching certificate. We have not found, nor has the District or Templeton cited, any clearly stated legislative policy supporting the notion that school districts should be free in all instances to hire the "best" athletic coach available, and to define that term solely as a matter of athletic achievement and success. Instead, the District gleans this vague, unstated policy from a synthesis of a variety of statutes governing athletic activities in our schools. (See, e.g., § 51210, *subd. (g)* [adopted course of study for grades 1-6 "shall include" physical education], 51220, *subd. (d)* [adopted course of study for grades 7-12 "shall offer courses" in physical education], 51206 [for public elementary schools, physical fitness "is of equal importance to that of other elements of the curriculum"], 51223.5, *subd. (a)* [same], 51223.5, *subd. (b)* [grades 1-8

shall either "(e)m<sup>1</sup>ploy a physical education specialist" or provide each teacher with analogous training].)

This unstated alleged policy to hire the "best" available coach is insufficient to counterbalance the *express* statement in *section 44919(b)* giving credentialed teachers currently [\*\*1189] [\*\*\*685] employed in the district an employment preference for athletic coach positions. This express direction suggests the Legislature intended schools, whenever possible, to hire qualified coaches who already possess the skills of a teacher. Had the Legislature intended that coaches who excelled only in athletic competency should prevail, adding the second part of *section 44919(b)* would have been unnecessary. While our Legislature certainly might make such a policy choice, that it has done so is not evident in the Education Code. One searches the code in vain for any statement of legislative intent that districts should hire "the best coach available." We reiterate that "[i]n construing ... statutory provisions a court ... may not rewrite the statute to conform to an assumed intention which does not appear from its language." (*People v. One 1940 Ford V-8 Coupe, supra*, 36 Cal. 2d at p. 475, italics added.)

[\*651] Our interpretation of *section 44919(b)*, giving "teachers presently employed by the district" an employment preference when it comes to hiring athletic coaches, is, moreover, as supported by a reasonable public policy decision as is the District's (and Templeton's) proffered "best available coach" policy. As indicated above, the "best coach" in a public school setting may be one who serves goals beyond merely producing a winning team. For example, the Legislature may have believed teachers already employed in the district would not place undue emphasis on a student's athletic achievements to the detriment of the student's academic studies. The Legislature may also have believed it was to students' benefit to see their teachers performing in nonacademic surroundings, modeling a balance of academic and nonacademic activities students will have to achieve as adults. The Legislature may have believed having teachers serve as coaches would foster a sense of community at the school, and thereby foster greater respect for the school and the teachers.<sup>11</sup>

<sup>11</sup> The dissent perceives an expression of legislative policy to hire the "best" coach available in *section 33080's* declaration that the purpose of the state's educational system is to "enable each child to develop all of his or her own

14 Cal. 4th 627, \*651; 927 P.2d 1175, \*\*1189;  
59 Cal. Rptr. 2d 671, \*\*\*685; 1997 Cal. LEXIS 1

potential." It hardly bears mentioning that this exceedingly general statement of the purpose of the educational system is insufficient to outweigh the express statement in *section 44919(b)* granting teachers an employment preference. Certainly the dissent cites no cases in which *section 33080* has been used to invalidate more specific legislative pronouncements. Nor, as indicated above, do we perceive any necessary conflict between *section 33080* and our interpretation of *section 44919(b)*.

We emphasize that, although these statements of public policy support our interpretation of *section 44919(b)*, none is expressly stated. We identify them for two reasons. First, they reveal that our interpretation of *section 44919(b)* could be supported by a reasonable public policy. Second, although it is certainly *possible* the Legislature could have a policy of desiring school districts to hire the "best available" coach, it may have determined that the "best coach" preferably would be one with a teaching credential and the concomitant training and ability. Because none of these policy choices are apparent from the Education Code, we reiterate that due respect for the power of the Legislature and for the separation of powers directs we follow the public policy choices actually discernible from the Legislature's statutory enactments, amendments and deletions, namely: (i) that teachers should enjoy some tangible advantage in the hiring process for athletic coach positions; and (ii) that districts retain control over setting the qualifications for coaching positions, as well as retain the evaluative function when choosing coaches according to the criteria thus established.<sup>12</sup>

12 The dissent states that "[m]andatory employment preferences deemphasize merit" (dis. opn., *post*, at p. 662), thereby suggesting we should refuse to find such preferences. The dissent also labels *section 44919(b)*'s employment preference for teachers "artificial" (dis. opn., *post*, at p. 662.), thereby implying the preference is unjustified or lacking a basis in reality. Finally, the dissent opines that "[p]ublic school athletes need and deserve the best available coaches." (*Ibid.*) From these statements, it appears the dissent is expressing its own policy choices. While one might, as a personal matter, agree with these sentiments, the choice is not for this court to make. An even casual acquaintance with the issue of the proper regulation of public education in this

state reveals the topic is fraught with conflicting policy choices. Proper appreciation of our judicial role dictates we leave these decisions to the political branches of our state government.

[\*\*1190] [\*\*\*686] Templeton and the dissent both argue an interpretation of *section 44919(b)* to require school districts to give an employment preference to [\*652] teachers currently working in the district is absurd, because such teachers may be terminated from such extra-duty assignments "at any time" pursuant to *section 44923*. The Court of Appeal declined to resolve this question, explaining that because the District never hired Stanley, the question was a mere hypothetical not posed on the facts of this case. We agree; we are here concerned with a teacher's rights to be hired as an athletic coach, not a district's rights under other statutes to terminate an employee.

Nevertheless, we note *section 44923*'s provision that tenured teachers can be terminated from any extra-duty assignments "at any time" is not inconsistent with the hiring preference granted teachers under *section 44919(b)*. To begin with, *section 44923* apparently governs *all* extra-duty assignments, whereas *section 44919(b)* specifically addresses the hiring of athletic coaches only. Second, authorizing districts in *section 44923* to terminate teachers from extra-duty assignments "at any time" merely places teachers on roughly equal footing with noncredentialed employees who may be hired for the same position. *Section 44954, subdivision (a)* permits school districts to "release temporary employees ... [¶] ... [a]t the pleasure of the [governing] board prior to serving during one school year at least 75 percent of the number of days the regular schools of the district are maintained." In light of this liberal right to terminate temporary employees, *section 44923* may be viewed as the Legislature's attempt to ensure that teachers who are hired as coaches take such positions subject to the same general rules regarding termination as temporary employees, when both work in extra-duty assignments.

Accordingly, we find the language of *section 44919(b)*, read in context and with due respect for the Legislature's expressed educational policy choice delegating ample discretion to school districts, requires that school districts first consider the applications of credentialed teachers currently employed in the district before considering walk-ons. Only if such teachers are

14 Cal. 4th 627, \*652; 927 P.2d 1175, \*\*1190;  
59 Cal. Rptr. 2d 671, \*\*\*686; 1997 Cal. LEXIS 1

found unqualified *under applicable qualifications standards as promulgated by the district* may a district consider walk-ons.

#### CONCLUSION

We hold section 44919(b) establishes, for limited-duty assignments of athletic coach, a limited employment preference for credentialed teachers [\*653] presently employed by the school district, a preference conditioned on such a teacher applying for the position and meeting the qualifications established by the school district. Because the record does not indicate whether Stanley's application for one of the coaching vacancies was rejected because he failed to meet the District's qualifications, the judgment of the Court of Appeal directing the trial court to issue a writ of mandate is vacated and the matter transferred to the Court of Appeal with directions to remand the case to the trial court for further proceedings consistent with this opinion.

George, C. J., Mosk, J., and Kennard, J., concurred.

#### DISSENT BY: CHIN

#### DISSENT

CHIN, J.,

Dissenting.--*Education Code section 44919, subdivision (b) (section 44919(b))*, provides as relevant: "Governing boards shall classify as temporary employees persons, other than substitute employees, who are employed to serve in a limited assignment supervising athletic activities of pupils; *provided, such assignment shall first be made available to teachers presently employed by the district.*" (Italics added.)<sup>1</sup> Plaintiffs California Teachers Association [\*\*1191] [\*\*\*687] et al. (collectively CTA) claim, and the Court of Appeal agreed, that the italicized language gives teachers a right of first refusal over public school coaching positions, and that a local school district may not hire a nonteacher--no matter how outstanding--as a coach if a single teacher anywhere in the district applies for the position.

1 In its entirety, *section 44919(b)* provides: "Governing boards shall classify as temporary employees persons, other than substitute employees, who are employed to serve in a limited assignment supervising athletic activities of pupils; provided, such assignment shall first be

made available to teachers presently employed by the district. Service pursuant to this subdivision shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district."

The majority rejects this contention, correctly in my view. But in its place, it gives the 15 words at issue a tortured interpretation divorced from any meaning drawn from the words themselves. The statute, the majority says: (1) provides teachers "some tangible advantage in the hiring process" (maj. opn., *ante*, at p. 635); but (2) a local district may "promulgate[]" "regulations" (*id.* at p. 644) establishing whatever minimum qualifications, including "intangibles" (*id.* at pp. 640-641), the district desires; (3) if the district does not promulgate regulations, it must hire a teacher, no matter how poorly qualified, over a nonteacher, no matter how outstanding; but (4) if the district does promulgate regulations, it may reject a teacher applicant if it finds the applicant is unqualified under those regulations; however, (5) the district must measure any teacher applicant against these qualifications before it may even "consider" (*ibid.*) nonteacher applicants; and, (6) if any teacher meets these minimum standards, it must hire the teacher and may never "consider" any nonteacher applicants. (See also *id.* at p. 652.)

[\*654] Whatever the statutory language means, it surely does not mean all this. The language is far from a stellar example of statutory drafting, but, reasonably construed, it merely means that before the district may hire a nonteacher as a coach, it must first make vacant coaching assignments accessible to teachers by posting or otherwise giving notice so teachers are aware of the positions and may compete for them on an equal basis with nonteachers. Stated differently, the district may not hire an outsider before first making the position available to teachers in this fashion.

The trial court correctly found that the district did make the coaching positions available to Gary Stanley within the meaning of *section 44919(b)*. The Court of Appeal erred in reversing the judgment denying the petition for writ of mandate. Hence, I would reverse the judgment of the Court of Appeal.

#### I. FACTS

The relevant facts are straightforward. The Rialto

14 Cal. 4th 627, \*654; 927 P.2d 1175, \*\*1191;  
59 Cal. Rptr. 2d 671, \*\*\*687; 1997 Cal. LEXIS 1

Unified School District (district) hired Martin Sipe, a credentialed teacher, as the boys varsity basketball coach and athletic director of a new district high school. Previously, Sipe had been the coach at an older high school in the district. The district hired as Sipe's assistant coach the same person--a nonteacher--who had previously been Sipe's assistant at the other school. At Sipe's recommendation, the district also hired a nonteacher as the assistant coach of the freshman team. The individual plaintiff in this case, Stanley, a teacher in the district, received flyers concerning these coaching positions and unsuccessfully applied for them. Stanley, joined by the California Teachers Association and the Rialto Education Association, filed a petition for writ of mandate, seeking an injunction prohibiting the district from hiring a nonteacher as a coach if any teacher in the district wanted the position. The petition also sought damages.

The trial court denied the petition, finding that *section 44919(b)* "does not require that a teacher already employed in the District *must* get a coaching position to the exclusion of all others if he or she applies," and that "The District first made the position available to Petitioner Stanley by advertising it to current teachers already employed in the District and by interviewing Mr. Stanley for the position before hiring a non-certificated District employee." (Original italics.) The CTA prevailed in the Court of Appeal, which held that, before a coaching position "may be offered to anyone not then employed by the district as a teacher, the assignment must have been offered to and refused by any teacher then employed by the district who had applied for the assignment." We granted the district's petition for review.

[\*655] [\*\*1192] [\*\*\*688] II. DISCUSSION

I would reverse the judgment of the Court of Appeal. That court read and, in a different way, the majority reads, far more meaning into the language "first ... made available" than is warranted.

#### A. Plain Meaning

The linchpin of the CTA's position seems to be that the statute has an unambiguous plain meaning. It argues that the phrase "shall first be made available" can only mean that teachers have a right of first refusal, and a nonteacher may be hired only if no teacher applies for the position. The Court of Appeal agreed, finding "this meaning is clear from the words of the statute themselves

... ."

On the contrary, the language is not at all plain and requires interpretation. Although the Court of Appeal's interpretation is plausible (I discuss below the majority's interpretation), it is not the only possible one. If the statute had said, "shall first be made available to teachers presently employed by the district, and all such teachers shall have a right of first refusal," it would have been clear and would have compelled the Court of Appeal's interpretation. It did not. It merely said coaching positions "shall first be made available" to teachers. Black's Law Dictionary gives several one-word synonyms for "available," one being "accessible." (Black's Law Dict. (6th ed. 1990) p. 135, col. 1.) The phrase "made available" can readily be interpreted to mean make accessible by "posting," as it is used in other statutes, or otherwise giving notice to teachers. (E.g., *Health & Saf. Code*, § 34332, *subd. (h)(4)* ["posted or made available"]; *Civ. Code*, § 7100, *subd. (a)* ["available and posted"].)

The majority finds my interpretation "implausible" (maj. opn., *ante*, at p. 633) for three reasons, none of which withstands scrutiny. First, it argues the Legislature could have more clearly expressed the intent merely to make the positions accessible. (*Id.* at p. 634.) It certainly could have used clearer language. But the lack of clarity does not rule out my interpretation any more than it rules out the Court of Appeal's or the majority's, which are also not clearly stated.

Second, the majority asserts my interpretation would make *section 44919(b)* "a nullity, for it would then give teachers no greater rights than they would have in the absence of the statute" because "nothing would prevent such teachers from learning of an opening for athletic coach and applying to fill the opening." (Maj. opn., *ante*, at p. 634.) This assertion is [\*656] simply incorrect, as the facts of this case suggest. The district hired as the assistant coach the same person who assisted the same head coach at the established high school. Absent the statute, it is conceivable the district might merely have hired that assistant for the new position without further ado, and without sending out flyers, which would have prevented teachers from applying and competing for the position. The statute, however, guaranteed that teachers could compete on equal terms with the assistant coach and any other nonteacher applicant. This interpretation does not make it a nullity. The statute has content without

14 Cal. 4th 627, \*656; 927 P.2d 1175, \*\*1192;  
59 Cal. Rptr. 2d 671, \*\*\*688; 1997 Cal. LEXIS 1

finding that it somehow gives teachers an unspecified advantage in the hiring process.

Third, and finally, the majority asserts my interpretation fails to give meaning to the word "first." (Maj. opn., *ante*, at pp. 634-635.) This is also incorrect. The majority states that "clearly" the word "first" means first in "priority." (*Id.* at p. 634.) It never suggests where this asserted clarity can be found. Simply asserting something is "clear" does not make it so. "First" can also mean first in *time*. First in time merely means that a district could not hire an outsider before "first" making the position accessible to teachers so they could apply and compete for it on an equal basis. To give the word that meaning, and no more, does not render it surplusage. Nothing in the statutory language gives teachers an advantage in the hiring process, just the opportunity to compete equally for the position.

If *section 44919(b)* does indeed have a plain meaning different from the one I urge, it is strange no one discovered it sooner. [\*\*1193] [\*\*\*689] The subdivision was enacted in 1977. (Stats. 1977, ch. 565, § 1, pp. 1795-1796.) No one asserted any of the currently urged meanings until this litigation nearly two decades later. Both the CTA's position and the majority's interpretation are revisionist history.

As I discuss further below, during the legislative process, the Legislative Counsel totally overlooked the meanings urged today. Moreover, they are inconsistent with regulations of the State Board of Education and the decision in *San Jose Teachers Assn. v. Barozzi* (1991) 230 Cal. App. 3d 1376 [281 Cal. Rptr. 724] (*Barozzi*). In 1988, the State Board of Education promulgated *California Code of Regulations, title 5, section 5592* (Regulation 5592), which provided: "The governing board of any school district may use a noncertified temporary athletic team coach as defined in *Section 5590* to supervise and instruct in interscholastic athletic programs and activities subject to the following general conditions: [¶] (a) An annual search among the district's certificated employees has not identified coaching personnel able to fulfill the district's coaching needs." In *Barozzi*, the Court of Appeal [\*657] *invalidated* the annual search condition on the ground it impermissibly infringed on local school districts' authority to hire whom they wanted as coaches. (*Barozzi, supra*, 230 Cal. App. 3d at p. 1379.) Ironically, under any of the new interpretations of *section 44919(b)*, the *Barozzi* court

invalidated the wrong part of the regulation. Instead of limiting local authority too much, as the *Barozzi* court found, the regulation does not limit it enough. The plaintiff San Jose Teachers Association, a subdivision of the CTA (*Barozzi, supra*, 230 Cal. App. 3d at p. 1378), missed the interpretation it urges today, even though it might have resulted in a greater victory than the relatively modest one it vainly sought.

Thus, the Legislative Counsel, the State Board of Education, the Court of Appeal in *Barozzi, supra*, 230 Cal. App. 3d 1376, and, until this case, even the CTA all overlooked the meanings urged today. Only now, some two decades after the language was enacted, have they been belatedly asserted. The reason is clear; these meanings did not and do not exist.

Whenever the Legislature has actually intended to establish a right of first refusal or an employment preference, it has stated that intent in clear, unmistakable language. The majority admits this to be the case (maj. opn., *ante*, at pp. 641-643), but "find[s] no significance" in this circumstance (*id.* at p. 643) because "the Legislature has used a different phraseology in each instance." (*Ibid.*) On the contrary, the difference between clear language and ambiguous language is quite "significan[t]." The fact the Legislature has consistently used clear language to establish a right of first refusal or other employment preference shows it knows how to do so and strongly indicates that, when the language is not clear, the Legislature did not intend to establish such a preference.

The conclusion is inescapable: The wording does not have a clear, unambiguous, plain meaning, and certainly none of the meanings urged for the first time in this litigation. Statutory construction is necessary.

#### B. Statutory Construction

Traditional "rules" of statutory construction often point in conflicting directions. Indeed, it is sometimes suggested that one can cite a rule to support virtually any interpretation. Here, however, once we recognize the ambiguity of the statutory language, all the rules support a narrow reading.

##### 1. The Statutory Scheme as a Whole

"The words of the statute must be construed in context, keeping in mind the statutory purpose, and

14 Cal. 4th 627, \*657; 927 P.2d 1175, \*\*1193;  
59 Cal. Rptr. 2d 671, \*\*\*689; 1997 Cal. LEXIS 1

statutes or statutory sections relating to the same [\*658] subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) It is "a cardinal rule of statutory construction, that 'every statute should be construed with reference to the whole system of law of which it is a part so [\*\*1194] [\*\*\*690] that all may be harmonized and have effect.' " (*Landrum v. Superior Court* (1981) 30 Cal. 3d 1, 14 [177 Cal. Rptr. 325, 634 P.2d 352].)

The California Constitution empowers the Legislature to "authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." (*Cal. Const., art. IX, § 14, 2d par.*) The Legislature has exercised this power and granted local school districts broad authority, both generally, and specifically regarding hiring coaches. It enacted a statute substantially identical to *California Constitution, article IX, section 14. (Ed. Code, § 35160.)* It also found and declared that "school districts ... have diverse needs unique to their individual communities and programs. Moreover, in addressing their needs, common as well as unique, school districts ... should have the flexibility to create their own unique solutions." (*Ed. Code, § 35160.1, subd. (a)*, italics added.) It went on to state expressly its intent to give school districts "broad authority to carry on activities and programs ... which, in the determination of the governing board of the school district, ... are necessary or desirable in meeting their needs ... . It is the intent of the Legislature that *Section 35160 be liberally construed to effect this objective.*" (*Ed. Code, § 35160.1, subd. (b)*, italics added.)

Consistent with this "broad" general grant of authority to local districts to act as local conditions dictate, the Legislature spoke on the specific question here, hiring coaches: "Each school district governing board shall have general control of, and be responsible for, all aspects of the interscholastic athletic policies, programs, and activities in its district, including, but not limited to, eligibility, season of sport, number of sports, personnel, and sports facilities." (*Ed. Code, § 35179, subd. (a)*, italics added.) In *Barozzi*, the Court of Appeal cited this language to find that the Board of Education had no authority to require the annual review provided in *Regulation 5592. (Barozzi, supra, 230 Cal. App. 3d at p.*

1383.)

In combination, these statutes express a clear legislative policy: Personnel decisions regarding athletic programs are solely for local school districts to make, considering local needs and conditions. *Section 44919(b)* must be interpreted in light of this clear policy. Did *section 44919(b)* dramatically [\*659] restrict the authority of local school districts over coaching personnel decisions, or did it merely require advance posting and an opportunity for teachers to compete? The latter interpretation is consistent with the entire statutory scheme, the former a jarring departure.

Yet another statute supports a narrow reading of *section 44919(b)*. *Education Code section 44923* provides: "In the event a permanent employee of a school district has tenure as a full-time employee of the district, any assignment or employment of such employee in addition to his full-time assignment may be terminated by the governing board of the district *at any time.*" (Italics added.) This language reaffirms the district's authority over coaching assignments, even as to tenured teachers. My interpretation of *section 44919(b)* meshes neatly with *section 44923*. Teachers and nonteachers compete equally, and the district may hire and terminate all equally. Granting teachers a right of first refusal or other hiring preference would raise many problems. If *section 44919(b)* forces a district to hire a teacher rather than a superior nonteacher candidate, could the district then immediately "terminate[]" that assignment under *section 44923*? If so, must it then *rehire* the same teacher to fill the newly created vacancy? Or does *section 44919(b)* give a teacher only a one-time preference (which interpretation would effectively render *section 44919(b)* nugatory, while requiring the charade of hiring, then firing, a teacher in order to hire a superior nonteacher candidate)? The CTA's and the majority's interpretations place *sections 44919(b)* and *44923* in perpetual war with one another. Mine harmonizes them.

## 2. History of the Statutory Language

"Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining [\*\*1195] [\*\*\*691] the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal. 3d at p. 1387.*)

The context and history of *section 44919(b)* show the language at issue was intended only to be a minor

14 Cal. 4th 627, \*659; 927 P.2d 1175, \*\*1195;  
59 Cal. Rptr. 2d 671, \*\*\*691; 1997 Cal. LEXIS 1

clarification, not a dramatic departure from settled legislative policy. When *Education Code section 44919* was first enacted in 1976, effective April 30, 1977, it did not contain *subdivision (b)*. (Stats. 1976, ch. 1010, § 2, pp. 3434-3435.) It provided (and still does in *subdivision (a)*) that school districts may employ persons for a temporary time period of either three or four months, depending on the type of assignment, but that if the duties continue for a longer time, the temporary employee "shall be classified as a probationary employee." This provision [\*660] meant that a school district could only hire an outside coach for a few months before that coach became a probationary employee.

Assembly Bill No. 1690 of the 1977-1978 Regular Session (Assembly Bill No. 1690) was introduced to address this problem and to increase the flexibility of local districts to employ outside coaches. It added *section 44919(b)*. In its original version (Apr. 14, 1977), that subdivision provided only: "Governing boards shall classify as temporary employees persons, other than substitute employees, who are employed to serve in a limited assignment supervising the extracurricular activities of pupils." The new language, however, could have created a new problem, indeed the opposite problem of the one being solved. The language was ambiguous as to whether local districts could even hire permanent teachers as coaches. It could be read as providing that if a district employed a tenured teacher to serve in a limited assignment (e.g., as a coach), it would have to reclassify that teacher as a temporary employee. If the governing board "shall" classify persons employed as coaches as "temporary," could teachers accept work as coaches without losing their permanent status? An amendment to the bill was necessary to clarify this point.

Assembly Bill No. 1690 was therefore amended once, to change *section 44919(b)* to read as it now does. (Assem. Amend. to Assem. Bill No. 1690 (1977-1978 Reg. Sess.) June 1, 1977.) The amendment solved the problem by making clear that local districts could continue to hire teachers as well as outsiders as coaches. It thus gave local districts maximum flexibility. There is no hint the Legislature intended the amendment to do more or to limit this flexibility. The new language ensured that coaching positions would continue to be made available to teachers while providing that teachers could take coaching positions without risk that their permanent status would change to temporary. The bill as a whole was designed to aid, not hamper, school officials

in their quest for good coaches, whether within or outside the teaching ranks.

Given this history, we should not interpret the bill to deprive local districts of the very flexibility it was intended to give and that other statutes expressly provide. I am "not persuaded the Legislature would have silently, or at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the existing law." ( *In re Christian S.* (1994) 7 Cal. 4th 768, 782 [30 Cal. Rptr. 2d 33, 872 P.2d 574].)

### 3. Legislative Counsel's Digest

"The Legislative Counsel's Digest is printed as a preface to every bill considered by the Legislature." (*Southland Mechanical Constructors Corp. v.* [\*661] *Nixen* (1981) 119 Cal. App. 3d 417, 428, fn. 5 [173 Cal. Rptr. 917].) The Legislative Counsel is a state official required by law to analyze pending legislation to assist the Legislature in considering that legislation. ( *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 17 [270 Cal. Rptr. 796, 793 P.2d 2]; *People v. Martinez* (1987) 194 Cal. App. 3d 15, 22 [239 Cal. Rptr. 272].) Therefore, "It is reasonable to presume that the Legislature amended those sections with the intent and meaning expressed in the Legislative Counsel's digest." (*People v. Superior Court (Douglass)* (1979) 24 Cal. 3d 428, 434 [155 Cal. Rptr. 704, 595 P.2d 139]; see also *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1158, fn. 6 [278 Cal. Rptr. 614, 805 P.2d 873].) [\*\*1196] [\*\*\*692] Indeed, we have stated that the rule that opinions of the Attorney General are entitled to "great weight" "is particularly compelling as to opinions of the Legislative Counsel, since they are prepared to assist the Legislature in its consideration of pending legislation." ( *California Assn. of Psychology Providers v. Rank*, *supra*, 51 Cal. 3d at p. 17; see also *Franklin v. Appel* (1992) 8 Cal. App. 4th 875, 890 [10 Cal. Rptr. 2d 759] [applying this rule to the Legislative Counsel's Digest].)

The reaction of the Legislative Counsel toward the language at issue here--"such assignment shall first be made available to teachers presently employed by the district"--is quite remarkable. As explained above, Assembly Bill No. 1690 did not contain this language at first. When the bill was originally introduced without this language, the Legislative Counsel's Digest summarized the significance of the entire new *section 44919(b)*. It

14 Cal. 4th 627, \*661; 927 P.2d 1175, \*\*1196;  
59 Cal. Rptr. 2d 671, \*\*\*692; 1997 Cal. LEXIS 1

explained concisely that *section 44919(b)* "would add to the circumstances under which a certificated individual could be classified as a 'temporary' employee, cases in which a person was employed to serve in a limited assignment supervising the extracurricular activities of pupils. The bill would not limit such classification to employment for terms of any specified length." (Legis. Counsel's Dig., Assem. Bill No. 1690 (1977-1978 Reg. Sess.) Apr. 14, 1977, p. 138.) The bill was then amended to add the language at issue. However, the Legislative Counsel changed the digest only by replacing the words "the extracurricular" with "athletic" to reflect another change in the amendment.

*The Legislative Counsel's Digest did not make the slightest mention of the language that is at the heart of this litigation.*

The explanation is obvious. As discussed *ante*, at page 660, the new language was merely a clarification, not a major change in the bill and the overall statutory scheme. The Legislative Counsel recognized it as such. Before the bill, local districts could hire permanent teachers as coaches. The amendment assured that this practice would continue. If the Legislature had [\*662] intended the major piece of legislation urged today, surely the amendment would have registered at least a blip on the Legislative Counsel's radar screen.

#### 4. Policy

Obviously, the Legislature establishes policy, not this court. However, "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal. 3d at p. 1387.) "A statute should be interpreted so as to produce a result that is reasonable. [Citation.] If two constructions are possible, that which leads to the more reasonable result should be adopted." (*Granberry v. Islay Investments* (1984) 161 Cal. App. 3d 382, 388 [207 Cal. Rptr. 652].)

Adding bureaucratic red tape and tying the hands of local administrators are bad policies. Mandatory employment preferences deemphasize merit. A requirement that school districts hire any teacher who meets minimum qualifications over a superior nonteacher candidate would harm California's public schools. Teaching classes and coaching interscholastic sports are quite different undertakings. Many teachers make

excellent coaches. Often a teacher applicant will be the best available choice and should be hired. Local school districts should not be discouraged from hiring teachers as coaches. But, by the same token, sometimes a nonteacher is the best candidate. Sometimes, as here, the nonteacher is already an assistant coach in the district; an artificial preference should not prevent the district from retaining a deserving assistant. Sometimes a veteran assistant might apply for promotion to head coach when that coach retires; again, an artificial preference should not prevent a deserved promotion. Public schools should be allowed to use to the fullest the tremendous pool of outside coaching talent. Public school athletes need and deserve the best available coaches.

The CTA would prohibit a district from hiring a nonteacher if a single teacher anywhere in the district applied. The majority would prohibit a district from even *considering* outside applicants unless and until it found all teacher applicants unqualified. For prestigious positions such as head football [\*\*1197] [\*\*\*693] coach of a high school in a large district like Los Angeles--with thousands of teachers--either view would effectively mean that nonteachers need not apply (unless, under the majority view, the district is prepared to declare every teacher applicant unqualified before it even considered outside applicants). A school district that wanted to revive a moribund program by hiring an Olympic wrestler, or a former professional basketball player, or an [\*663] alumnus who had coached in the National Football League, would be stymied if a single minimally qualified teacher anywhere within the district applied for the position. Stanford University could hire a distinguished alumnus to coach its football team, but it would be a rare public school, especially in a large urban district, that could do so.

Public schools should aim as high as the applicant pool allows. They should not be forced to hire any teacher who meets the minimum established standards. Excellence must not be reserved for private schools.

#### C. The Majority's Interpretation

The majority "reiterate[s] that '[i]n construing ... statutory provisions a court ... may not rewrite the statute to conform to *an assumed intention which does not appear from its language.*' " (Maj. opn., *ante*, at p. 650, italics added by the majority.) I agree. Yet that is essentially what the majority does. It asserts "the Legislature *clearly intended* to afford some degree of

14 Cal. 4th 627, \*663; 927 P.2d 1175, \*\*1197;  
59 Cal. Rptr. 2d 671, \*\*\*693; 1997 Cal. LEXIS 1

advantage or priority to" teachers (*id.* at p. 634, italics added) without ever identifying where this "clear[]" intent is supposed to be found, and it rewrites the statute to conform to that asserted intention. What is most clear about this statute is that it is not clear. <sup>2</sup> The majority's interpretation finds no support in the statutory language, any credible method of statutory interpretation, or policy.

3

2 The majority cannot decide whether it claims the plain or express statutory language compels its conclusion, or whether it recognizes it is interpreting an ambiguous statute. (Compare maj. opn., *ante*, at pp. 632 ["we are called upon to interpret a legislative enactment whose meaning is not as clear as the parties, and the appellate courts, would like"], 642 [referring to the "Legislature's failure to use unambiguous language" and recognizing that "the Legislature's choice of words in *section 44919(b)* is not as clear as in [other statutes]"], and 645 [agreeing "for purposes of argument ... the language of *section 44919(b)* lacks sufficient clarity"] with pp. 648 [referring to the "employment preference ... created by the *plain language* of *section 44919(b)*" (italics added)], 650 [a policy to hire the best available coach does not "counterbalance the *express* statement in *section 44919(b)* giving credentialed teachers ... an employment preference for athletic coach positions" (original italics)], and 651, fn. 11 [referring to "the *express* statement in *section 44919(b)* granting teachers an employment preference".])

3 The majority asserts that a statement in a staff analysis of Assembly Bill No. 1690-- "[t]he district must offer these assignments to their regular teachers before hiring such temporary coaching assistance" "--is "consistent" with its interpretation. (Maj. opn., *ante*, at p. 648, italics deleted.) That statement, although itself ambiguous, is arguably consistent with the *Court of Appeal's* interpretation, but it is *inconsistent* with the majority's interpretation. The statement does not suggest the district may or should promulgate regulations to weed out teachers to whom the statute applies or the district may not even *consider* nonteacher applicants.

Apparently relying on a statute that did not yet exist when *section 44919(b)* was enacted, and that has since

been repealed (Ed. Code, former [\*664] § 35179.5 [enacted in 1985, repealed in 1994]; see maj. opn., *ante*, at pp. 637-639), <sup>4</sup> the majority asserts that the [\*\*\*694] statutory phrase, "made available to teachers [\*\*1198] presently employed by the district," does not apply to all teachers presently employed by the district, but only to those teachers found qualified under whatever intangible standards any local school district chooses to establish. While, as a matter of policy, this reading is at least an improvement on the Court of Appeal's, <sup>5</sup> it is a clear departure from the statutory language. The reference in *section 44919(b)* to "teachers presently employed by the district" is *unqualified*. My interpretation conforms to this unqualified reference by making coaching positions available, i.e., accessible, to *all* teachers. The majority adds a restriction not in the statutory language.

4 Because *Education Code section 35179.5* has been repealed, I do not discuss it in detail. As originally enacted in 1985, it mandated minimum qualifications for nonteacher applicants only, and did not apply to teachers at all. (Stats. 1985, ch. 694, § 1, p. 2306.) Only in 1990 was it amended to cover teachers as well. (Stats. 1990, ch. 1212, § 1, pp. 5077-5078; Ed. Code, former § 35179.5, subd. (d).) The resultant regulations (see maj. opn., *ante*, at pp. 637-638, fn. 5) were therefore targeted primarily at nonteachers, not teachers, and would have screened out few, if any, persons who had earned a teaching credential. Indeed, the Department of Finance opposed the 1990 amendment partly because "Extending the qualifications to credentialed physical education teachers may not be necessary since most recently credentialed teachers have received such instruction through their teacher preparation program." (Dept. of Finance, Analysis of Assem. Bill No. 2063 (1989-1990 Reg. Sess.) May 1, 1990, p. 2.)

5 The district argues persuasively that requiring it to hire any teacher who applies--including, for example, a kindergarten teacher as varsity football coach despite the lack of knowledge of either coaching or football--as the Court of Appeal interpreted the statute, would have had devastating consequences. The majority dismisses the argument as "fall[ing] of its own weight" because the majority permits the district to establish minimum qualifications. (Maj. opn., *ante*, at p. 644.) The argument, of course, was

aimed at the CTA's position and the Court of Appeal's opinion, not the new interpretation the majority proffers today. As the majority implicitly recognizes when it rejects the Court of Appeal's interpretation, the district's argument was right on target.

Without explanation, the majority also adds a new prohibition the parties have never suggested and that has no relation to any statutory language whatever: According to the majority, *section 44919(b)* somehow requires that the district find all teacher applicants unqualified before it may even "consider" nonteacher applicants. (Maj. opn., *ante*, at pp. 641, 652.) This requirement raises artificial bureaucratic rules to a new level. The word "first"--whatever it means--relates to "employ[ing]" teachers as coaches (see the first clause of the first sentence of § 44919(b)), not merely to "considering" an applicant. Although a district may not "employ[]" a nonteacher before first making the position available to teachers, nothing prevents the district from considering, and even giving notice to and accepting applications from, nonteachers at the same time as it is giving notice to and considering teacher applicants. The majority's new requirement, besides [\*665] being sheer invention, would force mental gymnastics probably beyond the limits of normal human capability. In many cases, no matter how hard and how good faith the effort, it would be impossible not even to *consider* nonteacher applicants while evaluating the teacher applicants.

This case presents a good example. Sipe was the head basketball coach and athletic director at the new high school. He would naturally play a major, possibly decisive, role in selecting his own assistant coach. Sipe's assistant at the previous high school applied to be his assistant at the new one. Now the majority says Sipe could not even "consider" that person as his new assistant unless and until all teacher applicants had been found unqualified! To pass this test would require superhuman powers. Until all teacher applicants are rejected, must Sipe guard day and night against letting slip that he was considering making his current assistant his new one? Would Sipe violate *section 44919(b)*, and expose the district to a lawsuit for injunctive relief and damages, if, in a weak moment, he mentioned to a friend, or his spouse, that he considered his assistant an excellent coach? Apparently that is the mandate the majority finds in *section 44919(b)*.

The majority deprives local schools of the control over coaching personnel the Legislature expressly and intentionally gave them. (*Ed. Code*, § 35160, 35160.1, 35179.) The majority responds, "That the Legislature intended to provide districts more flexibility when hiring athletic coaches does not of necessity negate the employment preference to 'teachers presently employed in the district' created by the *plain language* of *section 44919(b)*," because, "were that the case, no purpose would have been served in amending Assembly Bill No. 1690, as it was originally proposed, to state such a preference." (Maj. opn., *ante*, 648 [\*\*\*695] [\*\*1199], italics added.) I agree such an amendment would have served no purpose, which is why the Legislature did *not* state such a preference, either by some "plain language" the majority never identifies, or otherwise. There is not and never has been an "*express* statement in *section 44919(b)* giving credentialed teachers currently employed in the district an employment preference for athletic coach positions." (Maj. opn., *ante*, at p. 650, original italics.)

The majority recognizes that its interpretation may prevent a district from hiring the best candidate as an interscholastic sports coach, but seems untroubled. "One searches the [Education Code] in vain," it says, "for any statement of legislative intent that districts should hire 'the best coach available.'" (Maj. opn., *ante*, at p. 650.) I would have thought it implicit that the Legislature intends the best for our public school children. But the intent is not just implicit, it is expressed: "Each child is a unique person, with unique needs, and the purpose of the educational system of this state is to [\*666] enable each child to develop *all* of his or her own potential." (*Ed. Code*, § 33080, italics added.) Interscholastic sports programs help students develop their potential. Hiring the best available coach helps develop all of this potential. The Legislature does, indeed, intend the best for our children in public schools.

Who might make the "best" possible coach for a given vacancy depends on the circumstances. I do not suggest the district should always hire the person who could lead the team to the highest winning percentage. Often, for reasons the majority identifies, a teacher would make the best coach. (Maj. opn., *ante*, at p. 651.) But sometimes a nonteacher would be the best choice. Each situation is unique. On one occasion, the district might believe the previous coach had emphasized athletics too much and want to hire a teacher who could place the

14 Cal. 4th 627, \*666; 927 P.2d 1175, \*\*1199;  
59 Cal. Rptr. 2d 671, \*\*\*695; 1997 Cal. LEXIS 1

program into proper perspective. On another occasion, the program may be moribund and need an inspirational outsider to revive it. For example, a football team might have had a string of losing seasons due to poor coaching. The program might have become something of a joke to those who could most profit from it, the students themselves. Some students who had the "potential" (*Ed. Code, § 33080*) to become stellar athletes might ignore the team and maybe even drop out of school altogether. The district might think it important to hire someone, possibly a nonteacher, who could reestablish pride in the team and inspire potential dropouts to join it, to their great benefit both athletically and academically.

Local school districts need and should have the authority to make the best possible coaching personnel decisions after considering the diverse and unique needs of each situation.

This last sentence is not a statement of my policy, it is the *Legislature's*. (*Ed. Code, § 35160, 35160.1* ["school districts ... have diverse needs unique to their individual communities and programs"; "in addressing their needs, common as well as unique, school districts ... should have the flexibility to create their own unique solutions"; therefore, school districts have "broad authority to carry on activities and programs ... necessary or desirable in meeting their needs"], 35179 [each school district has control of "all aspects of the interscholastic athletic policies, programs, and activities," including "personnel"], 44923.) *Section 44919(b)* promoted, it did not change, this clearly stated Legislative policy.

### III. CONCLUSION

Today's decision shortchanges our public school students. In this case, a school district sought to achieve some continuity for students forced to [\*667] transfer to a newly created high school by making the head and assistant basketball coaches at the established school the coaches at the new one. What it got for its efforts was a

lawsuit for injunctive relief and damages, a lawsuit today's opinion validates. I cannot agree.

At a time the public and Legislature are increasingly concerned about the quality of [\*\*1200] [\*\*\*696] education public school students receive, the majority creates a morass out of 15 ambiguous statutory words. At best, the opinion will merely produce a mountain of red tape, as school districts scramble to promulgate regulations as vague and full of "intangibles" as possible so they can justify rejecting inferior teacher candidates in favor of superior nonteacher candidates, while simultaneously they try to create a record to prove they did not consider the nonteachers until they rejected the teachers. This is bad enough. Schools should concentrate on helping children develop their potential, not on satisfying numbing bureaucratic requirements. More likely, the opinion will lead to ever more litigation that drains school districts' limited financial resources, as teachers bypassed in favor of nonteachers sue for injunctive relief and damages. This is worse. Money earmarked for education should be spent on education, not litigation. At worst, the opinion will actually accomplish what the majority recognizes: It will prevent local school districts from hiring the best available coaches for our young people in public schools.

Fortunately, the damage is correctable. The Legislature merely needs do again what I think it has already done--make clear that it intends the best for our children, and that school districts may hire the best available coaches without fear of being sued. I call upon the Legislature to act promptly to undo today's decision by amending *section 44919(b)*. Although coaching positions should be, and are, available to teachers, so too should they be available to nonteachers. May the best candidate be selected.

Baxter, J., and Brown, J., concurred.