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HIGHLIGHTS

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bleeding, he would have delayed his hernia surgery. 101 CA4th at 752.

At trial, plaintiff asked the trial judge to give a special jury instruction on informed consent and objected to the court's decision to give BAJI 6.30, the standard medical malpractice jury instruction on evaluating expert testimony. The trial court rejected plaintiff's special instruction and also allowed the use of BAJI 6.30. The jury returned a defense verdict. 101 CA4th at 752.

The First District Court of Appeal affirmed, although it was sympathetic to plaintiff's contentions. The court noted that plaintiff's proposed instruction on informed consent was preferable to the instruction given by the trial judge because the judge's instruction "encouraged the jury to evaluate Dr. Leichtling's duty of disclosure solely by reference to the expert testimony," a result that might erroneously lead jurors to conclude that experts determine whether a significant risk needs to be disclosed to a patient. 101 CA4th at 756.

Nonetheless, the court found that the erroneous instructions were not prejudicial error. First, the use of BAJI 6.30 was appropriate in this case because plaintiff's claim was based on two theories, negligence and informed consent. BAJI 6.30 was thus applicable to the negligence claim. 101 CA4th at 755. Second, plaintiff's own special instruction also failed to fully explain the role of expert testimony in resolving the informed consent claim. The court then reasoned that, by virtue of its verdict, the jury must have decided that aspirin use did not pose a significant risk, and the result would have been the same had the requested instructions been given. 101 CA4th at 756.

CCP §998 Offers

Can a CCP §998 offer be enforced when the offeree responds with the condition that both sides are to bear their own costs? According to the Fourth District Court of Appeal, the answer is no.

In *Bias v Wright* (2002) 103 CA4th 811, 127 CR2d 137, a personal injury action, plaintiff made defendant a CCP §998 offer that was silent as to how the parties were to bear costs.

Within the statutory acceptance period, defendant's counsel telephoned plaintiff's counsel and orally accepted the offer, but in the written confirmation of the acceptance, defendant included a provision that each party was to bear her own costs.

Plaintiff refused to agree to the cost-sharing amendment. The trial court granted defendant's motion for an order enforcing the alleged settlement agreement, but the Fourth District reversed on appeal.

Analyzing several components of the §998 offer, the court first held that a §998 offer may be accepted orally. Although §998 requires that the offer itself be made in writing, there is no requirement that the acceptance be in writing, unless the offer specifies that it be. In this case, it was appropriate for defense counsel to orally accept the offer before sending written confirmation.

To be enforceable, however, an oral acceptance of a §998 offer must be absolute and unqualified. 103 CA4th at 818. Applying ordinary contract law, the appellate court held that the defendant's written confirmation providing that each side would bear its own costs could be considered a counteroffer, not an acceptance, and thus there was a factual dispute over the terms of the settlement. Neither the trial court nor the clerk could adjudicate such a dispute and thus the trial court erred in entering judgment on the §998 offer.

Applying the New Two-Year Limitations Period for Personal Injury and Wrongful Death Claims

Shaana A. Rahman

Introduction

Effective January 1, 2003, SB 688 amended CCP §340(3) to increase to 2 years the formerly 1-year statute of limitation for personal injury, wrongful death, and assault and battery claims. SB 688 also enlarged the statutory period for victims of the September 11, 2001, terrorist attacks. This article discusses application of the new statutory period and the validity of legislative attempts to apply new limitations periods retroactively or to revive previously barred claims. Such legislative attempts are not uncommon. See, *e.g.*, SB 1779, which amended CCP §340.1 to extend the statute of limitations on some child sexual abuse claims, and CCP §354.6, which allows certain World War II forced-labor victims to recover compensation.

Applying New Limitations Period to Lapsed Claims

When CCP §340(3) was amended to delete the provisions for actions for assault, battery, and injury or death from a wrongful act of neglect, two new statutes were created: (1) CCP §335.1, which provides a 2-year statute of limitation for those actions, and (2) CCP §340.10, which requires that the statute of limitation described in §335.1 apply to any action brought for injury or for the death of any terrorist victim, as the statute defines that term. Section 340.10(b) expressly states that the statute is to be retroactive for victims of September 11, 2001. Thus, the application of the new 2-year statute of limitation will

be different depending on whether or not the injured party is a victim of September 11.

The validity of the retroactive provision concerning claims by September 11 victims may be open to question. A retroactive or retrospective law is generally defined as one that takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes a new duty, or attaches a new disability with respect to the transactions or considerations already past. See Black's Law Dictionary 1317 (6th ed 1990). Although neither the federal nor the California Constitution prohibits passage of a retrospective or retroactive law, such a law is invalid if it conflicts with constitutional protections, *i.e.*, if it (1) is an ex post facto law; (2) impairs the obligation of a contract; or (3) deprives a person of a vested right or substantially impairs such right, thereby denying due process. See generally 7 Witkin, Summary of California Law, *Constitutional Law* §486 (9th ed 1987).

In California, the general rule is that a statute affecting a substantive right will, if possible, be construed prospectively to avoid a finding of unconstitutionality. However, it is also well established in California that statutes of limitation are procedural in nature—that is, they neither create a new cause of action nor deprive a defendant of any defense on the merits. See *Stauch v Superior Court* (1980) 107 CA3d 45, 49, 165 CR 552. A procedural statute may be given effect as to pending and future litigation even if the underlying cause of action accrued before the statute took effect. *Pacific Coast Med. Enters. v Department of Benefit Payments* (1983) 140 CA3d 197, 205, 189 CR 558; see also *Olson v Hickman* (1972) 25 CA3d 920, 922, 102 CR 248.

Once a limitation period runs, the prospective defendant gains an immunity from liability. The United States Supreme Court has held, in essence, that if the lapse of time creates a property right, retroactive revival is beyond the legislature's power, but if the lapse of time bars a personal claim for money or damages, there is no denial of due process in disappointing the hopes of a complete defense. *Campbell v Holt* (1885) 115 US 620, 29 L Ed 483, 6 S Ct 209. This principle was reaffirmed in *Chase Secs. Corp. v Donaldson* (1945) 325 US 304, 89 L Ed 1628, 65 S Ct 1137.

The California Supreme Court holds the contrary view and has rejected the Supreme Court's approach. In *Chambers v Gallagher* (1918) 177 C 704, 171 P 931, the supreme court held that the legislature cannot enact a new limitation period that revives a cause of action after the original period has lapsed. The court reached a similar result in *Mudd v McColgan* (1947) 30 C2d 463, 183 P2d 10, and *Evelyn, Inc. v California Employment Stabilization Comm'n* (1957) 48 C2d 588, 311 P2d 500. The court sidestepped the issue in *Douglas Aircraft Co. v Cranston* (1962) 58 C2d 462, 465, 24 CR 851, a case in which the statute of limitation at issue was not made expressly retroactive to apply to time-barred actions.

Recent lower court decisions, however, have interpreted *Douglas* to mean that a new limitation period can be applied retroactively if the legislature expressly declares it to be so within the legislation. See *Liebig v Superior Court* (1989) 209 CA3d 828, 257 CR 574. In *Liebig*, the First District Court of Appeal distinguished *Chambers*, *Mudd*, and *Evelyn* on the basis that they dealt with limitation periods created by statute, not common law. Ultimately, the *Liebig* court held that the legislature can expressly revive time-barred civil common law causes of action. 209 CA3d at 835. Several courts have used this approach to permit a new limitation statute to apply to lapsed claims whenever the new statute expressly mandates such an effect. See, *e.g.*, *Nelson v Flintkote Co.* (1985) 172 CA3d 727, 734, 218 CR 562; *Gallo v Superior Court* (1988) 200 CA3d 1375, 1378, 246 CR 587. Moreover, in its majority opinion in *People v Frazer* (1999) 21 C4th 737, 88 CR2d 312, a case addressing the constitutionality of a legislative revival of a time-barred *criminal* prosecution, the California Supreme Court noted that "in the 80 years since it was decided, *Chambers* has not been used by any state court to strike down a statute like [the one at issue, which revived a limitation period that had run] in a criminal case or in any civil case not involving some form of tax dispute." 21 C4th at 775 n32. The court did not overrule *Chambers*, however.

Without doubt, the legislature has mandated that CCP §335.1 be applied retroactively for victims of September 11 and has gone to great lengths to give the reasons why. Nevertheless, *Chambers* is still good law, as a forceful dissent in *Frazer* pointed out. 21 C4th at 778 (J. Kennard, joined by J. Brown, dissenting). The California Supreme Court has yet to decide that *Chambers* does not apply to a limitation period created by common law or to hold that the legislature's expressed intention that the statutory period be applied retroactively is valid. Until such time, CCP §§335.1 and 340.10 remain open to attack on this basis.

Applying §335.1 to Pending Claims

Although the new and amended statutes embodying SB 688 apply retroactively only to victims of September 11, 2001, they apply directly to everyone with a pending claim, *i.e.*, a cause of action that had not lapsed as of January 1, 2003. Under California law, the legislature may extend the statutory period within which an action must be brought; the California Supreme Court has held that "an amendment which enlarges a period of limitation applies to pending matters where not otherwise expressly excepted." *Mudd v McColgan* (1947) 30 C2d 463, 468, 183 P2d 10. Thus, a claim in which the 1-year statute of

limitation was not yet exhausted on January 1, 2003, benefits from the new 2-year statute of limitation and the prospective plaintiff's time to file a lawsuit is extended to 2 years from the date of injury.

The application of legislation to pending claims is said to be without retroactive effect because the application is prospective, not retrospective, meaning there is no impairment of vested rights. 30 C2d at 468. Essentially, an individual has no vested right in the running of the statute of limitation until "it has completely run and barred the action." *Weldon v Rogers* (1907) 151 C 432, 434, 90 P 1062. As the supreme court has said, a "true retroactive operation of a limitation statute is such as would revive matters that had already been barred by the lapse of time." *Mudd v McColgan* (1947) 30 C2d 463, 468, 183 P2d 10. Thus, §335.1's application to causes of action that have not already lapsed is valid.

Conclusion

Although the trend is to permit retroactive application of new limitations periods when, as here, the legislature has expressly mandated retroactivity, a defendant might challenge the retroactive application of these new statutes based on *Chambers*. Given that, it will be some time before the full litigation impact of these new and amended statutes is known.

SUPREME COURT WATCH

Free Speech Versus Consumer Protection: Will The U.S. Supreme Court "Just Do It" To Nike?

Christina J. Imre

In May 2002, the California Supreme Court dropped a bombshell on the business world, one with consequences felt far beyond the state's borders. A sharply divided court ruled that defendant Nike had no free speech protection for publicly defending itself against media charges of unfair labor practices. *Kasky v Nike Inc.* (2002) 27 C4th 939, 119 CR2d 296. Under the court's ruling, if the trial court were to ultimately find that Nike's public relations campaign contained false statements, the company could be subject to severe injunctive and disgorgement remedies under California's consumer protection laws. But this agreeing to hear the case and decide the issue. *Kasky v Nike Inc.* (2002) 27 C4th 939, 119 CR2d 296, cert granted (2003) 123 S Ct 8173.

The fracas began in the late 1990s with a media blitz of charges on television and in the print media. Nike, which uses Asian subcontractors to manufacture its products, was accused of promoting "slavery" and "sweatshop" conditions. The allegations ran the gamut: that the subcontractors paid less than the local minimum wage, demanded illegal overtime, subjected workers to physical, verbal, and sexual abuse, and exposed employees to a variety of toxic materials in violation of local health regulations. 27 C4th at 974.

As debate over international labor practices raged, Nike responded with a concerted campaign, denying the charges not only in press releases but in letters to op-ed pages of newspapers, as well as to university presidents and athletic directors. Nike even took out full-page advertisements to showcase a report by former U.S. Ambassador Andrew Young, who found no evidence of unsafe working conditions.

But this was only the beginning. Enter Marc Kasky, a consumer activist who sued Nike in California under the state's unfair competition and false advertising laws. Bus & P C §§17200–17210, 17500–17509. Kasky contended that Nike's press campaign itself constituted "false advertising" because it contained factual misrepresentations about the company's labor practices. Under California's broad consumer protection statutes, he sought an injunction and disgorgement of all monies acquired from the alleged misconduct. Nike raised its right to free speech as a defense, but in a 4–3 decision, the divided state supreme court was unreceptive.

The supreme court majority held that even statements made outside of regular advertising channels constituted "commercial speech" (entitled to less protection than pure political speech) because the campaign was aimed at enhancing Nike's image with consumers, and, ultimately, at selling more product. In broad language, the opinion concluded that Nike could be subject to a false advertising claim for op-ed pieces, "editorial advertisements," press releases, or even for answering reporters' questions. Thus, the state's interest in regulating false advertising trumped Nike's free speech rights and the lawsuit was allowed to proceed.

Justice Chin, joined by Justice Baxter, penned a vigorous dissent, noting that economic globalization and labor practices, especially Nike's, have been the subject of considerable public interest and debate. Thus, Nike's press campaign was not truly "commercial" speech at all. He also condemned the decision for its one-sidedness: "Handicapping one side in this important worldwide debate is both ill considered and unconstitutional." 27 C4th at 971. Justice Chin argued that, in the name of public comment, Nike's