



DAILY APPELLATE REPORT

CIVIL LAW

Education: School district acted reasonably in denying parent's request to add item to agenda when it involved student-run event at one school. *Mooney v. Garcia*, C.A. 6th, DAR p. 8794

Environmental Law: U.S. Army Corps of Engineers does not violate Clean Water Act by authorizing hydropower project under nationwide permits rather than requiring individual permit. *Snoqualmie Valley Preservation Alliance v. United States Army Corps of Engineers*, U.S.C.A. 9th, DAR p. 8809

Environmental Law: Wildlife Conservation Board has limited discretion to expend money from Habitat Conservation Fund because expenditure of 'approximately' \$6 million is authorized. *Outfitter Properties LLC v. Wildlife Conservation Board* (Dept. of Fish and Game), C.A. 3rd, DAR p. 8797

Workers' Compensation: Single payment of benefits required for attending qualified medical evaluation does not commence limitation period for payment of temporary disability benefits. *Meeks Building Center v. WCAB*, C.A. 3rd, DAR p. 8790

CRIMINAL LAW

Criminal Law and Procedure: Speech is not protected by First Amendment when it goes beyond mere encouragement and becomes integral part of crime. *U.S. v. Meredith*, U.S.C.A. 9th, DAR p. 8802

Criminal Law and Procedure: Bond may be forfeited when defendant fails to appear at competency hearing because competency proceedings are part of criminal proceedings covered by bail bond. *People v. Accredited Surety & Casualty Co.*, C.A. 5th, DAR p. 8788

Criminal Law and Procedure: Court miscalculates sentence under provision of One Strike law that was eliminated by Legislature and limited terms on multiple offenses committed on single occasion. *People v. Rodriguez*, C.A. 2nd/4, DAR p. 8779

Full rulings and summaries are online by 4 p.m. the day they are issued. www.dailyjournal.com

BRIEFLY

A judge has ruled that the University of California must release the names of all the police officers involved in pepper-spraying student protesters at UC Davis last year. The Sacramento Bee reports that Alameda Superior Court Judge Evelio Grillo issued the ruling on Tuesday in response to a lawsuit filed by the Sacramento Bee and the Los Angeles Times. The UC police officers' union had tried to keep the names under wraps, saying that naming officers was barred under state law and could subject them to harassment. But Grillo says the report is subject to release under the California Public Records Act. He did, however, stay his order through July 27 so the police union can appeal. The name of the officer shown on video footage spraying the seated Occupy protesters on Nov. 18 had previously been released.

Editor's note III

The Daily Journal is taking nominations for our annual list of California's Top 100 Lawyers to be published Sept. 12. To find out how to submit a candidate for the list, email nominations@dailyjournal.com

Circuit sides with EPA on greenhouse gas rules

Ruling on regulation is the most important climate change decision since 2007, some say.

By Fiona Smith

Daily Journal Staff Writer

In a resounding victory for the federal Environmental Protection Agency and others pushing to curb climate change, an appellate court has rejected a slew of suits from business interests and state governments that sought to block rules cutting greenhouse gas emissions.

The unanimous ruling from the Washington, D.C. Circuit Court of Appeals puts the EPA full-steam ahead in limiting emissions from vehicles, power plants and other major sources of pollution under the Clean Air Act by finding that the agency followed proper procedures and presented substantial scientific evidence to back up its efforts. *Coalition for Responsible Regulation v. EPA*, 09-1322 (D.C. Cir. June 26, 2012).

It is the most important climate change decision since the 2007 Supreme Court ruling that found the EPA may regulate greenhouse gases under the federal Clean Air Act, according to some observers. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

Tuesday's decision vindicates the EPA, finding it "isn't some rogue agency when it comes to greenhouse gas regulation," said Cara Horowitz, an attorney and executive director of the UCLA Emmett Center on Climate Change and the Environment. "The court relies on the Supreme Court in *Massachusetts v. EPA* to give EPA a wide berth in regulating greenhouse gases."

The decision rebuffs claims by several industry groups and state governments, including Western States Petroleum Association, the American Frozen Food Institute and the states of Texas and Virginia, which filed dozens of consolidated lawsuits

against the EPA in 2009 challenging the agency's decision to regulate greenhouse gases.

The plaintiffs alleged the EPA relied on flawed science when it made the crucial finding that greenhouse gases endanger public health and welfare and should be regulated. They also challenged the agency's subsequent national vehicle standards, rules the state of California played a key role in developing, as well as an agency effort to reduce the number of businesses impacted by climate regulation. Several environmental groups and states, including California, intervened in support of the EPA.

Calling the ruling a setback for business, the plaintiffs are considering an appeal to halt the EPA's "devastating regulations," said Jay Timmons, CEO of the National Association of

See Page 3 — CIRCUIT

BUYING IN BULK



Robert Levins / Daily Journal

Linda S. Koffman, left, and Rita M. Silverman, helped a mid-sized landlord sell a swath of Santa Monica properties to a sole investor.

Portfolio purchases on the rise

Landlords, developers reap benefits of not selling single properties

By Jason W. Armstrong

Daily Journal Staff Writer

In late 2010, after landlord Arnold Bernstein spent two decades rehabilitating his five office buildings in Santa Monica — home to one of California's biggest hotbeds of technology, media and entertainment companies — he decided the time was right to sell them.

But rather than hunt down individual buyers, Bernstein clustered the properties as a single portfolio in hopes a big investment consortium would snap it up in one fell swoop.

The gamble paid off: In December, Houston

real estate investor The Lionstone Group paid \$90 million for the group of buildings.

While portfolio deals slowed to a trickle in the wake of the real estate crash, lawyers say they've seen a gradual rebirth of such sales in the past couple of years as clients look for ways to assure stronger deals in the sour economy. There's been an uptick in big funds and real estate companies snapping up clusters of distressed property debt, those lawyers say.

In such deals, "the buyers are generally bigger," said Bernstein, a Los Angeles real estate investor and retired accountant. "The

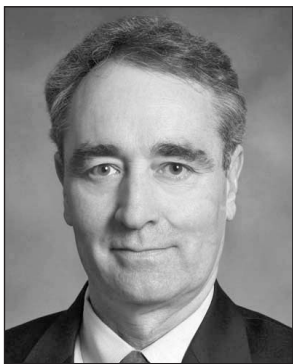
advantage to having a bigger buyer is that the financing is more likely to close. You can spend a lot of time with a [smaller] potential buyer, only to find out he didn't qualify for a loan or didn't have adequate financing."

Linda S. Koffman, an attorney with Gipson Hoffman & Pancione LLP who helped Bernstein sell his buildings, said the portfolio approach "gave him a good exit strategy."

"If he'd gone to sell each of these buildings individually, he would have attracted a different type of buyer" and would have incurred "more hours or broker time and cost to exit

See Page 6 — MULTIPLE

GUEST COLUMN



Martin Kenney is a professor in the Department of Human and Community Development at UC Davis and a Senior Project Director at the Berkeley Roundtable of the International Economy at UC Berkeley.

Weak justifications for the JOBS Act

Two months ago in a bipartisan love fest, our Congress passed the euphemistically-titled "Jumpstart Our Business Startups Act." The stated goal of this legislation was to make it easier for new firms to raise growth capital from public markets.

The supposed justification for what is actually another massive deregulation of U.S. financial markets was that small firms find it difficult to raise growth capital and that, by extension, this limits job creation. The legislation was sold by a massive public relations campaign funded by interested parties of all stripes.

To set the context for understanding the JOBS Act, what do we know? First, after the collapse of the dot-com bubble in 2000 there was a dramatic drop in the number of IPOs.

Second, this collapse had a powerful effect upon the returns to venture investors and par-

ticularly to late 1990s vintage funds. So much so that many venture capitalists are frightened that they will not be able to raise a new fund.

Third, the Sarbanes-Oxley Act, a reaction to the excesses of the dot-com era, created some increase in filing burdens, but work by Jay Ritter and colleagues show that this burden was not the key factor in slowing the number of IPOs. See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954788.

Of course, some might say any increased burden is too great, and they have a point since Sarbanes-Oxley is not being enforced anyway.

What are the facts regarding IPOs? One widely cited study concluded that as many as 22.7 million jobs were not created due to the shortfall of IPOs. The study bases this conclusion upon extrapolation from a selected sample of 25 un-

See Page 7 — UNSUPPORTED

MORE NEWS

Litigation

Down to Earth



Judge Candace Beason handles felony trials with an unusual ability to relate to the parties. **Judicial Profile**

Page 2

Litigation

Lewis Vuitton



Can knock-off luxury bags featured in a film damage a brand's image? By Dan Nabel of Greenberg Glusker Fields Claman & Machtinger LLP

Page 4

Litigation

Objective Willfulness



The Federal Circuit decided that the objective part of the *Seagate* test should be decided as a matter of law. By J. David Evered of Knobbe Martens Olson & Bear LLP

Page 4

Government

State Prisons Shrink

This month, California quietly shed an unwanted title - going from the largest prison system in the country to the second-largest after the state of Texas. But some critics say the difference is being made up in growing county jails.

Page 7

State prison population shrinks under realignment

But critics worry many of the inmates could simply end up in county jails.

By Henry Meier
Daily Journal Staff Writer

This month, California quietly shed an unwanted title, going from the largest prison system in the country to the second-largest after the state of Texas.

The change comes amid a significant drop in the number of prisoners held in state facilities nine months into California's realignment plan, which aims to transfer low-level inmates to county jails and rehabilitation programs. The state's prison population has fallen from roughly 160,000 to 135,000 since last October, according to reports by the California Department of Corrections and Rehabilitation. Some inmates have been released on parole while others are entered into post-release community supervision.

Critics of the department welcomed the precipitous drop but many say they remain unconvinced that the reduction signifies a shift in correctional philosophy rather than just a transfer from state buildings to local ones.

"What is the long-term plan for reaching an appropriate level of spending on incarceration in the state?" said Allen Hopper, criminal justice and drug policy director for the American Civil Liberties Union of Northern California. "We have the second highest recidivism rate in the country. We can't simply shift the problem to the counties and expect to have a different outcome. We have to figure out an alternative

to incarceration."

Critics like Hopper point to recent signs that county jail populations are swelling and that they could continue to grow as signs that reducing the incarcerated population through rehabilitation programs like drug courts and job training seminars is not a main goal of realignment.

During the same period that the estimated 25,000 prisoners were removed from the state's ledgers, an estimated 12,200 county jail beds have opened or soon will open, according to analysis by the ACLU.

And just this week, the Legislature made a last-minute change to the state budget that would further increase the number of jail beds. Lawmakers on Monday earmarked an additional \$500 million in Assembly Bill 1482, the state's budget bill, to go toward jail constructions bonds, Hopper said.

‘It’s clearly not the intent of the law or the Legislature to basically downscale the prison population on the back of county jails.’

— Joan Petersilia

Law enforcement representatives dispute the ACLU study's estimated number of jail beds as too high but acknowledge that additional jail space is a high priority.

"There's no question we need more beds," said Nick Warner, the legislative director for the California State Sheriffs' Association. "We have to take into account that inmates are going to be here longer and have serious mental health and medical issues that we're not cur-



S. Todd Rogers / Daily Journal

ACLU Criminal Justice and Drug Policy Director Allen Hopper in San Francisco

rently equipped to deal with.

Both sides need to take a more nuanced look at the problem, said Stanford Law School professor Joan Petersilia, who is the co-director of the school's Criminal Justice Center and a former adviser to Gov. Arnold Schwarzenegger.

"It's clearly not the intent of the law or the Legislature to basically downscale the prison population on the back of county jails," she said. "But if this is the way it has to be, we're still better off in the long run, even if former prison inmates are doing the same amount of time in jail" because inmates are closer to their home communities and the resources there.

The long-term development of county jail systems will be key, Petersilia said. If programmatic

changes can be instituted along with an increase in beds, jails can become a springboard for inmates' successful re-entry into society, she added.

Central to the hybrid plans she worked on was Assembly Bill 900, a jail and prison construction finance bill passed in 2007. Initially, much of the funds were allocated for transitional facilities for offenders coming off a state prison sentence, but they have since been appropriated to build jails, according to Petersilia.

"The AB 900 money was to be used to help inmates exit out of prison," she said. "They would have been moved [from prison] in the last year of their sentence to these re-entry hubs where you can reconnect them to family and services in the community. Now [the state] has sort of repurposed that money for regu-

lar jails, but it's still possible to get the benefits of local programming."

The challenge of merging the often punitive culture of jails with more rehabilitative programs is compounded by several factors.

First, the state is not allocating to the counties an amount equivalent to what it used to house offenders, and even with shifting budget plans, it's all but impossible that they'd do so. The math simply will not work, according to Hopper.

"The Legislative Analyst's Office and the governor's office have both acknowledged that the amount of money they are sending to the counties isn't enough to keep locking up people up in the same way we have at the state level," he said.

Second, the same problem that sparked the state's prison litiga-

BY THE NUMBERS

Prisons Down, Jails Up?

160,774 - state prisoners as of Sept. 30, 2011*

136,187 - state prisoners as of May 31, 2012*

12,200 - new county jail beds open or soon to open**

* According to the California Department of Corrections and Rehabilitation

** According to the American Civil Liberties Union

tion—overcrowding—is or will soon be affecting county jails like it did state lockups. In fact, 31 of the state's 58 counties are already under some sort of jail population cap, be it local, state or federal, according to Warner, the sheriffs' association representative.

That's put many sheriff's departments in a position where they have sole determination over who remains behind bars and who is released early. In many cases, only a fraction of the court's sentence is carried out under realignment.

"I have veteran deputies, guys who have been on the force for years, telling me they are releasing inmates who they shouldn't be," Warner said.

Despite the wrangling over realignment, there is some sense that a balance can be reached. Most observers agree nine months is hardly an adequate period from which to draw final conclusions about the vast array of changes that have been set in motion.

"Realignment is such a shift of people and responsibilities that we don't know how this will play out," Warner said. "But I suspect that we're going to be OK."

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Concessions leave little room for dissenters

Continued from page 1

public sector. That's in part because public-sector budgets are more finite and known in advance.

"There's usually a fiscal budget, year to year," Segall said. "You are frequently dealing with known deficits. A situation with a private company is a little more fluid."

But even in the public sector, unions often complain they don't receive enough financial information from the government to make informed decisions regarding which concessions they should offer.

"Both parties have to be working from the same numbers," Segall said. "It may require making information requests. Sometimes both sides hire experts. The experts have to agree on how to value things."

And government officials do not always accept concessions.

That was the case two weeks ago at Los Angeles County Superior Court. As court officials prepared to lay off 157 employees, one union made a last-minute offer for some workers to take one furlough day a month if the court would call off the action. Union representatives said court management declined because



Associated Press

Gov. Jerry Brown

the court wanted a more permanent solution to its budget woes.

While Hartinger said many deals are struck well before layoffs are set

to take place, he also said it is not unusual for negotiators to reach a solution late in the process.

"That's when the pressure is there and everyone sees the consequences of not making a deal," he said.

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BRIEFLY

Yahoo is ditching its provider of on-demand music, Rhapsody, for a similar service provided by Swedish subscription-music service Spotify. The changes to the Yahoo Music site are expected to be complete by early Wednesday. Spotify's rollout across the rest of Yahoo will take longer. Rhapsody had been a Yahoo partner since February 2008. Yahoo visitors will soon be able to hit a play button and have songs play without leaving the website, while the previous incarnation required users to navigate away from the page, said Yahoo spokeswoman Lisa Goodwin. Yahoo Inc. will also create an app for the Spotify platform that will provide original content like artist profiles. Spotify is free on computers but users who pay \$10 a month can choose songs for playback on mobile devices.

California's medical marijuana industry and critics who contend it has become a cover for illegal drug dealing will have to wait at least another year for the state to set up a system for licensing and regulating pot shops and growers. Assemblyman Tom Ammiano on Monday pulled his bill that would have established an appointed board to vet and oversee medical marijuana businesses. The delay will allow a Senate committee that deals with professional licenses to do research and hold a public hearing on the issue while preventing the measure from being killed. AB2312 narrowly passed the Assembly last month, but Ammiano said it was unlikely the Senate Committee on Business, Professions and Economic Development would have endorsed it or that Gov. Jerry Brown would have signed the legislation if it made it out of the Legislature. Instead, he and committee chairman Sen. Curren Price, D-Los Angeles, agreed to give senators time to evaluate and possibly amend Ammiano's proposal once the current

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Unsupported claims behind the JOBS Act

Continued from page 1

identified IPOs.

What are the real facts? In a recent report my colleagues and I prepared for the Kauffman Foundation, we examined the growth in revenues and employment for IPOs of emerging growth companies from June 1996 to 2010. We found that the aggregate employment for the 1,700 EGCs increased from 651,000 employees prior to the IPO to 1.666 million employees in 2010, a 156 percent increase. This meant that these firms in aggregate provided slightly over 1 percent of the total U.S. employment. Aggregate pre-IPO annual sales were an inflation-adjusted \$134 billion and this increased to \$481 billion in 2010, a 259 percent increase. See http://www.kauffman.org/uploadedfiles/post_ipo_report.pdf.

More important is that among these 1,700 were firms such as Amazon, eBay, Google and Salesforce.com that have changed the way we live and work. Will loosening IPO rules generate more Amazons and Googles, or is the investment market already efficient at finding such opportunities and thus providing more IPO funding will not generate more such home run firms?

How did the EGC IPOs fare historically? Overall, by 2010 only 29 percent of the EGCs from 1996 to 2000 remained as independent public companies. We found that the after-IPO bankruptcy rate was rather low, with only 13 percent going bankrupt, though this result is conditioned by the fact that many of the acquisitions were likely distressed and the public investors may have lost substantially all of their investments.

There is good news. For example, despite all of the bad press, biomedical firms had the highest survival rate of independent firms! It is possible to speculate upon the reasons for this, but one might be that during the last two decades there has been far less hype about these firms so they did not suffer

from inflated initial expectations, as compared to say Internet firms.

In California, we have been important beneficiaries of the success of U.S. financial markets. Our research shows that California was the home to 35 percent of the total number of IPOs. This was followed by 8 percent of the total headquartered in Massachusetts. To illustrate the dominance and the importance of the IPO machine to California, the suburban city of Sunnyvale, with 51 IPOs, had more during this period than all but seven states. Ensuring that investors from around the world continue to trust U.S. stock markets is an important policy issue for Californians.

In any longer run, [weaker protections] will make raising money more difficult because the essential lubricant of all markets, trust, is being destroyed.

To recapitulate, our research shows that EGCs did create a significant number of jobs and that, in general, the public market mechanisms have worked. Weakening the investor protections instituted after the great stock market crash of 1929, the new ones instituted after the 2000 dot-com crash, and even the ridiculously weak Dodd-Frank rules will not assist worthy small firms in raising money. In any longer run, they will make raising money more difficult because the essential lubricant of all markets, trust, is being destroyed.

Will the JOBS Act-endorsed crowd-sourcing models for selling equity, relaxed rules regarding management touting of new firms, and dramatically weakened accounting and financial reporting requirement lead to the stable markets that reassure and attract investors? Do venture capitalists and entrepreneurs believe that sticking public investors with bad securities will ensure the strength of U.S. markets? To illustrate, since the May 17th Facebook IPO, particularly now that we know SEC questioned the filing but did not inform investors, the IPO market has gone into rigor mortis.

Logical, tough and transparent regulations enforced fiercely are the key to the creation and growth of healthy markets. If Sarbanes-Oxley is bad legislation, then it should be fixed. Otherwise, it should be enforced. Letting the interested parties write securities legislation, as they did with the JOBS Act, is likely to lead to unfair, capricious markets that will handicap the U.S. jobs machine that we demonstrated in our report.