STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

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November 9, 2009

Ms. Maruch Atienza
Los Angeles Unified School District
333 South Beaudry Street, 26th Floor
Los Angeles, CA 90017

Robert Miyashiro
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

And Affected State Agencies and Interested Parties (See enclosed mailing list)

Re: **Draft Staff Analysis and Hearing Date**
Clean School Restrooms, 04-TC-01
Education Code Sections 17070.755, 17584.3, and 35292.5
Statutes 2003, Chapters 358 (AB 1124) and 909 (SB 892)
Office of Public School Construction, State Allocation Board, and
State Department of General Services Forms: SAB Forms 40-21, 50-04, 892, 892R

Dear Ms. Atienza and Mr. Miyashiro:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by Monday, **November 30, 2009**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Friday, January 29, 2010,** at 9:30 a.m. in Room 447 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about January 14, 2010. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Camille Shelton at (916) 323-3562 if you have questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosure
j:mandates/2004/tc/04tc01/corres/dsatrans

Hearing Date: January 29, 2010
J:/mandates/2004/TC/04-TC-01/tc/DSA

ITEM __

TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 17070.755, 17584.3, and 35292.5
Statutes 2003, Chapter 358 (AB 1124); Statutes 2003, Chapter 909 (SB 892),

Office of Public School Construction, State Allocation Board, and State Department of General Services Forms: SAB Forms 40-21, 50-04, 892, 892R

Clean School Restrooms

Los Angeles Unified School District, Claimant

Executive Summary

Background

This test claim addresses Education Code statutes and alleged executive orders describing the appropriate standards of cleanliness and maintenance for K-12 school restrooms. The test claim statutes were proposed as a response to a concern regarding the dangerous and unsanitary conditions of school restrooms. The test claim statutes and alleged executive orders require that:

- Restrooms shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during the hours when pupils are in class and not in class. Restrooms may be temporarily closed when necessary for pupil safety and repair.
- Schools participating in the Deferred Maintenance Program that are in violation of the clean restroom provisions are ineligible for state matching apportionments under the program.
- In order to participate in the Deferred Maintenance Program, schools are required to prioritize and certify the use of deferred maintenance funds to ensure that school restrooms are functional and meet local hygiene standards applicable to public facilities.
- In order to participate in the School Facilities Program, schools are required to prioritize and certify the use of funds in the Maintenance of Facilities Account to ensure that school restrooms are functional and meet local hygiene standards applicable to public facilities.
- The State Allocation Board has developed a Restroom Maintenance Complaint form and a response form for the district when complaints are lodged. The

response form must be filled out and sent to the State Allocation Board, verifying that the violation has been remedied, in order to receive the apportionment under the Deferred Maintenance Program.

Analysis

Staff finds that Education Code section 35292.5, subdivision (a), mandates the following activities on K-12 school districts:

- Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class. (A restroom may temporarily close when necessary for pupil safety or repair.)

However, these requirements do not impose a new program or higher level of service. Under prior law (including common law, and Education Code sections 17565, 17576, and 17593), school districts have long been required to perform these activities.

Moreover, staff finds that Education Code sections 17070.755 and 17584.3, and the State Allocation Board Forms 40-21, 50-04, 892, and 892R, do not impose a state-mandated program. Rather, the requirements of these statutes and alleged executive orders are conditions precedent to the receipt of state apportionments under the Deferred Maintenance Program and the School Facilities Program. School districts are not mandated by the state to participate in these programs.

Conclusion

Accordingly, staff finds that Education Code sections 17070.755, 17584.3, and 35292.5, and the State Allocation Board Forms 40-21, 50-04, 892, 892R, do not impose a reimbursable state-mandated program on school districts.

Staff Recommendation

Staff recommends that the Commission adopt this analysis and deny the test claim.

STAFF ANALYSIS

Claimant

Los Angeles Unified School District

Chronology

12/22/04	Claimant files test claim
01/11/05	Notice of complete test claim filing issued
03/24/05	Department of Finance files comments opposing the test claim
03/25/05	Department of General Services, Office of Public School Construction, files comments opposing the test claim

Background

This test claim addresses Education Code statutes and alleged executive orders describing the appropriate standards of cleanliness and maintenance for school restrooms. The test claim statutes were proposed as a response to a concern regarding the dangerous and unsanitary conditions of school restrooms. The legislative history for Assembly Bill No. (AB) 1124 (Stats. 2003, ch. 358) provides as follows:

> The author states, "According to a news report aired in Los Angeles, an undercover investigation at more than 50 California schools revealed that children risk their health everyday at school when they need to use the restroom. The three-month investigation found that many of the bathrooms at these schools were either locked or not available, they lacked toilet paper, soap and paper towels, they had broken fixtures and many even tested positive for bacterial contamination. Often, children choose not to use the restroom to avoid contamination. By doing so, they become prone to getting urinary tract infections and many end up suffering stomachaches." [1]

Similarly, the legislative history for Senate Bill 892 (Stats. 2003, ch. 909) states that "[a]ccording to the National Clearinghouse for Educational Facilities, close to 20 percent of middle and high-school students admit to parents that they avoid the school restroom due to dirty or unsafe conditions."[2]

The test claim statutes and alleged executive orders are described below.

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[1] Assembly Committee on Education, Report on AB 1124 (2003-2004 Reg. Sess.), as introduced February 21, 2003, and heard April 2, 2003, page 3.

[2] Senate Rules Committee, Senate Floor Analyses, SB 892 (2003-2004 Reg. Sess.), as amended September 8, 2003, page 3.

1. Education Code Section 35929.5: This section defines how restrooms in K-12 schools are to be maintained:
   - Restrooms shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
   - Restrooms shall be kept open during hours when pupils are not in class and a sufficient number of restrooms shall be open during hours when pupils are in class.
   - An exception to these requirements exists to allow schools to temporarily close any restroom as necessary for pupil safety or repair.
   - Any schools participating in the Deferred Maintenance Program that are in violation of these provisions are ineligible for Deferred Maintenance Program matching apportionments. Districts have 30 days after receipt of written notice to cure any violations prior to termination of funding.
2. Education Code Section 17584.3: This section makes general facility maintenance a priority purpose of funds apportioned under the Deferred Maintenance Program. In order to receive Deferred Maintenance Program apportionments, a priority for use of the funds must be to ensure that facilities, including restrooms, are functional and that they meet local hygiene standards generally applicable to public facilities.
3. Education Code Section 17070.755: This section makes general facility maintenance a priority purpose of funds in the Maintenance of Facilities Account. In order to receive School Facilities Program apportionments, a priority use of the funds must be to ensure that facilities, including restrooms, are functional and meet local hygiene standards generally applicable to public facilities.
4. Alleged Executive Orders
   - SAB Form 50-04: This is the application for funding under the School Facilities Program. The district must certify that it has established a Restricted Maintenance of Facilities Account pursuant to Education Code section 17070.75. The district must also certify that it has made a priority of the funds in the restricted account to ensure that facilities are functional and meet local hygiene standards.
   - SAB Form 40-21: In order to receive State Deferred Maintenance Funds, this form requires the County Superintendent of Schools to certify the amount each district deposits in its Deferred Maintenance Fund for the fiscal year indicated on the form. The form requires certification that, pursuant to Education Code section 17584.3, the district has made a priority of the deferred maintenance basic grant to ensure that facilities are functional and meet local hygiene standards. This form is due to the Office of Public School Construction within 60 days after the Basic Grant is apportioned.
   - SAB Form 892: This form is titled "Restroom Maintenance Complaint, Education Code section 35292.5." It describes the requirements established by Education Code section 35292.5 relating to sufficiency and availability of restroom facilities

in all public schools. The form asks for the location of the restroom in question and a description of the unsatisfactory conditions prompting the complaint. Types of complaints are listed on the form such as damaged sinks, empty soap dispensers and inaccessibility for extended periods of time. It asks for the complainant's contact information, although anonymous complaints are permitted.

- SAB Form 892R: This form is titled "Response to Restroom Maintenance Complaint. This form is sent to the school site originating the complaint as detailed in SAB Form 892. The Office of Public School Construction requires the school to cure the deficiency and provide confirmation by the District Superintendent within an allotted time period. It requires the District Superintendent to recertify that he or she understands the requirements of Education Code section 35292.5 and that failure to comply shall result in the withholding of deferred maintenance apportionments to the school district under Education Code section 17584.

Claimant's Position

The claimant contends that the test claim statutes and alleged executive orders constitute a reimbursable state-mandated program. The claimant filed a declaration from Bruce Kendall, Director of Maintenance and Operations for the Los Angeles Unified School District, requesting reimbursement for the following activities:

A. Restroom Maintenance and Access

1. Maintain and regularly clean restrooms. Additional custodians and restroom attendants have been hired. Restrooms are now routinely cleaned as often as every night and spot-cleaned and restocked twice per day. Service logs are maintained at each site.

2. Keep restrooms fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers. A daily inventory of fixtures needing repair is prepared and a "trouble call" system is in place to respond to reports of needed repairs. School plant managers randomly monitor restrooms daily.

3. Keep all restrooms open during school hours when pupils are not in classes, and keep a sufficient number of restrooms open during school hours when pupils are in classes. Restrooms previously closed and used for storage have been reopened and storage containers obtained. Three hundred and nine (309) restrooms have been renovated and 553 restrooms repainted.

B. Restroom Maintenance Complaints

1. Respond to restroom maintenance complaints lodged by members of the public either directly with the district or submitted by the complainant to the Office of Public School Construction. Staff, students, and visitors are urged to report needed repairs to site administrators using the district's Clean Restroom Hotline website.

2. In the case of a direct complaint to the district, responding directly to the person complaining and resolving the deficiency.
3. In the case of a member of the public who submits a SAB form 892 to the Office of Public School Construction, responding to the notice by providing a response on SAB form 892R.
4. Should the district responses prove insufficient to any published or unpublished criteria of the Office of Public School Construction, the district must participate in further resolution procedures including hearing of the matter before the State Allocation Board, taking subsequent steps to resolve the alleged violations, and complying with appeal procedures which may be provided for by the State Allocation Board.

C. Certification of the Use of Funds

Take the actions necessary to be able to certify in the annual applications for state deferred maintenance funds, and other forms as required by the State Allocation Board, that the district has made a priority of the use of funds in the restricted maintenance account to ensure that facilities are functional and meet local hygiene standards, and that the district has made a priority use of the deferred maintenance basic grant to ensure that facilities are functional and meet local hygiene standards.

The claimant estimates costs incurred at "more than $8.9 million in increased labor costs and $13.7 million in repair and renovation costs during the calendar year 2004 to implement these new duties mandated by the state and for which it cannot otherwise obtain complete funding or reimbursement."

Position of the Department of General Services, Office of Public School Construction

The Office of Public School Construction contends that the test claim statutes and alleged executive orders do not impose a reimbursable state-mandated program on the following grounds:

- Education Code section 35929.5 (which requires that restrooms be open, clean, and operational and supplied with water, soap, toilet paper, and a method for drying hands) clarifies existing law and does not impose a new program or higher level of service. Prior law in Education Code section 17576 already requires school districts to furnish sufficient patent flush water closets for the use of pupils.
- Education Code section 17584.3 does not impose a state-mandated program since participation in the Deferred Maintenance Program is voluntary. Education Code section 17582 states that a district "may" establish an account to be known as the district deferred maintenance account.
- School districts that participate in the Deferred Maintenance Program receive annual funding from the state that can be used on the maintenance of school restrooms.

Position of the Department of Finance

The Department of Finance contends that the test claim statutes and alleged executive orders do not impose a reimbursable state-mandated program on the following grounds:

- The test claim statutes pled do not impose a new program or higher level of service, but were enacted in response to negligent practices by school districts in violation of their existing duties. Long standing law, currently codified in Education Code section 17576 requires school districts to provide adequate restrooms for the use of students and staff. Merely clarifying that the hours of operation should coincide with the students' needs and specifying that restroom should be reasonably clean and operational cannot be considered new duties. This conclusion is further supported by a Legislative Counsel opinion requested by the author and provided to the Governor's Office when the bill was signed.

  The Legislative Counsel Opinion attached to the Department's comments addresses the question of whether Education Code section 35292.5, if enacted, "would impose a state-mandated local program on school districts for which the state must provide reimbursement under Section 6 of Article XIII B of the California Constitution?" The Legislative Counsel's Office concluded that existing law, originally enacted before January 1, 1975, requires school districts to provide sufficient water closets for the use of pupils, and that the activities required by section 36292.5 do not impose a new program or higher level of service.

- Activities required as a result of a school district's participation in the Deferred Maintenance Program and the School Facilities Program, are not mandated by the state. These programs are discretionary and requirements of the programs are imposed as a condition of receiving funds.

- The state is not required to provide separate funding for assisting schools with maintenance and repairs, but does so at its option with the Deferred Maintenance Program and the School Facilities Program. The state may condition receipt of these supplementary funds with reasonable expectations. "Because adequate restrooms are a health necessity, they are unquestionably a fundamental priority for maintenance. The legislation merely reminds schools of the obvious in this respect, and makes the optional funding program at risk if this duty is ignored."

Discussion

The courts have found that article XIII B, section 6, of the California Constitution[3] recognizes the state constitutional restrictions on the powers of local government to tax

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[3] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to

and spend.[4] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[5]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[6] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[7]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[8] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[9] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[10]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[11]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[12]

January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[4] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[5] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[6] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[7] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

[8] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[10] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[11] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[12] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code

In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[13]

Issue 1: Do the test claim statutes and alleged executive orders impose state-mandated duties within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes and alleged executive orders to impose a state-mandated program, the language must order or command a school district to engage in an activity or task. If the language does not mandate a school district to perform an activity or task, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision that triggers the requirements to apply, or where participation in the underlying program is voluntary, courts have held that the resulting requirements do not constitute a state-mandated program subject to article XIII B, section 6.[14] A state-mandated program is created when the test claim statutes or alleged executive orders establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur costs.[15]

A. Education Code Section 35292.5

The claimant asserts that Education Code section 35292.5 requires districts to perform new activities to meet the standards of cleanliness and maintenance described in this code section. Education Code section 35292.5 states in relevant part that:

> (a) Every public and private school maintaining any combination of classes from kindergarten to grade 12, inclusive, shall comply with the following:
>
> (1) Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
>
> (2) Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class.
>
> (b) Notwithstanding subdivision (a), a school may temporarily close any restroom as necessary for pupil safety or as necessary to repair the facility.

As a penalty for not performing these activities, schools that participate in the Deferred Maintenance Program will no longer receive deferred maintenance matching apportionments from the state. Subdivision (c) of section 35292.5 states that:

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sections 17551 and 17552.

[13] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[14] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

> Any school district that operates a public school that is in violation of this section as determined by the State Allocation Board, is ineligible for state deferred maintenance fund matching apportionments pursuant to section 17584 if the school district has not corrected the violation within 30 days after receipt of a written notice of the violation from the board. Prior to determining that the school district is ineligible, the board shall provide the school district with a reasonable opportunity to cure the violation.

Based on the plain language of the statute, staff finds that the following activities required by Education Code section 35292.5, subdivision (a), are mandated by the state:[16]

- Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class.

As more fully described below, the Deferred Maintenance Program is a voluntary program that school districts participate in to receive state funding. Even though Education Code section 35292.5 refers to the Deferred Maintenance Program, the activities required by the statute are imposed on all school districts, including those that do not participate in the Deferred Maintenance Program. Education Code section 35292.5 is located in Title 2, Division 3, Part 21 of the Education Code as duties imposed on all governing boards.

Accordingly, staff finds that Education Code section 35292.5 constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. Education Code sections 17070.755 and 17584.3; State Allocation Board Forms 50-04 and 40-21

As summarized below, Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 require school districts that apply for grant funding under the School Facilities Program and the Deferred Maintenance Program to certify to the State Allocation Board that the receipt of funding allocated through these programs is prioritized by the district to ensure that restroom facilities for pupils are functional and that they meet local hygiene standards generally applicable to public facilities. A summary of these two programs, Education Code sections 17070.755 and 17584.3, and the State Allocation Board Forms 50-04 and 40-21, is provided below.

School Facilities Program. Education Code section 17070.755 is part of the School Facilities Program, which was created by the Leroy F. Greene School Facilities Act.[17] The School Facilities Program provides bond funding for new construction and modernization projects of school districts. Basically, a district that has two or more school sites that each have a pupil population density greater than 115 pupils per acre in

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[16] Education Code section 75 states that "'[s]hall is mandatory and 'may' is permissive."

[17] Education Code sections 17000 et seq.

grades K through 6 or a pupil population density greater than 90 pupils per acre in grades 7 through 12 can apply to the State Allocation Board for funding that will be used to relieve overcrowded conditions.[18] This calculation, as outlined in Education Code section 17071.75, provides the amount of eligibility for proposed projects.

Once approved and prior to releasing funds, the State Allocation Board is required to ensure that the school district has made "all necessary repairs, renewals and replacements to ensure that a project is at all times maintained in good repair, working order and condition."[19] Under the act, good repair is defined as:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to a school facility inspection and evaluation instrument developed by the Office of Public School Construction and approved by the board or a local evaluation instrument that meets the same criteria. Until the school facility inspection and evaluation instrument is approved by the board, 'good repair' means the facility is maintained in a manner that assures that it is clean, safe and functional as determined by the interim evaluation instrument developed by the Office of Public School Construction or a local evaluation instrument. The school facility inspection and evaluation instrument and local evaluation instruments that meet the minimum criteria of this subdivision shall not require capital enhancements beyond the standards to which the facility was designed and constructed.[20]

The minimum criteria include a specific reference to restroom facilities stating that restrooms and restroom fixtures are functional, the restrooms appear to be maintained and stocked with supplies regularly, and the restroom facilities appear to be in compliance with Education Code section 35292.5.[21]

To ensure that districts in receipt of funds under the act comply with this requirement and to encourage continual maintenance, the applicant district must establish a restricted account, known as the Maintenance of Facilities Account, within the district's general fund for the sole purpose of funding ongoing and major maintenance.[22] The first priority for the funds in the Maintenance of Facilities Account is to comply with the State Allocation Board's requirement to ensure that a project is at all times maintained in good repair. The district must deposit three percent of the total general fund expenditures of the applicant school district into the Maintenance of Facilities Account every year for 20 years after receiving funds under this act. As an additional requirement to receipt of grant funding, the district must publicly approve an ongoing and major maintenance plan that specifies how the funds will be used.[23]

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[18] Education Code section 17071.75, subdivision (a)(1).

[19] Education Code section 17070.75, subdivision (a).

[20] Education Code section 17002, subdivision (d)(1).

[21] Education Code section 17002, subdivision (d)(1)(M)(i-iv).

[22] Education Code section 17070.75, subdivision (b)(1).

[23] Education Code section 17070.75, subdivision (b)(3)

The test claim statute, Education Code section 17070.755, was enacted in 2003 to provide that a priority for the use of the funds in the Maintenance of Facilities Account be used "to ensure that ... restroom facilities for pupils are functional and that they meet local hygiene standards generally applicable to public facilities." The alleged executive order, SAB Form 50-04, is the application for funding under the School Facilities Program. The district must certify in the application that it has established a Restricted Maintenance of Facilities Account and that it has made a priority of the funds in the restricted account to ensure that facilities, including restrooms, are functional and meet local hygiene standards.

Deferred Maintenance Program. Education Code section 17584.3 is included in the Deferred Maintenance Program, which is administered by the State Allocation Board for the purpose of funding the deferred maintenance of building systems that are necessary components of a school facility. Deferred maintenance is defined as "[t]he repair or replacement work performed on school facility components that is not performed on an annual or on-going basis but planned for the future" and falls within one of the categories specified on the application form.[24] Education Code section 17582 states that "[a] district *may* establish an account to be known as the district deferred maintenance account." Once an application is approved, school districts are provided "state matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components."[25] Education Code section 17582, subdivision (b), states that "[f]unds deposited in the district deferred maintenance fund shall only be expended for maintenance purposes as provided pursuant to subdivision (a)." The maintenance purposes referenced in this code section include:

> [F]or the purpose of major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of school buildings, the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials, the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials, the control, management, and removal of lead-containing materials, and any other items of maintenance approved by the State Allocation Board.[26]

The test claim statute, Education Code section 17584.3, establishes a priority for use of Deferred Maintenance funds to ensure that "facilities, including, but not limited to, restroom facilities for pupils, are functional and that they meet local hygiene standards generally applicable to public facilities." The alleged executive order, SAB Form 40-21, requires the county superintendent of schools to certify the amount each district deposits in it its Deferred Maintenance Fund for the fiscal year indicated on the form. The form

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[24] California Code of Regulations, title 2, section 1866.

[25] Deferred Maintenance Program Handbook, Office of Public School Construction. June 2007.

[26] Education Code section 17582, subdivision (a).

also requires certification that, pursuant to Education Code section 17584.3, the district has made a priority of the deferred maintenance basic grant to ensure that facilities, including restrooms, are functional and meet local hygiene standards.

Education Code Sections 17070.755 and 17584.3; State Allocation Board Forms 50-04 and 40-21 do not impose state-mandated activities on school districts.

The claimant contends that Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 mandate school districts to perform the following activities:

> Take the actions necessary to be able to certify in the annual applications for state deferred maintenance funds, and other forms as required by the State Allocation Board, that the district has made a priority of the use of funds in the restricted maintenance account to ensure that facilities are functional and meet local hygiene standards, and that the district has made a priority use of the deferred maintenance basic grant to ensure that facilities are functional and meet local hygiene standards.[27]

Staff finds that Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 do not impose state-mandated activities on school districts. Based on the court's analysis in *Department of Finance v. Commission on State Mandates (Kern High School District)*, whether a district applies for funding through the Deferred Maintenance Program or the School Facilities Program is completely at the pleasure of the school district and, therefore, the requirements imposed by the test claim statutes and alleged executive orders do not qualify as a state-mandated program within the meaning of article XIII B, section 6.[28]

In *Kern High School District*, the Supreme Court analyzed the issue of legal compulsion by examining the nature of the claimants' participation in the underlying programs themselves. The court ruled that even if participation in the programs in question was legally compelled, the claimants were not eligible for reimbursement because they were "free at all relevant times to use funds provided by the state for that program to pay required program expenses. . ."[29]

The California Supreme Court also addressed the issue of whether a district that incurs costs as a result of participating in an optional government funding program is eligible for reimbursement. The court held that there was no "practical" compulsion to participate in these programs because a district that chooses to not participate in the program or ceases participation in a program does not face "certain and severe...penalties" such as "double... taxation" or other "draconian" consequences.[30] The court rested its analysis on the premise that local entities possessing discretion will make the choices that are ultimately the most beneficial for the parties involved:

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[27] Test Claim, page 9.

[28] *Kern High School Dist., supra*, 30 Cal.4th 727, 754.

[29] *Id.* at page 731.

[30] *Id.* at page 754.

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[31]

The holding in *Kern High School District* applies here. School districts have complete discretion in determining whether to apply for Deferred Maintenance and School Facilities funding. Education Code section 17582 states that "[t]he governing board of each school district *may* establish a restricted fund to be known as the 'district deferred maintenance fund' for the purpose of major repair or replacement ..." Similarly, Education Code section 17070.25 discusses the application process for funding under the School Facilities Program. Education Code section 17070.70, subdivision (b), states that "[t]he *applicant* school district shall comply with all laws pertaining to the construction, reconstruction, or alteration of, or addition to, school buildings." Thus, if the costs of taking the actions necessary to be eligible for these funds are too high, then the school district can forgo participation in these programs in exercise of its discretionary authority. Furthermore, school districts are not subjected to any penalties for not participating in these programs. Nothing in the law imposes a consequence or penalty for choosing to not participate in the Deferred Maintenance Program or School Facilities Program.

In *City of Merced v. State of California,* (1984) 153 Cal.App.3d 777, the court determined whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill when a local agency exercised the power of eminent domain. The court stated:

> [W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[32]

The court's holding in *City of Merced* demonstrates the underlying notion that in order to constitute a state-mandated activity, the school district or agency must have no other option but to perform the activities specified in the test claim statute or executive order.

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[31] *Id.* at page 753.

[32] *City of Merced, supra,* 153 Cal.App.3d 777, 783.

In *Kern High School District,* the Supreme Court reaffirmed the *City of Merced* by stating the following:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[33]

Therefore, the courts' holding in *Kern High School District* and *City of Merced* preclude the finding of a mandate where districts are free to participate in the program at will. Therefore Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 do not impose state-mandated activities within the meaning of California Constitution XIII B, section 6.

C. State Allocation Board Forms 892 & 892R

Subdivision (c) of Education Code 35292.5 requires the State Allocation Board to establish a mechanism for determining whether a school district has performed the activities specified in subdivision (a); i.e, every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers; and restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class.

The State Allocation Board implemented a complaint process that allows pupils, parents and guardians to file complaint forms with the Office of Public School Construction (OPSC). In order to file a complaint, parents, guardians and pupils fill out SAB Form 892, which requests information about the deficient condition of the restroom facilities. This form informs the complainant of the requirements pertaining to school restrooms specified in Education Code section 35292.5 and that any school district that is in ". . . violation of this section, as determined by the State Allocation Board, is ineligible for state deferred maintenance fund matching apportionments." Form 892R is the response that must be completed by the offending district in order to verify that the violation has been remedied. This form also requires the district to certify that it understands the requirements of Education Code section 35292.5. Form 892R contains a clause stating that "[f]ailure to respond to complaints may result in the school district being ineligible for state deferred maintenance fund matching apportionments pursuant to Education Code section 17584."

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[33] *Kern High School District, supra,* 30 Cal.4th 727, 743.

Based on the language contained in these forms, only school districts that participate in the Deferred Maintenance Program are required to supply this form and to take the actions necessary to be able to certify that the district has complied with Education Code section 35292.5. State Allocation Board Regulation 1866.4.2 states that:

> A district's unresolved complaints, pursuant to Education Code section 35292.5, will be presented to the Board prior to the annual basic grant apportionment for the fiscal year in which the complaint was filed. If the board determines that a violation of Education Code section 35292.5 has occurred, the district will receive a 30 day notice to correct the violation. Districts that do not correct the violation within 30 days of the date of the written notice shall be deemed ineligible for the basic grant and the funds may be distributed to other eligible districts[34]

The regulation does not provide that school districts must provide these forms and respond to complaints, nor do the State Allocation Board regulations explicitly require school districts to provide these forms to the school community. Rather, the compulsion to use Forms 892 and 892R is ancillary to a school district's decision to apply for funding through the Deferred Maintenance Program. The relevant regulations only state that schools in violation of Education Code section 35292.5 that also wish to receive Deferred Maintenance Program funding will no longer be eligible.

Therefore, staff finds that State Allocation Board Forms 892 and 892R do not impose a state-mandated activity within the meaning of article XIII B, section 6 of the California Constitution.

Issue 2: Do the activities mandated by Education Code section 35292.5, subdivision (a), impose a new program or higher level of service?

Education Code section 35292.5, subdivision (a), mandates the following activities on K-12 school districts:

- Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class. (A restroom may temporarily close when necessary for pupil safety or repair.)

Education Code section 35292.5 was enacted by Statutes 2003, chapter 909 (SB 892), and became effective on January 1, 2004. Section 3 of the statute states the following:

> The Legislature finds and declares that, as regards public schools, a principal purpose of this act is to clarify the preexisting requirements of Section 17576 of the Education Code by specifying the minimum requirements necessary to provide sufficient patent flush water closets for the use of pupils in a manner that is consistent with those requirements that apply to other public and private persons or agencies pursuant to

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[34] California Code of Regulations, title 2, section 1866.4.2.

> Health and Safety Code section 118505 of the Health and Safety Code. Because the local mandate established pursuant to Section 17576, which was enacted on January 1, 1948, was enacted prior to January 1, 1975, no reimbursement is required under this act pursuant to Section 6 of Article XIII B of the California Constitution.[35]

Legislative disclaimers and findings, like those described in Section 3 of the test claim statute, are not determinative to a finding of a reimbursable state-mandated program.[36] Rather, the statutory scheme in Government Code section 17500 et seq., contemplates that the Commission has the sole and exclusive authority to adjudicate the issue.[37] Thus, the Commission must independently determine whether the required activities mandated by Education Code section 35292.5 constitute a new program or higher level of service within the meaning of article XIII B, section 6.

The claimant argues that Education Code section 35292.5 imposes new requirements regarding maintenance and operation of restrooms that were not required by prior law. The claimant further cites to Health and Safety Code section 118505, and argues that the code section "...specifically exempts public or private elementary or secondary school facilities..." from the requirements applicable to public facilities regarding maintenance and operation of restrooms. Thus, claimant contends that keeping school restrooms open, maintained, regularly cleaned, fully operational, and stocked with toilet paper, soap, and paper towels, are new requirements imposed on school districts beginning January 1, 2004.

Staff disagrees with the claimant. For the reasons below, staff finds that the activities required by Education Code section 35292.5 do not constitute a new program or higher level of service.

In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at *state-mandated increases in the services* provided by local agencies and school districts.[38] The enactment of new statutory language, however, does not always mean that the Legislature intended to change the law, or to increase the level of service provided by school districts. The courts have recognized that changes in statutory language can be intended to clarify the law, rather than to change it.

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[35] Health and Safety Code section 118505 requires publicly and privately owned facilities where the public congregates to be equipped with sufficient temporary or permanent restrooms to meet the needs of the public at peak hours. The statute requires the State Building Standards Commission and the Office of the State Architect to develop standards to satisfy the requirement. The statute exempts "any public or private elementary or secondary school facility."

[36] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 541.

[37] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817-1818.

[38] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][39]

The requirements to keep school restrooms open, maintained, regularly cleaned, fully operational, and stocked with toilet paper, soap, and paper towels are not new requirements imposed on school districts. As explained below, school districts were required to perform these activities before the enactment of the test claim statute.

Under common law, the courts have long recognized a special relationship between schools and their pupils based on the compulsory nature of K-12 education. This special relationship establishes an affirmative duty on school districts to protect students and to keep the school premises safe and welcoming.

> A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. This affirmative duty arises, in part, based on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 714-715; ... see also Cal.Const., art. 1, § 28, subd. (c) [students have inalienable right to attend safe, secure, and peaceful campuses]; Ed. Code, § 48200 [children between 6 and 18 years subject to compulsory full-time education].) "The right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." (*In re William G.* (1985) 40 Cal.3d 550, 563 ...)[40]

Since 1948, the Education Code has also required school districts to provide "sufficient patent flush water closets," or restrooms, as an integral part of the school facilities. This requirement is currently found in Education Code section 17576, which states the following:

> The governing board of every school district shall provide, as an integral part of each school building, or as part of at least one building of a group of separate buildings, sufficient patent flush water closets for the use of the pupils. In school districts where the water supply is inadequate, chemical water closets may be substituted for patent flush water closets by the board.

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[39] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[40] *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517.

> This section shall apply to all buildings existing on September 19, 1947, or constructed after such date.[41]

In addition, prior law required the governing boards of school districts to furnish and repair school property (Ed. Code, § 17565) and required the clerk of each district under the direction of the governing boards, to "keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school" (Ed. Code, § 17593). These requirements have been in statute since the 1959 Education Code.[42]

Thus, immediately before the enactment of the test claim statute, each school district was required to provide, as an integral part of at least one school building, "sufficient patent flush water closets for the use of pupils," and to keep school property "in repair." Since patent flush water closets are an integral part of the school building, they are considered school property and required to be kept "in repair."

In order to determine the meaning of these prior law requirements (to keep sufficient patent flush water closets in repair), courts first look at the words of the statute, giving them their plain and ordinary meaning. The courts use the dictionary as a proper source to determine the usual and ordinary meaning of a word or phrase in a statute. Under the rules of statutory interpretation, when the language at issue is clear, the courts should not indulge in further construction.[43]

Webster's Third New International Dictionary defines "water closet" as "1.a. a closet, compartment, or room for defecation and excretion into a hopper fitted with a device for flushing away with water... b. the hopper *and its accessories.*"[44] Thus, under prior law, the requirement to provide a water closet, or restroom in a school building, included the requirement to provide its accessories; i.e., toilet paper, soap, and paper towels.[45]

"Sufficient" is defined broadly to include more than the quantity of an item. The quantity of restrooms required by prior law is clearly provided with the language in Education Code section 17576 that requires a restroom to be provided "as an integral part of each school building, or as part of at least one building of a group of separate buildings." As

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[41] Education Code section 17576 was added by Statutes 1976, chapter 277, and derived from former Education Code section 18009 (Stats. 1947, ch. 527).

[42] These statutes were added by Statutes 1976, chapter 277, and derived from former Education Code sections 16051 and 18001.

[43] *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1258.

[44] Webster's Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, page 2582.

[45] Evidence Code section 451, subdivision (f), requires a court when interpreting a statute to take judicial notice of ". . . [f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute."

relevant here, the dictionary also defines "sufficient" to mean "marked by ...quality to meet with the demands, wants, or needs of a situation or of a proposed use or end."[46]

And "repair" is defined to mean "1.a. the act or process of repairing; restoration to a state of soundness, efficiency, or health; b. the state of being in good or sound condition."[47] This definition is consistent with the court's interpretation in *People v. Tufts* of a county ordinance requiring that toilets be maintained in good repair.[48] The defendant, who maintained property with an inoperable toilet, argued that the county ordinance was unconstitutionally vague, claiming that the words "state of good repair" were uncertain. The court disagreed, and held that a toilet that does not work is not in a state of good repair. Rather, "good repair" means that the property must be fit for use.

> We disagree, especially in the context pleaded here that the toilet was inoperative. Common sense is sufficient to tell anyone that a toilet which does not work is not in a state of good repair. Persons of ordinary intelligence should be able to understand this. We have rejected a similar challenge. (*People v. Balmer* (1961) 196 Cal.App.2d Supp, 874, 879-880 ...) There we said "The words 'good repair' have a well known [an]d definite meaning ... They sufficiently inform the ordinary owner that his property must be fit for the habitation of those who would ordinarily use his dwelling." (*Id.* at p. 880.)[49]

With these definitions, staff finds that the prior law requirement imposed on school districts to keep sufficient patent flush water closets in repair means that the school restrooms had to be open, maintained, regularly cleaned, fully operational, and stocked with toilet paper, soap, and paper towels – the same requirements imposed by the test claim statute. Thus, the Legislature, with the enactment of Education Code section 35292.5, has not increased the level of service provided by school districts to their pupils. Accordingly, the activities required by Education Code section 35292.5, subdivision (a), do not impose a new program or higher level of service.

CONCLUSION

Accordingly, staff finds that Education Code sections 17070.755, 17584.3, and 35292.5, and the State Allocation Board Forms 40-21, 50-04, 892, 892R, do not impose a reimbursable state-mandated program on school districts.

Staff Recommendation

Staff recommends that the Commission adopt this analysis and deny the test claim.

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[46] Webster's Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, at page 2284.

[47] Webster's Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, page 1923.

[48] *People v. Tufts* (1979) 97 Cal.App.3d Supp. 37.

[49] *Id.* at p. 44.

Date of Hearing: April 2, 2003

ASSEMBLY COMMITTEE ON EDUCATION
Jackie Goldberg, Chair
AB 1124 (Nunez) - As Introduced: February 21, 2003

SUBJECT : School restroom facility maintenance

SUMMARY : Requires that specified funds be used, as a first priority, for the maintenance of school restroom facilities. Specifically, this bill :

1) Requires that maintenance of facilities account (MFA) funds be used, as a first priority, to ensure that restroom facilities for pupils are functional and that they meet state and local hygiene standards generally applicable to public restrooms; and,

2) Requires that funds apportioned to a school district or county office of education (COE) from the State School Deferred Maintenance Fund (DMF), be used, as a first priority, to ensure that the restroom facilities for pupils are functional and that they meet state and local hygiene standards generally applicable to public restrooms.

EXISTING LAW :

1) Requires the State Allocation Board (SAB) to require a school district to make all necessary repairs, renewals and replacements to ensure that a school facilities project funded under the Leroy Green School Facilities Act is at all times kept in good repair working order and condition;

2) Requires SAB to ensure compliance with maintenance requirements by requiring a facility project applicant school district to establish an MFA and agree to deposit into the MFA, in each FY for 20 years after receipt of construction funds, a minimum amount equal to or greater than 3% of the applicant school district's total GF expenditures for that FY, including other financing uses, prior to the approval of a facilities project. Requires COEs to calculate MFA contributions based upon the COE GF less any restricted accounts;

3) Allows school districts to establish a DMF for the purpose of

specified major repair or replacement of school facilities. SAB is required to apportion, utilizing a specified formula, matching funds to school districts for DMF; and,

4) Allows annual deposits into the MFA account in excess of 2 1/2% of the district GF budget to count towards the district's matching funds requirement necessary to receive apportionments from DMF to the extent that funds are used for deferred maintenance.

FISCAL EFFECT : According to the author, "This bill does not seek additional funding or revenues. What the bill would do is to redirect deferred maintenance funds to ensure that restroom facilities for students are functional and clean."

COMMENTS :

Related current legislation . AB 378 (Steinberg), requires school districts and COEs, upon receiving school facility project funds, to agree to deposit into MFA for each fiscal year (FY) for 20 years an amount no less than 3% of the total expenditures by a school district or COE from its GF for that FY, as defined. The bill also redefines MFA uses as repair and all costs of maintaining in working order the facility, grounds and equipment associated with each district site.

AB 1395 (Lowenthal) expresses the Legislative intent that the governing board of a school district provide every public school pupil with access to sanitary and safe restrooms at a schoolsite.

AB 1550 (Goldberg) requires the Department of General Services to adopt facility standards and establish and maintain an inventory for state-financed early childhood education, public elementary, secondary and post secondary school facilities.

SB 123 (Escutia) states the intent of the Legislature to ensure that every public school has restroom facilities that are clean, operational, and stocked at all times with soap and paper supplies and that the number of restroom facilities in each public school are adequate to serve the school's population.

SB 892 (Murray) authorizes use of DMF to maintain and supply pupil restroom facilities and would require, as a condition of receipt of matching state funds, that the school district

certify that it has properly maintained and supplied rest room facilities for the immediately preceding 12-month period.

Arguments in support . The author states, "According to a news report aired in Los Angeles, an undercover investigation at more than 50 Southern California schools revealed that children risk their health everyday at school when they need to use the restroom. The three-month investigation found that many of the bathrooms at these schools were either locked or not available, they lacked toilet paper, soap and paper towels, they had broken fixtures and many even tested positive for bacterial contamination. Often, children choose not to use the restroom to avoid contamination. By doing so, they become prone to getting urinary tract infections and many end up suffering

stomachaches."

What maintenance needs currently qualify for MFA and DMF ?
Current law defines the allowed uses of MFA funds as all actions necessary to keep roofing, siding, painting, floor and window coverings, fixtures, cabinets, heating and cooling systems, landscaping, fences, and other items designated by the governing board of the district in good repair.

Current law also specifies that DMF be used for the purpose of major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of school buildings, the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials, the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials, the control, management, and removal of lead-containing materials, and any other items of maintenance approved by SAB.

Proposed author's amendments . The author offers the following amendment: Page 4, line 39, strike out "First" and insert Except for expenditures necessary to address imminent risks to health or safety, first

REGISTERED SUPPORT / OPPOSITION :

Support

California Association of Student Councils
California Federation of Teachers
California School Employees Association
California Medical Association
Riverside County Office of Education

Opposition

None on file

Analysis Prepared by : Mavonne Garrity / ED. / (916) 319-2087

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916)
327-4478

SB 892

UNFINISHED BUSINESS

Bill No: SB 892
Author: Murray (D), et al
Amended: 9/8/03
Vote: 21

SENATE EDUCATION COMMITTEE : 9-1, 5/7/03
AYES: Vasconcellos, Alpert, Chesbro, Denham, Karnette, Romero, Sher, Speier, Vincent
NOES: Knight
NO VOTE RECORDED: McPherson, Alarcon, Scott

SENATE APPROPRIATIONS COMMITTEE : 11-0, 6/4/03
AYES: Alpert, Battin, Aanestad, Ashburn, Bowen, Burton, Escutia, Karnette, Machado, Murray, Speier
NO VOTE RECORDED: Johnson, Poochigian

SENATE FLOOR : 39-0, 6/5/03
AYES: Aanestad, Ackerman, Alarcon, Alpert, Ashburn, Battin, Bowen, Brulte, Burton, Cedillo, Chesbro, Denham, Ducheny, Dunn, Escutia, Figueroa, Florez, Hollingsworth, Johnson, Karnette, Knight, Kuehl, Machado, Margett, McClintock, McPherson, Morrow, Murray, Oller, Ortiz, Perata, Poochigian, Romero, Scott, Sher, Soto, Speier, Torlakson, Vasconcellos

SUBJECT : Public school restrooms

SOURCE : Author

DIGEST : This bill requires every public and private school maintaining any combination of classes from

CONTINUED

kindergarten to grade 12, inclusive, to comply with specified restroom maintenance standards and specifies that any school district that operates a public school that is

in violation of these standards is ineligible for state deferred maintenance funds matching apportionments.

Assembly amendments (a) delete the provision that would have required compliance with the bill as a condition of receipt of apportionments from the School Fund, (b) add provision that the bill would apply to all public and private K-12 schools, (c) add the provision that the State Allocation Board (SAB) would determine compliance with the bill as a condition of eligibility for deferred maintenance matching funds if the violation is not corrected, as specified, (d) add the provision that would hold harmless employees who perform maintenance or repair, as specified, (e) add the provision that would allow a school to temporarily close for safety or repairs, and (f) provide that the bill clarifies preexisting requirements, as specified.

ANALYSIS : According to the National Clearinghouse for Educational Facilities, close to 20 percent of middle and high-school students admit to parents that they avoid the school restroom due to dirty or unsafe conditions.

This bill:

1. Requires every public and private school maintaining specified grade levels to comply with all of the following:

   A. Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.

   B. The school shall keep all restrooms open during school hours when pupils are not in classes, and shall keep a sufficient number of restrooms opening during school hours when pupils are in classes.

1. Allows that a school may temporarily close any restroom as necessary for pupil safety or as necessary to repair

the facility.

2. Specifies that any school district that operates a public school that is in violation of the provisions of this bill as determined by the State Allocation Board (SAB) is ineligible for deferred maintenance funds (DMF) state matching apportionments if the violation is not corrected within 30 days after receipt of a written notice of the violation from SAB.

3. Specifies that, prior to determining that the school district is ineligible for DMF, as specified, SAB shall provide the school district with a reasonable opportunity to cure the violation.

4. Expresses legislative intent that a school employee who performs maintenance or repair functions related to restroom facilities as specified not be subject to discipline if the employee performs his or her responsibilities as required by his or her employer.

Comments

A National Problem . Maintaining safe, clean, operational and fully stocked school restrooms is a national problem. An Internet search for "school restrooms" wielded 116,000 responses including specific efforts to address these problems in Massachusetts, North Carolina, Florida and California.

Los Angeles Unified School District's Approach . On February 12, 2003, Los Angeles Unified School District announced a six-part $10 million initiative to ensure that middle and senior high school students have access to clean, functioning restrooms. The six parts include:

1. Open bathrooms - A posted map which sites and gives hours for each student restroom.

2. Clean bathrooms - Daily cleaning and restocking three times daily.

3. Regular Inspections and Monitoring - Hiring restroom attendants and additional custodians and establishing a

"Restroom Hotline".

4. Student Involvement - Encouraging student "pride of ownership" to help keep restrooms clean.

5. Parent Involvement - Involving parents to develop behavior standards to maintain clean, functioning bathrooms on campus.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee, unknown General Fund (Proposition 98) cost pressure likely in the millions, for public school districts to comply with the requirements of this measure. General Fund compliance costs to SAB of at least $150,000.

SUPPORT : (Verified 9/8/03)

California School Boards Association
California Teachers Association
County of Los Angeles Board of Supervisors

OPPOSITION : (Verified 9/8/03)

Los Angeles Unified School District

NC:nl 9/10/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

210 Cal.App.3d 1254, 258 Cal.Rptr. 783
(Cite as: 210 Cal.App.3d 1254)

E. W. BLISS COMPANY, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; MARCO MANUFACTURING, INC., Real Party in Interest
No. B039899.

Court of Appeal, Second District, Division 3, California.
May 25, 1989.

SUMMARY

A punch press manufacturer petitioned for a writ of mandate to compel the trial court to vacate its order sustaining without leave to amend a demurrer to its cross-complaint for comparative indemnity against the employer of an injured employee. The employee had sued both the manufacturer and employer for injuries resulting from the removal of an operation guard from a punch press. The Court of Appeal denied the petition, holding that the clear language of Lab. Code, § 4558, subd. (d) does not permit any right of action for indemnity against an employer by another defendant, and provides a right of contribution against the employer for its comparative share of liability only if the employee first secures a judgment against the employer and the employer fails to pay its pro rata share. (Opinion by Danielson, Acting P. J., with Arabian, J., concurring. Separate opinion by Croskey, J., concurring in the result.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Employer and Employee § 18--Injuries to Employees; Occupational Health and Safety--Actions--Codefendant's Cross-complaint Against Employer for Comparative Indemnity.
In light of the plain language of Lab. Code, § 4558, subd. (d), a codefendant in an action by an injured employee has no right of action for comparative indemnity against the employer, nor is there any right of action for contribution against the employer unless and until after the employee first secures a judgment against the employer and the employer fails to pay its comparative share of the judgment. Accordingly, in an employee's action against his employer and a punch press manufacturer for injuries sustained as a result of removal of the point-of-operation guard, the trial court properly sustained without leave to amend the employer's demurrer to the manufacturer's cross-complaint for comparative indemnity.
[See Cal.Jur.3d, Labor, § 65 et seq.; Am.Jur.2d, Master and Servant, § 397 et seq.]

(2) Statutes § 42--Construction--Aids--Dictionary.
A dictionary is a proper source to determine the usual and ordinary meaning of a word or phrase in a statute.

(3) Employer and Employee § 18--Injuries to Employees; Occupational Health and Safety--Actions--Employer's Liability to Codefendant--"Comparative Share" of Liability--Contribution and Indemnity.
The Legislature's use of the words "comparative share" instead of "pro rata" in defining an employer's share of a judgment in favor of an injured employee under Lab. Code, § 4558, subd. (d) (liability for removal of safety guard), is not ambiguous, and does not refer to indemnity or comparative fault. The term "comparative share" in referring to the employer's liability to another who is also sued by the injured employee is used simply to identify and compare the employer's share of the judgment with that of the codefendant seeking contribution. The Legislature did not create a right of action for indemnity under the statute.

(4) Statutes § 21--Construction--Legislative Intent.
When analyzing a statute, a court begins with the fundamental rule that it should ascertain the intent of the Legislature so as to effectuate the purpose of the law.

(5) Statutes § 30--Language--Literal Interpretation--Words With Clear Meaning.
In determining the Legislature's intent in a statute, the court turns first to the words themselves for the answer. It is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. Moreover, where the language is clear, there can be no room for interpretation.

210 Cal.App.3d 1254, 258 Cal.Rptr. 783
(Cite as: 210 Cal.App.3d 1254)

(6) Torts § 9--Persons Liable--Joint and Several Tortfeasors.
Concurrent tortfeasors are jointly and severally liable to a plaintiff for the total amount of damages, diminished only in proportion to the amount of negligence attributable to the person recovering.

COUNSEL

Chase, Rotchford, Drukker & Bogust, Lawrence O. De Coster and Joan E. Hewitt for Petitioner.

No appearance for Respondent.

Graves, Roberson & Bourassa and Stephen D. Roberson for Real Party in Interest.

DANIELSON, Acting P. J.

E. W. Bliss Co. (Bliss) seeks a writ of mandate to compel respondent court to vacate its order entered on December 9, 1988, sustaining without leave to amend a demurrer to its cause of action for comparative indemnity against cross-defendant Marco Manufacturing, Inc. (Marco). On March 1, 1989, this court issued an alternative writ of mandate directing respondent court either to vacate that order and to make a new and different order or to show cause why a peremptory writ of mandate should not issue ordering the court to do so.

We deny the petition and discharge the alternative writ.

Procedural and Factual Statement

In his first amended complaint Alejo Robles (plaintiff) sought damages arising from a personal injury he suffered when he was working with a punch press. Bliss, which allegedly designed, manufactured, distributed, sold, serviced, maintained, repaired and/or delivered the subject punch press, was a named defendant in the first, second, third, and fourth causes of action, respectively for negligence, strict products liability, breach of express warranty, and breach of implied warranty.

Marco, his employer, was named as the defendant in the fifth cause of action for negligence per se under Labor Code section [FN1] 4558. Specifically, plaintiff alleged that on May 21, 1986, he was injured while operating the power press to form materials from a die, because of the removal of the point-of-operation guard, which had been removed at Marco's specific instruction. Portions of his left hand had to be amputated as the result of his injuries. ***1257**

FN1 All further section references are to the Labor Code unless otherwise indicated.

Bliss answered by generally denying the complaint's material allegations and by asserting eight affirmative defenses. Along with its answer Bliss filed a cross-complaint against Marco for offset of workers' compensation benefits (the third cause of action), and for comparative indemnity based on violation of section 4558 (the fourth cause of action).

Marco demurred to the fourth cause of action, for comparative indemnity, on the ground that it failed to state a cause of action. The thrust of its argument was that the clear import of subdivision (d) of section 4558 mandated that there be a judgment in favor of the employee, plaintiff here, and the failure of the employer to pay its comparative share of the judgment, as conditions precedent to a claim for contribution or indemnity against Marco, the employer.

In its opposition Bliss took the contrary position. Bliss argued that the only reasonable interpretation of subdivision (d) was to allow a cause of action against the employer by way of a cross-complaint in the action by the employee; that this would avoid the problem of two trials; and that it could not have been the intent of the Legislature to do otherwise. The procedure posited by Bliss would be to allow the cause of action for comparative indemnity by way of cross-complaint and then have the court enter judgment according to special verdicts in which the jury would allocate comparative fault as between the defendants and the plaintiff.

Marco asserted in its reply that Bliss's interpretation totally ignored the plain language of subdivision (d) of section 4558.

On December 9, 1988, the court sustained Marco's demurrer to the fourth cause of action for comparative indemnity on the ground of failure to state a cause of action.

Issue Presented

(1a) The sole legal issue presented in this proceeding is whether subdivision (d) of section 4558 authorizes any cause of action for contribution or indemnity by any defendant against the employer and, if so, under what conditions.

Discussion

In resolving the above issue we must determine the meaning of subdivision (d) of section 4558.

In 1982 the Legislature enacted section 4558, and thereby created a cause of action in favor of an employee against his or her employer, for injury ***1258** proximately caused by the employer's knowing removal of or failure to install a point-of-operation guard on a power press. (Stats. 1982, ch. 922, § 12, pp. 3369-3370.)

(2, 3)(**See fn. 2.**) Subdivision (d) of section 4558 provides: "No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment." [FN2]

FN2 It has been asserted that the use of "comparative" instead of "pro rata" in reference to the employer's share of the judgment leads to an inference that the concept of indemnity is involved, and thus, renders subdivision (d) "patently ambiguous and confusing." The fallacy of this assertion is its premise that the term "comparative share" must be equated with the term "comparative fault," which is a term embraced by the concept of indemnity.

However, the sense of the statute, and its legislative history do not support that interpretation. Such a construction of the term "comparative share" is directly contrary to the Legislature's clear mandate that "[n]o right of action for ... indemnity by any defendant shall exist against the employer." (§ 4558, subd. (d).)

If the Legislature had intended to create a right of action for indemnity, it would have inserted the word "indemnity" along with the word "contribution" in the second provision of subdivision (d). For example, the Legislature could have drafted the statute to read "however, a defendant may seek contribution *or indemnity* against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment." (Italicized words could have been added.) That the Legislature did not do.

What, then, is the meaning of the term "comparative share" in subdivision (d)? A dictionary is a proper source to determine the usual and ordinary meaning of a word or phrase in a statute. (See, e.g. *People v. Katrinak* (1982) 136 Cal.App.3d 145, 156 [185 Cal.Rptr. 869].) The word "share," used as a noun, is defined as "a portion belonging to, due, or contributed by an individual." (Webster's New Collegiate Dict. (1979) pp. 1057-1058.) The adjective "comparative" is defined as "relating to" (*id.* at p. 226); and as: "[p]ertaining to, based on, or involving comparison." (The American Heritage Dict. (2d ed. 1982) p. 300.)

In the context of subdivision (d) the obvious use of the term "comparative share" is simply to identify and compare the employer's share of the judgment with the share of the defendant seeking contribution, i.e., the employer's share relative to defendant's share. Accordingly, we conclude that the Legislature's use of the word "comparative" instead of "pro rata" in defining the employer's share of the judgment is not ambiguous and does not raise the specter of indemnity.

(4) When we analyze a statute, "[w]e begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] (5) In determining such intent '[t]he court turns first to the words themselves for the answer.' [Citation.] We are required to give effect to statutes 'according to the usual, ordinary

import of the language employed in framing them.' [Citations.]" (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].)

Moreover, "'[W]here ... the language is clear, there can be no room for interpretation.' [Citation.]" (***1259***Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 607 [224 Cal.Rptr. 631, 715 P.2d 590]; accord, *Walker v. Superior Court* (1988) 47 Cal.3d 112, 121 [253 Cal.Rptr. 1, 763 P.2d 852].)

(1b) In the light of the plain, clear, and unambiguous language of subdivision (d) we conclude that there is no merit to Bliss's petition. This language establishes that the Legislature intended there to be no right of action for indemnity, *at all*, against the employer by any defendant; and that there is no right of contribution against the employer unless, and until after, the employee secures a judgment against the employer, and the employer fails to pay its comparative share of the judgment.

(6) Concurrent tortfeasors are jointly and severally liable to a plaintiff for the total amount of damages, diminished only "'in proportion to the amount of negligence attributable to the person recovering.'" (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 589-590, 591 [146 Cal.Rptr. 182, 578 P.2d 899].) (1c) "The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them." (Code Civ. Proc., § 876, subd. (a).)

"Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them. ..." (Code Civ. Proc., § 875, subd. (a).)

In pertinent part, section 878, Code of Civil Procedure, provides: "Judgment for contribution may be entered by one tortfeasor judgment debtor against other tortfeasor judgment debtors by motion upon notice."

For example, suppose a court enters a judgment in an action by the employee, based on a jury verdict that the employee's injuries are attributable 20 percent to the employee's negligence and 80 percent to the negligence of the employer and a codefendant. In such a case, pursuant to section 4558, subdivision (d), if the employer fails to pay his pro rata share of the judgment, i.e., 40 percent of plaintiff's damages, then the codefendant is entitled to seek contribution against the employer for recovery of that portion of the judgment which represented the employer's unpaid share under the noticed motion procedure set forth in section 878 of the Code of Civil Procedure.

Decision

The petition for a writ of mandate is denied. The alternative writ is discharged. ***1260**

Arabian, J., concurred.

CROSKEY, J.

I concur in the result reached by the majority opinion but reject my colleagues' embrace of the proposition that Labor Code section 4558, subdivision (d) is "plain, clear and unambiguous." It is not only patently ambiguous and confusing but it is also inexplicably inconsistent with other statutory language dealing with similar subject matter.

Bliss argues at some length that the reference in Labor Code section 4558, subdivision (d), to the employer's failure to discharge "his or her *comparative* share of the judgment" indicated a legislative intent to inject principles of comparative fault and partial indemnity. (Italics added.) I concur with the view of the majority that that argument must be rejected. However, that a dispute even arose must be laid at the door of legislative imprecision. [FN1] If the Legislature intended, as I believe it did, to permit only contribution and to bar indemnity claims entirely, why then the use of the term "comparative"? Why not simply use the same terminology of "prorata share" as set out in Code of Civil Procedure sections 875 and 876? [FN2]

FN1 The majority's justification of the legislative terminology (see maj. opn., *ante*, fn. 2) only seems to confirm this conclusion.

FN2 Code of Civil Procedure section 875 provides in pertinent part: "(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution

among them as hereinafter provided.

"(b) Such right of contribution shall be administered in accordance with the principles of equity.

"(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his *pro rata share* thereof. It shall be limited to the excess so paid over the *pro rata share* of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own *pro rata share* of the entire judgment.

"

. . . . .

"(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them." (Italics added.)

"

. . . . .

Code of Civil Procedure section 876, subdivision (a) provides: "(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them."

A review of the legislative history of Labor Code section 4558 unfortunately sheds no light whatever on what the Legislature may have had in mind when it incorporated the term "comparative share" in subdivision (d). The term comparative has primarily been used to refer to the relative liability of two or more tortfeasors whose degree of fault is compared in order to apportion responsibility for a judgment. For example, as the court ***1261** noted in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598 [146 Cal.Rptr. 182, 578 P.2d 899], "... the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a *comparative* fault basis. " (Italics added). This rule modified the previous office of indemnity which had been limited to accomplishing the transfer of the entire loss from one tortfeasor to another, who in justice and equity should bear it. On the other hand, "[c]ontribution distributes the loss equally among all tortfeasors, each bearing his pro rata share." (*Herrero v. Atkinson* (1964) 227 Cal.App.2d 69, 73 [38 Cal.Rptr. 490, 8 A.L.R.3d 629].)

This oxymoronic concept of comparative contribution [FN3] seems to be simply a case of poor draftsmanship. However, a further and far more significant example is demonstrated by the seemingly unnecessary conflict between Labor Code section 4558, subdivision (d) and the general contribution provisions set out in Code of Civil Procedure section 875, subdivision (c). Under the latter section the right of contribution may be enforced by a tortfeasor who has either discharged the judgment or paid more than his pro rata share.

FN3 A term also used in Code of Civil Procedure section 877.6, subdivision (c), but with no apparent meaning other than "pro rata."

Under Labor Code section 4558, subdivision (d), on the other hand, the exact opposite is true. A third party judgment tortfeasor may seek contribution from an employer who has not paid *his* comparative share without any requirement that the party who seeks such contribution have paid more than his share of the judgment (or any portion for that matter); and, what is even more puzzling, there is no provision in subdivision (d) allowing the employer to seek contribution if the third party does not pay *his* proper share. [FN4] In such event, is the employer permitted to fall back on Code of Civil Procedure section 875, subdivision (c)? If so, then why not provide for the same procedure in the Labor Code provision? If not, then what is the policy reason for denying to an employer the rights enjoyed by every other class of joint tortfeasor? If there is some significant or comprehensive legislative scheme hidden here which is furthered by such differences, it has escaped this Justice.

FN4 It seems clear from the text of subdivision (d) that the authority for "a defendant" to seek contribution does *not* include an em-

> ployer defendant since (1) the term "employer" is separately used and (2) the *only* precondition to the right to seek contribution is that the employer has not discharged "his or her comparative share."

Petitioner's application for review by the Supreme Court was denied August 16, 1989. ***1262**

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110 Cal.App.4th 508, 1 Cal.Rptr.3d 673, 178 Ed. Law Rep. 404, 03 Cal. Daily Op. Serv. 6157, 2003 Daily Journal D.A.R. 7709
(Cite as: 110 Cal.App.4th 508, 1 Cal.Rptr.3d 673)

Court of Appeal, Fifth District, California.
M. W., a Minor, etc., Plaintiff and Respondent,
v.
PANAMA BUENA VISTA UNION SCHOOL DISTRICT, Defendant and Appellant.
No. F037618.

July 11, 2003.
Certified for Partial Publication.[FN*]

FN* Parts II, III, and IV of the majority opinion are not certified for publication. (See Cal. Rules of Court, rules 976(b) and 976.1.)

Review Denied Oct. 1, 2003.

Background: Student sued school district, seeking damages for negligent failure to supervise and careless failure to guard, maintain, inspect and manage school premises, based upon sexual assault committed by another junior high school student. The Superior Court, Kern County, Super. Ct. No. 235872, James M. Stuart, J., entered judgment for student on jury verdict awarding $1,547,260 in economic damages and $850,000 in apportioned non-economic damages. School district appealed.

Holdings: The Court of Appeal, Wiseman, J., held that:
(1) risk of harm to student was foreseeable;
(2) school district was not required to have foreseen particular form of assault in order for duty of care to be imposed; and
(3) school district owed student duty of care to protect him from assault on campus, including sexual assault.

Affirmed.

Harris, J., concurred with separate opinion.

Levy, J., dissented with opinion.

West Headnotes

[1] Schools 345 ⚿89.2

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.2 k. Negligence in General. Most Cited Cases
Special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students; this affirmative duty arises, in part, based on the compulsory nature of education.

[2] Schools 345 ⚿89.11(1)

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.11 Supervision of Other Pupils
345k89.11(1) k. In General. Most Cited Cases
Purpose of the law requiring supervision of students on school property is to regulate students' conduct so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars. West's Ann.Cal.Educ.Code § 44807; 5 CCR § 5552.

[3] Schools 345 ⚿89.2

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.2 k. Negligence in General. Most Cited Cases
Student may recover for injuries proximately caused by a breach of a school district's duty to supervise. West's Ann.Cal.Educ.Code § 44807; 5 CCR § 5552.

[4] Schools 345 ⚿89.11(1)

345 Schools
345II Public Schools

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345II(F) District Liabilities
345k89.11 Supervision of Other Pupils
345k89.11(1) k. In General. Most Cited Cases
Risk of harm to special education student sexually assaulted by another student on junior high school property prior to beginning of classes was foreseeable, for purpose of assaulted student's negligent supervision action; district was aware that some students arrived on campus prior to commencement of scheduled supervision, students arriving on campus prior to commencement of supervision were not supervised, district schooled special education students and was aware that plaintiff student arrived on campus prior to commencement of supervision and was susceptible to abuse, and student who committed assault had been subject of complaints by minor and had been disciplined for numerous serious infractions. West's Ann.Cal.Educ.Code § 44807; 5 CCR § 5552.
See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 154; Cal. Jur. 3d, Negligence, § 145.

[5] **Schools 345 ⚿89.2**

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.2 k. Negligence in General. Most Cited Cases
Existence of a duty of care of a school district toward a student depends, in part, on whether the particular harm to the student is reasonably foreseeable.

[6] **Schools 345 ⚿89.2**

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.2 k. Negligence in General. Most Cited Cases

Schools 345 ⚿89.5(1)

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.5 Condition of Premises
345k89.5(1) k. In General. Most Cited Cases
For purposes of determining whether a duty of care exists on the part of a school district toward a student, students are not "at risk" merely because they are at school, and schools, including school restrooms, are not dangerous places per se.

[7] **Negligence 272 ⚿213**

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases
For purposes of determining whether duty of care exists, foreseeability of harm is determined in light of all the circumstances and does not require prior identical events or injuries.

[8] **Schools 345 ⚿89.2**

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.2 k. Negligence in General. Most Cited Cases
School district was not required to have foreseen particular form of assault perpetrated upon special education student at junior high school, namely, act of sodomy, in order for duty of care to be imposed upon district; there was no meaningful distinction between physical assault and sexual assault for purposes of foreseeability. West's Ann.Cal.Educ.Code § 44807; 5 CCR § 5552.

[9] **Schools 345 ⚿89.11(1)**

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.11 Supervision of Other Pupils
345k89.11(1) k. In General. Most Cited Cases
School district owed special education student duty of care to protect him from assault on junior high school campus, including sexual assault perpetrated by another student; harm to special education students was foreseeable, school district had statutory duty to take all reasonable steps to protect students, burden on school districts to ensure adequate supervision for students permitted on their campuses prior to start of school was relatively minimal, and policy concern of providing children with safe learning environments was paramount. West's

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Ann.Cal.Educ.Code § 44807; 5 CCR § 5552.

[10] **Schools 345 ⚿89.11(1)**

345 Schools
345II Public Schools
345II(F) District Liabilities
345k89.11 Supervision of Other Pupils
345k89.11(1) k. In General. Most Cited Cases
Rule that imposition of duty of care to protect against sexual misconduct was contingent upon showing that particular harm was foreseeable did not apply to determination of whether school district owed duty of care to special education student sexually assaulted by another student. West's Ann.Cal.Educ.Code § 44807; 5 CCR § 5552.

****674 *511** Sylvester & Oppenheim, Richard D. Oppenheim, Jr., Sherman Oaks, Danalynn Pritz; Lewis, D'Amato, Brisbois & Bisgaard, R. Gaylord Smith, Jeffry A. Miller, San Diego; Robinson, Palmer & Logan and Gary Logan, Bakersfield, for Defendant and Appellant.

Law Offices of Ralph B. Wegis and Ralph B. Wegis, Bakersfield, for Plaintiff and Respondent.

OPINION

WISEMAN, J.

We are called to address the accountability of school districts for actions that occur on their campuses when school grounds are open to students during non-instructional times. In this case, an eighth grade special education student filed suit against a school district after he was sodomized by another student in the school bathroom prior to the beginning of class. ****675** The school district provided only general supervision at the time, under which no adult was specifically responsible for supervision of the students on campus. A jury returned a verdict against the school district in excess of $2 million.

The school district appeals, arguing that it owed no duty of care to the student to prevent the sexual assault. We disagree. The assault occurred on the school's watch, while the student was entrusted to the school's care. It was substantially caused by the school's indifference toward the dangers posed by failing to adequately supervise its students, particularly special education students. In the published portion of this opinion, we find the school district owed the student a duty of care to protect him from this foreseeable assault.

In the unpublished portion of this opinion, we determine the district was not immune from liability and sufficient evidence supports the jury's findings of liability and damages. We affirm the judgment.

PROCEDURAL AND FACTUAL HISTORIES

Earl Warren Junior High School is a 20-acre campus in defendant and appellant Panama Buena Vista Union School District (District) in Bakersfield, California, with seventh and eighth grade students. During the 1996-1997 school year, the gates to the school were unlocked at approximately 7:00 a.m. when custodial and cafeteria staff arrived. Custodial staff unlocked the bathrooms sometime between 7:00 a.m. and 7:45 a.m. The school principal typically arrived at 7:15 a.m. and the vice-principal between 7:20 a.m. and ***512** 7:30 a.m. Office staff arrived between 7:00 a.m. and 7:30 a.m. The teachers were required to be on duty to supervise at 7:45 a.m., and they arrived at varying times before the start of their shifts. School started at 8:15 a.m. Prior to 8:15 a.m., student access to the campus was unrestricted.

During the 1996-1997 school year, there were 560 students enrolled at the school. The majority of the students arrived on campus between 7:45 a.m. and 8:05 a.m. According to the principal, at 7:15 a.m., there were no more than five or 10 students on campus and sometimes no students at all. The school offered zero-period physical education at 7:30 a.m. for approximately 90 students. Those students typically arrived between 7:15 a.m. and 7:30 a.m. The principal testified that the early morning hours were historically calm and quiet. Prior to May 21, 1997, there were no reported problems in the morning before the start of school.

Each of the four junior high schools in the District had organized, directed supervision 30 minutes before the start of school. Prior to that time, each of the schools employed a different type of supervision. The decision regarding the type of supervision was left to the discretion of each school's principal. Two of the

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junior high schools required students who arrived early to congregate in a common area supervised by an adult.

At Earl Warren, the school had a policy of providing "general" supervision prior to 7:45 a.m., where every adult on campus was charged with the broad responsibility of supervising the students. On this critical point, the principal was impeached with his prior testimony. In his deposition, he testified that between 7:00 a.m. and 7:45 a.m. no one had the responsibility for supervision of the students. He later changed his answer to add "as relates to scheduled teacher supervision only." In any event, no adult had the responsibility to supervise students in a specific area. No one maintained visual contact over the students who arrived early, and there was **676 no one supervising the bathrooms and handball courts, identified as "trouble spots" due to lack of visibility.

By contrast, "direct" or "scheduled" supervision began at 7:45 a.m., under which an assigned person supervised each area of the campus. The campus was divided into zones that specific individuals were responsible for supervising. The parents were never informed that there was no specific plan for supervision of the students prior to 7:45 a.m. Nor were they ever asked not to bring their children to school prior to 7:45 a.m.

In May 1997, plaintiff and respondent M.W. (the minor), 15 years old at the time, was enrolled in eighth grade at Earl Warren in a special education class. He had a third-grade mentality, and the school categorized him as *513 mentally retarded, a designation that carried special concerns with regard to his safety and well-being. The minor had unique vulnerabilities and was susceptible to being "tricked" and emotionally abused. The principal testified that sexual abuse of special education students was also a concern. The minor attracted attention because he frequently stood by himself. He struggled socially among his peers and complained to school personnel about being teased.

The minor's mother, a teacher with the District, routinely dropped the minor off at school between 7:15 a.m. and 7:20 a.m. on her way to work. The minor's mother testified that there were numerous parents transporting their children for the zero-period class and a lot of students walking about the campus. She dropped her son off in front of the school office. Between March and May 1997, the minor was sometimes reluctant to get out of the car. The minor's mother did not request school personnel to watch out for her son in the morning or to restrict his access to the campus. She never received any notice from the school requesting that she not bring her son early or advising that there was no supervision prior to 7:45 a.m. The minor's mother believed her son was supervised prior to the start of school.

The minor generally stayed near the school office and would often go inside and talk to the staff. Most of the other students who arrived early stayed inside an amphitheater area near the office. Sometimes the minor played at the basketball court by the gym. The minor was self-sufficient, well-behaved, and could use the restroom without adult assistance. Both the principal and vice-principal were aware that the minor was dropped off at school at 7:15 a.m.

Chris J. was a special education student at Earl Warren with the minor. He turned 14 years old in May 1997. Chris had educational difficulties and was in a resource specialist program. Chris had demonstrated misconduct with multiple individuals, including students, teachers and adults, and was frequently disciplined at school.

During his seventh and eighth grade years at Earl Warren, Chris received over 30 instances of discipline. His discipline record included 14 acts of defiance of authority; nine bus tickets for violating bus rules, culminating in suspension from the bus for the remainder of the school year; and six gum-chewing incidents. Chris was disciplined for disrupting class, damaging school property, displaying an inappropriate attitude, throwing food at the principal, and calling the yard supervisor a "bitch." Chris's misconduct was not limited to adults. He was also disciplined for spitting food at a student; kicking a male student in the groin; fighting (horseplay) with a student at the bus stop; "flipping off" a student; and punching and teasing the minor. As a *514 result of his conduct, Chris received numerous suspensions from **677 school. The vice principal testified that Chris's response to the discipline was improving in his eighth grade year. Nonetheless, some of the more serious incidents-kicking a male student in the groin, calling

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the yard supervisor a "bitch," throwing food at the principal, and continuing acts of defiance-occurred in Chris's eighth grade year.

In November 1996, Chris's bus privileges were suspended in his eighth grade year. Afterward, Chris' father dropped him off at 6:20 a.m. or 6:30 a.m. before the school gates opened. School personnel did not have a specific recollection of seeing Chris on campus in the early morning hours. However, the principal testified that if Chris were dropped off at the school that early, he would have expected school personnel to have noticed him.

Chris and other students emotionally tormented the minor on a daily basis by teasing and ridiculing him before school started. They called the minor "stupid" and "retarded" in an effort to take advantage of him. According to Chris, the students did so because they were bored and "like[d] to get kicks out of other people's weaknesses." The minor sometimes retreated to the principal's office to escape the teasing. He complained several times to the vice-principal and his teachers about the teasing, but was only told to stay away from Chris. According to the minor, on one occasion in the seventh grade, Chris was sent to the principal's office after the minor complained, but Chris did not get in much trouble. The minor testified that, while in the eighth grade, he complained to the vice principal three separate times about Chris, but was always given the same response-to stay away from Chris-even after explaining that staying away did not work.

On May 21, 1997, just days before the end of the school year, Chris was "uptight" and "felt like he wanted to have sex that morning." Chris had been thinking about sex all morning when he witnessed the minor being dropped off at school by his mother. Chris remembered being able to lure the minor into an unlocked and unsupervised classroom in March 1997, where he grabbed the minor by the arms and rubbed his penis against the minor's penis. The minor did not tell anyone about that incident, which lasted about 10 minutes, because he was scared.

At approximately 7:15 a.m., with no adults in sight, Chris tricked the minor into entering the boy's restroom and then sodomized him. The two were in the restroom approximately 10 minutes. Chris threatened the minor by saying that if he told anyone, he (Chris) would kill him by punching his nose bone into his brain. Chris stated that he picked the minor "because he believed [the minor's] mental capacity to be that of a third or fourth grader and did not believe [the minor] could remember the things he had done to him, and *515 therefore, he would not tell anybody, anyone, and also, the threats he made towards [the minor] due to his mentality would scare him enough that he would not ever tell anyone."

Later that day, the minor told his mother about the assault in the bathroom, and she notified the District and the police. The following day, the minor spoke to the vice-principal about the assault. During the investigation, the District and the minor's mother first found out about the March 1997 incident in the classroom. Chris was arrested and subsequently expelled from school.

The minor became quiet and withdrawn. He constantly feared that Chris was going to kill him and obsessed about his own safety. He took excessively long baths, picked at his body and wiped his bottom until it bled. His seizures increased, and **678 he reported hearing voices. The minor was diagnosed with major depression recurrent with psychotic features. He was also diagnosed with post-traumatic stress disorder. The minor was twice hospitalized, including following a suicide attempt after students locked him in a "porta potty" in April 1999.

On March 11, 1998, the minor filed a complaint for personal injuries and damages against the District, Chris and Chris's parents. The minor's amended complaint alleged one cause of action against the District for negligent failure to supervise and careless failure to guard, maintain, inspect and manage the school premises. The District moved for summary judgment, alleging it did not owe a duty of care to supervise the minor or Chris more closely than it did, since it was unaware that the minor was at risk of a physical or sexual assault by Chris. The District also maintained that the alleged failure to adequately supervise did not render the school restroom a dangerous condition of public property. The trial court denied the motion, finding that the District failed to prove it had a complete defense or that its duty could not be established by the minor.

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In August 1999, the case resulted in a mistrial.[FN1] In January 2000, the minor was admitted to an independent living school and residential facility where he showed improvement. In July 2000, the District filed a renewed motion for summary judgment based on new decisional law and testimony from the first trial. The District argued that it owed no duty to the minor to protect him from an unforeseeable sexual assault and that any alleged lack of supervision was not a cause of plaintiff's injuries. The court denied the motion, finding a triable issue of fact regarding whether it was foreseeable that the minor's mental capacity exposed him to harm from third persons and whether the ***516** District provided the kind of supervision that a reasonably prudent person would afford under the circumstances. The court found the causation issue to be a different one than was brought in the first motion and therefore not a proper subject of a renewed motion.

> FN1. There are no court minutes or other documents in our record relating to the mistrial. However, the mistrial is referenced in the District's renewed motion for summary judgment.

Following a 15-day trial in November and December 2000, the jury returned a verdict in favor of the minor in the amount of $2,547,260, which represented $1,547,260 for economic damages and $1,000,000 for non-economic damages. The jury attributed 85 percent of the fault to the District and 15 percent of the fault to Chris. Judgment was entered against the District in the amount of $2,165,171 (85 percent of $2,547,260). The court granted the minor's motion for a corrective nunc pro tunc order, and the judgment against the District was amended to $2,397,260 ($1,547,260 plus 85 percent of $1,000,000). The court denied the District's motions for a new trial and judgment notwithstanding the verdict.

DISCUSSION

The District claims reversible error based on a number of independent grounds: 1) it owed the minor no duty of care to prevent the sexual assault; 2) even assuming it owed and breached its duty of care to the minor, the breach was not the actual cause of the minor's injuries; 3) it is immune from liability; and 4) there is insufficient evidence to support the jury's apportionment of fault and the minor's claim for future damages.

****679** *I. Duty of care*

The District maintains it owed the minor no duty to protect him from the sexual assault, since it had no prior actual knowledge of Chris's propensity to commit the assault. The existence of a duty of care is a question of law decided on a case-by-case basis. (*Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1458, 249 Cal.Rptr. 688; *Bartell v. Palos Verdes Peninsula Sch. Dist.* (1978) 83 Cal.App.3d 492, 498, 147 Cal.Rptr. 898.) " 'While it is the province of the jury, as trier of fact, to determine whether an unreasonable risk of harm was foreseeable under the particular facts of a given case, the ... court must still decide as a matter of law whether there was a duty in the first place, even if that determination includes a consideration of foreseeability. [Citations.]' [Citation.]" (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1078, 107 Cal.Rptr.2d 801; see also *Wiener v. Southcoast Childcare Centers, Inc.* (2003) 107 Cal.App.4th 1429, 1436, 132 Cal.Rptr.2d 883[FN*] [issue of foreseeability, when analyzed to determine existence or scope of duty, is question of law].) Moreover, in light of the jury's verdict in this case, "[i]n reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate ***517** and reasonable inferences indulged in to uphold the verdict if possible." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429, 45 P.2d 183.) Thus, to the extent there are any factual conflicts underlying the legal question of duty, those factual conflicts must be resolved in favor of the minor.

> FN* Reporter's Note: Review granted July 30, 2003, S116358.

" 'As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct: Such a duty may arise, however, if "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." [Citations.]' [Citations.]" (*Leger v. Stockton Unified School Dist., supra,* 202 Cal.App.3d at

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p. 1458, 249 Cal.Rptr. 688.)

[1] A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. This affirmative duty arises, in part, based on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 714-715, 230 Cal.Rptr. 823; see also Cal. Const., art. I, § 28, subd. (c) [students have inalienable right to attend safe, secure and peaceful campuses]; Ed.Code, § 48200 [children between ages 6 and 18 years subject to compulsory full-time education].) "[T]he right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." (*In re William G.* (1985) 40 Cal.3d 550, 563, 221 Cal.Rptr. 118, 709 P.2d 1287.)

The principles pertaining to a school district's duty to supervise students are well established. "It is the duty of the school authorities to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. [Citations.] The school district is liable for injuries which result from a failure of its officers and employees to use ordinary care in this respect." (*Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 600, 110 P.2d 1044; see also **680*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747, 87 Cal.Rptr. 376, 470 P.2d 360; Ed.Code, § 44807; Cal.Code Regs., tit. 5, § 5552 [where playground supervision is not otherwise provided, principal of school must provide for supervision by certificated employees of pupils on the school grounds during recess and other intermissions and before and after school].)

[2] The purpose of the law requiring supervision of students on school property is to regulate students' conduct "so as to prevent disorderly and **518** dangerous practices which are likely to result in physical injury to immature scholars ...." (*Forgnone v. Salvadore U.E. School Dist.* (1940) 41 Cal.App.2d 423, 426, 106 P.2d 932.) As noted by the California Supreme Court, "[s]uch regulation is necessary precisely because of the commonly known tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm." (*Dailey v. Los Angeles Unified Sch. Dist., supra,* 2 Cal.3d at p. 748, 87 Cal.Rptr. 376, 470 P.2d 360.)

The California Supreme Court explained the standard of care imposed upon a school district in supervising its students as follows: "The standard of care imposed upon school personnel in carrying out [the] duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circum[s]tances.' [Citations.] Either a total lack of supervision [citation] or ineffective supervision [citation] may constitute a lack of ordinary care on the part of those responsible for student supervision." (*Dailey v. Los Angeles Unified Sch. Dist., supra,* 2 Cal.3d at p. 747, 87 Cal.Rptr. 376, 470 P.2d 360; see also *Leger v. Stockton Unified School Dist., supra,* 202 Cal.App.3d at p. 1459, 249 Cal.Rptr. 688.)

[3] California courts have long recognized that a student may recover for injuries proximately caused by a breach of this duty to supervise. (See, e.g., *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 523, 150 Cal.Rptr. 1, 585 P.2d 851 [student stated claim against school district based on failure to exercise due care in supervision on school premises]; *Dailey v. Los Angeles Unified Sch. Dist., supra,* 2 Cal.3d at pp. 747-751, 87 Cal.Rptr. 376, 470 P.2d 360 [sufficient evidence to support verdict against school district for negligent supervision even where another student's misconduct was immediate, precipitating cause of injury]; *Lucas v. Fresno Unified School Dist.* (1993) 14 Cal.App.4th 866, 871-873, 18 Cal.Rptr.2d 79 [school district had legal duty to supervise students to prevent them from throwing dirt clods at each other during recess]; *Charonnat v. S.F. Unified Sch. Dist.* (1943) 56 Cal.App.2d 840, 845-846, 133 P.2d 643 [school district liable for negligence or willful misconduct of pupil resulting in injuries to another pupil while both were playing during recess hour]; *Forgnone v. Salvadore U.E. School Dist., supra,* 41 Cal.App.2d at p. 426, 106 P.2d 932 [wrongful absence of supervisor may constitute negligence creating liability on part of school district for student's injuries].)

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[4][5][6][7] In this case, we decide whether the District owed a duty to protect the minor from a sexual assault by Chris. The existence of a duty of care of a school district toward a student depends, in part, on whether the particular harm to the student is reasonably foreseeable. ***519**(*Leger v. Stockton Unified School Dist., supra,* 202 Cal.App.3d at p. 1459, 249 Cal.Rptr. 688.) Students are not at risk merely because they are at school, and schools, ****681** including school restrooms, are not dangerous places per se. (*Ibid.*) Foreseeability is determined in light of all the circumstances and does not require prior identical events or injuries. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 502-503, 229 Cal.Rptr. 456, 723 P.2d 573; *Ziegler v. Santa Cruz City High Sch. Dist.* (1959) 168 Cal.App.2d 277, 284, 335 P.2d 709.) "It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities.... Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of [adequate] safeguards." (*Taylor v. Oakland Scavenger Co., supra,* 17 Cal.2d at p. 600, 110 P.2d 1044; see also *Leger v. Stockton Unified School Dist., supra,* 202 Cal.App.3d at p. 1460, 249 Cal.Rptr. 688 [harm reasonably foreseeable from threats of violence known by school authorities even where violence had yet to occur].) Further, "the issue of 'foreseeability' does not depend upon the foreseeability of a particular third party's act, but instead focuses on whether the allegedly negligent conduct at issue created a foreseeable risk of a *particular kind of harm.*" (*Wiener v. Southcoast Childcare Centers, Inc., supra,* 107 Cal.App.4th at p. 1436, 132 Cal.Rptr.2d 883.)[FN**]

FN** Reporter's Note: Review granted July 30, 2003, S116358.

> "The term 'duty' is a conclusory statement which reflects the sum total of policy considerations which leads the law to say a particular plaintiff is entitled to protection against a specific harm. [Citations.] Even though a harm may be foreseeable, ... a concomitant duty to forestall and prevent the harm does not automatically follow. [Citations.] Rather, the question is whether the risk of harm is sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence, a threshold issue of law which requires the court to consider such additional factors as the burdensomeness of the duty on defendant, the closeness of the relationship between defendant's conduct and plaintiff's injury, the moral blame attached to defendant's conduct and plaintiff's injury, and the prevention of future harm." (*Bartell v. Palos Verdes Peninsula Sch. Dist., supra,* 83 Cal.App.3d at pp. 499-500, 147 Cal.Rptr. 898; see also *Wiener v. Southcoast Childcare Centers, Inc., supra,* 107 Cal.App.4th at p. 1436, 132 Cal.Rptr.2d 883.)**

In this case, Earl Warren's gates were unlocked at approximately 7:00 a.m., 45 minutes before scheduled supervision. After 7:00 a.m., student access to the campus was unrestricted until the start of school at 8:15 a.m. The District was admittedly aware that students were on campus between 7:00 a.m. and 7:45 a.m. However, no adult was charged with the specific responsibility of supervising these students in areas on the campus. In short, no one watched these students or the "trouble spots," such as the school bathrooms, during this period. The District in no way advised parents not to bring their children prior to 7:45 a.m. Nor did the District inform the parents of the lack of direct ***520** supervision in the early morning hours. In fact, the minor's mother believed her son was supervised prior to the start of school.

The District schooled special education students and was aware that at least one, the minor, arrived on campus at 7:15 a.m. The District acknowledged that, as a special education and mentally retarded student, the minor had unique vulnerabilities and was susceptible to abuse. The principal of Earl Warren, himself, testified that the sexual abuse of special education students was a concern. The minor complained several times about Chris, who ****682** received over 30 instances of discipline during his two years at Earl Warren. This discipline resulted from grave acts of defiance and inappropriate and violent behavior that included kicking a male student in the groin; throwing food at the principal; calling the yard supervisor a "bitch"; damaging school property; "flipping off" a student; and punching and teasing the minor. Chris received several suspensions from school. This was clearly a troubled child and the District knew it. In addition, even though school personnel did not have a specific recollection of seeing Chris on campus prior to 7:45 a.m., the District was aware that Chris's bus

privileges had been suspended, and the principal expected employees to have noticed Chris, particularly given the low number of students on campus in the early morning.

In short, we find it reasonably foreseeable that, given the lack of direct supervision in the early morning hours, a special education student, such as the minor, was at risk for a sexual or other physical assault. The District's superintendent acknowledged that supervision has a special meaning to educators on the issue of safety and entails observing the person being supervised. This simply did not occur at Earl Warren prior to 7:45 a.m. Given the unique vulnerabilities of special education students, the District knew or reasonably should have known that the minor was subject to the risk of an assault, including a sexual assault, from Chris.

[8] It is not necessary for the District to have foreseen that an act of sodomy could have occurred. We find no distinction between a physical assault and a sexual assault for purposes of foreseeability in this case. (See *Wiener v. Southcoast Childcare Centers, Inc., supra,* 107 Cal.App.4th at pp. 1436-1437, 132 Cal.Rptr.2d 883[FN***] [defendants' alleged negligent conduct in failing to erect sufficient barrier between childhood learning center playground and adjacent street sufficiently likely to result in kind of harm experienced-children being struck by automobile driven on playground-that liability appropriately imposed regardless of whether criminal act of driver was foreseeable]; see also *Claxton v. Atlantic Richfield Co.* (2003) 108 Cal.App.4th 327, 330, 338-339, 133 Cal.Rptr.2d 425 [prior incidents of criminal assaults at gas station that were not racially motivated were sufficiently similar to hate crime to give rise to duty to prevent attack]; cf. ***521***Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1369-1370, 132 Cal.Rptr.2d 748 [no duty of care owed to student injured in fight at school where assailant had threatened to hit another student the day prior, since no foreseeable danger to readily identifiable potential victim].) The fact that a particular act of sodomy in a school bathroom may have been unforeseeable does not automatically exonerate the District from the consequences of allowing students, particularly special education students, unrestricted access to the campus prior to the start of school with wholly inadequate supervision. Such conduct created a foreseeable risk of a particular type of harm-an assault on a special education student. Not only was such an assault reasonably foreseeable, it was virtually inevitable under the circumstances present on this campus.

> FN*** Reporter's Note: Review granted July 30, 2003, S116358.

When a school district instructs special education children, it takes on the unique responsibilities associated with this instruction and the special needs of these children. Further, the burden on school districts to provide adequate supervision for such students prior to the start of school is minimal. In fact, a school district could satisfy its responsibility merely by precluding students from coming on campus in the early morning hours. Moreover,**683 there is no additional financial burden placed on school districts to prevent a sexual assault as compared to any other assault. The District's own practice proves our point. Within the District, two other junior high schools required students who arrived early to congregate in a common area supervised by an adult. Unlike here, students were not allowed to roam the campus without any supervision. We are not imposing an unusual or onerous duty upon the District to provide supervision prior to 7:45 a.m. Instead, we are only requiring supervision that other schools within the District have already seen fit to provide on their campuses. This is especially important, given the District's knowledge of the unique factual circumstances in this case.

[9] Given the foreseeability of harm to special education students, the well-settled statutory duty of school districts to take all reasonable steps to protect them, the relatively minimal burden on school districts to ensure adequate supervision for any students they permit on their campuses prior to the start of school, and the paramount policy concern of providing our children with safe learning environments, we find the District owed the minor a duty of care to protect him from an assault on campus. (See *Thompson v. Sacramento City Unified School Dist., supra,* 107 Cal.App.4th at pp. 1364-1365, 132 Cal.Rptr.2d 748 [articulating factors considered in determining whether duty was owed].)

The District relies on *Romero v. Superior Court, supra,* 89 Cal.App.4th 1068, 107 Cal.Rptr.2d 801 and *Chaney v. Superior Court* (1995) 39 Cal.App.4th

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152, 46 Cal.Rptr.2d 73 in maintaining it owed the minor no duty to protect him *522 from a sexual assault by Chris because it had no actual knowledge of Chris's propensity to commit a sexual assault. In *Chaney*, a 23-year-old woman alleged that a close personal family friend sexually assaulted her while she was in his home over many years, beginning when she was 10 years old. The woman filed suit against her alleged assailant and joined the assailant's wife on the theory that she caused the woman to suffer damages by negligently supervising her while she was in the home. (*Id.* at pp. 154-155, 46 Cal.Rptr.2d 73.) In addressing the extent of a wife's duty to her minor invitees to prevent sexual assaults perpetrated by her husband, the court held: "[P]ublic policy requires that where a child is sexually assaulted in the defendant wife's home by her husband, the wife's duty of reasonable care to the injured child depends on whether her husband's behavior was reasonably foreseeable. Without knowledge of her husband's deviant propensities, a wife will not be able to foresee that he poses a danger and thus will not have a duty to take measures to prevent the assault." (*Id.* at p. 157, 46 Cal.Rptr.2d 73.)

The *Chaney* rule was applied in *Romero*, where a 16-year-old boy assaulted a 13-year-old girl while the two were visiting a friend's home. The girl's mother had indicated her desire to the friend's parents that they supervise the teenagers, and the assault occurred when the parents left home for an hour. (*Romero v. Superior Court, supra*, 89 Cal.App.4th at pp. 1073-1075, 107 Cal.Rptr.2d 801.)

"Prior to the incident, [the 16-year-old boy] had a long history of school misconduct, including sexual harassment of female students, fighting, and other misbehavior that resulted in numerous detentions and suspensions. He had been arrested and charged with vandalism and violating curfew. [One of the friend's parents] was aware of [the boy's] curfew violations, but there [was] no evidence the [parents] knew about the arrests and [the boy's] misconduct **684 in school." (*Romero v. Superior Court, supra*, 89 Cal.App.4th at p. 1074, 107 Cal.Rptr.2d 801.)

The parents thus had no knowledge of the boy's propensity "to inflict violence on female minors," and they did not know about the existence of his school disciplinary record. (*Romero v. Superior Court, supra*, 89 Cal.App.4th at p. 1087, 107 Cal.Rptr.2d 801.) The girl and her mother sued the parents for negligent supervision and emotional distress. The trial court granted summary judgment as to the emotional distress claim, but found the parents owed a duty of care to the girl and allowed the negligent supervision claim to proceed. (*Id.* at pp. 1075-1076, 107 Cal.Rptr.2d 801.)

In holding that summary judgment should have been granted on the negligent supervision claim, the appellate court reasoned:

*523 "We believe ... that sound public policy requires that where one invitee minor sexually assaults another in the defendant's home, the question of whether the defendant owed a duty of reasonable care to the injured minor depends on whether the assailant minor's conduct was *reasonably foreseeable*, but that conduct will be deemed to have been reasonably foreseeable only if the defendant had *actual knowledge* of the assaultive propensities of the teenage assailant. [¶] ... [¶]

"We adopt and apply the *Chaney* duty rule and hold as a matter of law that an adult defendant who assumed a special relationship with a minor by inviting the minor into his or her home will be deemed to have owed a duty of care to take reasonable measures to protect the minor against an assault by another minor invitee while in the defendant's home when the evidence and surrounding circumstances establish that the defendant had *actual knowledge* of, and thus *must have known*, the offending minor's assaultive propensities. Under the California 'no duty to aid' rule ..., no liability may be imposed on such a defendant for negligent supervision of an injured minor invitee under a nonfeasance theory of liability solely upon evidence that the defendant had *constructive* knowledge or notice of, and thus 'should have known' about, the minor assailant's assaultive propensities.

"Were we to hold otherwise, parents who invite into their homes teenage minors they do not know intimately would face lawsuits and potentially devastating financial liability in tort in the event one invitee minor assaults another under circumstances in which the assaultive propensities of the offend-

> ing teenager were not known to them. Parents possessing any information suggesting that a teenager that they or their own children may wish to invite into the home may have been involved in physical conduct that resulted, for example, in disciplinary action at school would be required to conduct an investigation in order to protect themselves against potential liability. They would be hampered in their investigative efforts by legitimate and well-established rules of confidentiality regarding juvenile matters." (*Romero v. Superior Court, supra,* 89 Cal.App.4th at pp. 1081, 1083, 107 Cal.Rptr.2d 801.)

The court concluded that, in spite of the special relationship between the parents and the teenage invitees, the parents did not owe a duty of care to supervise the victim at all times during her visit, to warn her, or to protect her against the sexual assault. This was because there was no evidence the parents had prior actual knowledge of the assailant's propensity to sexually assault female minors. (*Romero v. Superior Court, supra,* 89 Cal.App.4th at p. 1080, 107 Cal.Rptr.2d 801.) While ****685** the parents knew the 16-year-old boy before the incident, they never considered him dangerous and thought him polite, helpful and likeable. The parents knew nothing adverse about him other than that he might have had a curfew violation. (*Id.* at p. 1088, 107 Cal.Rptr.2d 801.)

> ***524** "The circumstantial evidence on which plaintiffs relied included (among other things) [the boy's] school records showing he had a long history of misconduct, including sexual harassment of female students, fighting and other misbehavior that resulted in numerous detentions and suspensions; as well as evidence that [the boy] had been arrested and charged with vandalism. *There is no evidence in the record to show that the [parents] knew about this misconduct.* We conclude the evidence presented by [the girl] was insufficient as a matter of law to show that the [parents] owed her a duty to supervise and protect her from a sexual assault by [the boy] during the short period of time the [parents] were away from home .... [The girl] cites no authority, and we are aware of none, that requires adults to assume that a male teenage invitee will sexually assault a female teenage invitee simply because the adults are away from the house for an hour." (*Romero v. Superior Court, supra,* 89 Cal.App.4th at p. 1088, 107 Cal.Rptr.2d 801, italics added.)

Relying on *Chaney,* the *Romero* court noted that the plaintiffs must allege facts showing that sexual misconduct was foreseeable. (*Romero v. Superior Court, supra,* 89 Cal.App.4th at p. 1089, 107 Cal.Rptr.2d 801.)

> "To impose on an adult a duty to supervise and protect a female teenage invitee against sexual misconduct by a male teenage invitee, it is not enough to assert that [it][is] *conceivable* the latter might engage in sexual misconduct during a brief absence of adult supervision. As we have already held, the imposition of such a duty of care requires evidence of facts from which a trier of fact could reasonably find that the defendant adult had prior actual knowledge of the teenage assailant's propensity to sexually molest other minors. [¶] Here, the record is devoid of any such evidence. [The girl] presented no evidence, direct or circumstantial, from which the trier of fact could reasonably conclude that the [parents] must have known of [the boy's] history of misconduct at school, his arrests, or his propensity to sexually assault a female minor." (*Romero v. Superior Court, supra,* 89 Cal.App.4th at p. 1089, 107 Cal.Rptr.2d 801, fn. omitted.)

[10] The District implores us to extend the *Romero/Chaney* rule to this case. We find no authority to support the District's position and decline to adopt it. The public policy reasons surrounding the *Romero/Chaney* rule do not exist in the context of a school district's supervisory responsibilities. Simply put, the school grounds provide a different setting than an adult's home. And there are differing public policy concerns related to the responsibilities of school districts that provide mandatory education as compared to adults who invite children into their home on a voluntary basis.

School districts are subject to well-established statutory duties mandating adequate supervision for the protection of the students. These affirmative duties arise from the compulsory nature of school attendance, the ***525** expectation and reliance of parents and students on schools for safe buildings and grounds, and the importance to society of the learning activity that takes place in schools. (See *Rodriguez v. Inglewood Unified School Dist., supra,* 186

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Cal.App.3d at p. 714, 230 Cal.Rptr. 823.) ****686** These duties are not charged to private homeowners who invite minors into their homes. We therefore conclude that the District owed the minor a duty of care to protect him from the sexual assault.

II.-IV.[FN**]

FN** See footnote *, *ante*.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.
HARRIS, J.
I concur fully in Justice Wiseman's opinion.

I write separately to make further comments as to the existence of the school district's duty toward the minor victim in this case. First, I note that *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 25 Cal.Rptr.2d 137, 863 P.2d 207 and *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 91 Cal.Rptr.2d 35, 989 P.2d 121 address premises liability and are inapplicable to the instant case given the special relationship that exists between a school district and its students.

Second, in my view, even if *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 107 Cal.Rptr.2d 801 was extended to this type of situation, the school district herein would still have a duty toward the minor victim given its actual knowledge of the pertinent factual circumstances in this case. *Romero* held the parents therein had no legal duty to the victim because they had no actual knowledge of the minor's assaultive tendencies or even his school disciplinary record, which included "a long history of misconduct, including sexual harassment of female students, fighting and other misbehavior that resulted in numerous detentions and suspensions; as well as evidence that [the minor] had been arrested and charged with vandalism." (*Id.* at p. 1088, 107 Cal.Rptr.2d 801.) In contrast to *Romero*, however, the school district was well aware of Chris's disciplinary record and his assaultive propensities, his prior interactions with the victim, the victim's repeated complaints about him, and their presence together on campus in the absence of supervision, and it could be held liable for failing to provide that supervision.

***526** Dissenting Opinion of LEVY, J.
The victim in this case suffered grievous harm. Moreover, Chris, the 14-year-old perpetrator, unquestionably had serious behavior problems. However, I cannot agree that it was *reasonably foreseeable* that a student, who had been disciplined primarily for defiant and disruptive behavior, would rape another student while on school grounds. The majority's contrary position expands the concept of duty to the point of essentially imposing strict liability on school districts for the criminal conduct of any student with a discipline record that includes hitting and kicking other students. This is a clear departure from established California law. Therefore, I respectfully dissent.

As noted by the majority, a school district has a general legal duty to exercise reasonable care in supervising the conduct of the students on school grounds and may be held liable for injuries proximately caused by the failure to exercise such care. (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 513, 150 Cal.Rptr. 1, 585 P.2d 851.) The standard imposed on school personnel in carrying out this duty is the degree of care " 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.' " ****687**(*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747, 87 Cal.Rptr. 376, 470 P.2d 360.) For example, a school district may be held liable for injuries arising out of students engaging in unsupervised "roughhousing" or "horseplay" on campus during school hours, i.e., the type of behavior one would expect from unsupervised children. (*Dailey v. Los Angeles Unified Sch. Dist., supra*, 2 Cal.3d at p. 751, 87 Cal.Rptr. 376, 470 P.2d 360.) Nevertheless, there are limits on this duty to supervise. A school district is not an insurer of its students' safety. (*Hoyem v. Manhattan Beach City Sch. Dist., supra*, 22 Cal.3d at p. 513, 150 Cal.Rptr. 1, 585 P.2d 851.)

With respect to the district's alleged negligent supervision in the context of this particular incident, the district cannot be held liable for the minor's injuries in the absence of a legal duty to protect its students from sexual assaults perpetrated by other students while on campus. Such a duty exists only if the risk of the particular type of harm was reasonably fore-

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seeable when it occurred. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 739, 69 Cal.Rptr. 72, 441 P.2d 912.) "As a classic opinion states: 'The risk reasonably to be perceived defines the duty to be obeyed.' (*Palsgraf v. Long Island R.R. Co.* (1928) 248 N.Y. 339, 344, 162 N.E. 99 ....)" (*Ibid.*) Moreover, the bare *possibility* that the injury complained of could result from the defendant's acts is insufficient. Through hindsight, everything is foreseeable. (*Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1133, 286 Cal.Rptr. 85.)

The majority asserts that the district knew or reasonably should have known that the minor was subject to the risk of an assault, including a sexual ***527** assault, from Chris. However, the majority does not adequately explain why this is so. The majority simply focuses on the victim's status. According to the lead opinion, the "unique vulnerabilities of special education students" (lead opn., *ante,* at p. 682) and the "unique responsibilities" associated with their instruction and their " special needs" (*id.* at p. 682) made this particular type of harm, i.e., a sexual assault, foreseeable. The deficiency in this analysis is that no consideration is given to whether it was reasonably foreseeable that another student would commit such a crime. Under California law, a duty to protect the minor from a sexual assault does not exist unless it was reasonably foreseeable that this kind of harm could occur. (*Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1459, 249 Cal.Rptr. 688.)

Although the law generally does not impose a duty on a defendant to control the conduct of another or to warn of such conduct, the special relationship that exists between a school district and its students may impose such a duty. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 712, 715, 230 Cal.Rptr. 823.) However, this duty is not unlimited.

To determine the scope of a school district's duty to control the conduct of one of its students, the California Supreme Court has looked to the common law duty that parents owe third parties to supervise and control the conduct of their children. In *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 80 Cal.Rptr.2d 811, 968 P.2d 522, the court noted that the relationship between school personnel and students is analogous in many ways to the relationship between parents and their children. (*Id.* at p. 934, 80 Cal.Rptr.2d 811, 968 P.2d 522.) "At common law, '[s]chool officials are said to stand *in loco parentis,* in the place of parents, to their students, with similar powers and responsibilities.' " (*Id.* at p. 935, 80 Cal.Rptr.2d 811, 968 P.2d 522.)

California law finds a special relationship between parent and child. ****688**(*Hoff v. Vacaville Unified School Dist., supra,* 19 Cal.4th at p. 934, 80 Cal.Rptr.2d 811, 968 P.2d 522.) Accordingly, the parent has a duty to exercise reasonable care to control the minor child so as to prevent the child from intentionally harming others. (*Ibid.*) However, this duty of supervision is limited. The parent's " '[k]nowledge of dangerous habits and ability to control the child are prerequisites to imposition of liability.' " (*Id.* at p. 935, 80 Cal.Rptr.2d 811, 968 P.2d 522.) " '[O]nly the manifestation of specific dangerous tendencies ... triggers a parental duty to exercise reasonable care to control the minor child in order to prevent ... harm to third persons.' " (*Ibid.*)

Applying this analysis here, it is my position that the district cannot be held liable for injuries arising out of this criminal conduct under a theory of negligent supervision unless it had *knowledge* of Chris's "specific dangerous tendencies," i.e., his tendencies to commit sexual assaults. Admittedly, Chris ***528** was a discipline problem. However, defiance and disruption are not indications of such "dangerous tendencies." Further, Chris's prior acts of physical violence, i.e., punching respondent in seventh grade and kicking another student in the groin in eighth grade, would not lead one to reasonably anticipate that he would commit a sexual assault.

In contrast, the majority finds no distinction between a physical assault and a sexual assault for purposes of foreseeability in this case. The majority offers no justification for this position. Apparently, in the majority's view, each type of assault results in the same kind of harm. However, the facts of this case belie this conclusion. Before this sexual assault occurred, the minor had been physically assaulted, i.e., punched by Chris, without any apparent long-term adverse consequences. In contrast, the minor was devastated by this sexual assault. Moreover, if physical assaults and sexual assaults are considered equivalent in this

context, school districts will be compelled to view every defiant and disruptive child as a potential rapist. This is an unreasonable burden.

Additionally, contrary to the majority, I consider the analogous situation presented in *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 107 Cal.Rptr.2d 801, to be persuasive. There, the adult defendants were sued for negligent supervision when, after inviting two minors into their home, one was sexually assaulted by the other. The court found that the adults assumed a special relationship with the minors. (89 Cal.App.4th at p. 1081, 107 Cal.Rptr.2d 801.) Nevertheless, the court held that under a nonfeasance theory of negligent supervision, the adults had no duty to protect the injured minor in the absence of *actual knowledge* of the offending minor's propensities. (89 Cal.App.4th at p. 1083, 107 Cal.Rptr.2d 801.)

In reaching this conclusion, the *Romero* court adopted the rule set forth in *Chaney v. Superior Court* (1995) 39 Cal.App.4th 152, 46 Cal.Rptr.2d 73. In *Chaney*, the court was faced with determining the extent of a wife's duty to her minor invitees to prevent sexual assaults perpetrated by her husband. The court noted that the wife's duty of reasonable care to the injured child depends on whether the husband's behavior was reasonably foreseeable. (*Id.* at p. 157, 46 Cal.Rptr.2d 73.) However, "[w]ithout knowledge of her husband's deviant propensities, a wife will not be able to foresee that he poses a danger and thus will not have a duty to take measures to prevent the assault." (*Ibid.*) The court further held that, although a wife's knowledge may be proven by circumstantial evidence, it must reflect the wife's actual knowledge and not merely constructive knowledge or notice. (*Ibid.*) In other words, such deviant behavior is so shocking and outrageous that, as a matter of law, one cannot be charged with reasonably foreseeing the risk of harm unless one ****689** has actual knowledge of the perpetrator's propensities.

***529** This "actual knowledge" requirement is equally applicable here. Without actual knowledge of Chris's deviant tendencies, the district could not reasonably foresee the danger he posed. The district had no knowledge of Chris's propensity to commit sexual assaults. Before this outrageous incident, there had never been any sexual misconduct at any school in the district for at least 31 years. These circumstances mandate the finding that it was not reasonably foreseeable that this junior high school boy would rape a special education student on school grounds.

The lead opinion dismisses the *Chaney*/ *Romero* line of authority on the ground that "school grounds provide a different setting than an adult's home." (Lead opn., *ante,* at p. 685.) The lead opinion further states, without elaboration, that "there are differing public policy concerns related to the responsibilities of school districts that provide mandatory education as compared to adults who invite children into their home on a voluntary basis." (*Ibid.*) However, both school districts and adults who invite children into their homes are acting in loco parentis. Thus, in taking this position, the majority is effectively elevating a school district's duty to exercise reasonable care to control a minor child above that of a parent.

In sum, under these circumstances, the district should not be held liable for the sexual assault perpetrated by one of its students. The district had no knowledge of that student's propensity to commit such an act. Consequently, the district did not owe a legal duty to the minor to protect him from this unforeseeable event. Accordingly, I would reverse the judgment on this ground.

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THE PEOPLE, Plaintiff and Respondent,
v.
ROSE MARY TUFTS et al., Defendants and Appellants.
Crim. A. No. 16027.

Appellate Department, Superior Court, Los Angeles County, California.
Aug. 23, 1979.

SUMMARY

Two women were convicted in a trial by jury of violations of sections of a county-health code pertaining to the proper maintenance of dwelling units. Municipal court for the Los Angeles Judicial District of Los Angeles County, No. 698925, Brian D. Crahan, Judge.

The appellate department of the superior court reversed as to one of the counts against one of the defendants and the judgments were otherwise affirmed. The court held that a section requiring that dwelling units contain lavatories and bathtubs or showers, that toilet rooms, bath and shower rooms, and utility rooms be adequately lighted and ventilated to the outside atmosphere, and that such rooms and the fixtures and equipment therein be maintained in a state of good repair and free from dirt, filth and corrosion, was too vague to be enforced against defendant landlord, who was charged with failing, refusing and neglecting to maintain a toilet fixture in good repair. The court pointed out that either a landlord or a tenant may have the responsibility for maintenance and cleanliness of toilet facilities, and it held that it could not be ascertained which of those parties is criminally liable under the ordinance. All other contentions of vagueness and overbreadth of the sections involved were rejected. The court held that a section prohibiting the maintenance of property in such condition as to permit breeding or harborage of rodents or vermin was not preempted by Health & Saf. Code, §§ 1800-1813, which establish an obligation on persons possessing places infested with rodents to tray to exterminate them, make a violation of that requirement a misdemeanor, and provide for health officers to inspect infested places and to do the exterminating at public expense, charging the property owner therefor, if necessary. The court pointed out that the thrust of the local regulation is in the field of prevention of infestation while that of the state provisions is extermination. The court further held that the evidence was sufficient to sustain the convictions and rejected a contention of error in the trial court's failure to order a hearing on the competency of one of the defendants to stand trial. In conclusion, the court rejected that defendant's assertion of error in the trial court's failure to allow her trial counsel to tell the jurors that he was an appointed counsel. (Opinion by Cole, P. J., with Dowds and Saeta, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Health and Sanitation § 2--Regulations and Ordinances-- Constitutionality--Certainty.
The words "state of good repair" as used in a county ordinance providing that fixtures and equipment in toilet rooms shall be maintained in a state of good repair and free from dirt, filth, and corrosion, were not so uncertain as to render the ordinance unconstitutionally vague with respect to a defendant charged with failing, refusing and neglecting to maintain a toilet fixture in good repair. The complaint specifically alleged that the toilet drain was obstructed and the toilet was inoperative, and common sense is sufficient to tell anyone that a toilet which does not work is not in a state of good repair.

(2) Health and Sanitation § 2--Regulations and Ordinances-- Constitutionality--Overbreadth.
A section of a county ordinance providing that fixtures and equipment in toilet rooms shall be maintained in a state of good repair and free from dirt, filth, and corrosion could not be said to be unconstitutionally overbroad, on the theory that at one time or another toilets break down or stop functioning, as applied to a landlord charged with failing, refusing and neglecting to maintain a toilet fixture in a state of

good repair. Properly construed with related sections, the law referred to conditions menacing public health, and the record showed that the condition on which the charge was based was not a mere transitory plumbing ailment. Moreover, defendant had no standing to raise an issue of overbreadth as to the "filth and corrosion" language of the ordinance; she was not charged under that language.

(3a, 3b) Health and Sanitation § 2--Regulations and Ordinances-- Constitutionality--Identification of Persons Criminally Liable.
A county ordinance requiring that dwelling units contain lavatories and bathtubs or showers, that toilet rooms, bath and shower rooms, and utility rooms be adequately lighted and ventilated to the outside atmosphere, and that such rooms and fixtures and equipment be maintained in a state of good repair and free from dirt, filth, and corrosion, was too vague to be enforced against a landlord who was charged with failing, refusing, and neglecting to maintain a toilet fixture in good repair. Either a landlord or a tenant may have the responsibility for maintenance and cleanliness of toilet facilities and it could not be ascertained which of them is criminally liable under the ordinance.

(4) Criminal Law § 6--Prohibition by Law--Sufficiency and Validity of Enactment--Certainty.
A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. However, a statute will be upheld if its terms may be made reasonably certain by reference to the common law or to its legislative history or purpose. A statute will likewise be upheld, despite the fact that the acts it prohibits are defined in vague terms, if it requires an adequately defined specific intent. A court, however, may not create a standard, and a specific intent defined in the same vague terms as those defining the prohibited acts does not make a statute acceptably definite.

(5) Criminal Law § 6--Prohibition by Law--Sufficiency and Validity of Enactment--Certainty.
The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited.

(6) Health and Sanitation § 2--Regulations and Ordinances-- Constitutionality--Certainty.
The word"harborage" as used in a county ordinance prohibiting the maintenance of property in such condition as to permit breeding or harborage of rodents or vermin is not too vague a word to establish criminal liability. It is a common enough English language phone not to be misleading, especially when read in context.

(7) Health and Sanitation § 2--Regulations and Ordinances-- Constitutionality--Overbreadth.
A county ordinance prohibiting the maintenance of property in such condition as to permit breeding or harborage of rodents or vermin could not be said to be overbroad in that all premises will permit the breeding or harborage therein of rodents. A fair reading of the ordinance shows that it relates to the prevention of conditions conducive to the presence of rodents, which is a valid statutory objective, aimed at protecting public health.

(8) Health and Sanitation § 2--Regulations and Ordinances-- Constitutionality--Certainty.
A county ordinance prohibiting the maintenance of property in such condition as to permit breeding or harborage of rodents or vermin could not be attacked on the ground of vagueness on the basis that it had no guidelines for determining when there is a likelihood of rodent infestation. Fairly read, the balance of the section allows a health officer to notify a violator of the condition, and to indicate the measures required to correct it.

(9) Criminal Law § 6--Prohibition by Law--Sufficiency and Validity of Enactment--Certainty.
A criminal statute which is so indefinite, vague and uncertain that the definition of the crime or standard of conduct cannot be ascertained therefrom is unconstitutional and void. However a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language. Nor does the act that its meaning is difficult to ascertain or susceptible of different interpretations render the

statute void. All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears.

(10) Criminal Law § 6--Prohibition by Law--Sufficiency and Validity of Enactment--Certainty.
In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them, the courts must endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms. It is not necessary that a statute furnish detailed plans and specifications of the act or conduct prohibited. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.

(11) Health and Sanitation § 2--Regulations and Ordinances--State Preemption.
A county ordinance prohibiting the maintenance of property in such condition as to permit breeding or harborage of rodents or vermin was not preempted by Health & Saf. Code, §§ 1800-1813, which establish an obligation on persons possessing places infested with rodents to try to exterminate them, make a violation of that requirement a misdemeanor, and provide for health officers to inspect infested places and to do the exterminating at public expense, charging the property owner therefor, if necessary. The thrust of the local regulation is in the field of prevention of infestation while that of the state provisions is extermination. The state law does not fully and completely cover the field; there is no paramount state concern against local action aimed at preventing rodents from breeding; and the local ordinance has no adverse effect on transient citizens.
[See Cal.Jur.3d, Health and Sanitation, § 2; Am.Jur.2d, Health, § 5.]
(12) Health and Sanitation § 1--Prosecutions--Instructions.
In a prosecution of a landlord for violating a county ordinance by maintaining a condition which permitted the breeding "and" harborage of rodents, it was not error to instruct the jury in the disjunctive, referring to maintaining a condition that would permit the breeding "or" harborage of rodents. When a statute lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, should do so in the conjunctive to avoid uncertainty. Merely because the complaint is phrased in the conjunctive, however does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts.

(13) Health and Sanitation § 1--Prosecutions--Due Process.
In a prosecution for violation of a county ordinance prohibiting the maintenance of property in such condition as "will" permit breeding or harborage or rodents, defendant was not denied due process by the fact the complaint used the word "did" with reference to the breeding and harborage. There was a clear reference to the ordinance in the complaint, and the use of the word "did" instead of the word "will" at most amounted to charging a greater offense than the lesser one which was proved.

(14) Health and Sanitation § 1--Prosecutions--Sufficiency of Evidence.
In a prosecution for violation of a county ordinance prohibiting the maintenance of property in such condition as will permit breeding or harborage of rodents, the evidence was sufficient to show that defendant occupied or maintained or caused or permitted another person to occupy or maintain the premises described in the complaint, where witnesses testified that they rented rooms there from defendant, on behalf of a codefendant, and that they gave the rent checks, payable to the codefendant, to defendant, and where ownership of the premises was shown by a quitclaim deed to defendant as well her name on the tax roll.

(15) Health and Sanitation § 1--Prosecutions--Sufficiency of Evidence.
In a prosecution of a landlord for violating sections of a county public health code with respect to improper maintenance of premises, the evidence was sufficient to support defendant's conviction, where health inspectors testified, as experts, to the existence of conditions which in their opinion violated the sections involved, and where defendant had alleged under oath in an unlawful detainer action that she was the

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owner of the property, though she had later retreated to the position of a lessee with an option to purchase. In either event her control of the premises was adequately established so as to subject her to liability.

(16) Criminal Law § 211--Trial--Proceedings on Issue of Insanity--At Time of Trial--Right to Hearing on Competency.
In a prosecution of a landlord for violating sections of a county public health code with respect to improper maintenance of premises, the trial court did not err in failing to order a hearing on defendant's competency to stand trial, where, though the issue of competency was raised by defense counsel at arraignment and the court took no action, and was again raised a month later and rejected by the court, no question of competency was raised at the time of trial some six months later. Under Pen. Code, § 1368, subd. (b), providing for a hearing on competency at counsel's suggestion, a defendant is entitled to a hearing if the trial judge has a doubt as to competence and is not entitled to such a hearing merely on the statement of defense counsel; there must be substantial evidence of doubt as to competence before a defendant is entitled to a hearing.

(17) Criminal Law § 42--Rights of Accused--Fair Trial--Right to Inform Jury That Counsel Is Appointed.
The record in a prosecution of a landlord for violating sections of a county public health code with respect to improper maintenance of premises did not establish that defendant was denied a fair trial in that her trial counsel was not allowed to tell the jurors that he was an appointed counsel, where, though the settled statement on appeal contained a hearsay statement to the effect that the jurors told trial counsel that they had convicted defendant because if she could afford private counsel she could afford to clean up her property, the settled statement also showed that the matter was never brought to the trial court's attention and that the court had no knowledge of the subject.

COUNSEL

Charlotte Low and Robert B. Le Corvec for Defendants and Appellants.

Burt Pines, City Attorney, Rand Schrader and Lewis N. Unger, Deputy City Attorneys, for Plaintiff and Respondent.

COLE, P. J.

Appellant Wheeler was convicted of three counts of violating sections of the Los Angeles County Public Health Code (which code was after incorporated into the City of Los Angeles Municipal Code) and appellant Tufts was convicted of one such count. We affirm the convictions, except that of appellant Wheeler as to one of the charges, describing the evidence and section so far as is necessary to answer the contentions made.

I

(1)One of the counts involving appellant Wheeler alleged violation of section 819 of the public health code. The complaint alleges that she failed, refused and neglected to maintain toilet fixture in a state of good repair, at 7046 Firmament Avenue, specifically alleging that the toilet drain was obstructed and the toilet was inoperative. The code section itself provides that fixtures and equipment in toilet rooms hall be *44 maintained in a state of good repair and free from dirt, filth, and corrosion."

Wheeler argues that this provision is unconstitutionally vague, claiming that "state of good repair" is uncertain. We disagree, especially in the context pleaded here that the toilet was inoperative. Common sense is sufficient to tell anyone that a toilet which does not work is not in a state of good repair. Persons of ordinary intelligence should be able to understand this. We have rejected a similar challenge. (*People v. Balmer* (1961) 196 Cal.App.2d Supp. 874, 879-880 [17 Cal.Rptr. 612].) There we said "'The words "good repair" have a well known d definite meaning ... They sufficiently inform the ordinary owner that his property must be fit for the habitation of those who would ordinarily use his dwelling.'" (*Id.*, at p. 880.)

(2)Appellant Wheeler next argues that the section is unconstitutionally overbroad, apparently on the basis that at one time or another toilets break down, or stop functioning. While it is true that unreasonable restrictions on one's use his property might violate substan-

tive due process, we agree with the People's argument that, properly construed with other sections of the county public health code, the section relates to conditions where public health is menaced. The record here shows that the toilet condition was not a mere transitory plumbing ailment. A health inspector testified that after finding the inoperative toilet he sent a notice to Wheeler regarding this and other violations, and indicating the required remedies. He returned to the premises and found no change in the condition and then set a hearing with notice to Wheeler, which she failed to attend. No due process violation occurred, because there is no unreasonable restriction on appellant's use of her rental property. To the extent the overbreadth argument goes further and relates to the "filth and corrosion" language of the ordinance, Wheeler has no standing to raise the issue. She was not convicted on count of any "filth and corrosion." This is not a First Amendment case. (See 5 Witkin, Summary of Cal. Law (8th ed. 1974) pp. 3282-3284.)

(3a)We are left to consider, with respect to this charge, one additional ground with respect to section 819. That section reads in full as follows: " Sec. 819. Toilet Rooms and Plumbing Fixtures. (8588, eff. 5-8-64) Every dwelling unit shall contain a lavatory and bathtub or shower. All lavatories, bathtubs, and showers of dwellings, house courts, hotels, motels, and apartment houses, shall be provided with hot and cold running water under pressure. All toilet rooms, bath and shower rooms, ***45** and utility rooms shall be adequately lighted and ventilated to the outside atmosphere. All such rooms and the fixtures and equipment therein shall be maintained in a state of good repair and free from dirt, filth, and corrosion. "At oral argument we asked counsel to file further letter briefs discussing who is criminally liable for violation of this section, a matter not originally raid by the parties. In reply, the People contend that reading the public health code as a whole, section 819 was intended to apply to both lessors and lessees dwelling units. They cite section 817 of the code which states that with a certain exception " it shall be unlawful for any person to occupy or to cause or permit another person to occupy any dwelling unit ..." which does not have at least one water closet. The People also refer to section 825 which prescribes certain conditions for sleeping quarters and states "No person shall occupy, rent, or lease, suffer or permit another person to use ..." quarters not in compliance. Finally, reference is made by the People to section 827 which requires the consent of the owner or occupants for inspections in the nighttime hours. From these sections, and invoking the familiar principle that all of the parts of a statute should be construed together, the People argue that the scope of the ordinance is to prevent anyone from living or permitting another to live in premises that will endanger the health of the occupant. The People also state that if section 819 is ambiguous as to persons liable under its provisions the vagueness would not apply to lessors but only to tenants. The requirement of the section that toilet rooms be provided with hot and cold water and concerning lighting a ventilation, the People say, is a type of requirement that would be placed up a landlord, while only the final requirement of the section relating to maintaining the premises in a state of good repair and free from dirt, filth and corrosion is "under the dual realistic control" of both tenant and landlord.

One preliminary problem with the People's argument is that it can be argued with some conviction that the express description in sections 817, 825 and 827 of the persons liable for violating them is in stark contrast with the silence on this subject in section 819. Another problem is that the argument that only the last portion of the section is ambiguous strikes at the very part at issue here. If, as seems logical, a tenant is not likely to be in a position to see that each dwelling unit contains a lavatory and bathtub or shower, and if a tenant is not expected to be the one to provide the required hot and cold running water and to see that rooms are adequately lighted and ventilated to the outside atmosphere, then the only portion of section 819 applicable to tenants is the part which concern us in this action. ***46**

(4)The basic principles which control our decision are not in dispute. They are summarized in *People v. McCaughan* (1957) 49 Cal.2d 409, 414 [317 P.2d 974] as follows: "'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of e process of law.' (*Connally v. General Const. Co.*, 269 U.S. 385, 391 [46 S.Ct. 126

70 L.Ed. 322]; *Lanzetta v. New Jersey*, 306 U.S. 451, 453 [59 S.Ct. 618, 83 L.Ed 888]; *In re Peppers*, 189 Cal. 682, 685-687 [209 P. 896].) A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as standard for the ascertainment of guilt by the courts called upon to apply it. (*Winters v. New York*, 333 U.S. 507, 515-516 [68 S.Ct. 665, 92 L.Ed. 840]; *In re Peppers, supra.*, 189 Cal. at 685-687; *People v. Building Maintenance etc. Assn.*, 41 Cal.2d 719, 725 [264 P.2d 31]; *People v. Saad*, 105 Cal.App.2d Supp. 851, 854 [234 P.2d 785].) A statute will be upheld if its terms may be made reasonably certain by reference to the common law (see *Connally v. General Const. Co., supra.*, 269 U.S. at 391; *Lorenson v. Superior Court*, 35 Cal.2d 49, 60 [216 P.2d 859]) or to its legislative history or purpose. (See *Connally v. General Const. Co., supra.*, 269 U.S. at 391-392; *People v. King*, 115 Cal.App.2d Supp. 875, 878 [252 P.2d 78].) A statute will likewise be upheld, despite the fact that the acts it prohibits are defined in vague terms, if requires an adequately defined specific intent. (See *People v. Building Maintenance etc. Assn., supra.*, 41 Cal.2d at 724 and cases cited.) A court, however, may not create a standard (*Lanzetta v. New Jersey, supra.*, 306 U.S. 451; *Connally v. General Const. Co., supra.*, 269 U.S. 385), and a specific intent defined in the same vague terms as those fining the prohibited acts does not make a statute acceptably definite."

(5)And, more specifically pointed to the problem under discussion, is this language in *United State v. Cardiff* (1952) 344 U.S. 174, 176 [97 L.Ed. 200, 202, 73 S.Ct. 189] where the Supreme Court said "The vice of vagueness in criminal statutes is the treachery they conceal either in determining *what persons are included* or what acts are prohibited." (Italics supplied.)

(3b)The People's argument, to which we have alluded, points up the problem with respect to section 819. It would not seem unreasonable that a landlord be held responsible, at the time a tenant takes over property under a lease, for seeing that the toilet facilities are in good repair and free from dirt, filth and corrosion. Yet we do not know, with respect to the present charge, whether it relates to conditions existing at the start of a lease term or not. While it is also not unreasonable that a landlord be *47 held similarly responsible for such maintenance and cleanliness later on during a lease term, it is equally likely that the tenant may have assumed these responsibilities. (See and compare with each other Civ. Code, §§ 1941, 41.1, subds. (b) and (c), and 1942.1.) California statutes recognize that landlord and tenant may agree with each other on these matters. Thus the pertinent responsibility may be on one or the other. It would be most unreasonable to charge a landlord with the failure to maintain a toilet fixture in good order when the tenant has undertaken in writing, as he may under section 1942.1 of the Civ Code to maintain it, or when the tenant has the legal obligation to repair it when his own conduct has caused it to become inoperable. (See Civ. Code, § 1929.)

We hold that section 819 of the Public Health Code of the County of Los Angeles, as adopted by Ordinance No. 127507 of the City of Los Angeles is too vague to be enforced against appellant Wheeler, since it cannot be ascertained who is liable under the section.

II

Each appellant was convicted (Wheeler as to the Firmament property and Tufts as to 6901 Peach Avenue) of violating section 628 the public health code. That section states: "No person shall occupy, maintain, or cause or permit another person to occupy or maintain any building, lot, premise, vehicle, or any other place, in such condition of construction or maintenance as will permit the breeding or harborage therein or thereon of rodents, fleas, bedbugs, cockroaches, lice, mosquitoes, or any other vermin. No person may permit an accumulation of any material that may serve as a rodent harborage unless such material be elevated not less than eighteen (18) inches above the ground or floor with a clear intervening space thereunder. Whenever the Health Officer finds any building, lot, premise, vehicle, or other place to be infested with vermin or rodents, or to be in such an insanitary condition as to require fumigation or renovation, the Health Officer may notify the owner, his agent, the tent, or possessor thereof in writing specifying the manner in which the provisions hereof are being violated and indicating the specific measures that shall be taken by the recipient of such notice

to abate said conditions."

We reject the various challenges made to these convictions, as follows:

(6)First, each appellant argues that "harborage" is too vague a word to establish criminal liability. We think it is a common enough English language phrase, especially when read in context, not to be misleading. ***48**

(7)Second, Wheeler says the section is or broad because all premises "will permit the breeding or harborage therein of rodents." A fair reading of the ordinance shows that it relates to the prevention of conditions conducive to the presence of rodents. That is a valid statutory objective, aimed at protecting public health.

(8)Third, Tufts asserts that the section is vague, in that it has no guidelines for determining when there is a likelihood of rodent infestation. Fairly read, the balance of the section allows health officer to notify a violator of the condition, and to indicate the measures required to correct it. As noted above, a health inspector testified that is was done in the instant case, but that no steps were taken to remedy the condition. Reading the section to support its constitutionality, as we must if possible, we believe that it meets the test of sufficient explicitness set forth in *Smith v. Peterson* (1955) 131 Cal.App.2d 241, 245-246 [280 P.2d 522, 49 A.L.R.2d 1194]. (9) There the court said: "It is well settled that a criminal statute which is so indefinite, vague and uncertain that the definition of the crime or standard of conduct cannot be ascertained therefrom, is unconstitutional and void. However, there is a uniformity of opinion among the authorities that a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language."

"Nor does the fact that its meaning is difficult to ascertain or susceptible of different interpretations render the statute void. All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. Doubts as to its construction will not justify us in disregarding it.

(10)"In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them the courts mu endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms. It is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and ***49** understanding (*Lockheed Aircraft Corp. v. Superior Court*, 28 Cal.2d 481 [171 P.2d 21, 166 A.L.R. 701]; *Collins v. Riley*, 24 Cal.2d 912 [152 P.2d 169]; *Pacific Coast Dairy v. Police Court*, 214 Cal. 668 [8 P.2d 140, 80 A.L.R. 1217]; *People v. Ring*, 26 Cal.App.2d Supp. 768 [70 P.2d 281]; *Smulson v. Board of Dental Examiners*, 47 Cal.App.2d 584 [118 Pd 483]; *Lorenson v. Superior Court*, 35 Cal.2d 49 [216 P.2d 859]; *Sproles v. Binford*, 286 U.S. 374 [52 S.Ct. 581, 76 L.Ed. 1167].)"

(11)Fourth, Tufts points to sections 1800 through 813 of the Health and Safety Code, and claims that they preempt local regulation of rodent control. They do not. The sections establish an obligation on persons possessing places infested with rodents to try to exterminate them (§ 1803) and make a violation of this requirement a misdemeanor (§ 1813). Others of the sections provide for health officers to inspect infested places and to do the exterminating at public expense, charging the property owner therefor, if necessary. The thrust of the local regulations is in the field of prevention of infestation while that of the state provisions is extermination. State law preempts local law in one of three situations (which are elaborated, for example, in *Yuen v. Municipal Court* (1975) 52 Cal.App.3d 351, 354 [125 Cal.Rptr. 87], cited to us by the People). Without prolonging this opinion, it is manifest that the local health code involve here in no way has been preempted-none of the three tests is met: The state law does not fully and completely cover the field; clearly there is no paramount state

concern against local action aimed at preventing rodents from breeding;nd clearly the local ordinance has no adverse effect on transient citizens.

(12)Fifth, Wheeler objects to People's instruction No. 2 because the complaint pleaded a violation of section 628 in the conjunctive (referring to maintaining a condition "as did permit the breeding *and* harborage" of rodents-our italics), while the instruction was in the disjunctive, (referring to maintaining a condition "as will permit the breeding *or* harborage" of rodents-again, our italics). Appellant's argument is that this difference is a material variance, leading to a conviction of an uncharged offense. Appellant is wrong. "... When statute ... lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, should do do in the conjunctive to avoid uncertainty ... Merely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts ..." (*In re Bushman* (1970) 1 Cal.3d 767, 775 [83 Cal.Rptr. 375, 463 P.2d 727].) ***50**

(13)Sixth, Tufts points to the difference between the charging language " *did*permit the breeding and harborage" and the language of section 628 which states will permit." She elevates this difference to a denial of due process, asserting that she could have produced a different defense if the complaint had read differently. The evidence showed no actual presence of rodents on the premises, there being only a showing that at one time rodent droppings had been found. Thus appellant says she did not receive notice of the charge. Appellant focuses on the other wrong language. The offense is the maintaining of a *condition* conducive to breeding and harborage of rodents. The actual presence of rats, of course, would rather conclusively establish the existence of the condition. But their absence does not negate the fact that the condition permits-in other words makes possible-the breeding and harborage of rodents. In effect, the use of the word "did," instead of the word "will," at most amounted to charging a greater offense than the lesser one which was proved. There was a clear reference to section 628 in the complaint. No error resulted.

III

(14)Appellant Tufts argues tt there was not enough evidence presented to show that she occupied or maintained or caused or permitted another person to occupy or maintain the Peach Avenue premises. Given the testimony of MacCauley that he rented a room there from Tufts, on behalf of Wheeler, and that he gave the rent checks, payable to Wheeler, to Tufts, similar testimony from witness Gladden and the existence of a quitclaim deed to Tufts as well as her name on the tax roll as being the owner of the property, the contention is frivolous.

IV

The third count of which Wheeler stan convicted relates to public health code section 605. The section requires an owner, agent or manager of premises to maintain them in a clean, sanitary condition, free from accumulations of garbage, rubbish refuse and other wastes at all times, except as provided by the provisions of the ordinance or other law. The argument that the term "agent" and the term "accumulations" are vague is not worth discussing. The contention that overbreadth exists because every time one leaves garbage cans out he accumulates garbage, rubbish and refuse is without merit. The argument ignores the facts that this is not what Wheeler was charged with doing, and it overlooks the fact that other provisions of the ordinance allow-indeed require-the keeping of ***51** garbage in receptacles (§ 601) and the depositing and keeping of rubbish in adequate containers for up to 15 da (§ 603).

V

(15)As to all of the counts involving her, Wheeler says the evidence was not sufficient. We need not recite it. We note only that health inspectors testified, as experts, to the existence of conditions which in their opinion violated the sections involved. As to her ownership of the property, she alleged under oath in an unlawful detainer action that she was the owner, later retreating to the position of a lessee with an option to purchase. In either event her control of the Firmament premises was adequately established, so as to subject her to liability.

VI

(16)The next contention relates to Wheeler's competency to stand trial. The record shows that at arraignment in June 1977 trial counsel "raised the issue of incompetency" but the court took no steps. In July 1977 "defense counsel again raised the issue of incompetency which was rejected by the Court." The trial was not until January 1978. No question of competency was then presented. We could dispose of the argument that under Penal Code section 1368, subdivision (b) the court should have ordered a hearing held on the issue with the simple observation that appellant has not presented us with a record sufficient to show that the court did not meet its obligations. We need not do so, however. Meeting the issue head on it is enough to observe that *People v. Hays* (1976) 54 Cal.App.3d 755, 759 [126 Cal.Rptr. 770], binds us. Penal Code section 1368, subdivision (b), states that if counsel informs the court he believes that the defendant is or may be incompetent, the court shall order that the question is to be determined in hearing held pursuant to Penal Code sections 1368.1 and 1369. In *Hays*, the court interpreted this provision to mean that a defendant is entitled to a hearing if the trial judge has a doubt as to the defendant's competence and that defendant is not entitled to such a hearing merely upon the statement of defense counsel. The court held that there still must be substantial evidence of doubt as to competence before a defendant is entitled to a hearing.

We recognize that Wheeler argues that this case should not be followed. We are obliged to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 [20 Cal.Rptr. 321 369 P.2d 937].) Accordingly, appellant Wheeler's additional argument that she was denied the right to ***52** appear in person at the trial because s was incompetent and her waiver of appearance on the opening day accordingly was meaningless, is based on an assumption not supported by the record.

VII

(17)The last contention on appeal is Wheeler's argument that she was denied a fair trial because her trial counsel was not allowed to tell the jurors that he was an appointed counsel. The statement on appeal has the hearsay statement in it that trial counsel has informed appellate counsel that "the jurors allegedly told trial counsel" that they convicted Wheeler because if she could afford private counsel she could afford to clean up her property.

The argument asks us to reverse a conviction because of what jurors allegedly told trial counsel; the settled statement shows that this matter was never brought to the trial court's attention a that it has no knowledge of the subject. Thus, not only is this an impermissible attempt to impeach a verdict (Evid. Code, § 1150, subd. (a)), the record is inadequate in any event.

The late filed motion to add a declaration of Clarence MacCauley to the record on appeal is denied.

The judgment of conviction of appellant Wheeler as to count 1 is reversed. The judgments are otherwise affirmed.

Dowds, J., and Saeta, J., concurred.
A petition for a rehearing was denied August 31, 1979. ***53**

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Supreme Court of California
WESTERN SECURITY BANK, N.A., Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
BEVERLY HILLS BUSINESS BANK et al., Real Parties in Interest. VISTA PLACE ASSOCIATES et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WESTERN SECURITY BANK, N.A., et al., Real Parties in Interest.
No. S037504.

Apr 7, 1997.

SUMMARY

After a partnership went into default on a loan it had obtained from a bank, the bank and the partnership modified the terms of the loan, and the general partners obtained unconditional, irrevocable standby letters of credit in favor of the bank as additional collateral. When the partnership again went into default, the bank foreclosed nonjudicially on the real property securing the loan and then presented the letters of credit to the issuer so as to cover the unpaid deficiency. The issuer brought an action for declaratory relief, seeking a declaration that it was not obligated to accept or honor the bank's tender of the letters of credit or, alternatively, a declaration that, if it was required to honor the letters, the partners were obligated to reimburse the issuer. The trial court entered a judgment decreeing that the issuer was required to honor the letters of credit and that the issuer was not barred from severally seeking reimbursement from the partners. (Superior Court of Los Angeles County, No. BC031239, Ernest George Williams, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B066488, reversed, concluding that, under Code Civ. Proc., § 580d, part of the antideficiency law, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. Thereafter, the Legislature enacted urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580.5). After the Supreme Court granted review and returned the matter to the Court of Appeal for reconsideration in light of the urgency legislation, the Court of Appeal concluded the legislation constituted a substantial change in existing law and thus was prospective only and had no impact on the Court of Appeal's earlier conclusions regarding the parties' rights and obligations.

The Supreme Court reversed the judgment of the Court of Appeal and remanded. The court held that the Court of Appeal erred in concluding that the enactment of Sen. Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case. (Opinion by Chin, J., with George, C. J., Baxter, and Brown, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. Concurring and dissenting opinion by Mosk, J., with Kennard, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Letters of Credit § 10--Duties and Privileges of Issuer--Letters Presented to Cover Deficiency--Following Nonjudicial Foreclosure--Retroactivity of New Legislation.
In an action brought by the issuer of letters of credit against a bank that had loaned money to a partnership secured by real property, and against the partnership and its general partners, the Court of Appeal erred in concluding that the Legislature's postjudgment enactment of urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580.5), had no effect on a prior Court of Appeal holding in this case to the effect that, under Code Civ. Proc., § 580d, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. The partners obtained the letters of credit as additional collateral for repayment of the loan and presented the letters for payment to the issuer after the bank foreclosed nonjudicially on the real property. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case.
[See 3 Witkin, Summary of Cal. Law (9th ed. 1987) Negotiable Instruments, § 11.]
(2) Statutes § 5--Operation and Effect--Retroactivity.
Statutes do not operate retrospectively unless the Legislature plainly intended them to do so. A statute has retrospective effect when it substantially changes the legal consequences of past events. A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. When the Legislature clearly intends a statute to operate retrospectively, the courts are obliged to carry out that intent unless due process considerations prevent them from doing so.

(3) Statutes § 5--Operation and Effect--Retroactivity--Amendments-- Purpose--Change in Law or Clarification.
A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. The courts assume that the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. The courts' consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation. An amendment that in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. In such a case, the amendment may logically be regarded as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change. Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power that the Constitution assigns to the courts.

(4) Statutes § 5--Operation and Effect--Retroactivity--Legislative Intent-- Change in Law or Clarification.
A subsequent expression of the Legislature as to the intent of a prior statute, although not binding on the court, may properly be used in determining the effect of a prior act. Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a clarification, the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. Whether a statute should apply retrospec-

tively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. Thus, where a statute provides that it clarifies or declares existing law, such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, the court must give effect to this intention unless there is some constitutional objection to it.

(5) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle.
The liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. Under the independence principle, a letter of credit is an independent obligation of the issuing bank rather than a form of guaranty or a surety obligation (Cal. U. Com. Code, § 5114, subd. (1)). Thus, the issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. Absent fraud, the issuer must pay upon proper presentment, regardless of any defenses the customer may have against the beneficiary based in the underlying transaction.

(6) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle--Effect of Draw on Letter of Credit.
A standby letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. A creditor that draws on a letter of credit does no more than call on all of the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

COUNSEL

Ervin, Cohen & Jessup, Allan B. Cooper, Steven A. Roseman and Garee T. Gasperian for Petitioner and Real Parties in Interest Western Security Bank, N.A.

William K. Wilburn as Amicus Curiae on behalf of Petitioner and Real Parties in Interest Western Security Bank, N.A.

Walker, Wright, Tyler & Ward, John M. Anglin and Robin C. Campbell for Petitioners Vista Place Associates et al.

R. Stevens Condie and Charles T. Collett as Amici Curiae on behalf of Petitioners Vista Place Associates et al.

No appearance for Respondent.

Saxon, Dean, Mason, Brewer & Kincannon, Lewis, D'Amato, Brisbois & Bisgaard, Arter & Hadden, Eric D. Dean, Steven J. Coté, Robert S. Robinson and Michael L. Coates for Real Parties in Interest Beverly Hills Business Bank.

Gibson, Dunn & Crutcher, Dennis B. Arnold, Hill, Wynne, Troop & Meisinger, Neil R. O'Hanlon, Cadwalader,Wickersham & Taft, Robert M. Eller, Joseph M. Malinowski, Kenneth G. McKenna, Michael A. Santoro, John E. McDermott, Kenneth G. McKenna, John C. Kirkland, Stroock & Stroock & Lavan, Julia B. Strickland, Bennett J. Yankowitz, Chauncey M. Swalwell, Brobeck, Phleger & Harrison, George A. Hisert, Jeffrey S. Turner, John Francis Hilson, G. Larry Engel, Frederick D. Holden, Jr., and Theodore W. Graham as Amici Curiae on behalf of Real Parties in Interest Beverly Hills Business Bank.

CHIN, J.

This case concerns the extent to which two disparate bodies of law interact when standby letters of credit are used as additional support for *237 loan obligations secured by real property. On one side we have California's complex web of foreclosure and antideficiency laws that circumscribe enforcement of obligations secured by interests in real property. On the other side is the letter of credit law's "independence principle," the unique characteristic of letters of credit essential to their commercial utility.

The antideficiency statute invoked in this case is Code of Civil Procedure section 580d. That section precludes a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure under a power of sale in a deed of trust or mortgage on real property. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43-44 [27 Cal.Rptr. 873, 378 P.2d 97].) [FN1] The independence principle, in summary form, makes the letter of credit issuer's obligation to pay a draw conforming to the letter's terms completely separate from, and not contingent on, any

underlying contract between the issuer's customer and the letter's beneficiary. (See, e.g., Cal. U. Com. Code, § 5114, subd. (1); *San Diego Gas & Electric Co. v. Bank Leumi* (1996) 42 Cal.App.4th 928, 933-934 [50 Cal.Rptr.2d 20].) [FN2]

FN1 In pertinent part, Code of Civil Procedure section 580d provides: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust."

FN2 In 1996, the Legislature completely revised division 5 of the California Uniform Commercial Code, which pertains to letters of credit. (Stats. 1996, ch. 176.) The enactment of chapter 176 repealed the former division 5 and added a new division 5. (Stats. 1996, ch. 176, §§ 6, 7.) The new provisions apply to letters of credit issued after the statute's effective date. (Stats. 1996, ch. 176, § 14.) Letters of credit issued earlier are to be dealt with as though the repeal had not occurred. (Stats. 1996, ch. 176, § 15.) We have no occasion in this case to consider the provisions of the new division 5.

The Legislature (Stats. 1996, ch. 497, § 7) later amended a statutory reference found in California Uniform Commercial Code section 5114 as it existed before chapter 176 was enacted. This second legislative action might appear to restore the prior section 5114 from the repealed former division 5 and possibly leave two sections numbered 5114 in the new division 5. (See Cal. Const., art. IV, § 9; Gov. Code, § 9605.) We have no occasion in this case to address the meaning or effect of this seeming incongruity either.

All references to section 5114 in this opinion are to California Uniform Commercial Code section 5114 as it existed before the 1996 legislation.

The Court of Appeal perceived a conflict between the public policies behind Code of Civil Procedure section 580d and the independence principle under the facts of this case. Here, after nonjudicial foreclosure of the real property security for its loan left a deficiency, the lender attempted to draw on the standby letters of credit of which it was the beneficiary. Ordinarily, the issuer's payment on a letter of credit would require the borrower to reimburse the issuer. (See § 5114, subd. (3).) The Court of Appeal considered that this result indirectly imposed on the borrower the equivalent of a *238 prohibited deficiency judgment. The court concluded the situation amounted to a "fraud in the transaction" under section 5114, subdivision (2)(b), one of the limited circumstances justifying an issuer's refusal to honor its letter of credit.

The Legislature soon acted to express a clear, contrary intent. It passed Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) as an urgency measure specifically meant to abrogate the Court of Appeal's holding. (Stats. 1994, ch. 611, §§ 5, 6.) In brief, the aspects of Senate Bill No. 1612 we address provided that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw. After the Legislature's action, we returned the case to the Court of Appeal for reconsideration in light of the statutory changes. On considering the point, the Court of Appeal concluded the Legislature's action was prospective only and had no impact on the court's earlier analysis of the parties' rights and obligations. Accordingly, the Court of Appeal reiterated its former conclusions.

We again granted review and now reverse. The Legislature's manifest intent was that Senate Bill No. 1612's provisions, with one exception not involved here, would apply to all existing loans secured by real property and supported by outstanding letters of credit. We conclude the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision. The legislation therefore has no impermissible retroactive consequences, and we must give it the effect the Legislature intended.

I. Factual and Procedural Background

On October 10, 1984, Beverly Hills Savings and Loan Association, later known as Beverly Hills Busi-

ness Bank (the Bank), loaned $3,250,000 to Vista Place Associates (Vista), a limited partnership, to finance the purchase of real property improved with a shopping center. Vista's general partners, Phillip F. Kennedy, Jr., John R. Bradley, and Peter M. Hillman (the Vista partners), each signed the promissory note. The loan transaction created a "purchase money mortgage," as it was secured by a "Deed of Trust and Assignment of Rents" as well as a letter of credit.

Vista later experienced financial difficulties, and the loan went into default. Vista asked the Bank to modify the loan's terms so Vista could continue operating the shopping center and repay the debt. The Bank and Vista agreed to a loan modification in February 1987, under which the three Vista partners each obtained an unconditional, irrevocable standby letter of *239 credit in favor of the Bank in the amount of $125,000, for a total of $375,000. These were delivered to the Bank as additional collateral security for repayment of the loan. Under the modification agreement, the Bank was entitled to draw on the letters of credit if Vista defaulted or failed to pay the loan in full at maturity.

Western Security Bank, N.A. (Western) issued the letters of credit at the Vista partners' request. Each partner agreed to reimburse Western if it ever had to honor the letters. Under the agreement, each Vista partner gave Western a $125,000 promissory note. FN3

FN3 The parties' arrangements reflected a common use of letters of credit. A letter of credit typically is an engagement by a financial institution (the issuer), made at the request of a customer (also referred to as the applicant or account party) to pay a specified sum of money to another person (the beneficiary) upon compliance with the conditions for payment stated in the letter of credit, i. e., presentation of the documents specified in the letter of credit. (See Gregora, *Letters of Credit in Real Property Finance Transactions* (Spring 1991) 9 Cal. Real Prop. J. 1, 1-2.)

A letter of credit transaction involves at least three parties and three separate and independent relationships: (1) the relationship between the issuer and the beneficiary created by the letter of credit; (2) the relationship between the customer and the beneficiary created by a contract or promissory note, with the letter of credit securing the customer's obligations to the beneficiary under the contract or note; and (3) the relationship between the customer and the issuer created by a separate contract under which the issuer agrees to issue the letter of credit for a fee and the customer agrees to reimburse the issuer for any amounts paid out under the letter of credit. (Gregora, *Letters of Credit in Real Property Finance Transactions, supra,* 9 Cal. Real Prop. J. at p. 2; *San Diego Gas & Electric Co. v. Bank Leumi, supra,* 42 Cal.App.4th at pp. 932-933; see *Voest-Alpine Intern. Corp. v. Chase Manhattan Bank* (2d Cir. 1983) 707 F.2d 680, 682; and *Colorado Nat. Bank, etc. v. Bd. of County Com'rs* (Colo. 1981) 634 P.2d 32, 36-38, for a discussion of the history and structure of letter of credit transactions.)

Letters of credit can function as payment mechanisms. For example, in sales transactions a letter of credit assures the seller of payment when parting with goods, while the conditions for payment specified in the letter of credit (often a third party's documentation, such as a bill of lading) assure the buyer the goods have been shipped before payment is made. (Gregora, *Letters of Credit in Real Property Finance Transactions, supra,* 9 Cal. Real Prop. J. at p. 3.) In the letter of credit's role as a payment mechanism, a payment demand occurs in the ordinary course of business and is consistent with full performance of the underlying obligations. (*Ibid.*)

The use of letters of credit has now expanded beyond that function, and they are employed in many other types of transactions in which one party requires assurances the other party will perform. (Gregora, *Letters of Credit in Real Property Finance Transactions, supra,* 9 Cal. Real Prop. J. at p. 3.) When used to support a debtor's obligations under a promissory note or other debt instrument, the so-called "standby" letter of credit typically provides that the issuer

> will pay the creditor when the creditor gives the issuer written certification that the debtor has failed to pay the amount due under the debtor's underlying obligation to the creditor. (*Ibid.*) Thus, a payment demand under a standby letter of credit indicates that there is a problem-either the customer is in financial difficulty, or the beneficiary and the customer are in a dispute. (*Ibid.*)

In December 1990, the Bank declared Vista in default on the modified loan. The Bank recorded a notice of default on February 13, 1991, and began ***240** nonjudicial foreclosure proceedings. (Civ. Code, § 2924.) It then filed an action against Vista seeking specific performance of the rents and profits provisions in the trust deed and appointment of a receiver.

On June 11, 1991, attorneys for the Bank and Vista signed a letter agreement settling the Bank's lawsuit. In that agreement, Vista promised it would "not take any legal action to prevent [the Bank's] drawing upon [the letters of credit] after the Trustee's Sale of the Vista Place Shopping Center, ... provided that the amount of the draw by [the Bank] does not exceed an amount equal to the difference between [Vista's] indebtedness and the successful bid of the Trustee's Sale." Vista promised as well not to take any draw-related legal action against the Bank after the Bank's draw on the letters of credit.

On June 13, 1991, the Bank concluded its nonjudicial foreclosure on the shopping center under the power of sale in its deed of trust. The Bank was the only bidder, and it purchased the property. The sale left an unpaid deficiency of $505,890.16.

That same day, the Bank delivered the three letters of credit and drafts to Western and demanded payment of their full amount, $375,000. The Bank never sought to recover the $505,890.16 deficiency from Vista or the Vista partners. About the time that Western received the Bank's draw demand, it also received a written notice from the Vista partners' attorney. The notice asserted that Code of Civil Procedure section 580d barred Western from seeking reimbursement from the Vista partners for any payment on the letters of credit, and that if Western paid, it did so at its own risk.

Western did not honor the Bank's demand for payment on the letters of credit. Instead, on June 24, 1991, Western filed this declaratory relief action against the Bank, as well as Vista and the Vista partners (collectively, the Vista defendants). Western's complaint sought: (1) a declaration that Western is not obligated to accept or honor the Bank's tender of the letters of credit; or, alternatively, (2) a declaration that, if Western must pay on the letters of credit, the Vista partners must reimburse Western according to the terms of their promissory notes.

The Vista defendants cross-complained against Western for cancellation of their promissory notes and for injunctive relief. In July 1991, the Bank filed a first amended cross-complaint, alleging Western wrongfully dishonored the letters of credit, and the Vista defendants breached the agreement not to take legal action to prevent the Bank's drawing on the letters of credit.

The Bank, Western, and the Vista defendants each sought summary judgment. After several hearings and discussions with counsel, which produced a stipulation on the key facts, the court issued its decision on January ***241** 23, 1992. By its minute order of that date, the court (l) denied the three motions for summary judgment, (2) severed the Vista defendants' cross-complaint against Western for cancellation of the promissory notes, (3) severed the Bank's amended cross-complaint against the Vista defendants for breach of the letter agreement, and (4) issued a tentative decision on the trial of Western's complaint for declaratory relief and the Bank's amended cross-complaint against Western for wrongful dishonor of the letters of credit.

The trial court signed and filed the judgment on March 26, l992. The court decreed the Bank was entitled to recover $375,000 from Western, plus interest at 10 percent from June 13, 1991, the date of the Bank's demand, and costs of suit. The court further decreed Western could seek reimbursement from the Vista partners severally, and each Vista partner was obligated to reimburse Western, pursuant to the promissory notes in favor of Western, for its payment to the Bank. Western appealed, and the Vista defendants cross-appealed.

The Court of Appeal, after granting rehearing and accepting briefing by several amici curiae, issued an opinion reversing the trial court on December 21,

1993. In that opinion, the court concluded: "We hold that, under section 580d of the Code of Civil Procedure, an integral part of California's long-established antideficiency legislation, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, *may* decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's *nonjudicial* foreclosure on real property. Such a use of standby letters of credit constitutes a 'defect not apparent on the face of the documents' within the meaning of California Uniform Commercial Code section 5114, subdivision (2)(b), and therefore such permissive dishonor does no offense to the 'independence principle.' " (Original italics, fn. omitted.)

In that first opinion, the Court of Appeal also solicited the Legislature's attention: "To the extent that this result will present problems for real estate lenders with respect to the way they now do business (as the Bank and several amici curiae have strongly suggested), it is a matter which should be addressed to the Legislature. We have been presented with two important but conflicting statutory policies. Our reconciliation of them in this case may not prove as satisfactory in another factual context. It is therefore a matter which should receive early legislative attention." (Fn. omitted.)

We granted review, and while the matter was pending, the Legislature passed Senate Bill No. 1612, an urgency statute that the Governor signed on ***242** September 15, 1994. Senate Bill No. 1612 affected four statutes. Section 1 of the bill amended Civil Code section 2787 to state that a letter of credit is not a form of suretyship obligation. (Stats. 1994, ch. 611, § 1.) Section 2 of the bill added Code of Civil Procedure section 580.5, explicitly excluding letters of credit from the purview of the antideficiency laws. (Stats. 1994, ch. 611, § 2.) Section 3 of the bill added Code of Civil Procedure section 580.7, which declares unenforceable letters of credit issued to avoid defaults on purchase money mortgages for owner-occupied real property containing one to four residential units. (Stats. 1994, ch. 611, § 3.) Section 4 of the bill made "technical, nonsubstantive changes" to section 5114. (Stats. 1994, ch. 611, § 4; Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

The Legislature made its purpose explicit: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act to confirm the independent nature of the letter of credit engagement and to abrogate the holding [of the Court of Appeal in this case] .... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.) The same purpose was echoed in the bill's statement of the facts calling for an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.)

After the Legislature enacted Senate Bill No. 1612, we requested the parties' views on its effect. On February 2, 1995, after considering the parties' responses, we transferred the case to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of the Legislature's action.

On reconsideration, the Court of Appeal determined Senate Bill No. 1612 constituted a substantial change in existing law. Believing there was no clear evidence that the Legislature intended the statute to operate retrospectively, the Court of Appeal thought Senate Bill No. 1612 had only prospective application. Therefore, Senate Bill No. 1612 did not affect the Court of Appeal's prior conclusions on the parties' rights and obligations. The Court of Appeal filed its second opinion on September 29, 1995, mostly repeating its prior reasoning and conclusions. We granted the Bank's petition for review.

II. Discussion

(1a) As the Court of Appeal recognized, we first must determine the effect on this case of the Legislature's enactment of Senate Bill No. 1612. ***243** (2) A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1208 [246 Cal.Rptr. 629, 753 P.2d 585]; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 [182 P.2d 159].) A statute has retrospective effect

when it substantially changes the legal consequences of past events. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7 [255 Cal.Rptr. 412, 767 P.2d 679].) A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. (*Ibid.*) Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587, 592 [128 Cal.Rptr. 427, 546 P.2d 1371].)

(3) A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. (Cf. *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [20 Cal.Rptr.2d 341, 853 P.2d 507].) Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71]; *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991) 1 Cal.App.4th 827, 833 [2 Cal.Rptr.2d 441]; see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828, fn. 8 [114 Cal.Rptr. 589, 523 P.2d 629].) Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. (*Stockton Sav. & Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 204 [114 P.2d 592]; *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1440 [28 Cal.Rptr.2d 726]; *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 976-977 [185 Cal.Rptr. 49].)

One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: " 'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.... [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change.' (1A Singer, Sutherland Statutory Construction (5th ed. 1993) § 22.31, p. *244 279, fns. omitted.)" (*RN Review for Nurses, Inc. v. State of California* (1994) 23 Cal.App.4th 120, 125 [28 Cal.Rptr.2d 354].) [FN4]

> FN4 The " 'presumption of substantial change' " mentioned in the quoted passage refers to the presumption that amendatory legislation accomplishing substantial change is intended to have only prospective effect. Some courts have thought changes categorized as merely formal or procedural present no problem of retrospective operation. However, as mentioned above, California has rejected this type of classification: "In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com., supra*, 30 Cal.2d at p. 394; cf. *Kizer v. Hanna, supra*, 48 Cal.3d at pp. 7-8.)

Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935]; see *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582].) Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. (Cf. *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 51-52 [276 Cal.Rptr. 114, 801 P.2d 357].) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them.

(4) "[A] subsequent expression of the Legislature as

to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act." (*California Emp. etc. Com. v. Payne, supra*, 31 Cal.2d at pp. 213-214.) Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a "clarification," the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. (*Id.* at p. 214.) Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. (*Evangelatos v. Superior Court, supra*, 44 Cal.3d at p. 1206.) Thus, where a statute provides that it clarifies or declares existing law, "[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto." (***245***California Emp. etc. Com. v. Payne, supra*, 31 Cal.2d at p. 214; cf. *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 798 [27 Cal.Rptr.2d 545]; *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211 [221 Cal.Rptr. 728].)

With respect to Senate Bill No. 1612, the Legislature made its intent plain. Section 5 of the bill states, in part: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act [FN5] to confirm the independent nature of the letter of credit engagement and to abrogate the holding in [the Court of Appeal's earlier opinion in this case], that presentment of a draft under a letter of credit issued in connection with a real property secured loan following foreclosure violates Section 580d of the Code of Civil Procedure and constitutes a 'fraud ... or other defect not apparent on the face of the documents' under paragraph (b) of subdivision (2) of Section 5114 of the Commercial Code.... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.)

> FN5 Section 2 of Senate Bill No. 1612 added Code of Civil Procedure section 580.5, which provides in pertinent part: "(b) With respect to an obligation which is secured by a mortgage or a deed of trust upon real property or an estate for years therein and which is also supported by a letter of credit, neither the presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit nor the honor or payment of, or the demand for reimbursement, receipt of reimbursement or enforcement of any contractual, statutory or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit shall, whether done before or after the judicial or nonjudicial foreclosure of the mortgage or deed of trust or conveyance in lieu thereof, constitute any of the following: [¶] (1) An action within the meaning of subdivision (a) of Section 726, or a failure to comply with any other statutory or judicial requirement to proceed first against security. [¶] (2) A money judgment for a deficiency or a deficiency judgment within the meaning of Section 580a, 580b, or 580d, or subdivision (b) of Section 726, or the functional equivalent of any such judgment. [¶] (3) A violation of Section 580a, 580b, 580d, or 726." (Code Civ. Proc., § 580.5, subd. (b), as added by Stats. 1994, ch. 611, § 2.)
>
> Section 4 of Senate Bill No. 1612 made certain technical, nonsubstantive changes to section 5114, which embodies the independence principle applicable to letter of credit payment obligations. (§ 5114, as amended by Stats. 1994, ch. 611, § 4.)

The Legislature's intent also was evident in its statement of the facts justifying enactment of Senate Bill No. 1612 as an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.) The Legislature's unmistakable focus was the disruptive effect of the Court of Appeal's decision on the expectations of parties to transactions where a letter of credit was issued in connection with a loan secured by real property. By abrogating the Court of Appeal's decision, the ***246** Legislature intended to protect those

parties' expectations and restore certainty and stability to those transactions. If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect. (See, e.g., *Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1020 [241 Cal.Rptr. 199]; *City of Redlands v. Sorensen, supra,* 176 Cal.App.3d at pp. 211-212; *Tyler v. State of California, supra,* 134 Cal.App.3d at pp. 976-977; but see *Del Costello v. State of California, supra,* 135 Cal.App.3d at p. 893, fn. 8 [courts need not accept Legislature's interpretation of statute].) The plain import of Senate Bill No. 1612 is that the Legislature intended its provisions to apply immediately to existing loan transactions secured by real property and supported by outstanding letters of credit, including those in this case.

We next consider whether Senate Bill No. 1612 effected a change in the law, or instead represented a clarification of the state of the law before the Court of Appeal's decision. As mentioned earlier, Senate Bill No. 1612 amended two code sections (§ 5114; Civ. Code, § 2787) and added two sections to the Code of Civil Procedure (§§ 580.5, 580.7). The two code sections Senate Bill No. 1612 amended plainly made no substantive change in the law. The amendments to section 5114, which concerns the issuer's duty to honor a draft conforming to the letter of credit's terms, were "technical, nonsubstantive changes," as the Legislative Counsel's Digest correctly noted. (See Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

In the other section amended, Civil Code section 2787, Senate Bill No. 1612 added a statement reflecting an established formal distinction: "A letter of credit is not a form of suretyship obligation." (Stats. 1994, ch. 611, § 1.) Civil Code section 2787 defines a surety or guarantor as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." Generally, a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal for that obligation. (See, e.g., Civ. Code, § 2806 et seq.)

(5) By contrast, the liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. (See *San Diego Gas & Electric Co. v. Bank Leumi, supra,* 42 Cal.App.4th at pp. 933-934; *Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal.App.3d 1474, 1480 [238 Cal.Rptr. 920]; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69].) Thus, as the amendment to Civil Code section 2787 made clear, existing law viewed a *247 letter of credit as an independent obligation of the issuing bank rather than as a form of guaranty or a surety obligation. (See, e.g., Dolan, The Law of Letters of Credit: Commercial and Standby Credits (rev. ed. 1996) § 2.10[1], pp. 2-61 to 2-63 (Dolan, Letters of Credit); 3 White & Summers, Uniform Commercial Code (4th ed. 1995) Letters of Credit, § 26-2, pp. 112-117.) The issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. (*San Diego Gas & Electric Co. v. Bank Leumi, supra,* 42 Cal.App.4th at p. 934.) Absent fraud, the issuer must pay upon proper presentment regardless of any defenses the customer may have against the beneficiary based in the underlying transaction. (*Ibid.*)

Senate Bill No. 1612's remaining statutory addition with which we are concerned,[FN6] Code of Civil Procedure section 580.5, specified that letter of credit transactions do not violate the antideficiency laws contained in Code of Civil Procedure sections 580a, 580b, 580d, or 726. (Code Civ. Proc., § 580.5, subd. (b)(3).) In particular, the new section specifies that a lender's resort to a letter of credit, and the issuer's concomitant right to reimbursement, do not constitute an "action" under Code of Civil Procedure section 726, or a failure to proceed first against security, regardless of whether they come before or after a foreclosure. (Code Civ. Proc., § 580.5, subd. (b)(1).) Similarly, letter of credit draws and reimbursements do not constitute deficiency judgments "or the functional equivalent of any such judgment," (Code Civ. Proc., § 580.5, subd. (b)(2).)

FN6 We do not address the effect of section 3 of Senate Bill No. 1612, which added section 580.7 to the Code of Civil Procedure. This section provides, in pertinent part: "(b) No letter of credit shall be enforceable by any party thereto in a loan transaction in which all of the following circumstances exist: [¶] (1) The customer is a natural person. [¶] (2) The letter of credit is issued to the beneficiary to avoid a default of the existing

> loan. [¶] (3) The existing loan is secured by a purchase money deed of trust or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer. [¶] (4) *The letter of credit is issued after the effective date of this section.*" (Code Civ. Proc., § 580.7, subd. (b), italics added, as added by Stats. 1994, ch. 611, § 3.) The italicized language, not found in the other statutory changes made by Senate Bill No. 1612, suggests the Legislature intended section 580.7 to have prospective effect only. However, this case does not involve any interpretation of this section or its effect, and so we express no view on those matters.

The Court of Appeal saw Code of Civil Procedure section 580.5 as a change in the law, in large part, because of the analogy it employed to examine the use of standby letters of credit as additional support for loans also secured by real property. The Bank argued a standby letter of credit was the functional equivalent of cash collateral. The Court of Appeal disagreed, instead analogizing standby letters of credit to guaranties and emphasizing the similarities of purpose and function: "No matter how it may be regarded ***248** by the beneficiary, a standby letter is certainly not cash or its equivalent from the perspective of the debtor; in reality, it represents his promise to provide *additional funds* in the event of his *future* default or deficiency, thus confirming its use not as a means of payment but rather as an instrument of guarantee." (Original italics.) The Court of Appeal relied on *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (*Gradsky*) and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (*Commonwealth Mortgage*).

Gradsky held that a creditor, after nonjudicial foreclosure of the real property security for a note, could not recover the note's unpaid balance from a guarantor. (*Gradsky, supra*, 265 Cal.App.2d at p. 41.) Significantly, the court did not find Code of Civil Procedure section 580d's prohibition of deficiency judgments barred the creditor's claim on the guarantor: "It is barred by applying the principles of estoppel. The estoppel is raised as a matter of law to prevent the creditor from recovering from the guarantor after the creditor has exercised an election of remedies which destroys the guarantor's subrogation rights against the principal debtor." (*Gradsky, supra*, 265 Cal.App.2d at p. 41.)

The court noted that the guarantor, after payment, ordinarily would be equitably subrogated to the rights and security formerly held by the creditor. (*Gradsky, supra*, 265 Cal.App.2d at pp. 44-45; cf. Civ. Code, §§ 2848, 2849.) However, where the creditor first resorts to nonjudicial foreclosure, the guarantor could not acquire any subrogation rights from the creditor because under Code of Civil Procedure section 580d, the nonjudicial sale eliminated both the security and the possibility of a deficiency judgment against the debtor. (*Gradsky, supra*, 265 Cal.App.2d at p. 45.) Because the creditor has a duty not to impair the guarantor's remedies against the debtor, the court held the creditor is estopped from pursuing the guarantor after electing a remedy-nonjudicial foreclosure-that eliminated the security for the debt and curtailed the possibility of the guarantor's reimbursement from the debtor. (*Id.* at pp. 46-47.)

However, the rules applicable to surety relationships do not govern the relationships between the parties to a letter of credit transaction. (See Dolan, Letters of Credit, *supra*, § 2.10[1], pp. 2-62 to 2-63.) At the time of this case's transactions, a majority of courts did not grant subrogation rights to an issuer that honored a draw on a credit; the issuer satisfied its own primary obligation, not the debt of another. (*Tudor Dev. Group, Inc. v. U.S. Fid. & Guar. Co.* (3d Cir. 1992) 968 F.2d 357, 361-363; see 3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-15, pp. 211-212; but see Cal. U. Com. Code, § 5117; fn. 2, *ante*, at pp. 237-238.) Nor does the ***249** beneficiary of a credit owe any obligations to the issuer; literal compliance with the letter of credit's terms for payment is all that is required. (Cf. *Paramount Export Co. v. Asia Trust Bank, Ltd., supra*, 193 Cal.App.3d at p. 1480; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank, supra*, 86 Cal.App.3d at p. 178.)

Gradsky contains additional language suggesting a much broader rule than its holding and analysis warranted. Going beyond the subrogation theory underlying its holding, the court observed: "If ... the guarantor ... can successfully assert an action in assumpsit

against [the debtor] for reimbursement, the obvious result is to permit the recovery of a 'deficiency' judgment against the debtor following a nonjudicial sale of the security under a different label. It makes no difference to [the debtor's] purse whether the recovery is by the original creditor in a direct action following nonjudicial sale of the security, or whether the recovery is in an action by the guarantor for reimbursement of the same sum." (*Gradsky, supra,* 265 Cal.App.2d at pp. 45-46.) The court also said: "The Legislature clearly intended to protect the debtor from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the debtor following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.) In view of the reasoning of the court's holding, these additional observations were unnecessary to the case's determination.

Commonwealth Mortgage followed *Gradsky* to hold a mortgage guaranty insurer could not enforce indemnity agreements to obtain reimbursement from the debtors for the insurer's payment to the lender after the lender's nonjudicial sale of its real property security. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 517.) The court said the mortgage guaranty insurance policy served the same purpose as the guaranty in *Gradsky,* and thus *Gradsky* would bar the insurer from being reimbursed under subrogation principles. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 517.) The court found the substitution of indemnity agreements for subrogation rights did not distinguish the case from *Gradsky.* Relying on the rule that a principal obligor incurs no additional liability on a note by also being a guarantor of it, the court said the agreements added nothing to the debtors' existing liability. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 517.) Thus, the court said the indemnity agreements could not be viewed as independent obligations. (*Ibid.*) Instead, the court concluded they were invalid attempts to have the debtors waive in advance the statutory prohibition against deficiency judgments. (*Ibid.*)

As did *Gradsky, Commonwealth Mortgage* also inveighed against subterfuges that thwart the purposes of Code of Civil Procedure section 580d. ***250** (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at pp. 515, 517.) "Although section 580d applies by its specific terms only to actions for 'any deficiency upon a note secured by a deed of trust' and not to actions based upon other obligations, the proscriptions of section 580d cannot be avoided through artifice [citation] .... In determining whether a particular recovery is precluded, we must consider whether the policy behind section 580d would be violated by such a recovery. [Citation.]" (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 515.) Thus, as did the *Gradsky* court, the *Commonwealth Mortgage* court augmented its opinion with concepts unnecessary to its determination of the case. [FN7]

> FN7 The precedential value of such statements in *Commonwealth Mortgage* also is clouded by a factual enigma the court left unresolved. As the Court of Appeal recognized, the lender in that case purchased the real property security at the trustee's sale for a full credit bid, which ought to have satisfied the debt. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 512, fn. 3.) Despite the apparent absence of any deficiency, the court deemed it unnecessary to decide whether a deficiency in fact remained before discussing the effect of Code of Civil Procedure section 580d's prohibition of deficiency judgments. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 515.)

The Court of Appeal in this case extrapolated from the *Gradsky* and *Commonwealth Mortgage* precedents a rule that swept far beyond their origins in guaranty and suretyship relationships: "Not only is a *creditor* prevented from obtaining a deficiency judgment against the debtor, but no other person is permitted to obtain what would, in effect, amount to a deficiency judgment." (Original italics.) The Court of Appeal apparently concluded a transaction has such an effect if it "has the practical consequence of requiring the debtor to pay *additional money* on the debt *after* default or foreclosure." (Original italics.) "Thus, we preserve the principle, clearly established by *Gradsky* and *Commonwealth* [*Mortgage*], that a lender should not be able to utilize a device of any kind to avoid the limitations of section 580d; and we apply that principle here to standby letters of credit." However, as we have seen, neither *Gradsky* nor *Commonwealth Mortgage* established such a principle as a rule of law. Instead, their statements accentuated the courts' vigilance regarding attempted eva-

sions of the antideficiency and foreclosure laws.

(1b) The Court of Appeal mistook standby letters of credit for such an attempt by seeing them only as a form of guaranty. The court analogized the standby letter of credit to a guaranty because of the perceived functional similarities. One consequence of that analogy was that the court applied to standby letters of credit a rule whose legal justifications originated in the subrogation rights owed to sureties. However, as discussed before, letters of credit-standby or otherwise-are not a form of suretyship, and the rights of the parties to these transactions are not governed by suretyship principles. ***251** Further, suretyship involves no counterpart to the independence principle essential to letters of credit.

While analogies can improve our understanding of how and why letters of credit are useful, analogies cannot substitute for recognizing the letters' unique qualities. The authors of one leading treatise aptly summarized the point: "In short, a letter of credit is a letter of credit. As Bishop Butler once said, 'Everything is what it is and not another thing.' " (3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-2, p. 117, fn. omitted.)

By focusing on analogies to guaranties, the Court of Appeal also overlooked that the parties in this case specifically intended the standby letters of credit to be additional security. [FN8] The parties' stipulated facts include that the original loan agreement was secured by a letter of credit, and that "Vista caused [the subsequent letters of credit] to be issued by Western as additional collateral security ...." The Court of Appeal found the letters of credit were not security interests in personal property under California Uniform Commercial Code section 9501, subdivision (4), as the Bank had argued. However, we need not determine whether a standby letter of credit comes within the scope of division 9 of the California Uniform Commercial Code. A letter of credit is sui generis as a means of securing or supporting performance of an obligation incurred in a separate transaction. Regardless of whether this idiosyncratic undertaking meets the qualifications for a security interest under the California Uniform Commercial Code, it nevertheless is a form of security for assuring another's performance.

FN8 To the extent that resort to analogy is appropriate for such a singular legal creation as the standby letter of credit, its closest relative would seem to be cash collateral. As one commentator noted: "In view of the relative positions of the beneficiary, the [customer], and the issuing bank, the standby letter of credit is more analogous to a cash deposit left with the beneficiary than it is to the traditional letter of credit or to the performance bond. Because the beneficiary generates all the documents necessary to obtain payment, he has the power to appropriate the funds represented by the standby letter of credit at any time.... [¶] Even though the standby letter of credit is functionally equivalent to a cash deposit, it differs from a cash deposit because the customer does not have to part with its own funds until payment is made and it is forced to reimburse the issuing bank. Because the cash-flow burden might otherwise be prohibitive, this is a great advantage to a party who enters into a large number of transactions simultaneously. Moreover, the beneficiary is satisfied; while it does not actually possess the funds, as it would if a cash deposit were used, it is protected by the credit of a financial institution." (Comment, *The Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218, 225-226, fns. omitted; see Dolan, Letters of Credit, *supra*, § 1.06, pp. 1-24 to 1-25, for a discussion of cases illustrating use of standby credits in lieu of cash, bonds, and other security.)

When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory ***252** prohibition of deficiency judgments. Code of Civil Procedure section 580d does not limit the security for notes given for the purchase of real property only to trust deeds; other security may be given as well. (*Freedland v. Greco* (1955) 45 Cal.2d 462, 466 [289 P.2d 463].) Creditors may resort to such other security in addition to nonjudicial foreclosure of the real property security. (*Ibid.*; *Hatch v. Security-First Nat. Bank* (1942) 19 Cal.2d 254, 260 [120 P.2d 869].) (6) A standby letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. (See *San Diego Gas & Electric Co. v. Bank Leumi, supra*, 42 Cal.App.4th at pp. 933-

934; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank, supra*, 86 Cal.App.3d at p. 178.) A creditor that draws on a letter of credit does no more than call on all the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

(1c) The Legislature plainly intended that the sections of Senate Bill No. 1612 we have addressed would apply to existing loan transactions supported by outstanding letters of credit. We conclude the Legislature's action did not effect a change in the law. Before the Legislature passed Senate Bill No. 1612, an issuer could not refuse to honor a conforming draw on a standby letter of credit-given as additional security for a real property loan-on the basis that the draw followed a nonjudicial sale of the real property security. The Court of Appeal created such a basis, but produced an unprecedented rule without solid legal underpinnings or any real connection to the actual language of the statutes involved.

Therefore, the aspects of Senate Bill No. 1612 we have discussed did not effect any change in the law, but simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion. Because the legislative action did not change the legal effect of past actions, Senate Bill No. 1612 does not act retrospectively; it governs this case. The Legislature concluded that Senate Bill No. 1612 should be given immediate effect to confirm and clarify the law applicable to loans secured by real property and supported by letters of credit. This conclusion was reasonable, particularly in view of the uncertainties the financial community evidently faced after the Court of Appeal's decision. (See, e.g., Murray, What *Should I Do With This Letter of Credit?* (Cont.Ed.Bar 1994) 17 Real Prop. L. Rptr. 133, 138-140.)

In sum, the Court of Appeal erred in concluding the Legislature's enactment of Senate Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision and make certain the parties' obligations when letters of credit supported loans also secured by real property. The Legislature manifestly intended the ***253** respective obligations of the parties to a letter of credit transaction should remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Senate Bill No. 1612. Accordingly, we conclude the judgment of the Court of Appeal should be reversed. [FN9]

FN9 Western belatedly claims it should not be liable for prejudgment interest on the amount of the letter of credit it dishonored. It argues it should not be "punished" for seeking a declaration of its rights in a novel and complex case. The Court of Appeal decided that "if it is ultimately determined that Western is liable to the Bank on the letters of credit then it must follow that it is liable for legal interest thereon from and after the day when its obligation to pay on the letters arose. (Civ. Code, § 3287, subd. (a).)" Western did not petition for review of this aspect of the Court of Appeal decision. In any event, Western's liability for prejudgment interest is clear. The award of this interest is not imposed for the sake of punishment. The award depends only on whether Western knew or could compute the amount the Bank was entitled to recover on the letters of credit. (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173 [286 Cal.Rptr. 146].) The Court of Appeal correctly assessed Western's liability for prejudgment interest.

Disposition

The judgment of the Court of Appeal is reversed, and the cause remanded for further proceedings consistent with this opinion.

George, C. J., Baxter, J., and Brown, J., concurred.

WERDEGAR, J.,

Concurring and Dissenting.-I concur in the majority's conclusion that California Uniform Commercial Code section 5114, subdivision (2)(b), does not excuse Western Security Bank, N.A. (Western), the issuer, from honoring its letter of credit upon demand for payment by Beverly Hills Business Bank (the Bank), the beneficiary. I would not, however, reach this conclusion under the majority's reasoning that Senate Bill No. 1612 (Stats. 1994, ch. 611) merely declared existing law and that, prior to the bill's enactment, the antideficiency law had no effect on letters of credit. Instead, I agree with Justice Mosk that section 5114 simply does not bear the interpretation that the use of a letter of credit to support an obliga-

tion secured by a mortgage or deed of trust constitutes "fraud in the transaction." (Cal. U. Com. Code, § 5114, subd. (2); see conc. & dis. opn. of Mosk, J., *post*, at pp. 262-263.) Thus, Western was obliged to honor the Bank's demand for payment.

The conclusion that the Bank may properly draw upon the letter of credit does not compel the further conclusion that the antideficiency law ultimately offers no protection to Vista Place Asssociates. This is illustrated by a comparison of the majority opinion and the separate opinion of Justice Mosk, which agree on the former point but disagree on the latter. In my view, the Bank's petition for review of a decision rejecting its claim (as ***254** beneficiary) against Western (as issuer) under superseded law does not present an appropriate vehicle for broader pronouncements on the antideficiency law's effect on other claims and other parties. Because the Legislature in Senate Bill No. 1612 has articulated rules that will govern all future letters of credit, and because letters of credit typically expire after a finite period, the status of residual letters of credit issued before the bill's effective date will soon become an academic question. In contrast, whether the antideficiency law should as a general matter be expansively or narrowly construed remains of vital importance, as demonstrated by the interest in this case shown by amici curiae involved in the purchase and sale of real estate. Under these circumstances, the principle of judicial restraint counsels against the majority's sweeping declaration that the reach of the antideficiency law prior to Senate Bill No. 1612 was too narrow to affect the respective obligations of the parties to a letter of credit transaction.

Underlying the broad declaration just mentioned is the majority's erroneous conclusion that Senate Bill No. 1612 merely clarified existing law and, thus, may be applied to transactions entered into before the bill's operative date. Before that date, the antideficiency law did not distinguish between residential and nonresidential real estate transactions. Now, however, as amended by Senate Bill No. 1612, the antideficiency law does distinguish between residential and nonresidential real estate transactions. New Code of Civil Procedure section 580.7, which the bill added, makes a letter of credit unenforceable when issued to avoid the default of an existing loan and "[t]he existing loan is secured by a purchase money deed of trust or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer." (*Id.*, subd. (b)(3).)

In light of this provision, we may conclude that letters of credit before Senate Bill No. 1612 either were enforceable in the specified residential real estate transactions but now are not, or were not enforceable in all other real estate transactions but now are. This case does not require us to choose between these possibilities. Either way, Senate Bill No. 1612 went beyond mere clarification to change the effective scope of the antideficiency law. To apply it retroactively would change the legal consequences of past acts. Under these circumstances, it is appropriate to apply the ordinary presumption that a legislative act operates prospectively, and inappropriate to apply to this case the new set of rules articulated in Senate Bill No. 1612.

MOSK, J.,

Concurring and Dissenting.-I agree with the majority that the issue before us is not whether Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) has retrospective application. It does not. ***255** Rather, we must determine what the law was *before* Senate Bill No. 1612 was enacted to provide, in effect, a "standby letter of credit exception" to the antideficiency statutes.

I disagree with the majority that Senate Bill No. 1612 did not change prior law. In my view, far from merely "clarifying" the "true" meaning of prior law-as the majority implausibly assert-its numerous amendments and additions to the statutes reversed what the Court of Appeal aptly referred to as "the fifty years of consistent solicitude which California courts have given to the foreclosed purchase money mortgagee." [FN1]

> FN1 Among other things, Senate Bill No. 1612 amended Civil Code section 2787, added Code of Civil Procedure sections 580.5 and 580.7, and amended California Uniform Commercial Code former section 5114. (See Stats. 1994, ch. 611, §§ 1-6.) It appears, however, that our decision in this matter will have limited application. It will operate only when: (a) a lender obtained a

> standby letter of credit prior to September 15, 1994, the effective date of Senate Bill No. 1612, to support a transaction secured by a deed of trust against real property; (b) the creditor defaulted on the deed of trust; (c) the lender elected to foreclose on by way of trustee's sale rather than through judicial foreclosure; and (d) the lender thereafter demanded payment under the standby letter of credit. In view of the limited precedential value of this case, a better course would have been to dismiss review as improvidently granted.

As the majority concede, a legislative declaration of an existing statute's meaning is neither binding nor conclusive. "The Legislature has no authority to interpret a statute. That is a judicial task." (*Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582]; see also *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935].) As the majority also concede, the legislative interpretation of prior law in this case is particularly unworthy of deference: Nothing in the previous legislative history of letter of credit statutes suggests an intent to create an exception to the antideficiency statutes. Indeed, it is apparently only recently that standby letters of credit have been used in real estate transactions.

Accordingly, unlike the majority, I conclude that before Senate Bill No. 1612, standby letters of credit were not exempt from the antideficiency statutes precluding creditors from obtaining a deficiency judgment from a creditor following nonjudicial foreclosure on a real property loan.

I.

As the Court of Appeal emphasized, before Senate Bill No. 1612, the potential conflict between the letters of credit statutes and the antideficiency statutes posed a question of first impression, arising from the relatively recent innovation of the use of standby letters of credit as additional security ***256** for real estate loans. Does the so-called "independence principle"-under which letters of credit stand separate and apart from the underlying transaction-constitute an exception to the antideficiency statutes that bar deficiency judgments after a nonjudicial foreclosure on real property?

The majority conclude that even before Senate Bill No. 1612, there was no restriction on the right of a creditor to demand payment on a standby letter of credit after a nonjudicial foreclosure on real property. They are wrong.

Under the so-called "independence principle," the issuer of a standby letter of credit "must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." (Cal. U. Com. Code, former § 5114, subd. (1), as amended by Stats. 1994, ch. 611, § 4.) In turn, the issuer of a standby letter of credit "is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit." (*Id.*, subd. (3).) [FN2]

> FN2 As the reference to "goods or documents" in the statute suggests, the drafters appear to have contemplated use of letters of credit in commercial financial transactions, not as additional security in real estate transactions.

A standby letter of credit specifically operates as a means of guaranteeing payment in the event of a future default. "A letter of credit is an engagement by an issuer (usually a bank) to a beneficiary, made at the request of a customer, which binds the bank to honor drafts up to the amount of the credit upon the beneficiary's compliance with certain conditions specified in the letter of credit. The customer is ultimately liable to reimburse the bank. The traditional function of the letter of credit is to finance an underlying customer's beneficiary contract for the sale of goods, directing the bank to pay the beneficiary for shipment. A different function is served by the 'standby' letter of credit, which directs the bank to pay the beneficiary not for his own performance but upon the customer's default, thereby serving as a guarantee device." (Note, "*Fraud in the Transaction": Enjoining Letters of Credit During the Iranian Revolution* (1980) 93 Harv. L.Rev. 992, 992-993, fns. omitted.)

Thus, in practical effect, a standby letter of credit constitutes a promise to provide additional funds in the event of a future default or deficiency. As such, prior to passage of Senate Bill No. 1612, it potentially came up against the restrictions of the antideficiency statutes barring a creditor from obtaining additional funds from a debtor after a nonjudicial foreclosure. Indeed, as ***257** the parties concede, nothing in the applicable statutes or legislative history prior to the amendments and additions enacted by Senate Bill No. 1612 created any specific exception to the antideficiency statutes for standby letters of credit. Nor did anything in the applicable statutes or legislative history "imply" that the antideficiency statutes must yield to the so-called "independence principle," based on public policy or otherwise.

We have previously summarized the history and purpose of the antideficiency statutes as follows.

"Prior to 1933, a mortgagee of real property was required to exhaust his security before enforcing the debt or otherwise to waive all rights to his security [citations]. However, having resorted to the security, whether by judicial sale or private nonjudicial sale, the mortgagee could obtain a deficiency judgment against the mortgagor for the difference between the amount of the indebtedness and the amount realized from the sale. As a consequence during the great depression with its dearth of money and declining property values, a mortgagee was able to purchase the subject real property at the foreclosure sale at a depressed price far below its normal fair market value and thereafter to obtain a double recovery by holding the debtor for a large deficiency. [Citations.] In order to counteract this situation, California in 1933 enacted fair market value limitations applicable to both judicial foreclosure sales ([Code Civ. Proc.,] § 726) and private foreclosure sales ([*id.*,] § 580a) which limited the mortgagee's deficiency judgment after exhaustion of the security to the difference between the fair [market] value of the property at the time of the sale (irrespective of the amount actually realized at the sale) and the outstanding debt for which the property was security. Therefore, if, due to the depressed economic conditions, the property serving as security was sold for less than the fair [market] value as determined under section 726 or section 580a, the mortgagee could not recover the amount of that difference in this action for a deficiency judgment. [Citation.]

"In certain situations, however, the Legislature deemed even this partial deficiency too oppressive. Accordingly, in 1933 it enacted section 580b [citation] which barred deficiency judgments altogether on purchase money mortgages. 'Section 580b places the risk of inadequate security on the purchase money mortgagee. A vendor is thus discouraged from overvaluing the security. Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value. [Citation.] If inadequacy of security results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if defaulting ***258** purchasers were burdened with large personal liability. Section 580b thus serves as a stabilizing factor in land sales.' [Citations.]

"Although both judicial foreclosure sales and private nonjudicial foreclosure sales provided for identical deficiency judgments in nonpurchase money situations subsequent to the 1933 enactment of the fair value limitations, one significant difference remained, namely property sold through judicial foreclosure was subject to the statutory right of redemption ([Code Civ. Proc.,] § 725a), while property sold by private foreclosure sale was not redeemable. By virtue of sections 725a and 701, the judgment debtor, his successor in interest or a junior lienor could redeem the property at any time during one year after the sale, frequently by tendering the sale price. The effect of this right of redemption was to remove any incentive on the part of the mortgagee to enter a low bid at the sale (since the property could be redeemed for that amount) and to encourage the making of a bid approximating the fair market value of the security. However, since real property purchased at a private foreclosure sale was not subject to redemption, the mortgagee by electing this remedy, could gain irredeemable title to the property by a bid substantially below the fair value and still collect a deficiency judgment for the difference between the fair value of the security and the outstanding indebtedness.

"In 1940 the Legislature placed the two remedies, judicial foreclosure sale and private nonjudicial foreclosure sale on a parity by enacting section 580d [ci-

tation]. Section 580d bars 'any deficiency judgment' following a private foreclosure sale. 'It seems clear ... that section 580d was enacted to put judicial enforcement on a parity with private enforcement. This result could be accomplished by giving the debtor a right to redeem after a sale under the power. The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. [Citation.] By choosing instead to bar a deficiency judgment after private sale, the Legislature achieved its purpose without denying the creditor his election of remedies. If the creditor wishes a deficiency judgment, his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forego the right to a deficiency judgment. In either case his debt is protected.' " (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 600-602 [125 Cal.Rptr. 557, 542 P.2d 981], fns. omitted.)

Over the several decades since their enactment, our courts have construed the antideficiency statutes liberally, rejecting attempts to circumvent the proscriptions against deficiency judgments after nonjudicial foreclosure. "It is well settled that the proscriptions of section 580d cannot be avoided through artifice ...." (**259*Rettner v. Shepherd* (1991) 231 Cal.App.3d 943, 952 [282 Cal.Rptr. 687]; accord, *Freedland v. Greco* (1955) 45 Cal.2d 462, 468 [289 P.2d 463] [In construing the antideficiency statutes, " 'that construction is favored which would defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remedied by the statute, or ... to accomplish by indirection what the statute forbids.' "]; *Simon v. Superior Court* (1992) 4 Cal.App.4th 63, 78 [5 Cal.Rptr.2d 428].)

Nor can the antideficiency protections be waived by the borrower at the time the loan was made. (See Civ. Code, § 2953 [such waiver "shall be void and of no effect"]; *Valinda Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106, 112 [40 Cal.Rptr. 735] [The debtor's waiver agreement was "contrary to public policy, void and ineffectual for any purpose."].)

In this regard, as the Court of Appeal observed, two decisions are of particular relevance here: *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (hereafter *Gradsky*), and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (hereafter *Commonwealth*).

In *Gradsky*, the Court of Appeal held that Code of Civil Procedure section 580d operated to preclude a lender from collecting the unpaid balance of a promissory note from the guarantor after a nonjudicial foreclosure on the real property securing the debt. It concluded that if the guarantor could successfully assert an action against the borrower for reimbursement, "the obvious result is to permit the recovery of a 'deficiency' judgment against the [borrower] following a nonjudicial sale of the security under a different label." (*Gradsky, supra*, 265 Cal.App.2d at pp. 45-46.) "The Legislature clearly intended to protect the [borrower] from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the [borrower] following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.)

In *Commonwealth*, borrowers purchased real property with a loan secured by promissory notes provided by a bank. At the bank's request, they obtained policies of mortgage guarantee insurance to secure payment on the promissory notes. They also signed indemnity agreements promising to reimburse the mortgage insurer for any funds it paid out under the policy. When the borrowers defaulted on the promissory notes, the bank foreclosed nonjudicially on the real property. It then collected on the mortgage insurance; the mortgage insurer then brought an action for reimbursement on the indemnity agreements. **260*

The Court of Appeal in *Commonwealth* held that reimbursement was barred by Code of Civil Procedure section 580d. It rejected the argument that the indemnity agreements constituted separate and independent obligations: "The instant indemnity agreements add nothing to the liability [the borrowers] already incurred as principal obligors on the notes .... To splinter the transaction and view the indemnity agreements as separate and independent obligations ... is to thwart the purpose of section 580d by a subterfuge [citation], a result we cannot permit." (*Commonwealth, supra*, 211 Cal.App.3d at p. 517.)

The majority's attempt to distinguish *Gradsky* and *Commonwealth*, by characterizing them as grounded in subrogation law, is unpersuasive. Indeed, in *Com-*

monwealth, subrogation law was not directly in issue; the indemnity obligation provided a contract upon which to base collection. [FN3]

> FN3 In any event, the analogy between standby letters of credit and guarantees is not as "forced" as the majority would suggest. As one commentator recently observed, "upon closer analysis, the borders between standby credits and contracts of guarantee are not so well settled as they may first appear." (McLaughlin, *Standby Letters of Credit and Guaranties: An Exercise in Cartography* (1993) 34 Wm. & Mary L.Rev. 1139, 1140; see also Alces, *An Essay on Independence, Interdependence, and the Suretyship Principle* (1993) 1993 U. Ill. L.Rev. 447 [rejecting distinction between letters of credit and "secondary obligations," i.e., guarantees and sureties].) Moreover, "courts have long recognized that, in a sense, issuers of credits 'must be regarded as sureties.' [Citation.] A seller of goods often insists on a commercial letter of credit because he is unsure of the buyer's ability to pay. The standby letter of credit arises out of situations in which the beneficiary wants to guard against the applicant's nonperformance. In both instances, the credit serves in the nature of a guaranty." Dolan, The Law of Letters of Credit: Commercial and Standby Credits (2d ed. 1991) § 2.10[1], pp. 2-61 to 2-62.)

The majority miss the point. As the Court of Appeal in this matter explained: "*Gradsky* and *Commonwealth* reflect the strong judicial concern about the efforts of secured real property lenders to circumvent section 580d by the use of financial transactions between debtors and third parties which involve post-nonjudicial foreclosure debt obligations for the borrowers. Their common and primary focus is on the lender's requirement that the debtor make arrangements with a third party to pay a portion or all of the mortgage debt remaining after a foreclosure, i.e., to pay the debtor's deficiency."

The Legislature, in enacting Senate Bill No. 1612, expressly abrogated the Court of Appeal decision in this matter and gave primacy to the so-called "independence principle" as against the antideficiency protections. Its additions and amendments to the statutes-lobbied for, and drafted by, the California Bankers Association-significantly altered prior law. Senate Bill No. 1612, therefore, should have prospective application only. ***261**

In their strained attempt to reach the conclusion that Senate Bill No. 1612 governs this case, the majority adopt the fiction that a standby letter of credit is an "idiosyncratic" form of "security" or the "functional equivalent" of cash collateral. They offer no sound support for such an approach. There is none. [FN4]

> FN4 The principal "authority" cited by the majority for the proposition that standby letters of credit are the "functional equivalent" of cash collateral is a student law review note published over a decade ago-and apparently never cited in any case in California or elsewhere. (Comment, *The Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218.) Significantly, the note nowhere discusses the use of standby letters of credit in transactions involving purchase money mortgages or the potential conflict between the so-called "independence principle" and antideficiency statutes. Indeed, it assumes that "[t]hose who engage in standby letter of credit transactions are usually large corporate or governmental entities with access to high-quality counsel and are thus in a position to evaluate and respond to the risks involved." (*Id.* at p. 238.) Needless to say, that is often *not* the case in real property transactions, particularly those involving residential property. As a leading commentator observed: "the motivation of the parties to a real estate secured transaction is frequently other than purely commercial, and their relative bargaining power is often grossly disproportionate." (Hetland & Hansen, *The "Mixed Collateral" Amendments to California's Commercial Code-Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?* (1987) 75 Cal.L.Rev. 185, 188, fn. omitted.)

As the Court of Appeal observed, from the perspective of the debtor, a standby letter of credit is not cash or its equivalent. It is, instead, a promise to provide

additional funds *in the event of future default or deficiency* and has the practical consequence of requiring the debtor to pay *additional* money on the debt *after* default or foreclosure. [FN5] Moreover, unlike cash, which can be pledged as collateral security only once, a standby letter of credit does not require a debtor to part with its own funds until payment is made and thus permits a borrower to use standby letters of credit in a large number of transactions separately. Cash collateral, by contrast, does not impose personal liability on the borrower following a trustee's sale and does not encourage speculative lending practices.

> FN5 Although it appears to be uncommon, an issuer of a standby letter of credit may demand security from its customer in the form of cash collateral or personal property as a condition for issuing the letter of credit. In the event of a draw on the letter of credit, the issuer would then have recourse to the pledged security, up to the value of the draw, without requiring its customer to pay additional money. Whether a real estate lender's draw on a standby letter of credit backed by security, and not by a mere promise to pay, would fall within the mixed security rule is a difficult question that need not be addressed here.

As the Court of Appeal observed: "For us to conclude that such use of a standby letter of credit is the same as an increased cash investment (whether or not from borrowed funds) is to deny reality and to invite the very overvaluation and potential aggravation of an economic downturn which the antideficiency legislation was originally enacted to prevent." ***262**

II.

The Court of Appeal correctly concluded that, before Senate Bill No. 1612, there was no implied exception to the antideficiency statutes for letters of credit. It erred, however, in holding that Western Security Bank, N.A. (Western) could have refused to honor the letter of credit on the ground that the Beverly Hills Business Bank (Bank), in presenting the letters of credit after a nonjudicial foreclosure, worked an "implied" fraud on Vista Place Associates (Vista).

The Court of Appeal cited former California Uniform Commercial Code former section 5114, subdivision (2)(b), which provides that when there has been a notification from the customer of "fraud, forgery or other defect not apparent on the face of the documents," the issuer "may"-but is not obligated to-"honor the draft or demand for payment."(Cal. U. Com. Code, § 5114, subd. (2)(b) as amended by Stats. 1994, ch. 611, § 4.) [FN6] The statute is inapplicable under the present facts.

> FN6 An issuer's obligations and rights are now governed by California Uniform Commercial Code section 5108, enacted in 1996 as part of Senate Bill No. 1599. (Stats. 1996, ch. 176, § 7.) The same legislation repealed section 5114, relating to the issuer's duty to honor a draft or demand for payment, as part of the repeal of division 5, Letters of Credit. (Stats. 1996, ch. 176, § 6.)

Western, presented with a demand for payment on a letter of credit, was limited to determining whether the documents presented by the beneficiary complied with the letter of credit-a purely ministerial task of comparing the documents presented against the description of the documents in the letter of credit. If the documents comply on their face, the issuer must honor the draw, regardless of disputes concerning the underlying transaction. (*Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69]; Cal. U. Com. Code, former § 5109, subd. (2) as added by Stats. 1963, ch. 819, § 1, p. 1934.) Thus, in this case, Western was not entitled to look beyond the documents presented by the Bank and refuse to honor the standby letter of credit based on a potential violation of the antideficiency statutes in the underlying transaction.

In my view, the concurring and dissenting opinion by Justice Kitching in the Court of Appeal correctly reconciled the policies behind standby letter of credit law and the antideficiency provisions of Code of Civil Procedure section 580d, as they existed *before* Senate Bill No. 1612. Thus, I would conclude that Western was obligated, under the so-called "independence principle," to honor the standby letter of credit presented by the Bank. None of the limited exceptions to that rule applied. Western was not, however, without recourse. It was entitled to seek reimbursement from Vista, pursuant ***263** to former California Uniform Commercial Code former section

5114, subdivision (3) and its promissory notes. Vista, in turn, could seek disgorgement from the Bank, if it has not legally waived its protection under Code of Civil Procedure section 580d-an issue that is not before us and should be remanded to the trial court. As Justice Kitching's concurrence and dissent concluded, "[t]his procedure would retain certainty in the California letter of credit market while implementing the policies supporting section 580d."

Kennard, J., concurred. ***264**

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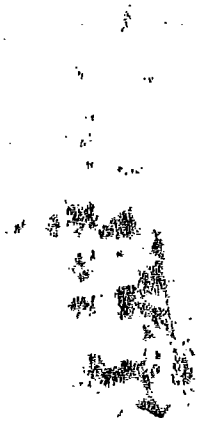

Original List Date: 12/29/2004
Last Updated: 11/9/2009
List Print Date: 11/09/2009
Claim Number: 04-TC-01
Issue: Clean School Restrooms

Agenda Mailing List

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