The 2010 Election and the New Chief Justice: How Will the State Supreme Court Change?

By Jeremy B. Rosen

Recently the state Supreme Court has been the focus of quite a bit of attention. This paper has reported (see Laura Ernde, *Daily Journal*, "Will New Chief Justice Retain Unity," Sept. 29, 2010) that "one of the hallmarks of the California Supreme Court under the leadership of Chief Justice Ronald M. George has been the court's high rate of unanimity." This causes many who practice in the high court to wonder whether the dynamic will alter under new Chief Justice Tani Cantil-Sakauye, and whether other potential changes in the composition of the court may signal a shift in the direction of the court.

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We are in the midst of a gubernatorial election in which Meg Whitman has made an issue of former Gov. Jerry Brown's prior controversial appointments to the state Supreme Court, including Chief Justice Rose Bird. It does not appear that former Governor Brown has explained during this campaign how he will make judicial selections. However, during a prior campaign, he defended his record on judicial appointments made as governor: "I made my choices based on three factors: qualifications determined by the state bar; diversity in terms of philosophy and ethnicity, and third, community service...I'm really proud of the judges I appointed." Given the lengthy tenure of many of the justices now sitting on the Supreme Court, it is very possible that the next governor could appoint two to four additional members who could join the new Chief Justice to create a very different court than exists today.

There are a number of significant legal issues that have been resolved in contested 4-3 decisions in recent years with Chief Justice George usually in the majority. These areas of the law could change dramatically if the new Chief Justice disagrees with her predecessor or if there are other changes to the court's composition based upon appointments by either a Governor Brown or a Governor Whitman.

Consumer protection/class actions: In *in re Tobacco II*, the state Supreme Court, in a 4-3 majority opinion where the deciding vote was cast by a pro-tem justice sitting in for Chief Justice George, who was recused, concluded that while a class representative proceeding on a claim of misrepresentation as the basis of his or her unfair competition law action must demonstrate actual reliance on the allegedly deceptive or misleading statements pursuant to the voter passed Proposition 64, which eliminated the no injury requirement to bring such an action, all class members are not required to demonstrate such standing. 46 Cal.4th 298, 315-322 (2009). Thus, there was no need to show that the large class of plaintiffs had actually been injured by the defendants' conduct.

The three dissenting justices disagreed with the majority's approach, noting the counterintuitive effect of the reasoning, as applied in the case before it, is that "so long as the named plaintiffs actually relied

on the [tobacco company defendant's] allegedly deceptive advertising claims when buying and smoking cigarettes, they may seek injunctive and restitutionary relief on behalf of all California smokers who simply saw or heard such ads during the period at issue, regardless of whether false claims contained in those ads had anything to do with any class member's decision to buy and smoke cigarettes." The dissent further explained that "the majority's holding encourages the very sort of abusive shakedown suits that Proposition 64 was designed to curb."

Private Property Rights: In *Fashion Valley Mall LLC v. NLRB*, the state Supreme Court, in a 4-3 opinion with Chief Justice George in the majority, re-affirmed its controversial *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 decision holding that California's free speech clause applies to private shopping centers, notwithstanding the fact that the shopping center owners do not want to permit their property to be used for certain expressive activities. 42 Cal.4th 850 (2007). Thus, in a case arising out of a union members' leaflet campaign against a mall tenant, the court concluded that the mall acted improperly when it sought to enforce its rules prohibiting expressive activities advocating a boycott of mall tenants.

The three justice dissent would have overruled the *Pruneyard* decision and upheld the right of private property owners to prohibit expressive activity antithetical to their economic interests from taking place on their property: "[*Pruneyard*] was wrong when decided. In the nearly three decades that have since elapsed, jurisdictions throughout the nation have overwhelmingly rejected it. We should no longer ignore this tide of history. The time has come for us to forthrightly overrule [*Pruneyard*] and rejoin the rest of the nation in this important area of the law. Private property should be treated as private property, not as a public free speech zone." The dissent further explained that "[a] shopping center exists for the individual businesses on the premises to do business. Urging a boycott of those businesses contradicts the very purpose of the shopping center's existence. It is wrong to compel a private property owner to allow an activity that contravenes the property's purpose."

Enforcement of Arbitration Agreements: In *Gentry v. Superior Court*, the state Supreme Court considered whether class action arbitration waivers in employment arbitration agreements may be enforced to preclude class arbitrations by employees whose statutory rights to overtime pay allegedly have been violated. The Supreme Court, in a 4-3 opinion with Chief Justice George in the majority, held that the prohibition of class-wide relief impermissibly undermined the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws. 42 Cal.4th 443, 453-466 (2007). Thus, Robert Gentry could proceed with his class action and avoid arbitration.

The dissent argued that this was an improper effort to limit and restrict the terms of private arbitration agreements: "both the Federal Arbitration Act and the California Arbitration Act provide that an agreement to resolve disputes by arbitration, rather than by court litigation, must be enforced except upon grounds applicable to contracts generally. These statutes are intended to override courts' historical suspicion of arbitration as an inferior forum for the vindication of claims, and to endorse contracts — including employment contracts — in which parties agree to resolve their disputes by this relatively cheap, simple, and expeditious means."

Commercial Speech: The Supreme Court, in a 4-3 opinion with Chief Justice George in the majority, held that Nike's published statements about its labor practices was unprotected commercial speech. 27 Cal.4th 939, 963-969 (2002). The Court found the messages in question were directed by a commercial speaker to a commercial audience, and that they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products.

The three justices in dissent argued that Nike should have First Amendment protection for its statements: "Nike is a major international corporation with a multibillion-dollar enterprise. The nature of its labor practices has become a subject of considerable public interest and scrutiny. Various persons and organizations have accused Nike of engaging in despicable practices, which they have described sometimes with such caustic and scathing words as 'slavery' and 'sweatshop.' Nike's critics and these accusations receive full First Amendment protection. And well they should.... While Nike's critics have taken full advantage of their right to 'uninhibited, robust, and wide-open' debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy.... According to the majority, if Nike utters a factual misstatement, unlike its critics, it may be sued for restitution, civil penalties, and injunctive relief under these sweeping statutes. Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate."

Recovering Stolen Art Years After the Fact

By Brian Kabateck and Joshua Najemy

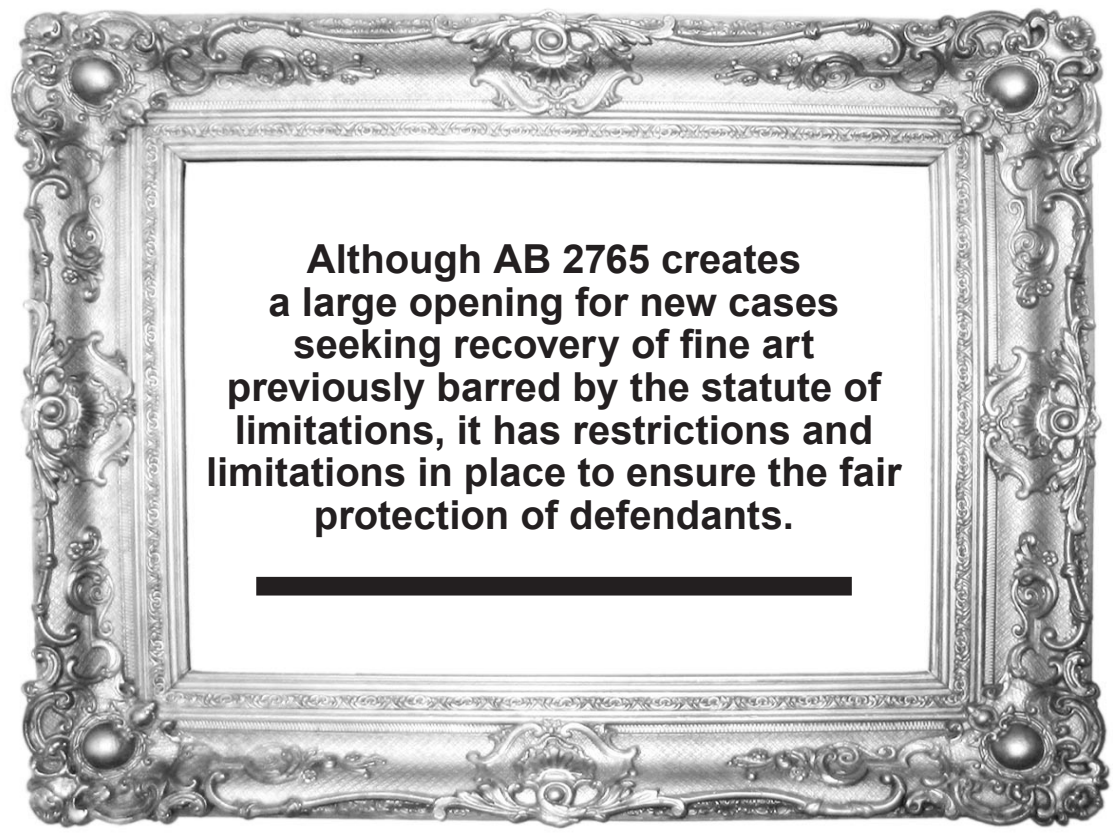
A new law passed by the California Legislature and signed by Gov. Arnold Schwarzenegger in late August opens a rare, time-limited window for filing claims for the return of stolen art that would otherwise be barred by the statute of limitations. The bill – Assembly Bill 2675 — does so in a fair and limited manner, making key concessions to the concerns of potential defendants.

This bill was crafted as an avenue for bringing cases seeking to recover art confiscated by Nazis during World War II after that avenue was narrowed by the court. *Von Saher v. Norton Simon*, 578 F.3d 1016 (2009).

The bill facilitates recovery of "works of art stolen through simple theft, as well as works taken by fraud or duress." This makes the law broad enough to avoid the pitfalls of the statute struck down in *Von Saher.* That statute was found to impinge on the federal government's domain over foreign affairs by singling out the acts of the former German government. However, it also makes the law broad enough to cover art confiscated during the atrocities of the Armenian Genocide, a topic and area of law in which this firm has been deeply involved with helping victims. Although this bill by no means applies exclusively to these cases, by specifically including art taken through fraud and duress, it has clear implications for cases of art taken from both classes of victims.

Once you have an applicable act of theft, here is what the new law does: it clarifies and expands the tolling effect of the discovery rule; increases the statute of limitations period from three years to six years; and imposes some limitations on the application of the new law and strengthens a good faith purchaser's defenses.

First, the bill clarifies that the discovery rule applies to cases of property stolen before 1982. Before this bill, there were conflicting California appellate decisions regarding use of the discovery rule with theft under California Code of Civil Procedure Section 338(c). A 1982 amendment to that section explicitly provided for tolling a victim's cause of action until he, his agent or the law enforcement agency investigating the theft, discovered the whereabouts of the article. Before then, there was no explicit mention of discovery-related tolling. The conflict was whether there was an implied discovery rule that would apply to thefts that occurred before the amendment. In *Naftzger v. American Numismatic Society*, the court ruled that there was such an implied discovery rule. 42 Cal.App.4th 421 (1996). This bill sides with the court's ruling in *Naftzger* that there is an implied discovery rule prior to the 1982 amendment and that



it "abrogates any contrary holding."

The bill also clarifies that the statute of limitations begins to run from the time of *actual* discovery of the whereabouts of the stolen property, and does not attribute any constructive knowledge to the victim. This is part of the holding in *Naftzger* adopted by the bill, and it applies to all causes of action for theft. However, the bill singles out fine art for special treatment by prescribing a new discovery rule that is even more favorable to plaintiffs. Under the new law, in the case of fine art, the statute of limitations does not start until the victim has actual knowledge of the identity and whereabouts of the work, *and* has actual knowledge of the facts giving rise to the victim's claim for possession of the work. For example, let's take someone who knew that his grandparents once owned a da Vinci and that the Getty now owns it. Sometime later, he then discovers that the work had been forcibly confiscated from his grandparents before its sale to the Getty. Upon that discovery, he will have a cause of action, despite having known the whereabouts of the piece for years.

In addition, the bill states that California Code of Civil Procedure Section 361, which allows for the use of another state's statute of limitations law under certain circumstances, does not apply to the theft of fine art. This further guarantees the protections of the new law.

Second, the bill retroactively extends the statute of limitations period for fine art from three to six years, and it revives certain claims that were dismissed due to statute of limitations. However, the revival is somewhat limited. It only applies to dismissals where the judgment is not yet final, or where the time for filing an appeal has not yet passed. There is no reprieve for cases long since adjudicated. The revival of claims under this bill is far more limited than Senate Bill 1899, which validly revived fully dismissed claims relating to the Northridge earthquake. Therefore, there is no ex post facto problem.

Finally, the bill imposes certain limitations. For instance, there is a short sunset. The special provisions only apply to cases filed up to Dec. 31, 2017. Thus, there is a discrete window of opportunity for filing cases under the expanded rules in this section.

Another limitation is that the special provisions only apply to claims against a museum, gallery, auctioneer or dealer. Claims against private individual owners do not provide the same liberality to the plaintiff regarding the discovery rule and longer limitations period. This recognizes the fact that museums and other art professionals are better able to protect themselves against such a lawsuit. A museum has more extensive access to records of ownership and is usually insured. On the other hand, a private collector who purchases a work will suffer greater hardship from an action for specific recovery, and will have less ability to guard against it.

As a further concession to the concerns of potential defendants, this bill allows defendants to raise all legal and equitable defenses, including laches and unclean hands. This is extremely important. The defenses of laches and unclean hands would otherwise be unavailable since they are equitable defenses and replevin or specific recovery is a legal action. Therefore, a defendant can still argue that a plaintiff's delay caused prejudicial loss of evidence or loss of witness testimony, and that the plaintiff's claim should be barred.

Although AB 2765 creates a large opening for new cases seeking recovery of fine art previously barred by the statute of limitations, it has restrictions and limitations in place to ensure the fair protection of defendants. This bill will protect the rights of many Californians by allowing a greater opportunity to correct the wrongs of the past. It will also encourage museums and other institutions to investigate more carefully the origin of individual works, possibly uncovering even more cases of stolen art. As a result of the just purpose advanced by this bill and its balanced and restrained approach, the bill did not receive a single vote in opposition to its passage.

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