

## Preserving Witness Testimony Under Section 2035 of the California Code of Civil Procedure

Kerne Matsubara

Consider the following situation. It is 1997 and your corporation is under audit by the Franchise Tax Board ("FTB") for income years 1981 to 1983. The primary issue being examined is whether your corporation and its subsidiaries were engaged in a single unitary business during those years. The ex-CEO and other former executives of the corporation who have personal and intimate knowledge about the business operations of the corporation during the 1980s are now in their sixties or seventies. Their testimony would support strongly your unitary filing position. What can you do to preserve their testimony and use such testimony as evidence should the matter be litigated in state court?

One useful technique under the California Code of Civil Procedure ("CCP") is the perpetuation of testimony, which may be used as a presuit device to take the testimony

of Equalization ("SBE"). Such testimony usually carries more weight than a self-serving declaration, because the FTB will have had the opportunity to cross-examine and test the credibility of the deponent. Although perpetuated testimony may be useful at trial, such testimony instead may encourage and expedite settlements by corroborating previously presented facts and revealing to the FTB the strength of your filing position.

### Presuit Perpetuation of Testimony

The California and Tax Court rules on perpetuating testimony have their origins in Rule 27 of the Federal Rules of Civil Procedure. In general, Rule 27 provides that prior to the commencement of a civil action, a deposition to perpetuate testimony may be taken by filing a petition in United States district court, which must approve the petition if the court is satisfied that the perpetuation of testimony would prevent a failure or delay of justice. Although both the California and Tax Court rules adopt a "failure or delay of justice" standard, the California courts have been more liberal than the Tax Court in approving perpetuation of testimony proceedings.

### United States Tax Court

Tax Court Rule 82 provides that a person may file a petition with the Tax Court to perpetuate testimony and take depositions regarding any matter that may be cognizable in Tax Court. The applicant must identify the persons to be deposed and state the reasons for the deposition, the expected substance of the deposition and how the proposed testimony is material to a matter in controversy.<sup>1</sup> In addition, the applicant must state any documents to be produced at the deposition by the person deposed, the time and place proposed for the deposition and the officer before whom the deposition is to be taken. The applicant also must show (i) that the applicant expects to be a party to a case cognizable in Tax Court but is at present unable to bring the case to court and (ii) the subject matter of the expected action and the applicant's interest in such matter.

Because the Tax Court considers Rule 82 to be an "extraordinary measure," the court additionally has required the applicant to show that testimony will, in all

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of a friendly witness. This technique is particularly useful in California state tax matters, because California's proceedings to perpetuate testimony are more liberal than the corresponding United States Tax Court rules. Properly perpetuated testimony may be presented as evidence in proceedings before the California courts or the State Board

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probability, be lost before trial.<sup>2</sup> The possibility that a witness might move away, become ill or lose his or her recollections or records is not sufficient to meet this standard.<sup>3</sup> Further, neither age nor a chronic medical problem alone is determinative. For example, the Tax Court has denied Rule 82 applications in the following situations: potential deponents who were in their sixties but in good health, an ailing 72-year old expert whose testimony the applicant failed to show would be unavailable at trial, and middle-aged witnesses whom the applicant alleged might move away and have diminished recollections.

### California Rules

CCP § 2035 generally provides for the perpetuation of testimony regarding matters cognizable in any California court by filing a petition in state court. The contents of the petition under CCP § 2035 are similar to that required under Rule 82. However, in contrast to the Tax Court, the California courts have approved perpetuation proceedings without requiring the applicant to show that there is danger that the testimony likely will be lost unless taken at once. The chance that a friendly

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witness may be unavailable when the case comes to trial because of, for example, old age, illness or moving away, should provide sufficient grounds to perpetuate the testimony of the witness.<sup>4</sup> Perpetuation proceedings, however, may not be used in California merely as a prelitigation investigatory discovery tool to determine whether a possible cause of action or defense exists or to identify potential parties.<sup>5</sup>

### California Procedures to Perpetuate Testimony

#### *The Petition*

To perpetuate testimony under CCP § 2035, you must file a verified petition in the superior court of the county in which the expected adverse party resides.<sup>6</sup> Because the FTB or the SBE will be the adverse party, the petition generally may be filed in superior court of Sacramento, San Francisco, Los Angeles or San Diego as the cities and

counties in which the Attorney General currently has an office.<sup>7</sup>

The petition must state all of the following—

- (1) The expectation that the petitioner will be a party to an action cognizable in a court of the State of California,
- (2) The present inability of the petition either to bring that action or to cause it to be brought,
- (3) The subject matter of the expected action and the petitioner's involvement,
- (4) The particular discovery methods that the petitioner desires to employ (limited to (i) oral and written depositions, (ii) inspections of documents, things and places and (iii) physical and mental examinations),
- (5) The facts that the petitioner desires to establish by the proposed discovery,
- (6) The reasons for desiring to perpetuate or preserve these facts before an action has been filed,
- (7) The name or a description of those whom the petitioner expects to be adverse parties so far as known,
- (8) The name and address of those from whom the discovery is to be sought and
- (9) The substance of the information expected to be elicited from each of those from whom discovery is being sought.<sup>8</sup>

State tax matters should satisfy items (1) through (3) above, and item (7) is answered easily by identifying the FTB as the potentially adverse party. Item (2) usually will be satisfied because prior to filing a lawsuit in California superior court, a final determination must be made by the FTB or SBE and the taxpayer must pay any tax due.<sup>9</sup> These conditions necessarily will not have occurred at the time the taxpayer is undergoing an FTB audit. As for item (4), you should indicate that you will be preserving testimony through the taking of depositions. For item (6), you should emphasize the ages of the potential deponents, if applicable. Even if a deponent is not advanced in age, the petition should note that the income years under audit are, as in our example, ten or more years ago and the time until a lawsuit may be filed is several years away.<sup>10</sup>

Finally, you must serve notice and provide a copy of the petition to the FTB as the expected adverse party.<sup>11</sup> This service is made in the same manner as the service of a summons and must be made at least 20 days before the date specified in the notice for the hearing on the petition.

#### *Manner of Perpetuating Testimony*

The perpetuation procedures are limited to the taking of oral or written depositions, the inspection of documents, things and places and physical and mental examinations.<sup>12</sup> Any deposition authorized by the court must be conducted in accordance with the ordinary discovery procedures pertaining to depositions.<sup>13</sup> If you take the deposition of a friendly witness, you should consider taking a video deposition as it may be more effective at trial, and perhaps have a greater impact on the FTB during administrative proceedings, than a printed transcript.<sup>14</sup>

As with the taking of depositions under regular discovery procedures in preparation for trial, you should prepare your witness and anticipate cross-examination by the FTB. You also should be careful not to preserve adverse testimony that otherwise might not be available at trial. Accordingly, even though the perpetuation procedures described above may be undertaken far in advance of trial, you should treat a presuit deposition with the same care as depositions taken during the pendency of a suit. If adverse testimony is elicited, at least you will have more time to take corrective measures than if such adverse testimony came to light on the eve of trial.

#### *Perpetuation of Testimony During Pending Suit*

It is not too late to perpetuate testimony even though a suit already has been initiated in state court. Tax Court Rule 81 provides that a party to a case pending in the Court may perpetuate testimony by deposition, provided that there is a “substantial risk” that the person to be deposed will not be available at trial. California, however, does not have such a stringent standard to preserve testimony through depositions taken during the pendency of a suit. Instead, the regular discovery procedures regarding depositions should apply.<sup>15</sup>

#### *Use of Preserved Testimony*

A deposition taken under CCP § 2035 to preserve testimony may be used as evidence in actions brought in a California court, subject to the limitations under the ordinary discovery rules relating to depositions.<sup>16</sup> Such

deposition also should be admissible in SBE hearings under the SBE’s liberal rules on evidence.<sup>17</sup> Perhaps more importantly, the perpetuation proceedings may be used to showcase the strength of your filing position and to demonstrate to the FTB your seriousness in the disputed tax matter. Depending on the strength and persuasiveness of the testimony obtained, preserved testimony may encourage and expedite settlements with the FTB. Thus, although the perpetuation of testimony proceedings are designed to prepare you to take your case to court, such proceedings could be a time and cost saving presuit device to give you a favorable settlement and avoid trial.

#### **Notes**

- 1 *Tax Ct. R. 81, 82(b)(1)*.
- 2 *Reed v. Commissioner*, 90 T.C. 698 (1988).
- 3 *See, e.g., Masek v. Commissioner*, 91 T.C. 1096 (1988); *Gale East, Inc. v. Commissioner*, 49 T.C.M. (CCH) 797 (1985).
- 4 *See* 2 B.E. Witkin, *California Evidence (3d ed.) (1996 Supp.)* §§ 1475-1479; Robert I. Weil & Ira A. Brown, *California Practice Guide Civil Procedure Before Trial* 8:419.
- 5 *CCP* § 2035(a).
- 6 *CCP* § 2035(c).
- 7 *CCP* § 401; *Cal. Gov’t Code* § 955; 3 B.E. Witkin, *California Procedure (4th Ed.)* §§ 779-782.
- 8 *CCP* § 2035(d).
- 9 *Cal. Const. art. XIII, § 32; Cal. Rev. & Tax. Code* § 19382.
- 10 *See Petition of Ernst*, 2 F.R.D. 447, 451 (1942) (“It is common knowledge that the lapse of time is replete with hazards and unexpected events. This is so regardless of the age, health or general status of an individual . . .”).
- 11 *CCP* § 2035(e).
- 12 *CCP* § 2035(b).
- 13 *CCP* § 2035(f).
- 14 *See* David Perry, *A Vision of Video*, *The Recorder*, Sept. 10, 1992, at 8.
- 15 *See CCP* § 2025.
- 16 *CCP* §§ 2025(a), 2035(g).
- 17 “Any relevant evidence, including affidavits, declarations under penalty of perjury, and hearsay evidence, may be presented if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. . . . The board [SBE] shall be liberal in allowing the presentation of evidence, but objections to the presentation of and comments on the weaknesses of evidence shall be considered in assigning weight to the evidence. . . .” *18 Cal. Admin. Code* § 5079(d).

## Upcoming Developments in California Unitary Tax

Jeffrey M. Vesely

As always, there is a tremendous amount of unitary tax activity in California. On the legislative front, there is renewed momentum to enact elective combination legislation and, to a lesser extent, to enact further water's edge election relief provisions. Administratively, the FTB is purportedly getting closer to releasing proposed deferred intercompany transaction regulations. On the litigation front, there are a number of cases pending in California which should be closely monitored.

- *Guy F. Atkinson Company v. FTB*. Should tax credits be applied on a unitary or separate company basis? A refund suit has been filed in the San Francisco Superior Court. Trial should occur within a year.
- *Ashland Inc. v. FTB*. In California, is there a separate functional test for determining whether income is business or nonbusiness? This issue has not yet

been decided by California courts. This case, which is due to go to trial in Sacramento later this year, involves both the sale of stock in a Canadian subsidiary and the sale of virtually all of the Company's exploration assets.

- *F. W. Woolworth v. FTB; Hunt-Wesson v. FTB*. In these cases, the interest offset rule is under constitutional attack. In *Woolworth*, it was upheld. In *Hunt-Wesson*, it was held to be unconstitutional. Both are on appeal.
- *Appeal of Yale Industries*. Is California's dividend received deduction statute unconstitutional? The case is fully briefed and awaiting oral argument before the SBE.

In California, the unitary tax is never quiet. The next few months should be interesting.

## California Supreme Court Allows Legislature to Circumvent Proposition 13 Regarding New Taxes

Richard E. Nielsen

In a case monitored by many groups<sup>1</sup> throughout the State, the California Supreme Court reversed the judgment of the Third District Court of Appeal which had affirmed the trial court's grant of summary judgment in favor of Sinclair Paint Company ("Sinclair"). The unanimous opinion<sup>2</sup> authored by Associate Justice Chin rejected Sinclair's contention that certain fees paid by Sinclair under the Childhood Lead Poisoning Prevention Act of 1991 were in fact unconstitutional taxes imposed with less than the two-thirds vote of the Legislature required by Proposition 13.<sup>3</sup> The Supreme Court held that case law clearly indicates that the police power is broad enough to include mandatory remedial measures to

mitigate the past, present, or future adverse impact of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects.

### Introduction

In 1991, the California Legislature enacted Assembly Bill No. 2038, the Childhood Lead Poisoning Prevention Act of 1991 (the "Act"). AB 2038 passed the Legislature with less than a two-thirds vote in both the Assembly and the Senate.<sup>4</sup> The Act created a new article in the California Health and Safety Code beginning at section 372. Health and Safety Code section 372.7(a) imposes a "fee" on "manufacturers and other persons . . . engaged in the stream of commerce of lead or products containing lead," whether presently or at any time in the past. The "fee" also applies to any persons who are "responsible for identifiable sources of lead" that have "significantly contributed . . . to environmental lead contamination," whether presently or at any time in the past.

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Under Health and Safety Code section 372.7(b), the California Department of Health Services (“DHS”) is required to establish specific “fees” by regulation. The statute provides that to the maximum extent practicable, the “fees” are to be assessed on a person’s “past and present responsibility for environmental lead contamination,” and a person’s “market share” responsibility for environmental lead contamination. The revenues generated by the “fees” are applied to a program administered by the DHS relating to the detection and monitoring of lead poisoning in children. The two industries which were singled out for the bulk of the payment of the fees were the paint and petroleum industries.

Article XIII A, Section 3 of the California Constitution requires that any changes in state taxes enacted for the purpose of increasing revenues must be passed by a two-thirds vote in both the Assembly and the Senate. This provision was added to the Constitution as part of Proposition 13, the 1978 voter initiative that also placed new restrictions on property tax rates, property tax assessments and local taxes. As the California Supreme Court recognized in *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208 (1978), in which the Court upheld Proposition 13 against a constitutional challenge, the individual elements of Proposition 13 together formed an interlocking “package” of measures deemed necessary by the voters to assure effective tax relief. Taken together, the elements of Proposition 13 create a system of firm fiscal restraints on the taxing powers of state and local governments. In Section 3 of Article XIII A, the voters made it clear that the Legislature could not raise new revenues without the unequivocal mandate of a two-thirds majority.

### Factual Background

Regulations were ultimately issued by DHS to implement the Act and in March 1993, Sinclair was assessed \$97,825.26 for the calendar year 1992. In May 1993, Sinclair paid the assessment to the State Board of Equalization (“Board”) which was charged under the Act with collection of the so-called fees. Sinclair later filed an administrative claim for refund with the Board asserting that the fees were unconstitutionally imposed taxes adopted in violation of the voting requirements of section 3. The Board denied Sinclair’s refund claim, and the underlying refund suit was filed.

Sinclair filed its complaint for refund of the fees against the Board in Sacramento Superior Court. Thereafter, DHS and other interested parties sought and

were granted leave to intervene. Sinclair noticed a motion for summary judgment based on a facial challenge to the provisions of the Act on the ground that the fees constituted invalid taxes because the Act did not receive a two-thirds vote of the Legislature.

Prior to hearing Sinclair’s motion, the Board as well as the Intervenor attempted to conduct extensive discovery. Sinclair resisted the discovery on the basis that it was unnecessary for determination of its motion which it contended presented purely legal issues. The Board filed a motion to compel.

The trial court held a hearing on Sinclair’s summary judgment motion and granted summary judgment in favor of Sinclair and against the Board, DHS and the Intervenor. The discovery dispute was never heard.

The Court of Appeal affirmed and held that the fee in question was a tax and not a regulatory fee because it was enacted solely for revenue purposes and its payment was not connected with any regulation of the taxpayer itself. Accordingly, the Court of Appeal held the fee was invalid and did not comply with the requirement of Proposition 13 that new state taxes be passed by a two-thirds vote of the State Legislature.

### Sinclair’s Legal Arguments

Sinclair contended that the charges imposed by the Act were taxes rather than permissible fees because they did not fund regulation of the fee payers or their products, nor did they fund delivery of a government benefit or service to the fee payers. Sinclair argued that the absence of regulation (at least the absence of any nexus between the present fee and specific regulation) or benefit or service provided to the fee payer made the issue of the alleged burden placed on society by Sinclair’s products irrelevant. Further, Sinclair asserted that discovery by the State and Intervenor directed against Sinclair was unnecessary in the context of a facial challenge to the Act.

The *Amici* in support of Sinclair contended that the compulsory nature of the charge indicated that it was a tax rather than a fee. *Amici* argued that remedying a burden created by a fee payer’s past activity is not by its very nature regulatory. *Amici* also argued that the Act does not provide for any regulatory activity directed at the fee payers. *Amici* argued as well that permitting discovery against fee payers in response to a facial challenge would create a chilling effect on such challenges, and that the existence of any benefit should be established at the time of the enactment of the statute.

### The State's and Intervenors' Arguments

The State contended that it need not prove the existence of any benefit to Sinclair from its payment of fees because the fees are used to reduce the burden placed on society by Sinclair's and other fee payers' purported contribution to lead poisoning in children. Simply put, the State contended that the mere imposition of the fee pursuant to the police power of the State constituted regulation. (See note 5, *infra*, for the Court's holding on this point.) The State also argued that extensive regulation of Sinclair and other fee payers with respect to lead already existed at both the state and federal level, and that within such a framework the imposition of the fee was valid. The State argued that it should have been allowed to conduct discovery against Sinclair in order to establish the benefit (purportedly reduced tort actions concerning lead poisoning) received by Sinclair from its payment of the fees. The State asserted as well that the trial court improperly considered or relied on the legislative history concerning the Act.

### Supreme Court's Analysis

The Court phrased the issue as "[a]re the 'fees' section 105310 imposes in legal effect 'taxes enacted for the purpose of increasing revenues' under Article XIII A, Section 3, and therefore subject to a two-thirds majority vote?" *Slip op.* at 6. The Court observed that although no cases could be found that interpret the language of Section 3, several California appellate decisions have considered whether various fees are really "special taxes" under Article XIII A, Section 4. The Court stated that these "special tax" cases may be helpful, though not conclusive, in deciding the case before it. *Slip op.* at 6.

The Court noted that whether impositions are "taxes" or "fees" is a question of law for the appellate courts to decide on an independent review of the facts. The distinction between taxes and fees is frequently blurred, taking on different meanings in different contexts. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. Most taxes are compulsory but compulsory fees may be deemed legitimate fees rather than taxes. *Slip op.* at 7-8.

The Court observed that special tax cases have involved three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and

(3) regulatory fees, imposed under the police power. All three of these may overlap in a particular case. The Court then went on to consider each separately. *Slip op.* at 8.

Special assessments on property or similar business charges, in amounts reasonably reflecting the value of the benefits conferred by improvements, are not "special taxes" under Article XIII A, Section 4. Neither are development fees enacted in return for building permits or other governmental privileges if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer. The Court agreed with Sinclair and the Court of Appeal that the fees did not constitute either special assessments or development fees as the face of the statute makes clear that the funds collected are used to benefit children exposed to lead, not Sinclair or other fee payers. *Slip op.* at 8-9.

The Court agreed with the State that the challenged fees fall within the third category, namely, regulatory fees imposed under the police power, rather than the taxing power. The Court relied on *Pennell v. City of San Jose*, 42 Cal.3d 365 (1986) for the proposition that regulatory fees in amounts necessary to carry out the regulation's purpose are valid despite the absence of any perceived benefit accruing to the fee payers. *Slip op.* at 10-11. Sinclair argued and the Court of Appeal agreed that the Act was primarily aimed at raising revenue. The Supreme Court disagreed and concluded that the Act imposes bona fide regulatory fees. *Slip op.* at 12.

The Court stated that the Act required manufacturers and other persons whose products exposed children to lead contamination to bear a fair share of the cost of

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*The Court saw no reason why statutes or ordinances which call upon polluters or producers of contaminating products to help in mitigation or clean-up efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allow them to operate.*

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mitigating the adverse health effects their products created in the community. Viewed as a "mitigating effects" measure, it is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations. The Court observed that from the viewpoint of general

police power authority, it saw no reason why statutes or ordinances which call upon polluters or producers of contaminating products to help in mitigation or clean-up efforts should be deemed less “regulatory” in nature than the initial permit or licensing programs that allow them to operate.<sup>5</sup> *Slip op.* at 12.

The Court stated that the case law cited or discussed clearly indicates that the State’s police power is broad enough to include the mandatory remedial measures to mitigate the past, present or future adverse impact of the fee payers operations, at least where, as here, the measure requires a causal connection or nexus between a product and its adverse effects. *Slip op.* at 12.

The Court cited *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App. 3d 1132 (1988) where it was held that a reasonable way to achieve Proposition 13’s goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying public to the pollution-causing industries themselves. In the instant matter, the Court concluded that the shifting of costs of providing evaluation, screening

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and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is likewise a reasonable police power decision. In the Court’s view, the fact that the challenged fees were charged after, rather than before, the products’ adverse effects were realized is immaterial to the question whether the measure imposes valid regulatory fees rather than taxes. *Slip op.* at 14.

In the Court of Appeal, it was concluded that the fees were enacted solely for revenue purposes and that their payment gave Sinclair and the other fee payers the right to carry on their business without any further conditions. The Supreme Court disagreed. The Supreme Court stated that all regulatory fees are necessarily aimed at raising revenue to defray the cost of the regulatory program in

question, but that fact does not automatically render those fees taxes. The Court also found inconclusive the fact that the Act permits Sinclair and the other fee payers to carry on their operations without any further conditions specified in the Act itself, because as indicated above, fees can regulate business entities without directly licensing them by mitigating their operation’s adverse effects. The Court observed that the Act is part of a broader regulatory scheme (other state and federal statutory provisions), which regulates Sinclair and other manufacturers in the stream of commerce for products containing lead. Thus, the Court concluded that Sinclair’s payment of the challenged fees did not confer the right to carry on business without any further conditions or regulations. *Slip op.* at 16.

The Court concluded that under existing law, the challenged fees can be reasonably characterized as regulatory fees rather than as taxes. The Court observed that Sinclair can still attempt to prove at trial that the amount of fees assessed and paid exceeded the reasonable cost of providing the protective services for which the fees were charged, or that the fees were levied for unrelated revenue purposes. Additionally, Sinclair has the opportunity to try to show that no clear nexus exists between its products and childhood lead poisoning, or that the amount of the fees bore no reasonable relationship to the social or economic burdens its operations generated. *Slip op.* at 17.

### Conclusion

Over \$45 million in fees have been collected under the Act. The potential impact of *Sinclair* is tremendous since it is completely dependent upon the Legislature’s propensity to camouflage taxes as fees. Virtually every industry can be found to place some type of burden on society and now the Court has only limited the Legislature’s ability to impose fees on those industries within the bounds of its inventiveness. It is difficult, if not impossible, to reconcile *Sinclair* with the state of the law existing prior thereto. With this decision, the Supreme Court has broken alarming new ground in the tax versus fee controversy. Proposition 218 was a response to local governments being overzealous with fees and only the future will reveal what response may be forthcoming if the State Legislature follows in their footsteps.

**Notes**

- <sup>1</sup> Western States Petroleum Association (“WSPA”), Western Independent Refiners Association (“WIRA”), California Manufacturers Association (“CMA”), California Chamber of Commerce (“CCC”) and California Taxpayers’ Association (“Cal-Tax”) (hereinafter collectively referred to as “*Amici*”) are nonprofit corporations and associations whose members represent a broad cross section of enterprises engaged in business in California and who appeared along with other organizations as *amici* in support of Respondent, Sinclair Paint Company. They were represented by [Richard E. Nielsen](#) and [Jeffrey M. Vesely](#) of Pillsbury Madison & Sutro LLP. The California Medical Association, California Academy of Family Physicians and various cities and counties were among the *amici* who appeared in support of Appellants.
- <sup>2</sup> Associate Justice Janice Rogers Brown did not participate in the case as she was the author of the Court of Appeal decision below.
- <sup>3</sup> *California Constitution Article XIII A, Section 3.*
- <sup>4</sup> The Act was enacted by the provisions of AB 2038, introduced by Assemblyman Lloyd G. Connelly on March 8, 1991. After numerous amendments in the Assembly and the Senate, the bill was forwarded to Governor Pete Wilson on September 25, 1991. The Governor signed the bill on October 10, 1991. AB 2038 was recorded by the Secretary of State as Chapter 799 of the Statutes of 1991.
- <sup>5</sup> The Court concluded that the imposition of “mitigating effects” fees in a substantial amount “regulates” future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products. What this conclusion ignores is that Sinclair’s as well as other fee payer’s products are already subjected to federal and state regulations regarding lead content, which presumably should deter and stimulate the conduct alluded to above. Also, what constitutes a substantial amount? Is it payer related? Is it an absolute amount or measured in some other fashion?