CHAPTER FOURTEEN

WHITE-COLLAR CRIME

ENVIRONMENTAL CRIMES

California, perhaps more than many other state, has always been a destination point, with its beautiful beaches, coastline and other natural resources. The California Redwoods, the timeless beauty of San Francisco, Monterey, and San Diego, or the great natural wonders of Yosemite, the Sierras, Lake Tahoe, the Colorado River, the Salton Sea and many others, must be protected from not only natural challenges such as erosion, wildfires, flooding and storms, but from man's tendency to pollute and contaminate as well. The early conservationist, and creator of the Sierra Club, John Muir (1838 -1914) was one of the pioneers in seeing the devastating impact that both man and nature can have on our natural resources. After the disastrous aftermath of Hurricane Katrina, the Department of Water Resources is working to identify and repair aging and damaged levees throughout California. In February 2006, Governor Schwarzenegger declared a state of emergency for California's levee system, and later signed an Executive Order directing DWR to make needed repairs to prevent catastrophic flooding and loss of life. A total of 29 critical erosion sites on the levee system will receive urgent repair

The regulatory body is the California Environmental Quality Act (CEQA) pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.

CEQA applies to certain activities of state and local public agencies. A public agency must comply with CEQA when it undertakes an activity defined by CEQA as a "project." A project is an activity undertaken by a public agency or a private activity which must receive some discretionary approval (meaning that the agency has the authority to deny the requested permit or approval) from a government agency which may cause either a direct physical change in the environment or a reasonably foreseeable indirect change in the environment.

Most proposals for physical development in California are subject to the provisions of CEQA, as are many governmental decisions which do not immediately result in physical development (such as adoption of a general or community plan). Every development project which requires a discretionary governmental approval will require at least some environmental review pursuant to CEQA, unless an exemption applies.

The Guidelines are the regulations that explain and interpret the law for both the public agencies required to administer CEQA and for the public generally. They are found in the California Code of Regulations, in Chapter 3 of Title 14. The Guidelines provide objectives, criteria and procedures for the orderly evaluation of projects and the preparation of environmental impact reports, negative declarations, and mitigated negative declarations by public agencies. The fundamental purpose of the Guidelines is to make the CEQA process comprehensible to those who administer it, to those subject to it, and to those for whose benefit it exists. To that end, the Guidelines are more than mere regulations which implement CEQA as they incorporate and interpret both the statutory mandates of CEQA and the principles advanced by judicial decisions.

The California legislature, in its support of environmental issues, finds and declares as follows:

- The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.
- It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man.
- There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.
- The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.
- Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.

The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution.

- It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect thequality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.

§ 21001. Additional legislative intent

The Legislature further finds and declares that it is the policy of the state to:

- Develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.
- Take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.
- Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.
- Ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.
- Create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.
- Require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality.
- Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.[1]

[1] http://ceres.ca.gov/topic/env_law/ceqa/stat/

21002.1. Use of environmental impact reports; policy
In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall apply to the use of environmental impact reportsprepared pursuant to this division:

- The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.
- Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.
- If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations.
- In applying the policies of subdivisions (b) and (c) to individual projects, the responsibility of the lead agency shall differ from that of a responsible agency. The lead agency shall be responsible for considering the effects, both individual and collective, of all activities involved in a project

The California Environmental Resource Evaluation System (CERES) CERES is an information system developed by the California Resources Agency to facilitate access to a variety of electronic data describing California's rich and diverse environments. The goal of CERES is to improve environmental analysis and planning by integrating natural and cultural resource information from multiple contributors and by making it available and useful to a wide variety of users. (See Web Resources)

Examples of recent environmental and conservation projects include:

California and its conservation partners recently closed escrow on a conservation plan for the historic 82,000 acre Hearst Ranch. The Hearst Corporation, American Land Conservancy and California Rangeland Trust have partnered with the state to preserve 128 square miles of pristine rangeland that includes 18 miles of spectacular coastline along scenic Highway One.

Hearst Castle: *La Cuesta Encantada*, "The Enchanted Hill" or better known to Californians, as ***"Hearst Castle,*** is nestled high above the ocean at San Simeon. The castle was the creation of two extraordinary individuals, William Randolph Hearst, wealthy owner of powerful newspapers, and architect Julia Morgan. Their collaboration, which began in 1919 and continued for nearly 30 years, transformed an informal hilltop campsite into the world-famous Hearst Castle -- a magnificent 115-room main house plus guesthouses, pools, and 8 acres of cultivated gardens. The main house itself, "La Casa Grande," is a grand setting for Hearst's collection of European antiques and art pieces. It was also a most fitting site for hosting the many influential guests who stayed at Hearst's San Simeon ranch. Guests included President Calvin Coolidge, Winston Churchill, George Bernard Shaw, Charles Lindbergh, Charlie Chaplin, and a diverse array of luminaries from show business and publishing industries.[2]

[2]California State Parks: http://www.parks.ca.gov/default.asp?page_id=591 and http://www.hearstcastle.com/

"The dramatic nature of this agreement is exceeded only by the vision for the state's future and the value for the people that it will provide," said Governor Schwarzenegger. "Thanks to Steve Hearst and our conservation partners, this magnificent property will forever be preserved." (Students are encouraged to view the web sites to see this absolutely magnificent and mystical castle.)

Completion of the agreement for $95 million after more than six years of planning marks one of the largest land conservation transactions in state history. Valued at $230 million, the property includes one of the most significant coastal land gifts ever made to the State of California. [3]
Another recent project, the Sierra Nevada Conservancy, is comprised of 25 million acres, 22 counties, 20 incorporated cities, 40 special districts, and 212 communities.[4]

OCCUPATIONAL HEALTH AND SAFETY

Commonly referred to as CAL/OSHA, this state regulatory agency protects workers and the public from safety hazards by enforcing California's occupational and public safety laws. They also provide information and consultative assistance to employers, workers and the public about workplace and public safety matters.

The Cal/OSHA Program is responsible for enforcing California laws and regulations pertaining to workplace safety and health and for providing assistance to employers and workers about workplace safety and health issues.

The Cal/OSHA Enforcement Unit conducts inspections of California workplaces based on worker complaints, accident reports and high hazard industries. There are 22 Cal/OSHA Enforcement Unit district offices located throughout the state of California.

Specialized enforcement units such as the Mining and Tunneling Unit and the High Hazard Enforcement Unit augment the efforts of district offices in protecting California workers from workplace hazards in high hazard industries. [5]

Role of OSHA

In 1970, Congress responded to the increasingly high number of job-related deaths and injuries by passing the Occupational Safety and Health Act (OSHA). The act declared that workplace injuries and deaths were resulting in lost production and wages and also preventable medical expenses and disability compensation payments. It also stated that every working person should be guaranteed safe and healthful working conditions.

OSHA primarily relies on the civil process and financial penalties to insure compliance.
A criminal misdemeanor carrying a fine of not more than $10,000 and a prison sentence of up to six months or both are provided in the case of a willful violation of the law that results in the death of an employee. A second conviction carries a fine of not more than $20,000 and a prison sentence of up to a year or both. False statements in any document submitted or required to be maintained under the act may also result in a fine of not more than $10,000 or imprisonment for not more than six months or both.

[3] http://www.resources.ca.gov/hearst_ranch.html
[4] http://www.resources.ca.gov/
[5] http://www.dir.ca.gov/dosh/

OSHA refers cases of intentional, knowing, or reckless violations that result in death for prosecution by state authorities and, in recent years, to the Environmental Protection Agency. One study finds that corporations generally have not been criminally prosecuted either by the federal government or by the two states with their own forms of OSHA. OSHA initiated 1,798 workplace death investigations in the last 20 years (170,000 workers died during this period) and sent a total of 196 cases to state or federal authorities for prosecution. This, in turn, led to 104 prosecutions, 81 convictions, and 16 jail sentences totaling 30 years.

The Cal/OSHA enforcement unit has jurisdiction over every employment and place of employment in California which is necessary to adequately enforce and administer all occupational safety and health standards and regulations.

The Cal/OSHA enforcement unit conducts inspections of California workplaces in response to a report of an industrial accident, a complaint about an occupational safety and health hazard, or as part of an inspection program targeting industries which have a high rate of occupational hazards, fatalities, injuries or illnesses.

One of the goals of OSHA is to utilize Educational Outreach To High-Risk Employee Groups http://www.dir.ca.gov/dosh/app2005.doc Their 2005 Activity and Outcome Measures includes outreach to Hispanic workers:

Consultation:

- 250 of the on-sites and or interventions performed will include outreach to Hispanic workers. Outreach may include a form of interviews, training, providing educational materials in Spanish and or combination of materials and assistance. Targeted industries will include construction, agriculture, and employers with experience modifications factors of 125% or greater.
- Spanish publication distribution was expected to exceed 9,000 during FFY2005. Distribution to high hazard industries and establishments with high numbers of Hispanic workers will receive priority

Samples of the enforcement codes include:

Section 6357 of the Labor Code, requires the California Occupational Safety and Health Standards Board -- an agency separate and independent from the Division of Occupational Safety and Health -- to adopt

- *"[O]n or before January 1, 1995... standards for ergonomics in the workplace designed to minimize instances of injury from repetitive motion."*
- *High Hazard Enforcement Program (see Labor Code Section 6314.1). 6314.1 which required the Division to*
- *"Identify employers in high hazardous industries with the highest incidence of preventable occupational injuries and illnesses and workers' compensation losses;"*
- *"Establish procedures for ensuring that the highest hazardous employers in the most hazardous industries are inspected on a priority basis;" and*
- *"Coordinate the inspections conducted in accordance with Section 6314.1 with the Division's consultation services."*

Section 6314.1 required that the Division establish a new compliance program for

- *"targeting employers in high hazardous industries with the highest incidence of preventable occupational injuries and illnesses and workers' compensation losses."*

Section 6314.1 sets forth a programmatic formula which requires a two-tiered selection or targeting methodology. First, "high hazardous industries" must be selected, and then specific employer-members of those hazardous industries must be selected on an establishment level basis. Section 6314.1 provides, then, a combination "industry" and "establishment" selection process. Identifying employers according to establishment level "hazard" criteria is much easier said (or legislated) than done. In California, workplace injury and illnesses data, by employer, cannot be accessed from one source.

Sections 6354 and 6355 of the Labor Code require that the Division:

- *"Establish a program for identifying categories of occupational safety and health hazards causing the greatest number and most serious preventable injuries and illnesses and workers' compensation losses, and places of employment where they are occurring, by utilizing the data system from which the list of high hazard employers is developed. The program must also include a component for reducing the number of work-related, repetitive motion injuries, including, but not limited to, back injuries;"*
- *"Develop procedures for offering consultation services to high hazard employers which may include development of educational material and procedures for reducing or eliminating safety and health hazards, conducting workplace surveys to identify health and safety problems, and development of plans to improve employer health and safety loss records; and"*
- *"Develop model injury and illness prevention training programs to prevent repetitive motion injuries, including recommendations for the minimum qualification of instructors."*
- *Due to Workers' Compensation Insurance Reform Legislation, some of the highlights of injury and illness compensation laws included:*
- *A seven percent rollback in employers' workers' compensation insurance premiums;*
- *Abolishment of the "minimum rate" law;*
- *A cap on vocational rehabilitation expenditures;*
- *Medical cost containment;*
- *Restrictions on mental stress claims;*
- *Provision for managed care options;*
- *Anti-fraud protections; and*
- *Opportunities for labor and management in the construction industry to create alternatives to the current injury compensation system in a collective bargaining agreement.*

Division of Labor Standards Enforcement

DLSE adjudicates wage claims, investigates discrimination and public work complaints, and enforces Labor Code statutes and Industrial Welfare Commission orders. http://www.dir.ca.gov/dlse/dlse.html

A primary function of the Division of Labor Standards Enforcement (DLSE) is to enforce the State's labor laws regulating wages, hours and working conditions for employees in the State of California. (Labor Code § 95) The Division's enforcement powers, however, are limited by the phrase "the enforcement of which is not specifically vested in any other officer, board or commission."

Since DLSE has the primary authority to investigate and prosecute all actions for the collection of wages, it is important to understand the concept of wages and the manner in which DLSE has defined and interpreted the law for purposes of this enforcement.

The California Supreme Court has concluded that: “Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. (Cf. Lab.Code, § 1198.4 [implying that some “enforcement policy statements or interpretations” are not subject to the notice provisions of the APA].) A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes.”

“The DLSE's primary function is enforcement, not rulemaking.” (Lab.Code, §§ 61, 95, 98-98.7, 1193.5)Nevertheless, recognizing that enforcement requires some interpretation and that these interpretations should be uniform and available to the public, the Legislature empowered the DLSE to promulgate necessary “regulations and rules of practice and procedure.” (Labor Code § 98.8.) The Labor Code does not, however, include special rulemaking procedures for the DLSE similar to those that govern IWC rulemaking, nor does it expressly exempt the DLSE from the APA.” *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, 569-570.

At first glance then, it would appear that DLSE may not interpret the myriad of laws which it must enforce without utilizing the very time consuming process of the Administrative Procedures Act. The *Tidewater* court did, however, provide that: If an issue is important, then presumably it will come before the agency either in an adjudication or in a request for advice. By publicizing a summary of its decisions and advice letters, the agency can provide some guidance to the public, as well as agency staff, without the necessity of following APA rulemaking procedures. The Supreme Court later expanded on its explanation of the use of agency advice letters in the case of *Yamaha Corp. of America v. State Board of Equalization* (1998) 1 9 Cal.4th 1, 21 (concurring opinion, adopted and cited with approval at *Morillion v. Royal Packing* (2000) 22 Cal.4th 575, 590) when it stated:

“Long-standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous. *(Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 861, 32 Cal.Rptr.2d 892). This principle has been affirmed on numerous occasions by this court and the Courts of Appeal...Moreover, this principle applies to administrative practices embodied in staff attorney opinions and other expressions short of formal, quasi-legislative regulations. (See, *e.g., DeYoung, supr*a, 147 Cal.App.3d 11, 19-21, 194 Cal.Rptr. 722 [long-standing interpretation of city charter provision embodied in city attorney's opinions]...”

The Supreme Court gave two reasons why such administrative letters should be entitled to great weight:

> First, “When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation.” *(Whitcomb Hotel, Inc. v. Cal. Emp. Com., supr*a, 24 Cal.2d at p. 757, 151 P.2d 233...
>
> Second, as we stated in *Moore, supr*a, 2 Cal.4th at pages 1017-1018, 9 Cal.Rptr.2d 358, 831 P.2d 798, “a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency’s interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it.”

As the Court of Appeal has further articulated: "[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication the administrative practice was consistent with underlying legislative intent."

Finally, the Supreme Court in the case of *Morillion v. Royal Packing Company (2000)* 22 Cal.4th 575 at 584, concluded that "advice letters [of the DLSE] are not subject to the rulemaking provisions of the APA." (citing *Tidewater, supra,* 14 Cal.4th at page 571) The Court then cited two of the Division's advice [opinion] letters regarding the DLSE's interpretation of the term "hours worked". The Court noted that the "DLSE interpretation is consistent with our independent analysis of hours worked." [6]

Here's an interesting sample of the code and ***"Strikebreakers!"***

Labor Code: 1134. It shall be unlawful for any employer willingly and knowingly to utilize any professional strikebreaker to replace an employee or employees involved in a strike or lockout at a place of business located within this state.

Labor Code: 1134.2. It shall be unlawful for any professional strikebreaker willingly and knowingly to offer himself for employment or to replace an employee or employees involved in a strike or lockout at a place of business located within this state.

Some examples of *"**child labor**"* laws are holdovers from the bad old days of the Industrial Revolution and agricultural jobs from the past.

Labor Code 1391. (a) Except as provided in Sections 1297, 1298, and 1308.7:
(1) No employer shall employ a minor 15 years of age or younger for more than eight hours in one day of 24 hours, or more than 40 hours in one week, or before 7 a.m. or after 7 p.m., except that from June 1 through Labor Day, a minor 15 years of age or younger may be employed for the hours authorized by this section until 9 p.m. in the evening.

(2) Notwithstanding paragraph (1), while school is in session, no employer shall employ a minor 14 or 15 years of age for more than three hours in any schoolday, nor more than 18 hours in any week, nor during school hours, except that a minor enrolled in and employed pursuant to a school-supervised and school-administered work experience and career exploration program may be employed for no more than 23 hours, any portion of which may be during school hours.

(3) No employer shall employ a minor 16 or 17 years of age for more than eight hours in one day of 24 hours or more than 48 hours in one week, or before 5 a.m., or after 10 p.m. on any day preceding a schoolday. However, a minor 16 or 17 years of age may be employed for the hours authorized by this section during any evening preceding a nonschoolday until 12:30 a.m. of the nonschoolday.

[6] http://www.dir.ca.gov/dlse/Manual-Instructions.htm

SECURITIES FRAUD

Stock market fraud emerged as a subject of intense public interest when it was announcedin June 2002that domestic diva Martha Stewart was the subject of a criminal investigation for lying to investigators about the sale of stock. This is covered in your text.

Why does the law punish individuals for buying or selling stock based on information that is not available to the public at large?

Insider Trading

The stock market rather than banks is increasingly where Americans deposit and look to grow their savings. The average individual has twice as much money in the stock market as in banks. As a result, the federal government has become increasingly concerned with insuring that the stock market functions in a fair fashion and has aggressively brought criminal charges against individuals for stock market fraud.

A corporation that wants to raise money to build new plants, hire workers, or manufacture innovative products typically sells securities or stocks to the public. Individuals purchase these stocks in hopes that as corporate profits rise, the stock will increase in value and they eventually will be able to sell the securities at a substantial profit. This investment in stocks is an important source of money for businesses and provides individuals with the opportunity to invest their money and to save for a house or retirement. Corporate executives and corporate boards of directors possess a fiduciary relationship (a high duty of care) to safeguard and to protect the investments of stockholders.

The federal Securities and Exchange Commission (SEC) is charged with insuring that corporate officials comply with the requirements of the Securities Exchange Act of 1934 in the offering and selling of stocks. The Act, for instance, requires corporations to provide accurate information on their economic performance in order to enable the public to make informed investment decisions. The SEC typically seeks civil law financial penalties against corporations that violate the law and refers allegations of fraud to the Department of Justice for prosecution. In 2002, Congress passed the ***Sarbanes-Oxley Act***. This is a corporate criminal fraud statute that requires the heads of corporations to certify that their firms' financial reports are accurate. A violation of this act is punishable by up to twenty-five years in prison.

In the past decade, the Department of Justice has focused its white-collar crime investigations on insider trading in violation of Section 10b and rule 10b-5 of the 1934 Act. The enforcement of these provisions is intended to insure that the stock market functions in a fair and open fashion. The Commission had charged Raymond Kolts, a Glendale, California attorney, for insider trading in the securities of Trimedyne, Inc., an Irvine, California company that manufactures medical devices. According to the Commission's complaint, Kolts, while representing Trimedyne in a civil lawsuit, learned that the FDA had given approval to Trimedyne to market its medical laser for treatment of enlarged prostate. Kolts also learned at that time that Trimedyne planned to announce publicly the FDA clearance the following week. Before Trimedyne publicly announced this approval, Kolts purchased 2,500 Trimedyne shares, realizing $30,000 in insider trading profits. Kolts is charged with securities fraud and the Commission is seeking an injunction against violations, disgorgement of the insider trading profits, and civil penalties of up to three times the trading profit. Securities and Exchange Commission v. Raymond G. Kolts, No. CV 99-06353 ER (RZx) (C.D. Cal.).

In a related action, the Commission sued three other defendants for insider trading in Trimedyne stock. The Commission alleges that Michelle Nguyen, Trimedyne's controller, used inside information to purchase 4,100 Trimedyne shares before the public announcement of the FDA approval, realizing insider trading profits of $42,000. The Commission further alleges that Nguyen tipped her sister, Lisa Nguyen, and brother, Hao Vu, who used the inside information to purchase 8,966 Trimedyne shares, realizing

$41,000 in insider trading profits. The Commission has charged the defendants with securities fraud and is seeking an injunction against future violations, disgorgement of the insider trading profits, and civil penalties of up to three times their trading profit. Securities and Exchange Commission v. Michelle Nguyen, Lisa Nguyen, and Hao Vu, No. SACV 99-830 AHS (ANx) (C.D. Cal.).

Other actions focused on insider trading by a director of Koo Koo Roo, Inc., a restaurant chain based in Southern California. According to the indictment and the Commission's complaint, in March 1998, Donald Wohl, then a Koo Koo Roo director, learned that the company planned to appoint Lee Iacocca as acting chairman of the board. Wohl used that nonpublic information to purchase 50,000 Koo Koo Roo shares for the accounts of three family members and two business associates, ultimately realizing $65,000 in insider trading profits. Wohl faced up to 10 years of imprisonment and a fine of $1,000,000 if convicted on the criminal charges. Wohl settled the Commission's action by agreeing to be enjoined from engaging in future fraud violations and from providing investment advice in violation of a previous Commission order barring him from the securities industry. He will be ordered to pay a total of $133,000 in disgorgement of trading profits, prejudgment interest, and civil penalties in connection with that settlement. Securities and Exchange Commission v. Donald B. Wohl, No. CV 99-06354 DDP (SHx) (C.D. Cal.); United States of America v. Donald B. Wohl, (C.D. Cal.).

In addition the Commission had sued six defendants for unlawfully trading in the stock of Bio-Dental Technologies Corp. before the public announcement that it would be acquired by Zila, Inc. Bio-Dental was a Northern California corporation that manufactured professional dental supplies. The Commission alleges that Rocco Anselmo, a Zila executive, used his advance knowledge of the acquisition in purchasing 10,000 Bio-Dental shares, realizing $23,000 in profits. Anselmo also tipped three friends to the pending merger, James Rammelt, Ivan Kron, and Donald Italia, who purchased a total of 31,200 Bio-Dental shares, realizing $67,000 in insider trading profits. The Commission also sued two Zila consultants, William Sklar and John Manion, who obtained advance knowledge of the acquisition through their work for Zila. According to the complaint, Sklar and Manion used their inside information to purchase Bio-Dental stock in advance of the public announcement. Sklar purchased 9,000 Bio-Dental shares and realized profits of $20,000. Manion purchased 13,000 shares and realized $28,000 in profits. Anselmo, Rammelt, Kron, Italia, and Sklar have settled with the Commission by agreeing to be enjoined from engaging in future securities fraud and to pay a total of $250,000 in disgorgement of trading profits, prejudgment interest, and civil penalties. The Commission was seeking an injunction against future violations, disgorgement of the insider trading profits, and civil penalties of up to three times his (Manion's) profit. Securities and Exchange Commission v. John R. Manion, Rocco J. Anselmo, James Rammelt, Ivan Kron, Donald S. Italia, and William E. Sklar, No. CIV 99-1103 [7]

MAIL AND WIRE FRAUD

The U.S. government has relied on the mail and wire fraud statutes to prosecute a variety of corrupt schemes that are not specifically prohibited under federal laws. These prosecutions range from fraudulent misrepresentations of the value of land and the quality of jewelry to offering and selling nonexistent merchandise. The common element in these schemes that permits the assertion of federal jurisdiction is the use of the U.S. mails or wires across state lines (phone, radio, television).

[7] Securities and Exchange Commission: http://www.sec.gov/news/press/pressarchive/1999/99-70.txt

Wiretapping, Intercepting, or Eavesdropping

PC 631. Wiretapping
(a) Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both a fine and imprisonment in the county jail or in the state prison

PC 632 Eavesdropping on or Recording Confidential Communications
(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio…

PC 632.5. Intercepting or Receiving Cellular Radio Telephone Communication
(a) Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), by imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment. If the person has been previously convicted of a violation of this section or Section 632, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment.

PC 632.6. Eavesdropping on Cordless Telephone Communications
(a) Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cordless telephones as defined in subdivision (c), between any cordless telephone and a landline telephone, or between a cordless telephone and a cellular telephone

PC 632.7. Recording of Unlawfully Intercepted Communications
(a) Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone…

PC 633. Law Enforcement Officers - Limited Exemption From Prohibition Against Overhearing or Recording Communications

Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, any officer of the California Highway Patrol, any chief of police, assistant chief of police, or police officer of a city or city and county, any sheriff, undersheriff, or deputy sheriff regularly employed and paid in that capacity by a county, police officer of the County of Los Angeles, or any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority, from overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

PC 633.1. Airport Law Enforcement Officers - Exemption From Prohibition Against Recording Telephone Communications

(a) Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits any person regularly employed as an airport law enforcement officer, as described in subdivision (d) of Section 830.33, acting within the scope of his or her authority, from recording any communication which is received on an incoming telephone line, for which the person initiating the call utilized a telephone number known to the public to be a means of contacting airport law enforcement officers. In order for a telephone call to be recorded under this subdivision, a series of electronic tones shall be used, placing the caller on notice that his or her telephone call is being recorded.

(b) Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders inadmissible any evidence obtained by an officer described in subdivision (a) if the evidence was received by means of recording any communication which is received on an incoming public telephone line, for which the person initiating the call utilized a telephone number known to the public to be a means of contacting airport law enforcement officers.

PC 633.6. Domestic Violence Restraining Order May Permit Victim to Record Prohibited Communication

(a) Notwithstanding the provisions of this chapter, and in accordance with federal law, upon the request of a victim of domestic violence who is seeking a domestic violence restraining order, a judge issuing the order may include a provision in the order that permits the victim to record any prohibited communication made to him or her by the perpetrator.

PC 635. Manufacturing or Selling Devices Intended for Eavesdropping or Interception of Radio Telephone Communications

Every person who manufactures, assembles, sells, offers for sale, advertises for sale, possesses, transports, imports, or furnishes to another any device which is primarily or exclusively designed or intended for eavesdropping upon the communication of another, or any device which is primarily or exclusively designed or intended for the unauthorized interception or reception of communications between cellular radio telephones or between a cellular radio telephone and a landline telephone in violation of Section 632.5, or communications between cordless telephones or between a cordless telephone and a landline telephone in violation of Section 632.6, ...

THE TRAVEL ACT

The Travel Act of 1961 was intended to assist state and local governments to combat organized crime. The Travel Act, Section 18 U.S.C. § 1952, authorizes the federal government to prosecute what are ordinarily considered the state criminal offenses of gambling, the illegal shipment and sale of alcohol, extortion, bribery, arson, prostitution, money laundering, and controlled substances. Federal jurisdiction is based on the fact that the crimes have been committed following travel in interstate or foreign commerce or through the use of the U.S. mails or any other facility in interstate or foreign commerce.

HEALTH CARE FRAUD

Roughly one-fifth of the federal budget is devoted to health care, most of which involves reimbursing doctors and health care workers for services provided under various federal and state programs to the elderly, children, physically and mentally challenged, and to economically disadvantaged individuals. The difficulty of administering programs of this size and complexity creates an opportunity for doctors and other health care providers to submit fraudulent claims for the reimbursement of services that, in fact, were never provided or to seek payment for unnecessary procedures. In 1996, Congress acted to prevent this type of fraud when it adopted a statute on health care fraud that punishes individuals who *knowingly and willfully execute or attempt to execute a scheme or artifice: . . to defraud any health care benefit program; or to obtain by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of any health care benefit program.*

Health care fraud is punishable by a fine and imprisonment of up to ten years or both. Fraudulent acts that cause serious injury are punishable by a term of imprisonment of up to twenty years, while fraudulent acts that result in death are punishable by up to life in prison.

In an example of current issues in Insurance Fraud, which included both auto insurance and medical claim fraud, a recent one year probe by the California Department of Insurance's Urban Organized Auto Fraud Task Force netted 25 suspects who created 22 "'phantom" auto accidents. The California Insurance Commissioner John Garamendi, recently announced the indictment of 25 suspects in connection with a major insurance fraud investigation dubbed "Operation Cashout." 20 suspects were arrested and another five suspects remain outstanding.

The Urban Organized Auto Fraud Task Force consists of investigators from the California Department of Insurance's Fraud Division, the Santa Clara County District Attorney's Office and the California Highway Patrol. All 25 suspects were charged with felony insurance fraud. Khai Van Nhin, 39, of San Jose, the main suspect and orchestrator of the scheme, was charged with 14 felony counts of insurance fraud and two felony counts of forgery.

"***Operation Cashout***" involved a ring of suspects who conspired to report auto accidents that never occurred in order to file false insurance claims. The suspects would typically claim they were driving on a freeway when another vehicle changed lanes striking the suspect's car, forcing him or her into a guard rail. Both vehicles reportedly involved in the claim were usually owned and driven by the ring members. They would file false vehicle damage claims and "cash out" the settlement, thereby taking the money but not repairing the vehicle. They would then use the same damaged vehicle to make repetitive false claims with different insurance companies. Often the driver and passengers would also submit false bodily injury claims as part of the phantom accidents in order to obtain additional insurance proceeds.

“All of us pay a penalty for insurance fraud because the costs are passed along to policyholders,” said Insurance Commissioner John Garamendi. “That’s why I’ve made fighting insurance fraud a top priority of my Department.”

The felony charges stem from 22 phantom accidents involving 12 cars. Various insurance companies became suspicious after noting some suspects were using the same addresses and vehicles in claims dating from 2000 through August 2005. This fraud ring was brought to the attention of the task force by Farmers Insurance, State Farm and Safeco Insurance companies. The charged claims involved approximately $400,000 in insurance payments.

The indictment was returned by the grand jury after the presentation of over 50 witnesses including individuals from the Special Investigative Units (SIUs) of several insurance companies and attorneys. Warrants remain outstanding for Khai Van Nhin and Mason Son Trans, 38, of San Jose, the other primary suspect.

"The efforts of this Department's Auto Fraud Task Force—in addition to the tip received from the insurance companies—helped to save California consumers millions of dollars that would have lined the pockets of these criminals," said Commissioner Garamendi. "Here is a message to all con artists seeking to scam the system: You can not hide from us – we will catch you, prosecute you and put you behind bars.”

Also providing information were the SIUs of State Farm, Progressive, AAA, Hudson, Farmers, Safeco, Qestrel, David Morse and Associates, 21st Century, Western General and Western United Insurance Companies. The Santa Clara County District Attorney’s office is prosecuting the case.
If convicted, Nhin faces a maximum sentence of 18 years in state prison. The other suspects face maximum prison terms ranging from 5 to 10 years. [8]

The ***Enforcement Branch*** of the Department of Insurance is the investigative body for the department. This branch consists of the Fraud Division and the Investigation Division. The Enforcement Branch maintains its lead through the collaboration of other law enforcement agencies and prosecutors throughout the state.[9]

Fraud Division
The core mission of the Fraud Division is to protect the public from economic loss and distress by actively investigating and arresting those who commit insurance fraud. The Fraud Division acts as the primary law enforcement agency in the State of California for investigating different types of Suspected Fraudulent Insurance Claims.

Investigation Division
The mission of the Investigation Division is to protect California Consumers by investigating suspected violations of laws and regulations pertaining to the business of insurance and seeking appropriate enforcement action against violators. The Insurance Commissioner has established a case handling priority system for the Investigation Division which helps to categorize major cases and prioritize the Division’s resources.

[8] http://www.insurance.ca.gov/0400-news/0100-press-releases/0070-2006/release088-06.cfm
[9] http://www.insurance.ca.gov/0300-fraud/

“Suspected insurance fraud” includes any misrepresentation of fact or omission of fact pertaining to a transaction of insurance including claims, premium and application fraud. These facts may include evidence of doctoring, altering or destroying forms, prior history of the claimant, policy holder, applicant or provider, receipts, estimates, explanations of benefits (EOB), medical evaluations or billings, medical provider notes (commonly known as SOAPE notes); Subjective complaint, Objective findings, Assessment, Plan and Evaluation, Health Care Financing Administration (HCFA) forms, police and/or investigative reports, relevant discrepancies in written or oral statements and examinations under oath (EUO), unusual policy activity and falsified or untruthful application for insurance.

An identifiable pattern in a claim history may also suggest the possibility of suspected fraudulent claims activity. A claim may contain evidence of suspected insurance fraud regardless of the payment status. “The Insurance Frauds Prevention Act” or “(IFPA)” refers to California Insurance Code section 1871-1879.8.[10]

HEALTHCARE AND DISABILITY INSURANCE FRAUD PROGRAM[11]
California Insurance Code Section 1872.85, specifically authorizes the Fraud Division to conduct investigations regarding healthcare and disability fraud. Every disability insurer or other entity liable for any loss due to health insurance fraud pays an annual assessment of .10 per insured life to support the Division's newest anti-fraud program. Of the approximately $2.6 million annually collected, $1.3 million funds the Fraud Division's efforts with the remaining $1.3 available to district attorneys through the grant process. Suspected Fraudulent Claims regarding healthcare and disability benefits, inflated pharmacy billings, false medical billings for services and/or durable medical equipment are just a few examples of the types of cases investigated in this program.

What is Insurance Fraud?
Fraud occurs when someone knowingly lies to obtain some benefit or advantage to which they are not otherwise entitled or someone knowingly denies some benefit that is due and to which someone is entitled. Depending on the specific issues involved, an alleged wrongful act may be handled as an administrative action by the Department or the Fraud Division may handle it as a criminal matter.

What Types of Insurance Fraud or Other Crimes Does the Fraud Division Handle?
The Fraud Division is charged with enforcing the provisions of Chapter 12 of the California Insurance Code, commonly referred to as the "Insurance Frauds Prevention Act," California Penal Code, Sections 549-550 and California Labor Code, Section 3700.5. Current law requires the Fraud Division to investigate various felony provisions of the Penal and Insurance Codes. Most often, investigations conducted by the Fraud Division involve some aspect of a "Suspected Fraudulent Claim" or other related crimes.

Cases investigated by the Fraud Division most often involve criminal acts involving automobile property and personal injury, workers' compensation, health insurance and residential and commercial property claims. California and federal laws also permit the Fraud Division to pursue its cases federally. In those instances, the crime of "*insurance fraud*" is usually pursued as "mail fraud," "criminal racketeering" or other federal offenses.

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[10] California Code of Regulations Subchapter 9 Insurance Fraud
Article 2 Special Investigative Unit Regulations http://www.insurance.ca.gov/0300-fraud/
[11] http://www.insurance.ca.gov/0300-fraud/0100-fraud-division-overview/0100-what-is-insurance-fraud/

Types of Fraud Crimes Investigated Include:

Automobile Collision	Premium Theft
Automobile Property	Senior Citizen Abuse
Medical	Insurance Company Insider Fraud
Life	Insurance Company Deceptive Practices/Condoning
Fraud	Sales Force Misconduct
Workers' Compensation	Phony Insurance Companies
Fire	Private Passenger Auto Insurance Consumer Abuse
Property	Bail Industry Misconduct
Healthcare	Viatical and Viatical Settlement

Viatical Settlement

A viatical settlement allows you to invest in another person's life insurance policy. With a viatical settlement, you purchase the policy (or part of it) at a price that is less than the death benefit of the policy. When the seller dies, you collect the death benefit.

Your return depends upon the seller's life expectancy and the actual date he or she dies. If the seller dies before the estimated life expectancy, you may receive a higher return. But if the seller lives longer than expected, your return will be lower. You can even lose part of your principal investment if the person lives long enough so that you have to pay additional premiums to maintain the policy. [12]

Examples of California statutes related to health care fraud include:

W&I 14014. Fraud to Obtain Health Care Services

(a) Any person receiving health care for which he or she was not eligible on the basis of false declarations as to his or her eligibility or any person making false declarations as to eligibility on behalf of any other person receiving health care for which that other person was not eligible shall be liable for repayment and shall be guilty of a misdemeanor or felony depending on the amount paid on his or her behalf for which he or she was not eligible, as specified in Section 487 of the Penal Code.

(b)(1) Any person who willfully and knowingly counsels or encourages any individual to make false statements or otherwise causes false statements to be made on an application, in order to receive health care services to which the applicant is not entitled, shall be liable to the Medi-Cal program for damages incurred for the cost of services rendered to the applicant.

PC 548. Defrauding Insurer

(a) Every person who willfully injures, destroys, secretes, abandons, or disposes of any property which at the time is insured against loss or damage by theft, or embezzlement, or any casualty with intent to defraud or prejudice the insurer, whether the property is the property or in the possession of such person or any other person, is punishable by imprisonment in the state prison for two, three, or five years and by a fine not exceeding fifty thousand dollars ($50,000). For purposes of this section, "casualty" does not include fire.

(b) Any person who violates subdivision (a) and who has a prior conviction of the offense set forth in that subdivision, in Section 550 of this code, or in former Section 556 or former Section 1871.1 of the Insurance Code, shall receive a two-year enhancement for each prior conviction in addition to the sentence provided under subdivision (a). The existence of any fact which would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the

[12] U.S. Securities Exchange Commission: http://www.sec.gov/answers/viaticalsettle.htm

defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

PC 549. False Insurance Claim Pending; Solicit, Etc. Any Business

Any firm, corporation, partnership, or association, or any person acting in his or her individual capacity, or in his or her capacity as a public or private employee, who solicits, accepts, or refers any business to or from any individual or entity with the knowledge that, or with reckless disregard for whether, the individual or entity for or from whom the solicitation or referral is made, or the individual or entity who is solicited or referred, intends to violate Section 550 of this code or Section 1871.4 of the Insurance Code is guilty of a crime, punishable upon a first conviction by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for 16 months, two years, or three years, or by a fine not exceeding fifty thousand dollars ($50,000), or by both that imprisonment and fine. A second or subsequent conviction is punishable by imprisonment in the state prison or by imprisonment in the state prison and a fine of fifty thousand dollars ($50,000).

PC 550. False or Fraudulent Claims

(a) It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following:
(1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.
(2) Knowingly present multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud.
(3) Knowingly cause or participate in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false or fraudulent claim.
(4) Knowingly present a false or fraudulent claim for the payments of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle.
(5) Knowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented in support of any false or fraudulent claim.
(6) Knowingly make or cause to be made any false or fraudulent claim for payment of a health care benefit.
(7) Knowingly submit a claim for a health care benefit that was not used by, or on behalf of, the claimant.
(8) Knowingly present multiple claims for payment of the same health care benefit with an intent to defraud.
(9) Knowingly present for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges for health care benefits for that claimant are presented for reconciliation at that same time.
(10) For purposes of paragraphs (6) to (9), inclusive, a claim or a claim for payment of a health care benefit also means a claim or claim for payment submitted by or on the behalf of a provider of any workers' compensation health benefits under the Labor Code.
(b) It is unlawful to do, or to knowingly assist or conspire with any person to do, any of the following:
(1)Present or cause to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact.
(2) Prepare or make any written or oral statement that is intended to be presented to any insurer or any insurance claimant in connection with, or in support of or opposition to, any claim or payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact.
(3) Conceal or knowingly fail to disclose the occurrence of an event that affects any person's initial or continued right or entitlement to any insurance benefit or payment, or the amount of any benefit or payment to which the person is entitled.

(4) Prepare or make any written or oral statement, intended to be presented to any insurer or producer for the purpose of obtaining a motor vehicle insurance policy, that the person to be the insured resides or is domiciled in this state when, in fact, that person resides or is domiciled in a state other than this state.

(c)(1) Every person who violates paragraph (1), (2), (3), (4), or (5) of subdivision (a) is guilty of a felony punishable by imprisonment in the state prison for two, three, or five years, and by a fine not exceeding fifty thousand dollars ($50,000), unless the value of the fraud exceeds fifty thousand dollars ($50,000), in which event the fine may not exceed double of the value of the fraud.

(2) Every person who violates paragraph (6), (7), (8), or (9) of subdivision (a) is guilty of a public offense.

(A) Where the claim or amount at issue exceeds four hundred dollars ($400), the offense is punishable by imprisonment in the state prison for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000), or by both that imprisonment and fine, unless the value of the fraud exceeds fifty thousand dollars ($50,000), in which event the fine may not exceed double the value of the fraud, or by imprisonment in a county jail not to exceed one year, by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine.

(B) Where the claim or amount at issue is four hundred dollars ($400) or less, the offense is punishable by imprisonment in a county jail not to exceed six months, or by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine, unless the aggregate amount of the claims or amount at issue exceeds four hundred dollars ($400) in any 12-consecutive-month period, in which case the claims or amounts may be charged as in subparagraph (A).

(3) Every person who violates paragraph (1), (2), (3), or (4) of subdivision (b) shall be punished by imprisonment in the state prison for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000), unless the value of the fraud exceeds fifty thousand dollars ($50,000), in which event the fine may not exceed double the value of the fraud, or by both that imprisonment and fine ; or by imprisonment in a county jail not to exceed one year, or by a fine of not more than one thousand five hundred dollars ($1,500), or by both that imprisonment and fine.

(d) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of a sentence be suspended for, any adult person convicted of felony violations of this section who previously has been convicted of felony violations of this section or Section 548, or of Section 1871.4 of the Insurance Code, or former Section 556 of the Insurance Code, or former Section 1871.1 of the Insurance Code as an adult under charges separately brought and tried two or more times. The existence of any fact that would make a person ineligible for probation under this subdivision shall be alleged in the information or indictment, and either admitted by the defendant in an open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

Except when the existence of the fact was not admitted or found to be true or the court finds that a prior felony conviction was invalid, the court shall not strike or dismiss any prior felony convictions alleged in the information or indictment.

This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 3 (commencing with Section 3000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

(e) Except as otherwise provided in subdivision (f), any person who violates subdivision (a) or (b) and who has a prior felony conviction of an offense set forth in either subdivision (a) or (b), in Section 548, in Section 1871.4 of the Insurance Code, in former Section 556 of the Insurance Code, or in former Section 1871.1 of the Insurance Code shall receive a two-year enhancement for each prior felony conviction in addition to the sentence provided in subdivision (c). The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt

is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury. Any person who violates this section shall be subject to appropriate orders of restitution pursuant to Section 13967 of the Government Code.
(f) Any person who violates paragraph (3) of subdivision (a) and who has two prior felony convictions for a violation of paragraph (3) of subdivision (a) shall receive a five-year enhancement in addition to the sentence provided in subdivision (c). The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.
(g) Except as otherwise provided in Section 12022.7, any person who violates paragraph (3) of subdivision (a) shall receive a two-year enhancement for each person other than an accomplice who suffers serious bodily injury resulting from the vehicular collision or accident in a violation of paragraph (3) of subdivision (a).
(h) This section shall not be construed to preclude the applicability of any other provision of criminal law or equitable remedy that applies or may apply to any act committed or alleged to have been committed by a person.

Any fine imposed pursuant to this section shall be doubled if the offense was committed in connection with any claim pursuant to any automobile insurance policy in an auto insurance fraud crisis area designated by the Insurance Commissioner pursuant to Article 4.6 (commencing with Section 1874.90) of Chapter 12 of Part 2 of Division 1 of the Insurance Code.

MONEY LAUNDERING

PC 186.9. MONEY LAUNDERING
Individuals involved in criminal fraud or drug or vice transactions confront the problem of accounting for their income. These individuals may want to live a high-profile lifestyle and buy a house or automobile that they could not afford based on the income reported on their tax forms. An obvious gap between lifestyle and income may attract the attention of the Internal Revenue Service or law enforcement. How can individuals explain their ability to purchase a million dollar house when they only report an income of $30,000 a year? Where did the cash come from that they used to buy the house? Bank regulations require that deposits of over $10,000 must be reported by the bank to the federal government. How can individuals explain to government authorities the source of the $50,000 that they deposit in a bank?

The solution is ***money laundering***. This involves creating some false source of income that accounts for the money used to buy a house, purchase a car, or open a bank account. This typically involves schemes such as paying the owner of a business in cash to list a drug dealer as an employee of the individual's business. In other instances, individuals involved in criminal activity may claim that their income is derived from a lawful business such as a restaurant. Money laundering statutes are intended to combat the "washing" of money by declaring that it is criminal to use or transfer illegally obtained money or property. This is punishable by a fine of up to $500,000 and imprisonment for up to twenty years.

- *The defendant engaged or attempted to engage in a monetary transaction.*
- *The defendant knew the transaction involved funds or property derived from one or more of a long list of criminal activities listed in the statute.*
- *The transaction was intended to conceal or disguise the source of the money or property; or*
- *The transaction was intended to promote the carrying on of a specified unlawful activity.*

Definitions

As used in this chapter:

(*a) "Conducts" includes, but is not limited to, initiating, concluding, or participating in conducting, initiating, or concluding a transaction.*

(b) "Financial institution" means, when located or doing business in this state, any national bank or banking association, state bank or banking association, commercial bank or trust company organized under the laws of the United States or any state, any private bank, industrial savings bank, savings bank or thrift institution, savings and loan association, or building and loan association organized under the laws of the United States or any state, any insured institution as defined in Section 401 of the National Housing Act (12 U.S.C. Sec. 1724(a)), any credit union organized under the laws of the United States or any state, any national banking association or corporation acting under Chapter 6 (commencing with Section 601) of Title 12 of the United States Code, any agency, agent or branch of a foreign bank, any currency dealer or exchange, any person or business engaged primarily in the cashing of checks, any person or business who regularly engages in the issuing, selling, or redeeming of traveler's checks, money orders, or similar instruments, any broker or dealer in securities registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 or with the Commissioner of Corporations under Part 3 (commencing with Section 25200) of Division 1 of Title 4 of the Corporations Code, any licensed transmitter of funds or other person or business regularly engaged in transmitting funds to a foreign nation for others, any investment banker or investment company, any insurer, any dealer in gold, silver, or platinum bullion or coins, diamonds, emeralds, rubies, or sapphires, any pawnbroker, any telegraph company, any person or business regularly engaged in the delivery, transmittal, or holding of mail or packages, any person or business that conducts a transaction involving the transfer of title to any real property, vehicle, vessel, or aircraft, any personal property broker, any person or business acting as a real property securities dealer within the meaning of Section 10237 of the Business and Professions Code, whether licensed to do so or not, any person or business acting within the meaning and scope of subdivisions (d) and (e) of Section 10131 and Section 10131.1 of the Business and Professions Code, whether licensed to do so or not, any person or business regularly engaged in gaming within the meaning and scope of Section 330, any person or business regularly engaged in pool selling or bookmaking within the meaning and scope of Section 337a, any person or business regularly engaged in horseracing whether licensed to do so or not under the Business and Professions Code, any person or business engaged in the operation of a gambling ship within the meaning and scope of Section 11317, any person or business engaged in controlled gambling within the meaning and scope of subdivision (d) of Section 19805 of the Business and Professions Code, whether registered to do so or not, and any person or business defined as a "bank," "financial agency," or "financial institution" by Section 5312 of Title 31 of the United States Code or Section 103.11 of Title 31 of the Code of Federal Regulations and any successor provisions thereto.

A key statute is PC 186.10, which was designed to stem the use of drug money in local banks.

PC 186.10. Multiple Transactions, Value over $5,000; Intent to Promote Criminal Activity

(a) Any person who conducts or attempts to conduct a transaction or more than one transaction within a seven-day period involving a monetary instrument or instruments of a total value exceeding five thousand dollars ($5,000), or a total value exceeding twenty-five thousand dollars ($25,000) within a 30-day period, through one or more financial institutions (1) with the specific intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any criminal activity, or (2) knowing that the monetary instrument represents the proceeds of, or is derived directly or indirectly from the proceeds of, criminal activity, is guilty of the crime of money laundering.

The aggregation periods do not create an obligation for financial institutions to record, report, create, or implement tracking systems or otherwise monitor transactions involving monetary instruments in any time period. In consideration of the constitutional right to counsel afforded by the Sixth Amendment to the

United States Constitution and Section 15 of Article I of the California Constitution, when a case involves an attorney who accepts a fee for representing a client in a criminal investigation or proceeding, the prosecution shall additionally be required to prove that the monetary instrument was accepted by the attorney with the intent to disguise or aid in disguising the source of the funds or the nature of the criminal activity.

PC 186.11. Fraud and Embezzlement; Victim Restitution (*Aggravated white collar crime enhancement) (a)(1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3).*

This enhancement shall be known as the ***aggravated white collar crime enhancement****. The aggravated white collar crime enhancement shall only be imposed once in a single criminal proceeding. For purposes of this section, "pattern of related felony conduct" means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events. For purposes of this section, "two or more related felonies" means felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.*

ANTITRUST VIOLATIONS

The Sherman (Antitrust) Act of 1890 was intended to insure a free and competitive business marketplace. The Sherman Act, according to former Supreme Court Judge Hugo Black, is designed to be a "comprehensive charter of economic liberty aimed at preserving free unfettered competition as the rule of trade." Imagine if every bar and restaurant in a college town agreed to sell beer at an inflated price rather than compete with one another for the business of students? The theory behind the Sherman Act, is that economic competition results in low prices, high quality, and promotes self-reliance and democratic values.

The criminal provisions of the Sherman Act state that any person *"who shall make any contractor engage in any combination or conspiracy" to interfere with interstate commerce is guilty of a felony.* A corporation shall be punished with a fine of ten million dollars and an individual by a fine of $350,000 or by imprisonment not exceeding three years, or both.
A conviction requires proof that two or more persons or organizations knowingly entered into a contract or formed a conspiracy.

The combination or conspiracy produced or potentially produced an unreasonable restraint of interstate trade.

The federal Securities and Exchange Commission (SEC) is charged with insuring that corporate officials comply with the requirements of the Securities Exchange Act of 1934 in the offering and selling of stocks. The Act, for instance, requires corporations to provide accurate information on their economic performance in order to enable the public to make informed investment decisions. The SEC typically seeks civil law financial penalties against corporations that violate the law and refers allegations of fraud to the Department of Justice for prosecution. In the past decade, the Department of Justice has focused its white-collar crime investigations on **insider trading** in violation of Section 10b and rule 10b-5 of the 1934 Act. The enforcement of these provisions is intended to insure that the stock market functions in a fair and open fashion.

California and Antitrust & Business Competition – Attorney General of California
In California, the state Attorney General's Antitrust Section is responsible for civil and criminal enforcement of California's antitrust laws and has authority to file civil actions under federal antitrust statutes. As noted in the following material, antitrust enforcement ensures fair competition to benefit businesses and consumers in California.

Music CD's and Unfair Competition
To address unfair competition in the sale of Music CDs, Attorney General Bill Lockyer, other state attorneys general and private counsel sued five major music distributors and three national chain stores alleging a price-fixing scheme that prevented other retailers from advertising discount prices. As part of the court-approved settlement in this matter, the defendants provided $67.4 million in cash and music CDs worth $75.7 million.

California is receiving about 665,000 music CDs valued at $8.9 million. To make the music CDs available to the widest range of California consumers, these CDs are being given to public libraries, K-12 school districts, colleges and universities throughout California, that signed up to participate in this distribution last year. Over 1200 public libraries, school districts, colleges and universities have signed up to receive Music CDs.

Under the free music CD distribution plan:

- Public libraries will receive 55% of the total distribution. This reflects the fact that public libraries can make the music CDs available repeatedly through their loan programs.
- California's public schools will receive 40% of the music CDs. This distribution will be administered through the 1,040 public school districts.
- Colleges and universities will receive 5% of the music CDs. These will be made available to California Community College Districts, California State Universities and the University of California

Gas and Oil Pricing
Recognizing that policy changes may be necessary to address the erosion of competition in the California gasoline market over more than a decade, the Attorney General directed a five-month study by his Task Force on Gasoline Pricing. As a result of the Attorney General's 70-page final report, the California Legislature and state Energy Commission are acting on recommendations that include building pipelines and establishing a strategic reserve to avoid gasoline supply and price spike problems. The report provides a comprehensive overview of the California gasoline market which was found to lack adequate competition and be highly concentrated in only a handful of oil companies. Meantime, the Attorney General's antitrust investigation into gasoline pricing is being pursued.

Oil Company Mergers
The Attorney General has undertaken at least four major antitrust investigations into oil company mergers since 1999 to determine potential harm to competition in California. In analyzing the mergers, the Attorney General has sought to encourage new competition or at a minimum avoid further eroding of the limited competition in the gasoline market. Oil company mergers reviewed include MOBIL-EXXON and ARCO-BP.

In addition, given the recent spikes in California gasoline prices, Attorney General Lockyer has sought to the extent possible under existing laws to keep the marketplace from becoming even more concentrated and less competitive from oil company mergers and unfair business practices. Giving close scrutiny to oil company mergers, the Attorney General led a successful effort to make California the only state to secure divestment of a refinery in the $81 billion Exxon-Mobil global merger.

The Attorney General also required other concessions aimed at preserving competition from the merger of Texaco-Shell and Arco-BP. The Attorney General has and will continue to investigate any unlawful conduct that arises in California's gasoline markets.

Deregulation of Electricity
In 1996, the state took the bold move of deregulating its electricity market with the aim of benefiting from market competition. Instead of lowering prices, the deregulation plan thrust California into an energy crisis that sent shock waves throughout the state and across the country in 2000. Market manipulation by power companies and other unlawful conduct is now under investigation by the Attorney General's Energy Task Force. Enforcement actions brought to date by the Attorney General have required energy companies to pay more than $1.6 billion in benefits to California ratepayers. The Enron debacle will be discussed later in the chapter.

Antitrust Enforcement in California [13]

What Are The Antitrust Laws?
The antitrust laws are a system of California and federal laws that prohibit unwarranted restraints on free and open competition. They allow the Attorney General to bring civil and criminal legal actions against individuals and businesses acting in restraint of trade. District attorneys can bring similar actions for antitrust offenses centered in their counties. The law provides that anyone injured by an antitrust offense may recover from the wrongdoer three times the damages suffered.

Why Are The Antitrust Laws Important To You?

As a consumer or taxpayer
Antitrust offenses almost always raise the prices paid by consumers. Being forced to pay illegally high prices is the equivalent of having money stolen from your pocket. Even relatively small price increases can have a tremendous overall effect statewide. The state’s economy and consumers suffer from the economic dislocations caused by antitrust offenses. And, when state or local governments pay too much for goods or services because of antitrust violations, either taxes must be raised or services must be reduced.

As an owner of a business
The cost of doing business affects the profit a business will make. If the price of goods or services used by your business is raised by antitrust restraints, your cost of doing business will rise. Some antitrust offenses, such as boycotts, can make it impossible for you to do business.

As a business person or an employee of a business
Antitrust violations are not just ways of doing business–they are serious crimes for which the penalties are severe. If anyone inside or outside your company asks you to violate the antitrust laws, they are asking you to commit a felony for which you could go to prison. Additionally, a business violating the antitrust laws is liable to its victims for three times the amount they are injured.

Government employees
Government agencies, large and small, rely on competitive bidding for their significant purchases. Because of their importance, competitive bids are particularly susceptible to antitrust violations. Governmental employee’s who detect antitrust violations, are the first-line defense against antitrust losses for the public treasury and for the people the government serves.

[13] http://ag.ca.gov/antitrust/index.htm

What To Look For
It is not possible to give a complete list and description of possible antitrust offenses in a publication of this size. However, the following discussion will identify the most important activities of which you should be aware.

Examples of violations of anti-trust laws

Horizontal price-fixing
It is illegal for any competitors to have any agreement to raise, stabilize or otherwise affect prices. The agreement need not be in writing or otherwise formalized–even an informal understanding concerning prices between competitors is illegal. The agreement need not set specific prices–any agreement affecting price levels is illegal. Even a practice of exchanging price information with competitors, where this practice affects prices, violates the antitrust laws.

Example: The owners of three major appliance stores meet informally and agree that the prices of refrigerators are too low. They promise to notify one another before deviating from their established prices. From then on, they offer fewer price reductions on refrigerators. The store owners have engaged in horizontal price-fixing.

Bid-rigging
Bid-rigging is an important type of horizontal price-fixing in which competitors agree in some way to affect the outcome of competitive bids. Submission of identical bids, if done pursuant to an agreement of the bidders, is one form of bid-rigging. Agreements among bidders to take turns in winning bids, to allocate opportunities to bid, or simply not to bid on certain contracts, are all examples of bid-rigging and are all illegal.

Example: A number of office machine distributors agree that, in bidding for government purchases of office equipment, they will take turns discounting from list price. Each distributor will bid at a discount only when it is his turn. The distributors have rigged the bids.

Other agreements among competitors
In addition to price-fixing, any other agreement among competitors which restrains competition is usually illegal. For example, boycotts (agreements by competitors not to sell to particular customers or not to buy from particular suppliers), market or customer allocations (agreements among competitors affecting to whom or where each will sell), and output limitations (agreements among competitors to limit overall quantities marketed) are almost always illegal, regardless of justification. Joint ventures undertaken by competitors can be legal, within certain limits.

Example: Two shoe manufacturers agree to stop selling to a discount shoe store because its prices are too low. The manufacturers have engaged in a boycott.

Vertical price-fixing (resale price maintenance)
Any agreement between a seller and a buyer regarding the price at which the buyer resells a product is illegal. Any attempt by a seller to have a buyer enter into such an agreement is also illegal.
Example: A manufacturer of light bulbs complains to a hardware store because the store is selling bulbs below the suggested retail price. The store promises that it will in the future keep its light bulb price within 10 percent of the suggested retail price. The manufacturer and the store are engaged in vertical price-fixing.

Other agreements between sellers and buyers

While agreements between a buyer and a seller that affect prices are always illegal, agreements that restrict the buyer's freedom to resell products can also be illegal. These agreements include restrictions on where and to whom the buyer may resell the product. Such restraints are illegal whenever they harm competition more than they help it.

Example: A clothing manufacturer discovers that two of its wholesale distributors are trying to sell its product to the same store and that they are offering discounts in order to make the sale. The manufacturer forbids one of the wholesalers to sell to the store. The manufacturer has placed a customer restriction on the wholesaler.

Tying

Sellers sometimes require a buyer to purchase a product the buyer does not want in order to be allowed to buy a product the buyer does want. Such requirements are called tying arrangements. Tying is generally illegal where the seller has some degree of control over the market for the product the buyer wants.

Example: A wholesale book distributor is the only company distributing a best-selling book in the city, but it requires bookstores to buy a certain number of less popular books if they want the bestseller. The distributor is imposing a tying arrangement.

Monopoly

A business may not unfairly keep others from competing with it. Businesses may and should compete vigorously to obtain customers, and growth through superior ability and efficiency is not illegal. However, a business with significant market power may not, without any legitimate business justification, take actions that exclude or handicap its competitors.

Example: The owner of three of the four ski areas in a popular resort stops participating in a popular joint marketing plan to offer lift tickets that are good at any of the four ski areas at the resort. If there is no legitimate business justification for the refusal other than to harm its smaller competitor, the owner of the three ski areas is monopolizing the market at that resort.

Mergers

Businesses may not merge with or acquire other businesses, when the effect may be substantially to lessen competition. The purpose of this federal statute is to stop the anticompetitive effects of increasing concentration or market power at an early stage. Such mergers and acquisitions may result in higher prices for consumers and other buyers. Mergers between competitors are more likely to raise concerns, but mergers between companies in other relationships, such as supplier and customer, may also be illegal.

Example: An isolated county has three hospitals. Two hospitals are large and provide a wide range of medical services. The third hospital is smaller and provides fewer services. Because of driving distances, it is very unlikely that patients will go to hospitals outside of the county. It is also very unlikely that any new hospitals will be built within the county in the foreseeable future. If the two large hospitals seek to merge, the transaction will violate the law.

On-Line Cigarette Sales to Minors
An example of how the law and law enforcement is changing, California's Attorney General Bill Lockyer recently announced Lorillard Tobacco Company (Lorillard) has reached an agreement with California and 32 other jurisdictions to implement measures to prevent the illegal sale of its cigarettes over the Internet and through the mail.

"Internet and mail order cigarette sales are a public health threat because they help put a deadly product in our children's hands," said Lockyer. "That is why I have gone to court to put online providers out of business in California and have worked with my fellow Attorneys General to take other steps to combat the problem. This agreement will help fight this danger to our kids by helping to cut the supply lines to unscrupulous cigarette traffickers. Lorillard deserves praise for stepping up to do the right thing."

The Lorillard protocols require: termination of cigarette shipments to any Lorillard direct customer the Attorneys General have found to be engaging in illegal Internet or mail order sales; reduction in the supply to any direct customer found by the Attorneys General to be engaged in the illegal re-sale of Lorillard cigarettes to Internet vendors; and suspension from the company's incentive programs any retailer found by the Attorneys General to be engaging in such illegal sales.

Combating antitrust actions include:

Some of the California's Attorney General's Antitrust Section activites include:

Petris-Center Endowment
The Nicholas Petris Center on Health Care Markets and Consumer Welfare was established at the University of California, Berkeley, in September 1999 with the court-approved endowment of $2 million from settlement payments in the Levi Strauss jeans price-fixing case. The Center since has since prepared the report, "California's Closed Hospitals, 1995-2000," commissioned by Attorney General Lockyer, providing the first close look at hospital closures statewide. The study focuses on reasons for hospital closures, distribution of the closed facilities and the characteristics of the closed hospitals.

Contact Lenses
California in June 2001 was actively involved in negotiating a multi-state settlement with Johnson & Johnson allowing consumers who purchased contact lenses in the last 14 years to be eligible for cash rebates on future lens purchases and eye exams. Johnson & Johnson was the last non-settling defendant in an antitrust action brought by California, 31 other states, and a private consumer class against contact lens manufacturers and the American Optometric Association. Settlements were reached earlier with the American Optometric Association and 13 individual optometrist defendants.

Bookstores
The Attorney General joined with the Federal Trade Commission in an investigation into the merger of the nation's largest chain bookseller, Barnes & Noble, with the country's largest book wholesaler. Concerns were raised about the merger's adverse impact on competition in the California market, especially for the large number of independent booksellers and book buyers. In June 1999, the parties canceled the proposed merger following announcement of opposition from the government.

Hospital Mergers
In August 1999, the Attorney General sued in federal court to block the proposed settlements with major drug companies over alleged anti-competitive practices that have made hundreds of millions of dollars available for consumer refunds and to support programs that benefit the public generally. These cases include a $100 million settlement with Mylan Laboratories over patient payments for the anti-anxiety drug Lorazepam and Clorazepate; a $55 million settlement with Bristol-Myers Squibb involving the anti-

cancer drug Taxol; and $80 million settlement with Aventis Pharmaceuticals Inc. and Andrx Corporation over the popular generic heart medication Cardizem CD.

Vitamins
As part of an $80 million settlement with major drug companies to resolve a vitamin price-fixing case, Attorney General Lockyer announced the distribution of $12.98 million to 28 California nonprofit groups to provide nutrition services and public health advocacy. The grant programs include meals for the elderly and seniors with Alzheimer's disease. The settled antitrust litigation targeted three Japanese and three European drug companies which together controlled about 80 percent of the world vitamin market. The companies allegedly conspired to fix prices for such vitamins as A, C, E, H, several B vitamins and carotenoids. The companies included Aventis Animal Nutrition, BASF Corp., Daiichi Pharmaceutical, Eisai Company, Hoffman-LaRoche and Takeda Chemical.

Public Corruption
The downfall of the Enron Corporation in 2001 is one of the largest corporate collapses in American history. The shock waves from the Enron scandal left thousands unemployed; resulted in significant financial losses for banks, pension funds, and investors; wiped out the life savings of countless individuals; and thus far has resulted in thirty-two criminal convictions or guilty pleas. The scandal virtually destroyed Enron’s accounting firm, the world famous Arthur Anderson. In an odd twist of fate, the recently convicted president of Enron, Kenneth Lay, died suddenly of a heart attack awaiting sentencing. Enron was responsible for price gouging California by deliberately creating scenarios that allowed crippling price increases of electricity.

Market manipulation
As the FERC report concluded, market manipulation was only possible as a result of the complex market design produced by the process of partial deregulation. Manipulation strategies were known to energy traders under names such as "Fat Boy", "”Death Star ", "Forney Perpetual Loop", "Ricochet", "Ping Pong", "Black Widow", "Big Foot", "Red Congo", "Cong Catcher" and "Get Shorty" Some of these have been extensively investigated and described in reports.

'''Megawatt laundering''' is the term, analogous to money laundering, coined to describe the process of obscuring the true origins of specific quantities of electricity being sold on the energy market. The California energy market allowed for price distinctions between electricity produced in-state and out-of-state. It was therefore advantageous to make it appear that electricity was being generated somewhere other than its true origin.

'''Overscheduling''' is a term used in describing the manipulation of transporting electricity along power lines. Power lines have a defined maximum load. Lines must be booked (or "scheduled") in advance for transporting bought-and-sold quantities of electricity. "Overscheduling" means a deliberate reservation of more line usage than is actually required and can create the appearance that the power lines are congested. Overscheduling was one of the building blocks of a number of scams. For example, the "'Death Star'" group of scams played on the market rules which required the state to pay "congestion fees" to alleviate congestion on major power lines. "Congestion fees" were a variety of financial incentives aimed at ensuring power providers solved the congestion problem. But in the Death Star scenario, the congestion was entirely illusory and the congestion fees would therefore simply increase profits.

In a letter sent from David Fabian to Senator Barbara Boxer in 2002, it was alleged that:

"There is a single connection between northern and southern California's power grids. I heard that Enron traders purposely overbooked that line, then caused others to need it. Next, by California's free-market rules, Enron was allowed to price-gouge at will."[14]

BRIBERY

The most frequently prosecuted state and federal official misconduct crime is the bribery of a public official. This offense, as we noted in discussing property offenses in Chapter 13, is committed by an individual who gives, offers, or promises a benefit to a public official as well as by a public official who demands, agrees to accept, or accepts a bribe. In other words, bribery punishes either giving or receiving a bribe and requires an intent to influence or to be influenced in carrying out a public duty. Bribery does not require a mutual agreement between the individuals. If you offer money to a police officer with the intent that he or she not charge you with a traffic offense, you are guilty of the bribery of a public official, regardless of whether the officer agrees to accept the bribe. The offense of offering a bribe to a public official requires that:The accused wrongfully promised, offered, or gave money or an item of value to a public official.

- The individual occupied an official position or possessed official duties.
- The money or item of value was promised, offered, or given with the intent to influence an official decision or action of the individual.
- The offense of soliciting a bribe requires that:
- The accused wrongfully asked, accepted, or received money or an item of value from a person or organization.
- The accused occupied an official position or exercised official duties.
- The accused asked, accepted, or received money or an item of value with the intent to have his or her decision or action influenced with respect to this matter.

Bribery is distinguished from graft. Graft does not require an intent to influence or to be influenced. Graft is defined as asking, accepting, receiving, or offering money or an item of value as compensation or a reward for an official decision. A builder that received a state contract to repair highways may express his or her appreciation and attempt to receive favorable consideration in the future by renovating a politician's summer home. Various state and federal statutes declare that it is a crime for a public official to ask for or to receive a reward for an official act.

Why punish public bribery? Public officials are charged with acting in the interests of society rather than acting in the interest of individuals who provide a financial or other benefit. Corrupt behavior undermines confidence and trust in government, leads to dominance by the rich and powerful, and is contrary to the notion that every individual should be treated equally. In other words, government should be responsive to the majority of Americans rather than to the minority of millionaires.

California ***BRIBERY*** statutes include:

PC 67. Bribing Executive Officer

Every person who gives or offers any bribe to any executive officer in this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison for two, three or four years, and is disqualified from holding any office in this state.

PC 67.5. Bribing Ministerial Officer

[14] http://en.wikipedia.org/wiki/California_electricity_crisis

(a) Every person who gives or offers as a bribe to any ministerial officer, employee, or appointee of the State of California, county or city therein, or political subdivision thereof, any thing the theft of which would be petty theft is guilty of a misdemeanor.
(b) If the theft of the thing given or offered would be grand theft the offense is a felony.

PC 68. Officer Asking or Receiving Bribes
(a) Every executive or ministerial officer, employee, or appointee of the State of California, a county or city therein, or a political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his or her vote, opinion, or action upon any matter then pending, or that may be brought before him or her in his or her official capacity, shall be influenced thereby…

PC 70. Official Asking or Accepting Gratuity
(a) Every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to receive any emolument, gratuity, or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor.

PC 92. Bribery of Judicial Officer
Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, or umpire, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the state prison for two, three or four years.

PC 93. Accepting Bribe - Judicial Officer, Juror, Referee, etc.
Every judicial officer, juror, referee, arbitrator, or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his or her vote, opinion, or decision upon any matters or question which is or may be brought before him or her for decision, shall be influenced thereby, …

PC 94. Acceptance of Emolument, Gratuity or Reward by Judicial Officer Prohibited
Every judicial officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. The lawful compensation of a temporary judge shall be prescribed by Judicial Council rule. Every judicial officer who shall ask or receive the whole or any part of the fees allowed by law to any stenographer or reporter appointed by him or her, or any other person, to record the proceedings of any court or investigation held by him or her, shall be guilty of a misdemeanor, and upon conviction thereof shall forfeit his or her office. Any stenographer or reporter, appointed by any judicial officer in this state, who shall pay, or offer to pay, the whole or any part of the fees allowed him or her by law, for his or her appointment or retention in office, shall be guilty of a misdemeanor, and upon conviction thereof shall be forever disqualified from holding any similar office in the courts of this state.

PC 137. Bribery of Witness to Induce False Testimony
(a) Every person who gives or offers, or promises to give, to any witness, person about to be called as a witness, or person about to give material information pertaining to a crime to a law enforcement official, any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony.
(b) Every person who attempts by force or threat of force or by the use of fraud to induce any person to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or withhold true material information pertaining to a crime from, a law enforcement official is guilty of a felony, punishable by imprisonment in the state prison for two, three, or four years.

PC 138. Witnesses; Bribing or Receiving Bribe Not to Attend Trial
(a) Every person who gives or offers or promises to give to any witness or person about to be called as a witness, any bribe upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding, or every person who attempts by means of any offer of a bribe to dissuade any person from attending upon any trial or other judicial proceeding, is guilty of a felony.
(b) Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his or her testimony shall be influenced thereby, or that he or she will absent himself or herself from the trial or proceeding upon which his or her testimony is required, is guilty of a felony.

PC 641. Bribery of Telephone Employee to Obtain Contents of Messages
Every person who, by the payment or promise of any bribe, inducement, or reward, procures or attempts to procure any telegraph or telephone agent, operator, or employee to disclose any private message, or the contents, purport, substance, or meaning thereof, or offers to any agent, operator, or employee any bribe, compensation, or reward for the disclosure of any private information received by him or her by reason of his or her trust as agent, operator, or employee, or uses or attempts to use any information so obtained, is punishable as provided in Section 639.

PC 641.3. Commercial Bribery
(a) Any employee who solicits, accepts, or agrees to accept money or any thing of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or any thing of value under those circumstances, is guilty of commercial bribery.
(b) This section does not apply where the amount of money or monetary worth of the thing of value is one hundred dollars ($100) or less.

PC 641.4. Commercial Bribery: Payment as Inducement for Placement or Referral of Title Business
(a) An employee of a title insurer, underwritten title company, or controlled escrow company who corruptly violates Section 12404 of the Insurance Code by paying, directly or indirectly, a commission, compensation, or other consideration to a licensee, as defined in Section 10011 of the Business and Professions Code, or a licensee who corruptly violates Section 10177.4 of the Business and Professions Code by receiving from an employee of a title insurer, underwritten title company, or controlled escrow company a commission, compensation, or other consideration, as an inducement for the placement or referral of title business, is guilty of commercial bribery.

The Foreign Corrupt Practices Act extends the concern with good government abroad and declares that it is illegal for an individual or U.S. company to bribe a foreign official in order to cause that official to assist in obtaining or retaining business. The statute makes an exception for "facilitating payments" to speed or insure the performance of a "routine governmental action," such as paying money to a foreign official to guarantee that an entry visa is quickly issued to a corporate employee. In 2005, the Titan Corporation in San Diego pled guilty and agreed to pay a fine of $28 million in settlement of various charges, including concealing a $2.1 million contribution to the election campaign of the President of the West African nation of Benin.

Review questions

1. What do you see as the main enforcement role for regulatory agencies that are charged with environmental protections?
2. What are *Viatical* agreements?
3. What are vertical, horizontal bidding and tying related to?
4. The Sherman Act states that any person *"who shall make any contractor engage in any combination or conspiracy" to interfere with interstate commerce*," ***shall*** be fined how much?
5. What is the purpose of the ***Sarbanes-Oxley Act****?*
6. What was the purpose of the Sherman Act?
7. What agency oversees environmental issues in California?
8. What agency investigates Health Care Fraud in California?
9. What is the law on eavesdropping, recording and monitoring conversations in California?

Web Resources:

California Environmental Resources Evaluation System:
http://www.ceres.ca.gov/

(California) Office of the Secretary for Resources
http://www.resources.ca.gov/

California Environmental Quality Act:
http://ceres.ca.gov/ceqa/
http://ceres.ca.gov/topic/env_law/ceqa/stat/

California Department of Insurance
http://www.insurance.ca.gov/0400-news/0100-press-releases/0070-2006/release088-06.cfm
http://www.insurance.ca.gov/0300-fraud/

California Code of Regulations Subchapter 9 Insurance Fraud Article 2 Special Investigative Unit Regulations
http://www.insurance.ca.gov/0300-fraud/0100-fraud-division-overview/0100-what-is-insurance-fraud/

California Public Resources Code: Division 13 Environmental Protection
http://ceres.ca.gov/topic/env_law/ceqa/stat/

California OSHA
http://www.osha.gov/
http://www.osha.gov/oshdir/stateprogs/California.html

Calif. Division of Occupational Health and Safety
http://www.dir.ca.gov/dosh/

Educational Outreach To High-Risk Employee Groups http://www.dir.ca.gov/dosh/app2005.doc

California Division of Labor Standards Enforcement Policies and Interpretations Manual
http://www.dir.ca.gov/dlse/Manual-Instructions.htm

California Department of Industrial Relations:
http://www.dir.ca.gov/

The California Labor Code can be found on line at:
http://www.leginfo.ca.gov/

California State Parks:
http://www.parks.ca.gov/default.asp?page_id=591

Hearst Castle http://www.hearstcastle.com/

DOSH Policies & Procedures
http://www.dir.ca.gov/samples/search/querypnp.htm

DOSH – Enforcement
http://www.dir.ca.gov/dosh/EnforcementPage.htm

Educational Outreach To High-Risk Employee Groups
http://www.dir.ca.gov/dosh/app2005.doc

Environmental Protection Act; Region 9 (Includes California)
http://www.epa.gov/region9/water/

Labor Code statutes and Industrial Welfare Commission orders.
http://www.dir.ca.gov/dlse/dlse.html

Securities and Exchange Commission:
http://www.sec.gov/news/press/pressarchive/1999/99-70.txt

Case Study #1: Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency (2005), 134 Cal. App. 4th 598

Discussion question:
Did the Citizens group make their point that the hotel project needed a project specific impact report?

Facts
(The) Citizens for Responsible Equitable Environmental Development (CREED) appeals the trial court's judgment denying its petition for a writ of mandate and dismissing its complaint for injunctive and declaratory relief against respondents City of San Diego Redevelopment Agency, San Diego Centre City Development Corporation, and the City of San Diego (collectively respondents). CREED filed this lawsuit seeking to require respondents to prepare a project specific environmental impact report (EIR) pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, n2 § 21000 et seq.) to analyze a hotel project proposed by real party in interest Westfield America, Inc. (Westfield) and various entities affiliated with Westfield. On appeal, CREED claims respondents abused their discretion in determining that the potential environmental impacts of the hotel project were adequately examined in two prior EIR's: (1) a 1992 EIR that analyzed environmental impacts associated with the update of the 1976 Centre City Community Plan (Community Plan), and (2) a 1999 EIR that updated the 1992 EIR in connection with the development of a baseball stadium in the Community Plan Planning Area (Planning Area).

CREED claims respondents were required to prepare a separate project specific EIR for the hotel project because: (1) section 21090 requires a project specific EIR for all redevelopment projects undertaken as part of a redevelopment plan; (2) respondents failed to satisfy the statutory requirements for relying on the 1992 EIR as a "master environmental impact report" under section 21157; (3) a "fair argument" can be made that the hotel project will have significant environmental impacts; (4) respondents' reliance on the prior EIR's violated CEQA's rules for limited environmental review associated with a project undertaken pursuant to a "program EIR" (Guidelines, n4 § 15168); and (5) CEQA's goals of information disclosure, public participation, and governmental accountability required a project specific EIR. We affirm the judgment. FACTUAL AND PROCEDURAL BACKGROUND

In 1992, respondents adopted the "Master Environmental Impact Report for the Centre City Redevelopment Project and Addressing the Centre City Community Plan and Related Documents" (MEIR). The MEIR evaluated the potential environmental impacts that would result throughout the entire Planning Area from the update of the Community Plan, the adoption of the Redevelopment Plan for the Centre City Redevelopment Project, and the adoption of other related programs in downtown San Diego.

In 1999, respondents adopted the "Final Subsequent Environmental Impact Report to the Final Master Environmental Impact Report for the Centre City Redevelopment Project and Addressing the Centre City Community Plan and Related Documents for the Ballpark and Ancillary Development Projects, and Associated Plan Amendments" (SEIR). The SEIR was prepared to supplement information contained in the MEIR. The SEIR analyzed the potential environmental impacts related to the development of a baseball stadium and various ancillary projects in the Planning Area.

In July 2002, real parties in interest submitted an application to construct a 30-story, 450-room hotel in the Planning Area, on the north side of G Street above the Horton Plaza G Street Parking Garage. In October 2002, respondents prepared the "Final Environmental Secondary Study for the Proposed Inter-Continental Hotel Project" (Secondary Study). The Secondary Study determined that the hotel project was likely to cause significant environmental impacts, including increased traffic and air pollution. However, the Secondary Study concluded that all of the potential significant environmental impacts that would be caused by the hotel project had been analyzed sufficiently in the MEIR and the SEIR, and that a

new EIR for the hotel project was therefore not required. In November 2002, respondents approved the hotel project.

In January 2003, CREED filed a petition for a writ of mandate and complaint for injunctive and declaratory relief against respondents. CREED claimed respondents had violated CEQA by relying on the MEIR and SEIR in approving the hotel project, and requested that the trial court order respondents to prepare a project specific EIR for the hotel project. In August 2004, after briefing and oral argument, the trial court entered judgment denying the petition and dismissing the complaint.

CREED timely appeals.

III.

Issue(s)

A. *CEQA overview*

(1) In *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1315-1316 [8 Cal. Rptr. 2d 473] (*Sierra Club*), the court provided an overview of CEQA and a description of some of the types of EIR's that may be prepared pursuant to that statute:

"Central to CEQA is the EIR, which has as its purpose informing the public and government officials of the environmental consequences of decisions before they are made. [Citation.]

"An EIR must be prepared on any 'project' a local agency intends to approve or carry out which 'may have a significant effect on the environment.' (§§ 21100, 21151; Guidelines, § 15002, subd. (f)(1).) [Fn. omitted.] The term 'project' is broadly defined and includes any activities which have a potential for resulting in a physical change in the environment, directly or ultimately. (§ 21065; Guidelines, §§ 15002, subd. (d), 15378, subd. (a); [Citation].) The definition encompasses a wide spectrum, ranging from the adoption of a general plan, which is by its nature tentative and subject to change, to activities with a more immediate impact, such as the issuance of a conditional use permit for a site-specific development proposal. [Citation.]

(2) "To accommodate this diversity, the Guidelines describe several types of EIR's, which may be tailored to different situations. The most common is the project EIR, which examines the environmental impacts of a specific development project. (Guidelines, § 15161.) A quite different type is the program EIR, which 'may be prepared on a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.' (Guidelines, § 15168, subd. (a); [citation].)"

(3) An agency also may adopt a "master environmental impact report" as defined in section 21157. Section 21157 provides that such a report may be prepared in connection with various projects including "[a] general plan, element, general plan amendment, or specific plan." (§ 21157, subd. (a)(1).) Section 21157, subdivision (b) specifies the required contents of a "master environmental impact report." Sections 21157.1 and 21157.6 describe the use of such a report in approving subsequent projects.

(4) "Judicial review under CEQA is generally limited to whether the agency has abused its discretion by not proceeding as required by law or by making a determination not supported by substantial evidence.

[Citations.]" (*Sierra Club, supra,* 6 Cal.App.4th at p. 1317.) The precise standard of review to be used in determining whether an agency has abused its discretion under CEQA varies depending on the type of claim under review. (*Ibid*.)

B. *Section 21090 does not require respondents to prepare a separate EIR for the hotel project*

(5) CREED claims section 21090 requires respondents to prepare a separate EIR for the hotel project. We apply the de novo standard of review to this claim as it raises an issue of statutory interpretation. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1503 [31 Cal. Rptr. 3d 353] [question of statutory interpretation is reviewed de novo in determining whether agency abused its discretion under CEQA].) "In construing any statute, '[w]ell-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.' [Citation.] 'We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' (*Ibid.*) If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.' [Citation.]" (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 484-485 [17 Cal. Rptr. 3d 88].)

Section 21090 provides:

"(a) An environmental impact report for a redevelopment plan may be a master environmental impact report, program environmental impact report, or a project environmental impact report. Any environmental impact report for a redevelopment plan shall specify the type of environmental impact report that is prepared for the redevelopment plan.

"(b) If the environmental impact report for a redevelopment plan is a project environmental impact report, all public and private activities or undertakings pursuant to, or in furtherance of, a redevelopment plan shall be deemed to be a single project. However, further environmental review of any public or private activity or undertaking pursuant to, or in furtherance of, a redevelopment plan for which a project environmental impact report has been certified shall be conducted if any of the events specified in Section 21166 have occurred."

(6) CREED contends that section 21090 requires that "every project undertaken as part of a redevelopment plan [has] to receive project-specific environmental review unless the plan itself was the subject of a *project* EIR." (Italics added.) However, the plain language of section 21090 does not require that an agency take any such action. Rather, section 21090 *prohibits* an agency from requiring further environmental review of redevelopment plans for which a project EIR has been prepared, *unless* the circumstances specified in section 21166 exist. n5 In other words, section 21090 does not contain any requirement that an agency prepare a project EIR. Rather, it *precludes* an agency from requiring further environmental review under the circumstances specified in that statute.

CREED argues that one can infer from the statute's legislative history the Legislature's intent to require such project specific EIR's via section 21090. n6 Although we need not consider this argument in view of the plain language of section 21090 (*Whaley, supra,* 121 Cal.App.4th at p. 485), the legislative history offered by CREED supports our interpretation. Section 21090 was amended in September 2002. (Stats. 2002, ch. 625, § 3, eff. Sept. 17, 2002.) Prior to the 2002 amendments, former section 21090 provided: "For all purposes of this division [CEQA], all public and private activities or undertakings pursuant to, or in furtherance of, a redevelopment plan shall be deemed to be a single project. However, further environmental review of any public or private activity or undertaking pursuant to, or in furtherance of, a redevelopment plan shall be conducted if any of the events specified in Section 21166 have occurred."

CREED claims the 2002 amendments to section 21090 were a response to the Court of Appeal's decision in *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 523 [98 Cal. Rptr. 2d 334] (*Mammoth Lakes*). In *Mammoth Lakes*, the court considered a town's program EIR, which was prepared in connection with a redevelopment plan that listed 72 separate public improvements. (*Id*. at p. 524.) The program EIR did not analyze the potential direct or indirect environmental impacts of the projects. (*Id*. at p. 525.) The *Mammoth Lakes* court held that the EIR was inadequate, based in large part on its conclusion that, to the extent environmental information was available regarding the 72 projects at the time the EIR was approved, it should have been contained in the program EIR. The court reasoned that if the program EIR were deemed sufficient, notwithstanding the fact that it failed to include available information on the environmental impacts of the 72 projects, section 21090 would prohibit any further environmental review. (*Id.* at pp. 535-536.)

As the treatise upon which CREED relies in its opening brief explains, the amendments to section 21090 were intended to make clear that further environmental review of a redevelopment plan would be precluded only if a project EIR had been prepared for the plan. (Beatty et al., Redevelopment in California (3d ed. 2004) p. 58 (hereinafter Beatty).) The 2002 amendments do not require further project specific environmental review for redevelopment projects whose environmental effects have been adequately studied in a program EIR:

"The effect of the changes to Public Resources Code section 21090 was to restore the flexibility that had been lost a result of the *Mammoth Lakes* case. EIR's prepared in connection with the adoption of a redevelopment plan may be either program or project EIRs. Only if the EIR is a project EIR will the *prohibition* on further environmental review contained in subsection 21090[, subdivision] (b) be applicable. *If the EIR is a program EIR, it will be subject to the same procedures and limitations as other program EIRs*.

"Most EIR's prepared for redevelopment plan adoptions will be program adoptions. [P]] [A] program EIR prepared in connection with redevelopment plan adoption is usually a more general document than an EIR that might be prepared for a discrete development project. The program EIR should focus on the 'cumulative' or 'synergistic' impacts of the entire program. At this stage, less specific information is required about subsequent plan implementing activities than will be the case when those activities are before the public agency for decision. At that point, the agency must examine the environmental record to determine whether it adequately discloses and analyzes the environmental consequences of the specific implementing activity. *If it does, then the agency may proceed with the decision on the basis of the existing environmental record*. If it does not, the further environmental studies disclosing those specific impacts must first be prepared." (**Beatty, *supra***, pp. 57-58, italics added.)

(7) There is nothing in either the plain language of section 21090 or in its legislative history that requires the preparation of an EIR of any kind. Specifically, section 21090 does not require an agency to prepare an EIR for a project whose environmental impacts have been sufficiently analyzed in a prior program EIR or master EIR. n7 In part III.E., *post*, we consider whether respondents properly determined that the hotel project's potential environmental effects were adequately examined in a prior program EIR.

Because CREED has not established that the MEIR is a "master environmental impact report" (§ 21157), we need not consider its arguments that respondents have not satisfied the statutory prerequisites of that section

CREED claims that in approving the hotel project, respondents violated CEQA to the extent that respondents relied on the MEIR as a "master environmental impact report," as that term is defined in

section 21157.

In the trial court, respondents maintained that the MEIR was a "program EIR" as defined by the Guidelines, section 15168, subdivision (a), and not a "master environmental impact report" as defined in section 21157. Respondents explained that although the MEIR's title included the words "master environmental impact report," the MEIR was adopted in 1992, the year *prior* to the amendments to CEQA that established the existence of the "master environmental impact report" as defined under section 21157. (Stats. 1993, ch. 1130, § 18, p. 6324.) Further, the MEIR states that it is a "program EIR."

CREED has failed to put forth any argument that the MEIR is in fact a "master environmental impact report" as defined in section 21157, rather than a "program EIR" as defined in the Guidelines section 15168, subdivision (a). Instead, CREED *assumes* that the MEIR is the same as a "master EIR" under CEQA, and argues that respondents violated various statutory requirements pertaining to master EIR's. Because CREED has failed to establish that the MEIR is a "master environmental impact report" within the meaning of section 21157, we reject CREED's argument that respondents failed to comply with the statutory requirements pertaining to the use of such reports in approving the hotel project.

D. *The fair argument standard does not apply to judicial review of an agency's determination that a project's potential environmental impacts were adequately analyzed in a prior program EIR*

CREED claims respondents were required to prepare an EIR for the hotel project because a fair argument can be made that the project would have significant environmental impacts.

(8) The fair argument standard provides that an agency must prepare an EIR "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75 [118 Cal. Rptr. 34, 529 P.2d 66].) This test establishes a low threshold for the initial preparation of an EIR, reflecting a preference for resolving doubts in favor of environmental review. (*Sierra Club, supra*, 6 Cal.App.4th at pp. 1316-1317.)

(9) The *Sierra Club* court outlined the appropriate standard of judicial review of an agency's fair argument determination: "A court reviewing an agency's decision not to prepare an EIR in the first instance must set aside the decision if the administrative record contains substantial evidence that a proposed project might have a significant environmental impact; in such a case, the agency has not proceeded as required by law. [Citation.] Stated another way, the question is one of law, i.e., 'the sufficiency of the evidence to support a fair argument.' [Citation.] Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. [Citation.]" (*Sierra Club*, *supra*, 6 Cal.App.4th at pp. 1317-1318.)

(10) However, the fair argument standard does not apply to judicial review of an agency's determination that a project is within the scope of a previously completed EIR. (*Sierra Club*, *supra*, 6 Cal.App.4th at p. 1318.) Once an agency has prepared an EIR, its decision not to prepare a supplemental or subsequent EIR n8 for a later project is reviewed under the deferential substantial evidence standard. (*Santa Teresa Citizen Action Group v. City of San Jose* (*Santa Teresa*) (2003) 114 Cal.App.4th 689, 702 [7 Cal. Rptr. 3d 868], citing *Sierra Club*, *supra*, 6 Cal.App.4th at p. 1318; see also *Sierra Club, supra*, 6 Cal.App.4th at pp. 1320-1321 [concluding "evidence does not support a determination that ... proposed site-specific project was either the same as or within the scope of the project, program, or plan described in the program EIR"].) "This rule applies to determinations regarding whether a new EIR is required following a program-EIR level of review." (**1 Kostka & Zischke, *supra*, § 11.16**, p. 440, citing *Santa Teresa*, *supra*, 114 Cal.App.4th at p. 703.)

In *Santa Teresa*, *supra*, 114 Cal.App.4th at p. 696, the City evaluated the potential environmental impact of a proposed water recycling project within an area known as "the Golden Triangle" n9 and its possible expansion, in an EIR that was completed in 1993. The EIR evaluated the "Golden Triangle" portion of the project at the "project" level (Guidelines, § 15161) and the future expansion of the project at "program" level (Guidelines, § 15168). (*Santa Teresa, supra*, 114 Cal.App.4th at p. 696.) In 2000, the City completed an initial study for one possible route for expansion of a pipeline portion of the project, which resulted in a negative declaration. n10 (*Id*. at p. 698.) In 2001, the City conducted a second initial study for a slightly different proposed expansion. (*Id*. at pp. 698, 704.) Also in 2001, the City adopted the second initial study by way of an addendum to the initial 1993 EIR. The addendum stated, " '[a] subsequent EIR will not be prepared because the project described in this addendum does not involve new significant environmental effects or a substantial increase in the severity of previously identified significant effects.' " (*Id*. at p. 699.)

The petitioners filed a petition for a writ of mandate seeking to set aside the City's action as a violation of CEQA. (*Santa Teresa, supra*, 114 Cal.App.4th at p. 699.) The trial court denied the petition. (*Id*. at p. 700.) On appeal, the petitioners claimed that the 2001 initial study was inadequate because it relied on the 1993 EIR. (*Id*. at p. 702.) The *Santa Teresa* court rejected the petitioner's argument that the fair argument standard applied to its claim:

"When an agency has already prepared an EIR, its decision not to prepare a[] [supplemental or subsequent EIR] for a later project is reviewed under the deferential substantial evidence standard. [Citation.] Petitioners argue that the stricter 'fair argument' rule should apply. We disagree. [P] ... [P]

"When the public agency has already prepared an EIR, no [supplemental or subsequent EIR] is required unless there are substantial changes in the project or the circumstances surrounding the project, or if new information becomes available. (§ 21166.) The reviewing court upholds an agency's decision not to require [a] [supplemental or subsequent EIR] if the administrative record as a whole contains substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR. (*Sierra Club, supra,* 6 Cal.App.4th at p. 1318.) This deferential standard is a reflection of the fact that in-depth review has already occurred. [Citation.]" (*Santa Teresa, supra,* 114 Cal.App.4th at pp. 702-703.)

In this case, CREED contends that the evidence "overwhelmingly supports a fair argument" that the hotel project is likely to have significant environmental impacts. In support of its claim, CREED asserts that respondents' Secondary Study revealed that the project was likely to have significant environmental impacts. Assuming this is accurate, the Secondary Study went on to conclude that, "No [p]otentially [s]ignificant [e]nvironmental [i]impacts were identified in the preceding environmental evaluation that had not been considered in the MEIR/SEIR."

As noted above, the fair argument standard does not apply to review of an agency's determination that a project's potential environmental impacts were adequately analyzed in a prior program EIR. (*Santa Teresa, supra*, 114 Cal.App.4th at pp. 702-703.) Therefore, in view of respondents' determination that the project's potential environmental impacts were adequately analyzed in the MEIR and the SEIR, we reject CREED's argument that the fair argument standard requires that respondents prepare an EIR for the hotel project.

Finally, CREED expressly states that it is not raising a substantial evidence challenge to respondents' determination that the MEIR and the SEIR adequately addressed the potential environmental impacts of the hotel project in raising its claim pertaining to the applicability of the fair argument standard. n11 However, CREED did raise an analogous challenge in the context of arguing that respondents failed to satisfy the statutory prerequisites for utilizing the MEIR as a "master environmental impact report" as that

term is defined in section 21157. We concluded in part III.C., *ante*, that we need not consider CREED's arguments pertaining to whether respondents satisfied the statutory prerequisites for utilizing the MEIR as a "master environmental impact report" (§ 21157) in light of CREED's failure to establish that the MEIR is such a report. However, to the extent CREED's brief can be construed to raise a substantial evidence challenge to respondents' determination that the hotel project's potential environmental impacts were adequately addressed in the MEIR and SEIR, we consider this argument in part III.E., *post*.

E. *Respondents did not violate CEQA in determining that the potential environmental effects of the hotel project were adequately examined in the MEIR and SEIR*

CREED claims that respondents violated CEQA in determining that the potential environmental effects of the hotel project were adequately examined in the MEIR and SEIR.

. Natural Resources Defense Council v. City of Los Angeles *(2002) 103 Cal.App.4th 268 [126 Cal. Rptr. 2d 615] (NRDC) does not preclude respondents from relying on the MEIR in approving the hotel project*

CREED claims *NRDC* "prohibit[s] [r]espondents from relying on the ten-year-old MEIR." In *NRDC*, the Los Angeles Harbor Department (LAHD) prepared a program EIR in 1997 in connection with various contemplated improvements at the Port of Los Angeles (Port). (*NRDC, supra*, 103 Cal.App.4th at p. 272.) In 2000, the United States Army Corps of Engineers prepared an EIR for the purpose of analyzing "project-specific" impacts of deepening various channels at the Port. (*Id*. at p. 274.) In May 2001, the City of Los Angeles (City) entered into a "lease/permit" with a lessee, China Shipping, for the purpose of constructing a container terminal at the Port. (*Id*. at p. 270.) Shortly thereafter, the City issued a notice of decision that stated that the city council had approved the project and had determined that the project had been adequately analyzed in the 1997 and 2000 EIR's. (*Id*. at p. 278.)

The petitioners filed a petition for a writ of mandate asserting that the City had violated CEQA. (*NRDC, supra*, 103 Cal.App.4th at p. 270.) The trial court denied the petition. (*Ibid*.) On appeal, the *NRDC* court determined that the city had violated CEQA by failing to prepare an additional EIR addressing project specific impacts that were outside the scope of the prior EIR's. (*NRDC, supra*, 103 Cal.App.4th at p. 270.)

NRDC is legally and factually distinguishable from this case, and does not stand for the proposition that a project specific EIR is required even where a governmental entity has determined that the potential **environmental** impact of a project was adequately considered in a prior EIR. In *NRDC*, the court noted that the city had entered into a "side letter agreement" with the lessee that addressed site-specific environmental concerns based on the city's "apparent[] concern[] that not all environmental issues had been addressed" in the prior EIR's. (*NRDC, supra*, 103 Cal.App.4th at p. 279.) In addition, notwithstanding this side letter agreement, the City failed to prepare an initial study to determine whether additional environmental analysis was required. (*Id*. at p. 282.) The *NRDC* court concluded, "The fact that the port[n13] and China Shipping entered into a side letter agreement addressing site-specific environmental concerns arising from this Project provides adequate support for appellants' argument that the port was required to prepare an initial study leading to either preparation of an EIR or a negative declaration for this Project." (*Id*. at p. 282.) Further, the *NRDC* court held that neither the 1997 EIR nor the 2000 EIR "adequately addresses the site-specific environmental concerns expressed in the side letter agreement." (*Id*. at p. 284.) In this case, in contrast, respondents performed an initial study that concluded that the MEIR and SEIR had adequately examined all potentially significant environmental impacts from the hotel project. For the reasons stated in part III.E.2, *post,* there is substantial evidence to support respondents' conclusion.

In addition, respondents cite *NRDC* as supporting their repeated assertion that respondents unlawfully relied on the MEIR and the SEIR in approving the hotel project because the project was not proposed

until after the MEIR and the SEIR were certified. We acknowledge that the *NRDC* opinion contains some language that suggests that a program EIR may not serve as the EIR for a project proposed after its certification. For example, the *NRDC* court stated: "The China Shipping project arose more than three years after the 1997 EIR and was not specifically addressed in the 2000 SEIS/SEIR. It cannot be considered part of the overall 'project' addressed in those documents." (*NRDC, supra*, 103 Cal.App.4th at pp. 284-285.) However, there is other language in *NRDC* that suggests the court's acknowledgment that a program EIR may, under appropriate circumstances, be used as an EIR for a project proposed after its certification. (*Id*. at p. 282 ["A program EIR does not always suffice for a later project"].)

To the extent *NRDC* can be read to suggest that a program EIR is never sufficient to analyze a project proposed after its certification, we disagree. The Guidelines unambiguously state that a program EIR may be used with "subsequent activities" as follows:

"(c) Use With Later Activities. Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

"(1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration.

"(2) If the agency finds that pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required.

"(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program.

"(4) Where the subsequent activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR.

"(5) A program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required." (Guidelines, § 15168, subd. (c).)

(11) To hold that a project specific EIR must be prepared for all activities proposed after the certification of the program EIR, even where the subsequent activity is "within the scope of the project described in the program EIR" (Guidelines, § 15168, subd. (c)(5)), would be directly contrary to one of the essential purposes of program EIR's, i.e., to streamline environmental review of projects within the scope of a previously completed program EIR. We conclude that a program EIR may serve as the EIR for a subsequently proposed project to the extent it contemplates and adequately analyzes the potential environmental impacts of the project, and that respondents were not prohibited from relying on the MEIR under *NRDC, supra*, 103 Cal.App.4th 268.

2. *Respondents' determination that the potential* ***environmental*** *effects of the hotel project were adequately examined in the MEIR and SEIR is supported by substantial evidence*

CREED contends that respondents' determination that the hotel project "will not have any significant effect on the environment that was not identified and considered in the MEIR" is not supported by substantial evidence.

In *Santa Teresa, supra*, 114 Cal.App.4th at page 704, the court outlined the substantial evidence standard of review in this context: "We independently review the administrative record. [Citation.] We resolve reasonable doubts in favor of the administrative decision. [Citation.] 'We do not judge the wisdom of the agency's action in approving the Project or pass upon the correctness of the EIR's environmental conclusions. [Citations.] Our function is simply to determine whether the agency followed proper procedures and whether there is substantial evidence supporting the agency's determination that the changes in the Project (or its circumstances) were not substantial enough to require an SEIR.' [Citation.]"

CREED first suggests that the hotel project was not within the geographic scope of the MEIR and that, therefore, the MEIR did not analyze the potential environmental impacts of the hotel project identified in the Secondary Study. The MEIR defines the term Planning Area and includes a map that identifies the boundaries of the Planning Area. The MEIR states, "The environmental analysis contained in this EIR considers the entire Planning Area ... ." The Secondary Study contains a map that indicates that the hotel project is within the Planning Area as defined by the MEIR. Therefore, we reject CREED's claim that the MEIR "exclud[es] the part of downtown where the Project is to be built."

Second, CREED reiterates its argument that the MEIR could not have served as an EIR for the hotel project because the project was proposed after certification of the MEIR. We reject that argument for the reasons stated in part III.E.1., *ante*.

Respondents point to considerable evidence in support of their determination that the potential environmental impacts of the hotel project were within the scope of the MEIR and the SEIR. First, the MEIR states that it is a program MEIR that will serve as "the basis for the environmental assessment of the proposed Community Plan." As noted in the MEIR, the Community Plan designated the area where the hotel is to be built as a "Commercial/Office District" in which "hotels and motels" would be emphasized as among the allowable land uses. In addition, the MEIR states that it is providing an environmental assessment of the "ultimate capacity buildout scenario" of the Planning Area over a 35-year period. The MEIR forecasts that a total of 5,880 additional hotel rooms would be constructed over a 35-year period within the Planning Area, and expressly contemplates the completion of the Horton Plaza Redevelopment Project, which the hotel project will complete. Further, the MEIR specifically provides that "this EIR will be used for project-specific approvals of future development activities with the ... Planning Area."

Respondents also completed the Secondary Study, an initial study pursuant to Guidelines section 15063, subdivision (d), to determine whether an additional EIR would be required for the hotel project. The Secondary Study analyzed potential environmental impacts from the project with reference to the MEIR and the SEIR, and concluded that all of the potential significant environmental impacts from the hotel project had been sufficiently analyzed in the MEIR and the SEIR. n14 For example, the Secondary Study noted that the hotel project "is consistent in land use and intensity" with the Community Plan. The Secondary Study did state that the "cumulative impacts of the [hotel project] would be significant and not fully mitigable with respect to air quality and traffic." However, the Study concluded that these "cumulative impacts would not be greater than those identified in the MEIR [and] SEIR."

We conclude that respondents' determination that the hotel project's potential environmental effects were adequately examined in the MEIR and SEIR is supported by substantial evidence.

F. *Respondents did not violate the goals of CEQA by failing to prepare a project specific EIR for the hotel project*

CREED claims that respondents' improper failure to prepare a project specific EIR for the hotel project

violated the goals of information disclosure, public participation, and government accountability embodied in CEQA. CREED also raises the specific claim that respondents improperly failed to circulate a draft of the Secondary Study for public comment.

We concluded in parts III.B.-E., *ante*, that respondents did not violate CEQA by failing to prepare a project specific EIR for the hotel project. Accordingly, we reject CREED's claim that respondents' purported violation of CEQA frustrated CEQA's purposes.

With regard to the specific claim concerning respondents' failure to circulate a draft of the Secondary Study for public comment, CREED has not cited any authority, and we are aware of none, that would require respondents to take such action. The Secondary Study stated that it "was prepared in compliance with the requirements for an Initial Study" according to the Guidelines. Guidelines section 15063, subdivision (d) outlines the requirements of an initial study. That section does not require that a draft initial study be circulated for public comment. (Accord *Santa Teresa, supra*, 114 Cal.App.4th at p. 702 ["City was not required to give notice that an initial study was being prepared, nor was City required to circulate the addendum [adopting the initial study] for public comment," citing Guidelines, §§ 15063, 15164, subds. (a), (c)].) We therefore reject CREED's claim that respondents were required to circulate a draft of the Secondary Study for public comment.

IV.

Decision

The judgment is affirmed.

Case Study #2: People v. Athar (2005) , 36 Cal. 4th 396

Discussion Question: Do you think Athar should have been convicted of money laundering as well as the conspiracy?

Facts

A jury found defendant Syed Abeida Athar guilty of conspiracy to engage in money laundering in violation of the general conspiracy statute, Penal Code section 182, subdivision (a)(1). Defendant was not charged with (or convicted of) money laundering itself under section 186.10, subdivision (a). The trial court sentenced him to a two-year term for the base crime of conspiracy, and imposed a four-year enhancement under section 186.10, subdivision (c)(1)(D).

Beginning in July 1994, defendant and some friends began to sell counterfeit Microsoft software. The partners established various fictitious businesses to conceal the unlawful sales and took the profits for themselves. They distributed the profits by depositing them into various bank accounts and transferring them by check, cashier's check, and cash to other accounts. Between August 1994 and September 1996, defendant and his partners engaged in nearly 300 transactions, and over $ 2.5 million was eventually transferred.

Since June 1996, Microsoft had been receiving complaints about the counterfeit software and had alerted the San Diego Police Department of the scheme. Based on the information received, police arrested defendant on September 6, 1996. The search following arrest turned up 1,100 to 1,300 units of counterfeit software in defendant's possession.

An indictment was filed in 1999, charging defendant and his partners with conspiracy to engage in money laundering and to manufacture a counterfeit mark. (§§ 182, 350, subd. (d)(3).) The indictment alleged approximately 55 overt acts, some occurring as early as July 1994. The indictment further alleged that "the value of the transaction or transactions exceeds two million five hundred thousand dollars ($ 2,500,000), in violation of Penal Code section 186.10 (c)(1)(D)." The indictment did not charge defendant with money laundering under section 186.10, subdivision (a), although several of his partners were so charged. Defendant was charged, however, with possession for sale of 1,000 or more counterfeit marks in violation of section 350, subdivision (d)(3).

As relevant here, a jury convicted defendant of conspiracy to commit money laundering. (§ 182, subd. (a)(1).) The jury also found that the value of the transactions was in excess of $ 2,500,000, the statutory minimum required for imposing a four-year enhancement following a conviction for the substantive crime of money laundering. (§ 186.10, subd. (c)(1)(D).) The trial court sentenced defendant to two years for conspiracy and four years for the money laundering enhancement under section 186.10, subdivision (c)(1)(D). The court then stayed the entire sentence and imposed five years' probation conditioned on one year in the county jail and various fines and restitution.

The Court of Appeal affirmed the judgment. Defendant petitioned for review, raising certain issues, but failed to question whether he should have received the money laundering enhancement because he was not charged or convicted of money laundering. We granted and transferred the case so the Court of Appeal could consider that issue.

A majority of the Court of Appeal held that money laundering enhancements apply to the charge of conspiracy to commit money laundering. We granted defendant's petition for review limited to the money laundering enhancement issue.

Issue(s)

Section 182, subdivision (a), provides that conspiracy to commit felonies other than those specifically identified "shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony." (§ 182, subd. (a).) Section 186.10, subdivision (c)(1), provides possible enhancements for money laundering, stating, among other things, that "Any person who is punished under subdivision (a) by imprisonment in the state prison shall also be subject to an additional term of imprisonment in the state prison as follows: [P] ... [P] (D) If the value of the transaction or transactions exceeds two million five hundred thousand dollars ($ 2,500,000), the court ... shall impose an additional term of imprisonment of four years." (§ 186.10, subd. (c)(1).)

The Court of Appeal majority upheld defendant's conspiracy conviction and application of the money laundering enhancement based on the fact that conspirators under section 182, subdivision (a), must be punished "in the same manner and to the same extent" as those convicted of the "target felony," i.e., money laundering.

The Court of Appeal, relying on the plain meaning rule, concluded that section 186.10, subdivision (c), requires the enhancement because it does not specifically prohibit it. (See *People v. Gardeley* (1997) 14 Cal.4th 605, 621 [59 Cal. Rptr. 2d 356, 927 P.2d 713] (*Gardeley*) [when statutory language is clear and unambiguous, and not susceptible of more than one meaning, courts should not engage in statutory construction].) The court observed that "[h]ad the Legislature intended to apply the money laundering enhancements to only those persons convicted of the substantive offense of money laundering, it would have so provided in subdivision (c) of section 186.10." Therefore, the court reasoned, because the Legislature did not exclude conspiracy actions from the enhancement provisions, the enhancement here was mandatory.

The People agree, asserting that the requirement of the conspiracy statute that one convicted of conspiracy must be punished "in the same manner and to the same extent" as provided for the punishment of the target offense, means that defendant is deemed punished under section 186.10. As the People observe, by its terms, section 186.10, subdivision (c), does not require a court to convict defendant of the target offense, but instead that he be punished *under* section 186.10, subdivision (a). Relying on *People v. Kramer* (2002) 29 Cal.4th 720 [128 Cal. Rptr. 2d 407, 59 P.3d 738] (*Kramer*), the People add that section 182's requirement that a defendant be punished for, as opposed to convicted of, the felony with the "greater maximum term" (§ 182, subd. (a)) demonstrates a legislative intent to incorporate enhancements into any conspiracy conviction.

Justice McDonald's dissent argued that the mere fact that section 182 refers to the target crime to determine the punishment for conspiracy does not mean one is deemed punished for the target crime. "[Defendant] did not commit the crime of money laundering ... he committed the crime of conspiracy. Therefore, he was punished under the conspiracy statute for committing the crime of conspiracy; he was not punished under the money laundering statute because he did not commit the crime of money laundering."

We agree with the Court of Appeal majority and the People. It is true, as defendant contends, that conspiracy is separate and distinct from the substantive crime that is its object. But we cannot ignore the fact that the punishment for a conspiracy to commit the felony of money laundering is the same as that for money laundering. (§ 182, subd. (a).)

Kramer, supra, 29 Cal.4th 720, supports the People's contention. In *Kramer*, we applied amended section 654 to decide the proper punishment in a case in which the defendant fired a gun at a moving car containing two occupants, and was convicted of both discharging a firearm at an occupied vehicle (§ 246), and assault with a firearm (§ 245, subd. (a)(2)). (*Kramer, supra*, 29 Cal.4th at p. 722.) Amended

section 654 provides that when an act or omission is punishable in different ways by different provisions of law, it "shall be punished under the provision that provides for the longest potential term of imprisonment ... ." (§ 654, subd. (a).) *Kramer* observed that the punishment for violating section 246 is three, five, or seven years, while the punishment for violating section 245, subdivision (a)(2), is two, three, or four years. (*Kramer, supra*, 29 Cal.4th at p. 722.)

Viewed in isolation, section 246 provided for the longest potential term of imprisonment and, under section 654, would be the applicable statute for sentencing defendant. (*Kramer, supra*, 29 Cal.4th at p. 722.) However, because the section 245, subdivision (a)(2), count was eligible for the firearm-use enhancement of section 12022.5, subdivision (a), while the section 246 count was not, we held that the assault charge under section 245, subdivision (a)(2), provided for a longer potential term of imprisonment as long as the firearm-use enhancement was included as part of the defendant's punishment. We concluded that "[t]he statutory language seems clear. Nothing in that language excludes enhancements." (*Kramer*, at p. 723.) We therefore determined that the court must consider enhancements in determining which penal provision provides for the longest potential term of imprisonment for the target felony. (*Ibid*.; § 654, subd. (a).) As the People observe, *Kramer*'s conclusion that a "term" is not limited to the base term applies with equal force to the punishment for the crime of conspiracy under section 182, subdivision (a).

Defendant relies on *People v. Hernandez* (2003) 30 Cal.4th 835 [134 Cal. Rptr. 2d 602, 69 P.3d 446] (*Hernandez*), where we considered to what extent a court can attach a special penal provision to conspiracy rather than to the underlying crime itself. The substantive question in *Hernandez* was whether the punishment specified for a financial-gain special circumstance could be added to the penalty for conspiracy to commit murder. (*Id*. at p. 864.) We held that the special circumstance does not apply to conspiracy to commit murder. (*Id*. at p. 870.)

In *Hernandez*, the jury convicted the defendant of first degree murder and conspiracy to commit murder under section 182, subdivision (a). (*Hernandez, supra*, 30 Cal.4th at p. 864.) Finding that the defendant committed the crimes in exchange for heroin and cocaine, the jury applied the financial-gain special circumstances for a sentence of life imprisonment without possibility of parole for the crime of conspiracy. At issue were two statutory provisions: (1) section 182, subdivision (a), which states that when two or more persons conspire to commit murder, "the punishment shall be that prescribed for murder in the first degree"; and (2) section 190.2, subdivision (a), which provides that " '[t]he penalty for a defendant who is found guilty of *murder in the first degree* is death or imprisonment in the state prison for life without the possibility of parole if one or more ... special circumstances has been found ... true ... .' " (*Hernandez, supra*, 30 Cal.4th at p. 865.)

Hernandez recognized that the question whether the penalty for the special circumstances in section 190.2 may apply to the crime of conspiracy to commit murder turned on statutory construction. (*Hernandez, supra*, 30 Cal.4th at p. 865.) Applying standard rules of statutory construction, we held that the penalty for the special circumstances does not apply to conspiracy to commit murder. (*Id*. at p. 870.) First, nothing in the wording of the statutes governing special circumstances indicated that the voters who enacted the death penalty law intended for the special circumstances to apply to conspiracy. (*Id*. at pp. 865-866.) Scrutinizing the wording of the initiative, we held that the provisions strongly implied that special circumstances may be charged as to the crime of murder only. (*Id*. at p. 866.)

Hernandez next observed that the crime of conspiracy was not mentioned in either the text of the 1978 death penalty measure, or the official ballot pamphlet for the election adopting that measure. (*Hernandez, supra*, 30 Cal.4th at p. 866.) Indeed, it was not clear in 1978 that capital punishment for an unsuccessful conspiracy to commit murder was permitted under the federal Constitution. (*Id.* at p. 867.) We noted that were we to construe section 190.2 to include conspiracy, that crime would require a substantially more severe punishment than that imposed for attempted premeditated murder, thus creating an irreconcilable

disparity between the otherwise similar offenses of attempt and conspiracy. (*Hernandez*, at pp. 867-868.) After also finding that allowing the death penalty for crimes not involving murder could raise potential constitutional problems, we concluded that the 1978 law should not be read to allow capital punishment for the conspiracy to commit murder. (*Id*. at pp. 869-870.)

In addition, *Hernandez* reasoned that the rule of construction that requires us to resolve statutory ambiguities in favor of the defendant bolstered the conclusion that the special circumstances enhancement should not apply to the crime of conspiracy. (*Hernandez, supra*, 30 Cal.4th at p. 869.) What we term the rule of lenity compels this result when the statute "is susceptible of two constructions." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896 [231 Cal. Rptr. 213, 726 P.2d 1288]; see also *People v. Lee* (2003) 31 Cal.4th 613, 627 [3 Cal. Rptr. 3d 402, 74 P.3d 176].) Therefore, *Hernandez* held that the enhancement does not apply to the crime of conspiracy. (*Hernandez, supra*, 30 Cal.4th at p. 870.)

(1) We find initially that the statutory construction principles we addressed in *Hernandez* do not help defendant. The purpose of the amendment adding the enhancements to section 186.10 was to stop "the deluge of drug proceeds being laundered through California based financial institutions" and "further deter money **laundering** [and] more effectively punish launderers." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3205 (1993-1994 Reg. Sess.) June 2, 1994, pp. 2-3.)

Because the money **laundering** process typically involves more than one person, and often large criminal networks, it is reasonable for us to find that the enhancements under section 186.10, subdivision (c), were intended to control large-scale **laundering** and the conspiracies that necessarily underlie the criminal operation. In *Hernandez* we found just the opposite, that there was nothing to indicate that the voters who enacted the 1978 death penalty law intended for the special circumstances to apply to conspiracy. (*Hernandez, supra*, 30 Cal.4th at pp. 865-866.)

(2) The rule of lenity also does not assist defendant. Under that principle, when "two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable," we construe the provision most favorably to the defendant. (*People v. Jones* (1988) 46 Cal.3d 585, 599 [250 Cal. Rptr. 635, 758 P.2d 1165].) Defendant urges us to apply this rule because, he argues, section 182, subdivision (a), is susceptible of two equally convincing interpretations: (1) the enhancement provisions apply to an individual who "conducts or attempts to conduct" (§ 186.10, subd. (a)) money laundering and not to those who engage in the crime of conspiracy only; or (2) because section 182, subdivision (a), states that the conspiracy is "punishable in the same manner and to the same extent as is provided for the punishment of that felony," the enhanced punishment of section 186.10, subdivision (c)(1)(D), is part of the punishment for the felony of conspiracy to engage in money laundering.

As the People observe, however, our holding in *Hernandez* was informed only partially by the rule of lenity. Unlike *Hernandez*, here the application of the section 186.10, subdivision (c), enhancements does not involve imposition of the death penalty without a murder, or any penalty that would raise serious constitutional concerns. In addition, if we apply the enhancements to defendant's conspiracy conviction, there will be no disparity between the punishment for attempt to launder money and for conspiracy. An attempt, like a conspiracy, is also punished under section 186.10, subdivision (c).

(3) Defendant next contends that the legislative mandate of section 182, subdivision (a), that conspiracy to commit a felony is punishable "in the same manner and to the same extent as is provided for the punishment of that *felony*" (italics added), refers to the felony of money laundering without any enhancements, i.e., to the base term. We are not convinced. The statute

specifically refers to the "punishment of that felony" (§ 182, subd. (a)) and thus includes all punishment for money laundering, including enhancements, depending on how much money was laundered, and whether the amount laundered was pled and proven. (§ 186.10, subd. (c).)

Defendant also relies on Health and Safety Code section 11370.4, subdivision (a). There, the Legislature specifically provided for enhancements where a "person [has been] convicted of a violation of, or of a conspiracy to violate," certain other drug trafficking offenses. (Health & Saf. Code, § 11370.4, subd. (a).) Defendant reasons that had the Legislature intended for the enhancement provisions to apply to conspiracy to engage in money laundering, it would have so indicated. According to defendant, nothing in the legislative history of section 186.10 demonstrates the Legislature intended to apply the enhancements to a conspiracy charged under section 182, subdivision (a). He contends that if we construe the punishment provision of the conspiracy statute under section 182, subdivision (a), as including the enhancement provisions of section 186.10, subdivision (c), we would render superfluous the Legislature's express reference to conspiracy in the drug trafficking enhancement statute. (See Health & Saf. Code, § 11370.4, subd. (a).)

(4) The Court of Appeal and the People, however, rely on statutory plain language to distinguish Health and Safety Code section 11370.4 from Penal Code section 186.10, subdivision (c), because the former statute refers to someone "convicted" of a drug offense, while section 186.10, subdivision (c), applies to anyone who is "punished under" section 186.10, subdivision (a). Prior to 1989, Health and Safety Code section 11370.4 enhancements applied to persons "convicted" of the specified drug trafficking offenses only, and did not include persons convicted of conspiracy to violate those sections who were punished under those sections. (Stats. 1985, ch. 1398, § 3, pp. 4948-4949; see *People v. Duran* (2001) 94 Cal.App.4th 923, 939-940 [114 Cal. Rptr. 2d 595].) The Legislature then amended the statute in 1989 specifically to include conspiracies to violate the relevant drug trafficking offenses. (See Stats. 1989, ch. 1326, § 2.5, pp. 5327-5328.) Therefore, because the initial statutory language may have created some doubt as to its applicability, the Legislature could have believed it was necessary to amend the statute in order to apply the statutory enhancements to conspirators because those enhancements had been limited specifically to persons convicted of the target offense. The general plain meaning expressed in section 182, subdivision (a), that a conspirator will be punished in the same manner and to the same extent as one convicted of the underlying felony, does not require additional legislative clarity. **(5)** (See *Gardeley, supra*, 14 Cal.4th at p. 621 [clear statutory language does not require construction].)

The People also rely on the reasoning in *People v. Villela* (1994) 25 Cal.App.4th 54 [30 Cal. Rptr. 2d 253]. *Villela* extended the registration requirement for narcotics offenders under Health and Safety Code section 11590 to those convicted of conspiracy to commit a drug offense. (*Villela*, at pp. 59-60.) The defendant maintained that the registration requirement should not apply to a conspiracy conviction under Penal Code section 182 because the Health and Safety Code did not list a section 182 conspiracy as an included offense. (*Villela*, at p. 57.) *Villela* reasoned that the registration requirement, though not an enhancement, was a punishment and concluded that the Legislature intended to subject conspirators to the same punishment as that imposed for perpetrators of the underlying felony. (*Id*. at pp. 60-61; § 182, subd. (a).) *Villela* held, therefore, that it would be appropriate to punish the defendant to the same extent as one convicted of the target felony, which included registration as a narcotics offender. (*Villela*, at pp. 60-61.)

(6) Defendant contends that *Villela* erred in concluding that the additional registration requirement was equal to a punishment. (See *People v. Castellanos* (1999) 21 Cal.4th 785 [88

Cal. Rptr. 2d 346, 982 P.2d 211] [sex offender registration is not punishment for ex post facto purposes].) As the People observe, however, even if we assume the court incorrectly called the additional registration requirement a punishment, the court was correct in reasoning that section 182 requires sentencing to the same extent as the underlying target offense, and that the sentencing is not limited to the base term of that offense.

Decision
(7) Applying the principles discussed above, we conclude that the enhancements set forth in section 186.10, subdivision (c), apply to a conviction of conspiracy to commit money laundering under section 182, subdivision (a). We therefore affirm.

Answers to Review Questions
Chapter 14

1. What do you see as the main enforcement role for regulatory agencies that are charged with environmental protections?
A. Subjective answer. However, students should be able to identify key objectives in the regulatory role of these agencies.

2. What are *Viatical* agreements?
A. A viatical settlement allows you to invest in another person's life insurance policy. With a viatical settlement, you purchase the policy (or part of it) at a price that is less than the death benefit of the policy. When the seller dies, you collect the death benefit.

3. What are vertical, horizontal bidding and tying related to?
A. Vertical price-fixing is the fixing of resale prices between seller and buyer
Horizontal price-fixing *It is illegal for any competitors to have any agreement to raise, stabilize or otherwise affect prices. Any agreement between a seller and a buyer regarding the price at which the buyer resells a product is illegal.* ***Tying:*** *Sellers sometimes require a buyer to purchase a product the buyer does not want in order to be allowed to buy a product the buyer does want. Such requirements are called tying arrangements. Tying is generally illegal where the seller has some degree of control over the market for the product the buyer wants*

4. The Sherman Act state that any person *"who shall make any contractor engage in any combination or conspiracy" to interfere with interstate commerce*," ***shall*** be fined how much?
A. A corporation ***shall*** *be punished with a* ***fine of ten million dollars*** *and an individual by a fine of $350,000 or by imprisonment not exceeding three years, or both.*

5. What is the purpose of the ***Sarbanes-Oxley Act****?*
A. This is a corporate criminal fraud statute that requires the heads of corporations to certify that their firms' financial reports are accurate. A violation of this act is punishable by up to twenty-five years in prison.

6.. What was the purpose of the Sherman Act?
A. The Sherman (Antitrust) Act of 1890 was intended to insure a free and competitive business marketplace. The Sherman Act, according to former Supreme Court Judge Hugo Black, is designed to be a "comprehensive charter of economic liberty aimed at preserving free unfettered competition as the rule of trade." Imagine if every bar and restaurant in a college town agreed to sell beer at an inflated price rather than compete with one another for the business of students? The theory behind the Sherman Act, is that economic competition results in low prices, high quality, and promotes self-reliance and democratic values.

7. What agency oversees environmental issues in California?
A. California Environmental Quality Act (CEQA) pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.

8. What agency investigates Health Care Fraud in California?
A. California Insurance Code Section 1872.85, specifically authorizes the California Department of Insurance, Fraud Division, to conduct investigations regarding healthcare and disability fraud.

9. What is the law on eavesdropping, recording and monitoring conversations in California?
A. Unless there is a warrant or consent, they are largely illegal, particularly with prohibited or protected, communications, such as the lawyer-client privilege. This does not preclude a legitimate claim to overhearing a conversation.