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Tuesday, April 8, 2014

Criminal**Panel lawyer billing record audit spawns criminal investigation**

Members of the Central District's indigent defense community are outraged over informal audits of panel attorney billing records that have triggered a federal criminal investigation by the Southern District U.S. attorney's office.

Civil Rights**Los Angeles County reaches settlement deal over aid to poor**

A coalition of advocates for poor local communities is set to announce a \$7.9 million settlement agreement with the county on Tuesday that will institute structural reform in the program and pay back aid that was prematurely terminated for

U.S. Supreme Court**Thomas alone on campaign finance?**

It was somewhat of a surprise last week when Thomas wrote only for himself in the *McCutcheon* campaign finance case. By **Richard L. Hasen**

Litigation**DirectTV's arbitration motion falls short**

Appellate decision upholds ruling in class action on behalf of consumers who claim they were charged illegal cancellation fees.

Mergers & Acquisitions**Dealmakers**

A roundup of recent merger and acquisition and financing activity and the lawyers involved.

U.S. Court of Appeals for the 9th Circuit State civil lawsuit access is a federal case, 9th Circuit rules

Whether the public has a right to speedily view newly filed California state court civil lawsuits is an important First Amendment question that merits a federal court airing, a 9th U.S. Circuit Court of Appeals panel held Monday.

Government**Attorney general to marry Los Angeles lawyer**

Kamala Harris revealed over the weekend that she's engaged to marry Venable partner Douglas Emhoff in a ceremony likely to occur within six months.

Antitrust & Trade Reg.**Judge sends antitrust suit against tech giants**

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Thomas alone on campaign finance?

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Justice Clarence Thomas is not afraid to go it alone at the Supreme Court. In *Citizens United v. Federal Election Commission*, the 2010 case striking down the law preventing business corporations from spending money from their general treasury on elections, the vote was 8-1 in favor of a

disclosure law also challenged by the plaintiffs. Thomas also was alone in *Doe v. Reed*, a 2010 case upholding the ability of the state of Washington to make public the names of voters signing referendum petitions. Again in *Shelby County v. Holder*, the 2013 blockbuster case preventing Congress from enforcing a part of the Voting Rights Act which required states with a history of racial discrimination in voting to get approval before making changes in their voting rules, Thomas alone would have gone farther than the majority. While the majority struck the coverage formula of the act, leaving the preclearance provision standing in case Congress could enact a new constitutional coverage formula, Thomas was ready to strike preclearance, too. "By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision," he wrote.

But it was somewhat of a surprise last week when Thomas wrote only for himself in the *McCutcheon* campaign finance case, depriving Chief Justice John Roberts of a majority opinion. *McCutcheon* concerned the constitutionality of a federal law which limited the total amount of money that an individual could donate to all federal candidates for office, political parties, and certain political committees in a two-year period. Since the 1976 opinion of *Buckley v. Valeo*, the Supreme Court has reviewed challenges to spending limits under strict scrutiny, but challenges to campaign contribution limits under a laxer "exacting scrutiny" standard.

Roberts, for four justices, wrote a plurality opinion striking down the law under the First Amendment. The opinion applied "exacting scrutiny" and refused the request of Sen. Mitch McConnell and others to apply strict scrutiny. "[W]e see no need in this case to revisit *Buckley's* distinction between contributions and expenditures and the corollary distinction in the applicable standards of review." Thomas, for himself only, wrote that he would apply strict scrutiny to all campaign limits and presumably strike all of them down: "This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment."

Why was the solitary Thomas opinion a surprise given his willingness to go it alone in other cases? Because Justices Antonin Scalia and Anthony Kennedy in past cases have signed onto earlier Thomas opinions, including the 2001 case *FEC v. Colorado Republican Federal Campaign Committee*, arguing for the application of strict scrutiny to campaign contribution limits.

The loss of Scalia and Kennedy appears to be more about tactics and appearances than substance. As I explained in a recent article in *Slate*, Roberts' plurality opinion in *McCutcheon* used subtle means to reach almost the same outcome as that favored by Thomas. Rather than applying "exacting scrutiny" in the typical lax way that the court has used in the past, the chief justice made that "exacting" level of scrutiny "rigorous." Rather than apply a capacious definition of the state's anticorruption interest to balance against First Amendment rights, the chief justice severely constricted the meaning of corruption to something akin to bribery. And the chief justice peppered his opinion with all kinds of dicta providing the means for challenging soft money limits on political

party fundraising and ultimately all contribution limits.

This was vintage Roberts playing his long game. He would rather take two, or four, steps to go down the road rather than run down that road where Thomas is. But he and Thomas are on the same road and will usually end up in the same place.

When the chief justice first tried this go-slow tactic in the campaign finance area, in a case called *Wisconsin Right to Life v. FEC*, he was criticized severely by both Scalia from the right and Justice David Souter from the left for all but overturning old precedent upholding the corporate spending ban. Scalia said the chief justice was exhibiting "faux judicial restraint." It took the next case in this area, *Citizens United*, for the chief justice to catch up on the road to Scalia, Kennedy and Thomas.

This time in *McCutcheon*, Scalia and Kennedy seemed willing to go along with some faux judicial restraint. If Thomas had his way, all campaign contribution limit laws would be subject to immediate challenge and would fall rather quickly. The gradualism of the chief justice means that's a project that takes a few more years.

The chief justice's gradualism also means that the court takes less public heat. It is hard to explain to the public how an opinion on aggregate contribution limits affects what's left of campaign finance law. Lower court application of *McCutcheon* will take a few years, and the heat from the opinion will dissipate. Then, when the court is ready, it can deliver the knockout blow. It did that in both the voting rights area, first warning of the unconstitutionality of the act and then striking it down, and in the *WRTL-Citizens United* sequence as to corporate spending in candidate elections.

Thomas has no interest in faux judicial restraint or a PR effort for the benefit of the court. But the other justices seem to be warming to the chief justice's velvet glove.

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to trial

Google Inc., Apple Inc., Intel Corp. and Adobe Systems Inc. lost their final effort to avoid trial in a huge employment antitrust lawsuit in federal court after Judge Lucy H. Koh denied their last remaining motions for summary judgment.

Securities

Cooley, Fenwick advise on \$100M IPO for Mobile Iron

Cooley LLP is advising one of the latest Silicon Valley startups to announce plans for an initial public offering: The firm is representing Mobile Iron Inc., which announced plans for a \$100 million IPO on Monday.

Mergers & Acquisitions

Latham advises Questcor Pharmaceuticals in \$5.6B sale to Mallinckrodt

Anaheim-based pharmaceutical developer Questcor Pharmaceuticals Inc. tapped Latham & Watkins LLP in its \$5.6 billion sale to Dublin-based drug maker Mallinckrodt Pharmaceuticals PLC.

Law Practice

Sheppard Mullin: McKenna acquisitions boost firm's real estate, insurance trial work

Sheppard's executive chairman, Guy Halgren, said the real estate additions in particular will solidify the firm's position as "one of the few go-to real estate firms in California."

Securities

Asset-based securitization: balancing disclosure and privacy

The SEC recently proposed new disclosure rules asset-based securitization. By **Mark O. Suttle**

Government

Time to embrace race-neutral government

"It is a sordid business, this divvying us up by race." Chief Justice John Roberts' famous words could easily apply to the latest battle in the state Legislature. By **Joshua Thompson**

Intellectual Property

As apps rise, are domain names the next AM radio?

New domain spaces open uncharted waters for brand owners, and "protections" are dubious. By **Sally M. Abel and Emily M. Gische**

Antitrust & Trade Reg.

Sunlight is the best disinfectant for telecom deals

Netflix's recent deal with Comcast unleashed a storm of controversy, but should it have? By **Anita Taff-Rice**

Judicial Profile

Elizabeth Guerrero Macias

Superior Court Judge Orange County (Santa Ana)

JAMS WELCOMES BRUCE A. FRIEDMAN, ESQ.



Accomplished neutral who has mediated a wide range of cases and served as a sole arbitrator, party arbitrator, and member of arbitration panels. Spent four decades as a trial lawyer representing clients in high-stakes litigation, serving as lead counsel in dozens of jury trials, bench trials and arbitrations. *Daily Journal* Top Neutral, 2013; Best Insurance Lawyer in Los Angeles, *Best Lawyers in America*, 2012; recognized by *Chambers USA* in insurance litigation.

Available nationwide as a mediator and arbitrator in cases involving:

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Insurance
Professional Liability
Real Estate



Case Manager Claire Vranicar: 310.309.6214 or cvrnicar@jamsadr.com

Corporate Counsel

Sacramento Municipal Utility District names GC

Laura O. Lewis was named general counsel of the Sacramento Municipal Utility District, the company announced Monday.

Real Estate

Post-redevelopment, lawyers navigate labyrinth of subsidies for affordable housing

As affordable housing becomes all the more important amid rapidly rising real estate prices, lawyers say the funding situation has become dire. But pending legislation may help matters.