

**Department 11
Superior Court of California
County of Sacramento
720 Ninth Street**

Hearing: Tuesday, April 13, 2010, 9:00 a.m.

JOSH SHAW, Taxpayer and Executive Director of California Transit Association, et al. v. JOHN CHIANG, California State Controller, et al.	Case Number: 07CS01179
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Proceedings: Motion to Vacate Judgment After Remittitur

**Filed By: Daniel J. Powell, Deputy Attorney General, Attorneys for
Respondent Michael C. Genest, California Director of
Finance**

The following shall constitute the Court's tentative ruling on the above-entitled matter. The tentative ruling shall become the ruling of the Court unless a party desiring to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

TENTATIVE RULING

Respondent Michael C. Genest, Director of Finance ("Respondent"), moves pursuant to Code of Civil Procedure section 663 to set aside the Judgment After Remittitur entered on December 9, 2009 ("Judgment") on the grounds there is an incorrect or erroneous legal basis for the Judgment.

The Court entered its Judgment After Remittitur on December 9, 2009. Among other things, the Judgment declared invalid \$1,187,909,982 in appropriations of spillover gas tax revenue from the Public Transportation Account for the 2007-08 budget year (the "Challenged Appropriations"). The Judgment also ordered a peremptory writ of mandate to issue commanding Respondents to take all steps necessary to restore/reimburse the Challenged Appropriations to the Public Transportation Account.

Respondent appears to object only to the portion of the Judgment providing for the issuance of a peremptory writ of mandate commanding Respondents to restore/reimburse the Challenged Appropriations.

The question before this Court is not whether a writ should issue. The Court of Appeal directed this Court to enter a judgment granting the petition for a peremptory writ of mandate. This Court has no discretion but to enter the judgment called for.

After a final decision on appeal, the trial court is reinvested with jurisdiction of the cause, but is empowered to act only in accordance with the directions of the reviewing court. When entry of a specific judgment is directed by the appellate court, the trial court has no discretion but to enter the judgment. (*Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1143.) Any judgment rendered contrary to the directions of the reviewing court would be void. (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367; *Hampton v. Superior Court of Los Angeles County* (1952) 38 Cal.2d 652, 656.)

In this case, the Third Appellate District Court of Appeal directed this Court to enter a judgment granting declaratory relief "and a writ of mandate" consistent with the Court's opinion in *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577. Thus, a writ must issue.¹

In light of this fact, Respondent's motion must be interpreted as an objection that the particular writ provided for in the Judgment does not conform to the directions of the reviewing court. (See *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1435 [remittitur is interpreted by reference to reviewing court's opinion].)

Respondent contends that the Judgment does not conform to the remittitur in that it: (1) compels the Governor, who is not a party to this proceeding, to include specific items of appropriation in his proposed budget to the Legislature, and (2) compels the Legislature to make the appropriations necessary to reimburse the Public Transportation Account. Respondent argues that these actions would violate the doctrine of Separation of Powers. Respondent implies that because these actions are unlawful, they could not have been intended by the Court of Appeal. Respondent's arguments lack merit.

Nothing in the Judgment requires the Governor to include any specific items of appropriation in his proposed budget to the Legislature. Although Plaintiff proposed such language for the peremptory writ of mandate, the writ actually issued by this Court did not include the proposed language.

Similarly, nothing in the Judgment compels the Legislature to make appropriations. Rather, the Judgment presumes that unexhausted, unencumbered funds are available, and compels Respondents to

¹ If Respondent believes the appellate court has inadvertently omitted to include in its instructions to this Court essential elements necessarily determined on appeal, Respondent's remedy was to petition for rehearing, or, in a proper case, to move for a recall of the remittitur. Respondent did neither.

restore/reimburse the Challenged Appropriations from such funds. No violation of the Separation of Powers doctrine occurs when a court orders appropriate expenditures from already existing funds. (See *Mandel v. Myers* (1981) 29 Cal.3d 531, 539, 542; *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 180-181; *County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 454-457.) If appropriated funds are "reasonably available" for the expenditures in question, the separation of powers poses no barrier to a judicial order directing the payment of such funds. (*Mandel v. Myers, supra*, at p.542.)

At the time it issued the Judgment, the Court did not know whether there were existing funds "reasonably" or "generally" available for the transfers in question (i.e., the purpose for which the funds were appropriated is "reasonably" or "generally" related to the nature of the expenditures in question). (*County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 456-458.) The Court's order assumes that Respondent will determine whether any current appropriations are available for the reimbursements in question and, if so, to approve the reimbursements from such appropriations. If current appropriations are not available, Respondent may so indicate in its Return.

The apparent premise of Respondent's objection to the Judgment now is that there are no unencumbered funds available to reimburse the PTA for the Challenged Appropriations and, therefore, the only way for the State to meet the obligation imposed by this Court's Judgment is to appropriate additional funds to be transferred from the General Fund to the PTA. Based on this, Respondent argues that the Court's Judgment, in effect, requires the Legislature to pass an appropriation, which Respondent contends would be a clear violation of the separation of powers.

There are several problems with Respondent's argument. First, although Respondent asserts that there are no unencumbered funds available to reimburse the PTA, there is at this time no *evidence* to support this assertion.

Second, even if there are no unencumbered funds available, the Judgment does not compel the Legislature to appropriate such funds. It compels Respondent to reimburse the Challenged Appropriations out of funds that have been appropriated. At most, the Judgment could be construed as obligating Respondent to pay funds that have not yet been appropriated. But such a judgment appears to be permissible, so long as the writ does not purport to compel the State to make payment from appropriations before they are enacted. (See *County of Sacramento v. Loeb, supra*, 160 Cal.App.3d at p.457 [court can retain jurisdiction to amend order to take into consideration further appropriations that may be enacted]; *Serrano v. Priest* (1982) 131 Cal.App.3d 188, 198; see also *California State Employees' Assn. v. Cory* (1981) 123 Cal.App.3d 888, 895 [presuming Legislature will give meaning to ruling by taking proper steps to

appropriate the amount required]; *Theroux v. California* (1984) 152 Cal.App.3d 1, 9 [same].)

Finally, Respondent goes too far in asserting that the separation of powers doctrine precludes any court interference in purely legislative matters. While it is true that courts generally are without power to interfere in purely legislative actions, the legislative power is not unlimited. There is a role for the judiciary in determining whether legislative enactments are within the authority of the legislative body and consistent with constitutional provisions. Under our system of government, the adjudicative function belongs with the judiciary. The doctrine of separation of powers forbids legislative usurpation of judicial authority just as it forbids judicial usurpation of legislative authority. The Legislature has no extra-constitutional authority to set itself above the judiciary by discarding the outcome or re-adjudicating the merits of particular judicial proceedings. (*Mandel v. Myers, supra*, at p.547.) This is particularly true in a case such as this where a court has found that a legislative enactment is unconstitutional.

Thus, while separation of powers principles may limit judicial authority over appropriations, it is not correct to say that the Legislature has plenary and unfettered discretion in budgetary matters. (See, e.g., *Brown v. Superior Court* (1982) 33 Cal.3d 242, 249 n.5 [funding of courts by legislative appropriation cannot be so inadequate as to materially impair the exercise of constitutional judicial functions]; *Millholen v. Riley* (1930) 211 Cal. 29, 33 ["A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation."].)

It is a bedrock rule that where there is a legal right, there must also be a legal remedy. (*Marbury v. Madison* (1803) 5 U.S. 137, 163.) Accordingly, it is not at all clear to this Court that the Legislature may rely on the separation of powers doctrine to refuse to appropriate funds to pay for a legitimate legal judgment without any valid reason, at least where the judgment is based on a determination that a legislative enactment is unconstitutional.

For all of these reasons, California courts have recognized that, at least in certain narrow circumstances, judicial orders for the disbursement of funds can intrude upon the legislative power of appropriation. The Court does not here attempt to delineate the limits of the judiciary's power in such matters. For purposes of this motion it is sufficient to conclude that the Court's Judgment, properly construed, falls within the acceptable limits.

Accordingly, Respondent's motion to vacate paragraph 10 of the Judgment is DENIED. However, to avoid any lingering confusion about what the Judgment requires, the Court is willing to modify its Judgment to clarify that the writ does not compel the Legislature to appropriate funds and does not compel the payment of funds that have not yet been appropriated.

In the event that this tentative ruling becomes the final ruling of the Court, counsel for Respondent is directed to prepare a formal order and Amended Judgment consistent with this ruling.