ADVANCED BIONICS CORP. V. MEDTRONIC, INC.: CALIFORNIA REJOINS THE UNION

By Bernice Conn[1]

INTRODUCTION

In its unanimous opinion in *Advanced Bionics Corp. v. Medtronic, Inc.*[2], the California Supreme Court put a halt to the expanding reach of California's "public policy" against non-compete agreements. Justice Brown captured the essence of the conflict created by California's refusal to enforce other state's contracts when she wrote "[we] are not a political safe zone vis-a-vis our sister states such that the mere act of setting foot on California somehow releases a person from the legal duties our sister states recognize."[3]

Yet, until the *Advanced Bionics* decision, this was the precise approach adopted by a growing number of California courts. The scope of Business and Professions Code § 16600 has been so steadily expanded that its original purpose as a form of anti-trust statute has been forgotten and it has instead been transformed into the embodiment of a supposed state policy protecting employee mobility at all costs.

The drafters of §16600 never intended this outcome. Section 16600 was enacted as part of California's statutory scheme protecting against the creation of monopolies and restraint of trade. It was intended to prevent collusive business agreements that would limit the availability of products and services to California consumers and result in price manipulation. The statute did not codify any fundamental principle of personal freedom. Nothing in the legislative history of the statute or case law suggests that it was intended to be used, or should be used, to allow non-residents to escape legally binding contracts entered into in other states or to permit Californians to interfere with such contracts with impunity.

At the core of the Supreme Court's opinion is the principle of comity. This fundamental rule of interstate relations compels the conclusion that § 16600 does not, and should not, permit California courts to invalidate legitimate contracts between non-residents or to bar the access of non-residents to their own state courts. That it recently has been used to do so is the result of an unwarranted judicial expansion of the statute that is inexorably, and needlessly, leading California into "unseemly conflict" with other states. The *Advanced Bionics* case, which resulted not only in competing injunctions issued by the California and Minnesota trial courts,

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[2] 29 Cal.4th 697 (2002), *modified en banc, reh'g denied* 29 Cal.4th 1195A (2003)

[3] *Id.* at p. 710 (Brown, J., concurring).

but in diametrically opposed appellate court rulings in each state, illustrates the inevitability and intensity of this growing interstate conflict.

The case involved a California employer, Advanced Bionics, that recruited a Minnesota resident, Mark Stultz, employed by Medtronic in Minnesota. Advanced Bionics was aware that Stultz had an employment contract prohibiting him, for two years, from working on directly competing products. So, Advanced Bionics and Stultz created a plan which called for Stultz to quit, with no advance notice, late in the day after the courts closed in Minnesota. Within hours, Advanced Bionics and Stultz filed a declaratory relief lawsuit in California seeking to void the non-compete clause in Stultz's employment contract and, the following morning, they sought a temporary restraining order barring Medtronic from filing suit in Minnesota to enforce the contract. Although not initially successful, Advanced Bionics and Stultz ultimately succeeded in getting a California court to issue a TRO enjoining Medtronic from pursuing its Minnesota lawsuit. In the interim, the Minnesota court issued a temporary injunction barring Stultz from working on the directly competing product.

Both restraining orders were affirmed on appeal, the California court holding that California should take exclusive jurisdiction of the dispute because its interests prevailed and the Minnesota court holding that Minnesota's interests outweighed those of California. The California Supreme Court granted review and held that, based on the facts of the case, and with due regard for the principles of judicial restraint and comity, the California court should not have issued an order enjoining the Minnesota proceedings, notwithstanding California's policy disfavoring non-competition agreements.

This article explores the national implications of enforcing § 16600 against non-residents. It traces the judicial expansion of § 16600 from its enactment as an early state anti-trust statute through its metamorphosis into the embodiment of an employee rights statute to its preemptive use as a jurisdictional tool in the *Advanced Bionics* case. In its opinion in *Advanced Bionics*, the California Supreme Court reaffirms that § 16600 is a statute enacted by, in and for California, with all the attendant limitations and considerations such legislation implies.

THE ORIGINS OF BUSINESS & PROFESSIONS CODE § 16600

Business and Professions Code § 16600 first appeared in California's Civil Code as §1673, enacted in 1872 as one of three related statutes governing the "restraint of trade"[4]. The statutes appear to have been lifted verbatim from §§ 833 to 835 of an 1865 draft of New York's

[4] "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Cal. Civ. Code, Title IV, Unlawful Contracts § 1673 - 1675 (1872).

Civil Code[5]. Sections 1673 to 1675[6] remained unamended until 1941 when they were repealed and reenacted as §§ 16600-16602 of the Business and Professions Code.

The comments to the first California Civil Code make clear that, in enacting §§ 1673-1675, the Legislature was not concerned with codifying any public policy aimed at protecting an individual's right to professional mobility. The Legislature enacted §§ 1673-1675 to insure that private business owners could not, amongst themselves, monopolize certain services or the production of certain products except in return for the sale of a business' good will, and even then only for a limited period of time and within a limited geographic area. The primary purpose of the three statutes was to prevent the creation of monopolies and insure that the public had a choice of available services and products.[7]

The Legislature was concerned that recent court decisions permitting the enforcement of restrictive covenants between business owners might lead to the restraint of trade or formation of monopolies.[8] In the first annotations to § 1673, the Code Commissioners discuss three troublesome cases in which restrictive covenants were upheld in sale contracts, noting that as to one "there was no sale of good will, nor any circumstances to justify the contracts"[9] and as to another "[b]y the terms of this section, and by the following section, the restraint imposed would seem to be obliged to be limited to a specified county."[10] The final case cited in the original comments involved the enforcement of a contract not to practice law anywhere in England as part of the sale of a professional law practice. The California Commissioners noted: "Such a contract manifestly tends to enforce idleness and deprives the State of the services of its citizens."[11]

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[5] New York Civil Code, Title IV, Unlawful Contracts § 833-835 (1865).

[6] Cal.Civ.Code §§ 1674-1675 provide that owners who sell the goodwill of a business, or partners in a dissolving partnership, may agree to refrain from carrying on a similar business within a specified county, city, or part thereof.

[7] *Centeno v. Roseville Community Hospital* 107 Cal.App.3d 62 (1979); *Kaplan v. Nalpak Corp.* 158 Cal.App.2d 197 (1958); *Rolley, Inc. v. Merle Norman Cosmetics* 129 Cap.App.2d 844 (1954).

[8] Cal.Civ.Code § 1673, Note: "Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent".

[9] *Id.* citing to *Dunlop vs. Gregory* 10 N.Y. 241 (1851)

[10] *Id.* citing to *Cal. Steam Nav. Co. vs. Wright* 6 Cal. 258 (1856), *Wright vs. Ryder* 36 Cal. 342 (1869) and *More vs. Bonnet* 40 Cal. 251 (1870).

[11] *Id.* citing to *Whittaker* vs. *Howe* 3 Beav. 387 (1841)

The Commissioners' concern was that courts were broadly enforcing non-compete provisions between business owners, to the detriment of the public welfare. The "public policy" discussed in early cases is the public policy against restraint of trade and monopolies - not a public policy protecting employee rights. There is no indication in the legislative history of any of these three statutes, or in the early cases interpreting the statutes, that the California Legislature intended to, or did, codify a fundamental public policy insuring individual professional mobility or guaranteeing to California citizens unfettered career opportunities. There is certainly no indication that the Legislature intended such considerations to take absolute precedence over employer interests or binding contracts between residents of other states.

JUDICIAL INTERPRETATIONS OF § 16600

In 1922, the Supreme Court analogized § 16600 to the Sherman Anti-Trust Act. It invalidated an agreement in which the parties acquired control of a market segment covering Northern California, Oregon, Washington and Nevada by agreeing not to service the market generally. The Court held that the contract would create a monopoly and that it was therefore illegal as a violation of the Sherman Anti-Trust Act and as a violation of § 16600, California's anti-trust law. The Court declared the contract void since its purpose was "to secure to defendant, so far as possible, a monopoly . . .in the selected territory. . . . That the covenants of the contract are illegal as being in restraint of trade, and against the express mandate of the law of the United States and of this state, we entertain no doubt."[12]

Earlier, in enforcing a restrictive covenant in a sale agreement the Supreme Court, explained a corollary purpose of Civil Code §§ 1673 - 1675: "While contracts of this nature receive strict construction, yet, in construing them, their legitimate aim and end are not to be lost sight of. They are designed to secure to the business of one person immunity from rivalry and consequent damage at the hands of another who would be a dangerous competitor by reason of his skill, energy and popularity. . . It is too narrow a construction to say this is limited to the carrying on of a business as owner or proprietor. To conduct, manage, or operate it wholly or in part as the agent of another is equally within the purpose of the law and the language of the Code." [13]

It was the Ninth Circuit in *Davis v. Jointless Fire Brick Co.* which, in 1924, relied on § 16600 in refusing to enforce a non-compete provision in a salesman's contract. In doing so, the Ninth Circuit relied on three California cases, none of which deal with employee contracts. In one case the court set aside an agreement between three different companies not to sell goods within certain territorial limits for a specified time and not to sell more than a specified

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[12] *Morey v. Paladini* 187 Cal. 727 (1922)

[13] *Meyers v. Merillion* 118 Cal. 352 (1897); *see also, Grogan v. Chaffee* 156 Cal. 611 (1909); *General Paint Corp. v. Seymour* 124 Cal.App.611 (1932) and cases cited therein.

percentage.[14] In another, the court refused to award liquidated damages for breach of a non-compete agreed to by a shareholder as part of a stock sale. [15] In the third case, the court refused to enforce a non-compete provision in a stock sale agreement, finding that a stockholder could not transfer the "good will" of a corporation, and thus the purchaser could not enforce the exception provided by § 1674.[16] Even the Ninth Circuit, however, did not go so far as to announce that the "public policy" embodied by § 16600 was that of endowing California citizens with unrestricted freedom of opportunity in their employment. In fact, the *Davis* case itself was not cited, or relied on by any California court for another thirty years.

Consistent with earlier California cases, in 1952, the Court of Appeal, Second District affirmed an award of damages for breach of a non-compete covenant contained in a licensing agreement. The court upheld a restrictive covenant preventing a former employee from manufacturing trailers of a certain design, finding that the contract did not prohibit the employee from carrying on his lawful business of manufacturing trailers but merely barred him from making and selling trailers of a particular design invented by the plaintiff who had granted him the license to use the design for a limited time only.[17]

Shortly thereafter, in *Gordon v. Landau*, the Supreme Court upheld a non-solicitation clause in a salesman's employment contract because the contract did not restrict the employee from engaging in a lawful profession, trade or business within the meaning of § 16600 or prevent him from carrying on a business. The contract required only that the employee not use his employer's confidential lists to solicit customers for himself for a period of one year following termination of his employment. The Court made clear that restrictions on the use of certain confidential information, i.e., customer lists, were permissible.[18]

The scope of § 16600 began to expand in 1965, when, in a brief, cursory opinion, the Supreme Court relied on § 16600 in reinstating an employee's pension rights which had been terminated after he quit and began working for a competitor.[19] Citing to the opinions in *Davis v.*

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[14] *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal.510 (1892).

[15] *Chamberlain v. Augustine et al.* 172 Cal. 285 (1916)

[16] *Merchants' Ad-Sign Co. v. Sterling* 124 Cal. 429 (1899)

[17] *King v. Gerold* 109 Cal.App.2d 316, 318 (1952)

[18] *Gordon v. Landau* 49 Cal.2d 690 (1958); *see also Handyspot Co. of Northern California v. Buegeleisen* 128 Cal.App.2d 191 (1954); *Gordon v. Wasserman* 153 Cal.App.2d 328 (1957).

[19] The company's policy provided that payments to "any retired Employee shall be (continued...)

Jointless, Chamberlain v. Augustine, Gordon v. Landau and *Morris v. Harris*[20], the Court held that § 16600 invalidated provisions in *employment contracts* prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so. However, as with each of the cases relied on, there was no employment contract or non-compete clause at issue. The dispute involved the forfeiture of vested retirement funds.

The metamorphosis of § 16600 into a "paramount" state policy began in 1994 in the *Metro Traffic*[21] case, in which the Court of Appeal, Second District flatly stated that "California courts have consistently declared this provision [§ 16600] an expression of public policy to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." Not surprisingly, the court does not cite any case in support of this comprehensive statement.

Instead, the court relies on *Diodes v. Franzen*, a 1968 suit for breach of corporate fiduciary duty - not involving an employment contract, restrictive covenant or § 16600 - for the "corollary" proposition that competitors may solicit another's employees, *who are not under contract*, if they do not use unlawful means or engage in acts of unfair competition. The *Metro Traffic* court adopted the statements in *Diodes*, a non-contract case, in holding that § 16600 insured that "the interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employer, where neither the employee nor his new employer has committed any illegal acts accompanying the employment change."[22]

The Second District does not discuss its reasoning or explain its apparent conclusion that there are no different or additional legal considerations which come into play when an employment contract has been executed. The *Metro Traffic* case is uniformly cited by both state and federal courts as authority for the proposition that § 16600 embodies California's long public policy of holding employee rights paramount. Yet, it is clear that the statute was not enacted for any such purpose and that there is no line of California cases which, prior to that time, "consistently" held that § 16600 was an expression of the public policy that every California

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[19] (...continued)
suspended or terminated in the event such retired Employee at any time enters any occupation or does any act which, in the judgment of the Retirement Committee or of an Employer is in competition with any phase of the business of any Employer." *See Muggill v. Reuben H. Donnelley Corp.* 62 Cal.2d 239 (1965)

[20] 127 Cal.App.2d 476 (1954). The First District Court of Appeal construed a sub-contracting agreement to be an employment agreement and held it invalid under § 16600.

[21] *Metro Traffic Control v. Shadow Traffic* 22 Cal.App.4th 853 (1994).

[22] *Id.* at 859-60 citing to *Diodes Inc. v. Franzen* 260 Cal.App.2d 244, 255 (1968)

citizen has the absolute right to pursue any lawful employment or enterprise of their choice, regardless of their contract obligations.[23]

In *Application Group, Inc. v. Hunter* [24], § 16600 was expanded into a statute with national scope. In this case, AGI, a California employer, recruited one of Hunter's non-resident employees who never worked in California and who had signed an employment agreement with a non-compete provision and a Maryland choice-of-law clause. Hunter sued in Maryland for breach of the non-compete and interference with contract; the suit was dismissed because of Hunter's failure to present evidence of damages.[25] AGI filed a declaratory relief action in California seeking a judgment that § 16600 rendered the non-compete agreement void. Thereafter, the trial court issued summary judgment in AGI's favor.

On appeal, the Court of Appeal, First District affirmed the judgment, declaring that § 16600 was intended to insure that "California employers will be able to compete effectively for the most talented, skilled employees in their industries, *wherever they reside*".[26] The court held that, at least as far as California is concerned, technology has obliterated the geographical distinctions which might hamper California's "broad freedom to choose from a much larger, indeed a national applicant pool" in order to maximize its economy.

In a truly remarkable conclusion, the court asserts that California has yet another "correlative" interest, this time that of "protecting its employers and their employees from anti-competitive conduct by out-of-state employers. . . including litigation based on a covenant not to compete to which the California employer is not a party - who would interfere with or restrict

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[23] It is in the early customer solicitation cases, not in the context of § 16600 or non-competition agreements, that California courts confirm each person's right to pursue any calling, business or profession of choice. These cases weigh that principle against an employer's right to the protection of trade secrets and confidential information. *See e.g., New Method Laundry Co. v. MacCann* 174 Cal. 26 (1916) and *Continental Car-Na-Var Corp. v. Moseley* 24 Cal.2d 104 (1944). In *Morlife, Inc. v. Perry* 56 Cal.App.4th 1514 (1997), the court recognized that "also fundamental to the preservation of our free market economic system is the concomitant right to have the ingenuity and industry one invests in the success of the business or occupation protected from the gratuitous use of that "sweat-of-the-brow by others". *Id.* at 1520.

[24] 61 Cal.App.4th 881 (1998)

[25] The Maryland court held that the non-compete was enforceable under Maryland law, but did not reach the choice-of-law issue. *Id.* at 887 n.3

[26] *Id.* at 901.

these freedoms."[27] The court does not discuss how its exceedingly broad interpretation of the statute is suggested by its legislative history or any prior case. It does not explain how attempts by non-resident employers to enforce contracts valid in their own states become "anti-competitive" conduct whenever a California employer recruits a party to the contract.

In reality, the expansive "public policy" which California courts have read into §16600 is a judicial policy which has set California on a collision course with virtually every other state in the Union. The effect of such sweeping judicial policy statements and the impact of such reasoning is dramatically illustrated by the events leading to the Supreme Court's opinion in *Advanced Bionics*.

THE ADVANCED BIONICS CASE

Mark Stultz was employed by Medtronic in Minnesota for five years, ultimately working as Senior Product Manager on Medtronic's spinal cord stimulation device (used for pain management). In 1995, when he began work for Medtronic, Stultz voluntarily signed an employment contract. The contract did not bar Stultz from accepting employment with a Medtronic competitor, but it did bar him, for two years, from working on directly competing products about which he had acquired confidential information while working at Medtronic. The contract also contained a choice of law provision providing that "the validity, enforceability, construction and interpretation of this Agreement shall be governed by the laws of the state in which the Employee was last employed by Medtronic".

In early 2000, while still employed by Medtronic, Stultz was recruited by Advanced Bionics, a California company which manufactures cochlear implant devices. Advanced Bionics was in the process of developing its own spinal cord stimulation device, intended to directly compete with that made by Medtronic. Although Advanced Bionics was aware of Stultz's employment contract, Stultz was hired to work on the new competing device.

On June 5, 2000, Stultz signed an employment offer from Advanced Bionics. Thereafter, Stultz was absent from work on June 5 and 6, 2000.

On June 7, 2000, between 4:00 p.m. and 5:00 p.m. Central Time, after Minnesota's courts had closed, Stultz delivered a written resignation to Medtronic, "effective immediately". By 4:00 p.m. Pacific Time, less than 2 hours after his resignation, Stultz and Advanced Bionics had filed an anticipatory declaratory relief action in California against Medtronic seeking a declaration that the employment restriction in Stultz's employment contract with Medtronic was void. By 6:00 p.m., Stultz and Advanced Bionics had served Medtronic's California agent with the lawsuit.

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[27] *Id.*

On June 8, 2000 at 9:00 a.m., Stultz and Advanced Bionics sought an *ex parte* Temporary Restraining Order in California barring Medtronic from commencing any litigation against Stultz and Advanced Bionics in Minnesota. The *ex parte* application was denied and Stultz and Advanced Bionics were ordered to give Medtronic at least 24 hours notice of their application.

On June 9, 2000, Medtronic removed the California case to federal court[28] and filed suit in Minnesota state court against Advanced Bionics and Stultz for damages based on breach of contract and interference with contract; Medtronic also sought injunctive relief. That same day, the Minnesota court issued a Temporary Restraining Order enjoining Stultz from working on Advanced Bionics' "neuro products" and, most importantly, enjoining Stultz and Advanced Bionics from seeking any orders in California which would interfere with the Minnesota court's jurisdiction.

On June 27, 2000 Mark Stultz relocated to California and began working for Advanced Bionics on a different medical device. On July 21, the California court set the California declaratory relief action for trial on October 16, 2000.

On August 3, 2000, the Minnesota court issued a temporary injunction barring Stultz from working on the competing spinal cord stimulation device being developed by Advanced Bionics, but not barring him from working for Advanced Bionics. The Minnesota Court inadvertently did not include in the injunction its prior order precluding the California courts from interfering with its proceedings.

On August 8, 2000, without any prior notice to Medtronic, Advanced Bionics and Stultz renewed their *ex parte* request for a Temporary Restraining Order before a different California Judge. The California trial court issued the *ex parte* TRO in Medtronic's absence and enjoined Medtronic from further pursuing its Minnesota action.

On August 16, 2000, the Minnesota court amended its August 3, 2000 temporary injunction *nunc pro tunc* to include the omitted anti-suit injunction against Advanced Bionics and Stultz.

On August 22, 2000, Advanced Bionics and Stultz appealed the Minnesota Court's August 3 and 16, 2000 temporary injunction.

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[28] Medtronic removed the California state action to federal court based on diversity because the complaint alleged that Stultz worked at the Advanced Bionics facility in Sylmar, California. On June 9, 2000, after the case was removed, Advanced Bionics and Stultz filed an amended complaint alleging instead that Stultz was a Minnesota resident intending to relocate to California to work for Advanced Bionics. The case subsequently was remanded to state court. Although finding that Medtronic had violated Rule 11, the federal court never sanctioned Medtronic.

On September 11, 2000 Medtronic appealed the August 8, 2000 TRO and, shortly afterward, sought a writ of mandate continuing the October 16, 2000 trial. Medtronic succeeded in obtaining an emergency appellate stay of all further trial court proceedings until the California appellate court ruled on the pending appeal and writ petition.

On September 12, 2000, the California trial court amended its August 8, 2000 TRO to permit Medtronic to participate in the Minnesota appellate proceedings.

THE CONFLICTING APPELLATE COURT OPINIONS

A. The California Appellate Opinion:

On March 22, 2001, the California Court of Appeal, Second Appellate District, affirmed the August 8, 2000 TRO holding that California had a materially greater interest than Minnesota in enforcing its law and therefore, California law would be applied. For these reasons – and because the California action was filed first – the court held that the dispute should be litigated in California which therefore justified the issuance of the TRO.[29]

Although the trial court had not engaged in any choice-of-law analysis, the appellate court did, virtually adopting the *Application Group* opinion in its entirety. The court concluded that California had a materially greater interest in the dispute than Minnesota and that enforcing the contractual choice of law provision in the contract (which required the application of Minnesota law) would "allow an out-of-state employer/competitor to limit employment and business opportunities in California."[30]

The court rejected Medtronic's argument that the TRO impermissibly restricted its right to petition for redress and immunized Stultz and Advanced Bionics from damages owed under Minnesota law, characterizing the attempted enforcement of these legal rights as "simply an effort to interfere directly with a competitor"[31]. The court went on to state that Medtronic could assert its damage claims against Stultz and Advanced Bionics in the California action - a meaningless observation since the court had held that Minnesota law would not apply.

Although the court considered the issue of comity, it did so only in the context of the first-filed rule. After analyzing California decisions, all involving only California courts, the court concluded that the first-filed rule justified California taking exclusive jurisdiction of the dispute. The appellate court approached the issue as an "either/or" decision, requiring it to

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[29] *Advanced Bionics Corp. v. Medtronic, Inc.* 87 Cal.App.4th 1235, 1237 (2001)

[30] *Id.* at 1250, citing *Application Group, Inc. v. Hunter*

[31] *Id.* at 1251.

determine whether California should "defer" to the Minnesota court. It concluded that because § 16600 was a fundamental California state policy, it should not and that the TRO was proper.

On June 13, 2001, the California Supreme Court unanimously granted Medtronic's Petition for Review.

B. The Minnesota Appellate Opinion:

On June 26, 2001, the Court of Appeals of Minnesota affirmed the issuance of the defensive temporary injunction *nunc pro tunc*, holding that "[t]he district court did not err in declining to apply the first-filed rule or in applying Minnesota law" because "Minnesota courts rightfully have jurisdiction over this litigation and the noncompete clause is enforceable."[32] The court noted that while California courts might view Medtronic's attempt to enforce its employment agreement as an attempt to avoid California law, Advanced Bionics had filed suit first, in California, specifically to avoid Minnesota law.

The court found that Stultz had voluntarily left Medtronic's employ, knowing that his future employment was subject to the non-compete agreement and that the choice-of-law provision in his contract called for the application of Minnesota law. As a non-party, Advanced Bionics could not have had any "justified expectations" that California law would apply to the dispute, but Medtronic, a party to the contract, did have a justified expectation that Minnesota law would govern, particularly since the dispute involved a contract executed and performed in Minnesota by Minnesota residents.

The Minnesota court also considered comity, that is, maintaining "a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other's interests in areas where their own interests are less strong."[33] It did not disagree that California has a policy disfavoring noncompete clauses, but concluded that "this case is about more than the enforceability of a noncompete clause. The public policy of this state is at issue, and it favors upholding valid contracts."[34]

The court affirmed the issuance of the injunction, finding that the customer relationships Stultz formed were a direct result of the opportunities provided by his employment with Medtronic and that Advanced Bionic's attempt to appropriate those relationships for its own benefit was barred under Minnesota law. Advanced Bionics and Stultz did not seek review of the ruling.

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[32] *Medtronic, Inc. v. Advanced Bionics Corp.* 630 N.W.2d 438, 456 (2001)

[33] *Id.* at 455.

[34] *Id.* at 456.

THE SUPREME COURT RULING

On December 19, 2002, the California Supreme Court reversed the California Court of Appeal, holding that the trial court improperly issued the TRO enjoining Medtronic from pursuing the Minnesota action. The Court held that an order enjoining proceedings in another state requires an exceptional circumstance that outweighs the threat to judicial restraint and comity principles inherent in such an order and that the facts presented in the case were not sufficient to justify the injunction.[35]

The Supreme Court's opinion recognizes that, although California may choose not to permit its own residents to enter into non-compete agreements, there are significant interstate issues created when a California court preemptively takes exclusive jurisdiction of a legitimate non-compete contract entered into between non-residents, even if the contract impacts California citizens. Relying on many similar decisions from different states, the Court found that "[a] parallel action in a different state presents sovereignty concerns that compel California courts to use judicial restraint when determining whether they may properly issue a TRO against parties pursuing an action in a foreign jurisdiction." [36] Even the specter of two parallel state proceedings and the possibility that one action might lead to judgment first and be applied as *res judicata* does not outweigh the respect and deference owed to independent foreign proceedings.[37]

The majority declined to reach the choice-of-law issue, but Justices Brown and Moreno did. While Justice Moreno concluded that the choice-of-law issue was irrelevant to determining whether parties should be enjoined from litigating a foreign action, he found the injunction

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[35] The Court further held that the "first-filed" rule in California means that when two courts of the same sovereignty have concurrent jurisdiction, the first to assume jurisdiction of a particular matter or controversy takes it exclusively. The first-filed rule does not apply to courts of different sovereignty. 29 Cal.4th at 707.

[36] *Id.*

[37] Advanced Bionics and Stultz petitioned for rehearing claiming that the opinion, as originally written, stated that the Court had granted review to decide whether California courts could enjoin a party subject to its jurisdiction from *commencing* litigation in another state, but that the Minnesota proceedings were pending at the time the TRO issued. The Court denied the petition, but amended its opinion to properly reflect the facts of the case, i.e., that the Minnesota suit was already pending when the TRO issued. However, since the opinion, as originally written, encompassed actions still to be commenced in another state, it is clear that the timing of the injunction is irrelevant to the Court's holding. Indeed, it is improbable that the Court would approve the issuance of preemptive restraining orders barring non-residents from even accessing their own state courts. Such conduct would raise not only comity issues, but constitutional issues as well.

improper for other reasons.[38] Initially, Justice Moreno noted that the Minnesota action did not threaten the California court's jurisdiction and, in fact, the Minnesota court issued only a "defensive" injunction intended to protect its own jurisdiction.

Adopting the "restrictive approach" to anti-suit injunctions followed by some federal circuits, he determined that the crucial issue was not simply whether California had a strong public policy against noncompetition agreements, but whether the Minnesota action was filed for the purpose of evading California law.[39] Reviewing the facts of the *Advanced Bionics* case, Justice Moreno concluded that based on the many significant ties to a Minnesota forum, as well as the choice-of-law clause designating Minnesota as the chosen forum, Medtronic had not filed its Minnesota lawsuit to evade the public policy of California.

Justice Brown wrote separately in support of her conclusion that choice-of-law factors weighed heavily in favor of permitting the Minnesota proceedings to go forward.[40] Reviewing all of the facts, Justice Brown decided that where almost all the geographic points of contact in the dispute were in Minnesota, California's strong interest in promoting competition by encouraging the free movement of personnel laterally across an industry was not "materially greater" than Minnesota's countervailing interest in enforcing bargained-for restrictions on that free movement.[41] Moreover, "California courts cannot then reach out and nullify those foreign obligations simply because the same obligations, if entered into here, would run afoul of important California policies. California government is, of course, free to make policy choices for California. . . but we cannot also tell our sister states how they should govern."[42]

Therein lies the crux of the dispute. California is one of the few states which refuse to enforce noncompetition agreements.[43] As discussed above, whether or not this decision, as applied to employment contracts, really is a public policy as opposed to the judicial expansion of an anti-trust statute is questionable. There is no doubt, however, that California law on this point differs from that of most other states. But it differs on many other issues as well. California would, in effect, exempt itself from the rules of comity by permitting its courts to enjoin other state courts and non-residents from enforcing valid contracts in their own states, whenever a

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38 *Id.* at 710 (Moreno, J., concurring)

39 *Id.* at 717-19

40 *Id.* at 708-10 (Brown, J., concurring)

41 *Id.* at 709.

42 *Id.*

43 *See, e.g.* North Dakota Cent. Code § 9-08-06 derived directly from Bus. & Prof. Code § 16600.

California resident has a "paramount" interest in seeing the contract disregarded. Permitting such injunctions to issue would wreak havoc with the most basic rules of interstate relations and eviscerate choice-of-law principles.

The *Application Group* court went too far when it held that California has the right to protect its employers from litigation based on covenants not to compete in contracts to which they are not parties. Yes, the California employer *is* a third party to the contract - usually one who comes along well after the contract is executed and creates the conflict which results in the litigation. It is unseemly, to say the least, for California courts to shield California employers who induce non-resident employees to breach their employment contracts, by protecting not only the California residents, but the breaching party, from suit in other states.

Nor can such injunctions be justified because, as is often argued, the enforcement of out-of-state noncompete clauses will impair the ability of California employers to compete for qualified employees if they cannot similarly protect themselves. Not only is this rationale belied by California's economy, if it is true, this is a consequence which California has voluntarily undertaken. If California really has chosen to elevate employee mobility over its employers' "competitive interests" then California employers will have to work within the limits of that policy decision. To the extent that there are economic ramifications to such a policy, the solution is not to be had in disregarding the laws of other states or in promoting a "race to the courthouse" in California, or in permitting California employers to collude with non-residents to breach their otherwise valid employment contracts.

Both the California Supreme Court and the Ninth Circuit have acknowledged that there are situations in which California's public policies may not take precedence over other states' laws. In *Nedlloyd Lines B.V. v. Superior Court*[44], the Supreme Court discussed the choice-of-law analysis to be used in California when there is such a conflict and noted that:

> There may also be instances when the chosen state has a materially greater interest in the matter than does California, but enforcement of the law of the chosen state would lead to a result contrary to a fundamental policy of California. In some cases, enforcement of the law of the chosen state may be appropriate despite California's policy to the contrary.[45]

In so noting, the Supreme Court cited to the Ninth Circuit's opinion in *S.A. Empresa, Etc. v. Boeing Co.*, in which one of the parties to a contract argued that the choice of Washington law in the contract violated California's public policy against exculpatory clauses and therefore

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[44] 3 Cal.4th 459 (1992)

[45] *Id.* at 467 n.6.

the choice-of-law clause had to be disregarded and California law applied. In refusing to adopt such a position, the Ninth Circuit articulated the core issue:

> Application of plaintiff's suggested rule to the present case would have the effect of imposing California's public policy on litigants and events having no substantial contact with the state. Adoption of the principle would mean that no party to a contract in any of the 50 states could be certain that his bargain would be enforceable. If minimum contact with California existed, a party could be made to answer a complaint filed in California. Under the rule argued for, every allocation of risk between the contracting parties would have to withstand scrutiny under the public policy dictates of California.[46]

Justice Brown reaffirmed these concerns in the *Advanced Bionics* case: "If we permit California courts to apply California law to a dispute like the one at issue here, then California's economic strength gives rise to a kind of political imperialism, absorbing every state into the California legal ethos."[47] Such considerations mandate that California courts not issue restraining orders which have the effect of imposing California's public policy on parties who never contemplated such an eventuality.

CONCLUSION

The transformation of § 16600 from an anti-trust statute to the embodiment of California's reverence for individual freedom was accomplished by a series of judicial leaps in reasoning. In the *Advanced Bionics* decision, the California Supreme Court reiterated that there are necessary limits to the scope of § 16600 and to the reach of California's public policies. Once again, Justice Brown summed it up perfectly. "Relocating to California may be, for some people, a chance for a fresh start in life, but it is not a chance to walk away from valid contractual obligations, claiming California policy as a protective shield."[48]

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[46] 641 F.2d 746, 752 (9th Cir. 1981)

[47] *Id.* at 709-10. The *Application Group* court noted that the California Supreme Court had approved the approach taken by the Ninth Circuit in the *S.A. Empresa* case, but concluded, pursuant to its choice of law analysis, that California's interests outweighed those of Maryland because not to have done so "would have been to allow an out-of-state employer/competitor to limit employment and business opportunities in California." 61 Cal.App.4th at 902.

[48] *Id.* at 710.