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Case No.

IN THE SUPREME COURT OF CALIFORNIA

Michael McClain, Avi Feigenblatt
and Gregory Fisher,

Plaintiffs, Appellants and Petitioners,

vs.

Sav-On Drugs, et al.,

Defendants and Respondents.

PETITION FOR REVIEW

After a Decision of the Court of Appeal
Second Appellate District, Division 2
Case Nos. B265011 and B265029
Affirming a Judgment Of Dismissal Following
An Order Sustaining Demurrer Without Leave to Amend
Los Angeles County Superior Court, Case Nos. BC325272 and BC327216
Honorable John Shepard Wiley

Service on the Attorney General and the Los Angeles District Attorney
Required by Bus. & Prof. Code § 17209 and
Cal. Rules of Court, Rule 8.29(a), (b), and (c)(1)

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Table Of Contents

TABLE OF AUTHORITIES

Cases

Statues and Regulations

ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeal's opinion *de facto* overrule this Court's opinions in *Loeffler v. Target Corp.* (2014) 58 Cal.4th 108 and *Javor v. SBE* (1974) 12 Cal.3d 790 by creating prerequistes to pursuing a *Javor* remedy which are by definition impossible to fulfill, not only for the three million California diabetics in this action, but for all California consumers regarding any sales tax issue?

2. In rewriting the presumption in California Civil Code §1656.1 from "rebuttable" to "irrebuttable," does the Court of Appeal cause California's sales tax scheme to violate this Court's direct holding in *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283, and by escheating money with no recourse, to violate the United States Constitution's Due Process and Takings Clauses?

INTRODUCTION

The *McClain* opinion is the first interpreting *Javor* since this Court's decision in *Loeffler*. Unfortunately, despite arising from a lower court, the *McClain* opinion would *de facto* overrule this Court's holdings in *Javor* and *Loeffler* that a consumer, the real party in interest in a sales tax transaction, may compel a retailer, the nominal party in interest, to pursue a refund from the SBE. It would also overturn this Court's holding in *National Ice* that for one legally responsible for a tax to collect

reimbursement from another, consent must be obtained, "either expressly or impliedly given."

Before the *McClain* opinion, when a California retailer overcharged a customer by adding sales tax reimbursement to the sales price on a tax-exempt sale, the customer had at least two rights of recourse: (1) the customer could "join the Board as a party to his suit for recovery against the retailer in order to require the Board in response to the refund application from the retailers to pay the refund owed the retailers into court" (*Javor* at 802-803) and (2) the customer could sue the retailer by rebutting the rebuttable presumption "that the parties had agreed to the addition of sales tax reimbursement." (Civil Code §1656.1.) Petitioners' First and Fifth Causes of Action are based on precisely those two rights of recourse.

In *Loeffler*, a 4-3 opinion of this Court, Justice Liu, writing for the dissent, warned courts to not overread *Loeffler* as applying to all cases involving a sales tax issue: "The court's ruling...need not be read to broadly establish that a consumer action may never go forward if it involves a tax issue." (58 Cal.4th at 1142.) In fact, the majority opinion seemed careful to employ language signaling that the Court it was not dooming all consumer actions involving a sales tax issue, but was limited to the claims and procedural peculiarities of the case before it. (*E.g.*, 58 Cal.4th at 1123-24 ["a consumer claim such as plaintiffs'"; "[a] consumer

lawsuit in this context"]; at 1130 ("[a]ctions of this sort"]; at 1131-32 ["these plaintiffs' UCL and CLRA claims"].)

Yet despite these warnings, the *McClain* court has read this Court's opinion in *Loeffler* so broadly as to make a *Javor* remedy definitionally impossible, effectively overruling it.

Important to bear in mind, in *Loeffler*, 1. the SBE was not a party; 2. the plaintiff expressly disavowed any desire to pursue a *Javor* remedy; and, 3. the plaintiff did not pursue a breach of contract remedy. In this case, 1. the SBE *is* a party; 2. plaintiff *wants* to pursue a *Javor* remedy; and, 3. the plaintiff has pursued breach of contract.

Regarding the first of these three important differences, *Loeffler* makes clear its concern that when a court decides a taxability issue, it has the benefit of having the SBE present and its voice heard:

> [I]f the taxability question proceeds from administrative proceedings to court, the Board will be the opposing party in any ensuing legal challenge. (See § 6933; see also § 6711.) The Board will be present to fully and vigorously litigate its position, leading to a judgment that defines the law for all and is binding on the Board for the future." (Id. at 1129.)

In fact, although they advocate against it now, prior to *Loeffler*, the retailer defendants in this case themselves argued that Petitioner should be allowed to pursue a *Javor* remedy:

> The appropriate remedy for a consumer who has erroneously overpaid sales tax to a retailer, who has in turn paid the taxes to the Board, is to join the Board as a party to his suit for recovery against the retailer, so that the Board may be

> required to respond to refund applications by the retailer and pay the refunds into court .... [Citing Javor.]

(Walmart's and Sav-on / Albertson's Separate Mem. ISO Demurrer to First Amended Complaint, both filed on or about April 19, 2005 (emphasis added), quoted at AA 496.)

> The California Supreme Court in *Javor I* intended to provide a specific remedy for taxpayers to recover improperly collected sales taxes from retailers. ...That remedy is all that Plaintiffs should be permitted to seek here."

(Defendants' Reply ISO Mtn. to Strike Portions of Second Amended Complaint, 12/28/2005 [emphasis in original] quoted at AA 496-497).)

Loeffler expressly confirmed the continuing utility of the *Javor* remedy in order to preserve the integrity of the tax system and avoid unjust enrichment to the state. (*Loeffler* at 1133) *Loeffler* noted that "such a remedy invokes, rather than avoids, tax code procedures." (*Id.* at 1101.) But, because the plaintiffs in that case declined to pursue a *Javor* remedy, *Loeffler* left open the question as to what circumstances are needed for a *Javor* remedy. (*Id.* at 1133-34.)

But now, although *Javor* has never been overruled, the Court of Appeal below interpreted *Javor* in such a manner as to effectively abolish the *Javor* -type remedy. It did so by imposing supposed "prerequisites" that by definition no case, not even *Javor* itself, could possibly satisfy. The Court of Appeal apparently believed that its result was preordained by *Loeffler*:

> Further, our Supreme Court in *Loeffler*-although silent on this point-noted no constitutional impediment to its ruling that left consumers with no direct remedy for a refund and instead relegated them to urging Board inquiry and to filing claims or actions under the Administrative Procedure Act. (*Loeffler, supra,* 58 Cal.4th 1081.) Were we to come to a contrary conclusion, we would effectively overrule *Loeffler*, something we are not allowed to do except in narrow circumstances not present here. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456.)

(Op. 26-27.)

The result reached by the Court of Appeal not only was not preordained by *Loeffler*, but violates it. If *Javor* is no longer good law, despite this Court's statement in *Loeffler* reaffirming the continued utility of *Javor*, then that conclusion must be reached by this Court and not by an intermediate court.

The Attorney General of the State of California, now its Governor, wrote to this Court on April 1, 2010, as an *amicus* in support of the consumers' position and contrary to the position of the SBE in *Loeffler*, in part as follows:

> Contrary to the reasoning put forth by Target Corporation (Target) and adopted by the Court of Appeal, the strictures of article XIII, section 32 of the state Constitution (article XIII, section 32) and Revenue and Taxation Code section 6931 (section 6931) do not apply to the claims at issue. Plaintiffs in this case are not attempting to impede, directly or indirectly, the state's collection of taxes; they are challenging Target's alleged unlawful and fraudulent practice of imposing a charge in the guise of a tax. Nothing in the language of article XIII, section 32 or the Revenue and Taxation Code suggests a prohibition on suits by private litigants alleging that a retailer is collecting money from consumers in a

> deceptive manner by passing off charges as government mandates when they are not...[H]aving been given a "get-out-of liability-free" card, it is easy to imagine that some unethicalretailers will impose bogus charges under the facade of charging a sales."

(AG Amicus Brief in *Loeffler*, at AA 374.)

These concerns expressed by the Attorney General are now increased exponentially because the customer has no rights of recourse whatsoever under *McClain*. The Court of Appeal's opinion concedes as much:

> The retail pharmacies lack any financial incentive to challenge the Board's implementation of Regulation 1591.1 by seeking a refund, and the statutory remedies available to the customers-urging the Board to conduct an audit or filing a claim or lawsuit under the Administrative Procedure Act-while effective enough to satisfy due process, are nevertheless the practical equivalent of allowing them to tug (albeit persistently) at the Board's sleeve.

(Op. 28, emphasis added).

Contrary to the Court of Appeal's explanation, however, "tugging at a sleeve" does not satisfy due process.

HOW THS CASE PRESENTS GROUNDS FOR REVIEW

Although *Javor* has never been overruled, the Court of Appeal below interpreted *Javor* in such a restrictive manner as to effectively abolish the *Javor* -type remedy. It did so by imposing supposed "prerequisites" that no case, not even *Javor* itself, could possibly satisfy. It also expanded the "safe harbor" recognized in *Loeffler* (for UCL and

CLRA claims) to become an all-encompassing "safe harbor" for all defendants for all claims:

> Judicial recognition of a right of customers to sue retailers when the Board has yet to determine whether a refund is due is also inconsistent with section 6901.5. . . . In *Loeffler*, our Supreme Court read this section as providing a "safe harbor" or "safe haven" for any retailer/taxpayer "vis-à-vis the consumer" if the retailer/taxpayer "remits reimbursement charges [it collects] to the Board. (*Loeffler, supra*, 58 Cal.4th at pp. 1100, 1103-1104, 1119.)

(Op. at 22 (emphasis added))

According to the opinion, the "safe harbor" even immunizes the SBE from liability on the *Javor*type remedy by blocking the first step in the process, which is to compel the retailer to file a tax refund claim with the SBE:

> If consumers can sue retailers to compel them to seek a refund from the Board, then the "safe harbor" from suit erected by section 6901.5 is no safe harbor at all. (*Accord, Loeffler*, at p. 1126 [noting conflict].

(Op. 22)

There is nothing in *Loeffler* to suggest that the" safe harbor" that it recognized was intended to bar initiation of a *Javor*-type remedy. On the contrary, this court stated in *Loeffler* that "[t]he integrity of the tax system and avoidance of unjust enrichment, possibly of the retailer, but more probably of the state, in certain circumstances may support a *Javor*-type remedy for consumers."

The Court of Appeal's opinion is in conflict with other controlling decisions of this court and of the United States Supreme Court besides *Javor* and *Loeffler*. The conflicted decisions include *State v. Savings Union Bank & Trust Co.* (1921) 186 Cal.294 (California's attempt to escheat customer money from a stakeholder bank without a procedure by which the rightful owner can assert a claim to recover the money is a violation of due process); *Webb's Fabulous Pharmacies v. Beckwith* (1980) 449 U.S. 155 [101 S.Ct. 446, 66 L.Ed.2d 358 (Florida statute providing that interest accruing on interpleader monies deposited with the clerk shall be deemed income of the clerk's office violates the Takings Clause of the Fifth Amendment to the U.S. Constitution); and *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283 (absent purchaser consent, either expressly or impliedly given, a statute authorizing retailers to collect sales tax reimbursement from customers is a violation of due process). Plenary review under California Rule of Court 8.500(b)(1) is required to resolve these conflicts and secure uniformity of decision.

Review is also required to settle questions of law in order to avoid a constitutional crisis for sales tax. Besides effectively abolishing the *Javor* remedy, the Court of Appeal's opinion rejected Petitioners' cause of action against the retailers for breach of the contractual agreement required by Civil Code §1656.1 in order for the retailer to collect sales tax

reimbursement from the customer. The Court's ground for this ruling is somewhat ambiguous,[1] but probably is that the "safe harbor" bars the claim.

Civil Code §1656.1 is the only statutory authority for retailers to collect sales tax reimbursement from consumers, and makes such collection "depend[] solely upon the terms of the agreement of sale." However, §1656.1 creates "rebuttable presumptions" that the parties "agreed to the addition of sales tax reimbursement to the sales price . . . if sales tax reimbursement is shown on the sales check or other proof of sale." The effect of the Court of Appeal's ruling is to make §1656.1's "rebuttable presumption" of customer consent to pay sales tax reimbursement irrebuttable.

This court has once before ruled sales tax reimbursement unconstitutional under the Due Process clause in a situation where there was no basis for finding that customer's consent to paying sales tax reimbursement was "either expressly or impliedly given," *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283, 290 ("*National Ice*").)

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[1] *See* Op. 27 ("We reject the customers' first argument because, as explained above, the premise of their breach of contract claims is that the retail pharmacies wrongly collected sales tax reimbursement that was not due, yet they have no means in this lawsuit of establishing whether it was due.")

The *Javor* -type remedy and the cause of action against the retailers for breach of contractual agreement required by Civil Code §1656.1 may be the only legal recourse that survives *Loeffler* for customers who are overcharged sales tax reimbursement. By effectively abolishing those two forms of recourse, the Court of Appeal's opinion removes the only constitutional justifications for a retailer's right to collect reimbursement from its customer, given that the tax that is legally imposed on the retailer alone.

Under the Court of Appeal's "safe harbor" ruling, if sales tax reimbursement is shown on the sales check or other proof of sale, customers have no legal power to dispute the charge, no matter how clearly the sale is legally tax exempt. With customers having no power to *dispute* the charge, there is also no basis for presuming that customers *agree* with the charge. The consensual basis for the constitutionality of sales tax reimbursement that this court first suggested in *National Ice* is therefore destroyed. And, as this court held in *National Ice*, there is no other constitutional basis for customers being obligated to reimburse retailers for a tax obligation that is statutorily imposed exclusively upon retailers.

Additionally, Tax Code §6901.5 is the statutory requirement for retailers to remit excess sales tax reimbursement to the SBE. It only operates with respect to sales tax reimbursement that was "computed upon an amount that is not taxable or is in excess of the taxable amount." The

conclusion is therefore inescapable that §6901.5 is not a taxation statute, precisely because the excess sales tax reimbursement funds governed by §6901.5 are, by definition, not owed as taxes. Rather, §6901.5 is an escheat statute.

Due process requires that an escheat be either a nonpermanent escheat "subject to the right of claimants to appear and claim the escheated property" and/or be accomplished by a judicial proceeding which, after notice satisfying due process standards, cuts off claimants permanently. (*See* pp. 29-30, *infra.*) After the Court of Appeal's opinion effectively abolished the *Javor*-type remedy, Tax Code §6901.5 immediately became a permanent escheat and unconstitutional for lack of any right in customers to claim the escheated funds that they were overcharged (much less a judicial proceeding to terminate their interest).

A future judicial constitutional invalidation of California's sales tax reimbursement regime as a result of the Court of Appeal's opinion would have severe economic consequences for California retailers. Unable to collect sales tax reimbursement from their customers to offset the sales tax liability imposed on retailers by Tax Code §6051, California retailers would experience considerable financial distress from having to absorb the sales tax themselves. That economic distress could spread throughout the State's economy and damage not only sales tax collections, but income tax and commercial property tax collections as well.

Fortunately, these events can be avoided by this court accepting review and restoring the law to what it was before the *McClain ruling*. This can be simply done. First, this court should hold that the "safe harbor" found by this court in *Loeffler* does not apply to a cause of action for breach of the express or presumed agreement required by Civil Code §1656.1 in order for a retailer to collect sales tax reimbursement. There are solid reasons why this is true as a matter of statutory interpretation.

The fact that Civil Code §1656.1 was enacted as an integral part of the 1978 overhaul of the tax code distinguishes Petitioner's breach of contract claim from the UCL and CLRA claims that were the subject of the "safe harbor" recognized in *Loeffler*. *See Loeffler at* 1126 ("The UCL cannot properly be interpreted to impose on retailers a duty with respect to sales tax *that is contradicted by the statutory scheme governing the sales tax*.") (Emphasis added.) Civil Code §1656.1, by contrast, is part of "the statutory scheme governing the sales tax." Immunizing retailers from liability for breaching the very contract that was enacted in order "to clarify that the incidence of the state sales tax is on retailers, not consumers" would seriously undermine the "statutory scheme governing the sales tax."

Rather, Civil Code §1656.1 must be harmonized with the Tax Code rather than be preempted by it. Any interpretation that would bar remedies for breach of the contract contemplated by Civil Code §1656.1 would effectively repeal §1656.1, and "[a]ll presumptions are against a repeal by

implication." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955, 960-961, citations omitted.)

Second, this court should reject all of the supposed "prerequisites" for application of the *Javor*-style remedy that were found to exist by the Court of Appeal's opinion. The *Javor*-style remedy has been in existence for 43 years since it was devised by this court, and until the Court of Appeal's opinion, had done just fine without any restrictive "prerequisites" to prevent its usage. While the *Javor*-style remedy has only been sought in a handful of cases during those 43 years, it has nevertheless served a vital purpose in protecting Tax Code §6901.5 from unconstitutionality. Absent a functional *Javor*-type remedy, Tax Code §6901.5 is unconstitutional as a permanent escheat by the State of private property with no due process procedure by which the rightful owner (the customer) can assert a claim to recover its property. (*See* Section III *et. seq., infra.*)

Conversely, if this court were to deny review, there may be no opportunity for any other California appellate court to re-interpret the sales tax law so as to correct the constitutional infirmities injected by the *McClain* opinion. Absent a ruling by this court, if future cases raise the same constitutional defects in federal courts, those courts may look to the Court of Appeal's opinion as a binding interpretation of California law. That would serve to lock-in a statutory interpretation establishing that California's sales tax law violates the United States the Due Process and

Takings clauses of the Fifth Amendment. Accordingly, it is essential that this court accept review so as to supplant the Court of Appeal's opinion with an interpretation of the sales tax law that does not run afoul of federal constitutional guarantees.

Finally, the Court of Appeal's opinion is in conflict with other controlling decisions of this court and of the United States Supreme Court besides *Javor* and *Loeffler*. The conflicted decisions include *State v. Savings Union Bank & Trust Co.* (1921) 186 Cal.294 (California's attempt to escheat customer money from a stakeholder bank without a procedure by which the rightful owner can assert a claim to recover the money is a violation of due process); *Webb's Fabulous Pharmacies v. Beckwith* (1980) 449 U.S. 155 [101 S.Ct. 446, 66 L.Ed.2d 358 (Florida statute providing that interest accruing on interpleader monies deposited with the clerk shall be deemed income of the clerk's office violates the Takings Clause of the Fifth Amendment to the U.S. Constitution); and *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283 (absent purchaser consent, either expressly or impliedly given, a statute authorizing retailers to charge customers for reimbursement of sales taxes imposed by law upon retailers is a violation of due process).

Plenary review under California Rule of Court 8.500(b)(1) is required to resolve these conflicts and to settle vital questions of law.

STATEMENT OF THE CASE

In March 2000, Regulation 1591.1(b)(5) promulgated by the SBE went into effect, exempting the sale of glucose test strips and skin puncture lancets from sales tax. Despite this, California retailers continued to charge California's three million diabetics millions of dollars per year in "sales tax reimbursement." They contend they remit these proceeds to the SBE. The SBE has refused to consider refunding the wrongfully collected sums, resulting in the State being unjustly enriched by millions of dollars each year.

These lawsuits were brought on behalf of California diabetics who use blood glucose test strips to monitor their blood sugar levels to determine when they need to use insulin. First filed in December 2004. the cases were stayed while the *Loeffler* case was first pending before the appellate court, and then again while the *Loeffler* case was pending before this Court. The stay was lifted shortly after this Court's opinion in *Loeffler* issued. Plaintiffs filed an amended complaint, including a cause of action carefully tracking the remedy allowed by this Court in *Javor*.

The trial court sustained demurrers to Petitioners' operative complaint, and also denied Petitioners' request for leave to amend to state a constitutional Takings Clause claim against the SBE. The Court of Appeal affirmed on March 13, 2017, in an opinion certified for publication.

Petitioners are limiting this Petition to two of their causes of action: (1) the Fifth Cause of Action against all defendants for the equitable remedy devised by this court in *Javor v. State Board of Equalization* (1972) 12 Cal.3d 758 ("*Javor*"), and (2) the First Cause of Action against the retailer defendants for breach of the contractual agreement required by Civil Code §1656.1 in order for retailers to collect sales tax reimbursement from their customers. In addition, Petitioners seek review of the Court of Appeal's decision not to reverse the trial court's denial of leave amend (which amendment was identified to the trial court as being to allege a constitutional Takings Clause claim).

FILING OF PETITION FOR REHEARING AND HOW THE COURT OF APPEAL RULED

Petitioners filed a Petition for rehearing. The Court of Appeal responded on April 10, 2017 by denying rehearing and modifying two paragraphs of its opinion. One of the modifications dealt with Petitioners' constitutional Takings Claim. The other modification added footnote 9 to the opinion stating that the court declined to consider arguments "that appear nowhere in [Petitioners'] prior briefs..." One of the arguments identified as being new and not considered was Petitioners' claim that "denying them a remedy violates due process because the collection of sales tax reimbursement by retailers effects an 'escheat' to the state." (Order, 4/10/2017, p. 2).

The Court of Appeal was wrong in stating that Petitioners had not raised the "escheat" argument in their prior briefs. Escheat was a focus of Petitioners' Due Process and Takings Clause arguments in the trial court (AA 517) and in all of Appellants briefs' filed in the Court of Appeal (AOB 73-76; ARB 35-39; RP 20-21; 24; 26-36; and 40-43).

ARGUMENT

I. THE COURT OF APPEAL'S OPINION ADOPTS "PREREQUISITES" FOR THE *JAVOR*-STYLE REMEDY THAT NO CASE, NOT EVEN THE *JAVOR* CASE ITSELF, COULD EVER SATISFY, THEREBY EFFECTIVELY ABOLISHING THE *JAVOR* -TYPE REMEDY.

The Court of Appeal's opinion holds that there are certain "prerequisites" that a customer's case must meet to qualify for application of the *Javor*-type remedy. But by definition, no case, not even the *Javor* case itself, could ever satisfy these supposed prerequisites.

The Court of Appeal's opinion first held that Petitioners fail to qualify for the *Javor*-type remedy because they "have several other remedies available to them," pointing to Tax Code §§ 6481, 6483 and 7054. (Op. 20-21.) But those tax code sections apply equally to deficiency determinations with respect to *any* sales tax returns. If the mere existence of those sections disqualifies a customer from a *Javor*-type remedy, then no customer can ever qualify. Indeed, the *Javor* plaintiffs themselves could not have qualified for the remedy because all three sections were enacted

prior to the Supreme Court's 1974 decision in *Javor*, and have remained materially unchanged since that time.

The Court of Appeal's opinion also identifies Government Code §§11340.6 and 11350 as being the source of "other remedies," namely to petition the Board under the Administrative Procedure Act to compel the Board to "adopt, amend or repeal" Regulation 1591.1 (b)(5) or to sue the Board for declaratory relief "as to the validity of" Regulation 1591.1. (Op. 21.)

Not only do these "other remedies" not allow the consumer to pursue a return of the already paid wrongful sales tax reimbursement, but, again, they would be present in every case to block every potential claim for a *Javor* remedy. Further, in this case, Regulation 1591.1(b)(5) is the Board Regulation that exempts sales of glucose test strips and lancets from the sales tax, and a cornerstone of Petitioners' case. Changing or challenging the validity of Regulation 1591.1(b)(5) is not Petitioners strategy.

The Court of Appeal's opinion next holds that Tax Code §6905, which forfeits and waives a tax refund claim that is not timely filed, is inconsistent with a *Javor*-type claim (Op. 21-22.) By definition, a *Javor*-type only arises when the retailer has refused or failed to file a claim for a tax refund and therefore must be judicially compelled to do so, so §6905 would defeat every potential every potential *Javor*.claim. Indeed, the *Javor* plaintiffs could not have qualified for the remedy because § 6905 was

enacted in 1941, prior to the Supreme Court's 1974 decision in *Javor,* and has remained materially unchanged since that time.

The Court of Appeal's opinion next holds that f Tax Code §6901.5 is inconsistent with a *Javor* remedy. (Op. 22.) A *Javor*-type remedy against the SBE only arises when a customer claims that a retailer has collected excess sales tax reimbursement and remitted it to the SBE under §6901.5. Therefore, by definition Section 6901.5 is involved in every case, so no customer could ever qualify for a *Javor*-type remedy.

The Court Of Appeal's opinion also holds that a prerequisite to the *Javor*-type remedy is that the Board already has determined that "the person seeking the new tax refund remedy is entitled to a refund." (Op. 20.) If consumers are not entitled to pursue a *Javor*-type remedy unless the Board already has determined that they are entitled to a refund, but absent a *Javor*-type remedy, there is no occasion for the Board to make such a determination, *then* the Javor-type remedy will be a dead letter because the reasoning is circular.

Additionally, although not described by the Court of Appeal's opinion as being a "prerequisite," the Court of Appeal's opinion also applies a "safe harbor" to block the first step in the*Javor* process, which is to compel the retailer to file a tax refund claim with the SBE:

> If consumers can sue retailers to compel them to seek a refund from the Board, then the "safe harbor" from suit erected by section 6901.5 is no safe harbor at all.