

## Court Requires 'Knowledge' in Securities Case

By Phillip Carrizosa  
Daily Journal Staff Writer

SAN FRANCISCO — In a ruling that could mean a new trial for former savings and loan kingpin Charles H. Keating, the California Supreme Court ruled in a separate case Monday that to win a securities conviction, prosecutors must prove that sellers know their representations are false or misleading or be criminally negligent in failing to acquire that knowledge.

By a 6-1 vote, the justices said although the statute does not explicitly require knowledge as a element of the offense, the state Legislature must have intended it.

Otherwise, wrote Justice Marvin R. Baxter for the majority in *People v. Simon*, S036981, fines of up to \$1 million could be imposed for essentially a strict liability crime.

"We generally presume that the Legislature would not attach a substantial penalty to a strict liability offense," Baxter wrote.

### Keating Conviction

Keating is currently serving a 10-year sentence in state prison based on his 1991 conviction for securities fraud. Keating's conviction was for sales of securities by means of false statements or omissions and making false statements to the corporations commissioner, the same crimes as Simon.

Nonetheless, Keating still faces another 12-year sentence based on his convictions in federal court for 75 counts of federal conspiracy as well as wire, bank and securities fraud in bilking investors and looting his failed Lincoln Savings and Loan Association.

Attorneys for Keating were scrambling Monday afternoon to obtain a copy of the court's decision in Simon and had no immediate comment. "I'm delighted for Mr. Simon but I want to read the opinion first," said Stephen C. Neal of Kirkland and Ellis in Los Angeles.

Deputy State Attorney General Sanjay T. Kumar, who is handling both the Simon and Keating cases, was away from his office and could not be reached for comment.

The men that Keating may have to

See Page 5 — SECURITIES

## State Supreme Court Requires 'Knowledge' in Securities Case

Continued from Page 1

thank are John Martin Simon and his attorney, Thomas F. Coleman of Los Angeles, who raised the argument that the court accepted.

Simon, an unpaid Lutheran minister who supports himself by preparing tax returns and brokering insurance, was convicted in June 1992 of seven counts of selling unqualified securities and five counts of selling securities by means of false statements or omissions. But the jury acquitted him on 20 counts, including fraud, and deadlocked on others.

Essentially, Simon and his employees sold interests in promissory notes and limited partnerships which Simon created and in which he or his corporation was the general partner. Simon eventually created 66 limited partnerships in which 870 people invested about \$11.5 million. Although a receiver was able to recover about \$7.5 million in funds, numerous investors lost significant sums.

Simon admitted his guilt but insisted that he never intended to violate any corporate securities law.

Interestingly, the case bypassed the state Court of Appeal after Coleman petitioned for a transfer directly to the state Supreme Court and the justices, having already agreed to hear Keating's appeal and obviously interested in the issue, granted the request.

In his 41-page majority opinion, Baxter noted that the California statute is modeled after the federal law, which does require proof of knowledge to convict.

Furthermore, Baxter said, even if the Legislature meant to delete knowledge as an element of the crime, that might violate constitutional due process.

"We presume the Legislature did not intend to enact a statute of doubtful validity," wrote Baxter, joined by Chief Justice

Malcolm M. Lucas and Justices Joyce L. Kennard, Armand Arabian, Ronald M. George and Kathryn Mickle Werdegard.

In dissent, Justice Stanley Mosk argued that the Legislature knew what it was doing in not explicitly requiring knowledge as part of the crime.

"Rewriting statutes is not the function of this court. We must review those the Legislature has given us," Mosk wrote.

And referring to the court's frequent use of the harmless-error doctrine to uphold convictions for other crimes, Mosk tartly added, "I further conclude that if there were any errors in the trial court's instructions, they are — in the frequent words of my colleagues — mere harmless errors."

Coleman was delighted with the court's opinion, particularly since he made the same argument unsuccessfully five years ago in *People v. Johnson*, 213 Cal.App.3d 1369. The court overruled *Johnson* in its decision Monday.

He said the appeal court in *Johnson* was too concerned about protecting consumers and failed to address the concerns of business people.

"I think the Supreme Court has brought the statute back into balance," Coleman said. He stressed that prosecutors don't have to prove actual knowledge since the justices said a conviction can be based on criminal negligence in failing to investigate and discover false or misleading statements.

However, Coleman said the prosecution "is going to have a hard time" reconvicting Simon because the jury acquitted him of all fraud charges, which have a knowledge requirement.

"The only reason the jury came back with guilty on the other charges was the judge said it didn't matter whether he knew it was false," Coleman said.