

SixTen and Associates Mandate Reimbursement Services

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July 13, 2009



Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: Health Fee Elimination, 05-4206-I-04
San Mateo County Community College District
Fiscal Years: 1999-00, 2000-01, and 2001-02
Incorrect Reduction Claim

Dear Ms. Higashi:

This letter is in rebuttal to the State Controller's Office response dated April 24, 2008, to the incorrect reduction claim of San Mateo County Community College District (District) submitted on August 25, 2005.

Part I. Mr. Silva's Transmittal Letter

Mr. Silva's transmittal letter, dated April 24, 2008, contains factual and legal allegations regarding the District's incorrect reduction claim. However, it was not signed under the penalty of perjury. The conclusions and assertions contained in the letter should be disregarded by the Commission due to this lack of certification.

A. CONTROLLER'S AUDIT AUTHORITY

The District does not dispute the Controller's authority to audit claims for mandated costs and to reduce those costs that are excessive or unreasonable. This authority is expressly contained in Government Code Section 17561. Government Code Section 17564 identifies the minimum amount of costs required to file a claim and the manner of claiming costs to be reimbursed. Thus, it is unclear to the District why Mr. Silva's

letter, at footnote one, cites Section 17564 in support of the Controller's authority to audit mandated costs. Similarly, the Statement of Decision in the incorrect reduction claim of San Diego Unified School District, cited at footnote two, is superfluous because it simply restates the statutory authority without elaboration. The District is unable to respond to these two citations without further elaboration from the Controller as to their intended relevance, since none is readily apparent.

B. BURDEN OF PROOF

Mr. Silva's letter erroneously asserts that the burden of proof is upon the District to establish that the Controller's adjustments were incorrect. The letter's reliance on Evidence Code Section 500, at footnote four, is completely misplaced because that Section is not applicable to administrative hearings, such as those conducted by the Commission.

California Code of Regulations Section 1187.5(a) states expressly that Commission "hearings will not be conducted according to technical rules relating to evidence and witnesses." The evidentiary standard for matters before the Commission, stated in that Section, is "[a]ny relevant non-repetitive evidence . . . [that] is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Further, Evidence Code Section 300 specifies that the Evidence Code is applicable only to actions before the California courts. There is no statute or regulation that makes the Evidence Code applicable to proceedings before the Commission, and therefore the Controller cannot rely on Section 500 to shift the burden of proof onto the District.

The Statement of Decision in the incorrect reduction claim of San Diego Unified School District, that is cited at footnote three of Mr. Silva's letter relied on *Honeywell, Inc. v. State Board of Equalization* (1982) 128 Cal.App.3d 739, 744 for the proposition that the Claimant had the burden of proof in showing that it did not experience offsetting savings. The decision was supported by "common sense" in that the burden of proof should rest with the party having the power to create, maintain, and provide the evidence.

In this incorrect reduction claim, the issue is not the District's original reimbursement claims, but the Controller's methods for determining adjustments. The Controller is the party with the power to create, maintain, and provide evidence regarding its auditing methods and procedures, as well as the specific facts relied upon for its audit findings. Thus, by Mr. Silva's own reasoning, the burden is upon the Controller to demonstrate that the auditors' methods were in compliance with applicable law.

Finally, the Controller must meet the burden of going forward. "Until the agency has met its burden of going forward with the evidence necessary to sustain a finding, the [party requesting review] has no duty to rebut the allegations or otherwise respond." (*Daniels*

v. Department of Motor Vehicles (1983) 33 Cal.3d 532, 536). Therefore, the Controller must first provide evidence as to the propriety of its audit findings because it bears the burden of going forward and because it is the party with the power to create, maintain, and provide this evidence.

C. BENEFIT RATE

The actual benefit costs reported by the District in their annual claims is an alternative to the average rate calculated by the auditors. The District addressed this issue in its incorrect reduction claim: “[t]he Controller has not indicated why it was necessary to calculate an average benefit rate when the District reported actual benefit costs in its general ledger, that is, why an average rate is better than actual benefit costs.” Mr. Silva’s letter asserts that the District did not provide documentation to support the actual benefit costs; therefore, the average rate was calculated. However, it does not explain how this average, derived from the same general ledger reports, is more accurate or supported than the actual costs. Additionally, no evidence is offered to support the assertion that the District’s Chief Accountant concurred with the calculation of an average benefit rate. The District provided actual benefit costs. Mr. Silva’s letter does not adequately explain why an average benefit rate was applied instead.

D. AUTHORIZED HEALTH SERVICES FEES

The District did not “confuse” health services fees that were authorized and those that were collected, as claimed in Mr. Silva’s letter. Further, his statement of the parameters and guidelines is out of context and misleading. The authorized health services fees are to be included in “reimbursement for this mandate received from any source” as stated in the parameters and guidelines. The District complied with Generally Accepted Accounting Principles (GAAP) and the parameters and guidelines when it properly reported, as offsetting revenue, health service fees that were received.

Although the parameters and guidelines clearly state that claimants must report revenue that is received, Mr. Silva’s letter asserts that the amount authorized is relevant due to “mandate law in general, and specific case law on point”, citing, at footnote five, *Connell v. Santa Margarita Water District*. The District cannot properly respond to “mandate law in general” because it is completely unsupported, and references no particular statute, regulation, or court decision as its basis. The reliance on *Connell* is misplaced because the Court in that case determined only that approval of the test claim in question was in violation of Government Code Section 17556(d), which prohibits approval of a test claim when there are offsetting savings sufficient to fully fund it. The Court makes absolutely no finding regarding offsetting revenue in the parameters and guidelines or the reimbursement process.

E. INDIRECT COST RATE

According to Mr. Silva's letter, the indirect costs disallowed in the audit were those amounts the District applied its federally approved indirect cost rate to that were not used to calculate the rate. Mr. Silva's letter does not supply a cost accounting rationale or legal basis for the proposition asserted. The application of an indirect cost rate is not limited to the data used in its creation. General cost accounting principles allow indirect cost rates to be formulated based on a number of bases so long as the source of the rate is representative of the distribution base.

F. STATUTE OF LIMITATIONS

Mr. Silva's letter asserts that "the audit of the fiscal year 1999-00 was proper, even under the 1996 version of Section 17558.5." However, this conclusion is based on the assumption that the audit initiation date is somehow relevant to the period of time that a claim is "subject to audit." Mr. Silva's letter provides no support for this assumption, and, as discussed more thoroughly below, it is not supported by the plain language of Government Code Section 17558.5.

The letter asserts that the applicable version of the statute of limitations was that version which was imposed by the amendment, effective January 1, 2003, to Section 17558.5. However, the court case cited in footnote six of Mr. Silva's letter is inapplicable to the time limitation placed on the audit of mandate claims because, as discussed more thoroughly below, this time limitation is not a true statute of limitations. Thus, it is not subject to the case law concerning a true statute of limitations.

Part II. State Controller's Office Analysis and Response to the Incorrect Reduction Claim by San Mateo Community College District (Spano Response)

RE: I. SCO REBUTTAL TO STATEMENT OF DISPUTE - CLARIFICATION OF REIMBURSABLE ACTIVITIES, CLAIM CRITERIA, AND DOCUMENTATION REQUIREMENTS

Mr. Spano's response (Tab 2; p. 4) asserts that the September 2002 Controller claiming instructions, by its "clarification" of applicable law and standards, determines the method to calculate indirect costs. However, this version of the claiming instructions was issued *after* all of the fiscal years that are the subject of this incorrect reduction claim. It is unclear to the District why the Controller did not include a copy of the claiming instructions that were actually in effect during at least one of the fiscal years in question in its response. But, since the claiming instructions are only guidelines and not a statement of the applicable law, they should have no effect on the determination of this incorrect reduction claim, regardless of the version cited.

RE: II. THE DISTRICT CLAIMED OVERSTATED SALARIES, BENEFITS, AND RELATED INDIRECT COSTS

The Controller asserts (Tab 2; p. 4) that the District overstated employee salaries and benefits by \$610,217 for the audit period, with related indirect costs of \$183,038.

Disallowed Employees

According to Mr. Spano's response (Tab 2; p. 5), "[t]he audit report clearly states the basis for the unallowable costs." However, if the audit report were as clear as the Controller believes it to be, there would be no need to reference emails and schedules exchanged (Tab 5) during the course of the audit to determine what comprises the \$530,342 in unallowable costs. The fact that the Controller "attempted to work with the district" concerning the adjustments further illustrates that there was an evolving understanding of the exact adjustments the Controller intended to make. As the final and binding document of the audit, the audit report must detail exactly what adjustments are being made. Simply listing a lump sum with the description of "unallowable costs" gives the District no basis to determine if the adjustments are in fact proper.

Mr. Spano's response (Tab 2; p. 5) asserts that "the district was not able to support the mandate-related portion of costs claimed for full-time faculty during any of the years audited" However, the District provided detailed information that supported the claimed salary and benefit costs for several faculty members, at least two of which were full-time. That response was sent by way of letter on August 31, 2004 at the auditor's request. The District identified a list of employees in its incorrect reduction claim for whom all salary costs were disallowed by the audit. Since Mr. Spano's response does not address this list, the District is proceeding on the assumption that it is accurate. Ernest Rodriguez and Dee Howard were both among those whose salary costs were entirely disallowed. The District's letter of August 31, 2004, clearly distinguishes between claimed costs, which related to the mandate, and those costs that were not claimed and did not relate to the mandate. Therefore, Mr. Spano's conclusion that the District failed entirely to support its claimed costs is false.

"Audited" Benefit Rate

Auditors calculated an average benefit rate, to be applied to all employees irrespective of their actual benefit rate, for each fiscal year that was the subject of the audit. Mr. Spano's response (Tab 2; p. 6) asserts that average rates were calculated because, according to the District's Chief Accountant, collecting the data necessary to determine the actual benefit rate would have "taken the district a long time" and, therefore, the Chief Accountant agreed to the calculation of an average rate.

First, this unsupported allegation should not be permitted because it does not comply with the Commission's regulations. Title 2, California Code of Regulations, Section 1185.1(b) governs the manner in which the Controller may reply to a claimant's incorrect reduction claim. According to that Section:

If the oppositions or recommendations regarding an incorrect reduction claim involve more than the discussion of statutes, regulations or legal argument and utilizes assertions or representations of fact, such assertions or representations shall be supported by documentary evidence and shall be submitted with the response.

Citing a District employee as having said that the necessary records collection would have taken too long, implying then that the calculation of average rates was necessary, was an assertion or representation of fact. Since Mr. Spano's response was not accompanied by documentation to support such an assertion or representation, Section 1185.1(b) requires that this portion of the response be disregarded. Notwithstanding, Mr. Spano's response has yet to address why it was necessary to calculate an average benefit rate when the District reported actual benefit costs.

Second, average benefit rates are not proper in this case because they cannot be representative of the actual benefit costs. The auditors only calculated one rate for each fiscal year. That rate was then applied to all employees involved in the mandate program. Employees have different total salaries and benefits, and some benefit costs are linked to salary level while others are a flat rate. To apply an average to all employees is to disregard the difference between each employee, and reaches an inaccurate and unrepresentative total benefit cost. The Controller has offered no reason, which complies with the Commission's regulations, for calculating average benefit rates. Average benefit rates do not accurately reflect benefit costs. Therefore, the audit adjustment is unsupported and should be disregarded.

Source Documentation

The final audit report concluded that \$530,342 of the unallowable costs attributed to salaries and benefits and related indirect costs were, at least in part, a result of the District failing to provide adequate supporting documentation. The District's response to the draft audit report, dated November 15, 2004, and the incorrect reduction claim both reiterate the fact that the documentation provided to support salaries and benefits costs were in accordance with the requirements of the parameters and guidelines.

Subsection (B)(1) of Section VI. of the parameters and guidelines identify what information is required in order to claim employee salaries and benefits costs. According to that subsection, a claimant is required to:

Identify the employee(s), show the classification of the employee(s) involved, describe the mandated functions performed and specify the actual number of hours devoted to each function, the productive hourly rate, and the related benefits.

During the audit process the District responded to requests for supplemental documentation to support hours claimed. According to Mr. Spano's response (Tab 2; p. 7), "[t]he district did not provide any additional source documentation or worksheets to refute" the audit finding that the District did not supply adequate source documentation. This conclusion is false, and ignores weeks of correspondence between auditors and the District, as evidenced by the August 31, 2004 letter from the District to the Controller, where additional documentation was produced at the auditors' request.

In support of the conclusion that the District's documentation was inadequate, Mr. Spano's response (Tab 2; p. 7) makes three specific assertions, the first being that the District did not provide documentation to "show that the costs claimed for full-time faculty accurately reflected the actual mandate-related time spent . . ." The aforementioned letter of August 31, 2004 is evidence that this assertion is erroneous. The letter specifically addresses two full-time faculty members and provides payroll registers in support of the costs claimed. The District is unable to respond to the second and third assertions made in Mr. Spano's response because they only reference "various other employees" without specifically identifying disallowed individuals or an identifiable group of persons for whom costs were disallowed. Without specific and accurate evidence of the District failing to provide adequate source documentation, the conclusions in Mr. Spano's response are entirely unsupported and should be disregarded.

Unreasonable or Excessive

The Controller (Tab 2; p. 8) asserts:

Government Code Section 17561(d)(2) allows the SCO to audit the district's records to verify actual mandate-related costs and reduce any claim that the SCO determines is excessive or unreasonable. In addition, *Government Code* Section 12410 states, "The Controller shall audit all claims against the state, and may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment." (Emphasis in original.)

Section 12410 is found in the part of the Government Code that provides a general description of the duties of the Controller. It is not specific to the audit of mandate reimbursement claims. The only applicable audit standard for mandate reimbursement claims is found in Government Code Section 17561(d)(2). The fact that Section 17561(d)(2) specifies its own audit standard (excessive or unreasonable) implies that

the general Controller audit standard (correctness, legality, and sufficient provisions of law) does not apply here. Therefore, the Controller may only reduce a mandate reimbursement claim if it specifically finds that the amounts claimed are unreasonable or excessive under Section 17561(d)(2).

Further, the Controller has not asserted or demonstrated that, if Section 12410 was the applicable standard, the audit adjustments were made in accordance with this standard. The District's claim was correct, in that it reported the actual costs incurred. There is also no allegation in the audit report that the claim was in any way illegal. Finally, the phrase "sufficient provisions of law for payment" refers to the requirement that there be adequate appropriations prior to the disbursement of any funds. There is no indication that any funds were disbursed without sufficient appropriations. Thus, even if the standards of Section 12410 were applicable to mandate reimbursement audits, the Controller has failed to put forth any evidence that these standards are not met or even relevant. There is no indication that the Controller is actually relying on the audit standards set forth in Section 12410 for the adjustments to the District's reimbursement claims. Mr. Spano's response (Tab 2; p. 8) claims that it did indeed determine that the District's costs were excessive, as required by Section 17561(d)(2), because the claimed costs were not "proper" since they were not supported by adequate source documentation. The audit report and Mr. Spano's response simply state a conclusion that the unallowable costs are excessive, without demonstrating that they are.

RE: III. THE DISTRICT CLAIMED UNALLOWABLE OTHER OUTGOING EXPENSES

Mr. Spano's response (Tab 2, p. 8) states that "(d)uring the audit, we reviewed these expenses, which were recorded within the district's expenditure account #7310." However, the response does not state why these costs are not mandate-related, excessive, or unreasonable.

RE: III. [*sic*] THE DISTRICT OVERSTATED ITS INDIRECT COSTS

The Controller determined that \$112,243 in indirect costs were unallowable for the audit period because the District "did not apply the rate to the same base that was used in developing the rate" The indirect cost rate is a *ratio* stating the percentage of indirect costs incurred that are chargeable to a particular program. It does not apply only to the specific costs used to develop it. The Controller's response does not indicate that the federal indirect cost rate or its application to direct cost centers is unreasonable.

RE: IV. UNDERSTATED AUTHORIZED HEALTH FEE REVENUES CLAIMED

The Controller determined that revenue offsets were understated by \$70,603 for the audit period. This adjustment is due to the fact that the District offset costs based on

health fee services collected rather than the amount of fees the District was authorized to collect pursuant to Education Code Section 76355(a). Education Code Section 76355 gives the governing board the discretion to determine if any fee should be charged. The District is not required to charge a health fee, and must only claim offsetting revenue it actually experiences.

The Controller continues to rely on Government Code Section 17556(d), as amended by Statutes of 1989, Chapter 589, while neglecting its context and omitting a crucial clause. Section 17556(d) does specify that the Commission on State Mandates shall not find costs mandated by the state if the local agency has the authority to levy fees, but only if those fees are "*sufficient to pay for the mandated program.*" (Emphasis added). Section 17556 pertains specifically to the Commission's determination on a test claim, and does not concern the development of parameters and guidelines or the claiming process. The Commission has already found state-mandated costs for this program, and the Controller cannot substitute its judgment for that of the Commission through the audit process.

The two court cases Mr. Spano's response (Tab 2; p. 15) relies upon (*County of Fresno v. California* (1991) 53 Cal.3d 482 and *Connell v. Santa Margarita* (1997) 59 Cal.App.4th 382) are similarly misplaced. Both cases concern the approval of a test claim by the Commission. They do not address the issue of offsetting revenue in the reimbursement stages, only whether there is fee authority *sufficient to fully fund* the mandate that would prevent the Commission from approving the test claim.

In *County of Fresno*, the Commission had specifically found that the fee authority was sufficient to fully fund the test claim activities and denied the test claim. The court simply agreed to uphold this determination because Government Code Section 17556(d) was consistent with the California Constitution. The Commission has approved the Health Fee Elimination mandate, and therefore found that the fee authority is not sufficient to fully fund the mandate. Thus, *County of Fresno* is not applicable because it concerns the activity of approving or denying a test claim and has no bearing on the annual claim reimbursement process.

Similarly, although a test claim had been approved and parameters and guidelines were adopted, the court in *Connell* focused its determination on whether the initial approval of the test claim had been proper. It did not evaluate the parameters and guidelines or the reimbursement process because it found that the initial approval of the test claim had been in violation of Section 17556(d).

Mr. Spano's response (Tab 2; p. 15) notes that health service fees were included in the parameters and guidelines as a possible source of offsetting savings, and then concludes that fees authorized by Education Code Section 76355 *must* be deducted because "[t]o the extent districts have the authority to charge a fee, they are not

required to incur a cost.” The parameters and guidelines actually state:

Any offsetting savings that the claimant experiences as a direct result of this statute must be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, e.g., federal, state, etc., shall be identified and deducted from this claim. This shall include the amount of [student fees] as authorized by Education Code Section 72246(a)¹.

In order for a district to “experience” these “offsetting savings” the district must actually have collected these fees. Note that the student health fees are named as a potential source of the reimbursement *received* in the previous sentence. The use of the term “any offsetting savings” further illustrates the permissive nature of the fees. Student fees actually collected must be used to offset costs, but not student fees that could have been collected and were not. Thus, the Controller’s conclusion is based on an illogical interpretation of the parameters and guidelines.

Mr. Spano’s response (Tab 2; p. 15) asserts that it is “clear” that the Commission’s intent was for claimed costs to be reduced by fees authorized, rather than fees received as stated in the parameters and guidelines. It is true that the Department of Finance proposed, as part of the amendments that were adopted on May 25, 1989, that a sentence be added to the offsetting savings section expressly stating that if no health service fee was charged, the claimant would be required to deduct the amount authorized.

However, the Commission declined to add this requirement and adopted the parameters and guidelines without this language. The fact that the Commission staff and the California Community College Chancellor’s Office agreed with Department of Finance’s interpretation does not negate the fact that the Commission adopted parameters and guidelines that *did not* include the additional language. The Commission intends the language of the parameters and guidelines to be construed as written, and only those savings that are *experienced* are to be deducted.

The District complied with the parameters and guidelines when it did not report health service fee revenue it never received. As discussed, there is no basis in law for the Controller’s finding that the District was required to reduce its claimed costs by “authorized” health service fees. Therefore, the adjustments that result from this finding should be reversed.

¹ Former Education Code Section 72246 was repealed by Chapter 8, Statutes of 1993, Section 29, and was replaced by Education Code Section 76355.

RE: V. STATUTE OF LIMITATIONS FOR AUDIT

The District asserts that the FY 1999-00 and FY 2000-01 claims were beyond the statute of limitations for audit when the Controller completed its audit on January 7, 2005, by issuing the final audit report.

Applicable Statute of Limitations

The Controller's response (Tab 2; p. 18) claims that the FY 1999-00 and FY 2000-01 reimbursement claims were subject to the amended version of Government Code Section 17558.5 that went into effect on January 1, 2003, because they were still subject to audit on that date under the previous version of this section. The District contends that the two claims were subject only to the version of Section 17558.5 in effect at the time they were filed, and any subsequent amendment had no effect on the time limitation established for audit.

"The extension of the statutory period within which an action must be brought is generally held to be valid if made before the cause of action is barred." (*Evelyn, Inc. v. California Emp. Stab. Com.* (1957) 48 Cal.2d 588, 592). According to the court in *Evelyn*, "[t]his is on the theory that the legislation affects only the remedy and not a right." This theory is inapplicable to Section 17558.5 because the time limitation it contains is not a true statute of limitations since it does not concern "the statutory period within which an action must be brought."

Section 17558.5 is governed by the general principles of statutory construction, and not those principles specific to statutes of limitations, because it is merely a condition for the payment of a reimbursement claim and does not concern a court action. "Statutes of limitations are distinguished from procedural limits governing the time in which parties must do an act because they fix the time for commencing suit." (*Life Savings Bank v. Wilhelm* (2000) 84 Cal.App.4th 174, 177). The limitation in Section 17558.5 does not limit the time in which suit may be brought, or even govern any court action. Rather, it specifies the time in which the Controller may audit a reimbursement claim.

The time limitation for audit is a condition for payment of the claim. In other words, a reimbursement claim may be paid with the condition that it is subject to audit for a particular period of time. Section 17558.5 also acts to restrict the Controller's statutory authority to audit the disbursement of all state funds.

Since Section 17558.5 is merely a restriction on a statutory right to payment of a reimbursement claim, it is governed by the well-established rule that "legislation is deemed to operate prospectively only, unless a clear contrary intent appears." (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 953). There is no indication in the 2002 amendment to Section 17558.5 that it is to operate

retroactively on claims already filed. Therefore, the amendment had only prospective effect on claims filed after its effective date of January 1, 2003.

"Subject to Audit"

As the Controller correctly points out, the phrase "subject to" in Government Code Section 17558.5 places a claimant "under the power or authority of" the Controller in respect to audits. Therefore, once the claims were no longer subject to audit - December 31, 2003 for FY 1999-00, and December 31, 2004 for FY 2000-01 - the Controller's authority to audit came to an end, along with the authority to make adjustments based on this audit. If the Controller had failed to make any adjustments by issuing a final audit report, then the time limitation is not extended simply because the audit process had begun.

A key tenet of statutory interpretation is that "statutes must be given a reasonable and common sense construction . . . that will lead to a wise policy rather than to mischief or absurdity." (*Bush v. Bright* (1968) 264 Cal.App.2d 788, 792). If the Controller's interpretation was correct (i.e., so long as an audit was begun before the time limitation ran out then it could be completed at any later time) then there would be the absurd result that the Controller could issue a final audit report years or decades later and be entitled to the adjustments it contained.

The claimant would be in a state of limbo, not knowing whether the audit had been abandoned or the Controller's Office was simply taking its time. As the process currently stands, several months pass can pass between the exit conference, issuance of the draft audit report, and issuance of the final audit report. The Controller is able to abandon an audit at any point in the process, and there is no requirement that the claimant be notified of this. Thus, there is a very real possibility for this type of uncertainty to arise if the Controller's interpretation were correct.

Among the important purposes of statutes of limitations are protecting settled expectations, giving stability to transactions, and encouraging the prompt enforcement of substantive law. (*Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 872). The Controller's interpretation of Section 17558.5 frustrates these important purposes by creating uncertainty and giving the Controller the ability to indefinitely delay the completion of an audit.

Therefore, the reasonable interpretation is that the reimbursement claim is only subject to any adjustments that are the result of an audit if the audit is completed before the time limitation for audit has run out. In this case, that would mean that the FY 1999-00 and FY 2000-01 claims were beyond the time limitation when the Controller completed the audit by issuing the final audit report on January 7, 2005, and any resulting adjustments are void.

Part III. Certification

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this submission is true and complete to the best of my own knowledge or information or belief, and that the attached documents are true and correct copies of documents received from or sent by the state agency which originated the document.

Executed on July 13, 2009 at Sacramento, California, by



Keith B. Petersen, President
SixTen & Associates

Attachments:

- Exhibit "A" *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532
- Exhibit "B" Letter from the District to the Controller, August 31, 2004
- Exhibit "C" *Evelyn, Inc. v. California Emp. Stab. Com.* (1957) 48 Cal.2d 588
- Exhibit "D" *Life Savings Bank v. Wilhelm* (2000) 84 Cal.App.4th 174
- Exhibit "E" *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942
- Exhibit "F" *Bush v. Bright* (1968) 264 Cal.App.2d 788
- Exhibit "G" *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861

C: Kathy Blackwood, Chief Financial Officer
San Mateo County Community College District
3401 CSM Drive
San Mateo, CA 94402

Jim Spano, Division of Audits
State Controller's Office
300 Capitol Mall, Suite 1850
Sacramento, CA 95814

1 **DECLARATION OF SERVICE**

2
3 Re: Incorrect Reduction Claim 05-4206-I-04
4 San Mateo County Community College District
5 Health Fee Elimination
6

7 I declare:

8
9 I am employed in the office of SixTen and Associates, which is the appointed
10 representative of the above named claimant. I am 18 years of age or older and not a
11 party to the entitled matter. My business address is 3841 North Freeway Blvd, Suite
12 170, Sacramento, CA 95834.
13

14 On the date indicated below, I served the attached letter dated July 13, 2009, to Paula
15 Higashi, Executive Director, Commission on State Mandates, to:

16
17 Paula Higashi, Executive Director
18 Commission on State Mandates
19 980 Ninth Street, Suite 300
20 Sacramento, CA 95814

21
22 Jim Spano, Division of Audits
23 State Controller's Office
24 300 Capitol Mall, Suite 1850
25 Sacramento, CA 95814

26
27 Kathy Blackwood, Chief Financial Officer
28 San Mateo County Community College District
29 3401 CSM Drive
30 San Mateo, CA 94402

31 **U.S. MAIL:** I am familiar with the business
32 practice at SixTen and Associates for the
33 collection and processing of
34 correspondence for mailing with the
35 United States Postal Service. In
36 accordance with that practice,
37 correspondence placed in the internal mail
38 collection system at SixTen and
39 Associates is deposited with the United
40 States Postal Service that same day in the
41 ordinary course of business.

42 **FACSIMILE TRANSMISSION:** On the
43 date below from facsimile machine
44 number (858) 514-8645, I personally
45 transmitted to the above-named person(s)
to the facsimile number(s) shown above,
pursuant to California Rules of Court
2003-2008. A true copy of the above-
described document(s) was(were)
transmitted by facsimile transmission and
the transmission was reported as
complete and without error.

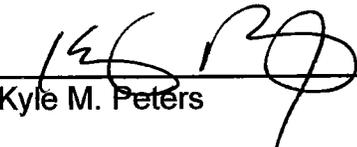
46 **OTHER SERVICE:** I caused such
47 envelope(s) to be delivered to the office of
48 the addressee(s) listed above by:

49 A copy of the transmission report issued
50 by the transmitting machine is attached to
51 this proof of service.

52 _____
(Describe)

53 **PERSONAL SERVICE:** By causing a true
54 copy of the above-described document(s)
55 to be hand delivered to the office(s) of the
addressee(s).

56 I declare under penalty of perjury under the laws of the State of California that the
57 foregoing is true and correct and that this declaration was executed on July 13, 2009, at
58 Sacramento, California.

59
60 
61 _____
Kyle M. Peters



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Cases Citing This Case

Daniels v. Department of Motor Vehicles (1983) 33 Cal.3d 532 , 189 Cal.Rptr. 512; 658 P.2d 1313

[L.A. No. 31586. Supreme Court of California. March 10, 1983.]

WILFRED ANTHONY DANIELS, Plaintiff and Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Defendant and Respondent

(Opinion by Broussard, J., expressing the unanimous views of the court.) [33 Cal.3d 533]

COUNSEL

James Gaus for Plaintiff and Appellant.

George Deukmejian, Attorney General, and Thomas Scheerer, Deputy Attorney General, for Defendant and Respondent.

OPINION

ROUSSARD, J.

In this appeal we consider whether an accident report filed pursuant to Vehicle Code section 16000 fn. 1 is sufficient without additional evidence to support the suspension of a driver's license in a formal Department of Motor Vehicles (D.M.V.) hearing.

In May 1979, the D.M.V. received what is known as an SR 1 report fn. 2 completed and signed by Carlita Lynn Dorham. The report described an accident [33 Cal.3d 535] that allegedly occurred April 25, 1979, involving a vehicle owned and operated by Dorham and another vehicle owned and operated by licensee Daniels.

On October 10, 1979, the D.M.V. issued an order of suspension of Daniels' driver's license for his failure to file an accident report and proof of financial responsibility. Daniels requested a formal hearing pursuant to section 16075. At the hearing, the referee produced and received into evidence the SR 1 report. The attorney for Daniels objected to the report on the grounds that it contained hearsay and that it had not been authenticated. The objection was overruled on the theory that the report was admissible under section 14108, which provides that at formal hearings "... the department shall consider its official records and may receive sworn testimony"

Daniels was called as a witness by the referee, but on advice of counsel, refused to respond when asked whether he was involved in the accident. He asserted that testifying would tend to incriminate him in the commission of a crime.

The referee found that Daniels had been in an accident involving property damage in excess of \$350, and that he did not have insurance or other type of financial responsibility covering the accident in effect at the time that it occurred.

Following the recommendation of the referee, the D.M.V. issued its order of suspension January 28, 1980. Daniels' petition for writ of mandate was denied by the superior court. The Court of Appeal reversed.

The events underlying the companion case of Himelspach v. Department of Motor Vehicles (1983) post, at page 542 [189 Cal.Rptr. 518, 658 P.2d 1319], are procedurally similar except that Himelspach did not personally attend the formal hearing. However, she was represented by counsel who, coincidentally, is the same attorney who represents Daniels. The Court of Appeal affirmed the superior court's denial of a petition for writ of mandate. We granted a hearing to resolve the conflicting decisions of the Courts of Appeal.

The California Financial Responsibility Law (Veh. Code, § 16000 et seq.) requires drivers of motor vehicles to be self-insured, to have insurance, or to be otherwise financially responsible for damages caused by accidents. A driver involved in an accident causing property damage over \$500 (formerly \$350) or death or personal injury must report such accident to the D.M.V. on an approved SR 1 report form. Failure to report an accident covered by section 16000 results in a notice of intent to suspend. The notice advises the driver or owner of his or her right to a formal or an informal hearing on the matter. (See §§ 14100 et seq. and 16075.) Those sections provide the procedural parameters [33 Cal.3d 536] for the hearing. Those procedural matters not covered by the Vehicle Code are governed by the Administrative Procedure Act (Gov. Code, § 11500 et seq.; see Veh. Code, § 14112). The question in issue here is whether the procedure whereby the D.M.V. bases its order suspending a license solely on the SR 1 report is authorized by statute and complies with the dictates of due process. For the reasons that follow, we conclude that, when the licensee requests a hearing, the use of the SR 1 report as the sole basis for suspension of a license under the Financial Responsibility Law is not authorized by statute. Because we so conclude, we do not decide whether the procedure of basing suspensions solely on the SR 1 report violates due process.

[1] When an administrative agency initiates an action to suspend or revoke a license, the burden of proving the facts necessary to support the action rests with the agency making the allegation. Until the agency has met its burden of going forward with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations or otherwise respond. *La Prade v. Dept. of Water & Power* (1945) 27 Cal.2d 47, 51 [162 P.2d 13]; *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113 [179 Cal.Rptr. 351]; *Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573 [103 Cal.Rptr. 306]. [2] The mere fact that the licensee has the right to subpoena witnesses (§ 14104.5) does not relieve the D.M.V. of meeting its burden of producing competent evidence supporting a suspension. Thus, in this case, the licensee had no duty to testify or otherwise rebut the allegations at the hearing until the D.M.V. made a prima facie showing by competent evidence that the licensee was involved in an accident that required the filing of an SR 1 report.

[3] It is well recognized that the private interest at stake in this case -- the right to retain a driver's license absent competent proof of a violation of the law -- is a substantial one. (*Burkhart v. Department of Motor Vehicles* (1981) 124 Cal.App.3d 99, 108 [177 Cal.Rptr. 175]; see *Dixon v. Love* (1977) 431 U.S. 105 [52 L.Ed.2d 172, 97 S.Ct. 1723].) Nevertheless, the D.M.V. contends that the societal interest in having an expeditious and inexpensive hearing outweighs the interest of the licensee. Whatever the weight given to the interest in an expeditious hearing, it is not so great as to allow the deprivation of a property interest absent a showing by substantial competent evidence of facts supporting a suspension.

On this point, the United States Supreme Court has noted that the "assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (*Edison Co. v. Labor Board* (1938) 305 U.S. 197, 230 [83 L.Ed. 126, 140, 59 S.Ct. 206].) This court has also taken the position that "[t]here must be substantial evidence to support such a board's ruling, and hearsay, unless [33 Cal.3d 537] specially permitted by statute, is not competent evidence to that end. [Citations.]" (*Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881 [129 P.2d 349, 142 A.L.R. 1383].) Thus, the suspension in this case is invalid unless it can be said that the evidence produced at the hearing was legally sufficient to support the findings.

[4] In this regard, two theories are advanced by the D.M.V. to support the use of the SR 1 report as the sole basis for findings justifying a suspension. First, it is argued that the evidence falls within a statutory exception to the hearsay rule. Second, even if the report is hearsay that would be inadmissible over objection in a civil action, it is specially permitted by statute in suspension hearings.

"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Unless otherwise provided by law, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).) There is no dispute that the SR 1 report constitutes hearsay and that it would be inadmissible in a civil action unless it meets the requirements of a recognized exception to the hearsay rule. The D.M.V. asserts that the report falls within the business record exception provided by Evidence Code section 1271. That statute makes admissible evidence of a writing made as a record of an event when (a) the writing was made in the regular course of business; (b) the writing was made at or near the time of the act, condition or event, (c) the custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) the source of information and method and time of preparation were such as to indicate its trustworthiness.

Two of the four requirements of Evidence Code section 1271 are met in this case. The report was made shortly after the accident, and the fact that the report is made under penalty of perjury and pursuant to a legal duty tends to indicate its trustworthiness. However, the D.M.V. as custodian, upon receipt of the form, is in no position to testify to its identity and the mode of its preparation. Most significant, though, is the fact that the report is not made in the regular course of business.

The D.M.V. argues that the report is made in the regular course of business because it is required by law (§ 16000) and "it is the regular course of business for the Department of Motor Vehicles to receive such reports." This argument, however, misconstrues the nature of the first requirement of the business records exception. Although it may be the regular course of business for the D.M.V. to receive the report, it undoubtedly is not in the regular course of business for the citizen author to make to make such a report. And, it is this aspect of the report that bears on the trustworthiness factor contemplated by this [33 Cal.3d 538] exception to the hearsay rule. Thus, we conclude that the SR 1 report does not meet the requirements of the business record exception to the hearsay rule.

The D.M.V. argues, however, that even if the report is hearsay that would be inadmissible in a civil proceeding, the SR 1 is an official record of the D.M.V. and that its admission in the suspension hearing is specially provided by statute.

The D.M.V. contends that the specific authority for use of the SR 1 report in a suspension hearing is found in the sections of the Vehicle Code dealing with the procedure to be followed in formal and informal hearings. In particular, the D.M.V. contends that the matter of admission of the SR 1 report is "covered" by section 14108, which provides in pertinent part that at formal hearings "... the department shall consider its official records and may receive sworn testimony" Section 14112, provides that "[a]ll matters in a formal hearing not covered by this chapter shall be governed, as far as applicable, by the provisions of the Government Code relating to administrative hearings"

If the matter is not "covered" by the Vehicle Code, the D.M.V. appears to concede that the issue is governed by Government Code section 11513, which provides in relevant part that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

The question thus becomes whether the language "shall consider its official records" is a clear legislative authorization to allow use of the report as the sole basis to support a license suspension. We conclude that section 14108, while allowing consideration of the official records of the D.M.V., does not provide authority for allowing the SR 1 to form the sole basis for a license suspension. fn. 3

The legislative mandate of Government Code section 11513 against sole reliance on hearsay evidence is emphatic; the language of section 14108 fails to express a clear legislative intent to supersede section 11513. fn. 4 Unlike statutes [33 Cal.3d 539] that clearly authorize exceptions to the hearsay rule, fn. 5 section 14108 does not reflect any factors providing the necessary competency, reliability, and trustworthiness that would transform the SR 1 report into legally sufficient evidence. That the report is made an "official record" of the D.M.V. does not suffice to create a greater degree of competency, reliability or trustworthiness in the preparation of the report. Particularly in this case, the form, as filed, lacks the requisite assurance of reliability that must be demanded before it will support a finding. In this case, for example, there is no claim of bodily injury. The section of the form providing for a "Cost Estimate by a Garageman" is incomplete. The estimate by the author is of \$400 damage, but there is no mention of any expert opinion or other basis for concluding that there was in fact that amount of damage. The amount of property damage is crucial because no duty arises to prepare the report or otherwise rebut the claim of facts authorizing suspension unless, in the absence of bodily injury, the amount of damages exceeds the statutory trigger point.

The D.M.V. contends that the rationale of *Burkhart v. Department of Motor Vehicles*, supra, 124 Cal.App.3d 99, supports reliance solely on the SR 1 report. In *Burkhart* the court held that the police officer's written statement admitted in a license suspension hearing under the implied consent law (§ 13353) [33 Cal.3d 540] was sufficient in itself to support a finding of failure to complete a chemical test, and that the procedure did not violate due process. *Burkhart* was arrested for driving under the influence of alcohol. (§ 23102, subd. (a).) On the same date the arresting officer executed a sworn statement under section 13353 to the effect that *Burkhart* had refused to take any chemical test as required by that section. Upon notice of intent to suspend his license, *Burkhart* requested a hearing pursuant to section 14107. The hearing was postponed twice because of the failure of the arresting officer to appear, and finally an informal hearing was held without the presence of the officer. At the hearing, the referee introduced the officer's sworn statement over objection of *Burkhart's* counsel. *Burkhart* and his wife contested several portions of the officer's statement; nevertheless, the referee found against *Burkhart*. The superior court held that the officer's statement was not sufficient prima facie evidence of any matter as to which there is conflicting evidence. In holding to the contrary, the Court of Appeal recognized that due process required a balancing test of the various interests involved, but concluded that the presence of the officer would not substantially enhance the reliability

of the hearing process, and the governmental interest and fiscal and administrative burdens involved outweighed requiring the state to produce the officer at the hearing.

In reaching that conclusion, Burkhart relied on Fankhauser v. Orr (1968) 268 Cal.App.2d 418 [74 Cal.Rptr. 61]. The Fankhauser court held that the report of the officer in an implied consent hearing was hearsay but that it was made admissible by section 14108. However, Fankhauser was a case where the licensee testified at the hearing, and his testimony supported the officer's written statement regarding probable cause to stop him and did not controvert the other averments of the officer's sworn statement. (268 Cal.App.2d at p. 423.) In addition, Burkhart specifically recognized but refused to follow contrary authority that declined to elevate the officer's written statement to the status of prima facie evidence if objected to or in conflict with other evidence. (See August v. Department of Motor Vehicles (1968) 264 Cal.App.2d 52 [70 Cal.Rptr. 172]; Fallis v. Department of Motor Vehicles (1968) 264 Cal.App.2d 373 [70 Cal.Rptr. 595].)

The court in August found that there was no dispute as to the existence of the facts upon which the D.M.V. suspended August's license under section 13353, and that August had failed to object to the introduction of the officer's report or request cross-examination of the officer at the informal hearing. Nevertheless, the court suggested that due process required providing the right to cross-examination when the licensee requests a hearing and contests the evidence presented by the agency. (264 Cal.App.2d at p. 60.) A stronger case for the right to cross-examine exists where, as here, the suspension is based on the uncorroborated report of a citizen who by chance happens to be involved in an accident. [33 Cal.3d 541]

Assuming, arguendo, the viability of the conclusion of Burkhart in the implied consent context, that case does not necessarily dispose of the question in this case. The result in Burkhart could be justified under the theory that the report filed by an officer under section 13353 would qualify under Evidence Code section 1271 as a business record or under Evidence Code section 1280 as an official record. Unlike the driver involved in an automobile accident, the statement under section 13353 is made by the officer in the regular course of his or her "business." In addition, the officer's report is a writing "made by and within the scope of duty of a public employee," and meets the other criteria of Evidence Code section 1280, and would thus qualify under that statutory exception to the hearsay rule as well. Whether these distinctions justify sole reliance on the officer's report in an implied consent hearing we need not now decide.

The SR 1 report filed in this case does not in itself reflect the competency, reliability, and trustworthiness necessary to permit use of the report as the sole basis for a finding supporting a license suspension. In view of the importance of the right affected and the lack of legislative authorization allowing sole reliance on the SR 1 report, we hold that, when the licensee requests a hearing, the SR 1 report is in itself insufficient to establish a prima facie showing of the facts supporting the suspension of a driver's license.

The judgment of the trial court is reversed and the cause is remanded to the trial court with directions to grant Daniels' petition and issue a peremptory writ commanding the D.M.V. to set aside its order of suspension and proceed in accordance with the views expressed herein.

Bird, C. J., Mosk, J., Richardson, J., Kaus, J., Reynoso, J., and Dalsimer, J., concurred.

FN 1. All statutory references are to the Vehicle Code unless otherwise noted. At the time of the accident, section 16000 provided: "The driver of a motor vehicle which is in any manner involved in an accident originating from the operation of a motor vehicle on any street or highway which accident has resulted in damage to the property of any one person in excess of three hundred fifty dollars (\$350) or in bodily injury or in the death of any person shall within 15 days after the accident, report the accident on a form approved by the department to the office of the department of Sacramento, subject to the provisions of this chapter. A report shall not be required in the event that the motor vehicle involved in the accident was owned or leased by or under the direction of the United States, this state, or any political subdivision of this state or municipality thereof." Since the accident, the minimum monetary amount has been increased to \$500.

FN 2. The report required to be filed by section 16000 is designated by the D.M.V. as an SR 1 report, and for convenience shall be referred to as such in this opinion.

FN 3. The mere admissibility of evidence does not necessarily confer the status of "sufficiency" to support a finding absent other competent evidence. "Admissibility is not the equivalent of evaluation; the former makes certain concessions in the interest of full and complete discovery while the latter, in the interest of fairness, withholds legal sanction to evidence found not to be trustworthy. Unlike the common practice in judicial proceedings, the fact that evidence may be admissible does not herefore guarantee the sufficiency of such evidence to sustain a finding." (Collins, Hearsay and the Administrative Process: A Review and Reconsideration of the State of the Law of Certain Evidentiary Procedures Applicable in California Administrative Proceedings (1976) 8 Sw.U.L.Rev. 577, 591 (hereafter cited as Hearsay and the Administrative Process).)

FN 4. Other statutory schemes authorizing admission of hearsay evidence in administrative hearings do so unequivocally. For example, the statutes governing procedure in a workers' compensation hearing quite specifically authorize the admission and sufficiency of certain evidence. Labor Code section 5703 provides: "The appeals board may receive evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:

"(a) Reports of attending or examining physicians.

"(b) Reports of special investigators appointed by the appeals board or a referee to investigate and report upon any scientific or medical question.

"(c) Reports of employers, containing copies of timesheets, book accounts, reports, and other records properly authenticated.

"(d) Properly authenticated copies of hospital records of the case of the injured employee.

"(e) All publications of the Division of Industrial Accidents.

"(f) All official publications of state and United States governments.

"(g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon such issues." (*Italics added.*)

Labor Code section 5708 provides: "All hearings and investigations before the appeals board or a referee are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter." (*Italics added.*)

Labor Code section 5709 provides: "No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure." (*Italics added.*) Even in this context, however, the "use" of hearsay evidence does not necessarily sanction sole reliance on uncorroborated hearsay. (See *Hearsay and the Administrative Process*, *supra*, fn. 132 at p. 603.)

FN 5. See, for example, Evidence Code section 1271 (business records); Evidence Code section 1280 (official records); Evidence Code section 1220 (admissions of a party); Evidence Code section 1240 (spontaneous statements).

[Return to Top](#)

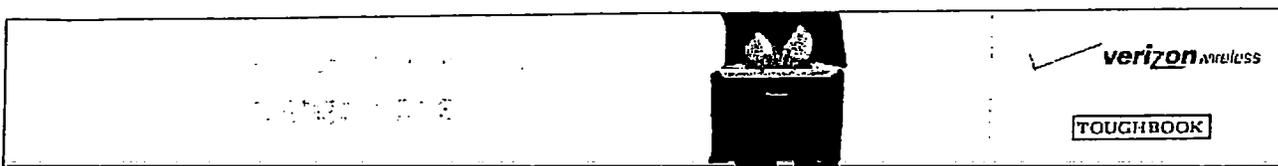
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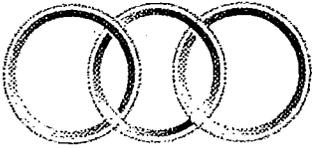
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**SAN MATEO COUNTY
 COMMUNITY COLLEGE DISTRICT**

Associate Chancellor

August 31, 2004

Jim Venneman, CPA
 Audit Manager
 Division of Audits
 State Controller's Office
 P.O. Box 942850
 300 Capitol Mall, Ste. 518
 Sacramento, CA 95814

Re: San Mateo Community College District, Health Fees Mandated Cost Audit

Dear Mr. Venneman:

Below is an explanation for the distribution and claiming of salaries & benefits for Gloria D'Ambra, Dee Howard, Ernest Rodriguez and Donna Elliott. I have also attached copies of some of the payroll and personnel data. You should already have the attachments, but I have circled the pertinent items. Please let me know if you have any further questions.

Both Dee Howard and Ernest Rodriguez are full-time faculty assigned to Health Services. Their regular pay was claimed as part of the mandated cost claim. In addition to their regular assignments, both of these faculty worked during the summer and/or during the school year in overload assignments. These assignments can be readily seen on the payroll registers provided by looking at the account code structure of the payments charged:

Dee Howard September 2001

| | | | | Claimed | Not Claimed |
|--------------|------|---------------------------|------------------------------|-----------|-------------|
| 10004 | 4340 | 1251 | 643000 | \$4318.47 | |
| General Fund | CSM | Counselor Salary-Reg | Health Services | | |
| 10004 | 4340 | 1451 | 631000 | | \$997.18 |
| General Fund | CSM | Counselor Salary-Overload | Counseling Services | | |
| 31002 | 4340 | 1451 | 646000 | | 655.68 |
| DSPS | CSM | Counselor Salary-Overload | Handicapped Student Services | | |
| 10004 | 4340 | 1451 | 631000 | | 382.48 |
| General Fund | CSM | Counselor Salary-Overload | Counseling Services | | |
| | | Total September 2001 pay | | \$4318.47 | \$2035.34 |

If you look at the payroll registers for all three years, the reason that varying percentages of pay was charged to the claim becomes apparent. For Ernest Rodriguez, in March, 2002, he took on a teaching assignment which is reflected in the account code 10003-3413-1110-201000 (General Fund-Cañada-Teaching Faculty-Psychology). This was not charged to the claim.

A similar analysis of Gloria D'Ambra shows that for 1999-2000, she had some overtime pay that was charged to 31031-4339-2341-649001 (CalWORKS-CSM-Classified Overtime-Student Personnel Services Programs & Services). That pay was not charged to the claim.

For Donna Elliott, the coding to program 543000 instead of 643000 appears to be the result of a poor quality typewriter ribbon. The attached assignment clearly shows health services fee, but, as you can see, the quality of the ribbon was poor and the program code appears to be 543000. This error was corrected on the personnel action form dated January 10, 2001. All of Donna Elliott's salary should have been charged to 643000 and should have been claimed on the mandated cost claim.

I hope this helps.

Sincerely,



Kathy Blackwood
Chief Financial Officer
San Mateo Community College District

Cc: Jim Keller
Greg Wedner

RODRIGUEZ, ERNEST

SSN: XXX-XX-6787

FOR THE PERIOD: 07-30-01 THRU 06-30-02

CONTRACT: 75,336,000 ACTUAL: 75,336,000 DAYS: 175 PCT: 100.00 BASE RET CD: 13X
HIRE: 09-01-70 ANNV: RET START: 01-08-89 RET WITHDRAW:

R C R F S U W
TYP C C A M D N PLN H ACCOUNT CODE
REG 1 3 N X N Y 114 C 01/10003/3345/1255/643000

PRC PRTP DATE SEQ GROSS TSA/DFC FED TAX STATE TAX FICA MEDICARE SDI RETIRE TOT GRS ADJUST TOT GRS UNITS RETIRE W-COMP WITHHOLD CHECK #
CRT 1 02-28-02 7,533.60 0.00 863.99 371.68 0.00 0.00 0.00 602.69 1,714.50 3,980.74 0.00 0.00 996967

CONTRACT: 75,336,000 ACTUAL: 75,336,000 DAYS: 175 PCT: 100.00 BASE RET CD: 13X
HIRE: 09-01-70 ANNV: RET START: 01-08-89 RET WITHDRAW:

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REG 1 3 N X N Y 114 C 01/10003/3413/1110/200100

REG 1 3 N X N Y 114 C 01/10003/3345/1255/643000

PRC PRTP DATE SEQ GROSS TSA/DFC FED TAX STATE TAX FICA MEDICARE SDI RETIRE TOT GRS ADJUST TOT GRS UNITS RETIRE W-COMP WITHHOLD CHECK #
CRT 1 03-28-02 7,533.60 0.00 863.99 371.68 0.00 0.00 0.00 602.69 1,714.50 3,980.74 0.00 0.00 109332

CONTRACT: 75,336,000 ACTUAL: 75,336,000 DAYS: 175 PCT: 100.00 BASE RET CD: 13X
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REG 1 3 N X N Y 114 C 01/10003/3413/1110/200100

REG 1 3 N X N Y 114 C 01/10003/3345/1255/643000

PRC PRTP DATE SEQ GROSS TSA/DFC FED TAX STATE TAX FICA MEDICARE SDI RETIRE TOT GRS ADJUST TOT GRS UNITS RETIRE W-COMP WITHHOLD CHECK #
CRT 1 04-30-02 7,533.60 0.00 863.99 371.68 0.00 0.00 0.00 602.69 1,714.50 3,980.74 0.00 0.00 121123

CONTRACT: 75,336,000 ACTUAL: 75,336,000 DAYS: 175 PCT: 100.00 BASE RET CD: 13X
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REG 1 3 N X N Y 114 C 01/10003/3345/1255/643000

PRC PRTP DATE SEQ GROSS TSA/DFC FED TAX STATE TAX FICA MEDICARE SDI RETIRE TOT GRS ADJUST TOT GRS UNITS RETIRE W-COMP WITHHOLD CHECK #
CRT 1 05-31-02 7,533.60 0.00 863.99 371.68 0.00 0.00 0.00 602.69 1,714.50 3,980.74 0.00 0.00 134621

teaching assignment

Claimed

not claimed

EMPLOYEE EARNINGS

FOR THE PERIOD:

SAN MATEO CO COMMUNITY COLLEGE DISTRICT

D'AMBRA, GLORIA M SSN: XXX-XX-0713

ACTUAL: HIRE: 07-01-83 ANNIV: PCT: BASE RET CD: 111 FED: M01 STATE: M01 0 ADD'L-FED
RET START: 01-08-89 RET WITHDRAW: RET WITHDRAW: ADDL RET:

R C R F S U W
TYP C C A M D N PLN H ACCOUNT CODE
REG 2 1 N 1 N Y 313 B 03/39030/4339/2130/643000

COMP 1 PAY RATE 2702.33 GROSS 2702.33 ADJUST *Claimed* 2702.33 UNITS 179.83 RETIRE 179.83
FICA MEDICARE 39.18 SDI 0.00 RETIRE 179.83 VOL DEDS 0.00 NET P 1,997.
FED TAX 279.82 STATE TAX 38.60 FICA 167.54 MEDICARE 39.18 SDI 0.00 RETIRE 179.83

ACTUAL: HIRE: 07-01-83 ANNIV: PCT: BASE RET CD: 111 FED: M01 STATE: M01 0 ADD'L-FED
RET START: 01-08-89 RET WITHDRAW: RET WITHDRAW: ADDL RET:

R C R F S U W
TYP C C A M D N PLN H ACCOUNT CODE
REG 2 1 N 1 N Y 313 B 03/39030/4339/2130/643000

COMP 1 PAY RATE 2702.33 GROSS 2702.33 ADJUST *Claimed* 2702.33 UNITS 179.83 RETIRE 179.83
FICA MEDICARE 39.18 SDI 0.00 RETIRE 179.83 VOL DEDS 30.50 NET P 1,966.
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RET START: 01-08-89 RET WITHDRAW: RET WITHDRAW: ADDL RET:

R C R F S U W
TYP C C A M D N PLN H ACCOUNT CODE
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R C R F S U W
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FICA MEDICARE 42.08 SDI 0.00 RETIRE 179.83 VOL DEDS 30.50 NET P 2,113.
FED TAX 309.75 STATE TAX 46.57 FICA 179.92 MEDICARE 42.08 SDI 0.00 RETIRE 179.83

ACTUAL: HIRE: 07-01-83 ANNIV: PCT: BASE RET CD: 111 FED: M01 STATE: M01 0 ADD'L-FED
RET START: 01-08-89 RET WITHDRAW: RET WITHDRAW: ADDL RET:

Overtime, differed 4 grant

SSN: XXX-XX-0713

FOR THE PERIOD:

CONTRACT: ACTUAL:

DAYS: HIRE: 07-01-83 ANNIV: PCT:

BASE RET CD: 111 FED: M01 STATE: M01 0 ADD'L-FED
RET START: 01-08-89 RET WITHDRAW: ADDL RET:

R C R F S U W
TYP C C A M D N PLN H ACCOUNT CODE
REG 2 1 N 1 N Y 313 B 03/39030/4339/2130/643000

COMP 1 PAY RATE 2783.50 GROSS 2783.50 ADJUST 0.00 TOT GRS 2783.50 UNITS 8.00 RETIRE 185.52

OT X X N 1 N Y 319 B 03/31031/4339/2341/649001

4 25.700 205.60 not claimed 205.60 8.00

PRC PRTYP DATE SEQ GROSS 2,989.10 TSA/DFC 0.00 FED TAX 322.83 STATE TAX 50.06 FICA MEDICARE 43.34 SDI 0.00 RETIRE 185.52 VOL DEDS 30.50 NET P 2,171.

CONTRACT: ACTUAL:

DAYS: HIRE: 07-01-83 ANNIV: PCT:

BASE RET CD: 111 FED: M01 STATE: M01 0 ADD'L-FED
RET START: 01-08-89 RET WITHDRAW: ADDL RET:

R C R F S U W
TYP C C A M D N PLN H ACCOUNT CODE
REG 2 1 N 1 N Y 313 B 03/39030/4339/2130/643000

COMP 1 PAY RATE 2783.50 GROSS 2783.50 ADJUST 0.00 TOT GRS 2783.50 UNITS 8.00 RETIRE 185.52

RET 1 1 N 1 N Y 313 B 03/39030/4339/2130/643000

1 2783.500 324.28 } not claimed 324.28 22.70

RET X X N 1 N Y 319 B 03/31031/4339/2341/649001

4 25.700 12.72 12.72

PRC PRTYP DATE SEQ GROSS 3,120.50 TSA/DFC 0.00 FED TAX 341.86 STATE TAX 53.45 FICA MEDICARE 45.25 SDI 0.00 RETIRE 208.22 VOL DEDS 30.50 NET P 2,247.

CONTRACT: ACTUAL:

DAYS: HIRE: 07-01-83 ANNIV: PCT:

BASE RET CD: 111 FED: M01 STATE: M01 0 ADD'L-FED
RET START: 01-08-89 RET WITHDRAW: ADDL RET:

R C R F S U W
TYP C C A M D N PLN H ACCOUNT CODE
REG 2 1 N 1 N Y 313 B 03/39030/4339/2130/643000

COMP 1 PAY RATE 2783.50 GROSS 2783.50 ADJUST 0.00 TOT GRS 2783.50 UNITS 8.00 RETIRE 185.52

PRC PRTYP DATE SEQ GROSS 2,783.50 TSA/DFC 0.00 FED TAX 291.31 STATE TAX 39.97 FICA MEDICARE 40.36 SDI 0.00 RETIRE 185.52 VOL DEDS 30.50 NET P 2,023.

CLASSIFIED PERSONNEL ACTION FORM

PART I: This Section to be completed for all Personnel Actions:

X SKYLINE ___ CSM ___ CANADA ___ CHANC OFC

Today's Date: 3-5-2000

564-58-5062
Social Security Number

Elliott, Donna
Last Name, First Name, MI

Office Assistant II

2333

Admissions & Records

Position/Suffix

Position Title

Organization #

Organization Title

PART II: Check below and complete the appropriate information pertaining to:

X NEW EMPLOYMENT ___ REASSIGNMENT ___ RE-EMPLOYMENT ___ TRANSFER ___ LABOR DISTRIBUTION
___ OTHER CHANGE (Reason:)

Classified
Salary Schedule

18
Range

1
Step

48
Percent of Full-Time

March 23, 2000
Effective Date

Shiela Claxton

Name of Previous Incumbent (if applicable)

List Months NOT Worked if less than 12 months/year

| | Start Time | Lunch/Dinner | End Time | Total Hours | (List Working Hours if other than Monday thru Friday, 8:00 a.m. to 4:30 p.m.) |
|-----------|------------|--------------|----------|-------------|--|
| Monday | 9:00 | to | 1:00 | 4.0 | |
| Tuesday | 9:00 | to | 1:00 | 4.0 | |
| Wednesday | 9:00 | to | 1:00 | 4.0 | |
| Thursday | 9:00 | to | 1:00 | 4.0 | |
| Friday | 10:00 | to | 12:00 | 2.00 | |
| Saturday | | to | | | |
| Sunday | | to | | | |

| Fund | Orgn | Acct | Prog | Pat | Grant/Funding Source (if applicable) | Grant Expir Date |
|-------|------|------|--------|-----|--------------------------------------|------------------|
| 39030 | 2333 | 2130 | 543000 | 100 | Health Services Fee | N/A |

TOTAL Must Total 100%

PART III: Check below and complete the appropriate information pertaining to:

___ RESIGNATION ___ RETIREMENT ___ TERMINATION - DISMISSAL ___ TERMINATION - LAYOFF

Last Working Day: Last Paid Day:

PART IV: Check below and complete the appropriate information pertaining to Leaves (over 30 days requires Board approval):

___ LONG-TERM ILLNESS (Work-Related? ___) ___ PREGNANCY DISABILITY ___ PERSONAL BUSINESS

DETAIL - Replaced Name: Position # / Title:
Absence Due To: #Days on Detail Assignment:
Detail Dates:
___ OTHER (Explain:)

PART V:

| | Name (print) | Signature | Date |
|-------------------------|------------------------|-----------|----------|
| Immediate Supervisor | Dennis Arreola | | 3-8-2000 |
| Org. Administrator | | | |
| Vice-President | Rosemary Ybarra Garcia | | 3-8-00 |
| Operations Office | Eloisa Briones | | 3-8-00 |
| Chief Executive Officer | Dr. Frances White | | 3-18-00 |

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CLASSIFIED PERSONNEL ACTION FORM

PART I: This Section to be completed for all Personnel Actions:

X SKYLINE CSM CAÑADA CHANC OFC

Today's Date: January 10, 2001

564-58-5062

Elliott, Donna

Social Security Number

Last Name, First Name, MI

20 0182 00

Position/Suffix

Office Assistant II

2333 Organization #

Admissions & Records Organization Title

PART II: Check below and complete the appropriate information pertaining to:

NEW EMPLOYMENT REASSIGNMENT X RE-EMPLOYMENT TRANSFER LABOR DISTRIBUTION OTHER CHANGE (Reason):

Classified Salary Schedule

18 Range

2 Step

100% Percent of Full-Time

January 25, 2001 Effective Date

None

Name of Previous Incumbent (if applicable):

List Months NOT Worked if less than 12 months/year

Table with columns: Day, Start Time, Lunch/Dinner, End Time, Total Hours. Includes working hours for Monday through Sunday.

Table with columns: Fund, Organ, Acct, Prog, Pot, Grant/Funding Source, Grant Expir Date. Includes values like 59030, 2333, 2130, 54300, 100, Health Services Fee, N/A.

PART III: Check below and complete the appropriate information pertaining to:

RESIGNATION RETIREMENT TERMINATION - DISMISSAL TERMINATION - LAYOFF

Last Working Day: Last Paid Day:

PART IV: Check below and complete the appropriate information pertaining to Leaves (over 30 days requires Board approval):

LONG-TERM ILLNESS (Work-Related?) PREGNANCY DISABILITY PERSONAL BUSINESS

DETAIL - Replaced Name: Position # / Title: Absence Due To: #Days on Detail Assignment: Detail Dates: OTHER (Explain):

PART V:

Table with columns: Name (print), Signature, Date. Lists Immediate Supervisor (Dennis Arreola), Org. Administrator, Vice-President (Rosemary Ybarra Garcia), Operations Office (Eloisa Briones), and Chief Executive Officer (Dr. Frances White).

Forward the original of this form to the Chancellor's Office of Personnel Services. Please call Personnel Services at extension 6555 for information concerning deadline dates for Board Reports, Payroll processing, and other required follow-up procedures.

Handwritten initials and date 3/7/01

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Evelyn, Inc., v. California Emp. Stab. Com. , 48 Cal.2d 588

[Sac. No. 6673. In Bank. May 24, 1957.]

EVELYN, INCORPORATED (a Corporation) et al., Appellants, v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al., Respondents.

COUNSEL

Homer E. Geis and Robert A. Waring for Appellants.

Edmund G. Brown, Attorney General, Irving H. Perluss, Assistant Attorney General, and William L. Shaw, Deputy Attorney General, for Respondents.

OPINION

SHENK, J.

This is an appeal by the plaintiffs from a judgment for the defendants in an action to recover unemployment insurance taxes paid under protest.

The plaintiff corporation, Evelyn, Incorporated, was organized in 1939 and the plaintiffs Evelyn Morris and Ernest Goveia became the sole stockholders. Thereafter, and during [48 Cal.2d 590] the years involved, 1942 through 1945, they conducted a dry cleaning business. They were elected as officers of the corporation and operated and managed the business by mutual consent, but the usual corporate meetings were not held, nor were the usual corporate records maintained. However, the corporate franchise tax and both state and federal corporate income taxes were paid each year. No salaries or dividends were officially declared, but the stockholders withdrew profits on an agreed basis and advanced personal funds when necessary to maintain the business. Both business and personal bills were paid from the business income. A payroll account was kept but the names of neither Ernest Goveia nor Evelyn Morris appeared thereon. However, in filing federal income withholdings and social security returns, the corporation made payments in behalf of Mr. Goveia and Mrs. Morris as if they were employees.

Prior to 1946 the corporation made no state unemployment insurance tax returns, but beginning that year returns were made in which Mr. Goveia and Mrs. Morris were named as employees. In 1950 a deficiency assessment was imposed by the defendant California Employment Stabilization Commission for unemployment insurance contributions for the years 1942 through 1945. During the entire period involved an employer must have had a minimum of four employees in order to be subject to the provisions of the Unemployment Insurance Law. (Unemployment Insurance Act, § 9, as amended Stats. 1937, ch. 740, § 1, p. 2055; Stats. 1945, ch. 545, § 1, p. 1082, ch. 942, § 1, p. 1776.) Unless Mr. Goveia and Mrs. Morris are to be considered as employees during that period the corporation did not have four employees and the assessment was improperly levied.

[1] The trial court found that "each of Goveia and Morris received compensation from the corporation for their services; that such compensation received by Goveia and Morris from the corporation is wages. ..." This finding is supported by substantial evidence and the court properly concluded that the compensation received constituted "wages with reference to the provisions of the Unemployment Insurance Act and subject to tax or contribution under the said Act." To hold now as a matter of law that Mr. Goveia and Mrs. Morris were not employees would be to disregard the corporate entity to suit the convenience and purpose of the stockholders. [2] Certainly they should not be permitted to assert the employer-employee

relationship in seeking benefits conferred by law, including coverage under the federal social security program [48 Cal.2d 591] and at the same time to deny the existence of such a relationship in order to avoid obligations imposed by other laws. (See *Higgins v. Smith*, 308 U.S. 473, 477 [60 S.Ct. 355, 84 L.Ed. 406]; *California Emp. Com. v. Butte County etc. Assn.*, 25 Cal.2d 624, 636- 637 [154 P.2d 892].)

The plaintiffs next contend that the assessment or at least a portion thereof was barred by the statute of limitations. As stated, the tax was assessed in 1950 for taxes due for the years 1942 through 1945. The law in effect prior to September 15, 1945, provided for an assessment against employer units which had failed to make the required returns, but limited such assessments as follows: "... provided, that in the absence of an intent to evade the provisions of this act such assessment must be made and notification given to the employer as hereinafter provided within three years from the date on which the contribution liability included in the assessment became due." (Gen. Laws, Act 8780d, § 45.5; Stats., 1943, p. 3054.) In 1945 section 45.5 was amended, effective September 15, 1945, to provide in subparagraph (f) as follows: "Except in the case of failure without good cause to file a return, fraud or intent to evade this act or the authorized rules and regulations, every notice of assessment shall be made within three years. ..." (Stats. 1945, p. 1097.)

As no intent to evade was put in issue it appears that under the 1943 Act a three year statute of limitation would have been in effect. [3] But under the 1945 Act there is no limitation on assessments for those delinquencies due, among other things, to a "failure without good cause to file a return." In the present case the trial court expressly found that there was no good cause why the plaintiff corporation failed to file a return. The plaintiffs contend that good cause exists for their failure and they refer to decisions which define "good cause" as to applications such as here not involved. The record in this case reveals no set of circumstances which would justify a finding of good cause for failure to file the returns. A bona fide but mistaken belief that the law does not require a particular course of conduct does not constitute good cause for a failure to comply therewith.

From the foregoing it is apparent that if the 1943 Act is applicable to any portion of the period in question, the assessment cannot be enforced as to that portion. But if the 1945 Act is applicable to all or any portion of the period, that portion of the assessment to which the act applies can and should be enforced. [48 Cal.2d 592]

Under the provisions of the acts both before and after September 15, 1945, the contributions required from an employer subject to the tax became due on the first day of the calendar month following the close of each calendar quarter. (Stats. 1943, p. 3037; Stats. 1945, p. 1095.) It is clear, therefore, that the contribution becoming due on the first day of October, 1945, for the third calendar quarter in 1945, and the contribution becoming due on the first day of January, 1946, for the fourth calendar quarter of 1945, were subject to the 1945 act and the assessment was properly levied as to those contributions.

The theory by which the defendants seek to make the 1945 act applicable to the remainder of the assessment is that before any action is barred by the statute the Legislature has the power to extend the period prescribed therein. [4] The extension of the statutory period within which an action must be brought is generally held to be valid if made before the cause of action is barred. (*Weldon v. Rogers*, 151 Cal. 432 [90 P. 1062].) The party claiming to be adversely affected is deemed to suffer no injury where he was under an obligation to pay before the period was lengthened. This is on the theory that the legislation affects only the remedy and not a right. (*Mudd v. McColgan*, 30 Cal.2d 463 [183 P.2d 10]; *Davis & McMillan v. Industrial Acc. Com.* 198 Cal. 631 [246 P. 1046, 46 A.L.R. 1095]; 31 Cal.Jur.2d 434.) An enlargement of the limitation period by the Legislature has been held to be proper in cases where the period had not run against a corporation for additional franchise taxes (*Edison Calif. Stores, Inc. v. McColgan*, 30 Cal.2d 472 [183 P.2d 16]), against an individual for personal income taxes (*Mudd v. McColgan*, supra, 30 Cal.2d 463), and against a judgment debtor (*Weldon v. Rogers*, supra, 151 Cal. 432). [5] It has been held that unless the statute expressly provides to the contrary any such enlargement applies to matters pending but not already barred. (*Mudd v. McColgan*, supra, 30 Cal.2d 463.)

The foregoing statement of the law is not disputed by the plaintiffs. They contend, however, that the change was more than a mere extension of the period of time in which an assessment might be levied; that the change required that the corporation be able to establish that it had good cause for not filing a return; that while it might have been able to show good cause had it been required to do so during the period in question it could not conveniently do so at the time of the assessment and after the events which gave rise to the obligation; that the change therefore constituted the creation of new [48 Cal.2d 593] obligations and the imposition of new duties, the exaction of new penalties not specifically provided for in the new legislation and the impairment of vested rights which they might assert in an action for the recovery of the assessment.

It should be borne in mind that the obligation which the commission sought to enforce was not one which arose out of the 1945 Act in altering the applicable statute of limitations, but rather one which arose out of provisions of the Unemployment Insurance Act existing at the time the corporation failed to comply therewith. [6] And where, as here, the Legislature properly could have extended the period of limitations as to all obligations surviving on September 15, 1945, certainly it could have imposed a less onerous burden on those obligations by providing a means of escape to those who had good cause

for their failure to comply with existing law. The plaintiffs cannot be heard to complain that because they now can make no showing of good cause they have thus been deprived of vested rights which would enable them to successfully maintain this action. They were never possessed of rights, vested or otherwise, which were entitled to the protection asserted by the plaintiffs. Furthermore, no showing is made by them as to the manner in which the corporation's failure to comply with the law might have been justified at the time the obligations were incurred, or why such a showing became an added burden by lapse of time.

The plaintiffs seek to establish the impropriety of the assessment for the first two calendar quarters of 1942 for an additional reason. They contend that the contributions for those quarters became due on the first days of April and July of that year. (See Stats. 1943, p. 3037.) It may be assumed that in such a case the three year period of limitations would have run prior to the effective date of the 1945 Act on September 15 of that year and the collection of the amounts due would have been barred. [7] The commission contends, however, that the contributions for those two calendar quarters did not become due until after the 15th day of September, 1942, and that the obligations still survived at the time the period was extended on the 15th day of September, 1945. This contention is based on provisions of the law which define employers subject to the Unemployment Insurance Act, and it is claimed that the plaintiff corporation did not become subject to the act until the 20th of September, 1942, for all prior contributions otherwise due for the year 1942. [48 Cal.2d 594]

Section 9 of the Unemployment Insurance Act as it read prior to September 15, 1945, provided that "Employer" means: (a) Any employing unit, which for some portion of a day, ... in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day. ..." (Stats. 1937, p. 2055.) It appears from the record that the plaintiff corporation completed its 20th week of qualifying employment on September 20, 1942. There is nothing to indicate that prior to that time the corporation was an employer subject to the tax. Accordingly, it could not have incurred any tax liability prior to that time, and on the first days of the months following the first two calendar quarters in 1942 no tax could have become due and payable on which the statute might have run. The plaintiffs claim that the corporation was qualified from the beginning of the year 1942 because of its employment record in the prior calendar year. But there is no evidence to show the corporation's employment record in 1941, and the plaintiffs were required to make such a showing if reliance were to be placed thereon as controlling.

It is contended by the plaintiffs that the provision relied on by the commission is one dealing only with the definition of "employer" and has no bearing on the question of when a contribution becomes due and payable. The contention may not be sustained. Obviously a contribution cannot become due and payable from a corporation before it qualifies as an employer. A construction in accord with this view was incorporated by the Employment Commission in its rule 37.6, wherein it was provided: "An employing unit upon becoming a subject employer during any calendar year shall file with the Commission within fifteen days thereafter, quarterly contributions and earnings reports for each completed quarter in that calendar year.

"Contributions for these quarters are due at the end of the quarter in which the employer became subject. ..." (Rules and Regulations on the California Unemployment Insurance Act, Rule 37.6 [1940].) The Employment Commission was expressly authorized to "adopt, amend or rescind regulations for the administration of this act. ..." (Stats. 1939, p. 3007.) The foregoing rule would appear to be within the power thus granted.

In recognition of the weight which may be accorded administrative [48 Cal.2d 595] interpretations and practices, as well as the plain meaning of the statutory language itself, it must be concluded that contributions from the plaintiff corporation for the first two calendar quarters of 1942 did not become due and payable until after the 20th of September, 1942; that the three-year period of the statute of limitations had not expired on the 15th day of September, 1945, as to those contributions, and that the period was properly extended as to contributions for those quarters as well as all other quarters involved in the assessment.

The judgment is affirmed.

Gibson, C.J., Carter, J., Traynor, J., Schauer, J., Spence, J., and McComb, J., concurred.

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Life Savings Bank v. Wilhelm (2000) 84 Cal.App.4th 174 , 100 Cal.Rptr.2d 657

[No. E025950. Fourth Dist., Div. Two. Oct. 13, 2000.]

LIFE SAVINGS BANK, Plaintiff and Appellant, v. TOM F. WILHELM et al., Defendants and Respondents.

(Superior Court of Riverside County, No. 91285, Lawrence W. Fry, Judge.)

(Opinion by Ramirez, P. J., with McKinster and Gaut, JJ., concurring.)

COUNSEL

Hemar & Rousso and Kenneth G. Lau for Plaintiff and Appellant.

Law Offices of Thurman W. Arnold III, Thurman W. Arnold III; and Timothy L. Ewanyshyn for Defendants and Respondents. [84 Cal.App.4th 175]

OPINION

RAMIREZ, P. J.-

Plaintiff Life Savings Bank (Life) appeals from an order of the trial court denying its request for relief from mistake, inadvertence [84 Cal.App.4th 176] and/or excusable neglect under Code of Civil Procedure section 473. *fn. 1* Life missed the filing deadline provided in section 726, subdivision (b), for its application for a hearing to determine the fair value of real property after a foreclosure sale in order to obtain a money judgment for the deficiency. Concurrently with filing its late application, Life filed a motion under section 473 for relief from its tardy filing. The trial court held that section 726, subdivision (b)'s three-month period for filing an application for a fair value hearing is essentially a statute of limitations and therefore relief under section 473 was not available. The trial court refused to hear Life's section 473 motion for relief on its merits and, finding it moot, declined to hear the application for a fair value hearing. Life appeals, claiming that the trial court erred in refusing to hear its motion for relief under section 473 on its merits, because section 726, subdivision (b) is merely a procedural time line and does not act as a statute of limitations.

Facts and Procedural History

On November 25, 1992, Life entered into two promissory notes with defendants Tom F. Wilhelm and Teresa A. Felix Wilhelm (the Wilhelms), whereby Life agreed to loan them a total of \$184,000. Each loan was secured by a deed of trust on a separate parcel of improved real property. The Wilhelms defaulted on their notes and Life filed an action for judicial foreclosure on September 6, 1996. On December 16, 1997, the parties entered into a stipulation for entry of judgment of judicial foreclosure. The trial court entered judgment based upon the stipulation the same day. Both the stipulation and the judgment indicate that the Wilhelms agree that they are personally liable for the payment of the amounts secured by the deeds of trust and that a deficiency judgment may be ordered against them.

On July 14, 1998, Life filed a writ of sale for the real property. Then, on April 8, 1999, the sheriff's sale took place. Life was the highest bidder and obtained the properties for a total of \$170,000. On July 19, 1999, Life concurrently filed a motion to allow it to have a hearing on its tardy application for a fair value hearing, as well as the application for the fair value hearing itself. As indicated above, the trial court found that because section 726, subdivision (b) imposed a statute of limitations,

Life could not seek relief under section 473. The trial court therefore declined to rule on the merits of the section 473 motion and declined to rule on the application for a fair value hearing. This appeal followed.

Discussion

[1a] Section 473 allows a court, in its discretion, to relieve a party from "a judgment, dismissal, order, or other proceeding taken against him or her [84 Cal.App.4th 177] through his or her mistake, inadvertence, surprise, or excusable neglect." (*Id.*, subd. (b).) However, section 473 does not provide relief from such errors that result in the running of the applicable statute of limitations. (*Carlson v. Department of Fish & Game* (1998) 68 Cal.App.4th 1268, 1279 [80 Cal.Rptr.2d 601]; *Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927, 929, 934 [55 Cal.Rptr.2d 193].)

Section 726, subdivision (b) provides, in part, that "[i]n the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for the debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the real property or estate for years therein sold as of the date of sale, the court shall render a money judgment against the defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of levy and sale and of action exceeds the fair value of the real property or estate for years therein sold as of the date of sale." It is undisputed that Life did not file its application for a fair value hearing until July 19, 1999, some 11 days after the expiration of the three-month period allowed by section 726. The sole issue on appeal is whether the three-month period acts as a statute of limitations such that no relief can be had under section 473 for mistake, inadvertence or excusable neglect. This being a pure question of law, we review the trial court's decision de novo. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699 [170 Cal.Rptr. 817, 621 P.2d 856]; *Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal.App.4th 1, 5 [77 Cal.Rptr.2d 581].)

[2] A statute of limitation prescribes the time period beyond which suit may not be brought. (*Utah Property & Casualty Ins. etc. Assn. v. United Services Auto. Assn.* (1991) 230 Cal.App.3d 1010, 1025 [281 Cal.Rptr. 917].) Statutes of limitations are distinguished from procedural limits governing the time in which parties must do an act because they fix the time for commencing suit. (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 418, p. 527.) [1b] The question we must consider, therefore, is whether section 726, subdivision (b) fixes the time in which a party may bring an action. Our reading of the plain language of the statute causes us to conclude that it does. A party who is entitled to seek a deficiency judgment must file an application within three months of the foreclosure sale or no money judgment for a deficiency can be obtained. (§ 726, subd. (b).)

In reaching our conclusion we are supported by cases that have interpreted section 580a as constituting a statute of limitations. (See, e.g., *Citrus State Bank v. McKendrick* (1989) 215 Cal.App.3d 941, 943 [263 Cal.Rptr. 781]; *California Bank v. Stimson* (1949) 89 Cal.App.2d 552 [201 P.2d 39]; *Ware v. Heller* (1944) 63 Cal.App.2d 817, 823-825 [148 P.2d 410].) As does section 726, subdivision (b), which applies to judicial foreclosures, section 580a provides that in the case of nonjudicial foreclosures, a creditor seeking a money judgment for a deficiency must bring an action seeking a deficiency judgment within three months of the sale of the security. (See *Citrus State Bank v. McKendrick*, *supra*, 215 Cal.App.3d at p. 945 [§§ 580a and 726 both limit the time in which to seek a deficiency judgment to three months after foreclosure sale] and *Coppola v. Superior Court* (1989) 211 Cal.App.3d 848, 863, fn. 8 [259 Cal.Rptr. 811] [time bar in § 580a for nonjudicial foreclosure has its equivalent for judicial foreclosure in § 726, subd. (b)].) Further, the fact that the policies behind the two sections, and indeed the entire statutory scheme regarding the foreclosure of mortgages, are the same, bolsters the conclusion that they should be interpreted in a similar fashion. Essentially they both seek to lighten the burden of trust debtors and to prevent excessive recoveries by secured creditors. (*Kirkpatrick v. Westamerica Bank* (1998) 65 Cal.App.4th 982, 986-987 [76 Cal.Rptr.2d 876]; *Citrus State Bank v. McKendrick*, *supra*, 215 Cal.App.3d at p. 947; *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 40 [27 Cal.Rptr. 873, 378 P.2d 97]; *California Bank v. Stimson*, *supra*, "89 Cal.App.2d at pp. 554-555.)

Thus, we conclude that section 726, subdivision (b) provides a three-month statute of limitations in which a party seeking a deficiency judgment must file an application for a fair value hearing and a determination of the amount of the deficiency. The trial court did not err in holding that Life was not entitled to seek relief under section 473 for its failure to meet the three-month deadline.

Life argues that section 726, subdivision (b) cannot be construed as a statute of limitations because a judgment in a judicial foreclosure is a multipart judgment comprised of both the judgment for the sale of the security and the judgment for the deficiency. Therefore, the three-month period is merely "intended to provide administrative convenience and expediency to the process of completing an already pending judicial foreclosure action" (Italics omitted.) Life argues that this distinguishes section 726, subdivision (b) from section 580a, because the latter applies to the initial court action, while the former applies when an action for foreclosure has already been initiated. We disagree.

Rather than comprising separate "judgments" to a single action, we hold that, for purposes of the statutes of limitations that apply to them, a judgment for judicial foreclosure, which includes a determination that a party has the [84 Cal.App.4th 179] right to seek a deficiency, and the deficiency judgment itself are the product of separate actions. Indeed, contrary to Life's argument, a deficiency judgment is not a necessary part of an action for judicial foreclosure. (See, e.g., *Ware v. Heller*, *supra*, 63 Cal.App.2d at p. 823 [while action to recover deficiency is founded on instrument secured by a deed of trust, action to recover deficiency may not be maintained until after security is exhausted].) A deficiency judgment need only be sought if the proceeds of the judicial foreclosure are insufficient to cover the secured obligation. Logically then, an action seeking a deficiency is separate from an action seeking the sale of security through judicial foreclosure.

Life cites *Korea Exchange Bank v. Yang* (1988) 200 Cal.App.3d 1471 [246 Cal.Rptr. 619] in support of its claim that an action for a deficiency is not a separate action. While the court in that case did refer to the deficiency action as a "motion," and concluded that notice of the deficiency "motion" need not be given to debtors whose default was taken in the foreclosure action, it did not hold that the deficiency action was part of the judicial foreclosure action, nor did it hold that section 726, subdivision (b) was not a statute of limitations.

Life also cites *United California Bank v. Tijerina* (1972) 25 Cal.App.3d 963 [102 Cal.Rptr. 234], wherein the court referred to actions under section 726 as two-stage proceedings. In that case, a debtor failed to disclose the existence of additional security in the foreclosure action and the creditors obtained a judgment indicating they were entitled to seek a deficiency judgment. The court held that the debtor was precluded from asserting the defense of failure to exhaust all security first in the deficiency action because the issues of waiver and the creditor's right to seek a deficiency had already been adjudicated in the foreclosure action. (*Id.* at pp. 968-969.) Again however, that court did not hold that the action for the deficiency judgment was part of the foreclosure action and did not consider, and thus reached no conclusion on whether section 726, subdivision (b) acts as a statute of limitations on obtaining a deficiency judgment.

Life also argues that the fact that the trial court retains jurisdiction during the period authorized for a redemption under section 729.010 et seq. necessarily requires us to find that the three-month limit was not meant to be a statute of limitations. We are not persuaded. The debtor's right to redeem is a right related to the foreclosure sale and is entirely separate from the creditor's right to obtain a deficiency judgment. Life has provided no authority, nor are we aware of any, for the proposition that the court cannot maintain jurisdiction over the former, yet lose jurisdiction over matters concerning the latter. [84 Cal.App.4th 180]

Life argues that section 726, subdivision (b) cannot be a statute of limitations because the court in *Florio v. Lau* (1998) 68 Cal.App.4th 637 [80 Cal.Rptr.2d 409] held that it was superseded by another conflicting statute. To the contrary, the court in *Florio* did not find the relevant statutes to be in conflict. Rather, it held that in cases involving mixed collateral of both personal and real property, the three-month limitation period in section 726, subdivision (b) does not apply at all. (68 Cal.App.4th at pp. 646-653.)

Finally, both Life and the Wilhelms advance several equitable points, which they argue support a finding in their favor. However, these equitable considerations do not apply in determining whether or not the three-month period in section 726, subdivision (b) is a statute of limitations. They would only apply if we determined that it was necessary to remand the case for a hearing on Life's motion for relief under section 473, and then would have to be determined by the trial court. Having determined that Life is not entitled to seek relief under section 473, there is no need for us to remand the case to the trial court, and no reason for us to consider the equitable arguments further.

Disposition

The trial court's order is affirmed. Defendants to recover their costs on appeal.

McKinster, J., and Gaut, J., concurred.

FN 1. All further statutory references are to the Code of Civil Procedure.

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City of Long Beach v. Department of Industrial Relations (2004)34 Cal.4th 942 , -- Cal.Rptr.3d --; -- P.3d --

[No. S118450. Dec. 20, 2004.]

CITY OF LONG BEACH, Plaintiff and Respondent, v. DEPARTMENT OF INDUSTRIAL RELATIONS, Defendant and Appellant.

(Superior Court of Los Angeles County, No. BS072516, David P. Yaffe, Judge.)

(The Court of Appeal, Second Dist., Div. Seven, No. B159333, [110 Cal.App.4th 636](#).)

(Opinion by Chin, J., with George, C. J., Baxter, J., Werdegar, J., Brown, J., and Moreno, J., concurring. Dissenting opinion by Kennard, J. (see p. 954).)

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OPINION

CHIN, J.-

[1] In this case, we address the application of the state's prevailing wage law (PWL; see Lab. Code, § 1770 et seq.) fn. 1 to private construction of a \$ 10 million animal control facility in Long Beach (the City). The Society for the Prevention of Cruelty to Animals of Los Angeles (SPCA-LA) built the facility, but it was partly funded by a \$ 1.5 million grant from the City that was expressly limited to project development and other *preconstruction* expenses. Section 1771 requires that "workers employed on public works" be paid "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed"

When the present contract was executed in 1998, "public works" was defined as including "[c]onstruction, alteration, demolition, or repair work done under contract and *paid for in whole or in part out of public funds ...*" (§ 1720, subd. (a), italics added.) As we observe, *after* the agreement was executed, and *after* the City's grant money was used for preconstruction expenses, a 2000 amendment to section 1720, subdivision (a)(1), was adopted to include within the word "construction" such activities as "the design and preconstruction phases of construction," including "inspection and land surveying work," items the City partly funded in this case.

[2] We first consider whether the project here is indeed a "public work" within the meaning of section 1771 and former section 1720. We will conclude, contrary to the Court of Appeal, that under the law in effect when the contract at issue was executed, a project that *private* developers build solely with *private* funds on land leased from a public agency remains private. It does not become a *public* work subject to the PWL merely because the City had earlier contributed funds to the owner/lessee to assist in [34 Cal.4th 947] defraying such "preconstruction" costs or expenses as legal fees, insurance premiums, architectural design costs, and project management and surveying fees.

This conclusion completely disposes of this case. We leave open for consideration at another time important questions raised by the parties, including (1) whether, assuming the project indeed was a "public work" under section 1771, it should be deemed a "municipal affair" of a charter city and therefore exempt from PWL requirements, and (2) whether the PWL is a matter of such "statewide concern" that it would override a charter city's interests in conducting its municipal affairs. Resolution of these important issues is unnecessary and inappropriate here because the present project was not a public work subject to the PWL.

FACTS

The following uncontested facts are largely taken from the Court of Appeal opinion in this case. The Department of Industrial Relations (Department) appeals from a judgment granting a petition for writ of mandate filed by the City. The City had sought to overturn the Department's determination that an animal shelter project financed in part with City funds and built on City lands was subject to the PWL.

In 1998, the City entered into an agreement with SPCA-LA, under which the City agreed to contribute \$ 1.5 million to assist in the development and preconstruction phases of a facility within City limits that would serve as an animal shelter and SPCA-LA's administrative headquarters. It would also provide kennels and office space for the City's animal control department. The agreement required the City's funds to be placed in a segregated account and used only for expenses related to project development, such as SPCA-LA's "investigation and analysis" of the property on which the shelter was to be built, "permit, application, filing and other fees and charges," and "design and related preconstruction costs." SPCA-LA was specifically precluded from using any of the City's funds "to pay overhead, supervision, administrative or other such costs" of the organization.

The City owned the land on which the facility was to be built, but leased it to SPCA-LA for \$ 120 per year. The City in turn ~~agreed to pay SPCA-LA \$ 60 a year as rent for the space occupied by its animal control department. The agreement further~~

provided it was "interdependent," with lease and lease-back agreements between the parties with respect to the City land on which the project would be built. The agreement further stated that "[i]f either the lease or lease-back is terminated then this agreement shall automatically terminate, without notice." Finally, the agreement provided "[i]f there is a [34 Cal.4th 948] claim relating to the payment of wages arising from the construction described herein," the City shall pay 95 percent of "all costs, expenses, penalties, payments of wages, interest, and other charges related to the claim, including attorneys' fees and court or administrative costs and expenses[.]"

The record shows a portion of the City's financial contribution was spent on such preconstruction expenses as architecture and design (\$ 318,333), project management (\$ 440,524), legal fees (\$ 16,645), surveying (\$ 14,500), and insurance (\$ 23,478). The City estimated that an additional \$ 152,000 in architectural, legal, development and insurance expenses would be required for completion. The dissent observes that some of these additional funds may have been spent after actual construction began. The dissent cites a letter from the City indicating that by the time construction began, some additional funds "had yet to be spent." (Dis. opn., *post*, at p. 958.) The record is unclear, however, if or when such funds were actually paid. But as we previously noted, the City's agreement with SPCA-LA required the City's funds to be used only for project development, design and related preconstruction costs, and the issue before us is whether the term "construction" includes such activities. Assuming some limited City funds were spent *during* construction, the record fails to demonstrate they were used *for* construction.

The project itself was completed in 2001 at a cost of approximately \$ 10 million. Evidence obtained from the SPCA-LA showed the project was intended to serve all of Los Angeles County and parts of Orange County. Animals from all these areas, not just from Long Beach, would be housed at the shelter. In addition, the facility would also house the SPCA-LA's headquarters.

[3] Section 1771 states in relevant part: "[N]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed ... shall be paid to all workers employed on public works." In 1998, when the present contract was executed, "public works" was defined as "[c]onstruction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds" (§ 1720, subd. (a), italics added.) The term "construction" was undefined. As discussed below, a 2000 amendment to section 1720, subdivision (a), adopted several years after the City executed its contract with SPCA-LA and made its limited contribution, now includes within "construction" such activities as "the design and preconstruction phases of construction," including inspection and surveying.

Acting on an inquiry by a labor organization, the Department began an investigation to determine whether the project was a "public work" under former section 1720 and was therefore subject to the prevailing wage rates [34 Cal.4th 949] that section 1771 mandated. The City argued that the project was not a public work, but even if it was, the prevailing wage law did not apply because it was strictly a charter city's "municipal affair." The Department concluded the project was a public work and the city's status as a charter city did not exempt it from the PWL. This determination was affirmed on an administrative appeal. The City filed a petition for a writ of mandate under Code of Civil Procedure section 1085 challenging the Department's decision that the PWL applied to the shelter project. The trial court granted the writ, and the Department filed a timely appeal. The Court of Appeal reversed, concluding that (1) the project was a public work under former section 1720 and section 1771, (2) the project was not a municipal affair exempt from the PWL, and (3) even if the project was a municipal affair, the PWL was a matter of statewide concern, precluding exemption under the municipal affairs doctrine. Concluding the shelter project was not a public work as then defined, we will reverse the judgment of the Court of Appeal.

DISCUSSION

[4] Before proceeding with our analysis, we set out some established principles that will help guide our decision. In *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976 [4 Cal. Rptr. 2d 837, 824 P.2d 643] (*Lusardi*), we spoke regarding the PWL's general intent and scope. We observed that "[t]he Legislature has declared that it is the public policy of California 'to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.' [Citation.] [¶] The overall purpose of the prevailing wage law is to protect and benefit employees *on public works projects*. [Citation.]" (*Lusardi, supra*, 1 Cal.4th at p. 985, italics added.)

Lusardi continued by observing that "[t]his general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits-enjoyed-by-public-employees. [Citations.]" (*Lusardi, supra*, 1 Cal.4th at p. 987.)

[5] In conducting our review, we must exercise our independent judgment in resolving whether the project at issue constituted a "public work" within the meaning of the PWL. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1583-1584 [18 Cal. Rptr. 2d 680] (*McIntosh*)). We have acknowledged [34 Cal.4th 950] that the PWL was enacted to protect and benefit workers and the public and is to be liberally construed. (See *Lusardi, supra*, 1 Cal.4th at p. 985.) The law does, however, permit public agencies to form alliances with the private sector and allows them to enter into leases of public lands and to give financial incentives to encourage private, nonprofit construction projects that provide public services at low cost (see Gov. Code, § 26227; *McIntosh, supra*, 14 Cal.App.4th at p. 1587; *International Brotherhood of Electrical Workers v. Board of Harbor Commissioners* (1977) 68 Cal. App. 3d 556, 562 [137 Cal. Rptr. 372] [lease to private developer to construct oil and gas facilities and pay city-lessor royalties not "public work" under former section 1720]).

[6] "Courts will liberally construe prevailing wage statutes [citations], but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act [citation]." (*McIntosh, supra*, 14 Cal.4th at p. 1589.) Here, we must determine whether the City's contract with SPCA-LA truly involved "construction" that was paid for in part with public funds.

The City observes that its \$ 1.5 million donation to SPCA-LA was neither earmarked nor used for actual construction of the facility. The City's agreement with SPCA-LA specifically designated the contributed funds for preconstruction costs. Those funds were in fact spent on architectural design, project management, legal fees, surveying fees, and insurance coverage. The City contends that, when the agreement was executed in 1998, "construction" meant only the actual physical act of building the structure.

The City notes that only in 2000, several years *after* the agreement was signed and *after* the City had contributed its funds to the project, did the Legislature amend section 1720, subdivision (a), by adding a sentence stating: "For purposes of this paragraph, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." (Stats. 2000, ch. 881, § 1.) The City views the foregoing amendment as a prospective *change* in the law, not a simple restatement of existing law.

The Department, on the other hand, argues that the term "construction" would encompass the planning, design, and "pre-building" phases of a project, which would include architectural design, project management, and surveying. The City's financial contribution to the project paid for all these items. In the Department's view, the 2000 amendment to section 1720, subdivision (a), merely clarified existing law. As will appear, we think the City's argument makes more sense. [34 Cal.4th 951]

The Court of Appeal observed that the "[Department's] position is supported by the common meaning of the word 'construction' ..., " citing a dictionary that defines construction as "[t]he act or *process* of constructing." (American Heritage Dict. (2d college ed. 1982) p. 315, italics added; see also *Priest v. Housing Authority* (1969) 275 Cal. App. 2d 751, 756 [80 Cal. Rptr. 145] [construction ordinarily includes "the entire process" required in order to erect a structure, including basements, foundations, and utility connections].) But that definition begs the question whether the construction "process" includes the preconstruction activities involved here. Other dictionaries give the word a more literal interpretation.

[7] For example, Webster's Third New International Dictionary (2002), page 489, gives a primary definition of "construction" as "[t]he act of putting parts together to form a complete integrated object." 3 Oxford English Dictionary (2d ed. 1989), page 794, defines the word as "the action of framing, devising, or forming, by the putting together of parts; erection, building." Thus, contrary to the Court of Appeal's statement, dictionary definitions do not strongly support the Department's position.

The Court of Appeal also relied on the Department's own regulations and rulings interpreting and implementing the PWL. It noted that the Department has defined "construction" as including "[f]ield survey work traditionally covered by collective bargaining agreements," when such surveying is "integral to the specific public works project in the design, preconstruction, or construction phase." (Cal. Code Regs., tit. 8, § 16001, subd. (c).) The total project cost was approximately \$ 10 million. The record does not clearly show whether the minimal (\$ 14,500) surveying work paid for out of the City's donation met the "collective bargaining" and "integral work" elements of the Department regulation. Neither the Court of Appeal nor the briefs explore these aspects of the regulation.

[8] In any event, assuming that regulation applies here, although we give the Department's interpretation great weight (e.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309 [58 Cal. Rptr. 2d 855, 926 P.2d 1042]), this court bears the ultimate responsibility for construing the statute. "When an administrative agency construes a statute in adopting a regulation or formulating a policy, the court will respect the agency interpretation as one of several interpretive tools that may be helpful. In the end, however, '[the court] must ... independently judge the text of the statute.'" (*Agnew v. State Bd. of*

Equalization (1999) 21 Cal.4th 310, 322 [87 Cal. Rptr. 2d 423, 981 P.2d 52], quoting *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7-8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031].) [34 Cal.4th 952]

[9] The Court of Appeal also relied on the Attorney General's opinion citing the Department regulation with apparent approval. (70 Ops.Cal.Atty.Gen. 92, 93-94 (1987).) But the question whether that regulation comported with the PWL was not before the Attorney General, who was asked only whether the PWL applied to engineering firm employees whom the city hired to perform services that the city engineer ordinarily performed. That issue involved determining whether the work was "performed under contract" or "carried out by a public agency with its own forces." (§ 1771.) As the opinion recites, "The inquiry assumes that the work in question is a 'public work' within the meaning" of former section 1720 and section 1771. (70 Ops.Cal.Atty.Gen., *supra*, at p. 93.) Indeed, the Attorney General's conclusion was that the PWL applied to the engineering firm's employees "except with respect to such duties which do not qualify as a public work." (*Id.* at p. 98, italics added.) Thus, the opinion seems inconclusive for our purposes. In any event, as with the Department's own regulations, the Attorney General's opinions are entitled to "considerable weight," but are not binding on us. (E.g., *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 71 [44 Cal. Rptr. 2d 399, 900 P.2d 648].)

As noted, the City relies in part on the 2000 postagreement amendment to section 1720, subdivision (a), defining "construction" to include work performed during the project's design and preconstruction phases. The City views the amendment as a change in existing law. It relies on an August 30, 2000, letter from the amendment's author, Senator John Burton, seeking to respond to interested parties' "concerns" regarding its operation. The letter recites that the amendment was "intended only to operate prospectively and therefore will only apply to contracts for public works entered into on and after the effective date of the legislation which will be January 1, 2001." (4 Sen. J. (1999-2000 Reg. Sess.) p. 6371.) The present contract was executed in 1998.

Although letters from individual legislators are usually given little weight unless they reflect the Legislature's *collective* intent (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45-46, fn. 9 [77 Cal. Rptr. 2d 709, 960 P.2d 513]; *Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1425-1426 [96 Cal. Rptr. 2d 314]), the Burton letter was presented, *prior* to the bill's enactment, to the full Senate, which carried his motion to print it in the Senate Daily Journal. Indeed, the letter is printed and included under the notes to section 1720 in West's Annotated Labor Code. (Historical and Statutory Notes, 44A West's Ann. Lab. Code (2003 ed.) foll. § 1720, p. 7.) Under these circumstances, we think the letter carries more weight as indicative of probable legislative intent. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 377-378 [20 Cal. Rptr. 2d 330, 853 P.2d 496]; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 590-591 [128 Cal. Rptr. 427, 546 P.2d 1371].) [34 Cal.4th 953]

[10] Moreover, Senator Burton's remarks conform to the well-established rule that legislation is deemed to operate prospectively only, unless a clear contrary intent appears (e.g., *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841 [123 Cal. Rptr. 2d 40, 50 P.3d 751]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1209 [246 Cal. Rptr. 629, 753 P.2d 585], and cases cited). We find in the available legislative history no indication of an intent to apply the amendment retroactively.

The Department, on the other hand, relies on an Assembly Committee on Labor and Employment report indicating, "The bill [amending section 1720] codifies current Department practice by including inspectors and surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project." (Assem. Com. on Labor and Employment, Rep. on Sen. Bill No. 1999 (1999-2000 Reg. Sess.) as amended Aug. 18, 2000, p. 3.) This language is inconclusive. Although it indicates the proposed legislation will now adopt the Department *practice* as to inspectors and surveyors, it fails to state that such adoption reflects *existing law* or should be applied retroactively to preexisting contracts. Moreover, the same Assembly Committee report notes that "in its current form, this bill also *expands* the definition of 'public works' to include architects, engineers, general contractors and others in their employ *who have not previously been subject to the prevailing wage laws.*" (*Ibid.*, italics added.) This language strongly indicates that the 2000 amendment was more than a simple restatement of existing law.

We also note that the Legislative Counsel's digest to the bill explains that it would "*revise* the definition of public works by providing that 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." (Legis. Counsel's Dig., Sen. Bill No. 1999 (1999-2000 Reg. Sess.), Stats. 2000, ch. 881, italics added.) The Legislative Counsel also evidently believed that the revision might impose new costs on local government. (*Ibid.*)

[11] The City observes that the United States Secretary of Labor has defined "construction," for purposes of the *federal* prevailing wage law (40 U.S.C. §§ 3141-3148) as: "All types of work done on a particular building or work at the site thereof ... by laborers and mechanics employed by a construction contractor or construction subcontractor" (29 C.F.R. § 5.2(j)(1) (2004).) "Laborers and mechanics" generally include "those workers whose duties are manual or physical in nature

(including those workers who use tools or who are performing the work of a trade), as distinguished [34 Cal.4th 954] from mental or managerial." (29 C.F.R. § 5.2(m) (2004).) This definition seemingly would not cover work done by surveyors, lawyers, project managers, or insurance underwriters, who function before actual construction activities commence.

We have found no case deciding whether surveyors' work constitutes "construction" under federal regulations. California's prevailing wage law is similar to the federal act and shares its purposes. (*Southern Cal. Lab. Management etc. Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882 [63 Cal. Rptr. 2d 106].) Although the Legislature was free to adopt a broader definition of "construction" for projects that state law covers, certainly the fact that federal law generally confines its prevailing wage law to situations involving actual construction activity is entitled to some weight in construing the pre-2000 version of the statute.

The Court of Appeal concluded that the broader interpretation of "construction" in former section 1720, subdivision (a), is "most consistent" with the PWL's purpose, to protect employees and the public. But, of course, no one suggests that had SPCA-LA, a private charitable foundation, funded the entire project, the PWL, which applies only to projects constructed in whole or in part with *public funds*, would nonetheless cover it. Does it make a difference that SPCA-LA received City funds for designing, surveying and insuring, and otherwise managing the project at the preconstruction phase? For all the reasons discussed above, we conclude the project falls outside the PWL's scope. Our conclusion makes it unnecessary to reach the City's alternative contention that the present project was not "done under contract" within the PWL's meaning. (See § 1720, subd. (a).)

CONCLUSION

The PWL does not apply in this case because no publicly funded construction was involved. The judgment of the Court of Appeal is reversed.

George, C. J., Baxter, J., Werdegar, J., Brown, J., and Moreno, J., concurred.

DISSENTING OPINION:

KENNARD, J., Dissenting.--When a construction project is funded in whole or in part by a public entity, California law requires that the workers be paid the local prevailing wage. Here, a city and a charity entered into a contract for construction of a building, and agreed that the city would pay for certain expenses essential to the overall project but would not pay for erection of the building itself. The majority concludes the project was not a public work and therefore not subject to the prevailing wage. I disagree. [34 Cal.4th 955]

I

In 1998, the City of Long Beach (City) contracted with the Society for the Prevention of Cruelty to Animals, Los Angeles (SPCA-LA) for the latter to construct a building that was to contain an animal shelter as well as the SPCA-LA's headquarters and the City's animal control department. The City agreed to contribute \$ 1.5 million to the project (which ultimately cost approximately \$ 10 million) and to lease to the SPCA-LA, at a nominal fee, the six and one-half acres of land on which the facility was to be built.

In December 1999, just after ground was broken and the actual building had begun, a local newspaper reported on the project. This prompted a labor organization to ask the state Department of Industrial Relations (DIR) to investigate whether the project was a public work and therefore subject to the prevailing wage law. In response to the DIR's inquiry, the City explained in a letter written in September 2000 that the SPCA-LA had placed the City's \$ 1.5 million contribution in a segregated account; that roughly \$ 1 million was being used to pay the architects, project managers, lawyers, and surveyors, as well as the insurance costs; the rest would be used for advertising, fundraising, and "startup costs" such as furniture and equipment; and that none of the City's money would be used to pay for the building itself. The City asserted that because its financial contribution would not be used to pay for the building itself, the project was not a public work. The DIR, however, determined that the project was a public work and therefore subject to the prevailing wage law; that ruling was affirmed on administrative appeal. The City challenged that decision in a petition for writ of mandate in the superior court. The court granted the writ, and the DIR appealed. The Court of Appeal reversed the superior court, concluding that the project was a public work.

II

Labor Code section 1771 fn. 1 provides that "all workers employed on public works" costing more than \$ 1,000 must be paid "the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" When the City and the SPCA-LA contracted to build the animal control facility in question, the version of section 1720, subdivision (a) (former section 1720(a)) then in effect defined "public works" in these words: "*Construction,*

alteration, demolition, or repair work done under contract and *paid for in whole or in part out of public funds ...*" (Stats. 1989, ch. 278, § 1, p. 1359, italics added.) At issue here is what the Legislature meant by the term "construction." That term, which has been in section 1720 since its enactment in 1937, is ambiguous. In a narrow sense it [34 Cal.4th 956] could mean --as the majority concludes--erection of the actual building only. In a broader sense it could mean--as the Court of Appeal concluded--the entire construction project, including the architectural, project management, insurance, surveying, and legal costs paid for by the City here. The parties furnish no legislative history bearing on the intent of the Legislature in 1937, when it used the word "construction" in former section 1720(a). But two principles of statutory interpretation provide guidance, as discussed below.

In construing an ambiguous statute, courts generally defer to the views of an agency charged with administering the statute. "While taking ultimate responsibility for the construction of a statute, we accord 'great weight and respect to the administrative construction' thereof. ... [¶] Deference to administrative interpretations always is 'situational' and depends on 'a complex of factors' ..., but where the agency has special expertise and its decision is carefully considered by senior agency officials, that decision is entitled to correspondingly greater weight" (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 436 [2 Cal. Rptr. 3d 699, 73 P.3d 554], citations & fn. omitted (*Sharon S.*); see also *Styne v. Stevens* (2001) 26 Cal.4th 42, 53 [109 Cal. Rptr. 2d 14, 26 P.3d 343]; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11-15 [78 Cal. Rptr. 2d 1, 960 P.2d 1031].)

The Legislature has given the Director of the DIR "plenary authority to promulgate rules to enforce the Labor Code," including "the authority to make regulations governing coverage" under the prevailing wage law. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 989 [4 Cal. Rptr. 2d 837, 824 P.2d 643].) When, as here, the meaning of a statutory term is ambiguous and there is no indication of the Legislature's intent regarding its meaning, this court should defer to the DIR's determination based on its "special expertise" (*Sharon S., supra*, 31 Cal.4th at p. 436), so long as that determination was "carefully considered by senior agency officials" (*ibid.*) and is consistent with the DIR's previous decisions. (*Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 13 [courts should not defer to an administrative agency that has taken a "vacillating position" as to the meaning of the statute in question]).

Here, in a 13-page decision signed by DIR Director Stephen Smith, the DIR concluded that this project was a public work. The DIR's regulations have long stated that surveying work, which the City paid for here, comes within the definition of the term "construction" under former section 1720(a), whether or not it occurs before the actual building process begins, so long as it is "integral to" the project. (Cal. Code Regs., tit. 8, § 16001, subd. (c).) The City does not deny that the work performed by the architect and the project manager--also paid for by the City--was integral to the construction project here. Thus, the DIR's determination that the construction project in question [34 Cal.4th 957] is a public work was carefully considered by a senior agency official and is consistent with the agency's regulations. Therefore, that decision commands great deference.

Also lending support to my conclusion is California's long-standing policy that prevailing wage laws are to be liberally construed in favor of the worker. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634-635 [12 Cal. Rptr. 671, 361 P.2d 247]; *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1589 [18 Cal. Rptr. 2d 680]; *Union of American Physicians v. Civil Service Com.* (1982) 129 Cal. App. 3d 392, 395 [181 Cal. Rptr. 93]; *Melendres v. City of Los Angeles* (1974) 40 Cal. App. 3d 718, 728 [115 Cal. Rptr. 409]; *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal. App. 3d 518, 531 [106 Cal. Rptr. 441].) When, as here, a term in the prevailing wage law can plausibly be construed in two ways, one broad and one narrow, and there is no evidence that the Legislature intended the term's narrow meaning, this court should adopt the term's broader meaning. The Legislature's objectives in enacting the prevailing wage law were these: "to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." (*Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at p. 987.) These purposes will be implemented by applying the prevailing wage law to the project here.

For the reasons given above, the word "construction" in former section 1720(a) refers to work that, in the Court of Appeal's words, is "integrally connected to the actual building and without which the structure could not be built." That includes the costs of surveying, architectural design and supervision, and project management paid for by the City here.

III

The majority acknowledges the two rules of statutory interpretation I just discussed. As applied here, those rules require a broad reading of the word "construction" in former section 1720(a). Yet the majority construes the term narrowly, holding that it does not encompass the expenses paid for by the City here. The majority's reasons are unpersuasive.

The majority repeatedly characterizes as "preconstruction" costs the expenses the City paid for architectural design and supervision, project management, insurance, surveying, and legal services. (Maj. opn., *ante*, at pp. 946, 947, 950, 951, 954.)

To label these expenses as "preconstruction" is [34 Cal.4th 958] misleading. The term implies that all these expenses were incurred *before* the building of the facility began. But, as explained below, that view finds no support in the record.

True, the *surveying* expenses were most likely incurred at the outset of the project, as is customarily the case. But that is not true of the project's management and architectural costs. The SPCA-LA's contract with project manager Pacific Development Services said the latter's duties included "Construction Management of *all phases of construction of the Project.*" (Italics added.) And the SPCA-LA's contract with the architectural firm of Warren Freedendfeld & Associates provided that the firm would "be a representative of and shall advise and consult with the owner *during construction,*" would "visit the site at intervals appropriate to the stage of construction," would "keep the Owner informed of the progress and quality of the Work," and would attempt to "guard the Owner against defects and deficiencies in the Work" as it progressed. (Italics added.) Indeed, the City's September 2000 letter to the DIR (see p. 955, *ante*) when the building phase of the project was well under way, said that of the approximately \$ 540,000 of the City's contribution that was budgeted for project management, \$ 100,000 had yet to be spent; and that of the \$ 360,000 of the City's contribution that was budgeted for architectural fees, \$ 40,000 had yet to be spent. The City's letter also mentioned that smaller portions of the legal and insurance costs had yet to be paid. Thus, the contracts with the project manager and the architect, as well as the City's letter, demonstrate that the City did not pay merely for "preconstruction" costs but also for expenses incurred while the facility was being constructed.

The majority talks at length about an amendment to section 1720(a) that the Legislature enacted in 2000, stating that the term "construction," as used in that section, includes "the design and preconstruction phases of construction." After a thorough review of the legislative history pertaining to the 2000 amendment, the majority concludes that the Legislature did not intend the amendment to apply retroactively. Right. So what? Retroactivity of the 2000 amendment is not at issue here; therefore, the intent of the 2000 Legislature has no bearing here. What is at issue is the intent of the Legislature back in 1937, when it first used the word "construction" to define public works in former section 1720(a). It is the duty of this court, not the 2000 Legislature, to determine the 1937 Legislature's intent, and the views of the 2000 Legislature on the subject are not controlling. As this court said less than two months ago: "[T]he Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative [34 Cal.4th 959] authority simply to say what it *did* mean." (*McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 473 [20 Cal. Rptr. 3d 428, 99 P.3d 1015].)

IV

I would uphold the Court of Appeal's decision that the project here was a public work and thus subject to the prevailing wage law. The majority concludes to the contrary and sees no need to resolve the remaining two issues on which this court granted review: (1) whether the project is a "municipal affair" exempt from the prevailing wage law, and (2) whether the prevailing wage law is a matter of statewide concern that overrides the municipal affair exemption. These are difficult and important questions. I would retain the case to decide them.

FN 1. Further statutory references are to this code unless otherwise indicated.

FN 1. All further statutory citations are to the Labor Code.

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Bush v. Bright , 264 Cal.App.2d 788

[Civ. No. 24819. First Dist., Div. One. Aug. 8, 1968.]

ARTHUR CURTIS ANTRIM BUSH, Plaintiff and Respondent, v. TOM BRIGHT, as Director of the Department of Motor Vehicles, etc., et al., Defendants and Appellants.

COUNSEL

Thomas C. Lynch, Attorney General, and Victor D. Sonenberg, Deputy Attorney General, for Defendants and Appellants.

Berwyn A. Rice for Plaintiff and Respondent. [264 Cal.App.2d 790]

OPINION

ELKINGTON, J.

This appeal concerns the interpretation of Vehicle Code section 13353, enacted in 1966, relating to chemical tests of intoxicated automobile drivers.

The section applies to any lawfully arrested person whom a peace officer has reasonable cause to believe was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. It provides that such person shall be deemed to have given his consent to a chemical test of his blood, breath or urine. He may choose the type of test to be given. It also provides that if such a person refuses the officer's request to submit to such a test it need not be given, but his driver's license shall be suspended for six months. provision is made that the person be told of the penalty which will result from his refusal.

[1] The purpose of section 13353 is to reduce the toll of death and injury resulting from the operation of motor vehicles on California highways by intoxicated persons. As said in *People v. Sudduth*, 65 Cal.2d 543, 546 [55 Cal.Rptr. 393, 421 P.2d 401], "In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient, and accurate system of detection, enforcement and, hence, prevention."

The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is "deemed to have given his consent" is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates. With this exception, the chemical tests may be given to any person covered by the statute, even if he be "dead, unconscious, or otherwise in a condition rendering him incapable of refusal."

[2] Such tests do not violate one's right against self- incrimination (*Schmerber v. California*, 384 U.S. 757, 760-765 [16 L.Ed.2d 908, 913-916, 86 S.Ct. 1826]; *People v. Sudduth*, supra, 65 Cal.2d 543, 546-547; *United States v. Wade*, 388 U.S. 218, 221 [18 L.Ed.2d 1149, 1153, 87 S.Ct. 1926]), nor one's right to be free from unreasonable searches and seizures (*Schmerber v. California*, supra, pp. 766-772 [16 L.Ed.2d pp. 917-920]), nor one's right to counsel (*United States v. Wade*, supra; *People v. Sudduth*, supra, p. 546; see also *Gilbert v. California*, 388 U.S. 263 [18 L.Ed.2d 1178, 87 S.Ct. 1951]).

The record before us discloses facts which are essentially uncontradicted. Respondent Arthur Curtis Antrim Bush was seen by a police officer driving an automobile in an erratic manner. He was lawfully arrested for the offense of driving a motor

vehicle while under the influence of intoxicating liquor. [264 Cal.App.2d 791] Bush had been at a party earlier that evening where he admittedly had at least 12 drinks of Scotch over ice. The drinks were larger than one would get in a bar, "certainly" more than an ounce in each drink. He then went to another party where he was sure he did not decrease the amount of his drinking. It is clear that when he was arrested he was grossly intoxicated. However, on three occasions when requested to submit to a chemical test he responded by answering "No," or by shaking his head negatively. Accordingly, a test was not given him. He had been properly advised as to the consequences of such a refusal.

After a Motor Vehicle Department administrative hearing Bush's license was ordered revoked for six months. He then sought a writ of mandate (Code Civ. Proc., § 1094.5) in the superior court for the purpose of annulling the order. The superior court exercised its independent judgment on the administrative record. fn. 1

[3] The court's findings recite that at the time Bush "was requested to submit to said test [he] was incapable of refusing to so submit because of his extreme intoxication." It was concluded as a matter of law "The petitioner did not violate the provisions of Vehicle Code section 13353." From the ensuing judgment setting aside Bush's license suspension this appeal was taken.

Bush based his argument below, as he does here, on the following language of section 13353: "Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent." He contends that this provision "is intended to provide the person arrested with certain inalienable rights" affording "a fundamental protection to the person whose reasoning power or intelligence has been so greatly impaired as to prevent him from making an intelligent choice or waiving the right afforded him." The Legislature, he says, "intended that a person be aware of his rights and be given an opportunity to make a reasonable choice or a waiver." Finally, he says, since he was too drunk to make an intelligent waiver of his rights, he was completely unaffected by the portion of the statute under which he could refuse the test, and by the penalty provision for its refusal. [264 Cal.App.2d 792]

The statute's provision that "Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent" does not confer any "rights" upon an intoxicated driver. It simply allows the chemical test of a person who is dead, unconscious or otherwise unable to refuse--making it clear that even in such cases the earlier provision that the person shall be deemed to have given his consent shall nevertheless apply.

Bush otherwise misconstrues the purpose and meaning of the statute. It is firmly established that a drunken driver has no right to resist or refuse such a test (See *Schmerber v. California*, supra, 384 U.S. 757, 760-765 [16 L.Ed.2d 908, 913-916]; *People v. Sudduth*, supra, 65 Cal.2d 543, 546-547). It is simply because such a person has the physical power to make the test impractical, and dangerous to himself and those charged with administering it, that it is excused upon an indication of his unwillingness. Since Bush's claimed rights are nonexistent there can be no issue as to their waiver.

The construction placed upon the statute by the lower court and by Bush would lead to absurd consequences--the greater the degree of intoxication of an automobile driver, the lesser the degree of his accountability under the statute. It would invalidate section 13353 as to grossly intoxicated drivers and frustrate the purpose of the Legislature.

[4] "Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers--one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity." (45 Cal.Jur.2d 625-626.) [5] "[I]n construing a statute the courts may consider the consequences that might flow from a particular interpretation. They will construe the statute with a view to promoting rather than to defeating its general purpose and the policy behind it." (Id., p. 631.) [6] Remedial statutes such as section 13353 "must be liberally construed to effect their objects and suppress the mischief at which they are directed. They should not be given a strained construction that might impair their remedial effect." (Id., pp. 681-682.)

Bush seems to argue that it is unreasonable and unfair to hold a person, deprived of understanding by his voluntary intoxication, accountable under Vehicle Code section 13353. An accountability for the results of one's voluntary intoxication is by no means novel in our law. For example, it has long [264 Cal.App.2d 793] been the rule, as to crimes not involving specific intent or diminished capacity, that "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." (Pen. Code, § 22.) Even if one be unconscious as a result of his voluntary intoxication he may nevertheless be held criminally responsible for an act committed while in that state. "The union or joint operation of act and intent or criminal negligence must exist in every crime, ... and is deemed to exist irrespective of unconsciousness arising from voluntary intoxication." (*People v. Conley*, 64 Cal.2d 310, 324 [49 Cal.Rptr. 815, 411 P.2d 911]; see also *People v. Alexander*, 182 Cal.App.2d 281, 291-292 [6 Cal.Rptr. 153]; *Witkin*, Cal. Crimes (1963) § 143, p. 136.)

It seems reasonable to us that an automobile driver should be held accountable for his act of refusing a test under section 13353 while in a state of voluntary intoxication. [7] We therefore hold that, if the requirements of section 13353 are otherwise met, regardless of the degree of his voluntary intoxication or lack of understanding resulting therefrom, when a driver of an automobile refuses or otherwise manifests an unwillingness to take the required test he is subject to the license suspension provisions of that section.

The judgment is reversed. The superior court, on appropriate findings, will enter judgment in favor of appellants.

Molinari, P. J., and Sims, J., concurred.

FN 1. The case was tried on the theory that the court was required to exercise its "independent judgment" on the record and that the "substantial evidence" rule did not apply. It is unnecessary in our resolution of this appeal to determine which was the applicable rule.

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Marin Healthcare Dist. v. Sutter Health (2002) 103 Cal.App.4th 861 , 127 Cal.Rptr.2d 113

[No. C034127. Third Dist. Nov. 14, 2002.]

MARIN HEALTHCARE DISTRICT, Plaintiff and Appellant, v. SUTTER HEALTH et al., Defendants and Respondents.

(Superior Court of Sacramento County, No. 97AS05803, John R. Lewis, Judge.)

(Opinion by Kolkey, J., with Blease, Acting P. J., and Raye, J., concurring.)

COUNSEL

Steeffel, Levitt & Weiss, Stephen S. Mayne and David T. Vanalek for Plaintiff and Appellant.

McDonough, Holland & Allen and Richard E. Brandt for Defendant and Respondent Sutter Health.

Keegin, Harrison, Schoppert & Smith, Jeffrey S. Schoppert and Wendy L. Wyse for Defendants and Respondents Marin General Hospital and Marin Community Health. [103 Cal.App.4th 866]

OPINION

KOLKEY, J.—

In this action, we must determine whether the judicially created doctrine enunciated in *Hoadley v. San Francisco* (1875) 50 Cal. 265 (*Hoadley*)-that the statute of limitations does not apply to actions by the state to recover property dedicated for public use against an adverse possessor-should be extended to bar the application of the statute of limitations to the state's action to void a lease of public-use property. Because the purpose of the *Hoadley* doctrine is to prevent public-use property that the state cannot directly alienate from being indirectly alienated through the passage of time-that is, through the statute of limitations-we conclude that the doctrine has no application to a lease of property which the state is authorized to make.

In this case, the plaintiff, Marin Healthcare District (the District), a political subdivision of the state, brought suit to recover possession of a publicly owned hospital and related assets that it had leased and transferred [103 Cal.App.4th 867] in 1985 to defendant Marin General Hospital (Marin General) fn. 1 pursuant to the terms of the Local Health Care District Law (Health & Saf. Code, § 32000 et seq.). The District's complaint alleges that the 1985 agreements are void because its chief executive and legal counsel had a financial interest in the agreements at the time of their execution, in violation of Government Code section 1090, which prohibits state employees from having any financial interest in any contract made by them or by any body of which they are members. fn. 2 But because the action was filed 12 years after the agreements were signed, the trial court concluded that the suit was time-barred.

The District contends here-as it did in the trial court-that under the California Supreme Court's decision in *Hoadley*, "a suit by a governmental entity to recover public-use property from a private party to whom it was illegally or invalidly transferred is never barred by any statute of limitations."

We conclude, to the contrary, that *Hoadley* stands for the more narrow rule that "property held by the state in trust for the people cannot be lost through adverse possession." (*People v. Shirokow* (1980) 26 Cal.3d 301, 311 [162 Cal.Rptr. 30, 605 P.2d 859].) Other cases have only extended the doctrine to prevent the statute of limitations from barring the recovery of public-use property that the state had no authority to alienate. (E.g., *Sixth District etc. Assoc. v. Wright* (1908) 154 Cal. 119, 129-130 [97 P. 144].) The doctrine has no application to the lease of property into which the state is authorized by law to enter (and which property the state will recover at the end of the lease term).

Extension of the *Hoadley* doctrine here would conflict with the Legislature's determination to apply statutes of limitations to actions brought by the state, including the type pleaded here. Specifically, ever since the first session of the California Legislature, "[t]he general legislative policy of California [has been] that the state shall be bound by its statute of limitations with respect to the bringing of actions for the enforcement of any and all such rights as may accrue to the state." (*People v. Osgood* (1930) 104 [103 Cal.App.4th 868] Cal.App. 133, 135 [285 P. 753].) While there are good policy reasons both for and against subjecting void leases of public property to the statute of limitations, we must defer to the Legislature's determination that the state, like other parties, is bound by the statute of limitations. We shall therefore affirm the judgment barring this 12-year-delayed suit from unsettling the balance of Marin General's lease term.

Factual and Procedural Background

The facts underlying this action are undisputed.

The District, a political subdivision of the State of California, is a local health care district organized and operating under the provisions of the Local Health Care District Law (Health & Saf. Code, § 32000 et seq.). The District owns an acute care hospital facility located in Marin County.

The statutory scheme governing local health care districts permits such districts to delegate pursuant to a lease of up to 30 years the responsibility of operating and maintaining a district-owned hospital (Health & Saf. Code, § 32126), and authorizes them to transfer the assets to a nonprofit corporation "to operate and maintain the assets" (Health & Saf. Code, § 32121, subd. (p)(1)). *fn.* 3. "The Legislature's stated reason for allowing such transfers [was] to permit local hospital districts 'to remain competitive in the ever changing health care environment ...' (Stats. 1985, ch. 382, § 5, p. 1556.)" (*Yoffe v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 746 [238 Cal.Rptr. 502].)

In or about November 1985, pursuant to those statutory provisions, the District leased the hospital's facilities and transferred certain of the District's assets used in the operation of the hospital, including cash, accounts receivable, and inventory, to defendant Marin General, a nonprofit public benefit corporation. The relevant agreements included a 30-year lease agreement and an agreement for transfer of assets (collectively, the 1985 contracts). Marin General has continuously operated the hospital facility since 1985.

At the time the 1985 contracts were entered, the District's chief executive officer was Henry J. Buhrmann. However, while Buhrmann was still employed as the District's chief executive officer, he became president and chief executive officer of Marin General and signed the 1985 contracts on [103 Cal.App.4th 869] behalf of *Marin General*. Two of the District's directors executed the contracts on the District's behalf. Moreover, the District's legal counsel, Quentin L. Cook, became legal counsel to Marin General before the 1985 contracts were executed. And when Marin General later combined to form another health care entity, Cook became chief executive officer of that entity.

In November 1997, nearly 12 years after the 1985 contracts were signed, the District filed the instant action against Marin General and the affiliated defendants, Marin Community Health and Sutter Health. (See *fn.* 1, *ante.*) The operative (first amended) complaint alleges that at the time the 1985 contracts were entered, Buhrmann's and Cook's simultaneous employment by Marin General and the District created a prohibited financial interest in those contracts within the meaning of Government Code section 1090. That statute prohibits state, county, district, and city officers or employees from being "financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." (*Ibid.*) *fn.* 4 And because the 1985 contracts were purportedly made in violation of Government Code section 1090, the complaint alleges that the contracts are void under Government Code section 1092. *fn.* 5

The first and second causes of action of the complaint seek a declaration that the 1985 contracts are void by virtue of Buhrmann's or Cook's alleged financial interest in the contracts and that therefore the District is entitled to recover the assets transferred by the 1985 contracts. The District also seeks to impose a constructive trust on all hospital assets (the fifth cause of action), to conduct an accounting of the assets transferred under the 1985 contracts and their proceeds (the sixth cause of action), and to direct defendants to deliver the assets to the District (the seventh cause of action). *fn.* 6

Defendants admitted the existence of a controversy concerning the District's claim that the 1985 contracts are void, denied

any wrongdoing, and alleged that the causes of action based on the purported invalidity of the 1985 contracts (the first, second, fifth, sixth, and seventh causes of action) were barred by the applicable statutes of limitations. [103 Cal.App.4th 870]

Defendants then brought a motion for summary adjudication with respect to the first, second, fifth, sixth, and seventh causes of action on the grounds that they were barred by all applicable statutes of limitations. *fn. 7* In support of their motion, defendants argued that the gravamen of the District's complaint was a claim that the 1985 contracts were void in violation of Government Code section 1092. As such, they claimed that the suit was an action "other than for the recovery of real property" within the meaning of Code of Civil Procedure section 335 et seq. and was barred by the applicable statutes of limitations.

The District, in turn, moved for summary adjudication of, among other things, "defendants' affirmative defense of the statute of limitations." Relying on the common law principle adopted by the California Supreme Court in *Hoadley, supra*, 50 Cal. 265, the District argued, both in support of its motion and in opposition to defendants' motion, that under settled case law, "a suit by a governmental entity to recover public-use property from a private party to whom it was illegally or invalidly transferred is *never* barred by *any* statute of limitations."

The trial court rejected the District's purported application of *Hoadley* and granted defendants' motions. In its tentative decision, which was subsequently incorporated into the judgment, the trial court opined in part that the "contracts here are fundamentally different from those in the *Hoadley* line of cases. The 1985 lease and sale of assets were legitimate contracts. Violation of [Government Code] Section 1090 can result in them being declared void. This is not like the *Hoadley* line of cases where the orig[ini]nal transactions had no legitimacy. Statutes of limitations do attach to claims seeking to have contracts declared void based on the nature of the claim asserted.... The issue here then is what limitations period applies to actions brought under [Government Code] Section 1090. *Schaefer v. Berinstein* [(1960) 180 Cal.App.2d 107 [4 Cal.Rptr. 236], disapproved on another point in *Jefferson v. J. E. French Co.* (1960) 54 Cal.2d 717, 719-720 [7 Cal.Rptr. 899, 355 P.2d 643]] is on point and stands for the proposition that the nature of the underlying right sued on will determine the applicable statute." (Italics added.)

The trial court then concluded that the appropriate statute of limitations for the District's claims concerning the validity of the 1985 contracts under Government Code section 1092 was the four-year catchall provision of [103 Cal.App.4th 871] Code of Civil Procedure section 343, and applying that statute, ruled that the District's claims were time-barred.

The parties thereafter settled the remaining claims in the complaint and stipulated to entry of judgment incorporating the trial court's ruling on the statute of limitations.

Discussion

I. Standard of Review

[1] "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. [Fn. omitted.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [107 Cal.Rptr.2d 841, 24 P.3d 493].) We review independently an order granting summary judgment or summary adjudication of issues. (*Id.* at p. 860; *Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1279 [48 Cal.Rptr.2d 229].)

[2] Although resolution of a statute of limitations defense normally poses a factual question reserved to the trier of fact, summary adjudication will nonetheless be proper "if the court can draw only one legitimate inference from uncontradicted evidence regarding the limitations question." (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582 [35 Cal.Rptr.2d 876]; *FNB Mortgage Corp. v. Pacific General Group* (1999) 76 Cal.App.4th 1116, 1126 [90 Cal.Rptr.2d 841].) This is such a case.

II. The Causes of Action are Subject to the Statute of Limitations

The gravamen of the District's claims is that the 1985 contracts are void as a matter of law because its chief executive officer and counsel each had a financial interest in the contracts in violation of Government Code section 1090. It is settled that "a contract in which a public officer is interested is *void*, not merely voidable. [Citations.]" (*Thomson v. Call* (1985) 38 Cal.3d 633, 646, *fn. 15* [214 Cal.Rptr. 139, 699 P.2d 316].)

~~But the District refrained from filing suit for the first 12 years of its 30-year lease. It argues that "under the rule confirmed in [*Hoadley*], a conveyance of public-use property that was not valid and effective when it was made can be attacked, and the~~

property reclaimed by the public, regardless of how much time has passed."

[3] There are certainly good policy arguments both for and against applying a limitations period to an action to void a lease of public property. [103 Cal.App.4th 872] On the one hand, "[t]he purpose of statutes of limitations is to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1387 [49 Cal.Rptr.2d 166], citing *Telegraphers v. Ry. Express Agency* (1944) 321 U.S. 342, 348-349 [64 S.Ct. 582, 586, 88 L.Ed. 788, 792]; accord, *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 362 [142 Cal.Rptr. 696, 572 P.2d 755].) Statutes of limitations also serve many other salutary purposes-some of which are relevant to this case-including protecting settled expectations; giving stability to transactions; promoting the value of diligence; encouraging the prompt enforcement of substantive law; avoiding the retrospective application of contemporary standards; and reducing the volume of litigation. (*Board of Regents v. Tomanio* (1980) 446 U.S. 478, 487 [100 S.Ct. 1790, 1796-1797, 64 L.Ed.2d 440, 449]; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395-396 [87 Cal.Rptr.2d 453, 981 P.2d 79]; *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 899 [218 Cal.Rptr. 313, 705 P.2d 886]; Ochoa & Wistrich, *The Puzzling Purposes of Statutes of Limitation* (1997) 28 Pacific L.J. 453.)

On the other hand, courts have noted that cases should be decided on their merits (see *Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 396) and that "[t]he public is not to lose its rights through the negligence of its agents" in failing to bring suit promptly. (*Board of Education v. Martin* (1891) 92 Cal. 209, 218 [28 P. 799].)

However, as a court, we must defer to the Legislature's judgment on which of these two policies to adopt. As our Supreme Court stated in a somewhat similar circumstance, "[t]o establish any particular limitations period under any particular statute of limitations entails the striking of a balance between the two [policies]. To establish any such period under any such statute belongs to the Legislature alone [citation], subject only to constitutional constraints [citation]." (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 396.)

As shown below, the Legislature has expressly addressed the application of statutes of limitations to actions brought by the state or its agencies.

A. The Application of Statutes of Limitations to a Public Entity

The parties agree that the District is a political subdivision of the state. We thus first turn to whether the Legislature intended to apply a statute of limitations to a suit by a state entity to void a contract in violation of Government Code section 1092. [103 Cal.App.4th 873]

"The rule quod nullum tempus occurrit regi-that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations-appears to be a vestigial survival of the prerogative of the Crown," but is nowadays premised on considerations of public policy. (*Guaranty Trust Co. v. U.S.* (1938) 304 U.S. 126, 132 [58 S.Ct. 785, 788, 82 L.Ed. 1224, 1227-1228].) "The true reason ... is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." (*Ibid.*)

[4] Accordingly, "the implied immunity of the domestic 'sovereign,' state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included" (*Guaranty Trust Co. v. U.S.*, *supra*, 304 U.S. at p. 133 [58 S.Ct. at p. 789, 82 L.Ed. at p. 1228].)

This is the rule in California: The rights of the sovereign "are not barred by lapse of time unless by legislation the immunity is expressly waived." (*City of L. A. v. County of L. A.* (1937) 9 Cal.2d 624, 627 [72 P.2d 138, 113 A.L.R. 370].) fn. 8

But sections 315 and 345 of the Code of Civil Procedure fn. 9 expressly waive the state's legislative immunity by applying statutes of limitations to various types of actions by the state and its agencies. "That it is not the policy of this commonwealth not to be bound by any statute of limitations is made clear by certain enactments which date back to the first session of the state legislature. (Code Civ. Proc., [§§] 315, 317, 345.) ... 'The general legislative policy of California is that the state shall be bound by its statute of limitations with respect to the bringing of actions for the enforcement of any and all such rights as may accrue to the state.'" (*People v. Osgood*, *supra*, 104 Cal.App. at p. 135.)

Title 2 of part 2 (commencing with § 312) addresses general statutes of limitations. Section 312, which is part of chapter 1 of title 2, reflects the Legislature's historical preference for limiting the time within which civil actions may be initiated: "Civil actions, *without exception*, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." (Italics added.) Chapter 2 of title 2 addresses [103 Cal.App.4th 874] the time for commencing actions for the recovery of real property (§ 315 et seq.),

while chapter 3 (§ 335 et seq.) addresses the time for commencing actions other than for the recovery of real property. In both cases, the Legislature has expressly subjected the state to the limitations periods.

With respect to actions for the recovery of real property, section 315 provides that "[t]he people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless: [¶] 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced" "The words 'right or title' in this passage are to be construed to mean 'cause of action.'" (*People v. Kings Co. Development Co.* (1918) 177 Cal. 529, 534 [171 P. 102]; accord, *People v. Chambers* (1951) 37 Cal.2d 552, 556 [233 P.2d 557] (*Chambers*).)

[5a] Thus, if the present action is deemed to seek the recovery of real property under chapter 2 of title 2 "by reason of the right or title of the people to the same," this 12-year-delayed action, brought by a state entity, would be subject to (and as we shall show, barred by) the 10-year limitations period specified in section 315.

On the other hand, if this action is deemed other than for the recovery of real property, it comes under chapter 3 of title 2 (commencing with section 335). fn. 10 But section 345 expressly waives the state's immunity from *any* of the relevant statutes of limitations in that chapter: "The limitations prescribed in this chapter apply to actions brought in the name of the state or county or for the benefit of the state or county, in the same manner as to actions by private parties" (§ 345.)

Accordingly, we next address whether one of the statutes of limitations that the Legislature has expressly made applicable to the state applies to the claim here.

B. Determination of the Applicable Statute of Limitations

[6] "To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. [Citations.] '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the [103 Cal.App.4th 875] applicability of the statute of limitations under our code.' [Citation.]" (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23 [32 Cal.Rptr.2d 244, 876 P.2d 1043], citing *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 214 [1 Cal.Rptr. 12, 347 P.2d 12, 77 A.L.R.2d 803], and *Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 733 [146 P.2d 673, 151 A.L.R. 1062]; see also Note, *Developments in the Law-Statutes of Limitations* (1950) 63 Harv. L.Rev. 1177, 1192, 1195-1198.)

Put another way, "[w]hat is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct. [Citation.]" (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207 [51 Cal.Rptr.2d 328]; see *Day v. Greene* (1963) 59 Cal.2d 404, 410-411 [29 Cal.Rptr. 785, 380 P.2d 385, 94 A.L.R.2d 802] [although a complaint may be styled as a breach of contract action, if the gravamen of the claim is fraud, the three-year period prescribed in § 338 governs, rather than the period applicable to contracts]; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 474, p. 599 ["If the 'gravamen' of the action is held to be tort, the action, though in form one for breach of contract, is subject to the tort limitation period"].)

Thus, for example, in *Leeper v. Beltrami*, *supra*, 53 Cal.2d 195, the California Supreme Court held that an action to set aside a deed and to quiet title to real property was barred by the three-year limitation period for fraud actions under section 338, rather than the five-year period under section 318 fn. 11 applicable to the recovery of real property, because the plaintiffs' recovery depended upon their right to avoid a contractual obligation, which, in turn, depended upon a finding of duress, a type of fraud. (*Leeper*, at pp. 213-214.) Based on its conclusion that "the modern tendency is to look beyond the relief sought, and to view the matter from the basic cause of action giving rise to the plaintiff's right to relief" (*id.* at p. 214), the state Supreme Court analyzed the case as follows: "Quieting title is the relief granted once a court determines that title belongs in plaintiff. In determining that question, where a contract exists between the parties, the court must first find something wrong with that contract. In other words, in such a case, the plaintiff must show he has a substantive right to relief before he can be granted any relief at all. Plaintiff must show a right to rescind before he can be granted the right to quiet his title." (*Id.* at p. 216.) Accordingly, the court applied the three-year limitation period for fraud actions to the quiet title action. [103 Cal.App.4th 876]

[5b] Here, the gravamen of the District's first and second causes of action, seeking to declare the 1985 contracts void, is its claim that these agreements are unlawful under Government Code section 1090, and therefore void under Government Code section 1092. Indeed, the operative complaint styles both the first and second causes of action "[f]or a Declaration Against All Defendants that the 1985 Contracts Were Made in Violation of Government Code § 1090." While the form of the pleading is not determinative of the issue (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 65-66 [72 Cal.Rptr.2d 359]), ~~none of the allegations in either cause of action hint at another basis for the District's claim for relief. And the other causes of action subject to defendants' summary adjudication motion-imposition of a constructive trust over the transferred assets,~~

an accounting of the transferred assets, and an injunction to return the transferred assets-are fairly described as ancillary to the first two.

Thus, the nature of the right sued on here is the public's right to be free of a government contract made under the influence of a financial conflict of interest. Accordingly, the applicable statute of limitations is the statute applicable to a claim under Government Code sections 1090 and 1092, not a claim for the recovery of real property-although that is the ultimate relief the declaration seeks.

C. Claims Under Government Code Section 1092 Are Subject to the Limitations Periods Under Chapter 3

Neither Government Code sections 1090 and 1092, nor the statutory scheme of which they are a part, specifies a limitations period for actions brought to void a contract entered in violation of Government Code section 1092.

Accordingly, the limitations periods under title 2 of part 2 apply (commencing with § 312) because section 312 provides that "[c]ivil actions, *without exception*, can only be commenced within the periods prescribed in this title ... unless where, in special cases, a different limitation is prescribed by statute." (Italics added.)

And since the nature of the right sued on here is the public's right to be free of a government contract made under the influence of a financial conflict of interest, this is an action "other than for the recovery of real property," and is thus covered by chapter 3 of title 2 of part 2 (commencing with § 335). And "[t]he limitations prescribed in [that] chapter apply to actions brought in the name of the State ... or for the benefit of the State" (§ 345.) [103 Cal.App.4th 877]

However, no case has squarely addressed the applicable statute of limitations for suits to void a contract in violation of Government Code section 1092, although various decisions have applied statutes of limitations to cases raising a financial conflict of interest under Government Code section 1090 or its predecessor statute. (See, e.g., *People v. Honig* (1996) 48 Cal.App.4th 289, 304, fn. 1 [55 Cal.Rptr.2d 555] [applying the three-year limitations period to penal actions under Gov. Code, § 1097 for violations of Gov. Code, § 1090]; *County of Marin v. Messner* (1941) 44 Cal.App.2d 577, 591 [112 P.2d 731] [action to recover money paid without authority under predecessor statute to Gov. Code, § 1090 is subject to three-year limitations period for liability created by statute]; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 294, 297 [295 P.2d 113] [when gravamen of taxpayer's action is fraud against the city based, in part, on violation of Gov. Code, § 1090, three-year statute applies].)

Accordingly, as we noted, to determine the applicable statute of limitations, we must look to the "nature of the right sued upon and not ... the relief demanded." (*Hensler v. City of Glendale, supra*, 8 Cal.4th at p. 23.) Government Code section 1090 prohibits state, county, district, and city officers or employees from being "financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." And under Government Code section 1092, "[e]very contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein." [7] "California courts have generally held that a contract in which a public officer is interested is *void*, not merely voidable." (*Thomson v. Call, supra*, 38 Cal.3d at p. 646, fn. 15.) Moreover, a governmental agency "is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract." (*Id.* at p. 647.) The California Supreme Court has ruled that this remedy results "in a substantial forfeiture" and provides "public officials with a strong incentive to avoid conflict-of-interest situations scrupulously." (*Id.* at p. 650.)

In this light, the one-year limitations period under section 340, subdivision (1), could be argued to apply to the District's claims to declare the 1985 contracts void and to repossess the transferred assets because it applies to "[a]n action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation." [8] A forfeiture is "[t]he divestiture of property without compensation" or "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." (Black's Law Dict. (7th ed. 1999) p. 661, col. 1.) Government Code section 1092, which voids contracts in which a state employee has a financial conflict of interest without regard to the restoration of benefits, certainly would appear to effect a forfeiture. [103 Cal.App.4th 878]

[5c] However, we need not decide whether section 340, subdivision (1), applies in this case. Even if an action under Government Code section 1092 is not deemed a claim based on a statute for a forfeiture, the District's causes of action-brought 12 years after it entered the purportedly void agreements-would be time-barred under the four-year limitations period under the catchall provision of section 343. Section 343, which is also part of chapter 3 (which applies to all actions brought by the state [§ 345]), provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

[9] As the California Supreme Court long ago explained, "[t]he legislature has ... specified the limitations applicable to a wide variety of actions, and then to rebut the possible inference that actions not therein specifically described are to be regarded as exempt from limitations, it has specified a four-year limitation upon 'an action for relief not hereinbefore provided for' (§ 343); and where it has intended that an action shall be exempt from limitations it has said so in clear and unmistakable language. [Citations.]" (*Moss v. Moss* (1942) 20 Cal.2d 640, 645 [128 P.2d 526, 141 A.L.R. 1422], quoting *Bogart v. George K. Porter Co.* (1924) 193 Cal. 197, 201 [223 P. 959, 31 A.L.R. 1045].)

[5d] Applying section 343 to this action to void the 1985 contracts on the ground of illegality would certainly be consistent with existing case authority. (E.g., *Moss v. Moss*, *supra*, "20 Cal.2d at pp. 644-645 [holding that cause of action for cancellation of an agreement is governed by § 343, in part because there is "no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality"]; *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725 [161 P.2d 677] ["ordinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure" unless, for example "the gravamen of the cause of action stated involves fraud or a mistake"]; see also *Piller v. Southern Pac. R.R. Co.* (1877) 52 Cal. 42, 44 ["the four years' limitation of [section] 343 applies to all suits in equity not strictly of concurrent cognizance in law and equity"]; *Dunn v. County of Los Angeles* (1957) 155 Cal.App.2d 789, 805 [318 P.2d 795] [action to set aside deed on the ground of coercion is governed by § 343].)

[10] In any event, we reject the District's contention that the gravamen of its causes of action is possession of real property or ejection. First, possession of real property is the ultimate relief sought (following a declaration to that effect), not the nature of the right sued upon, which controls the selection of the statute of limitations. (See *Leeper v. Beltrami*, *supra*, 53 [103 Cal.App.4th 879] Cal.2d at pp. 213-214.) *fn. 12* Instead, the District's right to recover the hospital facility from defendants depends wholly upon its establishing that Buhrmann and Cook were "financially interested" in the 1985 contracts so as to render those agreements void under Government Code section 1092. Second, only one of the two 1985 contracts that the District seeks to void pertains to real property. The agreement for transfer of assets cannot be founded on a claim to recover real property; therefore, this portion of the claim must surely be premised on chapter 3 of title 2 of part 2 of the Code of Civil Procedure addressing actions other than for the recovery of real property.

Nor does the fact that the contracts are claimed void avoid the statute of limitations. Actions to void contracts are nonetheless subject to the statute of limitations. (E.g., *Smith v. Bach* (1921) 53 Cal.App. 63 [199 P. 1106]; 3 Witkin, Cal. Procedure, *supra*, Actions § 507, p. 640.)

[5e] Finally, even if the gravamen of the District's causes of action was deemed to be for the recovery of real property under chapter 2 of title 2 (commencing with § 315), the District's 12-year delayed action would be barred because it would be subject to the 10-year limitations period under section 315 for actions by the people of this state "in respect to any real property" by reason of "the right or title of the people to the same."

D. Accrual of the District's Causes of Action

[11] As a general rule, a statute of limitations accrues when the act occurs which gives rise to the claim (*Myers v. Eastwood Care Center, Inc.* (1982) 31 Cal.3d 628, 634 [183 Cal.Rptr. 386, 645 P.2d 1218]), that is, when "the plaintiff sustains actual and appreciable harm. [Citation.] Any 'manifest and palpable' injury will commence the statutory period. [Citation.]" (*Garver v. Brace* (1996) 47 Cal.App.4th 995, 1000 [55 Cal.Rptr.2d 220].)

[5f] Assuming for the sake of argument that the 1985 agreements were made in violation of Government Code section 1090, the District sustained a "manifest and palpable" injury no later than November 1985. That is when it entered a contract influenced by a financial conflict of interest—the harm the statute seeks to avoid.

[12] After all, "Government Code section 1090 codified the common law prohibition of public officials having a financial interest in contracts [103 Cal.App.4th 880] they make in their official capacities." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1230 [97 Cal.Rptr.2d 467].) Because "it is recognized 'that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government' " [citations], "the objective of the conflict of interest statutes "is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision" [Citations.]" (*People v. Honig*, *supra*, 48 Cal.App.4th at p. 314.) Accordingly, Government Code section 1090 has been interpreted to prohibit a financially interested employee from participating in the "planning, preliminary discussion, compromises, drawing of plans and specifications and solicitation of bids that [lead] up to the formal making of the contract." (*People v. Honig*, *supra*, 48 Cal.App.4th at pp. 314-315, citing *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 571 [25 Cal.Rptr. 441, 375 P.2d 289]; see also *Thomson v. Call*, *supra*, 38 Cal.3d at pp. 647-648.)

[5g] Based on the limited record before us, it is undisputed that Buhrmann and Cook worked simultaneously for the District and Marin General before the 1985 contracts were executed in November 1985. Hence, the harm that Government Code section 1090 seeks to avoid arose no later than November 1985 when the contracts were executed. Accordingly, the District's causes of action to declare the 1985 contracts void under Government Code section 1092 accrued no later than November 1985. And the District makes no allegation that the commencement of the running of the statute of limitations should be tolled, only that its action is exempt from the otherwise applicable statute of limitations. Thus, unless the *Hoadley* doctrine exempts this action from the statute of limitations, defendants have successfully established that this action, filed in 1997-12 years later-is untimely under either section 315, section 340, subdivision (1), or section 343.

III. The District Has Not Established That Its Action Is Exempt from the Statute of Limitations

[13] The District's opposition to defendants' motion for summary adjudication rests wholly upon its insistence that "under the rule confirmed in [*Hoadley*] a conveyance of public-use property that was not valid and effective when it was made can be attacked, and the property reclaimed by the public, regardless of how much time has passed."

As we shall explain, *Hoadley* does not stand for such a broad proposition. No published case has applied the holding of *Hoadley*, or its reasoning, to an action to set aside contracts allegedly made in violation of Government Code section 1090. [103 Cal.App.4th 881]

In *Hoadley*, the plaintiff sued the City of San Francisco to quiet title to two parcels of land, located in an area dedicated for use as city squares. He claimed that he had acquired title (1) by virtue of an ordinance and a confirmatory act, and (2) by adverse possession. (*Hoadley, supra*, 50 Cal. at pp. 271-272.)

After holding that the plaintiff did not acquire title to the public squares pursuant to the ordinance or the confirmatory act (*Hoadley, supra*, 50 Cal. at p. 273), the court in *Hoadley* considered whether the city was barred by the applicable statute of limitations from opposing the plaintiff's claim of adverse possession. First, the court ruled that adverse possession could not extinguish a public use to which the land had been dedicated: "The Statute of Limitations was not intended as a bar to the assertion by the public of rights of that character." (*Id.* at p. 275.) Next, it ruled that the city's legal title could not be extinguished by adverse possession: "That is to say, the title was granted to the city in trust, for public use; and the city had no authority ... to alienate or in any manner dispose of it, but only to hold it for the purposes expressed in the statute. It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to private persons, and is effectually withdrawn from commerce; and the city having no authority to convey the title, private persons are virtually precluded from acquiring it. The land itself, and not the use only, was dedicated to the public. Land held for that purpose, whether held by the State or a municipality, in our opinion, is not subject to the operation of the Statute of Limitations." (*Id.* at pp. 275-276.)

Thus, *Hoadley's* holding was premised on the governmental entity's lack of "authority ... to alienate" property held for public use (*Hoadley, supra*, 50 Cal. at p. 275) and the presumably concomitant inability of a private person to acquire it indirectly through the failure of the government to timely bring suit within the statute of limitations—quite unlike the instant case where the District had statutory authority to enter into a lease.

This is made more clear by *Hoadley's* reliance on the reasoning in *Commonwealth v. Alberger* (1836) 1 Whart. 469 (*Commonwealth*), among other cases, in coming to its conclusion. (*Hoadley, supra*, 50 Cal. at p. 275.) In *Commonwealth*, the Supreme Court of Pennsylvania held that William Penn's son had no authority to sell a portion of a public square in Philadelphia dedicated to public use by his father. In holding that the defendants were not "protected by the lapse of time" (*Commonwealth*, at p. 486), the Supreme Court of Pennsylvania opined: "It is well settled that lapse of time furnishes no defense for an encroachment on a public right; such as the erecting of an obstruction on a street or public square.... [¶] These [103 Cal.App.4th 882] principles are of universal application, and control the present case as well as others. There is no room for presumption since the grant itself is shown and proves defective; and if there were no grant shown, presumption will not be made to support a nuisance, by encroachment on a public right; and no statute of limitations bars the proceeding by indictment to abate it. These principles, indeed, pervade the laws of the most enlightened nations as well as our own code, and are essential to the protection of public rights, which would be gradually frittered away, if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their right against adverse occupants, because they have interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment, than seeks a dispute to set it right ... [citation]." (*Id.* at pp. 486, 488.)

Accordingly, based on this analysis, it is clear that *Hoadley* held that public-use property that cannot be alienated directly should not be alienated indirectly to an adverse possessor through the passage of time.

Indeed, *Hoadley's* holding that the statute of limitations does not bar the state's recovery of public-use property against a claim of adverse possession is simply the mirror image of the rule that a private party cannot acquire prescriptive title to public-use property through adverse possession: "[S]o far as the title to real property is concerned, -prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right." (*Water Co. v. Richardson* (1887) 72 Cal. 598, 601 [14 P. 379]; see *People v. Shirokow, supra*, 26 Cal.3d at p. 311.) Thus, *Hoadley's* holding that property held by the state in trust cannot be lost through adverse possession is not so much a rule concerning the application of the statute of limitations as it is a substantive doctrine that a private party cannot acquire prescriptive title to public rights founded on adverse possession. Indeed, Civil Code section 1007 was amended in 1935 to codify this by prohibiting the acquisition of title by adverse possession of any public-use property, no matter how long the property is occupied. (Stats. 1935, ch. 519, § 1, p. 1592.) fn. 13 Hence, a statute now defines in more direct terms the common law exception that *Hoadley* established.

We thus face the question whether *Hoadley* should be *extended* beyond its codification to exempt any conveyance of public-use property from the [103 Cal.App.4th 883] statute of limitations, in the face of other statutory enactments that expressly apply limitations to actions brought by the state.

A. The Adverse Possession Cases

Hoadley has most commonly been cited as authority to bar an adverse possessor of public-use property from asserting the statute of limitations against the government's action to recover the property. (E.g., *Board of Education v. Martin, supra*, 92 Cal. 209 [the California Supreme Court relied upon *Hoadley* to hold that no statute of limitations bars an educational district from recovering lands taken by adverse possession]; *People v. Kerber* (1908) 152 Cal. 731, 733 [93 P. 878] [the statute of limitations does not apply to an action by the state to recover a portion of San Diego Bay tidelands purportedly acquired by adverse possession because tidelands "belong to the state by virtue of its sovereignty" and "constitute property devoted to public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations"]; *County of Yolo v. Barney* (1889) 79 Cal. 375, 378-381 [21 P. 833] [no statute of limitations restricted ability of hospital district to quiet title to property claimed by adverse possession]; *San Leandro v. Le Breton* (1887) 72 Cal. 170, 177 [13 P. 405] [no statute of limitations bars city from recovering land marked for public use against a claim of adverse possession], disapproved on another ground in *People v. Reed* (1889) 81 Cal. 70, 79 [22 P. 474]; *Visalia v. Jacobs* (1884) 65 Cal. 434, 435-436 [4 P. 433] [no statute of limitations bars city from recovering a portion of a city street taken by adverse possession]; *Proctor v. City & County of San Francisco* (9th Cir. 1900) 100 Fed. 348, 350-351 ["It is ... settled by a series of decisions by the supreme court that the rights of municipal corporations in such property are not affected by adverse possession, however long continued"]; see 3 Witkin, Cal. Procedure, *supra*, Actions, § 456, p. 578 ["There can be no adverse possession of property devoted to a public use"].)

More recently, in *People v. Shirokow, supra*, 26 Cal.3d 301, the California Supreme Court characterized *Hoadley* in conformity with these cases as holding that property held in public trust cannot be lost through adverse possession: "More than a century ago, in *Hoadley*[, *supra*,] 50 Cal. [at pages] 274-276, we articulated the rule that property held by the state in trust for the people cannot be lost through adverse possession. The statute of limitations is of no effect in an action by the state to recover such property from an adverse possessor whose use of the property for private purposes is not [103 Cal.App.4th 884] consistent with the public use. [Citation.]" (*People v. Shirokow, supra*, 26 Cal.3d at p. 311.)

Accordingly, *Hoadley* has no application to the circumstances presented here for several reasons.

First, the instant case does not involve the application of the statute of limitations to a claim of adverse possession of public property.

Second, *Hoadley's* premise is that the passage of time cannot grant title to that which the government has no authority to alienate. Here, the District had authority to enter into a lease of the hospital. The issue in this case is not whether the public property could be leased, but whether it was leased in conformity with the law. For this reason, too, *Hoadley* does not apply.

Indeed, the California Supreme Court in *Ames v. City of San Diego* (1894) 101 Cal. 390 [35 P. 1005], distinguished *Hoadley* on precisely this ground: "[I]n case of lands, the legal title to which is vested in the city, and which may be alienated by it, the rule just stated [in *Hoadley*] in relation to land dedicated to the public use does not apply." (*Id.* at p. 394.)

Finally, *Hoadley* surely does not apply to that part of the District's claim that concerns property that could never be the subject of adverse possession, namely, the assets (including the cash, inventory, and accounts receivable) which were transferred under the 1985 contracts.

B. The Unauthorized Transfer Cases

The District observes, however, that "the Supreme Court ... disposed of any notion that the *Hoadley* no-limitations rule was restricted to situations where public-use property had merely been seized and held by a private individual on a claim of adverse possession," since it has also been cited to defeat the application of the statute of limitations in actions for the recovery of public-use property that has been voluntarily transferred.

But a careful reading of the cases upon which the District relies demonstrates that they do not support its assertion that the "*Hoadley* rule" bars the application of the statute of limitations to *any* invalid, illegal, or "ineffective" transfer of a public-use asset, "*regardless* of the particular legal defect that rendered the original transfer invalid." Instead, these cases only extend *Hoadley* to bar the assertion of the statute of limitations with respect to the recovery of public-use property that the government had no authority to alienate. [103 Cal.App.4th 885]

In *Sixth District etc. Assoc. v. Wright, supra*, 154 Cal. 119 (*Sixth District*), for instance, the California Supreme Court cited *People v. Kerber, supra*, 152 Cal. 731 (an adverse possession case, which in turn relied upon *Hoadley*) to reject a statute of limitations defense to an action to recover a gift made in violation of the state Constitution's ban on gifts of public property. (*Sixth District, supra*, at p. 130.) In *Sixth District*, the governing board of an agricultural district conveyed to a private corporation all of the district's property in purported accordance with a statute expressly authorizing such transactions. (*Id.* at pp. 122-126.) However, the California Supreme Court held that the act purporting to authorize the transaction conflicted with a provision of the state Constitution barring gifts of public property (*id.* at pp. 128-129) and rejected the defendants' assertion of the statute of limitations: "[T]he property was held in trust by a state institution or public agency for a public use, which public use has not been discontinued or abandoned *by any lawful act of public authority*. As to such property it is well settled that the statute of limitations has no application." (*Id.* at p. 130, italics added.)

Thus, *Sixth District*, like *Hoadley*, was premised on public property held in trust that the government had no authority to alienate; thus, no limitation period could operate to alienate indirectly what could not be alienated directly.

The District also relies on *Chambers, supra*, 37 Cal.2d 552, for the proposition that no limitations period can bar a suit to retrieve public-trust property invalidly conveyed to a private party. But in *Chambers*, the state sought to quiet title on park land, which was mistakenly conveyed by a tax deed to a private party, *Chambers*. (*Id.* at p. 555.) Opposing the state's argument that the tax deed was void, *Chambers* defended on the basis of various statutes of limitations (*id.* at pp. 555-556), which the court rejected. First, the court found that the action was commenced *within* the 10-year period of section 315 for actions by the people of the state "in respect to any real property." (*Id.* at p. 556, quoting § 315.) And citing *Hoadley*, it noted that in any event, "neither section 315 of the Code of Civil Procedure nor the provisions on adverse possession ... apply to property owned by the state and devoted to a public use." (*Chambers*, at pp. 556-557.) Next, the court rejected *Chambers*'s assertion that the action was barred by the one-year limitations periods contained in the Revenue and Taxation Code, observing the general rule that "statutes of limitation do not apply against the state unless expressly made applicable" and ruling that "tax statutes do not apply against the state as to its property." (*Chambers, supra*, at p. 559.) It further reasoned that "it seems that if the statutes on adverse possession do not run against the property of the state which is dedicated to a public purpose (see authorities cited [including *Hoadley*]) the opposite result should not be reached, depriving the state of its property, by application to it of the [103 Cal.App.4th 886] provisions ... of the Revenue and Taxation Code. We hold therefore that they do not apply to the state." (*Id.* at p. 560, bracketed text added.)

Chambers, supra, 37 Cal.2d 552, does not assist the District. First and foremost, relying on the rule that statutes of limitations do not apply against the state unless made expressly applicable, *Chambers* merely construed the limitations periods in the tax statutes not to "apply against the state as to its property." (*Id.* at p. 559.) Second, although it suggested in dictum that section 315 does not apply to public-use property owned by the state, we do not rely on section 315 for the applicable limitations period in this case; thus, we have no need to rely on a construction of that section. Moreover, the cases that the Supreme Court cited for its dictum that section 315 does not apply to public-use property owned by the state (many of which we have cited here) do not so broadly hold. Third, regardless of the characterization of *Hoadley* in *Chambers*, the California Supreme Court's more recent characterization of *Hoadley* in *People v. Shirokow, supra*, 26 Cal.3d at page 311, more narrowly defines the doctrine to hold that the rule is "that property held by the state in trust for the people cannot be lost through adverse possession." The Supreme Court's holding in *Hoadley* and its most recent characterization of *Hoadley* would appear to be the most reliable expositions of the decision's scope. Fourth and finally, *Chambers* acknowledged that the limitations periods under chapter 3 of title 2 of part 2 (which we have found applies here) are, in fact, applicable to actions brought by the state. (*Chambers, supra*, "37 Cal.2d at p. 559.)

The remainder of the cases relied upon by the District simply hold that the passage of time does not prevent the state from recovering public-use property that the state has no right to alienate. (*People v. California Fish Co.* (1913) 166 Cal. 576, 598-600, 611-612 [138 P. 79] [the state did not have the legal power to transfer certain coastal tidelands because, in part, "[a] patent for state land, issued by the officers in a case where there has been no valid application or survey approved nor any valid payment of the price, is, of course, void as against the state"]; *California Trout, Inc. v. State Water Resources*

Control Bd. (1989) 207 Cal.App.3d 585, 631 [255 Cal.Rptr. 184] [licenses to validate diversion of water exceeded amount permitted under state law and thus action seeking rescission of licenses was not untimely because "[a]n encroachment on the public trust interest shielded by [statute] cannot ripen into a contrary right due to lapse of any statute of limitations"]; *Allen v. Hussey* (1950) 101 Cal.App.2d 457, 467-468, 473-475 [225 P.2d 674] [lucrative long-term lease of airport facilities, for which irrigation district received \$1 annual fee, was unauthorized breach of public trust and an unconstitutional gift of public funds].)

In contrast, the District here makes no allegation that it had "no authority" to effect a lease and transfer hospital assets on the terms provided. To the [103 Cal.App.4th 887] contrary, the provisions of the Local Health Care District Law then in effect expressly authorized such a lease and the other transfers involved. Nor does the District contend that the then-statutory framework permitting the transactions was unconstitutional or otherwise unlawful. The prohibition on conflicts of interest contained in Government Code section 1090 in no way prohibits the transfers authorized by the Local Health Care District Law (Health & Saf. Code, § 32000 et seq.), but instead directs individual government employees not to "hav[e] a financial interest in contracts they make in their official capacities." (*BreakZone Billiards v. City of Torrance, supra*, 81 Cal.App.4th at p. 1230.)

Accordingly, Government Code section 1090 does not deprive the government of authority to contract over, and thus the District had authority to lease, the public-use property. In contrast, all of the aforementioned cases that bar application of the statute of limitations are based on the premise that the passage of time cannot be permitted to indirectly alienate public-use property that the government is not authorized to alienate directly. Here, the District is entitled to lease the property, and just as importantly, the passage of time will not cause the District to lose the property. To the contrary, the lease will ultimately expire by its own terms, and the District will regain possession of the property. We thus decline to expand the holding of *Hoadley* to apply to a lease of public-use property and to the transfer of assets that the law authorizes the District to make.

IV. Conclusion

An action to void a contract under Government Code section 1092 comes within the limitations periods specified in chapter 3 of title 2 of part 2 of the Code of Civil Procedure. (§ 335 et seq.) And the Legislature has expressly applied all of the limitations periods in that chapter to actions brought in the name of the state. (§ 345.)

The public policy underlying *Hoadley, supra*, 50 Cal. 265—that "property held by the state in trust for the people cannot be lost through adverse possession" (*People v. Shirokow, supra*, 26 Cal.3d at p. 311)—is not furthered by extending it to allow an untimely suit to void a lease of public-use property, which will expire by its own terms and which the state is otherwise authorized to enter. Instead, *Hoadley* is meant to prevent public-use property that the state cannot directly alienate from being indirectly alienated by the passage of time. That is not the case with property that the state is authorized to lease and which the state will recover at the end of the lease term.

Moreover, even if the public policy under *Hoadley* was furthered by allowing an untimely suit to void a lease of public-use property, it is for the [103 Cal.App.4th 888] Legislature to weigh the competing public policies and so determine. Thus far, the Legislature has not created any exceptions to its subjection of the state to the limitation periods in chapter 3, and it has expressly codified *Hoadley* with respect to adverse possession claims.

Accordingly, we conclude that this action is time-barred. Defendants' uninterrupted operation of the hospital facility for nearly half of its 30-year lease before suit was brought certainly gave rise to a legitimate expectation that the 1985 contracts would not be challenged and that defendants could rely on those contracts in making investment decisions. Such expectations are precisely what the Legislature chose to protect when it expressly subjected the state to the same limitation periods that bind private parties' contract, tort, and statutory claims.

Disposition

The judgment is affirmed. Defendants are awarded their costs on appeal. (Cal. Rules of Court, rule 26(a).)

Blease, Acting P. J., and Raye, J., concurred.

Appellant's petition for review by the Supreme Court was denied February 25, 2003.

FN 1. Codefendant Marin Community Health is the sole member of defendant Marin General. After the agreements in issue were signed, another codefendant, Sutter Health, became the sole member of Marin Community Health.

FN 2. Government Code section 1090 provides: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity. [¶] As used in this article, 'district' means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries."

FN 3. The applicable code provisions have been amended several times since 1985 when the lease here was entered. Health and Safety Code section 32121 was amended in 1986, 1988, 1989, 1990, 1992, 1993, 1994, 1995, 1996, and 1998; Health and Safety Code section 32126 was amended in 1992, 1993, 1994, and 1998. (See 41 West's Ann. Health & Saf. Code (1999 ed.) foll. §§ 32121, 32126, pp. 242, 257.)

FN 4. See footnote 2, *ante*, for the full text of Government Code section 1090.

FN 5. Government Code section 1092 states: "Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member."

FN 6. The District's other causes of action have been dismissed.

FN 7. Marin General and Marin Community Health filed a joint motion for summary adjudication; Sutter Health filed a separate motion. However, as the two motions raise essentially the same issues, we shall refer to the defendants' motions for summary adjudication in the singular.

FN 8. Some courts have somewhat broadened this standard and ruled that statutes of limitations do not bind the state and its agencies "unless they do so expressly or by necessary implication." (E.g., *Philbrick v. State Personnel Board* (1942) 53 Cal.App.2d 222, 228 [127 P.2d 634], italics added.)

FN 9. Unless otherwise designated, all further statutory references (including statutory references to chapters and title) are to the Code of Civil Procedure.

FN 10. Section 335 provides: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

The sections that follow section 335 then prescribe the limitations periods for various types of actions.

FN 11. Section 318 provides in pertinent part: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff ... was seized or possessed of the property in question, within five years before the commencement of the action."

FN 12. A contrary result was suggested in *People v. Kings Co. Development Co.*, *supra*, 177 Cal. at page 535, where the court found that an action by the state to cancel a land patent, issued by officers acting under the influence of fraud, was an action in respect to land and was governed by section 315 for actions to recover real property. But that case preceded *Leeper v. Beltrami*, *supra*, 53 Cal.2d 195, and *Hensler v. City of Glendale*, *supra*, 8 Cal.4th at pages 22-23, which so clearly held that the nature of the right sued upon controlled the determination of the applicable statute of limitations.

FN 13. Civil Code section 1007, following a further amendment in 1968, presently provides: "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, *but no possession by any person, firm or corporation no matter how long continued* of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof." (Civ. Code, § 1007, italics added, as further amended by Stats. 1968, ch. 1112, § 1, pp. 2125-2126.)

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